NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 193

7 OCTOBER 2008

18 NOVEMBER 2008

RALEIGH
2010

CITE THIS VOLUME
193 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	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
	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
	Yvonne Mims Evans	Charlotte
	Linwood O. Foust	Charlotte

DISTRICT	JUDGES	ADDRESS
	ERIC L. LEVINSON	Charlotte
	F. LANE WILLIAMSON	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	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	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
THOMAS D. HAIGWOOD	Greenville
CLARENCE E. HORTON, JR.	Kannapolis
CHARLES C. LAMM, JR.	Terrell

DISTRICT	JUDGES	ADDRESS
	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	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

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)	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
Hugh B. Campbell	Charlotte
Samuel Cathey	Charlotte
Danny E. Davis	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
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

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

GENERAL STATUTES CITED

GENERAL STATUTES CITED

NORTH CAROLINA CONSTITUTION CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA, PLAINTIFF v. PHILIP MORRIS USA, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO COMPANY, INDIVIDUALLY AND AS SUCCESSOR BY MERGER TO THE AMERICAN TOBACCO COMPANY; AND LORILLARD TOBACCO COMPANY, DEFENDANTS

No. COA07-409

(Filed 7 October 2008)

1. Appeal and Error— appealability—order compelling arbitration—writ of certiorari

The Court of Appeals exercised its discretion under N.C. R. App. P. 21 to grant the State's petition for writ of certiorari to review the merits of an appeal from an order compelling arbitration.

2. Arbitration and Mediation— Master Settlement Agreement—sovereign immunity

The Business Court did not err in a declaratory judgment action arising out of the Master Settlement Agreement entered into by most of the states and various tobacco manufacturers to resolve tobacco-related litigation by ordering arbitration even though the State contends the order was barred by sovereign immunity because: (1) contrary to defendants' assertion, N.C.G.S. § 105-113.4C does not preclude an order compelling arbitration to determine whether North Carolina diligently enforced its escrow statute; (2) the State failed to demonstrate

that an order compelling arbitration was barred by sovereign immunity; and (3) the order does not violate the separation of powers doctrine.

3. Arbitration and Mediation— Master Settlement Agreement—diligent enforcement of state escrow statute

The Business Court properly concluded in a declaratory judgment action that the parties knowingly and intentionally agreed to arbitrate the dispute including diligent enforcement of North Carolina's escrow statute regarding the Master Settlement Agreement (MSA) entered into by most of the states and various tobacco manufacturers to resolve tobacco-related litigation because: (1) the plain language of the MSA established that the issue of application of the nonparticipating manufacturers (NPM) adjustment for 2003, including the question of diligent enforcement, must be arbitrated; (2) all of the other jurisdictions considering this issue concluded that the MSA subjected the issue of diligent enforcement to arbitration; and (3) the underlying dispute over the independent auditor's decision not to apply the NPM adjustment falls within the scope of the arbitration provision since it directly involves a determination concerning the operation or application by the independent auditor, and the dispute also arises out of or relates to the independent auditor's calculation of the annual payments.

4. Arbitration and Mediation— Tobacco Settlement Agreements—lack of diligent enforcement

Although the State contends in a declaratory judgment action that the participating tobacco manufacturers (PM) released any claims they possess regarding a lack of diligent enforcement in 2003, the dispute over whether the June 2003 Tobacco Settlement Agreements prohibited the PM from contesting diligent enforcement in 2003 fell within the purview of the auditor's determination concerning the applicability of the NPM adjustment, and therefore, must be presented as part of the arbitration process.

Appeal by plaintiff from order entered 4 December 2006 by Judge Ben F. Tennille in Wake County Superior Court. Heard in the Court of Appeals 13 November 2007.

Attorney General Roy Cooper, by Special Deputy Attorneys General Buren R. Shields, III and Melissa L. Trippe, for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Michael T. Medford, and Winston & Strawn, LLP, by Thomas J. Frederick, for defendant-appellee Philip Morris USA, Inc.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. and W. David Edwards, and Kirkland & Ellis LLP, by Stephen R. Patton and Douglas G. Smith, for defendant-appellee R.J. Reynolds Tobacco Company.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr., and Weil, Gotshal & Manges LLP, by Penny Reid,for defendant-appellee Lorillard Tobacco Company.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Clifton L. Brinson, and Howrey, LLP, by Robert J. Brookhiser and Elizabeth B. McCallum, for defendants-appellees Subsequent Participating Manufacturers.

GEER, Judge.

This appeal arises out of the Master Settlement Agreement ("MSA") entered into by most of the states and various tobacco manufacturers to resolve tobacco-related litigation. The State appeals from the Business Court's order compelling arbitration, arguing that the order is barred by sovereign immunity, interferes with prosecutorial discretion, and is inconsistent with the MSA. Forty-seven other jurisdictions have already addressed identical litigation brought by other governments and unanimously have concluded that the issues must be arbitrated.[1] While those opinions are not binding on us, we are in agreement with the reasoning in those decisions and see no

1. The decision by the Maryland Court of Special Appeals in *State v. Philip Morris Inc.*, 179 Md. App. 140, 155 n.10, 944 A.2d 1167, 1173 n.10, *cert. denied*, 405 Md. 65, 949 A.2d 653 (2008), lists decisions from 46 jurisdictions (44 states, the District of Columbia, and Puerto Rico) that have also addressed the issues before this Court regarding the MSA. The Maryland decision indicates that 45 of the 46 jurisdictions determined that the dispute is subject to arbitration, with a Louisiana trial court rendering the sole contrary decision. Since the filing of the Maryland opinion, the Louisiana Court of Appeals has reversed the trial court and held that the plain language of the MSA requires arbitration. *See State v. Philip Morris USA, Inc.*, 980 So. 2d 296 (La. Ct. App. 2008). In addition, a Georgia Superior Court has also concluded that the dispute is subject to arbitration. *See State v. Philip Morris USA, Inc.*, No. 2006CV6128 (Ga. Super. Ct. Feb. 4, 2008). In addition to Louisiana and Maryland, the following appellate courts have rendered decisions: *State v. Lorillard Tobacco Co.*, 2008 Ala. LEXIS 62, 2008 WL 821054 (Mar. 28, 2008); *State v. The Honorable Timothy J. Ryan*, No. 1 CA-SA 07-0083 (Ariz. Ct. App. May 24, 2007); *State v. Philip Morris, Inc.*, 279 Conn. 785, 905 A.2d 42 (2006); *People v. Lorillard Tobacco Co.*, 372 Ill. App. 3d 190, 865

basis for distinguishing the North Carolina litigation. We, therefore, affirm the Business Court's order compelling arbitration.

Facts

After decades of litigation between private consumers and cigarette manufacturers, the attorneys general in all 50 states initiated public causes of action against tobacco manufacturers. In 1998, 46 states (including North Carolina), the District of Columbia, Puerto Rico, and five U.S. Territories (collectively "the settling states") entered into the MSA with Philip Morris USA, Inc., R.J. Reynolds Tobacco Company, and Lorillard Tobacco Company, the original participating manufacturers (the "OPMs"). Since the execution of the agreement, more than 40 other manufacturers (identified as subsequent participating manufacturers or "SPMs") have joined the agreement. Together, the OPMs and SPMs are referred to as participating manufacturers (or "PMs").

Under the MSA, the PMs agreed to make annual payments to the settling states as compensation for smoking-related medical costs. The MSA requires the PMs, on 15 April of every year, to each make a single payment into an escrow account in an amount calculated annually by an independent auditor based on a formula set out in the MSA. The auditor allocates the annual settlement payment among the settling states in accordance with the MSA. The annual national payment is, however, subject to several adjustments, including the one at issue in this case: the non-participating manufacturers (the "NPMs") adjustment.

The NPM adjustment reduces the PMs' annual payment obligations as compensation for their losing market share to tobacco companies not subject to the MSA. In order to receive the adjustment, (1)

N.E.2d 546, *appeal denied*, 225 Ill. 2d 657, 875 N.E.2d 1119 (2007); *State v. Philip Morris Tobacco Co.*, —— Ind. App. ——, 879 N.E.2d 1212 (2008); *Commonwealth v. Philip Morris Inc.*, 448 Mass. 836, 864 N.E.2d 505 (2007); *Attorney General v. Philip Morris USA*, 2007 Mich. App. LEXIS 1490, 2007 WL 1651839, *appeal denied*, 480 Mich. 990, 742 N.W.2d 118 (2007); *State v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008); *State v. Philip Morris USA, Inc.*, 155 N.H. 598, 927 A.2d 503 (2007); *State v. Philip Morris Inc.*, 8 N.Y.3d 574, 869 N.E.2d 636 (2007); *State v. Philip Morris, Inc.*, 2007 ND 90, 732 N.W.2d 720 (2007); *State v. Philip Morris USA Inc.*, 2008 VT 11, 945 A.2d 887 (2008); *Commonwealth v. Philip Morris USA, Inc.*, No. 062245 (Va. Feb. 21, 2007). At present, trial and appellate courts in 45 states, the District of Columbia, and Puerto Rico have addressed the issues before this Court. No jurisdiction has found the arguments made by the State in this case to be persuasive.

the PM must have experienced a "Market Share Loss,"[2] and (2) an economic consulting firm must determine "that the disadvantages experienced as a result of the provisions of [the MSA] were a significant factor contributing to the Market Share Loss." (Internal quotation marks omitted.) If a PM meets these two requirements, then the PM may be entitled to reduce its payment for that year.

A state may avoid its share of the NPM adjustment by demonstrating that, during the year at issue, it "diligently enforced" a "Qualifying Statute," defined as a statute as set out in the MSA that imposes an escrow obligation on NPMs that is roughly equivalent to the payments the NPMs would pay if they had signed the MSA ("the escrow statute"). If a state makes the required showing, its share of the adjustment is reallocated to other settling states that did not diligently enforce a qualifying statute.

In early 2004, the independent auditor requested information from the National Association of Attorneys General ("NAAG") regarding qualifying statutes in the settling states. The NAAG informed the auditor that all of the settling states had enacted model statutes that they represented to have been in full force and effect. Based on this information, the auditor concluded that "no possible NPM adjustment is allocated to PMs." As the Business Court explained, the independent auditor, "having found that each Settling State had a Qualifying Statute in force, effectively presumed that each Settling State had diligently enforced that statute as required" by the MSA.

The current dispute involves the annual payment that was due on 17 April 2006. Pursuant to the NPM adjustment provisions, the economic consulting firm concluded that the MSA was a significant factor contributing to the PMs' 2003 market share loss. The OPMs, therefore, requested that the independent auditor apply the NPM adjustment to the payments due on 17 April 2006. The auditor, however, indicated that it "would not modify its current approach to the application of the NPM Settlement Adjustment" and would continue to presume that the statutes had been diligently enforced.

The OPMs formally objected to the independent auditor's final calculation on 10 April 2006 and requested that North Carolina and the other settling states arbitrate the dispute over the NPM adjustment. North Carolina refused to enter into arbitration, as did the other settling states. On 20 April 2006, the State filed a Motion for

2. A market share loss occurs if the PM's share of the U.S. cigarette market declines from one year to the next.

Declaratory Order requesting that the Business Court (1) construe the MSA term "diligent enforcement," (2) find and declare that North Carolina had diligently enforced its qualifying statute, (3) find that North Carolina is not subject to an NPM adjustment for 2003, and (4) require the OPMs and SPMs to make the escrow payment into a disputed payments account or seek an offset of any payments made. On 15 May 2006, the OPMs filed a "Motion to Compel Arbitration and to Dismiss or, in the Alternative, Stay This Litigation." The SPMs moved to intervene on 6 June 2006, and the Business Court granted the motion to intervene over the State's objection on 25 July 2006.

On 4 December 2006, the Business Court granted the PMs' motion to compel arbitration, directed that the parties submit their dispute to the arbitration panel as provided in the MSA, and stayed further litigation pending arbitration. The State appealed to this Court.

Discussion

[1] As an initial matter, we note that this appeal is from an order compelling arbitration. Generally, our courts have held that such orders are not immediately appealable. *See, e.g.*, *Laws v. Horizon Hous., Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696 (2000) (holding that no immediate right of appeal exists from an order compelling arbitration); *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 286, 314 S.E.2d 291, 293 (1984) (holding "there is no right of appeal from an order compelling arbitration").

The State does not argue otherwise, but contends that appellate jurisdiction exists because the order compelling arbitration denied its claim of sovereign immunity and, therefore, affects a substantial right under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d) (2007). *See Moore v. N.C. Coop. Extension Serv.*, 146 N.C. App. 89, 92, 552 S.E.2d 662, 664, *appeal dismissed and disc. review denied*, 354 N.C. 574, 559 S.E.2d 180 (2001); *RPR & Assocs. v. State*, 139 N.C. App. 525, 527, 534 S.E.2d 247, 250 (2000) ("[T]he denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable."), *aff'd per curiam*, 353 N.C. 362, 543 S.E.2d 480 (2001). As discussed in further detail below, we disagree with the State's contention that the Business Court's ruling implicates the State's sovereign immunity. The State has, however, also filed a petition for writ of certiorari. We exercise our discretion under N.C.R. App. P. 21 to grant the petition and review the merits of this appeal.

I

[2] We first address the State's contention that sovereign immunity bars any order compelling the State to arbitrate the question whether North Carolina "diligently enforced" its escrow statute. Sovereign immunity is a common law doctrine that prohibits a lawsuit *against* the State of North Carolina "unless it consents to be sued or upon its waiver of immunity." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983). Under this doctrine, " '[i]t is for the General Assembly to determine when and under what circumstances the State may be sued.' " *Id.* (emphasis omitted) (quoting *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961), *overruled on other grounds by Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976)).

In this case, however, the State was not sued, but rather brought suit against the OPMs. It then chose to settle the litigation pursuant to the MSA, which included among its terms an arbitration provision. The State does not appear to be arguing that no authority to enter into the MSA existed. Indeed, such an argument could result in forfeiture of hundreds of millions of dollars.

Nor can the State be asserting that it can never be bound to arbitrate. Courts, including our Supreme Court, have enforced arbitration agreements against sovereigns. *See Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 97, 414 S.E.2d 30, 35 (1992) (holding that county should be compelled to arbitrate based on contract including arbitration clause); *see also C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 423, 149 L. Ed. 2d 623, 634, 121 S. Ct. 1589, 1597 (2001) (holding that tribe "consented to arbitration" in agreement it signed and "thereby waived its sovereign immunity"); *Hardie v. United States*, 367 F.3d 1288, 1291 (Fed. Cir. 2004) (rejecting federal government's claim that it did not waive its sovereign immunity as to binding arbitration and holding "the United States is subject to the arbitration clause of the joint venture agreement just as any private party would be").

The State initially asserts that prosecutorial discretion is encompassed within sovereign immunity and "is protected irrespective of whether it is the subject of a provision in a State contract." According to the State, prosecutorial discretion "is subject, if [at] all, to only the most limited *judicial* review; and is never subject to the substitution of judgment or *de novo* determination by arbitration." As support for this broad assertion, the State relies solely upon *Heckler v. Chaney*,

470 U.S. 821, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985). Nothing in *Heckler* validates the State's proposition.

Heckler addressed whether individuals sentenced to death by lethal injection could seek review under the federal Administrative Procedure Act (the "APA") of the FDA's failure to take investigatory and enforcement actions to prevent states from using lethal injection drugs when the FDA had not approved their use for human executions. *Id.* at 823-24, 84 L. Ed. 2d at 718-19, 105 S. Ct. at 1651-52. As the opinion states, the case "turn[ed] on the important question of the extent to which determinations by the FDA *not to exercise* its enforcement authority over the use of drugs in interstate commerce may be judicially reviewed. That decision in turn involves the construction of two separate but necessarily interrelated statutes, the APA and the [Federal Food, Drug, and Cosmetic Act]." *Id.* at 828, 84 L. Ed. 2d at 721, 105 S. Ct. at 1654. Ultimately, the Court concluded that, under the APA, an enforcement decision is "presumptively unreviewable," but that "presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33, 84 L. Ed. 2d at 724, 105 S. Ct. at 1656. The Court stressed, however, that "Congress may limit an agency's exercise of enforcement power if it wishes . . . ." *Id.* at 833, 84 L. Ed. 2d at 725, 105 S. Ct. at 1656.

The obvious distinction is that this case does not involve the federal APA. Regardless, *Heckler* does not address a government's ability to enter into a contract providing for arbitration and does not discuss principles of sovereign immunity. The State's assertion, citing *Heckler*, that any review of an enforcement decision is limited to (1) a North Carolina court, (2) determining compliance with legislatively promulgated standards, (3) with application of an abuse of discretion standard is not supported by *Heckler*. Nor does *Heckler* in any way suggest, as the State claims it does, that "[a]ny further or different review/assessment is barred by sovereign immunity."[3]

In any event, requiring arbitration of the question whether a state has diligently enforced its escrow statute does not interfere with the

---

3. For this latter proposition, the State also cites *Central Carolina Nissan, Inc. v. Sturgis*, 98 N.C. App. 253, 261, 390 S.E.2d 730, 735, *disc. review denied*, 327 N.C. 137, 394 S.E.2d 169 (1990). In that case, this Court held only that the trial court properly imposed Rule 11 sanctions on an attorney for filing a declaratory judgment action, in the midst of settlement negotiations with the State, seeking a declaration that its anticipated defenses to any action to be later filed by the State were meritorious.

State's prosecutorial discretion. The State may prosecute or not, as it chooses. The State does not dispute that, under the MSA, if it has chosen not to prosecute, then it is subject to the NPM adjustment and is subject to litigation regarding issues relating to the adjustment. Indeed, the State clarified in its reply brief: "The State asserts the immunity of its sovereign prosecutorial discretion only as to this latter, legal determination [of whether the State in fact diligently enforced its escrow statute]. The State does not challenge the PMs' entitlement to an NPM Adjustment." In short, the State asserts that "sovereign immunity bars both the forum (national arbitration) and the standard of review (whatever the arbitrators select) that the OPMs assert." The State does not explain, however, in what manner the choice of forum and the standard of review regarding whether it has diligently enforced the statute implicates its discretion to decide whether to enforce the statute in the first place.

The Massachusetts Supreme Judicial Court has, in considering this exact argument, concluded that it "misses the mark." *Commonwealth v. Philip Morris Inc.*, 448 Mass. 836, 848, 864 N.E.2d 505, 514 (2007). The court explained:

> Submitting the diligent enforcement question to an arbitrator cedes neither sovereign power nor the task of reviewing discretionary enforcement decisions under [the escrow statute]. Any determination by the auditor or the arbitrator concerning diligent enforcement has meaning only in the context of the settlement agreement, with no effect on anyone except for the settlement agreement parties. It is an analysis to determine whether a condition in the contract has been met. There is no reason why the Commonwealth, as opposed to any other party to a contract, cannot be subject to an analysis of its having met (or not) contractual conditions within the terms established by the contract. Determining whether the Commonwealth has met a condition in a contract does not constitute a cession or delegation of the sovereign enforcement power. Indeed, the settlement agreement places no limitations on the Commonwealth's prerogative to enforce [the escrow statute] as it sees fit. Nor, as the Commonwealth suggests, does it subject the Commonwealth's enforcement decisions to discretionary review of the sort that takes place in a court. Judicial review tests the basis and legality of government action, and can result in a court's vacating a rule or an enforcement decision. . . . In contrast, the settlement agreement's diligent enforcement determination does nothing to compel, mod-

> ify, or vacate any action the Commonwealth may take pursuant to [the escrow statute].

Id. at 848-49, 864 N.E.2d at 514-15 (internal quotation marks omitted). *See also State v. Philip Morris USA, Inc.*, 927 A.2d 503, 513 (N.H. 2007) (holding that, under the MSA, even if compelled to arbitrate, the State retains full enforcement power and sovereign immunity is not implicated).

The State contends that N.C. Gen. Stat. § 105-113.4C (2007) differentiates this State from the other jurisdictions. The statute provides:

> The Master Settlement Agreement between the states and the tobacco product manufacturers, incorporated by reference into the consent decree referred to in S.L. 1999-2, requires each state to diligently enforce Article 37 of Chapter 66 of the General Statutes. The Office of the Attorney General and the Secretary of Revenue shall perform the following responsibilities in enforcing Article 37:
>
> (1) The Office of the Attorney General must give to the Secretary of Revenue a list of the nonparticipating manufacturers under the Master Settlement Agreement and the brand names of the products of the nonparticipating manufacturers.
>
> (2) The Office of the Attorney General must update the list provided under subdivision (1) of this section when a nonparticipating manufacturer becomes a participating manufacturer, another nonparticipating manufacturer is identified, or more brands or products of nonparticipating manufacturers are identified.
>
> (3) The Secretary of Revenue must require the taxpayers of the tobacco excise tax to identify the amount of tobacco products of nonparticipating manufacturers sold by the taxpayers, and may impose this requirement as provided in G.S. 66-290(10).
>
> (4) The Secretary of Revenue must determine the amount of State tobacco excise taxes attributable to the products of nonparticipating manufacturers, based on the information provided by the taxpayers, and must report this information to the Office of the Attorney General.

N.C. Gen. Stat. § 105-113.4C. According to the State, this statute constitutes a "promulgation of reviewable standards" from which "it is clear that the General Assembly intended to supply a definition for 'diligently enforced' in North Carolina by applying the common law of prosecutorial discretion."

The plain language of the statute—contained in the Chapter of the General Statutes relating to Taxation and not the section specifically addressing Tobacco Escrow Compliance, N.C. Gen. Stat. § 66-292 *et seq.* (2007)—indicates that the General Assembly was only setting out an allocation of responsibilities as between the Secretary of Revenue and the Office of the Attorney General in connection with diligent enforcement of the escrow statute. N.C. Gen. Stat. § 105-113.4C imposes certain duties on the Office of the Attorney General for compiling lists. Contrary to the State's assertion, the statute does not include any standards applicable to the decision of the Attorney General regarding whether to enforce the escrow statute under N.C. Gen. Stat. § 66-291(c) (2007) (stating that the Attorney General "may bring a civil action on behalf of the State" against manufacturer who fails to place funds in escrow) or N.C. Gen. Stat. § 66-293(a) (2007) (providing that Attorney General "may" impose civil penalty on person in violation of escrow requirements).

Simply put, no provision of the statute can be viewed as supplying a definition for "diligently enforced," as specifying the forum for determination of the issue of diligent enforcement, or as incorporating some unspecified standard of review for the exercise of prosecutorial discretion. In short, N.C. Gen. Stat. § 105-113.4C does not preclude an order compelling arbitration to determine whether North Carolina diligently enforced its escrow statute. The State has, therefore, failed to demonstrate that an order compelling arbitration is barred by sovereign immunity.

In a related argument, the State asserts: "Any judicial action which has the effect of usurping the prerogative of the General Assembly to determine the: (a) extent to which sovereign immunity is waived in a particular situation; or (b) limitations on the authority of any representative of the State to bind the State in contract on a particular subject, is barred by the Separation of Powers doctrine in Article I, section 6, Article II, sections 1 and 20, and Article IV, section 1, of the North Carolina Constitution." We do not understand the State to be contending in this argument that no authority existed to bind the State to the MSA—in oral argument, the State conceded that the General Assembly ratified the agreement, and the General

Assembly enacted the necessary legislation to implement its terms. To the extent that the State's argument hinges on N.C. Gen. Stat. § 105-113.4C, we have already concluded that the General Assembly did not intend, in passing that statute, to retroactively limit the procedures and standard for review governing the question of diligent enforcement. The Business Court's order compelling arbitration, therefore, does not violate the separation of powers doctrine.

II

[3] The State next contends that it did not, when signing the MSA, knowingly and intentionally agree to arbitrate whether North Carolina had "diligently enforced" its escrow statute. As the State asserts in its brief, " '[t]he [Federal Arbitration Act] directs courts to place arbitration agreements on equal footing with other contracts, but it does not require parties to arbitrate when they have not agreed to do so.' " (Quoting *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 293, 151 L. Ed. 2d 755, 768, 122 S. Ct. 754, 764 (2002)). Nevertheless, based upon our review of the MSA, we agree with all of the other jurisdictions considering this issue that the MSA subjects the issue of diligent enforcement to arbitration.

In order to determine whether a dispute is subject to arbitration, a court must "ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001) (internal quotation marks omitted). In this case, there is no dispute that the MSA contains an arbitration agreement; the issue is whether a specific dispute—the question of diligent enforcement—falls within the scope of that agreement. A trial court's conclusion, as here, that a particular dispute is subject to arbitration is a conclusion of law, reviewable de novo by the appellate court. *Id.*

Although the State makes various arguments suggesting that we should construe the contract in the light most favorable to the State, "[t]he interpretation of the terms of an arbitration agreement are governed by contract principles." *Trafalgar House Constr., Inc. v. MSL Enters., Inc.*, 128 N.C. App. 252, 256, 494 S.E.2d 613, 616 (1998). *See also Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005) ("The law of contracts governs the issue of whether an agreement to arbitrate exists."). As this Court has explained:

> "Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the

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

Hemric v. Groce, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (quoting *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975) and *Potter v. Hilemn, Inc.*, 150 N.C. App. 326, 331, 564 S.E.2d 259, 263 (2002)), *disc. review dismissed and cert. denied*, 359 N.C. 631, 616 S.E.2d 234 (2005). We, therefore, turn to the language of the MSA.

The State focuses on the provision of the MSA placing exclusive jurisdiction in the superior court. Section VII of the MSA provides:

> (a) Jurisdiction. Each Participating Manufacturer and each Settling State acknowledge that the Court: (1) has jurisdiction over the subject matter of the action identified in Exhibit D in such Settling State and over each Participating Manufacturer; (2) shall retain exclusive jurisdiction for the purposes of implementing and enforcing this Agreement and the Consent Decree as to such Settling State; and (3) *except as provided in subsections IX(d), XI(c) and XVII(d) and Exhibit O*, shall be the only court to which disputes under this Agreement or the Consent Decree are presented as to such Settling State. Provided, however, that notwithstanding the foregoing, the Escrow Court (as defined in the Escrow Agreement) shall have exclusive jurisdiction, as provided in section 15 of the Escrow Agreement, over any suit, action or proceeding seeking to interpret or enforce any provision of, or based on any right arising out of, the Escrow Agreement.

(Emphasis added.)

Subsection XI(c), a specific exception to the "exclusive jurisdiction" of the superior court, provides in turn:

> Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor (including, without limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j) or subsection XI(i)) shall be submitted to binding arbitration before a panel of three neutral

> arbitrators, each of whom shall be a former Article III federal judge. . . .

Thus, "[a]ny dispute, controversy or claim" falling within the scope of subsection XI(c) is not within the exclusive jurisdiction of the superior court and must be arbitrated.

The State contends, however, that the question of diligent enforcement does not fall within subsection XI(c). Other jurisdictions have unanimously held otherwise, and we agree with their analysis of the MSA.

With respect to the reference in XI(c) to "calculations performed by, or any determinations made by, the Independent Auditor," section XI(a)(1) of the MSA provides that the independent auditor "shall calculate and determine the amount of all payments owed pursuant to this Agreement, the adjustments, reductions and offsets thereto (and all resulting carry-forwards, if any), the allocation of such payments, adjustments, reductions, offsets and carry-forwards among the Participating Manufacturers and among the Settling States, and shall perform all other calculations in connection with the foregoing . . . ." Thus, the independent auditor has the responsibility to both calculate *and determine*, among other things, (1) the adjustments and (2) the allocation of adjustments among the settling states.

Subsection IX(j) sets out the steps that the independent auditor must take in calculating the PMs' annual payments. Each of 13 sequentially-numbered clauses references a particular adjustment, reduction, or offset that "shall be applied" to the results of the immediately preceding clause. The sixth step of that calculation states that "the NPM Adjustment *shall be applied* to the results of clause 'Fifth' pursuant to subsections IX(d)(1) and (d)(2) . . . ." (Emphasis added.) The subsection further provides that "[i]n the event that a particular adjustment, reduction or offset referred to in a clause below does not apply to the payment being calculated, the result of the clause in question shall be deemed to be equal to the result of the immediately preceding clause." Thus, as the Maryland Court of Special Appeals explained, "[t]his clause requires the independent auditor, as the party responsible for performing the calculation in question, to make a threshold determination whether the adjustment is applicable before computing its amount and modifying the amount of the subject payment by applying the adjustment." *State v. Philip Morris Inc.*, 179 Md. App. 140, 157, 944 A.2d 1167, 1177, *cert. denied*, 405 Md. 65, 949 A.2d 653 (2008).

The NPM adjustment cannot be divorced from the question whether a state diligently enforced its escrow statute. As the New Hampshire Supreme Court noted: "The parties do not point to, and the Court is not aware of, any provisions in the MSA other than those regarding the NPM Adjustment, where the diligent enforcement of a Qualifying Statute has any relevance. Thus, a dispute over diligent enforcement arises out of a determination by the Independent Auditor whether to apply the NPM Adjustment." *Philip Morris USA*, 927 A.2d at 512. *See also Philip Morris Inc.*, 179 Md. App. at 158, 944 A.2d at 1177 ("The diligent enforcement question, mentioned in the MSA only as part of the NPM Adjustment, is an indispensable underlying issue of the overall NPM Adjustment and, thus, the determination and calculations are inextricably linked."). Further, under XI(a)(1) of the MSA, the independent auditor is tasked with the allocation of payments and adjustments among the settling states. To make that allocation, there must be a determination whether the NPM adjustment applies; that determination in turn requires a determination whether the individual state has diligently enforced its escrow statute.

Accordingly, the issue of a state's diligent enforcement is a "dispute, controversy or claim arising out of or relating to . . . determinations made by, the Independent Auditor," as specified in subsection of XI(c) of the MSA. The issue is, therefore, subject to arbitration. This conclusion is confirmed by the subsequent parenthetical clause in the same subsection XI(c), specifying that arbitrable disputes "includ[e], without limitation, any dispute concerning *the operation or application* of any of the adjustments . . . described in subsection IX(j)." (Emphasis added.) The parties dispute whether the independent auditor properly refused to apply the NPM adjustment—thus, the dispute "concern[s] the . . . application" of the NPM adjustment. *See Philip Morris Inc.*, 179 Md. App. at 156, 944 A.2d at 1176-77 ("In the instant case, the auditor did not apply the NPM Adjustment to reduce the participating manufacturers' annual payment, a determination that resulted in a calculation greater than if the auditor had applied the NPM Adjustment. Accordingly, the question of diligent enforcement 'arises out of' or 'relates to' the auditor's calculations and determinations because it directly affects the amount of MSA payment the State and all other settling states receive. . . . As such, the dispute 'relates to' the 'operation' or 'application' of an 'adjustment' or 'allocation pursuant to IX(j).' ").

The State, however, contends that we should view XI(c)'s arbitration provision as referring only to accounting functions, such as the amount of payments. This argument overlooks the reference in the subsection to both "calculations" and "any determinations made by" the independent auditor. The plain language of the subsection thus broadens its scope beyond mere calculations. Indeed, calculation of the amount of payments and allocation of the adjustments among the states necessarily requires a determination whether an escrow statute was diligently enforced. *See State v. Philip Morris, Inc.*, 279 Conn. 785, 799, 905 A.2d 42, 49 (2006) ("Accordingly, we conclude that the underlying dispute over the independent auditor's decision not to apply the adjustment falls within the scope of the arbitration provision because it directly involves a *determination* of the independent auditor. Moreover, this dispute also *arises out of or relates to* the independent auditor's *calculation* of the annual payments because its determination not to apply the nonparticipating manufacturer adjustment resulted in it *calculating* higher annual payments than if it had determined that the adjustment should apply.").

The State maintains further—without citation of any authority—that the issue whether a state diligently enforced its escrow statute is a "legal" determination that cannot be decided by an accounting firm. Yet, the State also admits that the question of diligent enforcement "is determined based on North Carolina's actions"—a factual issue. To construe subsection XI(c) as the State requests and limit its scope only to accounting calculations, excluding any other "determinations," would require rewriting the MSA—something we may not do. *See Philip Morris Inc.*, 448 Mass. at 847, 864 N.E.2d at 513-14 (rejecting argument that independent auditor lacked authority under MSA to make diligent enforcement determination because it is a " 'quintessential[ly] judicial determination' ").

The State also argues that the fact that the independent auditor refused to apply the NPM adjustment does not mean it made a determination on the issue of diligent enforcement. It is undisputed that the independent auditor based its refusal to apply the NPM adjustment on a "presumption" that the states were each diligently enforcing their escrow statutes. The arbitration clause, however, encompasses any dispute "*concerning* the operation or application of any of the adjustments" in subsection IX(j). (Emphasis added.) The decision of the independent auditor not to actually determine whether states diligently enforced their statutes is a dispute "concerning the operation or application" of the NPM adjustment by the independent audi-

tor. *See Philip Morris USA*, 927 A.2d at 510 (rejecting State's contention that because Auditor did not actually make specific determination regarding diligent enforcement, it was not arbitrable; court held that State "overlooks the broad language in the arbitration clause stating that *any* dispute, controversy or claim *arising out of or relating to* the Auditor's calculations or determinations is subject to arbitration").

In any event, as the Massachusetts Supreme Judicial Court reasoned, once the economic consultants determined that the MSA was a significant factor in the loss of market share, "the only means by which the auditor could have denied the NPM adjustment for that year was by affirmatively finding that there was diligent enforcement by the States. It is therefore logically necessary that the auditor did make a diligent enforcement determination. Whether the auditor made this determination explicitly, or impliedly, or by employing a presumption makes no difference." *Philip Morris Inc.*, 448 Mass. at 847, 864 N.E.2d at 513. *See also Philip Morris USA*, 927 A.2d at 510 ("We concur with other appellate courts that have held that the Independent Auditor did, in fact, make a determination regarding diligent enforcement of Qualifying Statutes.").

In short, the plain language of the MSA establishes that the issue of the application of the NPM adjustment for 2003, including the question of diligent enforcement, must be arbitrated. The State's arguments otherwise cannot be reconciled with the actual language of the MSA. *See*, *e.g.*, *Philip Morris*, *Inc.*, 279 Conn. at 807-08, 905 A.2d at 54 ("Any challenge as to whether the independent auditor's initial determination [regarding applicability of the NPM adjustment] was, in fact, correct, under the circumstances, is an issue that the [MSA] reserves for binding arbitration."); *People v. Lorillard Tobacco Co.*, 372 Ill. App. 3d 190, 199, 865 N.E.2d 546, 554, *appeal denied*, 225 Ill. 2d 657, 875 N.E.2d 1119 (2007) (holding "that the plain and unambiguous language of the MSA's arbitration provision requires arbitration of the parties' dispute concerning the NPM Adjustment, including the State's diligent enforcement defense"); *Philip Morris Inc.*, 179 Md. App. at 162, 944 A.2d at 1180 ("The question of diligent enforcement cannot be made in a vacuum. We concur with the numerous jurisdictions that have held that the present dispute must be resolved under one clear set of rules that apply with equal force to every settling state."); *Philip Morris Inc.*, 448 Mass. at 849, 864 N.E.2d at 515 ("In sum, this dispute falls squarely under the arbitration provision of the [MSA]."); *State v. Philip Morris Inc.*, 8 N.Y.3d 574, 580, 869

N.E.2d 636, 639 (2007) ("The plain language of the MSA compels arbitration."); *State v. Philip Morris, Inc.*, 2007 ND 90, 732 N.W.2d 720, 727 (2007) ("Construing these provisions [subsections VII(a), IX(d), XI(c), and IX(j)] together, we believe the plain and unambiguous language of the settlement agreement requires arbitration of the parties' dispute.").

III

[4] Finally, the State contends that the PMs have released any claims they possess regarding a lack of diligent enforcement in 2003. The State points to 2003 Tobacco Settlement Agreements that were entered into separately from the MSA. The agreements provide that the signatory manufacturer "absolutely and unconditionally releases and forever discharges [each settling state] from any and all claims that it ever had, now has, or hereafter can, shall or may have . . . under Section IX(d) of the MSA with respect to Cigarettes shipped or sold during 1999, 2000, 2001, and 2002, including any effect such claims may have on future payments under the MSA."

The State then argues that "diligent enforcement" for 2003 relates to North Carolina's enforcement efforts during calendar year 2003. According to the State, any enforcement regarding escrow payments would have had to relate to cigarettes sold in 2002 and thus fall within the scope of the releases in the 2003 Tobacco Settlement Agreements. The PMs disagree with that construction of the MSA and the 2003 agreements, but argue that this question must be resolved by the arbitration panel. We agree.

It is well established that once a court has determined that a claim is subject to arbitration, then the merits of that claim—including any defenses—must be decided by the arbitrator. *See, e.g.*, *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991) ("[C]ourts must be careful not to overreach and decide the merits of an arbitrable claim. Our role is strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator."), *cert. denied*, 503 U.S. 919, 117 L. Ed. 2d 516, 112 S. Ct. 1294 (1992); *Goshawk Dedicated v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293, 1311 (N.D. Ga. 2006) ("Courts may not consider defenses to the case generally, as opposed to specific challenges to an arbitration agreement, because these are properly reserved for arbitrators."); *British Ins. Co. of Cayman v. Water Street Ins. Co.*, 93 F. Supp. 2d 506, 521 (S.D.N.Y. 2000) (holding that once court has decided matter is arbi-

trable, court must refrain from deciding validity of any defenses and refer them for resolution by arbitration). This principle applies equally when the parties have entered into a contract containing an arbitration clause, a party seeks arbitration of a claim arising out of the contract, and the opposing party claims that a subsequent agreement—not containing an arbitration clause—released the claims sought to be arbitrated. *See Schlaifer v. Sedlow*, 51 N.Y.2d 181, 185, 412 N.E.2d 1294, 1296 (1980) ("Once the parties to a broad arbitration clause have made a valid choice of forum, as here, all questions with respect to the validity and effect of subsequent documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator.").

In this case, the State's contention regarding the 2003 agreements addresses the merits of the PMs' claim under the MSA that they are entitled to have their required 2003 payments lowered based on the NPM adjustment. The State's assertion that the PMs' claim for a reduction is barred by the 2003 Tobacco Settlement Agreements constitutes a defense to the claim. The issue must, therefore, be decided by the arbitration panel. *See Philip Morris USA*, 927 A.2d at 512-13 ("[T]he dispute over whether the June 2003 agreements prohibit the PMs from contesting diligent enforcement in 2003 falls within the purview of the Independent Auditor's determination concerning applicability of the NPM Adjustment to the PMs' 2003 annual payment, and therefore must be presented as part of the arbitration process."); *Philip Morris Inc.*, 179 Md. App. at 167, 944 A.2d at 1183 ("Concurring with the other jurisdictions, we agree with the original manufacturers' assertion. . . . The dispute over whether the June 2003 Agreements prohibit the original manufacturers from contesting diligent enforcement in 2003 falls within the purview of the auditor's determination concerning the applicability of the NPM Adjustment and, therefore, must be presented as part of the arbitration process."). The Business Court's order compelling arbitration is, therefore, affirmed.

Affirmed.

Chief Judge MARTIN and Judge STEELMAN concur.

CITY OF WILSON REDEVELOPMENT COMMISSION, PLAINTIFF v. LILA RUTH BOYKIN, A/K/A LILA RUTH PROCTOR, ALL UNKNOWN HEIRS OF FANNIE FAISON CHESTER, JANNIS BYNUM, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, JOSEPH A. CHESTER, JR., AND WIFE, ANNE CHESTER, PEARL CHESTER McCANTS, AND HUSBAND, WALTER B. McCANTS, Sr., INDIA CHESTER WATKINS, AND HUSBAND, H. PIERRE WATKINS, JAMES ARTHUR CHESTER, AND WIFE, NORINE P. CHESTER, WILLIAM THOMAS CHESTER, AND WIFE, VERONICA A. CHESTER, IRVIN EUGENE CHESTER, AND WIFE, PATSY H. CHESTER, FANNIE E. CHESTER ALSTON, AND ZELDA CHESTER, AS WIDOW AND SOLE HEIR OF WILLIAM CHESTER, DEFENDANTS

No. COA08-268

(Filed 7 October 2008)

1. Eminent Domain— Ch. 40 action—competing ownership claims—pretrial determination not required

The trial court in a N.C.G.S. Ch. 40A condemnation action by a city redevelopment commission was not required to make a pretrial determination of the competing claims of ownership of the condemned property before conducting a jury trial to determine the fair market value of the property. N.C.G.S. § 40A-55.

2. Evidence— photograph—illustrative purposes—waiver—failure to show prejudicial error

The trial court did not err in a condemnation action by allowing a witness to illustrate his testimony with a single photograph of his grandmother in front of the pertinent property because: (1) in its jury instructions, the trial court cautioned the jury that photographs were to be considered for illustrative purposes only; (2) although plaintiff contends the trial court's instruction encouraged the jury to consider defendants' sentimental attachment to the property, plaintiff waived appellate review of this issue under N.C. R. App. P. 10(b)(1) by failing to make this argument at trial; and (3) plaintiff failed to articulate how this photo changed the outcome of the trial beyond a generalized assertion that it was intended to elicit sentimental value, and it was highly unlikely that this testimony had any significant effect on the jury's verdict.

3. Eminent Domain— amount paid for other property within geographical area

The trial court did not err in a condemnation action by admitting testimony that plaintiff city redevelopment commission had paid as much as $250,000 for another property within the geographical area of the redevelopment project because: (1) plaintiff

had paid $250,000 for an apartment building that plaintiff did not consider blighted or obsolete in contrast to the pertinent property that was a small single-family home rather than a well-maintained apartment complex; and (2) plaintiff failed to articulate how, in this evidentiary context, information about the price paid for a very different property would be likely to affect the jury's determination of fair market value of the subject property.

4. Judgments— entry of default—transferred interests—answer by attorney for unknown parties

Certain defendants in a Ch. 40A condemnation action were not subject to entry of default where (1) they had transferred their interests in the condemned property prior to the date they were served with complaints containing a declaration of taking; and (2) they were among heirs of the original landowner whose identities were unknown when the action was initially filed and were represented by a court-appointed attorney for "unknown parties" who filed an answer on their behalf.

5. Judgments— entry of default—motion to set aside default—abuse of discretion standard

The trial court did not abuse its discretion in a condemnation action by setting aside the entry of default entered against defendant Boykin because: (1) defendant filed an answer incorporating pleadings of Joseph Chester, Jr., and asserting that he held a power of attorney on her behalf, on the same day that plaintiff sought entry of default; (2) the order setting aside entry of default did not create any additional issues or create prejudice to plaintiff; (3) defendant, who held a one-half undivided interest in the pertinent property, was ninety-seven years old and living in a nursing home at the time of trial; and (4) given the factual and procedural history of this case, it cannot be said that the trial court abused its discretion by granting this motion.

Appeal by Plaintiff from Orders entered 12 September 2007 and 17 October 2007 by Judge Milton F. Fitch, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 10 September 2008.

Rose Rand Attorneys, P.A., by T. Slade Rand, Jr., for Plaintiff-Appellant.

Poyner & Spruill LLP, by Timothy W. Wilson and Jenny M. McKellar, for Defendant-Appellees Joseph A. Chester, Jr., and wife Anne Chester; and Lila Ruth Boykin.

Farris & Farris P.A., by Robert A. Farris, Jr., for Defendant-Appellee Jannis Bynum.

Connor, Bunn, Rogerson, & Woodard, P.L.L.C., by Misty E. Woodard, for Defendant-Appellees Unknown Heirs of Fannie Faison Chester.

ARROWOOD, Judge.

Plaintiff, the City of Wilson Redevelopment Commission for Wilson, North Carolina, appeals from orders entered in connection with a condemnation action filed against Defendant-Appellees. We affirm.

The procedural history of this case is summarized in pertinent part as follows: In 1916 Eliza Boykin was granted a property located at 204 S. Vick Street in Wilson, North Carolina (the subject property). Upon her death, it passed to her children Joseph Faison and Defendant Lila Ruth Boykin. In 1965 Joseph Faison and his wife deeded their undivided half interest in the subject property to Fannie Faison Chester. At Fannie Faison Chester's death, her half interest passed to her three surviving children, Arthur Lee Chester, William Chester, and Joseph Chester, Sr. In 1989 Arthur Chester deeded his interest in the subject property to Jannis Bynum. At the deaths of William Chester and Joseph Chester, Sr., their heirs succeeded to their ownership interests in the property. In 1987 Lila Ruth Boykin executed a power of attorney to Joseph Chester, Jr. At the time of trial, Lila Ruth Boykin possessed a one half undivided interest in the subject property, and the other half interest was divided among the heirs of Fannie Faison Chester and her children, Joseph Chester, Sr., and William Chester.

On 25 April 2005 Plaintiff filed a condemnation complaint, declaration of taking, and notice of action. Plaintiff condemned the subject property as part of an urban redevelopment project, whose aims included the promotion of "public health and welfare" and "the elimination of certain blighted areas in the City of Wilson[.]" The complaint was filed against the following Defendants: Lila Ruth Boykin; Unknown Heirs of Fannie Chester; Joseph Chester, Jr., and wife, Anne Chester (the Chester Defendants); Jannis Bynum; and the U.S. Department of Housing and Urban Development (HUD) (collectively, with later-identified heirs to the subject property, Defendants). Plaintiff estimated $36,260 to be just compensation for the condemnation, and deposited that amount with the Wilson County Superior

Court. In an amended complaint filed in July 2005, Plaintiff listed liens on the subject property.

On 25 August 2005 Defendant Bynum filed an answer disputing Plaintiff's estimate of just compensation for the subject property, and filed a crossclaim asserting sole ownership of the subject property by adverse possession and by virtue of the deed from Arthur Chester. HUD answered, claiming a lien on the subject property. In October 2005 an attorney was appointed to represent the interests of unknown heirs of Fannie Faison Chester. In October 2005, the Chester Defendants filed an answer disputing the estimated amount of just compensation. They also answered Bynum's crossclaim, denying her claim of sole ownership and setting out details of the family's history. In August 2005 Bynum filed a motion for disbursement of the deposit money. Plaintiff responded and alleged that "there may be question as to ownership of the subject property." The Chester Defendants opposed Bynum's motion.

On 9 May 2006 Plaintiff filed a motion for determination of issues other than just compensation, specifically asking the trial court to resolve the Defendants' "unsettled contentions" as to their respective ownership rights in the subject property. Following a pretrial hearing conducted 11 June 2007, the court denied Plaintiff's motion, and ruled that it would instead conduct a jury trial on the issue of the amount of just compensation, without regard to how the various Defendants might later agree to divide that amount.

On 11 June 2007 Defendant Lila Ruth Boykin filed an answer, joining in and incorporating by reference all pleadings filed by the Chester Defendants. She asserted that Joseph Chester, Jr. held a power of attorney and was her attorney in fact. The same day Plaintiff sought entry of default against Lila Ruth Boykin, and the Wilson County Clerk of Court entered default against Ms. Boykin.

A jury trial was conducted beginning 12 June 2007 to determine the amount of just compensation for condemnation of the subject property. At trial, Plaintiff presented the testimony of Leigh Ann Braswell, Plaintiff's Community Development Administrator. Braswell testified that the purpose of condemnation of the subject property and properties in the same area was "to remove the blighting conditions in the area." She described the neighborhood as one with "very substandard conditions" having "very high crime rates[.]" She considered the subject property to be "blighted and substandard." Plaintiff also presented testimony from Edward Robinson, a

real estate appraiser. Robinson testified that he had appraised the fair market value of the subject property at $45,000, and its replacement value at $120,000.

Defendants offered trial testimony from Janiss Bynum. She testified that she had lived on the subject property for seven years, and had undertaken significant renovation, remodeling, and maintenance of the house. Bynum obtained her interest in the property from Arthur Chester, a relative of her father's. Her father and Joseph Chester, Jr., were brothers. Bynum estimated that she spent $30,000 on various repairs, and that the fair market value of the subject property was $85,000.

Defendants also called Leigh Braswell as a witness. She testified that Plaintiff intended to tear down the subject property and replace it with a "green space" as part of a redevelopment project aimed at "acquiring blighted and substandard parcels[.]" She testified Plaintiff had paid $250,000 for an apartment building located in the same redevelopment area.

Joseph Chester, Jr., testified that he was born in 1938 and that the subject property had been in his family for many years. It was passed from his great-grandmother, Eliza Boykin, to his grandmother, Fannie Faison Chester. His father and uncles were born in the house, and Joseph Chester, Jr., had visited the house from the 1940's to the present. He illustrated his testimony with a photograph taken in 1900, depicting Fannie Faison Chester standing in front of the house. Joseph Chester offered other testimony detailing his family tree as pertinent to the subject property. Janiss Bynum was his cousin. He testified that in his opinion the fair market value of the property was $150,000.

Following the presentation of evidence, the jury returned a verdict on 13 June 2007, finding just compensation to be $170,000. On 22 June 2007 Plaintiff filed a motion for a new trial under N.C. Gen. Stat. § 1A-1, Rule 59. Plaintiff asserted that it was entitled to a new trial, on the grounds that the trial court failed to determine the specific ownership interest of all heirs and defendants before trial. Plaintiff also alleged that the verdict was excessive and was the result of prejudicial and improperly admitted evidence.

In November 2006 Plaintiff obtained an entry of default against the siblings of Joseph Chester, Jr., and their spouses; and against Zelda Chester, Arthur Chester's widow. On 11 June 2007 the Chester Defendants filed quitclaim deeds executed in their favor by five sib-

lings of Joseph Chester, Jr, and their spouses, releasing to the Chester Defendants any interest they held in the subject property. On 25 June 2007 the Chester Defendants filed a motion asking the trial court to set aside the defaults entered against these non-answering defendants, and to allow them an extension of time to file an answer. Defendants asserted that, prior to the entry of default these defendants had executed quitclaim deeds in favor of the Chester Defendants. They also contended that default should not have been entered, inasmuch as these defendants were among the unknown heirs of Fannie Faison Chester who were represented by appointed counsel. The trial court did not rule on this motion. The Chester Defendants also filed a motion to set aside the default entered against Lila Ruth Boykin and to deem her answer timely filed; their motion was granted on 12 September 2007. The Defendants accepted remittitur of verdict from $170,000 to $150,000, and on 12 September 2007 judgment in that amount was entered for Defendants. On 16 October 2007 the court denied Plaintiff's motion for a new trial. From the orders entering judgment, setting aside the default entered against Lila Ruth Boykin, and denying its motion for a new trial, Plaintiff timely appeals.

---

[1] Plaintiff argues first that the court committed reversible error by failing to make a pretrial determination of the competing claims of ownership of the subject property, on the grounds that pretrial "determination of these issues is a mandatory prerequisite to a trial by jury." We disagree.

In the instant case, the condemnees included HUD, which held a lien on the property, and the heirs of Eliza Boykin, who was granted the subject property around 1900. Plaintiff filed a pretrial motion asking the trial court to determine the specific fractional ownership of the various heirs before conducting a trial to determine the fair market value of the subject property. On appeal, Plaintiff asserts that the denial of this motion was reversible error.

Plaintiff filed its condemnation action under N.C. Gen. Stat. § Chapter 40A, "Eminent Domain." N.C. Gen. Stat. § 40A-1 (2007), provides in pertinent part that "the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by . . . all local public condemnors." Because Plaintiff is a local public condemnor, Chapter 40A governs the proceedings at issue. Its motion for pretrial determination of ownership issues

was filed under N.C. Gen. Stat. § 40A-47 (2007), which states in relevant part that:

> The judge, upon motion and 10 days' notice . . . shall, either in or out of session, hear and determine any and all issues raised by the pleadings other than the issue of compensation, including, but not limited to, the condemnor's authority to take, questions of necessary and proper parties, title to the land, interest taken, and area taken.

Plaintiff asserts that, as a matter of law, this statute makes it mandatory that all other issues be resolved before a jury trial is conducted on the issue of just compensation. However, the statute neither requires that this determination must always be made before trial, nor otherwise dictates the manner or time for resolution of such issues. Accordingly, we conclude that the statute does not on its face include such a requirement.

We have also considered the cases cited by Plaintiff. In this regard, it is important to keep in mind "the different standards for compensation for condemnees set out in two different statutes. . . . [C]ompensation [is] determined under N.C.G.S. § 136-112(1) . . . [if] DOT condemned the property. However, owners of property condemned under N.C.G.S. § 40A [are] entitled to compensation under N.C.G.S. § 40A-64(b), which provides for a compensation system more favorable to condemnees than the system provided for in N.C.G.S. § 136-112(1)." *Department of Transp. v. Rowe*, 353 N.C. 671, 673-74, 549 S.E.2d 203, 206 (2001). For example, "[t]o recover under G.S. § 136-112(1) the area affected and the area taken must constitute a single tract. Unity of ownership is an important criterion." In that circumstance, "determination of ownership of the area affected [but not taken] is a prerequisite to a determination of just compensation for the area taken." *State v. Forehand*, 67 N.C. App. 148, 153, 312 S.E.2d 247, 253 (1984) (citing *Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E.2d 390 (1978)).

However, there is no statutory or common law requirement that competing claims of condemnees always must be determined before trial, even when their resolution has no effect on the amount of just compensation. Under N.C. Gen. Stat. § Chapter 40A, the general rule is that "the measure of compensation for a taking of property is its fair market value." N.C. Gen. Stat. § 40A-64(a) (2007). "The fair market value of a property may be defined as 'the price which a willing buyer would pay to purchase the asset on the open market from a

willing seller, with neither party being under any compulsion to complete the transaction.' " *City of Charlotte v. Hurlahe*, 178 N.C. App. 144, 147, 631 S.E.2d 28, 30 (2006) (quoting *Carlson v. Carlson*, 127 N.C. App. 87, 91, 487 S.E.2d 784, 786 (1997)). On appeal, Plaintiff discusses factors that it contends would affect an individual condemnee's entitlement to share in the compensation award. These factors do not affect the objective determination of the fair market value of the subject property. *See* BLACK'S LAW DICTIONARY 1587 (8th ed. 2004), defining fair market value as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction."

Moreover, we note that N.C. Gen. Stat. § 40A-55 (2007), expressly contemplates that the competing claims of condemnees might be decided after determination of the fair market value of a condemned property. The statute provides that:

> If there are adverse and conflicting claimants to the deposit made into the court by the condemnor or the additional amount determined as just compensation, on which the judgment is entered in said action, the judge may direct the full amount determined to be paid into said court by the condemnor and may retain said cause for determination of who is entitled to said moneys. The judge may by further order in the cause direct to whom the same shall be paid and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made.

N.C. Gen. Stat. § 40A-55. The North Carolina Supreme Court has held that former N.C. Gen. Stat. § 40-23, which is in all substantive respects the same as N.C. Gen. Stat. § 40A-55, allows for post-trial determination of competing claims:

> G.S. § 40-23 refers specifically to "adverse and conflicting claimants." . . . G.S. § 40-23 contains no mandatory provision as to when or in what manner the respective interests are to be determined. . . . [W]here there are several interests or estates in a parcel of real estate taken by eminent domain, a proper method of fixing the value of, or damage to, each interest or estate, is to determine the value of, or damage to, the property as a whole, and then to apportion the same among the several owners according to their respective interests or estates[.]

Barnes v. N.C. State Highway Com., 257 N.C. 507, 520, 126 S.E.2d 732, 741-42 (1962) (internal quotation marks and citations omitted)). Citing *Barnes*, the North Carolina Supreme Court later held:

> In condemnation proceedings . . . a proper method for determining compensation to be paid . . . is, first, to determine the value of the property taken, as a whole, and then apportion the award among the several claimants. The taker of the property, thus having its total liability determined, is not affected by or interested in the division of the award by the court.

Charlotte v. Recreation Com., 278 N.C. 26, 32-33, 178 S.E.2d 601, 605-06 (1971) (citing *Barnes*, 257 N.C. 507, 126 S.E.2d 732)) (other citations omitted).

We conclude that the trial court did not err by denying Plaintiff's motion for pretrial determination of the respective ownership interests of the claimants to the subject property. This assignment of error is overruled.

---

[2] Plaintiff argues next that the trial court committed reversible error by allowing Joseph Chester, Jr., to illustrate his testimony with a single photograph of his grandmother in front of the subject property. We disagree.

At trial, Joseph Chester, Jr., testified without objection that the subject property had been in his family for many years, and had passed from his great-great grandmother to his grandmother. He also testified, again without objection, to the summers he spent there with his grandparents, both as a child and later as a young man. In connection with this testimony, Joseph Chester, Jr., showed the jury a photograph taken in 1900, of his grandmother standing in front of the subject property. In its jury instructions, the trial court cautioned the jury that photographs were to be considered only for illustrative purposes.

"Admission of evidence is 'addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown.' Under an abuse of discretion standard, we defer to the trial court's discretion and will reverse its 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 (2004) (quoting *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997); and *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

On appeal Plaintiff argues that admission of the photo for illustrative purposes improperly encouraged the jury to consider the

Defendants' sentimental attachment to the subject property. However, at trial Plaintiff made a perfunctory objection, saying only "Your Honor, objection, relevance[.]" Plaintiff did not argue at trial that the photograph was prejudicial to its case, or that it would invite improper considerations by the jury. Accordingly, Plaintiff has waived appellate review of this issue. See N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[.]" *See also*, *e.g.*, *Westminster Homes*, *Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) ("issues and theories of a case not raised below will not be considered on appeal").

Moreover, " '[t]he burden is on the appellant not only to show error, but to show prejudicial error, *i.e.*, that a different result would have likely ensued had the error not occurred. G.S. § 1A-1, Rule 61 [(2005)].' " *O'Mara v. Wake Forest Univ. Health Sciences*, 184 N.C. App. 428, 440, 646 S.E.2d 400, 407 (2007) (quoting *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983)). Plaintiff fails to articulate how this photo changed the outcome of the trial, beyond a generalized assertion that it "was intended to elicit sentimental value to the Chesters[.]" " 'We also observe that, based on our own review of the evidence, it is highly unlikely that this testimony had any significant effect on the jury's verdict.' " *Cameron v. Merisel Props., Inc.*, 187 N.C. App. 40, 52, 652 S.E.2d 660, 669 (2007) (quoting *O'Mara*, 184 N.C. App. at 441, 646 S.E.2d at 407). This assignment of error is overruled.

---

[3] Plaintiff next argues that the trial court erred by admitting testimony that Plaintiff had paid as much as $250,000 for another property within the geographical area of the redevelopment project. As discussed above, to obtain relief, the appellant "must show 'that a different result would have ensued in the absence of the evidence.' " *Jackson v. Carland*, 192 N.C. App. 432, 436, —— S.E.2d ——, —— (2008) (COA07-1122, filed 2 September 2008) (quoting *Ferrell v. Frye*, 108 N.C. App. 521, 526, 424 S.E.2d 197, 200 (1993)).

In the instant case, Plaintiff challenges the following exchange:

> DEFENSE COUNSEL: Miss Braswell, as part of this project the City of Wilson has bought some of the properties in this neighborhood what you call Triangle II voluntarily; correct?

MS. BRASWELL: Yes, sir.

DEFENSE COUNSEL: And the City of Wilson has paid voluntarily up to $250,000 for some of the -

PLAINTIFF'S COUNSEL: Objection, Your Honor. May I approach?

. . . .

THE COURT: Overruled.

DEFENSE COUNSEL: Thank you, judge. Miss Braswell, the City of Wilson has paid willing buyer or willing seller for some of the property in this neighborhood without having to file condemnation cases; correct?

MS. BRASWELL: Correct.

DEFENSE COUNSEL: And the City of Wilson under your oversight has paid up to a quarter of a million dollars for some property in this neighborhood, correct?

MS. BRASWELL: Subject, yes, sir, subject property that you're referring to I believe . . . was an 11-unit apartment complex.

DEFENSE COUNSEL: That was blighted and obsolete?

MS. BRASWELL: I wouldn't say that that particular property was blighted or obsolete, but the redevelopment statute provide that at least ⅔ of the property within the area must be blighted or obsolete.

Plaintiff argues on appeal that the "obvious implication" of this dialog was that Plaintiff "voluntarily paid more than five times as much for property similarly situated to defendants' property as it was willing to pay defendants for their property[.]" However, it was undisputed that the subject property was not "similarly situated" to the property discussed by Ms. Braswell.

This challenged testimony informed the jury that, as part of its redevelopment project, Plaintiff had paid $250,000 for an apartment building that Plaintiff did not consider "blighted or obsolete." In stark contrast, it was undisputed that the subject property was a small, single-family home, rather than a well-maintained apartment complex. Ms. Braswell characterized the subject property as "blighted" or "substandard," and described the neighborhood in which the subject property was located as having a "high crime rate" and "substandard conditions." Plaintiff fails to articulate how, in

this evidentiary context, information about the price paid for a very different property would be likely to affect the jury's determination of the fair market value of the subject property. This assignment of error is overruled.

---

[4] Plaintiff argues next that the court erred "by permitting the non-answering defendants to answer after the jury rendered its verdict" and by setting aside the default entered against Lila Ruth Boykin. We disagree.

In June 2006 quitclaim deeds were executed by Defendants Pearl Chester McCants, and husband, Walter B. McCants, Sr.; India Chester Watkins, and husband, H. Pierre Watkins; James Arthur Chester, and wife, Norine P. Chester; William Thomas Chester, and wife Veronica A. Chester; and Irvin Eugene Chester, and wife, Patsy H. Chester, transferring their interest in the subject property to the Chester Defendants. These deeds were not filed until June 2007. "However, North Carolina recognizes that 'the registration of deeds is primarily for the protection of purchasers for value and creditors; an unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties.' " *Daniel v. Wray*, 158 N.C. App. 161, 171-72, 580 S.E.2d 711, 719 (2003) (quoting *Bowden v. Bowden*, 264 N.C. 296, 302, 141 S.E.2d 621, 627 (1965); and citing *Patterson v. Bryant*, 216 N.C. 550, 5 S.E.2d 849 (1939)). We note that the present appeal does not implicate the interests of creditors or subsequent purchasers for value, and conclude that the quitclaim deeds were effective to transfer these Defendants' interests in the subject property to the Chester Defendants.

In July 2006 these Defendants were formally served with notice of the condemnation action, as were Fannie E. Chester Alston, and Zelda Chester, William Chester's widow and heir. Under N.C. Gen. Stat. § 40A-42 (1) and (2) (2007), title to the subject property did not vest in Plaintiff immediately upon serving these Defendants with notice of the condemnation action; the statute provides in pertinent part:

> (b) When a local public condemnor is acquiring property by condemnation for purposes other than for the purposes listed in subsection (a) above, title to the property taken and the right to possession . . . shall vest in the condemnor:
>
> (1) Upon the filing of an answer by the owner who requests only that there be a determination of just compensation

and who does not challenge the authority of the condemnor to condemn the property; or

(2) Upon the failure of the owner to file an answer within the 120-day time period established by G.S. 40A-46[.] . . .

"[W]e note that N.C.G.S. § 40A-42 [(2007)] states with precision that title and the right to immediate possession vest in certain specified circumstances, none of which are present in the case *sub judice*." *Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 591, 492 S.E.2d 369, 373 (1997). In the instant case, it is undisputed that condemnation of the subject property was for a purpose "other than for the purposes listed" in § 40A-42(a). Thus, under N.C. Gen. Stat. § 40A-42(b)(2), title to the subject property vested with Plaintiff "[u]pon the failure of the owner to file an answer within the 120-day time period established by G.S. 40A-46[.]"

N.C. Gen. Stat. § 40A-46 (2007) states that a party "served with a complaint containing a declaration of taking shall have 120 days from the date of service thereof to file answer." The date of service is alleged to be 9 July 2006, so title vested with Plaintiff on or about 6 November 2006. However, by the time these Defendants were served all of them except Fannie E. Chester Alston and Zelda Chester had already transferred their interest in the property to the Chester Defendants. Therefore, default entered against them had no effect on the condemnation action.

Moreover, all of these Defendants, including Fannie E. Chester Alston and Zelda Chester, are among the heirs of Fannie Faison Chester whose identities were unknown when Plaintiff initially filed suit. In October 2005 the trial court appointed an attorney to represent the interests of all "unknown parties." On 14 February 2006 counsel for the unknown heirs filed an answer on their behalf, seeking determination of the amount of just compensation. Consequently, these Defendants were not subject to entry of default.

We note that the trial court never ruled on Defendants' motion to set aside the defaults, which were not set aside. Consequently, the issue of whether the motion should have been granted is not before us. However, for the reasons discussed above, we conclude that default was improperly entered against the above-named Defendants.

[5] We next consider the default entered against Defendant Lila Ruth Boykin on the day that the case was set for trial. After trial, the court granted the Chester Defendants' motion to set aside the default

entered against Boykin. The trial court ruled that the Chester Defendants "have shown good cause to set aside the Entry of Default and to have Lila Ruth Boykin's Answer filed on June 11, 2007, deemed as timely filed." On appeal, Plaintiff argues the court committed reversible error in granting Defendant's motion.

The trial court has the general authority to set aside an entry of default in appropriate circumstances. N.C. Gen. Stat. § 40A-46 states that "at any time prior to the entry of the final judgment the judge may, for good cause shown and after notice to the condemnor extend the time for filing answer for 30 days." Additionally, N.C. Gen. Stat. § 1A-1, Rule 55(d) (2007) provides in pertinent part that "[f]or good cause shown the court may set aside an entry of default[.]"

"A trial court's decision to grant or deny a motion to set aside an entry of default and default judgment is discretionary. Absent an abuse of that discretion, this Court will not reverse the trial court's ruling." *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 621, 610 S.E.2d 469, 470 (2005) (internal citation omitted). " 'A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *N.C. Dep't of Transp. v. Haywood Cty.*, 360 N.C. 349, 351, 626 S.E.2d 645, 646 (2006) (quoting *White*, 312 N.C. at 777, 324 S.E.2d at 833). Thus, "determination of whether an adequate basis exists for setting aside the entry of default rests in the sound discretion of the trial judge." *Byrd v. Mortenson*, 308 N.C. 536, 539, 302 S.E.2d 809, 812 (1983) (citations omitted).

Accordingly, this Court applies an abuse of discretion standard in our review of the trial court's ruling on a motion to set aside entry of default in a condemnation action. For example, in *City of Durham v. Woo*, 129 N.C. App. 183, 497 S.E.2d 457 (1998), defendants did not file a formal answer, although two of them wrote letters to the city-condemnor, challenging the condemnation. The trial court granted a motion by several defendants to set aside the default entered against them, and this Court upheld the trial court's ruling on appeal:

> [T]he trial court's findings and conclusions were substantially equivalent to a finding of good cause and supported the action of the trial court in allowing [Defendants] to file an answer. In doing so, the trial court did not abuse its discretion.

Id. at 188, 497 S.E.2d at 461. And, in *City of Charlotte v. Whippoorwill Lake, Inc.*, 150 N.C. App. 579, 563 S.E.2d 297 (2002), this Court,

citing *Woo*, upheld the trial court's setting aside of entry of default in a condemnation action:

> In *Woo*, the 120-day time period had expired for the defendant to file an answer, but final judgment had not yet been entered against him. . . . [T]he trial court allowed the defendant a thirty-day extension from the date of its order to answer. The *Woo* Court held that the trial court properly exercised its discretion under section 40A-46. Here, the trial court stated in its order that "for good cause shown" defendant should be allowed a thirty-day extension for filing an answer. Final judgment had not been entered against defendant. Accordingly, the trial court did not abuse its discretion and we reject this assignment of error.

Id. at 582, 563 S.E.2d at 299.

In the instant case, we conclude that the trial court did not abuse its discretion by granting Defendant's motion to set aside the entry of default against Boykin and deem her answer timely filed.

The record shows the following: In October 2005 the Chester Defendants filed an answer to Bynum's crossclaim, in which they asserted that Joseph Chester, Jr., held a power of attorney for Lila Ruth Boykin. Plaintiff was thus aware that Boykin had given Joseph Chester, Jr., a power of attorney by no later than October 2005, as evidenced by the fact that Plaintiff served notice of the condemnation and an amended answer on Boykin "c/o Joseph Chester, Jr." Plaintiff nonetheless waited until the day of trial to seek entry of default against Boykin. On the same day that Plaintiff sought entry of default, Boykin filed an answer incorporating the pleadings of Joseph Chester, Jr., and asserting that he held a power of attorney on her behalf.

Further, "the trial court's order setting aside the entry of default did not create any additional issues or create prejudice to plaintiff[.]" *Emick v. Sunset Beach & Twin Lakes, Inc.*, 180 N.C. App. 582, 590-91, 638 S.E.2d 490, 496 (2006). In addition, it is undisputed that Lila Ruth Boykin, who held a one-half undivided interest in the subject property, was ninety-seven years old and living in a nursing home at the time of trial.

" 'A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice[.]' " *Harris v. Maready*, 311 N.C. 536, 544, 319 S.E.2d 912, 917 (1984) (quoting *Wiles v. Welparnel Construction Co.*, 295 N.C. 81, 84-85, 243 S.E.2d 756, 758

(1978)). Given the factual and procedural history of this case, we cannot find that the trial court abused its discretion by granting Defendant's motion to set aside the default entered against Boykin. This assignment of error is overruled.

Finally, Plaintiff argues that the trial court erred by denying its motion for a new trial. Plaintiff's argument is that it was entitled to a new trial on the basis of the alleged errors raised on appeal. As we have determined that the trial court did not err in these rulings, we necessarily reject Plaintiff's argument. This assignment of error is overruled.

For the reasons discussed above, we conclude that the trial court did not err and that its judgments and orders should be

Affirmed.

Judge BRYANT concurs in the result only.

Judge JACKSON concurs.

WELLS FARGO BANK, N.A. (F/K/A NORWEST BANK MINNESOTA, NATIONAL ASSOCIATION) ACTING BY AND THROUGH ITS SPECIAL SERVICER CAPMARK FINANCE, INC. (f/k/a GMAC COMMERCIAL MORTGAGE CORPORATION), AS TRUSTEE FOR THE REGISTERED HOLDERS OF GMAC COMMERCIAL MORTGAGE SECURITIES, INC. MORTGAGE PASS-THROUGH CERTIFICATES SERIES 1999-C1, PLAINTIFF v. AFFILIATED FM INSURANCE COMPANY, KNAPP, SCHENCK & COMPANY INSURANCE AGENCY, INC., SEASONS CHASE, LLC, ALLIANCE HOLDINGS INVESTMENTS, LLC, AND MSC CAROLINA, LLC, DEFENDANTS

No. COA07-735

(Filed 7 October 2008)

1. Appeal and Error— appealability—adverse jurisdiction ruling

Although an appeal from the denial of a motion to dismiss is an appeal from an interlocutory order, the Court of Appeals has jurisdiction because an interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of defendant.

2. Jurisdiction— personal jurisdiction—nonresident—long-arm statute—due process—findings of fact

A determination of whether North Carolina courts have personal jurisdiction over a nonresident defendant involves a two-step analysis including that: (1) the transaction must fall within the language of the State's long-arm statute; and (2) the exercise of jurisdiction must not violate the due process clause of the Fourteenth Amendment to the United States Constitution. Although the determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact, defendant failed to assign error to the trial court's findings of fact, and thus, the trial court's finding are presumed to be correct with review limited to a determination of whether the findings of fact support the conclusions of law.

3. Jurisdiction— personal jurisdiction—nonresident—long-arm statute—sufficiency of minimum contacts

The trial court did not err in a declaratory judgment action by denying nonresident defendant insurance broker's N.C.G.S. § 1A-1, Rule 12(b)(2) motion to dismiss based on lack of personal jurisdiction an action alleging breach of an obligation to procure property insurance for the purpose of protecting property in North Carolina because: (1) defendant voluntarily assumed an obligation to obtain insurance on North Carolina real estate, thus constituting purposeful activity; (2) defendant provided Evidence of Property Insurance forms indicating that the North Carolina real estate was covered; (3) defendant received compensation for procuring the insurance; (4) plaintiff's claims against defendant arise out of defendant's conduct directed at North Carolina property, thus falling under the long arm statute of N.C.G.S. § 1-75.4(6); and (5) sufficient minimum contacts existed with this State to allow the assertion of personal jurisdiction consistent with due process.

Appeal by defendant from order entered 9 March 2007 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 12 December 2007.

Kilpatrick Stockton LLP, by James H. Kelly, Jr. and Laura A. Greer, for plaintiff-appellee.

Doughton & Hart PLLC, by Thomas J. Doughton and Amy L. Bossio, for defendant-appellant Knapp, Schenck & Company Insurance Agency, Inc.

GEER, Judge.

Defendant Knapp, Schenck & Company Insurance Agency, Inc. ("Knapp Schenck") appeals from the denial of its Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.[1] Knapp Schenck is an insurance broker that was responsible for procuring insurance on a piece of property located in North Carolina. Plaintiff alleges that Knapp Schenck misrepresented that the property was covered and negligently failed to provide the coverage that it represented existed. Plaintiff has presented evidence that Knapp Schenck (1) voluntarily assumed an obligation to obtain insurance on North Carolina real estate, (2) provided "Evidence of Property Insurance" forms indicating that the North Carolina real estate was covered, and (3) received compensation for procuring the insurance. Because of this evidence and because plaintiff's claims against Knapp Schenck arise out of Knapp Schenck's conduct directed at North Carolina property, we hold that N.C. Gen. Stat. § 1-75.4(6) (2007) provides long-arm jurisdiction. Further, sufficient minimum contacts exist with this State to allow the assertion of personal jurisdiction consistent with due process.

Facts

On 25 November 1998, Seasons Group Limited Partnership executed a promissory note to Capmark Finance, Inc. for the purchase of the Ashley Creek Apartment Complex in Greensboro, North Carolina. Capmark, however, ultimately "endorsed, assigned, sold, transferred and delivered" its interest in the promissory note and deed of trust to Wells Fargo Bank, N.A. The deed of trust securing the note required that Seasons Group obtain insurance against loss and damage to the property. On 18 February 2000, Seasons Group assigned its obligations under the promissory note and deed of trust to defendant Seasons Chase, LLC. Seasons Chase's obligations were guaranteed by defendants Alliance Holdings Investments, LLC and MSC Carolina, LLC.

Knapp Schenck served as an insurance broker to obtain the required insurance on the property. Knapp Schenck ultimately secured insurance from defendant Affiliated FM Insurance Company for the period from 29 July 2002 through 29 July 2004. On 7 May 2003 and 30 July 2003, Knapp Schenck issued "Evidence of Property Insurance" forms representing that insurance coverage existed on the Ashley Creek Apartment complex.

1. Knapp Schenck is the only defendant that is a party to this appeal.

On 23 September 2003, flood water damaged several of the apartment buildings in the complex. Seasons Chase defaulted on the promissory note on 5 November 2003, and Wells Fargo initiated foreclosure proceedings on the property. In May 2004, Wells Fargo purchased the property in the foreclosure sale through an upset bid. On 23 August 2006, Wells Fargo submitted a formal sworn statement and proof of loss to Affiliated. Affiliated never responded to Wells Fargo's claim for coverage under the insurance policy.

Plaintiff filed an action for a declaratory judgment on 21 September 2006 against defendants Affiliated; Knapp Schenck; Seasons Chase; Alliance; and MSC Carolina. In the lawsuit, plaintiff sought a determination as to the coverage provided under the insurance contract. Knapp Schenck filed a motion to dismiss pursuant to Rule 12(b)(2), (4), and (5) of the Rules of Civil Procedure on 11 December 2006. Knapp Schenck supported its motion with an affidavit from its president, David Winship, stating that Knapp Schenck did not have any offices, property, agents, or employees in North Carolina. He also asserted that Knapp Schenck did not advertise in North Carolina or in media that might reach North Carolina and did not solicit potential clients or do business in North Carolina. Mr. Winship explained that Knapp Schenck had filed an application for certificate of authority with the North Carolina Secretary of State on 25 October 2005 because another client, unrelated to this action, owned real property located in North Carolina. Mr. Winship acknowledged that Knapp Schenck had acted as the broker to obtain the insurance policy on the Ashley Creek Apartments and that it had issued the "Evidence of Property Insurance" forms representing that coverage existed on the Ashley Creek Apartments.

In response to Knapp Schenck's motion to dismiss, plaintiff filed an affidavit from Kevin Baxter, a vice president for Capmark. Mr. Baxter's affidavit described the representations made by Knapp Schenck regarding coverage of the Ashley Creek Apartments, plaintiff's reliance on those representations, and the alleged resulting injury.

The trial court denied Knapp Schenck's motion to dismiss on 9 March 2007, finding that Knapp Schenck was the insurance broker that procured the policies of insurance to cover two North Carolina apartment complexes, one in Charlotte and the Ashley Creek Apartments in Greensboro. The court also found that Knapp Schenck issued "Evidence of Property Insurance" forms on 7 May 2003 and

30 July 2003, representing that insurance coverage existed for the Ashley Creek Apartments. The court further found that the policies issued by Affiliated and procured by Knapp Schenck contained North Carolina Amendatory Endorsements. Finally, the court found that Knapp Schenck applied for and, in 2005, received a Certificate of Authority from the North Carolina Secretary of State and that, since 2005, Knapp Schenck had an agent with a North Carolina mailing address.

The trial court denied Knapp Schenck's motion to dismiss, concluding that "[b]y brokering insurance coverage for real estate in North Carolina, which coverage complied with North Carolina laws through amendatory endorsements, the Defendant Knapp Schenck has availed itself of the laws and protections of the State of North Carolina." Knapp Schenck appealed the denial of its Rule 12(b)(2) motion to dismiss to this Court.

Discussion

[1] We note that this appeal is from an interlocutory order. This Court nonetheless has jurisdiction because "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." N.C. Gen. Stat. § 1-277(b) (2007). *See Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614, 532 S.E.2d 215, 217 (holding that denial of a motion to dismiss for lack of jurisdiction is immediately appealable), *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000).

[2] In order to determine whether North Carolina courts have personal jurisdiction over a nonresident defendant, a court must apply a two-step analysis: "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986).

As this Court recognized in *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005),

> [t]ypically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any [supporting] evidence; (2) the defendant supports its motion to dismiss with affidavits,

but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

This case falls in the third category.

When both parties submit affidavits, " 'the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions.' " *Id.* at 694, 611 S.E.2d at 183 (quoting N.C.R. Civ. P. 43(e)). *See also Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217 ("If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits."). If the court decides the matter based solely on the affidavits submitted by the parties, "the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper." *Id.* This procedure does not relieve the plaintiff of its burden of proving personal jurisdiction by a preponderance of the evidence at trial. *Id.*

"The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140, 515 S.E.2d 46, 48 (1999). Although it is ordinarily this Court's responsibility to determine whether the trial court's findings of fact are supported by competent evidence, *id.* at 140-41, 515 S.E.2d at 48, in this case, Knapp Schenck did not assign error to the trial court's findings of fact, but rather only challenged the trial court's conclusions of law. Consequently, the trial court's findings are "presumed to be correct," and our review is limited to a determination as to whether the findings of fact support the conclusions of law. *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591-92, 525 S.E.2d 481, 484 (2000).

A. Long-Arm Statute

[3] Knapp Schenck argues first that the trial court erred in concluding that jurisdiction existed under North Carolina's long-arm statute. Plaintiff identifies as applicable the following two provisions specifying actions in which personal jurisdiction exists:

(6) Local Property.—In any action which arises out of:

a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire,

dispose of, use, rent, own, control or possess by either party real property situated in this State; or

. . . .

(10) Insurance or Insurers.—In any action which arises out of a contract of insurance as defined in G.S. 58-1-10 made anywhere between the plaintiff or some third party and the defendant and in addition either:

a. The plaintiff was a resident of this State when the event occurred out of which the claim arose; or

b. The event out of which the claim arose occurred within this State, regardless of where the plaintiff resided.

N.C. Gen. Stat. § 1-75.4. N.C. Gen. Stat. § 58-1-10 (2007) defines a "contract of insurance" as "an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for the destruction, loss, or injury of something in which the other party has an interest."

Knapp Schenck contends that these provisions do not apply to it because it was merely a broker and that any promise to protect the property or contract of insurance was made by Affiliated. While North Carolina courts have not addressed whether N.C. Gen. Stat. § 1-75.4(6) or N.C. Gen. Stat. § 1-75.4(10) encompass activities of insurance brokers or agents responsible for procuring insurance, other states with similar long-arm statutes have considered the issue and concluded that provisions similar to § 1-75.4(6) do. Notably, Knapp Schenck has cited no authority to the contrary.

In *Seal v. Hart*, 310 Mont. 307, 309, 50 P.3d 522, 523-24 (2002), the plaintiff sold a resident of South Dakota goods intended to be resold in California, with final payment on the goods to be made to the plaintiff after the California sale. The plaintiff, as a condition of the sale, required that the purchaser obtain insurance on the goods and that the plaintiff receive proof of insurance prior to the plaintiff's relinquishing the goods. *Id.* at 309-10, 50 P.3d at 524. The purchaser contacted a South Dakota insurance agent and requested insurance coverage on the goods. After the agent solicited various bids, the purchaser chose the coverage of Canal Insurance Company. *Id.* at 309, 50 P.3d at 524. The agent faxed the plaintiff a copy of the application for insurance and a certificate of insurance establishing that

the goods were insured, subject to the conditions of the policies. *Id.* Subsequently, the goods were lost, and the insurance company denied coverage. The plaintiff brought suit in Montana against the South Dakota agent, among other defendants, for breach of a duty to procure insurance. *Id.* at 310, 50 P.3d at 524.

The Montana Supreme Court, *id.* at 312, 50 P.3d at 525, agreed with the plaintiff that long-arm jurisdiction existed over the insurance agent by virtue of M.R. Civ. P. 4B(1)(d), which provides that the Montana courts have jurisdiction over any claim for relief arising "from the doing personally, through an employee, or through an agent, of any of the following acts: . . . (d) contracting to insure any person, property or risk located within this state at the time of contracting." As in this case, the agent who undertook to procure insurance contended that the rule applied only to insurance companies and not to insurance agents. *Seal*, 310 Mont. at 315, 50 P.3d at 527. In rejecting this contention, the Montana Supreme Court explained:

> Admittedly, our research has not revealed extensive authority on [the agent's] proposition. However, those courts which have addressed this issue have held that similar long-arm jurisdictional provisions apply to insurance agents as well as the insurance companies. In *Dillon Equities v. Palmer & Cay, Inc.* (Ala. 1986), 501 So.2d 459, 462, the Alabama Supreme Court held that Alabama courts could exercise personal jurisdiction over an out-of-state insurance agent pursuant to its long-arm jurisdiction provision, which is virtually identical to Rule 4B(1)(d), M.R.Civ.P. Similarly, in *Cornell & Co. v. Home Ins. Cos.* (E.D.Pa. 1995), 1995 WL 46618, *3, in contemplating whether Pennsylvania courts could exercise personal jurisdiction over an out-of-state insurance broker, the United States District Court concluded: "It follows that since [the insurance broker] was supposed to obtain insurance for 'property or risk located within th[e] Commonwealth at the time of contracting,' jurisdiction can properly be maintained . . . ." We agree with the conclusions reached by these courts and, having found no authority to the contrary, hold that Rule 4B(1)(d), M.R.Civ.P., applies to insurance agents as well as insurance companies.

Id. at 313, 50 P.3d at 526.

The court then turned to whether the long-arm provision applied to the specific facts of the case before it. The court explained that "Rule 4B(1)(d), M.R.Civ.P., does not require that a plaintiff establish

the substantive elements of a contract or a duty of care before a court may exercise personal jurisdiction over a particular party." *Id.* at 314, 50 P.3d at 527. Rather, "[t]o assert personal jurisdiction over a prospective party, Rule 4B(1)(d), M.R.Civ.P., simply requires that the claim for relief arise out of the contracting to insure any person, property, or risk located within Montana at the time of contracting." *Id.* The court then defined "[a]rising from" as "a direct affiliation, nexus, or substantial connection between the basis for the cause of action and the act which falls within the long-arm statute." *Id.*

The court noted that the plaintiff alleged that the agent had a contractual duty to insure the goods against loss or damage, and she had breached her duty to procure the insurance. The agent admitted that the property was located in Montana at the time the policy was written. *Id.* at 315, 50 P.3d at 527. The court then concluded that the plaintiff's "claim for relief arose out of [the agent's] contracting to insure property located within Montana at the time of contracting." *Id.* Consequently, the agent was subject to the jurisdiction of the courts of Montana pursuant to M.R. Civ. P. 4B(1)(d).

As the Montana Supreme Court noted, other jurisdictions have reached similar conclusions. Thus, in *Dillon Equities v. Palmer & Cay, Inc.*, 501 So. 2d 459, 461 (Ala. 1986) (quoting Ala. R. Civ. P. 4.2(a)), the Alabama Supreme Court held that a Georgia insurance agent responsible for procuring insurance on an Alabama restaurant could be sued in Alabama under a long-arm provision, Ala. R. Civ. P. 4.2(a), stating: " 'A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's . . . (G) contracting to insure any person, property, or risk located within this state at the time of contracting . . . .' " *See also Cornell & Co., Inc. v. Home Ins. Cos.*, 1995 WL 46618, *2-3 (E.D. Pa. Feb. 6, 1995) (holding that insurance agent, hired to procure insurance on property in Pennsylvania, fell within long-arm statute, 42 Pa. C.S.A. § 5322(a)(6)(i), providing for personal jurisdiction over nonresidents who contract to insure any person, property or risk located in Pennsylvania at the time of contracting); *Hiatt v. Schreiber*, 599 F. Supp. 1142, 1147 (D. Colo. 1984) (holding that insurance agents fell within long-arm statute providing that "one contracting to insure property located in Colorado is subject to jurisdiction in Colorado" even though agents "are not the insurers per se but only insurance agents").

The long-arm provisions considered in these opinions are analogous to N.C. Gen. Stat. § 1-75.4(6)(a) providing for jurisdiction based

on "[a] promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to . . . protect . . . real property situated in this State." We find the reasoning of these opinions persuasive and have located no decisions holding that comparable language does not apply to insurance agents or brokers as opposed to insurers. We, therefore, hold that N.C. Gen. Stat. § 1-75.4(6)(a) can provide a basis for asserting long-arm jurisdiction over an insurance broker such as Knapp Schenck.

In this case, plaintiff has sued Knapp Schenck for breach of an obligation to procure property insurance for Wells Fargo's benefit for the purpose of protecting real property in North Carolina. The trial court found that Knapp Schenck served as an insurance broker for policies issued covering two apartment complexes in North Carolina and that a policy was issued "through Knapp Schenck" that allegedly provided coverage for Ashley Creek Apartments. Knapp Schenck, on two occasions, provided "Evidence of Property Insurance" to Wells Fargo's predecessor representing that insurance coverage existed for the Ashley Creek Apartments. The court further found that plaintiff's complaint alleged that it had sustained damages either as a result of wrongful coverage denial or Knapp Schenck's misrepresentations concerning such insurance coverage. These findings indicating the existence of evidence of a promise made by Knapp Schenck to Wells Fargo's predecessor to protect real property in North Carolina are sufficient to establish jurisdiction under N.C. Gen. Stat. § 1-75.4(6).[2]

B. Minimum Contacts

The question remains, however, whether the exercise of jurisdiction over Knapp Schenck is consistent with the Due Process Clause. "To satisfy the due process prong of the personal jurisdiction analysis, there must be sufficient 'minimum contacts' between the nonresident defendant and our state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Skinner v. Preferred Credit*, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158 (1945)). "Application of the 'minimum contacts' rule 'will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the

2. We express no opinion regarding whether N.C. Gen. Stat. § 1-75.4(10) applies to these facts.

benefits and protections of its laws.' " *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298, 78 S. Ct. 1228, 1240 (1958)). The "relationship between the defendant and the forum must be 'such that he should reasonably anticipate being haled into court there.' " *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501, 100 S. Ct. 559, 567 (1980)).

The United States Supreme Court has recognized two bases for finding sufficient minimum contacts: (1) specific jurisdiction and (2) general jurisdiction. Specific jurisdiction exists when "the controversy arises out of the defendant's contacts with the forum state." *Id.* at 366, 348 S.E.2d at 786. General jurisdiction may be asserted over a defendant "even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient 'continuous and systematic' contacts between defendant and the forum state." *Replacements*, 133 N.C. App. at 145, 515 S.E.2d at 51 (quoting *Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989)).

Because plaintiff's contentions regarding Knapp Schenck's minimum contacts relate to the events giving rise to this cause of action, we need not address whether general jurisdiction exists. The issue before us is specific jurisdiction. "[F]or purposes of asserting specific jurisdiction, a defendant has fair warning that he may be sued in a state for injuries arising from activities that he purposefully directed toward that state's residents." *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786 (internal quotation marks omitted).

The trial court concluded with respect to Knapp Schenck's minimum contacts:

> 4. It is reasonable to require the Defendant Knapp Schenck to litigate the issues presented in the present case in light of the Defendant Knapp Schenck's participation in obtaining insurance, and representation of insurance coverage on real estate in North Carolina.
>
> 5. By brokering insurance coverage for real estate in North Carolina, which coverage complied with North Carolina laws through amendatory endorsements, the Defendant Knapp Schenck has availed itself of the laws and protections of the State of North Carolina.

> 6. The Defendant Knapp Schenck is being sued in North Carolina as a result of representations made about insurance coverage for real estate located in North Carolina.

The findings of fact forming the basis for these conclusions included: (1) Knapp Schenck served as an insurance broker for two apartment complexes in North Carolina; (2) Knapp Schenck issued two "Evidence of Property Insurance" forms representing that insurance coverage existed for the Ashley Creek Apartments; (3) the policies were issued "through Knapp Schenck" by the insurer and had North Carolina Amendatory Endorsements; (4) Knapp Schenck maintained copies of the policies in its file; (5) Knapp Schenck was paid for the services it provided in connection with insurance coverage on real estate in North Carolina; and (6) Wells Fargo sustained damages as a result of Knapp Schenck's misrepresentations concerning insurance coverage.

Knapp Schenck first contends that there is no evidence that it purposefully availed itself of the privilege of conducting activities in North Carolina given that it has no office, property, agents, or employees in North Carolina; does not advertise in North Carolina or in national media that may reach North Carolina; and does not solicit potential clients, sell or provide services, or otherwise do business in North Carolina. Our appellate courts have held, however, that "[a] contract alone may establish the necessary minimum contacts where it is shown that the contract was voluntarily entered into and has a 'substantial connection' with this State." *Williamson Produce, Inc. v. Satcher*, 122 N.C. App. 589, 594, 471 S.E.2d 96, 99 (1996) (quoting *Tom Togs, Inc.*, 318 N.C. at 367, 348 S.E.2d at 786).

While North Carolina courts have not addressed the issue, the jurisdictions discussed in connection with the long-arm statute have concluded that an agreement to procure insurance for property located in the forum state is a sufficiently substantial connection to support jurisdiction. In *Cornell*, 1995 WL 46618 at *4, the federal district court noted that assertion of jurisdiction is appropriate when a party purposefully derives benefit from its interstate activities, and the Due Process Clause should not be wielded as a shield to avoid interstate obligations voluntarily assumed. The court then concluded that "it is reasonable and just to demand that [the insurance agent] litigate in the Eastern District of Pennsylvania" since the agent, hired to procure insurance, "voluntarily derived a benefit from, and created an obligation to, Cornell based upon the allocation

of risks and liabilities with respect to [the] Marcus Hook, Pennsylvania [job site.]" *Id.*

Similarly, in *Dillon Equities*, 501 So. 2d at 462 (internal quotation marks and citations omitted), the Alabama Supreme Court concluded that "[b]y procuring and placing insurance coverage on a restaurant/lounge located in Birmingham, Alabama, and deriving substantial benefit therefrom, [the insurance broker] purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. [The insurance broker] voluntarily assumed this interstate obligation for profit, and by doing so should have reasonably anticipate[d] being required to appear in Alabama to defend an action such as the present one, which arises out of their contracting to insure property located within Alabama." *See also Hiatt*, 599 F. Supp. at 1147-48 (holding that although defendants were mere insurance agents procuring insurance, "they have transacted business in Colorado and have thereby established the minimum contacts necessary to subject themselves to jurisdiction in this state for claims arising out of that business"; agents were properly subjected to jurisdiction in Colorado because they "afforded themselves of the benefits of the economy and laws of the State of Colorado").

Here, similar to these three cases, Knapp Schenck chose to assume an interstate obligation to procure insurance for North Carolina real estate, represented that it had fulfilled that obligation by providing coverage for the North Carolina property, and was paid for undertaking that obligation. By choosing to promise to obtain insurance for North Carolina real estate, Knapp Schenck must reasonably have anticipated that it could be sued in North Carolina if it failed to meet its promise. *See Wohlfahrt v. Schneider*, 66 N.C. App. 691, 694, 311 S.E.2d 686, 688 (1984) (reasoning that defendant was "the one that promised to make the note payments here, and in doing so he must have anticipated that here is where he would be sued if the payments were not made").

Knapp Schenck, however, points to *Skinner* and *Havey v. Valentine*, 172 N.C. App. 812, 616 S.E.2d 642 (2005), as being analogous to its situation. Because neither case involved purposeful activity directed by the defendant towards North Carolina property, we conclude those opinions are not pertinent here.

In *Skinner*, the plaintiff mortgage borrowers sought jurisdiction over a trust that had not existed at the time of the plaintiff's loan, but

subsequently was created as a passive depository for income from mortgage notes, some of which happened to be secured by North Carolina property, although the actual loan payments were made to another entity. 361 N.C. at 123-24, 638 S.E.2d at 211. The trust took no action directed toward North Carolina—indeed, our Supreme Court noted that our courts "rarely have dealt with so 'passive' a defendant." *Id.* at 124, 638 S.E.2d at 211. Moreover, the plaintiffs' allegations arose out of the execution of the original loan and not as a result of any conduct by the trust. *Id.*

In *Havey*, the plaintiff purchased furniture from a Vermont furniture store while visiting Vermont. 172 N.C. App. at 813, 616 S.E.2d at 645. The store contracted with an Indiana-based trucking company to deliver the furniture to the plaintiff's Raleigh, North Carolina residence. *Id.* During the delivery, a crate fell on the plaintiff and permanently injured him. *Id.*, 616 S.E.2d at 645-46. The plaintiff brought suit against the Indiana-based trucking company, which in turn filed a third-party complaint against the Vermont store. *Id.*, 616 S.E.2d at 646. The primary basis for personal jurisdiction relied upon by the trucking company was the furniture store's website. This Court held:

> As the website in this case does not specifically target North Carolina residents, does not allow viewers to purchase furniture directly from the website, and merely provides information to the viewer, we conclude the website is passive and does not, by itself, provide a basis for an exercise of personal jurisdiction by North Carolina courts. Similarly, because (1) all of the contract negotiations occurred outside of North Carolina, and (2) Stahler Furniture does not have any significant contacts with North Carolina, we conclude Stahler Furniture has not purposefully availed itself of the privilege of conducting activities in this state.

Id. at 817, 616 S.E.2d at 648. With respect to the fact that the plaintiff was injured in North Carolina and the furniture was shipped to North Carolina, this Court stressed: "[T]he key facts surrounding Yellow Transportation's third-party complaint against Stahler Furniture occurred in Vermont." *Id.* at 819, 616 S.E.2d at 649. The Court, therefore, held that specific personal jurisdiction did not exist. *Id.*

This case stands in contrast. The basis for jurisdiction does not result from passivity, and the allegations of wrongdoing are not unrelated to the North Carolina contacts. To the contrary, Knapp Schenck engaged in purposeful activity centering on North Carolina property, including promising to obtain insurance on that property, purporting

to obtain the insurance with North Carolina Amendatory Endorsements, and then sending formal representations that insurance on the North Carolina property had been obtained. Further, Knapp Schenck received compensation for the services it rendered regarding the North Carolina property. Consequently, we hold that the trial court appropriately concluded that Knapp Schenck had sufficient minimum contacts with the State of North Carolina to permit the exercise of personal jurisdiction. The trial court, therefore, properly denied the motion to dismiss.

Affirmed.

Judges McCULLOUGH and JACKSON concur.

CARL W. MEARES, JR., PLAINTIFF v. TOWN OF BEAUFORT, TOWN OF BEAUFORT HISTORIC PRESERVATION COMMISSION, LINDA DARK, MIKE MENARY, DELORES MEELHEIM, CAROL SADLER, AND GINNY WELTON, DEFENDANTS

No. COA07-882

(Filed 7 October 2008)

1. Zoning— historic preservation district—failure to act on application for building—writ of mandamus

A writ of mandamus was properly issued to require a Certificate of Appropriateness for building in a historic district where the zoning ordinance and the rules of procedure for the Historic Preservation Commission provided that failure to act on an application for a permit within 60 days results in approval and issuance of the permit, and the expiration of 60 days in this case is undisputed.

2. Zoning— building in historic district—subject matter jurisdiction

The trial court had subject matter jurisdiction over an action concerning the issuance of a Certificate of Appropriateness (COA) for building in a historic district. Plaintiff is an aggrieved party because the Historic Preservation Commission declined to consider his second application for the certificate to erect a building on a lot he owned, and the writ of mandamus did not require a vain act, despite the argument that the proposed build-

ing violates a zoning ordinance, because the issuance of the COA is an independent function and is not dependent on the issuance of a zoning certificate.

3. Zoning— historic district—application for building—automatic approval without action—informal communication—not an action

The trial court properly ruled that an application for a Certificate of Appropriateness for building in a historic district was approved by operation of law where the application was automatically approved if no action was taken in 60 days. Although defendants argue that the Historic Preservation Commission (HPC) acted when the town attorney informed plaintiff that the Commission would not act on this application while an earlier application was pending, there was no formal denial and the attorney's communication does not qualify as action by the HPC.

4. Zoning— historic district—certificate for building—independent from zoning certificate

The trial court did not usurp the authority of the town's zoning administrator by ordering the issuance of a Certificate of Appropriateness for building in a historic district. The issuance of a COA by the Historic Preservation Commission and the issuance of a zoning certificate are independent functions.

5. Zoning— certificate to build in historic district—estoppel to enforce zoning—neither parties nor issue before trial court

The argument that the trial court erred by ruling that a town was estopped from enforcing a zoning ordinance was misplaced where the issue before the trial court was the issuance of a Certificate of Appropriateness by a Historic Preservation Commission. The denial of a zoning certificate was not an issue before the trial court, and the zoning administrator and the Board of Adjustment were not parties to the current action.

6. Zoning— historic preservation—application to build—subsequent application—jurisdiction to consider

The first application to a Historic Preservation Commission to build in a historic area did not divest the Commission of jurisdiction to consider a subsequent application. There is no provision which precludes submission of alternative design proposals.

7. Zoning— historic district—application to build—petition in Superior Court—continuing jurisdiction of Commission

A Historic Preservation Commission was not divested of jurisdiction to address an application for a Certificate of Appropriateness to build in a historic area by the filing of a petition seeking a writ of mandamus. The issuance of a writ of mandamus is an exercise of original and not appellate jurisdiction.

8. Zoning— historic district—building—mandamus—exhaustion of administrative remedies

The trial court did not lack jurisdiction to address a petition for a writ of mandamus concerning a permit to build in a historic district where plaintiff had allegedly failed to exhaust his administrative remedies. The Historic Preservation Commission did not render a decision from which plaintiff could appeal and the petition for a writ of mandamus sought to compel consideration of the application.

9. Zoning— historic district—certificate allowing building—multiple applications

The trial court did not err by issuing a writ of mandamus compelling a Historic Preservation Commission to issue a Certificate of Appropriateness (COA) for a building where the application in question was plaintiff's second for the same property and defendants contended that public policy precludes processing multiple applications for the same site. Defendants provided no basis for determining that public policy grants the Commission the authority to refuse to process or consider an application for a COA.

10. Mandamus— historic district building certificate—stay—statutory criteria

The trial court did not err by refusing to stay a writ of mandamus pending appeal. N.C.G.S. § 1-291 does not require a stay upon satisfaction of statutory criteria.

11. Mandamus— stay denied—no abuse of discretion

The trial court did not abuse its discretion by not staying a writ of mandamus under N.C.G.S. § 1A-1, Rule 62.

12. Mandamus— building in historic district—stay denied—multiple reasons

The trial court did not abuse its discretion by refusing to stay a writ of mandamus involving building in a historic district.

Defendants argued that plaintiff raised the doctrine of laches for the first time in opposition to the stay, but this was only one of 10 arguments raised by plaintiff.

Appeal by defendants from order entered 31 May 2007 by Judge John E. Nobles in Carteret County Superior Court. Heard in the Court of Appeals 20 February 2008.

Poyner & Spruill, LLP, by Robin Tatum Currin, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, and Kirkman, Whitford & Brady, P.A., by Neil B. Whitford, Esq., for defendant-appellants.

BRYANT, Judge.

Town of Beaufort, Town of Beaufort Historic Preservation Commission (HPC), Linda Dark, Mike Menary, Delores Meelheim, Carol Sadler, and Ginney Welton (collectively defendants) appeal from an order entered 31 May 2007 which denied defendants' motion to stay or enjoin enforcement of an Order, Judgment, and Writ of Mandamus entered by the trial court 19 April 2007 which compelled the release of a Certificate of Appropriateness (COA), to be executed by defendants, to Plaintiff Carl W. Meares, Jr.

Pursuant to the Town of Beaufort Zoning Ordinance, the function of the HPC is to "review and pass upon the appropriateness of the construction, reconstruction, alteration, restoration, moving or demolition of any buildings, structures, appurtenant fixtures, outdoor advertising signs, or other exterior features in the historic district." Beaufort, N.C., Zoning Ordinance § 13.6(b) (2007). "Exterior features" include "color, architectural style, general design, and general arrangement of the exterior of the building or other structure, including the kind and texture of the building material, the size and scale of the building, and the type and style of all windows, doors, light fixtures, signs, and other appurtenant features." *Id.* at § 13.4. But, "[t]he [HPC] shall take no action . . . except to prevent the construction, reconstruction, alteration, restoration, moving or demolition of buildings, structures, appurtenant fixtures, outdoor advertising signs, or other significant features in the historic district which would be incongruous or incompatible with the special character of the district." *Id.*

"No exterior portion of any building or other structure . . . shall be erected, altered, restored, moved, or demolished within such district until after an application for a [COA] as to exterior features has been submitted to and approved by the Beaufort [HPC]." *Id.* A COA "is required to have been approved and issued by the Beaufort [HPC] prior to the issuance of a building permit or other permit granted for the purpose of constructing, altering, moving and demolishing structures." *Id.* The HPC has established Rules of Procedure the stated purpose of which is "[t]o establish procedures for organizing the business of the Beaufort [HPC] . . . and processing applications for [COAs] . . . ."

Though not the subject of this appeal, we note for context that on 12 September 2004 Meares filed with the HPC a COA application for a commercial and residential structure to be erected on one of three lots he owned on Front Street in Beaufort's Historic District. The proposed structure was to share a wall with the adjacent Aquadro Building already owned by Meares.

On 5 October 2004, the HPC denied Meares' September 2004 application on the ground that Meares' design violated the Beaufort Historic District Design Guidelines. Meares filed a claim in Carteret County Superior Court alleging a portion of the Design Guidelines was void as a matter of law. After cross motions for summary judgment, the Carteret County Superior Court granted Meares' motion and concluded that a portion of the Historic District Design Guidelines were void as a matter of law. Defendants appealed the matter to this Court.[1]

With Meares (I) pending, Meares submitted a second COA application to Beaufort's HPC—the subject of the instant case. Meares proposed an alternative structure to be erected on the same lot involved in Meares (I). The HPC declined to process Meares' second application.

On 30 March 2006, in Carteret County Superior Court, Meares filed a petition for writ of mandamus and complaint. The complaint alleged that on 15 February 2006 Meares filed with the HPC a second COA application which the HPC declined to process; the petition requested that the trial court order the HPC to hold a hearing and act on Meares' application.

---

1. Companion case *Meares v. Town of Beaufort*, COA07-889, referred to herein as "Meares (I)," also heard in the Court of Appeals on 20 February 2008 with the instant case, referred to herein as "Meares (II)."

On 3 May 2006, defendants filed a notice of removal to the United States District Court for the Eastern District of North Carolina on the grounds of a federal question under 28 U.S.C. §§ 1331 and 1441(b). By order dated 15 February 2007, the Federal District Court retained jurisdiction over the issue involving alleged violations of Meares' state and federal constitutional rights, but remanded to Carteret County Superior Court Meares' petition for a writ of mandamus on the grounds that it raised novel issues of North Carolina law.

Back in Superior Court, Meares and defendants filed cross motions for summary judgment. A trial court order filed 19 April 2007 granted Meares' motion for summary judgment and denied defendants' motion. Furthermore, the trial court issued a writ of mandamus ordering defendants to "act upon and issue a [COA]" to Meares pursuant to his second application.

In compliance with the trial court's order, defendants deposited a COA with the Clerk of Court, along with a motion for a stay of execution on the judgment and a notice of appeal. The trial court denied defendants' motion to stay or enjoin enforcement of the judgment pending appeal and ordered the immediate release of the COA. Defendants filed with this Court a petition for a writ of supersedeas, which was denied. Defendants gave notice of appeal from both the trial court's denial of defendants' motion to stay or enjoin enforcement of the judgment pending appeal and the order releasing to Meares the COA deposited with the Carteret County Clerk of Court.

On appeal, defendants raise twelve issues: whether the trial court erred by denying defendants' motion for summary judgment and issuing a writ of mandamus requiring the HPC to issue a COA on the grounds that (I) Meares lacked a clear right to the COA; (II) the proposed development violates the town's zoning ordinance; (III) a writ of mandamus cannot compel a vain or impossible act; (IV) the HPC had previously not approved or denied Meares' second application; (V) the trial court usurped the authority of the zoning administrator; (VI) the town is not estopped from enforcing its own zoning ordinance; (VII) the HPC lacked subject matter jurisdiction to consider Meares' second application; (VIII) Meares failed to exhaust his administrative remedies; and (IX) policy precludes the HPC from processing multiple COA applications for the same site. Defendants also contend that the trial court erred in denying defendants' motion to stay the judgment pending appeal (X) where the deposit of the COA with the Clerk of Court automatically stayed the judgment, (XI)

where the enforcement of the judgment while on appeal would irreparably harm the town, and (XII) where there was no basis for the stay on the theory of laches.

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 a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). On appeal, "the Court will review the trial court's order allowing summary judgment de novo." *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

I

[1] Defendants first argue that the trial court erred by issuing a writ of mandamus compelling the issuance of the COA when the time period the HPC had to review Meares' second application had not expired when Meares filed his petition for a writ of mandamus. Defendants argue the trial court entered judgment on a claim that was not ripe at the time it was filed. We disagree.

"Traditionally, a writ of mandamus would not be issued to enforce a duty involving judgment and discretion," *Orange County v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 386, 265 S.E.2d 890, 913 (1980) (citation omitted), or "enforce an alleged right which is in doubt," *Mears v. Board of Education*, 214 N.C. 89, 91, 197 S.E. 752, 753 (1938) (citations omitted). "[A] party seeking [the] writ . . . must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be required." *Ponder v. Joslin*, 262 N.C. 496, 504, 138 S.E.2d 143, 149 (1964) (citations omitted). "The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established." *Id.* But, "[o]ur Court has noted that mandamus may be appropriate when, as in the instant case, a party seeks to compel the enforcement of a zoning ordinance." *McDowell v. Randolph County*, 186 N.C. App. 17, 29, 649 S.E.2d 920, 928 (2007).

Under N.C. Gen. Stat. § 160A-400.9(d), "[a]ll applications for [COAs] shall be reviewed and acted upon within a reasonable time, not to exceed 180 days from the date the application for a [COA] is filed, as defined by the ordinance or the commission's rules of pro-

cedure." N.C. Gen. Stat. § 160A-400.9(d) (2006). The Beaufort Zoning Ordinance[2] and the HPC Rules of Procedure[3] establish that failure to approve or deny a completed application for a COA within sixty days following its submission results in the approval and issuance of the COA. *See* Beaufort, N.C., Zoning Ordinance § 13.4 (2006) and Beaufort, N.C., Historic District Commission Rules of Procedure, Rule 7.06 (2006). Thus, where the HPC fails to act within sixty days following the submission of a completed COA application, the approval of a COA is a ministerial rather than a discretionary function.

Here, Meares filed with the HPC his second application for a COA on 15 February 2006. On 30 March 2006, Meares filed in Carteret County Superior Court a petition for writ of mandamus and complaint to compel a hearing on his second application. In their answer filed 5 June 2006, defendants admit the HPC declined to process or consider the second application. In its order granting Meares' motion, the trial court noted the uncontested fact that the HPC failed to act on Meares' application within the sixty-day review period and issued a writ of mandamus ordering defendants to issue a COA to Meares pursuant to his application.

Acknowledging the undisputed expiration of the sixty-day window for HPC discretionary review without action and pursuant to the Beaufort Zoning Ordinance and Beaufort HPC Rules of Procedure, we hold the approval of Meares' second COA application and issuance of the COA was a ministerial duty appropriately compelled by the trial court's writ of mandamus. Accordingly, defendants' assignment of error is overruled.

II & III

[2] Defendants next argue the trial court lacked subject matter jurisdiction over this action because Meares is not an aggrieved party and

---

2. Approval by the Commission. "Upon the failure of the [HPC] to take final action upon a complete application within sixty (60) days after the final application for the [COA] has been submitted . . . the application for a [COA] shall be deemed to have been approved, except when mutual agreement in writing has been made with regard to an extension of the time limit." Beaufort, N.C., Zoning Ordinance § 13.8.

Beaufort, N.C., Zoning Ordinance § 13.8. Approval by the Commission. "Upon approval of any application for a [COA], the [HPC] shall forthwith cause a [COA] to be issued to the applicant . . . ."

3. "The [HPC] must issue or deny [COA] within sixty days after the filing of the application, except when limit has been extended by mutual agreement between the applicant and the [HPC]." Beaufort, N.C., Historic District Commission Rules of Procedure, Rule 7.06. Time for Decision.

its issuance of a writ of mandamus was error because it compels a vain or impossible act. Defendants argue the proposed construction in Meares' second COA application violates Beaufort Zoning Ordinance setback requirements. Specifically, because Meares' proposed design does not share a wall with another structure, the construction must set back fifteen feet from its proposed location. Assuming so, defendants argue Meares' proposal is not capable of being built as designed, and the HPC does not have the discretion to waive zoning ordinance violation enforcement. Therefore, defendants argue the HPC's failure to act on Meares' application for a COA resulted in no harm and Meares lacks standing to bring a claim against the town as an aggrieved party. We disagree.

Under the Town of Beaufort Zoning Ordinance, section 16.1, "[n]o building or structure or any part thereof shall be erected or structurally altered until a zoning certificate is issued by the Zoning Administrator." *Id.* at § 16.1. Under North Carolina General Statute 160A-388(b), "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." N.C. Gen. Stat. § 160A-388(b) (2006). Thus, if a zoning administrator denies a zoning certificate on the grounds that a project does not conform to zoning ordinance setback requirements, this decision can be appealed to the Board of Adjustment.

Under the Beaufort Zoning Ordinance, section 14.1, a "nonconforming project" is defined as "[a]ny structure, development, or undertaking that is incomplete at the effective date of this ordinance and would be inconsistent with any regulation applicable to the district in which it is located if completed as proposed or planned." Beaufort, N.C., Zoning Ordinance § 14.1 (2006). Under section 14.8, "work on nonconforming projects may begin . . . only pursuant to a variance issued by the Board of Adjustment." *Id.* at § 14.8(a). Thus, the Board of Adjustment has the authority to issue a variance and allow a nonconforming project to continue.

Defendants do not allege and, after our review of the Town of Beaufort Zoning Ordinance, we do not hold the issuance of a COA by the HPC is dependent upon the issuance of a zoning certificate. Thus, the HPC's issuance of a COA[4] is an independent function and not a vain and useless act.

4. Zoning Ordinance of the Town of Beaufort, North Carolina. Section 13.6. Powers and Duties of the Historic Preservation Commission. Subsection (b). "It shall be the function of the [HPC] to review and pass upon the appropriateness of the con-

"A person aggrieved is one adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 779, 525 S.E.2d 826, 829 (2000) (citation and quotation omitted). As previously stated, to erect a structure in the Beaufort Historic District, the Beaufort HPC must receive and approve an application for a COA. *See* Beaufort, N.C., Zoning Ordinance § 13.4.

Seeking to erect a structure on a lot he owned, Meares submitted a COA application to the HPC. Defendants concede that "the HPC has declined to process or consider" Meares' second application. By failing to address Meares' application for a COA, we hold Meares suffered a denial of legal rights. Thus, Meares is an aggrieved party, and defendants' assignments of error are overruled.

IV

[3] Defendants next question whether the trial court erred in denying defendants' motion for summary judgment and granting Meares' petition for mandamus where the HPC informed Meares through counsel the HPC would not address his second application while the denial of the first application was on appeal. Defendants argue that a communication to Meares that his application would not be approved constitutes final action by the HPC. We disagree.

Under the Town of Beaufort Zoning Ordinance, section 13, "[a]ll complete applications for [COAs] shall be reviewed and acted upon within a reasonable time and within sixty (60) days from the date said complete application for a [COA] is filed with the [HPC] . . . ." *Id.* at § 13.7. "Upon approval of any application for a [COA], . . . [a] report of the [HPC's] actions shall be submitted to the Town Manager and the Town Building Inspector stating the basis upon which such approval was made." *Id.* at § 13.8 (2006). "In the case of disapproval of any application for a [COA], the [HPC] shall state the reasons therefore in writing in terms of design, arrangements, texture, material, color, and other factors involved." *Id.* at § 13.9.

Here, Meares submitted a second COA application dated 15 February 2006 to the HPC. The HPC failed to approve or deny the application. The communication to which defendants refer came

---

struction, reconstruction, alteration, restoration, moving or demolition of any buildings, structures, appurtenant fixtures, outdoor advertising signs, or other exterior features in the historic district. . . ." Subsection (c). "It shall be the function of the [HPC] to review and pass upon the appropriateness of exterior features of buildings, structures and properties within the 'Historic District'."

from the Town Attorney and occurred on 18 January 2006, a month prior to Meares' submission of his second application in February. The Town Attorney never indicated he was acting on behalf of the HPC. Specifically, he acknowledged being "little more than [an] observer[] in this process." Therefore, the Town Attorney's communication does not qualify as action by the HPC. And since there was no formal denial of the second application, the trial court properly ruled the application approved by operation of law. *See Id.* at § 13.8. Accordingly, defendants' assignment of error is overruled.

V

[4] Defendants next question whether the trial court erred in concluding that Meares' second application meets the requirements of the town's zoning ordinance. Defendants argue that the trial court usurped the function of the zoning administrator. We disagree.

As discussed earlier (*see* section II & III), the issuance of a COA by the HPC and the issuance of a zoning certificate by the zoning administrator are independent functions. The trial court granted Meares' motion for summary judgment and ordered defendants to issue a COA. The trial court issued no order compelling the zoning administrator to any action or forbearance. Thus, the trial court did not usurp the authority of the zoning administrator. Accordingly, defendants' assignment of error is overruled.

VI

[5] Defendants argue the trial court erred by concluding the Town was estopped from enforcing its zoning ordinance. Defendants' argument is misplaced.

Here, the trial court granted Meares' motion for summary judgment, denied defendants' motion for summary judgment, and ordered defendants to issue a COA to Meares. In its conclusions of law, the trial court cited the HPC Rules of Procedure, entitled "COA Application Review and Processing," which provide that "[t]he Zoning Officer will review the [COA] Application for compliance with the zoning ordinance," and that "[a]pplications that are not in compliance with zoning and other Town code provisions will be returned to the applicant and will not be forwarded to the commission for review."

The trial court concluded that as defendants failed to notify Meares within the sixty-day window that the HPC declined to process, consider, or act on Meares' second application, "it is fair

and reasonable for [Meares] . . . to conclude that [his] Second Application complies with the Town's Zoning Ordinance and other Town code provisions, and the Defendants are estopped from contending otherwise."

We note our discussion under (V), reasoning that the trial court order compelling the HPC to issue a COA did not encroach upon the jurisdiction of the zoning administrator. Under Beaufort Zoning Ordinance section 18.5, "[a]n appeal may be taken to the Board of Adjustment by any person aggrieved by a decision of any officer, department or board of the town relative to enforcement of interpretation of this [zoning] ordinance." *Id.* at § 18.5. Furthermore, "[e]very decision of the Board of Adjustment shall be subject to review by the Superior Court by proceedings in the nature of certiorari." *Id.* at § 18.6.

The denial of a zoning certificate was not an issue before the Carteret County Superior Court. Moreover, the zoning administrator and the Board of Adjustment are not parties to the current action. Therefore, we hold the trial court order ruling that "Defendants are estopped from contending" Meares' second application does not comply with the Town's zoning ordinance does not infringe upon the authority vested by the zoning ordinance in the zoning administrator, the Board of Adjustment, or other parties not joined in this matter. *See* N.C. Gen. Stat. § 1-260 (2007) ("no declaration shall prejudice the rights of persons not parties to the proceedings.").

VII

[6] Defendants next question whether the trial court lacked subject matter jurisdiction to hear Meares' complaint. Defendants argue the HPC's denial of Meares' first application for a COA and the subsequent appeal from that denial (A) divested the trial court of jurisdiction to consider a second application for a certificate to develop the same property. In the alternative, defendants argue (B) that once Meares filed a complaint in Superior Court, the HPC was divested of jurisdiction to address Meares' application. Defendants also argue that because Meares filed his complaint within sixty days of filing his application with the HPC, he cannot assert that the HPC failed to act on his application within the sixty-day time frame. We disagree.

A

Defendants argue that when Meares filed his first COA application, the HPC was divested of jurisidiction to consider a second appli-

cation. Pursuant to the Town of Beaufort Zoning Ordinance, "[i]t shall be the function of the [HPC] to review and pass upon the appropriateness of exterior features of buildings, structures, and properties within the Historic District." Beaufort, N.C., Zoning Ordinance § 13.6(c). Since the function of the HPC is to consider the appropriateness of the exterior features proposed, *see Id.* at § 13.6(b), and we find no provision in the Town of Beaufort Zoning Ordinance or the Rules of Procedure of the Beaufort Historic District Commission which precludes the submission of alternative design proposals to the HPC, defendants' argument is overruled.

B

[7] Defendants further argue that when Meares filed a complaint in Carteret County Superior Court, the HPC was divested of jurisdiction to address Meares' application. However, "[t]he issuance of a writ of mandamus is an exercise of original and not appellate jurisdiction . . . ." *Baker v. Varser*, 239 N.C. 180, 189, 79 S.E.2d 757, 764 (1954) (citation omitted). "This extraordinary remedy is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction." *Snow v. North Carolina Bd. of Architecture*, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968) (citation and quotations omitted). We hold the HPC retained jurisdiction to address Meares' COA application during the sixty-day period prescribed by the Beaufort Zoning Ordinance following submission of the application. *See* Beaufort, N.C., Zoning Ordinance § 13.8 (2006) ("Upon failure of the [HPC] to take final action upon a complete application within sixty (60) days after the final application for the [COA] has been submitted . . . the application for a [COA] shall be deemed to have been approved . . . ."). Accordingly, defendants' assignment of error is overruled.

VIII

[8] Defendants next argue Meares failed to exhaust his administrative remedies by failing to appeal to the Board of Adjustment, the appellate body charged with appeals from the HPC and therefore, the trial court lacked jurisdiction to address Meares' complaint and petition. We disagree.

Pursuant to Beaufort Zoning Ordinance, section 18.5, "[a]n appeal may be taken to the Board of Adjustment by any person aggrieved by a decision of any officer, department or board of the town relative to enforcement or interpretation of this ordinance." *Id.* at § 18.5. Here, the HPC, in their answer to Meares' complaint filed in Carteret

County Superior Court, averred that "the HPC has declined to process or consider [Meares'] Second Application." Thus, the HPC failed to render a decision from which Meares could appeal. *See Robins v. Town of Hillsborough*, 361 N.C. 193, 198, 639 S.E.2d 421, 424 (2007) ("a [town board] conducting a quasi-judicial hearing can dispense with no essential element of a fair trial. One of those essential elements is that any decision . . . has to be based on competent, material, and substantial evidence that is introduced at a public hearing. Accordingly, it is impossible for a court reviewing a town board's decision to do so unless the town board actually renders that decision.") (citations and emphasis omitted).

The function of *mandamus* is to compel the performance of a ministerial duty to which the one seeking the performance has a clear legal right. *Ponder*, 262 N.C. at 504, 138 S.E.2d at 149. Meares' initial petition for a writ for mandamus sought to compel the HPC to consider his second COA application. *See* discussion *supra* Part II & III. We hold the HPC's consideration of Meares' COA application was a performance to which Meares had a clear legal right. Accordingly, defendants' assignment of error is overruled.

IX

[9] Defendants next argue that the trial court erred in issuing a writ of mandamus compelling the HPC to issue a COA for Meares' second COA application because public policy precludes the HPC from processing multiple COA applications for the same site. We disagree.

Defendants cite *Winchester Woods Assoc. v. Planning & Zoning Comm.*, 219 Conn. 303, 592 A.2d 953 (1991), for the proposition that public policy allows the HPC the discretionary authority to refuse to accept a second application due to the pending appeal of a first application. Though not binding on the matter, we note that *Winchester* involved the interpretation of Connecticut General Statute section 8-26, which states "[n]o planning commission shall be required to consider the application for approval of a subdivision plan while another application for subdivision of the same or substantially the same parcel is pending before the commission." Conn. Gen. Stat. § 8-26 (1989). We also note that the Supreme Court of Connecticut held that where the planning commission denied the plaintiff's second application "without any consideration of whether that application differed substantively from the plaintiff's [first] application" there was an abuse of discretion. *Winchester*, 219 Conn. at 312, 592 A.2d at 958.

As defendants have provided this Court with no basis for a determination that public policy grants the HPC the authority to refuse to process or consider an application for a COA, we overrule defendant's assignment of error.

X

[10] Defendants next argue the trial court erred in denying a stay of the judgment pending appeal. Defendants argue that under General Statute section 1-291, where an appellant, having been directed to execute an "instrument" does, in fact, execute such instrument and deposits the same with the Clerk of Court, agreeing to be bound by the judgment of the appellate courts, an automatic stay should be entered.

Under North Carolina Rules of Civil Procedure, Rule 62(d), "[w]hen an appeal is taken, the appellant *may obtain a stay of execution* . . . by proceeding in accordance with and subject to the conditions of . . . G.S. 1-291 . . . ." N.C. R. Civ. 62(d) (2007) (emphasis added). Under North Carolina General Statute section 1-291,

> [i]f the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment is not stayed by the appeal until the instrument has been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

N.C. Gen. Stat. § 1-291 (2007). *Cf. Wilmington Star-News v. New Hanover Regional Medical Ctr.*, 125 N.C. App. 174, 183, 480 S.E.2d 53, 58 (1997) ("the trial court possesses the legal authority to stay its own orders pending appeal in cases involving the Public Records Act."). We do not read N.C.G.S. § 1-291 to require that a stay is compelled upon satisfaction of the criteria under N.C.G.S. § 1-291. Accordingly, defendants' assignment of error is overruled.

XI

[11] Defendants next argue the trial court erred in refusing to stay the judgment under Civil Procedure Rule 62.[5] Defendants argue that their appeal is meritorious and enforcement of the judgment would irreparably harm the town by foregoing HPC review to determine if Meares' development was in congruity with the character of Beaufort's Historic District.

---

5. Defendants refer to N.C. Gen. Stat. § 1A-1, Rule 62, "Stay of proceedings to enforce a judgment."

"When evaluating the propriety of a trial court's stay order the appropriate standard of review is abuse of discretion. A trial court may be reversed for abuse of discretion only if the trial court made a patently arbitrary decision, manifestly unsupported by reason." *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117-18, 493 S.E.2d 806, 809 (1997) (citations omitted).

In *Abbott v. Highlands*, 52 N.C. App. 69, 277 S.E.2d 820 (1981), this Court considered a trial court's grant of a motion to stay its judgment pending appeal, which prevented a town from taxing the plaintiffs' pending appeal. *Id.* at 79, 277 S.E.2d at 827. We reasoned that there was some likelihood the plaintiffs' arguments could have prevailed on appeal and thus were not wholly frivolous. We held that the trial court's grant of the stay was not an abuse of discretion. *Id.*

Here, the trial court denied defendants' motion to stay or enjoin enforcement of the judgment pending the appeal and ordered that the COA executed by defendants be released and delivered by the Clerk of Superior Court to Meares. Acknowledging the merit of defendants' arguments on appeal we cannot say the appeal was frivolous. Nevertheless, we find no abuse of discretion by the trial court in releasing the COA to Meares. Accordingly, defendants' assignment of error is overruled.

XII

[12] Last, defendants argue the trial court erred in refusing to enter a stay where Meares, in his response in opposition to defendants' verified motion to stay or enjoin enforcement of judgment pending appeal, argued for the first time that the doctrine of laches precluded defendants from contending that Meares' second COA application does not comply with the Town of Beaufort Zoning Ordinance and other town code provisions.

We note that while Meares does argue the doctrine of laches in his response to defendants' motion to stay or enjoin enforcement of the judgment pending appeal, this is one of ten arguments Meares raises against defendants' motion to stay or enjoin the judgment. Accordingly, defendants' assignment of error is overruled.

Affirmed.

Judges HUNTER and STROUD concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. NOEL ANGEL VILLATORO, DEFENDANT

No. COA07-1458

(Filed 7 October 2008)

Criminal Law— guilty plea—request to withdraw—fair and just reasons not shown

The trial court did not err by denying defendant's motion to withdraw his guilty plea to two counts of first-degree kidnapping where he did not assert legal innocence, the State's proffer of evidence was strong, the time between the plea and the request to withdraw was lengthy, defendant was represented by competent counsel, and misunderstanding, haste, confusion, and coercion were not present.

Appeal by defendant from order entered on or about 26 May 2006 by Judge J. Gentry Caudill in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 August 2008.

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

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

STROUD, Judge.

Defendant appeals from the trial court's denial of his motion to withdraw his guilty plea. The dispositive issue before this Court is "whether [defendant] showed fair and just reasons for granting his presentence motion to withdraw his pleas of guilty to two counts of first degree kidnapping[.]" For the following reasons, we affirm the trial court's denial of his motion.

I. Background

On 25 April 2005, pursuant to a plea agreement defendant stipulated to facts summarized by the State upon entry of the plea as follows:

> [O]n April 16th of 2003, Charlotte-Mecklenburg Police responded to a call about some witnesses finding two dead bodies in a wooded area off Old Statesville Road here in Mecklenburg County. . . . When the police got there they also found a 1984 blue

Cadillac Fleetwood automobile. Those bodies were later identified as those of the two kidnapping victims and also murder victims, Martin Vargas Vargas and Guillermo Soto. They had been shotgunned to death. It is believed, Your Honor, they were killed on or about April the 6th of 2003 . . . .

. . . .

Mr. Villatoro was interviewed on May the 27th, 2003 and gave a statement to the police. He told police that—I believe he indicated on Sunday the 6th—I believe he indicated generally and other evidence would show that it was on or about April the 6th that he had been in a MS13 meeting with other members of MS13 . . . .

That he left that meeting with an Ignacio Rodriguez and Wilfredo Allas in a truck that a Jose Rivera and his brother, Augustine Rivera, were following in a car. Apparently a man named Elton Rodriguez was also present. They ended up at a gas station here in the Charlotte area where they saw these two Hispanic males, Mr. Martin Vargas Vargas and Guillermo Soto. Apparently Ignacio Rodriguez approached the two men and began talking to them. Ultimately the men were placed inside Mr. Vargas' blue 1984 Fleetwood Cadillac automobile. . . . Mr. Villatoro told police that Ignacio Rodriguez, Wilfredo Allas, and Elton Rodriguez got into the victims' Cadillac with the two victims. Mr. Villatoro said he did not know if anyone had a weapon at that time.

. . . .

They ultimately went up I-85, got off of I-85, ended up in the wooded area . . . and according to Mr. Villatoro, Augustine Rivera told the men to get out of the car, that is, Mr. Vargas Vargas and Mr. Soto, and they were taken into the woods out of sight of the road; that Augustine Rivera Rivera told them to take off their clothes and they were found only partially clothed. . . . Mr. Villatoro realized Elton Rodriguez had a shotgun. At that time Elton Rodriguez shot both men to death.

At that point they left the wooded area. Mr. Villatoro said that he, Jose Rivera and Ignacio Rodriguez ran . . . . At some point. . . . they all met back up and apparently at that point Augustine Rivera told the group that—that he had, in fact, had gone back and shot the victims twice.

On 2 June 2003, Richard E. Beam ("Mr. Beam") was appointed by the court to represent defendant. On or about 9 June 2003, the Mecklenburg County Grand Jury indicted defendant on two counts of first degree murder. On or about 3 November 2003, a grand jury indicted defendant on two counts of robbery with a dangerous weapon and two counts of first degree kidnapping, and on 3 December 2003, Mr. Beam was appointed as counsel for defendant on all of these charges also.

On or about 25 April 2005, defendant and the State reached a plea agreement. Defendant agreed to plead guilty to two counts of first degree kidnapping, to cooperate fully with State and Federal authorities, and to testify truthfully in regards to prosecution of the victims' murders. The State agreed to dismiss the two charges of first degree murder and two charges of robbery with a dangerous weapon.

On or about 13 August 2005, defendant sent correspondence to Special Superior Court Judge Albert Diaz requesting that the court remove his court-appointed attorney, Mr. Beam, and assign him a new attorney. Defendant alleged that Mr. Beam coerced him into his guilty plea and that he had ineffective legal representation. Judge Diaz treated defendant's correspondence as a motion for appropriate relief and scheduled a hearing for 15 September 2005. On or about 25 October 2005, the trial court appointed Grady Jessup ("Mr. Jessup") as defendant's new counsel. On 25 May 2006, the hearing on defendant's motion to withdraw his guilty plea began, and on or about 26 May 2006, the court denied defendant's motion to withdraw his guilty plea. Defendant appeals the denial of his motion. Thereafter, on 19 July 2007, defendant was sentenced to 68 to 91 months imprisonment for the two counts of first degree kidnapping for which he pled guilty. Defendant also appeals the judgment upon which his sentence was entered. On appeal, defendant's sole argument is that he "showed fair and just reasons for granting his presentence motion to withdraw his pleas of guilty to two counts of first degree kidnapping." For the following reasons, we affirm.

II. Withdrawal of Guilty Plea

Defendant argues that he has shown fair and just reasons for granting his motion to withdraw his guilty plea.

A. Standard of Review

> In reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea made before sentencing, the appellate

court does not apply an abuse of discretion standard, but instead makes an independent review of the record. There is no absolute right to withdraw a plea of guilty, however, a criminal defendant seeking to withdraw such a plea before sentencing is generally accorded that right if he can show any fair and just reason. The defendant has the burden of showing his motion to withdraw his guilty plea is supported by some fair and just reason. Our Supreme Court has set out the following factors for consideration of plea withdrawals:

> [1] whether the defendant has asserted legal innocence, [2] the strength of the State's proffer of evidence, [3] the length of time between entry of the guilty plea and the desire to change it, [4] and whether the accused has had competent counsel at all relevant times. [5] Misunderstanding of the consequences of a guilty plea, [6] hasty entry, [7] confusion, and [8] coercion are also factors for consideration.

State v. Robinson, 177 N.C. App. 225, 229, 628 S.E.2d 252, 254-55 (2006) (citations and quotation marks omitted).

"After a defendant has come forward with a fair and just reason in support of his motion to withdraw, the State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea." *State v. Meyer*, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992) (citation and quotation marks omitted). "[T]he State need not even address . . . [concrete prejudice] until the defendant has asserted a fair and just reason why he should be permitted to withdraw his guilty pleas." *Id.* at 744, 412 S.E.2d at 343 (citation omitted).

B. Factors in Determining Whether Defendant Has Shown Some Fair and Just Reason for Withdrawing His Guilty Plea

We must now consider the factors enumerated in *Robinson* to determine whether defendant has shown "some fair and just reason" to withdraw his guilty plea. *Robinson* at 229, 628 S.E.2d at 255.

1. Assertion of Legal Innocence

Defendant argues his "motion was based on his assertion of legal innocence. It complained of pressure from his first counsel to have him declare that he was guilty when he did not feel he was guilty." However, in *State v. Graham*, this Court determined that the "defendant made no concrete assertion of innocence, stating only that he

'always felt that he was not guilty.' " *State v. Graham*, 122 N.C. App. 635, 637, 471 S.E.2d 100, 102 (1996) (ellipses omitted).

Defendant's correspondence to Judge Diaz, which the court treated as a motion for appropriate relief, was stated as being in regards to "INEFFECTIVE LEGAL REPRESENTATION[.]" (Emphasis in original.) The correspondence set forth the reasons defendant believed he had received ineffective assistance of counsel and should receive new representation. Defendant did not address his guilt or innocence except in the last sentence, where defendant wrote that his attorney was "INAPPROPRIATELY PRESSURING ME TO ACCEPT THE GUILTY PLEA, WHEN I REALLY DID NOT FEEL I WAS GUILTY." (Emphasis in original.) It is clear that defendant's motion to withdraw his guilty plea was based upon coercion and ineffective assistance of counsel, not an assertion of legal innocence. Defendant's one sentence that he "REALLY DID NOT FEEL [HE] WAS GUILTY" is not an assertion of legal innocence. *See Graham* at 637, 471 S.E.2d at 102.

2. Strength of the State's Proffer of Evidence

Defendant claims that the State's evidence against him was weak, citing *State v. Hargett*, 255 N.C. 412, 121 S.E.2d 589 (1961) and *State v. Ham*, 238 N.C. 94, 76 S.E.2d 346 (1953). However, defendant's reliance on these cases is misplaced. Both *Hargett* and *Ham* involve criminal liability as an aider and abettor to homicide. *See State v. Hargett*, 255 N.C. 412, 121 S.E.2d 589 (1961); *State v. Ham*, 238 N.C. 94, 76 S.E.2d 346 (1953). However, here defendant pled guilty to two counts of first degree kidnapping as the State had dismissed the two murder charges against defendant as part of the plea arrangement. Whether the State's proffer of evidence was strong as to defendant's aiding and abetting in two murders is not the question before us; the question instead is whether the State's evidence was strong as to two counts of first degree kidnapping.

N.C. Gen. Stat. § 14-39 reads in pertinent part,

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony . . . ;

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . . ;

. . . .

(b) 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 . . . .

The State's evidence included defendant's personal statement made to police that

on or about April the 6th that he had been in a MS13 meeting with other members of MS13 . . . .

That he left that meeting with an Ignacio Rodriguez and Wilfredo Allas in a truck that a Jose Rivera and his brother, Augustine Rivera, were following in a car. . . . They ended up at a gas station here in the Charlotte area where they saw these two Hispanic males, Mr. Martin Vargas Vargas and Guillermo Soto. . . . Ultimately the men were placed inside Mr. Vargas' blue 1984 Fleetwood Cadillac automobile. . . . Mr. Villatoro told police that Ignacio Rodriguez, Wilfredo Allas, and Elton Rodriguez got into the victims' Cadillac with the two victims.

. . . .

They ultimately went up I-85, got off of I-85, ended up in the wooded area . . . and according to Mr. Villatoro, Augustine Rivera told the men to get out of the car, that is, Mr. Vargas Vargas and Mr. Soto, and they were taken into the woods out of sight of the road; that Augustine Rivera Rivera told them to take off their clothes and they were found only partially clothed. . . . Mr. Villatoro realized Elton Rodriguez had a shotgun. At that time Elton Rodriguez shot both men to death.

Based on this proffer, we conclude there was strong evidence defendant committed two counts of first degree kidnapping.

3. Length of Time Between Entry of the Guilty Plea and the Desire to Change It

On or about 25 April 2005, defendant pled guilty to two counts of first degree kidnapping. Approximately three and one-half months later, on 13 August 2005, defendant sent correspondence to Judge Diaz, which contained no direct request to withdraw defendant's guilty plea and was initially "treated as a Motion for Appropriate

Relief." Once a hearing was held, defendant's "motion" was treated as a request to withdraw his guilty plea.

Defendant, relying solely on *State v. Deal*, 99 N.C. App. 456, 393 S.E.2d 317 (1990), contends that his nearly four month delay can be excused by the fact that he "was only seventeen, had no criminal record, came from a foreign culture, had little command of English and had limited means by which he could communicate with his first counsel while he remained confined in the county jail."

Prior cases have "placed heavy reliance on the length of time between a defendant's entry of the guilty plea and motion to withdraw the plea." *Robinson at* 229, 628 S.E.2d at 255 (citation omitted). In *Robinson*, this Court affirmed the denial of defendant's motion to withdraw his guilty plea when it was made approximately three and one-half months after its entry. *Id.* at 229-32, 628 S.E.2d at 255-57; *see also State v. Graham*, 122 N.C. App. 635, 637-38, 471 S.E.2d 100, 101-02 (1996) (Denial of defendant's motion to withdraw guilty plea was affirmed when it was made five weeks after entry.).

Furthermore, *Deal*, the case upon which defendant relies, involved a defendant who had "been diagnosed as learning disabled and . . . read[] and spell[ed] at a second grade level." *State v. Deal*, 99 N.C. App. 456, 458, 393 S.E.2d 317, 318 (1990). This Court, in *Deal*, determined

> that in light of defendant's low intellectual abilities, there is sufficient credible evidence that he was laboring under a basic *misunderstanding of the guilty plea process*. We therefore find that his plea of guilty was not the result of *an informed choice*. Although he did not attempt to revoke his plea for over four months, this appears to have resulted from his *erroneous expectations and lack of communication with his attorney*. *Id.* at 464, 393 S.E.2d at 321 (emphasis added).

In the present case there is no evidence that defendant possessed low intellect. Furthermore, there is strong evidence that defendant had a good grasp on the "guilty plea process[,]" made "an informed choice[,]" and did not have "erroneous expectations[,] *see id.*, evidenced by his engagement in an approximately four month plea bargain process with the State. Defendant informed his original counsel, Mr. Beam, that he wanted a closed plea of not more than eight years imprisonment. Defendant did not accept the State's first or second plea offers as they did not offer what he requested. As part of defend-

ant's 25 April 2005 plea agreement, the State agreed that defendant would not serve more than seventy-nine months, fitting the requirements that defendant originally informed his counsel he wanted.

Similarly, there is no evidence of a "lack of communication" between defendant and his attorney, *see id.*, that could have prevented defendant from understanding the proceedings or choosing to plead guilty. Defendant's counsel, Mr. Beam, was assisted by an interpreter when he discussed with defendant his statement to police, his co-defendant's statements, discovery, the evidence, and the plea offers from the State. Furthermore, an interpreter was provided during his 25 April 2005 plea hearing. We conclude that defendant's case is not apposite to *Deal* in that defendant's delay in filing for withdrawal of his guilty plea had nothing to do with low intellectual abilities, a misunderstanding of the guilty plea process, or lack of communication with his attorney. See Deal at 464, 393 S.E.2d at 321.

4. Whether the Accused Has Had Competent Counsel at All Relevant Times

Defendant argues that Mr. Beam gave him advice that was "legally incompetent." The portion of testimony that defendant contends is evidence of Mr. Beam's incompetent representation occurred during defendant's motion to withdraw hearing. Mr. Beam, in reference to defendant aiding or assisting Elton Rodriguez or Augustine Rivera, said there was a "jury instruction that says it's presumed that when you are in that situation, that if you are a member of the group then you are involved."

The law regarding aiding or abetting is that "[a] person aids when, being present at the time and place, he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit a crime." *State v. Holland*, 234 N.C. 354, 358, 67 S.E.2d 272, 274-75 (1951) (citation and quotation marks omitted).

> Mere presence, even with the intention of assisting in the commission of a crime cannot be said to have incited, encouraged or aided the perpetrator thereof, unless the intention to assist was in some way communicated to [the perpetrator]; but if one does something that will incite, encourage, or assist the actual perpetration of a crime, this is sufficient to constitute aiding and abetting.

State v. Hoffman, 199 N.C. 328, 333, 154 S.E. 314, 316 (1930) (citations omitted).

Mr. Beam, when speaking of "presumptions," may have been referencing case law that has stated "when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement," and this can constitute aiding and abetting. *State v. Williams*, 225 N.C. 182, 184, 33 S.E.2d 880, 881 (1945) (citations and quotation marks omitted). Mr. Beam stated regarding a conversation about defendant's gang activity:

> A I explained to [defendant] that although he was merely present, that the group he was involved in killed two people.
>
> Q You said that he claimed that he is a member of that group, and that the jury could draw inferences from that; that they might be concerned that they might be up to no good and things [of] that nature.
>
> A Correct.

Further testimony by Mr. Beam showed he was specifically concerned with inferences that could be drawn from defendant's continued involvement with MS-13, while still claiming not to know what was going on the day of the murders:

> Q I think you mentioned this earlier, perhaps, I believe in response to one of Mr. Jessup's questions.
>
> Mr. Villatoro, in your conversations with him as his attorney, had told you, in fact, that he was present when Ignacio Rodriguez sold or he tried to sell the shotgun.
>
> A I believe he did. Yes, sir.
>
> Q Based upon your experience as an attorney, Mr. Beam, being on the approved list by the Capital Defenders Office and being qualified to represent defendants charged with first-degree murder, did that concern you—his being identified doing that and his admissions of doing that?
>
> A Yes, sir.
>
> Q Why?

> A His statement to police was that he was present when the killings happened but he didn't—he didn't know they were going to occur. He didn't have anything to do with the evidence about continuing to be seen with the individuals, including when the firearms were disposed of.
>
> Q It was very troubling as to Mr. Villatoro's role in this case as it related to the charges against him; correct?
>
> A Yes. When one is present when something like this happens and doesn't know anything is going to occur, it's somewhat counter-intuitive to be present in that vein and be present when they are selling the shotgun. The jury would have problems with that. That is what we discussed.

This testimony shows that Mr. Beam's discussions with defendant addressed the inferences that a jury could make from the evidence about defendant's gang involvement and about his knowledge of what may happen when the other gang members took the victims into the woods. Furthermore, though Mr. Beam used the word "presumed" during his testimony, there is no evidence to show that he instructed defendant that the burden of proof was on defendant to prove that he was not aiding and abetting these crimes. To the contrary, Mr. Beam advised defendant that the State had the burden of proving beyond a reasonable doubt that defendant was guilty of these crimes.

After a thorough review of the record, we also find other evidence of Mr. Beam's competence as defendant's counsel: Mr. Beam stated that he spent "a fair amount of time going over what the various slants were that one could put on the elements of [defendant's] statement, to meet those elements or not meet those elements[;]" Mr. Beam went over defendant's statement to police in great detail with defendant at least fourteen times with an interpreter; Mr. Beam talked to defendant for approximately three hours with an interpreter reviewing the plea agreement which defendant eventually accepted; Mr. Beam spent a long time explaining the possible punishment if defendant was found guilty of the charged crimes; Mr. Beam discussed the possibility of a felony murder conviction; Mr. Beam did not tell defendant that a plea was his only option; and at the plea hearing the court asked defendant "Are you satisfied with your lawyer's legal services?" Defendant replied, " Yes." Therefore, we conclude that defendant, at all relevant times, was represented by competent counsel.

5. Misunderstanding of the Consequences of a Guilty Plea, Hasty Entry, Confusion, and Coercion

Again, the record shows that defendant clearly understood the consequences of his plea, did not act hastily, and was not confused as he had previously rejected two plea offers prior to accepting the plea agreement which he originally told his attorney he would take. Though defendant asserts coercion by his attorney, we find no evidence in support of this contention in the record as defendant had previously rejected two other plea offers and his attorney stated he was prepared to proceed to trial. We therefore conclude that a "[m]isunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion" were not relevant factors to this case. *Robinson* at 229, 628 S.E.2d at 255 (numbers omitted).

III. Conclusion

In sum, we conclude that defendant has not shown fair and just reason for withdrawal of his guilty plea. Defendant did not assert legal innocence as the reason for his request to withdraw his guilty plea. The State's proffer of evidence against defendant for the crimes to which he pled guilty was strong. The length of time between defendant's entry of his guilty plea and his request to withdraw it was lengthy. Defendant, at all relevant times, was represented by competent counsel, and "[m]isunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion[,] *see id.* (numbers omitted), were not relevant to defendant's entry of his guilty plea. As defendant has failed to show a "fair and just reason" for withdrawal of his guilty plea, *see id.*, we need not address whether the State would be prejudiced by defendant's withdrawal. *See Meyer* at 743, 412 S.E.2d at 343. We affirm the trial court's denial of defendant's motion to withdraw his guilty plea.

AFFIRMED.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. JOHN ARTER NARRON, III

No. COA08-129

(Filed 7 October 2008)

1. Motor Vehicles— driving while impaired—chemical analysis of alcohol concentration—constitutionality of N.C.G.S. § 20-138.1(a)(2)

The language in N.C.G.S. § 20-138.1(a)(2) that the results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration does not violate a defendant's constitutional right to due process under the Fifth and Fourteenth Amendments in a driving while impaired case because: (1) *Smith*, 312 N.C. 361 (1984), expressly associated the reliability of chemical analysis with the provisions of N.C.G.S. § 20-138.l; (2) statutory criteria must be met under N.C.G.S. §§ 20-138.1 and 139.1 before results of a chemical analysis are admissible in court, and defendant may challenge the admissibility of a chemical analysis of his blood alcohol level; (3) in addition to technical challenges set out in the statutes, a defendant could impeach the admissibility, credibility, or weight of the results of chemical analysis in traditional ways; (4) the longstanding common law rule is that results of a chemical analysis are sufficient evidence to submit the issue of a defendant's alcohol concentration to the factfinder; (5) the challenged provision does not create an evidentiary or factual presumption, but simply states the standard for prima facie evidence of a defendant's alcohol concentration; (6) the language of the amendment is essentially the same as the established common law rule; and (7) the pertinent phrase does not create a legal presumption, and the statute simply authorizes the jury to find that the report is what it purports to be, namely the results of a chemical analysis showing defendant's alcohol concentration.

2. Motor Vehicles— driving while impaired—request for special instruction denied

The trial court did not err in an impaired driving case by denying defendant's motion for a special instruction regarding proof of defendant's blood alcohol concentration because: (1) defendant's argument is based on the erroneous premise that the instruction given by the court created an impermissible presumption; and (2) the court's instructions adequately informed the jury of the law as applied to the evidence presented at trial.

STATE v. NARRON

[193 N.C. App. 76 (2008)]

Appeal by Defendant from judgment entered 16 October 2007 by Judge Kenneth F. Crow in Pitt County Superior Court. Heard in the Court of Appeals 20 August 2008.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, and Assistant Attorney Generals Kathryne E. Hathcock and Christopher W. Brooks, for the State.

The Law Office of Matthew J. Davenport, P.A., by Matthew J. Davenport, for Defendant.

ARROWOOD, Judge.

John Narron, III (Defendant) appeals from judgment entered upon his conviction of impaired driving, in violation of N.C. Gen. Stat. § 20-138.1. We affirm.

Defendant was arrested on 13 January 2007 in Greenville, North Carolina, and charged with impaired driving. He was convicted in Pitt County District Court and appealed to Superior Court for trial *de novo*. On 5 February 2007 Defendant filed a motion to dismiss the charge of impaired driving, on the grounds that N.C. Gen. Stat. § 20-138.1 violated the North Carolina and U.S. Constitutions. He specifically challenged the statute's provision addressing chemical analysis as evidence of a defendant's blood alcohol concentration. On 10 August 2007 Judge Clifton W. Everett, Jr., entered an order denying Defendant's dismissal motion.

Defendant was tried before a Pitt County jury on 15 October 2007. The State's evidence tended to show in pertinent part, the following: Officer W.O. Terry of the Greenville, North Carolina, Police Department testified that, while on patrol in the early morning hours of 13 January 2007, he saw Defendant in the driver's seat of a motor vehicle that was stopped "in the middle of the travel lane" on the left side of a downtown street. Terry approached Defendant and noticed that Defendant's eyes were red and glassy and that he had an odor of alcohol. Terry summoned a traffic safety officer and about five minutes later Greenville Police Department Corporal Michael Montanye arrived at the scene.

Officer Montanye testified that at 1:30 a.m. on 13 January 2007 he was on duty as a traffic safety officer in Greenville. In response to Terry's call, Montanye drove to Cotanche Street, where he saw the Defendant in a vehicle "stopped in the left travel lane." Defendant told Montanye he had been at a party where he drank three beers. The

officer observed that Defendant's eyes were glassy, that he was talkative, and that he smelled of alcohol. Officer Montanye performed two tests on an alcosensor, a portable machine that measures alcohol in a person's breath. When both tests showed a positive result for the presence of alcohol, Montanye placed defendant under arrest and took him to the Pitt County Detention center. There he administered an Intoxylizer test which showed an alcohol concentration of 0.08.

Defendant did not present evidence at trial. After the presentation of evidence, the trial court submitted the case to the jury. Defendant moved for a special jury instruction regarding proof of the Defendant's blood alcohol concentration; his motion was denied. The jury found Defendant guilty of impaired driving, and the court entered judgment accordingly. From this judgment and conviction, Defendant appeals.

Standard of Review

Defendant argues that the statute under which he was convicted is unconstitutional. "[T]he judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy. This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality." *Guilford Co. Bd. of Education v. Guilford Co. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993) (citing *Greensboro v. Wall*, 247 N.C. 516, 101 S.E.2d 413 (1958)) (other citations omitted). "In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Guilford Cty. Bd. of Educ.*, 110 N.C. App. at 511, 430 S.E.2d at 684-85 (citing *Baker v. Martin*, 330 N.C. 331, 411 S.E.2d 143 (1991)) (other citation omitted). Moreover:

> A well recognized rule in this State is that, where a statute is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality.

In re Banks, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978) (citations omitted).

---

[1] Defendant argues that certain language in N.C. Gen. Stat. § 20-138.1(a)(2) (2007) renders the statute unconstitutional. N.C. Gen. Stat. § 20-138.1 provides in pertinent part that:

(a) A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) While under the influence of an impairing substance; or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]

Defendant contends that the provision that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" in N.C. Gen. Stat. § 20-138.1(a)(2) "constitutes a mandatory presumption violative of his right to due process secured by the Fifth and Fourteenth Amendments to the U.S. Constitution." We disagree.

Defendant asserts a violation of the "principles of due process of law which require the State to prove beyond a reasonable doubt every essential element of the crime charged and which preclude placing upon a defendant any burden to prove the nonexistence of any such element." *State v. White*, 300 N.C. 494, 499, 268 S.E.2d 481, 485 (1980) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975)). "The three essential elements of the offense of impaired driving are (1) driving a vehicle (2) upon any public vehicular area (3) while under the influence of an impairing substance or '[a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of [0.08] or more.' N.C.G.S. § 20-138.1 [(2007)]". *State v. Denning*, 316 N.C. 523, 524, 342 S.E.2d 855, 856-57 (1986).

Thus, "there are two ways to prove the single offense of impaired driving: (1) showing appreciable impairment; or (2) showing an alcohol concentration of 0.08 or more." *State v. McDonald*, 151 N.C. App. 236, 244, 565 S.E.2d 273, 277 (2002) (citing *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984)). The present appeal concerns proof of impairment by showing an alcohol concentration of .08 or more. N.C. Gen. Stat. § 20-4.01(1b) (2007), defines "alcohol concentration" as "[t]he concentration of alcohol in a person, expressed either as: a. Grams of alcohol per 100 milliliters of blood; or b. Grams of alcohol per 210 liters of breath." N.C. Gen. Stat. § 20-4.01(3a) (2007) defines "chemical analysis" in relevant part as "[a] test or

tests of the breath [or] blood . . . of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses."

In the instant case, the chemical analysis was performed on an Intoxilyzer 5000 machine, which showed Defendant's blood alcohol concentration to be eight one-hundredths grams of alcohol per 210 liters of breath (.08). "The Intoxilyzer is a breath-testing instrument approved for use by the North Carolina [Department of Health and Human Services (DHHS).] Pursuant to N.C. Gen. Stat. § 20-139.1 [(2007)], [DHHS] has adopted procedures for the use of this instrument which are codified at [10A N.C.A.C. 41B.0320 and 41B.0321 (December 2007)]." Machines such as the Intoxilyzer 5000 have been used for decades to measure blood alcohol concentration by chemical analysis of an individual's breath. *See*, *e.g.*, *State v. Powell*, 264 N.C. 73, 140 S.E.2d 705, (1965) (upholding admission of Breathalyzer results). Appellate cases have noted the general reliability of this chemical analysis, observing as early as 1984 that "the science of breath analysis for alcohol concentration has become increasingly reliable . . . and increasingly accepted as a means for measuring blood alcohol concentration." *State v. Smith*, 312 N.C. 361, 372, 323 S.E.2d 316, 322 (1984). *Smith* expressly associated the reliability of chemical analysis with the provisions of N.C. Gen. Stat. § 20-138.1:

> [S]cientific and technological advancements which have made possible this type of analysis have removed the necessity for a subjective determination of impairment[.] . . . Indeed, our legislature's recognition of this reliable and accurate innovation of blood alcohol concentration testing is manifested in N.C.G.S. § 20-138.1(a)(2) which now provides that a person who "after having consumed sufficient alcohol that he has, at any relevant time after driving, an alcohol concentration of [0.08] or more", commits the offense of impaired driving.

Id. at 373, 323 S.E.2d at 323.

However, under N.C. Gen. Stat. §§ 20-138.1 and 139.1, statutory criteria must be met before results of a chemical analysis are admissible in court. The defendant may challenge the admissibility of a chemical analysis of his blood alcohol level. N.C. Gen. Stat. § 139.1 (2007) provides in relevant part that:

> (a) In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration . . . as shown by a chemical analysis is

admissible in evidence. This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.

(b) The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration. A chemical analysis of the breath administered pursuant to the implied-consent law is admissible in any . . . proceeding if . . .

(1) It is performed in accordance with the rules of the Department of Health and Human Services.

(2) The person performing the analysis had . . . a current permit . . .

N.C. Gen. Stat. § 20-138.1 states:

(a1) A person who has submitted to a chemical analysis of a blood sample, pursuant to G.S. 20-139.1(d), may use the result in rebuttal as evidence that the person did not have, at a relevant time after driving, an alcohol concentration of 0.08 or more.

. . . .

(b1) Nothing in this section shall preclude a person from asserting that a chemical analysis result is inadmissible pursuant to G.S. 20-139.1(b2).

In addition to technical challenges set out in the statutes, a defendant presumably could impeach the admissibility, credibility, or weight of the results of chemical analysis in traditional ways.

As a corollary of the accepted reliability of chemical analysis, and of and the presence of statutory standards for their admissibility, the longstanding common law rule is that results of a chemical analysis are sufficient evidence to submit the issue of a defendant's alcohol concentration to the factfinder:

Once the trial court determined that the chemical analysis of defendant's breath was valid, then the reading constituted reliable evidence and was sufficient to satisfy the State's burden of proof under N.C. Gen. Stat. § 20-138.1(a)(2).

State v. Phillips, 127 N.C. App. 391, 394, 489 S.E.2d 890, 892 (1997) (citing *State v. Shuping*, 312 N.C. 421, 323 S.E.2d 350 (1984)). In 2006 the North Carolina General Assembly formally codified this rule by amending N.C. Gen. Stat. § 20-138.1 to state that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]" Defendant asserts that this amendment creates an impermissible presumption. We do not agree.

"A presumption of fact is defined as an inference of the existence of one fact from the existence of some other fact, or an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known." *Bryant v. Burns-Hammond Const. Co.*, 197 N.C. 639, 643, 150 S.E. 122, 124 (1929). "Inferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts." *State v. White*, 300 N.C. 494, 499-500, 268 S.E.2d 481, 485 (1980). The North Carolina Supreme Court has explained further that:

> The word presumption, as lucidly pointed out by STANSBURY, N. C. EVIDENCE § 215 (2d Ed., 1963), has been used in different senses, but always upon the premise that when a certain basic fact is established another (presumed) fact is assumed or inferred. The following situations illustrate the varying uses of the word presumption: (1) If evidence to disprove the presumed fact will not be heard, we have a rule of substantive law, sometimes loosely called "a conclusive presumption"; (2) If the basic fact authorizes, but does not compel, the jury to find the assumed facts, we have a permissible inference or *prima facie* evidence; (3) If the basic fact compels the jury to find the assumed fact unless and until sufficient evidence of its nonexistence has been introduced, we have a true presumption, and, in the absence of sufficient proof to overcome it, the jury must find according to the presumption.

State v. Cooke, 270 N.C. 644, 649, 155 S.E.2d 165, 168 (1967).

In the instant case, we are called upon to decide whether the provision that "results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" creates an unconstitutional presumption. We are concerned with the interpretation of "shall be deemed sufficient evidence to prove," as there is no

dispute about the phrases "results of a chemical analysis" or "a person's alcohol concentration." We conclude that the challenged provision does not create an evidentiary or factual presumption, but simply states the standard for *prima facie* evidence of a defendant's alcohol concentration.

" 'Statutory interpretation properly begins with an examination of the plain words of the statute.' If the language of a statute is clear, then the Court must implement the statute according to the plain meaning of its terms." *State v. Crow*, 175 N.C. App. 119, 123, 623 S.E.2d 68, 71 (2005) (quoting *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). "Nontechnical statutory words are to be construed in accordance with their common and ordinary meaning." *Comr. of Insurance v. North Carolina Rate Bureau*, 54 N.C. App. 601, 605, 284 S.E.2d 339, 342 (1981) (citations omitted)).

As noted by Defendant, the word "shall" connotes that the action referred to is mandatory. "It is well established that 'the word 'shall' is generally imperative or mandatory." *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). "The definition of the word 'deemed' in the legal context is 'considered' or 'treated as if.' BLACK'S LAW DICTIONARY 415 (6th ed. 1990); Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 254 (2d ed. 1995)." *Ward v. Wake Cty. Bd. of Educ.*, 166 N.C. App. 726, 731, 603 S.E.2d 896, 900 (2004) Black's Law Dictionary treats "sufficient evidence" as synonymous with "satisfactory evidence" which it defines as "evidence that is sufficient to satisfy an unprejudiced mind seeking the truth[;] Also termed sufficient evidence." BLACK'S LAW DICTIONARY 599 (8th ed. 2004). Finally, the word "prove" means "to establish the truth of a fact or hypothesis by satisfactory evidence." BLACK'S LAW DICTIONARY 1261 (8th ed. 2004).

The phrase at issue contains no obscure or technical terms. We conclude that in the context of "results of chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" the meaning of the phrase "shall be deemed sufficient evidence to prove" is that properly admitted results of a chemical analysis "must be treated as *prima facie* evidence of" a defendant's alcohol concentration.

"In interpreting statutes, . . . it is always presumed that the Legislature acted with full knowledge of prior and existing law."

Investors, Inc. v. Berry, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). Accordingly, our conclusion is further supported by the fact that the language of the amendment is essentially the same as the established common law rule that "[o]nce it is determined that the chemical analysis of the defendant's breath was valid, then a reading of [0.08] constitutes reliable evidence and is sufficient to satisfy the State's burden of proof as to this element of the offense of DWI." *Shuping*, 312 N.C. at 431, 323 S.E.2d at 356.

We also conclude that the provision that "results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration," which we construe as a statement of the standard for *prima facie* evidence of a person's alcohol concentration, does not create a legal presumption.

As discussed above, the essential feature of a true presumption is that proof of a basic fact permits or requires the fact finder to find a different, elemental, fact. For example, "[m]alice may be presumed upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon, nothing else appearing." *State v. Weeks*, 322 N.C. 152, 172, 367 S.E.2d 895, 907 (1988) (citation omitted). Thus, proof beyond a reasonable doubt of the basic fact—a defendant's use of a deadly weapon to commit a killing—allows the jury to find the elemental fact—that the defendant acted with malice.

The Defendant does not articulate what he contends is the elemental fact to be "presumed" upon proof of the basic fact of the existence of a properly admitted chemical analysis of his alcohol concentration, and we conclude there is none. For example, the statute does not state that "results of a chemical analysis shall be deemed sufficient evidence to prove" e.g., a person's degree of intoxication, or his operation of a vehicle on a state highway.

The "result of a chemical analysis" is a report of a person's alcohol concentration, and the statute provides that the result of such a test constitutes *prima facie* evidence of the defendant's alcohol concentration as reported in the results. In other words, the statute simply authorizes the jury to find that the report is what it purports to be—the results of a chemical analysis showing the defendant's alcohol concentration. This is the definition of *prima facie* evidence of an element of any criminal offense or civil cause of action—that the jury may find it adequate proof of a fact at issue. However, there is no "presumption" created with regards to some other element or factual issue. "Appellee contends that the instruction at issue here did not

create a presumption, mandatory or otherwise. . . . We agree that no such presumption was established here. . . . The instruction did not state that upon finding certain predicate facts, the jury could infer that a necessary element of the [State's] case had been met." *Koonce v. Pepe*, 99 F.3d 469, 473 (1st Cir. 1996).

We conclude that the statutory amendment simply codifies the common law threshold for *prima facie* evidence of a defendant's alcohol concentration. Therefore, there was no need for the trial court to call to the jury's attention that the chemical analysis was the basis of the trial court's determination that the State had presented *prima facie* proof of the element. If a case is submitted to the jury, then by definition, the court has determined that the State presented "sufficient evidence to prove" each of the elements of the offense. However, we perceive no prejudice to the Defendant in the court's statement to the jury that "results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration."

This assignment of error is overruled.

---

[2] Defendant also argues that the trial court erred by denying his motion for a special jury instruction. We disagree.

> "A trial court's jury instruction 'is for the guidance of the jury.' Furthermore, the purpose 'is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.' 'In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented.' A judge has the obligation 'to instruct the jury on every substantive feature of the case.' "

State v. Smith, 360 N.C. 341, 346-47, 626 S.E.2d 258, 261 (2006) (quoting *Sugg v. Baker*, 258 N.C. 333, 335, 128 S.E.2d 595, 597 (1962); *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971); *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253 (1985); and *State v. Mitchell*, 48 N.C. App. 680, 682, 270 S.E.2d 117, 118 (1980)).

> "However, '[t]he burden upon the defendant is to show more than a possibility that the jury applied the instruction in an unconstitutional manner.' Further, '[w]here the instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, we will not find error even if isolated expressions, standing alone, might be considered erroneous.' "

State v. Freeman, 185 N.C. App. 408, 419, 648 S.E.2d 876, 884 (2007) (quoting *State v. Smith*, 360 N.C. 341, 347, 626 S.E.2d 258, 261-62 (2006); and *State v. Morgan*, 359 N.C. 131, 165, 604 S.E.2d 886, 907 (2004)).

Defendant's argument, that the trial court erred by denying his motion for a special instruction, is premised on his contention that the instruction given by the court created an impermissible presumption. As discussed above, we have rejected this argument. We conclude that the court's instructions adequately informed the jury of the law as applied to the evidence presented at trial. This assignment of error is overruled.

For the reasons discussed above, we conclude the Defendant had a fair trial, free of reversible error.

No error.

Judges BRYANT and JACKSON concur.

BILLY MEARES, EMPLOYEE, PLAINTIFF v. DANA CORPORATION, EMPLOYER, AND SELF-INSURED SPECIALITY RISK SERVICES, THIRD-PARTY ADMINISTRATOR, DEFENDANTS

No. COA07-1401

(Filed 7 October 2008)

1. Workers' Compensation— alteration of prior award refused—disability status—injured knee and related conditions

The Industrial Commission in a workers' compensation case correctly denied defendants' request to change a prior award where defendant did not present evidence that would support reopening the case and changing the award from temporary total disability to permanent disability. Plaintiff was not required to stipulate to the change and, while his injured right knee had reached maximum medical improvement, there was medical testimony that he was not at maximum medical improvement for all of his injury-related conditions, including his other knee.

2. Workers' Compensation— attorney fees—motion to alter prior award—no reasonable grounds

The Industrial Commission did not abuse its discretion by awarding plaintiff attorney fees on defendant's motion to change a prior award of benefits where defendants did not have reasonable grounds for requesting the change and the Commission's inference about defendants' motion was based on reason. N.C.G.S. § 97-88.1.

Appeal by defendants from Opinion and Award entered 1 August 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 April 2008.

The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Paul C. Lawrence, Adam E. Whitten and Margaret M. Kingston, for defendant-appellants.

STROUD, Judge.

The issues presented by defendants are: (1) whether there was a change in condition such that the Industrial Commission should have changed its prior award and declared plaintiff to be permanently disabled under N.C. Gen. Stat. § 97-29, and (2) whether the award of attorney's fees under N.C. Gen. Stat. § 97-88.1 was appropriate. As to the first issue, we conclude that there was competent evidence to support the Industrial Commission's findings of fact, and the Industrial Commission's conclusions of law were supported by its findings of fact and based upon a correct understanding of the law; therefore the Industrial Commission did not err in declining to change its prior award to declare plaintiff permanently disabled as a result of a compensable injury. As to the second issue, we conclude defendants did not have reasonable grounds for requesting a hearing to determine whether plaintiff was permanently disabled; therefore the Industrial Commission did not err in awarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1. Accordingly, for the reasons that follow, we affirm.

I. Factual and Procedural Background

Billy Meares ("plaintiff") was employed by the Dana Corporation ("defendant-employer") for twenty-nine years, from 1972 to 2001. On

26 October 1999, plaintiff suffered an injury to his right knee while moving some boxes at work. On or about 2 October 2001, plaintiff filed Form 18, seeking workers' compensation benefits on account of the knee injury.

In an Opinion and Award issued on 13 July 2004 ("*Meares I*"), the Industrial Commission found that plaintiff "suffered a compensable injury to his right knee" and "plaintiff's right leg problems aggravated or exacerbated plaintiff's left knee arthritis to the extent that it became symptomatic and is in need of treatment." The Commission also found that "[p]laintiff ha[d] not reached maximum medical improvement and [was] in need of further treatment to both legs." Accordingly, the Commission concluded that plaintiff was entitled to continuing temporary total disability benefits and medical treatment for both legs. In the *Meares I* award, the Commission further concluded, *inter alia*, that defendants were "entitled to a credit for amounts paid to plaintiff as a severance package for the period 18 June 2001 through 31 December 2001."

Plaintiff appealed the Commission's award in *Meares I* to this Court, case No. COA04-1196, solely on the issue of defendants' credit for the severance package. *Meares v. Dana Corp./WIX Div.*, 172 N.C. App. 291, 293, 615 S.E.2d 912, 915 (2005). The record on appeal in *Meares I* was filed on 8 September 2004. This Court heard *Meares I* on 24 March 2005, reversing and remanding in a published opinion filed 2 August 2005 on the grounds that the severance package paid to plaintiff was not compensation for his injury and thus defendant-employer was not entitled to a credit for it. *Meares*, 172 N.C. App. at 300, 615 S.E.2d at 919.

While the appeal in *Meares I* was pending, defendants filed Form 33 with the Industrial Commission on 15 September 2004 ("*Meares II*"), which gives rise to the instant appeal, requesting a hearing on the basis that "the Plaintiff is unwilling to stipulate that he [is] permanently and totally disabled as defined by North Carolina General Statute § 97-29." A hearing on *Meares II* was held before Deputy Commissioner Ronnie E. Rowell on 24 October 2005. In an Opinion and Award filed 30 August 2006, Deputy Commissioner Rowell found that plaintiff had not reached maximum medical improvement ("MMI") for all injury-related conditions and concluded on that basis plaintiff was not permanently disabled. Deputy Commissioner Rowell ordered defendants to continue paying plaintiff disability compensation until further order of the Commission and awarded fees to plaintiff's attorney pursuant to N.C. Gen. Stat. § 97-88.1.

Defendants appealed to the Full Commission. The Commission admitted the 16 December 2005 deposition of Dixon Gerber, M.D. as additional evidence and heard defendants' appeal on 14 June 2007. The Commission found as fact that plaintiff "was not at maximum medical improvement for all of his injury-related impairments, specifically the left knee." Accordingly, the Commission concluded that "defendant's [sic] request for the Commission to declare the plaintiff to be permanently disabled is premature." The Commission also concluded that because nothing had changed in regard to plaintiff's condition "the present hearing was unnecessary[.]"[1] The Commission ordered defendants to continue to pay temporary total disability and medical compensation to plaintiff. The Commission also taxed five thousand dollars ($5,000.00) as costs against defendants for reasonable attorney's fees pursuant to N.C. Gen. Stat. § 97-88. The Commission further found that "defendant did not have reasonable grounds for prosecuting this claim[,]" and taxed an additional ten thousand dollars ($10,000.00) as costs against defendants for reasonable attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1. Defendants appeal.

II. Disability Benefits

A. Standard of Review

Appellate review of an award of the Industrial Commission is generally limited to a determination of "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 40, 653 S.E.2d 400, 409 (2007) (citation omitted). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony." *Id.* at 40-41, 653 S.E.2d at 409 (citation and quotation marks omitted). Therefore "[t]he Commission's findings of fact are conclusive on appeal when supported by competent evidence, even if there is evidence to support contrary findings." *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109, 561 S.E.2d 287, 291 (2002).

The Commission's legal conclusions are reviewed *de novo*. *Id.* "[W]here there are sufficient findings of fact based on competent evidence to support the [Commission's] conclusions of law, the [award] will not be disturbed because of other erroneous findings which do

1. This conclusion is labeled as finding of fact number 17. Nevertheless, whether or not there has been a change in condition is a conclusion of law. *Shingleton v. Kobacker Grp.*, 148 N.C. App. 667, 670, 559 S.E.2d 277, 280 (2002).

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). However, "[i]f the conclusions of the Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded . . . ." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). Whether or not "a change of condition pursuant to N.C. Gen. Stat. § 97-47 [has occurred] is a question of law, and thus, is subject to de novo review." *Shingleton v. Kobacker Grp.*, 148 N.C. App. 667, 670, 559 S.E.2d 277, 280 (2002) (citation and quotation marks omitted).

B. Analysis

[1] Defendants contend that the evidence that plaintiff has been *permanently* and totally disabled since his right knee replacement surgery in 2001 is plenary, therefore the Commission erred in concluding plaintiff was *temporarily* totally disabled. Defendants, citing *Knight v. Wal-Mart Stores, Inc*, 149 N.C. App. 1, 562 S.E.2d 434 (2002), *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003), argue plaintiff sought benefits under section 97-29, not section 97-31, therefore whether or not plaintiff has reached maximum medical improvement for all injury-related conditions is irrelevant. Defendants reason from this premise that the Commission found the facts under a misapprehension of law, and therefore, the case must be remanded.

As a threshold matter, we must determine if the facts before the Commission supported the reexamination and alteration of its prior award. The reopening of a workers' compensation case subsequent to a prior award by the Industrial Commission is governed by N.C. Gen. Stat. § 97-47, which states in pertinent part:

> Upon its own motion or upon the application of any party in interest on the grounds of a *change in condition*, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article . . . .

N.C. Gen. Stat. § 97-47 (2005) (emphasis added); *Shingleton*, 148 N.C. App. at 674, 559 S.E.2d at 282 (concluding that no change in condition had occurred when the plaintiff presented no medical evidence of a change in circumstances and the "plaintiff's testimony about her physical restrictions [was] virtually identical to that of the [earlier] hearing"). "In all instances the burden is on the party seeking the

modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify." *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996).

