NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES REPORTED

JUDICIAL STANDARDS COMMISSION ADVISORY OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARY JANE STRICKLAND AND STEVEN RANDALL STRICKLAND, PLAINTIFFS v. GREGORY K. HEDRICK; CITY OF LEXINGTON; LARRY RITZ; MICHAEL NOYES, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; SHELLY GUTIERREZ, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; BOBBY WELCH, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; CHIEF JOHN LOLLIS, IN HIS OFFICIAL CAPACITY; AND TABITHA ROBERTSON, DEFENDANTS

No. COA08-339

(Filed 2 December 2008)

1. Conspiracy; Malicious Prosecution— police officers— motion for summary judgment—good faith—governmental immunity—failure to offer evidence of corruption or malice—vicarious liability

The trial court did not err by granting the motion by defendant police officers, city and police chief for summary judgment on plaintiffs' claims of conspiracy and malicious prosecution because: (1) both defendant police officers produced evidence establishing their good faith and that they are entitled to the affirmative defense of governmental immunity; (2) although plaintiffs dismiss defendants' evidence an attempt to use their self-serving testimony to establish a lack of malice or corrupt motive, plaintiffs cite no authority for the proposition that a party may not rely on his sworn testimony regarding an issue; (3) plaintiffs' deposition testimony largely corroborated that of defendants; and plaintiffs proffered no evidence of actions by these officers outside the scope of their employment, no evidence of corruption,

and no evidence supporting their contention that the warrants were issued upon false statement; (4) plaintiffs failed to rebut either the presumption that these law enforcement officers acted in good faith or the evidence that defendants presented; (5) plaintiffs failed to offer any evidence of corruption or malice by the police chief or the city, and the claims against these defendants are based on vicarious liability for the torts of the other officers; (6) the law enforcement officers' discretionary decision to not resolve all the factual details regarding the sequence of events before issuing a warrant was not evidence of malicious prosecution; and (7) unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings.

2. Malicious Prosecution; Police Officers— governmental immunity—probable cause for arrest

Municipal defendants were entitled to summary judgment on the claim of malicious prosecution based on the defense of governmental immunity and also on the separate basis that plaintiffs cannot prove the absence of probable cause for their arrests, which is an essential element of a malicious prosecution claim, when plaintiffs' own complaint was sufficient to charge plaintiffs with second degree trespass and felonious breaking or entering and larceny, even though those charges were ultimately dismissed.

3. Conspiracy— malicious prosecution—motion for summary judgment

Municipal defendants were entitled to summary judgment on the claim of conspiracy because even if the claim is construed as alleging conspiracy to commit malicious prosecution, it is subject to dismissal since defendants were entitled to summary judgment on the claim of malicious prosecution.

4. Conspiracy; Malicious Prosecution— civil conspiracy—motion to dismiss—probable cause—failure to allege agreement—improper legal standard

The trial court did not err by granting the motion by defendant purchaser of plaintiffs' sign business for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of malicious prosecution and civil conspiracy claims because: (1) when ruling on a motion to dismiss under Rule 12(b)(6), the trial court considers only the plead-

ings, and plaintiffs' argument that defendant was deeply involved in knowingly bringing false charges against plaintiffs was based on evidence outside the pleadings; (2) the allegations of plaintiffs' complaint revealed that they could not prove the lack of probable cause, and the complaint did not state any claims against defendant individually; (3) generalized allegations that defendant landlord acted with one or more other defendants was not sufficient to state a claim against defendant purchaser; (4) the allegations of plaintiffs' complaint generally establish the existence of probable cause to charge plaintiffs with second degree trespass and felonious breaking or entering and larceny; (5) in regard to the civil conspiracy claim, plaintiffs' complaint does not allege an agreement between defendant and anyone else, and plaintiffs failed to allege there was an agreement among defendants; and (6) assuming arguendo that the trial court used an improper legal standard, the trial court is not required on this basis alone to determine that the ruling was erroneous.