In applying N.C. Gen. Stat. § 97-47, the North Carolina Supreme Court has stated:

> Change of condition refers to conditions different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition. [T]he change must be actual, and not a mere change of opinion with respect to a pre-existing condition. Change of condition is a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings.

McLean v. Roadway Express, 307 N.C. 99, 103-04, 296 S.E.2d 456, 459 (1982) (citations, quotation marks and ellipses omitted) (an increase in the plaintiff's disability rating following surgery is a change in condition within the meaning of N.C. Gen. Stat. § 97-47). Stated negatively, "[c]hanges of condition occurring during the healing period and prior to the time of maximum recovery and the permanent disability, if any, found to exist at the end of the period of healing are not changes of condition within the meaning of G.S. 97-47." *Pratt v. Central Upholstery Co.*, 252 N.C. 716, 722, 115 S.E.2d 27, 34 (1960). Furthermore, this Court has held that "a mere change of the doctor's opinion with respect to claimant's preexisting condition does not constitute a change of condition required by G.S. 97-47." *Allen v. Roberts Elec. Contr'rs.*, 143 N.C. App. 55, 62, 546 S.E.2d 133, 138 (2001) (citation, quotation marks and brackets omitted).

We first note that defendants' Form 33, which requested reconsideration by the Commission, did not allege any change of plaintiff's medical condition. Defendants' Form 33 requested a hearing solely on the grounds that "the Plaintiff is unwilling to stipulate that he [is] permanently and totally disabled as defined by North Carolina General Statute § 97-29."[2] Nevertheless, at the hearing before the Commission, defendants offered into evidence a deposition taken on 16

2. Defendants have not cited any statute or case that would require any party to a workers' compensation case to *stipulate* to any fact or legal conclusion, and we are unaware of any such rule. Stipulations are by definition voluntary and not mandatory. *See Black's Law Dictionary* 1455 (8th ed. 2004) (defining stipulation as "[a] voluntary agreement between opposing parties concerning some relevant point[.]").

December 2005 from Dr. Dixon Gerber, plaintiff's treating physician, which they contend is "new evidence."

Defendants argue that the testimony of Dr. Gerber supports their assertion that conditions had changed since the Commission's 13 June 2004 Opinion and Award in *Meares I*. Specifically, they cite Dr. Gerber's testimony that "I do not see him returning to that job ever, whether he has . . . the left knee done or not[,]" and Dr. Gerber's agreement with the statement that "[e]ven if [plaintiff] has the additional [left] knee replacement, it's really not going to change his status of being disabled as far as returning to work[.]"

However, in finding plaintiff has yet to reach maximum medical improvement for all injury-related conditions, the Commission also cited Dr. Gerber's 16 December 2005 deposition testimony. The Commission specifically found that "Dr. Gerber was of the opinion, and the Full Commission finds as fact, that the plaintiff was not at maximum medical improvement for all of his injury-related impairments, specifically the left knee." This finding is supported by Dr. Gerber's testimony, which stated that plaintiff "has the *same* degenerative arthritic condition in his left knee that he had in his right knee prior to his [compensable] injury[,]" and that "you can't say he's at maximum medical improvement for his left knee because he *still* has an arthritic knee." (Emphasis added.) The Commission's findings in turn support its conclusion of law: "There is no evidence suggesting that the plaintiff has ever reached maximum medical improvement for all of his injury-related conditions, and in particular his left knee. Since nothing has changed in this regard since the Full Commission's Opinion and Award on July 13, 2004, the present hearing was unnecessary . . . ."

Defendants also argue that the fact that plaintiff has reached MMI in his right knee is a substantial change which merits review and alteration of the *Meares I* Opinion and Award. The Commission's finding that "plaintiff ha[d] reached maximum medical improvement with respect to his right knee injury" is uncontroverted. However, merely reaching MMI with respect to plaintiff's right knee is not a substantial change which can sustain alteration of *Meares I*, (1) because the incapacity is "of the same kind and character" as the incapacity for which plaintiff was previously awarded benefits, (2) because there has been no change in plaintiff's "physical capacity to earn," *McLean*, 307 N.C. at 103-04, 296 S.E.2d at 459, and (3) because it occurred "during the healing period and prior to the time of maximum recovery[,]" *Pratt*, 252 N.C. at 722, 115 S.E.2d at 34. In sum, defendants have offered no

evidence of any change in plaintiff's condition which would support a reopening of the case. We conclude therefore that the Commission correctly determined that defendants had not met their burden of "prov[ing] the existence of the new condition," *Blair*, 124 N.C. App. at 423, 477 S.E.2d at 192, and accordingly denied defendants' request to change its previous award.

III. Attorney's Fees Pursuant to N.C. Gen. Stat. § 97-88.1

[2] Defendants contend they had reasonable grounds for requesting a hearing regarding the permanence of plaintiff's disability, therefore the Commission's award of attorney fees under N.C. Gen. Stat. § 97-88.1 was an abuse of discretion. We disagree.

N.C. Gen. Stat. § 97-88.1 states:

> If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

N.C. Gen. Stat. § 97-88.1 (2005).

The Commission concluded defendants did not have reasonable grounds for prosecuting the claim *sub judice* after finding:

> 17. . . . Since nothing has changed in [] regard [to maximum medical improvement for all of plaintiff's injury conditions] since the Full Commission's Opinion and Award on July 13, 2004, the present hearing was unnecessary and did not involve an issue that was ripe for adjudication.

Review of an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 requires a two-part analysis. First, "[w]hether the [party] had a reasonable ground to bring a hearing is reviewable by this Court *de novo*." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50-51, 464 S.E.2d 481, 484 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). For a reviewing court to determine whether a defendant had reasonable ground to bring a hearing, it must consider the evidence introduced at the hearing. *Ruggery v. N.C. Dep't of Correction*, 135 N.C. App. 270, 274, 520 S.E.2d 77, 80 (1999). The determination of reasonable grounds is not whether the party prevails in its claim, but whether the claim "is based on reason rather than stubborn, unfounded litigiousness." *Ruggery*, 135 N.C. App. at 274, 520 S.E.2d at 80 (citation and quotation marks omitted).

If this Court concludes that the party requesting the hearing lacked reasonable grounds, "[t]he decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman*, 121 N.C. App. at 54-55, 464 S.E.2d at 486. "An abuse of discretion results only where a decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Bryson v. Phil Cline Trucking*, 150 N.C. App. 653, 656, 564 S.E.2d 585, 587 (2002) (citation and quotation marks omitted) (affirming the Industrial Commission's award of attorney's fees as a punitive sanction for unfounded litigiousness). On the other hand, if the party requesting the hearing had reasonable grounds to request the hearing, any award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 will be reversed by this Court. *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225-26, 502 S.E.2d 419, 423 (1998).

We concluded *supra* that defendants did not introduce any evidence which would prove the existence of a change in condition and thereby sustain its request for alteration of *Meares I*. Therefore, we also conclude that defendants lacked reasonable grounds to litigate the permanence of plaintiff's disability. Because defendants lacked reasonable grounds to litigate this case, the Commission's decision to tax attorney's fees as costs against defendants "will not be disturbed absent an abuse of discretion." *Troutman*, 121 N.C. App. at 55, 464 S.E.2d at 486.

The Commission found as fact:

> 18. . . . One apparent reason why the defendant would ask the Commission to declare the plaintiff to be permanently and totally disabled is to expedite the running of the limitations period in N.C. Gen. Stat. §97-38[3] with a 'final determination' of the plaintiff's disability in order to deprive the plaintiff's dependents of compensation under that statute[.]"

(Footnote added.)

---

3. N.C. Gen. Stat. § 97-38 states in pertinent part:

> If death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 2/3%) of the average weekly wages of the deceased employee at the time of the accident[.]

N.C. Gen. Stat. § 97-38 (2005).

Dr. Gerber testified that plaintiff had developed complications from his right knee replacement surgery, including deep venous thrombosis and a pulmonary embolus and was at risk for developing the same conditions if he had replacement surgery on his left knee. Dr. Gerber also testified that a pulmonary embolus is a "potentially life threatening complication of surgery." Thus, the evidence before the Commission indicated that if plaintiff were to have replacement surgery on his left knee and he again developed serious complications, it would be foreseeable that plaintiff might die as a proximate result of his compensable injury. Therefore, we conclude the Commission's inference as to defendants' motives in asking the Commission to declare plaintiff permanently disabled was based on reason. In fact, it is somewhat unusual for the *defendants* in a workers' compensation case to request that an employee be declared permanently and totally disabled—normally the defendants oppose such a determination. Accordingly, we conclude that the Commission did not abuse its discretion when it taxed attorney's fees against defendants as costs pursuant to N.C. Gen. Stat. § 97-88.1.

IV. Conclusion

Because defendants submitted no evidence of a change in plaintiff's condition, we conclude the Commission did not err when it did not alter its previous award of benefits to plaintiff to declare him permanently disabled. We also conclude that the Commission did not abuse its discretion in awarding plaintiff's attorney fees pursuant to N.C. Gen. Stat. § 97-88.1, because defendants did not have reasonable grounds for requesting the hearing on the permanency of plaintiff's disability and because the Commission's inference as to defendants' motive for requesting a hearing was based on reason. Accordingly, the award of the Industrial Commission is affirmed.

Affirmed.

Judges HUNTER and ELMORE concur.

CARL W. MEARES, JR., PLAINTIFF v. TOWN OF BEAUFORT AND TOWN OF BEAUFORT HISTORIC PRESERVATION COMMISSION, DEFENDANTS

No. COA07-889

(Filed 7 October 2008)

1. Appeal and Error— mootness—challenge to historic preservation guideline—guideline eliminated

The issue of whether a historic preservation guideline was void did not become moot during the appeal even though the guideline ceased to exist. Plaintiff was entitled to rely on the language of the guidelines at the time he applied for his Certificate of Appropriateness.

2. Zoning— historic preservation—authority delegated by legislature—guideline more restrictive

A historic preservation guideline was void because it was more restrictive than the authority delegated by the General Assembly. The guideline referred to incongruence with a historically significant structure on the site rather than a landmark or district as stated in N.C.G.S. § 160A-400.9(a).

3. Declaratory Judgments— historic preservation guidelines and zoning setbacks—justiciable

A declaratory judgment action challenging a historic preservation guideline and the denial of a Certificate of Appropriateness (COA) was justiciable where defendants argued that plaintiff's design did not comply with the zoning setback requirements. The issuance of the COA was not dependent on the issuance of a zoning certificate.

4. Zoning— historic preservation—judicial review—statute of limitations for zoning ordinances

Zoning statutes do not limit how an applicant for a historic district Certificate of Appropriateness may seek judicial review, and the statute of limitations for challenging zoning ordinances did not block a challenge to a historic preservation guideline.

Appeal by defendants from order entered 19 April 2007 by Judge John E. Nobles in Carteret County Superior Court. Heard in the Court of Appeals 20 February 2008.

Poyner & Spruill, LLP, by Robin Tatum Currin, for plaintiff-appellee.

Kirkman, Whitford, Brady & Berryman, PA, by Neil B. Whitford, for defendant-appellants.

BRYANT, Judge.

The Town of Beaufort and Town of Beaufort Historic Preservation Commission (HPC) (collectively defendants) appeal from an order entered 19 April 2007[1] which granted Plaintiff Carl W. Meares, Jr.'s motion for summary judgment, denied defendants' motion for summary judgment, and among other things, declared unlawful and void as a matter of law the Town of Beaufort Historic District Design Guideline 8. For the reasons stated herein we affirm.

In 2000 and 2001, Meares sought to build a combination commercial and residential structure and met with State and Town of Beaufort officials to determine the type of regulations and requirements applicable to his plan. Based on a review of State statutes and Town of Beaufort ordinances and regulations, and based on conversations with State officials and representatives of the Town of Beaufort, Meares purchased lots 324, 326, and 328 on Front Street within Beaufort's Historic Overlay District for a cost of $595,000.

In November 2001, Meares met with Linda Dark, Chairperson of Beaufort's Historic Preservation Commission (HPC), to discuss his commercial and residential project. Pursuant to the Town of Beaufort Zoning Ordinance, the function of the HPC is to "review and pass upon the appropriateness of the construction, reconstruction, alteration, restoration, moving or demolition of any buildings, structures, appurtenant fixtures, outdoor advertising signs, or other exterior features in the historic district." Beaufort, N.C., Zoning Ordinance § 13.6(b) (2006). "Exterior features" include "color, architectural style, general design, and general arrangement of the exterior of a building or other structure, including the kind and texture of the building material, the size and scale of the building, and the type and style of all windows, doors, light fixtures, signs, and other appurtenant features." *Id.* at § 13.4. To aid in its function, the HPC established guidelines for the construction or external alteration of structures within the historic district. According to the Beaufort Historic District Guidelines, a COA "indicat[es] that a proposed exterior

1. See companion case Meares v. Town of Beaufort, COA 07-882, referred to as "Meares (II)."

change has been reviewed and approved by the [HPC] for consistency with established historic district guidelines."

At the November 2001 meeting, Dark gave Meares a copy of the Historic District Design Guidelines referencing a thirty-five foot height limitation among other standards for new construction and recommended that Meares work with John Wood, a Preservation Specialist from the North Carolina Department of Cultural Resources, and an architect of Wood's choice before submitting a design application to the HPC. Meares complied, and in October 2003, Meares provided Dark with sketches of his proposed design which illustrated a three story building.

On 2 December 2003, the HPC proposed a "Technical Correction" to the Historic District Design Guidelines. The HPC published no notice of the proposed technical correction to the public. The proposed technical correction would revise the design guidelines in part as follows:

Page 59 of the Guidelines—Building Height/Scale

8) The vistas of Beaufort's waterfront play a crucial role in defining the character of Beaufort's Historic District. Therefore, under no circumstances shall any proposed building visually encroach in height or scale upon the remaining public landscapes of Beaufort's Historic District . . . . These include . . . views of the historic district, particularly Front Street . . . unless it can be demonstrated that an historically significant building previously existed on the site of the proposed building. The new building shall be consistent in height and scale with the pre-existing historic structure.

The technical correction was unanimously approved 2 December 2003 and became Historic District Design Guideline 8.

In July 2004, the HPC conducted a pre-application meeting to review Meares' design. Meares' design illustrated a three story building. Dark raised the height of the building as a concern and specifically referenced Guideline 8. Despite these comments, Meares submitted his design in an application for a COA.

In October 2004, the HPC conducted a hearing on Meares' COA application for a three-story commercial and residential structure. Relying in part on Guideline 8, the HPC unanimously denied the application. Meares appealed to the Beaufort Board of Adjustment, where

the HPC's decision was vacated and a new hearing on Meares' application was ordered. However, before the new hearing could take place, Meares filed a civil action against defendants in Carteret County Superior Court.

Meares sought a declaratory judgment decreeing that the technical correction to the Beaufort design guidelines was void and unlawful, or that Meares had acquired common law vested rights to construct and occupy the commercial and residential structure, thereby precluding the application of the technical correction to his project. Meares and defendants filed cross motions for summary judgment. The trial court granted Meares' motion, denied defendants', and entered a declaratory judgment that stated (1) "[t]he Technical Correction adopted by the HPC and included in the section of the Beaufort Historic District Design Guidelines application to New Construction as paragraph 8, or Guideline 8, . . . is unlawful and void, as a matter of law," and (2) "even if Guideline 8 of the Technical Correction was not determined to be unlawful and void, [Meares had] acquired common law vested rights, as a matter of law, to develop the project on his property . . . ." The trial court ordered Guideline 8 stricken from the Beaufort Historic District Design Guidelines in its entirety. Defendants appeal.

On appeal, defendants raise the following five issues: whether the trial court committed reversible error by ruling (I) & (IV) Guideline 8 is unlawful and void as a matter of law; (II) & (V) Meares acquired common law vested rights to develop a proposed structure; and (III) Meares' action is justiciable.

[1] After oral argument, defendants filed notice with this Court that the Design Guidelines for the Beaufort Historic District & Landmarks had been revised and Guideline 8, as stated in the previous design guidelines, no longer existed.[2] Defendants contend there is no longer

---

2. Design Guidelines for the Beaufort Historic District & Landmarks, 1994, revised 2008, Chapter 5: Protecting Beaufort's Historic Vistas, p. 36.

> [T]he HPC has developed the following policy regarding new construction including additions to existing buildings in the Beaufort Historic District.
>
> > The vistas of Beaufort's waterfront play a crucial role in defining the character of Beaufort's Historic District. These include . . . views of the Historic District, particularly Front Street, from the water. An important factor in evaluating [COAs] for new construction and additions to existing structures will be the impact, from both the land and water on the vistas of Beaufort's waterfront. Generally, new construction, or additions to existing structures, that encroaches into the vistas of Beaufort's waterfront should be permitted

a live controversy as to whether Guideline 8 is unlawful and void as a matter of law. *See In re Appeal from CAMA Minor Dev. Permit*, 82 N.C. App. 32, 42, 345 S.E.2d 699, 705 (1986) ("[w]henever, during the course of litigation it develops that the relief sought has been granted or that questions originally in controversy between the parties are no longer at issue, the [issue] should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.") (citation omitted). We disagree with defendants' contention.

We note that Meares' complaint, filed in Carteret County Superior Court, arose out of facts involving his initial pursuit of a COA from Beaufort's HPC. Because the Board of Adjustment has ordered a new hearing on Meares' initial COA application and the HPC's revision to the Design Guidelines for the Beaufort Historic District & Landmarks does not change Meares' reliance on the guidelines in effect at the time he submitted a COA application, we hold Meares is entitled to rely on the language of the design guidelines in effect at the time he applied for the COA. *See Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 352, 578 S.E.2d 688, 690 (2003) (where an amended ordinance did not give the petitioner the relief he sought or change the petitioner's reliance on the prior ordinance, the petitioner's claim and injury remained viable, and the "[p]etitioner was entitled to rely upon the language of the ordinance in effect at the time he applied for the permit."). Accordingly, the issue of whether Guideline 8, as it existed at the time Meares filed his COA application, is void as a matter of law, is not moot.

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 a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2007). On appeal, "the Court will review the trial court's order allowing summary judgment de novo." *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citation omitted).

---

only to the extent necessary to allow reasonable use of the property. In weighing the impact of new construction and additions to existing structures, the commission should consider the traditional setting or context of the subject property relating to the vistas of Beaufort's waterfront.

Arguments

I & IV

[2] Defendants first argue the trial court committed reversible error in ruling that the HPC's Guideline 8 is unlawful and void as a matter of law. Defendants argue their authority to establish Guideline 8 of the Beaufort Historic District Design Guidelines is conferred by the North Carolina General Statutes. We disagree.

Under North Carolina General Statute section 160A-400.9, our General Assembly requires that "[p]rior to any action to enforce a landmark or historic district ordinance, the [preservation] commission shall . . . prepare and adopt principles and guidelines not inconsistent with this Part for new construction . . . ." N.C. Gen. Stat. § 160A-400.9(c) (2003). Under subsection (a), the North Carolina General Assembly requires that applications for COAs be approved by a preservation commission before structures can be erected in historic districts, but "the commission . . . shall take no action under this section except to prevent the construction . . . which would be *incongruous with the special character of the landmark or district*." N.C. Gen. Stat. § 160A-400.9(a) (2003) (emphasis added).

In *A-S-P Associates v. Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979), the plaintiffs brought an action challenging a city ordinance creating a historic district on the grounds that the General Assembly impermissibly delegated legislative power to the Historic District Commission. *Id.* Our Supreme Court reasoned that the delegation of the State's police power to municipalities with regard to local problems, such as zoning, has long been an accepted practice, but that delegation with regard to historic district preservation commissions is not unlimited. *Id.* at 218, 258 S.E.2d at 451.

Under N.C.G.S. § 160A-400.9(a), the discretion of the preservation commission is limited: "the commission . . . shall take no action under this section except to prevent the construction . . . which would be *incongruous with the special character of the landmark or district*." *Id.* (emphasis added). In *A-S-P Associates*, the Court interpreted this phrase to be "a contextual standard." *A-S-P Associates*, 298 N.C. at 222, 258 S.E.2d at 454. "In this instance the standard of 'incongruity' must derive its meaning, if any, from the total physical environment of the Historic District." *Id.*

Here, Guideline 8 imposes the requirement that new structures not be incongruent with a historically significant structure which

existed on the *site* of the proposed structure, rather than a *landmark or district* as stated in N.C.G.S. § 160A-400.9(a). Thus, Guideline 8 is more restrictive than is allowed pursuant to the authority delegated by the General Assembly. Accordingly, we hold the trial court did not err in ruling the HPC's Guideline to be unlawful and void as a matter of law.

II & V

Defendants next argue the trial court erred by ruling that Meares acquired common law vested rights to develop the project on his property as a matter of law. Because we have affirmed the ruling of the trial court that Guideline 8 is unlawful and void as a matter of law, we do not need to address defendant's alternative argument.

III

Defendants next argue that the trial court committed reversible error by denying defendants' motion for summary judgment on the grounds that Meares' action is not justiciable. Defendants argue that (A) Meares' design does not meet the criteria of Beaufort's zoning ordinance and as such is not capable of being built as designed and until such a design is submitted no case or controversy exists. Defendants also argue that (B) the validity of Guideline 8 cannot be challenged because of its similarity in effect to a zoning ordinance and under N.C. Gen. Stat. § 160A-364.1 the statute of limitations for challenging the enactment of such a zoning ordinance has expired.

A

[3] Defendants argue that Meares' action is not justiciable because Meares failed to submit a design which complies with the setback requirements of Beaufort's zoning ordinance and thus cannot be built as designed. Defendants argue that until Meares submits a design capable of being built there is no controversy in the denial of a COA. We disagree.

Under the Town of Beaufort Zoning Ordinance, section 16.1, "[n]o building or structure or any part thereof shall be erected or structurally altered until a zoning certificate is issued by a Zoning Administrator." Beaufort, N.C., Zoning Ordinance § 16.1 (2006). Under North Carolina General Statute 160A-388(b), "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 [the zoning] ordinance." N.C. Gen. Stat. § 160A-388(b) (2006).

Under Beaufort's zoning ordinance, section 14.1, a "nonconforming project" is defined as "[a]ny structure, development, or undertaking that is incomplete at the effective date of this ordinance and would be inconsistent with any regulation applicable to the district in which it is located if completed as proposed or planned." Beaufort, N.C., Zoning Ordinance § 14.1 (2006). Under section 14.8, "work on nonconforming projects may begin . . . only pursuant to a variance issued by the Board of Adjustment." *Id.* at § 14.8(a). Thus, if a zoning administrator denies a zoning certificate on the grounds a project does not conform to zoning setback requirements, the Board of Adjustment may issue a variance allowing an exception for the project's nonconformity.

Defendants do not allege and, after our review of the Beaufort zoning ordinance, we do not hold the issuance of a COA by the HPC[3] is dependent upon the issuance of a zoning certificate.[4] Thus, the controversy surrounding the HPC's denial of Meares' COA application remains.

B

[4] Defendants further argue that the validity of Guideline 8 cannot be challenged because if the guideline is subject to the same review standards as a zoning ordinance then under N.C. Gen. Stat. § 160A-364.1 the statute of limitations for challenging the enactment of this guideline has expired.

In *Hemphill-Nolan v. Town of Weddington*, 153 N.C. App. 144, 568 S.E.2d 887 (2002), the town board of adjustment denied a petitioner a variance from a subdivision ordinance. *Id.* at 145, 568 S.E.2d at 887. The petitioner filed a petition for *writ of certiorari* in superior court. *Id.* at 145, 153 S.E.2d at 888. The superior court dismissed the petition for failure to comply with the thirty-day time limit for filing appeals from the board of adjustment as established by N.C. Gen.

3. Zoning Ordinance of the Town of Beaufort, North Carolina. Section 13.6. Powers and Duties of the Historic Preservation Commission. Subsection (b). "It shall be the function of the [HPC] to review and pass upon the appropriateness of the construction, reconstruction, alteration, restoration, moving or demolition of any buildings, structures, appurtenant fixtures, outdoor advertising signs, or other exterior features in the historic district. . . ." Subsection (c). "It shall be the function of the [HPC] to review and pass upon the appropriateness of exterior features of buildings, structures and properties within the 'Historic District.' "

4. Zoning Ordinance of the Town of Beaufort, North Carolina. Section 16.1. Zoning Certificate. "No building or structure or any part thereof shall be erected or structurally altered until a zoning certificate is issued by the Zoning Administrator."

Stat. § 160A-388(e) (2001) ("[e]very decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed . . . within 30 days after the decision of the board is filed in such office as the ordinance specifies . . . ."). On appeal, this Court reasoned that the N.C.G.S. § 160A-388(e) did not apply to subdivision ordinances. "Although this Court has recognized that the legal principles involved in review of zoning applications are similar and relevant to review of the denial of subdivision applications, we have also stated that zoning statutes do not limit how a subdivision applicant may seek judicial review." *Hemphill-Nolan*, 153 N.C. App. at 147, 568 S.E.2d at 889 (citation and quotations omitted).

Similarly, here, while the legal principles involved in the review of zoning issues are relevant as to a review of design guidelines for new structures erected within Beaufort's Historic District, the zoning statutes do not limit how an applicant for a COA may seek judicial review. Accordingly, defendants' assignment of error is overruled.

Affirmed.

Judges HUNTER and STROUD concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. HARRY LEE BOWMAN, DEFENDANT

No. COA07-1518

(Filed 7 October 2008)

1. Search and Seizure— probable cause—collective knowledge of officers

The collective knowledge of a group of law enforcement officers may be imputed to the officer who initiates a vehicle search when the officer initiating the search does not testify and there is no evidence that the officer initiating the search was instructed to do so by another officer who had the requisite probable cause to search.

2. Criminal Law— competency to stand trial—waiver of hearing

Defendant waived his statutory right to a hearing on his mental competency to stand trial by his failure to assert that right at trial. N.C.G.S. § 15A-1001(a); N.C.G.S. § 15A-1002(a) and (b).

3. Criminal Law— competency to stand trial—court's duty to conduct hearing sua sponte

The trial court is not required to conduct a hearing sua sponte on defendant's mental competency to stand trial when there is no substantial evidence that defendant is incompetent and any evidence of incompetency is outweighed by evidence of defendant's competency.

4. Criminal Law— competency to stand trial—hearing by court sua sponte not required

A statement by defendant's wife that defendant doesn't have the capability of making a decision due to his cognitive mind brain injury did not require the trial court to order a competency hearing sua sponte where the wife's statement was unsworn, her potential for bias was self-evident, and there was substantial evidence that defendant was competent to stand trial, including his attorney's statement that defendant was able to assist in his defense, defendant's lucid and coherent testimony the next day on both direct and cross-examination, and defendant's testimony that he understood the habitual felon charge against him and his waiver of his right to have the jury determine that issue.

Appeal by defendant from judgment entered on or about 30 August 2007 by Judge Howard E. Manning, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 9 June 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General, J. Allen Jernigan, for the State.

Robert A. Hassell and Dawn D. Johnson for defendant-appellant.

STROUD, Judge.

This appeal presents two questions for review: (1) whether the collective knowledge of a group of law enforcement officers may be imputed to the officer who initiates a vehicle search when the officer initiating the search does not testify and there is no evidence that

the officer initiating the search was instructed to do so by another officer who had requisite probable cause to search; and (2) whether the trial court must conduct a competency hearing *sua sponte* on defendant's mental competence when there is no substantial evidence that defendant is incompetent and any evidence of incompetence is outweighed by evidence of defendant's competence. We answer the first question, which appears to be a legal question of first impression in North Carolina, affirmatively and the second, which is essentially a factual question based on settled law, negatively. Accordingly, for the reasons which follow, we find no error in defendant's convictions and sentence.

I. Factual Background

On 17 July 2003, a law enforcement team led by Alamance County Sheriff Terry Johnson ("Sheriff Johnson") and including Alamance County Deputies Ricky Putnam ("Deputy Putnam") and Jeremiah Richardson ("Deputy Richardson") and Graham Police Officer Clint Williams ("Officer Williams") conducted surveillance at the BB&T bank in Graham, Alamance County, after learning that Fred Swain ("Swain") planned to sell a controlled substance in the parking lot. Swain arrived around 10:25 a.m., in a green Pontiac Firebird driven by defendant Harry Lee Bowman, at the Wachovia bank parking lot next to the BB&T parking lot. Deputy Putnam and Deputy Richardson watched Swain exit the vehicle and walk to the adjacent BB&T bank. Deputy Putnam approached Swain in the BB&T bank parking lot. Swain had 100 pills of the controlled substance Oxycodone on his person.

Sheriff Johnson radioed other officers participating in the operation to block in the Firebird automobile to prevent its exit. After taking Swain into custody, Deputy Putnam proceeded to the Firebird where a canine handled by Officer Williams had already alerted on a travel bag in the backseat. A search of the travel bag revealed a shaving kit which contained, *inter alia*, medications prescribed to defendant, defendant's credit cards, and a shaving cream bottle with a false bottom. The shaving cream bottle contained marijuana and cocaine. Defendant was arrested.

On or about 18 August 2003, the Alamance County Grand Jury indicted defendant for possession of cocaine, conspiracy to sell a controlled substance, keeping and/or maintaining a vehicle for keeping and/or selling the controlled substance Oxycodone, misdemeanor possession of marijuana, and possession of drug paraphernalia. On

28 March 2005, a superseding indictment charged defendant with possession of cocaine, conspiracy to sell Oxycodone, and conspiracy to deliver Oxycodone. The Grand Jury returned two additional superseding indictments on 13 November 2006. The first charged defendant with felony possession of cocaine and conspiracy to sell Oxycodone; the second charged defendant with keeping and/or maintaining a vehicle for the use, storage, and/or sale of Oxycodone, possession of up to one-half ounce of marijuana, and possession of drug paraphernalia. Defendant was also indicted for attaining the status of habitual felon.

On 27 August 2007, defendant moved to suppress all evidence gathered during the search on 17 July 2003. The trial court held a hearing and denied defendant's motion by order rendered in open court.

Defendant was tried on 28 August 2007 in Superior Court, Alamance County. Prior to jury selection, the State dismissed the charges of conspiracy and keeping and/or maintaining a vehicle for the use, storage, and/or sale of a controlled substance. The trial court dismissed the paraphernalia charge upon defendant's motion at the close of the State's evidence. The jury returned verdicts of guilty for one count of possession of cocaine and one count of possession of marijuana. Defendant stipulated that his prior criminal record met the statutory requirements for habitual felon status and waived his right to a jury trial on that issue. On 30 August 2007, the trial court found that a mitigated sentence was justified and accordingly sentenced defendant to a minimum of ninety months and a maximum of one hundred seventeen months imprisonment. On 31 October 2007, the trial court entered a written order denying defendant's motion to suppress. Defendant appeals.

II. The Motion to Suppress

[1] In his first assignment of error, defendant argues that the trial court erred by denying his motion to suppress the evidence of cocaine and marijuana on the grounds that the warrantless search of his vehicle violated his Fourth Amendment rights. We disagree.

A. Standard of Review

Appellate courts give deference to the findings made by the trial court on a motion to suppress evidence because "the trial judge . . . is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses." *State*

v. Hughes, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000). Therefore, "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) (citation and quotation marks omitted). "Although the trial court's findings of fact are generally deemed conclusive where supported by competent evidence, a trial court's conclusions of law regarding whether the officer had reasonable suspicion or probable cause to detain a defendant is reviewable *de novo*." *State v. Young*, 148 N.C. App. 462, 466, 559 S.E.2d 814, 818 (citation, quotation marks and brackets omitted), *disc. review denied and appeal dismissed*, 355 N.C. 500, 564 S.E.2d 233 (2002). In addition to being supported by the findings of fact, the trial court's "conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Parker*, 183 N.C. App. 1, 7, 644 S.E.2d 235, 240 (2007) (citation and quotation marks omitted).

B. Analysis

Defendant concedes that the trial court's findings of fact were supported by the evidence, but argues that the findings did not support the trial court's conclusions of law. Specifically, defendant argues:

> There is no finding or testimony that Officer Williams, when he commenced the vehicle search, knew or had been advised that Swain and the owner of Poppy's Store had previously arranged a drug deal. Nor was there other evidence which would allow the judge to reasonably infer that Officer Williams was instructed to search the vehicle by another officer who did have the requisite probable cause to search.
>
> . . . .
>
> [T]he total absence of facts . . . as to the basis for Officer Williams' own decision to search the vehicle can only lead to the conclusion that the State failed to prove that Officer Williams had a sufficient basis . . . for concluding that he had probable cause for the search.

We disagree with defendant.

"A search of a motor vehicle which is on a public roadway or in a public vehicular area is not in violation of the fourth amendment if it is based on probable cause, even though a warrant has not

been obtained." *State v. Isleib*, 319 N.C. 634, 638, 356 S.E.2d 573, 576 (1987) (finding probable cause to search a vehicle existed when a confidential informant described the appearance, route, passengers, and contraband inside the vehicle, and named the driver by her first name) (citing *United States v. Ross*, 456 U.S. 798, 809, 72 L. Ed. 2d 572, 584 [1982]). "Probable cause exists if the facts and circumstances within the knowledge of the officer were sufficient to warrant a prudent man in believing that the suspect had committed or was committing the offense." *State v. Hernandez*, 170 N.C. App. 299, 306, 612 S.E.2d 420, 425 (2005) (citation, quotation marks, brackets and parentheses omitted).

Probable cause need not necessarily arise within the knowledge of the arresting officer because "[p]robable cause . . . can rest upon the *collective* knowledge of the police, rather than solely on that of the officer who actually makes the arrest." *U.S. v. Pitt*, 382 F.2d 322, 324 (4th Cir. 1967) (emphasis in original). Stated another way, "when a group of agents in close communication with one another determines that it is proper to arrest an individual, the knowledge of the group that made the decision may be considered in determining probable cause, not just the knowledge of the individual officer who physically effected the arrest." *U.S. v. Laughman*, 618 F.2d 1067, 1072 n.3 (4th Cir. 1980), *cert. denied*, 447 U.S. 925, 65 L. Ed. 2d 1117 (1980).

At the hearing on the suppression motion *sub judice*, the trial court found the following undisputed facts from the testimony of Deputy Putnam and Deputy Richardson:

> 8. On [17 July 2003 Deputy] Putnam was in the village of Saxapahaw at a market called Poppy's Store in response to a tip that an individual named Jasper [sic] Swain would be in the store trying to sell drugs to the owner of the store.
>
> . . . .
>
> 10. Around 8 am, Fred Swain entered the store, came straight to the counter without stopping, and tried to sell pills to the owner.
>
> 11. The owner [agreed to] meet [Swain] at the BB&T bank in Graham, NC approximately an hour and a half later.
>
> . . . .
>
> 13. Deputies Putnam and Richardson immediately contacted the Sheriff and other team members. Surveillance was set up at the BB&T bank in Graham.

14. Officers were set up in the Suntrust Bank parking lot next to the BB&T, inside the bank itself, and at other locations.

15. Approximately 10:30 am a green in color Pontic [sic] Firebird convertible drove by the BB&T parking lot on Main [S]treet and pulled into the Wachovia Bank parking lot next door.

. . . .

18. Immediately after the [F]irebird backed in [to a parking spot], Jasper [sic] Swain got out of the passenger side, walked through a row of bushes in a curbed area separating the two parking lots, and approached the owner of Poppy's Store who was standing where he agreed . . . at the morning meeting with Mr. Swain.

. . . .

20. Mr. Swain had 100 oxycotin pills in a plastic bag on his person, the same controlled substance he had agreed to sell to the store owner.

21. At the same time, Sheriff Terry Johnson radioed [] another officer to pull in front of the [F]irebird until the "takedown" had been done.

. . . .

23. At the time Deputy Putnam approached the Firebird, a K-9 officer had already discovered a black leather shaving kit in the rear seat of the [F]irebird. The kit had a Barbasol saving cream can with a false bottom. There appeared to be marijuana and cocaine inside the can.

These facts support the trial court's conclusion that law enforcement had probable cause to search the Firebird in which defendant's cocaine and marijuana were found. The positive identification of Swain as the man who had tried to sell pills to the owner of Poppy's Store combined with his arrival at the appointed place "were sufficient to warrant a prudent man in believing that [Swain] had committed or was committing the offense." *Hernandez*, 170 N.C. App. at 306, 612 S.E.2d at 425. Thus, the team of law enforcement officers involved in the operation had probable cause to search the car in which Swain was riding and in which defendant and his cocaine and marijuana happened to be present. The fact that the officer who actually initiated the search of the vehicle and the officer who ordered

defendant's arrest did not testify at the suppression hearing is unavailing because the knowledge of Deputy Putnam and Deputy Richardson as part of the team investigating Swain's illegal activity was imputed to Officer Williams, the officer who initiated the search. Accordingly, we conclude the search of the Firebird automobile was made with probable cause.

III. Competency to Stand Trial

Defendant next argues that the trial court erred by failing to order a hearing to determine defendant's competency to stand trial. We disagree.

A criminal defendant has a statutory right not to be tried for a crime when he is mentally incapacitated:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001(a) (2005). "The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court." N.C. Gen. Stat. § 15A-1002(a) (2005). In addition, the statute provides that "[w]hen the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b) (2005).

Construing these statutory provisions, our Supreme Court has "recognized that the trial court is only required to hold a hearing to determine the defendant's capacity to proceed *if* the question is raised." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (emphasis in original) (citation and quotation marks omitted), *cert. denied*, —— U.S. ——, 169 L. Ed. 2d 351 (2007). Thus, a defendant's "statutory right to a competency hearing is waived by the failure to assert that right at trial." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 (citations omitted).

[2] In the record *sub judice*, there is no evidence that defendant or his counsel raised any question or made any motion as to defendant's capacity to proceed at any point during the trial. Accordingly, we hold defendant waived his statutory right to a competency hearing by the failure to assert that right at trial. *See id.*

[3] "Nevertheless, under the Due Process Clause of the United States Constitution, a criminal defendant may not be tried unless he is competent[,]" *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 (citation, quotation marks and brackets omitted), and "[i]t is beyond question that a conviction cannot stand where the defendant lacks capacity to defend himself[,]" *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001) (citations omitted), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002). Therefore, "a trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 (emphasis in original) (citation, quotation marks and brackets omitted).

A defendant is mentally incompetent if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or lacks "a rational as well as factual understanding of the proceedings against him." *Id.* (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007) (citation and quotation marks omitted).

[4] Defendant argues that the trial court should have ordered a competency hearing *sua sponte* based on the trial court's colloquy with defendant's wife just after the trial court rendered its order denying defendant's motion to suppress:

> [DEFENDANT'S WIFE]: Sir, I would just like to let you know that considering his cognitive mind, brain injury, that he doesn't have the capability of making a decision, and that his health is so that I have to do everything for him. And I don't think he would make it away from me, and I'm very bothered by that. Judge, we have doctors saying that.
>
> . . . .
>
> COURT: . . . [I]f you don't think he's clicking on enough syllables, cylinders to help himself, then I will send him to, have psychiatric screening and further screening, and then they're going to come back and report on his mental status, 'cause I'm not going to participate in the trial of somebody who's short changed, if that's what the situation is.

Defendant argues that the statement of defendant's wife is substantial evidence of defendant's mental incapacity. However, the statement from defendant's wife is not substantial evidence which would have required the trial court to order a competency hearing *sua sponte*. *See King*, 353 N.C. at 467, 546 S.E.2d at 585 (evidence of past treatment for depression and suicidal tendencies, standing alone, does not constitute substantial evidence of mental incapacity). The statement is unsworn and made by an individual whose potential for bias is self-evident.

Furthermore, this evidence is outweighed by substantial evidence in the record indicating that defendant was competent to stand trial. *See Badgett*, 361 N.C. at 259-60, 644 S.E.2d at 221 (evidence that the defendant interacted appropriately with his lawyers and with the court and strongly understood the proceedings against him outweighed evidence that the defendant desired the death penalty and verbally attacked the prosecutor during sentencing). After the colloquy between the trial court and defendant's wife, the trial court turned to defendant's attorney:

> COURT: If you feel like he's able to assist you in his defense.
>
> [DEFENDANT'S ATTORNEY]: I do.
>
> COURT: We're going to go forward. You either take the choice or you send him away for a long, long time or he goes and does whatever the deal is. I don't care which. But I'll, we will deal with that in the morning one way or the other.

Defendant testified in his own defense the next day. His testimony was lucid and coherent in its entirety on both direct and cross-examination. Defendant also testified expressly that he understood the habitual felon charge against him when he stipulated to his status as an habitual felon and waived his right to have a jury determine that issue:

> COURT: All right. Do you, do you understand, Mr. Bowman, by making these stipulations and admitting to these three charges that you have with today's conviction, have obtained the status as an habitual felon? Do you understand that?
>
> . . . .
>
> And that by making these stipulations, you have waived, are waiving your right to have this jury determine that you've been con-

victed of these three felonies that we have just gone over. Do you understand that?

DEFENDANT: Yes.

We conclude that the record does not contain substantial evidence that defendant lacked "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or lacked "a rational as well as factual understanding of the proceedings against him." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 (citation and quotation marks omitted). Accordingly, we hold the trial court did not err when it failed to order a competency hearing *sua sponte*.

IV. Conclusion

Defendant has failed to show that the trial court erred by denying his motion to suppress or by failing to conduct a hearing on defendant's competency to stand trial. Accordingly, we conclude defendant received a fair trial, free of reversible error.

NO ERROR.

Chief Judge MARTIN and Judge CALABRIA concur.

IN THE MATTER OF: N.A.L. AND A.E.L., Jr., MINOR CHILDREN

No. COA08-510

(Filed 7 October 2008)

1. Termination of Parental Rights— guardian ad litem for mother—mental health issues—inquiry required

The trial court abused its discretion in a termination of parental rights proceeding by not conducting an inquiry as to whether a guardian ad litem should have been appointed for the mother, given the allegations made by DSS and the diagnosis of a personality disorder and borderline intellectual functioning.

2. Termination of Parental Rights— leaving children in foster care—insufficient progress willful

The trial court did not err by terminating a father's parental rights on the ground that he had willfully left the children in foster care for more than 12 months where he had made some

progress, but had not demonstrated that he was able to care for one child without significant care from others, much less two children, one of whom required special medical care. Willfulness under N.C.G.S. § 7B-1111(a)(2) is less than willful abandonment.

3. Termination of Parental Rights— best interests of children—no abuse of discretion

The trial court did not err in a termination of parental rights proceeding by determining that it was in the best interest of the children to terminate respondent-father's parental rights.

4. Termination of Parental Rights— reunification efforts ceased—appeal—no citation of legal authority

An assignment of error in a termination of parental rights proceeding concerning the cessation of reunification efforts was dismissed where no legal authority was cited in support of the argument.

Appeal by respondents from orders entered 20 February 2008 and 27 February 2008 by Judge Robert M. Brady in Caldwell County District Court. Heard in the Court of Appeals 27 August 2008.

Lauren Vaughan for petitioner-appellee Caldwell County Department of Social Services.

Pamela Newell Williams for Guardian ad litem.

Charlotte Gail Blake for respondent-father.

Judy N. Rudolph for respondent-mother.

BRYANT, Judge.

L.W.L.[1] (respondent-mother) and A.E.L., Sr. (respondent-father) appeal from an order entered 20 February 2008 terminating their parental rights to N.A.L., and an order entered 27 February 2008 terminating their parental rights to A.E.L., Jr. Respondent-father also appeals from an order entered 30 July 2007 ceasing reunification efforts with A.E.L., Jr. We affirm in part and reverse and remand in part.

The Caldwell County Department of Social Services (DSS) became involved with respondents' family in April of 2004 when N.A.L.

1. Initials have been used throughout this opinion to protect the identity of the juveniles.

was admitted to Caldwell Memorial Hospital due to severe coughing and wheezing. Hospital staff observed respondent-mother's interaction with N.A.L. and were concerned when respondent-mother repeatedly yelled and shouted profanity towards N.A.L., who was only five months old at the time. N.A.L. was admitted to the hospital again in November 2004 and February 2005. On both occasions, hospital staff observed respondent-mother yelling and shouting obscenities towards N.A.L. On 10 February 2005, petitions were filed alleging N.A.L. and A.E.L., Jr. were neglected and dependent juveniles. At the time the petitions were filed, respondent-mother left the home upon DSS' recommendation.

On 30 March 2005, respondent-father obtained a psychological evaluation which indicated he had a Full Scale IQ of 62. The evaluator concluded that respondent-father could not function over time as an adequate parent because of his limited intellect along with a potential for violence and loss of emotional control. The children were adjudicated neglected and dependent on 21 June 2005 based on respondent-mother's interaction with N.A.L. At the dispositional hearing, custody of the children remained with DSS. Respondent-mother was ordered to complete a psychological evaluation and follow any recommendations. Respondent-father was ordered to complete a sex offender specific evaluation because of allegations made by A.E.L., Jr. and to follow all recommendations. Both respondents were ordered to submit to random drug screens, regularly attend counseling and follow all recommendations, and make regular child support payments.

A review order was entered on 20 February 2006 ceasing reunification efforts with respondent-mother but continuing efforts with respondent-father. In a review order entered 17 May 2006, the court ordered respondent-father to obtain suitable housing and for respondent-mother not to reside with respondent-father. A review order entered 30 May 2006, specifically admonished respondent-father that respondent-mother was to have no contact with the children and that any such attempt would "compromise the continuing efforts of reunification with [respondent-father]." The trial court also noted that N.A.L.'s significant medical issues required the children to be placed in separate homes.

In August of 2006, the trial court approved a trial home placement for A.E.L. with respondent-father and continued N.A.L.'s unsupervised visits with respondent-father. Again, the court specifically ordered that respondent-mother should not have any contact with the

children. At the review hearing on 13 September 2006, the trial court noted N.A.L's extensive medical problems, including his diagnosis with Nephrotic Syndrome. The trial court found that respondent-father would likely be unable to provide appropriate care for N.A.L. in the near future because of respondent-father's limitations and N.A.L.'s needs. Based on its findings, the trial court ceased reunification efforts with respondent-father as to N.A.L.

On 9 February 2007, as to N.A.L., DSS filed a petition to terminate the parental rights of respondent-mother on the grounds of abuse or neglect, failure to make reasonable progress, incapability to provide proper care, and wilful abandonment. DSS also petitioned to terminate respondent-father's parental rights on the grounds of failure to make reasonable progress and incapability to provide proper care.

On 7 March 2007, the trial court returned custody of A.E.L., Jr. to respondent-father and ceased further reviews. The trial court ordered that respondent-mother have no contact with A.E.L., Jr. "at any time by any means." On 25 April 2007, DSS social workers visited respondent-mother's home and found respondent-father there with A.E.L., Jr. Respondent-father also admitted to allowing A.E.L., Jr. to have contact with respondent-mother on several occasions. DSS filed a new petition and requested and obtained non-secure custody of A.E.L., Jr. On 22 August 2007, the trial court ceased all reunification efforts with respondent-father as to A.E.L., Jr. and changed the permanent plan to adoption.

On 9 November 2007, DSS filed a petition to terminate the parental rights of respondent-mother and respondent-father as to A.E.L., Jr. The petition alleged grounds existed to terminate respondent-mother's parental rights on the basis of abuse or neglect, failure to make reasonable progress, failure to pay a reasonable portion of the cost of care, incapability to provide proper care, wilful abandonment, and her rights to another child have been involuntarily terminated. The petition alleged grounds existed to terminate respondent-father's parental rights on the basis of abuse or neglect, failure to make reasonable progress, incapability to of provide proper care, and his rights to another child have been involuntarily terminated.

On 20 February 2007 and 27 February 2007, the trial court entered orders terminating respondent-mother's and respondent-father's parental rights to N.A.L. and A.E.L., Jr., respectively. Respondent-mother and respondent-father appeal.

On appeal, respondent-mother argues the trial court erred by failing to appoint a guardian *ad litem*. Respondent-father argues the trial court erred by: (I) terminating his parental rights on the basis of neglect, failure to make reasonable progress, and dependency; (II) finding it in the children's best interest to terminate respondent-father's parental rights; and (III) ceasing reunification efforts between respondent-father and A.E.L., Jr.

Respondent-Mother's Appeal

[1] Respondent-mother argues the trial court erred by failing to appoint a guardian *ad litem* pursuant to N.C. Gen. Stat. § 7B-1101.1. We agree.

The Juvenile Code Provides:

> On motion of any party or on the court's own motion, the court *may* appoint a guardian ad litem for a parent if the court determines that 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. The parent's counsel shall not be appointed to serve as the guardian ad litem.

N.C. Gen. Stat. § 7B-1101.1(c) (2007) (emphasis supplied). "A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *In re J.A.A. & S.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." *Id.* (quotations omitted).

Here, respondent-mother did not move for appointment of a guardian *ad litem*. However, the petitions filed on 7 March 2007 and 9 November 2007 alleged that N.A.L. and A.E.L., Jr. were dependent. The petitions specifically alleged respondent-mother was "incapable of providing for the proper care and supervision of the minor child" due to respondent-mother's "problems in controlling her anger outbursts; her significant tendency to be aggressive towards others, including her child; and her lack of understanding of her prior neglect of the minor child." Additionally, respondent-mother's psychological assessment determined she has a Full Scale IQ score of 74—a score well below average. Respondent-mother was also diagnosed as having Personality Disorder NOS and Borderline Intellectual Function-

ing. The trial court also found in its order terminating the parental rights of respondent-mother that she "has significant mental health issues which impact her ability to parent this child and meet his needs."

Previously, a trial court was required to appoint a guardian *ad litem* when the petition to terminate parental rights alleged grounds existed to terminate parental rights under § 7B-1111(a)(6) (dependency). *In re J.D.*, 164 N.C. App. 176, 180, *disc. rev. denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). Given the allegations made by DSS and the diagnosis of respondent-mother, we believe the record indicates the trial court should have "properly inquired into" respondent-mother's competency pursuant to N.C. Gen. Stat. § 1A-1, Rule 17 and determined whether respondent-mother was in need of a guardian *ad litem*. Therefore, we must reverse the order of the trial court and remand in accordance with this opinion for a hearing to determine whether respondent-mother was in need of a guardian *ad litem*. By this remand we do not hold the trial court abused its discretion and erred by not appointing a guardian *ad litem*; however, based on the facts of this case it appears the trial court abused its discretion by failing to conduct an inquiry as to whether respondent-mother should be appointed a guardian *ad litem*.

Respondent-father's appeal

Termination of parental rights involves a two-step process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). At the adjudicatory stage, "the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). "If the trial court determines that grounds for termination exist, it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child." *Id.* at 98, 564 S.E.2d at 602. The trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *Id.*

Grounds for Termination

[2] Respondent-father contends the trial court erred by terminating his parental rights to N.A.L. and A.E.L., Jr. The trial court found three grounds existed to terminate respondent-father's parental rights. Because we find that the trial court did not err by terminating respondent-father's parental rights on the basis of willfully leaving the children in foster care for more than twelve months without mak-

ing reasonable progress, we need not address the remaining grounds for termination.[2]

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), parental rights may be terminated upon a finding that "the parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2007). "Willfulness under this section is less than willful abandonment, and does not require a finding of fault." *In re Clark*, 159 N.C. App. 75, 83-84, 582 S.E.2d 657, 662 (2003). "Willfulness may be found where even though a parent has made some attempt to regain custody of the child, the parent has failed to show reasonable progress or a positive response to the diligent efforts of DSS." *Id.* (quotations omitted).

Here, although respondent-father had made some progress, at the time of the termination hearing, respondent-father was unemployed, had not maintained suitable housing for the children, and had not participated in court-ordered anger management counseling. Most significantly, respondent-father continued to allow A.E.L., Jr. to be in the presence of his mother despite numerous orders by the court prohibiting any contact between the mother and the children. Respondent-father continued to rely on others for help with A.E.L., Jr. while he was in his care. Respondent-father had not demonstrated that he was able to care for one child without significant help from others, much less two children, one of whom required special medical care.

Although respondent-father argues the trial court was required to find that he willfully left his children in foster care, we have consistently held that the term "wilfulness" under G.S. 7B-1111(a)(2) is less than willful abandonment. *Clark*, 159 N.C. App. at 83, 582 S.E.2d at 662. This assignment of error is overruled.

Best Interest of the Children

[3] Respondent-father also argues the trial court erred by terminating his parental rights because it was not in the best interest of the children.

---

2. Where an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds. See *In re Greene*, 152 N.C. App. 410, 416, 568 S.E.2d 634, 638 (2002).

Once the trial court determines that grounds exist to terminate parental rights, it proceeds to the dispositional stage and must determine whether termination is in the best interest of the children. *In re Anderson*, 151 N.C. App. at 98, 564 S.E.2d at 602. In making this determination, the trial court shall consider:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2007). The trial court's determination of the child's best interest lies within its sound discretion and is reviewed only for abuse of discretion. *In re T.L.B.*, 167 N.C. App. 298, 301, 605 S.E.2d 249, 251 (2004).

In its dispositional order, the trial court found, as to N.A.L., that he was four years old and had been in the custody of DSS for almost three years. He had been placed with a family for over a year; he suffers from Nephrotic Syndrome which requires frequent medical visits and a monitored diet; the child needed to be with a family that understood and could care for his needs; respondent-father was unable to do so and failed to demonstrate his understanding of the child's needs; the minor child was bonding well with his placement family; little or no bond existed between respondent-father and the child.

As to A.E.L., Jr., the trial court made the following findings: a strong bond existed between respondent-father and the child; however, respondent-father did not demonstrate an understanding of the needs of the child; respondent-father's plan to care for the child continued to involve respondent-mother; the child had been in an out-of-home placement for five months; his grades had improved and he was participating in therapy on a regular basis; and the child was bonding with his placement family. Most notably, the trial court found A.E.L., Jr. had changed remarkably since being placed with his current fam-

ily. He was reading above grade level and was maintaining grades of C and above.

Based on the above findings, we can not say the trial court abused its discretion by determining it was in the best interest of the children to terminate respondent-father's parental rights.

Dispositional Order

[4] Finally, respondent-father argues the trial court erred by ceasing reunification efforts with A.E.L., Jr. We disagree.

Pursuant to N.C. Gen. Stat. § 7B-1001(a)(5)(a), a party may appeal from an order ceasing reunification efforts if:

> 1. A motion or petition to terminate the parent's rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.
>
> 3. The order to cease reunification is assigned as an error in the record on appeal of the termination of parental rights.

N.C. Gen. Stat. § 7B-1001(a)(5)(a) (2007). Here, after respondent-father's rights were terminated, he gave notice of appeal in open court from the order of the trial court ceasing reunification efforts, and assigned error to the order ceasing reunification efforts. Therefore, respondent-father properly preserved this issue for appeal. However, respondent-father has failed to cite any legal authority in support of his argument. Therefore, this assignment of error must be dismissed. *See* N.C. R. App. P. 28(b)(6) (2007).

For the foregoing reasons, the order of the trial court is affirmed in part, and reversed and remanded in part.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges JACKSON and ARROWOOD concur.

BIRD v. BIRD

[193 N.C. App. 123 (2008)]

DEBORAH HAMPTON BIRD, PLAINTIFF v. JAMES CALVIN BIRD, II, DEFENDANT

No. COA08-192

(Filed 7 October 2008)

1. Divorce— termination of alimony—cohabitation—summary judgment improper

The trial court erred by granting summary judgment for plaintiff wife on defendant husband's motion to terminate alimony on the basis of cohabitation because a genuine issue of material fact was presented as to whether plaintiff and her boyfriend cohabited where (1) a private investigator's affidavit stated that during her investigation, the boyfriend had been observed at plaintiff's house for a minimum of eleven consecutive nights; plaintiff and her boyfriend were observed driving each other's vehicles; the boyfriend was observed moving furniture into plaintiff's house, walking plaintiff's dog, parking in plaintiff's garage, and carrying groceries into plaintiff's house; the boyfriend had been observed letting workmen into and out of plaintiff's house; and the boyfriend's house appeared neglected as though no one lived in the house; (2) the boyfriend's own affidavit established that he had been romantically involved with plaintiff; he had spent the night at her house on several occasions; he and plaintiff had driven each other's vehicles; they had traveled together and dined out with their children; and he had given items of furniture to plaintiff; and (3) assuming arguendo that the boyfriend's affidavit did not create a genuine issue of material fact on its own, when considered in conjunction with the investigator's affidavit, an issue of fact was raised.

2. Rules of Civil Procedure— private investigator's affidavit—personal knowledge—use of passive tense in averments

The trial court did not err in an alimony termination case by considering a private investigator's affidavit even though plaintiff contends it was largely inadmissible based on its failure to comply with N.C.G.S. § 1A-1, Rule 56(e)'s requirement that affidavits shall be made on personal knowledge when the investigator used the passive tense in her averments because: (1) the averments that she was a private investigator who was hired to investigate plaintiff and her boyfriend made it reasonable to assume that the investigator was the observer referenced in her averments; and

(2) the investigator's affidavit can be interpreted so as to comply with Rule 56(e).

3. Evidence— hearsay—what plaintiff's neighbor told investigator

Although plaintiff properly asserted that a private investigator's averment in an alimony case as to what she was told by plaintiff's neighbor was inadmissible hearsay, this averment was not considered in the Court of Appeals' analysis.

Judge JACKSON dissenting.

Appeal by Defendant from judgment entered 29 October 2007 by Judge Joseph E. Turner in Guilford County District Court. Heard in the Court of Appeals 27 August 2008.

Nix & Cecil, by Lee M. Cecil, for Plaintiff-Appellee.

Wyatt Early Harris Wheeler, LLP, by Arlene M. Reardon, for Defendant-Appellant.

ARROWOOD, Judge.

Defendant (James Bird, II), appeals from summary judgment entered in favor of Plaintiff (Deborah Bird). We reverse.

The parties met in 1978, when they were in high school. They married in 1985 and had two children, boys born in 1994 and 1997. They separated in January 2004, and in June 2004 Plaintiff filed an action seeking child custody and support, alimony and post-separation support, and equitable distribution. In February 2006 the court entered an order awarding Plaintiff alimony for fifteen years. The judgment provided that Plaintiff's right to alimony would be terminated by, *inter alia*, Plaintiff's cohabitation.

On 30 May 2007 Defendant filed a motion to terminate alimony, on the grounds that Plaintiff had engaged in cohabitation with Michael Scott Cooper (Cooper). In discovery, Defendant alleged that Plaintiff and Cooper had an intimate, monogamous relationship; that Cooper had moved furniture into Plaintiff's house and had spent many nights there; that they shared the use of their vehicles; and that they dined out and traveled together with Cooper's and Plaintiff's minor children.

Plaintiff filed a motion for summary judgment on 6 September 2007, submitting Cooper's affidavit in support of her motion. In his

affidavit, Cooper denied cohabiting with Plaintiff and averred that they had never held each other out to be husband and wife, joined their finances, or contemplated moving in together. Defendant submitted the affidavit of Ann Cunningham in opposition to Plaintiff's summary judgment motion. Cunningham averred that she was a private investigator hired to investigate Cooper and Plaintiff "to determine whether they cohabited." Her affidavit stated further that Cooper had been observed in various activities and situations with Plaintiff. On 29 October 2007 the trial court entered an order granting Plaintiff's summary judgment motion. From this order Defendant has timely appealed.

Standard of Review

"At the outset, we note that the standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant. The court should grant summary judgment when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' N.C. Gen. Stat. § 1A-1, Rule 56(c)[(2007)].' " *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citing *Wilmington Star News v. New Hanover Regional Medical Center*, 125 N.C. App. 174, 178, 480 S.E.2d 53, 55 (1997)).

"It should be emphasized that in ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact." *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). "A genuine issue of material fact has been defined as one in which 'the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. . . . [A] genuine issue is one which can be maintained by substantial evidence.' " *Smith v. Smith*, 65 N.C. App. 139, 142, 308 S.E.2d 504, 506 (1983) (quoting *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974)).

However, "[w]hen 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).

---

[1] Defendant argues that the trial court erred by entering summary judgment for Plaintiff, on the grounds that there are genuine issues of material fact regarding whether Plaintiff and Cooper cohabited. We agree.

Under N.C. Gen. Stat. § 50-16.9(b) (2007), cohabitation is defined in pertinent part as follows:

> As used in this subsection, cohabitation means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage[.] . . . Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations. . . .

The issue on appeal is whether the record evidence shows a genuine issue of material fact regarding the "voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations" by Cooper and Plaintiff.

As discussed above, Plaintiff submitted Cooper's affidavit in support of her summary judgment motion. In his affidavit, Cooper admitted that he and Plaintiff had been romantically involved, at times dating each other exclusively; that he "occasionally" spent the night at Plaintiff's house and "rarely" stayed more than one or two consecutive nights; that Plaintiff and Cooper had traded vehicles on occasion; that they had traveled together and dined out with their children; and that he had moved items of furniture into Plaintiff's house. Cooper also stated that some of his activities with Plaintiff were part of his move from one house to another.

Defendant submitted the affidavit of investigator Ann Cunningham, stating that, during her investigation, Cooper had been observed at Plaintiff's house "for a minimum of eleven (11) consecutive nights"; that Plaintiff and Cooper were observed driving each

other's vehicles; that Cooper was observed moving furniture into Plaintiff's house, walking Plaintiff's dog, parking in Plaintiff's garage, and carrying groceries into Plaintiff's house; that Cooper had been observed letting workmen into and out of Plaintiff's house; and that Cooper's house in Hillsborough appeared neglected "as though no one lived in the house."

We conclude that the record evidence presents a genuine issue of material fact regarding cohabitation by Plaintiff and Cooper. We have considered the cases cited by both parties, particularly *Craddock v. Craddock*, 188 N.C. App. 806, 656 S.E.2d 716 (2008); *Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004); and *Rehm v. Rehm*, 104 N.C. App. 490, 409 S.E.2d 723 (1991). In these cases, this Court analyzed the evidence of cohabitation in the context of a motion to terminate spousal support based on the dependant spouse's cohabitation. *Long v. Long*, 160 N.C. App. 664, 588 S.E.2d 1 (2003), cited by the parties, discusses the same issue. However, in *Long* this Court held that the trial court's findings of fact were insufficient. Accordingly, the Court reversed and remanded for entry of adequate findings, rather than assessing the existing findings of fact.

We have also considered cases, including *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976); and *Hand v. Hand*, 46 N.C. App. 82, 264 S.E.2d 597 (1980), in which our appellate courts addressed the type of evidence required to support a finding that a married couple has reconciled after separating. Although these opinions include discussion of cohabitation, it is in a different factual context.

Our analysis of cases such as *Craddock*, *Oakley*, and *Rehm* reveals that this Court has generally found certain evidence to be significant. In all three cases there was evidence that the couple had a romantic or sexual relationship that included at least one instance of their spending the night together. However, in none of our appellate cases has the Court held that the existence of a sexual relationship, without more, was sufficient to show cohabitation. Rather, the Court has looked for additional indicia of the "voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people." These have included evidence that the couple shared in day-to-day activities and responsibilities. For example, in *Rehm*, there was evidence that the couple spent up to five nights a week together, and that at least twice they were seen kissing goodbye in the morning, wearing different clothes from the night before. On such evidence, this Court upheld the trial court's finding of cohabitation. On the other hand, in *Oakley*, there was evidence of

a sexual dating relationship, but no evidence that the couple had assumed responsibilities or habits typical of married people. In that case, this Court upheld the trial court's conclusion that the plaintiff had not engaged in cohabitation.

We note that *Long*, *Rehm*, and *Oakley* were appeals from a trial court's ruling on the issue of cohabitation. " '[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *Oakley*, 165 N.C. App. at 861, 599 S.E.2d at 927 (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)).

Because the instant case is an appeal from entry of summary judgment, the standard of review is significantly different. As discussed above, summary judgment is proper "only when all of the materials filed in connection with the action make clear that there are no factual questions to be resolved by the fact finder, and the movant is entitled to a favorable judgment as a matter of law." *Brandt v. Brandt*, 92 N.C. App. 438, 441, 374 S.E.2d 663, 665 (1988) (citation omitted). "In addition, because summary judgment is 'a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue.' " *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 682, 565 S.E.2d 140, 142 (2002) (quoting *Marcus Bros. Textiles v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999) (internal quotations)).

Craddock, 188 N.C. App. 806, 656 S.E.2d 716, like the instant case, was an appeal from entry of summary judgment on the issue of cohabitation. In *Craddock*, defendant-husband sought termination of his support obligation to plaintiff-wife, asserting that the plaintiff had cohabited with her boyfriend. The trial court granted summary judgment for plaintiff. Defendant appealed to this Court, which reversed, holding that the evidence raised a genuine issue of material fact on the issue of cohabitation.

The evidence in *Craddock* showed that the plaintiff and her boyfriend had an exclusive relationship for almost five years; that they ate together on the weekends, went to movies, traveled together on overnight vacations, spent holidays together, and engaged in monogamous sexual activity. In addition, plaintiff's boyfriend worked at plaintiff's house and used her address on his website. There was

other evidence that the two maintained separate residences, and had not mingled their finances. This Court held that the evidence presented a genuine issue of material fact on the issue of cohabitation. We reach the same conclusion in the instant case.

Cooper's own affidavit establishes that he and Plaintiff had been romantically involved; that he had spent the night at her house on several occasions; that he and Plaintiff had driven each other's vehicles; that they had traveled together and dined out with their children; and that he had given items of furniture to Plaintiff. It is arguable that this evidence, standing alone, might give rise to an issue of fact on cohabitation. However, assuming, *arguendo*, that Cooper's affidavit did not create a genuine issue of material fact on its own, when considered in conjunction with Cunningham's affidavit, an issue of fact is clearly raised.

[2] Preliminarily, we address Plaintiff's argument that Cunningham's affidavit was largely inadmissible. Plaintiff asserts that the affidavit fails to comply with Rule 56(e), which provides in relevant part that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Plaintiff's argument, that Cunningham's affidavit fails to show that its contents are based on personal knowledge, is supported solely by Cunningham's use of the passive tense in her averments. For example, Cunningham's affidavit states that "[d]uring the investigation, Michael Scott Cooper was observed moving furniture" rather than "I observed Michael Scott Cooper moving furniture." On the basis of this grammatical usage, Plaintiff asserts that, as a matter of law, the affidavit fails to demonstrate the affiant's personal knowledge. We disagree.

This Court has held that "[a]lthough G.S. 1A-1, Rule 56(e) states that affidavits in support of a motion for summary judgment must have these elements, we do not interpret the rule to require that such affidavits specifically state the elements as defendant suggests; it is sufficient that the affidavits can be interpreted so as to comply upon their faces." *Fuller v. Southland Corp.*, 57 N.C. App. 1, 5, 290 S.E.2d 754, 757 (1982) (citing *Middleton v. Myers*, 41 N.C. App. 543, 546, 255 S.E.2d 255, 256 (1979)). In the instant case, the introductory averments of Cunningham's affidavit state that:

1. I am Ann W. Cunningham with Cunningham & Associates, a private investigation firm.

2. I am a member of the National Association of Investigative Services.

3. I was retained to investigate Michael Scott Cooper and Deborah Hampton Bird to determine whether they cohabited.

4. Michael Scott Cooper was observed during the months of February and March 2007.

Following these averments are a series of statements about Cooper and Plaintiff, all employing the passive tense to state that Cooper "was observed" in various activities and situations. Based on Cunningham's averments that she is a private investigator who was hired to investigate Cooper and Plaintiff, it is reasonable to assume that Cunningham was the observer referenced in her averments. We conclude that her affidavit "can be interpreted so as to comply" with Rule 56(e). Accordingly, the trial court did not err by considering Cunningham's affidavit.

[3] Plaintiff also argues that Cunningham's averment as to what she was told by Plaintiff's neighbor was inadmissible hearsay. We agree, and have not considered this averment in our analysis.

In her affidavit, Cunningham stated that during her investigation Cooper had been observed at Plaintiff's house "for a minimum of eleven (11) consecutive nights." A factfinder might reasonably interpret this to mean that Cooper stayed overnight with Plaintiff for at least eleven consecutive nights. Cunningham states further that Plaintiff and Cooper drove each other's vehicles and that Cooper moved furniture into Plaintiff's house, both of which Cooper admits. She avers that Cooper was observed walking Plaintiff's dog, parking in Plaintiff's garage, carrying groceries into Plaintiff's house, and letting workmen into and out of Plaintiff's house. A factfinder might reasonably find these to be among the "marital rights, duties, and obligations which are usually manifested by married people[.]" In addition, Cunningham reported that Cooper's house in Hillsborough appeared uninhabited.

"We emphasize that in a summary judgment proceeding, the forecast of evidence and all reasonable inferences must be taken in the light most favorable to the non-moving party." *Woodson v. Rowland*, 329 N.C. 330, 344, 407 S.E.2d 222, 231 (1991) (citing *Wilkes County Vocational Workshop v. United Sleep*, 321 N.C. 735, 365 S.E.2d 292 (1988)). "While we express no opinion as to whether this evidence, by itself, would be sufficient to require an ultimate finding in [Defend-

ant's] favor, we do consider it sufficient to create an issue of fact for the jury and to overcome a motion for [summary judgment]." *Feibus & Co. v. Construction Co.*, 301 N.C. 294, 305, 271 S.E.2d 385, 392 (1980). "[I]t is not the function of this Court, or the trial court for that matter, to weigh conflicting evidence of record. Rather, in cases such as this, when there are genuine issues of material fact that are legitimately called into question, summary judgment should be denied and the issue preserved for the [fact finder]." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004).

For the reasons discussed above, we conclude that the trial court erred and that its order for summary judgment must be

Reversed.

Judge BRYANT concurs.

Judge JACKSON dissents in a separate opinion.

JACKSON, Judge dissenting.

Because defendant's affidavit is insufficient under North Carolina General Statutes, section 1A-1, Rule 56(e), I respectfully dissent. I would affirm the trial court's entry of summary judgment in favor of plaintiff.

In pertinent part, North Carolina General Statutes, section 1A-1, Rule 56(e) requires that "[s]upporting and opposing affidavits *shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.*" N.C. Gen. Stat. § 56(e) (2007) (emphasis added).

It long has been the rule that inadmissible material set forth in affidavits should not be considered by the trial court when ruling on a motion for summary judgment. *See Borden, Inc. v. Brower*, 17 N.C. App. 249, 253, 193 S.E.2d 751, 753, *rev'd on other grounds*, 284 N.C. 54, 199 S.E.2d 414 (1973).

Ann Cunningham's ("Cunningham") affidavit states:

1. I am Ann W. Cunningham with Cunningham & Associates, a private investigation firm.

2. I am a member of the National Association of Investigative Services.

3. I was retained to investigate Michael Scott Cooper and Deborah Hampton Bird to determine whether they cohabited.

4. Michael Scott Cooper was observed during the months of February and March, 2007.

5. During the investigation, Michael Scott Cooper was observed at Deborah Hampton Bird's residence for a minimum of eleven (11) consecutive nights.

6. During the investigation, Michael Scott Cooper was observed on numerous occasions driving the vehicle of Ms. Hampton Bird, and she was observed driving his vehicle on numerous occasions. He drove her vehicle to various places, including to his work. He kept the vehicle away from her home for hours, and returned to her home in business attire. She would transport her minor children in his vehicle, use it to go to the grocery store and generally use it as if it were her own.

7. During the investigation, Michael Scott Cooper was observed moving furniture and boxes into the residence of Ms. Hampton Bird.

8. During the investigation, Michael Scott Cooper's residence in Hillsborough, NC appeared as though no one lived in the house. A rug had been rolled up in the middle of the living room floor, and furniture seemed to be absent from the house. There were two ceiling fans in boxes on the floor. A fine layer of dust could be seen on the furniture and floor. The office in the house was observed to be dusty. Plants in said residence appeared to be in need of water.

9. At his residence in Hillsborough, the mail was piled up, one stack behind another in his mailbox as if no one was regularly checking the same.

10. At Michael Scott Cooper's residence in Hillsborough, the garbage had not been picked up. Additionally, there was no day-to-day garbage present, which would include old food, used toiletries, old mail, etc. An old pot from a plant had been discarded, but there was no day-to-day garbage in said cans.

11. I interviewed William Kennedy, Jr., living at 6400 Spyglass Road, Greensboro, NC 27410, a neighbor of Ms. Hampton Bird, and he indicated that he believed that Mr. Cooper and Ms. Bird were husband and wife, that the children present in the home

were the children of Mr. Cooper and Ms. Bird and that they had been in the house for months. Mr. Kennedy also indicated that Mr. Cooper's car is frequently in the garage and that he has seen the four members of the family in and out of the house, yard and driveway.

12. During the investigation, Michael Scott Cooper was observed taking Deborah Hampton Bird to dinner. They were also observed going to restaurants on numerous occasions as a family unit.

13. Michael Scott Cooper was observed to park, regularly, in Deborah Hampton Bird's garage.

14. Michael Scott Cooper was regularly observed assisting Ms. Bird with chores such as walking the dog, taking care of the dog, unloading the vehicle when she returned from trips, and assisting her when she returned from the grocery store.

15. On at least one occasion, Michael Scott Cooper was observed allowing workmen into the home of Ms. Bird when she was not present. He remained in the home during the entire time the workmen serviced the home and then he showed them out of the house.

In averments numbered 1, 2, 3, and 11, Cunningham clearly demonstrates her ability to establish facts and events of which she has personal knowledge within the meaning of Rule 56(e). Averments numbered 4 through 10 and 12 through 15, however, are conspicuously passive and devoid of language demonstrating Cunningham's personal knowledge of relevant facts or events. Accordingly, and especially in view of Cunningham's ability to attest properly to facts within her personal knowledge, I cannot join the majority's view that it is reasonable to assume that Cunningham was the observer passively referenced in her averments.

The issue becomes whether the properly stated averments are sufficient to show a genuine issue of material fact. I would hold that they are not. Averments numbered 1 through 3 attest to Cunningham's personal knowledge of (1) her name; (2) her place of employment; (3) her professional association; and (4) the purpose of her employment in the case *sub judice*, but they are wholly insufficient to establish any genuine issue of material fact. The only portion of averment number 11 that is properly admissible is that Cunningham "interviewed William Kennedy, Jr., living at 6400 Spyglass Road, Greensboro, NC 27410, a neighbor of Ms. Hampton Bird . . . ." As with averments num-

bered 1 through 3, this admissible portion of averment number 11 is insufficient to establish a genuine issue of material fact.

Without admissible evidence set forth in defendant's supporting affidavit demonstrating a genuine issue of material fact, plaintiff's evidence essentially remained uncontested. North Carolina General Statutes, section 1A-1, Rule 56(e) provides that

> [w]hen 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). Accordingly, I would affirm the trial court's entry of summary judgment in plaintiff's favor because defendant failed to demonstrate that a genuine issue of material fact exists.

STATE OF NORTH CAROLINA v. GEORGE TRUITT WALSTON, JR.

No. COA08-15

(Filed 7 October 2008)

1. Criminal Law— continuance—denial—drug dog handler absent

The trial court did not err by not continuing a cocaine prosecution because a canine handler could not be present. Defendant did not articulate any specific facts about which the officer would testify and which would substantiate his defense.

2. Evidence— drug dog handler not present—testimony about location of object

The trial court did not err by allowing an officer who was not a canine handler but who was present at the scene to describe a dog's location of something defendant had thrown aside in a chase. Cases requiring a voir dire on the dog's training and qualifications concern the identity of perpetrators; moreover, the dog's tracking in this case was within the witness's personal knowledge.

3. Evidence— drug dog alert—hearsay testimony—not plain error

There was no plain error in a cocaine prosecution in the admission of testimony relating an officer's statement about where a dog gave an alert. Assuming the testimony was hearsay, the other evidence in the case was sufficient for guilt.

4. Sentencing— drug trafficking—consecutive sentences

Sentences for cocaine trafficking were remanded where the trial court mistakenly understood N.C.G.S. § 90-95(h)(6) to require consecutive sentences for a defendant convicted of more than one drug trafficking charge disposed of at the same sentencing hearing.

Appeal by defendant from judgments entered 28 September 2007 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 18 August 2008.

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

Haral E. Carlin for defendant-appellant.

MARTIN, Chief Judge.

Defendant was convicted of trafficking in cocaine by possession of more than 28 grams but less than 200 grams and conspiracy to traffic in cocaine by possession of more than 28 grams but less than 200 grams. He was sentenced to two consecutive sentences, each with a minimum term of 35 months and a maximum term of 42 months. Defendant appeals from his conviction and sentence.

The evidence presented at trial tended to show that a man called "Cane" was working as a confidential informant for the Raleigh Police Department. On 28 July 2005, Cane contacted Pierre Estrella, asking Estrella to find someone to sell him an ounce of cocaine. Estrella called George Walston, Jr. ("defendant"), and they agreed to meet at a park in Cary. While at the park, Estrella and defendant discussed selling the cocaine, and they planned to arrive together at a location where they would meet Cane and where Estrella would introduce Cane and defendant. The parties agreed to meet at a Wendy's restaurant on Trinity Road, near the RBC Center in Raleigh. Detective L.T. Marshburn rode with Cane to Wendy's and waited about ten minutes before defendant and Estrella arrived in Estrella's

truck. When Estrella and defendant pulled into the Wendy's parking lot, Cane jumped into the truck. Cane gave a visual signal to Detective Marshburn that cocaine was present in the truck.

Shortly thereafter, Raleigh police officers arrived with their lights flashing. Estrella began to drive away but was stopped by the police. As Estrella attempted to drive away, defendant exited the truck and began running away from Wendy's toward the RBC Center. Detective Mark Quagliarello chased defendant, losing sight of him only briefly as defendant ran through a wash pit area of a car wash that was about ten to fifteen feet long, and maintained sight of him thereafter until he was apprehended. Detective Quagliarello chased defendant into a gulley and, from about ten feet away, observed defendant use his right hand to throw to the ground a plastic bag containing something. Then defendant fell, and police apprehended him. The police called a canine unit to search the gulley, and canine agent "Axe," accompanied by canine handler Sergeant P.T. Medlin, performed an article search of the area where defendant had been running and found a plastic bag containing 30.6 grams of cocaine.

At trial, defendant testified that on 28 July 2005 he was riding with Estrella to Estrella's house to watch a basketball game when Estrella pulled up to Wendy's, made a phone call to a man called "Tweet," and told Tweet to bring an ounce of cocaine because a man was there with the money. Realizing that a drug transaction was about to occur, defendant exited the vehicle and began to run away from the scene. After he was out of the vehicle, defendant looked up and saw a car coming straight at him, and defendant ran through a nearby car wash to avoid the car. Defendant continued to run across Trinity Road toward Edwards Mill Road through high grass but on flat land. Before he arrived at the intersection, he saw police running towards him, and he lay on the ground so the police would not think he had a gun. At that time, police apprehended defendant.

Defendant was arrested and charged with trafficking in cocaine by possession of more than 28 grams but less than 200 grams and conspiracy to traffic in cocaine by possession of more than 28 grams but less than 200 grams. The case was set for trial a number of times but was not reached on the calendar until 26 September 2007. Defense counsel was notified on 25 September that the case would be heard the next day, and she immediately contacted the Raleigh Police Department to find out if Sergeant Medlin was available for the trial. Sergeant Medlin was in Maryland for training during the week when

trial was scheduled and could not appear and testify. Defendant moved to continue the trial until Sergeant Medlin could appear, arguing that he was a material witness. The court denied defendant's motion, and defendant was tried by a jury and convicted on both charges.

I.

[1] Defendant first argues that the trial court committed reversible and prejudicial error by denying his motion to continue the trial in order to secure the attendance and testimony of Sergeant Medlin as a necessary and material witness for the defense, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution.

> Although a motion for a continuance is ordinarily addressed to the discretion of the trial judge and is reviewable only upon a showing of an abuse of discretion, when the motion is based on a constitutional right the ruling of the trial judge is reviewable on appeal as a question of law.

State v. Maher, 305 N.C. 544, 547, 290 S.E.2d 694, 696 (1982). "The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial . . . upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982).

Under the Sixth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The Sixth Amendment guarantees " '. . . in plain terms the right to present a defense' "; therefore, "[a] continuance in a criminal trial essentially involves a question of procedural due process. Implicitly, the courts balance the private interest that will be affected and the risk of erroneous deprivation of that interest through the procedures used against the government interest in fiscal and administrative efficiency." *State v. Roper*, 328 N.C. 337, 349, 402 S.E.2d 600, 607, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 1023 (1967)).

Article I, Sections 19 and 23 of the North Carolina Constitution also guarantee defendant a right to due process, stating "[i]n all crim-

inal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony," N.C. Const. art. I, § 23, and "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19.

> In examining the denial of a motion for a continuance for constitutional error, North Carolina case law, like its federal counterpart, implicitly balances the individual interest and the risk of an erroneous deprivation of that interest in light of the procedure being used against the State's interest in fiscal and administrative efficiency.

Roper, 328 N.C. at 352, 402 S.E.2d at 608. In balancing these interests, "[c]ourts have discussed numerous factors which are weighed to determine whether the failure to grant a continuance rises to constitutional dimensions. *Of particular importance are the reasons for the requested continuance presented to the trial judge at the time the request is denied.*" *Id.* at 349, 402 S.E.2d at 607 (emphasis added).

In the present case, defendant argued to the trial court that Sergeant Medlin was a necessary and material witness because he could testify (1) about the route the dog took in order to find the drugs, (2) about how the drugs were recovered, (3) that the canine officers train the dogs in the area where the drugs were located, (4) that the area where the drugs were located was a well-known area for drug activity, and (5) whether or not it was likely the drugs came from defendant. Although defendant now argues that Sergeant Medlin's testimony would have supported his defense that the drugs were not his, the information presented to the trial court was insufficient to substantiate this argument. Specifically, defendant argued that Sergeant Medlin could testify about the route the dog took in order to find the drugs and how the drugs were recovered. Such a general description of the expected testimony does not necessarily show any connection to defendant's defense. Defendant also argued that Sergeant Medlin could testify that canine training is conducted in the area near the RBC Center where defendant was apprehended. Without a more specific description of how this information would substantiate his defense, defendant has not shown that this evidence is material to his case. As for defendant's contention that the area was well-known for drug activity, Detective Marshburn

was competent to testify about the matter and in fact testified that in his experience the area was not well-known for drug activity.

Ultimately, defendant argued that Sergeant Medlin could testify as to "whether or not . . . it was likely these drugs actually came from [defendant]." This description of the expected testimony clearly equivocates as to *whether* the drugs likely came from defendant. By contrast, defendant did not state that Sergeant Medlin had any information to show that it was likely the drugs did *not* come from defendant. Since defendant did not articulate any specific facts about which Sergeant Medlin would testify and which would substantiate defendant's defense, we cannot assume that Sergeant Medlin would have testified that the drugs likely did not come from defendant. Although defendant presented the trial court with a description of evidence that likely would have been relevant to the case, he did not describe any evidence in sufficient detail to demonstrate that the lack of such evidence would materially prejudice his case. Where "defendant has failed to demonstrate he suffered material prejudice by the denial of his motion[] to continue," the trial court did not err in denying the motion to continue. *State v. Morgan*, 359 N.C. 131, 145, 604 S.E.2d 886, 895 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005).

II.

[2] Defendant next argues the trial court committed reversible error by overruling defendant's objection and allowing Detective Marshburn's testimony regarding Axe's tracking of defendant because Detective Marshburn did not produce the requisite qualifications of the dog. Defendant cites the requirements for admitting the actions of tracking dogs into evidence as recognized by this Court, including: (1) the dog must possess "acuteness of scent and power of discrimination," having been "accustomed and trained to pursue the human track"; (2) the dog must have experience and have been found reliable in pursuit; and (3) "in the particular case [the dog was] put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification." *State v. Green*, 76 N.C. App. 642, 644, 334 S.E.2d 263, 265, *disc. review denied*, 315 N.C. 187, 340 S.E.2d 751 (1985). Defendant also cites other cases where unknown fleeing perpetrators were pursued and tracked by a dog, identified by the dog, and arrested by police. *State v. Irick*, 291 N.C. 480, 496, 231 S.E.2d 833, 844 (1977) (dog tracked defendant from a "blind scent because, at the time, the police had no suspects in the . . . burglary"); *State v. McLeod*, 196

N.C. 542, 543, 546, 146 S.E. 409, 410, 411 (1929) (dogs tracked defendant from the scene of the crime, but "the action of the bloodhounds was such as to afford no reasonable inference of the identity of the prisoner as the guilty party").

In the line of cases cited by defendant, evidence of the tracking dog's action was admitted to prove the *identity* of the perpetrators. To this end, courts require a voir dire proceeding on the dog's credentials and training. *See Irick*, 291 N.C. at 495, 231 S.E.2d at 843. However, these case are clearly distinguishable from the instant case because Axe's tracking abilities were not used to identify defendant. Rather, Axe's tracking abilities were used to quickly locate the item Officer Quagliarello observed defendant throw in the gulley.

Furthermore, Detective Marshburn's testimony of Axe's tracking was admissible as a matter about which he had personal knowledge. *See* N.C. Gen. Stat. § 8C-1, Rule 602 (2007) (stating that in order for a witness to testify to a matter, he must have personal knowledge of the matter). Accordingly, the trial court did not err in admitting Detective Marshburn's testimony about Axe's tracking.

III.

[3] Defendant next argues the trial court committed plain error by allowing Detective Marshburn to testify as to Sergeant Medlin's statement about where the dog gave the alert for cocaine. He contends such testimony was inadmissable hearsay. "In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4) (2008). 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. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

Assuming *arguendo* that Detective Marshburn's testimony regarding Sergeant Medlin's statements leading to Detective Marshburn's discovery of the cocaine constituted hearsay, its admission is plain error only if the jury probably would have reached a different verdict had this evidence been excluded. *Id.* Other evidence presented at trial showed that prior to the defendant's arrival at Wendy's, defendant met with Estrella and discussed selling cocaine.

Defendant accompanied Estrella to sell cocaine and attempted to flee when police arrived and pursued him. Officer Quagliarello observed defendant throw an object on the ground while he was about ten feet away from defendant, and police recovered a plastic bag containing 30.6 grams of cocaine after searching the area. This evidence, even without Detective Marshburn's testimony of Sergeant Medlin's statements about the area where the dog alerted, was sufficient for the jury to find defendant guilty on the charges of both trafficking in cocaine by possession and conspiracy to traffic. Therefore, the trial court did not commit plain error in admitting Detective Marshburn's testimony.

IV.

[4] Finally, defendant argues the trial court committed reversible error by sentencing defendant to consecutive active terms of imprisonment under the mistaken impression that N.C.G.S. § 90-95(h)(6) required consecutive sentences for a defendant convicted of more than one drug trafficking charge at the same sentencing hearing.

The applicable statutes requires "[s]entences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." N.C.G.S. § 90-95(h)(6) (2007). Among the crimes covered in subsection (h) is "trafficking in cocaine." N.C.G.S. § 90-95(h)(3). This Court has held that N.C.G.S. § 90-95(h)(6) "does not require consecutive sentencing for two . . . offenses disposed of in the same proceeding." *State v. Bozeman*, 115 N.C. App. 658, 662-63, 446 S.E.2d 140, 143 (1994).

Normally, sentencing rests in the trial court's discretion, and:

> A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

State v. Pope, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962). However, a court's mistaken interpretation that a statute limits its discretion is cause to vacate the sentence and remand for resentencing. *State v. Crain*, 73 N.C. App. 269, 271, 326 S.E.2d 120, 122 (1985).

In the present case, during the sentencing phase of the trial, the court stated: "Going to General Statute 90-95h, subsection six, sen-

tence is imposed pursuant to this subsection shall run consecutively." Conspicuously absent from the court's statement of the law is the remainder of the language in subsection (h)(6) stating, "consecutively with . . . any sentence being served by the person sentenced hereunder." N.C.G.S. § 90-95 (h)(6). In determining what the court meant when it recited only the portion of the statute that said sentences "shall run consecutively," we consider that "ordinarily, the word 'must' and the word 'shall,' in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory." *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978). We can only conclude, based on the court's statement during sentencing, that the court incorrectly understood the statute as mandating consecutive sentences for offenses disposed of in the same proceeding. Thus, we must remand for a new sentencing hearing.

No error, remanded for resentencing.

Judges WYNN and HUNTER concur.

MICHAEL HARRIS AND LOUISE HARRIS, PLAINTIFFS v. RICHARD STEWART, BARBARA STEWART, AND YORK SIMPSON UNDERWOOD, L.L.C., DEFENDANTS

No. COA07-1174

(Filed 7 October 2008)

1. Real Property— reasonable time to perform rule—failure to include time of essence provision—appraisal not completed by date specified in contract—pre-closing conditions

The trial court did not err in a case arising out of a contract for the sale of real property by ordering plaintiffs' earnest money deposit plus any accrued interest held in escrow be refunded to plaintiffs even though defendants contend plaintiffs did not have an option to terminate the pertinent contract under Section 13(f) since an appraisal was not completed on or before 15 December 2005 as required in the contract because: (1) there is a well-settled exception that the reasonable time to perform rule applies to contracts for the sale of real property in the absence of a "time is of the essence" provision, and the dates stated in an offer to purchase and contract serve only as guidelines without being

binding on the parties; (2) although the reasonable time to perform rule has generally arisen in the context of missed closing dates, our Supreme Court has stated that this rule also applies to the performance of pre-closing conditions; (3) in the instant case the appraisal contingency specified a 15 December 2005 deadline, but did not contain a time is of the essence provision applicable to such date, nor is there any evidence demonstrating an issue of fact as to whether time was of the essence with respect to this date, thus making the reasonable time to perform rule applicable; (4) the reason plaintiffs failed to meet Section 13(f)'s 15 December 2005 deadline was that the appraiser waited until 20 December 2005 to sign and deliver the appraisal report to the bank, and there was no evidence that plaintiffs delayed or tarried in the completion of the contract; and (5) plaintiffs' five-day delay in completing the appraisal was reasonable as a matter of law.

2. Real Property— option to terminate contract—buyers' failure to directly arrange or pay for appraisal

The trial court did not err in a case arising out of a contract for the sale of real property by concluding plaintiff buyers had the option to terminate the contract under Section 13(f) even though plaintiffs did not directly arrange or pay for the appraisal because: (1) the express terms of Section 13(f) provided that the buyers shall arrange to have the appraisal completed, and there was no language in this clause indicating that the buyers must personally hire the appraiser or directly arrange the appraisal for such appraisal to satisfy the conditions of the clause; (2) there was no legal significance to the fact that the appraisal was arranged through the buyers' lender rather than by the buyers personally; (3) defendants produced no evidence for their proposition that plaintiffs did not pay for the appraisal, and it can reasonably be inferred that the cost of the appraisal was either taxed to plaintiffs through their application fees or that the cost would later be charged to plaintiffs at closing by their lender; and (4) assuming arguendo there was a genuine issue of fact as to whether the lender paid for the appraisal, this fact was immaterial since an appraisal is no less valid simply based on the fact a third party absorbs the cost of such service.

Appeal by defendants from order entered 23 April 2007 by Judge Abraham Penn Jones in Orange County Superior Court. Heard in the Court of Appeals 6 March 2008.

Bagwell, Holt, Smith, Tillman & Jones, P.A., by Nathaniel C. Smith, John G. Miskey, IV, and Christopher A. Crowson, for plaintiff appellees.

Ragsdale Liggett PLLC, by George R. Ragsdale, Robert J. Ramseur, Jr., and Ashley Huffstetler Campbell, for defendant appellants.

Martin & Gifford, PLLC, by G. Wilson Martin, Jr., for N.C. Association of Realtors, Inc., amicus curiae.

McCULLOUGH, Judge.

This appeal arises from a dispute concerning a contract for the sale and purchase of certain real property located in Chapel Hill. Defendants, Richard and Barbara Stewart, appeal from the entry of summary judgment in favor of plaintiffs, Michael and Louise Harris, ordering that plaintiffs' earnest money deposit, plus any accrued interest held in escrow by York Simpson Underwood, L.L.C. ("York Simpson Underwood") be refunded to plaintiffs. For the reasons stated herein, we affirm.

The relevant facts are as follows: On 11 November 2005, plaintiffs, as buyers, executed an Offer to Purchase and Contract ("the Contract") defendants' residence ("the Stewart property") located at 7601 Talbryn Way in Chapel Hill for $2,100,000. Shortly thereafter, plaintiffs mailed to York Simpson Underwood, defendants' escrow agent, the signed Contract and $40,000 in earnest money to be held in escrow. On 17 November 2005, defendants, as sellers, executed the Contract.

Section 13(f) of the Contract provided the following appraisal contingency clause:

> The property must appraise at a value equal to or exceeding the purchase price or, at the option of the Buyer, the contract may be terminated and all earnest monies shall be refunded to the Buyer. If this contract is not subject to a financing contingency requiring an appraisal, Buyer shall arrange to have the appraisal completed on or before December 15, 2005. The cost of the appraisal shall be borne by Buyer.

Although the Contract was not contingent on plaintiffs obtaining financing, plaintiffs applied for a loan with Wachovia Mortgage Company ("Wachovia"). Wachovia, by and through Fidelity Residential

Services, retained Arthur Dec of Dec Appraisal Service to perform an appraisal of the property. On or about 13 December 2005, Arthur Dec ("Mr. Dec") of Dec Appraisal Service sent Wachovia a letter, stating that he had appraised the Stewart property. The Appraisal Report ("the Dec Appraisal") lists 12 December 2005 as the effective date of the appraisal; however, Mr. Dec did not sign, seal, and deliver this report to Wachovia until 20 December 2005. Thus, the Dec Appraisal was not fully completed until 20 December 2005. Mr. Dec valued the Stewart property at $1,900,000, which was $200,000 less than the purchase price.

On 20 December 2005, plaintiffs received the Dec Appraisal report via email. That same day, plaintiffs mailed defendants a copy of the Dec Appraisal and a letter, stating that plaintiffs wished to terminate the Contract pursuant to the appraisal contingency clause in Section 13(f) of the Contract. The letter also requested that the $40,000 earnest money be refunded.

Defendants did not refund the $40,000 earnest money deposit. On 13 March 2006, plaintiffs filed suit against defendants and York Simpson Underwood, seeking entry of a judgment, declaring that the Contract had been terminated as a matter of law and ordering that defendant York Simpson Underwood release all escrow funds to plaintiffs. On 12 May 2006, defendants filed counterclaims for breach of contract and specific performance. Defendants maintained that they attended the closing ready, willing, and able to close, and that plaintiffs forfeited their earnest money deposit by refusing to close. Defendants contended that they were entitled to recover the difference between the Contract price and the fair market value of the Stewart property at the time of the breach, plus interest, consequential damages, and the forfeited earnest money deposit.

On 12 January 2007, defendants sold the Stewart property for $1,800,000, $300,000 less than the purchase price under the Contract. On 7 March 2007 and 9 March 2007, respectively, plaintiffs and defendants filed cross motions for summary judgment. These motions were heard on 26 March 2007.

On 23 April 2007, the trial court entered a judgment, granting plaintiffs' motion for summary judgment, denying defendants' motion for summary judgment, and declaring that "Plaintiffs properly terminated the contract for cause on December 20, 2005[, and] [p]laintiffs are entitled to a refund of the $40,000.00 in escrow money . . . plus any interest accrued thereon[.]" From this judgment, defendants appeal.

Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The party moving for summary judgment has the burden of showing that no material issue of fact exists. *Lexington State Bank v. Miller*, 137 N.C. App. 748, 751, 529 S.E.2d 454, 455-56, *disc. review denied*, 352 N.C. 589, 544 S.E.2d 781 (2000). Once the moving party has met its burden, "the nonmoving party may not rely on the mere allegations and denials in his pleadings but must by affidavit, or other means provided in the Rules, set forth specific facts showing a genuine issue of fact for the jury; otherwise, 'summary judgment, if appropriate, shall be entered against [the nonmoving party].' " *In re Will of McCauley*, 356 N.C. 91, 101, 565 S.E.2d 88, 95 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)).

I. Reasonable Time to Perform Rule

[1] Defendants first contend that plaintiffs did not have an option to terminate the Contract pursuant to Section 13(f) of the Contract because the Dec Appraisal was not completed on or before 15 December 2005. Because we conclude that the reasonable time to perform rule applies to the pre-closing act at issue, we disagree.

As a general rule, the language of a contract should be interpreted as written. *Kroger Ltd. P'ship v. Guastello*, 177 N.C. App. 386, 390, 628 S.E.2d 841, 844 (2006); however, there is a well-settled exception, the "reasonable time to perform rule," that applies to contracts for the sale of real property. With respect to these realty sales contracts, it has long been held that in the absence of a "time is of the essence" provision, time is not of the essence, the dates stated in an offer to purchase and contract agreement serve only as guidelines, and such dates are not binding on the parties. *Douglass v. Brooks*, 242 N.C. 178, 185, 87 S.E.2d 258, 263 (1955) (distinguishing an option contract, in which time is always of the essence, from a sales contract, in which time is not of the essence in the absence of language to that effect).

Although the "reasonable time to perform" rule has generally arisen in the context of missed closing dates, our Supreme Court has stated that this rule also applies to the performance of pre-closing conditions:[1]

1. A condition precedent is a fact or event that must exist or occur before there is a right to immediate performance. *Cox v. Funk*, 42 N.C. App. 32, 34, 255 S.E.2d 600, 601 (1979).

> **If the condition precedent were of crucial import to either or both parties and needed to be fulfilled by a certain date, other than that set for closing, [1] a separate date should have been explicitly included to govern the condition precedent, along with [2] a separate time-is-of-the-essence provision** if necessary**.** It would then have been clear that this particular condition, separate from the act of closing, must be strictly performed by a different date.

Fletcher v. Jones, 314 N.C. 389, 393 n.1, 333 S.E.2d 731, 734 n.1 (1985) (emphasis added).

In *Gaskill v. Jennette Enters., Inc.*, 147 N.C. App. 138, 141, 554 S.E.2d 10, 11 (2001), *disc. review denied*, 355 N.C. 211, 559 S.E.2d 801 (2002), a contract for the sale of real property was subject to the condition that the buyer obtain financing by a certain date. The contract contained a time is of the essence provision at the end of the contract, but it was ambiguous as to whether this provision was intended to apply to the deadline for the financing contingency or if it was only intended to apply to the date of closing. *Id.* at 139, 554 S.E.2d at 11. The buyer obtained a loan commitment after the deadline specified for the financing contingency, but prior to the date specified for closing. *Id.* at 139, 554 S.E.2d at 12. The seller thereafter refused to close. *Id.* The buyer sued for specific performance, and the trial court entered summary judgment in favor of the seller. *Id.* at 140, 554 S.E.2d at 12. In light of the *Fletcher* footnote above, this Court reversed. *Id.* at 142, 554 S.E.2d at 13. We reasoned that the trial court could not hold as a matter of law that time was of the essence with respect to the pre-closing deadline where it was ambiguous whether the time is of the essence language applied to the pre-closing condition. *Id.* Thus, implicit in our holding is the proposition that in the absence of a clear time is of the essence provision, the reasonable time to perform rule applies to pre-closing conditions, even where an express deadline for the pre-closing condition is provided. *See id.*; *see also Wolfe v. Villines*, 169 N.C. App. 483, 489, 610 S.E.2d 754, 759 (2005) ("As time was not of the essence in the contract, the failure to complete the required survey and close by 31 January 2002 does not vitiate the contract. The question rather is one of the reasonableness of the time to complete the contract.").

Here, the appraisal contingency specified a 15 December 2005 deadline, but did not contain a time is of the essence provision applicable to such date nor is there any evidence demonstrating an issue of fact as to whether time was of the essence with respect to this

date. Therefore, the reasonable time to perform rule is applicable to this pre-closing condition.

Having decided that plaintiffs had a reasonable time from 15 December 2005 to arrange an appraisal of the Stewart property, we must determine whether the trial court properly concluded that the five-day delay in this case was "reasonable" as a matter of law. "[D]etermination of 'reasonable time' is generally a mixed question of law and fact and thus for the jury[.]" *Yancey v. Watkins*, 17 N.C. App. 515, 520, 195 S.E.2d 89, 93, *cert. denied*, 283 N.C. 394, 196 S.E.2d 277 (1973). "[T]here are[,] [however,] cases which hold that when facts are simple and admitted and only one inference can be drawn, the determination of 'reasonable time' is a question of law." *Id.* (emphasis omitted).

For instance, in *Wolfe*, we held that a trial court properly concluded that a delay of three weeks in completing a survey was reasonable as a matter of law where there was no evidence that the plaintiff "delayed or tarried" in the completion of the contract. *Wolfe*, 169 N.C. App. at 489, 610 S.E.2d at 759. In the instant case, plaintiffs arranged for Mr. Dec to inspect the Stewart property on 12 December 2005. Likewise, the effective date listed on the Dec Appraisal is 12 December 2005. The reason that plaintiffs failed to meet Section 13(f)'s 15 December 2005 deadline was that Mr. Dec waited until 20 December 2005 to sign and deliver the appraisal report to Wachovia. There is no evidence that plaintiffs "delayed or tarried" in the completion of the Contract. Given our decision in *Wolfe* that the three-week delay in completing the survey was reasonable as a matter of law, it is clear that the trial court properly concluded then that the mere five-day delay in completing the appraisal was reasonable as a matter of law in this case. Thus, defendants' argument that plaintiffs did not have an option to terminate the Contract pursuant to Section 13(f) because the Dec Appraisal was not completed until 20 December 2005 is without merit.

II. Arrangement of Appraisal

[2] Next, defendants contend that plaintiffs did not have an option to terminate the Contract pursuant to Section 13(f) because plaintiffs did not directly arrange for the Dec Appraisal or pay for such appraisal. We disagree.

Conditions precedent are not favored by the law. *Craftique, Inc. v. Stevens and Co., Inc.*, 321 N.C. 564, 566, 364 S.E.2d 129, 131 (1988). As such, the provisions of a contract will not be construed as condi-

tions precedent in the absence of language clearly requiring such construction. *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375-76, 432 S.E.2d 855, 859 (1993).

Here, the express terms of Section 13(f) simply provide, "[b]uyer shall arrange to have the appraisal completed[.]" There is no language in this clause indicating that the buyer must personally hire the appraiser or directly arrange the appraisal for such appraisal to satisfy the conditions of the clause. Absent an express term in Section 13(f), requiring that the buyer personally or directly hire the appraiser as a condition precedent, we attach no legal significance to the fact that the Dec Appraisal was arranged through the buyer's lender rather than by the buyer personally. Likewise, defendants do not cite case law from any jurisdiction to support their contention that an appraisal obtained by a lender does not suffice for the purposes of an appraisal contingency clause.

Next, Section 13(f) of the Contract, provides "[t]he cost of appraisal shall be borne by Buyer." Defendants contend on appeal that plaintiffs did not "arrange" the Dec Appraisal because they did not pay for such appraisal. Defendants have produced no evidence in support of this proposition. The evidence of record shows that plaintiffs applied for a mortgage with Wachovia, and as part of the loan application process, Wachovia arranged for the Dec Appraisal. It can reasonably be inferred then that the cost of the appraisal was either taxed to plaintiffs through their application fees or that the cost would later be charged to plaintiffs at closing.

However, assuming *arguendo* that there is a genuine issue of fact as to whether Wachovia paid for the Dec Appraisal, this fact is immaterial to our analysis. Given that an appraisal is no less valid simply because a third party absorbs the cost of such service, the only logical reading of the cost allocation provision of Section 13(f) is that it was intended to allocate the cost of the appraisal, if any, as between the buyer and seller. Thus, as long as some party other than the seller paid for the Dec Appraisal, the fact that a third party paid for the appraisal is immaterial to the Contract. If, in fact, Wachovia absorbed the cost of the Dec Appraisal, then there is simply no cost to be allocated to the buyer for purposes of the cost allocation provision of Section 13(f). Any other reading of this cost provision would defy common sense.

Thus, defendants' contention that plaintiffs did not have an option to terminate the Contract pursuant to Section 13(f) because

plaintiffs did not personally arrange the Dec Appraisal or pay for such appraisal is without merit.

In sum, the undisputed evidence of record shows that plaintiffs appraised the Stewart property within a reasonable period of time following the 15 December 2005 deadline and such property appraised at a value less than the purchase price. The trial court properly concluded that plaintiffs had the option to terminate the Contract pursuant to the express terms of Section 13(f) of the Contract and that plaintiffs are entitled to a refund of their earnest money deposit plus accrued interest. Accordingly, we affirm the trial court's grant of plaintiffs' motion for summary judgment and denial of defendants' motion for summary judgment.

Affirmed.

Judges STEELMAN and ARROWOOD concur.

STATE OF NORTH CAROLINA v. SAMUEL TRAVIS TANNER

No. COA08-251

(Filed 7 October 2008)

1. Appeal and Error— motion to dismiss—failure to renew after introducing evidence—waiver

Defendant waived appellate review of the denial of his motion to dismiss charges of felonious possession of stolen property by not renewing it after introducing evidence. Plain error review does not apply.

2. Constitutional Law— effective assistance of counsel—failure to renew motion to dismiss—no reasonable possibility of different outcome

The failure to renew a motion to dismiss charges of felonious possession of stolen property was not ineffective assistance of counsel where defendant did not show that the alleged deficient performance prejudiced his defense.

3. Possession of Stolen Property— felonious—submission to jury only on breaking and entering—not guilty verdict on breaking and entering

A conviction for felonious possession of stolen property was remanded for sentencing as misdemeanor possession where the charge was submitted to the jury as a felony only on the basis of the goods having been stolen pursuant to a breaking or entering, but the jury found defendant not guilty of the breaking or entering.

Appeal by defendant from judgment entered on or after 6 August 2007 by Judge W. Osmond Smith, III in Wake County Superior Court. Heard in the Court of Appeals 10 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathleen M. Waylett, for the State.

William D. Spence, for defendant-appellant.

TYSON, Judge.

Samuel Travis Tanner ("defendant") appeals judgment entered after: (1) a jury found him to be guilty of felony possession of stolen goods pursuant to N.C. Gen. Stat. § 14-71.1 and (2) defendant pleaded guilty to attaining the status of habitual felon pursuant to N.C. Gen. Stat. § 14-7.1. We vacate and remand for resentencing.

I. Background

On 27 August 2006, several businesses located on South Person Street in Raleigh, North Carolina were burglarized and vandalized, including Hill's Barber Shop and Quality Hair Design. Items reported stolen included: razor blades, hair clippers, sheers, curlers, hair care products, an air purifier, a CD player, a telephone, and a small black and white television. Raleigh Police Detective Rich Bargfrede ("Detective Bargfrede") was assigned to investigate these crimes.

Detective Bargfrede conducted a search of the police database to determine whether any pawnshops in the area had purchased items that matched the description of the items reported stolen. Detective Bargfrede discovered that Reliable Loan had purchased a pair of hair clippers from Jeanette Brown ("Brown"). On 14 September 2006, Detective Bargfrede visited Brown at her residence located at 519 South Blount Street. Brown informed Detective Bargfrede that she had received the hair clippers from her roommates, defendant and

Antionette Harrison ("Harrison"). Neither defendant nor Harrison were present at that time.

Detective Bargfrede returned to the police station and conducted a further search of the police database to determine whether defendant or Harrison had sold any items to the surrounding pawnshops. The search revealed Harrison had pawned a CD player that matched the serial number of the CD player stolen two days prior from Quality Hair Design.

Detective Bargfrede returned to 519 South Blount Street with uniformed officers. Officers observed defendant and Harrison enter and exit the residence shortly thereafter. As officers approached defendant, he threw a red backpack into the bushes and started to walk in the opposite direction. Officers ordered defendant to stop and recovered the backpack. With defendant's permission, officers searched the backpack and found it contained various hair care products. Detective Bargfrede subsequently obtained and executed a search warrant on the residence located at 519 South Blount Street. Officers recovered numerous items from defendant's bedroom, which were identified as having been stolen from Hill's Barber Shop and Quality Hair Design.

Defendant was arrested and transported to the Raleigh Police Department. Defendant voluntarily waived his *Miranda* rights and provided Sergeant R.A. McLeod with two statements. The substance of defendant's two statements was that he had received the stolen goods from an unidentified person while he was helping this person "carry some bags [away] from" the barber shop.

Defendant testified on his own behalf at trial and recited yet another explanation for how the stolen goods had come into his possession. Defendant stated that several weeks prior to 14 September 2006, he had purchased a box of merchandise containing hair care products from a person identified as "Slim." Slim also sold defendant a refrigerator, CD player, and small television for the package price of eighteen dollars. On a subsequent occasion, defendant purchased drugs from a person accompanying Slim, which turned out to be counterfeit. Defendant testified that on 14 September 2006, he confronted Slim about the counterfeit drugs. In response, Slim gave defendant the backpack full of merchandise he carried on the date of his arrest.

Defendant was indicted on the charges of: (1) felony breaking and entering; (2) felony larceny; (3) felony possession of stolen

goods; and (4) attaining the status of habitual felon. After a four day trial, the jury found defendant to be guilty of felony possession of stolen goods, but acquitted him of felony breaking and entering and felony larceny. Defendant subsequently pleaded guilty to attaining habitual felon status in exchange for a maximum punishment of 261 months imprisonment. The trial court sentenced defendant within the presumptive range to a minimum of 121 months to a maximum of 155 months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) failing to dismiss the charge of felony possession of stolen goods at the close of all the evidence; (2) accepting the jury's verdict of guilty to the charge of felony possession of stolen goods and entering a judgment thereon; and (3) sentencing defendant as a habitual felon. Defendant also argues he received ineffective assistance of counsel.

III. Motion to Dismiss

[1] Defendant argues the trial court committed plain error by failing to dismiss the charge of felony possession of stolen goods based upon: (1) insufficient evidence establishing each element of the crime and defendant's identity as the perpetrator and (2) a fatal variance between the indictment and the evidence presented at trial. We disagree.

Defendant concedes defense counsel made a timely motion to dismiss the charge of felony possession of stolen goods at the close of the State's evidence, but "failed to renew his motion after the close of all the evidence as required by Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure." Defendant urges this Court to review these assignments of error under plain error analysis.

Plain error review applies only to jury instructions and evidentiary matters in criminal cases. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002) (citation omitted), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). "While this is a criminal case, defendant's failure to renew his motion to dismiss does not trigger a plain error analysis." *State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004) (citing *State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995)).

Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure specifically states:

> [i]f a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. *Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.*

N.C.R. App. P. 10(b)(3) (2007) (emphasis supplied). Because defendant introduced evidence at trial and failed to renew his motion to dismiss at the close of all the evidence, defendant waived his right to challenge such denial on appeal. *Id.* These assignments of error are dismissed.

IV. Ineffective Assistance of Counsel

[2] Defendant alternatively argues that if this Court should decide that his preceding assignments of errors were waived at trial, defense counsel's failure to renew the motion to dismiss at the close of all the evidence constituted ineffective assistance of counsel. We disagree.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)), *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 116 (2006). In order to establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

The dispositive issue before this Court becomes whether there is a reasonable probability that the trial court would have granted defendant's motion to dismiss had defense counsel renewed the motion at the close of all the evidence. "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." *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (citation and quotation omitted). The essential elements of possession of stolen property are as follows: "(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 pur-

pose." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (citations omitted). Defendant argues the State presented insufficient evidence tending to establish defendant knew or had reasonable grounds to believe the property was stolen and that he was acting with a dishonest purpose.

A. Reasonable Grounds

"Whether 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).

> [A] defendant-seller's knowledge or reasonable grounds to believe that property was stolen can be implied from his willingness to sell the property at a mere fraction of its actual value. *Such knowledge or reasonable belief can also be implied where a defendant-buyer buys property at a fraction of its actual cost.*

State v. Parker, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986) (citation omitted) (emphasis supplied).

Here, defendant conceded he first purchased a box full of hair care products from a person identified as "Slim" for the price of three dollars. Defendant subsequently purchased a refrigerator, CD player, and a small television from Slim for the price of eighteen dollars. Defendant's knowledge or reasonable belief that the property was stolen could be inferred or implied by his purchase of the property at "a fraction of its actual cost." *Id.* Viewed in the light most favorable to the State, sufficient evidence was presented to establish defendant knew or had reasonable grounds to believe the property he possessed was stolen.

B. Dishonest Purpose

> [T]he "dishonest purpose" element of the crime of possession of stolen property can be met by a showing that the possessor acted with an intent to aid the thief, receiver, or possessor of stolen property. The fact that the defendant does not intend to profit personally by his action is immaterial. It is sufficient if he intends to assist another wrongdoer in permanently depriving the true owner of his property.

Id. at 305-06, 341 S.E.2d at 561. By defendant's own admission, given in his second statement to police officers, defendant came into con-

tact with an unidentified man who had already made a "score." The unidentified man asked defendant to "help him carry some bags [away] from" the barber shop. Defendant complied with this request and identified some of the items contained in the red backpack he carried on the date of his arrest as the items he had received from this person. Viewed in the light most favorable to the State, sufficient evidence tended to show defendant intended "to aid the thief" or "to assist another wrongdoer in permanently depriving the true owner of his property." *Id.*

The State presented sufficient evidence tending to establish defendant knew or had reasonable grounds to believe the property was stolen and that he was acting with a dishonest purpose. We hold there is no reasonable probability that the trial court would have granted defendant's motion to dismiss had defense counsel renewed the motion at the close of all the evidence. Defendant failed to establish that his counsel's alleged deficient performance prejudiced his defense. *Allen*, 360 N.C. at 316, 626 S.E.2d at 286. This assignment of error is overruled.

V. Felony Possession of Stolen Goods

[3] Defendant argues the trial court erred in accepting the jury's guilty verdict as to the charge of felony possession of stolen goods and entering judgment thereon, after the jury found defendant not guilty of felony breaking and entering. We agree.

In order for the crime of possession of stolen goods to be elevated to a felony, the State was required to show and the jury must find an additional element of either: (1) the property stolen had a value of more than $ 1,000.00 or (2) that the property was stolen pursuant to a breaking or entering. *State v. Marsh*, 187 N.C. App. 235, 240-41, 652 S.E.2d 744, 747-48 (2007); N.C. Gen. Stat. § 14-72; *see also State v. Matthews*, 175 N.C. App. 550, 556, 623 S.E.2d 815, 820 (2006) ("Under N.C. Gen. Stat. § 14-72 (2003), defendant's larceny could be considered a felony, rather than a misdemeanor, only if the value of the property he took was more than $1,000.00 or if he committed the larceny in the course of a felonious breaking and entering."). Here, the trial court submitted defendant's felony possession of stolen property charge to the jury based *solely* on the goods having been stolen pursuant to a breaking and entering. Although the indictment alleged the value of the stolen goods exceeded $1,000.00 and evidence was presented at trial tending to support this valuation,

this basis to support felony possession of stolen goods was not submitted to the jury.

It is well-established in North Carolina that "[w]hen a charge of felony possession of stolen goods is based on the goods having been stolen pursuant to a breaking and entering[,] a court cannot properly accept a guilty verdict on the charge of felony possession of stolen goods when defendant has been acquitted of the breaking and entering charge." *Marsh*, 187 N.C. App. at 240, 652 S.E.2d at 747 (quoting *State v. Goblet*, 173 N.C. App. 112, 121, 618 S.E.2d 257, 264 (2005)); *see also Perry*, 305 N.C. at 229-30, 287 S.E.2d at 813. Because the jury found defendant to be not guilty of the underlying breaking and entering charge, upon which the State solely based its charge of felony possession of stolen goods, we vacate defendant's conviction of felony possession of stolen goods and the judgment entered thereon. *Marsh*, 187 N.C. App. at 241, 652 S.E.2d at 748. However, sufficient evidence was presented at trial and the jury found defendant to be guilty of the remaining elements of possession of stolen goods. We remand this case to the trial court for entry of judgment on the charge of misdemeanor possession of stolen goods. *See id.* at 241, 652 S.E.2d at 748; *Matthews*, 175 N.C. App. at 557, 623 S.E.2d at 820.

VI. Habitual Felon Status

Because we vacate defendant's underlying conviction for felony possession of stolen goods, the judgment sentencing defendant as a habitual felon must also be vacated. *See Marsh*, 187 N.C. App. at 242, 652 S.E.2d at 749.

VII. Conclusion

Defendant's assignments of error pertaining to the denial of his motion to dismiss the charge of felony possession of stolen goods were waived based on defense counsel's failure to renew the motion at the close of all the evidence. N.C.R. App. P. 10(b)(3). Defendant's arguments are not subject to plain error review and are dismissed. *Id.*; *Freeman*, 164 N.C. App. at 677, 596 S.E.2d at 322.

Defense counsel's failure to renew defendant's motion to dismiss at the close of all the evidence does not constitute ineffective assistance of counsel. Defendant failed to show his counsel's alleged deficient performance prejudiced his defense. *Allen*, 360 N.C. at 316, 626 S.E.2d at 286.

The trial court improperly accepted the jury's guilty verdict on the charge of felony possession of stolen goods after the jury acquit-

ted defendant of felony breaking and entering. We vacate the judgment entered on defendant's felony possession of stolen goods conviction. This case is remanded to the trial court for entry of judgment and resentencing on the charge of misdemeanor possession of stolen goods. *Marsh*, 187 N.C. App. at 241, 652 S.E.2d at 748. Because defendant's underlying felony conviction was vacated, the judgment sentencing defendant as a habitual felon is also vacated. *Id.* at 242, 652 S.E.2d at 749.

Vacated and Remanded for Resentencing.

Judges CALABRIA and ELMORE concur.

GORDON B. KUTTNER, PLAINTIFF v. VILMA MARIE KUTTNER, DEFENDANT

No. COA08-342

(Filed 7 October 2008)

1. Child Support, Custody, and Visitation— custody—attorney fees—findings and conclusions

An order directing that plaintiff pay attorney fees of $66,375.00 in a child custody matter was supported by adequate findings and conclusions. The reasonableness of the fees was supported by affidavits and plaintiff's stipulations, the court specifically found that none of the time was expended on matters not connected to this case, the fees were only for time spent by staff. Moreover, the reasonableness of attorney fees is not gauged by the fees charged by the other side.

2. Child Support, Custody, and Visitation— custody—attorney fees—frivolous claim—not basis of award

Plaintiff cannot base an appeal upon the failure of the trial court to make findings on a theory that was not the basis of its order. The concept that the trial court must make sufficient findings to support an award of attorney fees as punishment for filing a frivolous custody claim was not applicable here.

3. Child Support, Custody, and Visitation— custody—attorney fees—court's opinion

An expression of the trial court's opinion about attorney fees in a child custody action should not have been included in the order, but was extraneous and treated as surplusage.

Appeal by plaintiff from judgment entered 9 August 2007 by Judge Rebecca T. Tin in Mecklenburg County District Court. Heard in the Court of Appeals 11 September 2008.

Horack, Talley, Pharr & Lowndes, PA, by Kary C. Watson, for plaintiff-appellant.

Myers Law Firm, PLLC, by R. Lee Myers and Matthew R. Myers, for defendant-appellee.

STEELMAN, Judge.

The trial court's findings of fact were supported by competent evidence and the stipulations of plaintiff. The trial court did not award attorney's fees based upon the filing of a frivolous custody claim. The amount of attorney's fees awarded was reasonable. The order of the trial court is affirmed.

I. Factual and Procedural Background

Gordon B. Kuttner (plaintiff) and Vilma Marie Kuttner (defendant) were married on 25 February 2001. One child, Andrew Spencer Kuttner, was born of the marriage on 23 February 2003. The parties separated on 14 April 2006.

On 24 July 2006, plaintiff filed a complaint seeking custody of the minor child. On 19 September 2006, defendant filed an answer and counterclaim seeking custody, child support, attorney's fees, post-separation support, alimony, and equitable distribution. Defendant's claims for post-separation support, alimony, and equitable distribution were subsequently dismissed by the court as being barred by a pre-nuptial agreement between the parties.

On 9 August 2007, the court filed a custody, visitation, and support order that awarded defendant exclusive custody of the minor child, and granted plaintiff "reasonable but restricted visitation privileges." The order further provided that plaintiff pay monthly child support to defendant. On 9 August 2007, the court filed a separate

order directing plaintiff to pay attorney's fees of $66,375.00 arising out of the child custody and support claims.

Plaintiff appeals the order awarding attorney's fees.

II. Standard of Review

When the trial court sits as the trier of the facts, its findings of fact that are supported by competent evidence become binding on this Court. *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004).

N.C. Gen. Stat. § 50-13.6 states, in pertinent part, that "[i]n an action or proceeding for the custody or support, or both, of a minor child, . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat § 50-13.6 (2007); *see also Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996). "To support an award of attorney's fees, the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent." *Falls v. Falls*, 52 N.C. App. 203, 221, 278 S.E.2d 546, 558 (1981).

We note that Judge Tin's order found that counsel for plaintiff stipulated that: (1) the hourly rates charged by defendant's counsel were reasonable; (2) lead counsel for defendant was a skilled attorney with over 30 years experience, and did a good job handling defendant's custody and support claim; and (3) defendant was an interested party acting in good faith in connection with her claims for custody and child support. Plaintiff does not appeal these findings and they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991).

II. Analysis

[1] In his first argument, plaintiff contends that the trial court's order directing him to pay $66,375.00 in attorney's fees is not supported by adequate findings of fact or conclusions of law. We disagree.

A. Reasonableness of Fees

Plaintiff contends that the trial court failed to make sufficiently "detailed findings" concerning the actual time spent by defendant's counsel on the various issues involved in the case. Defendant's counsel submitted a 74-page attorney's fees affidavit containing detailed

time billing records showing the work performed on behalf of defendant. In addition, a twelve page supplemental affidavit of attorney's fees was filed. Judge Tin's order found:

> 34. The 261.43 hours spent by R. Lee Myers and the 68.59 hours spent by Matthew Myers and the 57.14 hours spent by Cindy Graham and the 13.03 hours spent by June DeLore were reasonably necessary and needed to be spent in order to adequately, fully, fairly and completely defend the Father's claim for custody and to prosecute Mother's claim for custody and support.
>
> 35. The total charges of $81,375.29 represent reasonable legal fees and expenses in connection with the custody and support claim by Mother.

The amount of time set forth in finding of fact 34 exactly matches the hours shown on the two attorney's fees affidavits. These findings, together with plaintiff's stipulation as to the reasonableness of the counsel's hourly rate, more than adequately support the reasonableness of the attorney's fees awarded.

B. Challenge to Findings of Fact

Findings of Fact 10, 13, and 27 read as follows:

> 10. During the pendency of this action, Mother has conducted herself and her litigation in an appropriate manner, taking those steps which were reasonably necessary in order to put forward her claim for custody and support
>
> 13. Mother has been able to call upon her attorneys on a consistent and regular basis for counsel and advice, particularly in light of the repeated attempts at intimidation by Father necessitating regular contact with her attorneys' office.
>
> 27. Significant time was expended during the course of representation by Mother's attorneys to deal with issues raised by Father which resulted in legitimate concerns by Mother which needed to be addressed by her attorneys; this occurred on an almost daily basis during telephone calls ostensibly for the purpose of talking to Andrew, but resulted in unpleasant discussions by Father with Mother.

Plaintiff contends that these findings are not expressly limited to issues of child support and custody. However, in findings of fact 19

and 20, the court acknowledged that defendant had incurred attorney's fees in regards to her marital disputes with plaintiff that were not associated with the child custody and support claims. The court specifically found "none of the time expended in matters not connected with child custody and support have been included in this Order for payment by Father."

Plaintiff further argues that there was no evidence that plaintiff intimidated defendant, and argues that the custody dispute was defendant's fault and not his fault. We hold that there is competent evidence in the record to support the trial court's findings, and they are thus binding on appeal. *See Lee* at 253, 605 S.E.2d at 224. We further note that much of plaintiff's argument attempts to raise issues concerning the conduct and good faith of defendant which are contrary to plaintiff's stipulation at trial that defendant "was an interested party acting in good faith in connection with her claims for custody and child support."

Finding of Fact 14 reads as follows:

> 14. Attorneys for Mother conducted the appropriate pretrial due diligence in preparing for trial, including the proper assemblage of exhibits, personal interviews with witnesses in their work and personal environments which resulted in a presentation of evidence in a concise, clear, cogent and convincing manner.

Plaintiff contends that defendant was personally involved in the preparation of exhibits and that not all of the preparation was done by her attorneys and their staff. Testimony revealed that defendant did work with counsel in preparing photograph exhibits. However, the trial court's order assessed attorney's fees only for the time actually spent by defendant's counsel and their staff. Plaintiff has not been charged for defendant's time. We further note that the total amount of attorney's fees, based upon the total number of hours, and applicable rates would have been $81,375.29. This amount was reduced to $66,375.00 by Judge Tin.

Finding of Fact 28 reads as Follows:

> 28. Time was spent by attorney for Mother to meet Father's Motions on two occasions, by his two separate lawyers for Temporary Parenting Orders from the Court, both of which were denied.

Plaintiff contends that there were no actual hearings on the motions and only one motion was denied. This finding states that time was expended to "meet" plaintiff's motion, not that there were actual court hearings. There is thus evidence in the record to support this finding, and it is thus binding on appeal. *See Lee* at 253, 605 S.E.2d at 224.

Finding of Fact 30 reads as follows:

> 30. Mother's attorneys conducted an investigation and review of facts and circumstances surrounding the care of Andrew in a manner which was appropriate and one which the Court finds to be consistent with the discharge of an attorney's duty to his client including visiting the environment in which Andrew spends his day (Candlewyck Preschool and Sander residence) and interviewing the witnesses which could potentially provide important information to the Court about Andrew's care in person, and preparing for their presentation to the Court.

Plaintiff argues that this finding is not supported by the evidence since defendant's counsel consumed a beer during the Sander interview. This argument borders upon the absurd and is rejected as being without merit.

C. Reasonableness of Fees Charged by Defendant's Counsel

Plaintiff makes several arguments in support of his assertion that the amount of fees charged by defendant's counsel were not reasonable. We note that none of these arguments is supported by any case or statutory authority.

First, plaintiff contends that since defendant's counterclaim sought a "substantial but reasonable attorney's fee" that defendant "intended from the beginning of the litigation to generate a substantial fee regardless of the nature and scope of the matters pending before the court." We summarily reject this trifling argument.

Second, plaintiff makes the novel argument that since the fees for plaintiff's counsel were much lower than the fees charged by defendant's counsel, they must be unreasonable. In making this argument, it is not clear whether plaintiff is referring to just the fees charged by his current counsel, or whether this includes all of the fees charged to plaintiff by his multiple different counsel that represented him during the course of the litigation. Regardless of which amount plaintiff

may be referring to, the reasonableness of attorney's fees is not to be gauged by the fees charged by the other side. Rather, the provisions of N.C. Gen. Stat. § 50-13.6 have been interpreted as follows:

> The trial court must also make specific findings of fact concerning the lawyer's skill, the lawyer's hourly rate and the nature and scope of the legal services rendered.

Cox v. Cox, 133 N.C. App. 221, 234, 515 S.E.2d 61, 70 (1999) (citation omitted). Plaintiff stipulated that the hourly rates charged by defendant's counsel were reasonable, that defendant's counsel was a skilled and respected member of the bar and that he did a good job representing defendant. The court made findings of fact as to the number of hours expended, and that those hours were "reasonably necessary." The trial court applied the correct legal standard in awarding attorney's fees.

We find all of plaintiff's contentions under his first argument to be without merit.

[2] In his second argument, plaintiff contends that the trial court erred in that it used the attorney's fee award to punish plaintiff for filing a frivolous custody claim. We disagree.

Plaintiff cites the case of *Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003), for the proposition that if an award of attorney's fees under N.C. Gen. Stat. § 50-13.6 is based upon "the supporting party" initiating a "frivolous action or proceeding" that the trial court must make findings of fact concerning that matter. *Id.* at 575-77, 577 S.E.2d at 150-51. While this concept is legally correct, it has absolutely no application to the instant case. Attorney's fees were awarded in this case based upon there being a custody and support action tried at the same time, where defendant was "an interested party acting in good faith," who had "insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6; *see Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005). Plaintiff cannot base an appeal upon the failure of the trial court to make findings of fact on a theory that was not the basis of its order.

This argument is without merit.

[3] In his third argument, plaintiff contends that the trial court abused its discretion in ordering attorney's fees in the amount of $66,375.00. We disagree.

Finding of Fact 37 reads as follows:

37. If this had been the Court's custody and child support case, she would want that level of effort spent on her behalf.

Plaintiff contends that this finding was an inappropriate expression of personal opinion by the court. We hold that this finding was extraneous to the issues presented to the court and should not have been included in the order. However, it is not essential to support any of the trial court's conclusions of law, and we treat it as surplusage. *See City of Charlotte v. McNeely*, 8 N.C. App. 649, 653, 175 S.E.2d 348, 351 (1970).

Plaintiff next argues that the attorney's fees order was not the result of a "reasoned decision" based upon finding of fact 37.

As noted above, this finding is surplusage. We have carefully reviewed the Order. It contains detailed findings of fact that are supported by evidence in the record. These findings support the trial court's conclusions of law, which in turn support the trial court's order, specifically, the amount of attorney's fees awarded.

This argument is without merit.

AFFIRMED.

Judges GEER and STEPHENS concur.

GLENN CARROLL, PETITIONER v. CITY OF KINGS MOUNTAIN, DEAN SPEARS, HOUSTON CORN, HOWARD SHIPP, MIKE BUTLER, JERRY MULLINAX, RODNEY GORDON, AND KEITH MILLER, IN THEIR CAPACITY AS CITY COUNCIL MEMBERS IN THE CITY OF KINGS MOUNTAIN, AND RICK MURPHREY IN HIS CAPACITY AS MAYOR FOR THE CITY OF KINGS MOUNTAIN, ROBERT BAZZLE, RESPONDENTS

No. COA07-1330

(Filed 7 October 2008)

1. Zoning— request for change—residency

There was competent evidence before a town council that a person requesting a zoning change for someone else's property (Bazzle) was a resident of the town even though he only listed a street address on the application.

2. Zoning— application to change—time limit from prior rezoning

A town council violated its zoning ordinance by considering an application to change a zoning map within the minimum time allowed from a previous change.

3. Zoning— change—standard of review

The trial court used the wrong standard of review when concluding that a town council's legislative actions in rezoning property were arbitrary and capricious.

Appeal by respondents from order entered 5 July 2007 by Judge Timothy L. Patti in Cleveland County Superior Court. Heard in the Court of Appeals 3 April 2008.

Arthurs & Foltz, by Douglas P. Arthurs, for petitioner appellee.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson and David W. Aycock, for respondent appellants.

Corry & Luptak, by Clayward C. Curry, Jr., for City of Kings Mountain, respondent appellant.

McCULLOUGH, Judge.

On 27 September 2005, after proper notice and a public hearing, the Kings Mountain City Council ("the Council") rezoned Glenn Carroll's ("Mr. Carroll") property located at 605 North Piedmont Avenue ("Mr. Carroll's property") to General Business ("GB"). There was no appeal or petition for judicial review filed with respect to the 27 September 2005 zoning of Mr. Carroll's property.

Less than a month after Mr. Carroll's property was zoned GB, on 17 October 2005, Robert Bazzle, a resident of Kings Mountain, filed an application with the Council, requesting that the Council amend the official Zoning Map of the City of Kings Mountain such that Mr. Carroll's property would be rezoned from GB to Residential ("R-8"). Mr. Bazzle listed his name, telephone number, and street address on the application form that he submitted to the Council, but he did not list a city or state on the address line. This request was scheduled for hearing on 31 January 2006, and notice of this hearing was published in the *Kings Mountain Herald* on 12 January 2006 and 19 January

2006. On 10 January 2006, Mr. Carroll filed a Protest Petition to Mr. Bazzle's request.

On 15 December 2005, new members of the Council were sworn in. On 17 January 2006, Steve Killian, the Planning Director for the City of Kings Mountain, on behalf of the City Planning and Zoning Board ("the Planning Board") sent a memorandum to Greg McGinnis, the City Manager, recommending the approval of Mr. Bazzle's rezoning request. The memorandum stated that the Planning Board's recommendation was based, in part, on the fact that the City's Land Development Plan called for a residential use rather than a business use in the area of Mr. Carroll's property.

Mr. Bazzle's rezoning request was presented for public discussion at an open meeting on 31 January 2006. Mr. Bazzle appeared at that meeting and is identified in the minutes of the meeting as residing at 901-2 Sterling Drive. Mr. Bazzle and Steve Killian acknowledged at the meeting that there had been no changes to Mr. Carroll's property since the 27 September 2005 zoning decision.

After the public hearing on Mr. Bazzle's request was closed, members of the Council discussed the matter further and voted to approve the request, by a count of 6 to 1.

On 27 February 2006, Mr. Carroll petitioned the trial court for judicial review and for a writ of certiorari. The trial court issued a writ of certiorari and heard the matter at the 29 March 2007 Session of Cleveland County Superior Court.

After a hearing on the matter, the trial court reversed the Council's decision to reclassify Mr. Carroll's property from GB to R-8, after concluding, *inter alia*:

> 2. That the City of Kings Mountain improperly considered Robert Bazzle's rezoning petition in violation of Article XIV Section 14.2(2)(c) of the Kings Mountain Zoning Ordinance by not requiring evidence that Robert Bazzle owned property or resided in the jurisdiction; therefore, the rezoning is null and void.
>
> 3. That the City of Kings Mountain improperly considered Robert Bazzle's rezoning petition, thereby circumventing the proper appeals process from the September 27, 2005 zoning decision; therefore, the rezoning is null and void.
>
> 4. That since there was no evidence presented at the time of the January 31, 2006 rezoning to the effect that there had been a

substantial change in condition or circumstance in the area since the September 27, 2005 rezoning, the actions of the City of Kings Mountain in rezoning the property from GB to R-8 were arbitrary and capricious; therefore, the rezoning is null and void.

The City of Kings Mountain, Dean Spears, Houston Corn, Howard Shipp, Mike Butler, Jerry Mullinax, Rodney Gordon, and Keith Miller, in their capacity as City Council members for the City of Kings Mountain, and Rick Murphrey, in his capacity as Mayor for the City of Kings Mountain, and Robert Bazzle (collectively, "respondents") appeal. On appeal, respondents contend that the trial court erred by: (1) finding that Mr. Bazzle presented no evidence to the Council that he was a resident of Kings Mountain and concluding that the Council improperly considered Mr. Bazzle's zoning amendment application; (2) concluding that the Council improperly circumvented the appeals process for the 27 September 2005 zoning decision; and (3) applying the wrong legal standard in determining whether the legislative actions of the Council were arbitrary and capricious.

I. Evidence of Mr. Bazzle's Residency

[1] First on appeal, respondents contend that the trial court erred in finding that Mr. Bazzle presented no evidence to the Council that he was a resident of Kings Mountain. We agree that this finding is erroneous.

After careful examination of the record on appeal, we hold that there was competent evidence before the Council at the 31 January 2006 hearing to show that Mr. Bazzle was a resident of Kings Mountain. Mr. Bazzle listed his street address on his application for rezoning and provided his signature at the bottom of the application for the purpose of certifying that all of the information provided on the application form was true. While Mr. Bazzle did not identify his city of residence on such form, this is consistent with the manner in which Mr. Bazzle is identified in the minutes of the 31 January 2006 meeting. Thus, there is evidence in the record that merely listing a street address, as opposed to a full address, was the common practice of Kings Mountain residents at City Council meetings, whereas, only non-residents included their cities of residence when identifying themselves at such meetings. Moreover, in considering the sufficiency of the listing of a street address as evidence of Mr. Bazzle's residency within the City of Kings Mountain, we find it instructive that even trial courts " 'sitting in a city' " may " 'judicially notice the streets, squares, the public grounds thereof, their location, and rela-

tion to one another, and the direction in which they run as laid down on an official map of the city.' " *State v. Martin*, 270 N.C. 286, 289, 154 S.E.2d 96, 98 (1967) (citation omitted). Thus, the fact that 901-2 Sterling Drive is an address located within the City of Kings Mountain is the sort of fact that would be generally known to the members of the Council and was not a fact subject to reasonable dispute.

Finally, Article XIV, Section 14.2(2)(c) of the Code of Ordinances for the City of Kings Mountain ("the Kings Mountain Ordinances"), provides, in part, "Applications to change, supplement, or amend this ordinance may be initiated by[] . . . [a]nyone who owns property or resides in the area of jurisdiction of this Ordinance or the agent of such person." Section 14.3 of the Kings Mountain Ordinances, provides, in part:

> The Planning Department, before scheduling any amendment on the application for consideration by the Planning Commission, shall ensure that it contains all the required information as specified in this Ordinance and on the application form.

There is no requirement in the Kings Mountain Ordinances that an applicant submit any supplemental proof of residency besides that which is listed on the application form. As previously discussed, based on Mr. Bazzle's certified application, the Council found that Mr. Bazzle was, in fact, a resident of Kings Mountain and there was competent evidence before the Council to support this finding. *See also Habitat for Humanity of Moore Cty., Inc. v. Board of Comm'rs of Town of Pinebluff*, 187 N.C. App. 764, 767, 653 S.E.2d 886, 888 (2007) ("Although Commissioners correctly note that the property owner did not sign the application, this is irrelevant in light of their finding that Habitat's application was complete."). Accordingly, the trial court's conclusion that the Council violated Article XIV, Section 14.2(2)(c) of the Kings Mountain Zoning Ordinances by not requiring more evidence that Robert Bazzle owned property or resided in the jurisdiction is erroneous.

II. Rezoning Procedure

[2] Next on appeal, respondents contend that the trial court erred in concluding that the Council circumvented the proper appeals process from the 27 September 2005 zoning decision by considering Mr. Bazzle's rezoning application. We agree that this conclusion is erroneous, but we conclude that the Council, nonetheless, exceeded its legislative authority by considering a zoning map amendment appli-

cation filed prior to the expiration of the four-month window mandated by Section 14.8 of the Kings Mountain Ordinances.

"[A]s a general matter, the power to zone real property is vested in the General Assembly by article II, section 1, of the North Carolina Constitution." *Chrismon v. Guilford County*, 322 N.C. 611, 617, 370 S.E.2d 579, 583 (1988). "This zoning power may be and has been conferred by the General Assembly upon various local governments by legislative enactment." *Id.*

Thus, "rezoning is a legislative act[.]" *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 373, 344 S.E.2d 357, 360, *disc. review denied and appeal dismissed*, 318 N.C. 417, 349 S.E.2d 600 (1986); *see also Brown v. Town of Davidson*, 113 N.C. App. 553, 556, 439 S.E.2d 206, 208 (1994). A city council, acting as a legislative body, has authority to rezone when "reasonably necessary to do so in the interests of the public health, safety, morals or general welfare." *See Willis v. Union County*, 77 N.C. App. 407, 409, 335 S.E.2d 76, 77 (1985). "Ordinarily, the only limitation upon [a city council's] legislative authority is that it may not be exercised arbitrarily or capriciously." *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1971). Furthermore:

> When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.

In re Appeal of Parker, 214 N.C. 51, 55, 197 S.E. 706, 709, *appeal dismissed*, 305 U.S. 568, 83 L. Ed. 358 (1938).

The enactment of zoning legislation within the limitations imposed by the constitution and the enabling statute is a matter within the legislative authority of the Council. Thus, the trial court's conclusion that the Council improperly circumvented an appeals process in exercising its legislative authority to amend the city's zoning map is erroneous. Nonetheless, we conclude that the Council's actions were improper because its legislative authority was subject to a time limitation provided by ordinance. The Kings Mountain Ordinances provide, in pertinent part, as follows:

Article XIV Amendment Procedures; Conditional Use Districts

14.1 General

The City Council may amend, supplement or change the Zoning Ordinance text and zoning district lines and designations according to the following procedure. . . .

14.2 Amendment Initiation

Applications to change, supplement or amend this Ordinance may be initiated by:

1) Textual Amendment

   (a) The City Council;

   (b) The Planning and Zoning Board;

   (c) Anyone who owns property or resides in the area of jurisdiction of this ordinance or the agent of such person.

2) Map Amendment

   (a) The City Council;

   (b) The Planning and Zoning Board;

   (c) Anyone who owns property or resides in the area of jurisdiction of this ordinance or the agent of such person.

* * * *

14.8 Maximum Number of Applications

No application for the same zoning district applicable to the same property or any part thereof shall be filed until the expiration of four (4) months from:

(1) The date of final determination by the City Council; or

(2) The date of the public hearing or scheduled public hearing if the application is withdrawn after it has been advertised for public hearing.

(Emphasis added.)

Here, Mr. Bazzle filed an application to amend the zoning district applicable to Mr. Carroll's property prior to the expiration of the four-

month window that began on 27 September 2005, the date in which the Council made a final determination that such district would be zoned GB. In considering Mr. Bazzle's application, the Council violated Section 14.8 of the Kings Mountain Ordinances and acted outside of the scope of its legislative authority. Accordingly, this decision should be reversed.

III. Standard of Review for Legislative Action

[3] Finally, although we conclude that the Council's zoning decision should be reversed under Section 14.8 of the Kings Mountain Ordinances, we briefly address respondents' remaining assignments of error that the trial court applied the wrong standard of review in concluding that the Council's legislative actions were arbitrary and capricious because (1) they were based on undocumented concerns of traffic; and (2) there was no "evidence of a substantial change in condition or circumstance in the area." We agree that the trial court applied the wrong standard of review in reaching these conclusions. The proper standard of review for legislative action by a city council is the deferential standard articulated above.

Because we conclude that Mr. Bazzle's application was filed and considered in violation of Section 14.8 of Kings Mountain Ordinances, we affirm.

Affirmed.

Judges STEELMAN and ARROWOOD concur.

STATE OF NORTH CAROLINA v. MATTHEW OWEN SHAFFER

No. COA08-214

(Filed 7 October 2008)

1. Appeal and Error— preservation of issue—failure to disclose expert witness information—wrong witness

An issue concerning the failure to disclose expert witness information was not preserved for appeal where the transcript reference after the assignment of error was to a discussion about a doctor, but the issue on appeal concerned a certified sexual assault nurse.

2. Rape; Sexual Offenses— multiple offenses—inconsistent verdicts

Defendant was not entitled to a new trial based upon the alleged inconsistency of verdicts in an incident involving multiple sexual assaults where defendant was convicted of first-degree sexual offense and crime against nature but acquitted of first-degree rape and assault by strangulation. The State presented sufficient evidence to support convictions for each offense and defendant is given the benefit of the acquittals.

Appeal by defendant from judgment entered on or after 29 June 2007 by Judge Gregory A. Weeks in Johnston County Superior Court. Heard in the Court of Appeals 10 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Hollis, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for defendant-appellant.

TYSON, Judge.

Matthew Owen Shaffer ("defendant") appeals judgments entered after a jury found him to be guilty of: (1) first-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a) and (2) crime against nature pursuant to N.C. Gen. Stat. § 14-177. We find no error in the jury's verdicts or the judgments entered thereon.

I. Background

On 7 June 2006, H.B. ("the victim") and defendant, along with several other people, drove to the Neuse River in Wayne County to "drink beer" and go fishing. After several hours, the group departed from their location and drove to a restaurant located in Goldsboro. Shortly after their arrival, defendant's brother accused the victim of stealing money from him, and an argument ensued. Thereafter, defendant and the victim left together in defendant's girlfriend's vehicle.

Defendant asked the victim "what [she] wanted to do" and "where [she] wanted to go." The victim responded that she wanted to go home. As defendant and the victim approached her residence, defendant asked the victim if she would engage in sexual activity with him. The victim stated, "h-ll no." Defendant continued to drive past the victim's residence to a pond in a field surrounded by woods, approximately a quarter of a mile down the road. Once they arrived

at the pond, defendant attempted to kiss the victim, but she pushed him away and told defendant she "wanted to go home."

Defendant allegedly responded by wrapping his hands around the victim's neck and choking her. Defendant ordered the victim to get out of the vehicle and to remove her pants. The victim hesitated and defendant hit her on the right side of her face with his fist. The victim subsequently complied with defendant's request and undressed. Defendant placed himself on top of the victim and penetrated her mouth, vagina, and rectum with his penis. At this time, the victim was "screaming and crying" for defendant to stop.

Defendant ordered the victim to "get on top of him" and attempted to place his penis inside her rectum a second time. The victim screamed "no." Defendant stood up, bent the victim over the hood of the vehicle, and inserted his penis inside her rectum. Defendant then forced the victim to perform oral sex on him under the threat of violence. Subsequently, defendant ordered the victim to "get on the ground" and he continued to have vaginal intercourse with her for "a long time." All the while, defendant threatened to kill the victim if she told anyone about this incident.

After defendant ejaculated, he ordered the victim to "get in the pond and wash off." Defendant then drove the victim to her residence and dropped her off at the road. The victim entered her residence and crouched down where the phone was located, but could not make a phone call. The victim was crying, spitting out blood, and refused to tell her mother what had transpired because of defendant's threats. Approximately five to ten minutes later, the victim's brother arrived home, observed and spoke with the victim, and called 911.

Johnston County Sheriff Deputy Richard Reliford responded to the 911 call and the victim told him about the incident in detail. Deputy Reliford noted that the victim's right eye was swollen shut, she was bleeding from her mouth, and her clothes were dirty. The victim was transported to Johnston Memorial Hospital by ambulance.

At the hospital, the victim was examined by a board certified sexual assault nurse, Beth Walker ("Walker"). Walker observed that various parts of the victim's body displayed abrasions and were bruised. Walker also observed swelling in the victim's vagina and a tear in her anal area. Walker completed a sexual assault kit. Test results revealed that a DNA profile of sperm found on the victim's shirt matched defendant's DNA profile.

Defendant did not offer any evidence at trial. On 29 June 2007, a jury found defendant to be guilty of first-degree sexual offense for forcible anal intercourse and crime against nature for coerced fellatio. The jury acquitted defendant of first-degree rape and assault by strangulation. The trial court determined defendant had a prior record level of IV and sentenced him in the presumptive range to a minimum of 335 months to a maximum of 411 months imprisonment for his first-degree sexual offense conviction. The trial court also sentenced defendant to a minimum of eight months to a maximum of ten months imprisonment for his crime against nature conviction. Defendant's sentences were ordered to be served concurrently. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying defendant's motion to prohibit the State from calling a sexual assault nurse to testify as an expert and (2) imposing separate sentences for first-degree sexual offense and crime against nature based upon the inconsistency of the verdicts.

III. Discovery

[1] Defendant argues the trial court erred by permitting the sexual assault nurse, Walker, to testify regarding her observations during her examination of the victim. Defendant asserts the State violated the discovery statute by failing to disclose expert witness information.

A. Standard of Review

"Whether a party has complied with discovery . . . and what sanctions, if any, to impose are questions addressed to the sound discretion of the trial court." *State v. Heatwole*, 344 N.C. 1, 15, 473 S.E.2d 310, 317 (1996) (citation omitted), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). A trial court may be reversed for an abuse of discretion only upon "a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Banks*, 322 N.C. 753, 761, 370 S.E.2d 398, 404 (1988) (citation omitted).

B. Appellate Review

The scope of review on appeal is limited to the consideration of those assignments of error set out in the record on appeal in accordance with Rule 10 of the North Carolina Rules of Appellate

Procedure. N.C.R. App. P. 10(a) (2008). Rule 10(c)(1) provides, in relevant part: "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) (2008). Here, defendant failed to assign any error to the admission of Walker's testimony based upon the State's violation of the discovery statute. In his brief, defendant's second question presented references assignment of error numbered 5. Defendant's assignment of error numbered 5 in the record on appeal states:

> The trial court committed reversible or, in the alternative, plain error in denying defendant's motion to prevent the state from calling a witness for whom no report was timely provided, thereby denying defendant his federal and state constitutional rights and his rights under state law.

Immediately following this assignment of error, defendant references "Tp. 545, lines 7-9[.]" However, the transcript references a colloquy between defense counsel and the trial court concerning the testimony of Dr. Daniel Catz, not Walker. Specifically, defense counsel argued to the trial court that Dr. Catz should not be permitted to opine how the victim's injuries were sustained because the State had allegedly failed to provide defendant with a copy of *his* expert opinion. Defendant failed to assign error to Walker's testimony in the record of appeal. This issue is not preserved for appellate review and is not properly before this Court. N.C.R. App. P. 10(a), (c)(1).

Nevertheless, "Appellate Rule 2 specifically gives either court of the appellate division the discretion to suspend or vary the requirements or provisions of any of the rules in order to prevent manifest injustice to a party, or to expedite decision in the public interest." *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 204-05 (2007) (citation and quotation omitted); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). However, "the exercise of [Appellate] Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *Hart*, 361 N.C. at 316, 644 S.E.2d at 205 (citations and quotations omitted). After a thorough examination of the record and transcripts, in our discretion, we decline to invoke Appellate Rule 2. No showing is made and the record fails to support that the Rules of Appellate Procedure need to be suspended in this case to "prevent manifest

injustice" to defendant. *Id.* at 315, 644 S.E.2d at 205. This assignment of error is dismissed.

IV. Inconsistent Verdicts

[2] Defendant argues that the verdicts for his first-degree sexual offense and crime against nature were inconsistent given the evidence presented at trial and the jury's decision to acquit him of first-degree rape and assault by strangulation. We disagree.

In North Carolina, it is well-established that "a jury is not required to be consistent and that incongruity alone will not invalidate a verdict." *State v. Rosser*, 54 N.C. App. 660, 661, 284 S.E.2d 130, 131 (1981) (citations omitted). The reasoning behind this legal principle was enunciated by the United States Supreme Court in *United States v. Powell*:

> where truly inconsistent verdicts have been reached, the most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, as the above quote suggests, inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.
>
> . . . .
>
> *We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them.* Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries

> into the jury's deliberations that courts generally will not undertake. Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it.

469 U.S. 57, 64-66, 83 L. Ed. 2d 461, 468-69 (1984) (internal citations and quotations omitted) (emphasis supplied); *see also State v. Reid*, 335 N.C. 647, 658, 440 S.E.2d 776, 782 (1994) (adopting the reasoning articulated in *United States v. Powell* for allowing seemingly inconsistent verdicts in the same trial). The United States Supreme Court also noted that "a criminal defendant . . . is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Powell*, 469 U.S. at 67, 83 L. Ed. 2d at 470.

Here, the jury convicted defendant of first-degree sexual offense and crime against nature. *See* N.C. Gen. Stat. § 14-27.4(a)(2)(b) (2007) (providing that a person is guilty of first-degree sexual offense if the person engages in a sexual act; with another person by force and against the will of the other person; and inflicts serious personal injury upon the victim or another person); N.C. Gen. Stat. § 14-177 (2007) ("If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon."). It is undisputed that the State presented sufficient evidence tending to support defendant's convictions on each of these offenses. The State also presented evidence which would have supported a guilty verdict on the offense of first-degree rape, and the greater offenses of crime against nature, first-degree and second-degree sexual offense based upon forced fellatio. However, the jury voted to find defendant not guilty of these crimes. Although the results on these charges may be difficult to reconcile, this Court is not required to grant defendant a new trial. *See Powell*, 469 U.S. at 69, 83 L. Ed. 2d at 471 ("[T]here is no reason to vacate respondent's conviction merely because the verdicts cannot rationally be reconciled. Respondent is given the benefit of her acquittal on the counts on which she was acquitted, and it is neither irrational nor illogical to require her to accept the burden of conviction on the counts on which the jury convicted."). This assignment of error is overruled.

V. Conclusion

Defendant failed to assign any error to Walker's testimony in the record on appeal. Accordingly, this issue is not preserved for appellate review and is not properly before us. N.C.R. App. P. 10(a), (c)(1). In our discretion, we decline to invoke Appellate Rule 2 because the

Rules of Appellate Procedure need not be suspended in this case to "prevent manifest injustice" to defendant. N.C.R. App. P. 2.

Defendant is not entitled to a new trial based upon the alleged inconsistency of the jury's verdicts and the judgments entered thereon. *Powell*, 469 U.S. at 69, 83 L. Ed. 2d at 471. Defendant received a fair trial, free from the prejudicial error he preserved, assigned, and argued.

No Error.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. RICHARD LIONEL COOK

No. COA06-1355-2

(Filed 7 October 2008)

1. Evidence— relevance—preclusion of cross-examination—no abuse of discretion

There was no abuse of discretion in a murder and assault prosecution arising from impaired driving where the trial court interrupted defendant's cross-examination concerning the side effects of his work-place exposure to chemicals, sent the jury out, and excluded the line of questions for lack relevance and a foundation. Defendant did not request a limiting instruction upon the jury's return and failed to lay a sufficient foundation through later testimony.

2. Evidence— refreshing memory—other evidence

Any error in allowing witnesses to refresh their memory was made harmless by the introduction of other evidence.

3. Evidence— highway patrol trooper's opinion—impaired driving—other evidence

The erroneous admission of a highway patrol trooper's opinion that defendant was impaired (because the opinion was based on hearsay and conjecture) did not change the outcome where there was other overwhelming evidence to the same effect.

STATE v. COOK

[193 N.C. App. 179 (2008)]

Appeal by defendant from judgments entered 22 February 2006 by Judge J.B. Allen Jr. in Alamance County Superior Court. This case was originally heard in the Court of Appeals 22 May 2007. *See State v. Cook*, 184 N.C. App. 401, 647 S.E.2d 433 (2007). Upon remand by order from the North Carolina Supreme Court, filed 12 June 2008. *See State v. Cook*, 362 N.C. 285, 661 S.E.2d 874 (2008).

Attorney General Roy Cooper, by Special Counsel Issac T. Avery, III, for the State.

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

TYSON, Judge.

This Court initially heard Richard Lionel Cook's ("defendant") appeal from judgment entered after a jury found him to be guilty of: (1) second-degree murder pursuant to N.C. Gen. Stat. § 14-17 and (2) two counts of assault with a deadly weapon inflicting serious injury pursuant to N.C. Gen. Stat. § 14-32(b). *See Cook*, 184 N.C. App. at 401, 647 S.E.2d at 433. A divided panel of this Court found no error in part and remanded in part with instructions. *See id.*

The State appealed pursuant to N.C. Gen. Stat. § 7A-30(2). Our Supreme Court vacated and remanded the matter to this Court. *Cook*, 362 N.C. at 286, 661 S.E.2d at 875. Upon remand and after further review, we hold that any error in the denial or admission of testimony, the jury's verdict, or the judgments entered thereon was harmless beyond a reasonable doubt.

I. Background

On or about 14 February 2005, defendant was indicted for: (1) second-degree murder; (2) felony death by motor vehicle; (3) two counts of assault with a deadly weapon inflicting serious injury; (4) reckless driving; and (5) driving while impaired. These charges stemmed from a traffic accident which occurred on 29 October 2004. For a more thorough discussion of the underlying facts, see this Court previous opinion: *Cook*, 184 N.C. App. at 401, 647 S.E.2d at 433.

Defendant's trial began 20 February 2006. On 22 February 2006, the jury found defendant to be guilty of second-degree murder and two counts of assault with a deadly weapon inflicting serious injury. Defendant was sentenced in the presumptive range to a minimum of 176 months and a maximum of 221 months imprisonment for

the second-degree murder conviction and consecutive terms of a minimum of 27 months and a maximum of 42 months imprisonment for each assault with a deadly weapon inflicting serious injury conviction. Defendant appealed.

A divided panel of this Court: (1) found no error in defendant's two assault with a deadly weapon inflicting serious injury convictions based on defendant's failure to assign error to those convictions and (2) remanded this case to the trial court for a hearing concerning the trial court's denial of defendant's motion to continue. *Id.* at 411, 647 S.E.2d at 439. Our Supreme Court specifically held that the trial court's failure to grant a continuance was error, but such error was harmless beyond a reasonable doubt. *Cook*, 362 N.C. at 286, 661 S.E.2d at 875. Our Supreme Court vacated this Court's ruling and remanded this case to this Court "for consideration of defendant's remaining assignments of error." *Id.*

II. Remaining Issues

Defendant argues the trial court erred when it: (1) precluded defendant's cross-examination regarding Gene Mullis's ("Mullis") personal knowledge of the side effects of the chemicals to which defendant was exposed at work on 28 October 2004; (2) allowed the State to refresh the recollection of John Talbot ("Talbot") and paramedic Kyle Buckner ("Buckner"); and (3) admitted North Carolina State Trooper Clint Carroll's ("Trooper Carroll") opinion testimony that defendant was impaired at the time the collision occurred.

III. Standard of Review

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006) (internal quotations omitted).

IV. Cross-examination of Mullis

[1] Defendant argues the trial court erred when it precluded *ex mero motu* defendant's cross-examination of Mullis, defendant's employer, about the side effects of the chemicals to which defendant was exposed the previous day. We disagree.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determi-

nation of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). "The trial judge has inherent authority to supervise and control trial proceedings. The manner of the presentation of the evidence is largely within the sound discretion of the trial judge and his control of a case will not be disturbed absent a manifest abuse of discretion." *State v. Davis*, 317 N.C. 315, 318, 345 S.E.2d 176, 178 (1986) (citations omitted).

Here, defense counsel, through cross-examination, attempted to introduce evidence of defendant's impairment by chemicals at work. The trial court interrupted the cross-examination and sent the jury out of the courtroom. The trial court told defense counsel that he had "not laid any ground work[]" and that this questioning was not "relevant at this time." Defendant argues that "when the [trial] [c]ourt interrupted defense counsel's cross-examination without objection from the [S]tate, the jury was left to infer that the [trial] [c]ourt felt that the evidence and the particular line of questioning was somehow improper, or worse still, irrelevant." We disagree. Upon the jury's return, defendant failed to request of the trial court to instruct the jury that its interruption of the cross-examination should not be viewed as an expression on the validity of the evidence. Defendant also made no further efforts to lay a sufficient foundation for admission of this testimony. No evidence was introduced, either before Mullis's testimony or after, regarding defendant's exposure to chemicals at work which defendant questioned Mullis about.

Defendant has failed to show that the trial court's preclusion of testimony of Mullis's personal knowledge about the side effects of the chemicals defendant was exposed to constituted a manifest abuse of discretion. *Hagans*, 177 N.C. App. at 23, 628 S.E.2d at 781. Defendant failed to request that the trial court issue a limiting instruction upon the jury's return and failed to lay a sufficient foundation for this line of questioning through later testimony. This assignment of error is overruled.

V. Refreshed Recollection

[2] Defendant argues the trial court erred when it allowed the State to refresh the recollections of Talbot and Buckner. We disagree.

A. Talbot

The following exchange occurred during Talbot's testimony:

Q Did you see any movements made by that truck?

A No, sir.

Q Was that a tango truck?

A Yes, sir.

Q Do you recall speaking to the DA's Office Investigator Mr. Lynch in, sometime in mid-November?

A Yes, sir.

Q Would it help to refresh your memory as to what you observed as to the tango truck that night?

[Defense Counsel]: Objection.

Court: Over-ruled

A Yes, sir.

Talbot then looked at his statement and stated his memory had been refreshed and that defendant's vehicle "swerved over so close to the tango truck that he had to swerve."

Presuming *arguendo* that the trial court's ruling was erroneous, the record shows that the State offered, and the trial court admitted, other evidence that the white vehicle defendant was driving was observed weaving. Other witnesses, in addition to Talbot, informed the jury that the white vehicle driven by defendant was weaving on the highway moments before the crash. We hold that any error from the admission of Talbot's refreshed testimony was harmless beyond a reasonable doubt. *See State v. Carter*, 357 N.C. 345, 359, 584 S.E.2d 792, 802 (2003) ("Assuming *arguendo* that the trial court erred at all in excluding such evidence, the fact that this same evidence was admitted without objection at a different point makes any alleged error likely harmless." (Citation omitted)). This assignment of error is overruled.

B. Buckner

The following exchange occurred during Buckner's testimony:

Q Did [defendant] ever say anything to you or in your presence about consumption of alcohol?

A No ma'am.

Buckner was then asked if he had reviewed a copy of the interview with the investigator. Buckner replied "I have a copy in my presence." Again, over defendant's objection, Buckner reviewed the statement

and was asked if he "can recall whether or not this defendant made any statements about what he had to drink?" Buckner said "Yes, ma'am. I do read here where I told Mr. Lynch that [defendant] did tell me that he had had a couple of beers."

Both the State and Defendant agree that it is unclear whether Buckner's recollection was refreshed or whether he merely read the prior statement into evidence. The identical testimony was nonetheless admitted into evidence when Buckner's fellow paramedic Mike Childers ("Childers") testified that "[defendant] responded with he had had two beers." We hold that any error in the admission of this evidence was harmless beyond a reasonable doubt. *Carter*, 357 N.C. at 359, 584 S.E.2d at 802. This assignment of error is overruled.

VI. Trooper Carroll's Opinion Testimony

[3] Defendant argues the trial court erred when it admitted Trooper Carroll's opinion testimony that defendant was impaired at the time the collision occurred. Defendant asserts this testimony was an opinion based upon hearsay and conjecture. We agree.

A. Personal Knowledge

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." N.C. Gen. Stat. § 8C-1, Rule 602 (2005).

The following exchange occurred during Trooper Carroll's testimony:

Q Trooper, that night when, when you had [defendant] sign that form, based on your investigation, had you formed an opinion that was satisfactory to yourself as to whether or not [defendant] had consumed some type of impairing substance that would appreciably impair his mental or physical faculties?

[Defense Counsel]: Objection.

Court: I'll let him give his opinion if he has one.

A Yes, sir. I had formed an opinion that night.

Q That he had or had not?

A That [defendant] had consumed a sufficient amount of impairing substance to appreciable notify [sic] his mental and

> physical faculties. And what I based it on was the witness statements that I had read that night at the accident, the damage of the cars that, that corroborated what the witness statements said, and also with what . . . [Childers] . . . had motioned [sic] to me in reference to [defendant] having been drinking that night.

We agree with defendant that this portion of Trooper Carroll's testimony was inadmissable because it was not based on Trooper Carroll's personal knowledge, but based solely upon hearsay and conjecture. *Id.* We hold the trial court erred when it admitted this portion of Trooper Carroll's testimony over defendant's objection. *Id.*

B. Prejudice

> [D]efendant is not entitled to a new trial unless the erroneous admission of this testimony prejudiced him.
>
> In determining whether a criminal defendant is prejudiced by the erroneous admission of evidence, the question is whether there is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict.

State v. Shaw, 106 N.C. App. 433, 441, 417 S.E.2d 262, 267 (citing N.C. Gen. Stat. § 15A-1443(a) (1988)), *disc. rev. denied*, 333 N.C. 170, 424 S.E.2d 914 (1992).

Here, the record shows other overwhelming evidence that defendant: (1) drank heavily before operating his vehicle; (2) caused a tractor trailer truck to run off the road; (3) almost swerved into another truck; (4) struck a vehicle parked on the shoulder of the highway; (5) told Childers he "had two beers[;]" and (6) tested positive for the presence of amphetamines, marijuana, and opiates in his body.

The State also presented evidence which tended to establish that the inside of defendant's vehicle and defendant's breath smelled of alcohol. Defendant has failed to show any reasonable possibility that the jury would have reached a different verdict had the trial court properly excluded Trooper Carroll's inadmissible opinion testimony. *Id.*

VII. Conclusion

Defendant has failed to show the trial court's *ex mero motu* pause of defense counsel's cross examination of Mullis was "so arbi-

trary that it could not have been the result of a reasoned decision." *Hagans*, 177 N.C. App. at 23, 628 S.E.2d at 781 (quotation omitted). Defendant made no further effort to lay a sufficient foundation to admit this testimony.

The trial court's allowance of the State to refresh the recollection of both Talbot and Buckner, if error, was harmless beyond a reasonable doubt. *Carter*, 357 N.C. at 359, 584 S.E.2d at 802. Presuming, without deciding, their testimony was admitted in error, identical testimony was introduced through other witnesses.

Defendant failed to show any reasonable possibility that, had the trial court properly excluded Trooper Carroll's opinion testimony, the jury would have reached a different verdict. *Shaw*, 106 N.C. App. at 441, 417 S.E.2d at 267.

Defendant received a fair trial, free from the prejudicial errors he preserved, assigned, and argued. We hold that any error in the denial or admission of testimony, the jury's verdict, or the judgments entered thereon was harmless beyond a reasonable doubt.

Harmless Error.

Judges WYNN and CALABRIA concur.

STATE OF NORTH CAROLINA v. BARRY WAYNE WELCH

No. COA07-1557

(Filed 7 October 2008)

Evidence— prior crimes or bad acts—prior drive-by drug sales—identity—intent—common plan or scheme

The trial court did not abuse its discretion in a possession with intent to sell and deliver cocaine and the sale and delivery of cocaine case by allowing the State to present evidence of two prior drug sales involving defendant because: (1) in drug cases, evidence of other drug violations is often admissible under N.C.G.S. § 8C-1, Rule 404(b); (2) the record showed substantial similarities existed between the three drug sales in that the sales were made to an undercover female officer in the same neighborhood within one to two blocks of each other; the officers iden-

tified defendant as the seller, and the same officer identified him as to both the 16 and 22 February sales; the sales were made by a man standing on the street to parties sitting inside an automobile; and the purchased substances as well as the amount and price of each substance was the same, i.e., single rocks of cocaine to individuals for twenty dollars; (3) the incidents were only separated by six days and ten months respectively; (4) although defendant contends the similarities merely reflect general characteristics of drive-by drug sales, this type of street-level drug sale is not a general substantive crime in and of itself, and not all drug sales are conducted in this manner; (5) drive-by drug sales are a modus operandi by which a party carries out the sale or distribution of drugs; and (6) the trial court guarded against the possibility of prejudice by conducting voir dire and by instructing the jury that it could only consider this evidence for the limited purposes of identity, intent, and common plan or scheme.

Appeal by defendant from judgment entered 31 August 2007 by Judge Ronald E. Spivey in Stokes County Superior Court. Heard in the Court of Appeals 18 August 2008.

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

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

HUNTER, Judge.

Barry Wayne Welch ("defendant") appeals from final judgment entered against him in the Stokes County Superior Court in accordance with jury verdicts finding him guilty of (1) possession with intent to sell and deliver cocaine and (2) the sale and delivery of cocaine.[1] Defendant was sentenced to an active term of 133-169 months imprisonment. In this appeal from his convictions for possession with intent to sell and deliver cocaine and the sale and delivery of cocaine, defendant contends that the trial court erred by allowing the State to present evidence to the jury of two prior drug sales allegedly involving defendant to show identity, intent, and common plan or scheme in violation of North Carolina Rules of Evidence 403 and 404(b). After careful review, we find no error.

1. The jury also found defendant guilty of being a habitual felon. He makes no argument regarding this conviction here.

The evidence presented by the State tended to show[2] that on 22 February 2006, the Stokes County Sheriff's Department ("Sheriff's Department") sent King Police Department Officer Carolyn McMackin ("Officer McMackin") and a confidential informant into the London section of Walnut Cove ("the London area") to make undercover drug purchases. Wearing a body wire monitored by Sheriff's Department Sergeant Randy Joyce ("Sergeant Joyce") and accompanied by the informant, Officer McMackin drove an unmarked, white Chrysler through the London area as it was starting to get dark. Upon noticing defendant on Brook Street, Officer McMackin pulled the car over. Defendant approached the passenger's window and asked Officer McMackin what she wanted. She informed him that she wanted "a $20 rock[,]" and defendant sold her a loose, unpackaged crack rock for twenty dollars. Following the transaction, Officer McMackin told Sergeant Joyce about the undercover buy and identified defendant as the seller. Field tests indicated the substance Officer McMackin had purchased contained 0.2 grams of cocaine.

At trial, the State sought to present evidence, primarily consisting of officer testimony, of two prior drug sales allegedly made by defendant to undercover officers on 16 February 2006 and 15 April 2005 respectively. Outside of the presence of the jury, the trial court conducted *voir dire* regarding the admissibility of this evidence. The State asserted that pursuant to North Carolina Rule of Evidence 404(b), these sales were admissible to show (1) identity of the seller, (2) intent to sell and deliver cocaine, and (3) a common plan or scheme to sell cocaine in the London area. Defense counsel argued that the prior incidents were not sufficiently similar to the offense for which defendant was being tried and that even if the prior incidents were sufficiently similar, their probative value was substantially outweighed by their prejudicial effect. The trial court held that the testimony was admissible and gave the jury a limiting instruction that the testimony regarding the prior incidents could only be used to show identity, intent, and a common plan or scheme.

The evidence offered by the State with regard to the 16 February 2006 incident tended to establish that at 9:15 p.m., Officer McMackin, accompanied by the same confidential informant, drove the same car into the London area to make undercover drug buys. She and the informant first stopped at a residence in London before proceeding to a second residence in the London area to purchase cocaine. At the first residence, Officer McMackin waited in the car. The informant

2. Defendant did not present any evidence.

entered the house and returned with an unidentified man. She and the informant followed the unidentified man, who was driving a moped, to the second residence located on Windmill Street. Upon arriving there, the unidentified man drove away.

At the second residence, Officer McMackin observed three men in the front yard. Two of the men approached the car, and Officer McMackin stated she wanted to purchase drugs from them. The men declined "because they thought [she was] a cop[,]" and told her that she needed to go get "Wayne," (the man on the moped), and bring him back with her to make the buys. As Officer McMackin started to drive away, the third man in the yard approached the passenger side of the car and "stated that he would sell [her] a rock." At approximately 9:39 p.m., the third man sold both Officer McMackin and the informant single rocks of cocaine for twenty dollars a piece. This sale occurred within one to two blocks of the 22 October 2006 and the 15 April 2005 sales, and Officer McMackin identified defendant as the seller both pretrial and at trial.

The State's evidence as to the 15 April 2005 sale tended to show that Sheriff's Department Officer Valerie Hicks Venable ("Officer Venable") bought crack from defendant in the London area sometime after 5:00 p.m. Officer Venable was alone in her unmarked car and drove very slowly so that people would approach her. As she traveled up Broad Street, a man approached her driver's side window and inquired if she "needed a piece." She responded that she wanted "[a] 20." The man instructed Officer Venable to drive around the block, which she did, returning to the same general location on Broad Street. The man approached the car again, informed her his name was "Barry[,]" and pointed out his "white Regal" parked nearby. Officer Venable paid the seller, whom she identified both pretrial and in court as defendant, twenty dollars for a single rock containing 0.1 grams of cocaine. This sale occurred within one to two blocks of the later sales, and Officer Venable identified defendant as the seller both pretrial and at trial.

Here, defendant argues the trial court erred in admitting evidence pertaining to the prior incidents because this evidence constitutes improper character evidence in violation of North Carolina Rule of Evidence 404 and because this evidence is substantially more prejudicial than probative in violation of North Carolina Rule of Evidence 403. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007); N.C. Gen. Stat. § 8C-1, Rule 403 (2007). We disagree.

Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b). As our Supreme Court has stated, Rule 404(b) is a rule of inclusion, "subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis omitted).

> As long as the prior acts provide "substantial evidence tending to support a reasonable finding by the jury that the defendant committed a similar act or crime and its probative value is not limited solely to tending to establish the defendant's propensity to commit a crime such as the crime charged," the evidence is admissible under Rule 404(b).