5. Conspiracy; Malicious Prosecution— malicious prosecution—motion for summary judgment—sufficiency of evidence

The trial court did not err by granting defendant landlord's summary judgment motion even though plaintiffs contend there were genuine issues of material fact regarding the claims of conspiracy and malicious prosecution because: (1) the lease corroborated the landlord's testimony that he did not lease any part of the pertinent warehouse to plaintiffs, and that their brief discussion about the warehouse in July 2002 did not result in any modification of the terms of the lease; (2) plaintiffs did not produce a signed modification of the lease, an amended lease, or any documentation supporting their claim of a leasehold over the warehouse; (3) the landlord's testimony established that plaintiffs defaulted on the obligation to pay monthly rent, unilaterally transferred the lease without permission effective 1 August 2002, and had not removed their personal belongings from the building by 29 August 2002; (4) the act of giving honest assistance and information to prosecuting authorities does not render one liable for malicious prosecution; and (5) plaintiffs produced no evidence that the landlord asked the police to arrest plaintiffs, gave a sworn statement in the case, spoke with the district attorney, filed an official complaint, or otherwise acted to initiate charges against plaintiffs.

6. Appeal and Error— preservation of issues—failure to appeal from order—failure to allege in complaint—failure to proffer evidence

Plaintiffs' assignments of error that the trial court erred by granting summary judgment in favor of defendant landlord on the claims of unfair or deceptive trade practices and conversion were not before the appellate court because: (1) plaintiffs' conversion and abuse of process claims against the landlord were dismissed on 19 June 2006, and plaintiffs did not appeal from this order; (2) in regard to the unfair or deceptive trade practices claim, although plaintiffs asserted the landlord charged an exorbitant rent, plaintiffs neither alleged it in their complaint nor produced any evidence on this issue, and plaintiffs cannot rely on the allegations in their complaint to defeat a properly supported summary judgment motion; and (3) plaintiffs failed to proffer evidence of the landlord's alleged false allegations of trespass and theft against plaintiffs.

7. Appeal and Error— appealability—failure to timely file notice of appeal—failure to file petition seeking certiorari

Plaintiffs' appeal from the 22 May 2006 dismissal of their claims against the municipal defendants under 42 U.S.C. § 1983 for violation of their constitutional rights was not properly before the Court of Appeals because: (1) plaintiffs failed to timely file notice of appeal and have not filed a petition seeking certiorari; and (2) the jurisdictional requirements of N.C. R. App. P. 3(d) may not be waived by the Court of Appeals even under its discretion granted by N.C. R. App. P. 2.

Appeal by Plaintiffs from Orders entered 22 May 2006 and 31 May 2006 by Judge Ronald E. Spivey; and appeal by Plaintiffs and Defendants from Order entered 16 November 2007 by Judge Steve A. Balog, all orders entered in Forsyth County Superior Court. Heard in the Court of Appeals 23 September 2008.

Robertson, Medlin & Blocker, PLLC, by Jonathan Wall, for Plaintiff-Appellants/Appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Allan R. Gitter, Jack M. Strauch, Bradley O. Wood, and Carol B. Templeton, for Defendant-Appellants City of Lexington, Michael Noyes, Shelly Gutiererrez, and John Lollis.

Frazier, Hill & Fury, RLLP, by William L. Hill, Torin L. Fury, and James Secor, III, for Defendant-Appellee Gregory Hedrick.

ARROWOOD, Judge.

This appeal arises from a complaint filed by Plaintiffs in Forsyth County, North Carolina, in response to criminal charges brought against them in Davidson County. The factual background of Plaintiffs' claims is summarized as follows: In 2002 Plaintiffs (Mary Jane Strickland and her son, Steven Strickland), operated a sign business at 218 Anna Lewis Drive, Lexington, North Carolina, in a commercial space rented from Dr. Gregory Hedrick beginning on 1 January 2002. Plaintiffs concede that by July 2002 they were delinquent on their rent payments, although the parties disagree about the amount of Plaintiffs' debt. In addition to leasing Plaintiffs a commercial office, Hedrick allowed them to leave personal possessions in part of a separate warehouse on the same property; a medical practice used the rest of the warehouse space as a separately enclosed medical records storage facility.

In August 2002 Plaintiffs sold the sign business to Larry Ritz, who assumed the lease obligation on 1 August 2002 and took possession of the property on 15 August 2002. Thereafter, conflicts arose among the parties. On 29 August 2002 Ritz reported to the police that Plaintiffs had stolen computer software included in the sale of the business. Also on 29 August 2002, Plaintiffs learned that Hedrick had changed the locks to the warehouse area. On 30 August 2002 Plaintiffs tried to get into the warehouse, but Hedrick refused them access, asked for payment of the money Plaintiffs owed him, and called the police. Several Lexington law enforcement officers arrived at the warehouse, including Officer Michael Noyes. In Noyes's presence, Hedrick and Ritz accused Plaintiffs of stealing Ritz's computer software. The officers looked in the warehouse for this software, but did not find it.

Plaintiffs assert that during their interaction at the warehouse on 30 August, Noyes addressed them in an abusive manner and appeared to favor Hedrick in the parties' dispute. Noyes denied this in his deposition testimony, stating that he told Plaintiffs to leave or face trespassing charges, but did not raise his voice or speak rudely to Plaintiffs. The parties agree that Noyes' only personal contact with Plaintiffs was on 30 August 2002, and that no charges were filed that night.

On 14 September 2002 Plaintiffs returned to 218 Anna Lewis Drive and entered the warehouse through the medical records office, ignoring the protests of its employees. Plaintiffs stayed for about five minutes and removed several boxes of items. This incident was reported to the police. On 20 September 2002 Hedrick reported that Plaintiffs had broken into the warehouse again that day, and that Plaintiffs had taken Ritz's computer software. Police officers questioned Plaintiffs about this on 20 September 2002, and warned them to stay away from the property at 218 Anna Lewis Drive.

On 24 September 2002, a Davidson County magistrate issued warrants for Plaintiffs' arrest, based upon information provided by Officer Shelley Gutierrez. Plaintiffs were charged with felony breaking or entering of the warehouse on 14 September 2002, felony larceny from the building, and 2nd degree trespass, also on 14 September 2002. In February 2003 Plaintiffs were tried in Davidson County District Court on the charges of 2nd Degree Trespass. On 11 February 2003 Plaintiffs were found not guilty of 2nd Degree Trespass, and the District Attorney voluntarily dismissed the felony charges.

On 10 February 2006 Plaintiffs filed suit against Defendants Larry Ritz; Dr. Gregory Hedrick; Tabitha Robertson; the City of Lexington; Lexington Police Chief John Lollis; and Lexington Police Officers Shelley Gutierrez, Michael Noyes, and Bobby Welch. Noyes, Gutierrez, and Welch were sued in their official and individual capacities. Plaintiffs brought claims of civil conspiracy and malicious prosecution against all Defendants; claims of abuse of process against Hedrick and Ritz; claims of conversion and unfair or deceptive trade practices against Hedrick; and a claim against the police officers under 42 U.S.C. § 1983, for violation of their U.S. Constitutional rights.

The complaint generally asserted that the Defendants had conspired to knowingly provide false testimony in support of "bogus warrants" charging Plaintiffs with criminal offenses. Plaintiffs alleged that Defendants acted maliciously or recklessly and had continued to prosecute Plaintiffs "after it became apparent the claims were bogus[.]" The complaint also asserted that Hedricks acted with the collateral purpose of collecting the debt owed him. Plaintiffs sought compensatory and punitive damages.

On 14 March 2006 Defendants City of Lexington, and Officers Lollis, Noyes, Gutierrez, and Welch (the municipal Defendants), filed

a motion under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007), seeking dismissal of Plaintiffs' claims, on the grounds that the claims were barred by the applicable statute of limitations and otherwise failed to state a claim for relief. On 22 May 2006 Judge Ronald Spivey ruled on their motion in an order stating in pertinent part:

1. Count I of plaintiffs' Complaint, . . . for civil conspiracy, is not barred by the statute of limitations and otherwise states a claim . . . [against] Noyes, Gutierrez and Welch[.] . . . [The] motion to dismiss . . . is DENIED;

2. Count II of plaintiffs' Complaint, . . . for malicious prosecution, states a claim . . . against the moving defendants[.] . . . [The] motion to dismiss as to Count II is DENIED;

3. Count III of plaintiffs' Complaint . . . for abuse of process, is barred by the applicable statute of limitations[.] . . . [These] claims . . . [are] DISMISSED WITH PREJUDICE;

. . . .