State v. Stevenson, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (quoting *State v Stager*, 329 N.C. 278, 303-04, 406 S.E.2d 876, 890 (1991)) (emphasis omitted). "In drug cases, evidence of other drug violations is often admissible under Rule 404(b)." *Id.* (citing *State v. Montford*, 137 N.C. App. 495, 501, 529 S.E.2d 247, 252, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000)).

In determining the admissibility of evidence of prior conduct under Rule 404(b), a court must determine "whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). "The determination of similarity and remoteness is made on a case-by-case basis, and the required degree of similarity is that which results in the jury's 'reasonable inference' that the defendant committed both the prior and present acts." *Stevenson*, 169 N.C. App. at 800, 611 S.E.2d at 209 (quoting *Stager*, 329 N.C. at 304, 406 S.E.2d at 891). "The similarities need not be 'unique and bizarre.' " *Id.* (quoting *Stager*, 329 N.C. at 304, 406 S.E.2d at 891). However, "[w]hen the State's efforts to show similarities between crimes establish no more than 'characteristics inherent to most' crimes of that type, the State has 'failed to

show . . . that sufficient similarities existed' for the purposes of Rule 404(b)." *State v. Carpenter*, 361 N.C. 382, 390, 646 S.E.2d 105, 111 (2007) (quoting *State v. Al-Bayyinah*, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002)) (second alteration in original).

> The decision to admit or exclude evidence is a matter addressed to the sound discretion of the trial court which will not be disturbed absent an abuse of discretion and "only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision."

State v. Smith, 99 N.C. App. 67, 71, 392 S.E.2d 642, 645 (1990) (quoting *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985)), *cert. denied*, 328 N.C. 96, 402 S.E.2d 824 (1991).

Here, defendant argues that sufficient similarities do not exist between the prior incidents and the one for which he was convicted and that the evidence pertaining to them should not have been admitted per Rule 404(b). Relying heavily on *Carpenter*, defendant argues that the only similarities that exist here involve generic characteristics inherent to most crimes of that type. *Carpenter*, 361 N.C. at 390, 646 S.E.2d at 111. Defendant makes no argument regarding the remoteness of the 16 February transaction, which occurred six days prior to the offense for which he was charged, and concedes that the remoteness pertaining to the 15 April transaction hinges on the similarity analysis. ("While the lapse in time itself did not require exclusion of evidence of the April 15 crimes . . . the substantial lapse in time combined with the significant factual dissimilarities, rendered it inadmissible under Rule 404(b) for any purpose.") Defendant further contends that his case is similar to *Carpenter* and that *Carpenter* compels a finding of error and prejudice under the facts here. We find these arguments to be without merit.

In *Carpenter*, defendant was tried and convicted for possession of cocaine with intent to sell and deliver. *Id.* at 383, 646 S.E.2d at 107. The defendant's prior offense occurred eight years earlier and involved the sale of six unpackaged crack rocks, weighing 0.82 grams, to an undercover officer in a high crime area. In contrast, in the later incident no one observed the defendant make a drug sale, and none of the traditional indices of sale and delivery were present. Rather, police stopped an automobile in which the defendant was a passenger and found on his person twelve, unpackaged crack rocks, weighing 1.6 grams. The stop did not occur in the same neighborhood as the prior incident.

In analyzing the two incidents in *Carpenter*, our Supreme Court concluded that the only real similarity between the incidents was the possession of several loose rocks of crack cocaine. *Id.* at 390, 646 S.E.2d at 111. Because the only similarity between the incidents in *Carpenter* was a common, generic characteristic in nearly all drug sales involving crack cocaine, the Court held that the admission of evidence regarding the earlier incident to show the defendant's intent was error. *Id.* at 391-92, 646 S.E.2d at 112.

Unlike *Carpenter*, a substantially greater degree of similarity exists between the three drug sales here. Specifically, the record tends to show the following similarities: (1) the sales were made to an undercover female officer in the same neighborhood within one to two blocks of each other; (2) the officers identified defendant as the seller, and the same officer identified him as to both the 16 and 22 February sales; (3) the sales were made by a man standing on the street to parties sitting inside an automobile; and (4) the purchased substance as well as the amount and price of the substance was the same, i.e., single rocks of cocaine to individuals for twenty dollars. In addition, with regard to proximity, unlike in *Carpenter* where the incidents were separated by eight years, the incidents here are only separated by six days and ten months respectively.

While defendant argues that the above similarities merely reflect general characteristics of drive-by drug sales, this argument misinterprets our Supreme Court's decision in *Carpenter* and is without merit. In *Carpenter*, the Supreme Court concluded that the evidence between the two incidents was merely generic to the crime of possession of cocaine with the intent to sell and distribute. *See id.* at 390, 646 S.E.2d at 111. However, unlike possession of cocaine with intent to sell and distribute, a drive-by, street-level drug sale is not a general substantive crime in and of itself and not all drug sales are conducted in this manner. Rather, it is a *modus operandi* by which a party carries out the sale or distribution of drugs.

As such, we conclude the similarities here are not merely generic traits by which all crimes of that type can be described. In fact, we find the level of similarity here to be much more comparable to and even greater than that present in *Stevenson*, where this Court held that evidence pertaining to two prior drug offenses, which occurred five and six years prior to the offense for which defendant was being charged, was admissible to show intent, knowledge, or a common plan or scheme. *Stevenson*, 169 N.C. App. at 798, 611 S.E.2d at 208 (noting that the incidents occurred on the same housing authority

premises from which defendant was banned, involved crack cocaine, and each time the same officer approached the defendant, causing him to flee). *Id.* at 801, 611 S.E.2d at 210.

Finally, we do not believe that the trial court abused its discretion by admitting evidence of defendant's prior drug sales, which were otherwise admissible under Rule 404(b). In fact, the trial court guarded against the possibility of prejudice by conducting *voir dire* and by instructing the jury that it could only consider this evidence for the limited purposes of identity, intent, and common plan or scheme. *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 75 (2002) (prior misconduct not unduly prejudicial under Rule 403 where trial court gave limiting instruction regarding permissible uses of 404(b) evidence).

In sum, after careful review, we hold that the trial court did not abuse its discretion by admitting the challenged evidence under Rule 404(b) for the limited purpose of showing defendant's intent, identity, and common plan or scheme.

No error.

Chief Judge MARTIN and Judge WYNN concur.

LUE SINDA BROWNING MANN, EMPLOYEE, PLAINTIFF v. TECHNIBILT, INC., EMPLOYER, ST. PAUL-TRAVELERS INSURANCE COMPANY/CHARTER OAK FIRE INSURANCE COMPANY—HARTFORD INSURANCE, CARRIER, DEFENDANTS

No. COA08-241

(Filed 7 October 2008)

1. Workers' Compensation— occupational disease—last injurious exposure—liability of second insurer

Competent evidence supported the Industrial Commission's findings and conclusions that plaintiff employee's last injurious exposure to the conditions of her employment that augmented or worsened her occupational disease (bilateral carpal tunnel syndrome) occurred after the date a second workers' compensation insurer came on the risk for the employer so that the second insurer was liable for compensation for plaintiff's occupational disease.

2. Workers' Compensation— compensability—estoppel—remand for findings and conclusions

The Industrial Commission erred in a workers' compensation case by failing to make any findings on whether a former workers' compensation insurer for defendant employer was estopped from denying the compensability of plaintiff's occupational disease claim, and the case is remanded to the Commission for further proceedings and to make findings of fact and conclusions of law regarding this issue.

Appeal by defendants from Opinion and Award entered 14 December 2007 by Commissioner Buck Lattimore for the North Carolina Industrial Commission. Heard in the Court of Appeals 10 September 2008.

No brief filed by employee-plaintiff.

York Williams Barringer Lewis & Briggs, LLP, by Stephen Kushner, for defendant-appellants Technibilt, Ltd. and Hartford Insurance Company.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Samuel E. Barker, for defendant-appellee St. Paul-Travelers Insurance Company/Charter Oak Fire Insurance Company.

TYSON, Judge.

Technibilt, Inc. ("Technibilt") and Hartford Insurance ("Hartford") appeal from the Opinion and Award of the Full Commission of the North Carolina Industrial Commission ("the Commission"), which held Hartford to be liable for Lue Sinda Browning Mann's ("plaintiff") occupational disease resulting from her employment with Technibilt. We affirm in part and remand in part.

I. Background

Plaintiff has been employed as a press welder at Technibilt since 1989. On or about 2 October 2003, plaintiff alleged she sustained an injury and occupational disease. Technibilt and its insurance carrier at the time, St. Paul-Travelers Insurance Company/Charter Oak Fire Insurance Company ("Travelers"), denied liability pending receipt of plaintiff's medical records.

Plaintiff's claim for bilateral carpal tunnel syndrome was later accepted, while plaintiff's claim of injury to her back, hip, and feet

was denied. Travelers referred plaintiff to Dr. William M. Pekman ("Dr. Pekman"). On 12 February 2004, Dr. Pekman recommended "a trial of non[-]operative treatment" and advised plaintiff that if the non-operative treatment did not relieve her symptoms, she may need to consider surgical decompression.

On 23 March 2005, plaintiff requested Travelers approve additional medical treatment. On 1 April 2005, Hartford became Technibilt's carrier "on the risk." On 13 April 2005, plaintiff returned to Dr. Pekman at the request of Technibilt and Travelers for re-evaluation of both hands. Dr. Pekman administered another "trial of non[-]operative treatment" at plaintiff's request.

On 10 January 2006, plaintiff requested the Commission to order a second medical opinion with a hand specialist selected by plaintiff. Technibilt and Travelers requested the Commission to deny plaintiff's motion for a second opinion and stated "[t]here is no valid, reasonable reason for a change in treating physicians." On 14 February 2006, the special deputy commissioner granted plaintiff's motion for a second opinion and ordered Technibilt and Travelers to provide plaintiff with a "one-time evaluation with a hand specialist of plaintiff's choice for evaluation and treatment recommendations."

On or about 27 February 2006, Technibilt and Travelers appealed the special deputy commissioner's Order and requested plaintiff's claim be assigned for hearing. Technibilt and Travelers alleged that "[Travelers] was not on the risk when [p]laintiff was last injuriously exposed to the alleged hazards of her disease." Hartford was added as a party on 21 April 2006.

On 31 May 2007, the deputy commissioner entered an Opinion and Award, which found "Hartford . . . responsible for [p]laintiff's condition beginning April 1, 2005[]" because "[p]laintiff continued to be injuriously exposed and her condition continued to worsen while Hartford . . . provided coverage . . . ." Technibilt and Hartford appealed the Opinion and Award to the Full Commission.

The Commission entered its unanimous Opinion and Award on 14 December 2007. The Commission found Hartford to be liable for plaintiff's occupational disease and ordered Technibilt and Hartford to pay "all medical expenses incurred or to be incurred by plaintiff as a result of the compensable disease . . . ." Technibilt and Hartford appeal.

II. Issues

Technibilt and Hartford argue the Commission erred when it: (1) found that plaintiff's last injurious exposure occurred when Hartford was the carrier "on the risk" and (2) failed to make any findings on whether Travelers was estopped from denying the compensability of plaintiff's claim.

III. Standard of Review

Our Supreme Court has stated:

> when reviewing Industrial Commission decisions, appellate courts must examine "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, "even though there [is] evidence that would support findings to the contrary."

McRae v. Toastmaster, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)).

"[T]he full Commission is the sole judge of the weight and credibility of the evidence . . . ." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. The Commission's mixed findings of fact and conclusions of law and its conclusions of law applying the facts are fully reviewable *de novo*. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982); *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996), *disc. rev. denied*, 345 N.C. 751, 485 S.E.2d 49 (1997).

IV. Last Injurious Exposure

[1] Technibilt and Hartford argue that the Commission erred when it entered findings of fact "regarding the last injurious exposure issue . . . ." We disagree.

Technibilt and Hartford assign error to findings of fact numbered 16, 19, 20, 21, 22, and 23, which state:

> 16. Dr. Caulfield testified that plaintiff's press welder job with defendant is a substantial causative factor of plaintiff's bilateral carpal tunnel syndrome, and that persons who do that job have a higher risk of developing carpal tunnel syndrome than members of the population not similarly exposed. Dr.

Caulfield recommended surgery on plaintiff's right hand first and then perhaps the left hand. Dr. Caulfield indicated that plaintiff's condition had gotten worse from 2003 to 2006 as plaintiff continued to work for defendant and that a delay in surgery creates a risk of permanent muscle weakness.

. . . .

19. Since April 1, 2005, plaintiff's condition has continued to worsen as she continued working in her same position for defendant. Plaintiff testified that the numbness and pain is worse and is a nine or ten on a one to ten scale. The more baby seats plaintiff welds in a day, the worse her symptoms are. Plaintiff testified that due to the numbness in her hands she had difficulty combing her hair, talking on the telephone, and driving to work.

20. Due to the worsening and severity of her pain from continued employment with defendant since April 1, 2005, plaintiff wishes to proceed with carpal tunnel surgery. However, plaintiff has been unable to get her group insurance to approve the surgery even though defendants have refused responsibility.

21. Prior to April 1, 2005, plaintiff's condition was not such that surgery was a necessity, nor did it cause plaintiff any incapacity from work. Plaintiff's condition progressed and was augmented due to her continued employment with defendant following April 1, 2005. Since then, plaintiff has been diagnosed with bilateral carpal tunnel syndrome as opposed to only right carpal tunnel syndrome which has progressed to the point of necessitating operative treatment.

22. Dr. Peltzer, Dr. Pekman, and Dr. Caulfield are of the opinion that plaintiff's employment with defendant caused her condition and that if plaintiff continues such employment her condition is likely to worsen or be aggravated.

23. The undersigned find that plaintiff's occupational disease was caused by her employment with defendant. Based upon the greater weight of the evidence, the undersigned find that plaintiff's occupational disease was augmented and worsened by her employment with defendant following April 1, 2005 when defendant Hartford Insurance came on the risk for defendant. Therefore, defendant Hartford Insurance was on the risk at the time of plaintiff's last injurious exposure.

Technibilt and Hartford also assign error to the Commission's conclusion of law numbered 2, which states:

> 2. Pursuant to N.C. Gen. Stat. § 97-57 where an occupational disease is compensable "the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was last exposed under such employer, shall be liable". Last injurious exposure is defined as an exposure that proximately augmented the disease to any extent, however slight. *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 88, 301 S.E.2d 359, 362 (1985) (*citing Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 169, 22 S.E.2d 275, 277, 278 (1942)); *See also Caulder v. Waverly Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985). The greater weight of the evidence supports that plaintiff's last injurious exposure to the conditions of her job with defendant that caused or augmented her occupational disease was after April 1, 2005 when Hartford Insurance Company came on the risk for defendant. N.C. Gen. Stat. § 97-57. Therefore, Hartford Insurance is liable for plaintiff's occupational disease beginning April 1, 2005.

N.C. Gen. Stat. § 97-57 (2005) states:

> In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

Our Supreme Court defined the term "last injuriously exposed" to mean " 'an exposure which proximately augmented the disease to any extent, however slight.' " *Rutledge v. Tultex Corp.*, 308 N.C. 85, 89, 301 S.E.2d 359, 362 (1983) (quoting *Haynes v. Feldspar Producing Company*, 222 N.C. 163, 166, 169, 22 S.E.2d 275, 277, 278 (1942)).

> A condition peculiar to the workplace which accelerates the progress of an occupational disease to such an extent that the disease finally causes the worker's incapacity to work constitutes a source of danger and difficulty to that worker and increases the possibility of that worker's ultimate loss. It constitutes, therefore, a hazard of the disease as the term "hazard" is commonly used.

Caulder v. Waverly Mills, 314 N.C. 70, 75, 331 S.E.2d 646, 649 (1985); *see also Fetner v. Granite Works*, 251 N.C. 296, 301, 111 S.E.2d 324, 327-28 (1959) ("G.S. 97-57 creates an irrebuttable presumption—a presumption of law. The last day of work was the date of disablement and the last thirty days of work was the period of last injurious exposure in the case at bar. The Commission may not arbitrarily select any 30 days of employment, other than the last 30 days, within the seven months['] period for convenience or protection of any of the parties, even if there is some evidence which may be construed to support such selection." (Citations omitted)); *Shockley v. Cairn Studios, Ltd.*, 149 N.C. App. 961, 563 S.E.2d 207 (2002), *disc. rev. denied*, 356 N.C. 678, 577 S.E.2d 888 (2003).

After thorough review of the record on appeal, transcript, depositions, and plaintiff's medical records, we hold competent evidence in the record supports the Commission's challenged findings of fact. *McRae*, 358 N.C. at 496, 597 S.E.2d at 700. These findings of fact, together with the Commission's other unchallenged findings of fact, support its conclusion of law numbered 2. *Id.* This assignment of error is overruled.

V. Estoppel of Denying Compensability

[2] Technibilt and Hartford argue that the Commission erred when it failed to make any findings on whether Travelers was estopped from denying the compensability of plaintiff's claim. We agree.

"While the Commission is not required to make findings as to each fact presented by the evidence, it must find those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission's award." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 511 (2004) (citations omitted). Because competent evidence was presented on whether Travelers was estopped from denying the compensability of plaintiff's claim, the Commission must address the issue of estoppel. *See Purser v. Heatherlin Properties*, 137 N.C. App. 332, 338, 527 S.E.2d 689, 693 (2000) ("[W]e remand this matter to the Industrial Commission to consider whether the facts of this case support a conclusion that the employer or the insurance carrier should be estopped from denying coverage.").

Here, as in *Purser*, "the Industrial Commission failed to consider the application of the doctrine of estoppel to the factual scenario at

hand." 137 N.C. at 338, 527 S.E.2d at 693. We remand this matter to the Commission for further proceedings and to make findings of fact and conclusions of law regarding all issues raised by the evidence upon which Travelers's and Hartford's liability depends.

VI. Conclusion

Competent evidence in the record on appeal supports the Commission's findings of fact. *McRae*, 358 N.C. at 496, 597 S.E.2d at 700. These findings of fact support the Commission's conclusions of law on the last injurious exposure. *Id.* These conclusions of law are not erroneous as a matter of law. The Commission's Opinion and Award on this issue is affirmed.

The Commission erred when it failed to make findings of fact with respect to the effect of Travelers's acceptance of plaintiff's claim. *Johnson*, 358 N.C. at 705, 599 S.E.2d at 511. This matter is remanded for findings of fact, conclusions of law, and a determination of whether Travelers is estopped from denying the compensability of plaintiff's claim.

Affirmed in Part; Remanded in Part.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. LARRY JAMES ATKINS

No. COA07-1134

(Filed 7 October 2008)

1. Appeal and Error— preservation of issues—failure to argue in brief

Although defendant contends the trial court erred in a double second-degree rape and first-degree burglary case by denying his motion to set aside the verdict as against the greater weight of the evidence, this argument was abandoned under N.C. R. App. P. 28(b)(6) based on defendant's failure to substantiate this argument in his brief.

2. Rape— second-degree—physically helpless victim—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the two counts of second-degree rape even though defendant contends there was insufficient evidence that the victim was physically helpless as defined under N.C.G.S. § 14-27.3(a)(2) because: (1) N.C.G.S. § 14-27.3(a)(2) defines physically helpless as a victim who is unconscious, or a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act; (2) at the time of the rape, the victim was eighty-three years of age and suffered from severe arthritis, she normally walked with the assistance of a walker, she needed assistance with everyday household chores and daily errands, and it as impossible for the victim to travel down the front steps of her house without assistance; and (3) given the victim's age, frailty, and physical limitations, there was evidence from which the jury could reasonably conclude that she fell within the class of physically helpless victims entitled to protection under the statute.

3. Burglary— first-degree—breaking—intent to commit felony at the time of breaking and entering—sufficiency of evidence

The State presented sufficient evidence of a breaking and felonious intent to support defendant's conviction of first-degree burglary because: (1) there was sufficient evidence of a breaking when the victim testified that defendant opened and entered through her window without permission; and (2) there was substantial evidence for a reasonable mind to infer that defendant intended to rape the victim at the time of the breaking and entering given the State's evidence that defendant, in fact, raped the victim after entering her home through her bedroom window.

Appeal by defendant from judgment entered 26 February 2007 by Judge Jack W. Jenkins in Wayne County Superior Court. Heard in the Court of Appeals 6 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant appellant.

McCULLOUGH, Judge.

Defendant Larry James Atkins ("defendant") was tried before a jury at the 26 February 2007 Criminal Session of Wayne County Superior Court after being charged with two counts of second-degree rape and one count of first-degree burglary.

The relevant evidence tended to show the following: eighty-three-year-old, Vera P. Brown ("Brown") lived alone at 1106 Atlantic Avenue, Goldsboro, North Carolina. Brown suffered from severe arthritis, could not cook or care for herself, was incontinent, and had trouble getting down her front steps without the use of a walker, wheelchair, or helper. Brown's cousin, Lillie Heath ("Heath"), took care of her on a daily basis, stopping by twice a day for over two and one-half years. Heath would drive Brown around town to pay her bills and buy her weekly groceries. Brown also relied on a hired caregiver who took care of her cleaning and cooking needs five days a week. Brown's neighbors recognized her frail condition and kept a watchful eye on her safety.

Defendant, who was fifty-one years old, lived illegally in a vacant house across the railroad tracks from Brown. He performed some minor yard work and ran errands for her a couple of times. Defendant conversed on several occasions with Brown as she read her newspaper on her front porch.

On some date prior to 2 August 2006, Brown found defendant in her home when he had not been invited. When Brown asked why he was in her home, defendant replied, "I came to check on you."

On 2 August 2006, sometime around 10:00 p.m., Brown went to the kitchen to get a snack. When she returned to her bedroom, she found that defendant had opened her window and climbed into her bedroom. Brown questioned defendant's uninvited presence. Defendant then threw Brown onto her bed. Defendant raised Brown's nightgown and began to have vaginal intercourse with her. Brown hollered, screamed, and begged for him to stop. Her pleas went unanswered. Defendant engaged in vaginal intercourse with her twice that night.

After defendant left, Brown laid in bed until her cousin, Heath, arrived for a scheduled visit between 8:30 a.m. and 10:00 a.m. the following morning. Heath testified that there was blood in Brown's bed.

At the close of the State's evidence, defendant moved to dismiss all charges for insufficient evidence. This motion was denied. Defendant did not offer any evidence. Instead, he rested on his motion to dismiss for insufficient evidence. The motion to dismiss was renewed again at the close of the evidence. The trial court denied that motion. Defendant was found guilty of all charges. Defendant then moved to have the verdict set aside as against the greater weight of the evidence. This motion was denied.

Defendant was sentenced to 168 to 211 months' imprisonment for each of the two rape convictions and 146 to 185 months' imprisonment for the first-degree burglary conviction. Defendant now appeals to this Court.

I.

[1] Defendant first contends that the trial court erred when it denied his motion to set aside the verdict as against the greater weight of the evidence. Because defendant did not substantiate this argument in his brief, we deem this assignment of error abandoned, pursuant to N.C. R. App. P. 28(b)(6) (2008).

II.

[2] Defendant next contends that the trial court erred in denying his motion to dismiss the two counts of second-degree rape because the State failed to produce sufficient evidence that Brown was "physically helpless," as that term is used within N.C. Gen. Stat. § 14-27.3(a)(2) (2007). Therefore, the evidence was insufficient to establish a necessary element of the theory of second-degree rape with which defendant was charged. We disagree.

The standard of review for a motion to dismiss for insufficient evidence is whether there is substantial evidence of each element of the offense charged and that the defendant is the perpetrator of such offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support the conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The reviewing court must view the evidence in the light most favorable to the State, giving the State every reasonable inference arising from the evidence. *Powell*, 299 N.C. at 98, 261 S.E.2d at 117.

A. N.C. Gen. Stat. § 14-27.3(a)

We begin the analysis with an overview of the statutory scheme. "At common law rape occurred when there was sexual intercourse

by force and without the victim's consent. Rape also occurred when there was sexual intercourse with a victim who was asleep or otherwise incapable of providing resistance or consent." *State v. Moorman*, 320 N.C. 387, 391, 358 S.E.2d 502, 505 (1987) (citations omitted). Our rape statutes essentially codify the common law of rape. *Id.*; N.C. Gen. Stat. § 14-27.2, *et seq*. N.C. Gen. Stat. § 14-27.3(a) provides:

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; **or**
>
> (2) Who is mentally disabled, mentally incapacitated, or **physically helpless**, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.3(a) (emphasis added).

Thus, N.C. Gen. Stat. § 14-27.3(a) delineates two distinct theories under which a defendant can be prosecuted for second-degree rape. The first theory, codified by N.C. Gen. Stat. § 14-27.3(a)(1), is applicable where the sexual intercourse is effectuated by force and against the victim's will; whereas, the second theory, codified by N.C. Gen. Stat. 14-27.3(a)(2), is applicable when the victim falls within a special class of victims, who are deemed by law incapable of resisting or withholding consent; thus, force and the absence of consent need not be proved by the State, as they are implied in law. *Moorman*, 320 N.C. at 390, 358 S.E.2d at 505; *see also Bill Books File*, H.B. 800 (1979) May 22, 1979 Senate Debate, p. 3 (Senator Mathis stating, "In second degree rape, we are adding persons who are mentally defective, mentally incapacitated, or physically helpless. This is basically a statutory rape section in cases where someone engages in a sex act with a person who is, in fact, incapable of resisting or communicating resistance.").

B. Physically Helpless Victims

In the instant case, defendant was indicted on the charge that he "unlawfully, willfully and feloniously did ravish, abuse and carnally know Vera Peeden Brown, who was at the time physically helpless," in violation of N.C. Gen. Stat. § 14-27.3(a)(2).

We must now consider whether the evidence, viewed in the light most favorable to the State, was sufficient to establish that Brown

falls within the class of victims entitled to protection under N.C. Gen. Stat. § 14-27.3(a)(2). "The cardinal principle of statutory interpretation is to ensure that legislative intent is accomplished." *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). "To determine legislative intent, we first look to the language of the statute." *Estate of Wells v. Toms*, 129 N.C. App. 413, 415-16, 500 S.E.2d 105, 107 (1998). "Under our canons of statutory interpretation, where the language of a statute is clear, the courts must give the statute its plain meaning." *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466, *disc. review denied*, *appeal dismissed*, 348 N.C. 692, 511 S.E.2d 643 (1998), *cert. denied*, 525 U.S. 1103, 142 L. Ed. 2d 770 (1999).

N.C. Gen. Stat. § 14-27.1(3) defines "physically helpless" as "(i) a victim who is unconscious; or (ii) a victim who is physically *unable to resist* an act of vaginal intercourse or a sexual act *or communicate unwillingness to submit* to an act of vaginal intercourse or a sexual act." N.C. Gen. Stat. § 14-27.1(3) (2007) (emphasis added). The American Heritage Dictionary (2d ed. 1982) defines the word "resist," in part, as meaning, "[t]o strive or work against; oppose actively." Thus, a "physically helpless" victim, as used within N.C. Gen. Stat. § 14-27.3(a)(2), is a victim who is "physically unable to [[t]o strive or work against; oppose actively] an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act[.]"

In the case *sub judice*, the State's evidence showed that at the time of the rape, Brown was 83 years of age and suffered from severe arthritis. She normally walked with the assistance of a walker. Without the walker, she had to move slowly and could only take a couple steps without having to stop and rest. She also needed assistance with her everyday household chores and could only transverse steps or do other daily errands with assistance. The record further contains evidence that because of Brown's physical condition, it was impossible for her to travel down the front steps of her house without assistance. Thus, it was impossible for Brown to escape her attacker. Given the evidence of Brown's age, frailty, and physical limitations, there is evidence from which the jury could reasonably conclude that Brown was not able to actively oppose or resist her attacker. As such, there was substantial evidence that Brown falls within the class of "physically helpless" victims entitled to protection

under N.C. Gen. Stat. § 14-27.3(a)(2).[1] Accordingly, this assignment of error is overruled.

III.

[3] Defendant next contends that the trial court erred when it refused to grant his motion to dismiss the first-degree burglary charge for insufficient evidence. We disagree.

In order to convict a defendant of first-degree burglary, the State must prove six elements: (1) the breaking and (2) entering (3) during the nighttime (4) into an occupied (5) dwelling or sleeping apartment (6) with the intent to commit a felony. *State v. Davis*, 282 N.C. 107, 116, 191 S.E.2d 664, 670 (1972). Defendant contends that the State's evidence was insufficient to establish: (a) a breaking and (b) felonious intent.

A. Breaking

Defendant first contends that the State failed to produce evidence to support the breaking element. The element of "breaking" requires a showing of any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open or closed. *State v. Jolly*, 297 N.C. 121, 127-28, 254 S.E.2d 1, 5-6 (1979). An intruder who opens an unlocked window satisfies the breaking element of first-degree burglary. *State v. McAfee*, 247 N.C. 98, 101, 100 S.E.2d 249, 251 (1957).

Defendant argues that the State produced no evidence that the screen through which defendant allegedly entered was ever removed. Defendant contends that the evidence shows that the screen must have always been there. Therefore, Brown must have let defendant into the house. However, Brown testified that defendant opened and entered through her window without permission. Since the evidence must be viewed in the light most favorable to the State, there is substantial evidence to support the breaking element of first-degree burglary. This assignment of error is overruled.

---

1. We note, however, that not all elderly victims will necessarily fall within the special class of victims who are deemed by law incapable of resisting or withholding consent pursuant to N.C. Gen. Stat. § 14-27.3(a)(2). Where there is evidence that a rape has been effectuated by force and against the will of the victim, the best practice is for the State to prosecute the defendant under the theory codified by N.C. Gen. Stat. § 14-27.3(a)(1).

B. Felonious Intent

Defendant next contends that the State did not produce sufficient evidence that defendant intended to commit a felony at the time of the breaking and entering. Defendant claims that because there was insufficient evidence to show that Brown was physically helpless, the jury could not convict him on the first-degree burglary charge because the State's evidence did not show that he had the intention to rape a physically helpless person. As previously discussed, the State's evidence was sufficient to establish that Brown was physically helpless. Even so, we note that the first-degree burglary indictment does not allege that defendant intended to rape a person who was physically helpless. The indictment charges only that defendant "broke and entered with the intent to commit the felony of rape against" Brown.[2] Likewise, the jury instructions charge that "at the time of the breaking and entering the defendant intended to commit a felony, second-degree rape."

With respect to the element of felonious intent, intent or its absence may be inferred from the circumstances surrounding the occurrence, but the inference must be drawn by the jury. *State v. Moore*, 277 N.C. 65, 73, 175 S.E.2d 583, 588 (1970). Given the State's evidence previously discussed that defendant, in fact, raped Brown after entering her home through her bedroom window, there was substantial evidence for a reasonable mind to infer that defendant intended to rape Brown at the time of the breaking and entering. This assignment of error is overruled.

Based on the foregoing, we find no error in defendant's convictions.

No error.

Judges STEELMAN and ARROWOOD concur.

---

2. The enactment of N.C. Gen. Stat. § 15A-924(a)(5) allows an indictment to charge merely an intent to commit a felony. "Allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded when testing the sufficiency of the indictment." *In re R.P.M.*, 172 N.C. App. 782, 791, 616 S.E.2d 627, 633 (2005). The first-degree burglary indictment would have been sufficient had it charged defendant with merely an "intent to commit a felony therein." *State v. Worsley*, 336 N.C. 268, 279-80, 443 S.E.2d 68, 73 (1994). The remaining verbiage of the indictment may be treated as mere surplusage. *State v. Pelham*, 164 N.C. App. 70, 79, 595 S.E.2d 197, 203, *appeal dismissed, disc. review denied*, 359 N.C. 295, 608 S.E.2d 63 (2004).

NEW HANOVER CHILD SUPPORT ENFORCEMENT (FORMERLY NEW HANOVER COUNTY DEPARTMENT OF SOCIAL SERVICES) ON BEHALF OF ANN MARIE DILLON, PLAINTIFF v. MICHAEL L. RAINS, DEFENDANT

No. COA07-1286

(Filed 7 October 2008)

1. Child Support, Custody, and Visitation— support—modification—self-employed business expenses

The trial court's findings were not sufficient for the appellate court to determine whether the trial court properly applied the Child Support Guidelines where the order did not refer to the self-employed business expenses about which defendant presented evidence.

2. Child Support, Custody, and Visitation— support—modification—other children

In a child support modification proceeding, the trial court's findings concerning other children were sufficient.

3. Child Support, Custody, and Visitation— support—calculation—amounts received for other children—included as income

The Child Support Guidelines do not exclude from income child support payments for another child. If the Conference of District Court Judges had intended to exclude those amounts, it would have done so.

Appeal by defendant from order dated 4 April 2007 by Judge Rebecca W. Blackmore in New Hanover County District Court. Heard in the Court of Appeals 28 April 2008.

Johnson, Lambeth & Brown, by Maynard M. Brown and Christopher C. Loutit, for plaintiff-appellee.

Fletcher, Ray & Satterfield, L.L.P., by Elizabeth Wright Embrey, for defendant-appellant.

BRYANT, Judge.

Michael L. Rains (defendant) appeals from an order modifying his child support obligation and requiring him to make child support payments to Ann Marie Dillon (plaintiff) in the amount of $591.00 per month. We remand for additional findings.

Facts

On 21 December 2006, plaintiff filed a motion to modify a support order on the basis of changed circumstances. The previous support order, entered 25 May 2002, ordered defendant to pay $300.00 per month to plaintiff for child support. On 4 April 2007, the trial court entered a modified order increasing defendant's support obligation to $591.00 per month. Defendant appeals.

On appeal, defendant raises two issues: (I) Whether the trial court erred by failing to deduct defendant's business expenses; and (II) whether the trial court erred when calculating defendant's deductions and credits for support obligations for other children.

Standard of Review

Pursuant to N.C. Gen. Stat. § 50-13.7(a) (2007), "[A]n order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." *Id.* "Modification of a child support order involves a two-step process. The court must first determine a substantial change of circumstances has taken place; only then does it proceed to calculate the applicable amount of support." *Meehan v. Lawrance*, 166 N.C. App. 369, 380, 602 S.E.2d 21, 28 (2004) (citation omitted).

I

[1] Defendant argues the trial court erred by failing to deduct business expenses when calculating his monthly gross income because he is self-employed. We agree.

The Child Support Guidelines define gross income from self-employment or operation of a business as "gross receipts minus ordinary and necessary expenses required for self-employment or business operation." N.C. Child Support Guidelines 2007, Ann. R. N.C. 49. Under the Guidelines, "ordinary and necessary" expenses do not include those "determined by the court to be inappropriate for determining gross income for the purposes of calculating child support." *Id.* Additionally, "the Guidelines vest the trial court with the discretion to disallow the deduction of any business expenses which are inappropriate for the purposes of calculating child support[.]" *Kennedy v. Kennedy*, 107 N.C. App. 695, 700, 421 S.E.2d 795, 798 (1992). "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determina-

tion of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In the present case, the trial court's order contains no reference to the $32,887.64 defendant claimed as business expenses in 2006. Although the trial court found that "defendant is self-employed with income determined to be $5,083.62 per month," it made no findings regarding defendant's business expenses. The trial court's determination of defendant's monthly income was based on the testimony of Katherine Call, the child support enforcement agent assigned to the case, who testified that deposits to defendant's personal account during 2006 totaled $61,003.48. However, the trial court merely divided the total amount deposited into defendant's personal account by twelve months to determine defendant's gross monthly income.

Although defendant presented evidence that he often used his personal account to cover business expenses and defendant submitted receipts to corroborate his testimony, the trial court made no findings regarding the evidence presented. While the trial court is not required to make detailed findings of fact on all evidence presented, we need sufficient findings to determine on appeal the facts the trial court used to support its judgment. We can speculate, based on comments made by the trial court during the presentation of evidence, that the trial court may have had issue with the credibility of defendant's testimony; however, speculation is not sufficient to affirm the trial court's order. Without more, the findings made by the trial court are insufficient for this Court to determine whether the trial court properly applied the Guidelines. *Cauble v. Cauble*, 133 N.C. App. 390, 400, 515 S.E.2d 708, 714 (1999) (holding findings insufficient where trial court's findings did not reference the defendant's business losses). Therefore, we must remand to the trial court to make appropriate findings in accordance with this opinion.

II

Defendant next argues the trial court abused its discretion when: (a) determining the parties' deductions for other children in their respective homes; and (b) including child support payments received by the parties for other children in determining the parties' respective gross incomes.

(a)

[2] Defendant argues the trial court erred by failing to make sufficient findings regarding the child support payments deducted from

the parties' gross income for the other child residing in their homes. We disagree.

In child support cases, when a parent has additional children living in his or her home, "[the] parent's financial responsibility . . . for his or her natural or adopted children who currently reside with the parent . . . is deducted from the parent's gross income." N.C. Child Support Guidelines 2007, Ann. R. N.C. 50. The parent's financial responsibility for the children who currently reside with the parent "is (a) equal to the basic child support obligation for these children based on the parent's income if the other parent of these children does not live with the parent and children[.]" *Id.*

In this case, both plaintiff and defendant bear financial responsibility for one other child residing in their respective homes. Although defendant argues the trial court's order does not contain sufficient findings of fact, "the trial judge is not required to make detailed findings of fact upon every item of evidence offered at trial." *Smith v. Smith*, 89 N.C. App. 232, 235, 365 S.E.2d 688, 691 (1988). Here, the trial court found that both parties had one other biological child residing in their respective homes. Also, the worksheet referenced in the trial court's order indicates both plaintiff and defendant received a deduction based on the financial responsibility for the other child in their respective homes. The trial court's findings were sufficient in calculating the deductions each party received for the child residing in their home.[1] Therefore, this assignment of error is overruled.

(b)

[3] Defendant argues the trial court erred by including in both parties' gross income child support payments received for other children. We disagree.

Under the Guidelines, income is defined as

> a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), ownership or operation of a business, partnership, or corporation, rental property, retirement or pensions, interest, trusts, annuities, capital gains social security benefits, workers compensation benefits, unemployment insurance benefits, disability pay

1. We note, however, the amount credited the defendant is subject to change once the trial court makes appropriate findings regarding defendant's business expenses.

> and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action.

N.C. Child Support Guidelines 2007, Ann. R. N.C. 49.[2]

Defendant argues, by including child support payments received for one child who resides in the home as income when calculating the support obligations for another child, the income designated for the child who resides in the home is effectively reduced. Although defendant's argument is not without merit, based on the rules of statutory construction, we hold the Guidelines do not exclude child support payments from income.

We rely on the general rule of statutory construction that the inclusion of certain items implies the exclusion of others. *See Alford v. Shaw*, 327 N.C. 526, 534-35, 398 S.E.2d 445, 449 (1990). Set out in the Guidelines is a list of monetary sources that are specifically excluded from a parent's income. The excluded sources are benefits received from "means-tested public assistance programs including but not limited to Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI), Food Stamps and General Assistance." N.C. Child Support Guidelines 2007, Ann. R. N.C. 49. The Guidelines do not exclude any other monetary sources from income.

As an example of other monetary sources *included* in income, the Guidelines provide that Social Security benefits received on behalf of a child are included as income to the parent who receives the benefits when determining child support for another child. However, once the child support obligation has been determined, the Social Security benefits are deducted from that parent's support obligation. Much like child support payments, these Social Security benefits are received for the benefit of the child to ensure that the child receives adequate care. Yet, the Conference of Chief District Judges (the Conference), by authority given pursuant to N.C. Gen. Stat. § 50-13.4, decided to include the Social Security benefits as income for the purpose of calculating child support obligations. Presumably, to counteract the potential detriment to the child for whom benefits are received, the Guidelines allow the Social Security benefits to be deducted from the receiving parent's total child support obligation. Notably, this deduction is similar to the deduction parents are given for children who reside in their home.

---

2. The Conference of Chief District Court Judges is tasked with the duty of prescribing uniform statewide presumptive guidelines for the computation of child support obligations. N.C. Gen. Stat. § 50-13.4 (c1) (2007).

The approach taken by the Conference as to Social Security Benefits received on behalf of a child may serve as an example of how to approach the issue of whether to include child support payments for another child as part of the parent's income. The decision of the Conference to include Social Security payments intended to benefit one child as income when calculating the support of another child creates the same scenario as defendant's argument—that is, payments received on behalf of one child are included in income when calculating the support obligations for another child thereby effectively reducing the amount of income to that child.

Applying the general rules of construction to interpret the Guidelines, we must conclude that had the Conference intended to exclude child support payments received for other children from income, it would have done so. *See Alford*, 327 N.C. at 534-35, 398 S.E.2d at 449 (the inclusion of certain things implies the exclusion of others). Thus, we must hold the Guidelines as written do not exclude child support payments from income. The trial court did not err by including as income the child support payments both parties received on behalf of children residing in their respective homes.

Despite our holding, we are inclined to agree with defendant that including child support payments received for one child as income when calculating the support obligations for another child effectively reduces the amount of income available to the child for whom child support is received. We note, after reviewing the child support guidelines for a number of states, the majority of states reviewed have excluded from income child support received for one child when determining the support obligations for another child. *See*, *e.g.*, GA. CODE ANN. § 19-6-15(f)(2) (2007) (excluding child support payments received for the benefit of a child of another relationship). We would urge the Conference to closely consider the effects of including child support payments received on behalf of a child residing in the home as income and clearly indicate in the Guidelines how child support payments should be addressed when calculating payments for another child residing outside of the home.

For the foregoing reasons, the order of the trial court is affirmed in part and remanded in part.

Affirmed in part, remanded in part.

Chief Judge MARTIN and Judge ARROWOOD concur.

TOMMY AKINS AND WIFE, STACY MAE AKINS, PLAINTIFFS v. MISSION ST. JOSEPH'S HEALTH SYSTEM, INC., DEFENDANT

No. COA07-1363

(Filed 7 October 2008)

Medical Malpractice— offer of judgment—rule of satisfaction—joint tortfeasors

The trial court erred in a medical malpractice case arising out of the negligent interpretation of an x-ray for a wrist injury by entering judgment against defendant hospital upon the jury verdict based upon the erroneous conclusion that the satisfaction of the N.C.G.S. § 1A-1, Rule 68(a) judgment against the doctor and Asheville Radiology Associates failed to discharge defendant from liability to plaintiffs because: (1) to treat a judgment under Rule 68 as a release or covenant not to sue, rather than as a final adjudication of the court, would require a construction of the term "judgment" that is not consistent with its plain meaning and with the definition that has already been adopted by our Supreme Court; (2) our General Assembly has chosen to recognize only one exception to the long-standing rule of satisfaction codified by N.C.G.S. § 1B-3(e), and it is not applicable to this case; (3) while treating a judgment entered under Rule 68 as a "judgment" as that term is used under N.C.G.S. § 1B-3(e) may, to some extent, frustrate the legislative intent of Rule 68 by discouraging a claimant from accepting offers of judgment in cases involving joint tortfeasors, the Court of Appeals declined to judicially craft a new exception to N.C.G.S. § 1B-3(e) since it is a policy matter best addressed by the legislature; (4) plaintiffs accepted an offer of judgment against the doctor and Asheville Radiology for the same wrist injury at issue in this case, and that judgment was fully satisfied; and (5) upon the jury's verdict that the doctor was acting as an apparent agent of defendant, the doctor and defendant became joint tortfeasors for purposes of N.C.G.S. § 1B-3(e), and plaintiffs' claims against defendant were extinguished.

Appeal by plaintiffs and cross-appeal by defendant from judgments entered 28 June 2007 and 10 September 2007 by Judge Richard L. Doughton in Buncombe County Superior Court. Heard in the Court of Appeals 3 April 2008.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., for plaintiff appellants-appellees.

Roberts & Stevens, P.A., by Mark C. Kurdys, for defendant appellant-appellee.

McCULLOUGH, Judge.

The dispositive issue on appeal is whether a judgment entered pursuant to N.C. Gen. Stat. § 1A-1, Rule 68(a) (2007), constitutes a "judgment" within the meaning of N.C. Gen. Stat. § 1B-3(e) (2007), such that satisfaction of such judgment discharges all other tort-feasors from liability to the claimant for the same injury. We answer in the affirmative.

The relevant facts and procedural history are as follows: On 3 June 2003, Tommy Akins and his wife, Stacy Akins, (collectively "plaintiffs") initiated an action against Constantino Cona ("Dr. Cona"), Asheville Radiology Associates ("Asheville Radiology"), and defendant Mission St. Joseph's Health System, Inc. ("defendant"), claiming that plaintiffs were injured and damaged by Dr. Cona's negligent interpretation of an x-ray of Tommy Akins' left wrist. Plaintiffs voluntarily dismissed defendant from that action.

Thereafter, Dr. Cona and Asheville Radiology served plaintiffs with an offer of judgment pursuant to Rule 68(a) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 68(a). On 28 January 2005, plaintiffs filed an acceptance of such offer of judgment with proof of service with the Buncombe County Clerk of Superior Court. Accordingly, on 28 January 2005, pursuant to Rule 68, the clerk of court entered a judgment ("the Rule 68 judgment") in plaintiffs' favor in the amount of $125,000. Dr. Cona and Asheville Radiology satisfied that judgment, and plaintiff filed a certificate of satisfaction of said judgment with the court.

On 18 April 2005, plaintiffs filed a new action against defendant, alleging that plaintiffs had filed an earlier action in which the issues of negligence and causation had been adjudicated with respect to Dr. Cona's actions in interpreting Tommy Akins' x-ray; that the earlier offer and acceptance of judgment in that action estopped defendant from relitigating those issues; that Dr. Cona was acting as defendant's agent at the time of his negligent interpretation of plaintiff Tommy Akins' x-ray; that the negligent acts of Dr. Cona were imputed to defendant; and therefore, "[a]s the direct and proximate result of this

negligence of . . . defendant, plaintiffs have been caused to suffer injury . . . including the [loss of] consortium of Tommy Akins to his wife, Stacy Akins." Defendant denied that Dr. Cona was an agent of the hospital.

The matter was tried before a jury at the 25 June 2007 and 26 June 2007 Civil Sessions of Buncombe County Superior Court. After hearing the evidence, the jury answered the issues as follows:

> 1) Was Dr. Constantiono [sic] Cona the apparent agent of the defendants, Mission St. Joseph's Health System, Inc. at the time [that] the x-rays of the Plaintiff Tommy Akins were read by Dr. Constantino Cona on July 2, 2000?
>
> Answer: **Yes**
>
> 2) What amount is the Plaintiff Tommy Akins[] entitled to recover for personal injury?
>
> Answer: **$1**
>
> 3) Did the negligence of the Defendant, Dr. Constantino Cona cause Stacie Mae Akins to lose the consortium of her spouse?
>
> Answer: **No**
>
> 4) What amount is the Plaintiff Stacie Mae Akins entitled to recover for loss of consortium?
>
> Answer: **(Not Answered)**

On 28 June 2007, the court entered judgment on the jury's verdict. The court did not order defendant to pay damages to plaintiffs after applying a credit and set-off for the $125,000 already recovered by plaintiffs in satisfaction of the judgment against Dr. Cona and Asheville Radiology in the prior action; however, the court reserved its rulings regarding assessment of costs for a later time.

Thereafter, on 3 July 2007, defendants moved for a judgment notwithstanding the verdict on the grounds that plaintiffs' claim against defendant had been discharged by the entry of the Rule 68 judgment because:

> 8. To the extent that a factual issue existed as to whether the Defendant was a tort feasor for the purpose of applying N.C.G.S. 1B-3(e), the jury's answer to the first issue submitted in this matter requires entry of an order dismissing the plaintiffs['] action, in that the trier of fact has found on the basis of

> the evidence and the Court's instructions that Dr. Cona was an apparent agent of the Defendant, which also establishes that the Defendant and Dr. Cona were, "***other tort-feasors***" with regard to ***"liability to the claimant for the same injury".*** N.C.G.S. § 1B-3(e) (2007).

On 5 July 2005, plaintiffs filed a motion for a new trial on the issue of damages on the grounds that "there was a manifest disregard of the jury instructions of the Court," that "inadequate damages [were] awarded under the influence of prejudice," and there was insufficient evidence to justify an award of nominal damages. After a hearing on the motions, the trial court denied defendant's motion for a judgment notwithstanding the verdict, denied plaintiffs' motion for a new trial, and awarded plaintiffs costs in the amount of $1,439.45.

On appeal, defendant contends that the trial court erred in failing to conclude that the satisfaction of the Rule 68 judgment discharged defendant from liability to plaintiffs. We agree.

N.C. Gen. Stat. § 1B-3 provides, in part, as follows:

> (e) The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. **The satisfaction of the judgment discharges the other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution.**

N.C. Gen. Stat. § 1B-3(e) (emphasis added).

This statute codifies the common-law rule applicable to joint tort-feasors, under which a claimant may obtain judgments against any and all joint tort-feasors for a single injury or wrongful death, but the claimant may have only one satisfaction. *Ipock v. Gilmore*, 73 N.C. App. 182, 186, 326 S.E.2d 271, 275, *disc. review denied*, 314 N.C. 116, 332 S.E.2d 481 (1985). This rule also applies where a principal is liable for torts committed by an agent under the doctrine of *respondeat superior*. *See Pinnix v. Griffin*, 221 N.C. 348, 350-51, 20 S.E.2d 366, 369 (1942).

I. Rule 68 "Judgment"

First, we consider whether a judgment entered pursuant to Rule 68 is a "judgment" as that term is used in N.C. Gen. Stat. § 1B-3(e). Plaintiffs cite *Payseur v. Rudisill*, 15 N.C. App. 57, 189 S.E.2d 562, *cert. denied*, 281 N.C. 758, 191 S.E.2d 356 (1972), for the proposition

that a "judgment" is not always a "judgment" as that term is used under N.C. Gen. Stat. § 1B-3. In *Payseur*, we held that satisfaction of a consent judgment, reflecting court approval of a negotiated settlement of a claim on behalf of an injured minor, a prerequisite to settlement of such claims with any tort-feasor, did not constitute a recovery and satisfaction of a judgment within the meaning of § 1B-3(e). *Payseur*, 15 N.C. at 63, 189 S.E.2d at 566.

Plaintiffs contend that since a Rule 68 judgment does not adjudicate the total injury or damage to a claimant, it is essentially nothing more than a settlement between two sets of parties. As such, plaintiffs contend that a judgment entered pursuant to Rule 68 should operate as a release or covenant not to sue, which does not bar a subsequent action against other joint tort-feasors not explicitly released or protected by the covenant. N.C. Gen. Stat. § 1B-4 (2007).

We disagree for two reasons. First, when language used in a statute is clear and unambiguous, this Court must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning. *Utilities Comm. v. Edmisten*, *Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). Because the word "judgment" is unambiguous, our Supreme Court has already accorded such term, as it is used in Rule 68, its plain meaning:

> The word "judgment" is undefined in Rule 68. As this word is unambiguous, we shall accord it its plain meaning. **Judgment means "[t]he final decision of the *court* resolving the dispute and determining the rights and obligations of the parties," and "[t]he law's last word in a judicial controversy."** Further, this Court has stated before that " 'the rendering of a judgment is a judicial act, *to be done by the court only*.' "

Poole v. Miller, 342 N.C. 349, 352, 464 S.E.2d 409, 411 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 722 (1996) (bold emphasis added) (citations omitted).

Thus, to treat a judgment entered pursuant to Rule 68 as a release or covenant not to sue, rather than as a final adjudication of the court, would require a construction of the term "judgment" that is inconsistent with its plain meaning and with the definition that has already been adopted by our Supreme Court.

Second, our General Assembly has chosen to recognize only one exception to the long-standing rule of satisfaction codified by N.C. Gen. Stat. § 1B-3(e). Following our decision in *Payseur*, the General

Assembly amended N.C. Gen. Stat. § 1B-3(e) to codify one exception to the general rule of satisfaction:

> [A] consent judgment in a civil action brought on behalf of a minor, or other person under disability, for the sole purpose of obtaining court approval of a settlement between the injured minor or other person under disability and one of two or more tort-feasors, shall not be deemed to be a judgment as that term is used herein, but shall be treated as a release or covenant not to sue as those terms are used in G.S. 1B-4 unless the judgment shall specifically provide otherwise.

We construe this exception narrowly, and it is clear that this exception does not apply to the case *sub judice*. *See Severance v. Ford Motor Co.*, 98 N.C. App. 330, 333, 390 S.E.2d 704, 707 (1990), *disc. review denied*, 331 N.C. 286, 417 S.E.2d 255 (1992) ("Because plaintiff did not bring the previous wrongful death action of *Severance v. Severance* on behalf of an injured minor or minor plaintiff as required by § 1B-3(e), and the consent judgment did not specify that it was anything other than a judgment, § 1B-4 does not apply to the case before us.").

While we agree with plaintiffs that treating a judgment entered pursuant to Rule 68(a) as a "judgment" as that term is used in N.C. Gen. Stat. § 1B-3(e) may, to some extent, frustrate the legislative intent of Rule 68 by discouraging a claimant from accepting offers of judgment in cases involving joint tort-feasors; we decline to judicially craft a new exception to N.C. Gen. Stat. § 1B-3(e), as we believe that this is a policy matter best addressed by the legislature. Therefore, we conclude that under the current language of Rule 68 and N.C. Gen. Stat. § 1B-3(e), entry and satisfaction of a judgment pursuant to Rule 68(a) discharges all other tort-feasors from liability to the claimant for the same injury pursuant to N.C. Gen. Stat. § 1B-3(e).

II. Application of N.C. Gen. Stat. § 1B-3(e)

Here, plaintiffs accepted an offer of judgment, and a judgment was entered in their favor in a prior action against Dr. Cona and Asheville Radiology for the same wrist injury at issue in this action. That judgment was fully satisfied. Upon the jury's verdict that Dr. Cona was acting as an apparent agent of defendant, Dr. Cona and defendant became joint tort-feasors for purposes of N.C. Gen. Stat. § 1B-3(e), and plaintiffs' claims against defendant were extinguished. *Yates v. New South Pizza, Ltd.*, 330 N.C. 790, 793-94, 412 S.E.2d 666,

669, *reh'g denied*, 331 N.C. 292, 417 S.E.2d 73 (1992). Accordingly, the trial court erred in entering judgment against defendant upon the verdict of the jury and by denying defendant's motion for a judgment notwithstanding the verdict.

Having decided that defendant was discharged from liability by the entry and satisfaction of the judgment against Dr. Cona and Asheville Radiology, we need not address plaintiffs' assignments of error.

For the foregoing reasons, we reverse the judgment entered upon the verdict of the jury and the judgment denying defendant's motion for a judgment notwithstanding the verdict and awarding costs to plaintiffs. We remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges STEELMAN and ARROWOOD concur.

STATE OF NORTH CAROLINA v. GARY LEE LAWRENCE, JR.

No. COA08-320

(Filed 7 October 2008)

1. Sentencing— Structured Sentencing—use of incorrect sentencing grid

The trial court erred by sentencing defendant for second-degree sex offenses and second-degree rape with the incorrect sentencing grid under N.C.G.S. § 15A-1340.17 using the grid from Structured Sentencing II instead of Structured Sentencing I, and each of these judgments is vacated and remanded to the trial court for resentencing because the trial court imposed sentences that exceeded the maximum sentences permitted under Structured Sentencing I.

2. Sentencing— Fair Sentencing Act—clerical error—manifest conflict in judgments

The trial court erred by incorrectly showing indecent liberties charges as Class F felonies, and defendant is entitled to a new sentencing hearing on these charges, because: (1) while our

courts have held that a trial court may amend the record to correct clerical mistakes, it cannot amend the record to correct a judicial error; (2) under the Fair Sentencing Act, the pertinent offenses were Class H felonies with a maximum punishment of ten years with a presumptive term of three years, whereas a Class F felony carried a maximum punishment of twenty years with a presumptive term of six years; and (3) although the State contends the judgments state Class F felonies but the listed punishment was consistent with Class H rather than Class F felony, thus making it a clerical error, there was a manifest conflict in the judgments when the ten-year sentence imposed would have been proper under either a Class H or Class F felony.

3. Sentencing— Structured Sentencing Act—classification of felonies

The trial court did not err by classifying one count of second-degree rape and two counts of second-degree sexual offense as Class C felonies rather than Class D felonies because, effective 1 October 1994, the felony classification of these offenses changed to Class C, the trial testimony of the two victims established that the incidents which were the bases for each of the charges against defendant occurred after 1 October 1994, and this evidence was sufficient to permit the trial court to sentence defendant under the Structured Sentencing Act.

Appeal by defendant from judgments entered 22 June 2006 by Judge Jerry R. Tillett in Camden County Superior Court. Heard in the Court of Appeals 11 September 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Amy C. Kunstling, for the State.

Richard E. Jester, for defendant-appellant.

STEELMAN, Judge.

Where the trial court erred in using the incorrect sentencing grid and misclassified two of the offenses, the judgments are vacated and remanded for resentencing.

I. Factual and Procedural Background

This is the second occasion that this case has come before the Court of Appeals. In *State v. Lawrence*, 165 N.C. App. 548, 599 S.E.2d 87 (2004), this Court reversed defendant's convictions based upon

lack of juror unanimity. The Supreme Court reversed this decision, *per curiam*, based upon its decision in *State v. Markeith R. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). *State v. Gary Lawrence*, 360 N.C. 393, 627 S.E.2d 615 (2006). However, the case was remanded for resentencing pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The underlying facts of this case are set forth in our original opinion.

On 22 June 2006, defendant was resentenced on sixteen convictions. From these judgments, defendant appeals.

Fair Sentencing, Structured Sentencing I, and Structured Sentencing II

The indictments in this case allege offense dates covering a span of time from 1 January 1991 through 31 July 1995. During this period of time, the State of North Carolina made numerous changes to its laws pertaining to the sentencing of criminal defendants convicted of felonies.

Offenses committed prior to 1 October 1994 are controlled by the Fair Sentencing Act. (Article 81A of Chapter 15A of the North Carolina General Statutes). Offenses committed between 1 October 1994 and 1 December 1995 are controlled by the first version of Structured Sentencing. (Article 81B of Chapter 15A; 1993 N.C. Sess. Laws ch. 538, § 1). Offenses committed on or after 1 December 1995 are controlled by the second version of Structured Sentencing. (Article 81B of Chapter 15A, 1995 N.C. Sess. Laws ch. 507, § 19.5).

II. Incorrect Sentencing Grid Applied

[1] In his first argument, defendant contends that the trial court sentenced him under the incorrect sentencing grid, N.C. Gen. Stat. § 15A-1340.17, using the grid from Structured Sentencing II instead of Structured Sentencing I. The State concedes, and we agree, that defendant's argument is correct.

When Structured Sentencing I was amended by the General Assembly, the minimum and maximum sentences for Class B2, C, and D felonies were increased. 1995 N.C. Sess. Laws ch. 507, § 19.5. As to the following charges, the trial court imposed sentences that exceeded the maximum sentences permitted under Structured Sentencing I: Pasquotank County case numbers 02 CRS 1331-1335 (Second-degree Sex Offense) and Camden County case numbers 00 CRS 768-70 (Second-degree rape and Second-degree Sex Offense).

The date of each of these offenses was between 1 October 1994 and 1 December 1995.

Each of these judgments is vacated and remanded to the trial court for resentencing.

[2] In his second argument, defendant contends that the judgments for the charges of indecent liberties incorrectly show the offenses to be Class F felonies, and that he is entitled to a new sentencing hearing on these charges. We agree.

"While our courts have held that a trial court may amend the record to correct clerical mistakes, it cannot amend the record to correct a judicial error." *State v. Mead*, 184 N.C. App. 306, 316, 646 S.E.2d 597, 603 (2007) (citation omitted). "Where there has been uncertainty in whether an error was 'clerical,' the appellate courts have opted to 'err on the side of caution and resolve [the discrepancy] in the defendant's favor.' " *State v. Jarman*, 140 N.C. App. 198, 203, 535 S.E.2d 875, 879 (2000) (quotation omitted).

In Currituck County case number 01 CRS 215 and Camden County case number 01 CRS 005, defendant was convicted of two counts of indecent liberties with a child. Each judgment was entered under the Fair Sentencing Act (Article 81A of Chapter 15A of the North Carolina General Statutes), the offenses were shown to be Class F felonies, and defendant was sentenced to an active sentence of ten years. The alleged dates of the two offenses were 1 January 1991 to 11 November 1993 (01 CRS 215) and 11 November 1993 to 11 November 1994 (01 CRS 005). Under the provisions of N.C. Gen. Stat. § 14-202.1 as it existed prior to 1 October 1994, the felony of indecent liberties with a child was a Class H felony. This statute was amended, effective 1 October 1994, to make this offense a Class F felony. *See* 1993 N.C. Sess. Laws ch. 539, § 1201; 1994 N.C. Ex. Sess. Laws ch. 24, § 14(c). Since the judgment in case 01 CRS 005 was entered under Fair Sentencing, and neither party objects to this classification, we assume that the date of the offense was prior to 1 October 1994.

Under the Fair Sentencing Act, a Class H felony carried a maximum punishment of ten years, with a presumptive term of three years. A Class F felony carried a maximum punishment of twenty years, with a presumptive term of six years. It is clear that the two counts of indecent liberties with a child were Class H and not Class F felonies. The trial court erred in declaring the offenses to be Class F felonies.

The State argues that while the judgments state that the offenses were Class F felonies, they also state that the maximum term for each offense was ten years, with a presumptive term of three years. Those provisions of the judgments are consistent with a Class H rather than a Class F felony. The State argues that the designation of the two offenses as Class F felonies was a clerical error, and that we should merely remand these cases to the trial court for correction of this error.

However, during the resentencing hearing, the trial court expressly stated that each offense was a Class F felony. Further, the ten year sentences imposed would have been proper under either a Class H or Class F felony. Given the manifest conflict in the judgments, we are unable to determine that the error was a clerical one, and we vacate and remand each of these judgments to the trial court for resentencing. *See Jarman* at 202, 535 S.E.2d at 878.

III. Class C Felonies

[3] In his third argument, defendant contends that the trial court erred in classifying Camden County cases 00 CRS 768-70 (one count of second-degree rape and two counts of second-degree sexual offense) as Class C felonies rather than Class D felonies. We disagree.

Prior to 1 October 1994, N.C. Gen. Stat. § 14-27.3 and 14-27.5 classified second-degree rape and second-degree sexual offense as Class D felonies. Effective 1 October 1994, the felony classification of these offenses changed to Class C. N.C. Sess. Laws ch. 539, § 1130-31; 1994 N.C. Ex. Sess. Laws ch. 24, § 14(c). The indictments and judgments in these cases stated that the offenses occurred between 13 November 1993 and 13 November 1994. Defendant argues that since most of this time occurred prior to the amendment of the respective statutes, he should have been sentenced as a Class D felon rather than a Class C felon.

"When a defendant assigns error to the sentence imposed by the trial court, our standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1)).

A review of the transcript reveals that C.L., the victim in case numbers 00 CRS 768-69, testified at trial that defendant committed a second-degree sexual offense against her by performing oral sex prior to her sixteenth birthday, which was 13 November 1994, but

after defendant's birthday, which was 13 October 1994. C.L. further testified that defendant committed second-degree rape against her after the second-degree sexual offense. C.L.'s twin sister, S.L., the victim in case number 00 CRS 770, testified that defendant committed a second-degree sexual offense against her by performing oral sex prior to her sixteenth birthday, which was 13 November 1994, but after defendant's birthday on 13 October.

The trial testimony of the two victims established that the incidents which were the bases for each of the charges against defendant occurred after 1 October 1994, and this evidence was sufficient to permit the trial court to sentence defendant under the Structured Sentencing Act. *See Deese* at 540, 491 S.E.2d at 685. No other evidence regarding the dates of the alleged offenses was introduced, and we hold that the State met its burden of showing that the offenses were committed after 1 October 1994. *See State v. Poston*, 162 N.C. App. 642, 651, 591 S.E.2d 898, 904 (2004).

This argument is without merit.

Defendant's remaining assignments of error listed in the record but not argued in defendant's brief are deemed abandoned. N.C. R. App. P. 28 (b)(6) (2008).

IV. Conclusion

The following judgments are vacated and remanded to the trial court for resentencing:

Pasquotank County: 02 CRS 1331-1335

Currituck County: 01 CRS 215

Camden County: 01 CRS 005

Camden County case numbers 00 CRS 768-70 are affirmed as to the classification of the felonies, but vacated and remanded for resentencing.

The remaining six judgments, unchallenged by defendant, are affirmed.

AFFIRMED in part; VACATED and REMANDED in part.

Judges GEER and STEPHENS concur.

IN RE FORECLOSURE OF ELKINS

[193 N.C. App. 226 (2008)]

FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM CHARLES H. ELKINS SR., IN THE ORIGINAL AMOUNT OF $130,900.00, DATED SEPTEMBER 19, 2001, AND RECORDED IN BOOK 2201, PAGE 535, FORSYTH COUNTY REGISTRY; CURRENT OWNER(S): CHARLES H. ELKINS JR. AND JOHN W. ELKINS; SUBSTITUTE TRUSTEES: PRIORITY TRUSTEE SERVICES OF NC, L.L.C. OR KENNETH D. CAVINS OR MATRESSA MORRIS OR CECELIA E. STEMPLE

No. COA08-150

(Filed 7 October 2008)

1. Appeal and Error— appealability—denial of jury trial

An interlocutory order denying a motion for a jury trial on whether a foreclosure should proceed affected a substantial right and was immediately appealable.

2. Constitutional Law— foreclosure—no right to jury trial

Article IV, Section 13 of the North Carolina Constitution did not guarantee appellant a jury trial in this foreclosure proceeding.

3. Mortgages and Deeds of Trust— foreclosure—authorization to proceed—superior court—no right to jury trial

N.C.G.S. § 45-21.6 did not create a right to trial by jury on whether a foreclosure should proceed.

4. Appeal and Error— preservation of issues—constitutional issues—not raised at trial

Issues of fairness and due process under the North Carolina Constitution that were not raised at trial were not preserved for appellate review.

Appeal by owners from order entered 17 September 2007 by Judge Henry E. Frye, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 18 August 2008.

Morris, Schneider, Prior, Johnson & Freedman, L.L.C., by Wendy A. Owens, for trustees-appellees.

John W. Elkins, pro se.

MARTIN, Chief Judge.

Charles H. Elkins, Jr. and John W. Elkins, as devisees of the Estate of Charles W. Elkins, Sr., their father, are the owners of real property located at 4720 Chippendale Way in Winston-Salem, North Carolina. The property was subject to a deed of trust dated 19 September 2001, given by Charles W. Elkins, Sr., to secure repayment

of a note currently held by Household Realty Corporation ("Household"). At the direction of the noteholder, the substitute trustee initiated foreclosure proceedings and filed a notice of hearing on 19 April 2007 in Forsyth County Superior Court, alleging "a default in the obligation to make payments of principal and interest under the Note secured by the Deed of Trust." After a hearing on 26 June 2007, the Clerk of Superior Court entered an order finding (1) Household was holder of the note sought to be foreclosed, which evidenced a valid debt owed by Charles H. Elkins, Sr.; (2) the note was in default and the holder had the right to foreclose under a power of sale; and (3) all parties against whom the holder intended to assert liability for the debt were served with the notice of hearing. The clerk then ordered that the substitute trustee could proceed to foreclose under the terms of the deed of trust. On the same date, the substitute trustee filed a Notice of Foreclosure Sale.

Appellant John W. Elkins ("appellant"), in his capacity as a co-owner of the property and co-beneficiary of his father's estate, appealed from the clerk's order to the superior court for a hearing *de novo*, pursuant to N.C.G.S. § 45-21.16. When the matter was called for hearing in superior court, appellant moved that the issues be tried by a jury. The superior court entered an oral order denying appellant's motion, and appellant gave notice of appeal.

---

[1] Although appellant's appeal is from an interlocutory order, our Supreme Court has held that an order denying a motion for jury trial is immediately appealable because it affects a substantial right. *In re McCarroll*, 313 N.C. 315, 316, 327 S.E.2d 880, 881 (1985).

[2] By his sole assignment of error, appellant contends the trial court violated his rights under Article IV, Section 13 of the North Carolina Constitution and his due process rights under Article I, Section 19 of the North Carolina Constitution by denying the motion for a jury trial on the issues before the court in the foreclosure proceeding. His argument proceeds in three parts: (1) that he has a right to a jury trial guaranteed by Article IV, Section 13 of the North Carolina Constitution; (2) that a right to a jury trial in foreclosure under power of sale proceedings was created by N.C.G.S. § 45-21.16; and (3) that the failure to grant a jury trial "violates basic fairness and due process requirements."

First, appellant argues that the North Carolina Constitution creates a right to jury trial, citing two provisions that pertain to jury

trials. Article I, Section 25 states: "Right of jury trial in civil cases. In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. art. I, § 25. Appellant acknowledges that this provision by itself guarantees a right to jury trial only in types of cases where the right to jury trial existed when the Constitution of 1868 was adopted. *Kiser v. Kiser*, 325 N.C. 502, 507, 385 S.E.2d 487, 490 (1989). Additionally, this Court has held that in matters of foreclosure by power of sale "there was no right at the time our Constitution was adopted either by virtue of the common law or statute to a jury [trial]." *In re Foreclosure of Sutton Investments, Inc.*, 46 N.C. App. 654, 663, 266 S.E.2d 686, 691, *disc. review denied*, 301 N.C. 90 (1980). However, he argues that Article I, Section 25 does not exclusively govern the right to jury trial and that a right is created in Article IV, Section 13, which states:

> Forms of action; rules of procedure.
>
> (1) *Forms of Action.* There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury.

N.C. Const. art. IV, § 13. He argues that our Supreme Court's interpretation of Article IV, Section 13 in *Faircloth v. Beard*, 320 N.C. 505, 508, 358 S.E.2d 512, 514 (1987), *abrogated by Kiser*, 325 N.C. 502, 385 S.E.2d 487, construed the language as creating a right to jury trial in all civil actions, where the Court held that "actions to protect private rights and to redress private wrongs . . . are civil actions under Article IV, Sec. 13 and this section of the Constitution guarantees that parties to such actions may have questions of fact tried by juries." *Id.* Appellant's contention ignores our Supreme Court's later decision in *Kiser*, which specifically declined "to construe *Faircloth* broadly as holding that article IV, section 13 creates a constitutional right to trial by jury in all civil cases arising from controversies affecting private rights and redressing private wrongs." *Kiser*, 325 N.C. at 509, 385 S.E.2d at 491. Although the Court did not disturb the result in *Faircloth* on other grounds, the Court's holding in *Kiser* rejected the analysis set forth in *Faircloth* and urged by appellant here. *Id.* at 510-11, 385 S.E.2d at 491-92. In abrogation of *Faircloth*, the Court held:

> [A]rticle I, section 25 contains the sole substantive guarantee of the important right to trial by jury under the state constitution

> while article IV, section 13 ensures that the right as defined in article I will be available in all civil cases, regardless of whether they sound in law or equity.
>
> The right to trial by jury under article I has long been interpreted by this Court to be found only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted. Conversely, where the prerogative did not exist by statute or at common law upon the adoption of the Constitution of 1868, the right to trial by jury is not constitutionally protected today. Where the cause of action fails to meet these criteria and hence a right to trial by jury is not constitutionally protected, it can still be created by statute. N.C.G.S. § 1A-1, Rule 38(a) (1983) ("The right of trial by jury as declared by the Constitution or statutes of North Carolina shall be preserved to the parties inviolate.").

Id. at 507-08, 385 S.E.2d at 489-90 (citations omitted). Accordingly, we hold, as in *Kiser*, that Article IV, Section 13 does not guarantee appellant a jury trial in this foreclosure proceeding.

[3] As noted in *Kiser*, pursuant to Rule 38(a), a right to trial by jury may arise where it is created by statute. *Id.* at 508, 385 S.E.2d at 490; *see also* N.C. Gen. Stat. § 1A-1, Rule 38(a) (2008). Hence, in the next prong of appellant's argument, he contends that the controlling statute, N.C.G.S. § 45-21.16, creates a right to trial by jury. The statute provides:

> The act of the clerk in . . . finding or refusing to [make findings in accordance with subsection (d)] is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo.

N.C. Gen. Stat. § 45-21.16(d1) (2005) (amended in other subsections by 2007 N.C. Sess. Laws ch. 351, § 4). Notably, the precise issue of whether this statute creates a right to jury trial was before this Court in *Sutton*, 46 N.C. App. at 662-63, 266 S.E.2d at 691. The respondent in *Sutton* also argued that the trial court should have granted his request for a jury trial upon a hearing de novo from a foreclosure proceeding. *Id.* at 662, 266 S.E.2d at 691. This Court looked at the enactment of N.C.G.S. § 45-21.16 and noted that:

> [It] was intended by the legislature to meet minimum due process requirements, not to engraft upon the procedure for foreclosure

> under a power of sale all of the requirements of a formal civil action. . . . Thus, upon appeal from an order of the clerk authorizing the trustee to proceed with sale, the judge is limited upon the hearing de novo to determining the same four issues resolved by the clerk [as identified in N.C.G.S. § 45-21.16(d)].

Id. at 663, 266 S.E.2d at 691. This Court further relied on language in N.C.G.S. § 45-21.16(d1) (then § 45-21.16(d)) and § 45-21.16(e) specifically stating that the "judge" had jurisdiction and authority to hear the appeal. *Id.* Based on this analysis, this Court concluded that the statute did not guarantee respondent a right "to a jury determination of the type of issues to be resolved by a hearing pursuant to [N.C.G.S. §] 45-21.16." *Id.* As this issue has been decided by a previous panel of this Court, we are bound to follow it. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Accordingly, we conclude that N.C.G.S. § 45-21.16 does not guarantee appellant a right to jury trial in this proceeding.

[4] Lastly, appellant asserts that the denial of his motion for a jury trial violated "basic fairness and due process requirements under Article I, Section 19 of the North Carolina Constitution and the Fifth and Fourteenth Amendments to the United States Constitution." Appellant did not address this issue in his motion in the trial court nor did he object to the denial of the motion on this ground. Thus, this issue has not been preserved for review. N.C.R. App. P. 10(b)(1) (2008) ("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.").

The order denying appellant's motion for a jury trial is affirmed.

Affirmed.

Judges WYNN and HUNTER concur.

JONES v. COWARD

[193 N.C. App. 231 (2008)]

BENJAMIN PAUL JONES, PLAINTIFF v. WILLIAM H. COWARD, AND COWARD, HICKS & SILER, P.A. DEFENDANTS

No. COA08-37

(Filed 7 October 2008)

1. Libel and Slander— defamation—attorney's statement to potential witness regarding lawsuit—absolute privilege

The trial court did not err by dismissing plaintiff's claim for defamation on the basis that defendant attorney's statement to a potential witness about plaintiff was privileged and thus immune from plaintiff's action because: (1) an attorney's statement or question to a potential witness regarding a suit in which that attorney is involved, whether preliminary to trial, or at trial, is privileged and immune from civil action for defamation, provided the statement or question is not so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety, and that it was so related to the subject matter of the controversy that it may have become the subject of inquiry in the course of the trial; and (2) the rule of absolute privilege was applicable when plaintiff's own evidence was that defendant approached the potential witness in an attempt to gather evidence for an ongoing suit, and regardless of the accuracy of the alleged statement that plaintiff got run out of town for drugs, it was not so palpably irrelevant to the subject matter of the controversy that no reasonable man could doubt its irrelevancy or impropriety, and it was so related to the subject matter of the controversy that it may have become the subject of inquiry.

2. Emotional Distress— attorney's statement to potential witness regarding lawsuit—intentional infliction of emotional distress—negligence—privileged statement

The trial court did not err by dismissing plaintiff's claims for intentional infliction of emotional distress and negligence because: (1) these claims are based upon the same question or comment plaintiff alleges defendant attorney put to the potential witness; (2) were plaintiff allowed to pursue the additional claims, the privilege protecting defendant from an action for defamation would be eviscerated and the public policy providing advocates the security to zealously pursue cases on behalf of their clients would be completely undermined; and (3) a thorough

review of plaintiff's arguments, the record, and relevant law revealed the additional arguments were without merit.

Appeal by plaintiff from an order entered 22 May 2007 by Judge James E. Lanning in Jackson County Superior Court. Heard in the Court of Appeals 20 August 2008.

Donald H. Barton, for plaintiff-appellant.

Coward, Hicks & Siler, P.A., by William H. Coward and Andrew C. Buckner, for defendants-appellees.

JACKSON, Judge.

According to plaintiff's complaint, William H. Coward ("defendant"), while a partner in the law firm of Coward, Hicks & Siler, P.A. (along with defendant, "defendants"), filed a lawsuit on 8 September 2005, the subject of which is not relevant to the instant action. On 19 January 2006, this complaint was amended and joined plaintiff as a defendant. In November 2006, defendant approached Bobby Bracken ("Bracken"), a potential witness in the action originally filed 8 September 2005, while he was eating breakfast in a public place, and either asked Bracken, "Did you hear that [plaintiff] got run out of town for drugs?" or stated, "[Plaintiff] got run out of town for drugs." Plaintiff filed the instant action on 11 May 2007, alleging defendants (defendant, and his law firm, through the doctrine of *respondeat superior*) had defamed (slandered) plaintiff through defendant's remarks to Bracken; had intentionally inflicted emotional distress; and had acted negligently. Plaintiff also sought punitive damages.

On 22 May 2007, defendants moved to dismiss plaintiff's action for failure to state a claim upon which relief could be granted based upon Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. At a 30 July 2007 hearing, defendants argued that defendant's alleged statement to Bracken was privileged, and thus immune to plaintiff's defamation claim, because it was made pursuant to defendant's representation of his clients in the 8 September 2005 action. By order entered 1 August 2007, the trial court granted defendants' motion to dismiss, and plaintiff timely appealed. Additional relevant facts will be addressed below.

In plaintiff's only argument on appeal, he contends the trial court erred in granting defendants' motion to dismiss. We disagree.

> Our 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. In ruling upon such a motion, the complaint is to be liberally construed, and the trial 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.

Meyer v. Walls, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997) (citations and quotation marks omitted).

We review the trial court's decision to dismiss plaintiff's claim *de novo*. *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 606-07, 659 S.E.2d 442, 447 (2008).

[1] Plaintiff first argues that the trial court erred in dismissing his claim for defamation on the basis that defendant's statement was privileged and thus immune from plaintiff's action.

> It is now well-established that defamatory statements made in the course of a judicial proceeding are absolutely privileged and will not support a civil action for defamation, even if made with malice. In determining whether or not a statement is made in the course of a judicial proceeding, the court must decide as a matter of law whether the alleged defamatory statements are sufficiently relevant to the issues involved in a proposed or ongoing judicial proceeding.

Harris v. NCNB Nat'l Bank of North Carolina, 85 N.C. App. 669, 672, 355 S.E.2d 838, 841 (1987) (citations omitted). In *Scott v. Statesville Plywood and Veneer Co., Inc.*, 240 N.C. 73, 81 S.E.2d 146 (1954), our Supreme Court stated:

> While statements in pleadings and other papers filed in a judicial proceeding are not privileged if they are not relevant or pertinent to the subject matter of the action, the question of relevancy or pertinency is a question of law for the courts, and the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety. If it is so related to the subject matter of the controversy that it may become the subject of inquiry in the course of the trial, the rule of absolute privilege is controlling.

Scott, 240 N.C. at 76, 81 S.E.2d at 149. "In North Carolina, the phrase 'judicial proceeding' has been defined broadly, encompassing more than just trials in civil actions or criminal prosecutions." *Harris*, 85 N.C. App. at 673, 355 S.E.2d at 842.

> According to the Restatement (Second) of Torts § 586 (1977),
>
> [a]n attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Id. See also Harris, 85 N.C. App. at 674, 355 S.E.2d at 842. "The public policy underlying this privilege 'is grounded upon the proper and efficient administration of justice. Participants in the judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits.' " *Harman v. Belk*, 165 N.C. App. 819, 824, 600 S.E.2d 43, 47 (2004) (quoting *Houpe v. City of Statesville*, 128 N.C. App. 334, 346, 497 S.E.2d 82, 90 (1998)). In North Carolina, this privilege has been extended to potential witness' statements to counsel. *Rickenbacker v. Coffey*, 103 N.C. App. 352, 357-58, 405 S.E.2d 585, 588 (1991). *Harris* cites with favor a number of cases from other jurisdictions in support of its holding that the privilege applies to statements made before trial, including *Russell v. Clark*, 620 S.W.2d 865 (Tex. App. 1981) (the privilege applies to attorney statements to potential witnesses, because there was reasonable possibility they might provide relevant evidence). *Harris*, 85 N.C. App. at 674-75, 355 S.E.2d at 843. *See also Robinson v. Home Fire & Marine Ins. Co.*, 49 N.W.2d 521 (Iowa 1951) (privilege applies to interview of potential witnesses).

We hold that an attorney's statement or question to a potential witness regarding a suit in which that attorney is involved, whether preliminary to trial, or at trial, is privileged and immune from civil action for defamation, provided the statement or question is not "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety[,]" and it was "so related to the subject matter of the controversy that it may [have] become the subject of inquiry in the course of the trial[.]" *Scott*, 240 N.C. at 76, 81 S.E.2d at 149. *See also Harris*, 85 N.C. App. at 672-73, 355 S.E.2d at 841-42.

Plaintiff's complaint contains the following relevant allegations: That at the time of defendant's alleged statement to Bracken—either,

"Did you hear that [plaintiff] got run out of town for drugs?" or "[Plaintiff] got run out of town for drugs."—defendant was representing clients in a civil suit which named plaintiff as a defendant; that defendant knew Bracken was a potential witness in that suit, and in fact deposed Bracken subsequent to the alleged comment; and that defendant had "no other purpose to speak to Bobby Bracken other than to learn information regarding the [suit.]"

Upon these allegations in plaintiff's complaint, we hold that the trial court did not err in dismissing plaintiff's defamation suit, as plaintiff's own evidence is that defendant approached Bracken as a witness, in an attempt to gather evidence for an ongoing suit. Regardless of the accuracy of the alleged statement, we hold that it was not "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety[,]" and it was "so related to the subject matter of the controversy that it may [have] become the subject of inquiry [*e.g.*, plaintiff's credibility. *See* N.C. R. Evid., Rule 609.] in the course of the trial," and thus, "the rule of absolute privilege is controlling." *Scott*, 240 N.C. at 76, 81 S.E.2d at 149. *See also Harris*, 85 N.C. App. at 672-73, 355 S.E.2d at 841-42. This argument is without merit.

[2] Plaintiff also contends that the trial court erred in dismissing his claims for intentional infliction of emotional distress and negligence. These claims are based upon the exact same question or comment plaintiff alleges defendant put to Bracken. Were plaintiff allowed to pursue the additional claims in this instance, and on these facts, the privilege we have held protects defendant from an action for defamation would be eviscerated, and the public policy providing advocates the security to zealously pursue cases on behalf of their clients would be completely undermined. *See Belk*, 165 N.C. App. at 824, 600 S.E.2d at 47. Furthermore, we have thoroughly examined plaintiff's arguments, the record, and the relevant law, and find these additional arguments to be without merit.

AFFIRMED.

Judges BRYANT and ARROWOOD concur.

STATE OF NORTH CAROLINA v. ANTWAN TERRELL MURPHY

No. COA08-382

(Filed 7 October 2008)

Sentencing— habitual felon—withdrawal of indictments—district attorney's discretion

The trial court was not required to sentence defendant as an habitual felon on armed robbery and attempted armed robbery charges where the State withdrew its indictment for habitual felon status as to those charges and sought habitual felon status only as to a firearms possession charge, which resulted in a greater sentence. The district attorney has the authority and discretion to withdraw an habitual felon indictment as to some or all of the underlying felony charges up to the time the jury returns a verdict that defendant had attained the status of an habitual felon.

Appeal by defendant from judgment entered 14 November 2007 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 11 September 2008.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General LeAnn M. Rhodes, for the State.

Michael J. Reece, for defendant-appellant.

STEELMAN, Judge.

Where the State withdrew its indictment for habitual felon status as to the charges of robbery with a dangerous weapon and attempted robbery with a dangerous weapon prior to the habitual felon portion of the trial, the trial court was not required to sentence defendant as an habitual felon on those charges.

I. Factual and Procedural Background

On 27 November 2006, Antwan Terrell Murphy (defendant) was indicted for the offenses of robbery with a dangerous weapon, attempted robbery with a dangerous weapon, possession of firearm by a felon, and as an habitual felon. This case was tried at the 16 July 2007 Criminal Session of Pitt County Superior Court. Defendant was found guilty of robbery with a dangerous weapon, attempted robbery with a dangerous weapon and possession of a firearm by a felon.

During the second phase of the trial, defendant was found guilty of being an habitual felon.

During the jury's deliberation on the two robbery and possession of a firearm charges, the prosecutor informed the court that the State would only be seeking habitual felon status as to the possession of a firearm charge. Defendant did not object to the State's withdrawal of the habitual felon charges as to the robbery charges. The jury found that defendant had achieved the status of an habitual felon.

The trial court consolidated the robbery and attempted robbery charges and imposed an active sentence of 117 to 150 months imprisonment. As to the possession of a firearm charge, defendant was sentenced as an habitual felon to an active, consecutive sentence of 73 to 97 months. Defendant appeals.

II. Analysis

Defendant contends the trial court committed error by not sentencing him as an habitual felon on the robbery with a dangerous weapon and attempted robbery with a dangerous weapon charges. We disagree.

A. Habitual Felons Act

The Habitual Felons Act (Article 2A of Chapter 14, North Carolina General Statutes) provides that when a defendant has previously been convicted of or plead guilty to three non-overlapping felonies, he may be indicted by the State in a separate bill of indictment for having attained the status of being an habitual felon. N.C. Gen. Stat. § 14-7.1, 14-7.3 (2007).

N.C. Gen. Stat. § 14-7.2 (2007) provides for the punishment of habitual felons and reads, in pertinent part:

> When any person is charged by indictment with the commission of a felony under the laws of the State of North Carolina and is also charged with being an habitual felon as defined in G.S. 14-7.1, he must, upon conviction, be sentenced and punished as an habitual felon. . . .

N.C. Gen. Stat. § 14-7.6 (2007) provides that:

> When an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article . . . be sentenced as a Class C felon.

Defendant asserts that the trial court was required to sentence him as an habitual felon under the provisions of N.C. Gen. Stat. § 14-7.2 and 14-7.6 (2007) with respect to the robbery and attempted robbery charges, as well as the possession of a firearm charge. Under the provisions of N.C. Gen. Stat. § 14-7.6, for purposes of sentencing as an habitual felon, the three prior felony convictions may not be counted in determining defendant's prior record level. Thus, in this case, as an habitual felon, defendant was a prior record level I for the class C felony, while he was a prior record level IV for the two class D felonies. If the trial court had sentenced defendant as an habitual felon with respect to the robbery charges, he would have received a lesser sentence.

Defendant fails to recognize the bifurcated nature of proceedings involving an indictment for habitual felon status as set forth in N.C. Gen. Stat. § 14-7.5. Under that statute, the existence of the habitual felon indictment may not be revealed to the jury "unless the jury shall find that the defendant is guilty of the principal felony . . ." *Id.* In the event that the jury finds the defendant guilty of the principal, or underlying felony, then a second trial is conducted on habitual felon status. This may be conducted before the same jury that heard the principal charge.

B. Prosecutorial Discretion

Defendant acknowledges that "North Carolina prosecutors have a choice between indicting a defendant with three prior felony convictions for the predicate felony offense alone, or indicting the defendant as an habitual felon in addition to indicting him for the predicate felony." The District Attorney thus has discretion whether to prosecute a defendant as an habitual felon or not. *State v. Cates*, 154 N.C. App. 737, 740, 573 S.E.2d 208, 209-10 (2002).

It is also clear that a prosecutor has the authority and discretion to dismiss charges against a defendant at any stage of the proceedings. N.C. Gen. Stat. § 15A-931(a) (2007) ("[T]he prosecutor may dismiss any charges stated in a criminal pleading . . . by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time."); *see also State v. Spicer*, 299 N.C. 309, 311-12, 261 S.E.2d 893, 895-96 (1980). Defendant contends, however, that the indictment for habitual felon status abrogated the District Attorney's authority and discretion to dismiss or withdraw charges against him.

We hold the District Attorney has the authority and discretion to withdraw an habitual felon indictment as to some or all of the underlying felony charges pending against a defendant, up until the time that the jury returns a verdict of guilty that defendant had attained the status of an habitual felon. Once such a verdict has been returned, then the court must sentence defendant as an habitual felon pursuant to N.C. Gen. Stat. § 14-7.2. However, this provision is not applicable until defendant has been convicted of *both* the underlying felony and habitual felon status.

C. Clerical Error

We note that both judgments entered in this matter state that defendant was found to be and was sentenced at a prior record level IV for felony sentencing. The record and the sentence imposed reflect that for the habitual felon judgment, defendant was a prior record level I. This matter is remanded to the Superior Court of Pitt County for correction of this clerical error.

Defendant's remaining assignments of error listed in the record but not argued in defendant's brief are deemed abandoned. N.C. R. App. P. 28 (b)(6) (2008).

AFFIRMED, REMANDED for correction of clerical error.

Judges GEER and STEPHENS concur.

IN THE MATTER OF: S.S.

No. COA08-29

(Filed 7 October 2008)

Juveniles— delinquency—failure to hold dispositional hearing within six months

The trial court did not err by denying defendant juvenile's motion to dismiss under N.C.G.S. § 7B-2501(d) the charges of second-degree kidnapping, crime against nature, and sexual battery based on the court's failure to hold a dispositional hearing within six months because: (1) the plain language of the statute allows the trial court to grant the juvenile's family a six-month window

of time to meet the needs of the juvenile without a court-ordered disposition, and it does not serve as a limit on the court's jurisdiction; and (2) the interpretation offered by the juvenile would defeat the intent of the statute and harm similarly situated juveniles when disposition in this case was continued multiple times to allow the juvenile to testify in the trial of his codefendant in order to benefit by receiving reduced charges and a level II disposition.

Appeal by respondent from judgment entered 14 August 2007 by Judge Edward Pone in Cumberland County District Court. Heard in the Court of Appeals 20 August 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Gail E. Dawson, for the State.

Mary McCullers Reece, for respondent-appellant.

CALABRIA, Judge.

S.S., a juvenile, appeals from a dispositional order sentencing him to one-year probation for the offenses of second-degree kidnapping, crime against nature, and sexual battery, based on a disposition agreement with the prosecutor to testify truthfully in the trial of a co-defendant. On appeal, the juvenile argues that the trial court erred in denying juvenile's motion to dismiss the charges pursuant to N.C. Gen. Stat. § 7B-2501(d) where the court failed to hold a dispositional hearing within six months.

Based upon our review of the record and the statute, we determine the trial judge properly denied the juvenile's motion to dismiss and properly sentenced the juvenile in this case. We, therefore, affirm.

On 26 April 2006 the State filed juvenile petitions alleging that the juvenile committed the offenses of indecent liberties between children, sex offense with a child under the age of 13 years, and first-degree rape. On 2 November 2006 the juvenile, through counsel, admitted he committed the offenses of second-degree kidnapping, crime against nature, and sexual battery. S.S. made this admission pursuant to an agreement with the prosecutor that, among other things, his charges would be reduced, and the State would recommend a level II disposition. In exchange, the juvenile agreed to testify truthfully in the trial of a co-defendant.

The disposition was originally scheduled for 1 January 2007. The case was continued more than once at the request of both the juvenile and the State to allow the juvenile the opportunity to testify against his co-defendant, and obtain the benefit of his agreement with the prosecutor. Co-defendant's hearing was not held until 12 June 2007. The dispositional hearing for S.S. was held 9 August 2007. Counsel for S.S. made a motion to dismiss pursuant to N.C. Gen. Stat. § 7B-2501 and the court denied the motion. The court entered a level II intermediate disposition of one-year probation, consistent with the juvenile's agreement with the prosecutor. This appeal followed.

The juvenile argues that the trial judge erred by denying his motion to dismiss pursuant to N.C. Gen. Stat. § 7B-2501(d) since the court failed to hold a dispositional hearing within six months. N.C. Gen. Stat. § 7B-2501(d) reads as follows:

> The court may dismiss the case, or continue the case for no more than six months in order to allow the family an opportunity to meet the needs of the juvenile through more adequate home supervision, through placement in a private or specialized school or agency, through placement with a relative, or through some other plan approved by the court.

N.C. Gen. Stat. § 7B-2501(d) (2007).

The juvenile argues that the statute requires the court to hold a dispositional hearing within six months or the court loses subject matter jurisdiction. The statute does not say, and the juvenile makes no argument regarding, the date that determines from when the six months is measured. The juvenile only indicates that it had been nine months since adjudication, over a year from the time the charges were filed, and twenty-one months from the time the incidents occurred.

The juvenile's interpretation of the statute is misplaced. The juvenile correctly states that the procedural requirements of the juvenile code should be strictly construed to protect the rights of juvenile respondents. *See In Re M.C.*, 183 N.C. App. 152, 645 S.E.2d 386 (2007) (Trial court's order dismissed due to the untimely filing of the juvenile petition). However, his interpretation of the statute contradicts the plain language of the statute, and would result in more harm to juvenile respondents. Therefore, we reject it.

The plain language of the statute allows the trial court to grant the juvenile's family a six-month window of time to meet the needs of

the juvenile without a court-ordered disposition. Presumably, the court can dismiss the juvenile's case, or provide a more lenient disposition, if the facts of the case warrant, and if satisfied with the steps taken by the family. While the juvenile argues this is a mandate that requires disposition within six months, it is merely an opportunity provided families to seek non-judicial solutions to meet the needs of the juvenile, while placing an outer limit on how long the family may seek these solutions. It does not serve as a limit on the court's jurisdiction. On the contrary, it grants the court the authority to enter a disposition at the end of a six-month period granted to families.

The interpretation offered by the juvenile would defeat the intent of the statute, and harm similarly situated juveniles. The present case is an example. Disposition was continued multiple times to allow the juvenile to testify in the trial of his co-defendant, and therefore benefit by receiving reduced charges and a level II disposition. According to the juvenile's interpretation the court would not accept this dispositional arrangement unless there were assurances that the trial of the co-defendant would be completed within the six-month window. The trial court would have held his dispositional hearing within that window, disregarding his dispositional arrangement. As a result, the juvenile would not have gotten the benefit of the reduced charges or the level II disposition.

N.C. Gen. Stat. § 7B-2501(d) is intended to provide an opportunity for families to seek non-judicial solutions for troubled juveniles and is not a limit on the jurisdiction of trial courts in juvenile matters. The trial court properly denied the juvenile's motion to dismiss.

Affirmed.

Judges TYSON and ELMORE concur.

ALICE BINS RAINEY, MICHELE R. ROTOSKY AND MADELINE DAVIS TUCKER, PETITIONERS-APPELLANTS v. NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION AND STATE BOARD OF EDUCATION, RESPONDENTS-APPELLEES

No. COA05-1609-2

(Filed 7 October 2008)

Administrative Law— superior court deference to demonstrated expertise and consistency of Board of Education—erroneous standard of review did not affect remainder of case

The Court of Appeals reconsidered its opinion in *Rainey* I, as directed by our Supreme Court, and held that its analysis concluding the superior court should not have given deference to the State Board of Educations's demonstrated expertise and consistency in applying various statutes, regarding pay increases for teachers who attain national certification, was erroneous. However, it reviewed the merits of the case without further consideration of the trial court's standard of review and concluded the remainder of the opinion in *Rainey I*, and its disposition, are unaffected by the error.

Appeal by petitioner from order and judgment entered 7 September 2005 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 22 January 2007. Opinion filed by the Court of Appeals 20 February 2007. Heard in the Supreme Court 16 October 2007. Opinion filed by the Supreme Court 9 November 2007 reversing the Opinion of the Court of Appeals. Remanded to the Court of Appeals for reconsideration.

Poyner & Spruill LLP, by Thomas R. West and Pamela A. Scott, for petitioners.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for respondents.

ELMORE, Judge.

On 9 November 2007, the North Carolina Supreme Court published an opinion reversing this Court's opinion in *Rainey v. N.C. Dep't of Pub. Instruction*, 181 N.C. App. 666, 640 S.E.2d 790 (2007) (*Rainey I*). Subsequently we filed an order stating that we would reconsider the case as directed by the opinion of the Supreme Court without additional briefs or oral arguments. We have reconsidered

the case as directed and, except as herein modified, the opinion we filed on 20 February 2007 remains in full force and effect.

In *Rainey I*, we reversed a superior court order affirming a Final Decision by the State Board of Education. *Id.* at 676, 640 S.E.2d at 797. Madeline Davis Tucker (petitioner) achieved certification by the National Board for Professional Teaching Standards (the National Board) in 2000. N.C. Gen. Stat. § 115C-296.2(b) requires the State to "[pay] a significant salary differential to teachers who attain national certification from [the National Board.]" N.C. Gen. Stat. § 115C-296.2(a) (2005). After petitioner received her certification, the North Carolina Department of Public Instruction (respondent) informed her that she would not receive the National Board salary increase. *Rainey I*, 181 N.C. App. at 669, 640 S.E.2d at 793. Petitioner appealed respondent's decision by filing a petition for a contested case hearing in 2002. *Id.* at 669, 640 S.E.2d at 793.

At the administrative hearing, respondent argued that petitioner was not a "teacher" for purposes of the statute and thus was not entitled to the salary increase for "teachers." *Id.* at 669-70, 640 S.E.2d at 793. The administrative law judge (ALJ) reversed respondent's decision and ordered that petitioner receive the salary increase. *Id.* at 670, 640 S.E.2d at 793-94. The State Board of Education (the State Board) did not adopt the ALJ's decision and affirmed respondent's original decision. *Id.* at 670, 640 S.E.2d at 794. Petitioner appealed to the superior court, which affirmed the State Board's decision. *Id.* at 670, 640 S.E.2d at 794. Petitioner then appealed to this Court, which reversed the superior court. *Id.* at 676, 640 S.E.2d at 797.

In reaching our decision, we applied N.C. Gen. Stat. § 150B-51(c), which was added to the North Carolina Administrative Procedures Act in 2000. *Id.* at 660, 640 S.E.2d at 794. That section states, in relevant part:

> 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) (2005).

Petitioner assigned error to the superior court's "application of the standard of review, arguing that the trial court improperly applied the *de novo* standard of review by deferring to respondent's construction of the statute at issue." *Rainey I*, 181 N.C. App. at 672, 640 S.E.2d at 795. We held that the trial court erred by giving deference to the State Board's "demonstrated expertise and consistency in applying various statutes." *Id.* at 672, 640 S.E.2d at 795. We decided the case on the merits, however, explaining that "the trial court's erroneous . . . application of the *de novo* standard of review in no way interfere[d] with our ability to assess how that standard *should have been applied* to the particular facts of this case . . . ." *Id.* at 673, 640 S.E.2d at 795 (quotations and citation omitted). On the merits, we held that petitioner satisfied the statutory requirements of N.C. Gen. Stat. § 115C-296.2 and reversed the superior court. Id. at 676, 640 S.E.2d at 797.

Respondent appealed to our Supreme Court, which reversed and remanded the case for our consideration. *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 680, 652 S.E.2d 251, 252 (2007) (*Rainey II*). The Supreme Court's opinion was limited to our discussion of the superior court's *de novo* review. The Court explained that N.C. Gen. Stat. § 150B-51(c) "does not bar the trial court from considering the agency's expertise and previous interpretations of the statutes it administers, as demonstrated in rules and regulations adopted by the agency or previous decisions outside of the pending case." *Id.* at 681, 652 S.E.2d at 252.

We have reconsidered our opinion in *Rainey I* as directed by the Supreme Court in *Rainey II*, and hold that our analysis of the superior court's deference to the State Board's "demonstrated expertise and consistency in applying various statutes" was in error. However, because we reviewed the merits of the case without further consideration of the trial court's standard of review, the remainder of the opinion and its disposition are unaffected by our error.

Accordingly, we hold that the superior court did not err in granting deference to the State Board's "demonstrated expertise and consistency in applying various statutes," and, for the reasons otherwise stated in *Rainey I*, we reverse the order of the superior court.

Reversed.

Chief Judge MARTIN and Judge STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 OCTOBER 2008

EAKER v. NABER CHRYSLER DODGE JEEP, INC. No. 07-1033	Randolph (06CVS770)	Affirmed
FIEL v. WEIL No. 08-125	Duplin (07CVS80)	Reversed and remanded
HYER v. HYER No. 07-1102	Buncombe (02CVD665)	Affirmed
IN RE A.J.W. & K.S.W. No. 07-1229	Alexander (05J82) (05J146) (06JB196-97)	Dismissed as to K.S.W.; new trial as to A.J.W.
IN RE C.L.B., A.B.B., D.K.B. No. 08-647	Johnston (06JT161-63)	Affirmed
IN RE H.K. No. 08-517	Gaston (06JA90)	Dismissed
IN RE I.N.B., T.N.B., D.N.B., A.S. No. 08-536	Robeson (07JA8-10) (07JA240)	Vacated and remanded
IN RE J.A.C. & S.J.C. No. 08-509	Surry (06J99A-100A)	Affirmed
IN RE J.J.B., J.R.B. No. 08-460	Stokes (05JA61A) (06JA40A)	Affirmed
IN RE K.M.F. & K.B.D. No. 08-519	Yadkin (05J67-68)	Affirmed
IN RE M.J.E.M. & A.L.E. No. 08-549	Harnett (02J194) (04J46)	Affirmed
IN RE P.S. No. 08-540	Alexander (07JT8)	Affirmed; remanded for correction of clerical error
IN RE T.R.C. No. 08-423	Burke (04J3)	Affirmed
JOHNSON v. MCNEIL No. 07-1383	Rockingham (06CVD1647)	Affirmed
KEMP v. KNIGHT No. 08-351	Cumberland (06CVS4418)	No error

LUMAMBA v. TECHNOCOM BUS. SYS. No. 08-61	Ind. Comm. (I.C. No. 434022)	Affirmed
PACIFIC MULCH, INC. v. SENTER No. 07-1538	Vance (06CVS667)	Affirmed
ROCHESTER MIDLAND CORP. v. SELLERS No. 08-172	Randolph (06CVS1733)	Dismissed
ROSS v. ROSS No. 07-981	Carteret (02CVD558)	Affirmed in part; vacated and remanded in part
STACY v. MERRILL No. 08-437	Alamance (06CVS1456)	Reversed and remanded
STATE v. CEESAY No. 07-897	Wake (01CRS29491-94)	Vacated in part and remanded for resentencing
STATE v. DOWNS No. 08-225	Chowan (05CRS50902)	No error as to trial; vacated and remanded as to restitution portion of judgments
STATE v. DUNSTON No. 07-1423	Durham (04CRS55284) (04CRS50087) (06CRS46152) (06CRS46154)	Remanded for resentencing
STATE v. GODWIN No. 07-1280	Johnston (05CRS57876) (05CRS57917)	No error
STATE v. JACKSON No. 08-119	Pasquotank (07CRS451)	No error
STATE v. JOHNSTON No. 08-173	Wilson (06CRS53209)	No error
STATE v. KEMP No. 07-1369	Wake (07CRS1582)	Affirmed
STATE v. OXENDINE No. 07-1162	Robeson (04CRS53160) (04CRS53161-62)	Affirmed
STATE v. PARKS No. 08-145	Cleveland (06CRS6595-97)	Vacated and remanded in part; no error in part

STATE v. PARKS No. 07-1495	Cleveland (05CRS54541-42)	No error in part, vacated and remanded in part
STATE v. SEXTON No. 07-1438	Buncombe (06CRS54479) (06CRS454)	No error in part, reverse and remand in part and vacate in part
STATE v. SIMPSON No. 08-296	Mecklenburg (06CRS232914)	No error
STATE v. THOMAS No. 08-210	Wake (06CRS107605) (06CRS107608) (07CRS1005)	No error
STATE v. WASHINGTON No. 08-201	Mecklenburg (05CRS210732-34) (05CRS210736) (05CRS31762)	No error
STEWART v. ESTATE OF BREWINGTON No. 08-401	Harnett (06CVS710)	Affirmed
WOODS v. SENTRY INS. A MUT. CO. No. 08-49	Wayne (06CVS1800)	Affirmed

COPPER v. DENLINGER

[193 N.C. App. 249 (2008)]

ANGELL COPPER, BY HIS MOTHER AND GUARDIAN AD LITEM, SHERRY COPPER; DESMOND JOHNSON, BY HIS FATHER AND GUARDIAN AD LITEM, WILMER JOHNSON; ERIC WARREN AND DION WARREN, BY THEIR MOTHER AND GUARDIAN AD LITEM, DEANN WARREN; JOSHUA THORPE, BY HIS MOTHER AND GUARDIAN AD LITEM, TRECO THORPE; TODD DOUGLAS, DECEASED, BY HIS MOTHER AND ADMINISTRATRIX OF HIS ESTATE, SHERYL SMITH; DEANTONIO RHODES, BY HIS MOTHER AND GUARDIAN AD LITEM, LINDA RHODES; JAZMYN JENKINS; AND GINA SOLARI; AS INDIVIDUALS AND AS REPRESENTATIVES OF THE CLASS OF SIMILARLY SITUATED DURHAM PUBLIC SCHOOL STUDENTS, PLAINTIFFS v. ANN T. DENLINGER, INDIVIDUALLY AND AS SUPERINTENDENT OF DURHAM PUBLIC SCHOOLS; THE DURHAM PUBLIC SCHOOL BOARD OF EDUCATION; GAIL HEATH, INDIVIDUALLY AND AS CHAIR OF THE DURHAM PUBLIC SCHOOL BOARD OF EDUCATION; HEIDI CARTER, STEVE MARTIN AND STEVE SCHEWEL, INDIVIDUALLY AND AS MEMBERS OF THE DURHAM PUBLIC SCHOOL BOARD OF EDUCATION; LARRY MCDONALD, INDIVIDUALLY AND AS FORMER PRINCIPAL OF SOUTHERN HIGH SCHOOL; RICHARD WEBBER, INDIVIDUALLY AND AS PRINCIPAL OF C.E. JORDAN HIGH SCHOOL; RODRIQUEZ TEAL, INDIVIDUALLY AND AS PRINCIPAL OF SOUTHERN HIGH SCHOOL; WORTH HILL, DURHAM COUNTY SHERIFF; AND R.A. SIPPLE AND JOSEPH COSTA, INDIVIDUALLY, AS AGENTS AND EMPLOYEES OF THE DURHAM COUNTY SHERIFF, AS AGENTS OF THE SUPERINTENDENT OF DURHAM PUBLIC SCHOOLS, AND AS AGENTS OF THE DURHAM PUBLIC SCHOOL BOARD OF EDUCATION, DEFENDANTS

No. COA07-205

(Filed 21 October 2008)

1. Appeal and Error— record—not timely filed—sanctions

Defendants' motion to dismiss plaintiff's appeal for failure to timely file the record on appeal was denied because the violation did not hinder review of the merits of the case or impair the adversarial process, but printing costs were assessed as a sanction against plaintiff's counsel.

2. Schools and Education— suspensions—no right to appeal—civil rights claim—exhaustion of administrative remedies

The trial court erred by dismissing plaintiffs' 42 U.S.C. § 1983 claims as to short-term school suspensions for gang activity for failure to exhaust administrative remedies. Plaintiffs' allegations that the board of education's current policy does not provide the right to appeal are sufficient to allege futility with respect to the short-term suspensions.

3. Schools and Education— short-term suspensions—gang activity—liability of superintendent—no allegations of knowledge

The trial court properly granted a Rule 12(b)(6) motion to dismiss a complaint against a school superintendent concerning short-term suspensions for gang activity where plaintiffs alleged

that the superintendent was liable under 42 U.S.C § 1983 as a supervisory official, but there were no allegations that she was deliberately indifferent to any procedural due process violations by principals when imposing short-term suspensions. Although plaintiffs on appeal raised a respondeat superior theory, they were not able to point to allegations of the superintendent having the required knowledge of the short-term suspensions.

4. Civil Rights— short-term school suspensions—allegations not sufficient

The trial court did not err in dismissing plaintiffs' claims against a board of education under 42 U.S.C. § 1983 for short-term suspensions for gang activity. Plaintiffs have provided no argument on appeal as to why the complaint's allegations are sufficient to establish the board's liability for procedural due process violations under *Monell v. New York City Department of Social Services*, 436 U.S. 658.

5. Schools and Education— short-term suspensions—gang activity—allegations that board policy violated—not violations of due process

The trial court properly granted defendants' Rule 12(b)(6) motion to dismiss plaintiffs' state constitutional claims with respect to short-term suspensions for gang activity. Plaintiffs contended that the school principals' failure to comply with school board policies violated their procedural due process rights, but it has been held that the school is only required to give students notice of the charges against them and an opportunity to be heard. Plaintiffs failed to allege facts establishing that their procedural due process rights were violated as opposed to the board's policies. N.C. Const. art. I, § 19.

6. Schools and Education— long-term suspensions—gang activity—§ 1983 claim—exhaustion of administrative remedies—futility

A complaint containing a claim under 42 U.S.C. § 1983 arising from long-term school suspensions for gang activity contained sufficient allegations that exhaustion of administrative remedies under N.C.G.S. § 115C-45(c) was futile for plaintiff Douglas, and the trial court erred by dismissing his claim, but the allegations as to the remaining plaintiffs were not sufficient. The dismissal of their procedural due process claims based on long-term suspensions were upheld.

7. Constitutional Law— long-term school suspensions—gang activity—exhaustion of administrative remedies—futility—sufficiency of allegations

A complaint raising North Carolina constitutional claims arising from long-term school suspensions for gang activity failed to allege sufficient facts to establish futility in the exhaustion of administrative remedies except as to plaintiff Douglas. The trial court did not err by dismissing those claims.

8. Schools and Education— long-term suspensions—gang activity—lack of opportunity to appeal—procedural due process

Plaintiff Douglas's complaint, arising from a long-term school suspension for gang activity, sufficiently alleged a claim against defendant board of education that his right to procedural due process was denied through lack of an opportunity to appeal the suspension, and the trial court erred by dismissing his claim. However, plaintiffs failed to make an argument as to how the complaint in this instance complied with the requirements for a 42 U.S.C. § 1983 claim, and that claim was properly dismissed.

9. Civil Rights— gang related school suspension—claim against superintendent

The trial court erred by dismissing plaintiff Douglas's claim under 42 U.S.C. § 1983 against a school superintendent in her individual capacity for a long-term suspension arising from gang activity. Defendants' contention would require that the evidence be viewed in the light most favorable to the moving party, which is precluded when deciding a Rule 12(b)(6) motion.

10. Civil Rights— gang-related school suspension—claim against superintendent—qualified immunity

The trial court should not have granted a Rule 12(b)(6) dismissal of plaintiff Douglas's 42 U.S.C. § 1983 claim against a school superintendent for a suspension arising from gang activity based on qualified immunity. The question of qualified immunity cannot be resolved in this case at this stage.

11. Civil Rights— gang-related school suspension—claim against superintendent—punitive damages

A complaint sufficiently alleged a claim for punitive damages under 42 U.S.C. § 1983 against a school superintendent arising from a student's long-term suspension for gang activity.

12. Constitutional Law— school suspensions—equal protection

Allegations of general bias in an equal protection claim cannot substitute for allegations that the discipline of each individual plaintiff at school was motivated by racial discrimination (where there was no class certification).

13. Constitutional Law— school suspensions—racial profiling

The trial court did not err by dismissing plaintiffs' equal protection claims based on allegations of profiling in gang-related school discipline. The complaint does not contain any allegation that plaintiffs were falsely accused of gang membership, and the paragraphs of the complaint cited to support racial profiling did not specifically relate to any of the plaintiffs.

14. Schools and Education— school board policy—gang related suspensions—vagueness

Plaintiffs sufficiently stated a claim that a school board's policy concerning discipline for gang involvement was facially unconstitutional for vagueness, and the Rule 12(b)(6) dismissal of their claim was reversed and remanded. However, the constitutionality of the policy cannot be decided without review of a list of prohibited items kept by principals and included in a student handbook, and the matter is remanded for further proceedings.

Judge Tyson concurring in part and dissenting in part.

Appeal by plaintiffs from order entered 5 October 2006 by Judge Orlando Hudson in Durham County Superior Court. Heard in the Court of Appeals 13 September 2007.

Frances P. Solari for plaintiffs-appellants.

Cranfill Sumner & Hartzog LLP, by Ann S. Estridge, Alycia S. Levy, and Dan M. Hartzog, Jr., for defendant-appellee Ann T. Denlinger.

Tharrington Smith, L.L.P., by Ann L. Majestic and Christine T. Scheef, for defendants-appellees The Durham Public School Board of Education, Gail Heath, Heidi Carter, Steve Martin, Steve Schewel, Larry McDonald, Richard Webber, and Rodriquez Teal.

Jack Holtzman for amicus curiae North Carolina Justice Center.

Lynn Fontana for amicus curiae ACLU of North Carolina Legal Foundation.

Lewis Pitts for amicus curiae Advocates for Children's Services of Legal Aid of North Carolina.

Ashley Osment for amici curiae North Carolina State Conference of NAACP Branches and the Triangle Lost Generation Task Force.

Sheria Reid for amicus curiae The North Carolina Black Leadership Caucus.

GEER, Judge.

Plaintiffs—current or former students in the Durham Public School System ("DPS")—brought this action essentially as a wholesale challenge to the disciplinary process in the Durham Public Schools. The lawsuit was dismissed in its entirety under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim for relief and under Rule 12(b)(1) for lack of subject matter jurisdiction.

We must conclude, as the trial court did, that many of plaintiffs' claims must be dismissed for lack of sufficient allegations even though the complaint contains 575 paragraphs. Apparently, in an eagerness to illuminate alleged systemic problems in the Durham schools, plaintiffs overlooked the need to allege a claim for relief on behalf of each individual plaintiff against each individual defendant. By relying substantially on broad assertions regarding DPS discipline and "defendants"—without distinguishing among the defendants—plaintiffs omitted to include in their complaint certain key allegations necessary to survive a motion to dismiss.

The concept of "notice pleading" does not excuse a plaintiff from stating the fundamental elements of his or her claim against each defendant. The regrettable length of this opinion is the result of the Court's need to parse through the complaint as to each plaintiff, for each claim for relief pursued on appeal, while considering the separate rules of liability pertinent to each type of claim for defendant Denlinger (the former superintendent of schools) and the Durham Public School Board of Education ("the Board"), the sole defendants at issue on appeal.

After a paragraph-by-paragraph review of the complaint as it relates to each plaintiff, each remaining defendant, and each claim,

we are compelled to affirm the trial court's dismissal of plaintiffs' claims for violation of their procedural due process rights with the exception of the claim brought on behalf of Todd Douglas (now deceased). We also affirm the dismissal of plaintiffs' equal protection claims. On the other hand, with respect to plaintiffs' constitutional challenge to the Board's policy relating to gangs and gang-related activity, we hold, based on the allegations in the complaint and the policy itself, that plaintiffs have sufficiently stated a claim for relief and, therefore, reverse the order below as to that claim. The arguments asserted by the Board in support of the policy are more appropriately considered at the summary judgment stage. We, therefore, remand for further proceedings regarding the procedural due process claims relating to Todd Douglas and the Board's gang policy.

Facts and Procedural History

On 24 March 2006, plaintiffs filed suit against the Board; certain individual Board members; Denlinger; current and former principals of Southern High School, Rodriquez Teal and Larry McDonald; the current principal of C.E. Jordan High School, Richard Webber; Durham County Sheriff Worth Hill; and two deputy sheriffs working as school resource officers, R.A. Sipple and Joseph Costa. Plaintiffs sought to proceed on behalf of a class of those minority students who had been unlawfully suspended or expelled since 1 September 2003. No class was, however, ever certified.

The complaint alleged that because of defendants' conduct in connection with short-term and long-term suspensions and the labeling of students as gang members, plaintiffs: (1) were outlawed and exiled without due process of law in violation of the North Carolina Constitution art. I, § 19; (2) were denied public education without due process of law in violation of the Due Process Clause of the United States Constitution and North Carolina Constitution art. I, §§ 15 and 19, and art. IX, § 2; (3) were unlawfully arrested in violation of the Fourth Amendment to the United States Constitution; (4) were denied equal educational opportunity and equal rights in violation of the Fourteenth Amendment to the United States Constitution and North Carolina Constitution art. I, §§ 1, 15, and 19, and art. IX, § 2; (5) were victims of a conspiracy to interfere with the exercise and enjoyment of their constitutional right to equal protection in violation of 42 U.S.C. § 1983(3) and N.C. Gen. Stat. § 99D-1 (2007); and (6) were victims of defamation *per se*. Plaintiffs also sought a declaratory judgment that the Board's pol-

icy 4301.10 ("Prohibition of Gangs and Gang Activities") is unconstitutionally vague and does not comport with the requirements of procedural due process.

Each of the defendants moved to dismiss the complaint. In an order entered 12 July 2006, the trial court first dismissed the claims against the Sheriff's Department defendants, including Sheriff Hill and the school resource officers, Sipple and Costa. Subsequently, in an order entered 5 October 2006, the trial court granted the school defendants' motion to dismiss on 19 separate legal grounds, including insufficient factual allegations for certain claims, the existence of adequate alternative state remedies (precluding state constitutional claims), failure to exhaust administrative remedies, and immunity. The trial court also dismissed the claim for relief regarding the Board's gang policy, concluding that the policy "defines a violation of the policy with sufficient definiteness that a student could understand what conduct was prohibited and it establishes standards to permit enforcement in a non-arbitrary, non-discriminatory manner."

Plaintiffs timely appealed from the 5 October 2006 order only and thus have abandoned their claims against Hill, Sipple, and Costa. In addition, plaintiffs state in their brief: "With the exception of Defendant Denlinger, Plaintiffs' claims against individual school defendants are not brought forward on appeal." Thus, plaintiffs have pursued only their claims against Denlinger and the Board. Plaintiffs have also limited the claims for relief argued on appeal, stating: "The causes of action which are the subject of this appeal are claims under 42 U.S.C. § 1983 and the North Carolina State Constitution for denial of Plaintiffs' rights of due process and equal protection and Plaintiffs' action for judgment declaring the DPS Gang Policy void and unenforceable as unconstitutionally vague on its face."

Plaintiffs have further narrowed the scope of their appeal by failing to bring forward on appeal the claims of several of the individual plaintiffs. Plaintiffs' brief states that Gina Solari has not appealed the dismissal of her claims. In addition, although plaintiffs' brief states the appeal has been brought on behalf of Deantonio Rhodes and Dion Warren, the trial court concluded that those two plaintiffs, as well as Gina Solari, "have failed to state any claims against any school defendants, and those plaintiffs' claims are therefore DISMISSED." Plaintiffs failed to assign error to that ruling and failed to make any specific argument in their brief as to why the court erred in conclud-

ing Rhodes and Dion Warren had not asserted a claim against Denlinger or the Board.[1]

Thus, the only remaining claims on appeal are those asserted on behalf of Angell Copper, Desmond Johnson, Eric Warren, Joshua Thorpe, Todd Douglas (deceased), and Jazmyn Jenkins against Denlinger and the Board for violation of procedural due process and equal protection rights under the state and federal constitutions. Plaintiffs' claim as to the constitutionality of the gang policy has also been brought forward on appeal.

Motion to Dismiss

[1] Defendants Denlinger and the Board have jointly moved to dismiss plaintiffs' appeal based on violations of the North Carolina Rules of Appellate Procedure. In their motion, defendants primarily argue that dismissal is appropriate based on plaintiffs' failure to file the record on appeal with this Court within the period prescribed by Rule 12.[2] Plaintiffs contend that they timely filed the record, and, in any event, any error was a mere technical violation not warranting sanctions. We disagree with both of plaintiffs' contentions.

A. *Timeliness of Filing of Record on Appeal*

In *White v. Carver*, 175 N.C. App. 136, 622 S.E.2d 718 (2005), this Court outlined the procedures required by the appellate rules for proper and timely settlement and filing of the record on appeal:

> Rule 12(a) of the Rules requires an appellant to file the Record on Appeal within fifteen days of settlement of the record. N.C.R. App. P. 12(a) (2005). The appellant must serve a proposed record on appeal upon the appellee who, within thirty days, may submit amendments, objections, or a proposed alternative record to the appellant. N.C.R. App. P. 11(c). Where the parties agree to the proposed record offered by the appellant or the amendments, objections, or proposed alternative record offered by the appellee, the agreed-upon record constitutes the settled Record on Appeal. *Id.* However, should the parties dis-

1. Although we note plaintiffs' brief does contain facts relating to Rhodes in the fact section, there is no corresponding legal argument as to why the complaint states a claim for relief as to Rhodes. Those claims, therefore, are not properly before us.

2. Defendants also point to other violations by plaintiffs of the appellate rules, including the failure to serve the initial proposed record on all parties, incorrect record references following the assignments of error, and the omission of the certification required by N.C.R. App. P. 28(j)(2)(A)(2). We do not specifically address these violations, although we note their existence.

> agree as to the inclusion of certain materials, the appellant must either (i) file the disputed items concurrent with the proposed record within fifteen days, or (ii) file for judicial settlement of the record within ten days of expiration of the period for serving amendments, objections, and alternative proposed records. *See id.*; N.C.R. App. P. 12(a).

Id. at 142-43, 622 S.E.2d at 722. To determine whether plaintiffs complied with Rule 12(a) in this case, we must first identify the date upon which the record was settled.

Rule 11(b) provides that if the parties have not settled the record on appeal by agreement, the appellant must serve a proposed record on appeal within 35 days after the filing of the notice of appeal if, as here, no transcript was ordered. N.C.R. App. P. 11(b). In this case, plaintiffs timely served their proposed record on appeal on those defendants who are parties to this appeal. Defendants then timely served amendments and objections to that proposed record on 18 December 2006 in accordance with Rule 11(c).

With respect to that stage, Rule 11(c) specifies that "the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal." N.C.R. App. P. 11(c). If, however, "the parties disagree as to the inclusion of certain materials, the appellant must either (i) file the disputed items concurrent with the proposed record within fifteen days, or (ii) file for judicial settlement of the record within ten days of expiration of the period for serving amendments, objections, and alternative proposed records." *White*, 175 N.C. App. at 143, 622 S.E.2d at 722.

In this case, defendants had until 27 December 2006 to serve any amendments, objections, or an alternative proposed record, taking into account service by mail and holidays. Plaintiffs, therefore, had until 8 January 2007 to request judicial settlement. Plaintiffs did not request judicial settlement, but rather reached an agreement with the other parties regarding the contents of the record.

The version of Rule 11(c) applicable to this appeal specified "that nothing herein shall prevent settlement of the record on appeal by agreement of the parties *at any time within the times herein limited for settling the record by judicial order*." N.C.R. App. P. 11(c) (effective for appeals prior to 1 March 2007) (emphasis added). As a

result, because no judicial settlement was requested and no agreement was reached by 8 January 2007, "the proposed record on appeal, in conformity with defendants' objections and amendments, became the record on appeal" by that date. *Kellihan v. Thigpen*, 140 N.C. App. 762, 764, 538 S.E.2d 232, 234 (2000). *See also White*, 175 N.C. App. at 143, 622 S.E.2d at 722-23 (holding that when appellant failed to file for judicial settlement after receiving amendments and objections, record on appeal was settled by "operation of Rules 11 and 12" even though parties continued to discuss contents of record and subsequently reached agreement).[3]

Rule 12(a) states that "[w]ithin 15 days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken." N.C.R. App. P. 12(a). Thus, plaintiffs had until 23 January 2007 to file the record on appeal with this Court in order to perfect their appeal from the trial court's order dismissing their claims. Plaintiffs did not, however, file the record with this Court until 14 February 2007—a date 49 days after the deadline for filing objections to the proposed record on appeal and a date "well outside the time period prescribed by the Rules." *White*, 175 N.C. App. at 143, 622 S.E.2d at 723 (holding that 50-day period between appellee's serving amendments and objections to appellant's proposed record on appeal and appellant's filing the record on appeal with appellate court warranted dismissal under Rules 11 and 12). Accordingly, we are compelled to conclude that plaintiffs failed to timely file the record on appeal with this Court.

B. *Appropriate Sanction*

Although we have determined that plaintiffs violated Rule 12, as well as other appellate rules, our Supreme Court has emphasized that dismissal of an appeal for violations of the appellate rules is not automatic. *See State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007) ("[E]very violation of the rules does not require dismissal of the appeal or the issue, although some other sanction may be appropriate, pursuant to Rule 25(b) or Rule 34 of the Rules of Appellate Procedure."). More recently, the Supreme Court set out in detail the

3. This conclusion is confirmed by the Supreme Court's clarifying amendment of Rule 11(c), applicable to appeals filed on or after 1 March 2007, which states: "If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c)."

analytical framework applicable in considering whether to sanction a party for appellate rules violations. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008).

In *Dogwood*, the Supreme Court determined that appellate rules violations could be categorized as three distinct types of "defaults": "(1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." *Id.* at 194, 657 S.E.2d at 363. In this case, we must determine whether a failure to timely file a record on appeal under Rule 12 is a jurisdictional defect or a nonjurisdictional violation. The distinction between the two types of errors is critical: if the appellant fails to properly invoke appellate jurisdiction, the "jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Id.* at 197, 657 S.E.2d at 365. "Moreover, in the absence of jurisdiction, the appellate court[] lack[s] authority to consider whether the circumstances of a purported appeal justify application of Rule 2."[4] *Id.* at 198, 657 S.E.2d at 365.

If, on the other hand, failing to timely file the record is a nonjurisdictional default, the appellate court "possesses discretion in fashioning a remedy to encourage better compliance with the rules." *Id.* Significantly, the Court stressed that "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* at 198, 657 S.E.2d at 365.

Turning to whether Rule 12 is jurisdictional, we first note that Rule 27, which governs extensions of time under the appellate rules, provides in part:

> Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. *Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a*

4. Under Rule 2 of the Rules of Appellate Procedure, "[t]o 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 . . . ." N.C.R. App. P. 2. In *Dogwood*, however, the Supreme Court noted that even if Rule 2 is unavailable, other "discretionary avenues of appellate jurisdiction" may be available under Rule 21. 362 N.C. at 197 n.3, 657 S.E.2d at 365 n.3.

petition for rehearing or the responses thereto prescribed by these rules or by law.

N.C.R. App. P. 27(c) (emphasis added). As filing the record on appeal does not involve the noticing of appeal or petitioning for discretionary review or rehearing, its deadline may be extended according to Rule 27(c).

The fact that the deadline in Rule 12 may be extended suggests that it is not jurisdictional. Our Supreme Court noted in *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365, that Rule 2 may not be invoked to save an appeal where appellant has defaulted under one of the rules described in the last sentence of Rule 27(c). Likewise, the notes of the drafting committee for Rule 2 indicate that the rule's phrase " 'except as otherwise expressly provided' [in Rule 2] refers to the provision in Rule 27(c) that the time limits for taking appeal laid down in these Rules (i.e. Rules 14 and 15) or in 'jurisdiction' statutes which are then replicated or cross-referred in these Rules, i.e. Rules 3 (civil appeals), 4 (criminal appeals) and 18 (agency appeals), may not be extended by any court." *Drafting Committee Note to* N.C.R. App. P. 2, 287 N.C. 671, 680 (1975). Thus, in contrast to the filing of the record on appeal, the deadline for filing a notice of appeal in a civil case under Rule 3 cannot be extended by any North Carolina court as the rule is jurisdictional. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 . . . . The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." (internal citations omitted)).

This view of Rule 12 as nonjurisdictional is consistent with prior decisions of the appellate courts exercising discretion in determining whether to dismiss an appeal after the untimely filing of a record on appeal. *See*, *e.g.*, *Cadle Co. v. Buyna*, 185 N.C. App. 148, 153, 647 S.E.2d 461, 465 (2007) (affirming trial court's dismissal of appeal for failure to timely file record on appeal where appellant "presented no persuasive basis for setting aside the trial court's dismissal of its appeal"); *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 570, 654 S.E.2d 47, 51 (2007) (declining to dismiss appeal for "technical" violation of Rule 12 where appellant substantially complied with Rule).

Having determined that plaintiffs' violation of Rule 12 does not result in mandatory dismissal, the issue becomes what sanction, if any, is appropriate in this case. *Dogwood*, 362 N.C. at 199, 657 S.E.2d

at 366, explained that an appellate court should impose sanctions, including dismissal, only when a party's nonjurisdictional rules violations rise to the level of a "substantial failure" under Rule 25 or a "gross violation" under Rule 34. In the absence of a substantial or gross violation, "the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible." *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366.

Determining whether a violation is "substantial" or "gross" "entails a fact-specific inquiry into the particular circumstances of each case, mindful of the principle that the appellate rules should be enforced as uniformly as possible." *Id.* at 199-200, 657 S.E.2d at 366. A court should consider, among other factors: (1) whether and to what extent the noncompliance impairs the court's task of review, (2) whether and to what extent review on the merits would frustrate the adversarial process, and (3) the number of rules violated. *Id.* at 200, 657 S.E.2d at 366-67. "[O]nly in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate." *Id.*, 657 S.E.2d at 366.

In this case, the violation of Rule 12 has not hindered our review of the merits of the case or impaired the adversarial process. On the other hand, we note that plaintiffs' counsel made no attempt to rectify the error when it was identified by defendants' counsel at the time the record was filed. Plaintiffs' counsel jeopardized review of plaintiffs' claims rather than filing a motion with this Court either requesting a retroactive extension of time pursuant to Rule 27 or that the record be deemed timely filed for good cause shown under Rule 25. *Compare Taylor v. City of Lenoir*, 353 N.C. 695, 696, 550 S.E.2d 141, 141 (2001) (ordering pursuant to Rule 25 that record on appeal be deemed timely filed for good cause shown), *rev'g*, 140 N.C. App. 337, 340, 536 S.E.2d 848, 850 (2000) (dismissing appeal despite class counsel's filing record seven days late and filing motion for extension of time as soon as counsel realized record was untimely).

Instead of taking corrective action, plaintiffs' counsel waited until defendants filed a motion to dismiss and then claimed, without support in the appellate rules, that there either was no violation or it was a "mere technical violation." The untimely filing of the record on appeal is not, however, a mere technical violation, but one that has resulted in the dismissal of appeals in the past. *See, e.g.*, *White*, 175 N.C. App. at 143, 622 S.E.2d at 723 (dismissing appeal when record was not filed until 50 days after appellee served amendments and objections to proposed record); *Byrd v. Alexander*, 32 N.C. App. 782,

783, 233 S.E.2d 654, 655 (1977) (dismissing appeal when record not timely filed and no extension sought).

While we conclude that the *Dogwood* analysis indicates that dismissal of this appeal is not warranted, when we consider that comparable delays in filing have resulted in dismissal and that the record contains other—although relatively minor—violations, we believe that some sanction is warranted. Pursuant to Rule 34(b), we order plaintiffs' counsel to pay the printing costs of this appeal. *See Caldwell v. Branch*, 181 N.C. App. 107, 110-11, 638 S.E.2d 552, 555, *disc. rev. denied*, 361 N.C. 690, 654 S.E.2d 248 (2007). We instruct the Clerk of this Court to enter an order accordingly.

Merits of the Appeal

"When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether 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." *Enoch v. Inman*, 164 N.C. App. 415, 417, 596 S.E.2d 361, 363 (2004). " 'A complaint may be dismissed pursuant to Rule 12(b)(6) where (1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim.' " *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005) (quoting *Toomer v. Garrett*, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002), *appeal dismissed and disc. review denied*, 357 N.C. 66, 579 S.E.2d 576 (2003)). In reviewing the dismissal of a complaint for failure to state a claim for relief, the appellate court reviews de novo " 'whether the complaint alleges the substantive elements of a legally recognized claim and whether it gives sufficient notice of the events which produced the claim to enable the adverse party to prepare for trial.' " *Id.* at 274, 620 S.E.2d at 880 (quoting *Toomer*, 155 N.C. App. at 468, 574 S.E.2d at 83).

I. Short-Term Suspensions

Plaintiffs first claim that their procedural due process rights under both the United States and North Carolina Constitutions were violated when they received short-term suspensions. In oral argument, plaintiffs' counsel represented that three plaintiffs had claims based on short-term suspensions: Joshua Thorpe, Dion Warren, and Eric Warren. As discussed above, because plaintiffs failed to as-

sign error to the trial court's dismissal of Dion Warren's claims, the only claims remaining on appeal are those of Joshua Thorpe and Eric Warren.

The complaint alleges that the short-term suspensions were imposed by the school principals, who are no longer parties to this case. Plaintiffs, however, contend that they are still entitled to recover against Denlinger and the Board under 42 U.S.C. § 1983 for federal constitutional violations. With respect to the state constitutional claims, plaintiffs acknowledge that they may only proceed against the Board. Because the analysis is different under each constitution, we address the claims separately.

A. *Section 1983 Claims*

[2] With respect to the § 1983 claims, both defendants argue that the plaintiffs failed to exhaust their administrative remedies with respect to the short-term suspensions and, therefore, the trial court lacked subject matter jurisdiction over the procedural due process claims. *See Good Hope Hosp.*, 174 N.C. App. at 272, 620 S.E.2d at 879 ("[P]rocedural due process claims may not be brought under § 1983 until administrative remedies have been exhausted."). Alternatively, defendants contend that plaintiffs have failed to allege the elements necessary to impose supervisory liability on Denlinger or to hold the Board liable under *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 638, 98 S. Ct. 2018, 2037 (1978). The trial court agreed with defendants both as to exhaustion and the failure of plaintiffs to sufficiently allege § 1983 claims against Denlinger and the Board and, therefore, dismissed the short-term suspension claims under Rule 12(b)(1) and 12(b)(6).

We note that plaintiffs, in their main brief, do not distinguish among defendants at all, referring collectively to "defendants" without recognizing the differing bases for liability among the types of school defendants. In their reply brief, plaintiffs do address the potential supervisory liability of Denlinger, but never specifically address the Board's § 1983 liability.

1. Exhaustion

We turn first to the exhaustion issue because it is a matter of subject matter jurisdiction. "It is well-established that '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.' " *Justice for Animals, Inc. v.*

Robeson County, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004) (quoting *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979)). If a plaintiff fails to exhaust his or her administrative remedies, the trial court lacks subject matter jurisdiction and the action must be dismissed. *Id.* "[T]he exhaustion requirement may be excused if the administrative remedy would be futile or inadequate." *Id.* at 372, 595 S.E.2d at 777. "[T]o rely upon futility or inadequacy, 'allegations of the facts justifying avoidance of the administrative process must be pled in the complaint.' " *Id.* (quoting *Bryant v. Hogarth*, 127 N.C. App. 79, 86, 488 S.E.2d 269, 273, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 406 (1997)).

In challenging the trial court's dismissal of their procedural due process claims for failure to exhaust administrative remedies, plaintiffs contend that because the Board's official policy does not provide a mechanism for appealing short-term suspensions imposed by school administrators to the Board, there was no administrative remedy available to exhaust. While ordinarily, on a motion to dismiss, we are limited to the allegations in the complaint, a court may consider matters outside the pleadings in deciding a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. *See Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (holding that court "may consider matters outside the pleadings" when reviewing a Rule 12(b)(1) motion). An appellate court "review[s] Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo . . . ." *Id.*

In response to plaintiffs' contention that no administrative remedy exists, defendants point to the 2001 amendments to N.C. Gen. Stat. § 115C-45 (2007), arguing that those amendments gave students the right to appeal to the Board a final administrative decision regarding "[a]n alleged violation of a specified federal law, State law, State Board of Education policy, State rule, or local board policy . . . ." N.C. Gen. Stat. § 115C-45(c)(2); 2001 N.C. Sess. Laws, ch. 260, s. 1. Nevertheless, plaintiffs allege in their complaint, and defendants do not dispute, that the Board's short-term suspension policy, Board policy 4303.2(A), specifically provides that students do not have a right to appeal their suspensions to the Board. We hold that plaintiffs' allegations that the Board's current policy bars appeal is sufficient to allege futility with respect to the short-term suspensions. The trial court, therefore, erred in dismissing plaintiffs' short-term suspension claims for failure to exhaust administrative remedies.

2. Supervisory Liability

[3] Plaintiffs next argue the trial court erroneously concluded that they had failed to state a claim for relief against Denlinger with respect to their short-term suspensions. Plaintiffs do not allege Denlinger personally participated in imposing the short-term suspensions, but rather argue the complaint sufficiently alleges facts necessary to support a claim that Denlinger, as a "supervisory official," is liable under § 1983 for the unconstitutional acts committed by school administrators. We disagree.

While "[t]he principle is firmly entrenched that supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates[,]" it is equally well recognized that liability "is not premised upon *respondeat superior* . . . ." *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.), *cert. denied*, 513 U.S. 813, 814, 130 L. Ed. 2d 24, 115 S. Ct. 67, 68 (1994). The North Carolina appellate courts have not specifically addressed what must be shown for supervisory liability under § 1983, but the Fourth Circuit, in a leading opinion, has held that three elements are necessary:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Id. at 799 (quoting *Miltier v. Beorn*, 896 F.2d 848, 854 (4th Cir. 1990)).

To meet the requirements of the first element, "a plaintiff must show the following: (1) the supervisor's knowledge of (2) conduct engaged in by a subordinate (3) where the conduct poses a pervasive and unreasonable risk of constitutional injury to the plaintiff." *Id.* In addition, "[e]stablishing a 'pervasive' and 'unreasonable' risk of harm requires evidence that the conduct is widespread, or at least has been used on several different occasions and that the conduct engaged in by the subordinate poses an unreasonable risk of harm of constitutional injury." *Id.* The second element of deliberate indifference is established "by demonstrating a supervisor's continued inaction in

the face of documented widespread abuses." *Id.* (internal quotation marks omitted). While we are not bound by decisions of the Fourth Circuit, we find the reasoning in *Shaw* persuasive and adopt its long-standing test for § 1983 supervisory liability.

In this case, plaintiffs' complaint alleges with respect to Thorpe that Southern High School Principal Teal gave Thorpe a five-day suspension beginning on 20 September 2005, another five-day suspension on 4 January 2006, and a six-day suspension on 28 February 2006. Eric Warren received a two-day suspension from Jordan High School Assistant Principal Dionne McLaughlin on 7 September 2005 and a three-day suspension from Assistant Principal Chris Tomasic on 8 November 2005.

The complaint contains no allegations that Denlinger had any actual knowledge of any of these short-term suspensions. Indeed, the complaint contains no allegations at all regarding Denlinger's knowledge about principals' practices when imposing short-term suspensions. The complaint includes broad allegations that "[a]s a matter of common custom, practice, and procedure, Durham Public School administrators, including [defendant principals], routinely" engage in specified conduct in connection with short-term suspensions. The complaint, however, fails to allege that Denlinger had any knowledge—actual or constructive—of the principals' conduct, custom, practice, or procedure. In addition, although the complaint does allege that Denlinger "deliberately violated Plaintiffs' constitutional right to procedural due process," that paragraph follows allegations regarding Denlinger's personal conduct in connection with long-term suspensions.

No allegations in the complaint suggest that Denlinger was deliberately indifferent to any procedural due process violations by principals when imposing short-term suspensions. In the absence of these allegations, plaintiffs have failed to state a claim for relief against Denlinger under § 1983 with respect to short-term suspensions. *See W.E.T. v. Mitchell*, 2007 WL 2712924, *12 (M.D.N.C. Sept. 14, 2007) ("Plaintiffs in this case have not alleged in any manner that Denlinger . . . had actual or constructive knowledge of [the teacher's] actions. Thus, having failed to allege the first element of a claim for failure to properly supervise [the teacher], Plaintiffs have failed to state a claim for supervisory liability under § 1983."); *Layman v. Alexander*, 294 F. Supp. 2d 784, 794 (W.D.N.C. 2003) (concluding dismissal of "supervisor liability" claim was proper when "[t]here are no

allegations . . . from which the Court may reasonably infer that either [supervisory officials] had actual or constructive knowledge that their subordinates posed a pervasive and unreasonable risk of constitutional injury to citizens like [plaintiff]").

Plaintiffs addressed the law regarding supervisory liability for the first time in their reply brief. Although plaintiffs recite the test for establishing supervisory liability, plaintiffs' reasoning—focusing on Denlinger being responsible for work delegated to subordinates and having the responsibility to end offensive practices—amounts to a claim based upon a *respondeat superior* theory of liability. Nowhere in their brief do plaintiffs point to any allegation of Denlinger's having the required knowledge with respect to short-term suspensions as opposed to long-term suspensions or procedural due process violations generally.

Although plaintiffs protest that an official's actual or constructive knowledge is a question of fact, their complaint is required to include allegations of the facts necessary to establish a claim for relief. *See id.* at 794 (dismissing supervisory liability claims were plaintiff failed to allege actual or constructive knowledge although plaintiff alleged that defendants failed to adequately supervise their subordinates). Because plaintiffs' complaint does not include the allegations necessary to set forth a claim against Denlinger with respect to short-term suspensions, the trial court properly granted the Rule 12(b)(6) motion as to those claims.

3. Municipal Liability

[4] With respect to the Board, the United States Supreme Court held in *Monell*, 436 U.S. at 694, 56 L. Ed. 2d at 638, 98 S. Ct. at 2037, that a local governmental body could be sued under § 1983, but that liability could not be premised on a theory of *respondeat superior*. Under *Monell*, a municipality may be found liable only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . ." *Id.*, 56 L. Ed. 2d at 638, 98 S. Ct. at 2037-38. The Supreme Court later clarified in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 89 L. Ed. 2d 452, 463, 106 S. Ct. 1292, 1298 (1986) (emphasis omitted), that "[t]he 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible."

We acknowledge that the United States Supreme Court has held that in § 1983 cases, a plaintiff is only required by Fed. R. Civ. P. 8(a)(2) to include "a short and plain statement" of the basis for liability. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 122 L. Ed. 2d 517, 524, 113 S. Ct. 1160, 1163 (1993). Nevertheless, plaintiffs have provided no argument on appeal as to why the complaint's allegations are sufficient to establish the Board's liability under *Monell* for procedural due process violations. Further, our review of plaintiffs' complaint reveals no allegations regarding any acts of the Board with respect to short-term suspensions. Since plaintiffs have not pointed to any allegations in their complaint that they contend support a claim for relief against the Board under § 1983 under the principles first set forth in *Monell*, we are compelled to hold that the trial court did not err in dismissing plaintiffs' short-term suspension claims against the Board.

B. *North Carolina Constitution*

[5] Plaintiffs have also contended that the procedures used in their short-term suspensions violated the North Carolina Constitution's "law of the land" clause, N.C. Const. art. I, § 19. As noted in discussing the § 1983 claims, plaintiffs' claims regarding short-term suspensions are based solely on the actions of the school principals. Plaintiffs asserted their claims against the principals in both the principals' individual and official capacities. "In a suit against a governmental employee in his official capacity, the plaintiff is seeking relief from the governmental entity that employs the defendant, while in a suit against that employee in his individual capacity, the plaintiff is seeking relief from the defendant as an individual." *Oakwood Acceptance Corp. v. Massengill*, 162 N.C. App. 199, 209, 590 S.E.2d 412, 420 (2004).

Thus, a claim against a school principal in his or her official capacity constitutes a claim against the Board for purposes of bringing a claim under the state constitution. *See Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) ("[O]fficial-capacity suits 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' " (quoting *Kentucky v. Graham*, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 121, 105 S. Ct. 3099, 3105 (1985))). Based on this reasoning, the trial court in this case dismissed "plaintiffs' claims against the individual defendants in their official capacity [as] redundant because the Durham Public Schools Board of Education is also named as a

defendant." Plaintiffs' claims under the state constitution may, therefore, be based on the actions of the school principals even though plaintiffs elected not to appeal the dismissal of their claims against the principals.

In the landmark decision, *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431, 113 S. Ct. 493 (1992), our Supreme Court held that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." Before the trial court and on appeal, the Board argued that plaintiffs' state constitutional claims were precluded because an adequate state remedy exists. The trial court agreed with the Board and dismissed plaintiffs' due process claims on that ground: "Adequate state remedies were available to plaintiffs for their state constitutional claims; therefore, plaintiffs' state constitutional claims for violations of their procedural due process and equal educational opportunity rights are DISMISSED."

Although plaintiffs addressed the trial court's separate conclusion that plaintiffs' claims were barred by a failure to exhaust their administrative remedies, plaintiffs' brief does not contain any specific argument regarding the trial court's determination that adequate alternative remedies exist. Even if plaintiffs' assignments of error could be construed as assigning error to this particular conclusion of law, Rule 28(b)(6) provides that "[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned."

In any event, plaintiffs have failed to demonstrate on appeal that the trial court erred in its alternative basis for dismissal: "Viewing the facts in the light most favorable to the plaintiffs, they have failed to allege sufficient facts to state a claim for relief for a violation of their state or federal due process rights against any defendants." Plaintiffs do not contend that the North Carolina constitution provides greater due process protection than the federal constitution. In *In re Alexander v. Cumberland County Bd. of Educ.*, 171 N.C. App. 649, 657, 615 S.E.2d 408, 414 (2005), this Court held, citing *Goss v. Lopez*, 419 U.S. 565, 581-84, 42 L. Ed. 2d 725, 738-40, 95 S. Ct. 729, 739-41 (1975), that "prior to imposing a short-term suspension of ten days or less, the school is only required to give the student notice of the charges against her and an opportunity to be heard—i.e., an opportunity to present her version of the incident."

Instead of focusing on the *Goss* test, plaintiffs assert that "[t]he allegations in Plaintiffs' verified complaint demonstrate a common custom and practice by Defendants to disregard procedures required by DPS policies [governing short-term suspensions]." Plaintiffs then argue that "[d]efendants are bound by their own regulations," and, therefore, the principals' failure to comply with Board policies violated their procedural due process rights.

As their sole support for this contention, plaintiffs cite *Orange County v. N.C. Dep't of Transp.*, 46 N.C. App. 350, 382, 265 S.E.2d 890, 910-11, *disc. review denied*, 301 N.C. 94 (1980). In *Orange County*, however, this Court did not address a procedural due process claim, but rather was being asked to determine directly, in connection with a petition for judicial review under the Administrative Procedure Act, whether the Department of Transportation had violated state and federal regulations. Nothing in *Orange County* can be read as holding that a violation of agency regulations necessarily constitutes a denial of procedural due process. Indeed, this Court pointed out in *Orange County* that "there are no state constitutional or statutory requirements which would require the Board of Transportation to hear any citizen," even though the Court also held that the regulations did include a hearing requirement. *Id.* at 382, 265 S.E.2d at 911.

In *Goss*, the United States Supreme Court held that due process requires for short-term suspensions "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S. at 581, 42 L. Ed. 2d at 739, 95 S. Ct. at 740. The Court explained, however, that "[t]here need be no delay between the time 'notice' is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is." *Id.* at 582, 42 L. Ed. 2d at 739, 95 S. Ct. at 740.

Plaintiffs have not identified any plaintiff for whom the complaint alleges that these requirements of *Goss* were violated. In their appellants' brief, plaintiffs point to Joshua Thorpe and the complaint's allegations that the school principal did not return his mother's telephone calls. The complaint does not allege, however, that Thorpe himself was not given notice of the reason that he was being sus-

pended or that he was denied an opportunity to tell the principal his side of what occurred. Even with respect to his mother, the complaint acknowledges that the principal's assistant returned the mother's call, and Thorpe's counsel obtained a complete copy of Thorpe's school record, including documentation relating to the short-term suspension at issue. Plaintiffs do not explain in what way these allegations reveal a violation of *Goss*.

Accordingly, plaintiffs have failed to allege facts establishing that their procedural due process rights were violated, as opposed to the Board's policies. The trial court, therefore, properly granted the Rule 12(b)(6) motion to dismiss plaintiffs' claims under the state constitution with respect to short-term suspensions.

II. Long-Term Suspensions

[6] Plaintiffs also allege that they were denied procedural due process under both the federal and state constitutions in connection with long-term suspensions. Although the complaint is not entirely clear, it appears that plaintiffs Angell Copper, Desmond Johnson, Jazmyn Jenkins, and Todd Douglas received long-term suspensions.

A. *Section 1983: Exhaustion of Administrative Remedies*

The trial court determined that it lacked subject matter jurisdiction over the long-term suspension claims because plaintiffs failed to allege they exhausted the administrative review process provided in N.C. Gen. Stat. § 115C-45(c). In arguing that the trial court erred, plaintiffs contend that it would have been futile to pursue the administrative remedy.

Although plaintiffs were not required to specifically reference "futility" in their complaint, the complaint was required to include allegations establishing futility. *See Justice for Animals, Inc.*, 164 N.C. App. at 372, 595 S.E.2d at 777 (holding that factual allegations justifying avoidance of administrative process must be pled in complaint). Our review of the complaint discloses no factual allegations that would support plaintiffs' futility argument except for Todd Douglas.

With respect to Douglas, the complaint alleges that he was suspended for 13 days and thus received a long-term suspension entitling him to appeal that suspension. The complaint alleges further that Denlinger wrote a letter dated 8 October 2003 purporting to allow Douglas to transfer to another school as of 9 October 2003, which, according to plaintiffs, would have made the suspension short-term.

Denlinger did not, however, have the letter delivered to Douglas' mother until 14 October 2003, the date that the principal had said Douglas could return to school and day 13 of the suspension. The complaint alleges that Denlinger's letter was designed "to cut off Todd's right to appeal." According to the complaint, Douglas' mother was notified that she had no right to appeal the suspension because it was short-term. Finally, the complaint alleges: "Todd was never given an opportunity to appeal his long-term suspension from Southern High School."

In arguing that these allegations are insufficient to establish futility, defendants contend that Denlinger's letter, as alleged in the complaint, addressed only Douglas' transfer to another school and not the suspension. Defendants do not, however, address the allegations that Douglas was denied an appeal on the ground that his suspension was short-term, even though it exceeded 10 days. We hold that those allegations are sufficient to allege as to Douglas that exhaustion of administrative remedies was futile.

We reach a different conclusion as to Copper, Jenkins, and Johnson. Plaintiffs make no specific argument at all in their brief as to Copper. Plaintiffs argue instead generally that they have "allege[d] a common pattern and practice by Defendants to frustrate the appeals process" and point to not only the allegations regarding Douglas, but also the factual allegations surrounding Jenkins' and Johnson's suspensions. In the complaint, plaintiffs state that after Jenkins and Johnson received their "school-based" disciplinary hearing in accordance with Board policy 4303.4(C), they received letters from Denlinger notifying them that they had until 9 January 2006 to appeal her decision to uphold their suspensions. The complaint alleges that Jenkins' letter was postmarked 14 January 2006; Johnson's letter was postmarked 16 January 2006.

Plaintiffs have, however, failed to address Board policy 4303.4(E), which states that a student may appeal the superintendent's decision to the Board "by giving written notice to the Superintendent and the Board within 10 school days *after receiving* notice of the Superintendent's decision." (Emphasis added.) Thus, regardless of the allegations in the complaint, Jenkins' and Johnson's potential appeals were not foreclosed by the timing of the delivery of Denlinger's letters.

Other allegations in the complaint refute plaintiffs' contention on appeal regarding "a pattern and practice" of thwarting appeals suffi-

cient to allege futility. The complaint contains no allegation that Rhodes, who received a long-term suspension, experienced any interference in his ability to appeal that suspension. More significantly, the complaint alleges, with respect to an earlier long-term suspension of Johnson, that Johnson's father received notice in early January 2005 that Denlinger had suspended Johnson for the remainder of the year and that he had until 28 January 2005 to appeal that decision to the Board. Because of health reasons, Johnson's father failed to appeal prior to the deadline. The complaint alleges, however, that the Board ultimately still heard the appeal, and on 12 May 2005, retroactively reduced Johnson's suspension to 10 days. The complaint's allegations that Johnson pursued the administrative review process and obtained a favorable result—when his appeal was untimely—precludes an inference from the complaint's allegations that pursuit of administrative remedies was futile.

Although plaintiffs did not contend in their brief that they sufficiently alleged that the administrative review process was inadequate (as opposed to futile), plaintiffs' counsel made such a claim during oral argument. The complaint, however, does not contain any allegations relating to the adequacy of the remedy provided by N.C. Gen. Stat. § 115C-45(c). Nor does the complaint contain any allegations from which we can infer that the administrative remedies were inadequate to remedy the procedural due process claims. The possible inadequacy of the administrative remedy is not before this Court.

We, therefore, hold that the complaint contains sufficient allegations that exhaustion of administrative remedies was futile for Douglas. The trial court erred in dismissing his procedural due process claims under Rule 12(b)(1). Because, however, the allegations of the complaint are insufficient as to the remaining plaintiffs, we uphold the dismissal of their procedural due process claims based on the long-term suspensions.

B. *N.C. Constitution: Adequacy of Alternative State Remedy*

[7] The trial court dismissed plaintiffs' state constitutional claims based on long-term suspensions on the grounds that (1) an adequate alternative state remedy existed and (2) plaintiffs had failed to exhaust their administrative remedies. Plaintiffs only assigned error to the exhaustion basis for the trial court's dismissal.

The parties appear to conflate the two concepts. Neither party specifically addresses whether an administrative remedy such as the

one provided under N.C. Gen. Stat. § 115C-45(c) can constitute an adequate alternative state remedy sufficient to preclude a constitutional claim. Nor does either party specifically address whether exhaustion is a prerequisite to bringing a state constitutional claim separate from the "adequate alternative state remedy" analysis. On appeal, plaintiffs simply rely on their argument that exhaustion would have been futile.

"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). As plaintiffs have limited their arguments on appeal to the question whether the administrative remedies were futile, and because we have already concluded the complaint fails to allege sufficient facts to establish futility except as to Douglas, we hold that the plaintiffs other than Douglas have failed to demonstrate that the trial court erred in dismissing their state constitutional claims with respect to long-term suspensions.

C. *Todd Douglas' Procedural Due Process Claims*

[8] In *In re Alexander*, 171 N.C. App. at 657, 615 S.E.2d at 415 (internal citations omitted), this Court held:

> As indicated in *Goss*, suspensions for longer than ten days or expulsions for the remainder of the school term or permanently require more formal procedures. This Court has held that when a school board seeks to impose a long-term suspension, a student not only has the right to notice and an opportunity to be heard, the student also has the right to a full hearing, an opportunity to have counsel present at the hearing, to examine evidence and to present evidence, to confront and cross-examine witnesses supporting the charge, and to call his own witnesses to verify his version of the incident.

The complaint alleges that Douglas received a 13-day suspension and, therefore, he was entitled to a full hearing with the procedural protections set out in *Alexander*. The complaint alleges that Douglas was denied an opportunity to any appeal of his long-term suspension and, therefore, alleges a claim that Douglas' right to procedural due process was denied. The question remains, however, whether the complaint alleges a claim against the only remaining defendants, Denlinger and the Board.

These allegations are sufficient to assert a claim against the Board under the North Carolina constitution based on the actions of

the principal and Denlinger in their official capacities. With respect to the adequacy of the alternative state remedy, defendants rely upon only the administrative remedies that plaintiffs contend Douglas was unlawfully denied. Thus, defendants have failed to establish that alternative adequate state remedies existed for Douglas and his mother.[5]

With respect to § 1983, however, plaintiffs again fail to make any argument as to how the complaint complies with the requirements of *Monell* as to Douglas' long-term suspension claim. The trial court, therefore, erred in dismissing the Douglas long-term suspension claim under the North Carolina constitution, but properly dismissed it under § 1983.

[9] With respect to the claim relating to Douglas asserted against Denlinger in her individual capacity under § 1983, plaintiffs do not rely on Denlinger's supervisory liability. The complaint alleges that Denlinger acted "purposefully . . . to cut off Todd's right to appeal." The complaint also alleges that Denlinger's 8 October 2003 letter was a "lie." Although defendants assert that the letter cannot be viewed as addressing Douglas' suspension as opposed to a transfer, that contention would require that we view the allegations in the light most favorable to the moving—rather than the non-moving—party. Such an approach is, of course, precluded when deciding a Rule 12(b)(6) motion to dismiss. The trial court, therefore, erred in dismissing under Rule 12(b)(6) the Douglas long-term suspension claim brought against Denlinger under § 1983.

[10] The trial court, however, also dismissed the § 1983 claim for damages against Denlinger based on qualified immunity. This Court has set out the following test for qualified immunity:

> In order to establish the existence of an official's right to the defense of qualified immunity, one must (1) identify the specific right allegedly violated; (2) determine whether that right was clearly established; and (3) if clearly established, determine whether a reasonable person in the officer's position would have known that his/her actions would violate that right.

---

5. We note that this Court recently held that "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 . . . ." *Carl v. State*, 192 N.C. App. 544, 555-56, 665 S.E.2d 787, 796 (2008).

Moore v. Evans, 124 N.C. App. 35, 48, 476 S.E.2d 415, 425 (1996). The first two determinations are questions of law for the court. *Id.* "The third determination, however, requires the factfinder to make factual determinations concerning disputed aspects of the officer['s] conduct." *Id.* (internal quotation marks omitted).

We do not believe that the question of qualified immunity can be resolved, in this case, at the motion to dismiss stage. This Court has previously held that while qualified immunity may be raised in a motion to dismiss under Rule 12(b), in deciding "a motion to dismiss on grounds of qualified immunity, the trial court may look only to the allegations of the complaint to determine whether qualified immunity is established." *Toomer*, 155 N.C. App. at 473-74, 574 S.E.2d at 86.

Denlinger argues that the Douglas claims do not involve a clearly established right because "the right to appeal a decision" is not a right protected by due process, but rather by N.C. Gen. Stat. § 115C-391(d5) (2007). We do not, however, read plaintiffs' complaint as referring to the right to appeal to the Board, but rather as referring to the right to the hearing process applicable to long-term suspensions. The right to the type of hearing set forth in *Alexander* was "clearly established" arguably at the time *Goss* was decided in 1975 and definitely by 2002 when this Court rendered its decision in *In re Roberts*, 150 N.C. App. 86, 92-93, 563 S.E.2d 37, 42 (2002) (setting out student's right to hearing to challenge long-term suspension), *appeal dismissed and disc. review improvidently allowed*, 356 N.C. 660, 576 S.E.2d 327, *cert. denied*, 540 U.S. 820, 157 L. Ed. 2d 38, 124 S. Ct. 103 (2003), *overruled in part on other grounds*, 358 N.C. 649, 599 S.E.2d 888 (2004).

With respect to the final prong of the qualified immunity test, the complaint does not allege who informed Douglas' mother that her son had no right to appeal because his suspension was short-term. Nevertheless, the complaint, when viewed in the light most favorable to plaintiffs, alleges that Denlinger, in an attempt to avoid review of the principal's long-term suspension decision, reinstated Douglas on paper without notifying his mother so that Douglas could return to school within 10 days. At this stage, we hold that a reasonable superintendent of schools would have known that she was violating a student's procedural due process rights by taking that action.

This determination does not establish that Denlinger is not entitled to qualified immunity with respect to the Douglas claim. We merely hold that the trial court should not have dismissed the claim

at this stage based on qualified immunity. *See Toomer*, 155 N.C. App. at 474, 574 S.E.2d at 87 (holding that defendants were not entitled to dismissal of claims under Rule 12(b) based on qualified immunity).

[11] Finally, Denlinger contends that the trial court properly dismissed any claim for punitive damages. As her sole authority for affirming the trial court's Rule 12(b)(6) ruling, Denlinger cites *Coleman v. Kaye*, 87 F.3d 1491, 1509 (3d Cir. 1996), *cert. denied*, 519 U.S. 1084, 136 L. Ed. 2d 691, 117 S. Ct. 754 (1997), which *upheld a jury's* punitive damages award. Our Supreme Court has held that "notice pleading" principles apply to claims for punitive damages. *Shugar v. Guill*, 304 N.C. 332, 338, 283 S.E.2d 507, 510 (1981). A plaintiff may recover punitive damages under § 1983 when a wrong is done willfully, under circumstances of rudeness or oppression, or in a manner which evidences a reckless and wanton disregard of a plaintiff's rights. *Moore*, 345 N.C. at 371, 481 S.E.2d at 24. Plaintiffs' allegations that (1) Denlinger "purposefully post dated her letter" in order "to cut off Todd's right to appeal" and that her letter was a "lie" are sufficient to meet the requirements of *Shugar* and *Moore*. The complaint, therefore, sufficiently alleges a claim for punitive damages against Denlinger arising out of Douglas' long-term suspension.

We note that the parties have not addressed whether the procedural due process claim survives Douglas' death. We leave that issue to be addressed in the first instance by the trial court. Nothing in this decision should be viewed as expressing any opinion on that issue.

III. Equal Protection

[12] Plaintiffs next challenge the trial court's dismissal of their equal protection claims, arguing that the claims are supported by their allegations of racial profiling and racial discrimination in the administration of discipline. Only the claims of Copper, Johnson, Eric Warren, Thorpe, Douglas, and Jenkins are before the Court.

In support of their equal protection claims, plaintiffs argue generally in their brief that minorities are treated disparately, and they set out in the brief an extensive discussion of allegations suggesting Denlinger is racially biased. Because, however, no class has been certified in this case, the issue is whether the complaint sufficiently alleges on behalf of each plaintiff an equal protection claim against Denlinger and against the Board.

We first note that the trial court's dismissal of the equal protection claims was grounded on both a failure to exhaust administrative

remedies and on Rule 12(b)(6). The trial court erred in applying the exhaustion of administrative remedies doctrine to the equal protection claims. *See Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 434-45, 471 S.E.2d 342, 347 (1996) (holding that § 1983 action based on violation of substantive constitutional right—as opposed to procedural due process—not precluded by failure to exhaust state administrative remedies), *cert. denied*, 519 U.S. 1112, 136 L. Ed. 2d 839, 117 S. Ct. 952 (1997); *Good Hope Hosp.*, 174 N.C. App. at 272, 620 S.E.2d at 879 ("Violation of a substantive constitutional right may be the subject of a § 1983 claim, regardless of whether administrative remedies have been exhausted, because the violation is complete when the prohibited action is taken.").

To state an equal protection claim, plaintiffs must allege that (1) they have been treated differently from others similarly situated to plaintiffs, and (2) the unequal treatment is the result of intentional or purposeful discrimination. *Id.* at 274, 620 S.E.2d at 880. " 'To state an equal protection claim, [plaintiffs] must plead sufficient facts to satisfy each requirement . . . .' " *Id.*, 620 S.E.2d at 880-81 (quoting *Veney v. Wyche*, 293 F.3d 726, 730-31 (4th Cir. 2002)).

Plaintiffs acknowledge that "[i]n order to make out a claim of racial discrimination, a plaintiff 'must allege purposeful discrimination; that is, he must assert that [defendant] took some adverse action against him as a result of a discriminatory animus.' " *Peterkin v. Columbus County Bd. of Educ.*, 126 N.C. App. 826, 827, 486 S.E.2d 733, 734 (1997) (quoting *Sterling v. Se. Penn. Transp. Auth.*, 897 F. Supp. 893, 896 (E.D. Pa. 1995)). Yet, the complaint in this case never alleges that any of the defendants took disciplinary action against Copper, Johnson, Warren, Thorpe, Douglas, or Jenkins based on their race.

Plaintiffs could have alleged that the short-term suspensions or long-term suspensions imposed on these plaintiffs were because of their race, but they did not do so.[6] *Compare Enoch*, 164 N.C. App. at 419, 596 S.E.2d at 364 (holding that plaintiff stated claim for relief under § 1983 when she alleged that defendant "subjected her to race discrimination in failing to promote her in violation of her right to

6. With respect to Dion Warren, plaintiffs do allege that a teacher—not a defendant in this case—did not equally enforce rules against white students and that two female Caucasian students engaged in arguably similar behavior to that of Dion Warren, but were not disciplined. Dion Warren's claims are not, however, properly before this Court.

equal protection under the Fourteenth Amendment to the United States Constitution"). Indeed, plaintiffs' brief on appeal does not point to any allegations that plaintiffs were individually subjected to discipline based on their race.

Instead, plaintiffs rely solely upon allegations (1) regarding a letter by Denlinger setting out a "no tolerance" policy for gang-related behavior that plaintiffs contend, upon information and belief, was not sent to African-American families, and (2) allegations regarding statistics indicating that a disproportionate number of minority students are suspended from the Durham public schools. These allegations of general bias cannot, however, substitute for allegations indicating that each individual plaintiff's discipline was motivated by racial discrimination. *See Yusuf v. Vassar College*, 35 F.3d 709, 713 (2d Cir. 1994) ("In order to survive a motion to dismiss, the plaintiff must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent.").

[13] Plaintiffs additionally argue that they have sufficiently alleged an equal protection claim based on racial profiling. Their entire argument in support of this contention reads:

> Denlinger and the School Board publicly acknowledge that school administrators are not trained to deal with gang activity and must rely heavily on school resource officers to identify students suspected of gang affiliation. (Comp. ¶ 46, 474, R. pp. 11, 475). Plaintiffs allege that Denlinger and the School Board were well aware that school resource officers routinely used impermissible racial profiling to identify students suspected of gang-related activity, (Comp. ¶¶ 477-479, R. p. 45), that they condoned and ratified the use of race as the primary indicator of gang affiliation, (Comp. ¶ 482, R. p. 45), and that, as a consequence of racial profiling, Plaintiffs were falsely accused of gang membership.

The paragraphs of the complaint cited in this portion of the brief do not specifically relate to any of the plaintiffs. Even more significantly, the brief contains no citation to the complaint following the assertion that "as a consequence of racial profiling, Plaintiffs were falsely accused of gang membership." A review of the complaint reveals the reason for this omission: the complaint does not contain any such allegation.

Moreover, the complaint contains allegations that conflict with plaintiffs' contentions on appeal. Although the complaint contains allegations that Copper, Douglas, Jenkins, Johnson, Thorpe, and Eric Warren, all African-American students, were labeled as gang members, the complaint also alleges that school administrators falsely accused Solari—alleged in the complaint to be a Caucasian student—of being the "Cripp Queen." The allegations include, among others:

> 137. In April 2004, Jordan High School Guidance Counselor Victoria Tirgrath advised Gina's mother that the "common consensus" among Jordan administrators and faculty was that *Gina was involved in gang activity* and should be expelled.
>
> . . . .
>
> 159. On or about September 10, 2005, in the presence of [the principal], Defendants [school resource officers] stated to Ms. Warren that Jazmyn Jenkins, Desmond Johnson, Angell Copper, *and Gina Solari*, among others, were known gang members and that Ms. Warren should not permit her sons to associate with them.
>
> . . . .
>
> 164. On October 4, 2005, [the school resource officer] falsely stated to Mr. Johnson that Jazmyn Jenkins, Angell Copper, and Eric Warren were known gang members and that *Gina Solari was a gang leader and carried a loaded shotgun in the trunk of her car.*
>
> . . . .
>
> 186. A week later, in early November 2005, [the school resource officer] falsely stated to Cassandra Jenkins that Angell Copper, Desmond Johnson, and Eric Warren were gang members and that *Gina Solari was known to be the "Cripp Queen."*

(Emphasis added.) Thus, the complaint alleges that a Caucasian student, Solari, was subjected to the same false gang-member labeling as the African-American plaintiffs. The complaint is, therefore, inconsistent with respect to the claim of racial profiling urged on appeal.[7]

7. We also note that the complaint contains numerous allegations regarding an altercation between Ivey Brooks and plaintiffs Copper, Jenkins, and Johnson in the school lobby. Although the complaint contrasts Brooks' treatment by school adminis-

See Yusuf, 35 F.3d at 714 (affirming dismissal of racial discrimination claim where complaint lacked fact-specific allegations of racial animus and included factual allegations indicating "race-neutral factors" that may have led to the challenged conduct).

It may have been a relatively simple matter for plaintiffs to make the necessary allegations. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 152 L. Ed. 2d 1, 11, 122 S. Ct. 992, 999 (2002) (finding complaint sufficient when plaintiff "alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA"); *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (in order to avoid dismissal under Rule 12(b)(6), " 'I was turned down for a job because of my race' is all a complaint has to say"). Nonetheless, we may not—in the guise of construing the complaint liberally—supply, on appeal, allegations that are missing. *See Holman v. Indiana*, 211 F.3d 399, 407 (7th Cir. 1999) ("The 'liberal construction accorded a pleading under [Fed. R. Civ. P. 8] does not require the courts to fabricate a claim that a plaintiff has not spelled out in his pleadings.' " (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1286 at 558 (2d ed. 1990))), *cert. denied*, 531 U.S. 880, 148 L. Ed. 2d 132, 121 S. Ct. 191 (2000). The trial court, therefore, did not err in dismissing plaintiffs' equal protection claims. *Peterkin*, 126 N.C. App. at 828, 486 S.E.2d at 735 ("Having failed to allege facts that would support a § 1983 claim [for racial discrimination], we must conclude that the trial court properly granted defendant's Rule 12(b)(6) motion to dismiss this action.").

IV. Gang Policy

[14] In their final argument, plaintiffs contend the trial court erred in dismissing their claim that the Board's gang policy is unconstitutionally vague on its face. Since the claim challenges the facial validity of the policy, it is, therefore, asserted only against the Board and not against Denlinger.

We are permitted to consider not only the allegations of the complaint itself, but also "documents which are the subject of a plaintiff's

---

trators with that of Copper, Jenkins, and Johnson, the complaint does not indicate Brooks' race apart from an allegation that a school resource officer labeled Brooks as a member of the Blood gang. If Brooks is Caucasian, then, as with Solari, the complaint would suggest that Caucasian students are also subjected to false labeling as gang members. On the other hand, if Brooks is African-American, then the allegations that Brooks was treated more favorably than Copper, Jenkins, and Johnson is inconsistent with the allegations of racial discrimination.

complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001). Thus, Board policy 4301.10 is properly before the Court.

The challenged policy reads:

> Rule 10: Prohibition of Gangs and Gang Activities. No student shall commit any act which furthers gangs or gang-related activities. A gang is any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of criminal acts and having a common name or common identifying sign, colors, or symbols. Conduct prohibited by this policy includes:
>
> i. Wearing, possessing, using, distributing, displaying, or selling any clothing, jewelry, emblems, badges, symbols, signs or other items which may be evidence of membership or affiliation in any gang;
>
> ii. Communicating either verbally or non-verbally (gestures, handshakes, slogans, drawings, etc.) to convey membership or affiliation in a gang;
>
> iii. Tagging, or otherwise defacing school or personal property with gang or gang-related symbols or slogans;
>
> iv. Requiring payment of protection, insurance, or otherwise intimidating or threatening any person related to gang activity;
>
> v. Inciting other students to intimidate or to act with physical violence upon any other person related to gang activity;
>
> vi. Soliciting others for gang membership;
>
> vii. Committing any other illegal act or other violation of school district policies that relates to gang activity.
>
> The Superintendent/designee shall consult with law enforcement officials semi-annually to establish a list of gang-related items, symbols and behaviors. The principal shall maintain this list in the main office of the school and shall notify students of the items, symbols and behaviors prohibited by this policy. This notice shall be included in the student handbook.
>
> Before being suspended for a first offense of wearing gang-related attire (when not involved in any kind of altercation), a

student will receive a warning and will be allowed to immediately change or remove the attire that is in violation of this policy.