5. Count VI of plaintiffs' Complaint . . . pursuant to 42 § U.S.C. 1983, is barred by the applicable statute of limitations, and, with respect to defendants City of Lexington and John Lollis, is also barred [by] the lack of any allegations in plaintiffs' Complaint that . . . deprivation of plaintiffs' rights . . . occurred pursuant to any policy or custom of defendants City of Lexington or John Lollis[.] . . . [Plaintiffs' claims under § 1983] are hereby DISMISSED WITH PREJUDICE[.]

On 10 April 2006 Ritz moved to dismiss Plaintiffs' claims against him, under Rule 12(b)(6). Judge Spivey granted Ritz's motion on 31 May 2006, dismissing all of Plaintiffs' claims against Ritz.

The 22 May 2006 order denied the municipal Defendants' motion for dismissal of Plaintiffs' claims for malicious prosecution and civil conspiracy. Defendants answered on 12 June 2006, denying the material allegations of Plaintiffs' complaint and raising various defenses. On 22 June 2006 Plaintiffs filed a notice of appeal from the orders of 22 May and 31 May 2006. The municipal Defendants moved to dismiss Plaintiffs' appeal from the 22 May 2006 order. Judge L. Todd Burke granted their motion on 15 September 2006, dismissing Plaintiffs' appeal of the 22 May 2006 order as untimely. On 15 December 2006 Plaintiffs withdrew their remaining appeal, from the 31 May 2006 order.

On 10 October 2007 the municipal Defendants filed a motion on behalf of Officers Lollis, Noyes, Gutierrez, and Welch in their official capacities, seeking summary judgment on Plaintiffs' claims of malicious prosecution and civil conspiracy. Defendants asserted that the claims were barred by governmental immunity. On 20 October 2007 the municipal Defendants filed a second summary judgment motion, this time seeking summary judgment for these Defendants in both their individual and official capacities. Defendants asserted that Plaintiffs had produced no evidence to support their claims, and reiterated that Defendants were entitled to governmental immunity.

On 17 April 2006 Hedrick answered Plaintiffs' complaint, denying its material allegations, asserting various defenses, and seeking dismissal of the claims against him. On 19 June 2006 Judge Richard W. Stone entered an order granting Hedrick's motion for dismissal of Plaintiffs' claims of conversion and abuse of process, but denying his motion for dismissal of the claims of civil conspiracy, malicious prosecution, and unfair or deceptive trade practices. On 30 October 2007 Hedrick filed a motion for summary judgment on the three remaining claims.

On 16 November 2007 Judge Steve A. Balog entered an order granting Hedrick's summary judgment motion and denying the municipal Defendants' summary judgment motions. The municipal Defendants have appealed from the denial of their summary judgment motions. The Plaintiffs appeal from: the part of the 22 May 2006 order dismissing Plaintiffs' claims under 42 U.S.C. § 1983; the 31 May 2006 order granting Ritz's motion for dismissal under Rule 12(b)(6), and; the 16 November 2007 order granting summary judgment for Hedrick.

Scope of Appeal

Preliminarily, we note that Robertson did not file an answer, and on 24 September 2007 Plaintiffs obtained an entry of default against her. On 13 November 2007 Plaintiffs voluntarily dismissed all claims against Welch. Neither Welch nor Robertson are parties to this appeal. Further, Plaintiffs did not appeal from the dismissal of their claims for abuse of process or conversion.

Appeal of Municipal Defendants

[1] Defendants City of Lexington, Police Chief Lollis, and Police Officers Noyes and Gutierrez, appeal the trial court's denial of their

motion for summary judgment on Plaintiffs' claims of conspiracy and malicious prosecution. They argue that Defendants Lollis, Noyes, and Gutierrez enjoy "quasi-judicial immunity and/or public official's immunity" and that "Plaintiffs have failed to forecast evidence of essential elements of their claims." We agree.

Summary judgment is properly granted 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).

The movant "bears the initial burden of demonstrating the absence of a genuine issue of material fact[,]" *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 123 (2002), and may meet its burden of proof "by (1) proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party (2) cannot produce evidence to support an essential element of his or her claim, or (3) cannot surmount an affirmative defense which would bar the claim." *Bernick v. Jurden*, 306 N.C. 435, 440-41, 293 S.E.2d 405, 409 (1982) (citation omitted).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (citations omitted). However, N.C. Gen. Stat. § 1A-1, Rule 56(e) provides in relevant part that:

> Supporting 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. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . .

"A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be

admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (citations omitted).

Defendants assert the affirmative defense of governmental immunity. "An affirmative defense is a defense that introduces a new matter in an attempt to avoid a claim, regardless of whether the allegations of the claim are true." *Williams v. Pee Dee Electric Membership Corp.*, 130 N.C. App. 298, 301-02, 502 S.E.2d 645, 647-48 (1998). "[A]s a complete bar to liability, governmental immunity constitutes an affirmative defense." *Clayton v. Branson*, 170 N.C. App. 438, 449, 613 S.E.2d 259, 268 (2005) (citations omitted).

"Under the doctrine of governmental immunity, a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function." *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993) (citations omitted). "Police officers . . . are public officials. As public officials, they share defendant City of [Lexington's] governmental immunity from liability for 'mere negligence' in performing governmental duties, but are not shielded from liability if their alleged actions were corrupt or malicious or if they acted outside of and beyond the scope of their duties." *Shuping v. Barber*, 89 N.C. App. 242, 248, 365 S.E.2d 712, 716 (1988) (citations omitted).

Accordingly, "a public official engaged in the performance of governmental duties involving the exercise of judgment and discretion may not be held personally liable . . . unless it be alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties." *Andrews v. Crump*, 144 N.C. App. 68, 76, 547 S.E.2d 117, 123 (2001). "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *In Re Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890-91 (1984) (citations omitted).

"It is well settled that absent evidence to the contrary, it will always be presumed 'that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.' This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence." *Leete v. County of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995) (quot-

ing *Huntley v. Potter*, 255 N.C. 619, 628, 122 S.E.2d 681, 687 (1961); and citing *Painter v. Board of Education*, 288 N.C. 165, 178, 217 S.E.2d 650, 658 (1975)). Moreover, "[e]vidence offered to meet or rebut the presumption of good faith must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise." *Dobson v. Harris*, 352 N.C. 77, 85, 530 S.E.2d 829, 836 (2000).

In the instant case, evidence before the trial court included affidavits and the deposition testimony of the Plaintiffs; Officers Noyes, Gutierrez, and Egelnick; Ritz and his employee Robertson; and Hedrick. As pertinent to the issue of governmental immunity, this evidence included the following:

Noyes testified that on 29 August 2002 Ritz reported that his computer software had been stolen. On 30 August 2002, while on duty as a Lexington Police Officer, he was summoned to the commercial property at 218 Anna Lewis Drive. When he arrived, Officer Egelnick and Hedrick were "discussing items being missing." Hedrick was refusing to allow Plaintiffs into the warehouse, and wanted Plaintiffs to return Ritz's software and to pay him the back rent they owed. Noyes told the Plaintiffs to leave the premises and warned that they would face trespass charges if they returned. While Noyes was at the warehouse, Ritz arrived and told the officers that computer software had been taken from the sign business office.

Noyes testified that Hedrick never asked him to file false charges or to provide false testimony, and described Hedrick as an acquaintance with whom he had no business dealings. He denied using abusive, inappropriate, or threatening language towards Plaintiffs. Noyes testified that he did not draw up the warrants, was not notified when the case was in court, and was not subpoenaed to testify. His participation in the case was limited to his presence at the warehouse on 30 August, interviews with witnesses, and discussion with Gutierrez. Noyes instructed Gutierrez that if Plaintiffs continued to return to the property after being told to stay away, that he should issue arrest warrants. He testified that Gutierrez issued warrants on the basis of information provided by several law enforcement officers.