Plaintiffs allege that this policy does not provide adequate notice to students of the precise conduct prohibited, gives excessive subjective discretion to school officials and school resource officers regarding which conduct to punish, and is unconstitutionally vague. The trial court concluded, however, that "[t]he challenged policy defines a violation of the policy with sufficient definiteness that a student could understand what conduct was prohibited and it establishes standards to permit enforcement in a non-arbitrary, non-discriminatory manner." The court, therefore, dismissed the declaratory judgment claim.

While Rule 10 contains a definition of "gang," it does not specify what "clothing, jewelry, emblems, badges, symbols, signs or other items . . . *may be evidence of* membership or affiliation in any gang." (Emphasis added.) Rule 10 also does not define what "gestures, handshakes, slogans, drawings, etc." will be deemed "to convey membership or affiliation in a gang."

Courts considering similar provisions that could, without further definition, equally encompass innocent and gang-related behavior or dress have found the provisions unconstitutionally vague. The Eighth Circuit Court of Appeals addressed a school policy prohibiting gang-related activities such as display of colors, symbols, signals, or signs. *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1305 (8th Cir. 1997). In addition to holding that the policy was fatally vague for failing to define the term "gang"—not an issue in this case—the court also separately held that the policy was unconstitutionally vague by failing to define the specific gang-related activities that were prohibited:

> Gang symbols, as with display of the flag, take many forms and are constantly changing. Accordingly, the District must "define with some care" the "gang related activities" it wishes students to avoid. The regulation, however, fails to define the term at all and, consequently, fails to provide meaningful guidance for those who enforce it.

Id. at 1310 (internal citations omitted).

The court explained further:

> Sadly, gang activity is not relegated to signs and symbols otherwise indecipherable to the uninitiated. In fact, gang sym-

> bols include common, seemingly benign jewelry, words and clothing. For example, color combinations frequently represent gang symbols. Indeed, the colors red and blue are the colors of our flag and the colors of two prominent gangs: the Bloods and Crips. Baseball caps, gloves and bandannas are deemed gang related attire by high schools around the country, as well as collegiate logos. A male student wearing an earring, or allowing a shoelace to go untied, is engaging in actions considered gang related. Even a student who innocently refers to classmates as "folks" or "people" is unwittingly speaking in the parlance of the Midwestern gangs "Vic Lords" and "Black Gangster Disciples." In short, a male student walking the halls of a District school with untied shoelaces, *a Duke University baseball cap* and a cross earring potentially violates the District regulation in four ways.

Id. at 1311 (emphasis added) (internal citations omitted). The court, therefore, ruled that "the District regulation violates the central purposes of the vagueness doctrine because it fails to provide adequate notice regarding unacceptable conduct and fails to offer clear guidance for those who apply it. A person of common intelligence must necessarily guess at the undefined meaning of 'gang related activities.' " *Id.*

Other courts have reached the same conclusion. *See Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1245 (D.N.M. 2000) (holding that county fair's policy banning the wearing of clothing that could be indicator of gang activity did not "in any way specif[y] what is meant by gang activity, gang symbols, or gang-related apparel" and that "[d]ue to this lack of specificity, enforcement of the dress code is left to the unfettered discretion of individual officers"); *Chalifoux v. New Caney Independent Sch. Dist.*, 976 F. Supp. 659, 669 (S.D. Tex. 1997) (holding that school policy that prohibited the wearing of "gang-related apparel" was unconstitutionally vague because it lacked a sufficient definition of such apparel); *City of Harvard v. Gaut*, 277 Ill. App. 3d 1, 7, 660 N.E.2d 259, 263 (1996) (holding that ordinance prohibiting persons from wearing known gang colors, emblems or other insignia "is not merely broad, but open-ended and potentially limitless").

The sole case cited by the Board as upholding a gang policy is *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist.*, 251 F.3d 662 (7th Cir. 2001). In *Fuller*, the plaintiffs were expelled as a result of a fight at a football game between two rival street gangs. *Id.* at 663-64. Although the plaintiffs contended that the school policy prohibiting

"gang-like activity" was unconstitutionally vague, the court noted: "Whatever is true of other rules, [the policy in that case] is not devoid of standards. It delineates specific activities which are covered by the rule: recruiting students for membership in a gang, threatening or intimidating other students to commit acts or omissions against their will in furtherance of the purpose of the gang." *Id.* at 666. The court differentiated the policy from that in *Stephenson* "which [was] directed at gang-related activities such as 'display of "colors", symbols, signals, signs, etc.'—activities more likely to implicate First Amendment rights." *Id.* (quoting *Stephenson*, 110 F.3d at 1303).

This case, in contrast to *Fuller*, involves a policy almost identical to the one in *Stephenson*. The Board has not cited any decision upholding a policy comparable to Rule 10 as adopted by the Board.

The Board, however, asserts that a list exists of prohibited items, symbols, and conduct and argues that this list both ensures that students have notice of prohibited conduct and dress and limits the discretion of school administrators enforcing the policy. *See Chalifoux*, 976 F. Supp. at 668 (holding that it would not "be overly burdensome for the District to provide a definite list of prohibited items and to update that list as needed"). According to Rule 10, this list must be maintained in the principal's office and must be included in the student handbook. Amici, however, correctly note that this list is not part of the record before this Court and assert that the student handbook in fact merely recites Rule 10 without including the list of the prohibited items, symbols, and conduct.

Based upon our review of the record, we believe that the constitutionality of Rule 10 cannot be decided without review of the list and consideration whether proper notice has been given to students of Rule 10 and the list. Yet, neither the student handbook nor the list of prohibited items required by the policy are included in the complaint, defendants' Rule 12(b)(6) motion, or anywhere else in the record on appeal. Although amici, in their brief, ask us to take judicial notice of the student handbook to determine the constitutionality of the gang policy, we cannot do so. *See Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (holding that "we will not take judicial notice of a document outside the record when no effort has been made to include it"), *cert. denied and disc. review denied*, 343 N.C. 511, 472 S.E.2d 8 (1996).

We note that the arguments of the Board and the amici underscore the need to focus on the procedural posture of this case: the

trial court dismissed the claim under Rule 12(b)(6). None of the cases relied upon by the parties involved such an early stage of the proceedings when the record has not yet been developed. *See Fuller*, 251 F.3d at 664 (appeal from decision following bench trial); *Stephenson*, 110 F.3d at 1306 (appeal from summary judgment order); *Chalifoux*, 976 F. Supp. at 663 (decision following bench trial).

In this case, plaintiffs' allegations in combination with the actual provisions of the Board's policy are sufficient to state a claim that the policy is unconstitutionally vague. The Board may be able to demonstrate at the summary judgment stage that proper notice is supplied to the students sufficient to eliminate any constitutional concerns. At the Rule 12(b)(6) stage, however, the Board has not established that plaintiffs have failed to state a claim for relief. Accordingly, we reverse that portion of the trial court's order dismissing plaintiffs' claim that the gang policy is unconstitutionally vague and remand for further proceedings.

Conclusion

We deny defendants' motion to dismiss the appeal, but sanction plaintiffs' counsel by requiring counsel to pay the printing costs of the appeal. We affirm the trial court's dismissal of plaintiffs' procedural due process claims with the exception of the claims brought on behalf of Todd Douglas regarding his long-term suspension. We reverse as to the Douglas procedural due process claim under § 1983 against Denlinger and under the North Carolina constitution against the Board and remand for further proceedings. We affirm the trial court's dismissal of plaintiffs' equal protection claims, but reverse the dismissal of plaintiffs' claim for declaratory relief regarding the Board's gang policy.

Affirmed in part; reversed in part.

Judge HUNTER concurs.

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

TYSON, Judge concurring in part and dissenting in part.

I concur with that portion of the majority's opinion which: (1) affirms the trial court's dismissal of Plaintiff Angell Copper, Desmond Johnson, Eric Warren, Joshua Thorpe, and Jazmyn Jenkins' proce-

dural due process claims; (2) affirms the trial court's dismissal of all of plaintiffs' equal protection claims; and (3) reverses the dismissal of plaintiffs' claim for declaratory relief. I disagree with that portion of the majority's opinion which reverses Todd Douglas' ("Douglas") procedural due process claims against Ann T. Denlinger ("Denlinger"), in her individual capacity, pursuant to 42 U.S.C. § 1983 and the Durham Public School Board of Education ("School Board") pursuant to the North Carolina Constitution. I respectfully dissent.

I. 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 citations and quotation omitted), *disc. rev. denied*, 358 N.C. 543, 599 S.E.2d 49 (2004). This Court is not required " 'to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.' " *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)). "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).

II. Douglas' 42 U.S.C. § 1983 claim

The majority's opinion holds the trial court erred by dismissing Douglas' long-term suspension claim brought against Denlinger, in her individual capacity, pursuant to 42 U.S.C. § 1983. I disagree.

A. Federal Procedural Due Process

Section 1983 of Title 42 of the United States Code provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects, or causes to be

> subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the [United States] Constitution* and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000) (emphasis supplied). Our Supreme Court has stated, "[t]o state a claim under Section 1983, a plaintiff must show actual *deprivation of a federal right* under color of law. Federal rights are those secured by the United States Constitution and federal statutes." *Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 432, 471 S.E.2d 342, 346 (1996) (internal citation and quotation omitted) (emphasis supplied), *cert. denied*, 519 U.S. 1112, 136 L. Ed. 2d 839 (1997).

"The United States Supreme Court has stated that a student facing suspension has a property interest that qualifies for protection under the Due Process Clause of the Fourteenth Amendment." *In re Roberts*, 150 N.C. App. 86, 91-92, 563 S.E.2d 37, 41 (2002) (citing *Goss v. Lopez*, 419 U.S. 565, 576, 42 L. Ed. 2d 725, 735-36 (1975)), *disc. rev. improvidently allowed and appeal dismissed*, 356 N.C. 660, 576 S.E.2d 327, *cert. denied*, 540 U.S. 820, 157 L. Ed. 2d 38 (2003). "At the very minimum . . . students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing." *Goss*, 419 U.S. at 579, 42 L. Ed. 2d at 737. However, "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id.* at 584, 42 L. Ed. 2d at 740.

In *In re Roberts*, this Court stated, with respect to long-term suspensions, "[t]he protections of due process require that petitioner be apprised of the evidence received and given an opportunity to explain or rebut it." 150 N.C. App. at 92-93, 563 S.E.2d at 42 (citing *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972)). Based upon the particular facts of *In re Roberts*, i.e., where the respondent sought to impose a long-term suspension and the Board Policy specifically provided for a factual hearing before the Hearing Board, this Court held the petitioner was entitled to "have the opportunity to have counsel present, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." 150 N.C. App. at 93, 563 S.E.2d at 42. Although the holding in *In re Roberts* was limited to those particular facts, this Court subsequently stated:

> when a school board seeks to impose a long-term suspension, a student not only has the right to notice and an opportunity to be heard, the student also has the right to a full hearing, an opportunity to have counsel present at the hearing, to examine evidence and to present evidence, to confront and cross-examine witnesses supporting the charge, and to call his own witnesses to verify his version of the incident.

In re Alexander v. Cumberland Cty Bd. of Educ., 171 N.C. App. 649, 657, 615 S.E.2d 408, 415 (2005) (citing *In re Roberts*, 150 N.C. App. at 92-93, 563 S.E.2d at 42).

B. Failure to State a Claim

We must now examine whether the allegations contained in plaintiffs' complaint are sufficient to state a federal procedural due process claim against Denlinger, in her individual capacity, pursuant to 42 U.S.C. § 1983. The majority's opinion holds the trial court erred by dismissing Douglas' long-term suspension claim against Denlinger based upon the following allegations contained in plaintiffs' complaint: (1) "Denlinger purposely postdated her letter October 8 [DAY 9] to cut off [Douglas'] right to appeal" and (2) Denlinger's October 8 letter was a "lie." I disagree with the majority's analysis. Any alleged interference with Douglas' "right to appeal" is insufficient to establish a violation of federal procedural due process under "the United States Constitution" or "federal statutes." *Edward Valves, Inc.*, 343 N.C. at 432, 471 S.E.2d at 346. Our Supreme Court has stated "the question [of] whether the right of appeal is essential to due process of law . . . has frequently been considered by the courts and answered in the negative." *Gunter v. Sanford*, 186 N.C. 452, 457-58, 120 S.E. 41, 44 (1923). "Due process of law . . . is not necessarily judicial process, and to due process the right of appeal is not essential." *Id.* at 458, 120 S.E. at 44.

The procedures to be used in appealing a long-term suspension are statutorily outlined in the North Carolina General Statutes. *See* N.C. Gen. Stat. § 115C-391 (2003). Douglas' "right to appeal" is provided by state statutory law, not federal constitutional law. The allegations in plaintiffs' complaint are insufficient to state a federal procedural due process claim against Denlinger pursuant to 42 U.S.C. § 1983 and were properly dismissed.

Alternatively, I would hold that the preceding allegations are nothing more than "unreasonable inferences" based upon the other

allegations contained in plaintiffs' complaint. *Good Hope Hosp., Inc.*, 174 N.C. App. at 274, 620 S.E.2d at 880. Plaintiffs' complaint alleged Douglas' mother, Mrs. Smith, met with school administrators on multiple occasions after being notified that Douglas was being suspended from school based upon his gang affiliation. On 8 October 2003, a school counselor delivered a letter to Douglas, which was signed by Denlinger and stated "after 'careful review' of [Douglas'] school records," Denlinger believed Douglas presented a danger to the school. The 8 October letter further stated that Denlinger had approved the principal's request for Douglas to transfer from Southern High School to Lakeview High School "effective immediately." Plaintiffs' complaint does not allege that Denlinger's 8 October letter addressed Douglas' suspension or his right to appeal. Further, plaintiffs' complaint does not contain any other allegation sufficient to support the inference that Denlinger informed Mrs. Smith that Douglas did not have the right to appeal a short-term suspension, by letter or any other means of communication. The record shows after Mrs. Smith had retained counsel, met with various administrators, and received the 8 October letter, no further appeal was sought on any basis, nor was there any legal action taken until nearly three years later with the commencement of this lawsuit.

Nothing in the record supports the allegations that Denglinger's 8 October letter was designed to "cut off" Douglas' right to appeal or that it was a "lie." These allegations are nothing more than "unreasonable inferences" that should be disregarded by this Court. *Good Hope Hosp., Inc.*, 174 N.C. App. at 274, 620 S.E.2d at 880. The trial court correctly found that plaintiffs, including Douglas, failed to state a federal procedural due process claim against Denlinger, in her individual capacity, pursuant to 42 U.S.C. § 1983. The trial court's ruling on this issue should be affirmed. Based upon this analysis, it is unnecessary to address whether Denlinger was entitled to qualified immunity or whether Douglas' 42 U.S.C. § 1983 claim survived his death. *See* N.C. Gen. Stat. § 28A-18-1 (2003).

III. Douglas' State Constitutional Claim

The majority's opinion further holds that the trial court erred by dismissing Douglas' long-term suspension claim against the School Board pursuant to the North Carolina Constitution. I disagree.

Here, the trial court's order stated the following in regards to plaintiffs' state constitutional claims:

> 5. State law provides a remedy for challenging final administrative decisions that allegedly violate federal or state statutory or constitutional law or board policy and for challenging long-term suspension or expulsion decisions. North Carolina Gen. Stat. § 115C-45(c) grants students the right to appeal final administrative decisions to the board of education. North Carolina Gen. Stat. § 115C-391(e) grants the right to appeal a long-term suspension or expulsion to the board of education. Under both statutes, the board's decision is subject to judicial review in accordance with Article 4 of Chapter 150B of the General Statutes. Plaintiffs cannot bring direct claims under the North Carolina Constitution when there is an adequate state remedy available. Adequate state remedies were available to plaintiffs for their state constitutional claims; therefore, plaintiffs' state constitutional claims for violations of their procedural due process and equal educational opportunity rights are DISMISSED.

In a separate section of its order, the trial court also dismissed plaintiffs' procedural due process claims and equal educational opportunity rights based upon plaintiffs' failure to allege that they had exhausted their administrative remedies or that these remedies were inadequate. The trial court's order can be read as dismissing plaintiffs' procedural due process claims under the North Carolina Constitution on two alternative and equally valid bases. Plaintiffs have failed to overcome the presumption of correctness in the trial court's order or to show reversible error on this issue.

The majority's opinion acknowledges in two separate instances that plaintiffs failed to assign error to or argue the issue of whether the trial court erred in holding adequate alternative state remedies existed to preclude plaintiffs' state constitutional procedural due process claims. When addressing plaintiffs' short-term suspensions under the North Carolina Constitution, the majority's opinion states:

> Although plaintiffs addressed the trial court's separate conclusion that plaintiffs' claims were barred by a failure to exhaust their administrative remedies, *plaintiffs' brief does not contain any specific argument regarding the trial court's determination that adequate alternative remedies exist.* Even if plaintiffs' assignments of error could be construed as assigning error to this particular conclusion of law, Rule 28(b)(6) provides that "[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned."

(Emphasis supplied). When addressing plaintiffs' long-term suspensions under the North Carolina Constitution, the majority's opinion also states: "The trial court dismissed plaintiffs' state constitutional claims based on long-term suspensions on the grounds that (1) an adequate alternative state remedy existed and (2) plaintiffs had failed to exhaust their administrative remedies. Plaintiffs only assigned error to the exhaustion basis for the trial court's dismissal."

Because plaintiffs' failed to challenge the trial court's dismissal of plaintiffs' state constitutional procedural due process claims on the basis that an adequate alternative state remedy existed, this issue is not properly before this Court and the trial court's ruling remains undisturbed. *See* N.C.R. App. P. 28(b)(6) (2007) ("Assignments of error not set out in the appellant's brief . . . will be taken as abandoned."). It is well-established that "[a] claim under our state constitution is available only 'in the absence of an adequate state remedy.' " *Craig v. New Hanover Cty Bd. of Educ.*, 185 N.C. App. 651, 655, 648 S.E.2d 923, 926 (2007) (quoting *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)), *disc. rev. denied*, 362 N.C. 234, 659 S.E.2d 439 (2008). The trial court properly dismissed Douglas' state constitutional claim. Plaintiffs have brought forth no argument on appeal to reverse this ruling. The majority's opinion erroneously reverses the dismissal of Douglas' state constitutional due process claim against the School Board.

IV. Conclusion

Any alleged interference with Douglas' state statutory "right to appeal" is insufficient to establish a violation of federal procedural due process under the United States Constitution or federal statutes. *Gunter*, 186 N.C. at 458, 120 S.E. at 44. Alternatively, the allegations that Denlinger's 8 October letter "cut off" Douglas' right to appeal and was a "lie" were, at most, "unreasonable inferences" based upon the other allegations contained in plaintiffs' complaint and should be disregarded by this Court. *Good Hope Hosp., Inc.*, 174 N.C. App. at 274, 620 S.E.2d at 880. The trial court properly dismissed Douglas' federal procedural due process claim against Denlinger, in her individual capacity, pursuant to 42 U.S.C. § 1983.

Plaintiffs' failed to challenge the trial court's dismissal of plaintiffs' state constitutional procedural due process claims on the basis that an adequate alternative state remedy existed. This issue is not properly before this Court and the trial court's ruling remains undisturbed. N.C.R. App. P. 28(b)(6). Plaintiffs have brought

forth no argument on appeal to reverse this ruling. The majority's opinion erroneously reverses the dismissal of Douglas' state constitutional procedural due process claim against the School Board. I respectfully dissent.

BETTIE NORWOOD; MELISSA Y. NORWOOD; NORWOOD FAMILY LIMITED PARTNERSHIP; SUGAR VIEW REAL ESTATE INVESTORS, LLC; MANNING GAMBRELL, AND WIFE, MARTHA GAMBRELL; DONNIE A. IVERSON AND WIFE, CATHY S. IVERSON; AND KATHLEEN J. BUNNELLS, PETITIONERS v. VILLAGE OF SUGAR MOUNTAIN, A NORTH CAROLINA MUNICIPALITY, RESPONDENT

No. COA07-1402

(Filed 21 October 2008)

1. Cities and Towns— annexation—original report—eighteen-acre tract shown—identification of included one-acre tract

Respondent municipality's original report identifying proposed areas for annexation sufficiently identified a one-acre tract that was ultimately annexed even though this one-acre tract was included on the map in a larger eighteen-acre tract and was not specifically carved out and identified on the map as a one-acre tract. The municipality could omit property described in its original report from the property it ultimately annexed.

2. Cities and Towns— annexation—recorded property lines or streets—new municipal boundaries

The trial court erred in an annexation case by finding and concluding that respondent did not use recorded property lines or streets in establishing the new municipal boundaries for the pertinent one-acre Norwood tract in violation of N.C.G.S. § 160A-36(d) because: (1) N.C.G.S. § 160A-36(d) contains no express requirement that the property lines utilized by a municipality must be immutable or the result of a formal, county-approved subdivision of land in order to qualify as recorded property lines; (2) the evidence showed respondent Village did use property lines that had been recorded by the Norwood family, the Village specifically utilized the property description contained in a deed, and the tract at issue was contained in the recorded plat; (3) even though on 12 June 2006 the Norwood family revised its plat and eliminated any references to the pertinent tract, the revi-

sion and recordation occurred well after the adoption of the annexation ordinance and was thus unavailable to the Village at the time of the annexation; (4) the Village's use and reliance on the then-existing recorded deed and plat, both of which were consistent with the actual description of the one-acre tract, complied with the mandates of N.C.G.S. § 160A-36(d); (5) the boundary lines derived from the street, the separately-owned commercial property, Ms. Norwood's residential property, and her mother's residential property met the requirements of N.C.G.S. § 160A-36(d); (6) even assuming arguendo that the line derived from the voluntarily annexed tract was not a recorded property line within the meaning of the statute, the record still supported that the Village complied with the statute; and (7) the recorded line that the Village used from the voluntarily annexed tract was already part of the pre-existing municipal boundary, and thus the line did not constitute a new municipal boundary within the meaning of the statute.

3. Cities and Towns— annexation—subdivision test—classification of entire tract as commercial

Respondent municipality could properly classify an entire 5.12 acre tract as commercial for purposes of the subdivision test set forth in N.C.G.S. § 160A-36(c), although a plat presented by petitioners divides the 5.12 tract into a 1.28 acre commercial tract, a .47 acre wooded tract, and a 3.36 acre wooded tract, where respondent's annexation reports and its subdivision test calculations were based upon county tax maps and actual observations of the properties made by a certified land surveyor; neither the county tax map nor the deed divided the property into separate tracts; the plat presented by petitioners did not exist at the time of annexation; the only actual use of the property was commercial; the wooded parts of the property cannot be developed for any purposes other than possibly serve the commercial facilities; and access to the 3.36 acre wooded parcel was provided by the 1.28 acre commercial tract.

4. Cities and Towns— annexation—violation of subdivision test—remand

The remedy for a municipality's alleged violation of the subdivision test was not to declare the annexation ordinance null and void but was to remand to allow the municipality to amend the annexation boundaries.

5. Cities and Towns— annexation—contiguity requirement—previously annexed shoestring

A municipality's annexation of a tract of land did not violate the contiguity requirements of N.C.G.S. § 160A-36(b) and N.C.G.S. § 160A-41(l) even though the annexed land abutted a ten-foot "shoestring" strip of land running along a highway where the shoestring, along with a larger tract, had been voluntarily annexed more than ten years earlier; the tract of land in question was contiguous to the municipality at the time it was annexed; and the vast majority of the tract at issue directly abuts the previously annexed larger tract and not the shoestring.

6. Cities and Towns— annexation—meaningful extension of municipal services

The trial court erred in an annexation case by finding and concluding that respondent municipality violated N.C.G.S. §§ 160A-33 through 42 with regard to its plans to provide meaningful municipal services to the newly annexed areas because: (1) the annexation order would extend the same police protection, waste collection services, and recreation department facilities that are now provided within the municipality; (2) although petitioners claim they do not expect to take advantage of the provided police protection aside from a few emergency calls per year, these arguments are irrelevant, and the trial court's findings and conclusions to this effect are in error; (3) our Supreme Court has already concluded that a municipality is not required to add employees or equipment in order to provide meaningful police protection; and (4) the inquiry regarding the extension of municipal services focuses on a qualitative analysis in regard to nondiscrimination and a quantitative analysis in regard to the types of services provided.

7. Cities and Towns— annexation—public policy violations—commercial-residential issue—unincorporated island issue—conflict of interest issue

The trial court erred in an annexation case by finding policy violations of N.C.G.S. §§ 160A-33 through -42 by respondent's decision to only annex commercial properties and not to annex similarly situated residential properties, the creation of an unincorporated island within the new corporate limits, and a conflict of interest regarding a council member's position on the Village Council and his status as president and one-third owner of the

local ski resort because: (1) the trial court did not explain or examine how the challenged annexation violated the policies contained in the statutes, and no case law supporting such conclusions was found; (2) to the extent all of these issues implicated bad faith or improper motivations to members of the Village Council, inquiry into such questions was improper not only for the Court of Appeals but also for the superior court as well; and (3) petitioners did not present competent and substantial evidence to overcome the presumption of fairness, impartiality, and good faith with which public officials are cloaked as is petitioners' burden.

Appeal by respondent from judgment entered 23 May 2007 by Judge James U. Downs in Avery County Superior Court. Heard in the Court of Appeals 14 May 2008.

David R. Paletta for petitioner-appellees.

Doughton & Hart PLLC, by Thomas J. Doughton and Amy L. Bossio, for respondent-appellant.

HUNTER, Judge.

The Village of Sugar Mountain ("the Village" or "respondent") appeals from a judgment declaring its proposed annexation ordinances to be unlawful, null, and void. After careful review, we reverse and remand.

I. Background

The Village is an incorporated municipality, with a population of less than 5,000, located in Avery County, North Carolina. The Village's original charter did not allow involuntary annexation. However, in 2000, the North Carolina Legislature amended the charter to permit the Village to involuntarily annex property.

On 23 August 2005, pursuant to its annexation power, the Village identified several areas for annexation by adopting a resolution of intent to annex. On the same date, the Village approved its Annexation Services Plan ("the original report"), which it was required to prepare pursuant to N.C. Gen. Stat. § 160A-35 (2007). The original report stated, *inter alia*, that the Village would provide the annexed properties with police protection, waste collection services, use of recreational facilities, and street maintenance. It also contained metes and bounds descriptions for the proposed annexation

areas and a map indicating the Village's then-existing boundaries and the proposed annexation areas. On 24 August 2005, the Village displayed the original report and a list of affected property owners.[1] N.C. Gen. Stat. § 160A-37(c) (2007). On 11 October 2005, it conducted a public informational meeting, and on 15 November 2005, it held a public hearing. On 20 December 2005, the Village adopted four ordinances which annexed property from four of the five areas included in the original report. Ordinance 122005A annexed Area 05-A, Ordinance 122005B annexed Area 05-C, Ordinance 122005C annexed Area 05-D, and Ordinance 122005D annexed Area 05-E.

Petitioners own real estate in the annexed areas and include: (1) Bettie Norwood, Melissa Y. Norwood, and the Norwood Family Limited Partnership (hereinafter collectively referred to as "the Norwood family") (Area 05-A); (2) Sugar View Real Estate Investors (Area 05-C); (3) Manning and Martha Gambrell (Area 05-D); (4) Donnie A. and Cathy S. Iverson (Area 05-D); and (5) Kathleen Bunnells (Area 05-E). On 1 February 2006, petitioners filed a Petition for Review of the Annexation Ordinances. After a hearing in superior court, the court entered a judgment holding, *inter alia*, that the proposed annexation ordinances were unlawful, null, and void. The Village appeals.

II. Analysis

A trial court's

> review of an annexation ordinance is limited to deciding (1) whether the annexing municipality complied with the statutory procedures; (2) if not, whether the petitioners will suffer material injury as a result of any alleged procedural irregularities; and (3) whether the area to be annexed meets the applicable statutory requirements.

Hayes v. Town of Fairmont, 167 N.C. App. 522, 523-24, 605 S.E.2d 717, 718 (2004) (citing *In re Annexation Ordinance*, 278 N.C. 641, 647, 180 S.E.2d 851, 855 (1971); *Trask v. City of Wilmington*, 64 N.C. App. 17, 28, 306 S.E.2d 832, 838 (1983), *disc. review denied*, 310 N.C. 630, 315 S.E.2d 697 (1984); N.C. Gen. Stat. § 160A-38 (2003)), *disc. review denied*, 359 N.C. 410, 612 S.E.2d 320 (2005).

> [Where o]n its face the record of the annexation proceedings shows substantial compliance with every essential provision of

1. As discussed *infra*, petitioners Bettie Norwood, Melissa Y. Norwood, and the Norwood Family Limited Partnership were not included in this list.

> the applicable [annexation] statutes, . . . the burden is upon petitioners . . . to show by competent evidence that [the municipality] in fact failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights.

In re Annexation Ordinance, 278 N.C. at 647, 180 S.E.2d at 855-56 (citation omitted). Respondent argues that the record of the annexation proceedings demonstrates its substantial compliance with the essential statutory provisions and that petitioners did not meet their burden of showing via competent evidence either that respondent failed to meet the statutory requirements as a matter of fact or an irregularity in the proceedings which materially prejudiced petitioners' substantive rights. Consequently, respondent asserts the trial court erred in declaring the annexation ordinances unlawful, null, and void. " 'On appeal, the findings of fact made below are binding on this Court if supported by the evidence, even where there may be evidence to the contrary.' However, 'conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.' " *Briggs v. City of Asheville*, 159 N.C. App. 558, 560, 583 S.E.2d 733, 735 (citations omitted), *disc. review denied*, 357 N.C. 657, 589 S.E.2d 886 (2003).

At the outset, we note that many of the trial court's supposed findings of fact are actually conclusions of law. In distinguishing between findings of fact and conclusions of law, "[a]s a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). "[F]indings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal." *Harris v. Harris*, 51 N.C. App. 103, 107, 275 S.E.2d 273, 276 (citations omitted), *disc. review denied*, 303 N.C. 180, 280 S.E.2d 452 (1981); *see also Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946) ("[t]he label of fact put upon a conclusion of law will not defeat appellate review").

In addition, we note that the trial court's findings and conclusions as to the alleged statutory violations committed by respondent which led to the trial court's striking down of the these ordinances fall into two distinct categories: (1) those purported statutory violations that pertain to a specific petitioner's or petitioners' property, and (2) those that pertain to all of petitioners' respective properties. We address the former in section III and the latter in section IV below.

III. Violations Pertaining to Specific Properties

A. The Norwood Property: Area 05-A

[1] Petitioner, the Norwood family, owns a tract of land consisting of approximately eighteen acres. Respondent annexed a one-acre tract, which was being used for commercial purposes, from this larger tract as part of Area 05-A. Respondent argues that the trial court erred in its findings of fact and conclusions of law that respondent: (1) did not properly identify the Norwood tract in its original report in violation of N.C. Gen. Stat. § 160A-35, and (2) did not "use recorded property lines and streets as boundaries" "[i]n fixing [the] new municipal boundaries" as to the one-acre tract in violation of N.C. Gen. Stat. § 160A-36(d) (2007). We agree.

At trial, petitioners essentially argued that the one-acre Norwood tract was left out of the original report because neither the tract nor the Norwood family were clearly identified on the Village's list of properties and property owners who might be affected by the annexation. However, N.C. Gen. Stat. § 160A-35 does not require such a list to be included in the original report. N.C. Gen. Stat. § 160A-35. Further, we note that the affected property owners' list that the Norwood family describes is actually mandated by N.C. Gen. Stat. § 160A-37(c). Petitioners waived all arguments pertaining to N.C. Gen. Stat. § 160A-37 at trial and specifically conceded that petitioners had notice that the Norwood family property was being considered for annexation. As such, to the extent that petitioners' argument involves a purported violation of N.C. Gen. Stat. § 160A-37's procedural requirements, these matters are not properly before us.

With regard to identifying proposed areas for annexation, N.C. Gen. Stat. § 160A-35 simply mandates that as part of the original report, the annexing entity must include "[a] map or maps of the municipality and adjacent territory" showing "[t]he present and proposed boundaries of the municipality." N.C. Gen. Stat. § 160A-35(1)(a). In looking at the evidence presented at trial and the applicable law, we do not believe that competent evidence exists to support the trial court's finding that the original report did not include the one-acre tract in violation of N.C. Gen. Stat. § 160A-35.

The map prepared by the Village as part of its original report clearly included the Norwood Family's one-acre tract which was ultimately annexed. In fact, Melissa Y. Norwood ("Ms. Norwood") admitted that the Norwood family's property, including "the piece of property [the Norwood family was] complaining about in this

case," was clearly shown on both the 10 August and 23 August 2005 maps prepared by the Village, the latter of which was included in the original report.

Even assuming, *arguendo*, that the 23 August map included the larger eighteen-acre tract and did not specifically carve out and identify the one-acre tract, this is of no import under the applicable law so long as the one-acre tract which the Village annexed was clearly included in the highlighted area on the 23 August map. Our law is clear that an annexing municipality has the "authority to adopt an ordinance extending the corporate limits of the municipality to include all, or such part, of the area described in the notice of public hearing which meets the requirements of G.S. 160A-36 and which the [municipality] has concluded should be annexed." N.C. Gen. Stat. § 160A-37(e). In other words, while it would have been impermissible for the Village to annex property that it had not included in its original report, it was permitted to omit property described in its original report from the property it ultimately annexed, which is exactly what occurred here.

In sum, as the 23 August map was clearly sufficient to allow the Norwood family to ascertain the existing boundaries of the town, the proposed areas of annexation, and the inclusion of their property in Area 05-A, we hold the trial court erred in finding that the one-acre Norwood tract was not properly identified in the original report and incorrectly concluded as a matter of law that N.C. Gen. Stat. § 160A-35 was violated here.

[2] Next, we also agree with respondent that the trial court erred by finding and concluding that respondent did not use "recorded property lines [or] streets" in establishing the "new municipal boundaries" for the one-acre tract in violation of N.C. Gen. Stat. § 160A-36(d). N.C. Gen. Stat. § 160A-36(d) provides that "[i]n fixing new municipal boundaries, a municipal governing board shall use recorded property lines and streets as boundaries." N.C. Gen. Stat. § 160A-36(d). This provision was amended by the General Assembly in 1998, and this appears to be the first case in which our appellate courts have been called upon to address the meaning of the phrase "recorded property lines." 1998 N.C. Sess. Laws ch. 150, § 6.

At trial, petitioners argued that because the Village used a surveyed line that (1) was not created via a county-approved subdivision of land and (2) could be changed by the Norwood family at any time, to construct a portion of the one-acre tract's boundary description, said description violated N.C. Gen. Stat. § 160A-36(d). As indicated by

its findings of fact and conclusions of law, the trial court accepted this argument. In looking at the evidence presented at trial and the applicable law, we do not believe that competent evidence exists to support the trial court's findings.

N.C. Gen. Stat. § 160A-36(d) contains no express requirement that the property lines utilized by a municipality must be immutable or the result of a formal, county-approved subdivision of land in order to qualify as "recorded property lines." Here, the record evidence clearly shows that the Village did use property lines that had been recorded by the Norwood family. In setting the new boundary lines, the Village specifically utilized the property description contained in a deed which: (1) transferred the eighteen-acre tract to the Norwood Family Limited Partnership; (2) was recorded with the Avery County Registry on 24 August 2000; (3) references five tracts, including the tract at issue here, which is labeled as tract two; and (4) incorporates by reference a plat which the Norwood family recorded with the Avery County registry in May 2000. The tract at issue is also contained in this plat.

While it is true that on 12 June 2006 the Norwood family revised its plat and eliminated any references to the tract at issue here, the revision and recordation occurred well after the adoption of the annexation ordinance and was not available to the Village at the time of annexation. Hence, we believe that the Village's use and reliance on the then-existing recorded deed and plat, both of which were consistent with the actual description of the one-acre tract, complied with the mandates of N.C. Gen. Stat. § 160A-36(d).

Furthermore, the record demonstrates that the one-acre tract at issue is bounded by: (1) a street; (2) a tract of commercial property, which is not owned by the Norwood Family Limited Partnership nor any member of the Norwood family and was recorded via deed; (3) Ms. Norwood's residential property, which is not part of the larger eighteen-acre tract, has its own tax parcel number, and was recorded via a separate deed; (4) Ms. Norwood's mother's residential property, which also is not part of the larger eighteen-acre tract, has its own tax parcel number, and was recorded via a separate deed; and (5) a 0.993-acre tract of Norwood family property, which is part of the larger eighteen-acre tract, has the same tax parcel number, and had been voluntarily annexed by respondent in 1989. The 1989 ordinance annexing the 0.993-acre tract and the property description of the tract contained in said ordinance were recorded. The boundaries for the one-acre tract at issue were drawn from these bordering properties.

Clearly, the boundary lines derived from the street, the separately-owned commercial property, Ms. Norwood's residential property, and her mother's residential property meet the requirements of section 160A-36(d). While we believe that the line derived from the voluntarily annexed tract is also a "recorded property line" within the meaning and intent of the statute, even if one assumes, *arguendo*, that it is not, the record still clearly supports that the Village complied with the statute. Section 160A-36(d) mandates the use of recorded property lines and streets "[i]n fixing *new* municipal boundaries[.]" N.C. Gen. Stat. § 160A-36(d) (emphasis added). Here, the recorded line that the Village used from the voluntarily-annexed tract was already part of the pre-existing municipal boundary; as such, this line did not constitute a "new municipal boundar[y]" within the meaning of the statute. Accordingly, we hold the trial court erred in concluding that respondent violated N.C. Gen. Stat. § 160A-36(d).

B. The Bell Property: Area 05-D

[3] A 5.12-acre tract of land owned by Melvin T. Bell and Susan D. Bell ("the Bell property") was annexed by the Village as part of Area 05-D. Respondent contends that the trial court erred in its findings of fact and conclusions of law: (1) that respondent incorrectly classified the Bell tract for purposes of N.C. Gen. Stat. § 160A-36(c)(1)'s subdivision test and that petitioners' evidence and calculations demonstrate that Area 05-D fails said test; and (2) that the Iversons and the Gambrells suffered "material injury" based on the inclusion of the Bell property in Area 05-D. We agree.

In both its original and final annexation reports, the Village classified the 5.12-acre Bell tract as entirely commercial. At trial, the Village argued that the Bell property was properly treated as entirely commercial for purposes of calculating the subdivision test because (1) the Bell property had a commercial operation on it and (2) the undeveloped parts of the property could not be developed for any other purposes because they were too steep. Consequently, respondent argued that the subdivision test analysis that petitioners offered, which divided the property into separate tracts, was an improper application of the statute. In addition, respondents asserted that even if one assumed, *arguendo*, that its calculations for Area 05-D failed the subdivision test, the Iversons and Gambrells ultimately had no standing to assert the issue because the Bells did not appeal the annexation ordinance and the Iversons and Gambrells could not show "material injury" as required by N.C. Gen. Stat. § 160A-38. N.C. Gen. Stat. § 160A-38(a) (2007).

At trial, petitioners argued that the Bell tract should not have been counted as one commercial tract but rather as a 1.28-acre commercial tract and a 3.84-acre wooded tract. When calculated this way, petitioners claimed that Area 05-D failed the subdivision test because only 55.14% of the residential and vacant lots located there were three acres or less. In support of their argument, petitioners offered a survey plat of the Bell property prepared on 12 June 2006, a date subsequent to the time of annexation and incidentally the same date on which the Norwood family updated their plat.

The plat offered by petitioners divides the 5.12-acre Bell property into three tracts: (1) a 1.28-acre commercial tract; (2) a 0.47-acre wooded tract; and (3) a 3.36-acre wooded tract. The plat also contains a summary of the total acres and lists 3.84[2] acres as "woods" and 1.28 acres as "being used." Petitioners contended, as they do here, not only that the entire 5.12-acre Bell property should not have been counted as commercial, but that the 0.47 and 3.36-acre wooded tracts should be combined into one tract and classified as vacant for purposes of the subdivision test.

As evidenced by its findings of fact and conclusions of law, the trial court accepted petitioners' position. However, the findings do not contain any detail nor any supporting rationales as to why the trial court rejected respondent's methods and calculations and accepted petitioners' as accurate. After reviewing the evidence and the applicable law, we believe the lack of detail and reasoning in the trial court's findings indicates that these findings were made under a misapprehension of law. Consequently, we do not believe that competent evidence exists to support these findings and conclude that the trial court erred in concluding that respondent violated N.C. Gen. Stat. § 160A-36(c)(1).

N.C. Gen. Stat. § 160A-36(c) requires that the land proposed for annexation must be developed for "urban purposes" which the statute defines pursuant to a "use and subdivision test" as follows:

> Any area which is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, *and is subdivided into lots and tracts such that at least sixty percent (60%) of the total*

2. The correct calculation should be 3.83 acres.

> *acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts three acres or less in size.*

N.C. Gen. Stat. § 160A-36(c)(1) (emphasis added). The emphasized portion of the above statute contains the requirements for the subdivision test.

> The subdivision test is concerned with the degree of land subdivision in the annexation area. The city first determines the total acreage of the annexation area and then subtracts all property that is in any of the[] four urban uses: commercial, industrial, institutional, or governmental. . . . What is left is property that is either in residential use or that is in nonurban use (or, colloquially, is *vacant*). The subdivision test is applied to this remaining property.

3 David M. Lawrence, *Annexation Law in North Carolina* § 4.10 at 4-41 (2007). "[A]creage in use for [urban] purposes shall include acreage actually occupied by buildings or other man-made structures together with all areas that are reasonably necessary and appurtenant to such facilities for purposes of parking, storage, ingress and egress, utilities, buffering, and other ancillary services and facilities." N.C. Gen. Stat. § 160A-36(c); *see also Hayes v. Town of Fairmont*, 167 N.C. App. at 530, 605 S.E.2d at 722; *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 20, 356 S.E.2d 599, 604 (1987), *affirmed per curiam*, 321 N.C. 589, 364 S.E.2d 139 (1988).

> In determining degree of land subdivision for purposes of meeting the requirements of G.S. 160A-36, the municipality shall use methods calculated to provide reasonably accurate results. In determining whether the standards set forth in G.S. 160A-36 have been met on appeal to the superior court under G.S. 160A-38, the reviewing court shall accept the estimates of the municipality as provided in this section unless the actual total area or degree of subdivision falls below the standards in G.S. 160A-36[.]

N.C. Gen. Stat. § 160A-42 (2007). This Court has previously concluded that in general land estimates based on recorded plats, tax maps and deeds, aerial photographs, and personal observations of a land surveyor comply with N.C. Gen. Stat. § 160A-42. *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 20-21, 293 S.E.2d 240, 245 (citing N.C. Gen. Stat. § 160A-42(1) & (2)), *disc. review denied*, 306 N.C. 559; 294 S.E.2d 371 (1982). "The normal practice has been to subtract the

whole of each lot or tract that has been characterized as in one of the four urban uses, even if some part of the lot or tract is in fact undeveloped, as long as the developed acreage is a significant portion of the tract as a whole." 3 David M. Lawrence, *Annexation Law in North Carolina* § 4.10 at 4-43. This Court has concluded that the entire lot or tract may be subtracted unless the urban use is "insignificant as compared to non[urban] use[.]" *See Asheville Industries, Inc. v. City of Asheville*, 112 N.C. App. 713, 720-21, 436 S.E.2d 873, 877 (1993) (citing *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980)). Petitioners have the burden of showing the urban use is insignificant. *Id.* "When compliance with the statutory requirements is in doubt, the determination of whether an area is used for a purpose qualifying it for annexation will depend upon the particular circumstances." *Id.* at 720, 436 S.E.2d at 877 (citing *Lithium Corp. v. Bessemer City*, 261 N.C. 532, 135 S.E.2d 574 (1964)).

When the evidence is viewed in accordance with the above law and practice, we believe it demonstrates that respondent used "methods calculated to provide reasonably accurate results" to "determin[e] [the] degree of land subdivision for purposes of" N.C. Gen. Stat. § 160A-36. N.C. Gen. Stat. § 160A-42. Here, the company that respondent hired to construct its annexation reports noted that the reports and the subdivision test calculations were "[b]ased upon Avery County tax maps acquired July 13th, 2005" as well as actual observations of the properties made by a certified land surveyor. Neither the county tax map nor the deed divide the Bell property into separate tracts. In contrast, petitioners' argument that respondent erred in treating the whole Bell property as commercial was primarily based on a plat that did not exist at the time of annexation. While observation of the actual condition of the property did show that it had wooded parts which were too steep to be developed, this is not, by itself, sufficient to demonstrate that respondent did not use methods calculated to provide reasonably accurate results. In fact, given that: (1) the only actual use made of the Bell property is commercial; (2) those parts of the property that are wooded cannot be developed for any purposes other than to possibly serve the commercial facilities; and (3) the 3.36-acre wooded piece has no street frontage, it does appear reasonable to classify the entire property as commercial and to exclude the whole tract in calculating the subdivision test. *E.g.*, *Adams-Millis Corp. v. Kernersville*, 6 N.C. App. 78, 84, 169 S.E.2d 496, 500 (concluding that a municipality can consider a landlocked lot as part of the lot in front of it and group the two lots, (the land-

locked lot and the one providing it with access to a street), as a single lot), *cert. denied*, 275 N.C. 681, —— S.E.2d —— (1969). Here, access to the street from the 3.36-acre wooded parcel is provided by the 1.28-acre commercial parcel. Further, as a leading scholar on North Carolina annexation law has opined:

> A significant degree of land subdivision is one sign of urban development. Industrial, commercial, institutional, and governmental property is subtracted before applying the subdivision test because that sort of property is already developed in urban use, and any remnants of tracts in those uses are generally unavailable for further subdivision. Because of that unavailability, it makes little sense to demand that such remnants be part of the area in which significant subdivision is required.

3 David M. Lawrence, *Annexation Law in North Carolina* § 4.10 at 4-46. Here, both respondent and petitioners admitted that the wooded properties could not be developed for any other purpose. Consequently, it does appear that respondent's methods in calculating the Bell tract provided "reasonably accurate results."

Nevertheless, even if one accepts that portion of the trial court's finding that the wooded tracts should be treated as vacant, when considering the evidence and the applicable law, we do not see how the trial court could find, (especially with no supporting details or rationale), that the 0.47-acre and 3.36-acre wooded tracts should be combined into one tract for purposes of the subdivision test simply because the survey plat has a summary which lists 1.28 acres as "being used" and 3.83 acres as "woods." Here, the plat and photographs of the Bell property which are included in the record show that the 0.47-acre tract is bounded by the commercial tract, a paved road and paved parking, and a gravel drive. In addition, the 0.47-acre tract fronts Highway 184 and no part of this tract abuts the 3.36-acre wooded tract. Hence, even if we accept the portion of the trial court's finding which concludes that the wooded tracts should be treated as vacant, we do not believe that competent evidence exists to support the portion of the trial court's finding that the Bell property should be counted as a 1.28-acre commercial tract and a 3.84-acre vacant tract. Rather, we conclude that the competent evidence demonstrates that the 0.47 and the 3.36-acre wooded tracts should be counted as separate, vacant tracts. As respondent notes, when this approach is taken, Area 05-D does pass the subdivision test (60.63%). In sum, given that Area 05-D passes the subdivision test if the Bell property is counted

entirely as commercial or if the two wooded parcels are counted as separate, vacant tracts, we hold that the trial court erred in concluding that respondent violated N.C. Gen. Stat. § 160A-36(c).

In the alternative, even if one assumes, *arguendo*, that Area 05-D violates the subdivision test, we agree with respondent that the Iversons and the Gambrells cannot demonstrate "material injury" as required by section 160A-38. Here, the only property that petitioners challenged at trial involving Area 05-D was the Bell property. The Bells are not parties to this case, and the time for their appeal has expired. N.C. Gen. Stat. § 160A-38(a). While petitioners argue that respondent cannot raise this issue because respondent did not object to the trial court's findings of fact that petitioners have standing, the trial court's finding of fact that "[p]etitioners own property within each of the areas [to be] annexed" does not by itself support a conclusion that the Iversons and the Gambrells had standing to contest respondent's alleged violation of N.C. Gen. Stat. § 160A-36's subdivision test. In addition, the trial court's finding that "[p]etitioners have standing to bring this cause of action" is actually a conclusion of law, which is reviewable *de novo*.

[4] Here, the trial court declared ordinance 122005C, which annexed Area 05-D, null and void. However, N.C. Gen. Stat. § 160A-38(g)(4) provides that the trial court may "[d]eclare the ordinance null and void, if the court finds that the ordinance cannot be corrected by remand as provided in subdivisions (1), (2), or (3) of this subsection." Hence, pursuant to N.C. Gen. Stat. § 160A-38(g)(2), the trial court should have simply remanded the ordinance to the Village to amend the annexation boundaries so as to conform with N.C. Gen. Stat. § 160A-36, which the Village could achieve by simply removing the Bell property. In other words, even though the Iversons and Gambrells own properties in Area 05-D, regardless of whether the Bell property is included in Area 05-D, their properties can still be annexed. As such, we fail to see how they suffered any "material injury" due to the inclusion of the Bell property in Area 05-D.

C. The Bunnells Property: Area 05-E

[5] Next, respondent asserts that the trial court erred in its findings of fact and conclusions of law that its annexation of petitioner Bunnells' property was not consistent with the public policy of "sound urban development" articulated in N.C. Gen. Stat. § 160A-33 and "the purposes set forth in N.C.G.S. [§] 160A-36(b)." N.C. Gen. Stat. § 160A-33 (2007); *see also* N.C. Gen. Stat. § 160A-36(b). Rather,

respondent argues that the competent evidence here demonstrates that it substantially complied with both statutory provisions and that consequently, Area 05-E meets the statutory annexation requirements. We agree.

Ms. Bunnells' property, located near the intersection of Highways 105 and 184, is the only property in Area 05-E. Her property directly abuts a parcel of land that was voluntarily annexed by the Village on 9 May 1995 as well as a ten-foot strip of land running along Highway 184, which was also voluntarily annexed on 9 May 1995. Petitioners admit and the trial court found that respondent did meet the literal contiguity requirements of N.C. Gen. Stat. § 160A-36(b) and N.C. Gen. Stat. § 160A-41(1) in annexing Area 05-E. N.C. Gen. Stat. § 160A-36(b); N.C. Gen. Stat. § 160A-41(1) (2007).

It is true that this Court has rejected annexations where the municipality has complied with the literal statutory contiguity requirements. *See Amick v. Town of Stallings*, 95 N.C. App. 64, 382 S.E.2d 221 (1989), *disc. review improvidently allowed*, 326 N.C. 587, 391 S.E.2d 40 (1990); *see also Hughes v. Town of Oak Island*, 158 N.C. App. 175, 580 S.E.2d 704, *affirmed per curiam*, 357 N.C. 653, 588 S.E.2d 467 (2003). However, in both *Amick* and *Hughes*, the respective corridors or "shoestrings" at issue were created and annexed at the same time as the properties that the municipalities had targeted for annexation. In addition, in those cases, this Court concluded that the municipalities had created and manipulated the size of the shoestrings solely to meet the contiguity requirements with the goal of annexing noncontiguous properties located at the end of the respective shoestrings. *See Amick*, 95 N.C. App. at 71-72, 382 S.E.2d at 226; *Hughes*, 158 N.C. App. at 182-84, 580 S.E.2d at 709-10.

In contrast, here, the alleged "shoestring" was annexed more than ten years prior to the annexation of Ms. Bunnells' property. In addition, not only was Ms. Bunnells' property contiguous to the Village at the time of annexation, the vast majority of her property directly abuts the previously annexed larger tract and not the corridor. As such, there was no "gerrymandering" or manipulation of the corridor here so as to meet the contiguity requirements as occurred in *Amick* and *Hughes*. Finally, to the extent that petitioners' argument implicates judicial review of the previous 1995 annexations, we decline to address these issues as the validity of the 1995 annexations are not the proper subject of petitioners' appeal. *McKenzie v. City of High Point*, 61 N.C. App. 393, 401, 301 S.E.2d 129, 131, *disc. review denied*, 308 N.C. 544, 302 S.E.2d 885 (1983).

IV. Violations Pertaining to All Properties

A. Meaningful Municipal Services

[6] Respondent also argues that the trial court erred in finding and concluding that respondent violated N.C. Gen. Stat. §§ 160A-33 through -42 with regard to its plans to provide municipal services to the newly annexed areas. At the center of the trial court's findings and conclusions that respondent violated these statutory provisions is the idea that respondent will not provide petitioners with any meaningful benefits from the annexation. Because we determine the trial court was operating under a misapprehension of existing law in making these findings and conclusions, we conclude they are in error.

N.C. Gen. Stat. § 160A-35 "obligates the annexing municipality to extend existing public services to the annexed area . . . ." *Nolan v. Village of Marvin*, 360 N.C. 256, 257, 624 S.E.2d 305, 306 (2006). Prior to our Supreme Court's decision in *Village of Marvin*, our appellate courts consistently held that a municipality substantially complies with the annexation statutes so long as the "municipal services [are] extended to [the] newly annexed areas in a nondiscriminatory manner, meaning that annexed residents and property owners must receive substantially the same services that existing [municipal] residents and property owners receive." *Id.* (citing *Green v. Town of Valdese*, 306 N.C. 79, 87, 291 S.E.2d 630, 635 (1982) and N.C. Gen. Stat. § 160A-37(h) (2003)).

However, in *Village of Marvin*, our Supreme Court held that in addition to the nondiscrimination requirement, a "meaningful extension of public services to [the] annexed property" is required. *Village of Marvin*, 360 N.C. at 257, 624 S.E.2d at 306 (citing N.C. Gen. Stat. §§ 160A-33, -35). Specifically, the Court concluded: "We agree that services must be provided on a (qualitative) nondiscriminatory basis; however, we also conclude that N.C.G.S. § 160A-35(3) is grounded in a legislative expectation that the annexing municipality possesses meaningful (quantitative) services to extend to the annexed property." *Id.* at 260, 624 S.E.2d at 308. In reaching this conclusion, the Court reasoned that N.C. Gen. Stat. § 160A-35 and N.C. Gen. Stat. § 160A-33 should be read *in pari materia*, and the Court highlighted certain aspects of this State's public policy on annexation as codified in N.C. Gen. Stat. § 160A-33 in support:

> "(2) That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively

> used for residential, commercial, industrial, institutional and government purposes or in areas undergoing such development;
>
> (3) That municipal boundaries should be extended, in accordance with legislative standards applicable throughout the State, to include such areas and to provide the high quality of governmental services needed therein for the public health, safety and welfare; and
>
> . . .
>
> (5) That areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality in accordance with G.S. 160A-35(3)."

Id. at 261, 624 S.E.2d at 308 (quoting N.C. Gen. Stat. § 160A-33 (2003)) (emphasis omitted).

In holding that the Village of Marvin's annexation ordinance "d[id] not provide for [a] meaningful extension of municipal services" to the newly annexed properties, the Supreme Court emphasized that the only services that the Village planned to provide were "part-time administrative services, such as zoning and tax collection, [which] simply fill[ed] needs created by the annexation itself, without conferring significant benefits on the annexed property owners and residents." *Id.* at 262, 624 S.E.2d at 308-09. Further, the Court emphasized that the Village of Marvin was not going to provide any of the municipal services specifically listed in N.C. Gen. Stat. § 160A-35(3). *Id.* at 260, 624 S.E.2d at 308-09. In addition, the Court was careful to note that its "decision d[id] not require an annexing municipality to provide all categories of public services listed in N.C.G.S. § 160A-35(3)." *Id.* at 261-62, 624 S.E.2d at 308. Finally, the Court held that due to the Village's failure to "provide for meaningful extension of municipal services," the Village had "not substantially complied with the statutory procedures set forth in N.C.G.S. sections 160A-33 to 160A-42" and that the property owners would "suffer material injury, in the form of municipal taxes, if annexation proceeds." *Id.* at 262, 624 S.E.2d at 309.

In applying the above analysis in *Nolan v. Town of Weddington*, this Court emphasized that "[t]he annexation statutes indicate police protection is a service that furthers annexation policy; in fact, the statute expressly contemplates that one type of service an annexing town may extend to an annexed area is 'police protection[.]' " *Town*

of Weddington, 182 N.C. App. 486, 492, 642 S.E.2d 261, 265 (first alteration added; second alteration in original), *disc. review denied*, 361 N.C. 695, 652 S.E.2d 648 (2007). In contrast to *Village of Marvin*, the Court noted that the Town of Weddington planned to provide the newly annexed areas with "police protection, a service that promotes the health, safety, and welfare of residents within the annexed area." *Id.* Accordingly, the Court held that the provision of police protection was a meaningful benefit. *Id.*

In the instant case, the annexation ordinance would extend the same police protection, waste collection services, and recreation department facilities that are now provided within the Village. Both police protection and waste collection services are specifically listed as core municipal services by statute. N.C. Gen. Stat. § 160A-35(3). Quantitatively, these benefits exceed those approved by this Court as meaningful in *Town of Weddington*.

Petitioners argue, in part, that these benefits are not meaningful because of the quality of the services. For example, petitioners note that respondent's projections indicate that respondent will incur little to no additional expenses associated with extended police protection (such as the fact that respondent will not need to hire additional officers), and petitioners claim that they do not expect to take advantage of the provided police protection aside from a few emergency calls per year. As discussed *infra*, we conclude that these arguments are irrelevant, and the trial court's findings and conclusions to this effect are in error.

First, prior to our Supreme Court's decision in *Village of Marvin*, our law was clear that a municipality was not required to add employees or equipment in order to provide meaningful police protection. *See, e.g.*, *Bali Co. v. City of Kings Mountain*, 134 N.C. App. 277, 284, 517 S.E.2d 208, 212-13 (1999). Further, and more importantly, we do not believe that our Supreme Court intended to impose such a requirement in *Village of Marvin*. In *Village of Marvin*, our Supreme Court considered "whether the applicable annexation statutes require an annexing municipality to extend a threshold (*quantitative*) level of public services to the annexed territory." *Village of Marvin*, 360 N.C. at 257, 624 S.E.2d at 306 (emphasis added). The Court emphasized that municipal "services must be provided on a (*qualitative*) nondiscriminatory basis" and that "N.C.G.S. § 160A-35(3) is grounded in a legislative expectation that the annexing municipality possesses meaningful (*quantitative*) services to extend to the annexed property." *Id.* at 260, 624 S.E.2d at 308.

As such, we do not believe that *Village of Marvin* establishes that our review as to whether the extension of municipal services is meaningful should center on the quality of services provided; rather, the qualitative analysis is grounded in nondiscrimination, and our inquiry into what types of services are provided is quantitative, not qualitative. Hence, it is not the number of incidents that the police will be involved in that concerns this Court, but rather the category of service provided. Consequently, we conclude that respondent substantially complied with the statutory annexation requirements and hold that the trial court erred in determining that respondent will not provide meaningful municipal services to petitioners' properties.

B. Additional Violations

[7] Next, respondent argues that there is no competent evidence to support the trial court's findings of fact that respondent violated the public policies articulated in N.C. Gen. Stat. § 160A-33 through N.C. Gen. Stat. § 160A-42 with regard to three other purported violations. Here, the trial court's findings of fact and conclusions of law center on: (1) respondent's decision "to only annex commercial properties and not to annex similarly situated residential properties"; (2) the "creation of . . . an unincorporated island within the [new corporate limits]; and (3) a conflict of interest regarding council member Jochl's position on the Village Council and his status as president and one-third owner of the local ski resort.

In actuality, the trial court's findings and conclusions regarding these three purported violations are not firmly based on a specific statutory violation, but rather are grounded in the trial court's belief that respondent's decision to annex these properties was a product of the Village's desire to "restrict the number of new voters brought into the Village by the annexations . . . [a] motivation [which] is contrary to the public policies set forth in N.C.G.S. 160A-33." With regard to each purported violation, i.e., the commercial-residential issue, the unincorporated island issue, and the conflict of interest issue, the trial court does not truly explain or examine how the challenged annexation violates the policies contained in the statutes, and unlike with the provision of municipal services discussed *supra*, we have found no case law supporting such conclusions. Furthermore, to the extent that all of these issues implicate bad faith or improper motivations to members of the Village Council, including Mr. Jochl, inquiry into such questions is improper not only for this Court but for the superior court as well. *See Allred v. City of Raleigh*, 7 N.C. App. 602, 613, 173 S.E.2d 533, 540 (1970), *reversed on other grounds*,

277 N.C. 530, 178 S.E.2d 432 (1971). Furthermore, petitioners did not present competent and substantial evidence to overcome the presumption of fairness, impartiality, and good faith with which public officials are cloaked as is petitioners' burden. *In re Annexation Ordinance*, 284 N.C. 442, 452, 202 S.E.2d 143, 149 (1974). As such, we conclude that the trial court's findings of fact and conclusions of law regarding these purported policy violations are error.

V. Conclusion

After careful review, we conclude that the record demonstrates that respondent substantially complied with the essential statutory provisions in annexing petitioners' property and that petitioners failed to produce competent evidence demonstrating that respondent failed to meet the statutory requirements as a matter of fact or that an irregularity in the proceedings existed which materially prejudiced petitioners' substantive rights. Consequently, we reverse and remand the trial court's judgment striking the Norwood family's one-acre tract from Area 05-A and declaring ordinances 122005A, 122005C, 122005D, and 122005E unlawful, null, and void and instruct the trial court to declare the ordinances valid.

Reversed and remanded.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. JASON JEREMIAH CHAPPELLE

No. COA07-1312

(Filed 21 October 2008)

1. Evidence— prior crimes or bad acts—argument—motive—calling defendant a thief

The trial court did not abuse its discretion in a first-degree arson case by admitting the victim's testimony regarding an argument she had with defendant on the day preceding the arson during which she refused to agree to allow defendant to store stolen goods in her home, or by admitting the victims' reference to defendant as a "thief," because: (1) the testimony was admissible under N.C.G.S. § 8C-1, Rule 404(b) since the nature of defendant's

argument with the victim, and her reaction to that argument, tended to show that he had a motive to set fire to her residence and was relevant to the State's theory of the case; (2) in one instance when the victim said she did not know that defendant was a thief in response to defendant's question as to their friendship, the victim was clarifying her reasons for refusing defendant entry to her home; and (3) on two other occasions defendant did not object to the victim's testimony that he was a thief, and in both instances the victim's testimony was admissible as corroborative of her earlier testimony regarding the argument and her reasons for telling defendant to leave.

2. Evidence— planned robbery—corroboration

The trial court did not err or commit plain error in a first-degree arson case by allowing the State to examine two witnesses regarding a planned robbery because: (1) the testimony was admissible as corroborative of the victim's testimony; (2) the State's question to defendant's brother as to whether defendant had discussed a planned robbery was proper in light of the victim's testimony; and (3) even assuming arguendo that the question was improper, defendant cannot show prejudice where the witness's answer was not harmful to defendant.

3. Arson— first-degree—identity of perpetrator—sufficiency of evidence

The trial court did not err in a first-degree arson case by concluding the State provided sufficient evidence to establish defendant's identity as the perpetrator of the arson because there was substantial circumstantial evidence from which a jury could reasonably find that defendant was the perpetrator of the arson, and although defendant's evidence contradicted the State's evidence, any such conflicts were for the jury to resolve.

4. Criminal Law— prosecutor's argument—criminal plan—knife and lighter found on defendant

The trial court did not err in a first-degree arson case by failing to intervene ex mero motu during certain portions of the State's closing argument because: (1) the victim testified to an argument in which she refused to allow defendant to include her in a criminal enterprise, and the State's argument merely alluded to that plan; and (2) the evidence showed that the fire was started with pieces of cardboard, and thus it was not improper for the State to argue that the knife and lighter found on defendant on

the morning of his detention were used to cut up cardboard and to start the fire.

5. Criminal Law— prosecutor's argument—character propensity inference—remarks made in passing—general deterrence arguments—other crimes evidence—characterization of defendant as impulsive dangerous criminal

The trial court did not err in a first-degree arson case by failing to intervene ex mero motu during certain portions of the State's closing argument that defendant characterizes as extremely inflammatory, allegedly called for a character propensity inference, and made it virtually certain that the jury relied on the other crimes evidence to return a guilty verdict because: (1) although the State needlessly digressed when it speculated that defendant was casing out a robbery victim when these remarks were gratuitous and served no useful purpose, there was evidence that defendant planned a robbery and that he disappeared at a time close to the fire; (2) even assuming arguendo that the remarks were improper, they were made in passing and were not a major focus of the State's closing argument, and thus defendant cannot demonstrate prejudice that would have resulted in a different result at trial; (3) in regard to defendant's general deterrence argument, he failed to cite any supporting authority and thus this argument is deemed abandoned under N.C. R. App. P. 28(b)(6); (4) the portions of the prosecutor's argument which defendant complains of were not general deterrence arguments, but specific deterrence arguments aimed at defendant himself; (5) the admission of the other crimes evidence was without error and the State's argument did not travel outside the record; (6) defendant's evidence did not tend to show his innocence, and the State presented substantial incriminating circumstantial evidence of defendant's guilt; and (7) it cannot be said that the prosecutor's characterization of defendant as an impulsive dangerous criminal lacked evidence when the State presented evidence that defendant set fire to an occupied trailer in the middle of the night out of anger and frustration that the occupant would not permit his entry.

6. Constitutional Law— effective assistance of counsel—failure to preserve arguments

Defendant did not receive ineffective assistance of counsel in a first-degree arson case based on his counsel's failure to preserve certain of his N.C.G.S. § 8C-1, Rule 404(b) arguments be-

cause: (1) defendant has not shown that the admission of a witness's testimony or that the State's purported use of the other crimes evidence, including its closing arguments, was error; and (2) without showing error, defendant cannot prevail on this claim.

7. Constitutional Law— right to counsel—right to self-representation—knowing and voluntary waiver of counsel

Defendant is not entitled to a new trial in a first-degree arson case even though he contends he was forced to make an unlawful choice concerning discharge of counsel and proceeding pro se and his waiver of counsel was allegedly unknowing because: (1) defendant requested to discharge his counsel after both sides rested on the second day of trial, he executed a waiver of counsel in which he relinquished his Sixth Amendment right to counsel, the court then appointed the public defender to remain as standby counsel and allowed defendant to reopen his case and to offer evidence, and defendant consulted with standby counsel throughout the remainder of trial; (2) defendant in the instant case chose between mutually exclusive constitutional rights, those rights being his right to counsel and his right to self-representation, and defendant's right to testify in his own defense was not implicated; (3) while defendant chose not to testify, he was afforded every opportunity to do so; (4) the trial court ex mero motu renewed defendant's motion to dismiss at the close of all evidence; (5) the record reflected that defendant thought he could stop the proceedings by moving to discharge counsel, and the trial court correctly determined that the trial decisions that resulted in impasse were mere trial tactics rather than critical matters requiring counsel to follow the client's wishes or be discharged from the matter; and (6) defendant's waiver of counsel was knowing and voluntary when the trial court made a full inquiry on the record, clearly articulated defendant's constitutional rights, and counseled defendant that it would be a terrible mistake to discharge his public defender, before allowing defendant to executive a written waiver of counsel.

8. Sentencing— stipulation to sentencing worksheet—ineffective to establish out-of-state convictions were substantially similar to North Carolina offense

Although defendant's stipulation to the State's sentencing worksheet was binding as to the existence of the prior convictions including the out-of state convictions, it was ineffective to establish that out-of-state convictions in the Commonwealth of

Virginia were substantially similar to a North Carolina offense as required by N.C.G.S. § 15A-140.14(e), and the trial court erred by failing to enter any findings in this regard. The State conceded that the prior driving while license revoked conviction was not within the statutory definition of a misdemeanor that may be counted for sentencing purposes, and on remand, that offense should be disregarded.

Appeal by defendant from judgment entered 12 January 2007 by Judge Thomas D. Haigwood in Pasquotank County Superior Court. Heard in the Court of Appeals 3 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

STEELMAN, Judge.

Where the State presented substantial evidence of each element of arson, the trial court did not err in denying defendant's motions to dismiss. Testimony that the victim of the arson refused to agree to allow defendant to store stolen goods in her home was relevant to show defendant's motive to burn the premises. The trial court did not err in allowing defendant to dismiss counsel over tactical differences and represent himself after a thorough colloquy demonstrating that his waiver of his right to counsel was knowing and voluntary. The prosecutor's closing argument approached, but did not exceed, the bounds of propriety. Where defendant has not shown error, he cannot prevail on a claim of ineffective assistance of counsel. Defendant's stipulation as to his prior convictions is effective to establish the convictions but ineffective to establish that his out-of-state convictions are substantially similar to a North Carolina offense.

I. Factual and Procedural Background

Jason Jeremiah Chappelle ("defendant") was found guilty of one count of first-degree arson at the 7 January 2007 Criminal Session of Pasquotank County Superior Court. The State's evidence at trial tended to show that defendant was acquainted with Colleen Durant ("Durant"), the occupant of a mobile home that was singed by a late-night fire on 20 July 2006. Durant and her overnight guest, Leanne Martin ("Martin"), each testified to the events of that evening. De-

fendant repeatedly knocked on the doors and a window of Durant's home and attempted to persuade the two women to let him in. The women told him to go away but did not call police. Eventually they turned off the lights and went to bed. Defendant again called out to the women, then all became quiet. No one else came to Durant's home that evening. Shortly after the women retired to bed, Martin smelled smoke. When Durant opened the door, she saw smoke coming from beneath the mobile home. Durant and Martin called police and the fire department.

Deputy Sheriff Forbes responded to the call. He found the two women in the street and saw flames coming from the back of the mobile home. Ms. Durant told him that "she knew who did it" and, giving defendant's name, told police that defendant was wearing blue shorts and riding a red bicycle. Firefighter Nelson extinguished the fire and noticed pieces of cardboard in the area of the fire. Two arson experts ruled out accidental causes and concluded that an incendiary fire was started by an open flame. These experts testified to burned debris, including insulation, vinyl skirting, and cardboard. Durant testified that the trailer's vinyl skirting, previously intact, had been partially removed. Although there had been a pile of cardboard boxes sitting near the front door of the mobile home before defendant's evening visit, only one box remained.

Deputy Gregory and Deputy Wooten testified that they found defendant on the edge of a road in the trailer park within view of Durant's home. He was wearing a blue t-shirt and blue shorts. He was astride a red bicycle. Deputy Wooten took him into custody. A search produced a cigarette lighter from defendant's pocket and a six-inch knife from his waistband.

At the close of the State's evidence, defendant's motion to dismiss was denied. Defendant, through counsel, advised the court he would not be presenting any evidence, and court was adjourned for the day. The next morning, defendant dismissed his attorney, and the court permitted him to present evidence. Defendant's motion to dismiss at the close of all the evidence was denied.

At sentencing, the trial court found defendant to be a prior record Level IV for felony sentencing purposes based upon prior convictions in the State of North Carolina and the Commonwealth of Virginia. Defendant received an active sentence of 117 to 150 months.

Defendant appeals.

II. Analysis

A. Evidentiary Issues

In his first two arguments, defendant contends that he is entitled to a new trial because the trial court erroneously allowed Durant to testify to other crimes, then allowed the State to impermissibly question other witnesses regarding that testimony. We disagree.

Defendant asserts that the evidentiary exception allowing motive evidence is closely circumscribed, and evidence detailing the cause of an argument that distinctly references other crimes, as contrasted with evidence that a dispute simply existed, is inadmissible to show motive. We first review defendant's arguments regarding Durant's testimony.

1. Durant's Testimony

[1] At trial, the State sought to introduce evidence of an argument between defendant and the victim as proof of malice and defendant's motive to commit arson. At the conclusion of the *voir dire* hearing, defendant contended first that the substance of the argument was irrelevant and, second, that under Rule 403 of the North Carolina Rules of Evidence, the probative value of the evidence was outweighed by the likelihood of undue prejudice. The trial court first ruled that the proffered testimony was relevant for the limited purpose of proving motive. The trial court then ruled that the probative value of the evidence outweighed any prejudicial value, stating that "enough of it [would be allowed] to support [the State's] theory." Defendant did not make a continuing objection or request a limiting instruction.

The jury returned to the courtroom, and Durant was permitted to testify to an argument with defendant that occurred on the day preceding the arson, as follows:

> Q. [D]id [the defendant] say anything that concerned you . . . earlier in the day when he talked to you and you decided not to let him in any more[?]
>
> A. I didn't want to let him in any more.
>
> Q. And why was that?
>
> A. Because he wanted to rob a place on Main Street Extended and take money, diamonds, and guns, and he said the drug dealers would be interested in them and he wanted to store stuff at

my house and I said, no. And I refused to let him in my house because he wanted to rob this place, store the stuff at my place, and bring these bad people, you know, to my place.

. . .

Q. [D]id he make a telephone call from your house?

A. Yes, he did. . . . He made a telephone call from my house to somebody and was talking to them about robbing the place.

Q. And what did he want that person to do . . . ?

A. To help him rob the place.

On cross-examination, Durant referenced this testimony upon three occasions. First, she acknowledged that she had considered defendant a friend, then stated "But . . . I didn't realize and I didn't know that he was a thief either, you know." Defendant's objection was overruled. Second, Durant stated, without objection, that the day of the arson was "the day he talked about robbing the place." Finally, Durant twice referred to the defendant as "thief," whereupon the trial court admonished her to "just answer the question."

Defendant contends that this testimony went beyond the scope necessary to show that defendant and the victim had an argument and instead provided irrelevant and inflammatory "other crimes" evidence that tended only to prove that defendant was a "robber" or "thief" and was not admissible under Rule 404(b) of the North Carolina Rules of Evidence. He further asserts that, even if the testimony was admissible, any probative value was substantially outweighed by the dangers of unfair prejudice and misleading the jury and the testimony should have been excluded under Rule 403.

a. Rule 404(b)

Rule 404(b) is a rule of inclusion rather than a rule of exclusion. *See*, *e.g.*, *State v. Agee*, 326 N.C. 542, 549-50, 391 S.E.2d 171, 176 (1990). The rule permits evidence of defendant's prior bad acts when introduced for a proper purpose. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007) ("Evidence of other crimes, wrongs, or acts . . . may, however, be admissible for other purposes, such as proof of motive . . ."). The "acid test" under Rule 404 is still relevancy. *State v. Emery*, 91 N.C. App. 24, 33, 370 S.E.2d 456, 461 (1988) (citing *State v. McClain*, 240 N.C. 171, 177, 81 S.E.2d 364, 368 (1954)).

A defendant's motive to commit a crime is clearly of consequence to his guilt or innocence. In the instant case, the nature of defendant's

argument with Colleen Durant, and her reaction to that argument, tended to show that he had a motive to set fire to her residence and was relevant to the State's theory of the case. We hold that Rule 404(b) did not require its exclusion as evidence probative only of defendant's propensity to commit crimes.

b. Rule 403

The trial court enjoys broad discretion to admit or exclude evidence under Rule 403, and will be reversed "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310 (1999) (internal quotation marks and citations omitted); *see also State v. Chapman*, 359 N.C. 328, 348-49, 611 S.E.2d 794, 811 (2005) (discussing Rules 402 and 403 of the North Carolina Rules of Evidence and the meaning of unfair prejudice).

In the instant case, the trial court considered the nature of the evidence, the possibility of prejudice to the defense, and arguments from both parties before rendering a decision. Upon a thorough review of the record, we cannot say that the trial court's decision was either arbitrary or unsupported by reason. *Anderson* at 175, 513 S.E.2d at 310. We hold that the trial court did not abuse its discretion in admitting Colleen Durant's testimony regarding the subject of the argument between Durant and defendant during the day preceding the arson.

c. Testimony of Durant During Cross-Examination

During defendant's cross-examination of Durant, she referred to defendant as a "thief" and to the day preceding the arson as "the day that he talked about robbing the place." Defendant objected to one statement but not the others. Where defendant preserved the issue by objection, the court's ruling is reviewed for an abuse of discretion. *Chapman*, 359 N.C. at 348-49, 611 S.E.2d at 811. Where defendant failed to preserve the issue for appellate review, this Court reviews the record for plain error. *Id.* at 349, 611 S.E.2d at 812.

We first consider the testimony to which defendant objected. In responding to defendant's question as to their "friendship," Durant stated "I didn't know that he was a thief[.]" Her response clarified her reasons for refusing defendant entry to her home. We hold that the trial court did not abuse its discretion when it overruled defendant's objection to this testimony. *Chapman*, 359 N.C. at 348-49, 611 S.E.2d at 811.

On two other occasions, defendant did not object to Durant's testimony but now complains that Durant's assertion that he was a "robber" or "thief" was plain error. A review of the record shows that Durant was sometimes emotional, her testimony was sometimes rambling, and the trial court occasionally admonished her to "just answer the question." The jury had the opportunity to hear the witness and observe her demeanor throughout her testimony.

In the first instance, defendant sought to establish from Durant the events of the day of the arson, and Durant stated "That was the day that he talked about robbing the place." In the second instance, defendant questioned Durant as to her interview with the fire inspector:

> Q. Do you recall telling him that you could tell that it was Mr. Chappelle because he spoke to you in a very low voice. Colleen, let me in. Let me in.
>
> A. He didn't speak in a low voice. He said, Colleen, let me in.
>
> Q. So if the inspector wrote down that you told him that he was—that you told him that Jason had talked to you in a low voice, Colleen let me in, let me in, that would be incorrect?
>
> A. If that's what I said then that's what happened. But I heard him say, Colleen, let me in, let me in. I did hear him say, Colleen, let me in.
>
> Q. In a low voice, is that right?
>
> A. I don't remember what kind of voice it was. But I did hear him say to let me in. And I wouldn't let him in. He is a thief. He's a thief.
>
> THE COURT: Ma'am, just answer the question.

Defendant did not object or move to strike Durant's response to his question, which, although emotional, was nonetheless admissible as corroborative of her earlier testimony regarding the argument she had with defendant that day. *State v. Riddle*, 316 N.C. 152, 156-57, 340 S.E.2d 75, 77-78 (1986) ("Corroboration is 'the process of persuading the trier of the facts that a witness is credible.' ") (quoting 1 Brandis on North Carolina Evidence § 49 (2d rev. ed. 1982)).

In both instances, Durant's testimony was admissible as corroborative of her earlier testimony regarding the argument and her

reasons for telling defendant to leave. *Riddle* at 156-157, 340 S.E.2d at 77-78. We hold that this was not error, much less plain error.

2. Other Witness Testimony

[2] Defendant argues that the State's examination of two other witnesses regarding the planned robbery was prejudicial to his defense. Because defendant failed to object at trial, we review for plain error. *Chapman*, 359 N.C. at 349, 611 S.E.2d at 812.

The State examined Martin, Durant's overnight guest, as to any conversation between Durant and defendant that she may have overheard. Martin responded that defendant wanted to store stolen property from a planned robbery and was unhappy when Durant told him to leave. We hold that this testimony was admissible as corroborative of Durant's testimony. *Riddle* at 156-57, 340 S.E.2d at 77-78. As discussed above, the subject of the argument was also admissible to show motive.

The State then asked defendant's brother, with whom he had previously resided, whether defendant had discussed any robbery plans with him. The brother responded that he had not. We hold that the State's question was proper in light of Durant's testimony. Even assuming *arguendo* that the question was improper, defendant cannot show prejudice where the witness' answer was not harmful to defendant.

We hold that, as to the testimony of these two witnesses, there was no error, much less plain error.

Defendant's evidentiary arguments are each without merit.

B. Motion to Dismiss

[3] In his third argument, defendant contends that the State's evidence was insufficient to establish his identity as the perpetrator of the arson. We disagree.

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)). The court must consider all "the evidence in the light most favorable to the State, giving the State the benefit of all

reasonable inferences." *Id.* (citation 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.' " *Id.*, 430 S.E.2d at 919 (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). The test of sufficiency "is the same whether the evidence is direct, circumstantial, or both." *Id.* (citing *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984)).

A review of the record shows that the evidence, when viewed in the light most favorable to the State, raised more than a suspicion or conjecture as to the defendant's identity as the perpetrator of the arson. Defendant had an argument with Durant earlier that day, and repeatedly knocked on the doors and windows of Durant's trailer, in a desperate attempt to gain access to the residence. Durant refused to let him in, and shortly thereafter, the fire started. Defendant was the only person in the vicinity of Durant's trailer that evening. As to the arson of Durant's home, there was circumstantial evidence that: (1) there were intact cardboard boxes outside Durant's residence when defendant arrived; (2) the fire was started with pieces of cardboard; (3) only one box remained when the investigators arrived; and (4) defendant was found in the area with a lighter and a six-inch knife which had foreign matter on the blade. Billy Hooten, a witness for the defendant, testified that defendant and his bicycle had disappeared shortly before the fire started. We hold that there was substantial circumstantial evidence from which a jury could reasonably find that defendant was the perpetrator of the arson. *Barnes*, 334 N.C. at 75, 430 S.E.2d at 918-19. Although defendant's evidence contradicted the State's evidence, any such conflicts were for the jury, not the trial judge, to resolve.

This argument is without merit.

C. The State's Closing Argument

In his fourth argument, defendant contends that the State's closing argument was improper and independent error because it urged the jury to improperly consider "other crimes" evidence as character evidence, included an improper "general deterrence" argument, and improperly suggested that acquittal might subject jurors to a risk of robbery by defendant. He further asserts that the State's characterization of him as an "impulsive dangerous criminal" was abusive name-calling. We disagree.

We note at the outset that defendant's brief fails to cite the appropriate standard of review for closing arguments and intertwines its

evidentiary arguments with those attacking the State's conduct during closing argument.

" 'Counsel are entitled to argue to the jury all the law and facts in evidence and all reasonable inferences that may be drawn therefrom, but may not place before the jury incompetent and prejudicial matters and may not travel outside the record by interjecting facts . . . not included in the evidence.' " *State v. Fletcher*, 354 N.C. 455, 486, 555 S.E.2d 534, 553 (2001) (alteration in original) (quoting *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993)). The standard of review for alleged errors in closing arguments "depends on whether there was a timely objection made or overruled, or whether no objection was made and defendant contends that the trial court should have intervened *ex mero motu*." *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003) (citation omitted). Where an objection was overruled, the trial court's ruling is reviewed for an abuse of discretion only where improper remarks were of a magnitude that their inclusion prejudiced defendant. *Compare Walters* at 105-06, 588 S.E.2d at 366 (concluding that the necessary showing of prejudice was not met even though the prosecutor's argument improperly compared defendant to Hitler in the context of being evil) *with State v. Jones*, 355 N.C. 117, 133-34, 558 S.E.2d 97, 107-08 (2002) (concluding that the trial court abused its discretion in allowing the prosecution's references to Columbine and Oklahoma City because their inclusion was both improper and prejudicial). Where no objection was made, this Court reviews the remarks for gross impropriety. *Walters* at 101, 588 S.E.2d at 364 (citing *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002)).

Statements made in closing arguments are not to be considered in isolation or out of context, but must be reviewed in the context in which they were made and the overall factual circumstances to which they referred. *State v. Cummings*, 353 N.C. 281, 297, 543 S.E.2d 849, 859 (2001) (quoting *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999) and *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)).

1. Asserted Errors Where There Was No Objection

[4] Defendant argues that the trial court erred in failing to intervene during the following portions of the State's closing argument:

> [Defendant] . . . needed a place to hide out. And the one person who he thought he could rely on to let him hide out had turned him out of their [sic] house. . . . she said he used to hang at my house, he was there. . . . I let him hang at my house up until that afternoon when he got on the telephone at my house and made a phone call asking some—talking about wanting to rob a house on West Main Street Extended and store the stuff at my house.
>
> . . .
>
> Once a fire is set, you can't control what it does. So that's why the law defines burning in the way that it defines it. . . . The fact is that this Defendant did not care about the consequences of his actions in his desperate attempt to find a place to stay and to store stolen property on the morning of July 20th when he took his knife, cut up the cardboard, walked to that end of the trailer, placed that cardboard up against that plastic pipe, took that lighter and set that cardboard on fire.

These arguments are reviewed for gross impropriety. *Walters*, 357 N.C. at 101, 588 S.E.2d at 364.

The State may argue the evidence and logical inferences that arise from the evidence. *Fletcher*, 354 N.C. at 486, 555 S.E.2d at 553. Colleen Durant testified to an argument in which she refused to allow defendant to include her in a criminal enterprise, and the State's argument merely alluded to that plan. Moreover, the evidence showed that the fire was started with pieces of cardboard. Thus, in the latter portion, it was not improper for the State to argue that the knife and lighter found on defendant on the morning of his detention were used to cut up cardboard and to start the fire. *Id.* We hold that the court did not err by not intervening *ex mero motu* with respect to these arguments.

2. Overruled Objections: *Fletcher*, *Tucker*, and *Brooks*

[5] Defendant further contends that portions of the prosecutor's argument were "extremely inflammatory," called for a character propensity inference, and made it "virtually certain" that the jury relied on the other crimes evidence to return a guilty verdict. As noted *supra*, before considering whether defendant was prejudiced or whether the trial court abused its discretion, we must first determine whether the prosecutor's remarks were improper. *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. Upon a determination of impropriety in

the prosecutor's argument, we then proceed to consider whether those remarks were prejudicial. *Id.*

In arguing that defendant had the opportunity to commit the crime, the prosecutor pointed out that defendant had no alibi at the time the fire was set and that defendant's own alibi witness, Billy Hooten, was unable to account for defendant's whereabouts at the time of the fire. She went on to say:

> Here he was at Hooten's house between 10:00 and 10:30 and where had he been by the way interestingly enough [sic] on some long bike ride around in the Forrest Park area. Where is that in relation to West Main Street Extended? Was he casing out his robbery victim—[OBJECTION. OVERRULED.]—on this long bike ride? So he had been on this long bike ride and now he's back at Mr. Hooten's house between 10:00 and 10:30 . . . when [Hooten] went in[to his house to fix defendant something to eat.] [Hooten] . . . comes out with the food some time a little before 11:00, . . . , and . . . Defendant has left and the bicycle is gone and he doesn't see him anymore.

The State also argued to the jury:

> . . . I ask you now to do your duty and follow the law and find this Defendant guilty of first degree arson.
>
> And in doing so, you achieve two [2] things. You achieve justice for Colleen Durant and she is no less deserving of that because of the way she chooses to live her life because justice is blind to a person's station in life and treats everybody equally.
>
> And the second thing is, you ensure this Defendant, I contend to you, this impulsive, dangerous criminal won't be on the streets of Pasquotank County to take advantage of somebody else like Colleen Durant or to rob anybody's house over on West Main Street Extended or anyone else for that matter. [OBJECTION. OVERRULED.] Or to set another person's house on fire in another moment of desperation that he may face in the future when he owes people money and the drug dealers are after him and he has no where [sic] to live . . . .

Relying on *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986) and *State v. Brooks*, 113 N.C. App. 451, 439 S.E.2d 234 (1994), defendant argues that the trial court erred in overruling his objections to these arguments in that: (1) the State's arguments improperly urged the jury

to use other crimes evidence for a forbidden purpose; (2) the State's characterization of defendant as an "impulsive dangerous criminal" was abusive name-calling; (3) the State's assertion that defendant might rob others improperly suggested that defendant would rob the jurors; and (4) the State's argument that defendant should be convicted so that he "won't be on the streets of Pasquotank County" was an improper general deterrence argument.

We first consider defendant's argument that the State's arguments improperly urged the jury to use other crimes evidence for a forbidden purpose. We agree that the State needlessly digressed when it speculated that defendant was casing out a robbery victim. These remarks were gratuitous and served no useful purpose. However, there was evidence that defendant planned a robbery and that he disappeared at a time close to the fire. While the argument was disingenuous, we hold that it was not improper. Even assuming *arguendo* that the remarks were improper, they were made in passing and were not a major focus of the State's closing argument. Thus defendant cannot demonstrate prejudice that would have resulted in a different result at trial. N.C. Gen. Stat. § 15A-1443(a) (2007); *see also State v. Campbell*, 133 N.C. App. 531, 539, 515 S.E.2d 732, 737 (1999).

As to defendant's general deterrence argument, he cites no supporting authority. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Richardson v. Maxim Healthcare/Allegis Grp.*, 188 N.C. App. 337, 345, 657 S.E.2d 34, 39 (2008) (alteration in original) (citation and internal quotations omitted). Pursuant to N.C. R. App. P. 28(b)(6), we deem this argument abandoned. Further, we find this argument to be without merit. The portions of the prosecutor's argument which defendant complains of were not general deterrence arguments, but specific deterrence arguments, aimed at the defendant himself. Such arguments are not improper. *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994); *Syriani*, 333 N.C. at 397, 428 S.E.2d at 144.

We now turn to defendant's remaining arguments. In *Brooks*, a panel of this Court awarded the defendant a new trial because the trial court improperly admitted irrelevant evidence of defendant's past physical violence towards his wife and allowed the State to argue that conduct to the jury. 113 N.C. App. at 458, 439 S.E.2d at 239. This Court held that these errors were prejudicial and deprived the defendant of a fair trial. *Id.* at 459. We hold that *Brooks* is inapposite. In the instant case, the admission of the other crimes evidence was

without error and the State's argument did not "travel outside the record." *Fletcher*, 354 N.C. at 486, 555 S.E.2d at 553; *see also State v. Wortham*, 287 N.C. 541, 546, 215 S.E.2d 131, 132 (1975) (affirming the Court of Appeals determination that there was no reversible error while noting that the "District Attorney was perilously near crossing the line from allowable denunciation into the forbidden territory of abuse which would have required reversal.").

In *Tucker*, evidence of past convictions was admitted solely to impeach defendant's credibility. 317 N.C. at 543, 346 S.E.2d at 423. The Supreme Court held that the prosecutor's use of this evidence in closing arguments was improper and prejudicial, and that it was reversible error for the trial court to permit the prosecutor to argue the convictions as substantive evidence of defendant's guilt. However, in determining prejudice, the *Tucker* Court noted that defendant's evidence tended to show his innocence:

> The conflict [between the State's evidence and defendant's evidence] should have been determined by the jury free from the state's argument which gave force to the evidence of defendant's prior convictions beyond that permitted by the law. In light of the sharp evidentiary conflict, we conclude there "is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at" trial.

Id. at 544-45, 346 S.E.2d at 424 (quoting N.C.G.S. § 15A-1443 (1983)); *cf. Walters* at 105, 588 S.E.2d at 364 (noting that, where there is overwhelming evidence of defendant's guilt, defendant must show not only that the prosecutor's remarks were improper, but that they "were of such magnitude that their inclusion prejudiced defendant."). This case is more like *Walters*, in that defendant's evidence did not tend to show his innocence, and the State presented substantial incriminating circumstantial evidence of defendant's guilt. We hold that *Tucker* is inapposite.

In the instant case, the prosecutor characterized defendant as an impulsive dangerous criminal. The State is afforded wide latitude in its jury arguments. *Syriani*, 333 N.C. at 398, 428 S.E.2d at 144. However, "[t]he district attorney should refrain from characterizations of defendant which are calculated to prejudice him in the eyes of the jury when there is no evidence from which such characterization may legitimately be inferred." *State v. Britt*, 288 N.C. 699, 712, 220 S.E.2d 283, 291 (1975). Here, the State presented evidence that defendant set fire to an occupied trailer in the middle of the night out

of anger and frustration that the occupant would not permit him entry. It is a reasonable inference that such an individual is impulsive, and that such desperate measures are dangerous. While the prosecutor's comments approached the limits of the wide latitude permitted for argument, we cannot say that the argument lacked evidence "from which such characterization may legitimately be inferred."

This argument is without merit.

D. Ineffective Assistance of Counsel

[6] In his fifth argument, defendant contends that counsel's failure to preserve certain of his Rule 404(b) arguments at trial constituted ineffective assistance of counsel. The burden of proving ineffective assistance of counsel requires defendant to satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Roache, 358 N.C. 243, 279, 595 S.E.2d 381, 405 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). In the instant case, defendant has not shown that the admission of Martin's testimony or that the State's purported use of the other crimes evidence, including its closing arguments, was error. Without showing error, defendant cannot prevail on a claim that he received ineffective assistance of counsel. *Id.*

This argument is without merit.

E. Waiver of Counsel

[7] In his sixth argument, defendant contends that he is entitled to a new trial because he was forced to make an unlawful choice concerning discharge of counsel and his waiver of counsel was unknowing. We disagree.

Defendant contends that, under *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), the trial court forced him to make an unlawful choice between legal representation by counsel who refused to fol-

low his wishes as to critical trial matters and proceeding *pro se*. He argues that, under *State v. Colson*, 186 N.C. App. 281, 650 S.E.2d 656 (2007), this error rendered his waiver unknowing and involuntary. This argument is unavailing.

Both the State and the defense rested at the close of the afternoon session on the second day of trial. The next morning, court was reconvened outside the presence of the jury to consider defendant's letter requesting to discharge his counsel and to offer evidence. These proceedings lasted well over an hour and involved dialogue among the court, defendant, and counsel. Upon detailed inquiry, the trial court concluded that the differences between defendant and his counsel were stylistic and tactical. Citing defendant's absolute constitutional right to self-representation, the court heard defendant's motion to discharge counsel. Defendant then executed a waiver of counsel in which he relinquished his Sixth Amendment right to counsel. The court then appointed the public defender to remain as standby counsel and allowed defendant to re-open his case and to offer evidence. Defendant called witnesses on his own behalf but did not testify himself and gave no indication that he wished to do so. The record reflects that defendant consulted with standby counsel throughout the remainder of trial.

1. *Colson* and Defendant's Constitutional Rights

In *Colson*, this Court granted a new trial to a defendant who was forced to choose between his constitutional right to counsel and his constitutional right to testify in his own defense. 186 N.C. App. at 284-85, 650 S.E.2d at 658 (referring to defendant's dilemma as a "Hobson's choice, . . . involving the relinquishment of one constitutional right in order to assert another") (citing *State v. Luker*, 65 N.C. App. 644, 652, 310 S.E.2d 63, 67 (1983), *rev'd on other grounds*, 311 N.C. 301, 316 S.E.2d 309 (1984) and *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)). The facts in the instant matter are distinguishable from *Colson*. The defendant in *Colson* was forced to choose between his right to counsel and the right to testify in his own defense. Defendant in the instant case chose between mutually exclusive constitutional rights: his right to counsel and his right to self-representation. Defendant's right to testify in his own defense was not implicated. While defendant chose not to testify, he was afforded every opportunity to do so. The trial court allowed defendant to re-open his case and present evidence, provided defendant with the assistance of standby counsel, and *ex mero motu*

renewed defendant's motion to dismiss at the close of all the evidence. Defendant's reliance on *Colson* is misplaced.

2. Defendant's Waiver of His Right to Counsel

We now turn to defendant's claim that his waiver was unknowing and not voluntary.

> Like the decision regarding how to plead, the decision whether to testify is a substantial right belonging to the defendant. *While strategic decisions regarding witnesses to call, whether and how to conduct cross-examinations, . . . and what trial motions to make are ultimately the province of the lawyer*, certain other decisions represent more than mere trial tactics and are for the defendant. These decisions include what plea to enter, whether to waive a jury trial and whether to testify in one's own defense.

Luker, 65 N.C. App. at 649, 310 S.E.2d at 66 (emphasis added) (citing ABA Standards For Criminal Justice, the Defense Function, § 4-5.2 (1982 Supp.); *Wainwright v. Sykes*, 433 U.S. 72, 91, 97 S. Ct. 2497, 2509, 53 L. Ed. 2d 594, 611 (1977), (Burger, C.J., concurring)), *rev'd on other grounds*, 311 N.C. 301, 316 S.E.2d 309 (1984). The record clearly reflects that defendant thought that he could stop the proceedings by moving to discharge counsel. The trial court correctly determined that the trial decisions that resulted in impasse were "mere trial tactics" rather than "critical matters" requiring counsel to follow the client's wishes or be discharged from the matter. Our review shows that the trial court made a full inquiry on the record, clearly articulated defendant's constitutional rights, and counseled defendant that it would be "a terrible mistake" to discharge his public defender, before allowing defendant to execute a written waiver of counsel. On this record, we hold that defendant's waiver of counsel was knowing and voluntary.

We also hold that defendant's contention that he effectively moved for mistrial is unsupported by the record.

This argument is without merit.

F. Prior Convictions at Sentencing

[8] In his final two arguments, defendant contends that the State's evidence was insufficient to prove prior convictions and substantial similarity of offenses in the Commonwealth of Virginia. We agree in part and disagree in part.

Defendant stipulated in writing to the information set forth in the sentencing worksheet prepared by the State. During the sentencing hearing, he orally affirmed this stipulation to the trial court. The trial judge found that the defendant had twelve prior record points and sentenced him at a prior felony record level IV. However, the court did not make a finding that the Virginia offenses were substantially similar to the North Carolina offenses as classified by the State in the worksheet.

Prior panels of this Court have determined that a stipulation regarding out-of-state convictions is insufficient, absent a determination of substantial similarity by the trial court, to support the trial court's prior record determination. *State v. Palmateer*, 179 N.C. App. 579, 581-82, 634 S.E.2d 592, 593-94 (2006); *see also State v. Hanton*, 175 N.C. App. 250, 253-55, 623 S.E.2d 600, 602-04 (2006). We are bound by our prior holdings on this issue. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989).

While the stipulation by defendant is binding as to the existence of the prior convictions (including the out-of-state convictions), it is not binding as to the substantial similarity of the out-of-state offenses under N.C. Gen. Stat. § 15A-140.14(e). The State concedes that the prior driving while license revoked conviction is not within the statutory definition of a misdemeanor that may be counted for sentencing purposes, and on remand, that offense should be disregarded.

III. Conclusion

Defendant received a trial free from error. However, defendant's stipulation to the State's sentencing worksheet was ineffective to establish that out-of-state convictions are substantially similar to a North Carolina offense, and the trial court erred in failing to enter any findings in this regard. We thus remand this matter for a new sentencing hearing.

We deem abandoned those assignments of error not addressed in defendant-appellant's brief. N.C. R. App. P. 28(b)(6).

NO ERROR AS TO TRIAL.

REMANDED FOR RE-SENTENCING.

Judges McCULLOUGH and ARROWOOD concur.

MARSHA A. EARLY, PETITIONER v. COUNTY OF DURHAM, DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. COA08-96

(Filed 21 October 2008)

1. Appeal and Error— appealability—attorney fees—final order—mootness

Petitioner's two motions to dismiss DSS's appeal from the trial court's orders granting attorney fees in a wrongful termination case are denied because: (1) DSS's appeal is not interlocutory when the Court of Appeals decision will be the final disposition in this matter given the facts that DSS entered a notice of appeal and response to petitioner's motions to dismiss before the issue of back pay had been decided by the State Personnel Commission, and the ALJ awarded petitioner $154,101.03 in back pay that has already been paid; and (2) in regard to petitioner's motion to dismiss the appeal as moot, the appeal is not moot when DSS's appeal addresses the amount and appropriateness of attorney fees which was the relevant issue on appeal in *Early I*.

2. Public Officers and Employees— wrongful termination—appropriate standard of review—automatic remand not required when same result achieved

Although the Court of Appeals was unable to determine in a wrongful termination case against a county DSS whether the superior court applied the correct standard of review in regard to the attorney fees issue when the wording in the record suggested it applied both de novo review and the whole record test, our Supreme Court has held that a superior court's erroneous application of the appropriate standard of review does not automatically necessitate remand. The order is affirmed because the superior court, reviewing the case de novo, should have found as it did that the State Personnel Commission's (SPC) conclusions of law were sufficient to entitle petitioner to attorney fees for the administrative portion of this case and thus it properly reversed DSS's rejection of the SPC recommendation.

3. Costs— attorney fees—sufficiency of findings

The trial court did not abuse its discretion in a wrongful termination case against a county DSS by awarding petitioner attorney fees under N.C.G.S. § 6-19.1 even though DSS contends there

were insufficient findings because: (1) an award of attorney fees under this statute requires findings that petitioner is the prevailing party, the agency acted without substantial justification, and there were no special circumstances making the award of attorney fees unjust; (2) there was no substantial justification for DSS's rejection of the SPC recommended order in light of DSS's misconstruction, in its final decision and brief, of both the SPC recommended order and the Court of Appeals' holding in *Early* I, as well as DSS's persistent opposition at every level of petitioner's attempted receipt of the attorney fees to which she was entitled; (3) although DSS contends the superior court erred by not including in its order a written list of specific findings supporting its assessment of attorney fees, DSS's brief cites no authority for this contention other than merely pointing to Rule 52; (4) the superior court's findings, along with its supplemental order, satisfied the procedure under N.C.G.S. § 6-19.1 given its consideration of the records, in addition to its findings as to time and labor expended, skill required, the customary fee for like work, and the experience or ability of petitioner's attorney; (5) while ordinarily the superior court does not have authority to award attorney fees incurred on appeal, here the superior court was not acting in its capacity as a trial court, but rather as an appellate court reviewing this case de novo; and (6) our Court of Appeals has held that a superior court, upon the Court of Appeals' remand of the issue of attorney fees, may award attorney fees incurred by a prevailing party on appeal under N.C.G.S. § 6-19.1, and the Court of Appeals has stated that a superior court has jurisdiction to interpret N.C.G.S. § 6-19.1 and award attorney fees before final disposition of the case when reviewing the agency action de novo.

Appeal by respondent from judgments entered 13 July 2007 and 27 August 2007 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 25 August 2008.

Office of the County Attorney, by Deputy County Attorney Lowell L. Siler, for respondent-appellant.

Patrice Walker for petitioner-appellee.

MARTIN, Chief Judge.

Respondent-appellant County of Durham Department of Social Services ("DSS") appeals from the 13 July 2007 and 27 August 2007

orders granting $17,982.50 in attorney fees to petitioner-appellee Marsha Early ("Early") as the prevailing party in the employment action underlying this case.

The history of this case is set out in *Early v. County of Durham Dep't of Soc. Servs.* (*Early I*), 172 N.C. App. 344, 616 S.E.2d 553 (2005). In pertinent part, that case addressed the termination of Early by DSS from her permanent position as a Child Support Agent on 14 December 2000. Early complied with DSS's internal grievance procedure, then on 19 February 2001 filed a motion for a contested case with the State Office of Administrative Hearings ("OAH"). At the initial hearing, an administrative law judge ("ALJ") made 73 findings of fact but recommended that DSS's decision to terminate Early be affirmed, ruling that Early was not protected by the "just cause" provisions of Chapter 126 of the North Carolina General Statutes because she was not a "permanent employee" of the state.

Upon Early's appeal of the ALJ's decision, the State Personnel Commission ("SPC") reversed and found that permanent county employees are protected by the "just cause" provisions of Chapter 126 and, as such, DSS lacked just cause to terminate Early. The SPC recommended that DSS reinstate Early with back pay and benefits and ordered, in the event of her reinstatement, that Early could petition for attorney fees, "which shall be awarded in any amount to be determined by the Commission upon receipt and consideration of a Petition for Attorney Fees and the required documentation."

DSS rejected the SPC recommendation, specifically rejecting the SPC's finding that there was no months-of-service prerequisite to appealing a termination under the State Personnel Act ("SPA") and, accordingly, the SPC's conclusion that OAH did not have subject matter jurisdiction to hear Early's claim. DSS affirmed its decision to terminate Early. On 29 May 2002, Early filed a petition for judicial review in Wake County Superior Court. On 11 July 2002, the superior court filed an order concluding that the reasons given by DSS for not adopting the entire recommendation of the SPC were without merit; that Early's discharge was not supported by substantial evidence; that her discharge was arbitrary, capricious, and an abuse of discretion; that DSS did not have just cause to terminate Early's employment; and that OAH had subject matter jurisdiction to hear Early's just cause claim. The court ordered DSS to reinstate Early, awarded back pay and benefits, and ordered that Early "may petition for attorney fees pursuant to N.C.G.S. 126-4(11) and 25 N.C.A.C. 1B.0414 and 1B.0438."

DSS appealed and the superior court's ruling was upheld by this Court on appeal. *See Early I* at 365, 616 S.E.2d at 557. Pertinent to the issues before us today, our ruling in *Early I* reaffirmed *McIntyre v. Forsyth County Dep't of Soc. Servs.*, 162 N.C. App. 94, 96-97, 589 S.E.2d 745, 747, *disc. review denied*, 358 N.C. 377, 598 S.E.2d 136 (2004), where this Court noted that N.C.G.S. § 6-19.1 authorizes a superior court to award attorney fees to the employee of a county Department of Social Services who has prevailed under the SPA. Although we indicated in *McIntyre* that fees were not available in SPA cases for services rendered prior to judicial review, *see id.* at 97, 589 S.E.2d at 747, N.C.G.S. § 6-19.1 has since been amended to permit such an award with respect to contested cases filed on or after 1 January 2001. *See* 2000 N.C. Sess. Laws ch. 190 §§ 1, 14. Thus, a trial court may award fees for representation during administrative proceedings. *See Early I* at 365, 616 S.E.2d at 567.

After initially granting discretionary review, the North Carolina Supreme Court concluded that review was improvidently allowed and dismissed DSS's appeal. *See Early v. County of Durham Dep't of Soc. Servs.*, 361 N.C. 113, 637 S.E.2d 539 (2006). On 11 January 2007, Early filed a motion with the Wake County Superior Court seeking attorney fees pursuant to N.C.G.S. § 126-4(11) and 25 N.C.A.C. 1B.0414 and 1B.0438, as well as N.C.G.S. § 6-19.1. Early's motion requested that the superior court order DSS to pay $21,898.26 to Early in fees for the period during which Early represented herself, and $16,232.60 to Early's attorney for fees incurred since her attorney was retained. On 29 January 2007, DSS reinstated Early and returned her to her former position.

On 5 February 2007, Early filed separate motions with the SPC for back pay, attorney fees, and an order requiring DSS to provide Early with documentation as to the amount of wages and benefits to which she would have been entitled had she not been wrongfully terminated. The SPC heard the motions on 16 February 2007. On 14 March 2007, DSS filed a response to Early's motion to compel back pay alleging that Early had failed to mitigate damages from 2003 to 2006, the period during which her initial claim of wrongful termination was being litigated and appealed. DSS's response also requested that the court refer the issue of back pay to OAH and the SPC. On 28 March 2007, the SPC entered an order recommending, pursuant to N.C.G.S. § 126-(4)(11) and 25 N.C.A.C.1B.0414 and .0438, that attorney fees be awarded to Early in the amount of $17,982.50. The SPC's order did not address the issue of back pay. On 30 May 2007, the SPC entered an

amended order, again recommending that DSS reimburse Early $17,982.50 in attorney fees. However, in its 22 June 2007 "final decision," DSS rejected the SPC's recommendation on the grounds that:

> It was error for the [SPC] to determine that [Early] is entitled to reimbursement of her attorney[] fees pursuant to N.C.G.S. § 126-4(11) and 25 N.C.A.C. 1B.0438 and .0414 [because] the North Carolina Court of Appeals decision . . . specifically . . . authorized the award of attorney fees pursuant to N.C.G.S. § 6-19.1 . . . [which] allows for an award of attorney fees in [SPC] cases only for services rendered on judicial review in superior court . . . not for services performed prior to judicial review . . . or proceedings in the appellate courts.

DSS's rejection of the SPC's recommendation further stated that:

> To obtain attorney fees for any representation before the [OAH] the fees would have to be awarded pursuant to [N.C.G.S.] § 126-4(11) and 25 N.C.A.C. 1B.0414 and 1B.0438.
>
> Attorney fees generated for representation before the North Carolina Court of Appeals or North Carolina Supreme Court would have to be awarded pursuant to North Carolina Appellate Rules of Procedure, Rule 34.

On 29 June 2007, Early filed a petition for judicial review of DSS's "final decision" alleging, among other things, that each of the determinations made in DSS's final decision, as discussed above, was affected by error of law. On 3 July 2007, Early filed a further petition for judicial review and motion in the cause requesting that the superior court remand the case to the SPC to determine the amount of back pay to which Early was entitled. Pursuant to N.C.G.S. § 150B-43, Early appealed DSS's rejection of the SPC's recommendation to the superior court. On 13 July 2007, the superior court held a hearing on Early's petition for judicial review. The court concluded as a matter of law that:

> 7. As a "prevailing party" in the judicial review of the administrative action, [Early] may be entitled to recover attorney fees pursuant to N.C.G.S. § 6-19.1.
>
> 8. The decision of the North Carolina Court of Appeals affirming Judge Hill's ruling on the attorney fees issue did not modify Judge Hill's order or otherwise change the nature of the relief granted

> [Early] on the attorney fees issue. N.C.[G.S.] § 6-19.1 is the statutory section that gives courts the discretionary power to award attorney fees in certain civil actions, while N.C.[G.S.] § 126-4(11) gives the [SPC] the authority to set policies and rules governing the assessment of attorney fees in cases in which the [SPC] has concluded that a claimant is entitled to reinstatement and/or back pay. These two statutes are not inconsistent or mutually exclusive as they apply to a court's power to award attorney fees under the facts of this case, and the ruling of the Court of Appeals did not change or otherwise obviate [Early]'s ability to seek attorney fees . . . . Furthermore, [Early] did not need Judge Hill's specifically set forth permission or approval to seek attorney's fees pursuant to N.C.[G.S.] § 6-19.1 or N.C.[G.S.] § 126-4(11).
>
> 9. Based on full consideration of the record, the court concludes that [DSS] acted without substantial justification in pressing its claim against [Early], and that there are no special circumstances in this case that would make an award of attorney fees unjust.
>
> 10. Based on the statutory provisions set forth above, the process of "judicial review" of an administrative decision necessarily includes both the superior court review of that proceeding and any additional appellate review of the decision of the superior court.
>
> . . . .
>
> 12. The court is to consider the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney in finding facts pursuant to an exercise of its discretion to award attorney fees to a prevailing party.

Accordingly, the superior court ordered:

> Based on the foregoing, [Early]'s third petition for judicial review is allowed. It is ordered that [DSS]'s final decision is reversed to the extent it denied [Early]'s motion for attorney fees for the services of Patrice Walker, Esq. It is hereby ordered that [Early] has thirty (30) [days] . . . to provide detailed records as to the number of hours expended . . . in pursuit of the judicial review po[r]tion of [Early]'s case . . . .

After Early submitted a clarification of the attorney fees exhibit, the superior court entered a supplemental order on 27 August 2007. In its order the court noted its consideration of the time and labor

expended, the skill required for this type of case, the customary fee for like work, and the experience or ability of the attorney in assessing attorney fees. Based on these considerations, the superior court concluded as a matter of law that the time expended, the different hourly rates set forth in the fee agreement, and the overall attorney fees were all reasonable and thus ordered that Early's attorney was "entitled to reasonable attorney fees in the amount of $22,876.00." The superior court referred the issue of back pay to the SPC. On 25 September 2007, DSS filed its notice of appeal.

[1] Initially we note that Early has filed two motions to dismiss DSS's appeal, arguing that the trial court's orders granting attorney fees were interlocutory and that, because our previous ruling in *Early I* confirmed the superior court's authority to award attorney's fees in this matter, DSS's current appeal is moot. We disagree.

> "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2005). "Interlocutory orders and judgments 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 to settle and determine the entire controversy.' Generally, there is no right of immediate appeal from interlocutory orders and judgments."

Ward v. Wake County Bd. of Educ., 166 N.C. App. 726, 728-29, 603 S.E.2d 896, 899 (2004) (quoting *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999)). In the case at bar, DSS entered a notice of appeal and responses to Early's motions to dismiss before the issue of back pay had been decided by the SPC. However, prior to the parties' oral argument before this Court, ALJ Melissa Owens Lassiter awarded Early $154,101.03 in back pay, and counsel for both parties indicated to this Court that the award has been paid. Thus our decision today will be the final disposition in this matter. As such, DSS's appeal is not interlocutory. Regarding Early's motion to dismiss this appeal as moot, we find that, because DSS's appeal in this case addresses the amount and appropriateness of attorney fees rather than the trial court's authority to award attorney fees which was the relevant issue on appeal in *Early I*, this appeal is not moot. Accordingly, we deny both motions to dismiss.

---

[2] On appeal, DSS argues (I) the trial court's orders awarding attorney fees pursuant to N.C.G.S. § 6-19.1 did not include the findings required under that statute, and (II) the superior court exceeded

its authority by awarding attorney fees pursuant to N.C.G.S. § 6-19.1 for legal services before this Court and the Supreme Court. As part of its first argument, DSS contends the superior court applied the incorrect standard in reviewing DSS's final decision. We will first address the proper standard of review and then the requirements of N.C.G.S. § 6-19.1.

When a superior court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court. *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002); *Avant v. Sandhills Ctr. for Mental Health, Developmental Disabilities & Substance Abuse Servs.* 132 N.C. App. 542, 545, 513 S.E.2d 79, 82 (1999). Judicial review of a final determination of the SPC is governed by N.C.G.S. § 150B-51(b) which provides in pertinent part:

> [I]n reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency . . . for further proceedings. It may also reverse or modify the agency's decision . . . if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> > (1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2007). Our Supreme Court has noted that grounds upon which the reviewing court may reverse or modify an agency's final decision may be categorized as either "law-based" or "fact-based." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004). The first four grounds listed in N.C.G.S. § 150B-51 may be characterized as law-based inquiries, while the final two grounds are characterized as fact-based inquiries. *Id.* In cases appealed from an administrative tribunal, questions of law receive *de novo* review, while questions of fact are reviewed under the "whole record test." *Id.* Thus, where a petitioner alleges that the agency's decision was affected by error of law, the reviewing court should engage in *de novo* review.

Under the *de novo* standard of review, the reviewing court should " 'consider the matter anew and freely substitute[] its own judgment for the agency's.' " *Id.* at 660, 599 S.E.2d at 895 (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). However, the *de novo* standard set forth by the Supreme Court in *Carroll* does not mandate that the reviewing court make new findings of fact in the case. Instead, the court, sitting in an appellate capacity, should generally defer to the administrative tribunal's "unchallenged superiority" to make findings of fact. *Carroll* at 662, 599 S.E.2d at 896 (citing *Salve Regina College v. Russell*, 499 U.S. 225, 233, 113 L. Ed. 2d 190, 199 (1991)).

Under the whole record test, however, the reviewing court "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter de novo." *Carroll* at 660, 599 S.E.2d at 895 (quoting *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)). Under this test a court must review all the evidence of record to determine whether the agency's findings have a "rational basis" in the record. *See In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979).

In the case at bar, the superior court did not make any new findings of fact during its review of DSS's final decision. However, the superior court's order repeatedly stated that it was "[b]ased on full consideration of the record." This wording suggests that the superior court applied both *de novo* review and the whole record test in reviewing DSS's final decision, leaving this Court unable to conclude that the superior court exercised the correct standard of review in regards to the attorney fees issue.

Our Supreme Court has held, however, that in cases where a superior court reviews an agency decision, the superior court's erroneous application of the appropriate standard of review does not automatically necessitate remand. *See, e.g.*, *Mann Media*, 356 N.C. at 15-16, 565 S.E.2d at 18-19 (declining to remand for proper application of the appropriate standard of review in the interests of judicial economy); *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 579-80, 281 S.E.2d 24, 28-29 (1981) (applying the appropriate provisions of N.C.G.S. § 150A-51 based on the nature of the errors alleged on appeal without considering the standards of review applied by the reviewing superior court and Court of Appeals). Because Early's petition for judicial review clearly alleged that DSS's determinations regarding attorney fees were affected by errors of law, this Court's obligation to

review for errors of law, *see* N.C.G.S. §§ 7A-27(b), 150B-52, "can be accomplished by addressing the dispositive issue(s) before the agency and the superior court" and determining how the reviewing superior court should have decided the case upon application of the appropriate standards of review. *Carroll* at 664-65, 599 S.E.2d at 898 (quoting *Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting), *rev'd*, 355 N.C. 269, 559 S.E.2d 547 (2002) (adopting the standard of review stated in dissenting opinion)).

Because Early's petition for judicial review of DSS's final decision alleged errors of law, the appropriate standard of review for the superior court under N.C.G.S. § 150B-51(b) should have been *de novo*. The dispositive issue in the appeal before the superior court was whether attorney fees could be awarded to Early by the SPC pursuant to N.C.G.S. § 126-4(11) and 25 N.C.A.C. 1B.0414 and .0438. We note here that DSS's final decision rejecting the SPC's recommendation misconstrued this issue. In its decision, DSS asserted that the SPC could not award legal fees pursuant to N.C.G.S. § 6-19.1 and that fees could be awarded in this case only by the superior court pursuant to N.C.G.S. § 6-19.1. However, our review of the record indicates the SPC's recommendation did not propose to award attorney fees under N.C.G.S. § 6-19.1. Instead, the SPC's recommended order cited N.C.G.S. § 126-4(11), 25 N.C.A.C. 1B.0414, and .0438 as authoritative. N.C.G.S. § 126-4(11) provides in pertinent part:

> Subject to the approval of the Governor, the State Personnel Commission shall establish policies and rules governing each of the following:
>
> . . . .
>
> (11) In cases where the Commission finds discrimination, harassment, or orders reinstatement or back pay whether (i) heard by the Commission or (ii) appealed for limited review after settlement or (iii) resolved at the agency level, the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved.

N.C. Gen. Stat. § 126-4(11) (2007). Pursuant to authority granted it by N.C.G.S. § 126-4(11), the SPC has promulgated 25 N.C.A.C. 1B.0414 and 25 N.C.A.C. 1B.0438. 25 N.C.A.C. 1B.0414 provides in pertinent part:

> Attorney's fees may be awarded by the State Personnel Commission only in the following situations:
>
> . . . .
>
> (5) the grievant is the prevailing party in a final appeal of a Commission decision;
>
> . . . .
>
> Attorney's fees may be awarded when any of the above situations occur, either within the agency internal grievance procedure, in an appeal to the State Personnel Commission, or in an appeal of a State Personnel Commission decision.

25 N.C. Admin. Code 1B.0414 (August 2008). 25 N.C.A.C. 1B.0438 provides that:

> The Commission shall award the reimbursement of legal fees and costs as follows:
>
> (1) Attorney fees incurred in connection with the contested case proceeding before the Commission and the General Courts of Justice at a reasonable hourly rate based on the prevailing market rate but at a rate no higher than the fee agreement between the parties;
>
> . . . .
>
> Fees shall not be awarded unless requested by an attorney or the Petitioner and documented by an itemized, per activity, accounting of the hours expended, in addition to a copy of the fee agreement between the parties and any relevant receipts or other documentation of prior payment.

25 N.C. Admin. Code 1B.0438 (August 2008). Under N.C.G.S. § 126-4(11), the SPC has discretionary authority to enter an award of attorney fees for services rendered up to the SPC's final decision. *See N.C. Dep't of Corr. v. Harding*, 120 N.C. App. 451, 454-55, 462 S.E.2d 671, 674 (1995), *aff'd per curiam*, 344 N.C. 625, 476 S.E.2d 105 (1996), *subsequent appeal on other grounds*, 140 N.C. App. 145, 535 S.E.2d 402 (2000). Although advisory decisions by the SPC are not binding on the local appointing authority in appeals involving local government employees, *see* N.C. Gen. Stat. § 126-37(b1) (2007), the SPC's determinations regarding its authority under N.C.G.S. § 126-4(11) are entitled to considerable weight. *See MacPherson v. Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973). The authority of the su-

perior court judge when reviewing actions of administrative agencies is limited to affirming, modifying, reversing or remanding the decision of the agency. *Faulkner v. N.C. State Hearing Aid Dealers & Fitters Bd.*, 38 N.C. App. 222, 226, 247 S.E.2d 668, 670 (1978).

As discussed in *Early I*, the SPC, in its initial hearing of the matter, found that Early was discharged without just cause and recommended reinstatement with back pay and benefits. Subsequently, Early prevailed in her appeal of the SPC decision. Thus, based on its review of the case history, the SPC correctly found on remand that it had jurisdiction to assess attorney fees for the administrative portion of this case against DSS pursuant to N.C.G.S. § 126-4(11) and award such fees pursuant to 25 N.C.A.C. 1B.0414.

In regards to the SPC's award of attorney fees for the judicial review portion of this case pursuant to 25 N.C.A.C. 1B.0438, we note that there is no direct precedent indicating that the SPC may award attorney fees incurred during an appeal before either this Court or our Supreme Court. The language of 25 N.C.A.C. 1B.0438 provides however that the SPC "shall award . . . [a]ttorney fees incurred in connection with the contested case proceeding before the [SPC] and the General Courts of Justice." 25 N.C. Admin. Code 1B.0438. Article IV Section 5 of the North Carolina Constitution provides that "[t]he Appellate Division of the General Court of Justice shall consist of the Supreme Court and the Court of Appeals." N.C. Const. art. IV, § 5 (amended 1970); *see also* N.C. Gen. Stat. § 7A-5 (2007). As such, the language of 25 N.C.A.C. 1B.0438 could reasonably be interpreted to give the SPC jurisdiction to award attorney fees for the administrative and appellate work of Early's attorney in this case. However, we need not address this narrow issue for two reasons. First, DSS has not raised the issue of the SPC's interpretation of 25 N.C.A.C. 1B.0438 on appeal. Second, the superior court's order simultaneously affirmed the SPC's recommended order for attorney fees under N.C.G.S. § 126-4(11) and awarded attorney fees pursuant to N.C.G.S. § 6-19.1. As the superior court judge noted, "[t]hese two statutes are not inconsistent or mutually exclusive as they apply to a court's power to award attorney fees under the facts of this case." Accordingly, the superior court, reviewing the case *de novo*, should have found the SPC's conclusions of law sufficient to entitle Early to attorney fees for the administrative portion of this case and thus reversed DSS's rejection of the SPC recommendation. Because the superior court arrived at this result, we affirm this portion of its order.

[3] We turn now to DSS's contention that the superior court's award of attorney fees under N.C.G.S. § 6-19.1 did not include the proper findings. DSS argues that the superior court should have "[found] facts specially and state[d] separately its conclusions of law thereon," pursuant to N.C.G.S. § 1A-1, Rule 52(a)(1) (2007). In the alternative, DSS contends that its rejection of the SPC decision was justified and therefore the superior court's order awarding fees under N.C.G.S. § 6-19.1 was error. We find no merit in either argument.

We will first address the issue of whether DSS rejected the SPC's recommendation without substantial justification. N.C.G.S. § 6-19.1 provides that:

> In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law, 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) (amended 2001). In order to award attorney fees under this statute a court must find that: (1) the petitioner is the prevailing party; (2) the agency acted without substantial justification; and (3) there were no special circumstances making the award of attorney fees unjust.

Upon its review of DSS's decision, the superior court's determination that DSS acted without "substantial justification" is a conclusion of law and is reviewable by this Court on appeal. *See Whiteco Indus. v. Harrelson*, 111 N.C. App. 815, 819, 434 S.E.2d 229, 232-33 (1993), *disc. review denied*, 335 N.C. 566, 441 S.E.2d 135 (1994). It is proper for this Court to consider the entire record in our determination of whether "substantial justification" existed. *Williams v. N.C. Dep't of Env't & Nat. Res.*, 166 N.C. App. 86, 89, 601 S.E.2d

231, 233 (2004), *review denied*, 359 N.C. 643, 614 S.E.2d 925 (2005). For purposes of our review, "[t]he trial court's findings of fact are binding on appeal if there is evidence to support them, even though evidence might sustain findings to the contrary." *Tay v. Flaherty*, 100 N.C. App. 51, 56, 394 S.E.2d 217, 220, *disc. review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990). In the context of N.C.G.S. § 6-19.1, substantial justification means "justified to a degree that could easily satisfy a reasonable person." *Crowell Constructors v. State ex rel. Cobey*, 342 N.C. 838, 844, 467 S.E.2d 675, 679 (1996). The burden to show substantial justification is on the state agency. *See Williams* at 90, 601 S.E.2d at 233. The agency must demonstrate that its position at and from the time of its initial action was rational and legitimate to such a degree that a reasonable person could find it satisfactory or justifiable in light of the circumstances then known to the agency. *See id.*

For purposes of determining "substantial justification" our review of the entire record includes our findings in *Early I*, as well as DSS's final decision rejecting the SPC recommendation. In light of DSS's misconstruction, in its final decision and brief, of both the SPC recommended order and our holding in *Early I*, as well as DSS's persistent opposition at every level to Early's attempted receipt of the attorney fees to which she was entitled, we conclude there was no substantial justification for DSS's rejection of the SPC recommended order. As such, under N.C.G.S. § 6-19.1 and our holding in *Early I*, the superior court's order awarding attorney fees for the judicial review portion of this case was appropriate in substance. We turn now to DSS's argument regarding the appropriateness of the order's form.

Under our past interpretations of N.C.G.S. § 6-19.1, the only findings required under N.C.G.S. § 6-19.1 are those listed in the statute and discussed *supra*, as well as such necessary 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). Here, DSS contends that the court erred by not including in its order a written list of specific findings supporting its assessment of attorney fees. Other than merely pointing to Rule 52, however, DSS's brief cites no authority for this contention. N.C.G.S. § 1A-1, Rule 1 provides in part that the Rules of Civil Procedure "shall govern the procedure in the superior and district courts . . . in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute*." N.C. Gen. Stat. § 1A-1, Rule 1 (2007) (empha-

sis added). N.C.G.S. § 6-19.1 prescribes the procedure to be followed for awarding attorney fees in a very specific setting. This procedure is to be followed by a court:

> In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to N.C.G.S. § 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State . . . .

Id. Rule 52(a)(1) of the North Carolina Rules of Civil Procedure, on the other hand, is a more general provision. This Court has held that Rule 52(a)(1) is inapplicable to a hearing on petition for attorney fees where an "action" was already in existence, requiring a petition for judicial review to be characterized as a motion for a court order pursuant to Rule 7(b)(1). *Tay* at 54-55, 394 S.E.2d at 219; *Carswell v. Hendersonville Country Club, Inc.*, 169 N.C. App. 227, 231, 609 S.E.2d 460, 463 (2005); *see also Markham v. Swails*, 29 N.C. App. 205, 208, 223 S.E.2d 920, 922 (1976), *review denied*, 290 N.C. 309, 225 S.E.2d 829 (1976).

Here, the superior court, in its order entered 13 July 2007, found that "based on a full consideration of the record, . . . [DSS] acted without substantial justification in pressing its claim against [Early] and that there are no special circumstances in this case that would make an award of attorney[] fees unjust." Furthermore, the superior court ordered that Early "provide detailed records as to the number or hours expended in the judicial portion" of the case. Only after consideration of these records, in addition to its findings as to time and labor expended, skill required, the customary fee for like work, and the experience or ability of Early's attorney did the superior court enter its supplemental order awarding attorney fees. In light of the facts presented in the record, we conclude that the superior court's findings, along with its supplemental order, satisfied the prescribed procedure of N.C.G.S. § 6-19.1.

Finally, DSS argues that the superior court exceeded its authority by awarding attorney fees pursuant to N.C.G.S. § 6-19.1 for legal services before this Court and our Supreme Court. DSS contends that a superior court does not have jurisdiction to award attorney fees for legal services provided in the appellate courts. However, this argument does not account for the procedural and factual context of this case and DSS has overstated the issue.

The purpose of N.C.G.S. 6-19.1 is to "curb unwarranted, ill-supported suits" asserted by the State. *Crowell Constructors* at 844, 467 S.E.2d at 679. While the statute does not require the agency to demonstrate the infallibility of each suit it initiates, *see id.*, N.C.G.S. 6-19.1 specifies that the award of attorney fees to the prevailing party under this statute is within the discretion of the reviewing judge upon his or her conclusion that certain criteria are present. *Tay* at 57, 394 S.E.2d at 220. Decisions within the discretion of the trial judge will be reviewed on appeal only upon a showing that the trial judge abused his discretion. *See id.* "An abuse of discretion occurs where the ruling of the trial court could not have been the result of a reasoned decision." *May v. City of Durham*, 136 N.C. App. 578, 582, 525 S.E.2d 223, 227 (2000).

While ordinarily the superior court does not have authority to award attorney fees incurred on appeal, here the superior court was not acting in its capacity as a trial court, but rather as an appellate court, reviewing this case *de novo*. The superior court acquired jurisdiction to award attorney fees when Early petitioned for review of the final agency decision pursuant to N.C.G.S. § 150B-43, but this action arose from our remand of the issue of attorney fees in *Early I*. We have narrowly held that a superior court, upon this Court's remand of the issue of attorney fees, may award attorney fees incurred by a prevailing party on appeal pursuant to N.C.G.S. 6-19.1. *Harding* at 455-56, 462 S.E.2d at 674. Furthermore, this Court has stated that a superior court has jurisdiction to interpret N.C.G.S. § 6-19.1 and "award attorney fees before final disposition of the case when reviewing the agency action *de novo*." *McIntyre* at 98, 589 S.E.2d at 748 (reciting the holding in *Able Outdoor v. Harrelson*, 341 N.C. 167, 170, 459 S.E.2d 626, 628 (1995)).

In the case at bar, the superior court's award of attorney fees pursuant to N.C.G.S. § 6-19.1 occurred before the issue of back pay had been resolved and thus before the final disposition of the case. Furthermore, the superior court was reviewing DSS's decision *de novo* and acting under authority specifically enunciated by this Court in *Early I*. Because sufficient evidence existed to support the superior court's findings that DSS acted without substantial justification and no special circumstances made the award of attorney fees unjust, as discussed *supra*, DSS has failed to show that the superior court abused its discretion in awarding attorney fees pursuant to N.C.G.S. § 6-19.1. Therefore, this assignment of error is without merit.

Affirmed.

Judges BRYANT and ELMORE concur.

MARIA D. MEZA, PETITIONER, v. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENTS

No. COA07-407

(Filed 21 October 2008)

Public Assistance— emergency Medicaid coverage—superior court review of agency decision—standard of review

The superior court applied the correct standard of review in a case involving the extent of Medicaid coverage for emergency mental health treatment for a nonqualified alien, and its judgment and order were affirmed. The matter is controlled by N.C.G.S. § 108-79(k) and *Chatmon v. N.C. Department of Health and Human Services*, 175 N.C. App. 85, not the APA, and the superior court sits as both a trial court and an appellate court. The superior court engages in independent fact finding to determine whether the DHHS decision is consistent with state and federal law, but the trial court may not rehear the case, make wholly new findings, or determine that grounds not relied on by DHHS would justify the decision. The standard of review was not the basis of the appeal and was not addressed in *Diaz v. Division of Social Services*, 360 N.C. 384, and *Chatmon* remains controlling.

Judge Steelman dissenting.

Appeal by respondents from judgment and order entered 26 January 2007 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 October 2007.

Ott Cone & Redpath, P.A., by Thomas E. Cone, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for respondents-appellants.

GEER, Judge.

Respondents, the North Carolina Department of Health and Human Services' Division of Social Services and Division of Medical Assistance (collectively "DHHS" or "the agency"), appeal from the superior court's decision reversing DHHS' final decisions regarding petitioner Maria D. Meza's entitlement to emergency Medicaid coverage as a non-qualified alien for two separate periods of medical treatment in the fall of 2004 and winter of 2005. On appeal, DHHS challenges the standard of review applied by the superior court. We hold, however, that the superior court properly applied N.C. Gen. Stat. § 108A-79(k) (2007), as construed by *Chatmon v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 85, 622 S.E.2d 684 (2005), *disc. review denied*, 360 N.C. 479 (2006), and, therefore, affirm the superior court's decision.

The facts in this case are essentially undisputed. Ms. Meza applied for Medicaid coverage through the Mecklenburg County Department of Social Services for her hospitalization for in-patient mental health treatment at the Behavioral Health Center, CMC-Randolph from 15 October 2004 to 29 October 2004. On 26 January 2005, the Division of Medical Assistance issued a notice of benefits awarding Medicaid coverage for the day of admission (15 October 2004), but denying coverage for the remainder of the hospitalization.

Ms. Meza was also admitted to the same facility a second time, from 17 January 2005 to 11 February 2005, for in-patient mental health care. On 13 May 2005, the Division of Medical Assistance issued its notice of benefits for this hospitalization, again awarding Medicaid coverage only for the day of admission.

On both occasions when Ms. Meza was admitted to the hospital, she was a "non-qualified alien," who could not receive Medicaid coverage unless her medical condition met the definition of an "emergency medical condition" under federal law. A "non-qualified alien" is "an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law." 42 U.S.C. § 1396b(v)(1) (2007). The applicable federal law, 42 U.S.C. § 1396b(v)(3), defines "the term 'emergency medical condition' [to] mean[] a medical condition . . . manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—(A) placing the patient's health in serious

jeopardy, (B) serious impairment to bodily functions, or (C) serious dysfunction of any bodily organ or part."

Ms. Meza appealed the Division's decisions denying her coverage, and on 14 July 2005, a DHHS hearing officer conducted a hearing on both determinations. On 26 August 2005, the hearing officer issued a separate decision as to each period of hospitalization.

With respect to the first hospitalization, the hearing officer found that upon admission, Ms. Meza was diagnosed as " 'acutely psychotic,' " with her husband reporting that she often wandered out of the house, forgot to change her clothes for several weeks at a time, threw food and clothing, and neglected her personal hygiene. The hearing officer further found that Ms. Meza's condition worsened to the extent that she was considered a danger to herself and forced medication was deemed necessary. According to the hearing officer, after 22 October 2004, Ms. Meza was no longer considered to be a danger to herself.

Based on these findings, the hearing officer concluded that from 15 October 2004 to 21 October 2004, Ms. Meza's medical condition required emergency medical services, and thus she was entitled to Medicaid coverage for that period. With respect to the period of 22 October 2004 to 29 October 2004, the hearing officer concluded that Ms. Meza's condition had stabilized to the extent that she was no longer a danger to herself, and, therefore, "the remaining treatment was to cure the underlying illness." As a result, the hearing officer reversed the Division's decision in part and awarded Ms. Meza Medicaid coverage for her treatment from 15 October 2004 through 21 October 2004, but not from 22 October 2004 through 29 October 2004.

With respect to Ms. Meza's second hospitalization, the hearing officer found that she had been diagnosed with schizophrenia and that she was withdrawn, isolated, and suspicious and had feelings of persecution. The hearing officer concluded that Ms. Meza's condition did not qualify as "emergent" under the federal definition because her condition had stabilized following the initial day of admission. Based on this determination, the hearing officer affirmed the Division's decision awarding Medicaid coverage for the date of admission, 17 January 2005, only.[1]

1. We note that the hearing officer's second conclusion of law in the second decision appears to be mistakenly taken from the first decision and is irrelevant to any review of the second decision.

The hearing officer's decisions constituted DHHS' final decisions. Pursuant to N.C. Gen. Stat. § 108A-79(k), Ms. Meza filed a petition for judicial review of the DHHS' decisions in Mecklenburg County Superior Court. Concluding that the case involved statutory interpretation and application of law to facts, the superior court reviewed DHHS' legal determinations de novo. The court concluded that DHHS had misinterpreted the controlling federal law and, consequently, had applied erroneous legal standards for determining whether the treatment Ms. Meza received was for a qualified medical emergency.

On review, the superior court found that at the time of each of Ms. Meza's hospital admissions:

> Ms. Meza was in a severe psychotic state of sudden onset resulting from decompensation of her long-standing underlying illness. Throughout each [of her admissions], she demonstrated severe symptoms of psychosis, loss of touch with reality, paranoia and suspiciousness, internal distractions including delusions and hallucinations, gross disorganization, and inability to attend to basic needs such as eating, bathing, and grooming. Throughout most of both admissions, she was unable to talk or communicate in any meaningful manner with staff or her peers, and her judgment and insight were very limited. She refused medication during both admissions, and forced medication orders were required during each.

The court determined that Ms. Meza's condition "placed her health in serious jeopardy and could reasonably have been expected to result in either placing [her] in serious jeopardy or serious impairment to bodily functions or serious dysfunction of a bodily organ or part." The court further found that Ms. Meza's treatment was "required and given to stabilize her condition" and that "her condition was not stabilized until her discharge."

Based on its findings, the superior court concluded: (1) "[Ms. Meza]'s medical condition at each admission was an emergency medical condition as defined in 42 U.S.C. § 1396(v)(3)," and (2) "[Ms. Meza]'s treatment throughout each admission constituted immediate, medically necessary, and appropriate treatment for [her] emergency medical condition." The superior court reversed DHHS' decisions and ordered the Division to provide Ms. Meza with Medicaid coverage for the entirety of both hospitalizations. DHHS timely appealed to this Court.

Discussion

DHHS has limited its appeal to three assignments of error: (1) that "[t]he trial court erred in its *de novo* review of the decision of the Respondent agency"; (2) that "[t]he trial court erred when, after a *de novo* review of the decision of the Respondent agency, it made new findings of fact and conclusions of law inconsistent with the agency's findings and conclusions"; and (3) that "[t]he trial court erred when, after a *de novo* review of the decision of Respondent agency, it made independent findings of fact and conclusions of law inconsistent with finding[s] and conclusions of the agency which had not been excepted to." Each of these assignments of error relates to the standard of review applicable to a superior court's review of DHHS decisions regarding Medicaid coverage for treatment.

The applicable standard of review is set forth in N.C. Gen. Stat. § 108A-79(k), which provides in pertinent part:

> Any applicant or recipient who is dissatisfied with the final decision of the Department [of Health and Human Services] may file . . . a petition for judicial review in superior court of the county from which the case arose. . . . The hearing shall be conducted according to the provisions of Article 4, Chapter 150B, of the North Carolina General Statutes. The court shall, on request, examine the evidence excluded at the hearing under G.S. 108A-79(e)(4) or G.S. 108A-79(i)(1) and if the evidence was improperly excluded, the court shall consider it. *Notwithstanding the foregoing provisions, the court may take testimony and examine into the facts of the case, including excluded evidence, to determine whether the final decision is in error under federal and State law, and under the rules and regulations of the Social Services Commission or the Department of Health and Human Services.* . . . Nothing in this subsection shall be construed to abrogate any rights that the county may have under Article 4 of Chapter 150B.

(Emphasis added.) In *Chatmon*, 175 N.C. App. at 90-91, 622 S.E.2d at 688-89, we specifically addressed the role of the superior court under § 108A-79(k).

This Court first noted the unusual posture of appeals under § 108-79(k): "[A]lthough a superior court is sitting in an appellate capacity when reviewing public assistance and social services decisions, the statute authorizes the superior court to engage in inde-

pendent fact-finding in order to determine whether the Department of Health and Human Services' final decision is consistent with state and federal law." *Id.* at 90, 622 S.E.2d at 688. As *Chatmon* explains, the task for the superior court under the statute is not to determine whether a DHHS decision "was warranted on any basis, but rather whether the [DHHS] decision, and the basis upon which it relied, was legally and factually justified." *Id.* "Accordingly, section 108A-79(k) requires the trial court to sit as both a trial and appellate court." *Id.* The Court then concluded:

> In order to give meaning to both functions, the trial court should be limited to determining whether the reason offered for the Department of Health and Human Services' decision . . . was factually and legally correct. Section 108A-79(k) should not be read to authorize the trial court to rehear the case, make wholly new factual findings, and determine that alternative grounds not relied upon by the Department of Health and Human Services would also justify the [decision].

Id. at 90-91, 622 S.E.2d at 688.

In this case, the superior court was required under § 108A-79(k) to determine whether the hearing officer's decisions regarding Ms. Meza's two hospitalizations were factually and legally correct. With respect to the first hospitalization, the officer determined that Ms. Meza's condition had stabilized as of 22 October 2004 and that, from that date on, "the absence of immediate medical attention would not be expected to result in placing [Ms. Meza]'s health in serious jeopardy, or serious impairment to bodily function or serious dysfunction to [any] bodily organ or part." Ms. Meza did not, according to the hearing officer, require emergency care, but rather "the remaining treatment was to cure the underlying illness." With respect to Ms. Meza's second hospitalization, the hearing officer determined: "From January 18, 2005, the absence of immediate medical attention would not be expected to result in placing [Ms. Meza]'s health in serious jeopardy, or serious impairment to bodily function or serious dysfunction to [any] bodily organ or part. [Ms. Meza]'s condition was stabilized and the remaining treatment was to cure the underlying illness. Her treatment no longer qualified as emergent under the federal definition."

In reviewing these decisions, the superior court proceeded as mandated by *Chatmon*: it addressed whether the hearing officer was factually and legally correct in making these findings and conclu-

sions. The superior court did not base its decision on some alternative ground, but rather concluded that the hearing officer had improperly determined that Ms. Meza's medical condition, for which she was hospitalized, did not constitute an emergency medical condition under applicable federal law from 22 October 2004 until 29 October 2004 and from 18 January 2005 until 11 February 2005.

While the trial court did make its own findings of fact, these findings were not wholly *independent* of those made by the hearing officer; nor did the trial court disregard the findings of the hearing officer. Rather, the trial court considered the same evidence and concluded that the hearing officer's findings were not factually and legally justified. Accordingly, the trial court modified the findings to bring them into compliance with the law. The modification to make them correct falls within the direction of *Chatmon* to "determin[e] whether the reason offered for the Department of Health and Human Services' decision . . . was factually and legally correct[,]" without "mak[ing] wholly new factual findings" or "determin[ing] that alternative grounds not relied upon . . . would also justify" the decision. 175 N.C. App. at 90-91, 622 S.E.2d at 688. The trial court used the same grounds; it just reached a different conclusion.

Although DHHS quotes from *Chatmon* at the beginning of its brief, it disregards *Chatmon* in discussing the superior court's order. DHHS does not explain in what way the superior court failed to comply with § 108A-79(k) or *Chatmon*. As the superior court limited its review of DHHS' two decisions to a determination regarding whether they were factually and legally correct, we hold that the court's order complies with § 108A-79(k) and *Chatmon*.

In arguing that the superior court's findings of fact were improper, DHHS has relied solely on cases decided under the Administrative Procedure Act ("APA"), N.C. Gen. Stat. §§ 150B-1 through 150B-52 (2007). N.C. Gen. Stat. § 108A-79(k) and *Chatmon*—not the APA—control with respect to this case. *See* N.C. Gen. Stat. § 150B-43 (2007) ("Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, *unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.*" (emphasis added)).

The dissenting opinion suggests that *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 628 S.E.2d 1 (2006), overruled *Chatmon*. As correctly

pointed out by the dissent, *Diaz* "addressed the identical *substantive* question presented in the instant case," (emphasis added), which was: "This case requires determination of the scope of coverage and reimbursement for a nonqualifying alien's medical treatment under federal and North Carolina Medicaid law." 360 N.C. at 385, 628 S.E.2d at 2. Nevertheless, the *procedural* posture in *Diaz* differs significantly from that with which we are now faced. Although the trial court in *Diaz* had likewise found that the plaintiff's treatment was for an emergency medical condition, DHHS based its appeal to this Court in *Diaz* on the *substance* of the trial court's order—that is, the trial court's interpretation and application of the federal statute's definition of "emergency medical condition" to the treatment of the disease. The focus of *Diaz* was thus on the proper construction of 42 U.S.C. § 1396b(v), a question of law.

As such, the standard of review employed by the trial court in *Diaz* to reverse the DHHS decisions to deny coverage to the plaintiff was neither implicated nor discussed by the Supreme Court. Indeed, N.C. Gen. Stat. § 108A-79(k) and *Chatmon* were never even cited in the Supreme Court's opinion or the Court of Appeals' decision.[2] The Supreme Court's decision addressed only the question presented to it on appeal: whether the trial court had properly interpreted and applied the federal statute.

Since an improperly applied standard of review was not the basis of the DHHS appeal in *Diaz*, the Supreme Court did not address the question. *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, however, to create an appeal for an appellant."). Thus, the statement in *Diaz* that, "[i]n cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test[,]" 360 N.C. at 386, 628 S.E.2d at 2, does not explicitly apply to a case involving N.C. Gen. Stat. § 108A-79(k), as the Supreme Court did not consider that question.

Nothing in *Diaz* suggests that the Court intended to impose a whole record review with respect to findings of fact when such an approach is contrary to the plain language of the statute. The statute specifically authorizes the superior court to "take testimony and examine into the facts of the case," a method of review that cannot be

2. Notably, none of the briefs filed in the Supreme Court addressed the proper construction and application of N.C. Gen. Stat. § 108A-79(k) or the relevance of *Chatmon*.

reconciled with whole record review. It is telling that the Supreme Court did not itself apply the whole record test or even reference the findings of fact of either the hearing officer or the superior court judge. Rather, the Court applied the pertinent federal statute directly to the apparently uncontested evidence.

The timing of the *Chatmon* and *Diaz* decisions does not suggest that the latter *sub silentio* overruled the former. It is worth noting that on 6 April 2006, the day before the *Diaz* decision was handed down, the Supreme Court also denied discretionary review of this Court's decision in *Chatmon*. *See Chatmon v. N.C. Dep't of Health & Human Servs.*, 360 N.C. 479 (2006). Given this time line, indicating that the Supreme Court was fully aware of the holding of *Chatmon* when it made its decision in *Diaz*, we cannot conclude that *Diaz* intended to overrule *Chatmon* without even addressing it.

In this case, contrary to the procedural posture of *Diaz*, DHHS has based its appeal solely on challenging the standard of review applied by the trial court to the hearing officer's decision. As the Supreme Court stated in *Diaz*, "[w]hen 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." 360 N.C. at 387, 628 S.E.2d at 3. Simply put, we cannot rewrite § 108A-79(k) to conform it to review of other administrative decisions. As *Diaz* cannot be read as construing § 108A-79(k), and it never addresses *Chatmon*, *Chatmon* remains controlling. It is perhaps telling that DHHS in this case, although relying upon *Diaz* for the substantive law, does not suggest that *Diaz* in any way overruled *Chatmon*.

Alternatively, DHHS argues that the superior court lacked authority to make alternative findings because Ms. Meza's petition for judicial review did not set out any exceptions or objections to specific findings of fact in DHHS' decisions. Because DHHS cites no authority in support of this argument, we deem the assignment of error abandoned. *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."). *Cf. Cape Med. Transp., Inc. v. N.C. Dep't of Health & Human Servs.*, 162 N.C. App. 14, 22, 590 S.E.2d 8, 14 (2004) (holding that "consistent with section 150B-51(c) [of the APA], the trial court is permitted to make its own findings of fact, even though neither party objected to those findings" of the agency).

Finally, DHHS also challenges the superior court's determination as to whether DHHS' decision was legally correct. The superior court concluded that DHHS' final decisions involved the application of improper legal standards and were based on an incorrect interpretation of the governing federal statute and regulation. DHHS agreed in its brief to this Court that the issues presented by Ms. Meza to the superior court were questions of statutory construction and the application of the controlling law to the facts:

> The ultimate issue in Appellee's petition [for judicial review] is this[:] she wanted the superior court to determine that her entire stay was a Medicaid covered event. While the agency must apply the statutory language to the facts of the case, the determination as to whether an "emergency" has ended for Medicaid coverage purposes is a matter of statutory interpretation. If the agency applies the federal law and corresponding State code and caselaw, and appropriately appl[ies] these criteria to the specific facts of a case, the agency has acted correctly, and no error should flow from that decision.

DHHS, however, overlooks the standard of review governing such questions: statutory construction and the application of law to fact are questions of law that a reviewing court considers de novo. *See In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003) ("Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court."); *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980) ("Whether . . . statutory requirements have been met is a question of law, reviewable on appeal."). Thus, as to the issues identified by DHHS as raised below, the superior court properly conducted a de novo review to the extent it was functioning as an appellate court.[3]

We do not address the remaining contentions in DHHS' brief because they are not encompassed by any assignment of error. *See* N.C.R. App. P. 10(a) ("[T]he scope of review on appeal is confined to

3. We do not understand DHHS' argument that the superior court did not "engage in a true de novo review" of the agency's decisions under § 108A-79(k). In support of its contention, DHHS points to the fact that the superior court "cites the exact federal statutes as the agency and does not set out any error regarding the manner in which the agency identifies the applicable law." While the superior court and the hearing officer agreed on what was the controlling statute, the superior court concluded that the hearing officer erred in his application of that statute to the actual facts relating to Ms. Meza. In short, the superior court considered the proper construction and application of the statute de novo.

a consideration of those assignments of error set out in the record on appeal . . . ."). The merits of the superior court's decision are not properly before us because DHHS did not specifically assign error to any of the superior court's findings of fact or conclusions of law apart from DHHS' contentions regarding the standard of review. The findings of fact are, therefore, binding on appeal, and there are no "disputed conclusions of law" to review. *Medina v. Div. of Soc. Servs.*, 165 N.C. App. 502, 505, 598 S.E.2d 707, 709-10 (2004). Accordingly, we affirm the superior court's judgment and order.

Affirmed.

Judge WYNN concurs.

Judge STEELMAN dissents in a separate opinion.

STEELMAN, Judge, dissenting.

I must respectfully dissent from the majority opinion. That opinion is grounded entirely upon the concept that, under the provisions of N.C. Gen. Stat. § 108A-79(k), the trial court was completely free to disregard the findings of fact made by the Hearing Officer for the Department of Health and Human Services and make its own independent findings of fact. I disagree with this analysis for several reasons.

Background

Contrary to the assertions of the majority opinion, there was sharply conflicting medical evidence presented to the hearing officer in this matter. The condition for which petitioner was hospitalized was not a new condition. She was hospitalized for this condition on several previous occasions, in 1999 or 2000, and again in 2002. Rather than returning to her country of origin and seeking treatment there, she remained in the United States. The episodes in October of 2004 and January of 2005 were triggered by petitioner's not taking any of the medications prescribed for her during her last hospitalization.

Dr. Benjamin reviewed petitioner's records and testified that, as to the first admission, there was no sudden onset of petitioner's condition. Rather he found it to be a chronic illness and that only the first day of admission fit into the emergent criteria. The report of Dr. Mehta was also in evidence. He opined that all of the care of petitioner on the first admission, from 15 October 2004 through 29

October 2004, was necessary for the treatment of an "emergency medical condition as defined in the statute." The hearing officer found a middle ground position that the emergency condition existed from 15 October 2004 through 21 October 2004.

As to the second admission, 17 January 2005 to 11 February 2005, Dr. Benjamin concluded that petitioner's condition was not acute, but rather was chronic, and thus should not have been covered by Medicaid. Dr. DiNome disagreed, stating in his letter that the care of petitioner from 17 January 2005 to 11 February 2005 constituted a single course of treatment that was necessary for the treatment of "an emergency medical condition as defined in the statute." The hearing officer ruled that none of this hospitalization was covered by Medicaid.

There was thus a clear and distinct conflict in the expert testimony of the medical witnesses as to whether the treatment of petitioner was covered under the provisions of 42 U.S.C. 1396b. There is evidence in the record to support either the position of the hearing officer or that of Judge Evans. The questions then presented are: who should make the determinations of credibility and weight that will resolve the case; what was the appropriate standard of review for the superior court; and what is the appropriate standard of review for this Court.

Standard of Review of Superior Court

The majority argues that the standard of review for the superior court under N.C. Gen. Stat. § 108A-79(k) is *de novo* and is controlled by this Court's decision in *Chatmon v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 85, 622 S.E.2d 684 (2005), *disc. rev. denied*, 360 N.C. 479, —— S.E.2d —— (2006). The majority attempts to distinguish the express holding found in the Supreme Court decision of *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 628 S.E.2d 1 (2006). I refuse to so blithely dismiss the holding of our Supreme Court.

In *Diaz*, the first issue addressed was the appropriate standard of review for the courts in cases arising under the provisions of N.C. Gen. Stat. § 108A-79(k). The language used by the Supreme Court could not have been more clear and concise:

> In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test. *See N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004).

Id. at 386, 628 S.E.2d at 2-3. It is for the Supreme Court and not the Court of Appeals to overrule decisions of our Supreme Court. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993).

A whole record test review of findings of fact by an administrative agency is a deferential review. *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895. If there is any evidence in the record to support the findings, they are binding on the courts, even though the courts, looking at the evidence anew, might reach a different result. *Id.* As noted above, there was evidence in the record supporting the hearing officer's findings and decision. The application of the whole record test in this case required that the trial court affirm the decision of the hearing officer.

Chatmon v. N.C. Department of Health & Human Services

Even applying the tests set forth in *Chatmon* to the instant case, I believe that the majority has construed *Chatmon* far too liberally, and that a more restrictive interpretation of that case is appropriate. In *Chatmon*, this Court wrestled with the appropriate standard of review for the trial court under N.C. Gen. Stat. § 108A-79(k). The relevant portions of that statute state:

> The hearing shall be conducted according to the provisions of Article 4, Chapter 150B, of the North Carolina General Statutes. The court shall, on request, examine the evidence excluded at the hearing under G.S. 108A-79(e)(4) or G.S. 108A-79(i)(1) and if the evidence was improperly excluded, the court shall consider it. Notwithstanding the foregoing provisions, the court may take testimony and examine into the facts of the case, including excluded evidence, to determine whether the final decision is in error under federal and State law, and under the rules and regulations of the Social Services Commission or the Department of Health and Human Services.

N.C. Gen. Stat. § 108A-79(k) (2007). Aside from its reference to the Administrative Procedure Act ("APA"), the statute is silent as to the appropriate standard of review. *Chatmon* construed the provisions of N.C. Gen. Stat. § 108A-79(k), as follows:

> The task of the superior court in this case was not to determine whether a sanction was warranted on any basis, but rather whether the Department of Health and Human Services' decision, and the basis upon which it relied, was legally and factually justi-

> fied. While section 108A-79(k) authorizes a trial court to take testimony and reexamine the facts, this authorization is only "to determine whether the final decision [of the Department of Health and Human Services] *is in error* . . . ." N.C. Gen. Stat. § 108A-79(k) (emphasis added). . . . Section 108A-79(k) should not be read to authorize the trial court to rehear the case, make wholly new factual findings, and determine that alternative grounds not relied upon by the Department of Health and Human Services would also justify the sanction.

Id. at 90-91, 622 S.E.2d at 688. *Chatmon* also recites the well-established two-pronged test that appellate courts must follow in administrative appeals under the APA. First, the court shall determine whether the trial court, sitting as an appellate court, applied the correct standard of review, and, second, whether the trial court properly applied that standard. *Id.* at 89, 622 S.E.2d at 688. Neither *Chatmon* nor N.C. Gen. Stat. § 108A-79(k) explicitly grants the superior court the authority to engage in *de novo* review of the administrative agency's findings.

In the instant case, the trial court did not hear any evidence that any party contended was improperly excluded, nor did it take any testimony. Thus, under *Chatmon*, its role was limited to whether the decision was "legally and factually justified." *Id.* at 90, 622 S.E.2d at 688. This is not what the trial court did in this case. Rather, the trial court, based upon the identical evidence before the hearing officer, made its own independent findings of fact and reached a different conclusion of law. This was in direct contravention of the holding in *Chatmon* stating that the trial court was not authorized "to rehear the case [and] make wholly new factual findings." *Id.* at 90-91, 622 S.E.2d at 688.

Conclusion

In *Diaz*, our Supreme Court adopted the test set forth in *Greenery Rehabilitation Group v. Hammon*, 150 F.3d 226 (2d Cir. 1998), which utilized a "stabilization" construction of the provisions contained in 42 U.S.C. § 1396b(v)(3). Emergency medical conditions under the statute are to be "sudden, severe, and short-lived physical injuries or illnesses that require immediate treatment to prevent further harm." *Diaz* at 387-88, 628 S.E.2d at 4. The Supreme Court went on to state that "the role of the Court is not to sit as a super legislature and second-guess the balance struck by elected officials." *Id.* at 389, 628 S.E.2d at 5 (citing *State v. Bryant*, 359 N.C. 554, 555, 614

S.E.2d 479, 486 (2005)). Our courts are to defer in this matter to the policy adopted by the United States Congress.

I would hold that the trial court erroneously made new findings of fact in this case and applied the wrong standard of review. The decision of the trial court should be reversed.

STATE OF NORTH CAROLINA, PLAINTIFF v. SAMUEL L. LOFTON, DEFENDANT

No. COA07-1530

(Filed 21 October 2008)

1. Evidence— prior crimes or bad acts—assault—motive—similarities—remoteness

The trial court did not commit plain error in a felony aggravated assault on a handicapped person, felonious assault by strangulation, false imprisonment, and habitual felon case by permitting the victim to testify about prior incidents of defendant assaulting her because: (1) the evidence was admissible to show motive since defendant disputed committing any crimes against the victim; (2) the testimony regarding defendant's previous motive to hit the victim was relevant since it made it more probable that defendant committed the charged crimes against the victim when he again accused her of cheating on him; (3) similarities existed between the offenses when all three incidents involved defendant accusing the victim of cheating on him before striking her, one of the prior incidents and the current incident involved the use of a weapon, and the prior incidents and the current crime involved defendant violently hitting the victim on the head or face; (4) the victim testified that the prior incidents occurred less than a year before the incidents for which defendant was charged; and (5) any prejudicial effect of the evidence was outweighed by their probative value in establishing defendant's motive in assaulting the victim.

2. Evidence— victim's mental condition—victim impact evidence

The trial court did not commit plain error in a felony aggravated assault on a handicapped person case by permitting the victim to testify regarding her mental condition, including her

dreams, after the alleged incident because: (1) the victim's testimony regarding her mental condition was not victim impact evidence; and (2) "serious injury" under N.C.G.S. § 14-32 for the charge of assault on a handicapped person includes serious mental injury caused by an assault with a deadly weapon, and the victim's testimony regarding her mental state supported an element of that crime.

Appeal by defendant from judgments entered on or about 18 July 2007 by Judge William C. Gore, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 19 August 2008.

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

Leslie C. Rawls, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of felony aggravated assault on a handicapped person, felonious assault by strangulation, false imprisonment, and was found to have attained habitual felon status. Defendant appeals, claiming the trial court committed plain error when: (1) it allowed the victim to testify to previous incidents with defendant which were "inadmissible under the North Carolina Rules of Evidence as more prejudicial than probative and as improper evidence of prior bad acts[,]" and (2) it admitted evidence of the victim's mental condition which "had no probative value, but was highly inflammatory and likely to arouse the jury's sympathies." For the following reasons, we find that the trial court did not commit error.

I. Background

The State's evidence tended to show: In approximately 1996, Vivian Downs ("Ms. Downs"), the victim, suffered a stroke which paralyzed the entire right side of her body. As a result of the stroke, Ms. Downs cannot move her right arm and can only slightly move her leg. Ms. Downs can walk with assistance. Ms. Downs also suffers from arthritis.

Ms. Downs met defendant in 2001. Ms. Downs and defendant dated briefly. In May of 2001, Ms. Downs moved in with defendant. In 2005, defendant began hitting Ms. Downs after accusing her of sleeping with defendant's brother-in-law, while they were visiting him in Raleigh. Approximately a month after this incident, defendant struck

Ms. Downs in the face. In early October 2005, defendant accused Ms. Downs of cheating on him with two lesbians and hit her in the face causing her to fall onto the floor; defendant then threw a sharp knife at Ms. Downs, which missed her and went underneath the sofa. Ms. Downs tried to hide her resulting bruises from family and friends.

On the evening of 10 October 2005, around 10:30 p.m., Ms. Downs was watching television in the master bedroom while defendant was watching television in another bedroom. Defendant hurried out of the bedroom and opened the front door. Ms. Downs had not heard anyone knock or ring the doorbell. Defendant then came back to the master bedroom and asked Ms. Downs, "Where is he at? Where is that M.F.?" and struck her, causing her to fall across the bed. Ms. Downs asked defendant what was wrong with him. Defendant then told Ms. Downs, "You better tell me who it is. . . . When I come back, I'm going to kill you." Ms. Downs then heard defendant go into the kitchen and open the utensil drawer where he retrieved a knife and hammer.

Ms. Downs tried to get away, but defendant grabbed her by the hair, pulled her, and kicked her to the hardwood floor. Ms. Downs' knees were bruised and her head was bleeding. Ms. Downs asked defendant to take her to the hospital and he told her, "Die, bitch." Defendant then began to tear up the room, breaking things, and took the mattress off the bed, while Ms. Downs remained on the floor. Defendant continued to hit Ms. Downs in the head and stomach so hard that at one point she thought she had been knocked unconscious.

Ms. Downs remained on the floor for at least an hour. Ms. Downs once again tried to escape, but defendant caught her at the front door and dragged her back to the bedroom, while continuing to kick her. Defendant eventually put the mattress back on the bed, and Ms. Downs got off the floor. Defendant then punched Ms. Downs' breasts, grabbed her by the throat, put her in the closet, and started choking her. After choking her, defendant continued punching Ms. Downs in her breasts, causing them to turn red and blue.

Around 6:30 a.m., Ms. Downs made an attempt to contact her daughter on the telephone for help, telling defendant that she needed to cancel the van service for disabled people she rides to work because it was Columbus Day. However, Ms. Downs' daughter did not understand what Ms. Downs was saying as Ms. Downs was attempting to talk in codes because defendant was watching her. Later, Ms. Downs' sister, Arleen Best ("Mrs. Best"), called to tell Ms. Downs

that her father was in the hospital. Mrs. Best's husband, Richard Best ("Mr. Best"), came over to get Ms. Downs to take her to see her father and observed the house in disarray and bruises on Ms. Down's neck.

Around 12:30 p.m., Ms. Downs left with Mr. Best, and she confessed to him that defendant had beaten her. Mr. Best took Ms. Downs to Cape Fear Valley Medical Center, and her medical examination documented two lesions on her scalp, a hematoma on her breast, and several bruises on various parts of her body. As a result of this incident, Ms. Downs was put on medication for anxiety to help her rest because she was having visions about defendant coming at her with a knife.

Ms. Downs was interviewed at the emergency room on 10 October 2005 around 3:00 p.m. by Officer Kenneth Timms ("Officer Timms") of the Fayetteville Police Department. Ms. Downs told Officer Timms defendant had assaulted her and the details surrounding the assault. Defendant was taken into custody. While being processed, defendant, without being questioned, told Officer Timms "the reason he hit [Ms. Downs] was because he thought she was cheating on him and there was a man in the house."

On or about 25 September 2006, the Cumberland County Grand Jury indicted defendant for felonious assault on a handicapped person ("assault on a handicapped person"), felonious assault by strangulation ("assault by strangulation"), false imprisonment, and communicating threats. This same day a special indictment was issued indicting defendant with habitual felon status.

Trial began, and at the close of the State's evidence the trial court dismissed the charge of communicating threats due to a lack of evidence. On or about 18 July 2007, the jury found defendant guilty of assault on a handicapped person, assault by strangulation, and false imprisonment. Defendant was also found to have attained habitual felon status. Judge William C. Gore Jr. sentenced defendant to 73-97 months on the assault on a handicapped person conviction and a consecutive term of 73-97 months on the combined counts of assault by strangulation and false imprisonment. Defendant appeals, claiming the trial court committed plain error when: (1) it allowed the victim to testify to previous incidents with defendant which were "inadmissible under the North Carolina Rules of Evidence as more prejudicial than probative and as improper evidence of prior bad acts[,]" and (2) it allowed in evidence of the victim's mental condition which "had no probative value, but was highly inflammatory and likely to arouse the

jury's sympathies." For the following reasons, we find that the trial court did not commit plain error.

II. Standard of Review

Defendant concedes that he did not object at trial to Ms. Downs' testimony. Plain error analysis is the applicable standard of review when a criminal defendant has not objected to the admission of evidence at trial. *State v. Ridgeway*, 137 N.C. App. 144, 147, 526 S.E.2d 682, 685 (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 said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations, quotation marks, ellipses, and brackets omitted). "Therefore, if after thoroughly examining the record, we are not persuaded that the jury probably would have reached a different result had the alleged error not occurred, we will not award defendant a new trial." *Ridgeway* at 147, 526 S.E.2d at 685 (citation omitted).

III. Evidence of Prior Bad Acts

[1] Defendant first contends that the trial court committed plain error by permitting Ms. Downs to testify about prior incidents of the defendant assaulting her. Specifically, defendant contends that the prior acts to which Ms. Downs testified are only relevant to show that defendant "had the propensity to commit an offense of the nature of the crimes charged in this case."

Ms. Downs testified about her relationship with the defendant:

> A. From the start, it was pretty good. That last, I'd say, the latter part of—well, no, that whole year, 2005, things had changed. He had gotten really—he got—what can I say? He just got mean. He started hitting on me.

Q. And what would prompt his abuse?

A. Different things. One time he hit me. He accused me of [sic] his brother-in-law but he didn't hit me until like two or three weeks later.

Q: What do you mean he accused you of—

A: We had went and spent the weekend with him in Raleigh, North Carolina, and then about two weeks later, he said that I went to bed with him. So I argued with him how am I going to be with another man and you're in the same house and his wife in the same house. I thought it was crazy. You got a problem. And so he hit me. At that point then I knew that—that was the first time he ever hit me so I felt like if he did it once, he do it again. Things just escalated, you know. He never said I'm sorry. He never apologized. He just said that I shouldn't have done that, you know, and things just escalated. I never knew what would set him off. He was always arguing, fussing about anything or nothing. And things aren't so—you know, I kept saying something was wrong but it's just hard to explain. I didn't really—

Q: Ms. Downs, when you said he hit you because he accused you of sleeping with his brother-in-law, when approximately was that?

A: I'm sorry?

Q: When was that?

A: I can't remember the month. I can't remember. I just know that after that, maybe a month later, he hit me again and it escalated.

Q: Where did he hit you?

A: In the face.

Ms. Downs continued to testify about another prior incident in which defendant struck her:

Q: Okay. Let me take your attention to the first part of October in 2005. What happened with regard to you and the defendant in the first part of that week?

A: Well, for the past—that—for those couple of weeks, he had been real mean and one day I came home from work and he had accused me of being with these two lesbians and he hit me.

Q: Where did he hit you?

A: In the face. And he knocked me—I fell on the floor, you know. He did that as soon as I got home from work. I just got in the door good. He started fussing with me. I said what's wrong with you, you know. And then at one point, I was in the kitchen and he was fussing at me about what—well, I can't remember. He used to fuss all the time and he said something and I retaliated and I said something back.

Q. What did he say? What did you say?

A. I can't remember. It's been so much. I can't remember. But he was fussing with me and sometimes I would say something. Sometimes I just couldn't stand it and I said, you know, I'm grown too. I don't have to put up with your abuse. I would say something. I would say something that would strike a nerve and he'd hit me. That particular day, he hit me in the face and I went towards the living room. (Witness crying.)

MS. ROTHSTEIN: Your Honor, if we could just have a moment.

THE COURT: Yes, ma'am.

THE WITNESS: And then he threw a knife at me. He threw a sharp knife at me and it missed me by that much. I said you could have hit me in my eye but it missed and went underneath the sofa, but again I didn't tell anybody.

A. Analysis

" '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. "Evidence which is not relevant is not admissible[,]" and "[a]ll relevant evidence is admissible . . . ." N.C. Gen. Stat. § 8C-1, Rule 402. Even when relevant,

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b).

> Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried.

State v. Bagley, 321 N.C. 201, 206-07, 362 S.E.2d 244, 247 (1987) (citation and quotation marks omitted), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

> Where evidence of prior conduct is relevant to an issue other than for determining the defendant's propensity to commit the charged offense, the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403. . . . Finally, once a trial court has determined the evidence is admissible under Rule 404(b), the court must still decide whether there exists a danger that unfair prejudice substantially outweighs the probative value of the evidence.

State v. Stevenson, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (citations and quotation marks omitted).

B. Relevancy

Our Supreme Court has determined that "testimony about [a] defendant's misconduct toward his wife was proper under Rule 404(b) to prove motive, opportunity, intent, preparation, absence of mistake or accident with regard to the subsequent . . . attack upon her." *State v. Scott*, 343 N.C. 313, 330, 471 S.E.2d 605, 615 (1996) (citation and quotation marks omitted). "Specifically, evidence of frequent quarrels, separations, reconciliations, and ill-treatment is admissible as bearing on intent, malice, motive, premeditation, and deliberation." *Id.* at 331, 471 S.E.2d at 616 (citation omitted). "The existence of a motive is, however, a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible where the doing of the act is in dispute." *State v. Coffey*, 326 N.C. 268, 280, 389 S.E.2d 48, 55 (1990) (citation and quotation marks omitted), *cert. denied*, 421 S.E.2d 360 (N.C. 1992).

Here, defendant pled not guilty to all charges. Furthermore, during the cross examination of Ms. Tina Powell ("Ms. Powell"), the daughter of Ms. Downs, defendant attempted to show that Ms. Downs

was the cause of her own injuries, rather than defendant, by extensively questioning Ms. Powell about various incidents when Ms. Downs had injured herself, including burning herself while cooking, falling out of bed, and slamming a door on her foot and falling. As defendant disputed committing any crimes against Ms. Downs, the evidence of motive is admissible. *See id.*

At trial, Ms. Downs testified that defendant had twice previously hit her because he believed she was cheating. This testimony regarding defendant's previous motive to hit Ms. Downs makes it more probable that defendant committed the charged crimes against Ms. Downs as once again defendant believed she was cheating on him, in accord with defendant's own words to Officer Timms. N.C. Gen. Stat. § 8C-1, Rule 401; *Coffey* at 280, 389 S.E.2d at 55. Therefore, we conclude that Ms. Downs' testimony regarding prior violent incidents was relevant. *See* N.C. Gen. Stat. § 8C-1, Rule 401.

C. Similarity and Remoteness

"The determination of similarity and remoteness is made on a case-by-case basis, and the required degree of similarity is that which results in the jury's 'reasonable inference' that the defendant committed both the prior and present acts." *Stevenson* at 800, 611 S.E.2d at 209. Our Supreme Court has stated that "[u]nder Rule 404(b) a prior act or crime is 'similar' if there are some unusual facts present in both crimes." *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007) (citation, quotation marks, and ellipses omitted). Here notable similarities exist between the offenses for which defendant was convicted and the prior incidents about which Ms. Downs testified. First, all three incidents involved defendant accusing Ms. Downs of cheating on him before striking her. Second, one of the prior incidents and the current incident involved the use of a weapon. Third, the prior incidents and the crimes defendant was charged with involved him violently hitting Ms. Downs on the head or face. We conclude that these similarities allowed the jury to make a "reasonable inference" that defendant committed both the prior and present acts. *Stevenson* at 800, 611 S.E.2d at 210.

With regard to remoteness, we have determined that "[r]emoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Stevenson* at 801, 611 S.E.2d at 210 (citation and quotation marks omitted). Ms. Downs testified that the prior incidents

occurred in 2005, less than a year before the incidents for which defendant was charged. "One year is sufficiently close in time as to be relevant." *State v. Strickland*, 153 N.C. App. 581, 590, 570 S.E.2d 898, 904 (2002) (discussing defendant's prior attacks on the victim), *cert. denied*, 357 N.C. 65, 578 S.E.2d 594 (2003). Therefore, we conclude that these prior incidents were sufficiently similar and close in time to be admitted.

D. Probative Value Versus Prejudicial Effect

"[R]elevant . . . 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. "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Stager*, 329 N.C. 278, 315, 406 S.E.2d 876, 897 (1991) (citation omitted). Furthermore, "[t]he party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission." *State v. Anthony*, 133 N.C. App. 573, 579, 516 S.E.2d 195, 199 (1999) (citation omitted), *aff'd*, 351 N.C. 611, 528 S.E.2d 321 (2000). Defendant has not shown that the trial court abused its discretion in admitting the evidence of defendant's prior assaults against Ms. Downs because any prejudicial effect of the evidence of defendant's prior assaults against Ms. Downs are outweighed by their probative value in establishing defendant's motive in assaulting Ms. Downs. We conclude that Ms. Downs' testimony regarding prior violent incidents by defendant was properly admitted, and this argument is overruled.