Ritz testified that in August 2002 he purchased Plaintiffs' sign business. He did not rent the warehouse space or have a key to the warehouse door. Although he assumed the lease on 1 August 2002 and took possession of the sign business on 15 August 2002, Plaintiffs

kept a key for a few weeks after that. The sale included computers and equipment associated with the business, and specifically included a box of discs and computer software. This box of software disappeared the same weekend that Plaintiffs moved their belongings out of the sign shop. Ritz testified that Plaintiffs took the software and discs, removed certain programs from the computers, and removed the business records from the sign business. After the software disappeared, Ritz reported the missing discs to police and also spoke with Robertson, Hedrick, and the District Attorney about the missing software.

On the night of 30 August 2002 Ritz was driving past the building, saw police lights in the warehouse area, and stopped to investigate. Hedrick and Plaintiffs were at the back entrance to the warehouse, arguing about Plaintiffs' access to the warehouse and their debt to Hedrick. When Ritz testified at Plaintiffs' trespassing trial, the trial court did not allow him to testify about the missing software, ruling that the missing software was a civil matter. Ritz strongly denied the material allegations of Plaintiffs' complaint, calling each of them "a lie."

Officer Gutierrez testified that in September 2002 he was employed by the Lexington Police Department. While on duty, he received phone calls from Robertson and from Ritz reporting the theft of Ritz's software. Gutierrez, who was assigned to investigate the case, learned from others that the Plaintiffs had "continuously stalked" the employees of the medical practice that stored patient files in the warehouse, and that on at least one occasion Plaintiffs had "forcibly entered" the warehouse through the medical records area, despite being told to stay away. Gutierrez took a statement from Robertson and interviewed Vickie Clodfelter, an employee of the medical practice, who reported that on 14 September Plaintiffs barged into the warehouse and removed items. Officer Noyes told Gutierrez that during the 30 August 2002 incident at the warehouse he warned Plaintiffs they would face trespassing charges if they returned, and directed Gutierrez to issue arrest warrants if Plaintiffs continued to trespass at 218 Anna Lewis Drive. Gutierrez testified further that in September 2002 the police received complaints that Plaintiffs were "stalking" tenants of 218 Anna Lewis Drive. On 24 September 2002 Gutierrez presented this information to a magistrate, who issued warrants for Plaintiffs' arrest. Gutierrez did not serve the warrants and had no further involvement with the criminal proceedings.

In her deposition, Robertson testified that she had worked at the sign shop, first for Plaintiffs and then for Ritz. The missing software had been in a box in the commercial shop area. After the 30 August incident, Plaintiffs began following her and watching the business from across the road. She reported Plaintiffs' behavior to police at least once. On both 14 September and 20 September 2002 employees of the medical practice told Robertson that Plaintiffs had broken into the warehouse. Robertson denied the material allegations of the complaint, testifying that she had not been asked to provide false testimony, had not done so, and never conspired or agreed with others to offer false testimony.

We conclude that both Gutierrez and Noyes produced evidence establishing their good faith. To review, Gutierrez testified that he issued warrants on the basis of information that (1) Ritz had reported the theft of computer software; (2) Robertson had reported a breaking or entering and larceny from the warehouse or commercial area; (3) Noyes had previously warned Plaintiffs that they faced trespassing charges if they returned to the property; (4) nurses employed by the medical practice reported that the Plaintiffs had forcefully entered the warehouse on 14 September 2002, refused to leave when asked, and removed items from the building, (5) Plaintiffs were observed following or "stalking" employees of 218 Anna Lewis Road, and; (6) Plaintiffs were seen parked across the road watching the warehouse and commercial building.

Gutierrez testified that he had never met the Plaintiffs, had no personal relationship with Hedrick, and had never discussed the case with Hedrick. Regarding Noyes, the undisputed evidence showed that Noyes had no previous history of conflict with the Plaintiffs, and that his personal interaction with them was confined to the 30 August 2002 warehouse incident and an alleged conversation with Ms. Strickland later that evening. Noyes' involvement after 30 August 2002 was limited to routine police procedures, such as discussing the case with Gutierrez and conducting a few interviews. Neither Noyes nor Gutierrez participated in Plaintiffs' arrest, neither one testified in court, and each testified that he was not even notified when Plaintiffs were tried for trespass in district court.

Moreover, Noyes and Gutierrez both offered sworn testimony that their actions were taken in good faith, and strongly denied any conspiracy, use of false testimony, or other improper actions. Defendants Noyes, Gutierrez, Robertson, Ritz, and Hedrick each

denied unequivocally being asked by Hedrick or anyone else to provide "false testimony"; denied conspiring or agreeing to bring false claims against Plaintiffs, and denied making any false statements to law enforcement officers or others about this matter.

Plaintiffs dismiss Defendants' evidence as an "attempt to use [their] self-serving testimony to establish a lack of malice or corrupt motive[.]" However, Plaintiffs cite no authority for the proposition that a party may not rely on his sworn testimony regarding an issue. *See*, *e.g.*, *Middleton v. Myers*, 299 N.C. 42, 46, 261 S.E.2d 108, 111 (1980) (affirming entry of summary judgment on malicious prosecution where defendant's "affidavit averred that the prosecution of the plaintiff was instigated in good faith . . . and the plaintiff failed to present counter-affidavits or other evidence creating factual issues"). We conclude that these Defendants bolstered the presumption of good faith with evidence and are entitled to the affirmative defense of governmental immunity on Plaintiffs' claims against them.

"An adequately supported motion for summary judgment triggers the opposing party's responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate he will be able to sustain his claim at trial." *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981) (citations omitted). The Plaintiffs failed to produce such evidence.

Plaintiffs' deposition testimony largely corroborated that of the Defendants. Mary Jane Strickland testified that she rented space from Hedrick in 2002 to operate a sign business, and that Plaintiffs stored items in a warehouse on the premises. In August 2002 Plaintiffs owed Hedrick money for back rent. They sold the business to Ritz effective 1 August 2002, including everything at the sign shop except Plaintiffs' personal items. Ms. Strickland admitted that on 29 August 2002 Hedrick told Plaintiffs he had changed the lock to the warehouse, and that when they returned the next night Hedrick would not let them into the warehouse and called the police. When the law enforcement officers arrived, Hedrick told Noyes that Plaintiffs had stolen $30,000 worth of software from Ritz, and that he had locked them out of the warehouse for not paying rent. In Noyes' presence, Ritz also accused Plaintiffs of stealing his software.

Ms. Strickland further conceded that Plaintiffs did not have permission to be on the premises after 30 August 2002, and that when she and her son entered the warehouse area on 14 September 2002, the medical office employees "screamed" at them to leave. She admit-

ted having no "concrete evidence" of a conspiracy, and no "concrete evidence" against Robertson, Welch, Noyes, Lollis, or Gutierrez. Ms. Strickland agreed that Plaintiffs had no dealings with Noyes after 30 August 2002 and that she had no evidence that the police "knew" the charges were false. Regarding Hedrick, Ms. Strickland agreed that Plaintiffs were commercial tenants, that Hedrick told them to leave on 30 August 2002, and that she "assumed he didn't want us in there" after that date. She had no evidence about conversations Hedrick may have had with others. After the 30th, Ms. Strickland never contacted Hedrick about the money they owed him.

Plaintiff Steven Strickland testified that on 29 August 2002 Hedrick told them the warehouse keys were changed. On 30 August Hedrick would not let them enter the warehouse, called the police, and in Noyes' presence accused Plaintiffs of stealing Ritz's software worth $30,000. He conceded that when he entered the warehouse on 14 September, an employee "started shouting and screaming" for them to leave, but that they stayed for about five minutes and removed some personal items. Steven Strickland testified that their only evidence against Gutierrez was that his name was on the warrant. When questioned by defense counsel, Steven Strickland could not identify any evidence of a conspiracy. Plaintiffs both testified that on 20 September they were questioned by law enforcement officers, who told them that Hedrick had reported a break in at the sign shop, and was angry at them for returning to the warehouse on 14 September.