IV. Evidence of the Victim's Mental Condition

[2] Defendant next contends that the trial court committed plain error by permiting Ms. Downs to testify regarding "her mental condition, including her dreams, after the alleged incident." Defendant asserted Ms. Downs' "testimony was inadmissible victim impact statements and therefore irrelevant" and quoted the following from the trial:

> Q: And, Ms. Downs, what are your, if any, long-term injuries as a result of the attack by the defendant?
>
> A. Well, at first, I said that I wasn't going to let Mr. Lofton ruin my life. I kept praying and I prayed and everybody was trying

> to get me to go to counseling and I said, No, I don't need a counselor because I felt like I didn't do anything wrong. I don't have a problem. I don't go around hitting people and abusing people so why should I go. Everybody said I should go. I said, no, I'm just going to try to go on with my life. You know, but eventually it came back to haunt me. Because I got sick. The doctor put me on medication for anxiety to help me rest, but I'm going to have to go back because it's not working. I have dreams where I see visions where I see—you know, I'll see his hands—supposed to be him coming at me with a knife and then I'll jump up and then I can't breathe.

Victim impact evidence includes "[a] description of the nature and extent of any physical, psychological, or emotional injury suffered by the victim as a result of the offense committed by the defendant." N.C. Gen. Stat. § 15A-833(a)(1) (2005). "[V]ictim-impact evidence is generally inadmissible during the guilt/innocence phase of a trial." *State v. Davis*, 177 N.C. App. 98, 104, 627 S.E.2d 474, 478 (2006) (citation omitted). However, we do not regard Ms. Downs' testimony regarding her mental condition as victim impact evidence.

Defendant was charged with assault on a handicapped person. N.C. Gen. Stat. § 14-32.1 reads in pertinent part,

> A person commits an aggravated assault or assault and battery upon a handicapped person if, in the course of the assault or assault and battery, that person:
>
> (1) Uses a deadly weapon or other means of force likely to inflict serious injury or serious damage to a handicapped person; or
>
> (2) Inflicts serious injury or serious damage to a handicapped person; or
>
> (3) Intends to kill a handicapped person.

N.C. Gen. Stat. § 14-32.1(e) (2005). "[S]erious injury, within the meaning and intent of that term as used in N.C.G.S. § 14-32, includes serious mental injury caused by an assault with a deadly weapon." *State v. Everhardt*, 326 N.C. 777, 780, 392 S.E.2d 391, 393 (1990). Because "serious injury" may include serious mental injury, *see id.*, we deem Ms. Downs' testimony regarding her mental state to support an element of one of the crimes with which defendant was charged, and it is therefore relevant. *See* N.C. Gen. Stat. §§ 8C-1, Rule 401, 14-32.1. This argument is overruled.

V. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in admitting evidence as to defendant's prior bad acts and Ms. Downs' mental condition. Therefore, we find no error.

NO ERROR.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. JASON W. ALLEN

No. COA08-215

(Filed 21 October 2008)

1. Assault— deadly weapon inflicting serious injuries—beating with hands—no fractures

The trial court correctly denied defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious injury where defendant attacked the woman with whom he lived with his hands and fists and there were no fractures. Defendant was 25 years old and the victim was thirty-eight; defendant was seven inches taller and forty pounds heavier; defendant delivered repeated blows to the face and head, with the victim losing consciousness; and the victim suffered traumatic head injuries, including bleeding, swelling, and bruising and damage to her ear and mouth. The absence of fractures is relevant but not determinative.

2. Larceny— motor vehicle—intent to permanently deprive owner of possession—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felonious larceny of a motor vehicle where defendant left with the victim's automobile after beating her into unconsciousness, abandoned the vehicle in Virginia, and went to Florida to start a new life. Defendant's abandonment of the vehicle put it beyond his power to return and showed his indifference to whether the owner ever recovered it.

3. Criminal Law— instructions—flight—no error

The trial court did not err by giving an instruction on flight where defendant stole the victim's vehicle to facilitate his departure from the scene of an assault, defendant made no attempt to contact the authorities or obtain help for the victim, defendant abandoned the vehicle in Virginia, and he was arrested in Florida, where he had gone to start a new life.

4. Assault— instructions—hands and feet as deadly weapon—no plain error

There was no plain error in a prosecution for assault with a deadly weapon inflicting serious injury where defendant contended that the court had given a peremptory instruction on the use of hands and feet as a deadly weapon. Reading the instructions contextually and in their entirety, the court told the jury to determine whether defendant's hands and feet were a deadly weapon beyond a reasonable doubt based on the evidence. Furthermore, considering the evidence as well as the instruction, defendant did not establish the probability of a different result without the verdict.

5. Criminal Law— deadlocked jury—deliberations resumed without statutory instruction—no plain error

The trial court did not commit plain error or abuse its discretion when a jury reported that it could not reach a verdict and the court granted a recess and returned the jury for more deliberations without giving an instruction permitted by N.C.G.S. § 15A-1235(c), and the jury reached a verdict after an hour.

Appeal by defendant from judgment entered 11 June 2007 by Judge Phyllis Gorham in Onslow County Superior Court. Heard in the Court of Appeals 27 August 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kimberly D. Potter, for the State.

William D. Spence, for defendant-appellant.

JACKSON, Judge.

On 13 June 2007, Jason W. Allen ("defendant") was convicted of assault with a deadly weapon inflicting serious injury, felonious larceny of a motor vehicle, and felonious possession of a stolen vehicle. The trial court arrested judgment on the charge of felonious posses-

sion of a stolen vehicle; the remaining charges were consolidated, and defendant was sentenced within the presumptive range to twenty-seven to forty-two months imprisonment. Defendant appeals. For the reasons stated below, we hold no error.

As of 7 September 2002, defendant had been living with Susan Clarkson ("Clarkson") in her Jacksonville, North Carolina residence for approximately two months. On 7 September 2002, Clarkson and defendant invited Clarkson's friend, George Wilhelm ("Wilhelm") for dinner. Throughout the evening, Clarkson, Wilhelm, and defendant ate food and drank various alcoholic beverages. At some point that evening, Clarkson and Wilhelm danced together. In response, defendant became upset and stated to Clarkson that it made him jealous.

Around midnight that evening, Clarkson hugged Wilhelm in her doorway as Wilhelm departed. Clarkson then began to walk through her home to her master bedroom when defendant struck her from behind in the back of her head with his fist. Clarkson testified that defendant then punched her in the face repeatedly, held her down by her neck, spat on her, and threw her around her bedroom onto the floor and the bed. Clarkson eventually lost consciousness from the repeated punches to her head.

When Clarkson regained consciousness, she called 911 and received medical treatment from EMS and at the hospital. Although Clarkson did not suffer any fractures as a result of the assault, her face remained extremely bruised and swollen for over a month.

Following defendant's assault, Clarkson learned that her 1995 Ford Explorer, valued at $10,000.00 and which had been at her residence on 7 September 2002, was missing. The car was recovered more than a week later in Norfolk, Virginia where defendant had driven and abandoned it. Clarkson did not give defendant permission to use her car on either 7 or 8 September 2002.

[1] On appeal, defendant first contends that the trial court erred by denying defendant's motion to dismiss the assault with a deadly weapon inflicting serious injury charge at the close of all the evidence because the evidence was insufficient to establish every element of the crime. Specifically, defendant argues that (1) the use of his hands and fists during his assault did not constitute the use of a deadly weapon; and (2) defendant did not inflict serious injury upon Clarkson. We disagree.

In order to survive a motion to dismiss based upon the sufficiency of the evidence, the State must present substantial evidence of each essential element of the charged offense and of defendant's being the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (internal citations and quotation marks omitted). The reviewing court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences that can be drawn from the evidence. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455.

Defendant was convicted of assault with a deadly weapon inflicting serious injury pursuant to North Carolina General Statutes, section 14-32(b). "The elements of a charge [pursuant to section] 14-32(b) are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997) (quoting *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990)).

An assailant's hands may be considered deadly weapons for the purpose of the crime of assault with a deadly weapon inflicting serious injury depending upon the manner in which they were used and the relative size and condition of the parties. *See, e.g.*, *State v. Harris*, 189 N.C. App. 49, 60, 657 S.E.2d 701, 708-09 (2008) (substantial evidence of defendant's use of his hands as a deadly weapon when the 175 pound defendant caused hand-print bruises on the 110 pound victim's arms, thighs, and buttocks, as well as bruises on the victim's neck which could have been the cause of the victim's swollen mouth, tongue, and throat); *State v. Rogers*, 153 N.C. App. 203, 211, 569 S.E.2d 657, 663 (2002) (substantial evidence of defendant's use of his hands as a deadly weapon when defendant was six feet two inches tall and weighed 165 pounds and struck victim in her face, breaking her nose, cheekbone, and jaw when victim was five feet three inches tall and weighed ninety-nine pounds); *State v. Grumbles*, 104 N.C. App. 766, 769-71, 411 S.E.2d 407, 409-10 (1991) (substantial evidence of defendant's use of his hands as a deadly weapon when the 175 pound defendant hit and choked the 107 pound victim leaving marks on her neck and causing facial swelling and a broken jaw).

In the case *sub judice*, the State presented evidence that defendant was twenty-five years old, seven inches taller, and forty pounds heavier than Clarkson who was thirty-eight years old. Defendant

struck repeated blows to Clarkson's head and face with his hands and fists. Clarkson suffered traumatic head injuries and extreme facial bruising and swelling, as well as bleeding from her left ear and nose. Additionally, Clarkson's left eye was swollen shut for over a month, the inside of her ear was damaged, and the inside of her mouth was "chewed up." As a result of defendant's blows to Clarkson's head and face, she lost consciousness. When she awoke, she remained disoriented.

Accordingly, we hold the State presented substantial evidence of defendant's use of his hands as deadly weapons and that Clarkson suffered severe injury as a result. That she did not ultimately suffer any fractures as a result of the assault is relevant, but not determinative as to whether she sustained severe injury. "Any weakness in the State's evidence or discrepancy between the State's evidence and [d]efendant's testimony was for the jury to consider." *Harris*, 189 N.C. App. at 60, 657 S.E.2d at 709. The trial court did not err in denying defendant's motion to dismiss the assault with a deadly weapon inflicting serious injury charge.

Defendant requests that we reconsider the analysis provided in the first footnote of *Harris* which maintains the use of hands as deadly weapons for purposes of the crime of assault with a deadly weapon and distinguishing the North Carolina Supreme Court's decision in *State v. Hinton*, 361 N.C. 207, 210, 639 S.E.2d 437, 439-40 (2007). We agree with the analysis set forth in *Harris*, and we hold that precedent set forth in *Hinton* does not control in the case *sub judice*.

In *Harris*, we specifically noted that the Supreme Court's holding in *Hinton* neither addressed nor distinguished the statutory rule of law germane to both *Harris* and the case *sub judice*, North Carolina General Statute, section 14-32(b). *See Harris*, 189 N.C. App. at 61, 657 S.E.2d at 708-09 n.1, *and* N.C. Gen. Stat. § 14-32(b) (2005).[1] In *Hinton*, our Supreme Court held that a defendant's hands are not a deadly weapon for purposes of the crime of robbery with a dangerous weapon as set forth in North Carolina General Statutes, section 14-87. *Hinton*, 361 N.C. at 208, 639 S.E.2d at 438. The Court explained

> [i]t is true assault with a deadly weapon is a lesser included offense of robbery with a dangerous weapon. . . . However, the

1. We note that the relevant statutory citation in *Harris* refers to the 2007 version of the North Carolina General Statutes; however, section 14-32(b) was not amended between 2005 and 2007.

> fact that assault with a deadly weapon is a lesser included offense of robbery with a dangerous weapon does not mean that the *scope* of the weapon elements must be identical for each offense. The fact that every dangerous weapon under N[orth Carolina General Statutes, section] 14-87 would also be a deadly weapon for purposes of assault with a deadly weapon does not necessitate that all deadly weapons for purposes of assault with a deadly weapon are dangerous weapons under N[orth Carolina General Statutes, section] 14-87. *The doctrine of lesser included offenses moves downstream, not upstream* . . . .

Hinton, 361 N.C. at 210, 639 S.E.2d at 439-40 (first emphasis in original) (second emphasis added). For these reasons, we decline to reconsider the first footnote in *Harris*. *Hinton* does not control the case *sub judice*.

[2] Defendant next contends that the trial court erred by denying defendant's motion to dismiss the felonious larceny of a motor vehicle charge at the close of all the evidence because the evidence was insufficient to establish every element of the crime. We disagree.

As stated above, in order to survive a motion to dismiss based on the sufficiency of the evidence, the State must present substantial evidence of each essential element of the charged offense and of defendant's being the perpetrator. *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Blake*, 319 N.C. at 604, 356 S.E.2d at 355 (internal citations and quotation marks omitted). The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences that can be drawn from the evidence. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455.

Defendant was convicted of felonious larceny of a motor vehicle in violation of North Carolina General Statutes, section 14-72(a). "The essential elements of a larceny are that the defendant[] (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of [the] property permanently." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). North Carolina General Statutes, section 14-72(a) provides that when the value of the stolen goods exceeds $1,000.00, the crime is a Class H felony. *See* N.C. Gen. Stat. § 14-72(a) (2005).

Defendant limits his contention to the argument that the State did not present substantial evidence sufficient to reach the jury as to

defendant's intent to deprive Clarkson permanently of her property. However, our Supreme Court has explained

> the intent to permanently deprive need not be established by direct evidence but can be inferred from the surrounding circumstances. [Furthermore,] the abandonment of a vehicle . . . places it beyond a defendant's power to return the property and shows a total indifference as to whether the owner ever recovers it.

State v. Kemmerlin, 356 N.C. 446, 474, 573 S.E.2d 870, 889-90 (2002) (internal citations and quotation marks omitted).

In the case *sub judice*, the evidence tended to show that after the assault on 8 September 2002, defendant took Clarkson's Ford Explorer, valued at approximately $10,000.00, without her permission. Defendant drove Clarkson's vehicle to Norfolk, Virginia, where he remained for several days before making his way to Naples, Florida to start a new life. On 15 September 2002, the abandoned vehicle was located in Norfolk, Virginia. Defendant's abandonment of the vehicle in Norfolk, Virginia placed the vehicle beyond his power to return it to Clarkson and showed his indifference as to whether Clarkson ever recovered it. Therefore, in addition to establishing the other essential elements of felonious larceny of a motor vehicle, the State presented substantial evidence sufficient to allow an inference that defendant intended to permanently deprive Clarkson of her vehicle. The trial court did not err in denying defendant's motion to dismiss the felonious larceny of a motor vehicle charge.

[3] Next, defendant argues that the trial court erred by instructing the jury on defendant's flight. We disagree.

"This Court reviews jury instructions only for abuse of discretion. Abuse of discretion means manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *State v. Bagley*, 183 N.C. App. 514, 520, 644 S.E.2d 615, 622 (2007) (internal citations and quotation marks omitted). We review jury instructions contextually and in their entirety. *State v. Glynn*, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554, *disc. rev. denied*, 360 N.C. 651, 637 S.E.2d 180 (2006). The party asserting error also bears the burden of showing that the jury was misled or that the verdict was affected by the instruction. *State v. Blizzard*, 169 N.C. App. 285, 297, 610 S.E.2d 245, 253 (2005).

"Mere evidence that [the] defendant left the scene of the crime is not enough to support an instruction on flight. There also must be

some evidence that [the] defendant took steps to avoid apprehension." *See State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625-26 (2001) (flight instruction upheld when the defendant left murder scene, failed to obtain help for victim, arranged surrender with police officers, but drove around and stopped at multiple gas stations to clear his head before turning himself in to police officers) (quoting *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991)); *State v. Grooms*, 353 N.C. 50, 80, 540 S.E.2d 713, 732 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001) (flight instruction upheld when defendant telephoned a friend from a bus station asking for twenty dollars to leave town). Recently, this Court noted that "an action that was not part of [d]efendant's normal pattern of behavior . . . could be viewed as a step to avoid apprehension." *State v. Shelly*, 181 N.C. App. 196, 209, 638 S.E.2d 516, 526, *disc. rev. denied*, 361 N.C. 367, 646 S.E.2d 768 (2007) (flight instruction upheld when defendant left the scene of a shooting and spent the night at the home of his cousin's girlfriend rather than returning home).

In the instant case, defendant stole Clarkson's vehicle to facilitate his departure from the scene of the assault. Defendant made no effort to contact the authorities, to obtain help for Clarkson, or to surrender himself. Instead, defendant drove from Jacksonville, North Carolina to Norfolk, Virginia where he abandoned Clarkson's vehicle. Defendant testified that after spending a few days in Norfolk, Virginia, he made his way to Naples, Florida to start a new life. On 8 September 2002, a warrant for defendant's arrest was issued in Jacksonville, North Carolina. Defendant was not arrested, however, until 23 August 2006 when he finally was located in Naples, Florida. On these facts, there was no error in the trial court's instruction on defendant's flight.

[4] Defendant next asserts that the trial court committed plain error in peremptorily instructing the jury that hands and fists are a deadly weapon. We disagree.

Defendant failed to object to the trial court's jury instructions at trial. As such, defendant failed to preserve this issue for appellate review and is limited to plain error review. *See* N.C. R. App. P. 10(b)(2), 10(c)(4) (2007), *and State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error,

> something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (brackets in original) (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (emphasis in original) (second brackets in original) (footnote call numbers omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). The appellate court must be convinced upon review of the entire record that a different verdict probably would have been reached but for the error. *See State v. Cummings*, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007); *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79.

In the case *sub judice*, defendant takes issue with the trial court's statement that "[h]ands and fists are a deadly weapon." Reading this instruction alone, defendant's argument might have merit. However, we are bound to review jury instructions contextually and in their entirety. *Glynn*, 178 N.C. App. at 693, 632 S.E.2d at 554. In pertinent part, the trial court instructed the jury as follows:

> The defendant has been charged with assault with a deadly weapon inflicting serious injury. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:
>
> First, the defendant assaulted the victim by intentionally and without justification or excuse [] hitting the victim in the head and face several times. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances given as a reasonably prudent person would ordinarily draw therefrom.
>
> Second, the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. Hands and fists are a deadly weapon.

> *In determining whether hands and fists were a deadly weapon, you should consider* the nature of the hands and fists, the manner in which they were used and the size and strength of the defendant as compared to the victim.
>
> Third, that the defendant inflicted serious injury upon the victim. Serious injury is such injury as causes great pain and suffering.
>
> *If you find from the evidence beyond a reasonable doubt* that on or about September 8, 2002, the defendant intentionally hit the victim on the head and face several times with his hands and fists and *that his hands and fists were a deadly weapon* thereby inflicting serious injury upon the victim, nothing else appearing, it would 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, you must return a verdict of not guilty.*

(Emphasis added.) While it might have been more prudent for the trial court to instruct that hands and fists *have been* found to be a deadly weapon, when we read the instructions together, it becomes apparent that the trial court properly charged the jury to make the determination whether hands and fists were a deadly weapon beyond a reasonable doubt based on the evidence and in light of specified considerations. Thus, we cannot say that the singular statement complained of by defendant was such a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (emphasis in original), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

Furthermore, the State presented evidence that defendant was seven inches taller than Clarkson and outweighed her by forty pounds. Defendant repeatedly punched Clarkson's head and face causing severe injury including unconsciousness, disorientation, bleeding, and extreme swelling and bruising that lasted for a month. Defendant's own testimony established that he threw Clarkson to the ground, sat on top of her arms, and repeatedly hit her in the face "fast." Under our well-established standard of review, in view of the evidence presented as well as the jury instructions as a whole, defendant fails to establish that the verdict probably would have been different but for the singular instruction. We hold there is no plain error on these facts.

[5] In his final argument, defendant contends that the trial court abused its discretion and committed plain error in failing to instruct the deadlocked jury as required by North Carolina General Statutes, section 15A-1235(c). "To find plain error, the error in a trial court's instructions to the jury must have been 'so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against [the defendant].' " *State v. Boston*, 191 N.C. App. 367, 643, 663 S.E.2d 886, 891 (2008) (brackets in original) (quoting *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)). North Carolina General Statutes, section 15A-1235(c) expressly commits the power to require further deliberations within the trial court's discretion by stating "the judge *may* require the jury to continue its deliberations . . . ." N.C. Gen. Stat. § 15A-1235(c) (2007) (emphasis added). However, "[t]he judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *Id.*

In the instant case, after approximately two and one half hours of deliberation, the trial court received a note from the jury stating that the jury "cannot come to a consensus as a team on Count I . . . ." The trial court responded

> [w]hat I am going to do is I am going to send you back into the jury room to continue deliberating. Before that, however, I do want to ask you if you want to take an afternoon recess at this time. I'll be glad to give you a [fifteen] minute recess at this time.

After a fifteen minute recess, the jury resumed its deliberations for another hour at which time the jury returned a verdict of defendant's guilt. On these facts, we cannot say that the trial court abused its discretion. *See State v. Hagans*, 177 N.C. App. 17, 26, 628 S.E.2d 776, 783 (2006) (no abuse of discretion when trial court provided supplemental instructions and allowed jury to deliberate further after one day). Defendant's final argument is without merit.

No Error.

Judges BRYANT and ARROWOOD concur.

IN RE C.G.A.M. & J.C.M.W.

[193 N.C. App. 386 (2008)]

IN THE MATTER OF: C.G.A.M., J.C.M.W.

No. COA08-617

(Filed 21 October 2008)

1. **Termination of Parental Rights— guardian ad litem for parent—incarcerated—not incompetent**

The trial court did not abuse its discretion by not appointing a guardian ad litem for a father at a termination of parental rights hearing. Under the statute applicable to this case, N.C.G.S. § 7B-1101.1, the court may appoint a guardian ad litem when the parent is incompetent or has diminished capacity; here, nothing in respondent's conduct at the hearing raised a question about his competency. His lack of capability was mostly due to repeated incarcerations, not to significant mental health issues impacting his ability to parent.

2. **Termination of Parental Rights— grounds—findings—clear, cogent, convincing evidence**

The trial court's findings of fact about the grounds for termination of respondent father's parental rights were supported by clear, cogent, and convincing evidence.

3. **Termination of Parental Rights— findings—required considerations**

The trial court's decision to terminate parental rights was not an abuse of discretion where its findings addressed each of the statutorily required considerations. N.C.G.S. § 7B-1110(a).

Appeal by respondent father from orders entered 4 April 2008 by Judge Peter Mack in Carteret County District Court. Heard in the Court of Appeals 15 September 2008.

Debra Gilmore, for Carteret County Department of Social Services, petitioner-appellee.

Pamela Newell Williams, for Guardian ad Litem.

Sofie W. Hosford, for respondent-appellant father.

JACKSON, Judge.

James Douglas M. ("respondent") appeals from orders terminating his parental rights. The mother voluntarily relinquished her

parental rights prior to the termination hearing and is not a party to this appeal. For the reasons stated below, we affirm.

The Carteret County Department of Social Services ("DSS") first removed C.G.A.M. and J.C.M.W. ("the children") from parental custody and placed them in its custody on 3 January 2006, based upon allegations of domestic violence between the parents, drug use by the mother, unstable housing, and improper care. Respondent ultimately stipulated that the children were dependent and the children remained in DSS custody pursuant to a permanent plan of guardianship with a relative, concurrent with adoption. On 18 December 2006, respondent was ordered to pay $50.00 a month in child support effective 1 January 2007, as well as pay off a $224.00 arrearage at a rate of $25.00 per month.

Pursuant to a permanency planning and review order entered 31 January 2007, defendant was ordered to comply with a number of conditions in order to achieve reunification with the children: 1) obtain and maintain stable employment and housing free from drugs, alcohol, and domestic violence; 2) contribute a reasonable sum to the cost of the children's care; 3) participate in a substance abuse assessment and comply with all recommendations; 4) participate in domestic violence counseling and comply with all recommendations; 5) comply with all probation and parole requirements; 6) complete a parenting assessment and comply with all recommendations; 7) complete an anger management assessment and comply with all recommendations; 8) refrain from illegal activities; 9) submit to random drug screens, including making the results of probation drug screens available to DSS; and 10) maintain weekly contact with a social worker. On 25 July 2007, the Carteret County District Court held respondent in civil contempt of court for falling $524.00 in arrears on his child support obligation and failing to pay $275.00 toward his arrearage by 30 June 2007.

On 6 July 2007, DSS filed petitions to terminate the parental rights of both parents. In its petitions, DSS alleged neither parent could provide proper care, control, and supervision for the children, and were unlikely to be able to do so in the foreseeable future. DSS also alleged that respondent had a lengthy criminal history, had pending criminal charges, had no job or stable housing, and had failed to complete court-ordered substance abuse and domestic violence counseling. DSS further alleged that neither parent had maintained contact with a social worker, had provided any

tangible items or supplies for the children in the past six months, or had paid child support.

The trial court held a termination hearing on 8 February 2008. DSS called one witness at the hearing—Andrea Gillikin ("Gillikin"), a social worker—and introduced nine documentary exhibits. Gillikin was assigned to the children's case on 6 January 2006. She testified that the children's mother already had relinquished her parental rights.

Respondent stipulated that he was incarcerated at the time the children were removed from parental custody. Gillikin testified that respondent was released from prison on 17 November 2006. Shortly thereafter, respondent began visitation with the children. Visitation continued one hour per week until February 2007.

On 12 January 2007, Gillikin met with respondent prior to a permanency planning and review hearing and gave him a list of low-income housing options in the area, as well as referrals for a substance abuse assessment, domestic violence counseling, parenting assessment, and anger management counseling, so that he could work toward reunification with the children. Gillikin was not aware of any attempts respondent made to contact any of the programs that she recommended to schedule appointments.

Respondent last visited the children on 20 February 2007. The following day he told another social worker that he was seeking help for methadone addiction. He was arrested that day. In March of 2007, respondent called DSS to request a visit with the children. DSS told him that he would have to pass a drug test before he could see them. He did not submit to a drug test at that time, and Gillikin did not hear from him again with respect to visitation. Gillikin further testified that respondent never provided any cards, gifts, or letters for the children, other than two DVDs on one visit and possibly gifts on another visit.

On 30 August 2007, respondent was convicted of a 21 February 2007 offense of felony possession with intent to manufacture, sell, or deliver a schedule II controlled substance. He began serving his sentence on 13 September 2007 and his projected release date is 27 November 2008.

Respondent testified that after he was released from prison in November of 2006, he worked forty to fifty hours per week at a wage of $5.50 per hour. He earned $0.70 per day working on the

road crew while in prison. However, he testified that he never paid child support for the children or provided other money for their care.

While incarcerated, respondent began an anger management class, but was unable to complete it because he was moved to another facility. In the new facility, he had enrolled in anger management classes but had not yet begun them at the time of the hearing. He was also enrolled in narcotics anonymous ("NA"), alcoholics anonymous ("AA"), a GED program, and a cognitive behavioral intervention ("CBI") class. At the time of the termination hearing, he was actively attending NA and AA meetings, but had not yet begun classes to obtain his GED or the CBI class. Respondent expressed a desire to be a part of his children's lives after his release from prison in November 2008. His criminal record was introduced into evidence without objection.

On 4 April 2008 the trial court filed orders terminating respondent's parental rights as to both children. As grounds for termination of respondent's parental rights, the trial court concluded that: 1) respondent neglected the children as the term is defined in North Carolina General Statutes, section 7B-101(15) by willful abandonment; 2) he willfully left the children in foster care for more than twelve months without making reasonable progress under the circumstances to correct the conditions that led to removal; 3) he was incapable of providing the children with proper care and supervision, and there was a reasonable probability that the incapability would continue for the foreseeable future; and 4) he willfully failed to provide any financial support towards the children's cost of care since entering foster care.

[1] Respondent first argues that the trial court erred when it did not appoint him a guardian *ad litem* at the termination hearing. We disagree.

Respondent contends that because the petitions alleged that he was incapable of caring for his children and that the incapability likely would continue in the future, the trial court had a duty to appoint a GAL on his behalf. However, the cases upon which he relies were decided pursuant to prior statutory authority.

North Carolina General Statutes, section 7B-1101.1 became effective on 1 October 2005 and was made applicable to petitions or actions filed on or after that date. 2005 N.C. Sess. Laws 398 § 19. The

instant petitions were filed on 6 July 2007. Therefore, section 7B-1101.1 is the statute applicable to this case.

The language in former sections 7B-602 (governing appointment of a GAL for an abuse/neglect/dependency hearing) and 7B-1101 (governing appointment of a GAL for a termination of parental rights hearing) which required a trial court to appoint a GAL when the petition alleged incapability to care for the juvenile due to substance abuse, mental retardation, mental illness, or organic brain syndrome was deleted from those sections when section 7B-1101.1 was enacted. *See* 2005 N.C. Sess. Laws 398 §§ 2, 14. Similar language was not incorporated into the newly enacted section 7B-1101.1. *See* 2005 N.C. Sess. Laws 398 § 15.

Section 7B-1101.1 provides that a trial court may appoint a guardian *ad litem* for a parent, "if the court determines that there is a reasonable basis to believe that the parent is [(1)] incompetent or [(2)] has diminished capacity and cannot adequately act in his or her own interest." N.C. Gen. Stat. § 7B-1101.1(c) (2007).

"A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a *substantial* question as to whether the litigant is *non compos mentis*." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (citing *Rutledge v. Rutledge*, 10 N.C. App. 427, 432, 179 S.E.2d 163, 166 (1971)) (emphasis added). Whether to conduct such an inquiry is in the sound discretion of the judge. *Id.*

Here, nothing in respondent's conduct at the hearing raised a question about his competency. He testified on his own behalf and asserted his own interest in retaining his parental rights. Therefore, the trial court was within its discretion when it did not appoint a guardian *ad litem*. Respondent's contentions here stand in marked contrast to those raised in *In re. N.A.L. & A.E.L.*, 193 N.C. App. 114, 666 S.E.2d 768 (2008). In that case, this Court reversed the termination order and remanded so that a hearing could be held to determine whether a GAL was required. *Id.* at 119, 666 S.E.2d at 772. There, the petition alleged the children were dependent because the mother had "problems in controlling her anger outbursts; [she had a] significant tendency to be aggressive towards others, including her child; and [she had a] lack of understanding of her prior neglect of the minor child." The mother's IQ was 74; she had a personality disorder; she had borderline intellectual functioning; and she had "significant men-

tal health issues which impact[ed] her ability to parent th[e] child and meet his needs." *Id.* at 118-19, 666 S.E.2d at 771. Here, defendant's incapability was due in large part to his repeated incarceration, not "significant mental health issues which impact [his] ability to parent[.]" Therefore, this argument is without merit.

[2] Respondent also argues, in effect, that the trial court's findings of fact with respect to the grounds for termination of his parental rights were not supported by clear, cogent, and convincing evidence. We disagree.

At the adjudicatory stage, the petitioner has the burden to prove that at least one ground for termination exists by clear, cogent, and convincing evidence. N.C. Gen. Stat. § 7B-1109(f) (2007); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001) (citations omitted). Review in the appellate courts is limited to a determination of whether clear, cogent, and convincing evidence exists to support the findings of fact, and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed*, *disc. rev. denied*, 353 N.C. 374, 547 S.E.2d 9 (2001) (citation omitted). Unchallenged findings of fact are binding on this Court. *In re S.D.J.*, 192 N.C. App. 478, 486, 665 S.E.2d 818, 824 (2008) (citing *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")). " '[F]indings of fact made by the trial court . . . are conclusive on appeal if there is evidence to support them.' " *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007) (quoting *Hunt v. Hunt*, 85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987)).

Pursuant to North Carolina General Statutes, section 7B-1111, one of the grounds for terminating parental rights is the fact that "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than [twelve] months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2007). To establish this ground, the trial court must find by clear, cogent, and convincing evidence that: 1) the parent willfully left the child(ren) in foster care or placement outside the home for more than twelve months, and 2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child(ren). *In re O.C. & O.B.*, 171 N.C. App.

457, 464-65, 615 S.E.2d 391, 396, *disc. rev. denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

> A finding of willfulness does not require a showing of fault by the parent. Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children.

Id. at 465, 615 S.E.2d at 396 (citations and internal quotation marks omitted).

With respect to this ground for termination, the trial court made the following unchallenged findings of fact by clear, cogent, and convincing evidence:

> 13. [The children] were placed in the legal custody of CCDSS on or about January 3, 2006. They have been continuously in the legal custody of CCDSS since that date.
>
> . . . .
>
> 18. Upon [respondent's] release [from prison], the assigned CCDSS social worker, Andrea Gillikin, met with the father. Ms. Gilliken notified the father that, at minimum, he would need to secure stable housing and employment to work toward reunification.
>
> . . . .
>
> 20. This Court . . . held a permanency planning and review hearing on January 12, 2007. Prior to the hearing, Ms. Gillikin met with the father and went over the agency's recommendations for him. The father did not indicate that any of the recommendations or requests would be a problem. The Court adopted the agency's recommendations and issued [] an order that:
>
> The father shall complete the following services and comply with the following conditions to demonstrate that he is actively working towards reunification:
>
> - obtain and maintain stable employment and housing; housing shall be free from drugs, alcohol, and domestic violence.
> - contribute a reasonable sum to the cost of the children's care.
> - participate in a substance abuse assessment and comply with all recommendations.

- participate in domestic violence counseling and comply with all recommendations.
- comply with all probation/parole requirements.
- complete a parenting assessment and comply with all recommendations.
- comp[l]ete an anger management assessment and comply with all recommendations.
- refrain from illegal activities[.]
- submit to random drug screens—he shall make results of probation drug screens available to DSS and the GAL by today's order of the Court.
- set up an appointment with the social worker within the next 10 days and maintain weekly contact with the social worker.

These findings of fact, not having been challenged on appeal, are binding on this Court. *In re S.D.J.*, 192 N.C. App. at 486, 665 S.E.2d at 824. The trial court made one additional finding of fact relevant to this ground, which has been challenged on appeal: "21) The father failed to complete any of the court-ordered services and failed to meet the conditions." There is clear, cogent, and convincing evidence of record that although respondent may have begun to address some of the items listed in finding of fact number 20, he did not complete them.

Because these findings of fact are supported by clear, cogent, and convincing evidence, and they in turn support the trial court's conclusion that this ground for termination was established, this argument is without merit.

We note that the trial court concluded that grounds existed pursuant to sections 7B-1111(a)(1), (2), (3), (6), and (7) of the North Carolina General Statutes to terminate respondent's parental rights. Although respondent argues that other grounds are not supported by the evidence, we need not address his arguments as to those other grounds. *See In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984) (a finding of one statutory ground is sufficient to support the termination of parental rights). To the extent that respondent assigned error to additional findings of fact made by the trial court, we need not address those assignments of error as they pertain to the other grounds for termination of his parental rights.

[3] Finally, respondent argues that the trial court's decision to terminate parental rights was an abuse of discretion. We disagree.

Once the trial court has determined that a ground for termination exists, it moves on to the disposition stage, where it must determine whether termination is in the best interest of the child. N.C. Gen. Stat. § 7B-1110(a) (2007). The trial court's decision at this stage is reviewed for an abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002) (citation omitted).

In determining the best interests of the child, the court must consider:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2007).

Here, the trial court's order demonstrates that the court did not abuse its discretion when it terminated respondent's parental rights. The trial court made the following findings of fact in the best interest phase of the hearing:

42. [The ages of the children].

43. [The] permanent plan is adoption. [The children are] placed in a pre-adoptive home . . . and [have] been living in that home for fourteen (14) months. The pre-adoptive parents have strongly indicated their desire to adopt the children; the likelihood of adoption is high.

44. Neither [child] asks about their parents.

45. [The children] wish to be adopted by their current pre-adoptive family. They feel secure and loved as members of this family.

46. Ms. Gillikin has personally observed the children's interactions with their pre-adoptive parents. She observed that [the children] are blossoming and thriving in their current pre-adoptive home.

47. CCDSS would support adoption by the pre-adoptive parents.

48. Termination of parental rights would assist [the children] in obtaining the permanency of adoption.

49. It is in the best interests of [the children] for [their] father's parental rights to be terminated.

These findings of fact address each of the statutorily required considerations. Therefore, the court did not abuse its discretion in terminating respondent's parental rights.

Affirmed.

Judges McCULLOUGH and STEPHENS concur.

BARBARA C. TROUTMAN, PLAINTIFF-APPELLEE v. BUDDY ROSS TROUTMAN, DEFENDANT-APPELLANT

No. COA08-174

(Filed 21 October 2008)

1. Divorce— equitable distribution—criminal acts—relevance and prejudicial effect

There was no abuse of discretion in an equitable distribution action in the admission of defendant's criminal acts in shooting into the marital home and holding plaintiff as a hostage where defendant argued that the evidence was prejudicial but offered no support for the argument other than a detailed finding by the court. The majority of the finding concerns acts against the marital home and referred to defendant's treatment of plaintiff only as necessary to explain the sequence of events.

2. Divorce— equitable distribution—liquidity of assets not addressed—not raised at trial

The trial did not err in an equitable distribution action by not making findings concerning the liquidity of certain accounts, an

insurance check, and logging equipment where the liquidity of these assets was not raised at trial.

3. Divorce— equitable distribution—unequal distribution—factors—health and age of parties—incarceration

The trial court did not abuse its discretion in an equitable distribution action by ordering an unequal distribution of the marital estate where defendant argued that he was in ill health and older than the healthy plaintiff. Besides offering no authority for the argument that this factor should tilt the scale in his favor, he is incarcerated and neither works to maintain his standard of living nor pays for health care. The trial court's findings concerning defendant's maintenance of the marital property and defendant's failure to pay support were conclusively established.

4. Divorce— equitable distribution—valuation of real estate—multiple tracts

The trial court did not err in an equitable distribution action by valuing three parcels of real estate separately rather than as one, and in the values assigned to the parcels. There was no evidence to suggest they were more valuable combined, and the only evidence of an erroneous value was defendant's bald, self-serving testimony.

5. Divorce— equitable distribution—marital property—logging equipment

Findings in an equitable distribution action concerning the classification of logging equipment as marital property were binding where defendant did not assign error to them.

6. Appeal and Error— preservation of issues—failure to object at trial—proceeds from sale of marital property

Defendant did not object at trial and so did not preserve for appeal an argument concerning the handling of his shares from the sale of marital property.

Appeal by defendant from order entered 15 August 2007 by Judge April C. Wood in Iredell County District Court. Heard in the Court of Appeals 27 August 2008.

Judith M. Daly for defendant.

Katherine Freeman for plaintiff.

ELMORE, Judge.

Buddy Ross Troutman (defendant) appeals from an order concerning the equitable distribution of marital property between himself and his former wife, Barbara C. Troutman (plaintiff). We affirm.

I.

Plaintiff and defendant were married in 1960 and separated in 2002, at which point plaintiff was sixty-six years old and defendant was seventy years old. Defendant was ordered to pay post-separation support in the amount of $500.00 per month, but never made any payments, nor did he contribute to taxes or insurance on the marital residence, where plaintiff continued to live after the separation. On two separate occasions—once in January 2002 (on the day the parties separated) and once in February 2007—defendant came to the marital home and shot at and into the house, doing serious damage to the home. On the second occasion, he held plaintiff hostage for some time until local police were able to remove him. Plaintiff was not able to repair the damage done by defendant during these incidents because she was paying back taxes on the home out of a monthly income of less than $700.00, which came from social security and her pension.

Defendant requested an unequal distribution of the marital property in his favor, and a hearing was conducted on 27 April 2007. The trial court ordered that two-thirds of the marital property be distributed to plaintiff and one-third to defendant. Defendant now appeals.

II.

We note first that, although defendant has made many assignments of error, he has not assigned error to any of the trial court's findings of fact. As such, they are binding on this Court, and we take them as "conclusively established." *Hartsell v. Hartsell*, 189 N.C. App. 65, 68, 657 S.E.2d 724, 726 (2008); *see also Langdon v. Langdon*, 183 N.C. App. 471, 475, 644 S.E.2d 600, 603 (2007).

A.

[1] Defendant first argues that evidence of his criminal activity should have been excluded, as it was prejudicial. This argument is without merit.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2007). Admitting or excluding such evidence is up to the trial court's discretion; as such, the ruling "will not be disturbed on appeal absent a clear showing the court abused its discretion[.]" *Warren v. Jackson*, 125 N.C. App. 96, 99, 479 S.E.2d 278, 280 (1997).

The trial court admitted testimony by plaintiff regarding the incidents outlined in the following uncontested finding of fact:

> [O]n or about January 11, 2002, the Defendant shot a gun into the home and cause[d] damage to the house at that time. Some windows were damaged as a result of the Defendant's actions and the Plaintiff was forced to put plastic over the windows with duct tape in order to keep the weather outside. . . . That on or about February 9, 2007[,] the Defendant came to the former marital home while the Plaintiff was at home. That the Defendant refused to allow the Plaintiff to leave the home and forced [her] to sit at the table with a shirt over her head. That after an approximate[ly] 8 hour standoff with the police, the Plaintiff was able to go to the bathroom of the home. That the Defendant shot at the Plaintiff through the bathroom door approximately 4 times and damaged the bathroom door and tiles. The Defendant then shot at the Plaintiff through the closet in the bathroom and further cause[d] damage to the bathroom tile. That as a result of the Defendant's actions, law enforcement threw tear [gas] into the house, further damaging the property, including but not limited to busting out windows in the marital residence. That the Defendant is currently under a bond as a result of his actions but has not been convicted from these[.] *The Court is not considering the actions of the Defendant against the Plaintiff in this case, but considers his actions against the property.* Due to the homeowners' insurance being cancelled in 2006[,] the damages by the Defendant are not covered by insurance and the Plaintiff has obtained an estimate for the repairs to the residence of $19,000[.00] to repair the marital residence. That the Plaintiff does not have the funds to repair the former marital home. The Plaintiff has had to live in the house with the windows covered in plastic with duct tape and . . . as a result of the police coming into the home the furniture was overturned and damaged.

(Emphasis supplied.) Defendant argues that the admission of plaintiff's testimony was unduly prejudicial, as it provided information

that could have been introduced by evidence with less risk of prejudice to defendant. We disagree.

Defendant offers no support for his claim that the testimony was overly prejudicial except to state that the detailed finding of fact given above shows that the court was "swayed by the emotional aspect of the misconduct," outlining as it does defendant's treatment of plaintiff during the incidents. However, the majority of the finding concentrates on the extent and nature of the property damage defendant's actions inflicted on the marital home, referring to defendant's treatment of plaintiff only as necessary to explain the sequence of events. We find nothing in the finding of fact to contradict the trial court's statement that the purpose of the finding was to "consider[] [defendant's] actions against the property." Because defendant cannot show that the trial court abused its discretion, this assignment of error is overruled.

B.

Defendant next makes three arguments as to the portion of the order granting unequal distribution of the marital property in favor of plaintiff. We address these arguments in turn.

1.

[2] Defendant first argues that the trial court erred in failing to make certain findings of fact to support the unequal distribution of marital property and in failing to make certain conclusions of law required by statute. This argument is without merit.

> Per N.C. Gen. Stat. § 50-20(c) (2007),
>
> [t]here shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably.

The statute then lists factors the court must take into account, one of which is the "liquid or nonliquid character of all marital property and divisible property." N.C. Gen. Stat. § 50-20(c)(9) (2007). As to findings of fact, the statute states that "[i]n any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property and divisible property has been equitably divided." N.C. Gen. Stat. § 50-20(j) (2007).

Defendant argues that the trial court failed to make findings of fact required by statute as to the liquidity of the following assets: IRA accounts, checking accounts, savings account, the check from the insurance company, and the logging equipment. This argument is without merit.

When evidence concerning one of the individual factors listed in N.C. Gen. Stat. § 50-20(c) is introduced, the trial court must make findings as to that factor. *See Armstrong v. Armstrong*, 322 N.C. 396, 406, 368 S.E.2d 595, 600 (1988). However, defendant makes no showing that the liquid or nonliquid nature of the assets at issue was ever brought up at trial. Defendant points only to plaintiff's testimony that she had made withdrawals from an IRA out of necessity, and then makes the broad statement that "[t]he nature of assets held in savings accounts, checking accounts[,] and actual checks are liquid in nature." Because it does not appear that defendant put the liquidity or nonliquidity of the assets in dispute, we overrule this assignment of error.

Defendant also argues simply that the trial court was required to "stat[e] separately its conclusions of law." Given that in the two paragraphs of his brief immediately preceding this statement defendant correctly identifies and outlines the trial court's appropriate and thorough conclusions of law, we are at a loss to understand defendant's argument on this point. As such, we overrule this assignment of error.

2.

[3] Defendant then argues that the trial court abused its discretion in ordering an unequal distribution of the marital estate because the evidence did not support an award in favor of plaintiff. This argument is without merit.

As noted above, we review the trial court's distribution for an abuse of discretion.

> A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. 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) (citation omitted). Where the trial court's order sets forth findings of fact supporting its conclusion that "an equal division is not equitable,"

this Court will not disturb that holding on appeal unless we, "upon consideration of the cold record, can determine that the division ordered by the trial court[] has resulted in an obvious miscarriage of justice." *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 776 (1984).

The trial court in this case made the following relevant finding of fact:

> The Court considered all the parties' contentions for an unequal distribution listed on the Pre-Trial Order. The Court gave great weight to . . . the length of the parties' marriage—44 years [—] that both parties receive social security income, the actions of the Plaintiff to maintain the marital residence and adjoining real estate, the Defendant['s] actions in reducing the value of [the] marital property and[,] in fact, destroying marital property in 2002 and 2007, the fact that the Plaintiff has solely paid the taxes, some of which accrued after the date of separation, and homeowners[' insurance] on the property and the Defendant has not, that the Defendant has not paid his post-separation support and the Plaintiff had to borrow money to maintain the property, and the health of the Defendant. The Court has also considered the active nature of the IRA's [*sic*] of the Plaintiff's [*sic*].

Again, we take this finding of fact as conclusively established.

Defendant argues that the trial court did not give enough weight to his ill health in its distribution of the marital property; plaintiff's health is good, he argues, and she is six years younger than he. Defendant seems to believe that this factor, above all others, should tilt the scale in his favor. He offers no legal basis for this argument and, indeed, the facts of the matter make his argument nonsensical: he is currently incarcerated, where he neither works to maintain his standard of living (a point he argues in his brief) nor must pay for health care (to treat the health problems he states that he has).

Given these facts, we cannot say that the trial court abused its discretion or that its holding resulted in a miscarriage of justice. As such, this assignment of error is overruled.

3.

[4] Finally, defendant argues that the trial court erred in valuing the real property portion of the marital property distributed by the trial court's order. This argument is without merit.

Altogether, the parcels consist of 58.24 acres; the trial court separated them into the 1.56 acres on which the marital home sits, an adjacent 8.99 acres, and an adjacent 47.69 acres. The trial court distributed the 1.56 acres and the marital home to plaintiff and ordered that the other two parcels be sold off and the proceeds divided between plaintiff and defendant, with plaintiff receiving two-thirds and defendant receiving one-third. The trial court valued the property for purposes of distribution by subtracting the tax value of the marital home, $104,340.00, from the value given all 58.24 acres by an appraiser, $495,000.00. This left $390,660.00, of which two-thirds ($260,440.00) went to plaintiff and one-third ($130,220.00) went to defendant.

Defendant makes two arguments as to this: first, that the trial court erred by separating the land into adjacent parcels of land to be treated separately, rather than as one parcel, and second, that the monetary values assigned to the parcels of land were without basis. Both of these arguments are without merit.

As to the first, defendant argues that the trial court's order commits waste of the marital assets because the land is more valuable when considered as one large parcel. Defendant can point to no evidence in the record, however, that suggests that this is the case.

As to the second, we note once again that defendant's failure to assign error to the trial court's relevant finding of fact makes that finding conclusive and binding on this Court. The relevant finding of fact here is the one that provides the valuation of the various parcels of land as stated above. In any case, the only evidence to which defendant points to contradict the trial court's findings on the valuation of the land is his own testimony, which consisted of unsupported statements that the land was now worth "a million and a half" dollars and that nearby land was selling for $47,000.00 or $60,000.00 an acre. These bald, self-serving statements do not constitute a basis for concluding that the trial court abused its discretion in this valuation.

Both arguments are without merit, and thus these assignments of error are overruled.

C.

[5] Defendant next argues that the trial court erred in classifying certain property related to the logging business as marital property. This argument is without merit.

We again note that the findings of fact in the trial court's order are binding on this Court. In finding of fact 14, the court stated:

> The Court finds that the following items are items of marital property and should be distributed to the Defendant at the following values:
>
> Dump truck—$800.00
> Low Boy trailer—$800.00
> Trackhoe—$4000.00
> Barko Loader[—]$15,000.00
> Fella Buncher—$12,000.00
> Trailer—$900.00
> Trackhoe—$10,000.00
> Trailer—$1,000.00
> Timber removed f[ro]m field—$1,500.00
> Numerous tools—[no evidence as to value]
> Crane—$900.00
> Two ladders—$600.00
> Welder—$200.00
>
> The Court finds that the 1982 GMC truck was used in the Troutman Logging and Land Clearing business and is marital property. That this vehicle was wrecked and the insurance check was issued in the amount of $9,750.00 and that check is marital and should be distributed to the Plaintiff.

Defendant argues to this Court that the evidence presented at the hearing did not support these findings. However, because defendant did not assign error to them, they are binding on this Court; as such, we overrule this argument.

D.

[6] Finally, defendant argues that the trial court erred in ordering that the proceeds from the sale of the property awarded to defendant be held in his attorney's trust account until such time as he is released from jail. Defendant did not object to this portion of the trial court's ruling at trial, even though the transcript reveals he was given an explicit opportunity to do so. As such, he has not preserved this argument for appeal, and we do not address it. *See* N.C. R. App. Proc. 10(b)(1) (2007).

Affirmed.

Judges TYSON and CALABRIA concur.

NEW HANOVER COUNTY WATER AND SEWER DISTRICT, PLAINTIFF v. JAMES RAY THOMPSON, DEFENDANT AND THIRD-PARTY PLAINTIFF v. T.A. LOVING, INC. AND DALE TODD D/B/A DALE TODD WELL DRILLING, THIRD-PARTY DEFENDANTS

No. COA08-258

(Filed 21 October 2008)

1. Appeal and Error— preservation of issues—failure to raise issue at trial—failure to cite authority

Although defendant contends the trial court erred in a condemnation case by awarding final judgment for plaintiff county water and sewer district even though plaintiff's relocation of the easement to accommodate another landowner was arbitrary, defendant waived this argument by failing to raise it at trial, and even if this argument was preserved for appeal, defendant failed to cite any authority to support this contention as required by N.C. R. App. P. 28(b)(6).

2. Eminent Domain— sewer line easement—just compensation

The trial court did not err in a condemnation case by awarding final judgment for plaintiff county water and sewer district even though defendant landowner contends that plaintiff failed to use the statutory formula under N.C.G.S. § 40A-64 and that its failure to use an appraiser to determine the amount of just compensation should preclude application of N.C.G.S. § 40A-46 to prevent defendant from contesting the amount of deposit because: (1) the statutory procedure under N.C.G.S. § 40A-64 to determine just compensation was not applicable when defendant waived the issue of just compensation by failing to file an answer within the 120-day time limit prescribed by N.C.G.S. § 40A-46; and (2) the statute directs the trial court to enter final judgment in the amount deposited after plaintiff's failure to file an answer within 120 days of service of the complaint, and this finding supports the trial court's conclusion of law that $12,000.00 was just compensation.

3. Eminent Domain— sewer line easement—condemnation—abuse of power claim—motion for final judgment after motion to continue granted

Plaintiff county water and sewer district did not abuse its power in a condemnation action by filing a motion for final judgment after defendant's motion to continue was granted, changing the route, refiling the complaint, serving the summons with an incorrect date, plaintiff's contact with defendant, or failure to appraise damages because: (1) defendant's only appearance in the trial court before plaintiff filed the motion for final judgment was a motion to continue filed on 13 November 2006, more than 120 days from service of the complaint; (2) plaintiff was not on notice that defendant appeared in the case until after the 120-day time limit had passed; and (3) although defendant asserted plaintiff had notice that it should not move for final judgment based on the fact that he spoke to a county employee regarding the removal of the well on his property on 21 August 2006, this dispute related to plaintiff's alleged tort damages, and the trial court granted defendant's motion to extend time to file an answer in order to raise the tort claims.

4. Constitutional Law— substantive due process—procedural due process—just compensation

The application of N.C.G.S. § 40A-46 in a condemnation case did not violate defendant landowner's substantive and procedural due process rights under the United States Constitution by allegedly depriving him of just compensation because: (1) defendant waived the substantive due process issue by failing to raise it at the trial court level; (2) in regard to procedural due process, defendant received ample notice and opportunity to contest the amount of just compensation; and (3) although the civil summons erroneously notified defendant he had thirty days to respond to the complaint, this error did not prejudice defendant when plaintiff did not seek a final judgment against defendant until more than 120 days from service of the complaint.

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

Although defendant contends plaintiff waived its right to enforce the purported admission of just compensation by calendaring the motion for final judgment less than fifteen days before the trial date, this assignment of error is dismissed because defendant did not raise this issue at trial.

Appeal by defendant and third-party plaintiff from judgment entered 5 December 2007 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 10 September 2008.

Assistant County Attorney Sharon J. Huffman, for New Hanover County for plaintiff-appellee.

Rose Rand Attorneys, P.A., by Jason R. Page and Ennis Law Firm, P.C., by David Paul Ennis, for defendant-appellant.

CALABRIA, Judge.

James Ray Thompson ("defendant") appeals the trial court's final judgment in New Hanover County Water and Sewer District's ("plaintiff's") condemnation action. We affirm.

Sometime prior to March 2004, plaintiff approached defendant about obtaining an easement for a sewer line along the eastern property line of a vacant lot owned by defendant. In exchange for granting the easement, plaintiff offered to provide defendant with six free sewer taps. On 30 March 2004, plaintiff sent defendant a letter asking defendant to sign the enclosed easement agreement in exchange for the sewer taps valued by plaintiff at $12,000.00.

Defendant did not sign the easement agreement. On 12 April 2004, defendant sent a letter to plaintiff listing several items plaintiff and defendant discussed that were not in the plaintiff's "packet."[1] Specifically, defendant asked plaintiff to place "all dirt that is displaced by the sewer line" on defendant's property, to have New Hanover County pay for installation of a new well on defendant's property, to provide a sewer tap at no charge for defendant's neighbor, and to waive requirements for sewer permits or charges for "whatever is built on [defendant's] property."

On 15 June 2004, New Hanover County Deputy Engineer, James S. Craig, sent defendant a letter stating:

> You have previously been notified via two letters stating New Hanover County's need for a sewer easement on your above referenced parcel of land. We have also, meet [sic] twice on your property to discuss various issues you had regarding this easement and the removal of dirt from the site. At that time we felt all

1. It is unclear from the record whether the "packet" referred to in defendant's April letter is the same as the easement agreement sent by the plaintiff in March.

> matters had been address [sic], yet to date we have not received the signed easement. It is imperative that we receive this document in our office no later than June 30, 2004 to proceed on schedule with this project.
>
> If I do not hear from you and/or we are unable to come to an agreement on the necessary easement, this matter will be brought before the County Commissioners, at their July 12, 2004 meeting for condemnation.

After adopting a resolution authorizing condemnation of sewer utility easements on defendant's property, plaintiff sent defendant a "Notice of Action" pursuant to N.C. Gen. Stat. § 40A-40 on 15 July 2004 by certified mail. This notice was followed by a letter dated 20 July 2004, notifying defendant that condemnation of the sewer easement was authorized and construction would begin on defendant's property on 30 August 2004. In addition, the letter notified defendant that the existing well on the property would be moved and defendant would need to coordinate with plaintiff to arrange for relocation of the well.

Plaintiff originally filed a complaint, Declaration of Taking, and Notice of Deposit on 9 September 2004 pursuant to N.C. Gen. Stat. § 40A-41. However, because plaintiff did not obtain service of process on defendant, plaintiff re-filed the complaint on 21 June 2006 ("the complaint"). In addition, plaintiff's civil summons incorrectly notified defendant that he had thirty days to respond to the Complaint, rather than 120 days allowed by N.C. Gen. Stat. § 40A-46. Defendant was properly served with the re-filed Complaint on 1 July 2006.

On 8 November 2006, the trial court administrator set a hearing date for either dismissal of the action for failure to prosecute or for default judgment. On 13 November 2006, defendant filed a motion and order for continuance stating he "[did] not know what this [was] about" and requested time to hire an attorney. On 12 December 2006, plaintiff filed a motion requesting a final judgment. On 2 February 2007, defendant filed a motion to continue requesting additional time to respond to the complaint, investigate the action, and determine tort damages to his property from the condemnation. The trial court granted defendant's motion for the purpose of determining tort damages.

On 19 February 2007, defendant filed an answer denying, *inter alia*, that $12,000.00 was just compensation for the taking ("answer").

Defendant also included in his answer counterclaims against plaintiff for inverse condemnation and negligence. On 19 April 2007, plaintiff moved to dismiss the counterclaims for failure to join T.A. Loving and Dale Todd Drilling as necessary parties. On 30 May 2007, defendant filed a motion for leave to add third-party defendants T.A. Loving and Dale Todd Drilling. The trial court granted defendant's motion to file a third-party complaint. Defendant voluntarily dismissed the counterclaims. On 5 December 2007, the trial court granted final judgment in favor of plaintiff, determining that defendant "fail[ed] to plead or appear in the time allowed by law regarding the justness of the compensation deposited." Defendant appeals.

I. Standard of Review

The standard of review of a judgment entered on a bench trial is "whether the trial court's findings of fact are supported by competent evidence." *Terry's Floor Fashions, Inc. v. Crown Gen. Contr'rs, Inc.*, 184 N.C. App. 1, 10, 645 S.E.2d 810, 816 (2007), *review denied*, 362 N.C. 373, 664 S.E.2d 561 (2008) (citing *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988)). Where there are no objections to the findings of fact, they are conclusive upon appeal and the only question is whether the findings support the conclusions of law. *In re Pierce*, 67 N.C. App. 257, 259, 312 S.E.2d 900, 902 (1984).

Here, defendant did not assign error to any of the trial court's findings of fact. Therefore, we examine whether the trial court's findings support its conclusions of law resulting in judgment for the plaintiff. *Id.*

II. N.C. Gen. Stat. § 40A-46

Defendant argues it was "fundamentally unfair" to apply N.C. Gen. Stat. § 40A-46 because plaintiff (1) relocated the easement to accommodate another landowner; (2) failed to use the statutory formula to determine just compensation; and (3) filed a motion for final judgment after defendant filed his motion to continue. We disagree.

Chapter 40A of the General Statutes delineates the exclusive procedures to be followed by a local public condemnor. *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 160, 394 S.E.2d 698, 700 (1990). In order to institute a condemnation action, a local public condemnor must file a complaint, declaration of taking, and deposit an amount of just compensation estimated by the condemnor. N.C. Gen. Stat. § 40A-41 (2007). N.C. Gen. Stat. § 40A-46 provides that

> Any person named in and served with a complaint containing a declaration of taking shall have 120 days from the date of service thereof to file [an] answer. Failure to answer within said time shall constitute an admission that the amount deposited is just compensation and shall be a waiver of any further proceeding to determine just compensation; in such event the judge shall enter final judgment in the amount deposited and order disbursement of the money deposited to the owner. Provided, however, at any time prior to the entry of the final judgment[,] the judge may, for good cause shown and after notice to the condemnor[,] extend the time for filing [an] answer for 30 days.

N.C. Gen. Stat. § 40A-46 (2007). "When the language of a statute is plain and free from ambiguity, expressing a single definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly." *Long v. Smitherman*, 251 N.C. 682, 684, 111 S.E.2d 834, 836 (1960) (quotation omitted).

[1] We first address defendant's contention that plaintiff's relocation of the easement to accommodate another landowner was arbitrary. Defendant did not raise this argument at the trial court level. "A contention not raised in the trial court may not be raised for the first time on appeal." *Town of Chapel Hill*, 100 N.C. App. at 159-60, 394 S.E.2d at 700 (citation omitted). In addition, even if this argument was preserved for appeal, defendant offers no authority to support this contention. *See* N.C.R. App. P. 28(b)(6) (assignments of error for which no authority is cited will be deemed abandoned). Accordingly, we do not address this argument.

[2] Defendant next argues that plaintiff's failure to use the statutory formula prescribed by N.C. Gen. Stat. § 40A-64 and failure to use an appraiser to determine the amount of just compensation should preclude application of N.C. Gen. Stat. § 40A-46 to prevent defendant from contesting the amount of deposit. We disagree.

The statutory procedure set forth in N.C. Gen. Stat. § 40A-64 to determine just compensation is not applicable where defendant waived the issue of just compensation by failing to file an answer within the time limits proscribed by N.C. Gen. Stat. § 40A-46. The statute clearly provides that when a defendant fails to file an answer within 120 days of service of a complaint, he waives "any further proceeding to determine just compensation." In addition, the statute directs the trial court to enter final judgment "in the amount

deposited." The trial court found that defendant did not file an answer within 120 days of service of the complaint. This finding supports the trial court's conclusion of law that $12,000.00 was just compensation. Defendant's assignment of error is overruled.

[3] Defendant next argues that plaintiff "abused its power" by filing a motion for final judgment after defendant's motion to continue was granted. We disagree. Defendant also argues changing the route, refiling the complaint, serving the summons with an incorrect date, plaintiff's contact with the defendant, and failure to appraise damages also constitutes an abuse of power. We address these arguments in the preceding and following sections of this opinion.

In support of his argument, defendant cites *City of Durham v. Woo*, 129 N.C. App. 183, 497 S.E.2d 457 (1998). We find this case distinguishable. In *Woo*, this Court concluded it was within the trial court's discretion to set aside a default judgment against the defendants because, although defendants failed to file a formal answer with the court within 120 days, two of the defendants sent letters to the trial court responding to the complaint. *Id.* at 188, 497 S.E.2d at 461. The trial court found that the letters constituted an appearance in the condemnation proceeding and "put the City on notice that it should not have proceeded to file a motion for entry of default." *Id.* at 186, 497 S.E.2d at 460; *see also Realty Corp. v. Bd. of Transportation*, 303 N.C. 424, 430, 279 S.E.2d 826, 830 (1981) (concluding property owners' failure to answer a condemnation proceeding filed by the DOT did not subject them to an entry of default where the parties stipulated that matters concerning a related proceeding would apply to the condemnation action). In addition, one of the *Woo* defendants continued to negotiate with the plaintiff to secure an increased price for the property. *City of Durham*, 129 N.C. App. at 185, 497 S.E.2d at 459.

In the case *sub judice*, defendant's only appearance in the trial court before plaintiff filed the motion for final judgment, was a motion to continue filed on 13 November 2006, more than 120 days from service of the complaint. Unlike the defendants in *Woo*, plaintiff was not "on notice" that defendant appeared in the case until after the 120-day time limit had passed. Furthermore, the question before the *Woo* court was whether the trial court abused its discretion in setting aside the default judgment against defendant. Here, the question posed by defendant is whether plaintiff "abused its power" by moving for final judgment as permitted by N.C. Gen. Stat. § 40A-46. Defendant also asserts that because he spoke to a county employee regarding

the removal of the well on his property on 21 August 2006, this constituted notice to the plaintiff that it should not move for final judgment. However, this dispute related to plaintiff's alleged tort damages. The trial court granted defendant's motion to extend time to file an answer in order to raise the tort claims. We conclude defendant failed to show that plaintiff abused its power by proceeding to final judgment.

III. Due Process

[4] Defendant next argues the application of N.C. Gen. Stat. § 40A-46 in this case violated his substantive and procedural due process rights under the United States Constitution.

A. Substantive Due Process

Defendant contends N.C. Gen. Stat. § 40A-46, is unconstitutional because it "deprive[d] a landowner from his constitutional right to receive just compensation." Defendant did not challenge the constitutionality of N.C. Gen. Stat. § 40A-46 on substantive due process grounds at the trial court level. Constitutional issues not raised at the trial court level cannot be considered for the first time on appeal. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (citations omitted); *see also Department of Transp. v. Rowe*, 353 N.C. 671, 674, 549 S.E.2d 203, 207 (2001) (concluding this Court erred in considering the constitutionality of a statute when defendant did not raise the issue at the trial court level). This assignment of error is dismissed.

B. Procedural Due Process

Defendant also argues he was not afforded procedural due process in this case. We disagree.

"The fundamental premise of procedural due process protection is notice and the opportunity to be heard. Moreover, the opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' " *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (internal citation omitted).

Defendant received ample notice and opportunity to contest the amount of just compensation. Defendant and plaintiff engaged in several discussions regarding the easement in 2004. These discussions included plaintiff's proposal of $12,000.00 as an amount of just compensation for the easement. Plaintiff sent defendant a letter notifying him of the amount of just compensation and advising him

of his rights under N.C. Gen. Stat. § 40A-40 on 15 July 2004. Defendant did not contest that plaintiff followed the statutory procedures provided for notifying property owners of condemnation proceedings under N.C. Gen. Stat. §§ 40A-40, -41, and -43. Defendant was served with the condemnation complaint and notice of deposit on 1 July 2006. Although the civil summons erroneously notified defendant he had thirty days to respond to the complaint, this error did not prejudice defendant. Plaintiff did not seek a final judgment against defendant until 12 December 2006, which is more than 120 days from service of the complaint.

IV. Notice of Hearing

[5] Defendant also contends that plaintiff "waived its right to enforce the purported admission of just compensation" by calendaring the motion for final judgment less than fifteen days before the trial date. Defendant did not raise this issue before the trial court, therefore we need not address it on appeal. *See Town of Chapel Hill*, *supra*.

We conclude the trial court did not err in awarding final judgment for the plaintiff. The trial court's judgment is affirmed.

Affirmed.

Judges TYSON and ELMORE concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. GREGORY LAMONT JOHNSON, DEFENDANT

No. COA08-55

(Filed 21 October 2008)

1. Evidence— prior inconsistent statements—similar evidence without object

The trial court did not err in a first-degree burglary, first-degree arson, and violation of a domestic violence protective order case by allowing an officer to testify to a statement allegedly made by the victim at an earlier time that defendant stated he was going to kill her which was not consistent with her trial testimony because: (1) the officer testified without objection that she heard defendant say to the victim that he was going to kill

her; and (2) where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.

2. Burglary and Unlawful Breaking or Entering— first-degree burglary—requested instruction given in substance

The trial court did not err by failing to give defendant's requested instruct to the jury that in order to convict defendant of first-degree burglary, defendant had to enter the building with the intent to commit arson because, although the trial court did not give defendant's requested instructions verbatim, it gave them in substance since the actual instructions twice stated that defendant had to have the requisite intent to commit a felony, arson, at the time of the breaking and entering.

3. Criminal Law— instruction—flight

The trial court did not err or commit plain error in a first-degree burglary, first-degree arson, and violation of a domestic violence protective order case when it instructed the jury that it could consider flight from the crime as evidence of guilt because there was ample evidence that defendant fled and took steps to avoid apprehension.

Appeal by defendant from judgments entered on or about 5 April 2006 by Judge Andy Cromer in Superior Court, Forsyth County. Heard in the Court of Appeals 9 September 2008.

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

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

STROUD, Judge.

Defendant appeals from convictions for first degree burglary, first degree arson, and violation of a domestic violence protective order. The issues before the Court are whether the trial court erred in (1) allowing testimony about a witness' prior inconsistent statement, (2) refusing to give defendant's proposed jury instruction, and (3) giving a jury instruction on flight. For the following reasons, we find no error.

I. Background

The State's evidence tended to show the following: During the early hours of 15 March 2005, Lisa Stewart ("Ms. Stewart") made two calls to 911 regarding a domestic dispute with her ex-boyfriend, defendant. Ms. Stewart made the first call to 911, stating that defendant had a knife and was pacing on her back porch. Defendant's presence at Ms. Stewart's residence was in violation of a domestic violence protection order which Ms. Stewart had obtained against him. Corporal A.N. Swaim ("Corporal Swaim") with the Winston-Salem Police Department arrived at Ms. Stewart's apartment shortly thereafter, but defendant was not present when she arrived. Ms. Stewart stated that she did not want to press charges for violation of the domestic violence protective order.

Shortly thereafter, Ms. Stewart again contacted 911 regarding defendant, and Corporal Swaim returned to Ms. Stewart's apartment. When Corporal Swaim arrived, defendant was pulling on Ms. Stewart's screen door while holding a knife and yelling "please let me in." Ms. Stewart's door was "rigged" in a way that made it difficult to open. Corporal Swaim repeatedly told defendant to put the knife down and drew her service weapon. Defendant told Officer Swaim, "You're going to have to kill me. I'm not going back to jail[,]" and resumed demanding that Ms. Stewart "[l]et [him] in." Other officers arrived at the scene.

Corporal Swaim and Officer Banville both sprayed defendant with pepper spray, but defendant merely "wiped it off." Defendant became more agitated and continued yelling "let me in," while wielding the knife. Eventually defendant was able to pull the storm door open.

Once inside, defendant pushed Ms. Stewart, slammed the front door shut, and locked it. Officer Swain then heard defendant say, "I'm going to kill you." The officers unsuccessfully attempted to kick in the front door. Approximately a minute and a half to two minutes after defendant entered Ms. Stewart's apartment, Corporal Swaim observed defendant light curtains on fire with a cigarette lighter. The officers were able to gain entrance with a key from Ms. Stewart who had exited her apartment out the back door shortly after defendant had entered the front door.

Officer Swaim then observed defendant running up the stairs with the knife. By this time the apartment was consider-

ably ablaze, and the officers unsuccessfully tried to stop the fire. Officer Swaim went outside and observed defendant who had come out of an upstairs bedroom window and onto the porch roof. Defendant was pacing back and forth saying, "You're going to have to kill me. I'm not going back to jail." Defendant then jumped from the porch roof to an adjacent apartment and crawled into the apartment through a window.

As members of the Winston-Salem Police Department Special Enforcement Team were trying to open the door to the room where defendant was barricaded, defendant brandished a knife through an opening in the door and stated "I'll cut you" and "take one of you out". Eventually defendant told the police he was "coming out[,]" and he was taken into custody.

The fire investigator from the scene testified that there was considerable damage to Ms. Stewart's apartment and that the point of origin of the fire was at the window beside the front door. The fire investigator believed that an accelerant was used because of the extent of the damage, the odor of gasoline, and the fact that he found an open gasoline can near the point of origin of the fire. Furthermore, on 6 July 2004, Ms. Stewart had called the police and reported that defendant had threatened to kill her and to burn her house down.

On or about 25 July 2005, a grand jury indicted defendant for first degree burglary ("burglary"), first degree kidnapping, violation of a domestic violence protective order ("50B violation"), habitual misdemeanor assault, and assault with a deadly weapon. In a separate indictment defendant was also indicted for first degree arson ("arson"). On or about 3 April 2006, a superceding indictment was issued on the charge of arson.

The jury found defendant guilty of burglary, arson, and the 50B violation. Defendant was sentenced to a consolidated term of 117 to 150 months imprisonment for the burglary and arson. Defendant received a consecutive sentence of 150 days for the 50B violation.

On or about 10 April 2007, this Court allowed defendant an appeal through the issuance of a writ of certiorari. Defendant argues the trial court erred in (1) allowing testimony about a witness' prior inconsistent statement, (2) refusing to give defendant's proposed jury instruction, and (3) giving a jury instruction on flight. For the following reasons, we find no error.

II. Prior Inconsistent Statement

[1] Defendant first contends that "the trial court erred in allowing Officer Kearns to testify to a statement allegedly made by Ms. Stewart at an earlier time that was not consistent with her trial testimony . . . ." The specific statement with which defendant contends Officer Kearns should not have been allowed to testify to was Ms. Stewart telling Officer Kearns defendant told her, "I'm going to kill you." Defendant contends this is error because Ms. Stewart testified "she never heard the defendant say at any time that he was going to kill her."

However, Officer Swaim testified without objection that she heard defendant say to Ms. Stewart, "I'm going to kill you." "Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) (citations omitted); *see State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985) ("Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence."). This argument is overruled.

III. Jury Instructions

Defendant's next two arguments allege errors in the trial court's jury instructions.

A. Intent Required for First Degree Burglary

[2] Defendant's first argument as to the jury instructions is that "the trial court erred in refusing to instruct the jury that in order to convict the defendant of first degree burglary the defendant had to enter the building with the intent to commit arson . . . ." Defendant contends that

> the pattern jury instruction did not adequately instruct the jury on when the defendant had to possess the requisite intent to commit a felony . . . [as] the jury would be misled into believing that they had to find the intent element once the State had proven that an arson was committed after entry.

Defendant requested that the jury instructions contain the following language:

> The offense of burglary is the breaking and entering with the requisite intent. It is complete when the building is entered or it does not occur. A breaking and an entry without the intent to commit a felony in the building is not converted into burglary by the subsequent commission therein of a felony subsequently conceived.

Here,

> [w]e review jury instructions contextually and in its entirety. 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. The party asserting error 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.

State v. Hall, 187 N.C. App. 308, 314, 653 S.E.2d 200, 207 (2007) (citation, semicolon, ellipses, and brackets omitted), *disc. review denied*, 360 N.C. 653, 663 S.E.2d 431 (2008).

The trial court instructed the jury in pertinent part,

> For you to find the defendant guilty of this offense, first degree burglary, the State must prove six things beyond a reasonable doubt. . . . Sixth, that *at the time of the breaking and entering*, *the defendant intended to commit arson*. . . .
>
> So if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant broke into and entered an occupied dwelling house, without the owner's consent, during the nighttime, and *at that time intended to commit felonious arson*, it would be your duty to return a verdict of guilty of first degree burglary.

(Emphasis added.)

We conclude that though the trial court did not give defendant's requested instructions verbatim it gave them in substance as the actual instructions twice state that defendant had to have the requisite intent to commit a felony, arson, "at the time of the breaking and entering . . . ." *See*, *e.g.*, *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988) (citation omitted) ("Whether the trial court instructs

using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion."); *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976) (citation omitted) ("[T]he trial court is not required to give a requested instruction in the exact language of the request."); *State v. West*, 146 N.C. App. 741, 744, 554 S.E.2d 837, 840 (2001) (citation omitted) ("Thus, while Defendant's proposed jury instructions were certainly a correct statement of the law, the trial court's jury instructions were proper as they presented in substance what Defendant had requested."); *State v. Duncan*, 136 N.C. App. 515, 517, 524 S.E.2d 808, 810 (2000) (citation, quotation marks, and brackets omitted) ("The trial court has discretion in selecting the language used in its jury instructions . . . but if a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance."). This argument is overruled.

B. Flight

[3] Finally, defendant claims "the trial court committed plain error when it instructed the jury that they could consider flight from the crime as evidence of guilt." Defendant contends, "There was no evidence of flight at all." We disagree.

Defendant concedes that no objection to this instruction was made at trial, and thus plain error review should apply. *State v. Smith*, 188 N.C. App. 207, 213, 654 S.E.2d 730, 735, *disc. review denied*, 362 N.C. 479, —— S.E.2d —— (2008) ("When a defendant does not object to instructions, the alleged error is subject to review for plain error only.") However, "[a] prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all." *State v. Johnson*, 320 N.C. 746, 750, 360 S.E.2d 676, 679 (1987) (citation and quotation marks omitted). Where "the challenged instruction was not error, . . . 'plain error' analysis is not required." *Id.* (citation omitted).

A trial court may instruct a jury on a defendant's flight where "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 434 (1990) (citations and quotation marks omitted). "[M]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that de-

fendant took steps to avoid apprehension." *State v. Westall*, 116 N.C. App. 534, 549, 449 S.E.2d 24, 33, *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994).

During the trial, the State presented evidence of several instances when defendant fled from the police and sought to avoid apprehension. When Officer Swaim first arrived at Ms. Stewart's apartment and attempted to stop him from entering, defendant told her, "You're going to have to kill me. I'm not going back to jail[,]" and continued his efforts to enter the apartment. Neither a gun pointed at him nor pepper spray deterred defendant. Once defendant entered Ms. Stewart's apartment, he slammed the metal door shut and deadbolted it. When the police finally entered Ms. Stewart's apartment, defendant ran up the stairs with the knife and out an upstairs window onto the porch roof. While the police were trying to negotiate with defendant, he jumped across the porch roof to another apartment, crawled though a window, and barricaded himself inside. As the police were trying to open the door behind which defendant was barricaded, defendant stuck the knife outside the door, slashing it up and down and saying "I'll cut you" and "take one of you out". Thus, there was ample evidence that defendant fled and took steps to avoid apprehension. *See Westall* at 549, 449 S.E.2d at 33. The admission of these jury instructions was not in error, and this argument is overruled.

IV. Conclusion

For the foregoing reasons we conclude that defendant failed to properly preserve any contentions as to allegedly prior inconsistent statements and that the trial court properly instructed the jury as to first degree burglary and flight.

NO ERROR.

Judges McGEE and McCULLOUGH concur.

MARK HUEBNER, Plaintiff v. TRIANGLE RESEARCH COLLABORATIVE, a North Carolina Corporation, and THADDEUS K. SZOSTAK, Defendants

No. COA08-70

(Filed 21 October 2008)

Appeal and Error— notice of appeal—tolling of time requirement—actual notice of judgment

Plaintiff could not use Appellate Rule 3(c) to toll the time for filing his notice of appeal based on lack of service where he had actual notice of entry of the judgment. The language of a Rule 60(b) motion, filed almost three years before plaintiff's notice of appeal, indicated actual notice of the underlying order and judgment, and that motion was denied approximately two years and nine months before notice of appeal.

Appeal by plaintiff from an order and judgment entered 12 August 2004 by Judge Donald W. Stephens in Durham County Superior Court. Heard in the Court of Appeals 23 September 2008.

McDaniel & Anderson, L.L.P., by John M. Kirby, for plaintiff-appellant.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for defendant-appellees.

PER CURIAM.

Mark Huebner ("plaintiff") appeals from an order dismissing his complaint involuntarily and from a judgment in favor of Triangle Research Collaborative and Thaddeus K. Szostak ("defendants"). For the reasons stated below, we dismiss this appeal.

I. Background

On 12 July 2002, plaintiff filed a complaint against defendants seeking: (1) unpaid wages, liquidated damages, and attorney's fees pursuant to North Carolina's Wage and Hour Act (N.C. Gen. Stat. §§ 95-25.1 to 95-25.25); and (2) an injunction, reinstatement to employment, and compensation for lost wages, benefits and other economic losses pursuant to North Carolina's Retaliatory Employment Discrimination Act (N.C. Gen. Stat. §§ 95-240 to 95-245). On 16 September 2002, defendants filed an answer and counterclaim

alleging that plaintiff had breached the confidentiality agreement contained in his employment contract.

On 4 October 2002, Jeffrey L. Starkweather filed a notice of appearance on plaintiff's behalf, and Elizabeth P. McLaughlin filed a motion to withdraw as plaintiff's counsel. The trial court allowed Ms. McLaughlin's motion to withdraw on 24 April 2003. On 16 May 2003, defendants filed a motion to continue and a motion for partial summary judgment. On 20 May 2003, the trial court entered an order continuing the trial; the court administrator rescheduled trial for 11 August 2003; and defendants' counsel and Mr. Starkweather agreed to extend the deadline for mediation until 21 July 2003. On 21 May 2003, defendants served Mr. Starkweather with notice that their motion for partial summary judgment would be heard on 17 July 2003.

Neither plaintiff nor Mr. Starkweather appeared for a scheduled 14 July 2003 mediation, and on 23 July 2003, defendants filed a motion for sanctions. On that same date, plaintiff filed a notice of voluntary dismissal without prejudice pursuant to N.C.R. Civ. P. 41. In response, on 30 July 2003, defendants filed a motion to dismiss plaintiff's complaint involuntarily. In support, defendant Triangle Research Collaborative asserted it had a pending compulsory counterclaim that it had not dismissed, and therefore, plaintiff's notice of voluntary dismissal was ineffectual as it amounted to a failure to prosecute the action.

Although Judge Stafford Bullock heard defendants' motion to dismiss on 22 August 2003, he did not enter a ruling upon the motion. In a letter dated 12 May 2004, the court notified the parties that the case was set for trial on 28 June 2004. A notation on the letter indicated that copies were sent to Ms. McLaughlin (plaintiff's former counsel) and to Mr. Starkweather (plaintiff's counsel at that time). Neither Mr. Starkweather nor plaintiff attended the 28 June 2004 hearing. During the hearing, Judge Donald Stephens stated that "[w]e've left messages with Jeffrey Starkweather's office all morning and notified his office that this matter would be called this afternoon. He is not here. We're proceeding without him. He certainly had notice from the printed calendar." Judge Stephens further noted that Judge Bullock had signed an order on 28 June 2004 relinquishing jurisdiction over the motions which Judge Bullock had heard on 22 August 2003. After hearing defendants' motion to dismiss, Judge Stephens allowed the defendant's motion in open court. Defendants then presented evidence as to their counterclaim, and Judge Stephens found that plaintiff had vio-

lated the confidentiality terms of the parties' employment contract. After permanently enjoining plaintiff from disclosing certain confidential information, Judge Stephens awarded $3,000.00 in attorney's fees to defendants.

On 28 June 2004, Judge Stephens signed one copy of an order dismissing plaintiff's complaint; this order was entered on 12 August 2004. On 6 July 2004, he signed a duplicate copy of the same order which was entered on 29 October 2004. In a judgment signed on 6 July 2004 and entered on 19 October 2004, Judge Stephens ruled in defendants' favor on the counterclaim. This copy also has a handwritten notation stating "Duplicate Copy Entered 12 Aug 04[.]" Judge Stephens signed a second copy of the same judgment on 12 August 2004, *nunc pro tunc*, 28 June 2004; however, the filing date for the second copy is unclear as the file stamp on the document provided in the record is illegible. This copy also contains a handwritten notation stating that "copies [were] mailed to atty" on 18 August 2004.

In correspondence dated 17 September 2004 and file-stamped 22 September 2004, plaintiff informed Court Administrator Kathy Shuart that he was terminating the services of Mr. Starkweather. On 27 October 2004, attorney Michael A. Jones filed a motion on plaintiff's behalf pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007). The Rule 60(b) motion sought relief from the "Order Dismissing Plaintiff's Complaint Involuntarily[,]" filed on 12 August 2004 and from the "Findings of Fact, Conclusions of Law, and Judgment on Counterclaim[,]" filed on 12 August 2004. This language exactly tracked the labels in Judge Stephens' order and judgment. Following a November 2004 hearing on the Rule 60(b) motion, Judge Anthony M. Brannon entered an order denying said motion on 2 December 2004.

On 11 September 2007, plaintiff gave notice of appeal from the order and judgment "filed on or about August 12, 2004" by Judge Stephens, which was approximately three years subsequent to the filing of his Rule 60(b) motion and approximately two years and nine months after entry of the order denying said motion. In the notice of appeal, plaintiff asserted that the order and judgment had "never been served as required by Rule 58." On 27 March 2008, defendants filed a motion to dismiss plaintiff's appeal asserting that the notice of appeal was untimely.

Plaintiff contends that he was never served with Judge Stephens' order and judgment in accordance with Rule 58 of the North Carolina

Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 58 (2007). Defendants do not contest plaintiff's assertion, and the record before us does not show that defendants ever served plaintiff with Judge Stephens' underlying judgment and order in accordance with Rule 58.

II. Analysis

Plaintiff argues that defendants' failure to serve him with Judge Stephens' order and judgment in accordance with Rule 58 triggered Rule 3(c) of the North Carolina Rules of Appellate Procedure which tolled the time for the filing of his notice of appeal, consequently rendering his notice of appeal timely. N.C.R. App. P. 3(c).

Appellate Rule 3(c) states:

> In civil actions . . . a party must file and serve a notice of appeal . . . within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 . . . or . . . within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period[.]

N.C.R. App. P. 3(c). In other words, the operation of Appellate Rule 3(c) is directly tied to Rule 58, which governs entry of judgment. "[T]he purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered." *Durling v. King*, 146 N.C. App. 483, 494, 554 S.E.2d 1, 7 (2001) (citations omitted). The relevant part of Rule 58 states:

> Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b) or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered.

N.C.R. Civ. P. 58. In other words, like Appellate Rule 3(c), Rule 58 has its own tolling provision, which expands the time in which a party can bring certain post-trial motions when the judgment is not properly served in accordance with Rule 58. *Id.* However, Rule 58 explicitly caps the tolling of time for bringing these motions at ninety days from entry of judgment. *Id.* In addition, under Rule 58, the issue of whether service of the judgment is proper does not affect whether judgment was entered. *Durling*, 146 N.C. App. at 493, 554 S.E.2d at 7.

Plaintiff argues that Rule 3(c)'s language establishes that the time for filing notice of appeal is tolled until a party is properly served with the judgment pursuant to Rule 58 regardless of the amount of time that passes between entry of judgment and the filing of the notice of appeal. Plaintiff further contends that this Court's opinion in *Davis v. Kelly*, 147 N.C. App. 102, 554 S.E.2d 402 (2001), conclusively establishes that this is true even if: (1) the time and entry of judgment is easily identifiable; (2) an appellant has actual notice of entry of judgment; and (3) an appellant has actual notice of the content of the judgment. Plaintiff also claims that *Davis* holds that an appellant does not waive the benefit of Rule 3(c)'s tolling provision by improperly filing a notice of appeal without first objecting to improper service of the judgment. In sum, plaintiff argues that *Davis* conclusively establishes that his notice of appeal was timely. For the reasons discussed below, we reject plaintiff's arguments.

In *Davis*, judgment was entered against the defendant on 24 August 2000, and the defendant was served with the judgment on 1 September 2000. *Id.* at 105, 554 S.E.2d at 404. On 20 September 2000, the defendant served a proper notice of appeal on the plaintiff but filed the notice of appeal in the wrong court. *Id.* The defendant corrected the mistake on 10 October 2000; however, the plaintiff filed a motion to dismiss alleging that the 10 October notice of appeal was untimely because it was filed outside the thirty day period mandated by Appellate Rule 3(c). *Id.* The Court rejected the plaintiff's argument, noting that the "plaintiff [had] not fully compl[ied] with the service requirements of Rule 58 . . . until 26 October 2000" because he had not filed a certificate of service as required by N.C. Gen. Stat. § 1A-1, Rule 5(d) until that date. *Id.* The Court concluded that "[t]he running of the time for filing and serving a notice of appeal was tolled pursuant to N.C.R. App. P. 3 until plaintiff's compliance [with Rule 58], and defendant's notice of appeal is, therefore, timely." *Id.*

Contrary to plaintiff's assertions, we do not read *Davis* as conclusively resolving the issues of actual notice and waiver. While it

appears that similar to plaintiff here, the defendant in *Davis* had actual notice of entry of judgment and the judgment's content, the Court did not discuss the issue of actual notice. In addition, while the defendant in *Davis* had filed a notice of appeal without objecting to the improper proof of service, the Court also did not discuss or address waiver. Furthermore, unlike in the instant case, the defendant in *Davis* actually filed and served a proper notice of appeal (albeit in the wrong court), that would have been timely without the benefit of Appellate Rule 3(c)'s tolling provision. Even more importantly, in *Davis*, the defendant corrected his filing mistake approximately forty days after receiving service of the judgment and twenty days after filing the notice of appeal in the wrong court. Here, plaintiff did not file his notice of appeal until almost three years after he filed his Rule 60(b) motion and approximately two years and nine months after the entry of the order denying said motion.

Based on the lack of discussion of actual notice and waiver in *Davis* and the critical factual distinctions between that case and the instant one, we do not believe that *Davis* forecloses dismissal of an appeal based on waiver due to an appellant's extended delay in filing the notice of appeal where the record clearly indicates that an appellant has actual notice of the entry of judgment and its content. Furthermore, we do not believe the purposes of Rule 58 are served by allowing a party with actual notice to file a notice of appeal and allege timeliness based on lack of proper service when almost three years had passed since the party had filed its Rule 60(b) motion and the entry of an order denying it.

Hence, we conclude that because: (1) the language of plaintiff's Rule 60(b) motion demonstrates that he had actual notice of the time and entry of Judge Stephens' order and judgment as well as their content; (2) almost three years had passed between the time plaintiff respectively filed his Rule 60(b) motion and his notice of appeal; and (3) approximately two years and nine months had passed between the entry of the order denying the Rule 60(b) motion and the filing of the notice of appeal, plaintiff cannot now utilize Appellate Rule 3(c) to toll the time for filing his notice of appeal. Thus, plaintiff has waived the benefit of Rule 3(c) by failing to take timely action with regard to his notice of appeal. Without the benefit of the tolling provision, plaintiff's notice of appeal is untimely. "Failure to give timely notice of appeal in compliance with . . . Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed." *Booth v. Utica*

Mutual Ins. Co., 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983) (citations omitted).

Plaintiff asks us to "exercise [our] discretion . . . to accept this case under [our] powers of *certiorari*" in the event that we "ha[ve] any substantial question about the timeliness of this appeal[.]" N.C.R. App. P. 21(a)(1) permits this Court to issue a writ of certiorari to allow us to review a trial court's judgments and orders "when the right to prosecute an appeal has been lost by failure to take timely action[.]" However, N.C.R. App. P. 21(c) provides that a party's "petition [for writ of certiorari] shall be filed without unreasonable delay[.]" Under the facts here, we conclude that defendant's request for certiorari has not been filed without unreasonable delay. Consequently, we decline to exercise our discretionary powers pursuant to Appellate Rule 21 to review plaintiff's appeal.

Accordingly, we allow defendants' motion to dismiss plaintiff's appeal.

Appeal dismissed.

Panel consisting of Judges HUNTER, ELMORE, and GEER.

D&R CONSTRUCTION CO., INC., PLAINTIFF v. BLANCHARD'S GROVE MISSIONARY BAPTIST CHURCH, AN UNINCORPORATED ASSOCIATION; TRUSTEES OF BLANCHARD'S GROVE MISSIONARY BAPTIST CHURCH; LEON HOLLEY, CHAIRMAN TRUSTEE; CURTIS HOLLEY, JR., TRUSTEE; SAMUEL EASTON, TRUSTEE; AND BARBARA HOLLEY, TRUSTEE, DEFENDANTS AND RBC CENTURA BANK, ADDITIONAL DEFENDANT

No. COA08-94

(Filed 21 October 2008)

1. Arbitration and Mediation— motion to vacate—confusion over what rules would apply

The trial court did not err by allowing defendants' motion to confirm and enter judgment on an arbitration award and by denying plaintiff's motion to vacate the arbitration award and demand for trial de novo even though plaintiff contends the arbitration was not conducted pursuant to correct law because: (1) although the Uniform Arbitration Act which was in effect when the parties

contracted in 2003 was Article 45A of Chapter 1, a 3 March 2006 consent order required the arbitration to be in accordance with Article 45C of the North Carolina General Statutes, and any confusion which an individual may have had about what rules would apply was not relevant given the clear terms of the consent order; (2) plaintiff did not argue that the arbitrator failed to apply the provisions of Article 45C properly; and (3) although plaintiff contends the confusion over which rules the arbitrator was applying resulted in no meeting of the minds as to the application of the appropriate rules, the consent order evidences otherwise, and plaintiff has not appealed from the consent order nor alleged that there was any defect in the entry of the consent order.

2. Arbitration and Mediation— alleged conflict in statutes— inapplicable statute

Although plaintiff contends in an arbitration case that N.C.G.S. §§ 1-569.3(b) and -569.4(c) are in conflict with each other and incapable of being read harmoniously, there was no conflict between the two provisions, and in any event, N.C.G.S. § 1-569.3(b) was inapplicable when the consent order to arbitrate in the instant case was entered after 1 January 2004.

Appeal by plaintiff from order and judgment entered 10 July 2007 by Judge Clifton W. Everett, Jr. in Superior Court, Gates County. Heard in the Court of Appeals 26 August 2008.

Ericka Young James, for plaintiff-appellant.

Hornthal, Riley, Ellis & Maland, L.L.P., by M.H. Hood Ellis and L. Phillip Hornthal, III, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals order and judgment allowing defendants' "Motion to Confirm and Enter Judgment on Arbitration Award" and denying plaintiff's "Motion to Vacate Arbitration Award and Demand for Trial *De Novo*." The dispositive issue before this Court is whether the arbitration was conducted pursuant to the correct law. For the following reasons, we affirm the order and judgment of the trial court.

I. Background

On 3 June 2003, plaintiff and Blanchard Grove Missionary Baptist Church ("Church") by Leon Holley, Curtis Holley, Jr., and Barbara

Holley entered into a "Contractual Agreement" ("contract"). The contract read in pertinent part,

> The parties, Blanchard Grove and Trustees ("Buyer(s)"), and D & R Construction Co., Inc ("Contractor"), in consideration for the promises and covenants made herein, agree that the Contractor shall build a new construction church sanctuary for the Owners, according to the terms set forth below:
>
> . . . .
>
> 9. *Arbitration*: Any disagreement arising out of this Agreement or the application of any provisions thereof shall be submitted to an Arbitrator(s) not interested in the finances of the contract. The parties may agree on an Arbitrator, or may select one each and these two shall select a third. Any such arbitration award shall be binding and have the same weight and effect as a legal decision.

During construction of the church building, a dispute developed between plaintiff and defendants regarding payment. Plaintiff filed liens on defendants' real property, and on 3 August 2004, plaintiff filed a verified "COMPLAINT, MOTION TO STAY PENDING ARBITRATION, MOTION TO APPOINT ARBITRATOR AND MOTION FOR PARTIAL SUMMARY JUDGMENT[.]" (All caps in original.) In its complaint plaintiff brought claims for breach of contract, unjust enrichment, and a lien judgment on the property. Plaintiff also requested that the trial court stay the litigation pending arbitration, appoint an arbitrator, and grant partial summary judgment.

On 12 October 2004, defendants answered plaintiff's complaint alleging several defenses and counterclaiming for breach of contract. On 13 December 2004, plaintiff filed "MOTIONS, REPLY TO COUNTERCLAIM, AFFIRMATIVE DEFENSES AND THIRD PARTY COMPLAINT[.]" (All caps in original.) In July of 2005, RBC Centura Bank ("RBC") filed a motion to intervene as a defendant and an answer to plaintiff's complaint.

On 3 March 2006, the trial court by consent order allowed RBC to intervene, stayed the action pending arbitration, ordered disputes to be submitted to arbitration "in accordance with Section 9 of the June 3, 2003 'Contractual Agreement' between D&R Construction Co., Inc. and Blanchard's Grove Missionary Baptist Church and Article 45C of Chapter 1 of the North Carolina General Statutes[,]" appointed an arbitrator, and ordered costs of the arbitration to be split equally

between plaintiff, the defendant Church, and RBC. Arbitration was held on 1 March 2007 and the arbitration decision was filed on 11 April 2007. The arbitration decision determined that plaintiff had breached its contract with defendants, and therefore plaintiff was not entitled to any recovery from defendants and its claims of lien were void. Based on plaintiff's breach, the arbitration award assessed damages in the amount of "$62,422.56 with interest thereon at the rate of 8% per annum to run from February 14, 2004 until paid together with the costs of this action" to be paid by plaintiff to defendants.

On 2 May 2007, defendants filed a motion for confirmation of the arbitration award and entry of judgment in accordance with the award ("defendants' motion for confirmation of the award"). On 9 May 2007, plaintiff filed a "DEMAND FOR TRIAL de NOVO . . . and NOTICE OF SUBSTITUTION OF COUNSEL" ("plaintiff's motion for new trial") and a "MOTION TO VACATE ARBITRATION AWARD & NOTICE OF SUBSTITUTION OF NEW COUNSEL" ("plaintiff's motion to vacate"). (All caps in original.) On 22 May 2007, defendants filed a motion to deny and strike plaintiff's two motions and to impose sanctions (defendants' motion to deny"). On 4 June 2007, a notice of hearing was filed regarding both of plaintiff's motions and defendants' motion to deny.

On 9 July 2007, a consent order was filed allowing plaintiff to substitute counsel and the trial court heard defendants' motion for confirmation of the award and both of plaintiff's motions. On 10 July 2007, the trial court entered its order which denied both of plaintiff's motions and allowed defendants' motion for confirmation of the award. Plaintiff appeals from the 10 July 2007 order. For the following reasons, we affirm the order and judgment of the trial court.

II. Law Applied at Arbitration

[1] Plaintiff's first three arguments are all variations of the same issue: whether the arbitration was conducted pursuant to the correct law. Plaintiff first argues that "the trial court erred in refusing to hear any evidence from plaintiff on it's [sic] motion to vacate, including the testimony of a material witness present pursuant to subpoena, thereby violating plaintiff's substantive rights and preventing plaintiff's ability to establish a record for review." Plaintiff claims that its previous attorney, James Laurie ("Mr. Laurie"), was present to testify regarding "confusion as which set of rules would apply" at the arbitration. Plaintiff claims that this confusion arose because the construction contract was entered on 3 June 2003, when the

> applicable arbitration statute in effect . . . was the Uniform Arbitration Act, now repealed. N.C. Gen. Stat. § 1-567.2 (2001). The arbitration statute in effect at the time the matter was brought before the courts was the Revised Uniform Arbitration Act ("RUAA"), under Chapter 1, Article 45C of the North Carolina General Statutes. Because the parties' contract predated the RUAA, and because the contract itself did not clearly specify the scope and terms of the arbitration, and did not specify the applicable rules for arbitration, the parties had to supply these terms post-contract.

"The law of contracts governs the issue of whether there exists an agreement to arbitrate. Accordingly, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes." *Burgess v. Jim Walter Homes, Inc.*, 161 N.C. App. 488, 490-91, 588 S.E.2d 575, 577 (2003) (citations omitted). However, in this case, plaintiff does not dispute that it agreed to submit the dispute to arbitration, and plaintiff did not appeal from the consent order which directed the case to arbitration. Plaintiff disputes only that it agreed to be bound by the Revised Uniform Arbitration Act, Article 45C, as opposed to the Uniform Arbitration Act, which was in effect at the time of entry of the construction contract.

In this case, the parties entered into two agreements to arbitrate: first, the construction contract in 2003, and second, the consent order in 2006. As plaintiff notes in its brief as to the specific rules to govern the arbitration, the "parties had to supply these terms post-contract[,]" and the parties did actually "supply these terms" in the consent order. Here the arbitration hearing was convened "pursuant to the Order of the Court filed on March 3, 2006, and *consented to by the Parties*." The Uniform Arbitration Act which was in effect in 2003 was Article 45A of Chapter 1. The 3 March 2006 consent order requires the arbitration to be "in accordance with . . . Article 45C of Chapter 1 of the North Carolina General Statutes." (Emphasis added.) The provisions of the order are clear and unambiguous. Any "confusion" which an individual may have had about what rules would apply is not relevant, given the clear terms of the consent order. *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975) (citations omitted) ("A consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties. Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must con-

strue the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms.") We conclude that the trial court did not abuse its discretion in refusing to allow Mr. Laurie to testify as to the alleged "confusion" as such testimony would be irrelevant. This argument is meritless.

Plaintiff's next argument is closely akin to the previous argument in that plaintiff again claims there was confusion as to the applicable rules as "[a]rbitrator Michael announced in open court that he would be applying the Rules for Court Ordered Arbitration in North Carolina" instead of Article 45C of Chapter 1 of the North Carolina General Statutes. Plaintiff claims the arbitrator exceeded his authority "[b]y acting contrary to the express authority conferred" in the 3 March 2006 consent order. However, as we have already determined, the consent order directed that the arbitration be conducted pursuant to Article 45C of Chapter 1 of the North Carolina General Statutes. Plaintiff does not argue that the arbitrator failed to apply the provisions of Article 45C properly. This argument is also meritless.

Plaintiff finally contends that the "confusion" over which rules the arbitrator was applying resulted in "no meeting of the minds as to the application of the appropriate rules." Again, a meeting of the minds as to the applicable rules is evidenced by the 3 March 2006 consent order which required Article 45C of Chapter 1 of the North Carolina General Statutes to govern the arbitration proceedings. Plaintiff has not appealed from the consent order and has not alleged that there was any defect in the entry of the consent order, and thus this argument is also meritless.

III. Conflicting Law

[2] Lastly, plaintiff contends that N.C. Gen. Stat. §§ 1-569.3(b) and -569.4(c) are in conflict with each other and incapable of being read harmoniously.

N.C. Gen. Stat. § 1-569.3 reads,

> (a) This Article governs an agreement to arbitrate made on or after January 1, 2004.
>
> (b) This Article governs an agreement to arbitrate made before January 1, 2004, if all parties to the agreement or to the arbitration proceeding agree in a record that this Article applies.

N.C. Gen. Stat. § 1-569.3 (2003).

N.C. Gen. Stat. § 1-569.4(c) reads,

> (c) A party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S. 1-569.3(a) . . . . Any waiver contrary to this section shall not be effective but shall not have the effect of voiding the agreement to arbitrate.

N.C. Gen. Stat. § 1-569.4(c) (2003).

Plaintiff contends, "The provision at N.C.G.S. § 1-569.3(b) allows for waiver of the provision at N.C.G.S. § 1-569.3(a). In contrast, the provision at N.C.G.S. § 1-569.4(a)(c) [sic] prohibits the variance or waiver of the terms in the provision found at N.C.G.S. § 1-569.3(a)." We see no conflict between the two provisions. First, N.C. Gen. Stat. § 1-569.3(a) applies to agreements "to arbitrate made *on or after* January 1, 2004[;]" N.C. Gen. Stat. § 1-569.3(b) applies to agreements "to arbitrate made *before* January 1, 2004." N.C. Gen. Stat. § 1-569.3(a), (b) (emphasis added). Also, N.C. Gen. Stat. § 1-569.4(c) does *not* list § 1-569.3(b) as one of the "nonwaivable" provisions contained in Article 45C; it lists *only* subsection (a). *See* N.C. Gen. Stat. § 1-569(4)(c). In any event, the consent order to arbitrate in this case was entered *after* January 1, 2004; therefore N.C. Gen. Stat. § 1-569.3(b) is not applicable. Only N.C. Gen. Stat. § 1-569.3(a) applies, and the parties did not even attempt to waive any of the provisions of Article 45C, but instead expressly agreed to their application. This argument is meritless.

IV. Conclusion

For the reasons as stated above, we deem all of plaintiff's arguments to be unsupported by the record and the law and without merit. We affirm the trial court order and judgment.

AFFIRMED.

Judges McGEE and McCULLOUGH concur.

IN RE BOOKER

[193 N.C. App. 433 (2008)]

IN THE MATTER OF: WILLIAM R. BOOKER, III, RESPONDENT

No. COA08-565

(Filed 21 October 2008)

1. Appeal and Error— appealability—mootness—involuntary commitment—prior discharge

Although the period for respondent's involuntary commitment has expired, a prior discharge will not render questions challenging the involuntary commitment proceeding moot, and an appeal of an involuntary commitment order is not moot when the challenged judgment may cause collateral legal consequences for appellant.

2. Mental Illness— involuntary commitment—failure to record sufficient findings of fact—dangerous to self and others

The trial court erred in an involuntary commitment case by failing to record sufficient facts to support its findings that respondent was dangerous to himself and to others, and the order is reversed because: (1) a trial court's duty to record the facts that support its findings is mandatory and required by N.C.G.S. § 122C-268(j); (2) the doctor's findings that were incorporated by reference in the trial court's order were insufficient to support the trial court's determination that respondent was dangerous to himself and to others; and (3) a determination of whether there was sufficient competent evidence presented during the hearing was unnecessary since the trial court failed to make any findings from the evidence presented at the hearing and only incorporated the doctor's findings in his written report.

Appeal by Respondent from order dated 15 November 2007 by Judge Joseph E. Setzer, Jr. in District Court, Wayne County. Heard in the Court of Appeals 22 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson, for Petitioner.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for Respondent.

McGEE, Judge.

William R. Booker, III (Respondent) was involuntarily committed to a mental health facility on 26 October 2007 pursuant to an Affidavit and Petition for Involuntary Commitment initiated by Respondent's sister and a custody order entered by a magistrate. Respondent was examined by Dr. P.R. Chowdhury (Dr. Chowdhury) on 30 October 2007. Dr. Chowdhury diagnosed Respondent with bipolar disorder and alcohol abuse. Dr. Chowdhury found Respondent to be mentally ill, dangerous to himself, and dangerous to others. Dr. Chowdhury recommended that Respondent receive an inpatient commitment of up to fifteen days and an outpatient commitment of seventy-five days.

A hearing was held in District Court on 1 November 2007. The trial court found that Respondent was mentally ill and dangerous to himself. The trial court ordered that Respondent remain hospitalized for up to fifteen days and ordered an outpatient commitment of seventy-five days.

Dr. Chowdhury filed a Request for Hearing on 7 November 2007 indicating that it would be necessary for Respondent to remain hospitalized beyond the fifteen days ordered by the trial court. Dr. Chowdhury examined Respondent again on 13 November 2007. In his 13 November 2007 report, Dr. Chowdhury stated that it was his opinion that Respondent was "[m]entally ill; [d]angerous to self; [and] [d]angerous to others[.]" Dr. Chowdhury recommended inpatient commitment for thirty days and outpatient commitment for sixty days.

In response to Dr. Chowdhury's request for hearing, a second hearing was held on 15 November 2007. At this hearing, Respondent's sister testified that she and Respondent lived with their 85-year-old mother, and that on the evening of 26 October 2007, she heard Respondent yelling angrily outside their mother's bedroom. She testified that when she got to their mother's bedroom, she found their mother on the floor, and their mother said she had fallen because Respondent had scared her.

Respondent's sister also testified that she went with Respondent to one of his doctor's appointments in May 2007 and was told by a nurse that Respondent had not been coming to his appointments. She testified that "when [Respondent] runs out of his medications at the end of the month and does not refill them, [Respondent] will come out of his room every five minutes and walk into [their] mother's

room. . . . want[ing] [their] mother to give him money." Respondent's sister further testified that she did not want Respondent to come back to live with their mother.

Dr. Chowdhury testified at the 15 November 2007 hearing that Respondent had been diagnosed with bipolar disorder, manic alcohol abuse, and co-morbid condition. Dr. Chowdhury also testified that Respondent did not acknowledge that he had a mental disease and that Respondent did not think he needed medication. However, Dr. Chowdhury testified that Respondent agreed that Respondent had a substance abuse problem and also admitted that he had a prior history of substance abuse.

Dr. Chowdhury also testified that he believed Respondent was dangerous to himself, but that Respondent had not attempted to injure himself, nor had Respondent actually injured himself. Dr. Chowdhury further testified that Respondent had not been aggressive but had been irritable. He testified that Respondent's mood had been unstable and that he had been changing Respondent's prescriptions due to side effects. Dr. Chowdhury also testified that Respondent needed supervision because Respondent was reluctant to take his medications. Dr. Chowdhury stated that if it was determined that Respondent needed to be started on other medications, the medications would need to be started while Respondent was hospitalized. Dr. Chowdhury's 13 November 2007 report was admitted into evidence.

Respondent also testified at the 15 November 2007 hearing. Respondent testified that on 26 October 2007 he found his mother sitting on the floor of her bedroom. Respondent denied yelling at his mother. Respondent said that his mother "has dementia. . . . [and] his mother will be in a rest home." Respondent testified that he had previously passed the bar examination in Pennsylvania but that he had no resources or opportunities to get work. Respondent further said that if he were to leave that day, he would have nowhere to go, and that he had no transportation or driver's license. Respondent also said that he had asked his mother for money. He testified that he had bipolar disorder and that he took Respiredal for ten years, but that it did not appear to work.

The trial court concluded that Respondent was mentally ill and was dangerous to himself and others. In its order, the trial court incorporated by reference as findings the 13 November 2007 report of

Dr. Chowdhury. The trial court ordered that Respondent be recommitted to an inpatient facility for a period not to exceed thirty days and be recommitted to an outpatient facility for a period not to exceed forty-five days. Respondent appeals. Respondent was discharged from his inpatient commitment on 5 December 2007.

[1] Respondent first contends that the trial court failed to record sufficient facts to support its findings that Respondent was dangerous to himself and dangerous to others. We agree.

We first note that although the period for Respondent's involuntary commitment has expired, "a prior discharge will not render questions challenging the involuntary commitment proceeding moot." *In re Mackie*, 36 N.C. App. 638, 639, 244 S.E.2d 450, 451 (1978) (citation omitted). Furthermore, an appeal of an involuntary commitment order is not moot when the challenged judgment may cause collateral legal consequences for the appellant. *See, e.g.*, *In re Hatley*, 291 N.C. 693, 231 S.E.2d 633 (1977).

[2] N.C. Gen. Stat. § 122C-268(j) (2007) provides that "[t]o support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b. The court shall record the facts that support its findings."

Our Court stated in *In re Hayes*, 151 N.C. App. 27, 29, 564 S.E.2d 305, 307, *disc. review denied*, 356 N.C. 613, 574 S.E.2d 680 (2002), that "[w]e see no reason to distinguish the standard of review of a recommitment order from that of a commitment order, and hence, we review this order as we would a commitment order."

> On appeal of a commitment order our function is to determine whether there was *any* competent evidence to support the "facts" recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous to self or others were supported by the "facts" recorded in the order.

In re Collins, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980) (alteration in original) (citations omitted). N.C.G.S. § 122C-268(j) specifically requires that the facts supporting the findings of the trial court be recorded. A trial court's duty to record the facts that support its findings is "mandatory." *In re Koyi*, 34 N.C. App. 320, 321, 238 S.E.2d 153, 154 (1977).

In its order, the trial court checked the box on the printed form that reads: "Based on the evidence presented, the Court by clear, cogent and convincing evidence finds as facts all matters set out in the physician's[] report, specified below, and the report is incorporated by reference as findings." The date of the last physician's report was 13 November 2007 and the physician's name listed was Dr. P.R. Chowdhury. The next box on the printed form that provided a section for other findings of fact to be recorded was not checked and no other findings of fact were recorded in the order.

The 13 November 2007 report stated it was Dr. Chowdhury's opinion that Respondent was mentally ill, dangerous to himself, and dangerous to others, but the only "matters set out in" the report as findings by Dr. Chowdhury were that Respondent was a "56 year old white male, with history of alcohol abuse/dependence, admitted with manic episode. [He] [c]ontinues to be symptomatic with limited insight regarding his illness." These findings by Dr. Chowdhury "incorporated by reference" in the trial court's order are insufficient to support the trial court's determination that Respondent was dangerous to himself and to others.

Whether or not there was sufficient competent evidence presented during the 15 November 2007 hearing that Respondent was dangerous to himself and to others, we do not determine, since the trial court failed to make any findings from the evidence presented at the hearing and instead only incorporated in its order the findings of Dr. Chowdhury in his written report. Because we conclude that the facts recorded in the trial court's order to support its findings, as specifically required by N.C.G.S. § 122C-268(j) (2007), are insufficient to support the trial court's findings that Respondent was dangerous to himself and to others, we must reverse the trial court's order. *See In re Neatherly*, 28 N.C. App. 659, 222 S.E.2d 486 (1976).

As this issue is dispositive of this case on appeal, we need not review Respondent's second assignment of error. Respondent did not argue his remaining assignments of error and they are therefore deemed abandoned. N.C.R. App. P. 28(a).

Reversed.

Chief Judge MARTIN and Judge STEPHENS concur.

LUTHER FISHER, PLAINTIFF v. ROBERT J. ANDERSON, TRACY J. HENJUM, STANTON J. SMITH, DEFENDANTS

No. COA08-468

(Filed 21 October 2008)

Enforcement of Judgments— 10-year statute of limitations— not extended by 30-day stay of execution

The automatic stay of a judgment from execution for thirty days from entry of the judgment to allow time for notice of appeal set forth in N.C.G.S. § 1A-1, Rule 62(a) is not a "statutory prohibition" under N.C.G.S. § 1-234 and does not extend the 10-year statute of limitations provided by N.C.G.S. 1-47(1) for commencing an action to enforce a judgment.

Appeal by plaintiff from an order entered 14 January 2008 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 September 2008.

Vongxay Law Firm, PLLC, by Bounthani Vongxay, for plaintiff-appellant.

Leslie C. Rawls, for defendants-appellees.

CALABRIA, Judge.

Luther Fisher ("plaintiff") appeals the trial court's order denying his motion for summary judgment and dismissing his complaint for failure to state a claim based upon the expiration of the statute of limitations. We affirm.

Plaintiff alleges he is the assignee of a judgment ("the judgment") entered on 14 August 1997 against Robert Anderson, Tracy Henjum and Stanton Smith (collectively referred to as "defendants"). On 24 August 2007, plaintiff filed a complaint ("the complaint") seeking to enforce the judgment pursuant to N.C. Gen. Stat. § 1-47. Defendants moved to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, on the grounds that the complaint was filed more than ten years after the entry of the judgment. Plaintiff moved for summary judgment and asked the court to deny defendants' motion to dismiss.[1] On 14

1. In his "Motion for Summary Judgment," plaintiff referenced Rule 12(c) of the North Carolina Rules of Civil Procedure governing motion for judgment on the pleadings. The trial court treated the motion as one for summary judgment.

January 2008, the trial court granted defendants' motion and dismissed plaintiff's action for failure to state a claim upon which relief can be granted. The trial court also denied plaintiff's motion for summary judgment. From this order, plaintiff appeals.

I. Standard of Review

In his brief, plaintiff's argument addresses only defendant's motion to dismiss. Accordingly, our review is limited to whether the trial court erred in granting defendant's motion to dismiss. *See* N.C. R. App. P. 28(b)(6) (2007) (assignments of error for which no argument or authority is cited are deemed abandoned).

The standard of review of a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is " 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. [. . .]' " *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)).

"A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citation omitted). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period [rests] on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Id.* "The statute of limitations [defense] is 'inflexible and unyielding,' and the defendants are vested with the right to rely on it as a defense." *Staley v. Lingerfelt*, 134 N.C. App. 294, 299, 517 S.E.2d 392, 396 (1999) (citation omitted). "The trial court has no discretion when considering whether a claim is barred by the statute of limitations." *Id.*

II. Analysis

Plaintiff argues the trial court erred in granting defendants' motion to dismiss because Rule 62(a) of the North Carolina Rules of Civil Procedure, when read in conjunction with N.C. Gen. Stat. § 1-234, operates to toll the statute of limitations by thirty days. We disagree.

"When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its

plain and definite meaning." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988).

The statute of limitations for commencement of an action upon a judgment "or decree of any court of the United States, or of any state or territory thereof," is within ten years "from the date of its entry." N.C. Gen. Stat. § 1-47(1) (2007); *see also* N.C. Gen. Stat. § 1-46 (2007) ("The periods prescribed for the commencement of actions, other than for recovery of real property, are as set forth in this Article."). Pursuant to Rule 58 of the North Carolina Rules of Civil Procedure, a judgment is entered when "it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2007).

N.C. Gen. Stat. § 1-234 provides, in relevant part, as follows:

> Upon the entry of a judgment under G.S. 1A-1, Rule 58 . . . directing in whole or in part the payment of money, the clerk of superior court shall index and record the judgment on the judgment docket of the court of the county where the judgment was entered. . . . The judgment is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for 10 years from the date of the entry of the judgment . . . in the county where the judgment was originally entered. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the 10 years aforesaid, as against the defendant in such judgment . . . .

N.C. Gen. Stat. § 1-234 (2007).

We note that the ten-year period referred to in N.C. Gen. Stat. § 1-234 governs judgment liens on real property. Nothing in the plain language of N.C. Gen. Stat. § 1-234 indicates the limitations on the duration of a judgment lien should apply to the statutory period set forth in N.C. Gen. Stat. § 1-47(1). Here, plaintiff alleged the judgment against defendants was entered on 14 August 1997. N.C. Gen. Stat. § 1-47(1) required plaintiff to file his complaint within ten years of 14 August 1997. Since plaintiff filed his complaint on 24 August 2007, he failed to assert his claim within the ten-year statute of limitations and his complaint was properly dismissed.

Assuming *arguendo*, that the legislature intended the limitation for the duration of a judgment lien outlined in N.C. Gen. Stat. § 1-234 to apply to the ten-year statute of limitations in N.C. Gen. Stat. § 1-47, plaintiff failed to demonstrate N.C. Gen. Stat. § 1-234 applies to the facts in this case. Plaintiff did not allege that enforcement of the judgment was restrained by an injunction, order, appeal, or statutory prohibition. *Compare Adams v. Guy*, 106 N.C. 275, 278-79, 11 S.E. 535, 536 (1890) (plaintiff's execution on a dormant judgment is not barred by the statute of limitations where defendant's appeal restrained plaintiff from enforcing the judgment within ten years) with *Exum v. R.R.*, 222 N.C. 222, 224, 22 S.E.2d 424, 425 (1942) (appeal of denial of a motion to set aside a judgment did not toll the ten-year statute of limitations because no restraint on enforcement of judgment was effected by the appeal).

Plaintiff argues that Rule 62(a) operates as a "statutory prohibition" under N.C. Gen. Stat. § 1-234 to restrain enforcement of the judgment. We disagree.

Rule 62(a) governs a stay of proceedings to enforce a judgment and provides: "no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of the time provided in the controlling statute or rule of appellate procedure for giving notice of appeal from the judgment." N.C. Gen. Stat. § 1A-1, Rule 62(a) (2007). Under this rule, judgments are automatically stayed from execution for thirty days from entry of the judgment. N.C.R. App. P. 3(c) (2007). Nothing in the plain language of Rule 62(a) indicates the legislature intended the automatic stay from execution to add thirty days to the ten-year statute of limitations on commencing an action to enforce a judgment. Furthermore, our Supreme Court has held that issuance of an execution does not operate to toll the ten-year duration of a judgment lien. *McCullen v. Durham*, 229 N.C. 418, 428, 50 S.E.2d 511, 519 (1948); *Cheshire v. Drake*, 223 N.C. 577, 583, 27 S.E.2d 627, 630 (1943). If the issuance of an execution does not prolong the life of a judgment lien, it follows that the thirty-day stay on the issuance of an execution or proceedings to enforce the judgment would also not operate to toll the statute of limitations for commencement of an action to enforce a judgment. We affirm the trial court's order.

Affirmed.

Judges McCULLOUGH and TYSON concur.

SIGNALIFE, INC., PLAINTIFF v. RUBBERMAID, INC., NEWELL RUBBERMAID, INC., GARY SCOTT, AND DAVID HICKS, DEFENDANTS

No. COA08-496

(Filed 21 October 2008)

Abatement— electronic filing in federal court—filing next morning in superior court

The trial court properly dismissed plaintiff's amended complaint where a complaint was filed electronically by defendants at 12:25 a.m. in federal court and by plaintiff at 9:01 on the same day in superior court clerk's office. It is undisputed that the actions involve substantially the same issues between substantially the same parties; plaintiff's state action is wholly unnecessary and is subject to abatement. Moreover, judicial economy compels the same result.

Appeal by plaintiff from order entered on or after 8 February 2008 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 September 2008.

Hamilton Moon Stephens Steele & Martin, P.L.L.C., by Jackson N. Steele and Mark R. Kutny, for plaintiff-appellant.

McGuireWoods, L.L.P., by Robert A. Muckenfuss, for defendant-appellees.

TYSON, Judge.

Signalife, Inc. ("plaintiff") appeals order entered granting Rubbermaid, Inc., Newell Rubbermaid, Inc., Gary Scott, and David Hicks's (collectively, "defendants") motion to dismiss plaintiff's amended complaint filed in Mecklenburg County Superior Court based upon a "prior action pending" in the United States District Court for the Western District of North Carolina. We affirm.

I. Background

Plaintiff is a medical device company which developed a FDA approved electrocardiograph monitoring device called the "Fidelity 100." In 2004, Newell Rubbermaid, Inc. entered into negotiations with plaintiff to acquire the exclusive distribution rights to plaintiff's various technologies. A definitive agreement was not reached at that time. On 26 March 2006, plaintiff, Newell Rubbermaid, Inc., and

Rubbermaid, Inc., a subsidary of Newell Rubbermaid, Inc., entered into and signed the 2006 Sales and Marketing Service Agreement ("the agreement").

Subsequently, a dispute arose between the parties regarding their respective obligations under the agreement. The background facts underlying the contention between the parties are disputed and irrelevant for purposes of this appeal. Plaintiff and defendants attempted to negotiate a settlement before resorting to litigation and agreed not to file suit before 24 January 2007.

At approximately 12:25 a.m. on 24 January 2007, defendants electronically filed a complaint against plaintiff in the United States District Court for the Western District of North Carolina. Defendants alleged the following causes of action: (1) negligent misrepresentation; (2) breach of representation and warranty; and (3) breach of contract. At approximately 9:01 a.m. on 24 January 2007, plaintiff filed a complaint against defendants in the Office of the Clerk of Superior Court for Mecklenburg County. After an extensive series of motions and rulings, plaintiff filed an amended complaint in superior court alleging seven separate claims for relief. On 20 December 2007, defendants filed a motion to dismiss plaintiff's amended complaint based upon a " 'prior action pending' involving substantially similar subject matter and parties in a North Carolina federal court." On 1 February 2008, plaintiff filed its answer and counterclaims in federal district court and alleged the identical claims pending before the superior court. Trials were set for September 2008 in federal court and February 2009 in state court. On or after 8 February 2008, a special superior court judge granted defendants' motion to dismiss plaintiff's amended complaint without prejudice to plaintiff's right to pursue its claims for relief in federal court. The superior court based its ruling upon the "prior action pending" doctrine and stated that "all parties can obtain complete relief in the Federal Court Action, making the State Court Action 'wholly unnecessary.' " Plaintiff appeals.

II. Issue

Plaintiff argues the superior court erred by granting defendants' motion to dismiss its amended complaint it filed therein.

III. Prior Action Pending Doctrine

Plaintiff argues the superior court erred in granting defendants' motion to dismiss "on the grounds that the 'prior action pend-

ing' doctrine is not applicable to substantially similar actions filed simultaneously in the North Carolina Federal and State Courts." We disagree.

The leading case in North Carolina addressing the "prior action pending" doctrine in this context is *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990). After acknowledging that a conflict among jurisdictions existed regarding the question of whether a prior pending federal action would abate a subsequent state action, our Supreme Court adopted the minority position that answered this question in the affirmative. *See id.* at 560, 391 S.E.2d at 187 ("[A] minority of courts maintain that where the prior pending action is in a federal court sitting in the same state as the subsequent state action, the second action is abated. We conclude that the minority rule is the better reasoned authority." (Internal citations omitted)). Our Supreme Court further enunciated the "prior action pending" doctrine as applied in North Carolina:

> Where a prior action is pending in a federal court within the boundaries of North Carolina *which raises substantially the same issues between substantially the same parties as a subsequent action within the state court system having concurrent jurisdiction*, the subsequent action is wholly unnecessary and, in the interests of judicial economy, should be subject to a plea in abatement.

Id. at 560-61, 391 S.E.2d at 187 (emphasis supplied).

Our appellate courts have not previously addressed cases where actions are filed in both federal courts and North Carolina state courts on the same day. However, in *Nationwide Mut. Ins. Co. v. Douglas*, this Court considered the effects of filing separate actions in two North Carolina state courts within hours of each other. 148 N.C. App. 195, 197, 557 S.E.2d 592, 593 (2001). In *Nationwide*, the defendant filed a declaratory judgment action in Carteret County Superior Court. 148 N.C. App. at 197, 557 S.E.2d at 593. Approximately three and one half hours later, the plaintiff filed a declaratory judgment action in Wake County Superior Court. *Id.* Although it had notice of the pendency of the action in Carteret County, the Wake County Superior Court entered an order: (1) denying defendant's motion to dismiss based on the pending action in Carteret County; (2) denying defendant's alternative motion for change of venue to Carteret County; and (3) granting plaintiff's Rule 12(c) motion for judgment on the pleadings. *Id.*

This Court affirmed the Wake County Superior Court's order, but stated:

> *we conclude that the trial court's failure to abate the action in Wake County in favor of the prior filed action in Carteret County, although it ran contrary to the general rule of abatement*, nonetheless served the hoary notions of judicial economy upon which the abatement doctrine is founded by effectively avoiding a multiplicity of actions, excess delay and duplicitous costs.

Id. at 198-99, 557 S.E.2d at 594 (citation omitted) (emphasis supplied). The holding in *Nationwide* appears to require the first to file test to be applied in cases where the "prior action pending" doctrine is implicated. *Id.* This principle is applicable to the case at bar.

It is undisputed that the actions filed in the United States District Court for the Western District of North Carolina and the Mecklenburg County Superior Court involve "substantially the same issues between substantially the same parties[.]" *Eways*, 326 N.C. at 560, 391 S.E.2d at 187. Defendants herein electronically filed an action in the United State District Court in North Carolina approximately nine hours prior to the time plaintiff filed its action in state court. We hold that defendants' federal action was "pending" at the time plaintiff filed its action in Mecklenburg County Superior Court. Based on our Supreme Court's holding in *Eways* and this Court's reasoning in *Nationwide*, plaintiff's subsequent state action is "wholly unnecessary" and is subject to a plea in abatement. *Eways*, 326 N.C. at 560-61, 391 S.E.2d at 187; *Nationwide*, 148 N.C. App. at 198-99, 557 S.E.2d at 594. The superior court properly dismissed plaintiff's amended complaint filed therein based upon the "prior action pending" doctrine.

Judicial economy also compel us to reach the same result. According to the superior court's order, the federal action was scheduled to commence sometime in September 2008. Defendants' brief now asserts the trial date is set for December 2008. By the time this opinion is filed, the parties will have completed a substantial amount of preparation for trial in the United States District Court for the Western District of North Carolina, as well as most of the discovery requested by each party. To reverse the superior court's order would be contrary to the interests of judicial economy. This assignment of error is overruled.

IV. Conclusion

Defendants' action was "pending" in the United States District Court for the Western District of North Carolina prior to the time plaintiff filed its action in Mecklenburg County Superior Court. Plaintiff's subsequent state action is abated in accordance with the "prior action pending" doctrine applicable in this State. The superior court properly dismissed plaintiff's amended complaint. The superior court's order is affirmed.

Affirmed.

Judges McCULLOUGH and CALABRIA concur.

STATE OF NORTH CAROLINA v. TIMOTHY LAVONNE CROCKETT

No. COA07-1283

(Filed 21 October 2008)

Sentencing— prior conviction—sufficiency of proof

The State presented prima facie evidence that defendant was previously convicted of larceny after breaking and entering so as to support defendant's sentence as a level IV offender, even though the judgment lists only the breaking and entering conviction, where the State introduced a computerized criminal history from the Department of Criminal Information and a printout from records maintained by the County Sheriff's Department that showed the larceny conviction, and the court noted that the clerk of court's computer system showed the larceny conviction. The scheme for proving prior convictions set forth in N.C.G.S. § 15-A-1340.14(f) does not prioritize the methods of proving prior convictions.

Appeal by Defendant from judgment entered 1 May 2007 by Judge J. Gentry Caudill in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General T. Lane Mallonee, for the State.

Russell J. Hollers, III for Defendant.

McGEE, Judge.

Timothy L. Crockett (Defendant) was convicted on 1 May 2007 of possession with intent to sell or deliver cocaine and sale of cocaine. The events giving rise to Defendant's convictions occurred on 23 August 2006 when Defendant sold cocaine to undercover police officers. During the second phase of Defendant's trial, which began on 1 May 2007, Defendant was tried for attaining the status of habitual felon. During this part of Defendant's trial, the State called an employee of the Mecklenburg County Clerk of Court's office to identify certified copies of judgments for the following underlying felonies: (1) possession of cocaine, file 92 CRS 75167, conviction date 21 September 1995; (2) felonious breaking and entering, file 98 CRS 51194, conviction date 24 June 1999; and (3) possession with intent to sell and deliver cocaine, file 05 CRS 30213, conviction date 21 February 2006. The jury convicted Defendant of being an habitual felon based on these three felonies on 1 May 2007.

At sentencing, the State presented a prior record level worksheet listing Defendant's prior convictions and showing a total of nine prior record points, making Defendant a record level IV for sentencing purposes. Although Defendant did not include the prior record level worksheet in the record on appeal, the transcript of the sentencing hearing shows that the nine prior record points were calculated as follows: (1) four points for sale of cocaine, a Class G felony; (2) two points for larceny after breaking and entering, a Class H felony; (3) one point each for two Class M-1 misdemeanors; and (4) one point for the elements of the current offense being included in a prior offense for which Defendant had been convicted. The trial court found that Defendant was a prior record level IV for sentencing purposes. The trial court sentenced Defendant within the presumptive range to a minimum of 125 months to a maximum of 159 months in prison.

Defendant's sole argument on appeal is that the trial court erred in sentencing him as a level IV offender because the State failed to produce sufficient evidence that Defendant was convicted of larceny after breaking and entering. Without that conviction, Defendant would be a level III offender and therefore be subject to a lower presumptive range for sentencing purposes. We do not agree with Defendant's contention.

In addressing this assignment of error, the standard of review is whether the sentence is supported by evidence presented at Defendant's trial and sentencing hearing. *State v. Jeffery*, 167 N.C.

App. 575, 578, 605 S.E.2d 672, 674 (2004) (citations omitted). The proof needed to determine a defendant's prior record level is set forth in N.C. Gen. Stat. § 15A-1340.14(f), which provides in pertinent part:

> A prior conviction shall be proved by any of the following methods:
>
> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.
>
> The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "a copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. The prosecutor shall make all feasible efforts to obtain and present to the court the offender's full record.

N.C. Gen. Stat. § 15A-1340.14(f) (2007).

To prove Defendant's prior conviction of larceny after breaking and entering, the State introduced a computerized criminal history from the Department of Criminal Information (DCI report) and a printout from records maintained by the Mecklenburg County Sheriff's Department.[1] At sentencing, the trial court also noted

1. It appears Defendant did not include any records from the Mecklenburg County Sheriff's Department in the record on appeal. However, Defendant did include a "local identification inquiry" from the Administrative Office of the Courts' computer system, that listed Defendant's convictions, as well as the DCI report.

that the clerk of court's computer system showed the larceny conviction. These records appear to show that Defendant was charged with breaking and entering, larceny after breaking and entering, and possession of stolen goods on 28 December 1998. The DCI report showed that Defendant pleaded guilty to both the larceny and the breaking and entering charges, and that the charge of possession of stolen goods was dismissed. The DCI report also shows that the larceny conviction was consolidated for judgment with the breaking and entering conviction.

The breaking and entering conviction was used to support Defendant's habitual felon conviction. The judgment suspending Defendant's sentence for the breaking and entering conviction in file 98 CRS 51194 was introduced at trial by the State to prove that Defendant had obtained the status of an habitual felon. This judgment lists only the breaking and entering offense, which was the only offense charged in file 98 CRS 51194.

Defendant argued at sentencing that the larceny charge had been dismissed as part of a plea agreement for the breaking and entering charge, but no documentation of a dismissal for the larceny charge in file 98 CRS 51195 was presented. Defendant now argues that if he had actually been convicted of larceny, the judgment should reflect both the larceny and the breaking and entering convictions, but that it only lists the latter. Defendant contends that the judgment is the best evidence of whether or not he was convicted of larceny, and that the absence of that charge on the judgment renders the other records insufficient to satisfy the State's burden.

The record introduced by the State to show Defendant's prior conviction of larceny is included within the methods of proof set forth in N.C. Gen. Stat. § 15A-1340.14(f). In *State v. Rich*, this Court held that an unverified computerized DCI report was sufficiently reliable to constitute an acceptable method of proof of prior convictions. *State v. Rich*, 130 N.C. App. 113, 116, 502 S.E.2d 49, 51, *disc. review denied*, 349 N.C. 237, 516 S.E.2d 605 (1998). Additionally, as the State argues, North Carolina's statutory scheme for proving prior convictions does not prioritize the methods of proving prior convictions. N.C. Gen. Stat. § 15A-1340.14(f) provides that a prior conviction "shall be proved by *any* of the following methods" (emphasis added), including a copy of a DCI report.

We are not persuaded by Defendant's assertion that the judgment's failure to list Defendant's larceny conviction renders the

State's other evidence of the larceny conviction insufficient. Since *prima facie* evidence was presented by the State showing that Defendant was previously convicted of larceny, such evidence supports the two prior record points challenged by Defendant, as well as the sentence imposed by the trial court. Therefore, we find the trial court did not err in determining that the State had met its burden, or in sentencing Defendant as a level IV offender. Defendant's assignment of error is overruled.

No error.

Judges McCULLOUGH and STROUD concur.

A. PERIN DEVELOPMENT COMPANY, LLC, PLAINTIFF v. TY-PAR REALTY, INC., DEFENDANT

No. COA07-1500

(Filed 21 October 2008)

1. Declaratory Judgments; Easements— purging easement— no jurisdiction

The trial court did not have jurisdiction under the Declaratory Judgment Act to purge an easement. Purging an easement is essentially the same as a request to void a conveyance or to nullify a written instrument, which are beyond the scope of the Act.

2. Easements— unilateral movement—alternative offered

Under the common law of North Carolina, plaintiff had no right to unilaterally relocate defendant's duly recorded easement, even though it offered an alternative route for defendant to access its property.

Appeal by plaintiff from order entered 27 September 2007 by Judge James E. Hardin, Jr. in Union County Superior Court. Heard in the Court of Appeals 1 May 2008.

Johnston, Allison & Hord, P.A., by Martin L. White and John C. Lindley, III, for plaintiff-appellant.

McNair Law Firm, by Allan W. Singer and Louis G. Spencer for defendant-appellee.

STROUD, Judge.

Plaintiff A. Perin Development Company, LLC, appeals from order entered 27 September 2007 dismissing its complaint for declaratory judgment or to quiet title. We affirm.

I. Background

The relevant facts are simple and undisputed. Plaintiff and defendant own adjacent tracts of land in Union County, North Carolina. Defendant owns an easement for a right-of-way across plaintiff's land. Defendant's easement was expressly granted by plaintiff's predecessor in title and duly recorded by the Union County Register of Deeds on 31 August 1990. Plaintiff constructed a public road across its property which is graded to a point adjacent to defendant's property; the exhibits in the record indicate the public road ends at a creek bed.

On 8 June 2007, plaintiff filed a complaint for declaratory judgment or alternatively an action to quiet title in Union County Superior Court. The complaint requested that the trial court "purge[] the Easement from the Union County Registry" or alternatively permit plaintiff to relocate the easement to the public road. On 27 September 2007, the trial court dismissed the complaint for failure to state a claim upon which relief may be granted.

II. Analysis

A. Purging the Easement

[1] We first consider whether the trial court had jurisdiction under the Declaratory Judgment Act to hear and determine an action to "purge" an easement. We conclude that it did not.

"The purpose of the Declaratory Judgment Act [, N.C. Gen. Stat. § 1-253 *et seq.*,] is to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations. It is to be liberally construed and administered." *Insurance Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964) (citations, quotation marks and ellipses omitted). Even though the Declaratory Judgment Act ("the Act") is to be liberally administered, jurisdiction under the Act may be invoked "only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise." *Id.*, 134 S.E.2d at 656-57. The North Carolina Supreme Court has categorically held that jurisdiction does not exist

under the Act for the purpose of declaring a conveyance void or nullifying a written instrument. *Town of Nags Head v. Tillett*, 314 N.C. 627, 629, 336 S.E.2d 394, 396 (1985) ("[T]he Declaratory Judgment Act is restricted to declaring the rights and liabilities of parties regarding property[;] for the trial court to find that the conveyances are void as a matter of law [is] beyond the scope of the [A]ct.") (Citation, quotation marks and brackets in original omitted.)); *Farthing v. Farthing*, 235 N.C. 634, 635, 70 S.E.2d 664, 665 (1952) ("The Declaratory Judgment Act, G.S. Ch. 1, Art. 26, is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is *not a vehicle for the nullification* of such instruments." (Emphasis added.)).

Plaintiff's prayer to the trial court to purge the easement from the Union County registry was in essence the same as a request to void a conveyance or to nullify a written instrument. Therefore, we conclude plaintiff sought relief which was beyond the scope of the Act. Accordingly, the trial court lacked jurisdiction to hear that portion of the complaint and properly dismissed it. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("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.")

B. Relocating the Easement

[2] Defendant cited no cases, and we are aware of none which would limit the jurisdiction of the trial court to hear and enter judgment on a complaint whereby the owner of the servient estate seeks to quiet title with regard to the location of an easement. *See York v. Newman*, 2 N.C. App. 484, 489, 163 S.E.2d 282, 286 ("[T]he complaint filed herein meets the minimum requirements of G.S. 41-10 in that it alleges that the plaintiffs own the described land and that the defendant *claims* an interest therein adverse to them." (Emphasis in original.)), *cert. denied*, 274 N.C. 518 (1968). Here, it is undisputed that plaintiff owned the servient estate and that defendant claimed an interest, an easement, adverse to plaintiff. However, we conclude that even though the trial court had jurisdiction to hear the claim to relocate the easement, plaintiff's claim is meritless.

"Grantees take title to lands subject to duly recorded easements which have been granted by their predecessors in title." *Hensley v. Ramsey*, 283 N.C. 714, 730, 199 S.E.2d 1, 10 (1973) (citation and

quotation marks omitted). Furthermore, once a party has acquired title to the use of an easement, even if by prescription, the owner of the servient estate may "not deprive him of his easement by providing another outlet." *Smith v. Jackson*, 180 N.C. 115, 117, 104 S.E. 169, 170 (1920).

Plaintiff acknowledges that it received its land subject to the duly recorded easement and concedes that under the existing common law of North Carolina it has no right to an order relocating the easement which was duly recorded in the registry of deeds. However, plaintiff urges us to adopt a new rule, citing *MPM Builders, LLC v. Dwyer*, 442 Mass. 87, 809 N.E.2d 1053 (2004), and various cases from other jurisdictions which rejected a common law rule similar to North Carolina's and instead allowed unilateral relocation that was consistent with the purpose of the easement and encouraged development of the servient estate.

However, this Court does not have authority to rely on cases from other jurisdictions and reject the common law of this State which has been set forth by the North Carolina Supreme Court. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (vacating a decision of this Court which relied on the authority of other jurisdictions to abolish a cause of action recognized by the North Carolina Supreme Court). The law of North Carolina in this case is plain—plaintiff has no right to move defendant's duly recorded easement, even by providing him with an alternative means of access. *Smith*, 180 N.C. at 117, 104 S.E. at 170. The trial court correctly dismissed this portion of plaintiff's complaint for failure to state a claim upon which relief may be granted.

III. Conclusion

The trial court had no jurisdiction pursuant to the Declaratory Judgment Act to consider plaintiff's request to purge the easement. This claim was properly dismissed by the trial court. Furthermore, under the common law of North Carolina, plaintiff has no right to unilaterally move defendant's duly recorded easement, even though it offered an alternative route for defendant to access its property. Accordingly, we affirm the trial court order dismissing plaintiff's complaint.

Affirmed.

Judges McCULLOUGH and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 OCTOBER 2008

BAILEY v. TOWN OF MAGGIE VALLEY No. 08-123	Haywood (06CVD29)	Affirmed in part, dismissed in part
BOILEAU v. SEAGRAVE No. 07-1431	Mecklenburg (05CVS7400)	No error as to the judgment entered upon the jury verdict, and the trial court's order denying Plaintiff's Rule 59 motion is affirmed
BROADBENT v. ALLISON No. 07-1342	Transylvania (01CVS261)	Vacated
GREENE v. COLBY No. 08-155	Brunswick (07CVD1526)	Affirmed
HUDSON v. HUDSON No. 08-76	Alamance (04CVD107)	Affirmed in part; reversed and remanded in part
IN RE A.B.T. No. 08-588	Haywood (04JT106)	Affirmed
IN RE A.C. No. 08-222	Martin (05JB63)	Affirmed in part; vacated in part; and remanded
IN RE A.E. No. 08-556	Chatham (06JA16)	Vacated and remanded
IN RE D.H., C.H., J.H., E.H. No. 08-667	Rowan (07JT176-79)	Affirmed
IN RE E.A.S.H. No. 08-438	Wake (05JT397)	Affirmed
IN RE J.D.C. No. 08-121	Alamance (06JB219)	Affirmed
IN RE J.G.L. No. 08-644	Nash (06JT109)	Affirmed
IN RE K.T.B., JR. No. 08-766	Moore (06JT01)	Affirmed
IN RE S.J.E. No. 07-1047	Durham (06J335)	Affirmed in part; vacated in part and remanded
IN RE W.H.P. IV No. 08-176	Iredell (07JB66)	Vacated

NEMCHIN v. NEMCHIN No. 08-107	Guilford (05CVD3707)	Affirmed
SAUS v. JENKINS No. 07-807	New Hanover (05CVD2576)	Affirmed
STATE v. AIKEN No. 08-224	Buncombe (06CRS59373) (06CRS11633)	No error
STATE v. ALLEN No. 08-98	Graham (06CRS464) (06CRS50388)	No error
STATE v. BISHOP No. 08-46	Sampson (06CRS51634) (06CRS51636) (06CRS51643)	Judgment arrested and remanded for sentencing
STATE v. ELLIOTT No. 08-139	Alamance (07CRS50670-71)	No error
STATE v. EVANS No. 08-293	Columbus (07CRS2989)	Affirmed
STATE v. FERNANDEZ No. 08-363	Mecklenburg (06CRS238982)	No prejudicial error
STATE v. GOMEZ No. 08-13	Mecklenburg (04CRS256356) (04CRS257975)	No error
STATE v. GRIMES No. 08-425	Pitt (03CRS8431)	Affirmed
STATE v. HASSOUMIOU No. 08-87	Guilford (06CRS74099)	Affirmed in part, dismissed in part without prejudice
STATE v. HATCHER No. 08-162	Johnston (06CRS11375) (06CRS52026) (06CRS52032) (06CRS52029)	Affirmed
STATE v. JORDAN No. 08-54	Wayne (06CRS53787)	Affirmed
STATE v. KELLY No. 08-232	Wayne (06CRS57862-64)	No. 06CRS057862, count 51, breaking or entering: No error. No. 06CRS057862, count 52, breaking or entering: no error. No. 06CRS057863, count 51, larceny

		after breaking or entering: No error. No. 06CRS057863, count 52, larceny after breaking or entering: Judgment of conviction reversed and sentence vacated. No. 06CRS057863, count 53, misdemeanor larceny: Judgment of conviction reversed and sentence vacated. No. 06CRS057864, count 51, felony possession of stolen goods: Judgment arrested. No. 06CRS057864, count 52, felony possession of stolen goods: Judgment arrested. No. 06CRS057864, count 53, misdemeanor possession of stolen goods, judgment arrested.
STATE v. LOPEZ No. 08-152	Buncombe (01CRS1762)	Affirmed
STATE v. MOODY No. 08-134	Mecklenburg (05CRS229134)	No error
STATE v. NORWOOD No. 08-317	Mecklenburg (05CRS255156)	Affirmed
STATE v. OXENDALE No. 08-257	Rutherford (06CRS4998-99)	No error
STATE v. PINEDA No. 08-74	Mecklenburg (05CRS218404) (05CRS218408) (05CRS220405)	No error
STATE v. PINSON No. 08-31	Guilford (07CRS82771) (07CRS24378)	No error
STATE v. ROBERSON No. 07-1435	Nash (06CRS53390)	No error
STATE v. SHAW No. 08-97	Wake (06CRS046098)	No error

STATE v. SLADE No. 08-274	Guilford (06CRS100231)	No error
STATE v. SMITH No. 08-191	Johnston (06CRS8035) (06CRS8042)	No error
STATE v. SMITH No. 08-406	Pasquotank (06CRS50411)	Affirmed
STATE v. STONE No. 08-298	Moore (07CRS2211) (06CRS2474)	No error in part; reversed in part and remanded for resentencing
STATE v. TEJEDA-RIVERA No. 08-283	Wake (07CRS1548)	No error
STATE v. TESSNEAR No. 08-256	Rutherford (06CRS53120)	No error
STATE v. WILLIAMS No. 08-318	Davidson (04CRS53940)	No error
STATE v. WITHERS No. 08-85	Guilford (04CRS72818)	No error

STATE OF NORTH CAROLINA v. ROGER EARL COLEY

No. COA07-645

(Filed 4 November 2008)

1. Constitutional Law— competency to stand trial—due process—findings of fact incorporating factual summary from detailed psychiatric report

The trial court did not abuse its discretion in a first-degree murder case by finding that defendant was competent to stand trial because: (1) there was no authority prohibiting the court from making findings of fact incorporating a factual summary from a detailed psychiatric report in lieu of listing the facts in the traditional manner; (2) evidence that a defendant suffers from mental illness is not dispositive on the issue of competency; (3) the record contained evidence that defendant possessed the capacity to comprehend his position, understand the nature of the proceedings against him, conduct his defense in a rational manner, and cooperate with his counsel; (4) although the defense produced evidence to the contrary, the trial court was presented with sufficient evidence at the competency hearing to sustain a conclusion that defendant was competent to stand trial; and (5) although two doctors differed as to the significance of defendant's rambling, the State's expert witness provided the trial court with sufficient evidence to suggest that defendant was capable of standing trial despite his tendency to ramble in response to questioning.

2. Jury— voir dire—inquiry into whether any jury members had prior unfavorable experiences with attorneys

The trial court did not abuse its discretion in a first-degree murder case by sustaining objections to questions posed by defense counsel to prospective jurors during the voir dire hearing as to whether any of the jury members had prior unfavorable experiences with attorneys because: (1) despite defendant's claims, he made no showing that the trial court's failure to allow defense counsel's question resulted in any undue prejudice to defendant; and (2) a review of the record revealed that the trial court's decision not to allow defense counsel's question did not deprive defendant of his right to an impartial jury.

3. Constitutional Law— right to remain silent—detective testified defendant invoked Fifth Amendment right

The trial court did not commit plain error in a first-degree murder case by allowing the prosecutor to elicit testimony indicating that defendant invoked his constitutional right to silence when questioned by police because: (1) although the detective erred by testifying defendant invoked his Fifth Amendment right to silence, the State did not elicit this testimony for the purpose of attacking defendant's guilt or credibility; (2) the detective provided the information to explain his subsequent actions regarding defendant; (3) although it may be true that defendant's credibility was at issue during trial, the trial court was presented with substantial evidence tending to support defendant's conviction; and (4) defendant failed to show that the introduction of the detective's statement amounted to a miscarriage of justice or that a different verdict probably would have been reached but for the introduction of this testimony.

4. Homicide— first-degree murder—request for instruction on lesser-included offense—voluntary manslaughter based on imperfect self-defense

The trial court did not err in a first-degree murder case by denying defendant's request for an instruction on voluntary manslaughter based on imperfect self-defense because: (1) viewed in the light most favorable to defendant, defendant's testimony was insufficient to demonstrate defendant reasonably believed it was necessary to kill his wife to save himself from great bodily harm; (2) although the wife victim threatened defendant and reached for a knife, defendant's own testimony revealed that defendant was able to secure the weapon before the wife could reach it; (3) once the weapon was secure, defendant was no longer in imminent danger from his wife; (4) even if defendant believed it was necessary to kill his wife to avoid great bodily harm, that belief was unreasonable; and (5) a review of the record revealed that defendant presented no evidence at trial to warrant a jury instruction of imperfect self-defense.

Judge GEER dissenting.

Appeal by defendant from judgment entered 2 August 2006 by Judge W. Russell Duke, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 28 November 2007.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals judgment entered after a jury verdict of guilty of first-degree murder. We determine there was no prejudicial error.

FACTS

On 7 March 2005, Roger Earl Coley ("defendant") called 911 from his house at 410 Myrtle Avenue in Rocky Mount, North Carolina, and reported that he had stabbed his wife, Deborah Thompson Coley, with a butcher knife. When the operator inquired as to how many times he had stabbed his wife, defendant responded that he had stabbed her "about twenty times." Officer Brian Patrick Livecchi of the Rocky Mount Police Department arrived at defendant's house a short time later. At the time Officer Livecchi arrived, defendant was standing on the porch with blood on his clothes. Officer Livecchi then handcuffed defendant and asked him what happened. Defendant responded, "I stabbed her." After handcuffing defendant, Officer Livecchi entered the residence and found Mrs. Coley leaning against a sofa. She was bleeding from her chest. Officer Livecchi took her pulse, and after determining the scene was secure, called the dispatcher to alert the firemen and paramedics.

After other police officers arrived, Officer Livecchi placed defendant in the back of his police car and drove him to the Rocky Mount Police Department. On the way to the police department, defendant made several statements. Defendant stated that "he just simply couldn't take it anymore" and that "she never gave him any respect." At the police station, defendant was informed of his *Miranda* rights by Detective Thomas Seighman. Defendant responded that he wanted to speak to an attorney. Despite defendant's invocation of his right to silence, defendant continued to make statements. Defendant was then allowed to make several phone calls, which were recorded by a video camera set up inside the police station. During one of these phone calls, defendant described the circumstances surrounding Mrs. Coley's stabbing.

Kevin Bissette, a member of West Edgecombe Rescue Squad, arrived shortly after Officer Livecchi. Mr. Bissette examined Mrs.

Coley and determined that she had no pulse. Mrs. Coley was then transported to the hospital as emergency personnel attempted to resuscitate her. These efforts proved unsuccessful, and Mrs. Coley died while being transported to the hospital.

A grand jury indicted defendant for first-degree murder on 23 May 2005. On 26 April 2006, a competency hearing was held before Judge Frank R. Brown in Edgecombe County Superior Court. After hearing the evidence, Judge Brown concluded defendant possessed sufficient capacity to proceed to trial. Defendant was tried before a jury for the murder of his wife, Deborah Coley, on 31 July 2006, in Edgecombe County Superior Court, Judge W. Russell Duke, Jr., presiding. On 2 August 2006, defendant was convicted of first-degree murder and sentenced to a term of life in prison without the possibility of parole. Defendant now appeals.

I.

[1] Defendant first argues the trial court erred by finding defendant competent to stand trial. We disagree.

"[T]he conviction of an accused person while he is legally incompetent violates due process[.]" *State v. Taylor*, 298 N.C. 405, 410, 259 S.E.2d 502, 505 (1979); *Pate v. Robinson*, 383 U.S. 375, 378, 15 L. Ed. 2d 815, 818 (1966). Our General Statutes expound on this notion, providing:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

N.C. Gen. Stat. § 15A-1001(a) (2007); *see Taylor*, 298 N.C. at 410-11, 259 S.E.2d at 505. The determination of whether a defendant is competent to stand trial rests within the trial court's discretion and the burden of persuasion falls upon the defendant. *State v. Pratt*, 152 N.C. App. 694, 697, 568 S.E.2d 276, 278 (2002), *cert. denied*, *appeal dismissed*, 357 N.C. 168, 581 S.E.2d 442 (2003). The trial court's findings of fact, as well as its final determination, will be upheld on appeal if supported by the evidence. *Id.* at 698, 568 S.E.2d at 279.

In the case at bar, an inquiry was held prior to trial to determine defendant's competency. During this hearing, the trial court was

presented with testimony from several expert witnesses. The State's expert witness, Dr. Charles Vance, an expert in forensic psychiatry, testified regarding his examination of defendant. According to Dr. Vance, defendant demonstrated an adequate knowledge of the nature and object of the proceedings against him, as well as of his position in relationship to these proceedings. Further, although Dr. Vance recognized that defendant suffered from dementia, which hindered him in his interactions with his lawyer, Dr. Vance opined that defendant's impairment was not so severe as to prevent him from working rationally and reasonably with his attorney. Thus, Dr. Vance was of the opinion that defendant was competent to stand trial. In response to the State's evidence, the defense proffered testimony from Dr. Katayoun Tabrizi, an expert in psychology. Dr. Tabrizi opined that in addition to suffering from dementia, defendant was also suffering from a psychotic mental illness that was not being treated. According to Dr. Tabrizi, these afflictions made defendant incapable of proceeding to trial.

At the conclusion of the hearing, the trial court entered an order holding that defendant possessed the capacity to proceed to trial. In this order, the trial court adopted as its findings of fact defendant's Forensic Psychiatric History And Evaluation/Legal Assessment/ Discharge Summary and Aftercare plan of Dorothea Dix Hospital for Roger Earl Coley ("evaluation"). Based on these findings, the trial court concluded that although defendant's mental defects "may complicate his interaction with his attorney" these defects "[were] not of sufficient magnitude to negate his capacity to stand trial[.]"

On appeal, defendant argues the trial court's determination of defendant's competency was in error. In support of his argument, defendant contends: (1) the trial court incorrectly adopted as its findings of fact defendant's evaluation; (2) the trial court was presented with no evidence at the preliminary hearing to support a conclusion that defendant was competent to stand trial; and (3) the defendant's trial testimony indicated that defendant did not possess the capacity to stand trial, regardless of the court's determination during the preliminary hearing.

1.

As noted above, the trial court was presented with testimony that supported the court's conclusion, which was:

> THE COURT CONCLUDES from all the evidence presented; that the Defendant was cooperative with forensic interviews; that

> he knew he was charged with 1st Degree Murder and has a clear recollection of the events associated with his criminal acts; that he showed an understanding of the nature of the legal proceedings as well as the court room personnel; that he was aware of pleas available and the significance of the pleas; that he suffers some degree of intellectual deficiency, but his I.Q. falls in the range of the upper 70s to the low 80s; that he has difficulty understanding hypothetical or abstract situations, but when language is simplified, he has the ability to grasp concepts and understand them; that the Defendant became excessively emotional when discussing his wife, but did not display similar problems with modulation in other contexts; that he has the ability to restrain himself and control his behavior when advised that such structure was needed to be imposed on the conversation; that his mental defects may complicate his interaction with his attorney, but are not of sufficient magnitude to negate his capacity to stand trial.

The question then becomes whether the trial court can adopt the facts as set forth in the psychiatric report in lieu of listing the facts in the traditional manner. We can find no authority prohibiting the court from making findings of fact by incorporating a factual summary from a detailed report.

We note that the court's findings of fact, if supported by competent evidence, are conclusive on appeal. *State v. Clark*, 300 N.C. 116, 265 S.E.2d 204 (1980). While the better practice is to make independent detailed findings of fact, *see State v. Aytche*, 98 N.C. App. 358, 363, 391 S.E.2d 43, 46 (1990), adopting facts set forth in the report was not prejudicial in this instance.

2.

"The test for capacity to stand trial is whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel[.]" *State v. Jackson*, 302 N.C. 101, 104, 273 S.E.2d 666, 669 (1981). "Evidence that a defendant suffers from mental illness is not dispositive on the issue of competency." *Pratt*, 152 N.C. App. at 697, 568 S.E.2d at 278. Our Supreme Court has noted that

> a defendant does not have to be at the highest stage of mental alertness to be competent to be tried. So long as a defendant can confer with his or her attorney so that the attorney may interpose

> any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner. It is the attorney who must make the subtle distinctions as to the trial.

State v. Shytle, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989).

Here, defendant asserts the trial court was presented with no evidence to support a conclusion that defendant was competent to stand trial. To the contrary, as previously discussed, the record contains evidence that defendant possessed the capacity to (1) comprehend his position, (2) understand the nature of the proceedings against him, (3) conduct his defense in a rational manner, and (4) cooperate with his counsel. Although the defense produced evidence to the contrary, we hold the trial court was presented with sufficient evidence at the preliminary hearing to sustain a conclusion that defendant was competent to stand trial.

3.

" '[A] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent.' " *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977) (citation omitted).

Defendant further argues that regardless of his competency during the initial hearing, defendant's trial testimony provided evidence that defendant did not possess the capacity to stand trial. Thus, defendant contends the trial court erred by not conducting an inquiry into defendant's competence at trial. Upon review, we hold defendant has produced insufficient evidence to support this contention. The record on appeal indicates that, at trial, defendant appeared to ramble in response to questions imposed by counsel. However, such behavior was not a new occurrence, and had been present during defendant's examinations prior to the preliminary hearing. Dr. Vance had previously noted that defendant often seemed to ramble when he was examined prior to trial. Although Dr. Vance and Dr. Tabrizi differed as to the significance of this rambling, Dr. Vance provided the trial court with sufficient evidence to suggest that defendant was capable of standing trial despite his tendency to ramble in response to questioning. The fact, by itself, that defendant continued this behavior at trial, did not amount to substantial evidence that defendant was mentally incompetent at trial. Therefore, the trial court did not err by failing to institute, *sua sponte*, a second competency hearing. Accordingly, defendant's assignment of error is overruled.

II.

[2] Defendant next argues the trial court incorrectly sustained objections to questions posed by defense counsel to prospective jurors during the *voir dire* hearing. Specifically, defendant argues the trial court erred by sustaining the State's objection to defense counsel's inquiry as to whether any of the jury members had prior unfavorable experiences with attorneys. We find defendant's argument to be without merit.

The trial court is responsible for ensuring that a competent, fair, and impartial jury is impaneled. *State v. Anderson*, 355 N.C. 136, 140, 558 S.E.2d 87, 91 (2002). "The nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the trial court." *State v. Hill*, 331 N.C. 387, 404, 417 S.E.2d 765, 772 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684, *reh'g denied*, 507 U.S. 1046, 123 L. Ed. 2d 503 (1993). "The exercise of such discretion constitutes reversible error only upon a showing by the defendant of harmful prejudice and clear abuse of discretion by the trial court." *State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997).

In the case at bar, defense counsel sought to ask the jury, "Has anyone in the jury box had a bad experience with an attorney?" After the State's objection to this question was sustained, defendant attempted a reworded version of this question, asking: "Has anyone had a [sic] experience with an attorney that they believe would affect the way they hear the evidence in this case?" Once again, the State lodged an objection to defense counsel's question. After determining defendant in this case was not an attorney, the trial court again sustained the State's objection, preventing defense counsel from posing the aforementioned question to the jury. On appeal, defendant now contends that the trial court's action of sustaining the State's objection, and thus preventing defendant from posing this question to the jury, denied him the opportunity to have his case heard before a fair and impartial jury. Despite defendant's claims, he makes no showing that the trial court's failure to allow defense counsel's question resulted in any undue prejudice to defendant. Rather, defendant simply contends that the aforementioned question was proper and should have been allowed at trial. After reviewing the record, we hold the trial court's decision not to allow defense counsel's aforementioned question did not deprive defendant of his right to an impartial jury. Therefore, defendant's assignment of error is overruled.

III.

[3] Defendant also argues the trial court committed plain error by allowing the prosecutor to elicit testimony indicating that defendant invoked his constitutional right to silence when questioned by police. We disagree.

It is well established "that the State may not introduce evidence that a defendant exercised his fifth amendment right to remain silent." *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983). If the defendant does not object at trial to the introduction of evidence regarding his silence, on appeal "the defendant has the burden of showing that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). "Erroneous admission of evidence may be harmless where there is an abundance of other competent evidence to support the state's primary contentions[] or where there is overwhelming evidence of defendant's guilt . . . [or] where defendant elicits similar testimony on cross-examination." *State v. Weldon*, 314 N.C. 401, 411, 333 S.E.2d 701, 707 (1985) (citations omitted).

In the case *sub judice*, defendant argues the State inappropriately referenced defendant's decision to invoke his right to silence. At trial, Detective Seighman testified that after defendant was informed of his *Miranda* rights, defendant invoked his right to silence and responded that "he would like to speak to an attorney." Detective Seighman further testified that despite defendant's invocation of his right to remain silent, defendant continued to make statements to Detective Seighman regarding his relationship with Mrs. Coley. Although he made no objection to Detective Seighman's testimony at trial, on appeal defendant contends that the introduction of this testimony amounted to plain error. Defendant argues that Detective Seighman's testimony regarding defendant's decision to invoke his right to remain silent served as an improper attack on defendant's credibility at trial. His credibility was pivotal, defendant argues, because his testimony surrounding Mrs. Coley's stabbing did not mirror his previous description of these events as shown to the court on a videotape. Thus, defendant argues evidence that he invoked his right to remain silent and to seek counsel from an attorney served to prejudice the jury against him and ultimately resulted in a guilty verdict. After reviewing the record, we are unpersuaded by defendant's arguments. It is true that Detective Seighman erred by testifying defendant

invoked his Fifth Amendment right to silence. However, the State did not elicit this testimony for the purpose of attacking defendant's guilt or credibility. Rather, Detective Seighman provided the information seemingly to explain his subsequent actions regarding defendant. Though it may be true that defendant's credibility was at issue during trial, the trial court was presented with substantial evidence tending to support defendant's conviction for the crime of first-degree murder. Defendant has failed to show that the introduction of Detective Seighman's statement amounted to a miscarriage of justice or that a different verdict probably would have been reached but for the introduction of this testimony. Therefore, we hold the trial court did not commit plain error by allowing Detective Seighman to testify regarding defendant's invocation of his Fifth Amendment rights.

IV.

[4] Defendant concludes by arguing that the trial court erred by denying defendant's request for an instruction on voluntary manslaughter. We disagree.

Voluntary manslaughter is defined as " 'an intentional killing without premeditation, deliberation or malice . . . [either] in the heat of passion . . . or in the exercise of imperfect self-defense where excessive force under the circumstances was used . . . .' " *State v. Lyons*, 340 N.C. 646, 663, 459 S.E.2d 770, 779 (1995) (citation omitted). Our Supreme Court has held that

> if defendant believed it was necessary to kill the deceased in order to save [himself] from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to [him] at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981). Although voluntary manslaughter is a lesser included offense of first-degree murder, an instruction regarding voluntary manslaughter, based on a theory of imperfect self-defense, is not required " 'unless evidence was introduced tending to show that at the time of the killing, the defendant *reasonably* believed' it necessary to kill the

victim in order to save himself from imminent death or great bodily harm." *State v. Maynor*, 331 N.C. 695, 700, 417 S.E.2d 453, 456 (1992) (citation omitted); *see State v. Price*, 344 N.C. 583, 589, 476 S.E.2d 317, 320 (1996). This Court will consider the facts in the light most favorable to defendant to determine if the evidence presented at trial was sufficient to warrant an instruction regarding voluntary manslaughter based on imperfect self-defense. *See State v. Mize*, 316 N.C. 48, 51, 340 S.E.2d 439, 441 (1986).

In the case *sub judice*, defendant argues he presented sufficient evidence at trial to warrant the inclusion of a jury instruction of voluntary manslaughter on the grounds that defendant's actions amounted to imperfect self-defense. We find defendant's argument to be without merit. At trial, defendant testified that on the night she was stabbed, Mrs. Coley began to curse and threaten him. To prevent others from overhearing Mrs. Coley's insults, defendant testified that he closed the door to the house they were occupying. When defendant turned back to face Mrs. Coley, she had picked up the phone and was searching for the telephone numbers of two local drug dealers. In response, defendant walked up to Mrs. Coley and "knocked the phone out of her hand." Angered by defendant's behavior, Mrs. Coley threatened to hurt him and reached for a knife. Before Mrs. Coley could retrieve the knife, defendant testified that he "grabbed it and just stabbed her." Viewed in the light most favorable to defendant, defendant's testimony is insufficient to demonstrate defendant reasonably believed it was necessary to kill Mrs. Coley to save himself from great bodily harm. Although Mrs. Coley threatened him and reached for the knife, defendant's own testimony reveals that defendant was able to secure the weapon before Mrs. Coley could reach it. Once the weapon was secure, defendant was no longer in imminent danger from Mrs. Coley. Thus, even if defendant believed it was necessary to kill Mrs. Coley to avoid great bodily harm, that belief was unreasonable. A review of the record reveals defendant presented no evidence at trial to warrant a jury instruction of imperfect self-defense. We therefore hold the trial court did not err by denying defendant's request to submit a jury instruction regarding voluntary manslaughter based on a theory of imperfect self-defense.

No error.

Judge STEELMAN concurs.

Judge GEER dissents by separate opinion.

GEER, Judge, dissenting.

As the United States Supreme Court has emphasized, "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 112-13, 95 S. Ct. 896, 903 (1975). Because I believe the trial court did not make the findings of fact necessary to support a conclusion that defendant has the capacity to be tried, I respectfully dissent.

It is fundamental that a trial court's determination of competency must be supported by findings of fact that in turn must be supported by competent evidence. *See State v. Taylor*, 298 N.C. 405, 409, 259 S.E.2d 502, 505 (1979) ("The record reveals that the able trial judge, in accordance with G.S. 15A-1002(b)(3), conducted a pretrial hearing, found facts, and concluded that defendant had the mental capacity to proceed to trial. That conclusion is supported by the findings and the findings are supported by the evidence adduced at the hearing."). In this case, however, the trial court hearing the competency issue essentially abdicated its fact-finding role by expressly adopting the report of the State's expert witness—Dr. Charles Vance of Dorothea Dix Hospital—as its findings of fact. I do not believe that a trial court may delegate fact-finding in this manner.

Moreover, to the extent that the trial court made its own findings of fact, I do not believe that those findings address all of the issues necessary to determine whether defendant had the capacity to stand trial. Further, other portions of the order are not supported by competent evidence. As our state Supreme Court has acknowledged, due process requires a procedure that must "jealously guard[] a defendant's right to a fair trial." *Id.* at 410, 259 S.E.2d at 505 (internal quotation marks omitted). A critical part of that procedure is a trial court's thoughtful fact-finding. Indeed, in the absence of such findings, the appellate courts cannot appropriately conduct their review—another safeguard for ensuring a fair trial.

Facts

It is worth summarizing the basic facts regarding defendant's condition, most of which are set forth in Dr. Vance's report. Dr. Vance and both of defendant's expert witnesses agreed that defendant suffers from dementia, a condition that deteriorates over time. Dr. Katayoun Tabrizi, a psychiatrist, and Dr. Claudia Coleman, a psychologist, how-

ever, believe that defendant also suffers from an untreated psychotic illness, such as schizoaffective disorder, based on his symptoms and family history. Dr. Tabrizi noted that defendant could benefit from treatment with psychiatric medications, and while "[i]t is difficult to predict Mr. Coley's exact response to psychiatric treatment . . . there is a substantial chance that some of his psychiatric symptoms could be successfully treated with medications, toward restoration of his capacity to proceed to trial."

Drs. Tabrizi and Coleman had difficulty evaluating defendant because of defendant's tangential and perseverative thinking process,[1] grandiose and paranoid ideation, disorganized thinking, and irritability in response to attempts to redirect him. Dr. Vance first attempted to evaluate defendant on an outpatient basis, but found:

> Mr. Coley was quite talkative and at times hard to interrupt, especially when discussing his marriage or his alleged crime. On such occasions he would speak for several minutes without pause when answering a question that sought a one or two word answer. Efforts to re-direct Mr. Coley to provide more succinct answers tended to render him more irritable, as he noted, "I'm the one that lived the life; I got to tell it just like it happened."

Dr. Vance concluded that defendant had "very circumstantial thought processes" and "tangential thought processes." As a result of this evaluation, Dr. Vance determined that defendant would need to be evaluated on an inpatient basis.

Defendant dropped out of school in either the ninth or tenth grade; he had been enrolled in special education classes. Dr. Coleman testified at trial that defendant's school records indicated that he was considered educable mentally retarded. Defendant also had a history of substance abuse (cocaine and alcohol) and had sustained a serious head injury in 1997 that resulted in moderate to severe cognitive deficits.

In 1993, in connection with an application for Social Security disability, a psychologist administered the Wechsler Adult Intelligence Scale-Revised ("WAIS-R") to defendant, and defendant had a Full Scale IQ score of 67. In May 1997, a psychologist again administered the WAIS-R for purposes of a Social Security disability determination, and defendant obtained a full scale IQ score of 80. The Wechsler

1. According to Dr. Coleman, perseveration exists when a person "gets on one idea [and] you can't get him off of it."

Adult Intelligence Scale—Third Edition ("WAIS-III"), which became available in 1997, was administered in 1999 by a psychologist in connection with defendant's third application for disability, and defendant obtained a Full Scale IQ score of 58. Defendant was found by Social Security to be disabled and, upon review in 2002, Social Security concluded that his disability was continuing. In 2004, defendant was referred for vocational rehabilitation, and administration of the WAIS-III resulted in a Full Scale IQ score of 74.[2]

Dr. Vance referred defendant to LaVonne Fox, Psy.D., also at Dorothea Dix Hospital, for further psychological testing. In Dr. Fox's report, she states that her review of defendant's records indicated that administration to defendant of the Wide Range Achievement Test ("WRAT-R3") resulted in a reading grade equivalent of sixth grade. The Woodcock Johnson Tests of Achievement indicated that defendant had a 3.9 grade equivalent for reading fluency, 6.3 grade equivalent for math fluency, 4.2 grade equivalent for writing fluency, 3.3 grade equivalent for broad reading, 5.4 grade equivalent for broad mathematics, and 3.5 grade equivalent for broad written language.

Dr. Fox administered malingering tests to defendant and determined "that Mr. Coley was cooperative with testing and was not attempting to feign or exaggerate cognitive (i.e. memory) impairment." On the Repeatable Battery for the Assessment of Neuropsychological Status ("RBANS-Form A"), defendant scored in the 0.1 percentile on the immediate memory index and in the 0.2 percentile on the delayed memory index. Dr. Fox concluded as to this testing: "Overall, the results of the RBANS revealed cognitive deficits in immediate and delayed memory and visuospatial/constructional abilities."

Dr. Fox also administered the Wisconsin Card Sorting Test, which she described as "a standardized measure of higher order executive functioning that involves abstract concept formation, problem solving, reasoning, cognitive flexibility, and the ability to benefit from feedback in situations where the rules are not made explicit." According to Dr. Fox, "Mr. Coley performed very poorly on this task," could not understand the directions, and "was unable to complete even one of the categories successfully . . . regardless of feedback that his responses were incorrect." Based on these results, Dr. Fox concluded that defendant had "deficits in the areas of cognitive flex-

2. None of the reports in the record identify whether the person who administered the 2004 test was a licensed psychologist.

ibility, inhibition, planning, and in his ability to alter plans on the basis of feedback, consistent with his presentation."

It is important to note that Dr. Vance, the State's expert witness, reported that (1) "the consistent opinion has been that Mr. Coley has been genuine in his presentation," (2) "it is clear that Mr. Coley has true impairment[,]" and (3) "psychological testing undertaken during this evaluation indicated that there is a very low chance that he is attempting to feign cognitive deficits[.]"

Discussion

When a trial judge conducts a hearing, without a jury, to determine a defendant's capacity to proceed to trial, "it is the court's duty to resolve conflicts in the evidence . . . ." *State v. Heptinstall*, 309 N.C. 231, 234, 306 S.E.2d 109, 111 (1983). If the trial judge fails "to conduct a hearing with appropriate findings and conclusions," the defendant is "not afforded due process." *State v. McRae*, 139 N.C. App. 387, 391, 533 S.E.2d 557, 560 (2000), *cert. denied*, 356 N.C. 442, 573 S.E.2d 160 (2002). A trial judge is excused from making findings of fact only "where the evidence would compel the ruling made." *State v. O'Neal*, 116 N.C. App. 390, 395, 448 S.E.2d 306, 311, *disc. review denied*, 338 N.C. 522, 452 S.E.2d 821 (1994).

In this case, the trial court's order—after reciting the case's basic procedural history, identifying the individuals present at the hearing, and listing the evidence considered—stated in its entirety:

> THE COURT adopts as its finding of facts the Forensic Psychiatric History And Evaluation/Legal Assessment/Discharge Summary and Aftercare plan of Dorothea Dix Hospital, for Roger Earl Coley.
>
> THE COURT CONCLUDES from all the evidence presented; that the Defendant was cooperative with forensic interviews; that he knew he was charged with 1st Degree Murder and has a clear recollection of the events associated with his criminal acts; that he showed an understanding of the nature of the legal proceedings as well as the court room personnel; that he was able to understand matters when presented in concrete terms; that he was aware of pleas available and the significance of the pleas; that he suffers some degree of intellectual deficiency, but his I.Q. falls in the range of the upper 70s to the low 80s; that he has difficulty understanding hypothetical or abstract situations, but

> when language is simplified, he has the ability to grasp concepts and understand them; that the Defendant became excessively emotional when discussing his wife, but did not display similar problems with modulation in other contexts; that he has the ability to restrain himself and control his behavior when advised that such structure was needed to be imposed on the conversation; that his mental defects may complicate his interaction with his attorney, but are not of sufficient magnitude to negate his capacity to stand trial; and that the Defendant possesses the capacity to proceed to trial.

These "findings" are not, however, sufficient to resolve the question of defendant's capacity to stand trial, as required by N.C. Gen. Stat. § 15A-1001(a) (2007).

A. *Trial Court's Improper Delegation of Fact-Finding.*

First, I believe that the trial court erred in incorporating by reference, "as its findings of fact," the report of the State's expert witness. Although the majority opinion states that it could not find any authority holding that this approach is impermissible, I think the more pertinent question is whether any authority *authorizes* a trial court to delegate its statutorily-allocated judicial fact-finding role to a witness. I cannot accept that such a delegation is consistent with our Supreme Court's mandate that courts must "jealously guard[] a defendant's right to a fair trial." *Taylor*, 298 N.C. at 410, 259 S.E.2d at 505 (internal quotation marks omitted).

In analogous contexts, our appellate courts have confirmed that a trial judge, when required to make findings of fact, may not delegate that responsibility to another person through incorporation by reference of a report submitted as evidence. In abuse, neglect, and dependency proceedings, this Court has held that because a trial court "may not delegate its fact finding duty[,]" a court "should not broadly incorporate . . . written reports from outside sources *as its findings of fact*." *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (emphasis added). This Court has explained that "although the trial court may properly incorporate various reports into its order, it may not use these as a substitute for its own independent review." *In re M.R.D.C.*, 166 N.C. App. 693, 698, 603 S.E.2d 890, 893 (2004), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005). Similarly, this Court has held in juvenile delinquency proceedings that it is the responsibility of the trial court to make findings whether home placement, counseling, and assessments are necessary for a juvenile and

that responsibility may not be delegated to a court counselor. *In re S.R.S.*, 180 N.C. App. 151, 159-60, 636 S.E.2d 277, 283-84 (2006).

I can conceive of no reason that a criminal defendant should be treated any differently than a juvenile in a delinquency proceeding or a parent in an abuse, neglect, or dependency proceeding. I would, therefore, hold that the paragraph adopting "as its finding of facts" Dr. Vance's report cannot be a basis for the order's conclusion that defendant had the capacity to proceed to trial.

I recognize, however, that following this paragraph, the trial court included conclusions that are more appropriately considered as findings of fact. The question remains whether those mislabeled findings are sufficient to support the trial court's conclusion that defendant had the capacity to stand trial.

B. *Failure to Make a Finding as to Defendant's Ability to Reasonably Assist in His Defense.*

I would hold that the findings mischaracterized as conclusions are not themselves sufficient to support the trial court's determination of capacity. Our General Assembly has set out in N.C. Gen. Stat. § 15A-1001(a) the issues that a trial judge must address in deciding a defendant's capacity to proceed to trial. That statute states:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

Id. As our Supreme Court has explained: " '[This] statute provides three separate tests in the disjunctive. If a defendant is deficient under any of these tests he or she does not have the capacity to proceed.' " *State v. Davis*, 349 N.C. 1, 21, 506 S.E.2d 455, 466 (1998) (quoting *State v. Shytle*, 323 N.C. 684, 688, 374 S.E.2d 573, 575 (1989)), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219, 119 S. Ct. 2053 (1999).

The most critical flaw in the trial court's competency order is its failure to make any finding that defendant was able "to assist in his defense in a rational or reasonable manner," as required by N.C. Gen. Stat. § 15A-1001(a). At most, the order finds that defendant's "mental defects *may complicate his interaction with his attorney*, but are

not of sufficient magnitude to negate his capacity to stand trial[.]" (Emphasis added.)

A defendant's ability to interact with an attorney is certainly one aspect of being able to "assist in his defense," but it does not necessarily fully resolve whether defendant meets the third test of N.C. Gen. Stat. § 15A-1001(a). In *State v. Jackson*, 302 N.C. 101, 104, 273 S.E.2d 666, 669 (1981) (emphasis added), our Supreme Court specifically distinguished between a defendant's ability to work with counsel and a defendant's ability to assist in his defense: "The test for capacity to stand trial is whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, *to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed*." The United States Supreme Court's decision in *Drope* likewise distinguished between the two areas of activity: "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, *to consult with counsel, and to assist in preparing his defense* may not be subjected to a trial." *Drope*, 420 U.S. at 171, 43 L. Ed. 2d at 112-13, 95 S. Ct. at 903 (emphasis added).

As the United States Supreme Court has further emphasized, the Sixth Amendment " 'grants to the accused *personally* the right to make his defense. It is the accused, *not counsel*, who must be informed of the nature and cause of the accusation, who must be confronted with the witnesses against him, and who must be accorded compulsory process for obtaining witnesses in his favor.' " *Rock v. Arkansas*, 483 U.S. 44, 52, 97 L. Ed. 2d 37, 46-47, 107 S. Ct. 2704, 2709 (1987) (second emphasis added) (quoting *Faretta v. California*, 422 U.S. 806, 819, 45 L. Ed. 2d 562, 572, 95 S. Ct. 2525, 2553 (1975)). Indeed, the Court explained in *Faretta* that "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." 422 U.S. at 819-20, 45 L. Ed. 2d at 572-73, 95 S. Ct. at 2533. Thus, as a unanimous United States Supreme Court stressed:

> "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so."

Cooper v. Oklahoma, 517 U.S. 348, 354, 134 L. Ed. 2d 498, 506, 116 S. Ct. 1373, 1376-77 (1996) (quoting *Riggins v. Nevada*, 504 U.S. 127, 139-40, 118 L. Ed. 2d 479, 492, 112 S. Ct. 1810, 1817-18 (1992) (Kennedy, J., concurring in judgment)).

In sum, to have the capacity to stand trial, a defendant must not only be able to interact with his attorneys, but must also be able to meaningfully exercise the rights inherent in a fair trial. Consequently, "in assessing a defendant's competency, the Court must determine the impact, if any, that his mental or physical condition will have on his ability to participate in his own defense, including the exercise of his fundamental rights such as the right to testify in his own behalf, the right to confront adverse witnesses and the right to be present." *United States v. Gambino*, 828 F. Supp. 191, 200 (S.D.N.Y. 1993).

In this case, at most, the trial court found that defendant could reasonably interact with counsel. It made no finding regarding defendant's ability to assist in his own defense, including the exercise of his fundamental trial rights such as the right to testify in his own behalf. Without such a finding, the order fails to address each of the tests set out in N.C. Gen. Stat. § 15A-1001(a)—to say nothing of the constitutional standard—and, therefore, is inadequate to support a determination that defendant had the capacity to proceed to trial.

The trial court's error is not surprising given the evidence submitted by the State. Dr. Vance's report identified "[t]he central question" as being "the extent which Mr. Coley's dementia hindered his ability to work with his attorney in a rational and reasonable manner." He then proceeded to answer that question by concluding that defendant was not unable "to work rationally and reasonably with his attorney." *Compare State v. McClain*, 169 N.C. App. 657, 663, 610 S.E.2d 783, 788 (2005) (finding trial court's determination of competency supported by testimony of expert that defendant was able both to cooperate with his attorneys and assist in his own defense, although attorneys might need to assign him specific tasks and he would need additional time to complete tasks). Thus, even if we could consider appropriate the trial court's adoption of Dr. Vance's report as its findings of fact, that report also does not address the dispositive question.

I would, therefore, remand for further findings of fact as to whether defendant had the ability to assist in his defense in a rational or reasonable manner, including the exercise of his fundamental trial rights such as the right to testify. While the majority opinion states

that "the record contains evidence that defendant possessed the capacity to . . . conduct his defense in a rational manner[,]" the order itself contains no such finding. When, as here, the evidence is conflicting, it is well established that an order cannot be affirmed based on findings that could have been made, but were not. *See Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) ("It is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it . . . .").

C. *Failure to Resolve All Conflicts in the Evidence.*

As our Supreme Court emphasized in *Heptinstall*, 309 N.C. at 234, 306 S.E.2d at 111, when a trial judge is determining a defendant's capacity to proceed to trial, the judge must resolve the conflicts in the evidence. In this case, Dr. Vance made a number of recommendations "in order to try to offset some of [defendant's] impairments." The trial court, however, never made any finding as to whether adoption of some or all of those recommendations was necessary in order to ensure defendant's capacity to stand trial.

Significantly, Dr. Vance described this case as a "close" one and repeatedly acknowledged that defendant's ability simply to work with his attorneys "was impaired." While Dr. Vance, at the time of the competency hearing, believed that defendant had an ability to control his behavior when the circumstances warranted it, he also recommended that counsel "adopt[] a more directive questioning style when conferring with Mr. Coley" and "allow him a 'cooling off period' before asking him to revisit [a topic making him upset or emotional] in a more structured manner."

Dr. Vance confirmed that based on the results of Dr. Fox's testing, a person with defendant's scores "would certainly be expected to have problems" processing information and making decisions based on that information. He warned, therefore, that "if [defendant is] asked to make a judgment on the spur of the moment, he might be more likely to have difficulty."

Dr. Vance further testified that when defendant was agitated, "he would be impaired in his ability to process material in a methodical, logical manner." As Dr. Vance stated in his report, and the trial judge found, "when Mr. Coley discusses his wife or the alleged crime, he has a tendency to become excessively and inappropriately emotional, to the point of bordering on agitation." Although Dr. Vance and the trial

judge noted that defendant did not have the same problem "in other contexts," defendant's trial focused entirely on defendant's wife and his crime, which was the killing of his wife. Dr. Vance acknowledged that "[i]t is within the realm of possibility" that defendant could become agitated during the trial.

Dr. Vance noted that if defendant became agitated, it would be advisable to "give him a cooling off period[.]" He also confirmed that if, at Dix Hospital, they "attempted to interrupt him before he had a chance to say what he wanted to say, it would at times make him more irritable or more sullen." He explained that Dix Hospital had "a fair amount of success" when defendant was told at the beginning of an interview that more structure was needed in the conversation, but Dr. Vance clarified that they also told defendant: "I'll give you an opportunity later on to tell me the full details. And we would always afford him that opportunity later on."

Dr. Vance explained that his recommendations were expressly "tailored to the specifics of the neuropsychological impairments we saw with him." When, however, Dr. Vance was asked about the need for accommodations, the following exchange then occurred:

> Q. Now, you understand that in a trial we can't foresee everything that's going to happen. And if the trial starts at eight in the morning and goes to five in the afternoon, we'll have a series of decisions we're going to have to make on what questions to ask, whether a witness is telling the truth or not, whether to call a witness.
>
> Is it your opinion that the court should make an accommodation to that, if we would have to make decisions to stop? And based on his deficit to give Mr. Coley an opportunity to think about this and think about—
>
> A. I do not profess to be an expert in how the court functions. These are simply my recommendations on how one might best interact with Mr. Coley. And I will leave it [to] the court's discretion how best to accommodate these recommendations if they need to be accommodated.

When specifically asked whether defendant's dementia and cognitive deficits were such that defendant would more likely be unable to assist at trial if the recommendations were not accommodated, Dr. Vance stated: "I cannot say whether the lack of any such provisions would so impair him as to cause him to fall below the threshold of

being competent. As I said, it's my opinion Mr. Coley is competent. *But it's also my opinion that he does not exceed that threshold by a significant margin*." (Emphasis added.)

In short, according to Dr. Vance—whose report was the sole basis for the trial court's order—defendant was just over the line for competency, with little margin for error, and Dr. Vance, because of a lack of knowledge regarding court processes, *could not* testify that, in the absence of the accommodations he recommended and Dix Hospital employed, defendant would still be competent. Although Dr. Vance left the issue of his recommendations to "the court's discretion," the trial court never addressed the need for those recommendations.

The question whether Dr. Vance's recommendations were necessary in order for defendant to have the capacity to proceed to trial was an issue integral to a determination whether defendant could reasonably assist in his defense. The recommendations—and the underlying neuropsychological impairments and dementia giving rise to those recommendations—directly relate to defendant's ability to exercise his fundamental trial rights, including the decisionmaking processes inherent in any trial.

Perhaps most distinctly, these recommendations relate to defendant's ability to exercise his constitutional right to testify. It has been established for more than 20 years that a defendant has a constitutional right to testify: "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.' " *Rock*, 483 U.S. at 51, 97 L. Ed. 2d at 46, 107 S. Ct. at 2708-09 (quoting *Faretta*, 422 U.S. at 819 n.15, 45 L. Ed. 2d at 574 n.15, 95 S. Ct. at 2533 n.15). *See also State v. Colson*, 186 N.C. App. 281, 283, 650 S.E.2d 656, 658 ("[T]he United States Supreme Court has consistently held that a defendant's absolute right to testify is an inherent part of both the due process requirements of the Fifth and Fourteenth Amendments and the compulsory process clause of the Sixth Amendment."), *appeal dismissed and disc. review denied*, 362 N.C. 89, 656 S.E.2d 280 (2007).

In *Rock*, the Supreme Court unambiguously stated: "Even more fundamental to a personal defense than the right of self-representation . . . is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness." 483 U.S. at 52, 45 L. Ed. 2d at 47, 107

S. Ct. at 2709. Indeed, in *Riggins*, 504 U.S. at 137-38, 118 L. Ed. 2d at 490-91, 112 S. Ct. at 1816, the United States Supreme Court acknowledged that a lack of capacity to testify effectively—in that case resulting from forced medication administration—implicates a defendant's constitutional right to a fair trial.

The actual trial of this case demonstrates the need to specifically address, in the competency order, which, if any, of Dr. Vance's recommendations should be adopted. During defendant's testimony, the State repeatedly objected to "the defendant being allowed to just ramble on and on" rather than answering defense counsel's questions. Other times, the State objected to defendant's answers as being incoherent: "Your Honor, I'm going to object. I don't know what we're talking about." On each occasion, the trial judge sustained the objection. When defense counsel tried to focus defendant's attention, the State successfully objected to counsel's asking leading questions.

Ultimately, after the trial judge sustained a series of objections to defendant's answers on the grounds of relevancy and counsel's questions as leading, defense counsel asked to be heard, and the jury was excused. Defense counsel explained what he was trying to elicit, and the trial judge responded:

> You can ask him that. You can ask him, what were you thinking? But you can't lead him into it.
>
> . . . .
>
> And if he's just going to ramble all morning, he's not going to answer the questions that's, that's, that's his decision. But you can't lead him. And he has to answer your questions.
>
> . . . .
>
> . . . . *And if he chooses not to answer them and just ramble on and on and on, that's his decision.*

(Emphasis added.) As defendant's examination continued, the State continued to successfully object to leading questions and to defendant's answers as rambling. As all of the expert witnesses agreed, however, defendant's rambling was a function of his dementia, especially when he was agitated—a situation that occurred when he had to talk about his wife and his crime, precisely the subject of his testimony.

Defendant's performance during the trial strongly suggests that without accommodations, defendant was unable to assist in his de-

fense—including exercising his constitutional right to testify—in a rational and reasonable manner as required by N.C. Gen. Stat. § 15A-1001(a). *See Riggins*, 504 U.S. at 142, 118 L. Ed. 2d at 494, 112 S. Ct. at 1819 (Kennedy, J., concurring in judgment) ("At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, . . . his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy.").

This Court's decision in *McClain*, 169 N.C. App. at 664, 610 S.E.2d at 788, provides a distinctive contrast to this case. Although the trial judge, once he found the defendant competent to stand trial, declined to postpone the trial in order to implement recommendations made by the defendant's expert witness to improve the defendant's competence, the trial judge "did modify the manner in which the trial was conducted to allow defendant more frequent breaks and longer breaks following the testimony of each witness so that defendant's attorneys could consult with defendant regarding witness testimony, explain anything he did not understand, and to solicit questions or relevant information from him." *Id.* The trial judge adopted these accommodations, even though the State's expert witness in *McClain* had testified "that defendant's competency as it related to his ability to stand trial was not dependent upon implementation of [the defendant's expert's] recommendations." *Id.*

In this case, by contrast, the State failed to present evidence that defendant's capacity *was not* dependent upon Dr. Vance's recommendations. Because Dr. Vance's testimony and report and the evidence from defendant's expert witnesses raise an issue whether adoption of some or all of those recommendations was necessary for defendant to be competent, I believe the trial court was required to address those recommendations in its competency order and should do so on remand.

D. *Findings of Fact not Supported by Competent Evidence.*

I also believe that some of the trial court's "conclusions" are not supported by competent evidence. First, the order adopts from Dr. Vance's report a statement that "Mr. Coley was cooperative with forensic interviews." While the order seems to make that finding as to all forensic interviews, suggesting that it supports a determination that defendant would be able to assist in his defense, Dr. Vance's

report makes that assertion only in describing defendant's efforts during particular interviews following inpatient admission to Dix Hospital. The order disregards the report's description of significant difficulties that occurred during other forensic examinations, including examinations by Dr. Vance, Dr. Fox, Dr. Tabrizi, and Dr. Coleman.

The trial court also found that defendant "showed an understanding of the nature of the legal proceedings as well as the court room personnel" and "was aware of pleas available and the significance of the pleas[.]" In fact, Dr. Vance's report and testimony reveal that initially defendant had some confusion as to plea bargains and the roles of courtroom personnel. His testimony—although not his report—explains that defendant was educated at Dix Hospital as to these matters and that defendant was, with some prompting, able to accurately repeat what he had been told. On the other hand, Dr. Fox's testing—relied upon by Dr. Vance—established that defendant had very substantial memory deficits. He functioned in the bottom 0.1% or 0.2% of the population—in other words, substantially worse than the bottom one percent of the population.

As Dr. Coleman explained: "You have to look at less than one in a thousand individuals to find someone whose memory, verbal memory of hearing what we're talking about today is less than Mr. Coley's for new information. Now, he can remember old information for good. And if you practice ten or twenty times with him he remembers it pretty well. But he doesn't remember it well after four trials. He doesn't remember it well after ten or fifteen minutes." Although this memory deficit was undisputed, neither the trial court nor Dr. Vance resolved this discrepancy between that deficit and reliance upon the Dix Hospital education process as establishing defendant's understanding of legal proceedings. The trial court's order thus leaves open a key question: How long did defendant remember what Dix Hospital taught him? One must wonder whether defendant's new-found knowledge remained with him months later at the date of trial. *See State v. Reid*, 38 N.C. App. 547, 549-50, 248 S.E.2d 390, 392 (1978) ("The fact that two to three months prior [to the competency hearing] the defendant was determined to be mentally capable to proceed to trial cannot be determinative in itself when the examining psychiatrist casts doubt on his own testimony" by stating on cross-examination that he could not express an opinion regarding the defendant's competency on the date of the hearing.), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 31 (1979).

The trial court also found that defendant "suffers some degree of intellectual deficiency, but his I.Q. falls in the range of the upper 70s to the low 80s[.]" This finding was based on Dr. Vance's somewhat casual assertion that:

> It is generally acknowledged, however, that intelligence tests can be sensitive to poor effort or performance and in that regard they may be more likely to underestimate intellectual ability than to overestimate it. For this reason, if a range of scores is present, the higher scores are generally viewed as more indicative of true intellectual ability. As such, the available data suggest that Mr. Coley's true IQ falls somewhere in the range of the upper 70s to the low 80s, which is consistent with a diagnosis of Borderline Intellectual Functioning.

Notably, the Dorothea Dix psychologist, Dr. Fox, did not apply this purported principle. Nor did the Social Security Administration do so when determining defendant to be disabled.

While the trial court was entitled to determine what weight to give each piece of evidence, Dr. Vance's assertion regarding defendant's "true IQ" does not rise above speculation.[3] A number of factors can cause variations in IQ results apart from poor effort, including improper administration of the test (such as allowing too much time) and aging of the test so that its standardization is no longer accurate. Since Dr. Vance has given no indication that he—or Dr. Fox—made any attempt to exclude causes for the *single* higher IQ score of 80 other than poor effort, the conclusion that defendant has a "true IQ" in the upper 70s or low 80s is merely speculative. *See Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230-31, 538 S.E.2d 912, 915 (2000) (finding expert witness' testimony constituted speculation and did not qualify as competent evidence when several other potential causes existed for plaintiff's condition, but expert did not pursue any testing to determine if they were, in fact, the cause of plaintiff's symptoms).

In addition, while the order addresses defendant's IQ, it does not include findings regarding his memory deficits, his ability to process new information, or his ability to alter his plans based on

3. There is also some question whether Dr. Vance, who was proffered as an expert in psychiatry rather than psychology, was competent to testify on how to interpret IQ testing. During his testimony, Dr. Vance repeatedly deferred to Dr. Coleman, a psychologist, on matters of testing. Indeed, he relied upon Dr. Fox to conduct all psychological testing in connection with his evaluation of defendant.

feedback—all areas related to defendant's ability to assist in his defense and all arising out of the State's expert's evaluation. Dr. Coleman testified, based on Dr. Fox's testing, that defendant had more significant deficits in processing new information than mildly retarded individuals. The State presented no contrary evidence. The United States Supreme Court has specifically criticized courts, including appellate courts, for "mention[ing] aspects of the report [of a psychiatric evaluation] suggesting competence," but not "mention[ing] the contrary data." *Drope*, 420 U.S. at 175, 43 L. Ed. 2d at 115, 95 S. Ct. at 905-06.

Conclusion

I would, therefore, hold that the trial court improperly delegated its fact-finding role by adopting Dr. Vance's report as its findings of fact. I would further hold that the remaining findings of fact are insufficient to resolve the question of defendant's capacity to stand trial. I would, accordingly, remand for further findings of fact. On remand, I would leave to the discretion of the trial court whether to hear additional evidence regarding defendant's capacity to stand trial. I, therefore, respectfully dissent from the majority opinion.

DORIS JEAN HOLLEMAN, PLAINTIFF v. CLAYTON HOLMES AIKEN, *ET AL.*, DEFENDANTS

No. COA07-1425

(Filed 4 November 2008)

1. Civil Procedure— Rule 12(b)(6)—plausibility standard—not adopted

The plausibility standard for deciding Rule 12(b)(6) motions has not been adopted in North Carolina, and the Court of Appeals does not have the authority to adopt a new standard.

2. Libel and Slander— libel per se—statements about book—claim properly dismissed

The trial court correctly granted a Rule 12(b)(6) motion to dismiss an action for libel per se by an author who had written a book about a performer where the performer's mother stated that they were not close personal friends with plaintiff and had not authorized the book. The complaint itself demonstrates the truth of some of the statements and, even if the statements are false,

they do not impeach plaintiff in her profession or tend to disgrace and degrade her, hold her up to public ridicule, or otherwise constitute libel per se.

3. Libel and Slander— libel per quod—statements about book—not defamatory

The trial court correctly granted a Rule 12(b)(6) motion to dismiss an action for libel per quod by an author who had written a book about a performer where the publications in issue from the performer's mother were simply that none of the defendants are affiliated with plaintiff and that none of the defendants or their close friends endorsed plaintiff's book. Even considering innuendo, colloquium, and explanatory circumstances, none of the publications are defamatory.

4. Contracts— tortious interference—unauthorized celebrity book—statements denying affiliation—claim not stated

The trial court correctly granted a Rule 12(b)(6) motion to dismiss an action for tortious interference with business relationships brought by the author of a book about a performer where the performer's mother denied affiliation with plaintiff or that the book was authorized. The complaint did not state the existence of a valid contract and did not allege that defendants had actual knowledge of the contract or intentionally induced nonperformance. As to eBay sales, the complaint specifically says that her account was suspended because she was illegally selling DVDs and CDS.

5. Emotional Distress— intentional and negligent—statements about book—claim not stated

The trial court correctly granted a Rule 12(b)(6) motion to dismiss claims for intentional infliction of emotion distress and negligent infliction of emotional distress arising from statements by a performer's mother that plaintiff was not a close acquaintance and that plaintiff's book was not endorsed by defendants. There were no allegations of negligence or extreme or outrageous conduct, and no specific allegations of the nature of plaintiff's severe emotional distress.

6. Injunctions— compel book promotion—not within scope of relief

The trial court did not err by granting defendants' Rule 12(b)(6) motion to dismiss a request for a mandatory injunction

requiring promotion of a book and retraction of defamatory statements. A mandatory injunction cannot be granted to require endorsement and promotion of a book, and the statements in issue were not defamatory.

7. Assault— civil battery—bodyguard grasping arm—claim sufficiently stated

The trial court erred by granting a Rule 12(b)(6) motion to dismiss a civil battery claim against a performer where his bodyguard was alleged to have grasped plaintiff's arm to move plaintiff away from defendant. Plaintiff alleged an offensive touching without her consent, and vicarious liability by defendant as the bodyguard's employer.

8. Assault— civil battery—bodyguard's actions—vicarious liability of corporation

The trial court did not err by granting defendants' Rule 12(b)(6) motion to dismiss vicarious liability battery claims against a performer's corporations and charitable foundation arising from a bodyguard's actions in the performer's presence. Plaintiff did not plead facts indicating that the performer was acting within the scope of his duties for the foundation rather than on his own behalf.

9. Appeal and Error— preservation of issues—brief—failure to cite authority—argument waived

Plaintiff's failure to cite legal authority on appeal resulted in abandonment of her argument concerning dismissal of alter ego claims against a performer's corporations and charitable foundation arising from the actions of a bodyguard.

10. Assault— civil battery—punitive damages—claim sufficiently stated

Plaintiff's allegations of willful and wanton conduct were sufficient to state claims against a performer for punitive damages as to civil battery arising from the actions of the performer's bodyguard, and the trial court should not have dismissed that claim.

11. Appeal and Error— preservation of issues—brief—authority not cited—argument abandoned

Plaintiff abandoned an argument on appeal concerning civil conspiracy by not citing legal authority to support her argument.

Appeal by plaintiff from order entered 18 July 2007 by Judge Ronald L. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 19 August 2008.

Arlaine Rockey, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by Matthew P. McGuire and Joseph S. Dowdy, for defendant-appellees.

STROUD, Judge.

According to the amended complaint filed in this action, plaintiff is an author who has written a book about singer Clay Aiken ("Mr. Aiken"). Most of plaintiff's claims arise out of her publication of a book about Mr. Aiken and her hope to have Mr. Aiken, as well as his mother and close friends, endorse and promote her book. Plaintiff has sued Mr. Aiken and other defendants, on various legal theories, based primarily upon their refusal to endorse her book. In addition to requests for compensatory and punitive damages, plaintiff asked the court to issue a mandatory injunction, requiring Mr. Aiken and other individuals to endorse, promote, and even assist in selling her book. For the reasons as stated below, we affirm the dismissal of these claims. Our courts cannot be used to force celebrities or their family or friends into making endorsements for another person's profit.

Unrelated to her claims regarding her book, plaintiff also alleged two claims for battery, both arising out of an encounter between Mr. Aiken's bodyguard and plaintiff, when the bodyguard sought to remove plaintiff from a chair next to Mr. Aiken. For the reasons as stated below, we reverse the order dismissing the battery claims only as to Mr. Aiken.

Plaintiff appeals the trial court order granting defendants' motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). The dispositive question before this Court is whether the trial court erred in concluding that plaintiff failed to state any claim against any defendants upon which relief could be granted. For the reasons stated below, we affirm in part and reverse in part the trial court's order dismissing plaintiff's claims.

I. Background

On or about 3 August 2006, plaintiff filed a voluminous verified complaint against defendants. On 15 November 2006, defendants filed a motion to dismiss for "[f]ailure to state a claim upon which relief

can be granted" pursuant to North Carolina Rule of Civil Procedure 12(b)(6) and a motion to strike several of plaintiff's allegations in her complaint pursuant to North Carolina Rule of Civil Procedure 12(f). On 2 January 2007, plaintiff filed a verified amended complaint.[1] Plaintiff's amended complaint alleges:[2]

> 6. The Defendant The Bubel Aiken Foundation ("BAF"), is a charitable organization . . . .
>
> 7. The Defendant Fifty2thirty Entertainment, LLC, ("Entertainment LLC") is a North Carolina, for-profit corporation . . . .
>
> 8. Upon information and belief, Defendants Fifty2thirty Merchandising, Inc., ("Merchandising, Inc."), Fifty2thirty Productions, Inc. ("Productions, Inc."), Fifty2thirty Music ("Music"), Fifty2thirty, LLC ("Fifty2thirty"), Fifty2thirty Publishing ("Publishing"), and Fifty2thirty Touring, Inc. ("Touring, Inc.") (together formerly referred to as the "John Doe Corporations in the Plaintiff's Complaint) are each for-profit corporations, incorporated by or on behalf of Aiken, and in each, Aiken is an officer and majority shareholder; (Collectively, together with Entertainment, LLC, hereinafter referred to as the "Fifty2thirty Corporations");
>
> . . . .
>
> 13. The Plaintiff is the author of the book, *Out of the Blue . . . Clay it Forward—How One Man & His Fans Are Changing The World* ("*Out of the Blue*"), that was published in or about January, 2006 in the United States;
>
> 14. Aiken is a popular, internationally-known, multi-platinum, RCA recording artist, professional singer, and entertainer who began his successful career as the runner-up on the second *American Idol* television competition series in 2003;
>
> 15. Parker is Aiken's mother;

---

1. The record contains no order permitting amendment to plaintiff's complaint nor any ruling upon defendants' motion to strike. However, no party has argued that the court improperly considered the amended complaint. We therefore assume that plaintiff filed the amended complaint with defendants' tacit consent, in response to defendants' motion to strike, which specifically requested that plaintiff be required to file an amended complaint.

2. The amended complaint is 68 pages in length, with an additional 9 page exhibit. Due to the length of the complaint, we will discuss the specific allegations regarding plaintiff's various claims within our analysis.

16. Wilson is one of Parker's close friends, and Wilson has been treated like extended family by Aiken and Parker;

. . . .

64. Plaintiff's parents were close friends with Amaryllis McGhee ("Amaryllis") and her late husband, Roscoe McGhee ("Roscoe"), who have two daughters, Joan Marbrey ("Joan") and Donna McGhee ("Donna") (collectively, "the McGhees");

. . . .

104. Plaintiff hired Aiken to sing at her daughter's wedding that occurred on May 19, 2001;

. . . .

109. After Aiken went on *American Idol*, Plaintiff had a shortened version of Plaintiff's daughter's wedding video with Aiken singing one song put on DVD; and Plaintiff registered it with the U.S. copyright office (hereinafter referred to as the "Wedding DVDs");

110. Until recently, Plaintiff believed in good faith that she owned the copyright to the Wedding DVDs as a work-for-hire derivative work; however, she recently learned, that because she did not have an explicit, written, work-for-hire contract signed by Aiken in advance, the copyright laws did not protect her;

111. During late 2003, 2004 and in early 2006, Plaintiff placed the Wedding DVDs on eBay™. to sell them initially during a time that she was ill with no insurance and was unable to work;

. . . .

115. It was by selling and giving away the Wedding DVDs that Plaintiff initially met online and subsequently became friends with many Aiken Fans all over the country, actually visiting with some of them, which in turn inspired Plaintiff to write *Out of the Blue*;

. . . .

118. Plaintiff sold four (4) CDs that she had burned as copies of Aiken's pre-American Idol CD, "redefined," in 2003 on

> EBay™., with a clear description that they were copies, for a total of about $70;
>
> . . . .
>
> 122. Plaintiff spent over two years writing *Out of the Blue*, which is a 564 page book, containing, *inter alia*, background information about Aiken's life, Plaintiff's life, and Plaintiff's experiences growing up with and close friendship with the McGhee family and containing memories of Plaintiff Amaryllis, Joan, and Donna about Aiken, as well as stories (all non-fiction except for one fiction piece clearly marked as such in Chapter Nineteen) by Aiken's Fans[.]

Plaintiff brought claims for libel *per se*, libel *per quod*, tortious interference with business relationships, intentional infliction of emotional distress, negligent infliction of emotional distress, injunctive relief, and battery. Plaintiff also claims defendants have civilly conspired against her as to each cause of action. Throughout the complaint, plaintiff has conflated various legal theories and made conclusory allegations that each and every defendant is liable for each and every act of every other defendant without alleging any factual basis for most of the claims. As to all of her causes of action, except injunctive relief, plaintiff claims she is entitled to compensatory and punitive damages.

On 23 January 2007, defendants filed motions to dismiss and to strike certain allegations in plaintiff's amended complaint and "plaintiff's briefs in opposition to defendants' motion to dismiss." On 18 July 2007, the trial court granted defendants' motion to dismiss because "[p]laintiff's Amended Complaint fails to state a claim against any of the Defendants upon which relief may be granted." Plaintiff appeals. The dispositive question before this Court is whether the trial court erred in concluding that plaintiff failed to state a claim against any defendant upon which relief could be granted. For the following reasons, we affirm in part and reverse in part.

II. North Carolina Rule of Civil Procedure 12(b)(6)

Plaintiff claims that her "verified Amended Complaint is detailed and alleged sufficient facts to meet all the legal elements of each cause of action to withstand the Motion to Dismiss[.]"

A. Standard of Review

[1] Plaintiff argues that this court should apply the "plausibility standard" as set forth in *Bell Atlantic Corp. v. Twombly*, —— U.S. ——,

——, 167 L. Ed. 2d 929 (2007). Plaintiff has also correctly noted that "[t]o date, North Carolina has not adopted the 'plausibility standard' set forth in *Bell Atlantic* for 12(b)(6) Motions to Dismiss[.]" This Court does not have the authority to adopt a new standard of review for motions to dismiss. *See Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Instead, we use the following standard, which is the correct standard of review as used by the North Carolina appellate courts:

> 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.
>
> 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.

Craven v. SEIU Cope, 188 N.C. App. 814, 816, 656 S.E.2d 729, 731-32 (2008) (citations and quotation marks omitted).

B. Libel *Per Se*

Plaintiff contends she has a valid claim of libel *per se* arising from four different publications made by Ms. Parker.[3] The four publications plaintiff challenges are:

1. Parker's 22 August 2005 Publication

> 194. On or about August 22, 2005 on several Aiken fan message board websites, the following message was published by or caused to be published by Parker:
>
> "Out of the Blue', by Jeannie Holloman (sic), is not an authorized book by Clay Aiken, his family or good friends

3. We quote the alleged defamatory statements in their entirety and unaltered; this includes their original errors and emphasis of the statements which plaintiff contends are defamatory.

the McGhees, whom we consider extended family. It is more fiction than truth and Miss Holloman did not know me or Clayton when he was young nor was she raised by Amaryllis. My understanding is that the book is a collection of fan stories and that Jeannie has colored it up with tales of knowing Clayton to sell the book. At least that is what her own biography says. Please know that if you buy the book the only mention of him that is truth is that he did sing at her daughter Natalie's wedding, but her sister Julie is the one who hired him. He does not know Jeannie Holloman in any way.

Thank you all for supporting my son and his foundations in the proper ways.

Clay's mom,

Faye Parker

[Hereinafter referred to as the "Parker Disclaimer"][underlining supplied];

2. Parker's 24 September 2005 Publication

254. On September 24, 2005 Parker forwarded (published) Joan's email, that included the McGhee Disclaimer, to Plaintiff's Book Editors (third parties), after which was the first time Plaintiff knew about this McGhee Disclaimer, Parker's email to Plaintiff's Book Editors read as follows:

obviously (sic) you and Miss Holloman (sic) did not see this disclaimer that was posted by the McGee family stating that the[y] did not want their names used in anyway to promote this book so I am sending you a copy and you may send to Miss Holloman (sic).

Also in speaking with my son [Aiken] and his attorney [upon information and belief, Parker is referring to Aiken's attorney] she [Plaintiff] does not have the permission to use his likeness in any way including the picture. [Parker included the September 4, 2005 email from Joan to Parker set forth hereinbelow] [bracketed information and underlining supplied]

> Rather than have you to send me the email address it may be easier for me to just send the disclaimer to

you. If you will just forward it to whoever needs to post it on the board.

Thanks, Joan

POST TO THE WEBSITES:

September 4, 2005

Jeannie Holleman was not raised by Amaryllis McGhee nor is she a close friend of Faye Parker. To our knowledge, the first time she ever met Faye was 1994 and Clayton Aiken in 2001. Amaryllis was not aware that Jeannie's book was going to be based on her memories of Clayton and put on the Internet and published. Jeannie does not have her blessings as she states on the book cover or the authorization to use the McGhee family to promote her book.

Amaryllis, Donna and Joan McGhee

[The September 4, 2005 statement above is referred to herein as the "McGhee Disclaimer"][underlining supplied].

3. Parker's 26 September 2005 Publication

264. On September 26, 2005, Parker wrote an email response to Plaintiff's undersigned counsel and also published it to, by sending a copy to, Joan [underlining supplied], set forth in part as follows:

i (sic) agree that the book is positive. What I don't' agree with is that Miss Holleman (sic) did not know my son as a child and if you would like to speak with the McGhee's, her claims of growing up in their house and being family with them are false. The only truth I can find is that Donna and her sister were friends. That her brother Mike was at the McGhee's a lot. Jeannie has picked Amaryllis brain and used her memories as her own in claims of growing up knowing my son. My son did not ever know who Jeanne (sic) was when she was in Hawaii forcing herself into family pictures. She has been told not to claim knowing him in any way.

Furthermore, my disclaimer was not an harrassment (sic) nor was the other disclaimer. I believe posting on the boards is not considered a harrasment (sic) otherwise there is a lot

of that going on. I have people emailing me saying Jeanne (sic) told them she just got off the phone with me and other claims that are not valid. . . . If there is any problem it is from Miss Holleman (sic) deceiving the fans to sell a book of their own stories they can find on the Internet To endorse the book she makes untrue claims of knowing Clayton. If you read the McGhee's disclaimer she met him about 2000 or thereabouts and he was hired by her sister for the wedding.

. . . .

. . . . I am forwarding a copy of my response to the McGhees.

Sincerly (sic) yours

Faye

[Hereinafter referred to as "Parker's email to Plaintiff's counsel"];

4. Parker's 7 October 2005 Publication

275. Upon information and belief, on October 7, 2005, Parker wrote and published the following email to a third party, whose name was disclosed to Defendants in Plaintiff's deposition [underlining supplied]:

I would like to put the record straight on the book "Out of the Blue" I understand that you posted something claiming I made an announcement proclaiming that the book was positive and made it look like I had endorsed the book. So for the record here is my report. I did place a disclaimer which could have been misinterpreted, as I re read it. I did not claim that the fans were lying. My claim was that the remarks made about relationships with my son as a child were not truths and that the McGhee's did not raise the author. She never was around my son as he was growing up and I have the McGhee's to verify that. My claim was this was fictional to sell the book. I do not know what the fans have written except the ones who have sent me letters and they were inspirational in how my son had helped them to overcome times in their lives when things were not going the best. I do not question any of that. I am happy that they could be inspired by anothers (sic) life. Unfortunately anything he or I say is dissected over and over again until it comes out entirely different from what we actually said.

> Like the childhood game of gossip. Those fan stories, I am sure are the positive part of the book. That still does not mean I endorse the book and the use of my name to sell it. The author has been sent letters from the attorney about this several times. The McGhee's do not endorse or give their blessings and most certainly does my son not do that.
>
> In fact, I almost feel ridiculous in trying to explain this to you as I know that Miss Holleman posts under many different names trying to convince people she has support when in fact it is her so I am not sure this is not her either. I find it a little amusing your email since I too am an interior designer. I am coping (sic) the McGhee's on this also.
>
> Faye Parker

5. Analysis

[2] Upon a thorough review of plaintiff's amended complaint and considering the allegedly libelous statements individually as well as cumulatively, *see Nucor Corp. v. Prudential Equity Group, LLC*, 189 N.C. App. 731, 736, 659 S.E.2d 483, 487 (2008), it appears that the overall import of all of the allegedly libelous statements is that neither Mr. Aiken nor his mother are close personal friends of plaintiff, nor do they or their close personal friends endorse or authorize plaintiff's book. Plaintiff claims that these statements are false, because she believes she had a closer personal acquaintance with Mr. Aiken and Ms. Parker than they acknowledge. Plaintiff also alleges that Amaryllis McGhee ("Ms. McGhee") gave her "blessing" for the book before it was completed, but ultimately Ms. McGhee and other defendants refused to endorse the book. In some instances, we must engage in convoluted logic to discern what plaintiff is claiming is false, much less defamatory. The gist of plaintiff's libel *per se* is that she believed, while she was writing her book, that Ms. McGhee in particular would endorse it, but ultimately neither Ms. McGhee nor other defendants did so.

Our law as to plaintiff's claim of defamation is that

> [i]n order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person. The term defamation applies to the two distinct torts of libel and slander.

> North Carolina law recognizes three classes of libel: (1) publications obviously defamatory which are called libel *per se*; (2) publications susceptible of two interpretations one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances become libelous, which are termed libels *per quod*.

Craven at 816-17, 656 S.E.2d at 732 (citations and quotation marks omitted).

> Libel *per se* is a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.
>
> Defamatory words to be libelous *per se* must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.
>
> Although someone cannot preface an otherwise defamatory statement with 'in my opinion' and claim immunity from liability, a pure expression of opinion is protected because it fails to assert actual fact. This Court considers how the alleged defamatory publication would have been understood by an average reader. In addition, the alleged defamatory statements must be construed only in the context of the document in which they are contained, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The articles must be defamatory on its face within the four corners thereof.

Nucor Corp. at 736, 659 S.E.2d at 486-87 (citations, quotation marks, and brackets omitted).

We first note that truth is a defense to a libel claim. *See, e.g.*, *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 276, 432 S.E.2d 428, 433 (1993), *aff'd per curiam*, 339 N.C. 602, 453 S.E.2d 146 (1995). Normally we do not consider defenses at this preliminary stage, *see Craven* at 816, 656 S.E.2d at 731; however, as to some of the alleged statements, the complaint itself demonstrates the truth of the allegedly libelous statements. Plaintiff alleges that the statement,

"Jeannie does not have her [,Ms. McGhee's,] blessings as she states on the book cover or the authorization to use the McGhee family to promote her book" is a defamatory statement. However, it is abundantly obvious from the complaint itself that this statement is true, as presumably plaintiff would not otherwise have requested issuance of a mandatory injunction "that Aiken, Parker and Wilson shall encourage, request, and allow the McGhees to publicly endorse" her book. Thus, from plaintiff's own complaint it is clear that some of the alleged defamatory statements are true. As plaintiff was asserting that Ms. McGhee endorsed her book, but Ms. McGhee did not endorse it, the statements issued by defendants that plaintiff is untruthful, in this regard, would also be protected by a "truth" defense.

In addition, plaintiff alleges that it was defamatory for Parker to publish that plaintiff was not raised by Ms. McGhee, but plaintiff's complaint alleges that "Amaryllis helped rear Plaintiff (meaning in the context of the saying 'It takes a village to raise a child')[.]" The common understanding of the statement that a person "raised" or "reared" a child is that the person filled the role of a parent to the child and probably resided in the same home with the child. Plaintiff's own complaint reveals that Ms. McGhee did not "raise" or "rear" plaintiff in any commonly understood sense of the word.

However, even if we make the generous assumption that all of the allegedly defamatory statements noted by plaintiff are false statements of fact, they still do not constitute libel *per se*. As the allegedly libelous statements obviously do not charge that plaintiff "committed an infamous crime" or that she has "an infectious disease[,]" the statements could be libelous *per se* only if they tend to impeach plaintiff in her trade or profession or if they otherwise tend to subject her "to ridicule, contempt or disgrace." *Id.* at 736, 659 S.E.2d at 486. All of the statements generally convey that defendants have no affiliation with plaintiff, that Aiken and Parker's close friends have not endorsed plaintiff's book, and that some of the defendants consider some of plaintiff's claims in the book to be false. Plaintiff has failed to demonstrate why these statements would be libelous *per se*. Certainly many successful books about famous persons such as Mr. Aiken, even biographies, are published without the authorization or endorsement of the person who is the subject of the book or that person's family or close friends or even over the objections of these persons. We do not conclude that any of these allegedly defamatory statements taken individually or as a whole impeach plaintiff in her profession or "tend to disgrace and degrade . . . [plaintiff] or hold h[er] up to public

hatred, contempt or ridicule, or cause h[er] to be shunned and avoided" as a matter of law. *Id.* These arguments are overruled.

C. Libel *Per Quod*

[3] Plaintiff next claims she has valid claims for libel *per quod* as to the four publications *supra* and two additional publications by Parker. The two additional publications are:

1. Parker's 27 August 2005 Publication

> 202. On August 27, 2005, to Plaintiff's Book Editors' surprise, Parker personally wrote Plaintiff's Book Editors an email responding to their foregoing Internet post; Parker's email was not invited, and Plaintiff's Book Editors had no reasonable expectation when posting the above Internet post that Parker would personally contact them in response to their Internet post; In said email Parker wrote to Plaintiff's Book Editors, in which the underlined portions are false statements, *inter alia*, [bracketed information, underlining, italics, and emphasis supplied]:
>
> **Subject:** Jeannie Holleman's Out of the Blue
>
> I think you are questioning the fact that the disclaimer posted on the website came from me. **It was in fact my disclaimer** and was put there for obvious reasons because Miss Holleman, and I spelled it correctly this time, has obviously spoken to too many people claiming connections and friendships and pretending to have taken care of Clayton as a child. Too many people have come forward with information that they would not have made up. They were not telling it to cause trouble but thought they were speaking with someone that was really a close friend. The McGhee's have been friends of ours from before the time Clayton was born. . . .
>
> ***Also, the McGhee's are adding a disclaimer stating that they have not approved any of the information and have not given blessings to the book as Miss Holleman claims.*** . . .
>
> Miss Holleman has been removed from E bay several times for bootlegging copies of a wedding where my son sang, without his permission, and for selling copies of his CD that were downloaded.
>
> . . .

> If you read the disclaimer again I did not say anything bad about Miss Holleman. I only stated the fact that her claim to know us was to sell the book. . . .
>
> I may forward this open letter [upon information and belief, Parker is referring to Plaintiff's Book Editors' open letter above] to the attorney [upon information and belief, Parker is referring to Aiken's attorney]. **When I told him I was making the disclaimer he said ok and he would take care of the rest.**
>
> Faye Parker . . .
>
> I will also be glad to forward you the scuttlebutt that originated on the website because of this open letter [upon information and belief, Parker is referring to Plaintiff's Book Editors' open letter above]. It does not make your company look very good. . . .
>
> I am looking forward to your comment. If you did not do this [upon information and belief, Parker is referring to Plaintiff's Book Editors' open letter above] and know who did I will try to help restore your reputation. [Hereinafter referred to as "Email to Plaintiff's Book Editors"];

2. Parker's 25 September 2005 Publication

   260. On September 25, 2005, Parker sent the McGhee Disclaimer by email to Plaintiff, and published this email to, by sending a copy to, Joan, with the following prefatory remarks: "The McGhee's placed a disclaimer Sept. 4th, 2005 not to use them in anyway to promote your book. I am sending you a copy. It is sad that you have to use people you call friends without their approval." [underlining supplied];

3. Analysis

Libel *per quod* is defined as "publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances become libelous . . . ." *Craven* at 736, 656 S.E.2d at 732.

> Under a libel *per quod* theory, there must be a publication or communication knowingly made by the defendant to a third person. The publication must have been intended by defendant to be defamatory and had to be understood as such by those to whom

> it was published. For these reasons, both the innuendo and special damages must be proven.

U v. Duke Univ., 91 N.C. App. 171, 181, 371 S.E.2d 701, 708 (citations omitted), *disc. review denied*, 323 N.C. 629, 374 S.E.2d 590 (1988). Even considering "innuendo, colloquium, and explanatory circumstances" we again conclude that none of Parker's publications are defamatory, but rather simply assertions that none of the defendants are affiliated with plaintiff and that none of the defendants nor their close friends endorse plaintiff's book. *Craven* at 736, 656 S.E.2d at 732. These arguments are overruled.

D. Tortious Interference with Business Relationships

[4] Plaintiff next "sues for interference with three types of contracts: book sales; literary agents; and eBay auction contracts. . . . ."

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

Holroyd v. Montgomery Cty., 167 N.C. App. 539, 546, 606 S.E.2d 353, 358 (2004) (citation and quotation marks omitted), *cert. and disc. review denied*, 359 N.C. 631, 613 S.E.2d 690 (2005).

As to contracts for "book sales" and "literary agents," plaintiff's complaint fails on the first element, the existence of a valid contract. *See id.* Plaintiff has not alleged the existence of any contracts, but merely her hope of future contracts. Even when we assume, *Craven* at 816, 656 S.E.2d at 731, that plaintiff had one contract with a literary agent as she claims, though her complaint did not even identify the name of any such literary agent nor any specific contractual agreement, plaintiff failed to allege that any of the defendants had actual knowledge of the contract or intentionally induced the literary agent not to perform. *See Haywood* at 546, 606 S.E.2d at 358.

Lastly, plaintiff claims that defendants interfered with her sales on eBay. Even if plaintiff at some time had a valid contractual agreement as a seller with eBay, plaintiff's complaint specifically alleges that she was *illegally* selling Mr. Aikens' DVDs and CDS on eBay in violation of federal copyright laws. Plaintiff's own complaint demon-

strates that it was plaintiff's illegal sales over eBay, and not any interference on the part of defendants, which caused eBay to suspend her account. Furthermore, plaintiff could have had only a hope or expectation of future book sales through eBay, as here again she did not allege the existence of a valid contract with any buyer which was formed through eBay. *See id.* These arguments are overruled.

E. Intentional Infliction of Emotional Distress

[5] Plaintiff next brings a cause of action for intentional infliction of emotional distress. "The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 412-13, 473 S.E.2d 38, 40-41 (1996) (citations and quotation marks omitted). Plaintiff has alleged no actions on the part of any of the defendants which we can identify as "extreme and outrageous[,]" *see Smith-Price v. Charter Behavioral Health Systems*, 164 N.C. App. 349, 354, 595 S.E.2d 778, 782 (2004) (citation and quotation marks omitted) ("Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."), or that this Court would conclude were intended to cause severe emotional distress.

Furthermore, plaintiff has failed to make any specific allegations as the nature of her "severe emotional distress." *See Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) (noting that in the context of negligent infliction of emotional distress "the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."); *see also Ramsey v. Harman*, 191 N.C. App. 146, 150, 661 S.E.2d 924, 926-27 (2008) (noting that the definition in *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97, of "severe emotional distress" also applies to intentional infliction of emotional distress). We conclude that plaintiff has failed to allege a claim for intentional infliction of emotional distress. This argument is overruled.

F. Negligent Infliction of Emotional Distress

Plaintiff next brings a cause of action against defendants for negligent infliction of emotional distress. Plaintiff argues that "Aiken has derivative liability for negligence predicated on the tortious behavior

of Parker (for libel and intentional infliction of emotion[al] distress), Wilson (for intentional infliction of emotional distress) and his bodyguard, Jerome (for two batteries)." We take this to mean that plaintiff is claiming that the alleged libel and/or battery somehow resulted from negligence by Mr. Aiken.

"To make out a claim for negligent infliction of emotional distress, a plaintiff must . . . [allege] that the defendant was negligent, that it was foreseeable to the defendant that his negligence would cause the plaintiff severe emotional distress, and that the conduct, in fact, caused severe emotional distress." *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 273, 542 S.E.2d 346, 352 (citation omitted), *disc. review denied and dismissed*, 353 N.C. 725, 551 S.E.2d 437 (2001). We find no factual allegations of negligence in the complaint. *Guthrie v. Conroy*, 152 N.C. App. 15, 25, 567 S.E.2d 403, 410 (2002) (citation omitted) ("Negligence is the breach of a legal duty owed by defendant that proximately causes injury to plaintiff."). In addition, plaintiff does not make any specific factual allegations as to her "severe emotional distress." See Johnson at 304, 395 S.E.2d at 97. This argument is overruled.

G. Injunctive Relief

[6] Plaintiff next requests this Court grant her injunctive relief ordering:

> Defendants to retract the defamatory statements . . . [, and] Aiken to place, either retractions from Aiken, Parker and Wilson, or a positive endorsement by Aiken of *Out of the Blue*, permanently on his official website with a photograph of the cover of the book and with a hyperlink to Plaintiff's website, and to allow and cooperate with a positive endorsement by Aiken, with his photograph, to be placed on Plaintiff's website and to place a positive endorsement on the back cover of *Out of the Blue*, and to write a positive Introduction to be included in *Out of the Blue* thanking the fans and Plaintiff for writing *Out of the Blue*; and ordering that Aiken, Parker and Wilson shall encourage, request, and allow the McGhees to publicly endorse *Out of the Blue*, including, but not limited to, having any or all of their names on the cover of the book or writing a positive comment for book; and any other injunctive relief that the Court deems just and proper.

As to plaintiff's request that defendants retract their defamatory statements, we concluded above that none of defendants' statements

were defamatory, and thus this request is meritless. Plaintiff's lengthy second request is for a mandatory injunction requiring defendants, in several ways, to endorse and promote plaintiff's book. However, a mandatory injunction cannot be granted for this purpose. *See Roberts v. Madison County Realtors Assn., Inc.*, 344 N.C. 394, 399-400, 474 S.E.2d 783, 787 (1996).

> Injunctions may be granted to prevent violation of rights or to restore the plaintiff to rights that have already been violated. No general principle limits injunctive relief to any particular kind of case or constellation of facts.
>
> Injunctions are denied in particular cases when the plaintiff fails to establish any underlying right. . . .
>
> . . . .
>
> [Mandatory injunctions] are affirmative in character, and require positive action involving a change of existing conditions—the doing or undoing of an act.

Roberts at 399-400, 474 S.E.2d at 787 (citations and ellipses omitted). Here we do not conclude that any of plaintiff's rights have been violated, and thus injunctive relief would not be proper. This argument is without merit.

H. Battery

[7] Plaintiff argues that Mr. Aiken's employee, Jerome, committed a battery upon her, at Mr. Aiken's specific direction and in his presence. We note that defendants' brief did not address the plaintiff's claims or arguments regarding battery. Plaintiff brought two causes of action for battery based upon the following allegations:

> 151. On February 25, 2005, as soon as Aiken saw Plaintiff, it was evident to others that Aiken knew who Plaintiff was; Aiken immediately spoke to his very large, bodyguard and employee, Jerome;
>
> 152. On February 25, 2005, immediately after Aiken spoke to him, Jerome walked up to Plaintiff, and, upon information and belief, acting with the instructions of Aiken, who had the right to control the manner in which Jerome performed the details of his job, within the scope of his employment, in furtherance of Aiken's business as an entertainer, and as a means or method of performing his job duties, Jerome inten-

> tionally and offensively touched or grabbed Plaintiff by her arm, without her consent, and yanked her out of the chair she was sitting in, and Jerome told Plaintiff that she was not going to be sitting there and directed her to stand behind the chairs, without any justification or legal excuse or privilege;
>
> . . . .
>
> 155. On February 25, 2005, after Plaintiff sat back down in the chair, upon information and belief, acting with the instructions of Aiken, who had the right to control the manner in which Jerome performed the details of his job, and within the scope of his employment, in furtherance of Aiken's business as an entertainer, and as a means or method of performing his job duties, Jerome intentionally and offensively touched and grabbed Plaintiff by her arm, without her consent, and pulled her out of the chair she was sitting in again, without her consent, and sternly told her she could not sit there and forced her to stand behind the chairs rather than to sit in one, without any justification or legal excuse or privilege;
>
> . . . .
>
> 157. Jerome's touchings of Plaintiff were offensive and harmful as he physically caused her pain and he left finger marks on her arm;

Plaintiff has alleged that Jerome, Aiken's employee, unlawfully touched her and that Mr. Aiken directed him to do so.

"A 'battery' is the offensive touching of the person of another without his/her consent . . . ." *City of Greenville v. Haywood*, 130 N.C. App. 271, 275, 502 S.E.2d 430, 433, *disc. review denied*, 349 N.C. 354, 525 S.E.2d 449 (1998).

> Under the doctrine of *respondeat superior*, a principal is liable for the torts of its agent which are committed within the scope of the agent's authority, when the principal retains the right to control and direct the manner in which the agent works. Of course, *respondeat superior* does not apply unless an agency relationship of this nature exists.

Phillips v. Restaurant Mgmt. of Carolina, L.P., 146 N.C. App. 203, 216, 552 S.E.2d 686, 695 (2001) (citation omitted), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 132 (2002). "An agency relationship

arises when parties manifest consent that one shall act on behalf of the other and subject to his control." *See id.* (citation and quotation marks omitted).

Plaintiff has pled a claim for relief for battery as she has alleged that an offensive touching occurred without her consent. *See Haywood* at 275, 502 S.E.2d at 433. Furthermore, plaintiff has alleged Mr. Aiken is liable for the battery upon the theory of vicarious liability as she alleged Mr. Aiken, as Jerome's employer, "had the right to control the manner in which Jerome performed the details of his job, within the scope of his employment, in furtherance of Aiken's business as an entertainer, and as a means or method of performing his job duties . . . ." *See Phillips at* 216, 552 S.E.2d at 695. She has also made factual allegations to support this claim. Thus, we conclude that plaintiff has sufficiently pled a claim for relief for battery against Mr. Aiken.

1. Other Defendants

[8] Plaintiff further claims "[d]efendants, BAF and, upon information and belief, the Fifty2thirty Corporations, are vicariously liable for the batteries upon Plaintiff by Jerome as Aiken was acting within the scope of his duties for and in furtherance of the business of BAF[.]" However, plaintiff has not alleged sufficient facts to support plaintiff's conclusory allegation. *See Acosta v. Byrum*, 180 N.C. App. 562, 567, 638 S.E.2d 246, 250 (2006) (citation omitted) ("When analyzing a 12(b)(6) motion, the court is to take all factual allegations as true, but should not presume legal conclusions to be true."); *see also Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (citation and quotation marks omitted) ("A 'conclusion of law' is a statement of the law arising on the specific facts of a case which determines the issues between the parties.") Plaintiff has not pled any facts which would indicate that "Aiken was acting within the scope of his duties for and in furtherance of the business of BAF[,]" rather than merely acting on his own behalf. As we conclude that plaintiff did not plead sufficient facts that Mr. Aiken was acting "within the scope of . . . [his] authority[,]" BAF and the Fifty2Corporations cannot be held vicariously liable upon a theory of *respondent superior*. *See Phillips* at 216, 552 S.E.2d at 695.

2. Alter Ego

[9] Plaintiff further alleges that the various corporate defendants are "alter egos" of Mr. Aiken.

Plaintiff alleged in her complaint that

> 11. Upon information and belief, as shown by the names and number of the Fifty2thirty Corporations, Aiken has excessively fragmented a single business enterprise into separate corporations, which, upon information and belief, are all affiliated companies with Aiken having complete control of the policies and business practices of each company;
>
> . . . .
>
> 26. Upon information and belief, Fifty2thirty Corporations are merely alter egos for Aiken, that he uses to run his performing business enterprise and to insulate himself from liability, in that at all times relevant to the causes of action in the instant Complaint:
>
> a. Aiken had complete domination over the policies and business practices of the Fifty2thirty Corporations;
>
> b. Aiken used the Fifty2thirty Corporations to commit wrong and unjust acts against Plaintiff's legal rights as set forth hereinbelow; and
>
> c. Aiken used his control over the Fifty2thirty Corporations to assist himself in committing Aiken's wrongful acts complained of hereinbelow;
>
> 27. The Court should pierce the corporate veils and hold Fifty2thirty Corporations jointly and severally liable for all actions of Aiken and his agents[.]

Thus plaintiff claims that this Court should hold the Fifty2thirty Corporations liable for the actions of Mr. Aiken and/or his agents.

We have been unable to discern any logical basis for plaintiff's "alter ego" claim. We also note that plaintiff's argument in her brief, in its entirety, is:

> The factual allegations made in Ms. Holleman's Amended Complaint and the reasonable inferences therein, are sufficient to withstand Defendants' Motion to Dismiss on the issue of the claims against Bubel-Aiken Foundation ("BAF") and all the Fifty2Thirty Corporations, including enough to show that each of the latter is merely the alter ego of Aiken. (R. pp. 115-19).

Plaintiff failed to cite any legal authority in support of her argument. It is therefore deemed abandoned, pursuant to North Carolina Rule of Appellate Procedure 28(b)(6). *See* N.C.R. App. P. 28(b)(6).

3. Punitive Damages

[10] As to the claims of relief for battery, plaintiff asserts that she is entitled to punitive damages.

> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.
>
> . . . .
>
> (c) Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages . . . .

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

" 'Willful or wanton conduct' means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." N.C. Gen. Stat. § 1D-5(7) (2005). Liberally construing plaintiff's verified amended complaint, *Craven* at 816, 656 S.E.2d at 731, we conclude that plaintiff has sufficiently pled Mr. Aiken acted with "willful or wanton" conduct and that he "participated in the conduct constituting the aggravating factor giving rise to the punitive damages[,]" and thus plaintiff has validly pled a claim for punitive damages, only as to the battery claims for relief. *See* N.C. Gen. Stat. §§ 1D-5(7), -15(a), (c). Thus, we conclude that plaintiff has sufficiently pled a claim for relief for two counts of battery solely as to Mr. Aiken. As we have already denied plaintiff injunctive relief, she has stated claims as to Mr. Aiken which are not

subject to dismissal only for compensatory and punitive damages on the battery claims for relief.

I. Civil Conspiracy

[11] Plaintiff also alleges a claim for civil conspiracy. Plaintiff's argument, in its entirety, in support of her civil conspiracy claim is that

> Ms. Holleman's Amended Complaint is replete with allegations of fact, not conclusions, that support Ms. Holleman's Civil Conspiracy cause of action. (R. pp. 130, 133-34, 136, 147-48, 154-56, 163-64, 166, 169-70). Ms. Holleman does allege that Aiken was a conspirator and does say which defendants entered into a conspiracy: Aiken, Parker and Wilson. (R. pp. 130, 133-34, 136, 147-48, 154-56, 163-64, 166, 169-70).

We must differ with plaintiff's characterization of her complaint, as we instead find it to be replete with conclusions and seriously lacking in relevant factual allegations. However, once again, plaintiff has cited no legal authority in support of her argument, and pursuant to North Carolina Rule of Appellate Procedure 28(b)(6), it is deemed abandoned. *See* N.C.R. App. P. 28(b)(6).

III. Conclusion[4]

We conclude that plaintiff failed to plead sufficient facts for all of her alleged claims for relief except for battery as to Mr. Aiken. Thus, we reverse the trial court order dismissing plaintiff's two claims for relief for battery as to Mr. Aiken for compensatory and punitive damages. As to all of plaintiff's other claims and as to all other parties, we affirm the trial court's order allowing defendants' motion to dismiss.

AFFIRMED IN PART AND REVERSED IN PART.

Judges McGEE and McCULLOUGH concur.

4. We need not address plaintiff's remaining two briefed arguments regarding vicarious liability and the alter ego theory as these were addressed within our analysis of plaintiff's claims for relief for battery.

ROBERT E. CARLISLE, PLAINTIFF v. CSX TRANSPORTATION, INC., DEFENDANT

No. COA08-43

(Filed 4 November 2008)

Railroads— negligence action—voluntary dismissal—tolling of statute of limitations

The trial court erred in part by granting a voluntary dismissal without prejudice in a negligence action by a railroad employee arising from a workplace injury. The action was filed first in Virginia, dismissed without prejudice for improper venue, and refiled in North Carolina. Under the Federal Employees Liability Act (FELA), the court cannot incorporate the saving provision of N.C.G.S. § 1A-1, Rule 41, but may equitably toll the statute of limitations when appropriate without needing to rely on Rule 41. Here, the court erred by tolling the statute of limitations for a year after entry of the voluntary dismissal order with no basis other than the application of Rule 41. Tolling the statute of limitations for other periods (such as the pendency of the original Virginia action or subsequent N.C. action) was proper under FELA.

Appeal by Defendant from order entered 12 December 2007 by Judge Karl Adkins in Scotland County Superior Court. Heard in the Court of Appeals 10 September 2008.

Moody, Strople, Kloeppel, Basilone & Higginbotham, Inc., by Claude W. Anderson, Jr., and Willard J. Moody, Sr., Pro Hac Vice; Moser, Garner, Bruner & Wansker, P.A., by Jerry L. Bruner; and Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for Plaintiff-Appellee.

Millberg, Gordon & Stewart, P.L.L.C., by Frank J. Gordon and Seth C. Turner, for Defendant-Appellant.

ARROWOOD, Judge.

CSX Transportation, Inc. (Defendant) appeals from an order granting Robert Carlisle's (Plaintiff's) motion for voluntary dismissal of his claim. We affirm in part and reverse in part.

The pertinent facts are summarized as follows: Plaintiff was born in 1943 and is a resident of Hamlet, North Carolina. He was employed by Defendant railroad as a brakeman and conductor for thirty-seven

years, from 1967 until 2004. Plaintiff's employment required him to walk on ballast, which is the base of crushed stone that supports train tracks. Plaintiff was twenty-four years old when he began working for Defendant. In his deposition, Plaintiff testified that as he aged from his 20's to his 50's, he found it increasingly uncomfortable to walk on the large and uneven ballast stone used by Defendant. In 1984, he suffered a knee injury that required surgery. In 2000, when he was 57, Plaintiff began experiencing significant knee pain, and consulted a physician. In January 2001 he was diagnosed with permanent damage to his knees caused by long-term exposure to walking on ballast.

On 11 December 2002, Plaintiff filed a complaint against Defendant in the state court of Virginia, in Portsmouth, Virginia. Plaintiff alleged that Defendant had been negligent in regards to the safety of the train yard work environment, specifically in its use of large and uneven ballast. He sought damages for injuries resulting from his many years of walking on the ballast. In June, 2004, about eighteen months after Plaintiff filed his lawsuit, Defendant moved to transfer the case to Richmond, Virginia. Thereafter, the parties continued to conduct discovery, and a trial date was set for October 2005, almost three years after Plaintiff filed his complaint. Shortly before the trial was to commence, Defendant moved to dismiss Plaintiff's claim for improper venue. On 7 October 2005 the trial court granted Defendant's motion and entered an order dismissing Plaintiff's complaint without prejudice. The dismissal order was entered on the condition that, if Plaintiff refiled by 15 December 2005, Defendant would not assert a statute of limitations defense based on time between the dismissal and Plaintiff's refiling the case.

On 29 November 2005 Plaintiff refiled his complaint in Scotland County, North Carolina. The case was scheduled for trial 27 August 2007. On 17 August 2007 Defendant filed a motion for summary judgment. Defendant asserted in relevant part that Plaintiff's claim had accrued at some time "in the 1980s and 1990s" and that the statute of limitations expired before Plaintiff filed his original complaint in December 2002.

A hearing was conducted on Defendant's motion on 27 August 2007. Defendant's summary judgment argument was based on excerpts from Plaintiff's deposition wherein Plaintiff testified that he had no trouble walking on the large uneven ballast in his 20's and 30's, but that in his 40's and 50's it became more difficult and caused an "abnormal" feeling in his knees. Plaintiff's counsel argued that this testimony showed only that, as Plaintiff aged, he experienced

more discomfort. A complicating factor was Plaintiff's traumatic knee injury and surgery in the 1980's.

The trial court took the matter under advisement overnight. The next day Plaintiff asked the trial court "to enter an order allowing us to voluntarily dismiss this case without prejudice pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 41(a)." The Defendant opposed Plaintiff's motion. The trial court stated that "the Court will grant the motion. I believe in people having their day in court whenever possible. So, I'll grant your motion." The court's order, rendered in open court on 28 August 2007, was reduced to writing and filed on 12 December 2007. The order tolled the statute of limitations from the time Plaintiff first filed suit in Virginia, and allowed Plaintiff a year in which to refile. From this order, Defendant has appealed.

Standard of Review

Plaintiff filed suit under the "Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U.S.C. §§ 51-60, [which] makes common carrier railroads liable in damages to employees who suffer work-related injuries caused 'in whole or in part' by the railroad's negligence." *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135, 140, 155 L. Ed. 2d 261, 271 (2003). "[Plaintiff] filed this case in state court under the FELA, 45 U.S.C. § 51 *et seq.*, which confers concurrent federal and state jurisdiction over FELA claims." *Shives v. CSX Transp.*, 151 F.3d 164, 166 (4th Cir. 1998).

"As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *St. Louis S.W. Ry. Co. v. Dickerson*, 470 U.S. 409, 411, 84 L. Ed. 2d 303, 306 (1985). " 'The decision of the United States Supreme Court upon the proper interpretation, construction, and effect of statutes regulating or affecting interstate and foreign commerce is conclusive upon all other tribunals when the same matters are called in question. And the decisions of the Federal courts are to be followed by the State courts, in the construction of the act.' " *Pyatt v. Southern R. Co.*, 199 N.C. 397, 402, 154 S.E. 847, 850 (1930) (quoting Richey, Federal Employer's Liability, (2 ed.), ch. 5, p. 33, sec. 20) (citations omitted).

Our decision in this case requires an understanding of the relationship between FELA and N.C. Gen. Stat. § 1A-1, Rule 41 (2007), as they pertain to the statute of limitations. The statute of limitations for an action brought under FELA is three years. 45 U.S.C. § 56 (2007)

("No action shall be maintained under this act [45 USCS §§ 51 et seq.] unless commenced within three years from the day the cause of action accrued."). Defendant argues that in its order granting Plaintiff's motion for voluntary dismissal, the trial court "erred in extending the statute of limitations under [FELA]." We agree in part and disagree in part.

Rule 41(a) states in pertinent part that:

> (1) . . . [An action] may be dismissed by the plaintiff without order of court . . . at any time before the plaintiff rests his case[.] . . . If an action commenced within the time prescribed therefor, . . . is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal[.]
>
> (2) Except as provided in subsection (1) . . . [an action] shall not be dismissed . . . save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified . . . dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor . . . is dismissed without prejudice under this subsection, a new action . . . may be commenced within one year after such dismissal unless the judge . . . [specifies] a shorter time.

Thus, under Rule 41, after resting his case, a party loses the unfettered right to a voluntary dismissal available under Rule 41(a)(1). Further:

> "For purposes of summary judgment motions, this Court holds that the record must show that plaintiff has been given the opportunity at the hearing to introduce any evidence relating to the motion and to argue his position. Having done so and submitted the matter to the [trial court] for determination, plaintiff will then be deemed to have 'rested his case' for the purpose of summary judgment and will be precluded thereafter in dismissing his case pursuant to Rule 41 during the pendency of the summary judgment motion."

Alston v. Duke University, 133 N.C. App. 57, 61, 514 S.E.2d 298, 301 (1999) (quoting *Wesley v. Bland*, 92 N.C. App. 513, 515, 374 S.E.2d 475, 477 (1988)). However, a party may still obtain a voluntary dismissal if ordered by the trial court under Rule 41(a)(2). In the instant case, it is undisputed that Plaintiff moved for dismissal after resting

his case; consequently, it is governed under North Carolina law by Rule 41(a)(2).

The determination of whether to grant a Rule 41 motion and under what conditions the motion should be granted is in the trial court's discretion. *See*, *e.g.*, *Smith v. Williams*, 82 N.C. App. 672-73, 673, 347 S.E.2d 842, 844 (1986) ("Dismissals entered pursuant to [Rule 41(a)(2)] are within the discretion of the trial court which may, in the further exercise of its discretion, dismiss with or without prejudice."). Accordingly, as a matter of North Carolina common law, a trial court has discretion to effectively extend the period of time available to file beyond the statute of limitations, by granting a plaintiff's motion for voluntary dismissal without prejudice. *See*, *e.g.*, *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 594, 528 S.E.2d 568, 571 (2000):

> "[A] party always has the time limit prescribed by the general statute of limitation and in addition thereto they get the one year provided in Rule 41(a)(1)." "If the action was originally commenced within the period of the applicable statute of limitations, it may be recommenced within one year after the dismissal, even though the base period may have expired in the interim." Thus, . . . under Rule 41, a plaintiff may "dismiss an action that originally was filed within the statute of limitations and then refile the action after the statute of limitations ordinarily would have expired."

(quoting *Whitehurst v. Virginia Dare Transport. Co.*, 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973); 2 Thomas J. Wilson, II & Jane M. Wilson, *McIntosh North Carolina Practice and Procedure* § 1647, at 69 (Supp. 1970); and *Clark v. Visiting Health Prof'ls*, 136 N.C. App. 505, 508, 524 S.E.2d 605, 607 (2000)).

However, a different rule applies to cases filed under FELA. The leading case on this subject is *Burnett v. New York Central R. Co.*, 380 U.S. 424, 13 L. Ed. 2d 941 (1965). In *Burnett*, the plaintiff filed a FELA action "in the Common Pleas Court of Hamilton County, Ohio" which was dismissed on the defendant's motion for improper venue. *Id.* at 424, 13 L. Ed. 2d at 943. The plaintiff promptly filed an identical claim in the proper federal court; however, although his original suit was timely, by the time his claim was dismissed for improper venue and then refiled, the statute of limitations had expired. The federal district court judge dismissed plaintiff's claim, and the United States Supreme Court reversed.

In *Burnett*, the Supreme Court observed that it previously had "expressly held [that] the FELA limitation period is not totally inflexible, but, under appropriate circumstances, it may be extended beyond three years. . . . [T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Id.* at 427, 13 L. Ed. 2d at 945. The Court held that the plaintiff's timely filing of a FELA claim had tolled the statute of limitations during the pendency of that action:

> In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, [and] the Act itself[.] . . . [We] conclude that it effectuates the basic congressional purposes in enacting this humane and remedial Act . . . to hold that when a plaintiff begins a timely FELA action in a state court of competent jurisdiction . . . and the state court action is later dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action.

Id. at 427-28, 13 L. Ed. 2d at 945.

The Court rejected the plaintiff's argument that the FELA statute of limitations incorporated the Ohio Saving Statute, holding that "[t]o allow the limitation provision to incorporate state saving statutes would produce nonuniform periods of limitation in the several States."

In sum, when a trial court enters an order allowing voluntary dismissal of a FELA claim, the court cannot incorporate the saving provision of Rule 41. However, the trial court may equitably toll the statute of limitations when appropriate, without needing to rely on Rule 41.

Against this backdrop, we consider the order entered in the present case, which states that:

> . . . Plaintiff, with the Defendant's objection noted, hereby voluntarily dismisses this action, pursuant to Rule 41(a) of the Rules of Civil Procedure, without prejudice. The parties agree that this is the first dismissal of these claims for purposes of Rule 41. The court rules that any statute of limitations for the plaintiff's claims in this cause are tolled from the date of the institution of the suit filed in the Circuit Court for the City of Portsmouth, Virginia, on December 11, 2002, Law No. 02-3623, provided the plaintiff refiles his Complaint in this cause within one year of the date that this Order is entered. Any statute of limitations defenses previ-

ously filed herein that existed at the time suit was filed in the Circuit Court of the City of Portsmouth, Virginia Law 02-3623, are preserved.

Defendant does not argue that the trial court abused its discretion in its general decision to grant Plaintiff's motion for a dismissal, and we find no abuse of discretion. We next evaluate the trial court's rulings on the statute of limitations.

The court's order tolls the statute of limitations for a time period that is best analyzed in four segments:

1. The time period between December 2002, when Plaintiff filed suit in Virginia, until the case was dismissed for improper venue.

2. The time period between the dismissal of the Virginia case and refiling in North Carolina.

3. The time that the case was pending in North Carolina until the trial court allowed Plaintiff's motion for voluntary dismissal without prejudice.

4. The additional year from the date the trial court entered its order allowing dismissal.

We first consider the period between the initial filing of Plaintiff's claim and its dismissal for improper venue. *Burnett* held that, where a plaintiff files a FELA action that is later dismissed for improper venue, the FELA statute of limitations may be equitably tolled during the pendency of the original action. As that is Plaintiff's situation, we conclude that under *Burnett* the trial court properly tolled the statute of limitations from the date that Plaintiff first filed suit in Virginia until the date the case was dismissed in Virginia for improper venue. Accordingly, this part of the trial court's order should be affirmed.

The Virginia trial court's order dismissing Plaintiff's action for improper venue was conditioned on Defendant's not raising a statute of limitations defense for the period between the dismissal and Plaintiff's refiling his case. Defendant does not argue that this was improper. We conclude that this part of the trial court's also order should be affirmed.

We next examine the trial court's tolling of the statute of limitations during the pendency of the case in North Carolina. As discussed above, although Rule 41 could not be used to toll the FELA

statute of limitations for the time that Plaintiff's case was pending in North Carolina, the trial court had the authority to toll the FELA statute of limitations if appropriate. *See Burnett*, 380 U.S. at 427, 13 L. Ed. 2d at 944-45 (noting that United States Supreme "Court has expressly held [that] the FELA limitation period is not totally inflexible, but, under appropriate circumstances, it may be extended beyond three years.").

In the instant case, the court did not state the reason for its order or make findings of fact. However, "[t]his Court has stated, 'absent a specific request made pursuant to Rule 52(a)(2), a trial court is not required to either state the reasons for its decision or make findings of fact showing those reasons.' When 'there is no suggestion in the record that defendant asked for findings of fact or conclusions of law to be included in the trial court's order, the court's failure to do so is not reversible error.' " *Couch v. Bradley*, 179 N.C. App. 852, 855, 635 S.E.2d 492, 494 (2006) (quoting *Strickland v. Jacobs*, 88 N.C. App. 397, 399, 363 S.E.2d 229, 230 (1988); and *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 494, 586 S.E.2d 791, 798 (2003)).

Moreover, where "a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990) (citations omitted). "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18 (2000). Accordingly, we uphold a trial court's order if it can be sustained on a valid legal basis for which the record contains competent evidence. In the instant case, we conclude that the record contains evidence supporting the presumed findings of fact necessary to support equitable tolling of the FELA statute of limitations for the period when Plaintiff's case was pending in North Carolina.

As discussed above, we apply federal law to the issue of whether equitable tolling of the FELA statute of limitations was appropriate:

> The three-year limitations period in the FELA is a condition of liability constituting a substantial part of the right created. Hence, federal law controls the application of the limitations period.

Noakes v. AMTRAK, 312 Ill. App. 3d 965, 967, 729 N.E.2d 59, 62 (2000) (internal quotation marks and citations omitted). In *Burnett*, *supra*,

the Court set out its rationale for equitable tolling of the FELA statute of limitations:

> Statutes of limitations are primarily designed to assure fairness to defendants. . . . This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights. . . . [There are c]onsiderations in favor of tolling the federal statute of limitations in this case[.] . . . Petitioner here did not sleep on his rights but brought an action within the statutory period in a state court of competent jurisdiction. . . . Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy[.]

This Court has applied the reasoning of *Burnett*:

> "The primary purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend." . . . "Statutes of limitation . . . are practical and pragmatic devices to spare the courts from litigation of stale claims." They stimulate activity, punish negligence and promote repose by giving security and stability to human affairs. However, this policy of repose is often outweighed "where the interests of justice require vindication of the plaintiff's rights."

Bruce v. Bruce, 79 N.C. App. 579, 583, 339 S.E.2d 855, 858 (1986) (quoting 51 Am. Jur. 2d *Limitations of Actions* Section 17 (1970); Chase *Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 89 L. Ed. 1628, 1635 (1945); and *Burnett*, 380 U.S. at 428, 13 L. Ed. 2d at 945)) (other citation omitted). Examination of the record reveals the presence of the considerations identified by the *Burnett* Court as warranting equitable tolling of the statute of limitations.

First, Plaintiff did not "sit on his rights." At the hearing on Defendant's summary judgment motion, Plaintiff argued that the cause of action accrued in January 2001, when he was diagnosed with osteoarthritis caused by years of walking on large ballast. Plaintiff filed his claim in December 2002. Assuming, *arguendo*, that Plaintiff accurately identified when the statute of limitations began to run, his claim was timely filed. Further, Plaintiff promptly refiled his case following dismissal for improper venue. Nor did he seek a voluntary dismissal in response to an unsuccessful attempt to continue the case.

Indeed, it is Defendant's dismissal motions that have delayed the resolution of Plaintiff's claims. For example, Defendant's summary judgment motion, which is based on a June 2005 deposition, asserts that the statute of limitations began to run in "the 1980s or 1990's." However, Defendant delayed filing its motion until just before trial, more than four years after Plaintiff filed suit and over two years after Plaintiff was deposed. Additionally, there is a relationship between Defendant's motion to dismiss for improper venue and its motion for summary judgment:

> 1. Plaintiff filed suit in December 2002. Eighteen months later, Defendant moved to transfer the case to Richmond. Thereafter, Plaintiff might reasonably believe that the trial would be conducted in Virginia.
>
> 2. In October 2005, less than a month before trial and almost three years after Plaintiff filed suit, Defendant moved to dismiss Plaintiff's case for improper venue.
>
> 3. Plaintiff promptly refiled suit in North Carolina, but Defendant did not move for summary judgment until August 2007, just before the trial was to start and more than four and a half years after Plaintiff filed suit.
>
> 4. Defendant's summary judgment motion was based on excerpts from Plaintiff's deposition. The deposition would not have been admissible in Virginia, where the case was originally scheduled for trial.

Thus, Defendant's summary judgment motion was only possible because it waited until after discovery was completed in Virginia before moving for dismissal for improper venue, then filed the summary judgment motion in a jurisdiction where the deposition would be admissible.

Moreover, Plaintiff explicitly raised the issue of the admissibility of Plaintiff's deposition. Plaintiff's counsel told the trial court that the Plaintiff's deposition was taken in Virginia, where a deposition cannot be used as the basis for a summary judgment motion. Because Plaintiff's counsel expected the trial to be conducted in Virginia, he had not examined Plaintiff to clarify Plaintiff's responses to some of Defendant's questions. The trial court told the parties it was "concerned about this statute argument they're making because of the deposition testimony" asking Plaintiff's counsel if it

were not true that he "anticipated that not being used in trial?" Plaintiff's counsel stated:

> [T]he rules in Virginia are clear that a deposition such as this one, a Discovery deposition, cannot be used to attack the lawsuit itself. It's prohibited. So, when defense counsel finishes examining your plaintiff, we normally do not ask that plaintiff any questions[.]
>
> . . . .
>
> If we had, at that time, known that [the Virginia trial judge] was going to throw the case out and rule that it should be in North Carolina, and knowing your rules here, we certainly would have asked [Plaintiff] . . . ["]Did you know what was causing the pain to your knees?"
>
> . . . .
>
> I would ask the Court to at least consider that and let [Plaintiff] be heard since all of these questions were defense cross-examination basically, aimed at one thing.

Thus, regardless of whether Defendant intended to mislead Plaintiff about the trial's venue, the effect of Defendant's last minute dismissal motion was to provide it with ammunition for a later summary judgment motion. The statute of limitations "exists 'to encourage the prompt presentation of claims' against [Defendant].' It does not exist to reward the [defendant] for deft legal maneuvering. [Defendant] was put on notice to defend against this action in [December] of [2002] and at all times since the filing of the complaint . . . has been aware that [Plaintiff] was pursuing his legal rights." *Stanfill v. United States*, 43 F. Supp. 2d 1304, 1311 (M.D. AL 1999) (quoting *United States v. Kubrick*, 444 U.S. 111, 117, 62 L. Ed. 2d 259, 266 (1979)).

We also find no indication that equitable tolling of the statute of limitations prejudiced Defendant. Significantly, unless the FELA statute of limitations is equitably tolled for the period of time that the case was pending in North Carolina, Plaintiff will lose, not only his "day in court" to determine the substantive issues raised in his complaint, but also the opportunity to meet Defendant's summary judgment motion with testimony or affidavits that clarify some of Plaintiff's deposition responses and address the issue of the onset of his condition.

"The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995) (citation omitted). In the instant case, we conclude that the evidence supports equitable tolling of the statute of limitations during the time the case was pending in North Carolina, and that this part of the trial court's order should be affirmed.

Finally, we consider the trial court's ruling tolling the statute of limitations for up to a year after the entry of its order. We discern no basis for this part of the court's order other than the application of Rule 41. Accordingly, the trial court erred by tolling the statute of limitations after its order became final, and this part of the trial court's ruling must be reversed.

The "defendant's action in taking an appeal from the dismissal order tolled the running of the [statute of] limitation[s] until final appellate action was taken[.]" *West v. Reddick, Inc.*, 302 N.C. 201, 204, 274 S.E.2d 221, 224 (1981). N.C.R. App. P. 32 provides in pertinent part that:

> (a) . . . [T]he mandate of the court consists of certified copies of its judgment and of its opinion[.] . . . The mandate is issued by its transmittal from the clerk of the issuing court to the clerk . . . of the tribunal from which appeal was taken to the issuing court.
>
> (b) Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk.

We conclude that the record supports the equitable tolling of the statute of limitations during the time that Plaintiff's case was pending in North Carolina, and that it continues to be tolled until the issuance of our mandate in this case. Thereafter, the statute of limitations begins to run again. For the reasons discussed above, we conclude that the trial court's order must be

Affirmed in part and reversed in part.

Judges BRYANT and JACKSON concur.

STATE v. ROBLEDO

[193 N.C. App. 521 (2008)]

STATE OF NORTH CAROLINA, PLAINTIFF v. LORENZO ROBLEDO, DEFENDANT

No. COA07-1568

(Filed 4 November 2008)

1. Drugs— trafficking in marijuana by possession—sufficiency of evidence—knowing possession

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in marijuana by possession even though defendant contends there was insufficient evidence of knowing possession of marijuana because: (1) the record revealed evidence of defendant's knowing possession of the marijuana found in his car including that defendant signed for and collected a package containing 44.1 pounds of marijuana, defendant helped load another package addressed to his niece containing 43.8 pounds of marijuana into the back seat of his car about a half hour later, and both boxes addressed to his niece containing a total of 87.9 pounds were found when law enforcement searched the car defendant was driving; and (2) defendant's possession of the marijuana was accompanied by several incriminating circumstances supporting an inference that defendant was aware of what the packages contained, in turn supporting the element of knowing possession, including that defendant had once lived in the same residence as his niece and he knew his niece frequently got this type of packages, defendant said that he was expecting to earn between $50 and $200 for simply taking the package from the UPS store to his niece even though his assertion as to the expected amount of money changed several times during the interview with the police, and the address on one of the boxes was found by law enforcement to be nonexistent.

2. Drugs— conspiracy to traffic marijuana—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to traffic marijuana because: (1) defendant cited no authority, and none was found, for the proposition that the State's voluntary dismissal of a conspiracy charge against one codefendant should be considered in ruling on a motion to dismiss the conspiracy charge against another codefendant; and (2) viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in the State's favor, the State presented sufficient evidence of mutual

implied understanding between defendant and a coparticipant to traffic marijuana.

3. Drugs— trafficking in marijuana by possession—conspiracy to traffic marijuana—failure to instruct on lesser-included offenses

The trial court did not err or commit plain error in a trafficking in marijuana by possession and conspiracy to traffic marijuana case by failing to instruct the jury on the lesser-included offenses of possession of more than ten but less than fifty pounds of marijuana and conspiracy to traffic in these amounts because the State presented evidence showing that: (1) defendant had possession of two boxes which contained marijuana totaling 87.9 pounds, each box holding approximately half of the total; (2) defendant was accompanied by his codefendant when the boxes were found together in the car he was driving; and (3) defendant presented no conflicting evidence to suggest that he had possession of only one package which would have required the trial court to instruct on the lesser-included offenses.

Appeal by defendant from judgment entered on or about 19 July 2007 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 15 May 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

William D. Auman for defendant-appellant.

STROUD, Judge.

Defendant Lorenzo Robledo appeals from judgment entered upon jury verdicts finding him guilty of trafficking in marijuana and conspiracy to traffic in marijuana. Defendant contends the trial court erred by: 1) denying his motion to dismiss the trafficking charge on the basis of insufficient evidence, 2) denying his motion to dismiss the conspiracy to traffic charge on the basis of insufficient evidence, and 3) failing to instruct the jury on the lesser-included offenses of trafficking by possession and conspiracy to traffic marijuana in amounts greater than ten pounds, but less than fifty pounds. After careful review of the record we conclude defendant received a fair trial, free of reversible or plain error.

I. Factual Background

On 27 June 2006, the Hendersonville Police Department ("HPD") received a phone call from a DEA agent in Texas describing a package being shipped to the Hendersonville UPS store ("the UPS store") that possibly contained marijuana. Detective Adams and Captain Jones, HPD officers, went to the UPS store on 29 June 2006 and opened the box designed for a DeWalt miter saw ("the DeWalt box"). The DeWalt box was wrapped on the outside with plastic wrap. The box contained four bricks of tightly packaged marijuana protected by styrofoam. Detergent had been poured around the marijuana to negate the smell. Captain Jones repackaged the contents and took the entire box to the HPD evidence storage room. Several phone calls were made to inform the addressee that the package could not be delivered and must be picked up. The box was addressed to a person named Armando Iberra, at an address which Detective Adams had determined to be non-existent.

On 5 July 2006, defendant went to the UPS store in a Pontiac Grand Am[1] to collect a Member's Mark box. The box was not addressed to defendant, but he produced an authorization note from his niece, Esperanzo Garcia ("Garcia"), in order to sign for and receive the box. About a half hour later, defendant returned to the UPS store with his alleged co-conspirator, Brenda Gilliam ("Ms. Gilliam") in the Grand Am. Ms. Gilliam entered the UPS store and requested the DeWalt box. Captain Jones was telephoned, and the box was quickly transported from the evidence storage room to the UPS store. Meanwhile, Detective Adams set up surveillance across the street.

Ms. Gilliam also produced an authorization note from Garcia in order to sign for and receive the box. Ms. Gilliam walked outside to the Grand Am driven by defendant. Cindy, the UPS counter clerk, helped Ms. Gilliam carry the box to the car. Defendant got out of the Grand Am and helped load the DeWalt box into the car, first trying to place it inside the trunk then eventually putting the box on the back seat.

After driving out of the UPS store parking lot, defendant and Ms. Gilliam were stopped by law enforcement and arrested. Detective Adams searched the vehicle. The DeWalt box was removed and the marijuana inside was later weighed to be 43.8 pounds. The Member's

1. The Grand Am was registered to Roberto Alcarez, but was defendant's car to drive.

Mark box collected earlier by defendant was discovered on the driver's side floorboard of the back seat. The Member's Mark box was examined at the scene and found to contain the exact same type of packaging as the DeWalt box and four bricks of marijuana. That marijuana was later weighed to be 44.1 pounds, for a total of 87.9 pounds in the two boxes.

Captain Jones later interviewed defendant. In the interview, defendant asserted that he and Garcia had previously lived at the same residence and that she had received many packages from UPS. He also acknowledged that he knew he would be collecting two packages that day. Finally, changing his story during the interview, he acknowledged that he was expecting to be paid fifty ($50), one hundred ($100), or two hundred ($200) dollars just for delivering the packages.

On 27 November 2006, the Henderson County Grand Jury indicted defendant for trafficking in marijuana in violation of N.C. Gen. Stat. § 90-95(h)(1) and conspiring to traffic in marijuana in violation of N.C. Gen. Stat. § 90-95(l). Defendant was tried before a jury in Superior Court, Henderson County from 17 to 18 July 2007. The jury found defendant guilty of trafficking in marijuana and conspiracy to traffic in marijuana. Upon the jury verdict, the trial court sentenced defendant to 35 to 42 months in the North Carolina Department of Corrections and a fine of $25,000. Defendant appeals.

II. Motions to Dismiss

Defendant argues the trial court erred when it denied his motions to dismiss both the trafficking charge and the conspiracy to traffic charge on the basis of insufficient evidence to sustain a conviction. We disagree.

A. Standard of Review

A defendant may move to dismiss a criminal charge when the evidence is not sufficient to sustain a conviction. N.C. Gen. Stat. § 15A-1227(a) (2005).

> Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.

State v. Bagley, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations, quotation marks and brackets omitted).

"Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court . . . does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255-56 (citations and quotation omitted), *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002). Evidence is not substantial if it "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, [and] the motion [to dismiss] should be allowed . . . even though the suspicion so aroused by the evidence is strong." *State v. Hamilton*, 145 N.C. App. 152, 155, 549 S.E.2d 233, 235 (2001) (citation, quotation marks, brackets, and ellipses in original omitted). This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*. *Bagley*, 183 N.C. App. at 523, 644 S.E.2d at 621.

B. Trafficking by Possession

[1] Defendant contends the trafficking charge should have been dismissed and not submitted to the jury because the State did not present sufficient evidence of knowing possession of marijuana. Defendant specifically argues that "[n]o evidence was introduced to indicate that Mr. Robledo had any knowledge of what was in either the DeWalt or Member['s] Mark box, as the state showed merely that he had agreed to make a pickup on behalf of the third party." Citing *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984), defendant argues "[t]he state must prove that Mr. Robledo had requisite knowledge that a controlled substance was contained within the boxes[,]" then recites facts which he contends prove defendant did not know what was in the boxes.

While not expressly included in N.C. Gen. Stat. § 90-95(h)(1),[2] it is well-settled that the offense of trafficking a controlled substance by possession requires "knowing possession." *State v. Shelman*, 159 N.C. App. 300, 307, 584 S.E.2d 88, 94, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003). "The 'knowing possession' element of the

2. Any person who . . . possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved . . . [i]s 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000)[.]

N.C. Gen. Stat. § 90-95(h)(1) (2005).

offense of trafficking by possession may be established by a showing that (1) the defendant had actual possession, (2) the defendant had constructive possession, or (3) the defendant acted in concert with another to commit the crime." *State v. Reid*, 151 N.C. App. 420, 428, 566 S.E.2d 186, 192 (2002) (citation omitted).[3]

"Whether the defendant was aware that marijuana was in the automobile [is] properly a question for the jury [if] there [is] sufficient evidence to go to the jury[.]"[4] *State v. Fleming*, 26 N.C. App. 499, 500-01, 216 S.E.2d 157, 158 (1975). Direct evidence is not required; awareness or knowledge may be inferred from incriminating circumstances. *State v. Wiggins*, 185 N.C. App. 376, 387-88, 648 S.E.2d 865, 873-74, *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007); *see also* N.C.P.I.—Criminal 104.41 ("A person's awareness of the presence of the [substance] [article] and his power and intent to control its disposition and use may be shown by direct evidence, or may be inferred from the circumstances." (Brackets in original.)).

"North Carolina Courts interpreting incriminating circumstances have found many examples of circumstances sufficient to allow a case to go to the jury." *State v. Neal*, 109 N.C. App. 684, 687, 428 S.E.2d 287, 290 (1993). Three circumstances which have been con-

---

3. Defendant conflates the theories of actual and constructive possession in his argument, but the distinction is immaterial in this case, because being aware of the presence of the contraband is an essential element of both actual and constructive possession. *Compare State v. Diaz*, 155 N.C. App. 307, 314, 575 S.E.2d 523, 528 (2002) ("A defendant has actual possession of a substance if it is on his person, he is *aware of its presence*, and either by himself or with others, he has the power and intent to control its disposition or use." (Emphasis added.)), *cert. denied*, 357 N.C. 464, 586 S.E.2d 271 (2003), *with State v. Wiggins*, 185 N.C. App. 376, 386-87, 648 S.E.2d 865, 872-73 ("A person is said to have constructive possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it. . . . Power and intent to control the contraband material can exist only when one is *aware of its presence*." (Citations, quotations and brackets omitted and emphasis added.)), *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007); *see also State v. Harris*, 178 N.C. App. 723, 725, 632 S.E.2d 534, 536 (2006) ("An accused has possession of a controlled substance within the meaning of the law when he has both the power and intent to control its disposition or use. Necessarily, power and intent to control the controlled substance can exist only when one is aware of its presence." (Citations and quotation marks omitted.)), *aff'd*, 361 N.C. 400, 646 S.E.2d 526 (2007).

4. Even the primary case cited by defendant appears to support the proposition that a defendant's denial of knowledge of contraband creates a jury question. *State v. Boone*, 310 N.C. 284, 292, 311 S.E.2d 552, 558 (1984), quotes and relies upon *State v. Elliott*, 232 N.C. 377, 378, 61 S.E.2d 93, 95 (1950), which stated, "[h]ere the appellant specifically pleads want of knowledge of the presence of liquor on the automobile and offered evidence in support of that plea. He thereby raised a determinative issue of fact."

sistently considered by the courts of this State on the issue of awareness or knowledge are (1) the degree of the defendant's control over the place where the contraband was found, *see State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) ("Where [contraband] materials are found on the premises under the [exclusive] control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." (Citation and quotation marks omitted)); *State v. Barfield*, 23 N.C. App. 619, 623, 209 S.E.2d 809, 812 (1974) ("evidence that defendant admitted that he placed the plastic bag which contained the heroin in the trash can [only a few steps from the door of his house], though he denied any knowledge of the contraband nature of its contents" was sufficient to survive the defendant's motion to dismiss), *cert. denied*, 286 N.C. 416, 211 S.E.2d 796 (1975); (2) the defendant's proximity to the contraband, *see State v. Burke*, 36 N.C. App. 577, 580, 244 S.E.2d 477, 479 (1978) (evidence that the "defendant was seated at a table upon which there were located some 5.5 pounds of marijuana in compressed bricks, and that he had in his hand a bag containing one-half pound of loose marijuana" was sufficient to survive the defendant's motion to dismiss even though the defendant denied knowing that the bags contained marijuana); and (3) "other incriminating circumstances," *see Matias*, 354 N.C. at 552, 556 S.E.2d at 271 ("[U]nless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred."); *see also Wiggins*, 185 N.C. App. at 387-88, 648 S.E.2d 873-74 (drug paraphernalia and a gun found between the driver and defendant passenger, a recent visit by a known drug seller and inconsistent explanations offered by the defendant were sufficient evidence of incriminating circumstances to survive the motion to dismiss).

Specific to illegal drugs found in automobiles, while "the mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs[,]" *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976) (citation and quotation marks omitted), "evidence which places an accused within close juxtaposition to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession," *id.*; *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 885-86 (1984) (inferring knowledge of marijuana discovered under rear seat floormat where the defendant

had custody of a borrowed car for only three days and had two passengers in the rear seat when the marijuana was discovered).

Reviewing the record, we find the following evidence of defendant's knowing possession of the marijuana found in his car: Defendant signed for and collected the Member's Mark package containing 44.1 pounds of marijuana. About a half hour later, defendant helped load the DeWalt package containing 43.8 pounds of marijuana into the back seat of the Grand Am. Both boxes, containing a total of 87.9 pounds, were found when law enforcement searched the Grand Am defendant was driving. This is substantial evidence that the boxes containing the marijuana were controlled by defendant.

Furthermore, defendant's possession of the marijuana was accompanied by several incriminating circumstances. Defendant had once lived in the same residence as his niece, and knew his niece frequently got this type of packages. Defendant said that he was expecting to earn between $50 and $200 for simply taking the package from the UPS store to his niece, though his assertion as to the expected amount of money changed several times during the interview with Captain Jones. The address on the DeWalt box was found by law enforcement to be non-existent. Drawing inferences from this evidence in the State's favor, we conclude that it supports an inference that defendant was aware of what the packages contained, which in turn supports the element of knowing possession. Accordingly, this assignment of error is overruled.

C. Conspiracy to Traffic

[2] Defendant argues the trial court should have dismissed the conspiracy to traffic marijuana charge on the basis of insufficient evidence. In addition to contending that the State did not offer "even a scintilla of evidence of any agreement between the co-defendants," defendant specifically argues:

> [I]t is clear from the record that the jury was unable to reach a verdict with regard to Ms. Gilliam's case, which was later dismissed by the prosecution.[5] This voluntary dismissal of the only

5. It is clear from the record that the jury was unable to reach a verdict with regard to Ms. Gilliam. However, with regard to purported dismissal of the conspiracy charge against Ms. Gilliam, defendant makes no reference to the record on appeal and we find no evidence in the record on appeal that the State indeed dismissed the conspiracy charge against Ms. Gilliam. However, the State acknowledges in its brief that "[t]he prosecutor chose to dismiss the charges[,]" so we assume that the charge was dismissed.

> co-defendant in effect leaves no one that [defendant] could have made an unlawful agreement with, without which there can be no conspiracy. It is well-established that if all participants in an alleged conspiracy (with [the] exception of the defendant) are legally acquitted, a conviction against a remaining defendant must be set aside.
>
> The defendant recognizes that a dismissal is not the functional equivalent of an acquittal, however submits that such should be considered as part of the totality of circumstances that suggest substantial evidence to be lacking.

(Citations omitted, footnote added.) We disagree.

Defendant cites no authority and we find none for the proposition that the State's voluntary dismissal of a conspiracy charge against one co-defendant should be considered in ruling on a motion to dismiss the conspiracy charge against another co-defendant. Rather, in ruling on a motion to dismiss for insufficient evidence, the court is limited to consideration of evidence which is actually admitted during the trial. *See State v. Spangler*, 314 N.C. 374, 383, 333 S.E.2d 722, 728 (1985) ("The trial judge must consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State."); *State v. Powell*, 299 N.C. 95, 99, 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."); *State v. Barnes*, 110 N.C. App. 473, 475, 429 S.E.2d 765, 766 (1993) ("In passing upon a motion to dismiss made pursuant to North Carolina General Statutes § 15A-1227, all of the evidence admitted, whether competent or incompetent, is viewed in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom.").

This Court has held that

> [t]o prove criminal conspiracy, the State must prove an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. The State need not prove an express agreement. Evidence tending to establish a mutual, implied understanding will suffice to withstand a defendant's motion to dismiss.

Wiggins, 185 N.C. App. at 389, 648 S.E.2d at 874 (citations and quotation marks omitted); *see also State v. Harrington*, 171 N.C. App. 17, 27-28, 614 S.E.2d 337, 346 (2005) (holding that a number of indefinite

acts such as the co-defendants' proximity and accessibility to the marijuana as well as the co-defendant's possession of scales and packaging devices was sufficient to show the co-conspirators had a common scheme or plan).

To support the charge of conspiracy, the State presented evidence at trial that defendant was planning to pick up two packages. Defendant collected one box containing marijuana by himself; he and Ms. Gilliam, his alleged co-conspirator, arrived together to collect the second box. Defendant and Ms. Gilliam both used authorization notes and tracking numbers from defendant's niece for the boxes they picked up from UPS. Both boxes they picked up had identical packaging inside containing styrofoam for padding and laundry detergent to prevent detection of the marijuana. Viewing this evidence in the light most favorable to the State and drawing all reasonable inferences in the State's favor, we conclude that the State presented sufficient evidence of mutual implied understanding between defendant and Ms. Gilliam to traffic marijuana. Accordingly, this assignment of error is overruled.

III. Omission of Instruction for Lesser Included Offenses

[3] Defendant argues that *State v. Williams*, 90 N.C. App. 614, 369 S.E.2d 832 (1988), requires a trial court to submit to the jury a lesser included offense of the crime charged in the bill of indictment where there is evidence that can support guilt of the lesser crime. Specifically, defendant contends that the trial court should have submitted an instruction on the lesser included offense of a Class G felony possession of less than fifty pounds of marijuana and conspiracy to possess less than fifty pounds. Defendant did not object to the instructions or request any corrections or additional instructions at trial, therefore this court may only review the trial judge's jury instructions for plain error. N.C.R. App. P. 10(c)(4); *State v. Carrillo*, 164 N.C. App. 204, 209, 595 S.E.2d 219, 223 (2004), *appeal dismissed and disc. review denied*, 610 S.E.2d 710 (N.C. 2005). "A plain error is one 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) (citation and quotation marks omitted), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d. 640 (2003).

"A prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction 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). According to the North Carolina Supreme Court,

> [a] trial court must submit to the jury a lesser included offense when and only when there is evidence from which the jury could find that the defendant committed the lesser included offense. When the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element, submission of a lesser included offense is not required. Mere possibility of the jury's piecemeal acceptance of the State's evidence will not support the submission of a lesser included offense. Thus, mere denial of the charges by the defendant does not require submission of a lesser included offense.

State v. Maness, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988) (citations omitted).

As discussed in Part II.B. *supra*, the State presented positive evidence showing that defendant had possession of two boxes which contained marijuana totaling 87.9 pounds, each box holding approximately half of the total. The State also presented positive evidence that defendant was accompanied by his co-defendant when the boxes were found together in the car he was driving. Defendant presented no conflicting evidence to suggest that he had possession of only one package which would have required the trial court to instruct on the lesser included offenses of trafficking less than fifty pounds of marijuana or conspiracy to possess less than fifty pounds of marijuana. We conclude that there was no evidence which supported instruction on a lesser charge for either offense. Accordingly we hold that the trial court did not err when it failed to instruct on the lesser included offense. Because the trial court did not err, there could be no plain error.

IV. Conclusion

For the foregoing reasons we conclude that the trial court did not err when it denied defendant's motions to dismiss the charges of trafficking marijuana and conspiracy to traffic marijuana. Additionally, the trial court did not err when it failed to instruct the jury on the lesser included offense of possession of more than ten, but less than fifty pounds of marijuana nor by failing to instruct the jury on the lesser included offense of conspiracy to traffic in those amounts. Accordingly, we conclude defendant received a fair trial, free of reversible or plain error.

No Error.

Judges McCULLOUGH and TYSON concur.

ALOMA COLEMAN BRYSON, PLAINTIFF v. JONATHAN HUBERT CORT, DEFENDANT

No. COA08-51

(Filed 4 November 2008)

1. Costs— attorney fees—judgment under $10,000—calculation of prejudgment interest

The trial court used the correct date for the commencement of an action when determining interest in a negligence action in which attorney fees were awarded under N.C.G.S. § 6-21.1 where the defendant contended that an earlier date should have been used, which would have resulted in an award over $10,000. There were alias and pluries summonses, the action was discontinued because an additional alias and pluries summons was not issued in the requisite time, and plaintiff revived her action by obtaining another alias and pluries summons. This was the date the court correctly used.

2. Costs— attorney fees—judgment under $10,000—post judgment interest not included

Interest after a judgment has no bearing on the trial court's ability to award attorney fees, and the trial court did not err by calculating prejudgment interest only to the date the judgment was entered.

3. Costs— attorney fees—no finding that justiciable issue missing

N.C.G.S. § 6-21.1 does not require a complete absence of a justiciable issue before awarding attorney fees, as does N.C.G.S. § 6-21.5.

4. Cost— attorney fees—amount of judgment—disproportionality

The trial court did not err in its award of attorney fees of $12,255.00 in a negligence action where defendant argued that the award was disproportionate to the amount of damages of $9,930.74. The legislature specifically enacted N.C.G.S. § 6-21.1 to

provide relief for people with damages so small that legal fees would otherwise make the action impractical. Plaintiff provided detailed time and billing statements from her attorney, and the trial court's factual findings indicate that it gave careful consideration to those statements as well as to the arguments from both parties. The amount of the fees can be directly attributed to defendant's insurance carrier not making any good faith attempt to resolve the matter.

5. Appeal and Error— frivolous appeal—motion for sanctions denied—legitimate issue raised

Plaintiff's motion on appeal for sanctions for a frivolous appeal in a negligence action involving attorney fees was denied where defendant raised a legitimate issue of law that had not previously been addressed. N.C. R. App. P. 34(a)(1),(2).

Appeal by defendant from judgment entered 5 September 2007 by Judge John S. Arrowood in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 August 2008.

The Law Offices of William K. Goldfarb, by William K. Goldfarb and Graham T. Stiles, for plaintiff appellee.

York, Williams, Barringer, Lewis & Briggs, L.L.P., by Heather G. Connor and Angela M. Easley, for defendant appellant.

McCULLOUGH, Judge.

Defendant Jonathan Hubert Cort appeals from a judgment of the trial court entered on 5 September 2007 awarding to plaintiff Aloma Coleman Bryson $12,255.00 in attorney's fees. We will also address plaintiff's motion filed on 23 May 2008, which requested that sanctions be imposed against defendant's counsel for filing a frivolous appeal. For the reasons stated herein, we affirm the judgment of the trial court and deny plaintiff's motion for sanctions.

I. Background

On 26 April 2004, plaintiff and defendant were involved in an automobile accident in Charlotte, North Carolina. When defendant was turning left at an intersection, he collided into plaintiff's vehicle, causing injuries to plaintiff and damages to her vehicle. On 1 February 2005, plaintiff filed a complaint against defendant in Mecklenburg County Superior Court alleging motor vehicle negli-

gence and requesting damages for her personal injuries, property damage, and lost wages arising from the accident. A civil summons was issued on 1 February 2005. On 2 May 2005, the complaint had not been served upon defendant; so plaintiff obtained an endorsement on the summons. Alias and pluries summons were issued on 27 June 2005, 22 February 2006, 9 June 2006, and 29 August 2006.

Defendant filed an answer on or about 28 September 2006, denying fault and asserting the defense of contributory negligence. Additional alias and pluries summons were issued on 2 November 2006, 8 January 2007, 6 March 2007, and 9 May 2007. Defendant and his automobile insurance carrier, State Farm Insurance Company, never made any offers to settle with plaintiff. The case was tried before a jury on 20 August 2007 in Mecklenburg County Superior Court, with the Honorable John S. Arrowood presiding. Both parties stipulated that if the jury found defendant to be completely at fault, plaintiff would be entitled to recover an additional $881.48 for her rental car expenses.

On 22 August 2007, the jury found that plaintiff was injured as a result of defendant's negligence and that plaintiff did not, by her own negligence, contribute to her injuries. The jury awarded plaintiff $8,173.98 for her personal injuries. Due to the parties' prior stipulation, plaintiff was also entitled to recover an additional $881.48 for her rental car expenses, resulting in an award of $9,055.46. The trial court calculated prejudgment interest on the principal sum, from 9 June 2006 to 24 August 2007, in the amount of $875.28. The jury verdict, rental car expenses, and prejudgment interest resulted in a total award of $9,930.74 for plaintiff.

After the jury's verdict, plaintiff moved for attorney's fees supported by an affidavit and billing statements from plaintiff's counsel. The trial court heard arguments from both parties on 22 August 2007. Both parties submitted additional briefing and the trial court heard further arguments on the issue of attorney's fees on 24 August 2007.

The trial court entered a judgment on 5 September 2007 awarding plaintiff compensatory damages in the amount of $9,055.46, prejudgment interest from 9 June 2006 to 24 August 2007 in the amount of $875.28, attorney's fees in the amount of $12,255.00, and costs in the amount of $1,168.30. Defendant filed a notice of appeal on 26 September 2007. On 23 May 2008, plaintiff filed a motion for sanctions, requesting that this Court impose sanctions on defendant's counsel for filing a frivolous appeal.

II. Issues

Defendant assigns error to the trial court's order of attorney's fees, arguing that (1) the trial court erred in its findings of fact and conclusions of law that plaintiff was entitled to an award of attorney's fees and (2) the award of $12,255.00 in attorney's fees to plaintiff was unreasonable. We will also address plaintiff's motion for sanctions.

III. Award of Attorney's Fees

[1] Generally, in the absence of statutory authority, attorney's fees cannot be recovered by the successful litigant. *Washington v. Horton*, 132 N.C. App. 347, 349, 513 S.E.2d 331, 333 (1999). N.C. Gen. Stat. § 6-21.1 "creates an exception to the general rule that attorney's fees are not allowable as part of the costs in civil actions." *Hill v. Jones*, 26 N.C. App. 168, 169, 215 S.E.2d 168, 169, *cert. denied*, 288 N.C. 240, 217 S.E.2d 664 (1975). N.C. Gen. Stat. § 6-21.1 (2007) provides as follows:

> In any personal injury or property damage suit . . . where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

The purpose of this statute is to provide relief for a person who sustained injury or property damage in an amount so small that, if he must pay counsel from his recovery, it is not economically feasible to bring suit on his claim. *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973). 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.* The Legislature was aware that the majority of such claims arise out of automobile accidents in which the alleged wrongdoer is insured and his insurance carrier controls the litigation. *Id.* "This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." *Id.* (citation omitted).

" 'The case law in North Carolina is clear that to overturn the trial judge's determination, the defendant must show an abuse of discretion.' " *Blackmon v. Bumgardner*, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999) (quoting *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982), *disc. review denied*,

307 N.C. 468, 299 S.E.2d 221 (1983)). An abuse of discretion occurs when the 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.' " *Robinson v. Shue*, 145 N.C. App. 60, 65, 550 S.E.2d 830, 833 (2001) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

If the trial court elects to award attorney's fees, it must also make findings of fact to support its award. *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000). Here, the trial court found that "the total amount of the Judgment is Nine Thousand Nine Hundred Thirty Dollars and Seventy-Four Cents [$9,930.74] triggering a determination of whether the Court, in its discretion, will award attorney's fees as a part of the costs under N.C.G.S. 6-21.1."

Furthermore, when attorney's fees are at issue, the trial court must examine the entire record, as well as the following factors: (1) settlement offers made prior to institution of the action; (2) offers of judgment made pursuant to Rule 68 and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of settlement offers as compared to the jury verdict. *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334-35. The trial court made the following findings of fact pertaining to these factors:

> 11) Prior to the verdict, the Defendant refused to make any effort whatsoever to resolve the case from the institution of said action to the present.
>
> 12) The Defendant was clearly negligent in the operation of a motor vehicle.
>
> 13) The Defendant made no offer of judgment and made no good faith attempt to resolve this matter.
>
> 14) The Defendant exercised superior bargaining power in this dispute through a 3rd party source.
>
> 15) Based upon the review of the whole record, and in its discretion, the Court will award attorney fees.

Defendant argues that the trial court did not have jurisdiction to award attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1 because the

total amount of the judgment exceeded $10,000.00. Specifically, defendant contends that the trial court's judgment of $9,930.74 is erroneous because it did not calculate the prejudgment interest correctly. Defendant argues that if the trial court had calculated the prejudgment interest properly, the judgment would have exceeded the $10,000.00 limit, set forth in N.C. Gen. Stat. § 6-21.1, and the trial court would not have had the discretion to award attorney's fees to plaintiff.

N.C. Gen. Stat. § 24-5(b) requires that "any portion of a money judgment designated by the fact finder as compensatory damages bears interest *from the date the action is commenced until the judgment is satisfied.*" N.C. Gen. Stat. § 24-5(b) (2007) (emphasis added). For purposes of N.C. Gen. Stat. § 24-5(b), the trial court calculated the prejudgment interest on the principal sum of $9,055.46, from 9 June 2006 until 24 August 2007, which resulted in prejudgment interest in the amount of $875.28 and a total judgment in the amount of $9,930.74. Defendant argues that "the date the action commenced" pursuant to N.C. Gen. Stat. § 24-5(b) is not 9 June 2006, but instead is 1 February 2005, the date that plaintiff filed her complaint. Defendant asserts that if 1 February 2005 had been used as the date the action commenced, the prejudgment interest would be in the amount of $1,851.78, resulting in a total judgment in the amount of $10,907.24, which exceeds the $10,000.00 threshold set forth in N.C. Gen. Stat. § 6-21.1. *See* N.C. Gen. Stat. § 6-21.1.

Defendant relies on Rule 3 of the North Carolina Rules of Civil Procedure which provides that a "civil action is commenced by filing a complaint with the court." N.C. Gen. Stat. § 1A-1, Rule 3(a) (2007). While an action can commence by filing a complaint, this is only so when certain requirements are met. *See* N.C. Gen. Stat. § 1A-1, Rule 3(a)(2). Rule 3 provides that the complaint "be served in accordance with the provisions of Rule 4. . . . If the complaint is not filed within the period specified in the clerk's order, the action shall abate." *Id.* Rule 4 requires the summons and petition to be served on the opposing party within sixty (60) days of issuance. N.C. Gen. Stat. § 1A-1, Rule 4(c) (2007).

If the opposing party is not served within sixty (60) days, Rule 4(d) permits the action to be continued by obtaining an alias or pluries summons, within ninety (90) days after the date of issue of the last preceding summons. N.C. Gen. Stat. § 1A-1, Rule 4(d)(2). Additional alias or pluries summons can be issued to continue to relate back to the date of the original complaint if obtained within

ninety (90) days of the date the previous alias or pluries summons was issued. *Id.*

Rule 4 further states the following:

> e) *Summons—Discontinuance.*—When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), *the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.*

N.C. Gen. Stat. § 1A-1, Rule 4(e) (emphasis added).

Rule 4(e) mandates that where there is neither endorsement nor issuance of an alias or pluries summons within ninety (90) days after issuance of the last preceding summons, the action is discontinued and treated as if it had never been filed. *Johnson v. City of Raleigh*, 98 N.C. App. 147, 148-49, 389 S.E.2d 849, 851, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176 (1990). Under Rule 4(e), an extension can be endorsed by the clerk or an alias or pluries summons can be issued after the ninety (90) days has run, but "the action is deemed to have commenced, as to such a defendant, on the date of the endorsement or the issuance of the alias or pluries summons." *Lemons v. Old Hickory Council*, 322 N.C. 271, 275, 367 S.E.2d 655, 657, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988).

Here, plaintiff had an alias and pluries summons issued on 22 February 2006, which expired on or around 22 May 2006. Because plaintiff did not have an additional alias and pluries summons issued during that time period, her action was discontinued on 22 May 2006. However, pursuant to the provisions of Rule 4(e), plaintiff revived her action by obtaining another alias and pluries summons on 9 June 2006. Her action is now deemed to have commenced on 9 June 2006.

Defendant also argues that plaintiff is bound by her request in her initial complaint, which was that prejudgment interest be calculated from the date she filed her complaint. Defendant is incorrect. Because of the lapse in the alias or pluries summons, plaintiff's action was discontinued on 22 May 2006. Once an action is discontinued, the trial court has no discretion in determining the date the action com-

menced. *See Lackey v. Cook*, 40 N.C. App. 522, 253 S.E.2d 335, *cert. denied*, 297 N.C. 610, 257 S.E.2d 218 (1979) (holding that if an action is discontinued, the trial court is required to follow Rule 4 to determine the date the action commenced). As discussed above, plaintiff's action is not deemed to have commenced until 9 June 2006 and therefore prejudgment interest was correctly calculated to begin on that date. *See* N.C. Gen. Stat. § 1A-1, Rule 4(e).

[2] Defendant also asserts that the trial court erred by only calculating the prejudgment interest until 24 August 2007, the date the judgment was entered. Defendant states that N.C. Gen. Stat. § 24-5(b) expressly provides interest to continue accruing "until the judgment is satisfied." N.C. Gen. Stat. § 24-5(b) (2007). Defendant is correct in that interest will continue to accrue on a judgment until it is satisfied; however, the additional interest accrued after judgment is entered has no bearing on the trial court's ability to award attorney's fees at the time of judgment. Defendant does not cite to any case which calculates the amount of judgment, pursuant to N.C. Gen. Stat. § 6-21.1, by adding interest that had accrued after the judgment had been entered. For purposes of N.C. Gen. Stat. § 6-21.1, the trial court uses the amount of prejudgment interest accrued on the date of entry of judgment to determine if it has the discretion to award attorney's fees.

To allow post-judgment interest for purposes of determining the $10,000.00 limit set forth in N.C. Gen. Stat. § 6-21.1 would allow and encourage non-prevailing parties to delay satisfying judgment in order to exceed the $10,000.00 threshold and avoid paying attorney's fees. This would frustrate the clear legislative intent of N.C. Gen. Stat. § 6-21.1. Thus, we hold that the trial court did not err in calculating prejudgment interest from 9 June 2006 to 24 August 2007, and therefore, was within its discretion in awarding attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1.

[3] Defendant further argues that the trial court's award of attorney's fees was improper because it did not meet the requirements of the N.C. Gen. Stat. § 6-21.5 (2007) by finding that "there was a complete absence of a justiciable issue of either law or fact" before awarding attorney's fees. N.C. Gen. Stat. § 6-21.5. However, the trial court did not award attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5, but instead awarded attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1, which does not have any such requirement. *See* N.C. Gen. Stat. § 6-21.1. Therefore, defendant's argument is without merit.

IV. Amount of Attorney's Fees

[4] Defendant argues that if we determine that the trial court had discretion to award attorney's fees to plaintiff, then its award of $12,255.00 is unreasonable. We disagree. When a trial court uses its discretion to determine the amount of attorney's fees, its award will not be disturbed without a showing of manifest abuse of its discretion. *West v. Tilley*, 120 N.C. App. 145, 151, 461 S.E.2d 1, 4 (1995). Before awarding attorney's fees, pursuant to N.C. Gen. Stat. § 6-21.1, the trial court must also make findings of fact concerning "the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence." *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 572, 551 S.E.2d 852, 856 (2001).

Defendant argues that the trial court abused its discretion because the amount of attorney's fees awarded is unreasonably disproportionate to the amount of damages awarded. However, it is a common occurrence in personal injury actions, for the attorney's fees to be considerably higher than the actual damages awarded. *See Wright v. Murray*, 187 N.C. App. 155, 651 S.E.2d 913 (2007) (finding that attorney's fees of $25,000.00 were reasonable on a $7,000.00 verdict); *Overton v. Purvis*, 162 N.C. App. 241, 591 S.E.2d 18 (2004) (holding that awarding $32,000.00 in attorney's fees was not excessive for a plaintiff who recovered $7,000.00 in damages); *Phillips v. Brackett*, 156 N.C. App. 76, 575 S.E.2d 805 (2003) (affirming the trial court's award of $15,231.50 in attorney's fees on a $3,829.98 verdict).

Defendant fails to recognize that the Legislature specifically enacted this statute to provide relief for claimants such as plaintiff. *See Hicks*, 284 N.C. at 239, 200 S.E.2d at 42 (explaining that the statute's purpose is provide relief for a person whose damages are in an amount so small that it is not economically feasible to bring suit on his claim if he must pay legal fees from his recovery). Here, plaintiff's attorney's fees exceeded her total award by $2,324.26. Without this remedy, plaintiff probably would have been deterred from pursuing her claim.

Furthermore, the trial court made the following factual findings regarding the amount of the attorney's fees:

> 9) Plaintiff's attorney has spent over Seventy-Four and One-third (74.3) hours in this action. Plaintiff's paralegal spent

in excess of Fourteen and Eight-tenths (14.8) hours in this action.

* * * *

16) The Plaintiff's attorney worked 74.3 hours on Plaintiff's case . . . . The Court finds that this time was reasonably necessary for prosecution of this case. The Court further finds that One Hundred Fifty dollars ($150.00) an hour is a reasonable rate for cases of this nature with a lawyer of this experience and skill. The Court also finds Seventy-five dollars ($75.00) an hour is a reasonable rate for cases of this nature for a paralegal to spend on this type of case and that Plaintiff's counsel used a paralegal for a total of 14.8 hours and that this time was reasonable and necessary.

In plaintiff's motion for attorney's fees, she provided the trial court with detailed time and billing statements from her attorney, which are included in the record on appeal. Plaintiff had initially requested $16,840.00 in attorney's fees. The trial court eliminated some of plaintiff's initial attorney's fees and, at defendant's request, reduced the hourly rate for plaintiff's counsel from $200.00 to $150.00. The trial court's factual findings indicate that it gave careful consideration to plaintiff's time and billing statements and to the arguments from both parties' counsel when making its determination. We find that competent evidence exists to support the amount of attorney's fees awarded and affirm the trial court's order.

It is important to note that the amount of attorney's fees can be directly attributed to defendant's auto insurance carrier, State Farm Insurance Company, and its failure to make any good faith attempts to resolve this matter. In its order, the trial court stated that, although defendant was "clearly negligent[,]" defendant's insurance company "refused to make any effort whatsoever to resolve the case from the institution of said action to the present." By refusing to compensate plaintiff for her injuries and property damage, defendant's insurance company delayed the matter, resulting in additional legal fees accruing for plaintiff.

At this point, defendant's insurance company has delayed paying plaintiff's counsel an additional year and has likely caused plaintiff to incur additional attorney's fees for this appeal. This common practice has deterred attorneys from representing plaintiffs in these actions due to the likely delay of payment for the attorney's services. We hope that in the future, N.C. Gen. Stat. § 6-21.1 will encourage insurance

companies to make efforts to resolve such personal injury claims quickly, so that they are not required to pay additional legal fees of the plaintiff.

V. Plaintiff's Motion For Sanctions

[5] Plaintiff has moved this Court to impose sanctions against defendant's counsel for filing a frivolous appeal pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 34(a)(1),(2) (allowing this Court to award sanctions if the appeal is "not well grounded in fact and warranted by existing law" or if the appeal was "taken or continued for an improper purpose"). However, defendant's counsel did raise a legitimate issue of law in his appeal that our Court had not previously addressed, concerning the interpretation of N.C. Gen. Stat. § 6-21.1 as it relates to Rule 4 of the North Carolina Rules of Civil Procedure. Thus, we deny plaintiff's motion for sanctions.

VI. Conclusion

For the foregoing reasons, we overrule defendant's assignments of error and affirm the judgment of the trial court. We also deny plaintiff's motion for sanctions.

Affirmed.

Judges McGEE and STROUD concur.

MARTY HOLLOWAY, EMPLOYEE, PLAINTIFF v. TYSON FOODS, INC., SELF-INSURED, EMPLOYER, DEFENDANT

No. COA07-930

(Filed 4 November 2008)

1. Workers' Compensation— spoilation—adverse inference not drawn

The decision of the Industrial Commission not to draw an adverse inference from spoilation of evidence in a workers' compensation case was reasonable and legally permissible. Spoilation gives rise to a permissible adverse inference as opposed to a presumption, plaintiff did not rely upon any other basis for sanc-

tions, such as the Rules of Civil Procedure, and the Commission's findings on the issue were sufficient.

2. Workers' Compensation— work-related injury—circumstances not known—no death

The Industrial Commission in a workers' compensation case properly denied the application of the presumption that an injury was work-related when the circumstances of work relatedness were unknown where no death occurred during the course of employment.

3. Workers' Compensation— causation—delay in calling 911—no expert evidence of result

The Industrial Commission did not err in a workers' compensation case by concluding that the 29-year-old plaintiff's employment did not increase the dangerous effect of his idiopathic cardiac condition, which led to a brain injury before he could be revived. Plaintiff pointed to a delay in calling 911 due to difficulty in finding a working telephone, but presented no expert evidence that the delay caused plaintiff to suffer more severe brain damage.

Appeal by plaintiff from opinion and award entered 4 April 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 January 2008.

David R. Paletta for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Bambee B. Blake and Ginny P. Lanier, for defendant-appellee.

GEER, Judge.

Plaintiff Marty Holloway appeals from an opinion and award of the Full Commission denying his claim for workers' compensation benefits. Plaintiff primarily argues on appeal that the Commission erred in not imposing sanctions on defendant Tyson Foods, Inc. for spoliation of evidence, including granting a presumption of compensability and monetary sanctions. Under controlling precedent, however, the spoliation of evidence gives rise to a permissive adverse inference and not a presumption. Moreover, the principle of spoliation of evidence as applied in North Carolina has evidentiary consequences and has not been relied upon as a basis for sanctions in the absence of other statutory or rule violations authorizing the imposi-

tion of sanctions. Because plaintiff has mistaken the law governing spoliation of evidence and has failed to demonstrate that the Commission's decision not to draw an inference adverse to defendant was unreasonable, we affirm.

Facts

Plaintiff has not assigned error to most of the Commission's findings of fact. Those findings are, therefore, binding on appeal, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991), and establish the following.

On 16 September 2002, the date of the alleged injury, plaintiff, who was 29 years old, was employed in the maintenance division of the packing department at Tyson Foods Roasted Products Plant in North Wilkesboro, North Carolina. As a maintenance employee, plaintiff was responsible for maintaining defendant's Linx 6200 Inkjet printers that were used to print "sell by" dates on the packages of chicken. The printers were prone to ink blockages, requiring plaintiff, as one of his routine tasks, to clean the printhead by using a solvent manufactured by Linx or by running a "Clear Nozzle Sequence."

On 16 September 2002, plaintiff was performing a nozzle clear to remove an ink blockage. Regina Wood, an employee in the Labeling Department, saw plaintiff standing by the line as she was walking to her worktable. The Commission found:

> She saw the plaintiff fall and he didn't have anything in his hands when he fell. She indicated that it was just like plaintiff's knees went out from under him. She did not hear any shouts or sounds from the plaintiff. The plaintiff was not flinging his arms when he fell. While Ms. Wood saw the plaintiff start to fall, she did not see the plaintiff actually come into contact with the ground.

Employees then contacted the plant nurse, Rebecca Houck. Subsequently, 911 was called.

Houck observed that plaintiff had no pulse, no respirations, his pupils were non-reactive, and his face was cyanotic. Houck and other employees performed CPR until the emergency medical technicians ("EMTs") arrived. The EMTs, who found plaintiff pulseless and in ventricular fibrillation, assessed plaintiff as being in cardiac arrest. They transported him to Wilkes Regional Medical Center where he was diagnosed with cardiac arrest that had led to anoxia.

Later that day, plaintiff was transferred to the Coronary Care Unit of Baptist Hospital. A cardiac catheterization on 16 September 2002

revealed normal coronary arteries. Plaintiff was discharged from Baptist Hospital to Carolina Institute of Rehabilitation on 16 October 2002 with discharge diagnoses of, among others, sudden cardiac arrest, ventricular fibrillation, Brugada syndrome, anoxic brain injury, and seizures. Plaintiff was discharged from the Institute of Rehabilitation on 27 November 2002 with a diagnosis of anoxic encephalopathy. Plaintiff was instructed to participate in physical therapy for eight to 10 weeks, occupational therapy for eight weeks, and speech therapy for 12 to 14 weeks.

On 27 December 2002, plaintiff was evaluated by Dr. Kenny Hefner with Medical Associates of Wilkes, who diagnosed plaintiff with status post cardiac arrest due to Brugada syndrome with mild persisting neurologic deficits. From December 2002 through February 2004, plaintiff participated in outpatient occupational, speech, and physical therapy at Wilkes Regional Medical Center Department of Rehabilitation Services.

A medical note from Baptist Hospital dated 14 January 2003 noted a concern that plaintiff may have received an electric shock while working on a printer, but indicated that there was no definite evidence that plaintiff had received a shock and ultimately concluded that plaintiff had suffered sudden cardiac death, with its etiology not being clear. On 21 January 2003, plaintiff underwent internal cardiac defibrillator ("ICD") placement. The Commission found that "the competent, persuasive medical evidence of record establishes that the placement of an ICD is treatment that would not be provided to someone who had experienced a one-time electrical shock injury. Rather, this treatment is consistent with someone who has idiopathic ventricular fibrillation." Plaintiff was also treated with a course of Amiodarone, which the Commission found "is not a treatment that is consistent with a one-time electrical shock injury."

Plaintiff applied for Social Security disability benefits on 15 January 2003 on the basis that he could not work after experiencing a cardiac arrest that resulted in brain injury. On 11 June 2003, the Social Security Administration deemed plaintiff disabled as of 16 September 2002 due to the primary diagnosis of organic mental disorders (chronic brain syndrome) and a secondary diagnosis of epilepsy.

Plaintiff filed a Form 18 on 8 May 2003 asserting that he was electrocuted while working on a machine, resulting in brain damage. Defendant denied plaintiff's claim in a Form 61 dated 26 August 2003 and in a second Form 61 dated 12 January 2004. In an opinion and

award filed 14 June 2005, Deputy Commissioner Wanda Blanche Taylor denied plaintiff's claim on the grounds that plaintiff's heart condition and brain damage were caused by an idiopathic condition and did not arise out of his employment.

Plaintiff appealed to the Full Commission. The Commission filed an opinion and award on 4 April 2007, affirming Deputy Commissioner Taylor's opinion and award with minor modifications. The Commission determined that plaintiff's injury was the result of a condition "that was idiopathic in nature" and, therefore, was not compensable and that "[n]o attribute of plaintiff's employment increased the dangerous effect of plaintiff's idiopathic condition." The Commission accordingly denied plaintiff's claim for workers' compensation benefits. Plaintiff timely appealed to this Court.

Discussion

Appellate review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). The Commission's findings of fact may only be set aside if there is a "complete lack of competent evidence to support them." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). This Court reviews the Commission's conclusions of law de novo. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

I

[1] Plaintiff first contends that the Commission erred in not imposing sanctions upon defendant as a result of spoliation of evidence. Plaintiff argues that defendant did not preserve the scene or the equipment involved—including the printer, the power cord, the power outlet, and the conveyor assembly—so as to allow experts to reconstruct the accident scene and determine whether there was an electrical hazard. Plaintiff sought, as sanctions for spoliation of evidence, a presumption of compensability, the payment of costs incurred for accident investigation, and attorneys' fees.

We first note that plaintiff does not, in his brief, specifically address the controlling North Carolina authority. While plaintiff presented the issue of spoliation as a matter of sanctions, our cases have held that the principle of "spoliation of evidence" means that "a party's intentional destruction of evidence in its control before it is made available to the adverse party can give rise to an inference that the evidence destroyed would injure its (the party who destroyed the evidence) case." *Red Hill Hosiery Mill, Inc. v. Magnetek, Inc.*, 138 N.C. App. 70, 78, 530 S.E.2d 321, 328, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 112 (2000). Although plaintiff sought a presumption of compensability as a consequence of the claimed spoliation, our courts "have determined that spoliation of evidence gives rise to an adverse inference as opposed to a presumption." *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 188, 527 S.E.2d 712, 719, *disc. review denied*, 352 N.C. 357, 544 S.E.2d 563 (2000). If, however, the evidence withheld or destroyed was equally accessible to both parties or there was a fair, frank, and satisfactory explanation for the nonproduction of the evidence, "the principle is inapplicable and no inference arises." *Id.* at 184, 527 S.E.2d at 716.

Nevertheless, even if a party presents evidence of spoliation sufficient to give rise to an adverse inference, that inference " 'is permissive, not mandatory.' " *Id.* at 185, 527 S.E.2d at 717 (quoting *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996)). As a result, if " 'the factfinder believes that the documents were destroyed accidentally or for an innocent reason, then the factfinder is free to reject the inference.' " *Id.* (quoting *Blinzler*, 81 F.3d at 1159). *See also Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 527, 613 S.E.2d 274, 281 (2005) ("The factfinder *is free* to determine the [evidence was] destroyed accidentally or for an innocent reason and reject the inference." (internal quotation marks omitted)).

In this case, the Commission concluded that "[t]he plaintiff's assertion that the defendant is subject to sanctions for spoliation of evidence is misplaced and without merit[,]" citing in support of that conclusion *Red Hill Hosiery*, *McLain*, and *Yarborough v. Hughes*, 139 N.C. 199, 209, 51 S.E. 904, 907-08 (1905), the case upon which both *Red Hill* and *McClain* relied. *McLain* specifically establishes that plaintiff's request for a burden-shifting presumption rather than an inference was "misplaced" and meritless, as the Commission observed. To the extent that plaintiff sought monetary sanctions, *Red Hill Hosiery*, *McLain*, and *Yarborough* indicate that the spoliation of evidence principle is an evidentiary matter.

While conduct giving rise to a spoliation inference might also support the imposition of sanctions under the Rules of Civil Procedure or other statutes, plaintiff did not rely upon any other basis for sanctions. *See Jones v. GMRI, Inc.*, 144 N.C. App. 558, 565, 551 S.E.2d 867, 872 (2001) (noting that plaintiffs failed to seek an instruction on spoliation, but instead contended that "the court should have used this doctrine as a basis to strike the defense pursuant to Rules 26(b)(3) and 37(b)(2)(B)"; holding that trial court did not abuse its discretion in denying sanctions), *cert. improvidently allowed*, 355 N.C. 275, 559 S.E.2d 787 (2002). Thus, the Commission was correct when it determined that the precise request made by plaintiff was not consistent with the law.

Further, it is apparent from the Commission's findings of fact that it considered plaintiff's contentions regarding spoliation, but chose not to draw an adverse inference. Although the Commission did not specifically reference spoliation in its findings of fact, the opinion and award contains extensive findings directly relevant to the issue, including findings regarding what defendant's employees did with the printer, testing conducted on the printer, reasons that the printer was returned to service, testing by the printer's manufacturer, the location of the printer on subsequent dates, the testing of the printer and other equipment by defendant's expert, and plaintiff's expert's testing. The Commission acknowledged that plaintiff's expert "implied that Tyson refurbished the plaintiff's printer in anticipation of his inspection, although he put forth no evidence to substantiate this allegation." The Commission decided to "give[] little weight to the opinion of [plaintiff's expert] because there is insufficient evidence of record to substantiate the same." The Commission further found: "The record shows that prior to September 16, 2002, there had never been any kind of electrical shock issues with any of the Linx 6200 inkjet printers at Tyson Foods. Tyson Foods continued to use the plaintiff's printer through July/August 2004 without incident." We hold that the Commission's findings are sufficient to address the issue of spoliation.

The Commission, acting as the trier of fact, was free to accept or reject the inference. "Inferences from circumstances when reasonably drawn are permissible and that other reasonable inferences could have been drawn is no indication of error; deciding which permissible inference to draw from evidentiary circumstances is as much within the fact finder's province as is deciding which of two contradictory witnesses to believe." *Snow v. Dick & Kirkman, Inc.*, 74 N.C.

App. 263, 267, 328 S.E.2d 29, 32, *disc. review denied*, 314 N.C. 118, 332 S.E.2d 484 (1985). Based upon our review of the record and the Commission's findings of fact, we believe that the Commission's decision not to draw an adverse inference was reasonable and legally permissible. *See id.* ("In this instance the inferences as to accident and effect that the Commission drew from the wealth of competent evidence presented were both factually reasonable and legally permissible in our opinion."); *Westbrooks v. Bowes*, 130 N.C. App. 517, 526, 503 S.E.2d 409, 415 (1998) ("In our opinion, the inferences drawn by the Commission regarding the cause of Westbrooks' death are factually reasonable and legally permissible.").

II

[2] Plaintiff next contends that the Commission erred when it concluded: "Plaintiff is not entitled to any presumption that this claim is compensable. The *Pickrell* presumption does not extend to a plaintiff who survives his injury. *Janney v. J.W. Jones Lumber Co.*, 145 N.C. App. 402, 550 S.E.2d 543 (2001)." In *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 370, 368 S.E.2d 582, 586 (1988), our Supreme Court held: "In cases . . . where the circumstances bearing on work-relatedness are unknown and the death occurs within the course of employment, claimants should be able to rely on a presumption that death was work-related, and therefore compensable, whether the medical reason for death is known or unknown."

In *Janney v. J.W. Jones Lumber Co.*, 145 N.C. App. 402, 406, 550 S.E.2d 543, 546 (2001), this Court specifically limited *Pickrell* to cases involving deaths: "[W]e decline to adopt the *Pickrell* presumption in this workers' compensation case not resulting in death." *Id.* The Court considered and rejected the argument—made also by plaintiff in this case—that his lack of memory placed him in the same position as the *Pickrell* plaintiff. *Id.* (explaining that although employer may be in better position than deceased employee's family to present evidence on cause of death, "[t]he same cannot be said for an employee who has survived his injury, even an employee who cannot remember the details of his accident").

Although plaintiff argues extensively in his brief as to why the *Pickrell* presumption should apply, he never addresses *Janney*. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d

30, 37 (1989). Accordingly, the Commission properly determined under *Janney* that the *Pickrell* presumption did not apply in this case.

III

[3] Finally, plaintiff contends that even if his brain injury was caused by an idiopathic condition, he was entitled to compensation because hazardous conditions of employment contributed to that injury. Plaintiff points to the fact that the plant nurse asked an employee to call 911, but the phones in the packing department and in a nearby office were not working. The employee ultimately reached the front desk, which in turn relayed the message to the guard post, and an employee at the guard post called 911. Plaintiff contends that there was a delay of 19 minutes in calling 911.

In arguing that this delay entitled him to compensation, plaintiff asserts: "Regardless of the cause of this emergency, Mr. Holloway sustained a more severe injury as a result of the danger Tyson created by restricting access to an outside phone line that could call 911." Plaintiff, however, failed to present any expert evidence to support this assertion. Although plaintiff points to Dr. David Sane's testimony that "it's quite likely that [plaintiff] sustained brain damage prior to arrival at the Wilkes County ED[,]" neither Dr. Sane nor any other expert witness testified that the delay in calling 911 caused plaintiff to suffer more severe brain damage. *See Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) ("[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.").

Plaintiff explored generally with Dr. Sane the importance of CPR and defibrillation. Dr. Sane confirmed that the optimum time frame to defibrillate a person in cardiac arrest is "[i]mmediately." He agreed (1) that the sooner an individual in cardiac arrest has his heart restarted, the better it is for the patient and (2) that CPR with defibrillation is more beneficial than CPR without defibrilliation. Dr. Sane also testified that "the longer you do CPR without restoring the cardiac rhythm to normal then that does carry a greater risk of brain damage and other damage." When, however, asked what was the most likely point in time that plaintiff sustained brain damage, Dr. Sane responded that "the greatest risk would've been the time when he was not receiving any resuscitated therapy or any CPR or the like, so prior to the onset of the CPR would've been the greatest period of risk."

The record thus lacks the necessary evidence that the claimed 19-minute delay between the plant nurse's starting CPR and the 911 call in fact contributed to a worsening of plaintiff's brain damage.

This Court has held: "When the employee's idiopathic condition is the sole cause of the injury, the injury does not arise out of the employment. The injury does arise out of the employment if the idiopathic condition of the employee combines with 'risk[s] attributable to the employment' *to cause* the injury." *Mills v. City of New Bern*, 122 N.C. App. 283, 285, 468 S.E.2d 587, 589 (1996) (emphasis added) (internal citations omitted) (quoting *Hollar v. Montclair Furniture Co.*, 48 N.C. App. 489, 496, 269 S.E.2d 667, 672 (1980)). Plaintiff failed to make the necessary showing of causation and, therefore, the Commission did not err in concluding that "[n]o attribute of plaintiff's employment increased the dangerous effect of plaintiff's idiopathic condition."

Affirmed.

Judges TYSON and STROUD concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. TIMOTHY FRANKLIN BALLARD, III, DEFENDANT

No. COA08-196

(Filed 4 November 2008)

1. Homicide— first-degree murder—not guilty instruction—plain error analysis

The trial court did not commit plain error in a first-degree murder case by allegedly failing to instruct the jury that if the State failed to prove any element of the charged offense, or any lesser-included offense, it must find defendant not guilty because: (1) the instructions stated that defendant should be found not guilty if the jury has reasonable doubt as to any elements of the charged crimes or if the jury finds defendant acted in self-defense; and (2) the trial court used the relevant sections of North Carolina Pattern Jury Instructions—Criminal 206.10 almost verbatim to instruct the jury as to the charged crimes, which included a "not guilty" instruction, the verdict sheet provided an

option of "not guilty," and there was no confusion as to other additional charges.

2. Jury— request to reexamine testimony—trial court exercised discretion to deny request

The trial court did not commit plain error in a first-degree murder case by denying the jury's request for the testimony of three witnesses on the ground that it would be inconvenient to produce because: (1) the trial court stated it had the discretion to order it, but it was not going to do so since it was completely impractical; and (2) the trial court thus recognized the authority to order the jury to reexamine testimony read back or transcribed, but in its discretion denied the jury's request.

3. Criminal Law— instruction—flight

The trial court did not commit plain error in a first-degree murder case by instructing the jury on defendant's flight because: (1) a trial court may instruct a jury on a defendant's flight where there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged; and (2) defendant's own testimony was enough to warrant the instruction as there was evidence defendant left the scene of the crime and took steps to avoid apprehension.

Appeal by defendant from judgment entered on or about 18 July 2007 by Judge Dennis J. Winner in Superior Court, Henderson County. Heard in the Court of Appeals 9 September 2008.

Attorney General Roy A. Cooper, III by Special Deputy Attorney General R. Marcus Lodge, for the State.

Reita P. Pendry, for defendant-appellant.

STROUD, Judge.

Defendant appeals from his conviction by a jury of second-degree murder. Defendant argues the trial court plainly erred in "failing to instruct the jury that if the [S]tate failed to prove any element of the charged offense, or any lesser included offense, it must find defendant not guilty[,]" and "denying the jury's request for the testimony of three witnesses[,]" and erred in instructing the jury on flight. For the following reasons, we find no prejudicial error.

I. Background

The State's evidence tended to show the following: Defendant and the victim lived together in a trailer on Kristilia Lane. Defendant and the victim were having problems because the victim owed defendant money. On 29 July 2006, defendant's brother, Luther Ballard, told defendant he was thinking of selling his .41 Magnum Smith & Wesson handgun, and defendant bought the gun.

Defendant testified that he and his brother Norman went to the trailer to get some of his stuff. Defendant claims the victim said he was going to kill him and that he shot the victim in self-defense. Defendant "was so scared [he] emptied the pistol." When Detective Scott Galloway ("Detective Galloway") of the Henderson County Sheriff's Department responded to a dispatch about the shooting on Kristilia Lane, he blocked defendant's escape, and defendant got out of his car and surrendered.

On or about 27 November 2006, defendant was indicted for first-degree murder. On or about 16 July 2007, a jury found defendant guilty of second-degree murder. On or about 18 July 2007, the trial court sentenced defendant to a minimum term of 216 months to a maximum term of 269 months imprisonment. Defendant argues the trial court plainly erred in "failing to instruct the jury that if the [S]tate failed to prove any element of the charged offense, or any lesser included offense, it must find defendant not guilty[,]" and "denying the jury's request for the testimony of three witnesses[,]" and erred in instructing the jury on flight. For the following reasons, we find no prejudicial error.

II. Jury Instructions as to Elements of the Charged Offenses

[1] Defendant first contends that

> [t]he trial court's instruction never told the jury that if it found that the State had failed to prove each essential element of first degree murder, it must find the defendant not guilty of that offense. Likewise, the trial court's instruction never told the jury that if the State failed to prove each essential element of second-degree murder, it must find the defendant not guilty of that offense.
>
> . . . .
>
> The court's instructions left the jury to think that it could choose the most likely offense of three—first degree murder,

> second degree murder, or voluntary manslaughter—rather than correctly informing the jury that it had to consider each charge separately, assess whether the State had met its burden as to that charge, and if it had not, enter a verdict of not guilty to that charge.

We disagree.

When a defendant fails to object to the trial court's jury instructions, he has failed to preserve the issue for appellate review. *See* N.C.R. App. P. 10(b)(2). Defendant concedes that he failed to object to the jury instructions on this issue. Therefore, the instructions are reviewed only for plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "A prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all." *State v. Johnson*, 320 N.C. 746, 750, 360 S.E.2d 676, 679 (1987) (citation and quotation marks omitted). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Odom* at 661, 300 S.E.2d at 378-79.

The trial court used the relevant sections of the North Carolina Pattern Jury Instructions—Criminal 206.10, almost verbatim, to instruct the jury as to the charged crimes. The trial court's instructions in pertinent part were,

> Therefore, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally, but not in self-defense, killed the victim with a deadly weapon, thereby proximately causing the victim's death; and that the defendant acted with malice, with premeditation or with deliberation, it would be your duty to return a verdict of guilty of First-Degree Murder. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of First-Degree Murder.
>
> If you do not find the defendant guilty of First-Degree murder, you must determine whether he is guilty of Second-Degree murder. If you find from evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and with malice, but not in self defense, wounded the victim with a deadly weapon, thereby proximately causing the victim's death, it would be your duty to return a verdict of guilty of Second-Degree Murder. If you do not so find or have a reasonable doubt as to one or

more of these things, you will not return a verdict of guilty of Second-Degree murder.

If you do not find the defendant guilty of Second-Degree Murder, you must consider whether he is guilty of Voluntary Manslaughter. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the victim with a deadly weapon and thereby proximately causing the victim's death, and that the defendant was the aggressor in bringing on the fight, or used excessive force, it would be your duty to find the defendant guilty of voluntary manslaughter, even if the State has failed to prove that the defendant did not act in self defense.

Or if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally, and not in self defense, wounded the victim with a deadly weapon and thereby proximately caused the victim's death, that the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of Voluntary Manslaughter. If you do not so find or have a reasonable doubt as to one or more of these things, you will return a verdict of Not Guilty.

And finally, if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self defense, then the defendant's action would be justified by self defense. Therefore you would return a verdict of not guilty.

"This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994) (citation omitted); *disc. review denied*, 339 N.C. 610, 454 S.E.2d 247 (1995). "Jury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law." *Carrington v. Emory*, 179 N.C. App. 827, 829, 635 S.E.2d 532, 534 (2006) (citing *State v. Anthony*, 354 N.C. 372, 395, 555 S.E.2d 557, 575 (2001)).

In spite of the trial court's accurate instructions of the relevant law pursuant to the pattern jury instructions, defendant directs our attention to three cases, *State v. Jenkins*, 189 N.C. App. 502, 658 S.E.2d 309 (2008); *State v. McArthur*, 186 N.C. App. 373, 651 S.E.2d 256 (2007); *State v. McHone*, 174 N.C. App. 289, 620 S.E.2d 903 (2005),

arguing that these cases require the trial court to give instructions to find the defendant not guilty if the jurors have a reasonable doubt or if the State fails to meet its burden as to any of the elements of the charged offense. All of these cases are clearly distinguishable from the present case. In *Jenkins*, this Court concluded that "the omission of 'not guilty' on the verdict form is reversible error." See *Jenkins* at 504, 658 S.E.2d at 311. However, in the case at bar, there was a "not guilty" option on the verdict form.

In McArthur, this Court concluded that

> we are required to award defendant a new trial because of the trial court's failure to include a specific instruction directing the jury to enter a verdict of not guilty if it found that the State had failed to prove any of the elements of the charged crimes beyond a reasonable doubt.

McArthur at 380, 651 S.E.2d 260. However, in the present case, unlike in *McArthur*, the trial court explicitly instructed the jury in its final mandate that, "If you do not so find or have a reasonable doubt as to one or more of these things, you will return a verdict of Not Guilty." The trial court provided the "not guilty" instructions before stating, "And finally, if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self defense, then the defendant's action would be justified by self defense. Therefore you would return a verdict of not guilty." Thus, in the present case, the instructions make it clear that defendant should be found not guilty if the jury has reasonable doubt as to any elements of the charged crimes *or* if the jury finds defendant acted in self defense.

In *McHone*, this Court concluded that the trial court committed plain error where the trial court as to the charge of first-degree murder failed "to provide a not guilty final mandate[,]" "the verdict sheet itself did not provide a space or option of 'not guilty'[,]" and there was additional confusion due to the trial court providing the final mandate and the "not guilty" option on the verdict sheet on the charge of armed robbery. *McHone* at 296-99, 620 S.E.2d at 909-10, *disc. review denied*, 362 N.C. 368, 628 S.E.2d 9 (2006). In the present case, the trial court provided the final mandate almost verbatim from North Carolina Pattern Jury Instruction 206.10, which included a "not guilty" instruction, the verdict sheet provided an option of "not guilty," and there was no confusion as to other additional charges. We conclude that the trial court did in fact "instruct the jury that if the [S]tate failed to prove any element of the charged offense, or any

lesser included offense, it must find defendant not guilty." Therefore, defendant's argument is overruled.

III. Denial of Jury's Request

[2] Defendant argues that "the trial court plainly erred in denying the jury's request for the testimony of three witnesses on the ground that it would be inconvenient to produce it." In the instant case, the jury sent a note to the trial judge requesting the testimony of three witnesses: Rebekah Mejia, Steve Harris, and Timothy Ballard. Subsequent to this request, the trial court informed the jury,

> THE COURT: Members of the jury, you have requested the testimony of three witnesses.
>
> I've got the discretion to order that, but I'm not going to do that. And I want to tell you why. It's just completely impractical, because the court reporter would have to go and type it all up, which means that I would have to send you all home now and bring you back Monday—assuming she—and force her to do it over the weekend.
>
> That's the only way the testimony is available. So, consequently I'm going to have to deny you alls request for that. Remember it's your duty to remember all the evidence, and to take your recollection of it, rather than what the attorneys have told you it is, if there's some conflict between the two.

As defendant failed to object to this issue at trial he again concedes that plain error is the proper standard of review. *See Odom* at 661, 300 S.E.2d at 378-79. N.C. Gen. Stat. § 15A-1233(a) reads,

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2005).

Defendant cites numerous cases that he contends are analogous to the present case; however, we conclude this case is controlled by

State v. James, 182 N.C. App. 698, 643 S.E.2d 34 (2007). In *James*, the jury requested it be allowed to review two witnesses' testimony. *Id.* at 706, 643 S.E.2d at 39. In response to this request the trial court stated,

> I would instruct you, or tell you, that although the Court Reporter does make a record of the testimony in the trial, it is not done or not produced as the testimony is being given—and the term is that it is being done in real time—but rather is later prepared by the Court Reporter. The Court Reporter takes the record that he has made and reduces it to a typed report, which takes some time. So I am not going to stop your deliberations and send him to type this transcript and come back at some later time to present that to you.
>
> So, in my discretion, I am not going to supply you with transcripts of the testimony but would instruct you to use your recollection as to the testimony of those other two witnesses, and the other witnesses in the trial.

Id.

The defendant in *James* argued that

> this exchange shows the trial court did not understand that it had the authority to allow the jury to reexamine testimony, and that this misunderstanding prejudiced him. In support, defendant cites *State v. Barrow*, 350 N.C. 640, 517 S.E.2d 374 (1999), and other cases in which the trial court failed to realize that it had discretion to grant or deny a jury's request to reexamine evidence.

Id.

However, this Court found no error and concluded that

> the facts of this case are more analogous to *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985), where a trial court recognized the authority to order the jury to reexamine testimony read back or transcribed, but in its discretion denied the jury's request. Here, the trial court noted that it would be time consuming for the testimony to be transcribed, but never indicated it lacked authority to order the court reporter to transcribe the requested testimony. The trial court further noted that it was denying the request at its discretion, which implies that the court understood that it could have granted the request at its discretion but chose not to do so. This is the distinguishing fact between the *Barrow* line of cases

and the *Burgin* line of cases, and places this case squarely with the latter.

Id.

Here too defendant cites to *State v. Barrow*, 350 N.C. 640, 517 S.E.2d 374 (1999). However, as the trial court here stated, "I've got the discretion to order that, but I'm not going to do that. And I want to tell you why. It's just completely impractical . . . .[,]" we conclude that this case is controlled by *James* citing *Burgin* "where a trial court recognized the authority to order the jury to reexamine testimony read back or transcribed, but in its discretion denied the jury's request." *Id.* Accordingly, this assignment of error is overruled.

IV. Jury Instructions on Flight

[3] Defendant next contends that "the trial court erred in instructing the jury on defendant's flight" as "[t]he instruction was not supported by the evidence." Defendant further contends that this is prejudicial to him because "flight could be evidence of consciousness of guilt . . . . [and] the jury could use it to infer that his claim of self-defense was not valid." We disagree.

The trial court instructed the jury on defendant's flight as follows:

> The State contends and the defendant denies that the defendant fled. Evidence of flight may be considered by you, together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient by itself to establish the defendant's guilt. Further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation or deliberation.

Here defendant objected to the flight instruction, and thus we review

> jury instructions contextually and in its entirety. 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. 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.

State v. Glynn, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554, *disc. review denied*, 360 N.C. 651, 637 S.E.2d 180 (2006) (citation, quotation marks, ellipsis, and bracket omitted).

A trial court may instruct a jury on a defendant's flight where "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (citations and quotation marks omitted).

> [M]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension. However, there need only be some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.

State v. Westall, 116 N.C. App. 534, 549, 449 S.E.2d 24, 33 (citation and quotation marks omitted), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994).

In the instant case, according to defendant's own testimony he took off his jacket, wrapped up the gun, and placed it in the car floorboard. Defendant gave the money he had to his brother, but defendant's brother gave it back with the car keys and told defendant to "Go[.]" Defendant left the scene and parked the car. At this point defendant claims he got out of his car when he saw an officer approaching. However, according to Detective Galloway, when he approached Kristilia Lane, defendant was doing a U-turn and Detective Galloway blocked defendant's car with his car. This testimony is enough to warrant an instruction on flight as there is evidence defendant left the scene of the crime and "took steps to avoid apprehension." *Westall* at 549, 449 S.E.2d at 33. This argument is overruled.

V. Conclusion

For the foregoing reasons we find no error in the trial court's jury instructions or in its denial to provide the jury with a transcript.

NO ERROR.

Judges McGEE and McCULLOUGH concur.

DEBRA SIZEMORE HENSLEY, ADMINISTRATRIX OF THE ESTATE OF ASHLEY NICOLE HENSLEY RAYMER, DECEASED, PLAINTIFF v. NATIONAL FREIGHT TRANSPORTATION, INC.; TDY INDUSTRIES, INC., D/B/A ALLVAC; LARRY ALLEN SMITH, INDIVIDUALLY AND D/B/A LARRY ALLEN SMITH TRUCKING; PAUL WAYNE SMITH, INDIVIDUALLY AND D/B/A LARRY ALLEN SMITH TRUCKING; ROBERT E. SMITH, INDIVIDUALLY AND D/B/A ALLEN SMITH TRUCKING; AND ALLEN SMITH TRUCKING, A *DE FACTO* NORTH CAROLINA PARTNERSHIP, DEFENDANTS

No. COA07-1544

(Filed 4 November 2008)

Negligence— freight falling from flatbed truck—responsibility for loading truck—issue of fact

Summary judgment should not have been granted for defendant shipper in a negligence action which resulted from a death of a motorcycle passenger after a coil of wire fell from a pallet on a flatbed truck onto an interstate highway. There was an issue of fact as to whether the shipper or the carrier was responsible for loading the truck.

Judge Tyson dissenting.

Appeal by plaintiff from judgment entered 23 August 2007 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 May 2008.

Guthrie, Davis, Henderson & Staton PLLC, by Dennis L. Guthrie, John H. Hasty, and Justin N. Davis, for plaintiff appellant.

Womble Carlyle Sandridge & Rice, PLLC, by James P. Cooney and Tricia Morvan Derr, for TDY Industries, Inc., d/b/a Allvac defendant appellee.

McCULLOUGH, Judge.

Plaintiff appeals from a trial court order granting defendant's motion for summary judgment. We reverse and remand.

FACTS

On 30 June 2005, Robert Smith ("Robert"), a truck driver who worked for National Freight Transportation, Inc. ("National Freight"), drove a flatbed truck to the TDY Industries, Inc., d/b/a Allvac ("Allvac") facility in Richburg, South Carolina to pick up a load of zir-

conium wire coil. The coils were lying on four pallets that were to be loaded onto the truck. One of the pallets held four coils, while the remaining pallets each held a single coil. Robert instructed the facility's forklift operator to load the pallets onto the truck and provided guidance as to where the pallets should be placed. Unhappy with the look of the pallet holding four coils, Robert instructed the facility workers to remove that pallet and band the coils. Robert then directed the forklift operator to replace the coils and used additional straps to secure the coils. After securing the coils, Robert signed a bill of lading and drove the truck to the Allvac plant in Monroe, North Carolina. Once in Monroe, Robert was informed that the plant was closed, so he checked the straps securing the load, tightened those straps that felt loose, and drove the truck to Harrisburg, North Carolina.

On 1 July 2005, Robert again drove to the Allvac Plant in Monroe. Before he left, he checked the load and tightened some of the straps. Upon arriving at the Monroe plant, Robert directed Allvac employees as to where to place additional materials on the truck. Robert tied down the materials, checked all the straps, tightened them, and drove the truck to a garage in Harrisburg.

On 4 July 2005, Larry Smith ("Larry"), who also worked for National Freight, left the garage with the truck and began to drive to Huntsville, Alabama. On his way to Huntsville, Larry heard a noise while driving southbound on Interstate 85. Larry looked in his right-hand mirror and saw sparks coming from the back of the truck. Thinking he may have lost a wheel, Larry stopped the truck at the side of the road. After inspecting the truck and his cargo, Larry determined that one of the coils had fallen off his truck.

On the evening of 4 July 2005, Ashley Nicole Hensley Raymer ("decedent") was riding on the back of a motorcycle being driven by Jeffrey Eugene Wellman. The two were driving on Interstate 85 in Mecklenburg County when Mr. Wellman observed sparks approximately 25 to 35 yards ahead of the motorcycle. Mr. Wellman moved the vehicle to dodge debris in the road, but was unable to dodge the coil lying in the road. The motorcycle struck the coil and ejected decedent into the road. An oncoming truck then struck decedent, causing her to sustain serious injuries. Decedent died as a result of those injuries later that evening.

On 8 December 2005, Debra Sizemore Hensley, Administratrix of the Estate of Ashley Nicole Hensley Raymer, deceased ("plaintiff"),

filed a complaint against National Freight, Allvac, Larry Allen Smith, Paul Wayne Smith, and Larry Allen Smith Trucking ("defendants") alleging defendants' negligence was the proximate cause of decedent's injuries. On 10 July 2007, Allvac filed a motion for summary judgment, asserting that no material question existed as to Allvac's liability for decedent's injuries. On 23 August 2007, the trial court granted the motion and dismissed all of plaintiff's claims against Allvac. Plaintiff now appeals.

I.

Plaintiff argues on appeal that the trial court erred in entering summary judgment in favor of Allvac. We agree.

"In ruling on a motion for summary judgment, the court does not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980). Where a party has moved for summary judgment, the movant bears the burden of showing "that there is no triable issue of fact and that he is entitled to judgment as a matter of law." *Id.* The movant may meet this burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). However, "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant." *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008). "[I]t is only in exceptional negligence cases that summary judgment is appropriate, since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court." *Ragland*, 299 N.C. at 363, 261 S.E.2d at 668. On appeal, a trial court's grant of summary judgment will be reviewed *de novo*. *Lord*, 191 N.C. App. at 293, 664 S.E.2d at 334.

"North Carolina follows the lex loci delicti rule (law of the situs of the claim) in resolving choice of law for tort claims." *Terry v. Pullman Trailmobile*, 92 N.C. App. 687, 690, 376 S.E.2d 47, 49 (1989). "The law of the place where the injury occurs controls tort claims, because an act has legal significance only if the jurisdiction where it occurs recognizes that legal rights and obligations ensue from it." *Id.* Here, decedent was injured in North Carolina so her substantive rights with regard to negligence must be determined by North Carolina law. *See id.*

Our state Legislature has determined that "[t]he [North Carolina Division of Motor Vehicles] may adopt any rules necessary to carry out the provisions of this Article." N.C. Gen. Stat. § 20-37.22 (2007). According to the Division,

> [t]he rules and regulations adopted by the U.S. Department of Transportation relating to safety of operation and equipment (49 CFR Parts 390-397 and amendments thereto) shall apply to all for-hire motor carriers and all for-hire motor carrier vehicles, and all private motor carriers and all private motor carrier vehicles engaged in interstate commerce over the highways of the State of North Carolina if such vehicles are commercial motor vehicles as defined in 49 CFR Part 390.5.

19A N.C.A.C. 3D.0801 (2007).

The Code of Federal Regulations provides, in pertinent part, that "[a] driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless . . . [t]he commercial motor vehicle's cargo is properly distributed and adequately secured[.]" 49 C.F.R. § 392.9(a)(1) (2007). Further, under these regulations, the driver of the truck has an affirmative duty to ensure the truck's cargo is properly distributed and adequately secured before he operates the vehicle. *Id.* "While not dispositive, [these regulations are] indicative of the proper allocation of duty as between a common carrier and a shipper for the proper loading of goods." *Rector v. General Motors Corp.*, 963 F.2d 144, 147 (6th Cir. Ky. 1992).

Under federal law, "[t]he primary duty as to the safe loading of property is therefore upon the carrier." *U.S. v. Savage Truck Line*, 209 F.2d 442, 445-46 (4th Cir. Va. 1953), *cert. denied*, 347 U.S. 952, 98 L. Ed. 1098 (1954). However,

> "[w]hen the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper."

Franklin Stainless Corp. v. Marlo Transport Corp., 748 F.2d 865, 868 (4th Cir. Va. 1984) (citation omitted).

In the case *sub judice*, Allvac filed a motion for summary judgment alleging National Freight assumed the responsibility for the

loading of the truck, and thus, Allvac was not liable for the accident. The trial court reviewed the motion and granted summary judgment, holding that there existed no genuine issue of material fact and that Allvac was entitled to judgment as a matter of law. On appeal, plaintiff argues the trial court erred in granting summary judgment because a genuine issue of material fact remains as to whether Allvac is liable for the negligent loading of the truck.

Our review of the record reveals that the loading of the truck was supervised by Robert Smith, the driver for National Freight. Robert instructed the facility workers on where to put the coils on the truck, directed that facility workers remove some of the coils, and requested that these coils be banded. Robert then instructed the facility workers on where to place the banded coils on the truck. Once the truck was loaded, Robert inspected the load and signed a bill of lading indicating that the truck had been "loaded and braced in accordance with the truck drivers' instructions."

Although the evidence demonstrates that Robert played a prominent role in the loading of the truck, the record on appeal also contains some evidence that Allvac, the shipper, maintained responsibility as to how the truck should be loaded. Mr. Smith testified that when the facility workers first loaded the truck, the four coils on the pallet in question were stacked on top of each other. According to Robert's testimony, when he inquired as to why they were being shipped in this manner, the forklift operator at the facility responded, "that's the way they wanted them shipped." Further, Robert testified that although he requested the coils be banded by the facility workers, he could not "tell them how to band it." Thus, Robert's testimony serves as evidence that Allvac maintained the ultimate responsibility in determining how the coils would be packaged and shipped on the truck.

After reviewing the arguments before us, we hold an issue of material fact remains as to which party bore the responsibility for the loading of the truck. Thus, the jury, and not the trial court, should make the determination of whether Allvac is liable for plaintiff's injuries.[1] Accordingly, we reverse the trial court's grant of summary

1. In its brief, Allvac argues that even if it bore responsibility for the loading of the truck, such improper loading was apparent, and thus, National Freight would be liable for failing to take further steps to secure the cargo. Although Allvac may be correct in this assertion, we hold this to be a question for the trier of fact. Therefore, summary judgment is not appropriate on this issue. *See Ebasco Service, Inc. v. Pacific Intermountain Express Co.*, 398 F. Supp. 565 (S.D.N.Y. 1975).

judgment and remand the case for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judge STROUD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge dissenting.

The majority opinion erroneously reverses the trial court's grant of summary judgment for TDY Industries, Inc. d/b/a Allvac ("Allvac") and remands the case for further proceedings. The trial court correctly ruled there are no genuine issues of material fact and Allvac is entitled to judgment as a matter of law. The trial court's judgment should be affirmed. I respectfully dissent.

I. 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, 671-72, 649 S.E.2d 658, 661 (2007) (internal citations and quotations omitted).

II. Analysis

The majority's opinion holds that "an issue of material fact remains as to which party bore the responsibility for the loading of the truck." I disagree.

The Code of Federal Regulations provides:

> A driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless—
>
> (1) The commercial motor vehicle's cargo is properly distributed and adequately secured as specified in §§ 393.100 through 393.142 of this subchapter.

49 C.F.R. § 392.9(a) (2005).

This Federal Regulation is consistent with N.C. Gen. Stat. § 20-116(g)(1) (2005), which provides:

> No vehicle shall be driven or moved on any highway unless the vehicle is constructed and loaded to prevent any of its load from falling, blowing, dropping, shifting, leaking, or otherwise escaping therefrom, and the vehicle shall not contain any holes, cracks, or openings through which any of its load may escape.

Both the Federal Regulation and our State place the liability for securing the load on a vehicle upon the carrier and driver of the vehicle, not the shipper.

The United States Court of Appeals for the Fourth Circuit has stated:

> The primary duty as to the safe loading of property is therefore upon the carrier. When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.

United States v. Savage Truck Line, 209 F.2d 442, 445 (4th Cir. 1953), *cert. denied*, 347 U.S. 952, 98 L. Ed. 1098 (1954); *see also Franklin Stainless Corp. v. Marlo Transport Corp.*, 748 F.2d 865, 868 (4th Cir.

1984) ("Responsibility for obviously improper loading generally rests on the carrier, and it must indemnify the shipper even though the shipper loaded the truck." (Citing *General Electric Co. v. Moretz*, 270 F.2d 780 (4th Cir. 1959); *Savage Truck Line*, 209 F.2d at 442)).

Here, Allvac showed "entitlement to summary judgment" when plaintiff could not establish Allvac owed plaintiff's decedent any duty to load or transport the coils safely, "an essential element of [plaintiff's] claim . . . ." *Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661; *see also Petty v. Print Works*, 243 N.C. 292, 298, 90 S.E.2d 717, 721 (1956) ("To recover damages for actionable negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." (Citation omitted)).

There is no genuine issue of material fact that Robert Smith, the driver who picked up the load at Allvac,: (1) instructed the forklift operator on where to place the coils on the truck; (2) instructed the forklift operator to take the coils off the truck and to band them; (3) instructed the forklift driver on where to replace the coils on his truck after banding; (4) inspected the load before leaving Allvac; (5) was satisfied that the truck had been loaded in accordance with his standards and his instructions; (6) signed two bills of lading, both of which acknowledged that the truck had been "loaded and braced in accordance with [his] instructions[;]" and (7) acknowledged that it was his job, his duty, and his responsibility, as the driver of the truck, to be sure that the coils were properly loaded with his instructions.

Once Allvac established its "entitlement to summary judgment[,]" "the burden shift[ed] to [plaintiff] to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [s]he can at least establish a *prima face* case at trial." *Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661. Plaintiff failed to produce any forecast of genuine issues of material fact to show that Allvac had retained or assumed any responsibility for the manner of or oversight over the loading or transporting of the coils.

The incident where plaintiff's decedent was killed, occurred five days and hundreds of miles after the shipment left Allvac's facility. Plaintiff failed to carry her burden "to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [s]he can at least establish a *prima facie* case at trial." *Id.* The trial court properly granted Allvac's motion for summary judgment and its judgment should be affirmed.

III. Conclusion

After Allvac showed entitlement to summary judgment, plaintiff failed "to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [s]he can at least establish a prima face case at trial." *Id.* An essential element of her claim is absent. Under our standard of review, the trial court properly granted Allvac's motion for summary judgment. *Id.* at 671-72, 649 S.E.2d at 661. I vote to affirm the trial court's order and respectfully dissent.

STATE OF NORTH CAROLINA v. ANTWAN L. ASH

No. COA07-1456

(Filed 4 November 2008)

1. Homicide— first-degree murder based on felony murder— robbery with dangerous weapon—sufficiency of evidence— corroborating evidence supporting confession

The trial court did not err by failing to dismiss the charges of first-degree murder and robbery with a dangerous weapon even though defendant contends his confession was the only evidence that the victim's property was taken and there was a lack of corroborating evidence to support the submission of this case to the jury because the State presented substantial independent evidence tending to support defendant's confession that permitted a reasonable inference that defendant unlawfully used a firearm to take the personal property of another and that a killing resulted during the perpetration of the crime.

2. Criminal Law— voluntary intoxication—failure to give instruction

The trial court did not commit plain error by failing to instruct the jury on voluntary intoxication as a defense to the charge of robbery with a dangerous weapon because: (1) evidence of mere intoxication is not enough to meet defendant's burden of production, and defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the pertinent crime defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming the requisite specific intent; (2) defendant failed to show that if the jury had received this in-

struction he would have been acquitted of the charge; (3) while there was some evidence that defendant killed the victim while intoxicated on "love boat" marijuana, there was no evidence as to exactly how much he consumed prior to the commission of the crime; and (4) there was abundant evidence that defendant acted with a clear purpose and design during the commission of the armed robbery, including defendant's statements to police that he left the scene and returned again to hide the victim's car and dead body, he drove the victim's car down the highway to a swamp to submerge the car in the water, and he grabbed a wad of money from the center console of the car as the car rolled toward the water.

3. Constitutional Law— effective assistance of counsel—failure to object—failure to request instruction on voluntary intoxication

Defendant did not receive ineffective assistance of counsel based on defense counsel's failure to object and request an instruction on voluntary intoxication with respect to the robbery with a dangerous weapon charge because: (1) the evidence presented at trial did not warrant a voluntary intoxication instruction with respect to the robbery with a dangerous weapon charge; and (2) it was improbable that the jury would have reached a different outcome if such instruction had been given.

Appeal by defendant from judgment entered 15 June 2007 by Judge Thomas D. Haigwood in Brunswick County Superior Court. Heard in the Court of Appeals 17 April 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa Trippe, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara Blackman, for defendant appellant.

McCULLOUGH, Judge.

Antwan L. Ash ("defendant") was tried before a jury at the 11 June 2007 Criminal Session of Brunswick County Superior Court after being charged with one count of first-degree murder and one count of robbery with a dangerous weapon. The State's evidence tended to show the following: In two videotaped interviews,[1] which took place on 31 October 2005 and 1 November 2005, defendant told law enforce-

1. These videotaped statements were played for the jury at trial.

ment that on 28 October 2005, defendant, who was sixteen years of age at the time, contacted the victim, Kendrick Lamar Sparrow, also called Burger ("Burger"), to buy drugs. Defendant had purchased drugs from Burger two or three times prior to this occasion. The drug purchase was scheduled to take place at defendant's house. Defendant borrowed a .40 caliber gun from his friend, Forty, and waited for Burger to arrive at defendant's house. Defendant explained that he always carried a gun with him during drug deals.

At approximately 8:00 p.m., defendant met Burger in the driveway of his house. Defendant was standing in front of the driver's side of Burger's vehicle, while Burger was seated inside of his vehicle. The drugs were in Burger's left hand. After some discussion about the price of the drugs, Burger bent down toward the floor of the vehicle. Defendant thought he saw "a little light shine" and suspected that Burger was going to try to rob him. Defendant pulled out the .40 caliber gun and fired between five to seven rounds at Burger. After that, Burger was not moving or breathing.

Defendant left the scene and went back to Forty's house to return the .40 caliber gun and retrieve a .22 caliber gun. Thereafter, defendant returned to Burger's vehicle and fired two rounds from the .22 caliber gun. According to defendant, he opened the driver's side door of Burger's four-door Pontiac Grand Prix and stepped up onto the running board. With his right foot on the gas pedal and left foot on the running board, defendant drove Burger's car down the highway toward Royal Oak Swamp. As the car rolled into the water, defendant grabbed a stack of $20 bills from the center console of the car, totaling between $450-$500, and jumped from the car. Defendant did not take any of the narcotics from Burger's vehicle.

After leaving Royal Oak Swamp, defendant met with his brother, Ben Ash, and his mother, Shirley Vereen. Defendant told them that he had killed Burger. Shortly thereafter, defendant and his brother checked in at the Microtel.

Later that evening, the Brunswick County Sheriff's Department was notified of the shooting. Lieutenant David Crocker testified that he found Burger's car 90 percent submerged in Royal Oak Swamp. Burger's body was removed from the vehicle. Police recovered cocaine and cigars from the water in the general area of Burger's vehicle; police did not recover any weapons from Burger, his vehicle, or the area where his vehicle was located.

The Sheriff Department's investigation revealed that the shots were fired near defendant's house. Police contacted defendant's mother, Shirley, on 31 October 2005. She advised law enforcement that her son had left Supply, spent a few nights in several motels, and was presently in Calabash. Police arrested defendant in Calabash, and defendant waived his *Miranda* and juvenile interrogation rights.

Based on defendant's interviews with police, Lieutenant Sam Davis ("Davis") retrieved five fired .40 caliber shell casings and two .22 shell casings in the driveway of defendant's house. On the same day, Davis also recovered a Ruger .40 caliber Smith & Wesson semi-automatic firearm from a wooded area across from Forty's residence. Firearm expert Beth Starosta-Desmond of the North Carolina Special Bureau of Investigation ("SBI") testified that the .40 caliber shell casings and the lead projectiles recovered from Burger's vehicle matched the .40 caliber gun.

Based on information provided to police by defendant's brother, Ben, Brunswick County Sheriff Tony Ciason retrieved a .22 caliber pistol from the side of the road near the crime scene. Lab tests revealed that the two .22 caliber shell casings were also a match to the .22 caliber pistol.

The State also introduced guest receipts from the Microtel Inn in Shallotte, North Carolina, and the Days Inn in Little River, South Carolina, respectively, which showed two rooms reserved on 28 October 2005, and two rooms reserved on 29 October 2005, in Shirley Vereen's name. These bills were paid in cash.

At the close of the State's evidence, the defense moved to dismiss the first-degree murder charge and the robbery with a dangerous weapon charge for insufficiency of the evidence. The trial court denied these motions.

Evidence for the defense tended to show the following: Dr. Moira Artigues, an expert in forensic psychiatry, diagnosed defendant as suffering from cannabis and alcohol dependence. Defendant told Dr. Artigues during an interview eighteen months after Burger's killing, that at the time of Burger's killing, defendant was under the influence of alcohol and "Love Boat," which is marijuana that has been soaked in formaldehyde. Dr. Artigues testified that defendant did not tell police about his intoxication during police interrogations because he was afraid that he would get his mother in trouble, as he had the year before when he told the Department of Social Services that his

mother gave him alcohol and marijuana. Defendant had witnessed violence between his parents, was beaten by his father, and was abandoned by his father at the age of twelve or thirteen. Thereafter, defendant and his family lived in hotel rooms and in a car. Dr. Artigues concluded that because of defendant's young age at the time of the killing and defendant's traumatic childhood, defendant suffered from impaired brain development and would not have been capable of forming a specific intent to kill at the time of the murder.

Inmate Edward Brock ("Brock") testified that he knew Burger and had purchased drugs from him in the past. Brock stated that at times Burger carried a gun in his car and that he recalled seeing Burger behave aggressively toward people in the community; however, he had never seen Burger threaten anyone with a gun nor was he aware of Burger having a reputation in the community for being aggressive.

At the close of the evidence, defendant renewed his motions to dismiss. These motions were denied. The jury unanimously found defendant guilty of first-degree murder, under the felony murder rule, and of robbery with a firearm. The trial court arrested judgment with respect to the robbery with a firearm charge, as defendant had been convicted of first-degree murder based only on the felony murder rule. Defendant was sentenced to life imprisonment without parole.

On appeal, defendant contends that (1) the trial court erred by failing to dismiss the charges of first-degree murder and robbery with a dangerous weapon for insufficiency of the evidence; (2) the trial court's failure to instruct the jury on voluntary intoxication as a defense to the charge of robbery with a dangerous weapon was plain error; and (3) defense counsel's failure to object and request an instruction on voluntary intoxication with respect to the robbery with a dangerous weapon charge constituted ineffective assistance of counsel.

I. Motion to dismiss

[1] First on appeal, defendant argues that the trial court erred by failing to dismiss the charges against defendant for insufficient evidence. Defendant contends that his confession was the only evidence that Burger's property was taken and that there was a lack of corroborating evidence to support the submission of this case to the jury. Defendant's argument is based upon the *corpus delicti* rule, articulated in *State v. Trexler*, 316 N.C. 528, 342 S.E.2d 878 (1986). We con-

clude, however, that defendant's reliance on this rule is misplaced, as there was substantial evidence upon which the jury could have reasonably concluded that defendant committed robbery with a dangerous weapon and felony murder based upon that robbery.

In ruling on a motion to dismiss, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). The Court must find that there is substantial evidence of each element of the crime charged and of defendant's perpetration of such crime. *Id.* "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

To convict a defendant of armed robbery, the State must prove three elements: " '(1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of "firearms or other dangerous weapon, implement or means"; and (3) danger or threat to the life of the victim.' " *Matter of Stowe*, 118 N.C. App. 662, 664, 456 S.E.2d 336, 338 (1995) (citations omitted). The elements necessary to establish first-degree murder under the felony murder rule are that the killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies. *State v. Richardson*, 341 N.C. 658, 666, 462 S.E.2d 492, 498 (1995).

Defendant is correct in his assertion that "a naked extrajudicial confession, uncorroborated by other evidence, is not sufficient to support a criminal conviction." *State v. Sloan*, 316 N.C. 714, 725, 343 S.E.2d 527, 534 (1986). The State must at least produce corroborative evidence, independent of defendant's confession, which tends to prove the commission of the charged crime. *Id.* In *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985), our Supreme Court expanded the type of corroboration which may be sufficient to establish the trustworthiness of the confession in cases in which independent proof is lacking but where there is substantial independent evidence tending to establish the trustworthiness of the confession. In *Trexler*, our Supreme Court reasoned that the pre-*Parker* rule is "still fully applicable in cases in which there is some *evidence aliunde* the confession which, when considered with the confession, will tend to support a finding that the crime charged occurred." *Trexler*, 316 N.C. at 532, 342 S.E.2d at 380-81. Thus, our *corpus delicti* rule in such cases only requires evidence *aliunde* the confession which, when considered with the confession, supports the confession and permits a reason-

able inference that the crime occurred. It does not require that the evidence *aliunde* the confession prove any element of the crime. *Id.*

Here, the State introduced defendant's confession that defendant fired five to seven shots into Burger's car, leaving Burger for dead in the driver's seat; that defendant left the scene and then returned fifteen minutes later and drove Burger's car toward a pond; that just before the car reached the pond, defendant grabbed a wad of $20 bills from Burger's car and jumped out. In addition to defendant's confession, the State presented uncontroverted corroborating evidence at trial that the bullets removed from Burger's body matched the .22 caliber pistol recovered near the scene, that Detective Davis retrieved five .40 caliber shell casings and two .22 caliber shell casings from the driveway area where the killing took place, that a .40 caliber Ruger was recovered in a wooded area across the street from defendant's friend's house, and that immediately following the crime, on 28 October 2005 and 29 October 2005, defendant hid in hotel rooms, which were paid with cash and reserved in his mother's name. Thus, the State presented substantial independent evidence tending to support defendant's confession. This evidence permits a reasonable inference that defendant unlawfully used a firearm to take the personal property of another and that a killing resulted during the perpetration of such crime. As such, there was substantial evidence to support the armed robbery and felony murder charges. This assignment of error is overruled.

II. Jury Instruction

[2] Next on appeal, defendant contends that the trial court's failure to instruct the jury on voluntary intoxication as a defense to the armed robbery charge amounted to plain error. The voluntary intoxication instruction was given as a possible defense to the premeditation and deliberation charge but not as a possible defense to the armed robbery charge. We disagree that the evidence necessitated such an instruction with respect to the armed robbery charge.

Since defendant did not object to the instructions at issue, any review is limited to plain error. *State v. Gaines*, 345 N.C. 647, 678-79, 483 S.E.2d 396, 415, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). Only in a rare case will an improper instruction justify reversal of a criminal conviction when no objection was made at trial. *Id.* To find plain error, "the error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or [one] which probably resulted in the jury reaching a different verdict than

it otherwise would have reached.' " *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (citation omitted).

Voluntary intoxication in and of itself is not a legal excuse for a criminal act. *State v. Gerald*, 304 N.C. 511, 521, 284 S.E.2d 312, 318 (1981). It is only a viable defense if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense. *Id.* The specific intent required for the underlying offense of armed robbery is the intent to permanently deprive the owner of his property. *State v. Wheeler*, 122 N.C. App. 653, 656, 471 S.E.2d 636, 639 (1996).

In *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992), our Supreme Court explained the proper usage of a voluntary intoxication instruction in the context of first-degree murder. It is "well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages or controlled substances." *Id.* Evidence of mere intoxication is not enough to meet defendant's burden of production. *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 537 (1988). Thus, before the trial court will be required to instruct on voluntary intoxication, defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried " 'defendant's mind and reason were so completely intoxicated and overthrown' " as to render him utterly incapable of forming the requisite specific intent. *State v. Golden*, 143 N.C. App. 426, 430, 546 S.E.2d 163, 166-67 (2001) (citation omitted). In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

Defendant relies on *Golden* in support of his argument that the trial court erred by failing to give a voluntary intoxication instruction with respect to the armed robbery charge, but we conclude that the instant facts are distinguishable from those in *Golden*. In *Golden*, the defendant requested a voluntary intoxication instruction as to the specific offenses; however, here, defendant did not request that such instruction with respect to the armed robbery charge at issue. Thus, a different standard of review is applicable to the case *sub judice* than that which was applied in *Golden*. *See Golden*, 143 N.C. App. at 430-34, 546 S.E.2d at 166-68.

Although it is true that the jury found defendant not guilty of first-degree murder based on premeditation and deliberation, the

burden, under a plain error review, is on defendant to show that absent any omission in the jury instructions, a different result would have been probable. Defendant has failed to show and we are not convinced that if the jury had been instructed on voluntary intoxication with respect to armed robbery, defendant would have been acquitted of that charge. While there was some evidence that defendant committed the killing while intoxicated on "love boat" marijuana, there was no evidence as to exactly how much he consumed prior to the commission of the crime at issue. Moreover, there is abundant evidence that defendant acted with a clear purpose and design during the commission of the armed robbery. According to defendant's statements to police, defendant left the scene and returned again to hide Burger's car and dead body. Defendant managed to drive Burger's car down the highway to Royal Oak Swamp and submerge the car in the water.

Moreover, while the evidence that defendant had been smoking love boat marijuana may have been sufficient to negate the specific intent of malice, premeditation, and deliberation, it is improbable that the jury would have found that "defendant's mind and reason were so completely intoxicated and overthrown" that he lacked the specific intent to permanently deprive Burger of his property when defendant grabbed the wad of money as the car rolled towards the water. This assignment of error is overruled.

III. Ineffective Assistance of Counsel

[3] Finally, defendant contends that defense counsel's failure to object and request an instruction on voluntary intoxication with respect to the robbery with a dangerous weapon charge constituted ineffective assistance of counsel. As discussed above, the evidence presented at trial did not warrant a voluntary intoxication instruction with respect to the robbery with a dangerous weapon charge, and it is improbable that the trial would have resulted in a different outcome if such instruction had been given. As such, defense counsel's failure to request such an instruction did not prejudice defendant and did not constitute ineffective assistance of counsel. *See State v. Blakeney*, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780, *cert. denied*, 359 N.C. 192, 607 S.E.2d 650 (2004) (Explaining that under the second prong of an ineffective assistance of counsel claim, defendant must show "the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error."). This assignment of error is overruled.

Based on the foregoing, we find no error in defendant's conviction.

No error.

Judges TYSON and STROUD concur.

TAMMY C. EDWARDS, ADMINISTRATRIX OF THE ESTATE OF PAUL ROGER EDWARDS, PLAINTIFF v. GE LIGHTING SYSTEMS, INC. AND GENERAL ELECTRIC COMPANY, DEFENDANTS

No. COA08-219

(Filed 4 November 2008)

1. Appeal and Error— appealability—denial of summary judgment—*Woodson* claim—substantial right

Although the general rule is that a party may not appeal the denial of a motion for summary judgment, defendant employer is entitled to an immediate appeal of an order denying summary judgment on a *Woodson* claim based on a substantial right because the North Carolina Workers' Compensation Act grants employers who comply with the Act immunity from suit which would be lost if the case was permitted to go to trial.

2. Wrongful death— *Woodson* claim—judicial abrogation of statutory immunity

Although defendant contends the trial court erred in a wrongful death action by denying defendant's motion for summary judgment on the ground that judicial abrogation of defendant's statutory immunity from suit violated the separation of powers of the North Carolina Constitution, this issue is controlled by *Woodson*, 329 N.C. 330 (1991), and is without merit.

3. Wrongful Death— *Woodson* claim—failure to state a claim

The trial court erred by denying defendant employer's motion for summary judgment in an action to recover for an employee's death from carbon monoxide poisoning based on plaintiff's failure to forecast evidence to establish a claim under *Woodson*, 329 N.C. 330 (1991), because: (1) the evidence taken in the light most favorable to plaintiff failed to show that defendant knew its con-

duct was substantially certain to cause serious injury or death to decedent; (2) although plaintiff presented evidence relating to the results of investigations following the accident, including expert testimony regarding the likelihood of an accident, there was no evidence that defendant knew, prior to decedent's death, that a carbon monoxide leak was substantially certain to occur; (3) although the evidence tended to show defendant did not adequately maintain its equipment, even a knowing failure to provide adequate safety equipment in violation of OSHA regulations does not give rise to liability under *Woodson*; (4) defendant has never been cited by OSHA prior to the accident for excess carbon monoxide emissions, for failing to continuously monitor carbon monoxide levels, or for failing to implement Process Safety Management which is a set of business regulations that use a statutorily-defined level of certain chemicals in a manufacturing process; and (5) in contrast to *Woodson* where the employer intentionally ordered the decedent to work in a known dangerous condition, decedent volunteered to work extra hours after his shift and chose to take a break behind the annealing ovens where the carbon monoxide concentration was very high.

Appeal by defendant G.E. Lighting Systems, Inc. from judgment entered 10 December 2007 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 8 October 2008.

Michaels & Michaels, P.A., by John A. Michaels, and Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Allan R. Tarleton, for plaintiff-appellee.

Smith Moore, L.L.P., by Jon Berkelhammer, Jeri Whitfield, and Lisa Shortt, and for defendant-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by J. Douglas Grimes for Amicus Curiae.

STEELMAN, Judge.

Where plaintiff's forecast of evidence failed to establish a claim under *Woodson v. Rowland*, the trial court erred in denying defendant's motion for summary judgment.

I. Factual and Procedural Background

Defendant General Electric Lighting Systems, Inc. ("GELS") is a subsidiary of defendant General Electric Company ("G.E."). GELS

manufactures industrial and highway lights through a process which requires metal parts to be baked in annealing ovens in an oxygen-free gas which contains a high concentration of carbon monoxide. The oxygen-free gas is produced by an exothermic generator called a DX generator. The annealing process is classified by G.E. as a "High Risk Operation."

In December 2003, plaintiff's decedent, Roger Edwards, was employed by GELS as an annealing oven operator in GELS's manufacturing plant located in Hendersonville, North Carolina. On or about 4 December 2003, while taking a break behind one of the annealing ovens between the second and third shifts, decedent died from carbon monoxide poisoning. An investigation by the North Carolina Department of Labor, Division of Occupational Safety and Health ("OSHA") following the accident revealed that equipment involved with the annealing ovens was leaking carbon monoxide, which caused decedent's death. GELS was subsequently cited by OSHA for a number of "serious" safety violations, but had never been cited for OSHA violations related to carbon monoxide levels at the plant prior to the death of plaintiff's intestate.

On 1 September 2005, Tammy Edwards, the administratrix of decedent's estate, filed a wrongful death action against defendants in Henderson County Superior Court. The complaint alleged the following as willful and wanton conduct on the part of defendants: (1) failure to have in place certain safety precautions and carbon monoxide monitors; (2) failure to properly train personnel in the use of the equipment and detection of safety hazards related to the equipment; (3) failure to follow generally accepted safety and maintenance recommendations; and (4) failure to provide effective ventilation. The complaint further alleged that as a result of defendants' conduct, plaintiff was entitled to recover both compensatory and punitive damages.

On 18 May 2007, defendants filed a motion for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure. Following a hearing on 12 October 2007, Judge Powell entered an order denying defendants' motion for summary judgment. Defendant GELS moved for reconsideration of this order, and on 18 January 2008 the trial court denied GELS's motion for reconsideration. GELS appeals.

II. Interlocutory Appeal

[1] We must first address plaintiff's motion seeking dismissal of GELS's appeal as interlocutory.

"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." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Generally, a party has no right of appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). An exception exists when the order will deprive the party of a substantial right absent an immediate appeal. *See* N.C. Gen. Stat. § 7A-27(d)(1); N.C. Gen. Stat. § 1-277(a) (2007). "As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a 'substantial right.' " *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993).

GELS acknowledges that this appeal is interlocutory, but argues that appellate review is necessary on the grounds that the North Carolina's Workers' Compensation Act grants employers who comply with the Act immunity from suit, which would be lost if the case is permitted to go to trial. GELS contends that this immunity from suit affects a substantial right.

This issue is controlled by our Supreme Court's holding in *Burton v. Phoenix Fabricators & Erectors, Inc.*, 362 N.C. 352, 661 S.E.2d 242 (2008). In *Burton*, the plaintiffs brought a wrongful death action against the decedents' employer pursuant to *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). The trial court denied the employer's motion to dismiss, and the employer sought to appeal the trial court's order. This Court found the employer's appeal to be interlocutory and dismissed the case. The North Carolina Supreme Court held "that the order of the trial court denying defendant's motion to dismiss affects a substantial right and will work injury if not corrected before final judgment[.]" *Burton* at 352, 661 S.E.2d at 242-43. The Court allowed the employer's petition for discretionary review and remanded the case to this Court for consideration on the merits. *Id.*

This case is in the identical posture to that in *Burton*. This Court is bound by the holdings of the Supreme Court. *Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996). We hold that GELS's appeal is properly before this Court.

III. Judicial Abrogation of Immunity

[2] In its first argument, GELS contends that the trial court erred in denying its motion for summary judgment on the grounds that "judicial abrogation of GELS's statutory immunity from suit violates the separation of powers of the North Carolina Constitution." We disagree.

This issue is controlled by the North Carolina Supreme Court's holding in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). We are bound by the decision in *Woodson*, *see Rogerson* at 732, 468 S.E.2d at 450, and this argument is without merit.

IV. The *Woodson* Doctrine

[3] In its next argument, GELS contends that the trial court erred in denying its motion for summary judgment because the complaint failed to state a claim for relief as provided for in *Woodson*. We agree.

Our standard of review of a trial court's ruling on a motion for summary judgment is *de novo*, and "this Court's task is to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citation omitted). "There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim . . ." *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675 (2006) (citation omitted). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Collingwood v. G.E. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted).

The North Carolina Workers' Compensation Act grants employers who fall under the purview of the act immunity from suit for civil negligence actions. *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003); N.C. Gen. Stat. § 97-10.1 (2007). In exchange for this immunity, the Act imposes liability, including medical expenses and lost income, on employers for work-related injuries "without [the worker] having to prove employer negligence or face affirmative defenses such as contributory negligence and the fellow servant rule." *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991) (citation omitted).

In *Woodson v. Rowland*, the North Carolina Supreme Court enunciated a limited exception to the exclusivity provisions of the Workers' Compensation Act and held that an employee may pursue a civil action against his or her employer in situations in which the employer "intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct[.]" *Woodson* at 340, 407 S.E.2d at 228. Our courts have defined "substantial certainty" as "more than the 'mere possibility' or 'substantial probability' of serious injury or death, . . . [but] less than 'actual certainty.' " *Pastva v. Naegele Outdoor Advertising*, 121 N.C. App. 656, 658-59, 468 S.E.2d 491, 493 (1996) (quotations omitted).

The cases following *Woodson* establish that *Woodson* did little, if anything, to expand the well-established principle that employers are not immune from tort liability based on their own intentional acts. *See*, *e.g.*, *Pendergrass v. Card Care*, *Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993) ("The conduct must be so egregious as to be tantamount to an intentional tort."). In *Whitaker v. Town of Scotland Neck*, our Supreme Court emphasized that "[t]he *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves. This exception applies only in the most egregious cases of employer misconduct." *Whitaker* at 557, 597 S.E.2d at 668. The Supreme Court rejected a multifactor test set out by the Court of Appeals in *Wiggins v. Pelikan*, *Inc.*, 132 N.C. App. 752, 513 S.E.2d 829 (1999), and reiterated that the proper standard of substantial certainty was the one originally set out in *Woodson v. Rowland*, which was "uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death." *Id.*

In the instant case, the evidence taken in the light most favorable to plaintiff tends to show the following facts and circumstances. GELS's employees were inadequately trained on the hazards of carbon monoxide, and the employees were not instructed on the signs and symptoms of carbon monoxide poisoning. In the weeks prior to the accident, decedent and other annealing oven operators complained to GELS supervisors that they were suffering from headaches, a symptom of carbon monoxide poisoning. Plaintiff contends that no action was taken by GELS in response to these complaints. As to GELS's maintenance of the equipment at the plant, plaintiff's evidence tended to show that: (1) there were problems and delays in ordering parts for the proper maintenance of the equipment;

(2) preventive maintenance had not been performed on the annealing furnaces or the DX generator in the two years preceding the accident; (3) GELS had not performed regular "smoke tests" on the furnaces to ensure that the seals and gaskets were intact; (4) the seals and gaskets on the furnaces had not been replaced; (5) one of the flues used to exhaust the excess gas produced by the DX generator was partially blocked by a sheet of metal; (6) GELS's budget for maintenance of equipment had been reduced in the years preceding the accident; and (7) GELS failed to implement recommendations of SM&E, a safety consulting firm hired by GELS, including the installation of carbon monoxide monitors. Plaintiff also asserted that GELS "obstruct[ed] OSHA's investigation [following the accident] and tamper[ed] with evidence."

Plaintiff's forecast of evidence failed to establish a claim under *Woodson*. There was no evidence that GELS knew its conduct was substantially certain to cause serious injury or death to decedent. Although plaintiff presented evidence relating to the results of investigations following the accident, including expert testimony regarding the likelihood of an accident, there is no evidence that GELS knew, prior to decedent's death, that a carbon monoxide leak was substantially certain to occur. *See Jones v. Willamette Indus., Inc.*, 120 N.C. App. 591, 595, 463 S.E.2d 294, 297 (1995) ("A *Woodson* claim cannot be made out or saved from summary judgment simply because a nonlegal expert states that *Woodson's* test has been met."); *see also Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995). Likewise, although the evidence tended to show that GELS did not adequately maintain its equipment, even a "knowing failure to provide adequate safety equipment in violation of OSHA regulations [does] not give rise to liability under . . . *Woodson* . . ." *Mickles* at 112, 463 S.E.2d at 212 (citing *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993)); *see also Jones*, 120 N.C. App. 591, 463 S.E.2d 294. Unlike the employer in *Woodson*, who had received four citations for violating safety procedures in the six and a half years preceding the incident, GELS had never been cited by OSHA prior to the accident for excess carbon monoxide emissions, for failing to continuously monitor carbon monoxide levels, or for failing to implement Process Safety Management, a set of business regulations that use a statutorily-defined level of certain chemicals in a manufacturing process. *See Vaughan v. J. P. Taylor Co.*, 114 N.C. App. 651, 654, 442 S.E.2d 538, 540 (1994) (noting that plaintiff's employer had no prior OSHA citations for safety violations). Further, in contrast to *Woodson*, where the employer intentionally ordered the decedent to work in a known

dangerous condition, in the instant case, decedent volunteered to work extra hours after his shift, and chose to take a break behind the annealing ovens, where the carbon monoxide concentration was very high. Although plaintiff contends that GELS could have done more to ensure its workers' safety, "the evidence does not show that [the employer] engaged in misconduct *knowing* it was substantially certain to cause death or serious injury." *Jones* at 595, 463 S.E.2d at 297.

The conduct of GELS and its supervisors did not rise to the level of misconduct described in *Woodson*. Plaintiff did not show that GELS willfully exposed decedent or any other employees to the hazard of carbon monoxide poisoning, but only that GELS was aware that the annealing process was a high risk operation which employed a toxic concentration of carbon monoxide, that there was a possibility that the equipment would leak, and that employees would be exposed to the leaking carbon monoxide.

We hold that there was no genuine issue of material fact, and that GELS was entitled to judgment as a matter of law. The trial court erred in denying GELS's motion for summary judgment. The order of the trial court is reversed and this matter remanded to the trial court for entry of an order dismissing plaintiff's action as to GELS.

REVERSED and REMANDED.

Judges TYSON and STROUD concur.

MICHELLE STOJANIK, ON BEHALF OF THE ESTATE OF AND THE HEIRS OF THE ESTATE OF BONNIE LYNN WOODRING, PLAINTIFF v. R.E.A.C.H. OF JACKSON COUNTY, INC., DEFENDANT

No. COA08-534

(Filed 4 November 2008)

Negligence— killing at abused women's shelter—not reasonably foreseeable

Summary judgment was properly granted for defendant in an action which resulted from the killing of a spousal abuse victim in defendant's shelter. Plaintiff's allegations about the prior actions of the victim's husband and the shelter's safety measures were not sufficient to raise a triable issue as to whether it was

reasonably foreseeable that the victim's husband would find and gain access to the shelter to harm the victim.

Appeal by plaintiff from order entered 26 March 2008 by Judge Mark Powell in Jackson County Superior Court. Heard in the Court of Appeals 9 October 2008.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Brett Dressler, and Matthews & Associates, by David P. Matthews and Jason C. Webster, for plaintiff-appellant.

Dean & Gibson, PLLC, by Rodney Dean and Leila W. Rogers, for defendant-appellee.

TYSON, Judge.

Michelle Stojanik, administratrix of the Estate of Bonnie Lynn Woodring and on behalf of the Heirs of the Estate of Bonnie Lynn Woodring ("plaintiff"), appeals from order entered, which granted R.E.A.C.H. of Jackson County, Inc.'s ("defendant") motion for summary judgment. We affirm.

I. Background

On 20 February 2007, plaintiff filed a complaint and alleged claims of "negligence/gross negligence" and wrongful death. Plaintiff's complaint asserted: (1) Bonnie Lynn Woodring ("the victim") and the victim's son were guests at defendant's abused women's shelter on 18 September 2006; (2) the victim's husband gained access to the shelter and killed the victim; (3) defendant failed to provide "adequate security, control, policies and procedures, measures and/or equipment" for the premises; (4) defendant's acts were the direct and proximate cause of the victim's death; and (5) plaintiff and other family members have been deprived of the victim's "love, society, companionship, comfort, guidance, and advice, as well as her service, protection, care and assistance."

On 18 May 2007, defendant answered plaintiff's complaint and alleged the defenses of: (1) failure to join an indispensable party; (2) independent intervening cause; and (3) release. Defendant's second defense stated:

> If it is determined that the defendant was in any negligent [sic] as alleged in the complaint, which has been and again is denied, then the intentional and criminal action of [the vic-

> tim's husband] which included breaking into a neighbors home to steal a shotgun, evading law enforcement on outstanding arrest warrants, breaking into the emergency shelter, kidnapping [defendant's] employee, threatening [defendant's] employee with a shotgun, taking the [victim] hostage while at gunpoint and ultimately shooting and killing the [victim], all act to sever any and all causation from any alleged negligence on the part of [defendant] to the death of [the victim] by superseding any negligence of the defendant and insulates the defendant from liability for damages.

Defendant subsequently moved for summary judgment "on the grounds that there are no issues of material fact and that the Defendant is entitled to summary judgment in its favor as a matter of law." Defendant tendered "all discovery which ha[d] been conducted in the case to date" in support of its motion for summary judgment.

Defendant's motion was heard 17 March 2008. The forecast of evidence at the hearing on defendant's motion for summary judgment tended to establish: (1) defendant's abused women's shelter is divided into two sections, a residential section and a work space section for defendant's employees; (2) the shelter has two wood framed glass panel exterior doors; (3) it is defendant's policy to require all doors to be locked at all times; (4) the victim's husband entered the shelter through an unlocked door; (5) the victim's husband forced one of defendant's employees into the residential section of the shelter; (6) when defendant's employee refused to tell the victim's husband where the victim was, the victim's husband opened "[t]he front shelter door[,]" which set off the alarm system; (7) the victim then entered the common area to confront her husband; and (8) the victim's husband took the victim outside, beat her, brought her back into the shelter, shot, and killed her.

On 26 March 2008, the trial court filed its order, which: (1) "denie[d] Defendant's motion as to Defendant's Third Defense (Release)[]" and (2) "grant[ed] Defendant's Motion as to Defendant's Second Defense (Independent Intervening Cause)." Plaintiff appeals.

II. Issue

Plaintiff argues the trial court erred when it granted defendant's motion for summary judgment on independent intervening cause.

III. Standard of Review

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

Wilkins v. Safran, 185 N.C. App. 668, 671-72, 649 S.E.2d 658, 661 (2007) (internal citations and quotations omitted).

IV. Independent Intervening Cause

Plaintiff argues the trial court erred when it granted defendant's motion for summary judgment because "a reasonable jury could conclude that either the affirmative act of leaving the back door unlocked or the negative act of failing to properly secure the premises with a steel door was a proximate cause of [the victim]'s death. (Emphasis original). We disagree.

Our Supreme Court has "emphasized that summary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979) (internal

citations omitted). "Summary judgment for defendant, in a negligence action, is proper where the evidence fails to show negligence on the part of defendant, or where contributory negligence on the part of plaintiff is established, or where it is established that the purported negligence of defendant was not the proximate cause of plaintiff's injury." *Hale v. Power Co.*, 40 N.C. App. 202, 203, 252 S.E.2d 265, 267 (citation omitted), *disc. rev. denied*, 297 N.C. 452, 256 S.E.2d 805 (1979).

"Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992). "To recover damages for actionable negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Petty v. Print Works*, 243 N.C. 292, 298, 90 S.E.2d 717, 721 (1956) (citation omitted).

"The general rule is that the intervening or superseding criminal acts of another preclude liability of the initial negligent actor when the injury is caused by the criminal acts." *Tise v. Yates Construction Co.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997). "[I]f between the negligence and the injury there is the intervening crime or wilful and malicious act of a third person producing the injury but that such was not intended by the defendant, and could not have been reasonably foreseen by it, the causal chain between the original negligence and accident is broken." *Ward v. R.R.*, 206 N.C. 530, 532, 174 S.E. 443, 444 (1934) (internal quotation omitted).

> It is axiomatic that to establish the element of foreseeability, the plaintiff need not prove that the defendant foresaw the injury in the exact form in which it occurred. The plaintiff need only show that in the exercise of reasonable care the defendant should have foreseen that some injury would result from his act or omission or that consequences of a generally injurious nature might have been expected.

Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 642, 281 S.E.2d 36, 40 (1981) (citations omitted).

In *Foster*, the plaintiff sued the owners of a shopping mall for injuries she received after being assaulted in the mall's parking lot. 303 N.C. at 638, 281 S.E.2d at 37. In the year prior to the assault on the plaintiff, thirty-one criminal incidents had been reported at the mall. *Id.* at 642, 281 S.E.2d at 40. Our Supreme Court stated:

> We cannot hold as a matter of law that the thirty-one criminal incidents reported as occurring on the shopping mall premises within the year preceding the assault on [the] plaintiff were insufficient to charge [the] defendants with knowledge that such injuries were likely to occur. The issue of foreseeability should therefore be determined by the jury, and the Court of Appeals erred in affirming the trial court's order granting summary judgment in favor of [the] defendants.

Id.

Here, defendant's forecast of evidence tended to establish: (1) the victim received defendant's Resident and Shelter Handbook, which stated " [y]ou will need to assist staff in determining how dangerous your abuser may be. If you are in danger it will be in the best interest of you, your children and other residents and staff to be placed in a shelter in another county[;]" (2) the victim never advised defendant's employees that she needed to be transferred to a shelter in another county; (3) "in [defendant's] 30 years, [it] ha[s] never had an abuser come on the property previous to this [incident][;]" and (4) "[t]he majority of abusers do it in the secrecy of their home. . . . [t]hey do not want people outside of their home to know they are doing anything."

Plaintiff's forecast of evidence tended to establish: (1) the location of defendant's shelter is kept confidential; (2) defendant requires all doors to be locked at all times; (3) defendant maintained a "panic" button in its employees' office space; (4) the victim asked defendant's employees for a 911 telephone; (5) the victim's husband had attempted to murder the victim in the past, threatened to find her, and to "finish the job[;]" and (6) upon re-entry into defendant's shelter, the victim expressed concern about her husband "finding [her] and trying to talk to [her]."

Plaintiff's allegations of the victim's husband's prior actions and the shelter's safety measures in place at the time of the victim's murder were not sufficient to raise a triable issue as to whether it was reasonably foreseeable that the victim's husband would attempt to find and gain access to the shelter to harm the victim. *See Brown v. N.C. Wesleyan College*, 65 N.C. App. 579, 583, 309 S.E.2d 701, 703 (1983) ("Based upon this forecast of evidence, we conclude that the scattered incidents of crime through a period beginning in 1959 were not sufficient to raise a triable issue as to whether the abduction and subsequent murder of plaintiff's intestate was reasonably foresee-

able."). Plaintiff failed to forecast evidence that the victim's death due to her husband's criminal actions was foreseeable to defendant and not an independent intervening cause of the victim's death. *Ward*, 206 N.C. at 532, 174 S.E. at 444. The trial court properly granted defendant's motion for summary judgment. This assignment of error is overruled.

V. Conclusion

The victim's husband's actions could not, as a matter of law, have been reasonably foreseen by defendant based on the parties' forecasts of evidence. The trial court properly granted defendant's motion for summary judgment based on "[d]efendant's Second Defense (Independent Intervening Cause)." The trial court's order is affirmed.

Affirmed.

Judges McCULLOUGH and CALABRIA concur.

STATE OF NORTH CAROLINA v. NICOLLE PHAIR

No. COA08-326

(Filed 4 November 2008)

1. Contempt— standard of review—competent evidence to support trial court's findings of fact and conclusions of law

Although defendant attorney frames all of her arguments in terms of an abuse of discretion by the trial court, the proper standard of review in contempt cases 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.

2. Contempt— criminal—defense attorney's cell phone rang during State's questioning of witness—willfulness

The trial court erred by holding defendant attorney in contempt of court based on her cell phone ringing during the State's direct examination of its first witness because: (1) no discussion of the incident was held at the time, defendant silenced her cell phone, and the State's direct examination continued; (2) N.C.G.S. § 5A-11 requires willful behavior, and although defendant ad-

mitted she knew from years of practicing law that she should turn her cell phone off while court is in session, defendant merely made a mistake in not turning her cell phone off before entering the courtroom; and (3) defendant did not exhibit a bad faith disregard for the trial court's authority, and her actions were not willful.

3. Contempt— criminal—defense attorney asked alleged improper question of client while on stand—willfulness

The trial court erred by holding defendant attorney in contempt of court based on her alleged improper questioning of her client while he was on the stand that implied the police had acted improperly because: (1) defendant's question was logical in terms of context and appeared to be the logical next step in the course of questioning; (2) while it is true that a juror hearing defendant's question might have understood it to have the improper implication the trial court gave it, the court's holding defendant in contempt was an extreme reaction to a question that defendant could have been told to rephrase; and (3) it did not appear that defendant's actions were willful or intended to mislead anyone present.

Appeal by defendant from orders entered 17 August 2007 by Judge Paul L. Jones in Lee County Superior Court. Heard in the Court of Appeals 23 September 2008.

The Turrentine Group, by Karlene Scott Turrentine, for defendant.

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

ELMORE, Judge.

Nicolle Phair (defendant) appeals from two orders finding that she committed contempt while representing the accused during a criminal trial. Having reviewed the orders and arguments, we reverse both orders.

I.

Defendant was representing an accused in a criminal trial when two incidents occurred giving rise to these two orders of contempt: first, defendant's cell phone rang during the State's questioning of a witness, and second, defendant asked an improper question of her client while he was on the stand.

[1] We first note that, although defendant frames all her arguments to this Court in terms of an abuse of discretion by the trial court, our standard of review for contempt cases 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." *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855, *disc. rev. denied*, 361 N.C. 702, 653 S.E.2d 158 (2007) (quotations and citations omitted). This standard applies to all of defendant's arguments below.

II.

[2] During the State's direct examination of its first witness, defendant's cellular phone rang.[1] No discussion of the incident was held at the time; defendant silenced her cell phone, and the State's direct examination continued. At the end of the trial, the trial court read into the record an order finding defendant in contempt, which was later reduced to writing.

That order notes that defendant brought into the courtroom a cellular telephone which rang audibly during court while the court was in session, then gives findings of fact as follows:

> The Court finds beyond a reasonable doubt that such conduct was committed within the hearing of the Court[;] that such conduct was committed in the Courtroom; that such conduct interrupted and interfered with matters before the Court; and that such conduct was committed after clear warning from the court by posting notification that cellular telephones must be turned off within the Courtroom and verbal notice by Court bailiff, Sgt. Jim Davis[,] that cellular telephones must be turned off prior to the opening of court.
>
> The conclusions of law are stated as follows:
>
> 1. That such conduct constituted grounds for contempt because the acts or omissions were intentionally done in open Court, which interrupted the proceedings of the Court and impaired the respect due its authority;
>
> 2. That such conduct was prohibited by N.C.G.S. [§] 5A-11(a)(1) and (2); [and]

1. There is no indication of this incident in the transcript, though it does not appear that the portion of the trial during which it occurred is included in the partial transcript submitted by defendant. However, since—per both parties—no oral mention was made of the phone ringing at the time it occurred, the transcript would shed no additional light on this argument.

3. That such conduct was willfully contemptuous.

Finally, the order requires defendant to forfeit her cellular telephone in order for it to be destroyed or to pay a $100.00 fine within 10 days of the order.

N.C. Gen. Stat. § 5A-11(1) and (2), to which the trial court cited, state that, among other behaviors, the following actions constitute criminal contempt: "Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings[, and w]illful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority." It is indisputable that defendant's cell phone ringing interrupted the proceedings of the court; thus, the question before us is whether her actions were willful.

"Willfulness" in this statute means an act "done deliberately and purposefully in violation of law, and without authority, justification, or excuse." *State v. Chriscoe*, 85 N.C. App. 155, 158, 354 S.E.2d 289, 291 (1987). The term has also been defined as "more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983).

Much of defendant's argument in her brief on this point is irrelevant, addressing portions of the statute to which the trial court did not cite in its order. Defendant's relevant argument relates to whether her actions were willful. Although defendant admits that she knew from years of practicing law that she should turn her cell phone off while court is in session, it seems clear that defendant merely made a mistake in not turning her cell phone off before entering the courtroom. While this was certainly irresponsible, we cannot say that defendant exhibited a "bad faith disregard" for the trial court's authority; indeed, rather than "more than deliberation or conscious choice[,]" defendant's actions here—or rather her inaction—seem to constitute *less* than conscious choice. *Forte*, 65 N.C. App. at 616, 309 S.E.2d at 730.

As such, the trial court's findings of fact are not supported by competent evidence, and as such its conclusion that defendant committed contempt must fail. Thus, we reverse this order.

III.

[3] During her direct examination of her client at trial, defendant asked him whether the investigating detective had asked the client

for information after a certain date. When the State objected to the question, the trial court conducted a discussion regarding the objection outside the presence of the jury. During this discussion, the trial court told defendant that her question implied that the police had acted improperly (by contacting defendant after he had been appointed counsel) and was an attempt to mislead the jury (because defendant knew that her client had been in jail at the time). Defendant denied any intention of willfully misleading the court. The trial court then held her in contempt.

This was reduced to a written order—the second order at issue here—which made the following findings of fact:

> [Defendant] asked her client . . . if the investigating officers had contacted him after [his] being arrested and appointed counsel. Under [the] Rules of Professional [R]esponsibility and Rules of Court[, defendant] either knew or should have known that the investigating officer was not allowed to contact her client. The question as posed would falsely mislead the jury to believe that the case was not properly investigated by [the police] not talking to the defendant. Such a question would be both unprofessional and unethical. Upon the Court requesting clarification of her position, [defendant] was both argumen[ta]tive and defensive in denying the charge of unethical conduct.
>
> The conclusions of law that follow state:
>
> 1. That such conduct: Asking the defendant whether the investigating officer had [c]ontacted him after being arrested and appointed counsel was unethical which [w]ould tend to mislead the jury;
>
> 2. That such conduct was prohibited by [N.C.]G.S. [§] 5A-11(a)(1); [and]
>
> 3. That such conduct was willfully contemptuous as Attorneys in North Carolina [a]re required to receive ethics training prior to being licensed and must take [e]thics training periodically by continuing legal education.

Finally, the order requires defendant to pay a fine of $250.00 within 10 days of the order.

Defendant's question was logical in terms of context: the State had just finished its cross-examination of the accused regarding whether the accused had provided address information to the inves-

tigating detective. On redirect, defendant asked whether the investigating detective had asked for this information on the date the accused made his statement to the detective; when the accused answered in the negative, defendant asked whether the detective asked for the address information after that time. This question was the basis of finding defendant in contempt.

As mentioned above, N.C. Gen. Stat. § 5A-11(a)(1) states that "[w]illful behavior committed during the sitting of a court and directly tending to interrupt its proceedings" constitutes criminal contempt. Defendant again argues that she did not intend to mislead the jury and, thus, did not willfully violate this statute.

While it is true that, given some thought, a juror hearing defendant's question might have understood it to have the improper implication the trial court gave it, the court's holding defendant in contempt seems an extreme reaction to a question that defendant could have easily been told to rephrase. A reading of the transcript reveals decided animosity between the trial court judge and defendant; during the discussion out of the jury's presence on the propriety of this question, for example, the judge made several comments like: "you just make sure you pay $1,000 within the next 10 days[;] otherwise I will personally report you to the state bar"; "I don't care if you appeal"; "And you don't be arguing with me. Do I put you in jail right now[?]"; and "The only thing you had to do was keep your mouth closed and admit you'd made a mistake."

Again, it does not appear that defendant's actions were willful or intended to mislead anyone present. In context, the question appears to be a logical next step in the course of questioning to any reader of the transcript. As such, we hold that the trial court's findings of fact are not supported by competent evidence and do not in turn support the conclusions of law in this order. Thus, we reverse it.

IV.

Because the trial court's orders are in error, we reverse both convictions for contempt against defendant. As we reverse on these grounds, we do not address the remainder of defendant's arguments.

Reversed.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA v. BOBBY E. BOWDEN

No. COA08-372

(Filed 4 November 2008)

Sentencing— prior definition of life sentence—80 years for all purposes

N.C.G.S. § 14-2 (1974) requires that defendant's 1975 life sentences be considered as an 80-year sentence for all purposes, and the matter was remanded for a hearing to determine the sentence reduction credits for which defendant is eligible and how those credits are to be applied. Although the State argued that the statute is ambiguous and that a life sentence cannot be defined in terms of years, judicial notice of a statement in a State's brief from 1978 disposes of the issue; moreover, the plain language of the statute states that life imprisonment shall be for 80 years. Had the legislature intended that the statute apply only when determining parole eligibility, it could have stated that intent explicitly.

Appeal by defendant from order entered 27 August 2007 by Judge Gary L. Locklear in Cumberland County Superior Court. Heard in the Court of Appeals 25 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant appellant.

McCULLOUGH, Judge.

Defendant Bobby E. Bowden appeals from an order denying his motion for appropriate relief. For the reasons stated herein, we reverse and remand for further proceedings.

I. Background

On 20 December 1975, defendant Bobby E. Bowden was convicted of two counts of first-degree murder in Cumberland County Superior Court and later sentenced to death. On 5 October 1976, our Supreme Court vacated defendant's death sentences and remanded so that life sentences could be imposed. *State v. Bowden*, 290 N.C. 702, 717, 228 S.E.2d 414, 424 (1976). On 26 October 1975, defendant

was given two life sentences, which are presumed to run concurrently. *See Jernigan v. State*, 279 N.C. 556, 563, 184 S.E.2d 259, 265 (1971) (stating that sentences imposed in the same jurisdiction and to be served at the same place or prison are presumed to run concurrently). Defendant has been in the custody of the Department of Correction since 20 December 1975. Defendant became eligible for parole in 1987, and has since received annual parole reviews.

On 12 December 2005, defendant filed a Petition for the Issuance of a Writ of *Habeas Corpus ad Subjiciendum*, arguing that after applying all of his sentence reduction credits, he had completed his 80-year sentence and, therefore, was entitled to immediate release. When defendant committed the offenses, N.C. Gen. Stat. § 14-2 (1974) provided that a life sentence should be considered as imprisonment for 80 years. *Id.* Defendant contended that he should have received good time and good conduct credit required by the 1981 Retroactive Provision of the Fair Sentencing Act, which would cut his sentence in half, reducing his 80-year sentence to 40 years. Defendant also asserted that he had accumulated 210 days of good conduct credit, 753 days of meritorious credit, and 1,537 days of gain time credit. On 25 January 2006, the trial court denied his petition.

Defendant appealed to our Court and we treated the matter as a motion for appropriate relief. We vacated the trial court's order and remanded the matter, ordering the trial court to conduct "an evidentiary hearing pursuant to N.C. Gen. Stat. § 15A-1420" to resolve issues of fact raised in defendant's petition.

The trial court conducted an evidentiary hearing on 27 August 2007, during which defendant provided detailed records from the Department of Correction regarding his sentence reduction credits. Initially, the Department of Correction's records indicated that all of defendant's good conduct time, merit time, and gain time credits had been applied to his sentence. However, for reasons unclear to this Court, the Department of Correction later retroactively changed the status of defendant's sentence reduction credits from "applied" to "pending."

The trial court issued an order on 27 August 2007, denying defendant's claim for relief. In its order, it concluded that N.C. Gen. Stat. § 14-2 (1974) only requires the Department of Correction to treat defendant's life sentence as a term of 80 years for purposes of parole eligibility. From this order, defendant appeals.

II. Issues

This Court reviews a trial court's conclusions of law on a motion for appropriate relief *de novo*. *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citation omitted). Defendant contends that the trial court erred by denying his motion for appropriate relief. Specifically, defendant argues that N.C. Gen. Stat. § 14-2 (1974) grants him a statutory right to have his life sentence treated as an 80-year sentence for all purposes, including the determination of his unconditional release date. We agree and reverse and remand.

III. Discussion

At the time defendant committed the offenses, N.C. Gen. Stat. § 14-2 provided the following:

> Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by fine, by imprisonment for a term not exceeding 10 years, or by both, in the discretion of the court. *A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison.*

N.C. Gen. Stat. § 14-2 (1974) (emphasis added). The State argues that N.C. Gen. Stat. § 14-2 (1974) does not govern the length of defendant's sentence in prison, but applies only when determining his eligibility for parole. Defendant asserts that the statute requires his life sentence to be considered as a sentence of 80 years for all purposes, and therefore, the Retroactive Provision of the Fair Sentencing Act reduces his sentence to 40 years.[1]

The State asserts that the statute is ambiguous. It argues that a life sentence cannot be defined in terms of years because when a person is sentenced to life, he or she is imprisoned for the term of his natural life. Furthermore, the State contends that N.C. Gen. Stat. § 14-2 should not be read alone, but must be interpreted in conjunction with N.C. Gen. Stat. § 148-58 (1974), which provides as follows:

> All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their

1. The applicable portion of this statute defining a life sentence as a term of 80 years became effective in 1974 and was repealed in 1977 and is only applicable for offenses committed between 8 April 1974 and 30 June 1978. N.C. Gen. Stat. § 15A-2002 (2007) currently provides that "a sentence of life imprisonment means a sentence of life without parole."

> sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that *any prisoner serving sentence for life shall be eligible for such consideration when he has served 20 years of his sentence.* Nothing in this section shall be construed as making mandatory the release of any prisoner on parole, but shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its merits.

Id. (emphasis added). Defendant claims that since there was no way to calculate a fourth of a life sentence, N.C. Gen. Stat. § 14-2 (1974) defined life as a term of 80 years so that prisoners with life sentences would be eligible for parole after 20 years.

Defendant asks our Court to take judicial notice of a statement contained in the State's brief in *State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978), and we grant defendant's request. An appellate court may take judicial notice of the public records of other courts within the state judicial system. *Whitmire v. Cooper*, 153 N.C. App. 730, 735 n.4, 570 S.E.2d 908, 911 n.4 (2002), *disc. review denied, appeal dismissed*, 356 N.C. 696, 579 S.E.2d 104 (2003). Accordingly, we take judicial notice of the following sentence: "The State agrees with the defendant that credit is now provided to those serving a life sentence since N.C.G.S. § 14-2 makes a life sentence equivalent to 80 years." Here, the State concedes to what defendant is currently arguing. Our judicial notice of this sentence is dispositive to the issue of whether defendant's life sentence is equivalent to 80 years for purposes other than parole eligibility.

Even without our judicial notice of the statement above, we still hold that N.C. Gen. Stat. § 14-2 (1974) treats defendant's life sentence as an 80-year sentence for all purposes. Our Supreme Court has previously considered a life sentence to be equivalent to 80 years, pursuant to N.C. Gen. Stat. § 14-2 (1974), for purposes other than parole eligibility. *See State v. Williams*, 295 N.C. 655, 679, 249 S.E.2d 709, 725 (1978); *see also Richardson*, 295 N.C. at 318-19, 245 S.E.2d at 760-61. In *Richardson*, our Supreme Court considered the defendant's life sentence to be the equivalent of 80 years for purposes of determining his pretrial incarceration credit. *Id.* In W*illiams*, our Supreme Court decided that each of the defendant's life sentences was equal to 80 years for purposes of adding his consecutive sentences and determining his total sentence of 300 years. *Williams*, 295 N.C. at 679-80, 249 S.E.2d at 725.

We do not read this statute to be ambiguous nor do we find that it must be read in conjunction with N.C. Gen. Stat. § 148-58 (1974). The plain language of the statute states that life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison without any limitation or restriction. We are not permitted to interpolate or superimpose provisions or limitations which are not contained in the text of the statute. *Sonopress, Inc. v. Town of Weaverville*, 139 N.C. App. 378, 383, 533 S.E.2d 537, 539 (2000). Had our Legislature intended that N.C. Gen. Stat. § 14-2 (1974) only apply when determining a prisoner's parole eligibility, it would have been a simple matter to have included that explicit phrase. *See In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 706, 446 S.E.2d 594, 596 (1994).

Contrary to the State's assertion, N.C. Gen. Stat. § 14-2 (1974) does not give the Department of Correction authority to commute all life sentences to 80 years. Instead, the Legislature merely defines the term of life imprisonment, which it has the authority to do. Our Legislature is granted the power and the authority to define crimes and set punishment for those crimes. *Jernigan*, 279 N.C. at 564, 184 S.E.2d at 265 (stating that the Legislature has exclusive power to determine the State's penological system and prescribe punishments for crime). In light of our decision to remand, it is unnecessary to address the remaining issues briefed on appeal.

IV. Conclusion

We hold that N.C. Gen. Stat. § 14-2 (1974) requires that defendant's life sentence is considered as an 80-year sentence for all purposes. We reverse the trial court's order and remand for a hearing to determine how many sentence reduction credits defendant is eligible to receive and how those credits are to be applied.

Reversed and Remanded.

Judges TYSON and CALABRIA concur.

STATE OF NORTH CAROLINA v. CURLEY JACOBS AND BRUCE LEE MCMILLIAN

No. COA04-541-2

(Filed 4 November 2008)

Sentencing— aggravating factor—*Blakely* error—evidence used to prove offense—not harmless

A *Blakely* error was not harmless where the court found as an aggravating factor for impersonating an officer that defendant took advantage of a position of trust, based on the individuals involved wearing DEA emblems and carrying badges. This was evidence that was also used to prove the offense.

On remand by order of the North Carolina Supreme Court in 361 N.C. 565, 648 S.E.2d 841 (2007), vacating in part, reversing in part, and remanding the decision of the Court of Appeals, *State v. Jacobs*, 174 N.C. App. 1, 620 S.E.2d 204 (2005), for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). Appeal by defendants from judgments entered 29 September 2003 by Judge Gary L. Locklear in Robeson County Superior Court. Originally heard in the Court of Appeals 3 March 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters and Special Deputy Attorney General Karen E. Long, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for defendant-appellant Curley Jacobs.

Ligon and Hinton, by Lemuel W. Hinton, for defendant-appellant Bruce Lee McMillian.

BRYANT, Judge.

This case comes before us on remand from the North Carolina Supreme Court in order that we may reexamine the issue of sentencing as it applies to defendant Jacobs in light of the Supreme Court's decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, *Blackwell v. North Carolina*, —— U.S. ——, 127 S. Ct. 2281, 167 L. Ed. 2d 1114 (2007). For the reasons stated herein, we remand for resentencing.

Facts and Procedural History

On 4 November 2002, defendant Jacobs was indicted by a grand jury for impersonating a law enforcement officer, first-degree burglary, and two counts of second-degree kidnapping. Defendant Jacobs was convicted of all charges by a jury on 29 September 2003. Prior to sentencing defendant Jacobs, the trial court found as aggravating factors that defendant Jacobs (i) induced others to participate in the commission of the offense, (ii) joined with more than one other person in committing the offense and was not charged with conspiracy, (iii) took advantage of a position of trust or confidence to commit the offense, and (iv) committed the offenses against a physically infirm victim. The trial court sentenced defendant Jacobs in the aggravated range to the following consecutive sentences: a minimum term of 36 months to a maximum term of 53 months for the offense of two counts of second-degree kidnapping and a minimum term of 95 months to a maximum term of 123 months for the offenses of first-degree burglary, impersonating a law enforcement officer, and robbery with a dangerous weapon.

The opinions of the United States Supreme Court in *Washington v. Recuenco*, *Blakely v. Washington*, and *Apprendi v. New Jersey* have set forth national guidelines for courts applying structured sentencing laws and set the framework for determining whether the process of imposing a particular sentencing structure is constitutional. *Washington v. Recuenco*, 548 U.S. 212, 165 L. Ed. 2d 466 (2006); *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004); and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000).

The United States Supreme Court has held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455.

> [T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

Blakely, 542 U.S. at 303-04, 159 L. Ed. 2d at 413-14 (internal citations omitted).

The North Carolina Supreme Court subsequently applied *Blakely* and *Recuenco* to North Carolina's Structured Sentencing Act, and held that a trial court's unilateral finding of an aggravating factor did not violate Article I, Section 24 of the North Carolina Constitution and that *Blakely* error was subject to harmless error analysis. *Blackwell*, 361 N.C. at 42-45, 638 S.E.2d at 453-55. When confronted with the task of conducting harmless error review, the court must decide, based on the record, "whether the evidence against the defendant was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt[.]" *Id.* at 49, 638 S.E.2d at 458 (citation omitted). It is the responsibility of the defendant to bring forth facts (1) contesting the applicability of the aggravating factor and (2) that support a contrary finding. *Id.* at 50, 638 S.E.2d at 458.

The trial court in the instant case erred when it unilaterally found aggravating factors that increased the penalty for defendant's crimes beyond the presumptive range into the aggravated range. Having determined that the trial court erred by finding, unilaterally, factors aggravating defendant's sentence, we must now determine whether such error was harmless error.

Defendant argues the trial court erred by finding as an aggravating factor that defendant took advantage of a position of trust. Specifically, defendant argues the trial court erred by using evidence that he "dressed up" as a law enforcement officer to support the finding of an aggravating factor when the same evidence was used to prove an element of impersonating an officer—a crime of which defendant was convicted.

Pursuant to N.C. Gen. Stat. § 14-277, a person commits the offense of impersonating a law-enforcement officer by falsely representing that he is a sworn law-enforcement officer and acting in accordance with the authority granted to a law-enforcement officer. N.C.G.S. § 14-277 (2007). A person falsely represents that he is a law-enforcement officer when he:

> (1) Verbally informs another that he is a sworn law-enforcement officer, whether or not the representation refers to a particular agency;
>
> (2) Displays any badge or identification signifying to a reasonable individual that the person is a sworn law-enforcement offi-

cer, whether or not the badge or other identification refers to a particular law-enforcement agency;

. . .

Id. A person acts in accordance with the authority granted a law-enforcement officer by searching a building or premises with or without a search warrant. N.C.G.S. § 14-277 (b)(3) (2007).

It is well established that evidence used to prove an element of a crime may not also be used to prove an aggravating factor. N.C. Gen. Stat. § 15A-1340.16(d) (2007); *State v. Tucker*, 357 N.C. 633, 636, 588 S.E.2d 853, 855 (2003). The trial court found as an aggravating factor that defendant took advantage of a position of trust. "A finding that a defendant took advantage of a position of trust or confidence depends on the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *State v. Bingham*, 165 N.C. App. 355, 366, 598 S.E.2d 686, 693 (2004), *rev. denied*, 359 N.C. 191, 607 S.E.2d 647 (2004) (quotations omitted).

Here, the trial court found that defendant took advantage of a position of trust because the victims believed that the individuals were actually law enforcement officers—a relationship that is conducive to the reliance of the victim upon the officer. The trial court seemingly based this finding on evidence that the individuals involved in the incident were dressed in jackets bearing DEA emblems and carried badges. This evidence was necessary to prove an element of the offense of impersonating a law enforcement officer. The trial court erred by using evidence that was also used to prove an element of an offense to support an aggravating factor. Accordingly, we hold the trial court's *Blakely* error in finding defendant took advantage of a position of trust was not harmless error.

Because one error in finding an aggravating factor requires remand, *State v. Baucom*, 66 N.C. App. 298, 301-02, 311 S.E.2d 73, 75 (1984), and the trial court did not find that each aggravating factor outweighed the mitigating factor, *State v. Norman*, 151 N.C. App. 100, 104, 564 S.E.2d 630, 633 (2002), we need not consider the other aggravating factors, *State v. Hurt*, 361 N.C. 325, 332, 643 S.E.2d 915, 919 (2007), and must remand to the trial court for resentencing in light of this opinion.

Except as ordered by the Supreme Court, and as herein modified, the opinion filed by the Court on 18 October 2005 remains in full force and effect.

REMANDED.

Judges STEPHENS and ARROWOOD concur.

JIM D. ATKINS; CAROL L. MANNING; PRESSLEY C. STUTTS, JR.; AND JERRY WATTS, PLAINTIFFS v. CLAY PEEK; PEEK PERFORMANCE, INC.; PACIFICARE HEALTH PLAN ADMINISTRATORS, INC.; PACIFICARE LIFE AND HEALTH INSURANCE COMPANY; AND PACIFICARE INSURANCE COMPANY, DEFENDANTS; AND CLAY PEEK AND PEEK PERFORMANCE, INC., DEFENDANTS & THIRD-PARTY PLAINTIFFS v. CHARLIE LEWIS; NICHOLAS LEWIS; ZACHARY LEWIS, INDIVIDUALLY AND KINGDOM INSURANCE GROUP, LLC; AND SHEP CUTLER, INDIVIDUALLY; AND CUTLER AND ASSOCIATES, INC., THIRD-PARTY DEFENDANTS

No. COA07-1535

(Filed 4 November 2008)

Appeal and Error— appealability—dismissal of third-party claims—separate and distinct issues from original claims asserted

Third-party plaintiffs' appeal from the trial courts' order dismissing its claims against third-party defendants arising from a dispute concerning agreements for the sale of certain insurance products was an appeal from an interlocutory order, and thus, dismissed because: (1) the trial court did not certify the judgment for appeal under N.C.G.S. § 1A-1, Rule 54(b); (2) avoidance of a separate trial on separate claims is not such a substantial right as would justify the bypassing of Rule 54(b) requirements; and (3) third-party plaintiffs' claims against third-party defendants involve separate and distinct issues from the claims asserted by original plaintiff, and such claims were dismissed without prejudice and can be pursued in a separate trial.

Appeal by defendants and third-party plaintiffs from order entered 12 September 2007 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 15 May 2008.

Ross Law Firm, by R. Matthew Van Sickle and C. Thomas Ross, for defendants and third-party plaintiff appellants.

Roberts & Stevens, P.A., by Ann-Patton Nelson and James W. Williams; Of Counsel Locke Lord Bissell & Liddell, LLP, by Michael P. Bruyere and John F. Kane, for third-party defendant appellees.

McCULLOUGH, Judge.

This appeal arises from a dispute concerning agreements for the sale of certain insurance products. Defendants and third-party plaintiffs, Clay Peek and Peek Performance, Inc., ("third-party plaintiffs") appeal from an order dismissing their claims against third-party defendants, Charles Lewis, Zachary Lewis, Kingdom Insurance, LLC, Shep Cutler, and Cutler and Associates, Inc. ("third-party defendants") pursuant to Rules 12(b)(6) and 14(a) of the North Carolina Rules of Civil Procedure. We dismiss this appeal as interlocutory.

The relevant facts and procedural background are as follows: Defendants Pacificare Health Plan Adminsistrators, Inc., Pacificare Life & Health Insurance Co., and Pacificare Insurance Co. (collectively, "Pacificare") are Indiana corporations licensed to do business in North Carolina, with a portion of their business consisting of the recruitment of agents and the sale of Medicare insurance products. Third-party plaintiff Peek Performance, Inc. ("Peek Performance") is a South Carolina corporation, with its principle business consisting of the recruitment of qualified and licensed insurance agents in North and South Carolina. Third-party plaintiff Clay Peek is an authorized agent of Peek Performance. Peek Performance contracted with Pacificare to recruit agents and sell and market Medicare insurance products in North Carolina and other states.

On 28 August 2006, four insurance agents licensed in North Carolina, Jim D. Atkins, Carol L. Manning, Pressley C. Stutts, Jr., and Jerry Watts (collectively, "original plaintiffs"), filed an action against third-party plaintiffs. In their complaint, original plaintiffs alleged that third-party plaintiffs recruited them to sell Pacificare's medicare insurance products within the State of North Carolina. Original plaintiffs alleged further that they entered contracts with third-party plaintiffs, and under such contracts, they were to be paid specified commissions for enrolling clients into Pacificare's Medicare Advantage plans. Thereafter, without original plaintiffs' consent or knowledge, third-party plaintiffs allegedly "fraudulently assigned the commission payments due to [original plaintiffs] from [Pacificare] to [third-party plaintiffs]"; altered the terms of the contracts such that original plaintiffs were designated as "solicitors" instead of "general agents," and wrongfully refused to release original plaintiffs from their contracts with third-party plaintiffs, which prevented original plaintiffs from obtaining employment elsewhere.

Based on these allegations, original plaintiffs asserted six claims for relief against Pacificare and third-party plaintiffs including: (1) unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1 (2007); (2) fraud and negligent misrepresentation; (3) breach of duty of good faith and fair dealing; (4) breach of contract; (5) quantum merit; and (6) unjust enrichment. None of these claims were asserted against third-party defendants.

On 27 October 2006, third-party plaintiffs asserted counterclaims against original plaintiffs and filed a third-party complaint against third-party defendants. In their complaint, third-party plaintiffs alleged, *inter alia*, that third-party defendants entered into and breached contracts with them by:

> failing to deliver . . . computer software to assist in the payment of commissions, by attempting to raise the cost per preset appointment, by not providing quality preset appointments, or appropriate quantity of preset appointments, and in failing to reimburse for invalid preset appointments and by delaying the payment of commissions earned and due to Peek Performance, Inc.

Third-party plaintiffs alleged that third-party defendants tortiously interfered with third-party plaintiffs' contracts by intentionally and with knowledge of existing agreements, inducing and encouraging various agents "not to perform for Peek Performance, Inc., not to renew with Peek Performance, Inc., and to seek termination of their contracts with Peek Performance, Inc[.]" Third-party plaintiffs also alleged that third-defendants slandered third-party plaintiffs, and through these actions, engaged in unfair and deceptive trade practices, in violation of N.C. Gen. Stat. § 75-1.1.

On 12 January 2007, third-party defendants moved to dismiss third-party plaintiffs' claims for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12 (2007). After a hearing on the matter, the trial court concluded that none of third-party plaintiffs' claims were "dependent upon the success, failure or continued maintenance of" original plaintiffs' claims against third-party plaintiffs and that such claims "can be pursued irrespective of the continued pursuit of Plaintiff's original claim[.]" As such, the trial court concluded that third-party plaintiffs' claims were improper under Rule 14 of the North Carolina Rules of Civil Procedure and that such claims fail to state a claim upon which relief may be granted.

N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 14(a) (2007). As such, the trial court granted third-party defendants' motions and dismissed third-party plaintiffs' claims, without prejudice.

Third-party plaintiffs appeal from the trial courts' order dismissing its claims. Third-party defendants contend that third-party plaintiffs' appeal is interlocutory and should be dismissed. We agree.

Where, as here, an order entered by the trial court does not dispose of the entire controversy between all parties, it is interlocutory. *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998). As a general rule, a party is not entitled to immediately appeal an interlocutory order. *Id.* However, there are two exceptions in which an appeal of right lies from an order that is interlocutory. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). The first exception applies where the order represents a " 'final judgment as to one or more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal." *Id.* (citation omitted); *see* N.C. Gen. Stat. 1A-1, Rule 54(b) (2007). Secondly, a party may appeal an interlocutory order where delaying the appeal will irreparably impair a substantial right of the party. *Abe*, 130 N.C. App. at 334, 502 S.E.2d at 881.

Neither of the two exceptions are applicable to the case *sub judice*. First, the trial court did not certify the judgment for appeal pursuant to Rule 54(b). Second, we have held that avoidance of a separate trial on separate claims is not such a substantial right as would justify the by-passing of Rule 54(b) requirements. *Green v. Duke Power Co.*, 50 N.C. App. 646, 649, 274 S.E.2d 889, 891 (1981), *aff'd*, 305 N.C. 603, 290 S.E.2d 543 (1982). Since third-party plaintiffs' claims against third-party defendants involve separate and distinct issues from the claims asserted by original plaintiff and such claims were dismissed without prejudice and can be pursued in a separate trial, the order in this case does not deprive third-party plaintiff of a substantial right. As such, this appeal must be dismissed.

Dismissed.

Judges TYSON and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 NOVEMBER 2008

BAILEY v. WINSTON SALEM STATE UNIV. No. 08-167	Forsyth (07CVS1315)	Affirmed
FLOYD v. ALLEN No. 07-1365	Robeson (04CVS2159)	Reversed
IN RE A.W., A.W., M.C. No. 08-506	New Hanover (06JT324-25) (06JT415)	Affirmed
IN RE C.S.J., N.S., K.S., & C.M.S. No. 08-631	Nash (06JA124-27)	Affirmed
IN RE D.R. No. 08-542	Durham (05J253)	Vacated
IN RE G.T., H.T., C.M. No. 08-685	Cumberland (06JA24-26)	Affirmed in part, vacated and remanded in part
JENKINS v. GILLESPIE No. 08-430	Randolph (05CVD851)	Affirmed
JONES v. JONES No. 07-1542	Brunswick (02CVD914)	Affirmed
SELWYN VILLAGE HOMEOWNERS ASS'N v. CLINE & CO. No. 07-116-2	Mecklenburg (04CVS21480)	Affirmed
STATE v. BENTON No. 08-295	Wayne (07CRS50779) (07CRS1979-80)	No error
STATE v. CHAPMAN No. 08-488	Guilford (06CRS89165-66) (06CRS89168)	No error
STATE v. EASTWOOD No. 08-508	Alamance (06CRS11769) (06CRS53769)	No prejudicial error
STATE v. GARY No. 08-309	New Hanover (05CRS55982)	No error
STATE v. HAITH No. 08-236	Alamance (06CRS57647) (06CRS20245)	No error
STATE v. HARLEY No. 08-60	Rowan (04CRS59340-43)	No error

STATE v. HOOKER No. 08-261	Guilford (07CRS75293)	No error
STATE v. JONES No. 08-338	Wake (06CRS48148)	No error; motion for appropriate relief dlsmissed without prejudice
STATE v. MARTIN No. 08-366	Cleveland (06CRS2705)	Vacated and remanded for resentencing
STATE v. MILES No. 07-1444	Alamance (06CRS59198)	No error
STATE v. MORRISON No. 08-299	Catawba (07CRS2621) (06CRS50018) (07CRS2041-42) (07CRS2620) (07CRS2622)	Affirmed
STATE v. NASH No. 08-343	Cumberland (05CRS68342)	No error
STATE v. RANDALL No. 07-1470	Durham (05CRS54382) (05CRS54384)	New trial in part, No Error in part
STATE v. TOMLIN No. 07-1558	Guilford (03CRS89524)	No error
STATE v. VAUGHAN No. 08-158	Northampton (06CRS58-60) (05CRS51613)	No error

ANDREW EGELHOF, DERIVATIVELY ON BEHALF OF RED HAT, INC., PLAINTIFF v. MATTHEW J. SZULIK, KEVIN B. THOMPSON, PAUL J. CORMIER, TIMOTHY J. BUCKLEY, MARK H. WEBBINK, ALEX PINCHEV, ROBERT F. YOUNG, EUGENE J. MCDONALD, F. SELBY WELLMAN, MARYE A. FOX, WILLIAM S. KAISER, DR. STEVE ALBRECHT AND H. HUGH SHELTON, DEFENDANTS

No. COA08-452

(Filed 18 November 2008)

1. Constitutional Law— due process—sanctions—notice and opportunity to be heard

Plaintiff and plaintiff's counsel were not denied due process in the imposition of non-monetary sanctions based on their pleadings in a shareholder derivative action against corporate officers where they received notice that sanctions were being sought and of the basis of those sanctions, and were given the opportunity to present arguments and testimony on their behalf.

2. Pleadings— sanctions—represented party—not signing pleading—subject to sanctions

Plaintiff and plaintiff's out-of-state counsel were represented parties and were subject to Rule 11 sanctions where the original complaint was signed only by plaintiff's North Carolina attorney, and the amended complaint was signed by that attorney and contained a verification by out-of-state counsel which said that the verification was made because plaintiff was absent from San Diego, where the attorney maintained his office. The portion of *Higgins v. Patton*, 102 N.C. App. 301, that held that defendants could request sanctions against represented plaintiffs regardless of whether they had signed the complaint was not overturned by a later case.

3. Pleadings— sanctions—facial reading of pleading

The trial court should not have ordered Rule 11 non-monetary sanctions against plaintiff and his out-of-state counsel where defendants alleged only that plaintiff's claim was not well grounded in fact and did not allege that plaintiff had filed his claim for any improper purpose; the trial court found that the initial pleadings would not alone support Rule 11 sanctions; and the court further found that sanctions were warranted when the combination of all the factors was considered. It has been held that the court must look at the face of the pleading when determining whether a pleading was warranted by existing law and must not read it in conjunction with responsive pleadings.

4. Costs— attorney fees—justiciable issue—shareholder's derivative action

The trial court's statements indicate that it exercised its discretion in denying defendants' request for attorney fees pursuant to N.C.G.S. § 6-21.5, and the court did not abuse its discretion where it found that the shareholder derivative issue raised by plaintiff was difficult, fact specific and contextual.

5. Pleadings— sanctions—supported by findings

The trial court's denial of Rule 11 sanctions was supported by findings concerning the difficult and case-by-case nature of the shareholder derivative issue raised in the complaint.

Judge CALABRIA concurring in part and dissenting in part.

Appeal by plaintiff and plaintiff's out-of-state counsel and cross-appeal by defendants from order entered on or after 4 February 2008 by Judge Ben F. Tennille in Wake County Superior Court. Heard in the Court of Appeals 25 September 2008.

Manning, Fulton & Skinner, P.A., by Michael T. Medford, for plaintiff Andrew Egelhof.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Pressly M. Millen and Sean E. Andrussier, for defendants.

Everett, Gaskins, Hancock & Stevens, L.L.P., by E.D. Gaskins, Jr. and Louis E. Wooten, III, for appellants Brian J. Robbins, Jeffrey P. Fink, Steven R. Wedeking and Robbins Umeda & Fink, L.L.P.

TYSON, Judge.

Andrew Egelhof ("plaintiff") and his out-of-state counsel, Jeffrey P. Fink, Brian J. Robbins, Steven R. Wedeking, and the law firm of Robbins Umeda & Fink, LLP (collectively, "plaintiff's counsel") appeal from order entered, which: (1) imposed sanctions on plaintiff and plaintiff's counsel and (2) failed to award Matthew J. Szulik, Kevin B. Thompson, Paul J. Cormier, Timothy J. Buckley, Mark H. Webbink, Alex Pinchev, Robert F. Young, Eugene J. McDonald, F. Selby Wellman, Marye A. Fox, William S. Kaiser, Dr. Steve Albrecht, and H. Hugh Shelton (collectively, "defendants") attorneys' fees and expenses. Defendants cross-appeal the denial of attorneys' fees as sanctions. We affirm in part and reverse in part.

I. Background

On 18 August 2004, plaintiff filed a Verified Shareholder Derivative Complaint against defendants on behalf of Red Hat, Inc. ("Red Hat"). Plaintiff alleged defendants: (1) engaged in insider trading; (2) breached their fiduciary duty; (3) abused their control of Red Hat; (4) grossly mismanaged Red Hat; (5) wasted valuable corporate assets; and (6) were unjustly enriched. On 29 December 2004, the case was designated as a complex business case and transferred to the special superior court for complex business cases. Defendants moved to dismiss the complaint on 27 June 2005 and alleged: (1) the complaint failed to adequately plead demand futility under Delaware law and (2) all counts should be dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

Plaintiff amended his complaint on 21 July 2005. Defendants moved to dismiss the amended complaint on 29 September 2005. In its order filed 13 March 2006, the trial court granted defendants' motion to dismiss with prejudice "on the grounds that the Amended Complaint does not establish demand futility under Delaware law and because [plaintiff] is no longer a shareholder and thus lacks standing to pursue this action." Plaintiff failed to appeal the trial court's grant of defendants' motion to dismiss.

On 25 April 2006, defendants filed a motion for attorneys' fees pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 and N.C. Gen. Stat. § 6-21.5. Defendants alleged: (1) "[p]laintiff filed his claim when it was neither well grounded in fact nor warranted by existing law[]" and (2) "there was a complete absence of a justiciable issue of either law or fact raised by [p]laintiff in his pleadings." After a hearing on 9 June 2006, the trial court ordered defendants to depose plaintiff. Plaintiff was deposed on 13 July 2006. Counsel for both plaintiff and defendants were present and participated in the deposition.

The trial court entered its final order on defendants' motion for attorneys' fees on 4 February 2008. The trial court's order: (1) prohibited plaintiff from acting as a shareholder derivative plaintiff or a class action representative in the state courts of North Carolina for a period of five years; (2) required Mr. Fink to pay *pro hac vice* fees; (3) prohibited plaintiff's counsel from appearing *pro hac vice* in the state courts of North Carolina for a period of five years; and (4) denied defendants' motion for attorney fees and expenses. Plaintiff and plaintiff's counsel appeal. Defendants cross-appeal.

II. Issues

Plaintiff and plaintiff's counsel argue the trial court erred when it imposed non-monetary sanctions. On cross-appeal, defendants argue the trial court erred when it failed to award attorneys' fees.

III. Plaintiff's and Plaintiff's Counsel's Appeal

Plaintiff and plaintiff's counsel argue the trial court erred when it imposed non-monetary sanctions: (1) without notice or hearing; (2) when plaintiff and plaintiff's counsel did not sign the amended complaint; and (3) were based upon unsupported findings of fact.

A. Due Process

[1] "Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994). "It is not adequate for the notice to say only that sanctions are proposed. The bases for the sanctions must be alleged." *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 439 (1998) (citing *Taylor v. Taylor Prods. Inc.*, 105 N.C. App. 620, 629, 414 S.E.2d 568, 575 (1992), *overruled on other grounds by Brooks v. Giesey*, 334 N.C. 303, 317, 432 S.E.2d 339, 347 (1993)). "In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him." *Id.*

Plaintiff and plaintiff's counsel cite *Gagliardi v. McWilliams* for the proposition that due process requires a party to be put on notice of the type of sanctions that could possibly be ordered by the trial court. 834 F.2d 81 (3rd Cir. 1987). In *Gagliardi*, the United States Court of Appeals for the Third Circuit vacated the district court's order and stated:

> The general request for "other appropriate relief" was insufficient notice to Gagliardi, who was proceeding pro se, of the possibility that his resort to the courts would be precluded without initial scrutiny by the district court. Even an experienced attorney would not have expected this type of injunctive sanction without some more specific notice.

834 F.2d at 83.

Neither our Supreme Court nor this Court have required a party, against whom statutory sanctions have been sought, to be put on notice of the specific type of sanctions, which may be ordered. North Carolina has consistently required only: (1) notice of the bases of the sanctions and (2) an opportunity to be heard. *See Griffin*, 348 N.C. at 280, 500 S.E.2d at 439; *see also Wilson v. Wilson*, 183 N.C. App. 267, 271, 644 S.E.2d 379, 382, *disc. rev. denied*, 362 N.C. 92, 657 S.E.2d 32 (2007); *Dunn v. Canoy*, 180 N.C. App. 30, 40, 636 S.E.2d 243, 250 (2006), *disc. rev. denied*, 361 N.C. 351, 645 S.E.2d 766 (2007); *Megremis v. Megremis*, 179 N.C. App. 174, 178-79, 633 S.E.2d 117, 121 (2006); *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 609, 596 S.E.2d 285, 290 (2004), *disc. rev. denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

Here, defendants' 25 April 2006 motion for attorney fees stated:

> Defendants . . . respectfully move for the entry of an order awarding to Defendants their reasonable attorneys' fees for services rendered by their attorneys in defense of this action pursuant to the following statutory authority:
>
> a. N.C. Gen. Stat. § 1A-1 (Rule 11 of the North Carolina Rules of Civil Procedure) *on the grounds that Plaintiff filed his claim when it was neither well grounded in fact nor warranted by existing law; and*
>
> b. N.C.G.S. § 6-21.5 *on the grounds that there was a complete absence of a justiciable issue of either law or fact raised by Plaintiff in his pleadings.*

(Emphasis supplied). Plaintiff subsequently submitted a memorandum of law in opposition to defendants' motion for attorneys' fees. On 9 June 2006, the trial court conducted a hearing on defendants' motion for attorneys' fees. The trial court's order filed on or about 12 June 2006 ordered defendants to depose plaintiff and stated:

> The scope of the deposition may include, but is not limited to: (1) [plaintiff]'s ownership of stock in Red Hat . . . and any other connection or involvement he may had had with Red Hat . . ., (2) his involvement with this litigation, including how he came to be involved and the extent of his knowledge of the proceedings in this litigation, (3) his involvement as plaintiff in any other shareholder derivative or class action litigation, (4) the general nature of any litigation in which he has been represented by Robbins, Umeda & Fink, (5) his connection with any lawyers, employees or agents of Robbins, Umeda & Fink, (6) any fee agreement or

> expectation of compensation he had with Robbins, Umeda & Fink in connection with this litigation, (7) his general work experience and educational background, (8) any criminal record which would impact his suitability to represent the corporation in this shareholder derivative action, and (9) the reasons for and timing of his selling his stock and abandoning his position in this litigation. Except as provided above he shall not be subject to examination about his personal life or finances. Nor shall he be required to disclose any substantive advice on legal issues provided in connection with his status as a shareholder derivative plaintiff by Robbins, Umeda & Fink. Any such communications that would be subject to the attorney client privilege shall not be the subject of examination.

Plaintiff and plaintiff's counsel were given notice of the "bases" of the alleged sanctions against them and were given an opportunity to present arguments and testimony on their behalf. Plaintiff's and plaintiff's counsel's due process rights were fully protected. *Griffin*, 348 N.C. at 280, 500 S.E.2d at 439; *see also Dunn*, 180 N.C. App. at 40, 636 S.E.2d at 250 (where the trial court "specifically informed [the appellant] that [it] was considering imposing Rule 11 sanctions[;]" "accepted an affidavit" from the appellant; and questioned the appellant and the other lawyers involved, this Court held the appellant "was thus given notice of the 'charges' against him in advance[,] . . . was given an opportunity to be heard[,] [and the appellant's] . . . due process rights were fully protected"). This assignment of error is overruled.

B. Signature on Amended Complaint

[2] The only signature on plaintiff's original complaint is that of F. Lane Williamson, plaintiff's North Carolina attorney. Plaintiff's amended complaint is again signed by F. Lane Williamson and contains a verification signed by out-of-state counsel, Jeffery P. Fink, which says, "I make this Verification because plaintiff is absent from the County of San Diego where I maintain my office." Plaintiff and plaintiff's counsel contend that the trial court could not enter nonmonetary sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 without their signatures on the amended complaint. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2005) allows the trial court to impose on the signer of the pleading, "a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses in-

curred . . . ." In *Higgins v. Patton*, this Court held "the defendants were entitled to request sanctions against the attorney, as signer of the complaint, and against both plaintiffs as represented parties, regardless of whether the plaintiffs signed the complaint." 102 N.C. App. 301, 305, 401 S.E.2d 854, 856 (1991), *rev'd in part by Bryson v. Sullivan*, 330 N.C. 644, 656-57, 412 S.E.2d 327, 333 (1992). In *Higgins*, this Court also held that "the complaint meets the legal certification requirement of Rule 11. When considered in conjunction with the answer, the complaint facially presents a plausible claim for trespass." 102 N.C. App. at 306, 401 S.E.2d at 857 (citation omitted). As noted above and contrary to the dissenting opinion's assertion, defendant never asserted in their motion, or argued in any of the hearings, that plaintiff filed his complaint "for any improper purpose" under either N.C. Gen. Stat. § 1A-1, Rule 11 or N.C. Gen. Stat. § 6-21.5. *Bryson*, 330 N.C. at 655, 412 S.E.2d at 332.

Our Supreme Court in *Bryson* held that:

> in determining whether a pleading was warranted by existing law *at the time it was signed the court must look at the face of the pleading and must not read it in conjunction with responsive pleadings* as the Court of Appeals erroneously held in the case and in other Rule 11 opinions. *E.g.*, *Higgins v. Patton*, 102 N.C. App. 301, 306, 401 S.E.2d 854, 857 . . . .

330 N.C. at 656-57, 412 S.E.2d at 333 (emphasis supplied). Our Supreme Court further stated:

> The legal question of whether a client whose counsel signs a pleading that violates Rule 11 but who does not himself sign the challenged pleading may be subject to sanctions under Rule 11 is not an issue arising on this appeal. The record shows that both of the plaintiffs signed the complaint. The authorities are divided on this question. . . . We thus leave this question to another day.

Id. at 659, 412 S.E.2d at 334-35 (footnote omitted).

Only that portion of *Higgins* which held the complaint should be "considered in conjunction with the answer" was overturned by our Supreme Court in *Bryson*. *Higgins*, 102 N.C. App. at 306, 401 S.E.2d at 857; *Bryson*, 330 N.C. at 656-57, 412 S.E.2d at 333. This Court remains bound by that portion of *Higgins* which held that "the defendants were entitled to request sanctions against . . . both plaintiffs as represented parties, regardless of whether the plaintiffs signed the complaint." 102 N.C. App. at 305, 401 S.E.2d at 856; *see also*

In the Matter of Appeal from Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (Citations omitted)). We hold that both plaintiff and plaintiff's counsel, as represented parties, were subject to sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. *Higgins*, 102 N.C. App. at 305, 401 S.E.2d at 856. This assignment of error is overruled.

C. Findings of Fact

[3] Plaintiff and plaintiff's counsel argue the trial court erred when it entered N.C. Gen. Stat. § 1A-1, Rule 11 non-monetary sanctions based upon unsupported findings of fact.

1. Standard of Review

> The 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. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).
>
> Finally, in reviewing the appropriateness of the particular sanction imposed, an abuse of discretion standard is proper because the rule's provision that the court shall impose sanctions for motions abuses concentrates the court's discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions.

Turner v. Duke University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989) (internal citation and quotation omitted) (emphasis original).

2. Analysis

> According to Rule 11, the signer certifies that three distinct things are true: the pleading is (1) well grounded in fact; (2) warranted by existing law, "or a good faith argument for the extension, modification, or reversal of existing law" (legal sufficiency);

> and (3) not interposed for any improper purpose. A breach of the certification as to any one of these three prongs is a violation of the Rule.

Bryson, 330 N.C. at 655, 412 S.E.2d at 332.

As noted above, defendants' motion for attorneys' fees alleged only that "Plaintiff filed his claim when it was neither well grounded in fact nor warranted by existing law . . . ." Defendants did not allege that plaintiff had filed his claim "for any improper purpose." *Id.* In *Bryson*, our Supreme Court held, as stated above, that "in determining whether a pleading was warranted by existing law at the time it was signed the court must look at the face of the pleading and must not read it in conjunction with responsive pleadings . . . ." 330 N.C. at 656-57, 412 S.E.2d at 333.

Here, the trial court stated in its order that "[it] does not believe that the initial pleadings in this case would, standing alone, support Rule 11 sanctions." The trial court further found that "when the combination of all the factors is considered, sanctions are warranted." Based on our Supreme Court's holding in *Bryson* and defendants failure to seek sanctions "for any improper purpose[,]" the trial court erred when it ordered sanctions to be imposed based on matters other than a review of the face of plaintiff's amended complaint. 330 N.C. at 655-57, 412 S.E.2d at 332-33. The trial court's entry of sanctions against plaintiff and plaintiff's counsel is reversed.

IV. Defendants' Cross-Appeal

Defendants argue the trial court erred when it: (1) failed to rule on their motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5 and (2) denied their motion for attorneys' fees pursuant to N.C. Gen. Stat. § 1A-1, Rule 11.

A. N.C. Gen. Stat. § 6-21.5

[4] Defendants argue the trial court failed to address their motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5 and that failure constituted reversible error. We disagree.

1. Standard of Review

The decision whether to award attorney's fees is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *Martin Architectural Prods., Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). An

abuse of discretion occurs when a decision is "either manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 248, 563 S.E.2d 269, 280 (2002) (quotation omitted).

2. Analysis

The trial court's order states:

> This matter is before the Court on Defendants' Motion for Attorneys' Fees filed after the Court granted Defendants' Motion to Dismiss. *The Court has concluded that it will not award attorney fees on the basis asserted by Defendants.* However, the Motion has brought to the Court's attention certain actions on the part of [plaintiff], the shareholder representative, and his out-of-state counsel which are of sufficient concern to the Court that the Court will enter non-monetary sanctions.

(Emphasis supplied).

Based upon the trial court's statement that "it will not award attorney fees on the basis asserted by Defendants[,]" it is clear that the trial court exercised its discretion and chose to deny defendants' motion for attorneys' fees pursuant to both N.C. Gen. Stat. § 1A-1, Rule 11 *and* N.C. Gen. Stat. § 6-21.5. The trial court did not "fail[] to exercise its discretion under the statute . . . ." Defendant's assertions to the contrary are overruled.

Defendants have also failed to show that the trial court manifestly abused its discretion when it denied defendants' motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5. Under N.C. Gen. Stat. § 6-21.5 (2005), a trial court "may award a reasonable attorney's fees to the prevailing party if the court finds there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." When reviewing a motion brought under N.C. Gen. Stat. § 6-21.5, the trial court is "required to evaluate whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue." *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991).

The trial court, in its Order on Motion for Attorney Fees, found: (1) "[d]emand futility under Delaware law . . . . is an area fraught with difficulty and not susceptible to bright-line tests[;]" (2) "[t]he test for

demand futility under Delaware law is always fact specific and contextual[;]" (3) "[t]he application of the law is done on a case-by-case basis[;]" and (4) "it will not award attorney fees on the basis asserted by Defendants."

Defendants have failed to show that the trial court's decision to deny their motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5 was "either manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Country Club of Johnston Cty., Inc.*, 150 N.C. App. at 248, 563 S.E.2d at 280 (quotation omitted). Under the applicable standard of review of the trial court's discretionary ruling, this assignment of error is overruled.

B. N.C. Gen. Stat. § 1A-1, Rule 11

[5] Because the trial court initially found "that [it] d[id] not believe that the initial pleadings in this case would, standing alone, support Rule 11 sanctions[,]" it is unnecessary to remand this matter to the trial court for a determination of whether Rule 11 sanctions would be appropriate based solely on the face of the amended complaint. *Bryson*, 330 N.C. at 656-57, 412 S.E.2d at 333. We will treat the trial court's finding as a decision not to impose sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 and review it according to the framework established by our Supreme Court in *Turner*. 325 N.C. at 165, 381 S.E.2d at 714.

The trial court's conclusion of law "that the initial pleadings in this case would [not], standing alone, support Rule 11 sanctions[]" is supported by its findings of fact. The trial court found: (1) "[d]emand futility under Delaware law . . . . is an area fraught with difficulty and not susceptible to bright-line tests[;]" (2) "the test for demand futility under Delaware law is always fact specific and contextual[;]" and (3) "[t]he [trial] [c]ourt's decision and order in *Pozen* was not entered until after the original *Egelhof* Complaint and Amended Complaint were filed; therefore [p]laintiff's counsel did not have the benefit of that decision when drafting the pleadings."

After a thorough review of the record on appeal, we hold that these findings of fact are supported by sufficient evidence. *Id.* The trial court properly found the imposition of Rule 11 sanctions was not appropriate based solely on review of the face of the complaint. The trial court's denial of defendants' motion for attorney fees pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 is affirmed.

V. Conclusion

Plaintiff and plaintiff's counsel received notice that Rule 11 sanctions were being sought against them and the statutory basis of those sanctions. N.C. Gen. Stat. § 1A-1, Rule 11(a). Plaintiff and plaintiff's counsel were provided an opportunity to be heard by and present evidence to the trial court on defendants' motion for attorneys' fees. Plaintiff's and plaintiff's counsel's due process rights were fully protected. *Griffin*, 348 N.C. at 280, 500 S.E.2d at 439. Both plaintiff and plaintiff's counsel, as represented parties, were subject to sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11(a). *Higgins*, 102 N.C. App. at 305, 401 S.E.2d at 856.

In determining whether plaintiff's amended complaint was well grounded in fact and warranted by existing law, the trial court failed to solely review the face of the amended complaint. *Bryson*, 330 N.C. at 656-57, 412 S.E.2d at 333. That portion of the trial court's order, which imposed sanctions against plaintiff and plaintiff's counsel under Rule 11 is reversed.

Contrary to defendants' assertion, the trial court exercised its discretion pursuant to N.C. Gen. Stat. § 6-21.5. Defendants failed to show the trial court manifestly abused its discretion when it denied defendants' motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5. The trial court properly determined that Rule 11 sanctions were not appropriate based solely on review of the face of the amended complaint. The trial court's denial of defendants' motion for attorneys' fees pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 11 and 6-21.5 is affirmed.

Those portions of the trial court's order, which ordered: (1) Jeffrey P. Fink to pay "the North Carolina State Bar and the Clerk of Court of Wake County an amount equal to the amount he would have been required to pay had he properly filed a *pro hac vice* motion and been admitted to appear in this action[]" and (2) "Mr. Williamson will insure that [plaintiff] receives a copy of this order[,]" are not before us and are left undisturbed.

Affirmed in Part and Reversed in Part.

Judge McCULLOUGH concurs.

Judge CALABRIA dissents by separate opinion.

CALABRIA, Judge, concurs in part and dissents in part.

I concur with the majority that the plaintiff and plaintiff's counsel were given appropriate notice of the basis for the sanctions that were brought against them and had an opportunity to be heard. However, I respectfully dissent from the majority's holding that the defendants must specifically allege that plaintiff filed claims "for an improper purpose." The trial court correctly imposed non-monetary sanctions under both Rule 11 and their inherent power to discipline attorneys who appear before the court. Furthermore, I agree with the defendants that the trial court erred by failing to award attorney's fees.

I. Rule 11

Rule 11 of the North Carolina Rules of Civil Procedure states in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or *upon its own initiative*, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

N.C. Gen. Stat. § 1A-1, Rule 11 (2007) (emphasis added).

The majority states that the trial court erred by imposing sanctions "based on matters other than a review of the face of the plaintiff's amended complaint," and relies on the Supreme Court's holding in *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992). The *Bryson* Court did indeed hold that "in determining whether a pleading was warranted by existing law at the time it was signed the court must look at the face of the pleading." *Id.* at 656-57, 412 S.E.2d at 333. The majority argues that because defendants did not allege that plaintiff filed his claim for an improper purpose, or failed to seek sanctions specifically for an improper purpose, the trial court may not consider the actions of the plaintiff beyond the pleadings. I disagree.

Although the *Bryson* Court limits whether or not to impose sanctions under the legal sufficiency prong of Rule 11, sanctions are not limited when later filings reveal the case has become meritless. The trial court may look beyond the face of the pleading when considering whether litigation was continued for an improper purpose. "[O]nce responsive pleadings or other papers are filed and the case has become meritless, failure to dismiss or further prosecution of the action may result in sanctions either under the improper purpose prong of the Rule, or under other rules, or pursuant to the inherent power of the court." *Id.* at 658, 412 S.E.2d at 334. The existence of an improper purpose under Rule 11 is determined by an objective standard. *Id.* at 656, 412 S.E.2d at 333. The plain language of Rule 11 gives the trial court the power to impose sanctions "upon its own initiative." An omission in the allegations by a party to the action cannot serve to take away the power of the court provided by Rule 11 to impose appropriate sanctions.

In the case *sub judice*, the trial judge made ample findings of fact to support a conclusion that the plaintiff and his counsel maintained their complaint for an improper purpose by continuing to litigate even when it was clear, or should have been clear, that their claim was meritless. The trial judge concluded that "the initial pleadings in this case, would, standing alone, support Rule 11 sanctions." The judge found that "the shortcomings in the Complaint . . . demonstrate a disregard for or lack of attention to the rules of procedure as well as court decisions and admonitions." The court also noted that plaintiff's counsel failed to notify the plaintiff of the business court's decision in *In re Pozen Shareholders Litigation*, 2005 NCBC 7, a case in which plaintiff's counsel also appeared before the court and one which "could have had a direct impact on [plaintiff's] case." Plaintiff's counsel also failed to communicate to plaintiff a formal request from the defense counsel "that plaintiff reconsider going forward with the litigation following the *Pozen* decision." They failed to do so.

Furthermore, the trial judge found that this lack of communication led directly to plaintiff's counsel's ignorance of the fact that plaintiff sold all his shares of Red Hat and therefore completely divested himself of standing to pursue a shareholder derivative action in Red Hat's name. "[T]he firm should have possessed that information and in all probability would have but for its failure to inform [plaintiff] of the developments in his case." Indeed, as the court found, plaintiff "played no significant role in the litigation process."

Applying an objective standard as provided in *Bryson*, it is clear from the trial court's findings that plaintiff and plaintiff's counsel knew, or reasonably should have known, that the claims were meritless once plaintiff's counsel became aware of the business court's decision in *Pozen*. This, along with other findings of misconduct by both the plaintiff and his counsel support a conclusion that the complaint was filed and maintained for an improper purpose in violation of N.C. Gen. Stat. § 1A-1, Rule 11. Sanctions were appropriate and the trial court's decision imposing sanctions should be affirmed.

II. Inherent Power of the Court to Discipline Attorneys

The trial court's authority to impose sanctions is not limited to Rule 11. Sanctions can also be ordered under a court's inherent power to deal with attorneys appearing before it. *North Carolina State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). "[I]t has been held repeatedly that in North Carolina there are two methods by which disciplinary action or disbarment may be imposed upon attorneys—statutory and judicial." *Id.*, at 701-02, 386 S.E.2d at 186. "Nothing contained in [the statutes creating and empowering the State Bar to discipline attorneys] shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys." N.C. Gen. Stat. § 84-36 (2007). This power includes the power to disbar attorneys appearing before it. *See In re Delk*, 336 N.C. 543, 550, 444 S.E.2d 198, 201 (1994).

In the instant case, the trial judge made several findings of fact concerning misconduct by plaintiff's counsel, most notably counsel's violation of Rule 1.4 of the Rules of Professional Conduct of the North Carolina State Bar, which mandates communication between a lawyer and his client. Plaintiff's counsel "failed to keep its client informed of significant developments in the lawsuit, including a motion for sanctions which could directly affect the client." The trial judge also found "Mr. Egelhof, the firm, and the individual lawyers have failed in their duties and responsibilities to each other and to the Court."

Plaintiff's counsel argues in its brief that the court lacks the authority to prospectively prohibit out-of-state counsel from appearing in North Carolina courts *pro hac vice*. However, this "prospective" prohibition is analogous to the court's power to disbar in-state counsel appearing before it, a power which has been repeatedly affirmed in North Carolina courts. "The right to appear *pro hac vice* in the courts of another state is not a right protected by the Due Process

Clause of the Fourteenth Amendment." *In re Smith*, 301 N.C. 621, 630, 272 S.E.2d 834, 840 (1981).

"The purpose of the statutes governing an attorney's ability to be admitted *pro hac vice* is to afford [North Carolina] courts a means to control out-of-state counsel and to assure compliance with the duties and responsibilities of attorneys practicing in this State." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 670, 554 S.E.2d 356, 365 (2001) (internal quotes omitted). In light of this purpose, it would be irrational to hold that the legislature intended to grant the power to "prospectively prohibit" licensed members of the North Carolina State Bar from appearing before North Carolina courts, but not exercise a similar power over out-of-state counsel. Therefore, I would affirm the trial court's imposition of non-monetary sanctions on plaintiff's counsel.

III. Defendants' Motion for Attorney's Fees

In affirming the trial court's failure to award attorney's fees, the majority states that "it is clear that the trial court exercised its discretion and chose to deny defendants' motion for attorney's fees pursuant to both N.C. Gen. Stat. § 1A-1, Rule 11 *and* N.C. Gen. Stat. § 6-21.5." I agree with the majority that the trial court's decision whether or not to award attorney's fees may not be overturned absent an abuse of discretion. *Martin Architectural Prods. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). However, "in deciding a motion brought under N.C.G.S. § 6-21.5, the trial court is *required* to evaluate whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue." *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991) (emphasis added). A plaintiff has "a continuing duty to review the appropriateness of persisting in litigating a claim which [is] alleged [to lack a justiciable issue]." *Bryson*, 330 N.C. at 660, 412 S.E.2d at 335 (quoting *Sunamerica*, *supra*).

The trial court made numerous findings of fact concerning misconduct by both plaintiff and his counsel as well as circumstances illustrating that their case was without merit. Nevertheless, the court denied any award of attorney's fees apparently because of the "timing" of the litigation relative to the order dismissing the *Pozen* case.

According to the record, the timeline began 10 November 2005 and ended 13 March 2006.

> The Order dismissing the *Pozen* case was entered November 10, 2005. Defendants' reply to Plaintiff's response to the motion to dismiss [in the *Egelhof* case] was filed November 15, 2005. Mr. Egelhof sold his shares in Red Hat on December 31, 2005. Oral arguments on the motion to dismiss were originally scheduled for December 20, 2005, but were heard February 2, 2006, upon Plaintiff's motion. The Order dismissing *Egelhof* was entered March 13, 2006.

The court found that plaintiff's counsel had ample notice of *Pozen* and its impact on the instant case, since plaintiff's counsel personally represented the plaintiff in *Pozen*. Furthermore, the record includes a letter dated 14 November 2005 sent by defendants' counsel to plaintiff's counsel urging them to voluntarily dismiss the case in light of *Pozen*, in return for a waiver of any claim for fees and costs. The trial court's reliance on "timing" here seems misplaced, since oral arguments on the motion to dismiss occurred nearly *three months* after the dismissal of *Pozen*, and more than a month after plaintiff divested himself of standing by selling all his stock. Plaintiff ignored defendants' counsel and persisted in litigation after it was clear that there was no justiciable issue in the case.

The trial court never expressly evaluated whether or not the pleading contained a justiciable issue when the plaintiff persisted in opposing defendants' motion to dismiss, or whether the plaintiff reasonably should have known. The trial court's failure to adequately address defendants' motion under N.C. Gen. Stat. § 6-21.5 is an abuse of discretion and constitutes reversible error. The case should be remanded for consideration of that issue.

Conclusion

I would affirm the trial court's imposition of non-monetary sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 and its inherent authority to discipline attorneys appearing before it. The case should be remanded for consideration of defendants' motion for attorney's fees under N.C. Gen. Stat. § 6-21.5.

STATE OF NORTH CAROLINA v. GERALDINE LEWIS RAMOS, DEFENDANT

No. COA07-994

(Filed 18 November 2008)

1. Crimes, Other— damaging computer or computer network—willfulness—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of damaging a computer or computer network in violation of N.C.G.S. § 14-455(a), even though defendant contends the State presented insufficient evidence that she acted willfully, because: (1) defendant's argument is based on her own testimony, and it overlooks the fact that only the State's evidence is looked at on appeal from the denial of a motion to dismiss; (2) a defendant's evidence may be considered only if it explains, clarifies, or is not inconsistent with the State's evidence; (3) willfulness involves a state of mind ordinarily proven by circumstantial evidence; and (4) the State presented evidence that when defendant's employment was terminated, she became enraged and her words and her body language were very violent; defendant refused to give back her keys until she got her paycheck which was typically not distributed until the end of the month; the critical files were found missing from the employer's server shortly after defendant had returned from her office; the police discovered the missing files on defendant's flash drive with 80% of them deleted or deleted and overwritten; defendant told the police she would give the files back when she got her paycheck; and defendant admitted at trial that she deleted computer files including curriculum and grant-writing files even though she claimed her boss had given her permission to delete her personal files which she interpreted to include work-related files.

2. Crimes, Other— damaging computer or computer network—instructions—willfulness—acting without authorization

The trial court erred by instructing the jury as to the elements of the offense of damaging a computer or computer network under N.C.G.S. § 14-455(a), and defendant is entitled to a new trial, because: (1) the trial court's instruction that defendant acted without authorization did not satisfy the requirement that the jury be instructed as to willfulness when the General Assembly intended to require proof of both willfulness and lack of authorization; (2) the showing that an act was intentional is not

the same as a showing that the act was willful; (3) a jury could reasonably find that defendant intended only to delete files that she believed her boss consented to her deleting, and there is no willful and knowing violation of a statute when defendant believed she had a bona fide right to do so; and (4) a jury could also reasonably believe that any deletion of the files was accidental based on defendant's testimony that she did not intend to delete the TAP files and did not believe she could enter those files while her boss was working on them.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 14 December 2006 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 17 January 2008.

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

Peter Wood for defendant-appellant.

GEER, Judge.

Defendant Geraldine Lewis Ramos appeals from her conviction of damaging a computer or computer network in violation of N.C. Gen. Stat. § 14-455(a) (2007). In order to obtain a conviction under that statute, the State must prove the defendant acted "willfully." We agree with defendant that the trial court erred by failing to instruct the jury that it was required to determine whether defendant deleted files on the computer willfully. Because there is a reasonable possibility that the jury might have reached a different verdict if properly instructed, we must grant defendant a new trial.

Facts

The State's evidence tended to show the following facts. Defendant was hired as a community outreach coordinator by the Latin American Resource Center ("LARC") on 15 May 2005. Her supervisor was LARC's director and founder, Aura Camacho-Maas. At that time, LARC had three full-time employees, including Camacho-Maas and defendant, and eight part-time employees. LARC had a computer network with five computers.

One of defendant's responsibilities was to write grant proposals for the organization. One proposal was supposed to be completed by

1 August 2005. On 1 August 2005, however, the proposal was not complete, and defendant and Camacho-Maas had to work until midnight to get the proposal done.

During the week prior to 15 August 2005, Camacho-Maas assigned defendant a second grant proposal due on 15 August 2005. The proposal required defendant to access computer files related to LARC's teacher apprenticeship program ("TAP"). When, on 15 August 2005, the proposal was still not completed, Camacho-Maas and defendant, who were the only employees in the office, had to work on the grant proposal together.

On that same day, Camacho-Maas told defendant that she was being terminated because she was unable to do the work required for her position. When Camacho-Maas asked defendant for her keys to the office, defendant refused to hand them over until she received her paycheck. Camacho-Maas explained to defendant that she would receive her paycheck at the end of the month as usual, and defendant left the building. Camacho-Maas followed defendant and told the receptionist that defendant had been terminated from her job and was not to enter the building without Camacho-Maas being present. The receptionist requested that Camacho-Maas send an e-mail confirming that instruction.

While Camacho-Maas was in her office typing the e-mail, she heard noises in the lobby. When she went to see what was happening, defendant and the receptionist were coming out of defendant's office with drums defendant had brought to LARC for a summer art program. After they left, Camacho-Maas closed the door to defendant's office and went back into her own office.

Moments later, Camacho-Maas realized the receptionist and defendant were again coming out of defendant's office. Camacho-Maas became concerned, went into defendant's office, sat down at defendant's computer, and discovered that the TAP files were missing from LARC's server. Camacho-Maas had seen the TAP files on the server earlier that day before she had terminated defendant's employment. Only LARC employees have access to the TAP files, and Camacho-Maas had not authorized anyone to move or remove the TAP files. Camacho-Maas called the police, and Detective B.R. Williams of the Raleigh Police Department was assigned to investigate the case.

On 16 August 2005, defendant returned to LARC, and Camacho-Maas called Detective Williams. He went to LARC, met defendant, and

told her why he was there. Defendant admitted that she had copied files onto her flash drive. Detective Williams asked defendant to accompany him to the police station so that he could copy the contents of the flash drive. A member of the Raleigh Police Department's cybercrimes unit found approximately 304 LARC files on defendant's flash drive, 80% of which were TAP files that were "either deleted or deleted and overwritten."

Defendant was charged with damaging a computer system or computer network. On 3 November 2005, defendant pled guilty in district court to damaging a computer. The trial court sentenced defendant to a suspended sentence of 45 days imprisonment and 12 months supervised probation. Defendant appealed to superior court on 7 November 2005.

During the trial in superior court, defendant presented evidence that she had researched and developed a curriculum that cost $5,000.00 to $6,000.00—a curriculum that she knew Camacho-Maas would want. Upon her termination, defendant told Camacho-Maas that she was going to delete her work off the computer. Camacho-Maas responded that defendant's work was not good and, therefore, she did not care if defendant deleted the files. Defendant testified that she never deleted the TAP files, but rather only deleted the research she had done for the curriculum and the part of the grant proposal that she had written. Defendant also testified that Camacho-Maas knew that defendant was deleting files and never said anything about what defendant was doing.

The jury found defendant guilty of damaging a computer system or computer network on 14 December 2006. The court sentenced defendant to a suspended sentence of 45 days and 18 months supervised probation. Defendant was also ordered to pay a fine in the amount of $3,107.50 and to complete 100 hours of community service. Defendant timely appealed to this Court.

I

[1] Defendant first contends that the trial court erred in denying her motion to dismiss. When considering a motion to dismiss, the trial court must determine whether the State presented substantial evidence of each element of the crime and of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State*

v. Matias, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). The evidence must be viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

N.C. Gen. Stat. § 14-455(a), the offense charged in defendant's indictment, states: "It is unlawful to willfully and without authorization alter, damage, or destroy a computer, computer program, computer system, computer network, or any part thereof." Thus, a violation of this statute requires proof: (1) that the defendant altered, damaged, or destroyed a computer, computer program, computer system, computer network, or any part thereof, (2) that the defendant did so willfully, and (3) without authorization.

In this case, defendant argues only that the State presented insufficient evidence that she acted willfully. She asserts that any files deleted were her own personal property, were deleted with the permission of the director of LARC, or were accidentally deleted. Defendant's argument is, however, based solely on her own testimony. Defendant overlooks the fact that, on appeal from the denial of a motion to dismiss, we look only at the State's evidence. *State v. Barnett*, 141 N.C. App. 378, 382-83, 540 S.E.2d 423, 427 (2000), *appeal dismissed and disc. review denied in part*, 353 N.C. 527, 549 S.E.2d 552, *aff'd per curiam in part*, 354 N.C. 350, 554 S.E.2d 644 (2001). A defendant's evidence may be considered only if it " 'explains, clarifies or is not inconsistent with the State's evidence.' " *Id.* (quoting *State v. Walker*, 332 N.C. 520, 530, 422 S.E.2d 716, 722 (1992), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271, 113 S. Ct. 2364 (1993)).

Because "willfulness" involves a state of mind, " 'ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred.' " *State v. Alexander*, 337 N.C. 182, 188, 446 S.E.2d 83, 86-87 (1994) (quoting *State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 629 (1964)). In this case, the State presented evidence that when defendant's employment was terminated, she "became enraged" and her "words and her body language were . . . very violent." Defendant also would not give Camacho-Maas her keys without immediately getting her paycheck. After Camacho-Maas explained that she would have to wait until the end of the month for her paycheck, defendant refused to hand over her keys and left.

The critical files were found missing from the LARC server a short while later, after defendant had returned to her office. The police discovered the missing files on defendant's flash drive with 80% of them deleted or deleted and overwritten. When questioned by the police, defendant stated that "she would give Miss Camacho-Maas' files back when she got her paycheck." At trial, defendant admitted deleting LARC computer files, including curriculum files and grant-writing files, although she claimed that Camacho-Maas had given her permission to delete her "personal files," which she interpreted to include work-related files.

This evidence was sufficient to allow a jury to find that defendant deleted computer files willfully. The trial court, therefore, properly denied the motion to dismiss.

II

[2] Defendant next contends the trial court erred in instructing the jury as to the elements of the offense under N.C. Gen. Stat. § 14-455(a). Defense counsel requested in writing the following instruction:

> For you to find the defendant guilty you must find that she
>
> 1. Willfully, that is intentionally and without an honest belief that there is an excuse or justification for it[,]
>
> 2. Without the knowledge or consent of the owner, Latin American Resource Center[,]
>
> 3. Damaged, Altered, or Destroyed a computer, computer network, computer program, computer system or part thereof of the Latin American Resource Center[.]

The court denied defense counsel's requested instruction and the court submitted the following instruction to the jury:

> The defendant, Geraldine Lewis Ramos, has been charged with the misdemeanor of damaging a compute [sic] system or computer network, or any part thereof.
>
> For you to find the defendant guilty of this offense the State must prove two things:
>
> First, that the defendant damaged a computer system or computer network or any part thereof by deleting a file or files from the computer system or computer network.

> Second, that the defendant did so without authorization. A person is without authorization when although the person has the consent or permission of owner [sic] to access a computer system or computer network the person does so in a manner which exceeds the consent or permission.
>
> If you find from the evidence beyond a reasonable doubt that on or about August the 15th, 2005 the defendant, without authorization, damaged a computer system or computer network, it would appeal [sic] your duty to return a verdict of guilty.

Defendant contends that the trial court's instruction was insufficient because it did not instruct the jury that it was required to find that defendant acted willfully.

The State contends that we should review the trial court's instructions to the jury under an abuse of discretion standard. The State has, however, mistakenly lumped all jury instruction issues under one standard of review. Our appellate courts have repeatedly held that "[a] trial judge *is required* by N.C.G.S. § 15A-1231 and N.C.G.S. § 15A-1232 to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (emphasis added). *See also State v. Gooch*, 307 N.C. 253, 256, 297 S.E.2d 599, 601 (1982) ("The trial court must charge the essential elements of the offense."); *State v. Jarrett*, 137 N.C. App. 256, 265, 527 S.E.2d 693, 699 ("The trial court is required to instruct the jury as to the essential elements of the offense charged and when the court undertakes to define the law, it must do so correctly."), *disc. review denied*, 352 N.C. 152, 544 S.E.2d 233 (2000).

The appellate courts have recognized that a trial judge has discretion in the manner in which he charges the jury, " 'but he *must* explain every essential element of the offense charged.' " *State v. Valladares*, 165 N.C. App. 598, 607, 599 S.E.2d 79, 86 (emphasis added) (quoting *State v. Young*, 16 N.C. App. 101, 106, 191 S.E.2d 369, 373 (1972)), *appeal dismissed and disc. review denied*, 359 N.C. 196, 608 S.E.2d 66 (2004). *See also State v. Holmes*, 120 N.C. App. 54, 71, 460 S.E.2d 915, 925 ("While the court must explain each essential element of the offense charged, the manner in which it chooses to do so is within its discretion."), *disc. review denied*, 342 N.C. 416, 465 S.E.2d 545 (1995). This Court distinguished the aspects of jury instructions subject to discretion from those that are mandatory in *State v. Wallace*, 104 N.C. App. 498, 504, 410 S.E.2d 226, 230 (1991)

(internal citations omitted), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241, 113 S. Ct. 321 (1992):

> In North Carolina, a trial judge is not required to follow any particular form in giving instructions and has wide discretion in presenting the issues to the jury. A judge is not required to state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence, although he may elect to do so in his discretion. A trial judge must, however, charge every essential element of the offense.

In short, if "willfulness" is an element of an offense under N.C. Gen. Stat. § 14-455(a), then the trial court was required to include "willfulness" in its instructions.

The State does not dispute either that willfulness is an element of N.C. Gen. Stat. § 14-455(a) or that the trial court's instruction failed to instruct the jury that defendant must have acted willfully. The State, however, contends that no error occurred because the trial court instructed the jury that defendant must have acted "without authorization." According to the State, "without authorization" and "willfully" are synonymous concepts. We cannot agree.

Our General Assembly defined "authorization" for purposes of computer-related crimes, including N.C. Gen. Stat. § 14-455(a), as meaning "having the consent or permission of the owner, or of the person licensed or authorized by the owner to grant consent or permission to access a computer, computer system, or computer network in a manner not exceeding the consent or permission." N.C. Gen. Stat. § 14-453(1a) (2007). As a result, a person acts "without authorization" if she accesses a computer without the consent or permission of the owner or in a manner exceeding any consent or permission. On the other hand, " '[w]ilful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965). One may act "without authorization," but still not act willfully. For example, a person who accidentally deletes files is not acting willfully, but has deleted the files without authorization.

Consequently, the trial court's instruction that the jury was required to find that defendant acted "without authorization" did not satisfy the requirement that the jury be instructed as to willfulness.

A contrary interpretation of the statute would be inconsistent with established principles of statutory construction:

> "[W]e are guided by the principle of statutory construction that a statute should not be interpreted in a manner which would render any of its words superfluous. We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation."

State v. Haddock, 191 N.C. App. 474, 482, 664 S.E.2d 339, 345 (2008) (quoting *State v. Coffey*, 336 N.C. 412, 417-18, 444 S.E.2d 431, 434 (1994)). The State's contention would require that we view either "willfully" or "without authorization" as redundant or surplusage. A more reasonable construction of the statute—especially given the plain meaning of the words—is that the General Assembly intended to require proof both of willfulness and lack of authorization. *See Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.").

When a trial court fails to instruct a jury that the State was required to prove willfulness as an element of a crime, the court has erred. *See State v. Maxwell*, 47 N.C. App. 658, 660, 267 S.E.2d 582, 584 (holding that trial court "should have charged on willfulness as an element"), *appeal dismissed and disc. review denied*, 301 N.C. 102, 273 S.E.2d 307 (1980). "Ordinarily, failure to instruct on each element of a crime is prejudicial error requiring a new trial." *State v. Whiteley*, 172 N.C. App. 772, 780, 616 S.E.2d 576, 581 (2005). Nevertheless, a failure to instruct on willfulness may amount to harmless error. *See State v. Rose*, 53 N.C. App. 608, 611, 281 S.E.2d 404, 406 (1981) (finding no prejudice when court failed to instruct jury that defendant's escape from prison must have been willful because "nothing in the record in any way indicates that defendant's escape was anything other than 'willful' "); *Maxwell*, 47 N.C. App. at 660, 267 S.E.2d at 584 (finding no prejudice because "all the evidence shows that if defendant took indecent liberties with the child he did so willfully").

In arguing that defendant was not prejudiced by any error, the State argues that "defendant admitted she deleted LARC's computer files." It is, however, well established that a showing that an act was intentional is not the same as a showing that the act was willful. As this Court explained in *State v. Whittle*, 118 N.C. App. 130, 135, 454

S.E.2d 688, 691 (1995) (quoting *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940)), "[t]he word 'willfully' means 'something more than an intention to commit the offense.' . . . 'It implies committing the offense purposely and designedly in violation of law.' " *See also State v. Clifton*, 152 N.C. 800, 802, 67 S.E. 751, 752 (1910) ("The word willful as used within the meaning of the statute implies something more than a mere voluntary purpose. When used in criminal statutes the word willful means not only designedly, but also with a 'bad purpose.' "); *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 619, 538 S.E.2d 601, 611 (2000) (holding that when statute requires willfulness, word "willfully" means more than intention to commit offense), *appeal dismissed and disc. review denied*, 353 N.C. 372, 547 S.E.2d 811 (2001).

Here, defendant presented evidence that she believed Camacho-Maas had authorized her to delete files amounting to her own work. Defendant testified that, at the time of her termination, defendant told Camacho-Maas, "since my work is no good I guess you won't mind if I take my work off computer [sic]." According to defendant, Camacho-Maas responded, "this was no consequence to her, that the work was not good, and it was no consequence." Defendant testified that Camacho-Maas followed defendant into her office while defendant was deleting the files. Defendant testified Camacho-Maas "didn't say anything, but she knew what I was doing at that time, reason [sic] I walked back down to the room." Defendant claimed that the only files that she deleted were:

> [t]he curriculum, research that I had done for the curriculum. I deleted part of the grant which was the grant that I had written. I think that was about three, three files, but it was not the TAP file.
>
> TAP file was in the server. It was a server and, in order for, to go into the server. She had already worked in the server, so I could not [sic] to go into the TAP file.
>
> I would have [sic] go into the server. Server couldn't be but one person going into it at the time, so I don't know.

Based on this testimony, the jury could reasonably find that defendant intended only to delete files that she believed—according to the State, incorrectly—Camacho-Maas had consented to her deleting. As our Supreme Court has held, "[n]either does one 'willfully and knowingly' violate a statute when he does that which he believes he has a *bona fide* right to do." *State v. Fraylon*, 240 N.C. 365, 373, 82

S.E.2d 400, 405 (1954). A jury could further find, based on defendant's testimony that she did not intend to delete the TAP files and did not believe she could enter the TAP files while Camacho-Maas was working on them, that any deletion of the files was accidental. Thus, the record contains evidence that would allow a jury to find that she deleted files without authorization, but not willfully. The trial court's failure to include willfulness in its instructions cannot, therefore, be deemed harmless error.

Accordingly, defendant is entitled to a new trial. Because of our disposition of this appeal, we need not address defendant's remaining contentions.

New trial.

Judge STROUD concurs.

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

TYSON, Judge concurring in part and dissenting in part.

I fully concur with that portion of the majority's opinion affirming the trial court's denial of Geraldine Lewis Ramos's ("defendant") motion to dismiss based upon the sufficiency of the evidence. Although the trial court failed to instruct the jury that the State was required to prove the element of willfulness, defendant failed to show any prejudice by this omission and is not entitled to a new trial. I disagree with that portion of the majority's opinion granting defendant a new trial based upon the instructions submitted to the jury. I respectfully dissent.

I. Standard of Review

> This Court reviews jury instructions contextually and in its entirety. 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 . . . ." *The party asserting error 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.*"

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (quoting *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002)) (emphasis supplied).

II. Analysis

The majority's opinion holds the trial court committed reversible error and awards defendant a new trial because the trial court failed to instruct the jury that the State was required to prove that defendant "willfully" deleted the files off of LARC's computer network. I disagree.

It is well-established that a trial judge is required to instruct the jury on every essential element of the crime charged. *State v. Mundy*, 265 N.C. 528, 529, 144 S.E.2d 572, 573 (1965); *State v. Hunt*, 339 N.C. 622, 649, 457 S.E.2d 276, 292 (1994). Here, defendant was charged and convicted of a violation of N.C. Gen. Stat. § 14-455, which provides:

> It is unlawful to *willfully and without authorization* alter, damage, or destroy a computer, computer program, computer system, computer network, or any part thereof. A violation of this subsection is a Class G felony if the damage caused by the alteration, damage, or destruction is more than one thousand dollars ($1,000). Any other violation of this subsection is a Class 1 misdemeanor.

N.C. Gen. Stat. § 14-455(a) (2005) (emphasis supplied). The trial court correctly instructed the jury on the element of "without authorization[,]" but failed to instruct the jury on willfulness. Based upon principles of statutory interpretation and contrary to the State's contention, the terms "willfully" and "without authorization" are not interchangeable. *See Lithium Corp. of Am. v. Town of Bessemer City*, 261 N.C. 532, 535, 135 S.E.2d 574, 577 (1964) ("Ordinarily, when the conjunctive "and" connects words, phrases or clauses of a statutory sentence, they are to be considered jointly." (Citation omitted)).

The majority's opinion correctly points out that the failure to instruct the jury on the element of willfulness has been repeatedly held to be harmless error. *See State v. Rose*, 53 N.C. App. 608, 611, 281 S.E.2d 404, 406 (1981); *State v. Maxwell*, 47 N.C. App. 658, 660-61, 267 S.E.2d 582, 584, *disc. rev. denied*, 301 N.C. 102, 273 S.E.2d 307 (1980). Here, our task is to determine whether the trial court's error prejudiced defendant to entitle her to a new trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2005) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States

when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. *The burden of showing such prejudice under this subsection is upon the defendant.*" (Emphasis supplied)).

Although defendant presented evidence tending to show that her supervisor, Aura Camacho-Mass ("Camacho-Mass"), had authorized defendant to delete her personal files from LARC's computer, other overwhelming evidence shows that defendant's actions were unequivocally willful. At trial, Camacho-Mass recounted the events which took place after she had informed defendant of her termination. Camacho-Mass testified defendant "became enraged. Her words and her body language were, were [sic] very violent. And she was crying in my office after she told me many things." Camacho-Mass further testified that defendant stated she "was a fake" and that "she'll destroy me in the agency." Defendant refused to return her office keys and immediately demanded her paycheck. Camacho-Mass informed defendant that she would receive her paycheck at the end of the month. After defendant left the building, Camacho-Mass informed the receptionist that defendant was not to be allowed to re-enter the building without her presence.

Shortly thereafter, Camacho-Mass heard noises outside her office and observed defendant and the receptionist exit defendant's office carrying drums that were used in the agency's summer program. Camacho-Mass testified she refrained from commenting on defendant's presence because she believed the drums belonged to defendant.

Camacho-Mass subsequently observed defendant and the receptionist exit defendant's office a second time and became "really concerned." Camacho-Mass sat down at defendant's computer, opened up the file server, and discovered that all the Teacher Apprenticeship Program ("TAP") files had been deleted from the agency's computer network. Camacho-Mass reported defendant's actions to the police. Camacho-Mass testified that neither defendant nor other personnel had permission to duplicate or remove the TAP files from LARC's network.

Raleigh Police Detective James Neville ("Detective Neville") of the cyber crimes unit, confirmed that 304 files were stored on LARC's flash drive and approximately 80 percent of these files were either deleted or overwritten.

The following day, defendant returned to her former workplace and met with Detective B.R. Williams to discuss the missing files. Defendant admitted she had copied the files onto her personal thumb drive "because they [were] her work." However, defendant also stated "she would give Miss Camacho-Mass' files back when she got her paycheck."

The jury also heard additional evidence regarding defendant's actions after this incident occurred. Defendant sent a "very incriminating letter" to all of the board members implying that Camacho-Mass had engaged in "racial behavior" and was misappropriating agency funds. Defendant's demeanor, her threat that she would "destroy" Camacho-Mass, her refusal to surrender her keys after termination, and her repeated returns to her former office after termination, the circumstances surrounding the deletion of the files, and defendant's statement that she had copied the files and would give the files back when "she got her paycheck" unequivocally show defendant's actions in duplicating and removing the files was willful. Based upon the preceding evidence, no reasonable probability exists that a different result would have been reached at trial if the trial court had instructed the jury on the element of willfulness. N.C. Gen. Stat. § 15A-1443.

Defendant has failed to show she was prejudiced by the trial court's jury instructions and is not entitled to a new trial. Because I would hold that defendant is not entitled to a new trial on this issue, I address defendant's remaining assignment of error.

III. Sentencing

Defendant argues the trial court erred by sentencing her to a "harsher sentence" than she received in the district court.

> A sentence within statutory limits is presumed to be regular. Where the record, however, reveals the trial court considered an improper matter in determining the severity of the sentence, the presumption of regularity is overcome. It is improper for the trial court, in sentencing a defendant, to consider the defendant's decision to insist on a jury trial. Where it can be reasonably inferred the sentence imposed on a defendant was based, even in part, on the defendant's insistence on a jury trial, the defendant is entitled to a new sentencing hearing.

State v. Peterson, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002) (internal citation and quotation omitted). In district court, defendant

was sentenced to a suspended sentence of forty-five days imprisonment and was placed on supervised probation for a period of twelve months. Defendant appealed to the superior court and asserted her right to a jury trial.

After the jury had returned a guilty verdict, the superior court imposed a suspended sentence of forty-five days imprisonment and placed defendant on supervised probation for a period of eighteen months. It is undisputed that the suspended sentence defendant received in superior court was authorized by statute, rested in the presumptive range, and was identical to the suspended sentence she received in district court. Before the superior court judge imposed defendant's sentence, he stated:

> I hope that your counsel told you, as he should have, that I am not bound to do what that district court judge did, and likely to do that, because up here we don't do that.
>
> They generally give minimum sentences down in district court. But any, any [sic] person who appeals a minimum sentence of the district court, thinks [they are] going to get a better result that you got get [sic] from those people is a fool.
>
> Any lawyer who tells someone to take up an appeal of a minimum sentence out of district court is equally unwise.

Defendant argues the preceding statements are evidence that her sentence was based on irrelevant and improper matters. I disagree. Nothing in the trial court's comments reveals it considered an improper matter in determining the severity of defendant's sentence or referred to her "insistence on a jury trial." *Id*. The trial court imposed the same suspended sentence defendant had received in district court. I vote to overrule this assignment of error.

IV. Conclusion

The trial court properly denied defendant's motion to dismiss. The trial court failed to instruct the jury on the element of willfulness contained in N.C. Gen. Stat. § 14-455. However, the totality of the evidence presented at trial shows defendant's actions in copying the files to her personal thumb drive and deleting the files off of LARC's network were unequivocally unlawful and done "willfully" and without authorization. N.C. Gen. Stat. § 15A-1443. Defendant has failed to show she was prejudiced by the trial court's erroneous jury instruction and is not entitled to a new trial.

Nothing in the record supports a reasonable inference that the trial court considered "improper matter[s]" in sentencing defendant or that "the sentence imposed on [] defendant was based, even in part, on [] defendant's insistence on a jury trial[.]" *Peterson*, 154 N.C. App. at 517, 571 S.E.2d at 885. Defendant received a fair trial, free from prejudicial errors she preserved, assigned, and argued. I respectfully dissent.

KOR XIONG, PLAINTIFF v. INGRID DIANE MARKS, DEFENDANT

No. COA08-52

(Filed 18 November 2008)

1. Appeal and Error— preservation of issues—motion in limine—closing argument—no offer of proof

Plaintiff did not preserve for appellate review the question of whether the trial court erred by denying his motion in limine requesting permission to use a poster-size copy of Rule 35 during his closing argument where he did not seek to make an offer of proof during trial. A ruling on a motion in limine is not sufficient to preserve an issue for appeal because it is preliminary and subject to change, and this rule has been applied to closing arguments.

2. Evidence— motion in limine—pretrial conference—agreement between attorneys—assignment of error dismissed

An assignment of error was dismissed in an automobile accident case where the plaintiff's counsel entered into a bargain with opposing counsel at the pretrial conference regarding the admission of certain evidence, received the benefit of that bargain, and cannot now be considered aggrieved. Furthermore, the appellate court does not second-guess trial strategy.

3. Appeal and Error— preservation of issues—exclusion of evidence—offer of proof required

An appellate argument was dismissed in an automobile accident case where plaintiff contended that the trial court improperly excluded evidence of his financial status at the time of the accident but did not make the required offer of proof.

4. Appeal and Error— motion for new trial—first raised in brief—sua sponte consideration of jurisdiction

Defendant's motion to dismiss plaintiff's appeal from a Rule 59 ruling was denied where defendant did not file a separate motion but raised it for the first time in her brief. However an appellate court has the power to inquire into the jurisdiction of a case before it at any time, even sua sponte.

5. Civil Procedure— motion for new trial—filed before entry of judgment

A Rule 59 motion for a new trial may be filed before entry of judgment, but the trial court does not have jurisdiction to hear and determine the motion until after entry of judgment.

6. Negligence— new trial denied—medical evidence of causation—not conclusive—credibility for jury

The trial court did not abuse its discretion by denying plaintiff a new trial in an automobile accident case pursuant to Rule 59(a)(7) where plaintiff contended that his medical testimony was conclusive and that the jury could not have reasonably found in defendant's favor on the evidence before it. The credibility of the evidence is for the jury, and plaintiff's expert testimony left some room for doubt regarding the cause of plaintiff's condition.

7. Civil Procedure— new trial on evidence issues denied—sufficient objection—offer of proof required

The trial court did not err by denying plaintiff a new trial under Rule 59(a)(8) on two evidentiary issues in an automobile accident case where plaintiff did not make an offer of proof. An offer of proof is required to constitute a sufficient objection under Rule 59(a)(8) when the error alleged is the exclusion of evidence.

Appeal by plaintiff from judgment entered on or about 7 September 2007 and order entered 18 September 2007 by Judge John O. Craig, III in Montgomery County Superior Court. Heard in the Court of Appeals 19 August 2008.

Van Laningham & Associates, PLLC by R. Bradley Van Laningham, for plaintiff-appellants.

Teague, Rotenstreich, Stanaland, Fox & Holt, by Paul A. Daniels, for defendant-appellees.

STROUD, Judge.

Plaintiff Kor Xiong appeals from the judgment dismissing his complaint with prejudice pursuant to a jury verdict on 7 September 2007 and from the order denying a new trial entered 18 September 2007. On appeal, plaintiff argues that the trial court erred by: (1) "improperly forc[ing] plaintiff to choose between excluding relevant evidence regarding his injury or letting in irrelevant evidence that no other person reported injury as a result of the wreck[;]" (2) "improperly refus[ing] to allow plaintiff to show the jury a copy of Rule 35[;]" (3) "refus[ing] to allow plaintiff to testify that he delayed seeking treatment for financial reasons[;]" and (4) failing to grant a new trial when "[t]here was insufficient evidence to justify the verdict" and evidence was excluded from the trial "contrary to law." For the following reasons, we affirm.

I. Factual and Procedural Background

On 18 June 2005 Kor Xiong ("plaintiff") was riding in the back seat of a motor vehicle operated by his nephew, Xeng Pao Vang. When Vang stopped on Highway 73 near Mt. Gilead to wait for traffic to pass before making a left turn, a vehicle operated by Ingrid Diane Marks ("defendant") struck Vang's vehicle from behind. Trooper Dale Walter arrived at the scene following the collision. Trooper Walter completed an accident report ("the accident report").

On 13 July 2005, nearly a month after the accident, plaintiff sought medical treatment at Stanly Memorial Hospital. The treating physician at the hospital diagnosed plaintiff as having "facial nerve palsy" and "neck and back pain secondary to trauma." The next day, 14 July 2005, plaintiff was seen by Dr. John Kilde, an ear, nose & throat specialist. Dr. Kilde confirmed the earlier diagnosis of facial nerve palsy and prescribed prednisone and eye ointment.

On 7 June 2006 plaintiff filed a complaint in Superior Court, Montgomery County, alleging personal injury resulting from the 18 June 2005 collision. In an answer filed on or about 18 September 2006, defendant admitted that she failed to reduce her speed as she approached Vang's vehicle and conceded she was "careless in the operation of her vehicle." However, defendant denied that the collision was the proximate cause of plaintiff's injuries.

On or about 21 August 2007 plaintiff filed a document containing six motions in limine. The first four motions are not at issue in this appeal. The fifth motion sought permission to use an enlarged copy of

Rule 35 of the North Carolina Rules of Civil Procedure during closing arguments. The sixth motion sought to prohibit defendant from "asking witnesses other than Plaintiff if they or anyone else in the collision was injured." By a written notation at the bottom of the document, the trial court granted the first four motions, denied the fifth, and granted the sixth, with some modification "by consent of atty's[.]"

The case was tried before a jury in Montgomery County Superior Court on 20 and 21 August 2007. The jury returned a verdict in favor of defendant on 21 August 2007. On 27 August 2007, plaintiff filed a motion for new trial pursuant to Rule 59. Judgment pursuant to the jury verdict was entered on 7 September 2007. Following a hearing on 10 September 2007, the trial court entered an order on 18 September 2007 denying plaintiff's motion for a new trial. Plaintiff appeals.

II. Motions in Limine

A. Use of Rule 35 During Closing Arguments

[1] Plaintiff argues that the trial court improperly denied his motion *in limine* requesting permission to show the jury a poster-size copy of Rule 35 during closing arguments. However, plaintiff did not seek to offer the poster at trial.

A ruling on a motion *in limine* is "merely preliminary" and not final. *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998). A trial court's ruling on a motion *in limine* is "subject to change during the course of trial, depending upon the actual evidence offered at trial." *Hill*, 347 N.C. at 293, 493 S.E.2d at 274 (citation and quotation marks omitted). For this reason, "a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). It follows that

> [a] party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted).

Hill, 347 N.C. at 293, 493 S.E.2d at 274 (citation and quotation marks omitted).

This Court has applied this rule to closing arguments even though they are not evidence. *State v. Williams*, 127 N.C. App. 464, 468-69,

490 S.E.2d 583, 586-87 (1997) (declining to consider alleged impropriety in the State's closing argument when the defendant moved *in limine* to prevent the State from including certain statements during closing and the State included those statements in its closing argument but defendant did not object). Accordingly, we conclude that plaintiff waived appellate review of this issue when he failed to make an offer of proof of an enlarged copy of Rule 35 to the trial court during trial. This assignment of error is dismissed.

B. Evidence of Other Person's Injury or Lack Thereof

[2] Plaintiff moved *in limine* to prohibit defendant from "asking witnesses other than Plaintiff if they or anyone else in the collision was injured" on the grounds that "[e]vidence of another person's injury or lack thereof . . . is . . . irrelevant under Rule 401." Plaintiff contends the trial judge erred in response to this motion when he (1) "*ruled* . . . that he would exclude evidence as to the injury status of people other than Plaintiff only if Plaintiff agreed to redact the injury code showing that Plaintiff reported injury to the Trooper at the scene of the accident" and (2) "*forced* Plaintiff to either redact relevant and properly admissible evidence of Plaintiff's report of injury at the accident scene or agree to allow irrelevant and prejudicial evidence as to the supposed injury status of others." (Emphasis added.)

However, plaintiff's contention does not square with the record on appeal. The record shows that before the trial court's ruling on the motion, the parties' attorneys discussed the issue and their forecasts of evidence with the trial judge at a pre-trial conference. After the discussion, according to the trial court's notation at the bottom of the motion *in limine*, the parties modified the motion by mutual consent. While it would have been extremely helpful to our review if the parties had expressly stipulated on the record to the provision that they consented to, we can reasonably infer from the record that defendant agreed to refrain from "asking witnesses other than Plaintiff if they or anyone else in the collision was injured" in exchange for plaintiff agreeing to redact all the injury codes from the accident report. At trial, plaintiff did redact the injury codes before introducing the accident report into evidence, and defendant refrained from asking whether anyone else had been injured in the accident.

Our statutory mandate is to review rulings of the trial court which aggrieve the party seeking review. *See* N.C. Gen. Stat. § 1-277 (2007) (allowing appeal only from a "judicial order or determination"); N.C. Gen. Stat. § 1-271 (2007) (allowing appeal only by an aggrieved party);

N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, . . . the complaining party [must] *obtain a ruling* [from the trial court] upon the party's request, objection or motion."); *see also Fayetteville Publ'g Co. v. Advanced Internet Tech., Inc.*, 192 N.C. App. ——, ——, 665 S.E.2d 518, 522 (2008) ("The trial judge's comments during the hearing . . . are not controlling; the written court order as entered is controlling.").

In the case *sub judice*, plaintiff speculated as to evidence which might be offered by defendant at trial and requested a preliminary ruling from the trial court to exclude that evidence. The trial court then reviewed the parties' forecasts of evidence, and determined preliminarily, subject to a final determination after the presentation of evidence at trial, that evidence of other persons' injuries or lack thereof would be relevant only if plaintiff introduced into evidence the accident report which contained the injury codes. *See, e.g., State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981) ("Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially."). Plaintiff and defendant then reached an agreement—defendant would not seek to put on evidence of the lack of injury to other passengers in the car and plaintiff would redact the injury codes from the accident report. At trial, both parties abided by the pre-trial agreement.

Plaintiff in effect sought to "fish in [the] judicial pond[] for legal advice." *National Travel Servs., Inc. v. State ex rel. Cooper*, 153 N.C. App. 289, 294, 569 S.E.2d 667, 670 (2002) (citation and quotation marks omitted) (disapproving the use of a declaratory judgment action to determine prospectively whether a certain act would violate an injunction). Plaintiff's counsel weighed the advice and made a conscious trial strategy decision to redact the injury codes from the accident report in order to keep from opening the door to defendant presenting evidence of the lack of injuries to others that the jury might well have considered persuasive against plaintiff. Plaintiff lived up to his end of the bargain at trial, as did defendant.

Plaintiff has therefore not presented a question which can be reviewed by this Court. The record contains no order or ruling of the trial court "forcing" plaintiff to redact the injury codes. Plaintiff cannot be considered aggrieved by the trial court when he consciously made a bargain with defendant and then received the benefit of it. Furthermore, this Court does not second-guess matters of trial strat-

egy. *See State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002) ("Decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court."), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681. Accordingly, we dismiss this assignment of error.

III. Exclusion of Evidence of Plaintiff's Finances

[3] In his next argument, plaintiff contends that the trial court improperly excluded evidence of his financial status at the time of the accident. We disagree.

On direct examination plaintiff's counsel asked and plaintiff answered, without objection from defendant, questions as to plaintiff's age and marital status. When plaintiff's counsel asked plaintiff what his wages were at the time of the accident, defendant's counsel objected to the question on relevancy grounds. The trial court allowed the question and answer concerning plaintiff's wages. Defendant requested a bench conference to discuss the admissibility of further evidence of plaintiff's financial condition. The bench conference was not transcribed by the court reporter, but the record includes a narrative per N.C.R. App. P. 9(c):

> Plaintiff argued that the jury needed to understand that plaintiff was young, married and made only $8.50 per hour. Plaintiff argued to Judge Craig that this was very relevant evidence as it explains why plaintiff waited for several weeks before seeking medical attention despite his symptoms. Defendant argued that . . . evidence of plaintiff's ability to pay medical bills [was prohibited by] the "reverse collateral source" [rule].[1]

After hearing from both parties, the trial court instructed plaintiff's counsel not to ask further questions regarding plaintiff's financial status.

> On appeal, plaintiff argues Judge Craig ruled at the bench that Plaintiff could not present evidence of Plaintiff's inability to pay medical bills or financial hardship to explain his delay in treat-

1. We wish to emphasize that our ruling in defendant's favor *sub judice* does not imply recognition of a "reverse collateral source rule" in any way. As far as we can tell, no such rule exists. While the well-established "collateral source rule" excludes evidence that the plaintiff's injury was compensated from another source, *Badgett v. Davis*, 104 N.C. App. 760, 763, 411 S.E.2d 200, 202 (1991), *disc. review denied*, 331 N.C. 284, 417 S.E.2d 248 (1992), we are not aware of a "reverse collateral source rule" which categorically excludes evidence of a plaintiff's overall financial condition or lack of another source for compensation for his injuries.

ment. Judge Craig also ruled that Plaintiff could not present evidence of Plaintiff's other financial obligations at the time of the accident.

In a civil case, appellate review is limited to questions actually presented to and ruled on by the trial court. N.C.R. App. P. 10(b)(1), *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 690, 562 S.E.2d 82, 95 (2002) ("It is a long-standing rule that a party in a civil case may not raise an issue on appeal that was not raised at the trial level."), *aff'd*, 358 N.C. 160, 190, 594 S.E.2d 1, 21 (2004). Additionally, "a party must preserve the exclusion of evidence for appellate review by making a specific offer of proof unless the significance of the evidence is ascertainable from the record." *In re Dennis v. Duke Power Co.*, 341 N.C. 91, 102, 459 S.E.2d 707, 714 (1995).

The record contains no indication that plaintiff made an offer of proof as to any evidence of plaintiff's financial condition beyond evidence that he was young, married, and earned only $8.50 per hour. In fact, plaintiff's argument to the trial judge in favor of admission of evidence of plaintiff's financial condition, quoted above, sought only the admission of evidence of exactly those three facts. Evidence that plaintiff was young and married was admitted without objection by defendant; evidence of plaintiff's hourly wage was admitted over defendant's objection. Because evidence as to all three items requested by plaintiff was before the jury and because plaintiff failed to make an offer of proof as to any further evidence of defendant's financial condition we conclude that there is nothing for this Court to review. Accordingly, we dismiss this argument.

IV. Plaintiff's Rule 59 Motion

A. Jurisdiction

[4] As a threshold matter, defendant moves this Court to dismiss plaintiff's appeal from the trial court's denial of plaintiff's Rule 59 motion on the grounds that plaintiff's motion for new trial was filed before judgment was entered, and therefore not properly before the trial court. However, defendant did not file a separate motion to dismiss plaintiff's appeal, first raising this issue in her brief. Accordingly, defendant's motion to dismiss plaintiff's appeal from the trial court's Rule 59 ruling is denied. *Smithers v. Tru-Pak Moving Systems*, 121 N.C. App. 542, 545, 468 S.E.2d 410, 412 ("A motion to dismiss an appeal must be filed in accord with Appellate Rule 37, not raised for the first time in the brief[.]"), *disc. review denied*, 343 N.C. 514, 472 S.E.2d 20 (1996).

However, an appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*. *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 341, 543 S.E.2d 169, 171 (2001). Jurisdiction is the "power to hear and determine causes." *McCullough v. Scott*, 182 N.C. 865, 871, 109 S.E. 789, 793 (1921) (citation and quotation marks omitted). The question of whether a trial court has jurisdiction to hear and determine a Rule 59 motion for new trial which was filed before the entry of judgment appears to be an issue of first impression in North Carolina. Rule 59 requires that "[a] motion for a new trial shall be served *not later than 10 days after* entry of the judgment[,]" but does not speak directly to whether a motion for new trial may be filed before entry of judgment. N.C. Gen. Stat. § 1A-1, Rule 59(b).

[5] A case from this Court, *Watson v. Dixon*, states that "Rules 50 and 59 of our Rules of Civil Procedure implicitly provide that these post-trial motions cannot be filed until after entry of judgment. . . . Thus, [the oral motions for j.n.o.v. and new trial] were not properly before the trial court as post-trial motions under Rules 50 and 59." 130 N.C. App. 47, 51, 502 S.E.2d 15, 19 (1998), *reaff'd on reh'g*, 132 N.C. App. 329, 511 S.E.2d 37 (1999), *aff'd*, 352 N.C. 343, 532 S.E.2d 175 (2000). However, this language in *Watson* appears to be dicta because the dispositive question was whether the 30-day time period for filing notice of appeal pursuant to Rule 3(c) of the North Carolina Rules of Appellate Procedure began to run when the order denying the motion for new trial was rendered in open court, or began to run when the written order denying the motion was entered. Rule 3 plainly states that the 30-day period begins to run "from the date of *entry* of the order[.]" N.C.R. App. P. 3(c)(3). Furthermore, a requirement that a Rule 59 motion for new trial may not be made until after entry of judgment is contrary to practice in our trial courts and to the greater weight of authority in federal cases addressing this question.[2]

The federal circuits appear to be generally in accord as to this issue, holding that a motion for new trial may be filed before entry of judgment. *See Dunn v. Truck World, Inc.*, 929 F.2d 311, 313 (7th Cir. 1991) ("If . . . the question [is whether the loser may file a motion for new trial] before the entry of judgment, then the answer is easy. It

2. "The North Carolina Rules of Civil Procedure are, for the most part, verbatim recitations of the federal rules. Decisions under the federal rules are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules." *Turner v. Duke University*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (citations omitted).

may. Rule 59 says that the motion must come 'not later than 10 days after entry of the judgment.' A pre-judgment motion satisfies this requirement."); *Douglas v. Union Carbide Corp.*, 311 F.2d 182, 184-85 (4th Cir. 1962) ("The wording of Rule 59(b) was designed to be broad enough to permit the motion to be made both before and after the entry of judgment. . . . [W]e think the defendant's motion to set aside the verdicts and grant a new trial [made before entry of judgment] was timely made and was in substantial compliance with the pertinent Federal Rules of Civil Procedure."); *see also Lewis v. U. S. Postal Service*, 840 F.2d 712, 713-14 (9th Cir. 1988) (motion to reconsider pursuant to Rule 59(e) was timely when filed before the entry of judgment); Fed. R. Civ. P. 59 advisory committee's note, 161 F.R.D 160 (1995) ("The phrase 'no later than' [in Rule 59] is used—rather than 'within'—to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk."); 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2812 at 135 (2d ed. 1995) ("[T]here is nothing to prevent making a motion for a new trial before judgment has been entered."). *But see Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 812 (9th Cir. 1981) ("[W]e do not think a Rule 59(e) motion could have been entertained [in this case]. Our conclusion in this regard is based on the fact that no judgments were ever entered in favor of [defendants], and on the language of Rule 59(e), which we think clearly contemplates entry of judgment as a predicate to any motion."); *Pedigo v. Unum Life Ins. Co. of America*, 180 F.R.D. 324, 328 (E.D. Tenn. 1997) (citing Rule 59 and declaring plaintiff's motion for new trial a nullity because it was filed before entry of judgment but subsequently denying the motion on its merits), *aff'd on other grounds*, 145 F.3d 804 (6th Cir. 1998).

We reconcile *Watson* with the federal authorities by concluding that though a motion for new trial may be *filed* before entry of judgment, the trial court does not have jurisdiction to hear and determine the motion until after entry of judgment. As *Stephenson* cautioned, "were we to permit Rule 59(e) motions without entry of judgment, litigants could obtain appellate review of partial judgments by simply appealing a Rule 59(e) order, completely by-passing the requirements [that only final judgments may be appealed from.]" 652 F.2d at 811. This caution is well-taken when the trial court rules on a motion for a new trial or to alter or amend a judgment prior to entry of judgment in the cause. However, no such concern arises here because the trial court first entered the judgment on 7 September 2007, then heard the Rule 59 motion on 10 September 2007 and entered the order denying a new trial on 18 September 2007. Therefore we conclude that the

trial court had jurisdiction and the motion for new trial was properly before the trial court. Accordingly, we will review on the merits the order denying plaintiff's motion for a new trial.

B. Standard of Review

[6] The standard of review for denial of a Rule 59 motion is well-settled:

> According to Rule 59, a new trial *may* be granted for the reasons enumerated in the Rule. By using the word *may*, Rule 59 expressly grants the trial court the discretion to determine whether a new trial should be granted. Generally, therefore, the trial court's decision on a motion for a new trial under Rule 59 will not be disturbed on appeal, absent abuse of discretion. [This Court] recognize[s] a narrow exception to the general rule, applying a *de novo* standard of review to a motion for a new trial pursuant to Rule 59(a)(8), which is an error in law occurring at the trial and objected to by the party making the motion.

Greene v. Royster, 187 N.C. App. 71, 77-78, 652 S.E.2d 277, 282 (2007) (citations, quotation marks, brackets and footnote in original omitted) (emphasis added).

C. Motion Pursuant to Rule 59(a)(7)

Plaintiff contends the trial court improperly denied his motion for a new trial because the evidence was insufficient to justify the jury's verdict. Plaintiff argues that the testimony of plaintiff's designated expert witness, Dr. Kilde, was unequivocal and conclusive. Plaintiff contends that because defendant did not put forth any evidence, the testimony of Dr. Kilde was determinative and the jury could not reasonably have found in defendant's favor on the evidence before it. We disagree.

A motion for new trial pursuant to Rule 59(a)(7) does not involve a question of law, therefore it is reviewed for abuse of discretion. *Greene*, 187 N.C. App. at 77-78, 652 S.E.2d at 282. The trial court may be reversed for abuse of discretion "only upon a showing that its actions are manifestly unsupported by reason." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citations and quotation marks omitted). In ruling on a Rule 59(a)(7) motion, the trial court should "set aside a jury verdict only in those exceptional situations where the verdict will result in a miscarriage of justice[,]" *Strum v. Greenville Timberline, LLC*, 186 N.C. App. 662, 667, 652 S.E.2d 307, 310 (2007) (citation, quotation marks and ellipses omitted), because

"[i]t is the jury's function to weigh the evidence and to determine the credibility of witnesses[.]" *Id.* (citation and quotation marks omitted).

"Even though evidence is uncontradicted, the credibility of the evidence is exclusively for the jury." *Coltrane v. Lamb*, 42 N.C. App. 654, 658, 257 S.E.2d 445, 447 (1979). Furthermore, the jury is allowed to "minimize or wholly disregard the testimony given by plaintiffs' medical experts" if they do not find it credible. *Albrecht v. Dorsett*, 131 N.C. App. 502, 506, 508 S.E.2d 319, 322 (1998). In *Albrecht*, the defendant did not bring forth an expert to contradict the testimony of the plaintiff's expert, but on cross-examination the plaintiff's experts gave contradicting responses to their direct testimony. *Id.*

Contrary to plaintiff's argument, Dr. Kilde's testimony was not unequivocal. Dr. Kilde testified in a deposition that was shown to the jury at trial regarding the causes of facial nerve palsy and his examination of plaintiff as follows: Plaintiff was diagnosed with facial nerve palsy, which is commonly known as Bell's Palsy. Facial nerve palsy may be idiopathic, meaning it occurs via virus without reason, or it may be trauma-induced. Dr. Kilde testified that he could not differentiate between a "classic viral Bell's Palsy" and a "traumatic Bell's Palsy" on a physical exam. Dr. Kilde testified that there was no evidence plaintiff sustained any fractures to his skull. Dr. Kilde did not definitively state that plaintiff's facial nerve palsy was caused by the accident. On cross-examination Dr. Kilde admitted that the majority of Bell's Palsy cases are not related to traumas.

While Dr. Kilde's testimony on cross-examination did not directly contradict his previous statements, it did leave room for doubt regarding the cause of plaintiff's nerve palsy, doubt which the jury was free to resolve in defendant's favor. The equivocal testimony of Dr. Kilde together with evidence that defendant waited almost a month to seek medical treatment was sufficient to justify the jury's verdict that defendant's actions were not the cause of plaintiff's injuries. Even though reasonable minds might have differed as to the cause of plaintiff's injuries, the trial court's denial of the motion for new trial did not constitute an abuse of discretion. *Coltrane*, 42 N.C. App. at 658, 257 S.E.2d at 447-48.

D. Motion pursuant to Rule 59(a)(8)

[7] Plaintiff claims the trial court erred in not granting his motion for new trial on the basis of two evidentiary issues: "[p]laintiff [(1)] was forced to redact information from evidence contrary to law and [(2)]

was not allowed to testify as to his reasons for not seeking treatment immediately following the accident." He contends that a trial court's evidentiary rulings are questions of law; therefore the evidentiary rulings should be reviewed *de novo*. However, we do not reach the merits of either evidentiary question.

Rule 59(a)(8) provides that a new trial may be granted if an "error in law occurr[ed] at the trial and [was] *objected to* by the party making the motion." N.C. Gen. Stat. § 1A-1, Rule 59(a)(8) (emphasis added). It is well-settled that "a party must preserve the exclusion of evidence for appellate review by making a specific offer of proof unless the significance of the evidence is ascertainable from the record." *Dennis*, 341 N.C. at 102, 459 S.E.2d at 714. Applying the rule and reasoning of *Dennis* to Rule 59, we conclude that an offer of proof is required to constitute a sufficient objection under Rule 59(a)(8) when the error alleged is the exclusion of evidence.

However, plaintiff "made no offer of proof as to the other testimony he contends was erroneously excluded by the trial court." *Nunn v. Allen*, 154 N.C. App. 523, 530, 574 S.E.2d 35, 40 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 630 (2003). Plaintiff did not offer Trooper Walter's unredacted accident report into evidence at trial. Likewise, plaintiff made no offer of proof as to any evidence of his financial condition other than what had already been admitted by the trial court. Absent a sufficient objection pursuant to Rule 59(a)(8) we conclude the trial court did not err when it failed to grant plaintiff a new trial on either of his evidentiary grounds.

V. Conclusion

We conclude that plaintiff did not preserve for appellate review any of his assignments of error arising from the trial. As to his Rule 59 motion, we conclude that the trial court did not abuse its discretion when it denied plaintiff a new trial on the grounds that there was insufficient evidence to support the jury's verdict or err when it failed to grant plaintiff a new trial on evidentiary grounds. Accordingly, the judgment and order of the trial court are affirmed.

Affirmed.

Judge McCULLOUGH concurs.

Judge McGEE concurs with a separate opinion.

McGEE, Judge, concurring.

I concur in the majority opinion in full and write separately only to reiterate that our decision in this case should not be perceived as being inconsistent with the holding in *Watson v. Dixon*, 130 N.C. App. 47, 502 S.E.2d 15 (1998). To the extent that the *Watson* Court's statement that "Rules 50 and 59 of our Rules of Civil Procedure implicitly provide that these post-trial motions cannot be filed until after entry of judgment" was not necessary to a determination of the issue before the Court, *Watson*, N.C. App. at 51, 502 S.E.2d at 19, said statement was *dicta* and, therefore, is not binding on the specific issue addressed in Section IV.A. of the opinion in the present case.

DIANE S. WIRTH, Plaintiff v. PETER J. WIRTH, Defendant

No. COA07-1393

(Filed 18 November 2008)

1. Divorce— equitable distribution—postseparation depreciation in business—cause could not be determined—divisible property

The trial court erred in an equitable distribution action by failing to classify a postseparation decrease in the value of defendant husband's contracting business as divisible property and in treating the decrease as a distributional factor. Under the plain language of N.C.G.S. § 50-20(b)(4)(a), all appreciation and diminution in value of material and divisible property is presumed to be divisible property unless the trial court finds the change in value to be attributable to the postseparation actions of one spouse. The finding here clearly states that it was impossible to determine what portion of the decrease was due to forces beyond defendant's control and what amount was attributable to defendant's management of the company.

2. Divorce— equitable distribution—consent order—subsequent increase in value of property

The trial court did not err in an equitable distribution action by valuing a condo at the amount specified in the parties' consent order, even though the value of the condo had increased. Settlement of issues prior to equitable distribution trials will not

be discouraged by interpretations contrary to the express terms of contractual agreements.

3. Divorce— equitable distribution—interest on sale of residence—consent order—controlling

The trial court did not err in an equitable distribution action by not classifying, valuing, and distributing the interest earned on the proceeds of the sale of the former residence. A consent order provided that the net proceeds from the sale were to be distributed to plaintiff; once distributed, the proceeds became plaintiff's separate property.

4. Divorce— equitable distribution—marital debt—postseparation payments

The trial court in an equitable distribution action properly considered defendant's postseparation payments on marital debt and gave him a credit for those payments.

5. Divorce— equitable distribution—delays in producing documents—sanctions—attorney fees

The trial court did not abuse its discretion in an equitable distribution action in the imposition of attorney fees as a sanction for obstruction or delay of an equitable distribution proceeding or in the amount of the sanction. Contrary to defendant's contention, he had sufficient notice of the possibility of sanctions and the opportunity to oppose their imposition, and there was evidence that plaintiff incurred excess attorney fees attributable to defendant's delay in the production of documents. Sanctions are not precluded by the absence of a finding of contempt. N.C.G.S. § 50-21(e).

6. Divorce— equitable distribution—distributive award—business holdings

The trial court's decision in an equitable distribution action to distribute business holdings to plaintiff created the need for a distributive award to defendant. The court's findings were sufficient to support its decision and the court did not abuse its discretion in the distribution of the parties' assets.

Appeal by defendant from judgment entered 8 June 2007 by Judge Rebecca T. Tin in Mecklenburg County District Court. Heard in the Court of Appeals 16 April 2008.

M. Clark Parker, for plaintiff-appellee.

Horack, Talley, Pharr & Lowndes, PA, by Kary C. Watson, for defendant-appellant.

STEELMAN, Judge.

Where the trial court was unable to determine whether the diminution in value of a corporation was due to the actions of defendant or to forces beyond his control, the trial court erred in treating the diminution in value as non-divisible property and considering it as a distributional factor. Where the parties entered into a consent order distributing certain marital assets, the trial court did not err in using the valuation set by the parties in the consent order in its final equitable distribution order. When the consent order distributed proceeds from the sale of the marital residence to plaintiff, any interest earned on the proceeds was separate and not marital property. Where defendant made postseparation payments on marital debts, and was awarded a credit for that amount towards his postseparation support arrearage, the trial court did not abuse its discretion in not allowing a second credit in equitable distribution. Where defendant fully briefed and argued to the trial court the issue of attorneys' fees pursuant to N.C. Gen. Stat. § 50-21(e), without objection to improper notice, he cannot complain about lack of notice on appeal. The trial court did not abuse its discretion in awarding attorneys' fees or in ordering plaintiff to pay a distributive award to defendant.

I. Factual and Procedural Background

Diane S. Wirth (plaintiff) filed this action against her husband, Peter J. Wirth (defendant), on 24 November 2003 seeking equitable distribution of the parties' marital property, postseparation support, alimony, injunctive relief, interim distribution, appointment of a receiver, divorce from bed and board, and attorneys' fees. Defendant filed a counterclaim also seeking equitable distribution.

On 23 August 2004, the trial court entered an order making interim distributions of property. On 18 January 2005, the parties entered into a Consent Order ("Consent Order"), which distributed a condominium unit owned by the parties at the Pinnacle Inn, Beach Mountain, North Carolina (hereinafter referred to as the "Condominium") to the plaintiff at a net fair market value of $75,000.00. The Consent Order also distributed to plaintiff the former marital residence, with directions that plaintiff sell the residence with the net proceeds from the sale to be awarded to plaintiff.

The trial on the equitable distribution claims and plaintiff's claim for alimony took place over six days in November 2006 and five days in February 2007. In addition, each party submitted written final arguments to the court on 23 March 2007, with plaintiff's argument being forty-one pages in length, and defendant's argument being forty-two pages in length. On 16 February 2007, Judge Tin entered an interim order containing detailed findings of fact and conclusions of law dealing with the parties' business interests. On 18 June 2007, Judge Tin entered an Equitable Distribution Judgment and also a Judgment and Order dealing with alimony, plaintiff's claim for attorneys' fees, and contempt. The Equitable Distribution Judgment made an unequal distribution of marital property, awarding defendant 54.27% of the net fair market value of the marital property, and 45.73% to plaintiff. This judgment ratified, confirmed, and incorporated by reference certain of the findings of fact contained in the 16 February 2007 order, and made some additional findings as to the parties' business interests. Defendant appeals only the Equitable Distribution Judgment.

II. Divisible Property

In his first argument, defendant contends the trial court erred in failing to classify, value, and distribute certain property that was divisible property. We agree in part and disagree in part.

A. Decrease in Value of Testa & Wirth, Inc. of North Carolina

[1] Testa & Wirth, Inc. of North Carolina ("TWNC") is a North Carolina corporation engaged in the business of general contracting. As of the date of separation ("DOS") and the date of distribution ("DOD"), defendant was the sole shareholder. The trial court found that defendant remained in control of TWNC both before and after DOS and concluded that the losses incurred by TWNC were not divisible property. The final order valued TWNC at $0.00 as of DOD and TWNC was distributed to defendant with a value of $403,340.00 as of DOS. In paragraph 48(j) of the order, the court treated the decrease in value as a distributional factor.

Neither party contests that TWNC was marital property. Instead, defendant argues that Judge Tin erred in failing to classify the decrease in TWNC's value as divisible property. Defendant contends that the decrease in value was due to economic conditions and other circumstances which were beyond his control, and that the decrease should thus have been classified as divisible property and distributed to both parties. Defendant cites to paragraph 48(h) of the final order in support of his position:

> Husband remained in control of TWNC after DOS and was the person responsible for managing its affairs. Notwithstanding facts demonstrating that the seeds of destruction of TWNC were in motion well prior to DOS, and stemmed, in large part, from events that were out of the control of Husband, the Court nonetheless finds that the decrease in the value of Husband's interest in TWNC after DOS is not divisible property. It is impossible to separate losses incurred due to Husband's active control over the company from losses which were incurred due to forces beyond his control. Contracts that went sour were nonetheless contracts and obligations taken on by Husband.

Defendant contends that this finding necessitated a holding by the trial court that the decrease in the value of TWNC was divisible property.

We agree with defendant. N.C. Gen. Stat. § 50-20 provides that, in an equitable distribution proceeding, the trial court "shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties . . ." N.C. Gen. Stat. § 50-20(a) (2007). Subsection (b)(1) defines "marital property" to include "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties[.]" N.C. Gen. Stat. § 50-20(b)(1) (2007). Divisible property is defined in subsection (b)(4)(a) to include:

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

N.C. Gen. Stat. § 50-20(a)(b)(4)(a) (2007).

Under the plain language of the statute, all appreciation and diminution in value of marital and divisible property is presumed to be divisible property *unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse. Where the trial court is unable to determine whether the change in value of marital property is attributable to the actions of one spouse, this presumption has not been rebutted and must control. *See Allen v. Allen*, 168 N.C. App. 368, 371-72, 607 S.E.2d 331, 334-35 (2005).

In the instant case, the trial court's finding clearly states that it was impossible to determine what portion of the decrease in value of TWNC was due to forces which were beyond defendant's control, and what amount was attributable to defendant's active postseparation management of the company. Thus, the presumption created by N.C. Gen. Stat. § 50-20(b)(4)(a) was not rebutted, and the trial court's finding does not support its conclusion that the decrease in value was not divisible property.

We hold that the trial court erred in failing to classify the decrease in the value of TWNC as divisible property and in treating the decrease as a distributional factor. This portion of the Equitable Distribution Judgment is reversed and remanded to the trial court. *See Robertson v. Robertson*, 167 N.C. App. 567, 575, 605 S.E.2d 667, 672 (2004). The diminution in value of TWNC is to be treated as divisible property and not as a distributional factor. The court is to recompute its equitable distribution award in accordance with these principles.

B. Increase in Value of the Condominium

[2] Defendant next contends that the trial court erred in failing to classify, value, and distribute the increase in value of the Condominium from DOS to DOD. We disagree.

N.C. Gen. Stat. § 50-20(i1) governs interim distributions of marital property. The statute permits the trial court to distribute the marital property of the parties pending a final equitable distribution trial. N.C. Gen. Stat. § 50-20(i1) (2007). The statute provides that any interim order "shall be taken into consideration at trial and proper credit given." *Id.*

> Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. . . . Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position.

Moore v. Richard West Farms, Inc., 113 N.C. App. 137, 141, 437 S.E.2d 529, 531 (1993) (internal quotations and citations omitted).

The Consent Order entered into by the parties provided for the distribution of certain real estate properties owned by the parties. The Condominium and its accompanying mortgage were distributed to plaintiff, and the parties agreed:

> [t]he distribution of [the Condominium] is "final" for purposes of equitable distribution, and Plaintiff shall have the right to own, possess, encumber, lease, sell, and otherwise deal with [the Condominium] as she sees fit. For purposes of equitable distribution, [the Condominium] . . . has a net fair market value of $75,000.00, and [the Condominium] shall constitute a portion of Plaintiff's share of the marital property of the parties.

In the Equitable Distribution Judgment, the trial court found that the Consent Order precluded any further valuation and distribution of the Condominium, and distributed the Condominium to plaintiff at a value of $75,000.00 in accordance with the terms of the Consent Order. Defendant argues that the Condominium substantially increased in value due to market forces from the time of the Consent Order to the equitable distribution trial, and that the trial court erred in failing to "classify, value and distribute the divisible property created by the appreciation of the [Condominium] . . ."

The Consent Order in the instant case specifically stated that it was a "final" distribution and provided for a valuation amount of the Condominium "[f]or purposes of equitable distribution." By its own terms, the Consent Order had the effect of precluding further valuation of certain of the parties' assets by the trial court at the final equitable distribution trial. It further precluded any consideration of the appreciation of this property as divisible property. The court gave plaintiff credit for the Condominium in the amount of $75,000.00 pursuant to the terms of the Consent Order.

Although defendant now wishes to take a position inconsistent with the clear terms of the Consent Order, we hold that he is bound by its terms. *See Moore* at 141, 437 S.E.2d at 531. Parties should be encouraged to settle as many matters as possible prior to equitable distribution trials, and we will not discourage such contractual agreements by interpreting them in a way contrary to their express terms.

We hold that the trial court did not err in valuing the Condominium at the amount specified in the parties' Consent Order.

C. Interest Earned on Proceeds From Sale of Former Marital Residence

[3] Defendant next contends that the trial court erred in failing to classify, value, and distribute the interest earned on the proceeds from the sale of the former marital residence. We disagree.

The Consent Order provided that plaintiff was to sell the marital residence, that the net proceeds from the sale were to be distributed to plaintiff, and

> [i]f the Marital Residence is sold prior to the trial of the equitable distribution claims the amount of net proceeds from the sale of the property, as determined above, shall constitute the net fair market value of the marital residence for purposes of equitable distribution.

Plaintiff sold the marital residence in July 2006 and deposited the net proceeds into a money market account. The trial court found that the interest earned on the money market account was not divisible property and did not distribute it in the Equitable Distribution Judgment.

The parties' Consent Order provided a specific formula by which the net proceeds were to be distributed to plaintiff. Once distributed, the property and the proceeds from its sale became plaintiff's separate property. We hold that the trial court correctly found that the Consent Order "preclude[d] any additional value being associated with [the former marital residence] in the form of divisible property."

D. Postseparation Payments on Marital Debt

[4] Defendant next contends that Judge Tin erred in failing to classify, value, and distribute the payments made by defendant on the interest-only mortgage loans for the former marital residence and the Condominium. We disagree.

N.C. Gen. Stat. § 50-20(b)(4)(d) provides that divisible property includes "[i]ncreases and decreases in marital debt and financing charges and interest related to marital debt." *Id.* "A trial court must value all marital and divisible property . . . in order to reasonably determine whether the distribution ordered is equitable." *Cunningham v. Cunningham*, 171 N.C. App. 550, 556, 615 S.E.2d 675, 680 (2005) (citation omitted). The distribution of marital property is within the discretion of the trial court. *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986). "Accordingly, the trial

court's rulings in equitable distribution cases receive great deference and may be upset only if they are so arbitrary that they could not have been the result of a reasoned decision." *Id.* "[O]ur Supreme Court impliedly approved the use of a credit as a means of taking into consideration postseparation payments made towards marital debts in *Wiencek-Adams v. Adams*, 331 N.C. 688, 417 S.E.2d 449 (1992)." *Smith v. Smith*, 111 N.C. App. 460, 510, 433 S.E.2d 196, 226 (1993), *rev'd in part on different grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

From November 2003 to spring of 2004, defendant made payments totaling $41,967.00 on the two interest-only mortgage loans associated with the former marital residence. The record reveals that the trial court took into account these payments made by defendant, and found that defendant received credit for the payments through a credit to his postseparation support arrearage. The trial court found that, as a result of this credit, "there was no divisible property related to Husband's interest payments."

We hold that the trial court properly considered defendant's postseparation payments made towards the marital debt and gave him credit for those payments. *See Warren v. Warren*, 175 N.C. App. 509 (finding that the trial court erred by making insufficient findings of fact regarding postseparation payments on marital debt). The trial court did not abuse its discretion in its treatment of defendant's postseparation payments. *See Smith* at 510, 433 S.E.2d at 226.

Defendant's arguments are without merit.

III. Attorneys' Fees

[5] In his second argument, defendant contends the trial court erred in ordering him to pay to plaintiff $30,000.00 in attorneys' fees as sanctions. We disagree.

N.C. Gen. Stat. § 50-21(e) (2007) provides that a trial court may impose sanctions on a party in the form of attorneys' fees where the court finds:

> (1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and

(2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

N.C. Gen. Stat. § 50-21(e)(1) and (2). On appeal, the standard of review of the trial court's decision of whether to order sanctions pursuant to N.C. Gen. Stat. § 50-21(e) is that of abuse of discretion, and the court's decision will be upheld unless the award is manifestly unsupported by reason. *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 425, 606 S.E.2d 164, 172 (2004); *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 34 (1999).

A. Notice

Defendant first contends that he did not receive proper notice that he was subject to sanctions. We disagree.

Although "N.C.G.S. § 50-21(e) is silent as to what type of notice is required under the statute and how far in advance notice must be given to a party facing sanctions[,]" *Megremis v. Megremis*, 179 N.C. App. 174, 179, 633 S.E.2d 117, 121 (2006), "a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 609, 596 S.E.2d 285, 290 (2004) (citation omitted).

Defendant cites *Megremis* and *Zaliagiris* for the proposition that sanctions imposed pursuant to N.C. Gen. Stat. § 50-21(e) without proper notice must be vacated. In *Zaliagiris*, "our Court held that the trial court erred in summarily recasting an assessment of expert witness costs as a sanction, without notice to the sanctioned party that the party would be made subject to such a sanction." *Megremis* at 180-81, 633 S.E.2d at 122 (citing *Zaliagiris* at 609-10, 596 S.E.2d at 290-91). In *Megremis*, we held that defendant's due process rights were violated where there was no written request for sanctions, no separate hearing on the issue of sanctions, and defendant received no notice regarding sanctions prior to the equitable distribution trial at which sanctions were imposed. *Megremis* at 181, 633 S.E.2d at 122.

The facts of the instant case are distinguishable from both *Megremis* and *Zaliagiris*. On 23 March 2007, plaintiff filed a written closing argument with the trial court, in which she requested "fees pursuant to § 50-21(e) which relate to additional time, effort and cost expended by the Plaintiff and her attorneys in obtaining the neces-

sary documentation to identify, classify and distribute the marital assets. The amount requested is $67,214.00." On that same day, defendant submitted a written closing argument in which he argued against plaintiff's request for sanctions. The trial court issued its Equitable Distribution Judgment, which included sanctions against defendant, on 8 June 2007, over two months after defendant's argument was filed.

We first note that defendant did not raise the issue of notice in his written closing argument, and he has failed to preserve this issue for appellate review. N.C. R. App. P. 10(b)(1) (2008). Further, although this Court held in *Megremis* that there was insufficient notice to the defendant regarding the possibility of sanctions when the defendant did not receive notice prior to trial, we note that the sanctions in *Megremis* were imposed by the trial court at trial. Thus, *Megremis* stands for the proposition that a party must have notice regarding the imposition of sanctions before the date on which those sanctions are imposed. Because defendant in the instant case had notice of and submitted an argument against plaintiff's request for sanctions over two months before the court imposed the sanctions, we hold that this constituted sufficient notice of the possibility that the trial court would impose sanctions. Defendant was aware of the nature of the requested sanctions, and was provided an opportunity to argue against their imposition.

This argument is without merit.

B. Abuse of Discretion

Defendant next contends that the trial court abused its discretion in finding that defendant unreasonably delayed the proceedings and that plaintiff was prejudiced by his actions. We disagree.

The trial court made the following findings of fact:

> 148. . . . the Court and counsel for Wife spent far too much time struggling to procure the documents and records needed for the court-appointed expert to value all of Husband's various business interests. The case would have been delayed even more if Wife's counsel had not persevered by filing motions to compel and pressing for the production of additional documents. Wife's counsel also issued subpoenas to third parties and entities to obtain documents which Husband had not produced.

149. . . . the Court finds that Husband unreasonably delayed the discovery process to some extent.

. . .

151. Taking into consideration the time spent as the result of Husband's delay, the hourly charges of Wife's attorney, the results obtained by Wife's attorney in obtaining various documents, and other factors, the Court finds that a reasonable sum to require Husband to pay to Wife for attorneys' fees incurred by her as the result of Husband's delay is the sum of $30,000.00.

Defendant does not contend that the trial court did not make adequate factual findings regarding its award of attorneys' fees, but that the trial court abused its discretion in awarding attorneys' fees.

There is evidence in the record that plaintiff incurred attorneys' fees greatly in excess of the $30,000.00 awarded by the trial court that were attributable to defendant's delay in the production of documents. Plaintiff made an initial request for production of documents to defendant in March of 2004. Defendant's response to this request was incomplete, and supplemental responses were made by defendant between June of 2004 and March of 2005. The parties' attorneys conferenced on 1 April 2005 and discussed the deficiencies in the production of documents. Plaintiff's attorney delivered a list of specific deficiencies to defendant's attorney on 7 April 2005, but defendant did not produce any of these documents until 11 July 2005, after plaintiff's attorney wrote a letter warning of a motion to compel if production was not made. The supplemental response made by defendant on 11 July was incomplete, and on 21 July 2005 plaintiff filed a motion to compel. The trial court issued an order in October 2005 requiring defendant to respond within seven days as to why he was unable to produce the balance of the requested documents.

The production of documents in this case occurred over a period of time that was at least nineteen months. Although the trial court did not find that defendant was in contempt, defendant cites no authority, and we find none, which precludes the imposition of sanctions absent a finding of contempt.

The trial court's findings of fact regarding plaintiff's attorneys' fees are supported by competent evidence. The amount of fees awarded was reasonable, and we hold that the trial court did not abuse its discretion in either the imposition or the amount of the sanction.

This argument is without merit.

IV. Distributive Award

[6] In his final argument, defendant contends that the trial court erred in ordering plaintiff to pay a distributive award of $220,542.00. We disagree.

"N.C. Gen. Stat. § 50-20(e) [2007] creates a presumption that an in-kind distribution of marital or divisible property is equitable, but permits a distributive award 'to facilitate, effectuate, or supplement' the distribution." *Allen* at 372-73, 607 S.E.2d at 334. In order to rebut the presumption of an in-kind distribution, the equitable distribution judgment must contain a finding, supported by evidence in the record, that an in-kind distribution would be impractical. *Id.*; *Brown v. Brown*, 112 N.C. App. 15, 19, 434 S.E.2d 873, 877 (1993). "[A] trial court's failure to comply with the provisions of the equitable distribution statute constitutes an abuse of discretion." *Pott v. Pott*, 126 N.C. App. 285, 289, 484 S.E.2d 822, 826 (1997).

The trial court's decision to distribute several business holdings to plaintiff created the need for a distributive award to defendant. Defendant contends that it was error for the court to distribute these companies to plaintiff where plaintiff did not possess any business experience or acumen.

A review of the record reveals that the business interests distributed to plaintiff did not require the active operation or management by plaintiff. The trial court found:

> The "in-kind" distribution of marital and divisible property and debt is controlled largely by (1) the stipulations of the parties which are set out in the Schedule, and (2) the Court's decision to distribute to Wife those business interests which are more susceptible to being liquidated.

The court further found that the five businesses owned with the Testa brothers should be distributed to one person in order to maximize the value of the companies.

We hold that the trial court's findings are sufficient to support its decision to make a distributive award. We further hold that the trial court did not abuse its discretion in its distribution of the parties' assets. *See Pott* at 289, 484 S.E.2d at 826.

This argument is without merit.

Assignments of error listed in the record but not argued in defendant's brief are deemed abandoned. N.C. R. App. P. 28(b)(6) (2008).

REVERSED and REMANDED in part; AFFIRMED in part.

Judges HUNTER and STEPHENS concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY WASHINGTON, DEFENDANT

No. COA08-217

(Filed 18 November 2008)

1. Motor Vehicles— operating motor vehicle with no insurance—expired registration—arrest—sufficiency of findings of fact—resisting, obstructing, or delaying law enforcement officer

The trial court erred by stating in its Finding of Fact 14 that defendant was placed under arrest for operating a motor vehicle with no insurance and with an expired registration because the arresting officer's testimony and the arrest warrants revealed that the vehicle was not defendant's responsibility when an officer ascertained that the vehicle belonged to a female and not defendant. However, the unchallenged portion of Finding of Fact 14 stating defendant was arrested for resisting, obstructing, or delaying a law enforcement officer is presumed to be supported by competent evidence and remains binding.

2. Search and Seizure— investigatory stop—operating motor vehicle with no insurance—expired registration—conclusions of law

Although the trial court erred in a felony possession of cocaine and habitual felon case by concluding in Conclusion of Law 1 that an officer had the right to make a brief investigatory stop for the purpose of attempting to question defendant about his transportation of a person wanted by law enforcement officers for several felony offenses since there was no competent evidence presented at the suppression hearing that defendant was involved in any criminal activity based on his association with this individual, the evidence in the record and the findings of fact amply supported the remaining portion of that conclusion of law

that the officer had the right to make a brief investigatory stop of defendant based on his operation of a motor vehicle with no insurance and with an expired registration plate.

3. Obstruction of Justice— resisting, obstructing, or delaying law enforcement officer—probable cause for investigatory stop

The trial court did not err by concluding that an officer had probable cause to arrest defendant for resisting, obstructing, or delaying a law enforcement officer even though defendant contends he did not flee from the officer's lawful attempt to make a brief investigatory stop but instead alleges the encounter was consensual because: (1) the officer had a right to make a brief investigatory stop of defendant based upon his operation of a motor vehicle with no insurance and with an expired registration plate; (2) the officer's failure to identify the reason for her lawful investigatory stop did not render the stop unlawful and reduce it to a consensual encounter; and (3) defendant's subsequent flight from the lawful investigatory stop contributed to probable cause that defendant was in violation of N.C.G.S. § 14-223.

Appeal by defendant from judgment entered 12 September 2007 by Judge Thomas H. Lock in Onslow County Superior Court. Heard in the Court of Appeals 22 September 2008.

Roy Cooper, *Attorney General*, *by Jay L. Osborne*, *Assistant Attorney General*, *for the State.*

Appellate Defender Staples Hughes, *by Assistant Appellate Defender Daniel Shatz*, *for defendant-appellant.*

MARTIN, Chief Judge.

Defendant, Michael Anthony Washington, was indicted in case number 05 CRS 58609 for simple possession of marijuana, possession of drug paraphernalia, and unlawfully resisting, obstructing, or delaying a public officer. In case number 05 CRS 58611, he was indicted for felony possession of cocaine, driving while license revoked, and for being a habitual felon. Defendant filed a motion to suppress the evidence obtained by the arresting officer on the grounds that the officer did not lawfully arrest defendant prior to her search of defendant's pockets incident to that arrest. The trial court heard and denied defendant's motion to suppress.

Defendant subsequently entered a guilty plea in case number 05 CRS 58611 to felony possession of cocaine and to being a habitual felon. As a result of his plea, the remaining charges against defendant in case numbers 05 CRS 58609 and 58611 were dismissed, and the trial court imposed a sentence of 80 to 105 months imprisonment. Prior to the entry of his plea and pursuant to N.C.G.S. § 15A-979(b), defendant properly preserved his right of appeal to this Court from the order denying his motion to suppress the evidence obtained by the arresting officer. *See* N.C. Gen. Stat. § 15A-979(b) (2007) ("An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty."). This appeal follows.

The scope of appellate review of a trial court's order granting or denying a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). When findings of fact are not challenged on appeal, "such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal quotation marks omitted).

In the present case, the findings of fact listed below are unchallenged by defendant and are, thus, presumed to be supported by competent evidence.

1. On 28 September 2005, at approximately 2:00 p.m., Jacksonville Police Detective Charles James and Detective Sgt. Ashley Weaver (then Ashley Brown) were parked in Det. James' unmarked police vehicle conducting surveillance on a residence located at 114 Cedar Creek Drive, Jacksonville, North Carolina. The detectives possessed several felony arrest warrants for an individual named Jerry Carr, who lived in that residence.

2. At approximately 2:45 p.m., the defendant arrived at the residence driving a white four-door motor vehicle. The officers observed the defendant get out of the vehicle and enter the residence.

3. Det. James ran a license plate check on the white vehicle and determined that its registration plate had expired and that the

vehicle was not covered by liability insurance, a violation of the motor vehicle laws of North Carolina.

4. About five minutes later, Jerry Carr and the defendant came out of the residence, got into the white vehicle, and drove off. The defendant was driving and Carr was sitting in the front passenger seat.

5. Det. James drove up behind defendant's vehicle and was preparing to stop it when defendant turned and stopped in the parking lot of a gasoline station at the corner of Cedar Creek Drive and Gum Branch Road.

6. Det. James parked next to the passenger side of defendant's vehicle. Det. James got out of his vehicle, ordered Carr out of the defendant's automobile, and placed Carr under arrest.

7. In the meantime, Sgt. Weaver approached defendant's vehicle from the driver's side. The defendant got out of his vehicle and started walking toward the door of the gasoline station. Sgt. Weaver identified herself and told defendant she needed to speak with him. The defendant asked her why, and she replied that they had warrants for Carr's arrest. The defendant continued walking away from her and replied, "If ya'll want to talk with him, you don't need me."

8. Sgt. Weaver told the defendant to stop at least three times. The defendant reached into his right front pants pocket and began to run down Gum Branch Road in the direction of Rain Tree Subdivision. Sgt. Weaver gave chase on foot.

9. Sgt. Weaver wanted to talk with the defendant because he was driving a vehicle with an expired registration plate and no liability insurance coverage and because he was transporting a person wanted by the police for several felony narcotics violations.

10. When Sgt. Weaver observed the defendant reach into his pants pocket, she concluded, based on her training and experience, that he had either some controlled substance or a weapon in that pocket.

11. During the foot chase, Sgt. Weaver never saw the defendant remove his hand from his pocket or throw anything down.

12. Two private citizens, a male motorcyclist and a female motorist, attempted to assist Sgt. Weaver by blocking defend-

ant's path with their vehicles. Both citizens then joined the foot chase.

13. Defendant ran behind a wood line and Sgt. Weaver lost sight of him for about 30 seconds. The private citizens and Sgt. Weaver kept shouting at the defendant, telling him to stop and lie down. The defendant came out of the woods and stopped in the driveway of a private residence.

14. Sgt. Weaver told him to get down on his knees and place his hands behind his head. The defendant got down on his knees, but did not place his hands behind his head. Sgt. Weaver forcibly handcuffed the defendant and placed him under arrest for resisting, obstructing, and delaying a law enforcement officer . . . .

15. Sgt. Weaver searched the wooded area where she had lost sight of the defendant, and she found a small plastic bag containing marijuana.

16. Law enforcement officers transported defendant to the Jacksonville Police Department, where Sgt. Weaver searched the defendant's outer clothing and found a small amount of cocaine and marijuana in his right front pants pocket.

Defendant contends the trial court erred by denying his motion to suppress because the search that led to the discovery of the evidence was not incident to a valid arrest. Defendant argues that the court erred when it concluded that the arresting officer "had probable cause to arrest defendant for resisting, obstructing, and delaying a law enforcement officer and for the motor vehicle violations [of operating a motor vehicle with no insurance and with an expired registration]." For the reasons discussed below, we affirm the trial court's order denying defendant's motion to suppress.

I.

[1] Defendant first contends the trial court erred by finding that defendant was placed under arrest "for operating a motor vehicle with no insurance and with an expired registration," arguing that there is no competent evidence to support this portion of Finding of Fact 14. We agree.

The evidence tended to show that, after running a license plate check on the vehicle defendant was driving on 28 September 2005,

the officers determined that the vehicle's registration plate had expired and that the vehicle was not covered by liability insurance in violation of the motor vehicle laws of North Carolina. At the hearing, Jacksonville Police Department Sergeant Ashley Weaver testified that "initially, yes, we did need to talk to [defendant] . . . to ascertain who was the owner of the vehicle and who was responsible for the insurance and registration." However, Sergeant Weaver also testified that, "during the foot chase, Detective James had ascertained that the vehicle belonged to a female, which was obviously not [defendant]." Accordingly, defendant was not charged with the traffic violations of operating a motor vehicle with no insurance and with an expired registration since the vehicle was "not his responsibility." She further testified:

> A. Once [defendant] was placed under arrest for the ROD[—resisting, obstructing, or delaying a law enforcement officer] for running, once I obtained his name and ran his driver's license, it was found that he did not have a valid driver's license and was driving while on a revoked license. He was placed under arrest for those—both of those and possession of marijuana. He was placed into a marked patrol vehicle and transported back to the police department.
>
> . . . .
>
> A. . . . I searched [defendant] incident to arrest.
>
> Q. And at that time, he was under arrest for?
>
> A. For the ROD. And when I got—once he was actually detained in handcuffs and I ran his name, he was under arrest for driving while license revoked and the possession of marijuana that was thrown where he was located.

In addition, the two arrest warrants issued to defendant on 28 September 2005 identify the following four offenses for which he was arrested: felony possession of cocaine, simple possession of marijuana, possession of drug paraphernalia, and unlawfully resisting, obstructing, or delaying a public officer. Therefore, based on the arresting officer's testimony and the arrest warrants in the record before this Court, we conclude that the evidence does not support the portion of Finding of Fact 14 which found that defendant was arrested for the motor vehicle violations of "operating a motor vehicle with no insurance and with an expired registration." However, the unchallenged portion of Finding of Fact 14 in which the trial court

found that defendant was arrested for resisting, obstructing, or delaying a law enforcement officer is presumed to be supported by competent evidence and remains binding.

II.

[2] In its Conclusion of Law 1, the trial court concluded that

> Sgt. Weaver had the right to make a brief investigatory stop of the defendant for the purpose of attempting to question him about his transportation of a person wanted by law enforcement officers for several felony offenses and based upon his operation of a motor vehicle with no insurance and with an expired registration plate.

Defendant contends the portion of this conclusion which states that the officer had the right to make a brief investigatory stop "for the purpose of attempting to question [defendant] about his transportation of a person wanted by law enforcement officers for several felony offenses" is not supported by the trial court's findings of fact and is erroneous as a matter of law. We agree.

"Article I, Section 20 of our North Carolina Constitution, like the Fourth Amendment, protects against *unreasonable* searches and seizures." *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) (emphasis in original). "The right to be free from unreasonable searches and seizures applies to seizures of the person, including brief investigatory stops." *In re J.L.B.M.*, 176 N.C. App. 613, 619, 627 S.E.2d 239, 243 (2006) (citing *Terry v. Ohio*, 392 U.S. 1, 16-19, 20 L. Ed. 2d 889, 903-05 (1968)). "An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)), *appeal after remand on other grounds*, 120 N.C. App. 804, 463 S.E.2d 802 (1995). "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." *Id.* at 441, 446 S.E.2d at 70 (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906; *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979)). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *Id.* at 442, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). However, "a per-

son's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ybarra v. Illinois*, 444 U.S. 85, 91, 62 L. Ed. 2d 238, 245 (1979) (citing *Sibron v. New York*, 392 U.S. 40, 62-63, 20 L. Ed. 2d 917, 934-35 (1968) ("The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.")), *reh'g denied*, 444 U.S. 1049, 62 L. Ed. 2d 737 (1980).

In the present case, the officers testified that they observed defendant drive up to Mr. Carr's residence, enter the residence for about five minutes, and exit the residence with Mr. Carr. According to the officers' testimony, defendant entered the driver's side of the vehicle, Mr. Carr entered the passenger's side of the vehicle, then defendant drove about 500 yards and came to a stop at the gas station. Jacksonville Police Department Detective Charles James, III provided the following additional testimony:

Q. Were you familiar with the defendant prior to [28 September 2005]?

A. No, I was not.

. . . .

Q. Detective James, what had [defendant] done illegally?

A. [Defendant] had not done anything. I was looking at the passenger of his vehicle, Mr. Carr.

. . . .

Q. And you didn't have any information on [defendant]?

A. No, I did not.

. . . .

Q. And you didn't have any warrants or [Sergeant Weaver] didn't have any warrants on [defendant]?

A. No, we didn't.

Q. And you didn't know who [defendant] was at th[e] time [defendant pulled the car into the gas station]?

A. No, I did not.

Q. And did [Sergeant Weaver]?

A. Not that I'm aware of.

Sergeant Weaver further testified:

Q. And prior to seeing [defendant] at [Mr. Carr's] address, . . . he was not the target of any investigation—

A. No, he was not.

Q. —with the police department or anything of that nature?

A. No.

Q. You had never had any dealings with him?

A. No, I haven't.

. . . .

A. . . . While we were waiting for Mr. Carr—once [defendant] arrived at the residence, we ran the tag on the vehicle [defendant was driving], and the vehicle had an expired registration and no insurance. So we had an[] issue with the driver of that vehicle also.

Thus, since there was no competent evidence presented at the suppression hearing that defendant was involved in any criminal activity *based on his association with Mr. Carr*, the portion of Conclusion of Law 1 which concluded that the officer had a right to make a brief investigatory stop of defendant *because he was transporting Mr. Carr* was erroneous as a matter of law. However, the evidence in the record and the findings of fact amply support the remaining portion of that conclusion of law which concluded that the officer "had the right to make a brief investigatory stop of the defendant . . . based on his operation of a motor vehicle with no insurance and with an expired registration plate." *See* N.C. Gen. Stat. §§ 20-111(1)-(2), 20-183(a), 20-313 (2007); *see, e.g.*, *State v. Johnson*, 186 N.C. App. 673, 675, 651 S.E.2d 907, 908 (2007) ("The improper tags, standing alone, gave the deputies sufficient cause to stop defendant."); *State v. Edwards*, 164 N.C. App. 130, 136, 595 S.E.2d 213, 218, *disc. review denied*, 358 N.C. 735, 603 S.E.2d 879 (2004) ("[T]hat defendant's vehicle had an expired Illinois registration plate . . . was sufficient in and of itself to warrant initially stopping defendant.").

III.

[3] Finally, defendant contends the trial court erred by concluding that the officer "had probable cause to arrest [him] for resisting, obstructing, and delaying a law enforcement officer." Defendant asserts that he did not flee from the officer's lawful attempt to make a brief investigatory stop, but argues that his encounter with the officer was consensual and that *State v. Sinclair*, 191 N.C. App. 485 (2008), controls. We believe the present case is instead analogous to the circumstances of *State v. Lynch*, 94 N.C. App. 330, 380 S.E.2d 397 (1989), and for the reasons discussed below, we find no error.

N.C.G.S. § 14-223 provides that, "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2007). The elements of resisting, delaying, or obstructing an officer have been identified as follows:

> [(1)] that the victim was a public officer;
>
> [(2)] that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
>
> [(3)] that the victim was discharging or attempting to discharge a duty of his office;
>
> [(4)] that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
>
> [(5)] that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Dammons, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612, *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382 (2004). "The conduct proscribed under [N.C.G.S. §] 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in the discharge of his duties." *Lynch*, 94 N.C. App. at 332, 380 S.E.2d at 398. For example, this Court has concluded that flight from a lawful investigatory stop "may provide probable cause to arrest an individual for violation of [N.C.G.S. §] 14-223." *See id.* at 334, 380 S.E.2d at 399.

In *Sinclair*, an officer and another plain-clothed law enforcement agent approached defendant, who was observed sitting in a chair "among six to ten other people" outside a bowling alley, which was "a local hangout" and a "known drug activity area." *See Sinclair*, 191 N.C. App. 486-87 (2008). After the officer said to the defendant, " '[L]et me talk to you,' . . . [d]efendant stood up out of his chair, took two steps toward [the officer], and said, 'Oh, you want to search me again, huh?' Defendant did not sound irritated or agitated, '[j]ust normal.' " *Id.* (fourth alteration in original). The officer replied, "Yes, sir," and continued walking toward the defendant. *See id.* at 487. Then, defendant "stopped ten or twelve feet from [the officer], 'quickly shoved both of his hands in his front pockets and then removed them,' . . . made his hands into fists and took a defensive stance." *See id.* at 487. As the officer got closer to the defendant, the defendant said, "Nope. Got to go," and " 'took off running' across an adjacent vacant lot," where officers gave chase and soon after took the defendant into custody. *See id.* This Court determined that these facts did not give the officer "a reasonable, articulable suspicion that [the d]efendant was involved in criminal activity," and that "even if [the officer] was attempting an investigatory stop, such a stop was unlawful." *Id.* at 491. This Court instead concluded that the encounter between the defendant and the officer was consensual and so determined that the defendant's flight from that encounter could not "be used as evidence that [the d]efendant was resisting, delaying, or obstructing [the officer] in the performance of his duties." *See id.* at 491.

In *Lynch*, plain-clothed officers who were on patrol in an unmarked police car observed the defendant on a street corner around 5:30 p.m. and "mistakenly believed" that the defendant was a person for whom they "had warrants to arrest . . . for sale or delivery of cocaine." *Lynch*, 94 N.C. App. at 330-31, 380 S.E.2d at 397. Shortly thereafter, the officers stopped a vehicle that the defendant had entered and one of the officers "approached the car, identified himself as a police officer, and asked defendant to identify himself. Defendant did not respond, jumped out of the car, and attempted to flee. [However, t]he officers apprehended defendant and, after a brief struggle, took him into custody," "initially arrest[ing him] for resisting public officers." *See id.* at 331, 380 S.E.2d at 397. This Court determined that, since the officers had "a reasonable basis to stop [the] defendant and require him to identify himself" to ascertain whether he was the named subject in their arrest warrants, "the officers were lawfully discharging a duty of their office." *See id.* at 333, 380 S.E.2d

at 399. Accordingly, based on the evidence of the defendant's flight from a lawful investigatory stop and his brief struggle after his arrest, this Court sustained defendant's conviction under N.C.G.S. § 14-223. *See id.* at 334, 380 S.E.2d at 399.

In the present case, as excerpted in the findings of fact above, Sergeant Weaver testified that when she approached defendant, she displayed her "police-issued, city-issued badge" and announced herself as a detective with the Jacksonville Police Department. She testified that defendant asked her what she wanted and she "advised him that [they] had warrants on his passenger and [that his passenger] was being placed under arrest." Defendant then told Sergeant Weaver, " 'Well, if y'all need him, then you don't need me,' or something to that effect, and then proceeded to walk away." Sergeant Weaver again advised defendant to stop, stating "that [she] needed to talk to him. He said that he was just going into the store and would be right back. [She] again told him to stop. On the third time, he reached into his right front pocket with his right hand and took off running." She further testified that she did not have an opportunity to advise defendant that she needed to speak with him about the expired registration and insurance on the vehicle defendant was driving, stating instead:

> I told him that I needed to talk to him. He asked why. I told him because we were arresting the passenger. He said, "Then you don't need to talk to me." I said, "Well, I need to talk to you. I need you to stop," at which time he said he was going in the store and he would be right back out. I told him, "No, that he needed to stop," at which time he took off running.

Defendant asserts that, because the officer did not state that she needed to speak with him about "his operation of a motor vehicle with no insurance and with an expired registration plate," there was no "objective reason" for him to treat Sergeant Weaver's repeated commands to stop "as anything but a consensual encounter from which he was legally entitled to flee." Thus, defendant argues that, according to *Sinclair*, his flight cannot be construed as an unlawful or willful act because "a person who . . . exercises his right to leave [a consensual encounter] cannot be guilty of willfully and unlawfully resisting the officer who is attempting to question him."

Defendant misapplies our decision in *Sinclair* to the present case. As we determined in Section II above, the trial court's conclusion that Sergeant Weaver "had the right to make a brief investigatory stop of the defendant . . . based upon his operation of a motor vehicle

with no insurance and with an expired registration plate" is supported by the evidence in the record and the court's findings of fact. *Sinclair* is distinguishable from the facts of the present case because this Court determined that the officers in *Sinclair did not have the right* to make an investigatory stop of the defendant. *See Sinclair*, 191 N.C. App. at 491 (2008) ("These facts did not give [the officer] a reasonable, articulable suspicion that [the d]efendant was involved in criminal activity.").

In addition, Sergeant Weaver's failure to identify the reason for her lawful investigatory stop does not render the stop unlawful and reduce it to a consensual encounter. *See, e.g.*, *Lynch*, 94 N.C. App. at 331, 333, 380 S.E.2d at 397, 399 (concluding that the officer had a right to make a brief investigatory stop while also finding that the officer only identified himself and asked the defendant to do the same before defendant fled). Our case law provides that, before a law enforcement officer can conduct a brief investigatory stop, "*the officer* must have a reasonable suspicion of criminal activity," *see State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003) (emphasis added) (citing *Terry*, 392 U.S. at 30, 20 L. Ed. 2d at 911), and "[t]he reasonable suspicion must arise *from the officer's knowledge* prior to the time of the stop." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000) (emphasis added). Thus, an analysis of whether an investigatory stop is lawful or unlawful is determined by an examination of the information known by the officer attempting the stop, not known by the individual being subjected to the stop. *See, e.g.*, *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 ("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.*") (emphasis added). In the present case, because the investigatory stop was legal, defendant's encounter with the officer was not consensual and defendant "did not have a right to resist." *See State v. Swift*, 105 N.C. App. 550, 555, 414 S.E.2d 65, 68 (1992). Accordingly, defendant's subsequent flight from the lawful investigatory stop contributed to probable cause that defendant was in violation of N.C.G.S. § 14-223. *See id.* (citing *Lynch*, 94 N.C. App. 330, 380 S.E.2d 397 (1989)). Therefore, we find no error in the trial court's conclusion of law that the officer had probable cause to arrest defendant for resisting, obstructing, or delaying a law enforcement officer, and find no error in the trial court's denial of defendant's motion to suppress.

The order denying defendant's motion to suppress is affirmed.

Affirmed.

Judges McGEE and STEPHENS concur.

HARRY JAMES O'CONNOR, JR., PLAINTIFF-APPELLANT v. KARA J. ZELINSKE, DEFENDANT-APPELLEE

No. COA08-280

(Filed 18 November 2008)

1. Child Support, Custody, and Visitation— sole physical custody—relocation to another state—best interests of child

The trial court did not abuse its discretion in a child custody case by entering an order granting defendant mother sole physical custody of the children and permitting her to relocate to Minnesota subject to plaintiff father having visitation privileges, allegedly without proper consideration of the best interests of the children and the effect the relocation would have on the children, because the trial court found: (1) plaintiff attempted to impugn defendant's reputation to the children; (2) examples of communications between plaintiff and the children contained inappropriate references or insinuations that were not in the best interest of the children; (3) plaintiff needed help from the local sheriff's department to give medication to the children during their visit with him; (4) plaintiff was asked to leave a voluntary domestic violence program based on his lack of participation; (5) plaintiff used Social Security payments disbursed for the care of the children to make house and utility payments, to pay other personal expenses, and to hire at least three private investigators to follow defendant; (6) there had been physical and emotional abuse of defendant by plaintiff, and defendant continued to fear plaintiff; and (7) defendant's mother was available to assist in supporting the children if defendant and the children moved back to Minnesota, defendant had many friends and relatives in the area, defendant's mother had sufficient space in her house to keep defendant and the children, and defendant had a job lined up in Minnesota.

2. Child Support, Custody, and Visitation— custody—visitation schedule—option to relocate to another state—sufficiency of findings of fact

The trial court did not abuse its discretion in a child custody case by entering an order establishing a visitation schedule and permitting defendant mother the option to relocate to Minnesota because there were sufficient findings of fact supporting a conclusion that the advantages to the children outweigh the disadvantages, and that relocation to Minnesota with defendant, who will be employed, living in a stable environment, and having a broad network of family and friends to assist her in caring for the children, would be in the best interests of the children.

3. Child Support, Custody, and Visitation— visitation schedule—reasonableness

The trial court did not err in a child custody case by setting a visitation schedule even though plaintiff father contends alternating weekends from Thursday to Sunday evenings within a one hundred mile radius of the children's home was unreasonable given the fact that plaintiff lives in North Carolina and the children would potentially be living in Minnesota because: (1) the trial court determined the children's potential relocation would be in their best interests, and thus the imposition on plaintiff did not constitute an abuse of the trial court's discretion in making its custody determinations; (2) the trial court is required to subordinate plaintiff's visitation privileges to the best interests of the children; and (3) plaintiff's unemployment resulting from his disability lessened any scheduling conflicts that might interfere with his ability to exercise his biweekly visitation rights.

4. Child Support, Custody, and Visitation— custody—transfer of past Social Security payments for benefit of children to custodial parent

The trial court erred in a child custody case by ordering plaintiff father to transfer to defendant mother, for the children's care, past Social Security payments made to him on behalf of the children because: (1) *Brevard v. Brevard*, 74 N.C. App. 484 (1985), held that North Carolina courts do not have the authority to order the Social Security Administration (SSA) to make payments to anyone other than the designated beneficiary of the payments unless that beneficiary is subject to an alimony or child support order; (2) even if plaintiff had been a beneficiary, he had not been subjected to a child support order and the district court had not

acquired jurisdiction over the SSA by making it a party to the action; and (3) although the Court of Appeals has subsequently issued at least two opinions concerning a designated payee's right to and control over SSA benefits intended for minor children that may be in conflict with *Brevard*, the Court of Appeals is without authority to overturn a prior precedent set by another panel of the same court.

Chief Judge MARTIN concurring in separate opinion.

Appeal by Plaintiff from order entered 3 August 2007 by Judge Robert W. Bryant, Jr. in District Court, Lee County. Heard in the Court of Appeals 6 October 2008.

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

Harrington, Gilleland & Winstead, LLP, by Susan M. Feindel, for Defendant-Appellee.

McGEE, Judge.

Harry James O'Connor, Jr. (Plaintiff) and Kara J. Zelinske (Defendant) are the biological parents of three minor children (the children). Plaintiff and Defendant first met in an on-line computer chat room in 2001. At that time, Plaintiff lived in North Carolina, and Defendant lived in Minnesota. Defendant visited Plaintiff in North Carolina for several weeks in 2002. Defendant returned to Minnesota, and approximately one month after that visit, Defendant called Plaintiff to inform him that she was pregnant. Defendant gave birth on 12 December 2002 in Minnesota to two children (the twins). Defendant and the twins continued to live in Minnesota, and Plaintiff continued to live in North Carolina, until 5 May 2004, when Defendant moved with the twins to North Carolina to live with Plaintiff. A third child was born on 12 March 2005. The relationship between Plaintiff and Defendant was turbulent, and Defendant moved back to Minnesota with the children in January of 2006. Defendant and the children moved back to North Carolina to live with Plaintiff in March of 2006. Following an altercation between Plaintiff and Defendant on 29 August 2006, Defendant again moved out of Plaintiff's residence with the children. Defendant and the children have continued to live separate from Plaintiff since that time.

Plaintiff filed this child custody action on 31 August 2006, requesting a temporary order preventing Defendant from leaving

North Carolina with the children, and seeking both temporary and permanent custody of the children. A temporary custody order was entered on 31 August 2006, preventing Defendant from leaving the State of North Carolina pending resolution of the underlying custody issues. At a date not shown in the record, but prior to the birth of the third child, a custody order was entered in Minnesota granting sole custody of the twins to Defendant, and denying any visitation to Plaintiff. Plaintiff filed an amended complaint in the present action on 8 September 2006, in which he requested that the District Court "contact the State of Minnesota to determine if it [would] release jurisdiction over the [twins][.]" Defendant filed her answer and counterclaim on 12 October 2006, in which she sought permanent custody of the youngest child, denial of the relief sought by Plaintiff in his amended complaint, and requested "the lump sum Social Security [d]isability settlement for the . . . children [awarded due to Plaintiff's disability] be transferred to . . . Defendant for the use and benefit of the . . . children." The trial court entered an order on 26 October 2006, finding that Minnesota had determined it no longer had exclusive continuing jurisdiction over the matter, and that District Court, Lee County had jurisdiction to consider modification of the prior Minnesota child custody order. The action was heard by the trial court on 22 March 2007, 2-3 May 2007, and 31 May 2007. The trial court entered its order on 3 August 2007, ordering, *inter alia*:

1. That Defendant shall have the sole care, custody and control of the [youngest child].

2. That Defendant shall retain sole custody of [the twins], but the previous order of the Minnesota court is modified to provide Plaintiff with visitation privileges[.]

. . . .

21. Neither [Plaintiff nor Defendant] is prohibited from moving to another state or location within the state.

. . . .

24. Plaintiff shall deliver to Defendant the sum of $9,326.00 immediately from the Social Security [d]isability funds Plaintiff received on behalf of the . . . children.

Plaintiff appeals.

I.

[1] In Plaintiff's first argument, he contends the trial court erred in entering an order granting Defendant sole physical custody of the children, and permitting Defendant to relocate to Minnesota without proper consideration of the best interests of the children, and the effect the relocation would have on the children. We disagree.

> Under our standard of review in custody proceedings, "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." Whether those findings of fact support the trial court's conclusions of law is reviewable *de novo*.

Mason v. Dwinnell, 190 N.C. App. 209, 221, 660 S.E.2d 58, 66 (2008) (citations omitted) (emphasis added). The trial court's custody decisions must be based upon the best interests of the children. The custody order shall include sufficient findings of fact to support its conclusions of law concerning the best custody placement for the children. Broad discretion is given to the trial court in its fact-finding duties and in making ultimate custody determinations. This Court will not disturb a trial court's findings absent a clear showing that the trial court abused its discretion. *Dixon v. Dixon*, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 671-72 (1984). Because Plaintiff fails to argue that the trial court's findings of fact are not supported by sufficient evidence, any such argument is deemed abandoned, and the trial court's findings of fact are binding on appeal. *Estroff v. Chatterjee*, 190 N.C. App. 61, 71-72, 660 S.E.2d 73, 79 (2008).

Plaintiff argues that the trial court failed to include sufficient findings of fact in its order to support its conclusion that the best interests of the children would be served by awarding custody to Defendant.

The trial court made the following extensive findings of fact relevant to this issue: Plaintiff suffered a work-related injury that required two operations, and Plaintiff still suffers neck pain and was prescribed thirty milligrams of Methadone four times per day, along with Motrin, Tylenol, and blood pressure medication. During a May 2002 trip to Minnesota to visit Defendant, Plaintiff consumed alcohol excessively and was verbally abusive to Defendant's roommate to such a degree that the roommate refused to allow Plaintiff to remain in the apartment she and Defendant shared. Defendant obtained a restraining order against Plaintiff from a Minnesota court, which

Defendant subsequently voluntarily dismissed just before she and Plaintiff began co-habitation in Wilmington, North Carolina.

The trial court further found that Plaintiff filed a domestic violence protective order against his then girlfriend, Andrea Batchelor (Ms. Batchelor), in New Hanover County on 9 December 2002, which was later dismissed. Ms. Batchelor filed a domestic violence protective order against Plaintiff on that same day. The trial court found that Plaintiff had "put Batchelor in a headlock, slammed her against a door, threatened to kill her, and would not let her leave[,]" and granted the protective order for one year. The trial court found that Plaintiff was unable to work due to his work-related injuries, and he borrowed money from his parents to cover his bills. Nonetheless, Plaintiff fell seven months behind on his house payments and was forced to sell his house. Since Defendant moved to North Carolina to be with Plaintiff in May of 2004, Defendant has maintained steady employment, other than the few weeks she took off following the birth of their third child.

Defendant was the primary caregiver for the children when she and Plaintiff lived together. Plaintiff's various pain medications, which cause drowsiness, limit his ability to care for the children on a regular basis. Plaintiff and Defendant argued in January of 2006, and Plaintiff pulled Defendant's hair while she was holding their infant daughter, causing Defendant to fall against the wall and to the floor. Following this incident, Defendant took the children back to Minnesota, where she and the children lived with Defendant's mother. Defendant obtained another restraining order against Plaintiff in Minnesota. However, Defendant subsequently dismissed the Minnesota restraining order and moved back to North Carolina with the children to live with Plaintiff. Plaintiff and Defendant argued again on 29 August 2006, and when Defendant threatened to call the police, Plaintiff pushed her into a wall. Defendant's mother called the house during the argument; Plaintiff lifted the receiver and replaced it, terminating the call, and then unplugged the phone. Defendant's mother called the police. Defendant, with the assistance of law enforcement, took the children and a few belongings and left the home.

The trial court found that Defendant was granted another restraining order against Plaintiff on 31 August 2006, which gave Defendant temporary custody of the children, and ordered Plaintiff not to contact the children. There was a hearing on 6 September 2006, and by order entered 7 September 2006, the trial court continued the

31 August 2006 protective order until 15 December 2006. This order also modified the original protective order, granting Plaintiff visitation with the children.

The trial court found that Plaintiff attempted to impugn Defendant's reputation to the children by telling them she had been in bed with two men. Plaintiff also attempted to use the children to determine who visited Defendant's home. Plaintiff further told the children that they "really do not have a routine." He "[a]sked if [one of the children] was being lectured." He "[a]ccused Defendant of interfering with Plaintiff's phone calls by pushing buttons." He "[a]sked one of the children if Defendant [had] a new guy that week." He told the children "that it is too bad that Defendant cannot afford her own place and has to mooch off of someone else."

The trial court concluded that "these . . . examples of communication between Plaintiff and the . . . children contain inappropriate references or insinuations that are not in the best interest of the . . . children." Plaintiff "appeared not to know which child to whom to give medicine during his visit and enlisted the help of the Lee County Sheriff's Department" to determine which child needed the medication. Plaintiff was asked to leave a domestic violence program he had voluntarily agreed to undergo because of his lack of participation.

The trial court further found that Plaintiff used Social Security payments disbursed for the care of the children to make house and utility payments, to pay other personal expenses, and to hire at least three private investigators to follow Defendant. Plaintiff withdrew $18,643.54 of these funds on 1 September 2006 and had them converted to a cashier's check. Plaintiff "degraded Defendant" to the children's daycare provider, Ms. Honeycutt, in front of the children. While Plaintiff was talking to Ms. Honeycutt, she noticed Plaintiff's hands shaking, and that he was sweating "profusely[.]" Ms. Honeycutt also noted that she had previously noticed the smell of alcohol on Plaintiff. Ms. Honeycutt indicated that "Defendant had appropriate conversations with [her] about the children and never made derogatory comments to [her] about Plaintiff." Ms. Honeycutt stated that the daycare center wished to terminate Plaintiff's visitation rights, as they were disruptive. The trial court terminated Plaintiff's visitation rights to the daycare, excepting special events.

The trial court found that when Defendant went with a friend to Plaintiff's house to try to obtain the children's birth certificates, which Defendant needed to apply for housing assistance, Plaintiff had

Defendant arrested for criminal domestic trespass. These charges were subsequently dismissed. Plaintiff refused to allow Defendant to retrieve her furnishings or the children's toys from Plaintiff's house, many of which were items Defendant had brought with her from Minnesota. Plaintiff has consumed alcohol after taking his Methadone, which increases the effects of the Methadone. There has been physical and emotional abuse of Defendant by Plaintiff, and Defendant continues to fear Plaintiff. The children are more closely bonded to Defendant. Neither Plaintiff nor Defendant has a support system in North Carolina. Plaintiff's sister believed Defendant to be fearful of Plaintiff, and she observed Defendant running into the kitchen to cry after arguments. Plaintiff told Defendant's mother that if Defendant took the children to Minnesota, they "would not reach the border." Defendant's mother is available to assist in supporting the children if Defendant and the children move back to Minnesota, and Defendant also has many friends and relatives in the area. Defendant's mother has sufficient space in her house to keep Defendant and the children, and Defendant has a job lined up in Minnesota.

We hold that these findings of fact are sufficient to support the trial court's conclusion of law that "it is in the best interest of the minor children that Defendant be granted their sole care, custody and control subject to Plaintiff having visitation privileges as hereinafter set forth." We find no abuse of discretion on this issue.

[2] Plaintiff next argues that the trial court erred in entering its order establishing a visitation schedule, and in permitting Defendant the option to relocate to Minnesota.

> "[T]he court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental and moral faculties. All other factors, including visitorial rights of the other applicant, will be deferred or subordinated to these considerations, and if the child's welfare and best interests will be better promoted by granting permission to remove the child from the State, the court should not hesitate to do so."

Evans v. Evans, 138 N.C. App. 135, 141, 530 S.E.2d 576, 580 (2000), quoting *Griffith v. Griffith*, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954). "The trial court must make a comparison between the two applicants considering all factors that indicate which of the two is

'best-fitted to give the child the home-life, care, and supervision that will be most conducive to its well-being.' " *Evans*, 138 N.C. App. at 142, 530 S.E.2d at 580, quoting *Griffith*, 240 N.C. at 275, 81 S.E.2d at 921; *see also In re Custody of Stancil*, 10 N.C. App. 545, 548-50, 179 S.E.2d 844, 847-48 (1971). "Although most relocations will present both advantages and disadvantages for the child, when the disadvantages are outweighed by the advantages, as determined and weighed by the trial court, the trial court is well within its discretion to permit the relocation." *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 80, 418 S.E.2d 675, 680 (1992), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).

In light of the trial court's findings of fact stated above, we hold the trial court did not abuse its discretion in allowing Defendant the option to relocate to Minnesota. We find sufficient findings of fact to support a conclusion that the advantages to the children outweigh the disadvantages, and that relocation to Minnesota with Defendant, who will be employed, living in a stable environment, and have a broad network of family and friends to assist her in caring for the children, would be in the best interests of the children. *See Evans v. Evans*, 169 N.C. App. 358, 362-63, 610 S.E.2d 264, 268-69 (2005).

[3] Plaintiff next argues that the trial court's visitation schedule is unreasonable. " 'The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child.' " *Stancil*, 10 N.C. App. at 550, 179 S.E.2d at 848 (quoting 2 Nelson, *Divorce and Annulment*, § 15.26 (2d Ed. Rev. 1961)). Plaintiff argues that the visitation schedule, whereby Plaintiff may exercise his visitation on alternating weekends from Thursday to Sunday evenings, within a one hundred mile radius of the children's home, is unreasonable. We note that the one hundred mile radius limitation does not apply when Plaintiff has holiday visitation rights.

Should Defendant relocate to Minnesota, the distance between North Carolina and Minnesota would certainly create a hardship on Plaintiff in making his visits. However, because the trial court has determined the children's potential relocation to Minnesota with Defendant would be in their best interests, we hold that this imposition on Plaintiff does not constitute an abuse of the trial court's discretion in making its custody determinations. The trial court is required to subordinate Plaintiff's visitation privileges to the best interests of the children. *Stancil*, 10 N.C. App. at 550, 179 S.E.2d at 848. We note that Plaintiff's unemployment resulting from his disabil-

ity lessens any scheduling conflicts that might interfere with his ability to exercise his bi-weekly visitation rights. Plaintiff's arguments are without merit.

II.

[4] In Plaintiff's second argument, he contends that the trial court erred in ordering Plaintiff to transfer to Defendant, for the children's care, past Social Security payments made to him on behalf of the children. We agree.

Our Court addressed this issue in *Brevard v. Brevard*, 74 N.C. App. 484, 328 S.E.2d 789 (1985). In *Brevard*, this Court held that North Carolina courts do not have the authority to order the Social Security Administration (SSA) to make payments to anyone other than the designated beneficiary of the payments, unless *that beneficiary* is subject to an alimony or child support order. The *Brevard* Court reasoned that because the Social Security payments at issue were for the benefit of the children, and the defendant was merely their designated representative, the alimony and child support exceptions could not apply. *Id.* at 487-88, 328 S.E.2d at 791-92.

> The courts of North Carolina, however, do not possess the power to compel the SSA to transfer the children's benefits to someone other than the designated payee, nor do they have the power to determine that [the] defendant is misusing Social Security benefits paid to him on behalf of the children and to direct that he account for them to some other person.

Id. at 488-89, 328 S.E.2d at 792. The *Brevard* Court further explained that its holding applied to funds that have already been disbursed by the SSA. *Id.* at 488, 328 S.E.2d at 792.

In addition, the *Brevard* Court noted two other issues concerning the trial court's authority in the matter: "(1) at that point, even if he had been the beneficiary, the defendant had not been subjected to a child support order, and so 42 U.S.C. § 659 had not come into play, and (2) the district court had not acquired jurisdiction over the SSA by making it a party to the action." *Id.* In light of the holding in *Brevard*, we are compelled to vacate that portion of the trial court's order requiring Plaintiff to transfer the Social Security benefits he received as designated representative for the children.

We note that following the *Brevard* decision, this Court has issued at least two opinions concerning a designated payee's right to

and control over SSA benefits intended for minor children that may be in conflict with the *Brevard* opinion.

First, in *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999), this Court ordered the trial court to "direct payment of the $421.00 [social security] disability check to [the] [p]laintiff, the custodial parent." *Id.* at 467, 517 S.E.2d at 927. These disability payments were being made for the benefit of the children through the defendant-father, as representative payee, due to the defendant's disability. These facts are nearly identical to those in the case now before us. *Sain* does not mention any issue of jurisdiction, the federal Social Security statutes, or the *Brevard* opinion. It seems apparent these issues were not brought to the *Sain* Court's attention on appeal. However, the *Sain* opinion does appear to direct the trial court to act in opposition to the earlier holding of *Brevard*. To the extent that the *Sain* opinion may be read as overruling any aspect of the *Brevard* opinion, it must be disregarded. *Wells v. Cumberland County Hosp. System, Inc.*, 181 N.C. App. 590, 592-93, 640 S.E.2d 400, 402-03 (2007); *see also In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (One panel of the Court of Appeals may not overrule another panel of the Court of Appeals.).

Second, this Court has directed the Department of Social Services, as representative payee, to spend SSA funds for a minor child in a specific manner. *In re J.G.*, 186 N.C. App. 496, 652 S.E.2d 266 (2007), *discretionary review denied*, 362 N.C. 176, 658 S.E.2d 485 (2008). The *J.G.* Court distinguished its opinion from *Brevard*, mainly by concluding that 42 U.S.C. § 407(a), upon which *Brevard* is based, was not applicable on the facts in *J.G.* The *J.G.* Court was very thorough in its analysis distinguishing the issue it faced from *Brevard* on the facts.[1] However, to the extent, if any, that the holding in *J.G.* is in contravention to the holding in *Brevard*, we again must follow the earlier precedent set in *Brevard*. *Cumberland County Hosp. System, Inc.*, 181 N.C. App. at 592-93, 640 S.E.2d at 402-03.

It is apparent to this Court that the holding in *Brevard* has found disfavor from subsequent panels of the Court of Appeals. A substantial number of other jurisdictions have determined that state courts have concurrent subject matter jurisdiction to make decisions concerning SSA benefits such as those at issue in the this case, *see Grace*

1. "The case *sub judice* is distinguishable as the action was brought by the guardian *ad litem* and not a claimant to the Social Security benefits. Therefore, the trial court here, unlike the court in *Brevard*, did not violate section 407(a)." *In re J.G.*, 186 —— N.C. App. at 506 —— n.4, 652 S.E.2d at 273 n.4.

Thru Faith v. Caldwell, 944 S.W.2d 607 (1997), and cases cited within. *Caldwell* specifically references *Brevard*, and it finds the reasoning in *Brevard* unconvincing. *Id.* at 612-13. The *In re J.G.* Court also references the conflict between the *Brevard* decision and other jurisdictions. *In re J.G.*, 186 N.C. App. at 506, 652 S.E.2d at 272-75.

Though we may find the reasoning set forth in *J.G.*, *Caldwell*, and other opinions questioning the holding in *Brevard* convincing, it is not within our authority to overturn a precedent set by this Court, which is the sole province of our Supreme Court.

Affirmed in part, vacated in part.

Judge STEPHENS concurs.

Chief Judge MARTIN concurs with a separate opinion.

MARTIN, Chief Judge, concurring.

I fully concur in the majority opinion and write separately only to emphasize that our decision should not be read as being inconsistent with the holding of *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999), i.e. that the trial court properly refused to consider a disability payment received on behalf of a minor child as income to the noncustodial parent in determining that parent's child support obligation. To the extent the Court directed, on remand, the trial court to direct that the disability payment be made to the custodial parent, such direction was not necessary to a determination of the issue before the Court, was *dicta*, and is not binding on the specific issue addressed in Section II of the majority opinion in the present case.

DONNIE R. SPRINKLE, EMPLOYEE, PLAINTIFF v. LILLY INDUSTRIES, INC., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA08-279

(Filed 18 November 2008)

1. Workers' Compensation— interest—medical compensation

The Industrial Commission did not err in a workers' compensation case by awarding under N.C.G.S. § 97-86.2 interest only on plaintiff's out-of-pocket expenditures related to his medical com-

pensation and on such other medical costs as have been personally paid for by plaintiff, and by denying plaintiff's request for interest on medical expenses paid for by his and his wife's third-party health insurance plans because: (1) a third-party health insurer may not reap the benefit of any award of interest under the statute which specifically provides that interest may be paid only to the employee; (2) plaintiff did not experience a loss of use of his money nor was he disadvantage by an inability to pay for care since he had a health insurance policy which contractually shifted the risk of loss from plaintiff to the health insurer; (3) the goal of compensating plaintiff for his loss or disadvantage is not met by awarding interest on amounts of medical compensation for which plaintiff was indemnified under his health policy; and (4) the legislative purpose and intent in enacting N.C.G.S. § 97-86.2 was not to create a penalty to employers and carriers nor a windfall for the employee.

2. Workers' Compensation— outstanding medical expenses— sufficiency of findings of fact

The Industrial Commission did not err in a workers' compensation case by its finding of fact that there were no outstanding medical expenses because: (1) the only outstanding medical expenses the Commission needed to consider were those plaintiff was responsible for paying; and (2) plaintiff's testimony that he did not have any outstanding medical bills was competent evidence to support this finding.

3. Workers' Compensation— motion to compel discovery— medical compensation—relevancy

The Industrial Commission did not err in a workers' compensation case by denying plaintiff's motion to compel discovery of amounts of medical compensation paid by defendant carrier to plaintiff's third-party health insurer because the information was not relevant and plaintiff was not entitled to interest on those amounts.

4. Workers' Compensation— denial of attorney fees—failure to show manifest abuse of discretion

The Industrial Commission did not err in a workers' compensation case by failing to award attorney fees to plaintiff because plaintiff did not show a manifest abuse of discretion by the Commission.

Appeal by plaintiff from opinion and award entered 31 October 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 October 2008.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellant.

Davis and Hamrick, L.L.P., by Shannon Warf Beach, for defendants-appellees.

MARTIN, Chief Judge.

This matter is on appeal to the Court of Appeals for the second time. Defendant-employer Lilly Industries, Inc. and defendant-carrier Liberty Mutual Insurance Company first appealed the Commission's 25 April 2002 Opinion and Award, awarding plaintiff Donnie R. Sprinkle total disability compensation benefits at the rate of $532 per week and payment of all medical expenses resulting from plaintiff's injuries sustained in a car accident while traveling between work sites. The facts of the case are fully set out in our unpublished opinion and need not be recounted here. *Sprinkle v. Lilly Indus., Inc.*, 161 N.C. App. 741, 590 S.E.2d 23 (2003) (unpublished). This Court affirmed the Commission's Opinion and Award, rejecting defendants' argument that plaintiff's injury was not within the course and scope of his employment.

During the period of defendants' denial of plaintiff's claim, plaintiff's medical expenses were initially paid through his employer-provided, third-party health insurance plan, with premiums partially paid by plaintiff. After plaintiff's discharge from employment and the expiration of his health insurance coverage through his employer under COBRA, plaintiff's medical expenses were paid through his wife's health insurance plan. After the Court of Appeals' decision, defendants reimbursed plaintiff his out-of-pocket expenses, and defendants also reimbursed plaintiff's third-party health insurer the amounts it paid for treatment of plaintiff's injuries arising from his work-related accident. Defendants paid interest on portions of the disability award which were unpaid during the pendency of the appeal.

On 7 December 2005, plaintiff filed a request that his claim be assigned for hearing, asserting (1) he was entitled to interest on the award of medical compensation which was unpaid while the first appeal was pending, pursuant to N.C.G.S. § 97-86.2, and (2) he should be awarded attorney fees because defendants lacked reasonable

grounds to defend the claim for interest. Plaintiff also moved to compel defendants to provide verified answers to plaintiff's interrogatories. Absent complete information regarding the amount of medical compensation awarded, plaintiff estimated that the accrued interest would total nearly $200,000. The Commissioner who presided over the hearing filed an Opinion and Award on 10 October 2006 denying plaintiff's motion to compel, awarding plaintiff interest on out-of-pocket expenditures related to medical compensation or other amounts of medical costs personally paid for by plaintiff, and concluding plaintiff was not entitled to an award of attorney fees. Plaintiff appealed to the full Commission, a majority of which affirmed the deputy commissioner's Opinion and Award with minor modifications. The majority of the Commission specifically denied "plaintiff's request for interest on medical expenses paid for by his and his wife's third-party health insurance plans." One Commissioner dissented. Plaintiff appeals to this Court.

---

[1] N.C.G.S. § 97-86.2 provides for an award of interest to be made to the employee in situations, such as the present, where the employer or insurance carrier fails to pay compensation to the employee during the time when an appeal is pending before the Court of Appeals. Specifically, the statute states:

> In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid . . . .

N.C. Gen. Stat. § 97-86.2 (2007). Plaintiff argues that the plain language of the statute necessitates that "final award or unpaid portion thereof" includes all amounts of medical compensation awarded, including amounts reimbursable to a third-party health insurer, citing *Childress v. Trion, Inc.*, 125 N.C. App. 588, 591, 481 S.E.2d 697, 699, *disc. review denied*, 346 N.C. 276, 487 S.E.2d 541 (1997), which holds "any award of medical compensation for the plaintiff's benefit is covered by G.S. 97-86.2." Plaintiff asserts that the Commission erred in its conclusions of law that such an interpretation of the statute "would be far removed from the goals of the Workers' Compensation Act" and that *Childress* is distinguishable from the present case. Accordingly, plaintiff contends that the Commission erred in awarding interest only on "plaintiff's out-of-pocket expenditures related to

his medical compensation and on such other medical costs as have been personally paid for by plaintiff" and in denying "plaintiff's request for interest on medical expenses paid for by his and his wife's third-party health insurance plans."

"The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). Our interpretation of N.C.G.S. § 97-86.2 is guided by the following principles. "Generally, if the language of the statute is clear and not ambiguous, we must conclude that the General Assembly intended the statute to be implemented according to the plain meaning of its terms." *Childress*, 125 N.C. App. at 591, 481 S.E.2d at 699 (citing *Hyler v. GTE Products*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993)). However, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (internal quotation marks omitted). Although the Workers' Compensation Act "should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependants, and its benefits should not be denied by a technical, narrow, and strict construction," *Hollman v. City of Raleigh, Public Utils. Dep't*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968), the appellate courts' "primary task in statutory construction is to ensure that the legislative intent is accomplished." *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 88, 484 S.E.2d 566, 569 (1997). We agree with the majority of the Commission that a literal interpretation of the language of N.C.G.S. § 97-86.2 would contravene the legislative purpose and intent behind its enactment.

This Court has previously noted:

> [T]he goals of awarding interest include the following: "(a) [T]o compensate a plaintiff for loss of the use value of a damage award or compensation for delay in payment; (b) to prevent unjust enrichment to a defendant for the use value of the money, and (c) to promote settlement."

Childress, 125 N.C. App. at 592, 481 S.E.2d at 699 (quoting *Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984)). The first purpose listed seeks to provide compensation to an employee where that employee has suffered some loss or disadvantage by the employer or carrier's failure to pay the award. In the case before us, plaintiff

paid some of his medical expenses out-of-pocket but was indemnified by his health insurer for the majority of his medical expenses. *See* N.C. Gen. Stat. § 58-1-10 (2007) ("A contract of insurance is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an *indemnity or reimbursement* for the destruction, loss, or injury of something in which the other party has an interest." (emphasis added)). Upon an award to an employee for medical compensation, the Workers' Compensation Act provides that the health insurer "may seek reimbursement from the employee, employer, or carrier that is liable or responsible for the specific medical charge according to a final adjudication of the claim." N.C. Gen. Stat. § 97-90.1 (2007). By contrast, the third-party health insurer may not reap the benefit of any award of interest under the statute, which specifically provides that interest may be paid only to the employee. N.C. Gen. Stat. § 97-86.2 ("If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant."). The issue before this Court concerns only whether the calculation of interest on an unpaid award should include *amounts of the award which were reimbursed to the third-party health insurer*. The parties do not dispute that interest should be calculated for the amounts of medical compensation reimbursed to plaintiff for his out-of-pocket expenses.

The compensatory element of the first purpose of awarding interest compels us to consider whether plaintiff in this case suffered loss or disadvantage by defendants' failure to pay the award of medical compensation while the appeal was pending before the Court of Appeals. Because plaintiff had a health insurance policy, which contractually shifted the risk of loss from plaintiff to the health insurer, *see* N.C. Gen. Stat. § 58-1-10, plaintiff did not experience a loss of use of his money nor was he disadvantaged by an inability to pay for care. Accordingly, in this case the goal of compensating plaintiff for his loss or disadvantage is not met by awarding interest on amounts of medical compensation for which plaintiff was indemnified under his health insurance policy.

Absent a compensatory purpose, the remaining purposes of awarding interest serve only to penalize the employer and the carrier for benefitting from the use value of the money and for electing not to settle the claim. However, to construe N.C.G.S. § 97-86.2 as a penalty is at odds with the general purpose of the Workers' Compensation Act. Our Courts have consistently recognized "[t]he purpose of the North Carolina Workers' Compensation Act is not only

to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers." *Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569. Contrary to this purpose, to construe N.C.G.S. § 97-86.2 as a penalty would create an incentive for employers or carriers to pay the award before the appeal has been decided, which would provide a remedy to the *third-party health insurer* rather than the *injured worker*. Furthermore, rather than limiting employers' liability, it would increase their liability by an indefinite amount, which could be quite substantial as evidenced by the present case. We conclude that to construe N.C.G.S. § 97-86.2 as creating a penalty without a countervailing compensatory goal ignores the overall purpose of the Workers' Compensation Act.

Viewed another way, the award of interest to an employee on amounts of medical costs for which he was indemnified by a third-party health insurer, where it fails to compensate the employee for a loss or disadvantage, creates a windfall for the employee. Our Courts have repeatedly disfavored construction of the Workers' Compensation Act as creating a windfall. *See Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569 ("[T]he [Workers' Compensation] Act in general and N.C.G.S. § 97-10.2 specifically were never intended to provide the employee with a windfall of a recovery from both the employer and the third-party tort-feasor."); *Pearson v. C.P. Buckner Steel Erection Co.*, 348 N.C. 239, 246, 498 S.E.2d 818, 822 (1998) ("To construe federal Medicaid statutes and regulations as preempting the state workers' compensation law under these circumstances would permit employers and carriers to reap a financial windfall in savings on medical expenses by denying liability for workplace injuries. This result would clearly undermine a central purpose of the Act, which is to provide 'swift and sure' compensation without protracted litigation."); *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 189-91, 345 S.E.2d 374, 381-82 (1986) (reversing an award of compensation that resulted in a windfall to plaintiff); *Conyers v. New Hanover Cty. Schools*, 188 N.C. App. 253, 259, 654 S.E.2d 745, 750, 751 (2008) (avoiding a result that "is not fair and just[,] as Defendant would be unduly burdened while Plaintiff would receive a windfall" and concluding a windfall for plaintiff would be "contrary to statutory intent"). *But see Helsius v. Robertson*, 174 N.C. App. 507, 516, 621 S.E.2d 263, 269 (2005) ("We recognize that the Workers' Compensation Act creates a system in which an employee may receive a 'windfall,' however the trial court has made specific findings of fact showing that this did not occur in the instant case."), *appeal dismissed and disc. review denied*, 360 N.C. 363, 629 S.E.2d 851 (2006).

In *Childress*, this Court addressed the potential for a windfall to plaintiff under N.C.G.S. § 97-86.2. The issue before this Court was "whether the Industrial Commission erred in requiring defendants to pay interest on plaintiff's outstanding medical expenses." *Childress*, 125 N.C. App. at 590, 481 S.E.2d at 698. Defendants in *Childress* argued that an award of interest on any portion of medical expenses would result in a windfall for plaintiff. *Id.* at 591, 481 S.E.2d at 699. In response to this contention, the Court wrote:

> [W]e note that in contested cases, workers' compensation plaintiffs incur the liability for all medical expenses if they lose; that plaintiffs often pay significant out-of-pocket medical expenses for prescription drugs, travel, deductibles, or actual payment of medical expenses when there is no other way plaintiffs can obtain treatment; and that because the factual scenarios in determining whether plaintiffs in workers' compensation cases have incurred out-of-pocket expenses are so numerous, the only reasonable construction is that any award of medical compensation for the plaintiff's benefit is covered by G.S. 97-86.2.

Id. By this language, the Court recognized a compensatory element to the award of interest on outstanding medical expenses. Noting the disadvantages and losses that an employee suffers while waiting for a disposition of the claim, the Court specifically acknowledged that "any award of medical compensation *for the plaintiff's benefit*" included interest. *Id.* (emphasis added). However, as noted above, interest awards on amounts reimbursed to a third-party health insurer are not for plaintiff's benefit.

For the foregoing reasons, we conclude that the legislative purpose and intent in enacting N.C.G.S. § 97-86.2 was not to create a penalty to employers and carriers nor a windfall for the employee; therefore, the language "final award or unpaid portion thereof," N.C. Gen. Stat. § 97-86.2, must not include amounts of medical compensation for which plaintiff was indemnified by his health insurer and which were reimbursable to the third-party health insurer.

[2] Plaintiff assigns error also to the Commission's findings of fact, asserting that no competent evidence supported the Commission's finding that there were no outstanding medical expenses. "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). At the hearing,

plaintiff testified that, to his knowledge, he did not have any outstanding medical bills, and no other evidence was presented of any outstanding medical bills. Plaintiff argues his testimony was insufficient to establish whether there were any outstanding bills mailed to either his third-party health insurer or to defendant-carrier. In light of our holding in this opinion, the only outstanding medical expenses the Commission needed to consider were those plaintiff was responsible for paying. Plaintiff's testimony that he did not have any outstanding medical bills was competent evidence to support the Commission's findings of fact.

[3] We also conclude that the Commission did not err in denying plaintiff's motion to compel discovery because plaintiff sought to discover amounts of medical compensation paid by defendant-carrier to plaintiff's third-party health insurer. Because plaintiff is not entitled to interest on those amounts, for the reasons stated above, the information was not relevant and the motion was properly denied.

[4] Lastly, plaintiff argues that the Commission abused its discretion in failing to award attorney fees to plaintiff. The award of attorney fees is within the Commission's discretion, as provided in the Workers' Compensation Act: "If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2007); *see also Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 398, 298 S.E.2d 681, 685 (1983) ("G.S. 97-88.1 places the award of attorneys' fees in the discretion of the Commission . . . ."). "[T]he Commission's determination [of matters within its sound discretion] will not be reviewed on appeal absent a showing of manifest abuse of discretion." *Lynch v. M.B. Kahn Constr. Co.*, 41 N.C. App. 127, 131, 254 S.E.2d 236, 238 (1979). Plaintiff has not shown a manifest abuse of discretion; therefore, we overrule this assignment of error.

Affirmed.

Judges McGEE and STEPHENS concur.

GARY LINSENMAYER AND CHARLENE J. LINSENMAYER, PLAINTIFFS v. OMNI HOMES, INC., AND STEPHEN MCCARTHY, DEFENDANTS

No. COA08-164

(Filed 18 November 2008)

1. Arbitration and Mediation— mandatory arbitration— prayer for relief in answer—not a proper motion

The trial court did not err by not ordering mandatory arbitration upon receiving an answer that listed arbitration as a prayer for relief, although a later motion to compel arbitration was granted. The prayer for relief made no claim that the parties were contractually bound to arbitrate and did not qualify as a motion as required by statute.

2. Arbitration and Mediation— arbitration requested in answer—not a proper motion—substantive rulings by court

The trial court did not err by issuing substantive rulings after arbitration was requested in an answer because the court had not received a proper motion requesting mandatory arbitration. The litigation continued in its ordinary course and defendants participated with counsel.

3. Arbitration and Mediation— notice—last known address

Defendants were given proper notice of an arbitration hearing by the arbitrator where notice was sent to the last known address, a place of business, which is specifically allowed by statute. Actual receipt is not required by the statute.

4. Arbitration and Mediation— arbitration—damages only

An arbitrator did not err by addressing only damages where the trial court had conclusively determined liability before a proper motion to compel arbitration was filed, with damages being the only remaining issue. Defendants cannot participate in litigation and then expect an unfavorable decision to be automatically vacated upon an order compelling arbitration.

5. Arbitration and Mediation— punitive damages—unfair and deceptive trade practice—arbitration clause

An arbitration clause in effect allowed punitive or exemplary relief (here, treble damages for unfair and deceptive trade practices) where the clause stated that it was the proper avenue for any dispute about the performance of the contract that the

parties could not resolve, and did not specifically exclude any particular form of damages. "Any dispute" would include plaintiffs' claim that defendants are liable for unfair and deceptive trade practices.

6. Arbitration and Mediation— no findings—treble damages—unfair and deceptive trade practices—prior determination by court

There was no error in an arbitrator's order by the absence of specific findings that would justify the award of treble damages for unfair and deceptive trade practices where the trial court had previously found for plaintiffs on the issue of liability for unfair and deceptive trade practices and found treble damages to be statutorily appropriate. The arbitrator had no responsibility for deciding the case on its merits, but was merely in charge of deciding the appropriate amount of actual damages that were to be trebled by law. The arbitrator was not required to make findings already established by the trial court.

7. Arbitration and Mediation— attorney fees—unfair and deceptive trade practices—arbitration clause

An arbitrator did not err by awarding attorney fees in an unfair trade practices dispute because the arbitration clause expressly stated that attorney fees would be awarded to the winning party at arbitration, attorney fees are allowed here by statute, and the arbitrator was following the mandate of the court.

8. Arbitration and Mediation— arbitration award—confirmed by court—no error

The trial court did not err by confirming an arbitration award where it did not find any of the statutory grounds for vacating the award, and there was no error in the proceeding or award.

Appeal by defendants from judgment entered 3 October 2007 by Judge J. Gentry Caudill in Gaston County Superior Court. Heard in the Court of Appeals 25 August 2008.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by Michael L. Carpenter, for plaintiff-appellees.

Smith, Cooksey & Vickstrom, PLLC, by Neil C. Cooksey and Steven L. Smith, for defendant-appellants.

HUNTER, Judge.

This case arises out of a construction contract dated 16 August 2005, which contained an arbitration clause. After a dispute over Omni Homes, Inc. and Stephen McCarthy's ("defendants") quality of workmanship and expenditures, Gary and Charlene Linsenmayer ("plaintiffs") filed a Complaint in Gaston County Superior Court on 1 September 2006. On 21 September 2006, Stephen McCarthy, acting *pro se* for defendants, answered the complaint and filed a counter suit against plaintiffs. Mr. McCarthy listed arbitration as defendants' first prayer for relief.

On 4 October 2006, plaintiffs served upon defendants a Motion to Dismiss and Reply to Counterclaim, Requests for Admissions, and First Set of Interrogatories and Request for Production of Documents. At the 27 June 2007 arbitration hearing, the arbitrator noted that defendants never answered any of these discovery requests and sanctioned them accordingly.

On 14 November 2006, plaintiffs filed a Motion for Summary Judgment. On 6 December 2006, the trial court granted the motion in plaintiffs' favor as to defendants' liability for breach of contract, negligence, fraud, and unfair and deceptive trade practices.[1] The court did not award summary judgment as to damages, but stated that the case would proceed to trial on that issue, that any damages awarded would be trebled pursuant to N.C. Gen. Stat. § 75-16, and that attorneys' fees would be awarded pursuant to N.C. Gen. Stat. § 75-16.1. On 18 December 2006, plaintiffs filed a Motion for Summary Judgment on Damages and attached the affidavit of Mr. Linsenmayer, in which he stated that plaintiffs were entitled to damages in the amount of $101,793.84. This motion was denied on 18 January 2007 when the court simultaneously dismissed defendant Omni Homes' counterclaims.

Defendants filed a Motion to Stay Litigation and Compel Mandatory Arbitration on 8 March 2007, and on 22 March 2007, the trial court ordered the matter to be arbitrated. The order stayed litigation but did not vacate prior proceedings of the trial court. On 12 June 2007, a notice of arbitration was sent to the parties. The hearing was held on 21 June 2007, with neither defendants nor their attorney in attendance. On 27 June 2007, an arbitration award was issued ordering defendants to pay $294,278.52 in damages and $20,693.24 in

1. Defendants do not assign as error the trial court's grant of summary judgment for plaintiffs.

attorneys' fees. While the arbitrator does not specify the amount of actual damages, defendants assert that the arbitrator awarded $98,092.84 in actual damages and then trebled that figure as defendants were found liable by the trial court for unfair and deceptive trade practices. On 3 July 2007, plaintiffs filed a Motion for Confirmation of Arbitration Award. Defendants filed a Motion to Vacate the Arbitration Award on 20 July 2007. The arbitration award was confirmed by the trial court on 3 October 2007 in a final judgment and order. Defendants appeal the arbitration award and the final judgment. After careful review, we affirm.

I.

The parties in this case do not dispute the validity of the arbitration clause, which states:

> Should any dispute arise relative to the performance of this contract that the parties cannot resolve, the dispute shall be referred to a single arbitrator acceptable to the builder and the buyer. If the builder and the buyer cannot agree upon an arbitrator, the dispute shall be referred to the American Arbitration Association for resolution.
>
> All attorney fees that shall be incurred in the resolution of disputes shall be the responsibility of the party not prevailing in the dispute.

[1] Defendants first argue that the trial court erred when it failed to order mandatory arbitration upon receiving defendants' Answer in which defendants listed arbitration as a prayer for relief. The issue presented in this assignment of error is whether the prayer for relief seeking arbitration satisfies N.C. Gen. Stat. § 1-569.7 (2007), which clearly requires a "motion" to be filed in the trial court requesting the court to order arbitration. Defendants are essentially seeking to have the Answer originally filed serve as a motion to compel arbitration where the existence of the arbitration clause was not mentioned.

When defendants filed their original *pro se* Answer on 20 September 2006, they merely responded to plaintiffs' allegations and asserted their own counterclaims. While defendants listed arbitration as their number one prayer for relief, they made no claim that the parties were contractually bound to arbitrate. Additionally, defendants later obtained counsel who filed another Answer and Counterclaim demanding a jury trial. Neither Answer made a motion for mandatory arbitration, or even mentioned the existence of an arbitration clause

in the contract between the parties. We find that the request for arbitration in the prayer for relief does not qualify as a "motion" asking the trial court to order arbitration.

Our Supreme Court has found that the trial court is not " 'ousted' of its jurisdiction" where "defendants failed to apply to the court for arbitration in order to exercise their contractual remedy to which they were entitled." *Adams v. Nelson*, 313 N.C. 442, 446, 329 S.E.2d 322, 324 (1985) (the trial court did not err in refusing to order arbitration where the defendants filed a motion to dismiss, but did not assert that there was an arbitration clause in the contract). In the present case, due to defendants' failure to demand arbitration in accordance with N.C. Gen. Stat. § 1-569.7, the trial court properly maintained its existing jurisdiction. The prayer for relief in the Answer was not sufficient. Once defendants made a Motion to Stay Litigation and Compel Mandatory Arbitration, the trial court became aware of the arbitration clause and granted the motion. Therefore, we find no error.

II.

[2] Next, defendants argue that the trial court erred in issuing substantive rulings when the case should have been ordered to arbitration after receipt of defendants' original Answer. These rulings include the grant of plaintiffs' motion for summary judgment as to liability, the dismissal of defendants' counterclaims, and the denial of defendants' motions to set aside summary judgment and request for leave to answer requests for admissions. It follows that the trial court did not err in issuing these rulings when it had not received a proper motion requesting mandatory arbitration. The litigation was continuing in its ordinary course and defendants were participating with representation by counsel. Thus, this assignment of error is without merit.

III.

[3] Next, defendants claim that the arbitrator erred by failing to give defendants proper notice of the arbitration hearing. The notice provision of the Revised Uniform Arbitration Act ("RUAA") is controlling. It states:

> (a) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in the ordinary course, *whether or not the other person acquires knowledge of the notice.*

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of communications.

N.C. Gen. Stat. § 1-569.2 (2007) (emphasis added).

The arbitrator complied with this notice requirement. A notice containing the hearing date, time, and place was sent to the record address for defendants. When Mr. McCarthy filed the original Answer for himself and Omni Homes, Inc., he listed his address as 1061-521 Corporate Center Drive, Suite 165, Fort Mill, South Carolina 29715, which was also the business address for Omni Homes. There is no indication in the record that defendants changed their address by notifying the court or the arbitrator. In his affidavit, Mr. McCarthy states that Omni Homes changed location on 15 March 2007. On 22 March 2007 the parties agreed that Judge Kirby would arbitrate the dispute. The notice of hearing was then issued on 12 June 2007. The last known address for defendants at that time was the Fort Mill address where the hearing notice was sent.

Defendants further argue that the arbitrator did not send the notice to Mr. McCarthy's residence, but the statute specifically states that notice can be sent to a person's residence or place of business. N.C. Gen. Stat. § 1-569.2(c). The arbitrator sent the notice to Mr. McCarthy's last known address, his place of business. The arbitrator also sent the notice to defendants' former attorney, Mr. Aaron Marshall, who never formally withdrew from the case but did send a letter to the arbitrator stating he was no longer representing defendants. Mr. Marshall told the arbitrator, and plaintiffs' attorney, that attorney Craig Wilkerson was replacing him as counsel for defendants, and the arbitrator sent the notice to Mr. Wilkerson as well. We find that the arbitrator used due diligence in attempting to notify defendants of the hearing by sending the notice to all parties involved. The statute says that notice is deemed received when it is "delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of communications." N.C. Gen. Stat. § 1-569.2(c). Actual receipt is not required by the statute. Thus, we find no error as to notice of the arbitration hearing.

IV.

[4] Defendants further claim that the arbitrator erred by misjudging the scope of the subject matter that had been submitted to him for arbitration. Specifically, defendants claim that the 9—arbitrator only addressed the issue of damages, thereby inappropriately relying upon the trial court's order of summary judgment for plaintiffs as to liability. We find that the arbitrator was correct in determining the issues presented for his determination.

It is clear that our statutory RUAA "gives the trial court the power to act both before and after the arbitration proceeding." *Henderson v. Herman*, 104 N.C. App. 482, 486, 409 S.E.2d 739, 741 (1991), *disc. review denied*, 330 N.C. 851, 413 S.E.2d 551 (1992).[2] Here, the trial court conclusively decided the issue of summary judgment for plaintiffs as to all aspects of liability before a proper motion to compel arbitration was filed, and the only issue left to be determined as to plaintiffs' claims was damages. Defendants cannot participate in litigation to the point where an unfavorable decision is rendered and then expect that decision to be automatically vacated upon an order compelling arbitration. In sum, the trial court merely stayed proceedings and did not vacate any of its prior orders. Therefore, the issue of liability was decided and not before the arbitrator. In fact, the trial court confirmed the award after noting that the arbitrator only made a determination as to damages. We find no error in the scope of the arbitration proceeding.

V.

[5] Defendants further argue that punitive and/or exemplary damages were improperly ordered by the arbitrator. Defendants point to the award of treble damages and claim that this award was punitive and/or exemplary in nature, the arbitration clause did not allow for punitive or exemplary damages, and the trial court did not make the required statutory findings when awarding these damages.

As to this assignment of error, " ' "[a]n [arbitration] award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the[] grounds [for setting it aside] exists." ' " *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 572, 654 S.E.2d 47, 51 (2007) (alterations in original; citations omitted).

2. When the opinion in *Herman* was issued, the Uniform Arbitration Act had not been revised, but the quotation remains accurate despite the revisions to the Act.

The controlling statute states, in pertinent part:

> (a) An arbitrator may award punitive damages or other exemplary relief if:
>
> (1) The arbitration agreement provides for an award of punitive damages or exemplary relief;
>
> (2) An award for punitive damages or other exemplary relief is authorized by law in a civil action involving the same claim; and
>
> (3) The evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.
>
> . . .
>
> (c) As to all remedies other than those authorized by subsections (a) and (b) of this section, an arbitrator may order any remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23.
>
> . . .
>
> (e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a) of this section, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

N.C. Gen. Stat. § 1-569.21 (2007).

As to subsection (a)(1), defendants assert that the arbitration clause does not provide for punitive or exemplary damages. However, the arbitration clause states that arbitration is the proper avenue should "*any dispute* arise relative to the performance of this contract that the parties cannot resolve[.]" (Emphasis added.) "Any dispute" includes plaintiffs' claim that defendants are liable for unfair and deceptive trade practices, which allows for an award of treble damages. N.C. Gen. Stat. § 75-16. Therefore, the arbitration clause does in effect allow for punitive or exemplary relief. Furthermore, the clause does not specifically exclude any particular form of damages.

[6] Additionally, defendants claim that under N.C. Gen. Stat. § 1-569.21(e), the arbitrator was required to specify the basis for the award of treble damages and to state separately the amount of relief awarded, which the arbitrator in this case did not do. Instead, the arbitrator ordered defendants to pay a lump sum of $294,278.52 in damages plus attorneys' fees. While there is no clear indication in the arbitration award as to whether treble damages were issued, the trial court acknowledged the issuance of treble damages in its award confirmation.

We find no error in the absence of specific findings that would justify treble damages as the trial court previously found for plaintiffs on the issue of liability for unfair and deceptive trade practices and found treble damages to be statutorily appropriate. "If the trial court finds that the defendant has violated the UTPA [North Carolina Unfair and Deceptive Trade Practices Act], it must award treble damages[.]" *Canady v. Crestar Mortg. Corp.*, 109 F.3d 969, 975 (4th Circ. 1997); N.C. Gen. Stat. § 75-16. The arbitrator was bound by law to treble the damages and was not required to make findings already established by the trial court.

Therefore, we find no error in the award of treble damages as the arbitration clause allowed for the determination of any dispute via arbitration, including a claim for unfair and deceptive trade practices, and the issue of treble damages had already been decided prior to arbitration. The arbitrator had no responsibility for deciding the case on its merits, but was merely in charge of deciding the appropriate amount of actual damages that were to be trebled by law.

VI.

[7] Defendants argue that the arbitrator erred in awarding attorneys' fees in the amount of $20,693.24. We disagree.

An arbitrator may award attorneys' fees if: "(1) [t]he arbitration agreement provides for an award of attorneys' fees; and (2) [a]n award of attorneys' fees is authorized by law in a civil action involving the same claim." N.C. Gen. Stat. § 1-569.21(b).

Here, the contract containing the arbitration clause expressly stated that attorneys' fees would be awarded to the winning party at arbitration. In addition, attorneys' fees are allowed by statute where a plaintiff alleges unfair and deceptive trade practices, as plaintiffs did in this case. N.C. Gen. Stat. § 75-16.1. When the trial court found summary judgment for plaintiffs with regard to unfair and deceptive

trade practices, it stated that plaintiffs were entitled to attorneys' fees and the arbitrator followed that mandate. We therefore find no error in the award of reasonable attorneys' fees.

VII.

[8] Defendants' final argument is that the trial court erred by confirming the arbitration award. A trial judge shall vacate an award if any of the statutory grounds exist under N.C. Gen. Stat. § 1-569.23. The trial court did not find any such grounds. Since we find no error in the arbitration proceeding or award, we thus find no error in the trial court's confirmation of that award.

For the foregoing reasons, we affirm the decision of the trial court.

Affirmed.

Chief Judge MARTIN and Judge WYNN concur.

STATE OF NORTH CAROLINA v. WALTER ANTHONY ALSTON, JR.

No. COA08-230

(Filed 18 November 2008)

Drugs— constructive possession—sufficiency of evidence

The State presented sufficient evidence that defendant constructively possessed the requisite amount of cocaine for a trafficking charge where defendant was the drug supplier for the renter of a house (Hughes), Hughes usually did not keep his cocaine in the house, defendant had sold cocaine from the entertainment room (where the drugs in issue were found) earlier in the day, and officers found defendant's gun in the entertainment room. Defendant's statement that he owned a lesser amount of cocaine in another room but not the cocaine in the entertainment room was not binding on the State.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 8 August 2007 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 10 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathryn Jones Cooper, for the State.

Duncan B. McCormick, for defendant-appellant.

CALABRIA, Judge.

Walter Anthony Alston, Jr. ("defendant") appeals a judgment entered upon a jury verdict finding him guilty of trafficking in cocaine by possessing more than twenty-eight grams but less than two hundred grams of cocaine. We find no error.

From 28 November 2006 until 1 February 2007, Guilford County Sheriff's officers ("the officers") investigated drug activity at 300 Regan Street, Greensboro, North Carolina ("the home"). On 1 February 2007, the officers executed a search warrant at the home, using a battering ram to enter the home. The home was occupied by five people: Jimmy Wayne Knight ("Knight"), Yvonne Bio ("Bio"), Justin Hughes ("Hughes"), defendant, and Ruth Reyes ("Reyes"). Knight owned the home and rented it to Hughes. Knight permitted Hughes and defendant to sell cocaine from the home and accepted one third of the proceeds from the sales. When the officers came into the home, defendant ran down a hallway and crashed into a locked storm door. An officer observed defendant make a throwing motion toward the living room, but did not see anything leave defendant's hand. The defendant retreated and was arrested in the living room. Knight and Bio were detained in the kitchen. Hughes was detained in the entertainment room. Defendant and Reyes were detained in the living room.

The officers found 7.3 grams of cocaine in the living room and 32.8 grams of cocaine in the entertainment room.[1] The cocaine in the entertainment room was found in varying amounts around the room. Officers found 12.3 grams on the floor, 11.3 grams on a shelf near the VCR, 7.5 grams on the floor near the nightstand, 0.3 grams on the floor near one of the doors, 0.1 grams on the floor, and 1.3 grams on top of a bureau. In addition to the cocaine, officers found other items in the entertainment room. Specifically, they found a loaded .38 revolver, a laser pointer, two-hundred seventy dollars in cash, a razor

1. State Bureau of Investigation Special Agent Shane Moore testified the cocaine found in the living room weighed 6.5 grams and the cocaine found in the entertainment room weighed 30.6 grams. The parties do not dispute that more than twenty-eight grams of cocaine were found in the entertainment room.

blade and a metal measuring cup, which appeared to be used to cook crack cocaine. The revolver belonged to the defendant and the cash belonged to Hughes. Hughes sold drugs for the defendant. Defendant acknowledged that he owned the cocaine found in the living room.

Defendant was charged with trafficking in cocaine by possessing more than twenty-eight grams but less than two hundred grams of cocaine and possession with the intent to sell or deliver cocaine. Defendant was also charged with possession with intent to sell and deliver marijuana and possession of a firearm by a felon. Defendant pled guilty to the charges of possession of a firearm and possession with intent to sell and deliver marijuana. Trial was held on 2 August 2007 before the Honorable Stuart Albright of Guilford County Superior Court. Defendant moved to dismiss the charge of trafficking by possession at the close of the State's evidence. The trial court denied the motion. The jury returned a verdict finding defendant guilty of trafficking cocaine by possession and guilty of possession with intent to sell and deliver cocaine. The trial court consolidated the charges and sentenced defendant to serve a minimum term of thirty-five months to a maximum term of forty-two months in the North Carolina Department of Correction. Subsequently, the trial court imposed a consecutive active sentence of thirteen to sixteen months for possession of a firearm by a felon. Defendant appeals the trial court's denial of the motion to dismiss the charge of trafficking in cocaine by possession.

I. Standard of Review

"In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the [S]tate, giving the [S]tate the benefit of all reasonable inferences which may be drawn from the evidence." *State v. Autry*, 101 N.C. App. 245, 251, 399 S.E.2d 357, 361 (1991) (citations omitted). A motion to dismiss is properly denied where the State presents substantial evidence of each element of the crime charged and that defendant is the perpetrator of the offense. *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "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).

II. Analysis

Defendant argues the trial court should have dismissed the trafficking in cocaine charge because the State failed to prove he possessed more than twenty-eight grams of cocaine. Defendant contends the State presented insufficient evidence of possession under either a constructive possession or acting in concert theory. Since we conclude that the State presented sufficient evidence to support the charge under a constructive possession theory, we do not need to address defendant's argument that the State did not present substantial evidence under an acting in concert theory. *State v. Garcia*, 111 N.C. App. 636, 639-40, 433 S.E.2d 187, 189 (1993) (to prove possession of a controlled substance, the State must prove actual possession, constructive possession, or acting in concert with another to commit a crime).

In order to support a charge of trafficking cocaine, the State must prove that defendant (1) knowingly possessed cocaine and (2) that the amount possessed was twenty-eight grams or more. *State v. Jackson*, 137 N.C. App. 570, 573, 529 S.E.2d 253, 256 (2000). The "knowingly possessed" element of the offense of trafficking by possession may be established by showing that: (1) defendant had actual possession; (2) defendant had constructive possession; or (3) defendant acted in concert with another to commit the crime. *State v. Diaz*, 155 N.C. App. 307, 313, 575 S.E.2d 523, 528 (2002); *State v. Reid*, 151 N.C. App. 420, 428, 566 S.E.2d 186, 192 (2002). A person has actual possession of a controlled substance if it is on his person, he is aware of its presence, and, either by himself or together with others, he has the power and intent to control its disposition or use. *Reid*, 151 N.C. App. at 428-29, 566 S.E.2d 192. "Constructive possession [of a controlled substance] occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the [controlled] substance." *State v. Wilder*, 124 N.C. App. 136, 139-40, 476 S.E.2d 394, 397 (1996) (citation omitted) (concluding sufficient evidence for jury to infer possession where officer observed defendant throw an object in the bushes and officers recovered a bag of cocaine from that location). "[U]nless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation omitted).

In the case *sub judice*, since defendant did not have exclusive possession of the home, the State was required to present sufficient

evidence of incriminating circumstances in order to allow the jury to infer defendant constructively possessed the cocaine found in the entertainment room. *Id.*

> Incriminating circumstances relevant to constructive possession
>
> include evidence that defendant: (1) owned other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6) possessed a large amount of cash.

State v. Miller, 191 N.C. App. 124, 127, 661 S.E.2d 770, 773 (2008) internal citations omitted). Evidence of conduct by the defendant indicating knowledge of the controlled substance or fear of discovery is also sufficient to permit a jury to find constructive possession. *State v. Turner*, 168 N.C. App. 152, 156, 607 S.E.2d 19, 22-23 (2005). Our determination of whether the State presented sufficient evidence of incriminating circumstances depends on "the totality of the circumstances in each case. No single factor controls, but ordinarily *the questions will be for the jury*." *State v. McBride*, 173 N.C. App. 101, 106, 618 S.E.2d 754, 758 (2005) (citations and internal quotations omitted).

In *Miller*, this Court held an inference of constructive possession was not supported by substantial evidence where the only evidence linking defendant to the cocaine was his proximity to the cocaine and his birth certificate found in the same room as the cocaine. *Miller*, 191 N.C. App. at 127, 661 S.E.2d at 773. However in *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001), proximity to the contraband plus testimony that defendant was the only person likely to have placed it in the location found were sufficient circumstances for a jury to infer constructive possession.

Viewing the evidence in the light most favorable to the State and giving it the benefit of all inferences raised, we conclude the State presented sufficient evidence of incriminating circumstances for the jury to infer defendant constructively possessed the cocaine found in the entertainment room. In particular, the State presented evidence tending to show defendant regularly visited and sold drugs from 300 Regan Street, defendant was present in the entertainment room prior to the officers entering the home, defendant sold crack cocaine to

Reyes in the entertainment room earlier that evening, Hughes usually did not keep more than one gram of cocaine on his person and kept his cocaine buried in the yard, the defendant was Hughes' drug supplier, and defendant's gun was found in the entertainment room. Accordingly, we find no error.

Defendant also argues that because the State introduced evidence that defendant told the officers he owned the cocaine in the living room but not the cocaine in the entertainment room, the State is bound by that statement. *See State v. Carter*, 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961) (State is bound by exculpatory statements by defendant introduced into evidence which are not contradicted or shown to be false by other facts or circumstances in evidence). We disagree. The State also presented evidence from which the jury could infer that defendant possessed the cocaine in the entertainment room: defendant was Hughes' drug supplier, that Hughes usually did not keep his cocaine in the house, defendant sold cocaine from the entertainment room earlier that day, and officers found defendant's gun in the entertainment room.

No error.

Judge TYSON concurs.

Judge ELMORE dissents by separate opinion.

ELMORE, Judge, dissenting.

I do not believe that the State established defendant's constructive possession of the cocaine in the entertainment room by presenting additional incriminating circumstances sufficient to deny defendant's motion to dismiss. Therefore, I respectfully dissent.

Simply put, there were too many other people with an interest in the cocaine to properly infer that defendant had constructive possession of the cocaine: There were four people besides defendant in the house at the time of the "bust." One of those four people, Hughes, was also a drug dealer. A second person, Knight, received payment *in kind* from both defendant and Hughes for allowing them to use his house to sell drugs. The other two people, Bio and Reyes, were both drug users who were in the house for the purpose of purchasing and using cocaine. Moreover, Knight's arrangement with defendant suggests that Knight, rather than defendant, was the owner of at least

some of the cocaine in the entertainment room. As the owner, Knight, rather than defendant, would have had the intent and power to maintain control over his portion of the cocaine's use and disposition. Because of these factors, I disagree with the majority's conclusion that the State proved that defendant had constructive possession of the cocaine found in the entertainment room, and therefore would hold that the State failed to establish that he knowingly possessed twenty-eight grams or more of cocaine.

Accordingly, I would hold that the trial court erred by denying defendant's motion to dismiss and would vacate defendant's conviction for trafficking in cocaine by possessing more than twenty-eight grams but less than two hundred grams of cocaine.

RANDY E. STRICKLAND, EMPLOYEE, PLAINTIFF v. MARTIN MARIETTA MATERIALS AND EMPLOYER, SPECIALITY RISK SERVICES, CARRIER, DEFENDANTS

No. COA08-476

(Filed 18 November 2008)

Workers' Compensation— short-term disability benefits— improper reduction in employer's credit to pay employee's attorney fees

The full Industrial Commission abused its discretion by reducing defendant employer's credit for short-term disability benefits paid to plaintiff employee by twenty-five percent in order to partially fund attorney fees for plaintiff because: (1) our Supreme Court has held that it is an abuse of discretion for the Commission to deny an employer full credit for benefits paid under an employer-funded plan if the benefits were not due and payable when made; (2) N.C.G.S. § 97-42 provides that employers are entitled to receive full dollar-for-dollar credit for all benefits paid under a private plan so long as payments were not due and payable when made; (3) defendant's short-term disability plan was fully funded by defendant employer, and defendants had not accepted plaintiff's injury as compensable when plaintiff received the short-term disability benefits, nor had there been a determination of compensability by the Industrial Commission; (4) plaintiff's counsel will be adequately compensated; and (5) the ruling was inconsistent with the legislative intent of N.C.G.S. § 97-42 to

encourage employers to make voluntary payments to injured employees before workers' compensation benefits are awarded and due.

Appeal by defendants from Opinion and Award entered 11 January 2008 by the Full Commission for the North Carolina Industrial Commission. Heard in the Court of Appeals 25 September 2008.

Regan & Regan PLLC, by James W. Ragan, for plaintiff appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by George H. Pender, for defendant appellants.

McCULLOUGH, Judge.

Defendant-employer Martin Marietta Materials and defendant-insurer Specialty Risk Services appeal from an Amended Opinion and Award entered 11 January 2008 by the Full Commission ("the Commission"). Defendants assigns error to the Commission's decision to reduce their credit for short-term disability benefits paid to plaintiff by twenty-five percent (25%) in order to partially fund attorney's fees for plaintiff. We hold that defendants are entitled to receive full credit, under N.C. Gen. Stat. § 97-42, for all compensation made to plaintiff under their short-term disability plan. We reverse and remand.

Plaintiff had been employed with defendant-employer Martin Marietta Materials, a rock quarry business, for over twenty years. On 24 March 2005, plaintiff injured his right shoulder while repairing a bent engine compartment door of a rock loader. Plaintiff reported his injury to defendant-employer and immediately began receiving medical treatment for his shoulder. Plaintiff continued to work for defendant-employer until his surgery on 22 June 2005. Plaintiff's surgery included an arthroscopic rotator cuff repair procedure as well as a distal clavicle excision and subacromial decompression. Due to physician-imposed physical restrictions, plaintiff has not returned to work since his surgery.

After plaintiff's surgery, defendants provided him with short-term disability benefits, pursuant to an employer-funded plan. Under this plan, plaintiff was paid for twenty-six (26) weeks in a total amount of $11,532.00. All payments to plaintiff were made during a time when

defendants had not accepted plaintiff's injuries as compensable by workers' compensation benefits.

Plaintiff filed a Form 18 notice of injury on or about 11 July 2005. On 31 October 2006, Deputy Commissioner Phillips entered an Opinion and Award denying plaintiff workers' compensation benefits. Plaintiff appealed and the case was heard before the Commission on 1 May 2007.

On 7 September 2007, the Commission filed an Opinion and Award, reversing the Deputy Commissioner's decision and awarding temporary total disability payments to plaintiff. The Commission concluded that (1) plaintiff was entitled to a weekly compensation rate of $512.66, beginning on 20 June 2005 and continuing until further order; and (2) plaintiff was not entitled to attorney's fees and costs because defendants had not engaged in stubborn unfounded litigiousness, pursuant to N.C. Gen. Stat. § 88.1.

The Commission also approved attorney's fees for plaintiff's counsel in the amount of twenty-five percent (25%) of compensation owed to plaintiff, ordering that twenty-five percent (25%) of the lump sum due to plaintiff be deducted and paid directly to plaintiff's counsel, and thereafter, every fourth compensation check due to plaintiff be deducted and paid directly to plaintiff's counsel. The Commission also held that defendants were not entitled to a credit of $11,532.00, pursuant to N.C. Gen. Stat. § 97-42, because of their delay in filing a denial of plaintiff's claim.

Defendants filed a Motion for Reconsideration of the Commission's Opinion and Award, for denying defendants' request for a credit under N.C. Gen. Stat. § 97-42. The Commission granted defendants' motion and reviewed the matter.

In an Amended Order and Award issued on 11 January 2008, defendants were granted a credit for the short-term disability payments received by plaintiff. The Commission concluded that defendants had been formally notified about plaintiff's claim on 13 January 2006 and had filed a Form 61 denying the claim on 22 February 2006. However, the Commission reduced defendants' credit by twenty-five percent (25%) in order to partially fund attorney's fees for plaintiff and stated the following:

> Defendants are entitled to a credit for the employer-funded short-term disability plan payments received by Plaintiff for the 26

> weeks following Plaintiff's June 22, 2005, shoulder surgery. N.C. Gen. Stat. §97-42. However, the Full Commission, in its discretion, reduces the credit by twenty-five percent (25%) in order to fund an attorney's fee based upon the full workers' compensation award. *Church v. Baxter Travenol Laboratories, Inc.*, 104 N.C. App. 411, 409 S.E.2d 715 (1991).

Defendants argue that the Commission erred when it reduced their credit for payments made through their short-term disability plan by twenty-five percent (25%). Defendants contend that under N.C. Gen. Stat. § 97-42, they are entitled to full credit in the amount of $11,532.00 for all benefits paid to plaintiff. We agree.

Appellate review of an Opinion and Award of the Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). We review 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) (citation omitted).

In its conclusions of law, the Commission determined that under N.C. Gen. Stat. § 97-42, defendants were entitled to a credit in the amount that they had already paid plaintiff in short-term disability benefits. However, the Commission reduced their credit by twenty-five percent (25%) "in order to fund an attorney's fee based upon the full workers' compensation award." N.C. Gen. Stat. § 97-42 provides, in pertinent part:

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

N.C. Gen. Stat. § 97-42 (2007). "The decision of whether to grant a credit is within the sound discretion of the Commission" and "will not be disturbed on appeal in the absence of an abuse of discretion." *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 887, 888 (2003). Our Supreme Court has clarified the extent of the Commission's discretion by holding that it is an abuse of discretion for the Commission to deny an employer full credit for benefits paid

under an employer-funded plan if the benefits were not due and payable when made. *See Evans v. AT&T Technologies, Inc.*, 332 N.C. 78, 85, 418 S.E.2d 503, 507-08 (1992); *Foster v. Western-Electric Co.*, 320 N.C. 113, 117, 357 S.E.2d 670, 673 (1987).

In *Foster*, the employer was denied a credit for payments it made to the employee under its private disability benefits plan. *Id.* at 114, 357 S.E.2d 671-72. On appeal, our Supreme Court reversed and held that the employer was entitled to full credit, under N.C. Gen. Stat. § 97-42, because the employer "had *not* accepted [the employee's] injury as compensable under workers' compensation at the time the payments were made[.]" *Foster*, 320 N.C. at 115, 357 S.E.2d at 672. The Court discussed the importance of granting credit to employers in order to further the legislative intent of N.C. Gen. Stat. § 97-42 to encourage employers to make voluntary payments to injured employees. *Id.* at 116-17, 357 S.E.2d at 673. The Court stated:

> Payment by the employer under a private disability plan accomplishes sound policy objectives by providing immediate financial assistance to the disabled worker *while* she is disabled. Through its plan, [the employer] affords a much-needed continuity of income to injured employees fully consistent with the expressed policies of workers' compensation.

Id.

Our Supreme Court also reversed the earlier decision in *Evans v. AT&T Technologies*, which only granted the employer partial credit for payments made to an injured employee under the employer's disability plan. 332 N.C. at 90, 418 S.E.2d at 511. The Court clarified that, under N.C. Gen. Stat. § 97-42, employers are entitled to receive "full dollar-for-dollar credit" for all benefits paid under a private plan, so long as payments were not due and payable when made. *Evans*, 332 N.C. at 85, 418 S.E.2d at 508. Our Court has also recognized that the Commission has limited discretion in denying an employer full credit under N.C. Gen. Stat. § 97-42. *See Cox v. City of Winston-Salem*, 171 N.C. App. 112, 115, 613 S.E.2d 746, 748 (2005) (discussing that it is an abuse of discretion to deny an employer full credit for wage-replacement benefits if solely funded by the employer); *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 576, 468 S.E.2d 396, 399 (1996) (holding that the Commission erred by denying the employer credit for payments made when the employer had not accepted the employee's claim as compensable). In this case, defendants' short-term disability plan was fully funded by defendant-employer.

Furthermore, when plaintiff received the short-term disability benefits, defendants had not accepted his injury as compensable, nor had there been a determination of compensability by the Industrial Commission. Thus, pursuant to *Foster* and *Evans*, defendants are entitled to full credit of $11,532.00 for all benefits paid to plaintiff.

In its Amended Opinion and Award, the Commission cited *Church v. Baxter Travenol Laboratories*, 104 N.C. App. 411, 409 S.E.2d 715, (1991), when referring to its discretion to reduce defendants' credit. In *Church*, the employer's private insurer paid the plaintiff benefits in the amount of $2,797.44 while he was injured. *Id.* at 416, 409 S.E.2d at 717. The plaintiff in *Church* was later awarded $3,769.79 in workers' compensation benefits. *Id.* Instead of awarding attorney's fees from the difference of $972.35, the Commission reduced the employer's credit so that the plaintiff's attorney in *Church* could be adequately compensated. *Id.* at 416-17, 409 S.E.2d at 717-18. We affirmed the Commission's decision reasoning that "[i]f attorney's fees were allowed to be calculated from only the difference between the workers' compensation award and the private insurer's payment, then almost no attorney could afford to take a contested case where voluntary payments had already been made." *Id.* at 416, 409 S.E.2d at 718. This would leave "injured employees without the representation they need to obtain the complete and total amount of their workers' compensation award [and] would defeat the purposes of the Act." *Id.*

After careful review of our Supreme Court's decisions in *Foster* and *Evans*, it is unclear whether *Church* is still binding on this Court. If *Church* remains binding, it applies only in the limited circumstance when the difference between the amount already paid by the employer and the amount awarded to the employee is so small that the claimant would be unable to obtain competent counsel if attorney's fees were only awarded from that amount.

Nevertheless, *Church* is not applicable to the facts of this case. Unlike the circumstances in *Church*, plaintiff's counsel will be adequately compensated. In addition to receiving twenty-five percent (25%) of all back compensation owed to plaintiff, plaintiff's counsel will also receive monthly payments of $512.66 for an indefinite duration. This is a substantial award of attorney's fees, and therefore, cannot fall under the rationale of *Church*.

As in *Foster* and *Evans*, the legislative intent of N.C. Gen. Stat. § 97-42 clearly supports granting defendants full credit for all short-

term disability benefits paid to plaintiff. Defendants provided plaintiff with wage-replacement benefits after he was injured, but before he was entitled to receive workers' compensation. Defendants' voluntary payments furthered the overall intent of the statute to provide compensation to individuals with work-related injuries as soon as possible. *See Evans*, 332 N.C. at 87, 418 S.E.2d at 509.

While we do not think that the Commission intended to penalize defendants by reducing their credit, the Commission's decision had the effect of doing so. An employer who has "paid an employee wage-replacement benefits at the time of that employee's greatest need, should not be penalized by being denied full credit for the amount paid as against the amount which was subsequently determined to be due the employee under workers' compensation." *Foster*, 320 N.C. at 117, 357 S.E.2d at 673. Denying employers full credit could be detrimental in that it "would inevitably cause employers to be less generous and the result would be that the employee would lose his full salary at the very moment he needs it most." *Id.*

In the case *sub judice*, the purpose of the statute was thwarted when defendants were required to pay significantly more solely due to the fact that they had provided short-term disability benefits to plaintiff. If defendants had not provided plaintiff with compensation under their disability insurance plan, they still would have been required to pay the amount of $11,532.00 once plaintiff was awarded workers' compensation benefits. Here, plaintiff's claim was not adjudged to be compensable until over two years after his injury. If defendants had waited until that time to compensate plaintiff in the amount of $11,532.00, plaintiff would have only been permitted to retain $8,649.00, seventy-five percent (75%) of that amount, as the remaining $2,883.00 would have been paid directly to plaintiff's attorney.

However, because defendants had already voluntarily paid $11,532.00 to plaintiff, the Commission denied their request for a full credit and ordered them to pay an additional $2,883.00 to plaintiff's attorney—an amount they would not otherwise have been required to pay. This discourages employers from providing disability benefits, resulting in injured employees having to wait until awarded workers' compensation benefits to be compensated. This ruling is inconsistent with the legislative intent of N.C. Gen. Stat. § 97-42, which is to encourage employers to make voluntary payments to injured employees before workers' compensation benefits are awarded and due.

For the above-mentioned reasons, we hold that defendants are entitled to full credit for all short-term disability payments made to plaintiff and find that the Commission erred in reducing defendants' credit by ordering additional payment of plaintiff's attorney fees. We reverse and remand for appropriate modification of the Commission's Opinion and Award.

Reversed and remanded.

Judges TYSON and CALABRIA concur.

BILL O. WEEKS AND TRACY WEEKS, PLAINTIFFS v. SELECT HOMES, INC., DEFENDANT

No. COA08-480

(Filed 18 November 2008)

1. Appeal and Error— appellate rules violations—substantial failure or gross violation—nonjurisdictional—sanctions less than dismissal

Defendant's motion to strike plaintiffs' brief and dismiss plaintiffs' appeal based on numerous violations of Appellate Rule 28 and the formatting requirements set forth in Appendices B and E of the North Carolina Rules of Appellate Procedure is denied because although the numerous appellate rules violations and other errors rise to the level of a substantial failure or gross violation, they are not so egregious as to warrant dismissal of plaintiffs' appeal given the number of nonjurisdictional appellate rules violations. In the exercise of its discretion, the Court of Appeals ordered plaintiffs' attorney to pay double the printing costs of this appeal and review the Rules of Appellate Procedure and certify by affidavit to the Court that he will be more diligent and comply with the Rules of Appellate Procedure in any future appeals. N.C. R. App. P. 34(b)(2)a and (3).

2. Warranties— implied warranty of habitability—modular home—directed verdict—notice of defects

The trial court did not err by granting defendant's motion for a directed verdict even though plaintiffs contend they produced more than a scintilla of evidence to prove their claim of breach of the implied warranty of habitability arising from the

purchase of a modular home because plaintiffs had notice of the alleged defects prior to the passing of the deed or the taking of possession.

3. Appeal and Error— preservation of issues—failure to argue

Although plaintiffs contend that the trial court committed error by engaging in improper and disrespectful conduct toward plaintiffs' trial counsel, this assignment of error is deemed abandoned because it was not set out in plaintiffs' brief as required by N.C. R. App. P. 28(b)(6).

Appeal by plaintiffs from order entered 2 November 2007 by Judge Moses A. Massey in Alleghany County Superior Court. Heard in the Court of Appeals 23 October 2008.

Law Office of Harold J. Bender, by Harold J. Bender, for plaintiff-appellants.

Forman Rossabi Black, P.A., by Emily J. Meister, for defendant-appellee.

TYSON, Judge.

Bill O. Weeks ("Mr. Weeks") and Tracy Weeks (collectively, "plaintiffs") appeal from order entered, which granted Select Homes, Inc.'s ("defendant") motion for directed verdict. We affirm.

I. Background

On 21 November 2006, plaintiffs filed a complaint and asserted claims of: (1) breach of contract; (2) breach of the implied warranty of habitability; and (3) unfair and deceptive trade practices. The complaint alleged: (1) plaintiffs had purchased a two story modular home from defendant for $135,545.00; (2) when placed upon plaintiffs' property, the home was "less durable and at a much lower quality then could be expected and was not as contracted by . . . [p]laintiffs in violation of the North Carolina Building Code and the specifications of the manufacturer[;]" (3) plaintiffs occupied the home on the condition that several defects would be repaired in accordance with the building code; (4) one of defendant's employees turned off the water supply to the home "to further injure . . . [p]laintiffs[;]" and (5) defendant's failure to properly install the home caused the structure to be unsuitable for its intended purpose.

Defendant answered plaintiffs' complaint, moved to dismiss, and alleged plaintiffs: (1) had failed to allege sufficient facts to support a

claim for unfair and deceptive trade practices; (2) are not entitled to recover for a breach of an expressed or implied warranty, "as the contract . . . specifically exclude[d] and disclaim[ed] any and all such warranties[;]" and (3) had failed to state or identify a claim upon which relief could be granted for defendant's alleged act of turning off plaintiffs' water.

Defendant also moved for summary judgment. Defendant's motions were heard on 11 June 2007. The trial court: (1) granted defendant's motion for summary judgment "as to [p]laintiffs' claims for Chapter 75, punitive damages and the alleged shutting off of water to [p]laintiffs' home" and (2) denied defendant's motion for summary judgment "as to [p]laintiffs' claims for breach of contract and breach of implied warranty of habitability . . . ." Plaintiffs did not appeal the trial court's order entered on defendant's motions to dismiss and for summary judgment.

Plaintiffs remaining claims proceeded to trial on 8 October 2007. At the close of plaintiffs' evidence, defendant moved for a directed verdict on the grounds that plaintiffs: (1) abandoned their claim for breach of contract; (2) prevented the performance of defendant; (3) accepted and took possession of the home with knowledge of defects; (4) failed to mitigate their damages; and (5) failed to otherwise prove or establish their damages. The trial court granted defendant's motion for a directed verdict, entered judgment in favor of defendant, and dismissed plaintiffs' remaining claims with prejudice. Plaintiffs appeal.

II. North Carolina Rules of Appellate Procedure

[1] On 9 July 2008, defendant moved to strike plaintiffs' brief and dismiss plaintiffs' appeal based on numerous violations of Appellate Rule 28 and the formatting requirements set forth in Appendices B and E of the North Carolina Rules of Appellate Procedure. Defendant alleged the following errors:

> (a) failure to satisfy the requirements for proper formatting and presentation of the Index to the Brief; (b) failure to include an inside caption, proper pagination and proper topical headings; (c) failure to include or provide a statement of grounds for appellate review; (d) failure to reference the assignments of error; (e) failure to provide proper citation to the Record and authorities relied upon; (f) failure to provide Identification of Counsel; (g) failure to provide a Certificate of Compliance; and (h) failure to include in

> Appendixes those portions of the transcript identified or to reproduce those portions verbatim in the body of the Brief.

Defendant's brief in support of its motion to strike plaintiffs' brief and dismiss plaintiffs' appeal includes two additional errors: (1) "numerous erroneous citations to authority[]" and (2) "countless typographical errors." Plaintiffs responded and stated "that if there are any violations of the Rules of Appellate Procedure, which the Plaintiffs-Appellants deny, they are non-jurisdictional and perhaps could best be summarized as inartful appellate advocacy."

We initially address defendant's motion to dismiss plaintiffs' appeal. In *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 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. 191, 194, 657 S.E.2d 361, 363 (2008). Here, plaintiffs' noncompliance falls within the third category.

A. 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 [appellate] rules does not rise to the level of a 'substantial failure' or 'gross violation.' " *Id.* at 199, 657 S.E.2d at 366.

> 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 sub-

> stantive 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, plaintiffs' Appellate Rules violations include the failure to: (1) reference any assignment of error immediately following each question presented as required by N.C.R. App. P. 28(b)(6); (2) include a statement of the grounds for appellate review as required by N.C.R. App. P. 28(b)(4); (3) include a certification that their brief contained no more than 8,750 words as required by N.C.R. App. P. 28(j)(1)(B)2; (4) include an index to their brief as required by N.C.R. App. P. 28(d)(1)a and b; (5) include an inside caption as required by N.C.R. App. P. 26(g)(1) and Appxs. B and E; (6) properly format the caption of their brief as required by N.C.R. App. P. 26(g)(1) and Appx. B; (7) properly position and format the page numbering of their brief as required by N.C.R. App. P. 26(g)(1) and Appx. B; and (8) properly format their topical headings as required by N.C.R. App. P. 26(g)(1) and Appx. B.

We hold that plaintiffs' numerous appellate rules violations and other errors "rise to the level of a 'substantial failure' or 'gross violation.' " *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366. We turn to "which, if any, sanction under [Appellate] Rule 34(b) should be imposed." *Id.* at 201, 657 S.E.2d at 367.

B. Appellate Rule 34(b)

> A court of the appellate division may impose one or more of the following sanctions:
>
> (1) dismissal of the appeal;
>
> (2) monetary damages including, but not limited to,
>
> a. single or double costs,
>
> b. damages occasioned by delay,
>
> c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;
>
> (3) any other sanction deemed just and proper.

N.C.R. App. P. 34(b) (2008).

Given the number of nonjurisdictional appellate rules violations in this case, we hold plaintiffs' noncompliance to be substantial, but not so egregious as to warrant dismissal of plaintiffs' appeal. *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)). In the exercise of our discretion, plaintiffs' attorney is ordered to: (1) pay double the printing costs of this appeal and (2) review the Rules of Appellate Procedure and certify by affidavit to this Court that he will be more diligent and comply with the Rules of Appellate Procedure in any future appeals. N.C.R. App. P. 34(b)(2)a and (3). The Clerk of this Court is to enter an order accordingly. We now review the merits of plaintiffs' appeal.

III. Issues

Plaintiffs argue the trial court erred when it: (1) granted defendant's motion for a directed verdict and (2) failed to allow the opinion testimony of two of plaintiffs' witnesses.

IV. Motion for a Directed Verdict

[2] Plaintiffs argue the trial court erred when it granted defendant's motion for a directed verdict because "plaintiffs produced much more than a scintilla of evidence to prove their claim of breach of the implied warranty of habitability." We disagree.

A. Standard of Review

> The standard of review for a motion for directed verdict is whether the evidence, considered in the light most favorable to the non-moving party, is sufficient to be submitted to the jury. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim. This Court reviews a trial court's grant of a motion for directed verdict *de novo*.

Herring v. Food Lion, LLC, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005) (internal citations omitted), *aff'd per curiam*, 360 N.C. 472, 628 S.E.2d 761 (2006).

B. Analysis

> [I]n every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such

> dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

Hartley v. Ballou, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974) (citation omitted).

Our Supreme Court further explained:

> An implied warranty cannot be held to extend to defects which are visible or should be visible to a reasonable man upon inspection of the dwelling. . . . The determinative question here is whether the purchaser, prior to the passing of the deed or the taking of possession (whichever first occurs), had notice of the alleged defects without regard to whether such notice was obtained while the house was under construction or after the completion thereof.

Id. at 61, 209 S.E.2d at 782 (internal citations omitted).

Here, the record on appeal clearly establishes that: (1) Mr. Weeks testified that he was familiar with "hundreds" of "construction projects . . . in a supervisory role" based on his out-of-state construction work; (2) plaintiffs testified they observed, photographed, and listed many problems and areas of concern throughout the construction process; (3) plaintiffs received notice from the Alleghany County Inspections Department of various items and deficiencies which needed to be completed or corrected before a Certificate of Occupancy would be issued; (4) plaintiffs hired a professional engineer to inspect "the conditions that [Mr. Weeks had] brought to [their] attention[;]" and (5) plaintiffs took possession of the home prior to the time the issues were rectified and before a Certificate of Occupancy was issued.

The trial court properly granted defendant's motion based on the reasoning articulated by our Supreme Court in *Hartley*. 286 N.C. at 61, 209 S.E.2d at 782. Plaintiffs had notice of the alleged defects "prior to the passing of the deed or the taking of possession . . . ." *Id.* This assignment of error is overruled.

In light of our holding, it is unnecessary to determine whether the trial court erred when it failed to allow plaintiffs to enter the opinion testimony of two of their witnesses. Professional Engineer Sydney Chipman's testimony of the costs of repairs and Mr. Weeks's testimony of the fair market value of the home does not negate the fact that plaintiffs had notice of the alleged defects before they took possession of the home.

[3] Plaintiffs' third and final assignment of error states "[t]hat the [trial] [c]ourt committed error by engaging in improper and disrespectful conduct towards . . . [p]laintiff[s'] trial counsel, in violation of . . . [p]laintiff[s'] Statutory and Constitutional Rights." This assignment of error is not set out in plaintiffs' appellate brief and is deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (2008) ("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."). This assignment of error is dismissed.

V. Conclusion

Plaintiffs had actual notice of alleged defects in their home "prior to the passing of the deed or the taking of possession . . . ." *Hartley*, 286 N.C. at 61, 209 S.E.2d at 782. The trial court properly granted defendant's motion for directed verdict on plaintiffs' breach of the implied warranty of habitability claim. *Id.* Plaintiffs have neither assigned error to nor argued that the trial court erred when it granted defendant's motion for a directed verdict on plaintiffs' breach of contract claim. That portion of the trial court's order is not before us and is also left undisturbed. The trial court's order is affirmed.

Affirmed.

Judges McCULLOUGH and CALABRIA concur.

STATE OF NORTH CAROLINA v. EMILY W. FOSTER

No. COA08-466

(Filed 18 November 2008)

1. Criminal Law— consequences of plea rejection—defendant's knowledge—plain error review not applicable—defense counsel's responsibility

Plain error review was not applicable in a prosecution for narcotics offenses where the trial court did not intervene ex mero motu to advise defendant of the potential maximum sentence she could face if she rejected the State's plea offer and was convicted as charged. Plain error review applies only to jury instructions and evidentiary matters; moreover, the duty to inform a defendant of the consequences of rejecting a plea bargain offer rests with defense counsel, not the trial judge.

2. Constitutional Law— ineffective assistance of counsel—record not sufficient—dismissed without prejudice

The record was not sufficient for appellate consideration of a claim of ineffective assistance of counsel arising from defense counsel's alleged failure to properly advise defendant of the correct potential sentence if she rejected a plea bargain. The assignment of error was dismissed without prejudice to defendant's right to file a motion for appropriate relief and request a hearing on the issue.

Appeal by defendant from judgments entered on or after 6 December 2007 by Judge Alma L. Hinton in Beaufort County Superior Court. Heard in the Court of Appeals 31 October 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Larry C. Economos, for defendant-appellant.

TYSON, Judge.

Emily W. Foster ("defendant") appeals from judgments entered after a jury found her to be guilty of two counts of trafficking in opium or heroin by sale and possession pursuant to N.C. Gen. Stat. § 90-95(h)(4). We find no error in part and dismiss without prejudice in part.

I. Background

On 17 September 2007, defendant was indicted on charges of trafficking in opium by possession and trafficking in Lortab, a derivative of opium, by sale. Both offenses arose out of a single sale of ten Lortab tablets to a confidential informant.

Prior to trial, defendant's attorney informed the trial court that defendant had rejected the State's plea offer, which would have allowed defendant to plead guilty to the lesser offense of sale of opium. Defendant's counsel noted on the record that if defendant had accepted the plea offer, defendant would be "looking at the presumptive range of—sentenced to six to eight months" and could possibly be placed on probation. Instead, counsel noted that "trafficking in . . . [o]pium requires a minimum sentence of 70 months, which is five years and ten months, plus it has a large fine, but definitely a mandatory sentence basically of six years. . . ." Defendant confirmed to the trial court that she had rejected the plea offer and wished to proceed to trial on the charges.

Defendant was convicted by a jury on both counts. At sentencing, the State sought the maximum sentence the court could impose. The trial court initially noted that "the statute calls for consecutive sentences." The following colloquy ensued:

> [Defense counsel]: I'm not aware of that—
>
> The Court: I could be wrong, but I—it's consecutive to any other sentence that she would be—that she would have been serving. Okay.
>
> [The State]: Right. I believe that if the two sentences are at the same time that you do have the authority to run them consecutive or concurrent.
>
> The Court: I agree with that.
>
> [Defense counsel]: Your Honor, obviously, [defendant] has—the only other criminal matter she's ever had was a worthless check, no prior drug charges of any kind, and, Your Honor, we would ask that, while we understand that there is a required sentence that would have a minimum of 70, the maximum, I believe—I believe it was 85 months, with a large fine—
>
> The Court: Say that again now?
>
> [Defense counsel]: I believe the sentence—I believe the sentence requires 70 months, doesn't it?

[The State]: Seventy is the minimum—

[Defense counsel]: A minimum of 70—

[The State]: And it's a Class F. A Class F, Your Honor, which is—it's a minimum of 70 and a maximum of 84 months for each count.

[Defense counsel]: But it's considered—opium is considered much—for sentencing, much worse than cocaine though it's a much smaller amount.

Your Honor, we would ask that you take into consideration the fact that she's had no significant other criminal history, no felonies, no drugs, and is married and has four children, that you would enter just one sentence in the matter and not do consecutive sentences.

Defendant was sentenced to two consecutive terms of a minimum of seventy to a maximum of eighty-four months imprisonment. Defendant appeals.

II. Issues

Defendant argues: (1) the trial court committed plain error by failing to intervene *ex mero motu* to correct her counsel's misstatements of law concerning her minimum sentence and (2) she received ineffective assistance of counsel.

III. *Ex Mero Motu* Failure to Inform

[1] Defendant argues the trial court committed plain error when it failed, *ex mero motu*, to correct her counsel's misstatement of law regarding the minimum mandatory consecutive terms she could be sentenced if she were found guilty of two counts of trafficking in opium. We disagree.

Plain error review applies only to jury instructions and evidentiary matters. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Here, defendant's assignment of error is neither a challenge to jury instructions nor an evidentiary matter. Plain error review is inapplicable to this assignment of error. *Id.*

Moreover, our review has not discovered any North Carolina or Federal case or statute that imposes a duty on the trial court to *ex mero motu* intervene and inform a represented defendant of the maximum consequences of rejecting a State offered plea bargain and proceeding to trial. Such comments could be viewed as encouraging a

defendant to plead guilty, which might raise challenges to the voluntariness of a guilty plea. *See State v. Pait*, 81 N.C. App. 286, 289, 343 S.E.2d 573, 576 (1986) ("The right to plead not guilty is absolute and neither the court nor the State should interfere with the free, unfettered exercise of that right; its surrender by a plea of guilty must be voluntary and with full knowledge and understanding of the consequences." (Citing *Brady v. U.S.*, 397 U.S. 742, 25 L. Ed. 2d 747 (1970); *State v. Ford*, 281 N.C. 62, 187 S.E.2d 741 (1972)); *see also* N.C. Gen. Stat. § 15A-1021(b) (2007) ("No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest."). The duty to inform a defendant of the consequences of rejecting a State offered plea bargain rests upon defendant's counsel, not the trial judge. This assignment of error is overruled.

IV. Ineffective Assistance of Counsel

[2] Defendant argues that she received ineffective assistance of counsel ("IAC") based upon her attorney's failure to properly advise her of the correct potential sentence she could serve if convicted prior to her rejection of the plea agreement. Defendant argues counsel should have advised her that pursuant to N.C. Gen. Stat. § 90-95(h)(6), if convicted of two counts of trafficking, her two sentences could be imposed consecutively and she could face a minimum term of 140 months imprisonment.

Our Supreme Court has stated that to successfully establish an ineffective assistance of counsel claim, defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (*quoting Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

N.C. Gen. Stat. § 90-95(h)(6) (2007) provides that "sentences imposed pursuant to this subsection *shall run consecutively* with and *shall commence* at the expiration of *any sentence being served by the*

person sentenced hereunder." (Emphasis supplied). In *State v. Bozeman*, this Court held that N.C. Gen. Stat. § 90-95(h)(6) mandated "only a single minimum sentence" and did not require consecutive sentences for three trafficking offenses "disposed of in the same proceeding." 115 N.C. App. 658, 662-63, 446 S.E.2d 140, 143 (1994). Based on this Court's precedent in *Bozeman*, defendant's sentences were not "disposed of in the same proceeding" and were not statutorily required to run consecutively. *Id.*

However, this Court must determine whether defense counsel advised defendant of the possible sentence she could have been required to serve if she were convicted of both counts of trafficking and the sentences were imposed consecutively. Defendant asserts that because of the erroneous advice she received from counsel and the trial court's failure to ensure she was made aware of the correct potential minimum sentence, she was deprived of the opportunity to make an intelligent and voluntary decision whether to accept the State's plea offer. Prior to trial, a colloquy transpired as follows:

> [Defense Counsel]: The State had offered a plea of the sale of the drug which is a Schedule III which would be a Class H felony, and she would be a Level I and looking at the presumptive range of—sentenced to six to eight months, and she's rejected the plea offer, and we wanted to get that on the record. And, Your Honor, *I have informed her that the Trafficking in Cocaine—I mean in Opium requires a minimum sentence of 70 months, which is five years and ten months, plus it has a large fine, but definitely a mandatory sentence basically of six years* versus *the Class H where Your Honor would have a wide range of options*, including probation, and at worst, the presumptive sentence of 6 to 8 months, and [defendant] has indicated that she wants a trial on that, and we wanted to put that on the record, Your Honor.
>
> The Court: Is that correct, [defendant]?
>
> [Defendant]: Yes, ma'am.
>
> The Court: All right.
>
> [The State]: Your Honor, that's correct as to the plea offer, and, on this calendar, she has two counts of Trafficking in Opium, one by possession and one by a sale, in 06 CRS 53426.
>
> The Court: All right. . . .

(Emphasis added).

We decline to reach defendant's IAC assignment of error because the record is not fully developed and it is not properly raised before us at this stage of review. *State v. Blizzard*, 169 N.C. App. 285, 299, 610 S.E.2d 245, 255 (2005). IAC claims brought on direct review will be decided on the merits "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *Id.* (quoting *State v. Fair*, 345 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)). Here, the record is insufficient for this Court to fully determine whether defendant was properly advised by counsel of the potential sentence the trial court could impose upon her conviction of two trafficking charges.

Defendant's assignment of error is dismissed without prejudice to defendant's right to file a motion for appropriate relief and request a hearing to determine whether she received effective assistance of counsel. *See id.* at 300, 610 S.E.2d at 255 ("The accepted practice is to raise claims of [IAC] in post-conviction proceedings, rather than direct appeal." (Quoting *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985))). This assignment of error is dismissed without prejudice to defendant's right to file a motion for appropriate relief in superior court.

V. Conclusion

Plain error review is inapplicable where the trial court did not act *ex mero motu* to advise defendant of the potential maximum sentence she could face if she rejected the State's plea offer and was convicted as charged.

After careful review of the record, briefs and contentions of the parties, we decline to consider defendant's claim of IAC and dismiss this assignment of error without prejudice to defendant's right to file a motion for appropriate relief.

No error in part and dismissed without prejudice in part.

Judges BRYANT and ARROWOOD concur.

STATE OF NORTH CAROLINA v. TRACY GLEN SMITH

No. COA08-533

(Filed 18 November 2008)

Criminal Law— guilty plea—plea bargain—misunderstandings

The trial court erred in a possession with intent to sell and deliver cocaine case by concluding defendant's guilty plea and admission of habitual felon status were entered knowingly and voluntarily based on misunderstandings that the denial of his pretrial motion to dismiss the habitual felon indictment was preserved for appellate review, and the case is remanded to the trial court where defendant may withdraw his guilty plea and proceed to trial on the criminal charges or attempt to negotiate another plea agreement because: (1) defendant's plea of guilty was given in consideration for the prosecutor's promise that defendant's pretrial motions would be preserved for appeal, and defendant was entitled to receive the benefit of his bargain; and (2) defendant cannot receive the benefit of his bargain based on the laws of North Carolina or our appellate rules since he only has a right to appeal the denial of his motion to suppress and cannot appeal the denial of his motion to dismiss the habitual felon indictment after a guilty plea.

Appeal by defendant from judgment entered on or after 4 December 2007 by Judge Benjamin G. Alford in Lenior County Superior Court. Heard in the Court of Appeals 23 October 2008.

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

Kevin P. Bradley, for defendant-appellant.

TYSON, Judge.

Tracy Glen Smith ("defendant") appeals from judgment entered after he pleaded guilty to: (1) possession with intent to sell and deliver cocaine pursuant to N.C. Gen. Stat. § 90-95(a) and (2) having attained habitual felon status. We vacate and remand.

I. Background

On 13 January 2006, Kinston Department of Public Safety Captain Milton Kivett ("Captain Kivett") went to the 300 block of East Blount

Street "to back two officers up on a traffic stop." Upon arrival, the officers had removed one of the occupants from the vehicle. Captain Kivett was advised by the other officers that they were going to search the vehicle.

Captain Kivett removed defendant from the front passenger seat of the vehicle and handcuffed him. Defendant was advised at that time that he was not under arrest. When Captain Kivett frisked defendant for weapons, he felt what he believed to be a "pocketknife or some type of knife[]" in defendant's pocket.

Captain Kivett advised defendant that he was going to search his pocket to retrieve what he thought to be a knife. Captain Kivett then illuminated defendant's pocket with a flashlight and discovered "two round glass type items with a burn on the end." Defendant was placed under arrest for possession of drug paraphernalia.

Captain Kivett conducted a search of defendant's person incident to arrest and discovered: (1) digital scales with white powder residue on them; (2) "a miscellaneous amount of clear plastic sandwich bags[;]" (3) clear plastic sandwich bags which contained several off-white rocks; (4) $353.00 in cash; and (5) a cellular phone.

On 4 April 2007, defendant was indicted for: (1) possession with intent to sell and deliver a controlled substance and (2) attaining the status of habitual felon. On 10 October 2007, defendant filed a motion to suppress "any and all evidence obtained as the result of the unconstitutional and invalid seizure and search of . . . [d]efendant." Defendant also filed a motion to dismiss his habitual felon indictment "on the grounds that the North Carolina Habitual Felon Act is unconstitutional."

Defendant's motions were heard on 3 December 2007. The trial court denied both motions and defendant pleaded guilty to possession with intent to sell and deliver cocaine and attaining the status of habitual felon. The trial court determined defendant to be a prior record level III offender and sentenced him to a mitigated active sentence of a minimum of seventy months and a maximum of ninety-three months incarceration. Defendant appeals.

II. Issues

Defendant argues: (1) his plea was not entered knowingly and voluntarily; (2) the trial court erred when it denied his motion to suppress; and (3) he received ineffective assistance of counsel.

III. Knowing and Voluntary Plea

Defendant argues "[t]he record does not establish knowing and voluntary waiver of jury trials when the guilty plea and admission of habitual felon status were entered on misunderstandings that the denials of [defendant]'s pretrial motions were preserved for appellate review." We agree.

> "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002).
>
> A defendant who pleads guilty has a right of appeal limited to the following:
>
> 1. Whether the sentence "is supported by the evidence." This issue is appealable only if his minimum term of imprisonment does not fall within the presumptive range. N.C. Gen. Stat. § 15A-1444(a1) (2001);
>
> 2. Whether the sentence "[r]esults from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21." N.C. Gen. Stat. § 15A-1444(a2)(1) (2001);
>
> 3. Whether the sentence "[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(2) (2001);
>
> 4. Whether the sentence "[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(3) (2001);
>
> 5. Whether the trial court improperly denied defendant's motion to suppress. N.C. Gen. Stat. §§ 15A-979(b) (2001), 15A-1444(e) (2001);
>
> 6. Whether the trial court improperly denied defendant's motion to withdraw his guilty plea. N.C. Gen. Stat. § 15A-1444(e).

State v. Jamerson, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003).

Here, upon defendant's guilty plea, defendant has a right to appeal only the trial court's denial of his motion to suppress. N.C. Gen. Stat. §§ 15A-979(b), -1444(e) (2007). Defendant does not have a right to appeal the trial court's denial of his motion to dismiss his habitual felon indictment.

> Where a defendant does not have an appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e). However, our appellate rules limit our ability to grant petitions for writ of certiorari to the following situations: (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) to review a trial court's denial of a motion for appropriate relief. N.C.R. App. P. 21(a)(1) (2003). In considering [A]ppellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court has reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in [Appellate] Rule 21. *State v. Nance*, 155 N.C. App. 773, 574 S.E.2d 692 (2003); *Pimental*, 153 N.C. App. at 73-74, 568 S.E.2d at 870; *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002).

Jamerson, 161 N.C. App. at 529, 588 S.E.2d at 547. Upon defendant's guilty plea, this Court is without authority to review, either as of right or by *certiorari*, the trial court's denial of defendant's motion to dismiss his habitual felon indictment.

In *State v. Wall*, our Supreme Court was confronted with a similar situation and vacated the trial court's order and remanded. 348 N.C. 671, 502 S.E.2d 585 (1998). Our Supreme Court stated:

> [the] defendant's plea of guilty was consideration given for the prosecutor's promise. He was entitled to receive the benefit of his bargain. However, [the] defendant is not entitled to specific performance in this case because such action would violate the laws of this [S]tate. Nevertheless, defendant may avail himself of other remedies. He may withdraw his guilty plea and proceed to trial on the criminal charges. He may also withdraw his plea and attempt to negotiate another plea agreement that does not violate [the laws of this State].

Id. at 676, 502 S.E.2d at 588.

Here, defendant's plea arrangement stated:

> That upon the defendant plea of guilt [sic] to possession of cocaine with the intent of sale or delivery a Class H felony and

> with the admission of his status as an habitual felon, the defendant will be sentenced as a Class C felon level 3 at the least amount of time possible *and the defendant's pretrial motions shall be preserved for appeal.*

(Emphasis supplied).

Defendant's plea of guilty was given in consideration for the prosecutor's promise. Defendant was entitled to receive the benefit of his bargain. Pursuant to our Supreme Court's holding in *Wall*, the judgment entered based on defendant's plea is vacated and this case is remanded to the trial court where defendant "may withdraw his guilty plea and proceed to trial on the criminal charges. . . . [or] attempt to negotiate another plea agreement . . . ." 348 N.C. at 676, 502 S.E.2d at 588; *see also State v. Jones*, 161 N.C. App. 60, 63, 588 S.E.2d 5, 8-9 (2003) ("[S]ince defendant bargained for review of three motions and our Court may review only one, we will not address the substantive issues raised by the motion to suppress. Rather, pursuant to *Wall*, we vacate the plea and remand the case to the trial court, placing defendant back in the position he was in before he struck his bargain: he may proceed to trial or attempt to negotiate another plea agreement."), *rev'd in part on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004). In light of our holding, it is unnecessary to and we do not address defendant's remaining assignments of error.

IV. Conclusion

Defendant cannot receive the benefit of his bargain based on the laws of this State or our Appellate Rules. Based on our Supreme Court's holding in *Wall*, the judgment entered based on defendant's guilty plea is vacated and this matter is remanded for proceedings not inconsistent with this opinion. 348 N.C. at 676, 502 S.E.2d at 588.

Vacated and Remanded.

Judges McCULLOUGH and CALABRIA concur.

IN THE MATTER OF: APPEAL OF FAYETTE PLACE LLC FROM THE DECISION OF THE DURHAM COUNTY BOARD OF EQUALIZATION AND REVIEW DENYING PROPERTY TAX EXEMPTION FOR CERTAIN PROPERTY FOR THE 2005 TAX YEAR

No. COA07-1483

(Filed 18 November 2008)

Taxation— ad valorem—exemption

A whole record test revealed that the North Carolina Property Tax Commission did not err by concluding the pertinent property belonged to the Durham Housing Authority and was exempt from ad valorem taxation because: (1) although legal title to the property was held by Fayette Place, the possession of legal title is not determinative as to the question of ownership; (2) where the state possesses a sufficient interest in the property, such as equitable title to the property, the property is said to belong to the state even where legal title to the property is held by another party; (3) Fayette Place is wholly controlled by subsidiary corporations of the Housing Authority, which qualifies as a unit of state government, and thus the property belongs to the Housing Authority for purposes of N.C.G.S. § 105-278.1(b); and (4) the property was exempted from ad valorem taxation according to both the constitutional exemption in Art. V, § 2(3) and the statutory exemption in N.C.G.S. § 105-278.1.

Appeal by Durham County from final decision entered 7 August 2007 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 1 May 2008.

Kennon, Craver, Belo, Craig & McKee, PLLC, by Henry W. Sappenfield, for taxpayer appellant.

County of Durham Tax Administration, by Assistant County Attorney Kathy R. Everett-Perry, for Durham County respondent appellee.

McCULLOUGH, Judge.

FACTS

In 2002, Fayette Place LLC ("Fayette Place"), a North Carolina limited liability company, was organized for the purpose of redeveloping the Fayetteville Street public housing project ("the property") as an Affordable Housing Community. Fayette Place was

formed as a joint venture between Development Ventures, Inc. ("DVI"), which owned 99% of the newly formed company, and Creative Housing Development Strategies, Inc. ("CHD"), which owned 1% of the newly formed company. CHD, a North Carolina business corporation, is a wholly owned subsidiary of DVI. DVI, a North Carolina non-profit corporation, is itself wholly owned by The Housing Authority of the City of Durham, North Carolina ("Housing Authority"), a quasi-governmental entity.

On 27 December 2002, the Housing Authority transferred ownership of the property to Fayette Place, subject to a declaration of restrictive covenants. Under the terms of this declaration, Fayette Place would operate the property as a public housing project for the benefit of the Housing Authority. On 2 November 2005, the Durham County Board of Equalization and Review ("Durham County Board") denied Fayette Place's application to exempt the property from *ad valorem* taxation for the 2005 tax year. On 14 November 2005, Fayette Place appealed this decision to the North Carolina Property Tax Commission ("Commission"). On 19 April 2007, this matter was heard before the Commission. On 7 August 2007, the Commission entered an order reversing the decision of the Durham County Board. According to the Commission, the property was exempt from taxation, as provided under N.C. Gen. Stat. § 105-278.1(3)(d) (2007) because the property "belongs to" the Housing Authority. Durham County ("County") now appeals.

I.

County first argues the Commission erred in concluding that the property belonged to the Housing Authority and was exempt from *ad valorem* taxation. We disagree.

Our General Statutes provide that:

> So far as [is] necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any [Property Tax] Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2007). "In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party[.]" N.C. Gen. Stat. § 105-345.2(c). In conducting its review, " '[t]he court may not consider the evidence which in and of itself justifies the [Commission's] decision without [also] taking into account the contradictory evidence or other evidence from which conflicting inferences could be drawn.' " *In re Moses H. Cone Memorial Hospital*, 113 N.C. App. 562, 571, 439 S.E.2d 778, 783 (1994) (citation omitted). "[T]he legal effect of evidence and the ultimate conclusions drawn by an administrative tribunal from the facts . . . are questions of law" and will be reviewed *de novo*. *Employment Security Com. v. Kermon*, 232 N.C. 342, 345, 60 S.E.2d 580, 583 (1950); *see In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). However, "the 'whole record' test is not a tool of judicial intrusion; 'instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.' " *In re Appeal of Owens*, 132 N.C. App. 281, 286, 511 S.E.2d 319, 323 (1999) (citation omitted).

"The general rule established by the Constitution is that all property in this State is liable to taxation, and shall be taxed in accordance with a uniform rule. Exemption of specific property, because of its ownership by the State or by municipal corporations, or because of the purposes for which it is held and used, is exceptional." *Hospital v. Rowan County*, 205 N.C. 8, 10, 169 S.E. 805, 806 (1933) (citation omitted). Statutes granting such exemptions "should be construed strictly, when there is room for construction, against exemption and in favor of taxation." *Salisbury Hospital*, 205 N.C. at 11, 169 S.E. at 806. Where a taxpayer seeks an exemption from *ad valorem* taxation, it is the taxpayer who bears the burden of proving

that its property meets the statutory requirements. *In re Appeal of Appalachian Student Housing Corp.*, 165 N.C. App. 379, 384, 598 S.E.2d 701, 704 (2004).

Under our State Constitution, "[p]roperty belonging to the State, counties and municipal corporations shall be exempt from taxation." N.C. Const. Art. V, § 2(3). Our General Statutes reiterate this exemption, providing that "[r]eal and personal property belonging to the State, counties, and municipalities is exempt from taxation." N.C. Gen. Stat. § 105-278.1(b). For the purposes of this statute, "[a] housing authority created under G.S. 157-4 or G.S. 157-4.1" qualifies as a unit of state government. N.C. Gen. Stat. § 105-278.1(3)(d).

Here, County argues that the property should not be exempted from *ad valorem* taxation because the property belongs to Fayette Place, a for-profit company, and not the Housing Authority. The Commission rejected County's argument and determined that the property did, in fact, belong to the Housing Authority.

In *In re Appeal of Appalachian Student Housing Corp.*, 165 N.C. App. 379, 598 S.E.2d 701, this Court determined that a housing complex, owned by a non-profit corporation and operated for the benefit of a state university, "belonged to" the state for the purposes of N.C. Gen. Stat. § 105-278.1(b). In reaching this conclusion, the *Appalachian* Court held:

> Neither the North Carolina Constitution nor G.S. § 105-278.1(b) require the State to have legal title in order to exempt the property from taxation. Nor do we find persuasive Watauga County's argument that the *ad valorem* tax exemption law of North Carolina applies only to exempt property to which the taxpayer holds legal title.

Id. at 388, 598 S.E.2d at 706.

On review of the instant case, we hold the record contains sufficient evidence to show that the property belongs to the Housing Authority. Although legal title to the property is held by Fayette Place, we have previously held that the possession of legal title is not determinative as to the question of ownership. *See id.* Instead, this Court will focus its inquiry on the state's interest in the property. Where the state possesses a sufficient interest in the property, such as equitable title to the property, the property is said to belong to the state even where legal title to the property is held by another party. *See id.* Here, Fayette Place is wholly controlled by subsidiary corporations of the

Housing Authority. Under this labyrinthine ownership structure, complete ownership of Fayette Place can be imputed to the Housing Authority. As the Housing Authority possesses complete ownership of Fayette Place, the possessor of legal title to the property, we hold that the property belongs to the Housing Authority for the purposes of N.C. Gen. Stat. § 105-278.1(b). Therefore, the property is exempted from *ad valorem* taxation according to both the constitutional exemption in Art. V, § 2 and the statutory exemption in § 105-278.1. The County's assignment of error is overruled, and the final decision appealed from is affirmed.

Affirmed.

Judges TYSON and STROUD concur.

STATE OF NORTH CAROLINA v. THOMAS NATHAN LEE

No. COA08-122

(Filed 18 November 2008)

Sentencing— prior record level—out-of-state conviction—stipulation ineffective to satisfy State's burden of proof

The trial court erred by calculating defendant's prior record level with points allocated for a New Jersey conviction despite the State's failure to establish that the offense was substantially similar to a corresponding North Carolina offense, and the case is remanded for resentencing because defendant's stipulation in the worksheet regarding defendant's out-of-state conviction was ineffective and did not satisfy the State's burden of proof to show substantial similarity under N.C.G.S. § 15A-1340.14(e).

Appeal by defendant from judgment entered 15 June 2007 by Judge Judson D. DeRamus, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 25 August 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Anne M. Middleton, for the State.

Eric A. Bach for defendant-appellant.

HUNTER, Judge.

On 24 May 2007, Thomas Nathan Lee ("defendant") entered a negotiated plea of no contest to first degree rape, two counts of second degree rape, first degree kidnapping, two counts of assault by strangulation, larceny of a motor vehicle, and first degree burglary.

In determining defendant's prior record level, the sentencing judge allocated points for prior convictions, including a New Jersey conviction of possession of a controlled substance on school property. The judge concluded that defendant had a prior record level III due to the five A1 or Class 1 misdemeanor convictions on his record. On 15 June 2007, defendant was sentenced to 269 to 332 months in prison. Defendant appeals this sentence arguing that the trial court erred in calculating defendant's prior record level because points were allocated for the New Jersey conviction despite the State's failure to establish that the offense was substantially similar to the corresponding North Carolina offense. After careful review, we agree with defendant and remand the case for resentencing.

With regard to prior record level points allocation for an out-of-state conviction, our legislature has enacted the following:

> If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2007).

This Court has found that the trial court errs if it sentences a defendant based in part on a prior foreign conviction that has not been proven to be substantially similar to the North Carolina equivalent by a preponderance of the evidence. *See State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004).

The State argues that a stipulation signed by defendant is sufficient to establish substantial similarity of the two crimes. The record shows that on 24 May 2007, the prosecutor and defense counsel signed the following stipulation:

> The prosecutor and defense counsel, or the defendant, if not represented by counsel, stipulate to the accuracy of the information

> set out in Sections I. and IV. of this form, *including the classification and points assigned to any out-of-state convictions*, and agree with the defendant's prior record level or prior conviction level as set out in Section II.

(Emphasis added.)

Section I of the worksheet shows a total of five points, one of which represents the disputed Class 1 misdemeanor conviction in New Jersey for possession of a controlled substance on school property. Taking that conviction into account, Section II indicates that defendant's prior conviction level for felony sentencing purposes is III. Defendant does not dispute the information in the worksheet; rather, he argues that the State did not present evidence at the sentencing hearing to prove that the possession charge is substantially similar to the North Carolina equivalent. According to precedent set by this Court, we must agree with defendant and remand the case for resentencing.

Although defendant does not cite the controlling case in his brief, nor does he make an argument based on its reasoning, we are bound to follow the case of *State v. Palmateer*, 179 N.C. App. 579, 634 S.E.2d 592 (2006), as the facts are analogous to the case at bar. In *Palmateer*, the defendant signed a similar stipulation with regard to the existence and classification of out-of-state convictions. *Id.* at 581, 634 S.E.2d at 593. This Court found, " 'the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a *question of law* to be resolved by the trial court.' " *Id.* (quoting *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006)) (emphasis added). According to *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979) (citation omitted), "[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." Accordingly, the *Palmeteer* Court concluded, "the stipulation in the worksheet regarding Defendant's out-of-state convictions was ineffective[,]" and remanded the case for resentencing. *Palmateer*, 179 N.C. App. at 582, 634 S.E.2d at 594 (citation omitted).

Pursuant to *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), "a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." The prior decision in

Palmateer requires us to find that defendant's stipulation in the case *sub judice* was "invalid and ineffective." Thus, the stipulation did not satisfy the State's burden of proof to show substantial similarity of the out-of-state offense to the corresponding North Carolina offense pursuant to N.C. Gen. Stat. § 15A-1340.14(e). We therefore remand for resentencing.

Remanded for resentencing.

Chief Judge MARTIN and Judge WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 NOVEMBER 2008

BARNARD v. N.C. DEP'T OF TRANSP. No. 07-1015	Ind. Comm. (TA-18275)	Affirmed
CALDON v. CALDON No. 08-260	Orange (93CVD178)	Reversed and remanded
DUNCAN v. DUNCAN No. 08-374	Macon (05CVD338)	Dismissed
HAWKINS v. WILLIAMS No. 08-632	Vance (07CVS1024)	Dismissed
HOLMES v. CSX TRANSP., INC. No. 07-1571	Wake (07CVS4798)	Affirmed
IN RE A.A.P., Al.M.P., An.M.P. No. 08-674	Wilkes (04JT157-59)	Affirmed in part; Reversed and remanded in part
IN RE A.M., Ja.M., Jo.M. No. 08-737	Harnett (06J13-15)	Affirmed
IN RE B.C.S. No. 08-573	Davidson (05JB189)	Affirmed
IN RE J.J. No. 08-456	Mecklenburg (07J188)	Affirmed
IN RE J.N.H. No. 08-738	Cabarrus (06JA140)	Affirmed
IN RE JO.A.P., JE.A.P., MA.A.A. No. 08-816	Brunswick (07J40-42)	Affirmed
IN RE M.R.M. No. 08-537	Buncombe (07JT327)	Vacated and remanded
IN RE N.M.D. & L.M.D. No. 08-862	Beaufort (06J82-83)	Affirmed
IN RE NEBENZAHL No. 07-1324	Guilford (07SP1235)	Dismissed
IN RE S.R., M.R., Y.R., J.R. No. 08-707	Surry (06J4-7)	Affirmed
IN RE T.P. No. 08-495	Mecklenburg (07J820)	Affirmed
OLIPHANT FIN. CORP. v. SILVER No. 08-27	Halifax (06CVS316)	Affirmed

ROBINSON v. SETO'S TEXACO, INC. No. 08-57	Ind. Comm. (I.C. NO. 534110)	Affirmed
SMITH v. SMITH No. 08-78	Union (04CVD483)	Affirmed in part and remanded in part
SNOW v. SNOW No. 08-105	Surry (04CVD1312)	Affirmed and remanded. Double costs of this appeal assessed against plantiff's counsel
STATE v. ALLISON No. 08-461	Guilford (07CRS24316) (07CRS78657-58) (07CRS78707)	No error
STATE v. BAILEY No. 08-307	Johnston (07CRS2442-43)	No error
STATE v. BERRY No. 08-262	Wake (06CRS18114-16)	No error
STATE v. BOOE No. 08-482	Davie (07CRS50434)	No error
STATE v. BRANNON No. 08-514	Mecklenburg (07CRS216861) (07CRS216863) (07CRS34027)	No error
STATE v. BYNUM No. 08-72	Mecklenburg (06CRS246637)	No error
STATE v. CORRY No. 08-11	Gaston (06CRS67313-16)	No error
STATE v. COX No. 08-381	Cherokee (06CRS819) (06CRS50182) (07CRS1-4)	No error
STATE v. JENNING No. 08-598	Orange (05CRS53413)	Affirmed in part and remanded in part for correction of clerical error
STATE v. MARTIN No. 07-1471	Rutherford (05CRS52602-04)	New trial
STATE v. MONROE No. 08-570	Guilford (06CRS87066-67) (06CRS87072-73)	No error
STATE v. MOODY No. 08-294	Northampton (05CRS51642) (06CRS56)	No error

STATE v. NEELY No. 08-325	Forsyth (07CRS50055) (07CRS5024)	No error
STATE v. NELSON No. 08-490	Forsyth (06CRS54388) (06CRS31286)	Affirmed
STATE v. POPE No. 08-440	New Hanover (05CRS59997) (05CRS60003) (05CRS60006-7) (05CRS60010) (05CRS60302) (05CRS60305) (06CRS714)	Vacated as to 05CRS59997, 05CRS60305, 05CRS60003. No Prejudicial Error as to Habitual Felon. Remaining Charges Remanded for Resentencing.
STATE v. SCOTT No. 08-384	Cabarrus (07CRS50024) (07CRS003702)	No error
STATE v. SLADE No. 08-367	Guilford (06CRS94355)	No error
STATE v. SULLIVAN No. 08-264	Henderson (07CRS50138-41)	No error
STATE v. TALLENT No. 08-359	Macon (07CRS50276)	Dismissed
STATE v. WEBB No. 08-186	Macon (06CRS80) (06CRS2122)	No error
STATE v. WOLFE No. 08-99	Buncombe (06CRS61315) (07CRS62-3)	No error
TAYLOR v. MILLER No. 07-913	Carteret (06CVS25)	Affirmed in part; remanded in part for further proceedings

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

ARBITRATION AND MEDIATION—Continued

motion to compel arbitration was filed, with damages being the only remaining issue. Defendants cannot participate in litigation and then expect an unfavorable decision to be automatically vacated upon an order compelling arbitration. **Linsenmayer v. Omni Homes, Inc., 703.**

Arbitration—request in answer—not a proper motion—substantive rulings by court—The trial court did not err by issuing substantive rulings after arbitration was requested in an answer because the court had not received a proper motion requesting mandatory arbitration. The litigation continued in its ordinary course and defendants participated with counsel. **Linsenmayer v. Omni Homes, Inc., 703.**

Attorney fees—unfair and deceptive trade practices—arbitration clause—An arbitrator did not err by awarding attorney fees in an unfair trade practices dispute because the arbitration clause expressly stated that attorney fees would be awarded to the winning party at arbitration, attorney fees are allowed here by statute, and the arbitrator was following the mandate of the court. **Linsenmayer v. Omni Homes, Inc., 703.**

Mandatory arbitration—prayer for relief in answer—not a proper motion—The trial court did not err by not ordering mandatory arbitration upon receiving an answer that listed arbitration as a prayer for relief, although a later motion to compel arbitration was granted. The prayer for relief made no claim that the parties were contractually bound to arbitrate and did not qualify as a motion as required by statute. **Linsenmayer v. Omni Homes, Inc., 703.**

Master Settlement Agreement—diligent enforcement of state escrow statute—The Business Court's properly concluded in a declaratory judgment action that the parties knowingly and intentionally agreed to arbitrate the dispute including diligent enforcement of North Carolina's escrow statute regarding the Master Settlement Agreement (MSA) entered into by most of the states and various tobacco manufacturers to resolve tobacco-related litigation. **State v. Philip Morris USA, Inc., 1.**

Master Settlement Agreement—sovereign immunity—The Business Court did not err in a declaratory judgment action arising out of the Master Settlement Agreement entered into by most of the states and various tobacco manufacturers to resolve tobacco-related litigation by ordering arbitration even though the State contends the order was barred by sovereign immunity because: (1) contrary to defendants' assertion, N.C.G.S. § 105-113.4C does not preclude an order compelling arbitration to determine whether North Carolina diligently enforced its escrow statute; (2) the State failed to demonstrate that an order compelling arbitration was barred by sovereign immunity; and (3) the order does not violate the separation of powers doctrine. **State v. Philip Morris USA, Inc., 1.**

Motion to vacate—confusion over what rules would apply—The trial court did not err by allowing defendants' motion to confirm and enter judgment on an arbitration award and by denying plaintiff's motion to vacate the arbitration award and demand for trial de novo even though plaintiff contends the arbitration was not conducted pursuant to correct law because: (1) although the Uniform Arbitration Act which was in effect when the parties contracted in 2003 was Article 45A of Chapter 1, a 3 March 2006 consent order required the arbitration

CITIES AND TOWNS—Continued

not to annex similarly situated residential properties, the creation of an unincorporated island within the new corporate limits, and a conflict of interest regarding a council member's position on the Village Council and his status as president and one-third owner of the local ski resort. **Norwood v. Village of Sugar Mountain, 293.**

Annexation—recorded property lines or streets—new municipal boundaries—The trial court erred in an annexation case by finding and concluding that respondent did not use recorded property lines or streets in establishing the new municipal boundaries for the pertinent one-acre Norwood tract in violation of N.C.G.S. § 160A-36(d). **Norwood v. Village of Sugar Mountain, 293.**

Annexation—subdivision test—classification of entire tract as commercial—Respondent municipality could properly classify an entire 5.12 acre tract as commercial for purposes of the subdivision test set forth in N.C.G.S. § 160A-36(c), although a plat presented by petitioners divides the 5.12 tract into a 1.28 acre commercial tract, a .47 acre wooded tract, and a 3.36 acre wooded tract, where respondent's annexation reports and its subdivision test calculations were based upon county tax maps and actual observations of the properties made by a certified land surveyor. **Norwood v. Village of Sugar Mountain, 293.**

Annexation—violation of subdivision test—remand—The remedy for a municipality's alleged violation of the subdivision test was not to declare the annexation ordinance null and void but was to remand to allow the municipality to amend the annexation boundaries. **Norwood v. Village of Sugar Mountain, 293.**

CIVIL PROCEDURE

Motion for new trial—filed before entry of judgment—A Rule 59 motion for a new trial may be filed before entry of judgment, but the trial court does not have jurisdiction to hear and determine the motion until after entry of judgment. **Xiong v. Marks, 644.**

New trial on evidence issues denied—sufficient objection—offer of proof required—The trial court did not err by denying plaintiff a new trial under Rule 59(a)(8) on two evidentiary issues in an automobile accident case where plaintiff did not make an offer of proof. An offer of proof is required to constitute a sufficient objection under Rule 59(a)(8) when the error alleged is the exclusion of evidence. **Xiong v. Marks, 644.**

Rule 12(b)(6)—standard—plausibility—not adopted—The plausibility standard for deciding Rule 12(b)(6) motions has not been adopted in North Carolina, and the Court of Appeals does not have the authority to adopt a new standard. **Holleman v. Aiken, 484.**

CIVIL RIGHTS

Gang-related school suspension—claim against superintendent—The trial court erred by dismissing plaintiff Douglas's claim under 42 U.S.C. § 1983 against a school superintendent in her individual capacity for a long-term suspension arising from gang activity. Defendants' contention would require that the evi-

CIVIL RIGHTS—Continued

dence be viewed in the light most favorable to the moving party, which is precluded when deciding a Rule 12(b)(6) motion. **Copper v. Denlinger, 249.**

Gang related school suspension—claim against superintendent—punitive damages—A complaint sufficiently alleged a claim for punitive damages under 42 U.S.C. § 1983 against a school superintendent arising from a student's long-term suspension for gang involvement. **Copper v. Denlinger, 249.**

Gang-related school suspension—claim against superintendent—qualified immunity—The trial court should not have granted a Rule 12(b)(6) dismissal of plaintiff Douglas's 42 U.S.C. § 1983 claim against a school superintendent for a suspension arising from gang activity based on qualified immunity. The question of qualified immunity cannot be resolved in this case at this stage. **Copper v. Denlinger, 249.**

Short-term school suspensions—allegations not sufficient—The trial court did not err in dismissing plaintiffs' claims against a board of education under 42 U.S.C. § 1983 for short-term suspensions for gang activity. Plaintiffs have provided no argument on appeal as to why the complaint's allegations are sufficient to establish the board's liability for procedural due process violations under *Monell v. New York City Department of Social Services*, 436 U.S. 658. **Copper v. Denlinger, 249.**

CONSTITUTIONAL LAW

Competency to stand trial—due process—findings of fact incorporating factual summary from detailed psychiatric report—The trial court did not abuse its discretion in a first-degree murder case by finding that defendant was competent to stand trial because there was no authority prohibiting the court from making findings of fact incorporating a factual summary from a detailed psychiatric report in lieu of listing the facts in the traditional manner; the record contained evidence that defendant possessed the capacity to comprehend his position, understand the nature of the proceedings against him, conduct his defense in a rational manner, and cooperate with his counsel; and although two doctors differed as to the significance of defendant's rambling, the State's expert witness provided the trial court with sufficient evidence to suggest that defendant was capable of standing trial despite his tendency to ramble in response to questioning. **State v. Coley, 458.**

Due process—sanctions—notice and opportunity to be heard—Plaintiff and plaintiff's counsel were not denied due process in the imposition of non-monetary sanctions based on their pleadings in a shareholder derivative action against corporate officers where they received notice that sanctions were being sought and of the basis of those sanctions, and were given the opportunity to present arguments and testimony on their behalf. **Egelhof v. Szulik, 612.**

Effective assistance of counsel—failure to object—failure to request instruction on voluntary intoxication—Defendant did not receive ineffective assistance of counsel based on defense counsel's failure to object and request an instruction on voluntary intoxication with respect to the robbery with a dangerous weapon charge because the evidence presented at trial did not warrant such an instruction. **State v. Ash, 569.**

DIVORCE—Continued

value of the condo had increased. Settlement of issues prior to equitable distribution trials will not be discouraged by interpretations contrary to the express terms of contractual agreements. **Wirth v. Wirth, 657.**

Equitable distribution—criminal acts—relevance and prejudicial effect—There was no abuse of discretion in an equitable distribution action in the admission of defendant's criminal acts in shooting into the marital home and holding plaintiff as a hostage where defendant argued that the evidence was prejudicial but offered no support for the argument other than a detailed finding by the court. The majority of the finding concerns acts against the marital home and referred to defendant's treatment of plaintiff only as necessary to explain the sequence of events. **Troutman v. Troutman, 395.**

Equitable distribution—delays in producing documents—sanctions—attorney fees—The trial court did not abuse its discretion in an equitable distribution action in the imposition of attorney fees as a sanction for the obstruction or delay of an equitable distribution proceeding or in the amount of the sanction. Contrary to defendant's contention, he had sufficient notice of the possibility of sanctions and the opportunity to oppose their imposition, and there was evidence that plaintiff incurred excess attorney fees attributable to defendant's delay in the production of documents. Sanctions are not precluded by the absence of a finding of contempt. **Wirth v. Wirth, 657.**

Equitable distribution—distributive award—business holdings—The trial court's decision in an equitable distribution action to distribute business holdings to plaintiff created the need for a distributive award to defendant. The court's findings were sufficient to support its decision and the court did not abuse its discretion in the distribution of the parties' assets. **Wirth v. Wirth, 657.**

Equitable distribution—interest on proceeds of sale of residence—consent order—controlling—The trial court did not err in an equitable distribution action by not classifying, valuing, and distributing the interest earned on the proceeds of the sale of the former residence. A consent order provided that the net proceeds from the sale were to be distributed to plaintiff; once distributed, the proceeds became plaintiff's separate property. **Wirth v. Wirth, 657.**

Equitable distribution—liquidity of assets not addressed—not raised at trial—The trial did not err in an equitable distribution action by not making findings concerning the liquidity of certain accounts, an insurance check, and logging equipment where the liquidity of these assets was not raised at trial. **Troutman v. Troutman, 395.**

Equitable distribution—marital debt—postseparation payments—The trial court in an equitable distribution action properly considered defendant's postseparation payments on marital debt and gave him a credit for those payments. **Wirth v. Wirth, 657.**

Equitable distribution—marital property—logging equipment—Findings in an equitable distribution action concerning the classification of logging equipment as marital property were binding where defendant did not assign error to them. **Troutman v. Troutman, 395.**

Equitable distribution—postseparation depreciation in business—cause could not be determined—divisible property—The trial court erred in an

EVIDENCE—Continued

dreams, after the alleged incident because: (1) the victim's testimony regarding her mental condition was not victim impact evidence; and (2) "serious injury" under N.C.G.S. § 14-32 for the charge of assault on a handicapped person includes serious mental injury caused by an assault with a deadly weapon, and the victim's testimony regarding her mental state supported an element of that crime. **State v. Lofton, 364.**

HOMICIDE

First-degree murder—felony murder—robbery with dangerous weapon—sufficiency of evidence—corroborating evidence supporting confession—The trial court did not err by failing to dismiss the charges of first-degree murder and robbery with a dangerous weapon even though defendant contends his confession was the only evidence that the victim's property was taken and there was a lack of corroborating evidence to support the submission of this case to the jury because the State presented substantial independent evidence tending to support defendant's confession that permitted a reasonable inference that defendant unlawfully used a firearm to take the personal property of another and that a killing resulted during the perpetration of the crime. **State v. Ash, 569.**

First-degree murder—not guilty instruction—plain error analysis—The trial court did not commit plain error in a first-degree murder case by allegedly failing to instruct the jury that if the State failed to prove any element of the charged offense, or any lesser-included offense, it must find defendant not guilty because the instructions stated that defendant should be found not guilty if the jury has reasonable doubt as to any elements of the charged crimes or if the jury finds defendant acted in self-defense. **State v. Ballard, 551.**

First-degree murder—request for instruction on lesser-included offense—voluntary manslaughter based on imperfect self-defense—The trial court did not err in a first-degree murder case by denying defendant's request for an instruction on voluntary manslaughter based on imperfect self-defense because: (1) viewed in the light most favorable to defendant, defendant's testimony was insufficient to demonstrate defendant reasonably believed it was necessary to kill his wife to save himself from great bodily harm; (2) although the wife victim threatened defendant and reached for a knife, defendant's own testimony revealed that defendant was able to secure the weapon before the wife could reach it; (3) once the weapon was secure, defendant was no longer in imminent danger from his wife; (4) even if defendant believed it was necessary to kill his wife to avoid great bodily harm, that belief was unreasonable; and (5) a review of the record revealed that defendant presented no evidence at trial to warrant a jury instruction of imperfect self-defense. **State v. Coley, 458.**

INJUNCTIONS

Compel book promotion—not within scope of relief—The trial court did not err by granting defendants' Rule 12(b)(6) motion to dismiss a request for a mandatory injunction requiring promotion of a book and retraction of defamatory statements. A mandatory injunction cannot be granted to require endorsement and promotion of a book, and the statements in issue were not defamatory. **Holleman v. Aiken, 484.**

SENTENCING—Continued

WORKERS' COMPENSATION—Continued

Causation—delay in calling 911—no expert evidence of result—The Industrial Commission did not err in a workers' compensation case by concluding that the 29-year-old plaintiff's employment did not increase the dangerous effect of his idiopathic cardiac condition, which led to a brain injury before he could be revived. Plaintiff pointed to a delay in calling 911 due to difficulty in finding a working telephone, but presented no expert evidence that the delay caused plaintiff to suffer more severe brain damage. **Holloway v. Tyson Foods, Inc., 542.**

Compensability—estoppel—remand for findings and conclusions—The Industrial Commission erred in a workers' compensation case by failing to make any findings on whether a former workers' compensation insurer for defendant employer was estopped from denying the compensability of plaintiff's occupational disease claim, and the case is remanded to the Commission for further proceedings and to make findings of fact and conclusions of law regarding this issue. **Mann v. Technibilt, Inc., 193.**

Denial of attorney fees—failure to show manifest abuse of discretion—The Industrial Commission did not err in a workers' compensation case by failing to award attorney fees to plaintiff because plaintiff did not show a manifest abuse of discretion by the Commission. **Sprinkle v. Lilly Indus., Inc., 694.**

Interest—medical compensation—The Industrial Commission did not err in a workers' compensation case by awarding interest only on plaintiff's out-of-pocket expenditures related to his medical compensation and on such other medical costs as have been personally paid for by plaintiff, and by denying plaintiff's request for interest on medical expenses paid for by his and his wife's third-party health insurance plans. **Sprinkle v. Lilly Indus., Inc., 694.**

Motion to compel discovery—medical compensation—relevancy—The Industrial Commission did not err in a workers' compensation case by denying plaintiff's motion to compel discovery of amounts of medical compensation paid by defendant carrier to plaintiff's third-party health insurer because the information was not relevant and plaintiff was not entitled to interest on those amounts. **Sprinkle v. Lilly Indus., Inc., 694.**

Occupational disease—last injurious exposure—liability of second insurer—Competent evidence supported the Industrial Commission's findings and conclusions that plaintiff employee's last injurious exposure to the conditions of her employment that augmented or worsened her occupational disease (bilateral carpal tunnel syndrome) occurred after the date a second workers' compensation insurer came on the risk for the employer so that the second insurer was liable for compensation for plaintiff's occupational disease. **Mann v. Technibilt, Inc., 193.**

Outstanding medical expenses—sufficiency of findings of fact—The Industrial Commission did not err in a workers' compensation case by its finding of fact that there were no outstanding medical expenses because: (1) the only outstanding medical expenses the Commission needed to consider were those plaintiff was responsible for paying; and (2) plaintiff's testimony that he did not have any outstanding medical bills was competent evidence to support this finding. **Sprinkle v. Lilly Indus., Inc., 694.**

Short-term disability benefits—improper reduction in employer's credit to pay employee's attorney fees—The full Industrial Commission abused its

ZONING—Continued

of Appropriateness by a Historic Preservation Commission. The denial of a zoning certificate was not an issue before the trial court, and the zoning administrator and the Board of Adjustment were not parties to the current action. **Meares v. Town of Beaufort, 49.**

Change—standard of review—The trial court used the wrong standard of review when concluding that a town council's legislative actions in rezoning property were arbitrary and capricious. **Carroll v. City of Kings Mountain, 165.**

Historic district—application for building—automatic approval without action—informal communication—not an action—The trial court properly ruled that an application for a Certificate of Appropriateness for building in a historic district was approved by operation of law where the application was automatically approved if no action was taken in 60 days. Although defendants argue that the Historic Preservation Commission (HPC) acted when the town attorney informed plaintiff that the Commission would not act on this application while an earlier application was pending, there was no formal denial and the attorney's communication does not qualify as action by the HPC. **Meares v. Town of Beaufort, 49.**

Historic district—application for building—petition in Superior Court—continuing jurisdiction of Commission—A Historic Preservation Commission was not divested of jurisdiction to address an application for a Certificate of Appropriateness to build in a historic area by the filing of a petition seeking a writ of mandamus. The issuance of a writ of mandamus is an exercise of original and not appellate jurisdiction. **Meares v. Town of Beaufort, 49.**

Historic district—building—mandamus—exhaustion of administrative remedies—The trial court did not lack jurisdiction to address a petition for a writ of mandamus concerning a permit to build in a historic district where plaintiff had allegedly failed to exhaust his administrative remedies. The Historic Preservation Commission did not render a decision from which plaintiff could appeal and the petition for a writ of mandamus sought to compel consideration of the application. **Meares v. Town of Beaufort, 49.**

Historic district—certificate allowing building—multiple applications—The trial court did not err by issuing a writ of mandamus compelling a Historic Preservation Commission to issue a Certificate of Appropriateness (COA) for a building where the application in question was plaintiff's second for the same property and defendants contended that public policy precludes processing multiple applications for the same site. Defendants provided no basis for determining that public policy grants the Commission the authority to refuse to process or consider an application for a COA. **Meares v. Town of Beaufort, 49.**

Historic district—certificate for building—independent from zoning certificate—The trial court did not usurp the authority of the town's zoning administrator by ordering the issuance of a Certificate of Appropriateness for building in a historic district. The issuance of a COA by the Historic Preservation Commission and the issuance of a zoning certificate are independent functions. **Meares v. Town of Beaufort, 49.**

Historic preservation—application to build—subsequent application—jurisdiction to consider—The first application to a Historic Preservation Com-

WORD AND PHRASE INDEX