Plaintiffs proffered no evidence of actions by these officers outside the scope of their employment, no evidence of corruption, and no evidence supporting their contention that the warrants were issued upon false testimony. Their sole example of impropriety is an allegation that Noyes was vulgar and hostile towards them on 30 August 2002. Noyes did not sign or issue the warrants, did not arrest Plaintiffs, and did not attend the trial. Indeed, Noyes never saw the Plaintiffs after 30 August 2002. No factual evidence contradicts Noyes' testimony denying all the pertinent allegations of Plaintiffs' complaint. However, Plaintiffs assert that when Noyes came to the warehouse on 30 August 2002, he urged Hedrick to demand the full amount Plaintiffs owed him, warned Plaintiffs that they would face jail if they did not pay Hedrick, and compared Plaintiffs to "a bag of dog poop." This contention, even if true, would tend to show that Noyes used inappropriate language, but does not constitute legal malice. We conclude that Plaintiffs failed to rebut either the presumption

that these law enforcement officers acted in good faith, or the evidence that Defendants presented. Therefore, Officers Noyes and Gutierrez were entitled to summary judgment.

Plaintiffs also failed to offer any evidence of corruption or malice by Officer Lollis or the City of Lexington; the claims against these Defendants are based on vicarious liability for the torts of the other officers. Our determination that Noyes and Gutierrez are entitled to summary judgment necessarily defeats Plaintiffs' claims of vicarious liability.

We have considered and rejected Plaintiffs' arguments to the contrary. Plaintiffs stress that the police received several different reports that Plaintiffs either trespassed at the warehouse, broke into the building, or stalked tenants of the building. They also note that law enforcement officers discussed the case, interviewed several people, and that their notes refer to Hedrick. However, Plaintiffs fail to articulate why this is not routine police procedure. Plaintiffs assert that the officers' search for the missing software on 30 August 2002 is proof that they "knew" the charges were false. To the contrary, if the software were stolen, it is reasonable that it would have been removed from the building. Plaintiffs direct our attention to inconsistencies in the break-in dates given to law enforcement officers by Hedrick, Ritz, Robertson, and the medical office employees. However, information received by law enforcement officers uniformly indicated that Plaintiffs returned to the commercial property several times after being told to stay away; that on at least one occasion Plaintiffs entered the warehouse and removed items; and that Ritz reported that Plaintiffs had stolen his computer software. In this context, law enforcement officers chose not to resolve all the factual details regarding the sequence of events before issuing warrants. This discretionary decision is not evidence of malicious prosecution.

Plaintiffs also attempt to rely on the assertions in their complaint. However, "Rule 56(e) clearly states that the unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings." *Lowe v. Bradford*, 305 N.C. 366, 370, 289 S.E.2d 363, 366 (1982).

[2] We conclude that Plaintiffs failed to offer evidence demonstrating a genuine issue of material fact on the issue of the municipal Defendants' entitlement to the defense of governmental immunity on

the claim of malicious prosecution. Accordingly, these Defendants were entitled to entry of summary judgment in their favor. We further conclude that the municipal Defendants were entitled to summary judgment on the separate basis that Plaintiffs cannot prove the absence of probable cause for their arrests, which is an essential element of a malicious prosecution claim.

"Plaintiff must establish four elements to support a malicious prosecution claim: (1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff." *Best v. Duke University*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994) (citations omitted). "The test for determining probable cause is 'whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge had no reasonable foundation.' " *Becker v. Pierce*, 168 N.C. App. 671, 677, 608 S.E.2d 825, 829-30 (2005) (quoting *Wilson v. Pearce*, 105 N.C. App. 107, 113-14, 412 S.E.2d 148, 151 (1992)) (internal citation omitted). "The critical time for determining whether or not probable cause existed is when the prosecution begins." *Hill v. Winn-Dixie Charlotte, Inc.*, 100 N.C. App. 518, 521, 397 S.E.2d 347, 349 (1990) (citing *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 318, 317 S.E.2d 17, 19 (1984)).

In the instant case, undisputed evidence establishes that:

1. In 2002 Ms. Strickland and Hedrick executed a commercial lease under which Plaintiffs rented space in a commercial building from Hedrick. In August 2002 Plaintiffs were delinquent in their rent payments and owed Hedrick money.

2. During the time Plaintiffs were renting from Hedrick, they left personal items in part of a warehouse on the property. A medical practice used the rest of the warehouse area as a medical records storage facility.

3. Plaintiffs sold their sign business to Ritz in August 2002. He assumed the lease effective 1 August 2002 and took possession 15 August 2002.

4. On 29 August 2002 Hedrick told Plaintiffs he had changed the locks on the warehouse. On 30 August 2002 Plaintiffs tried to get in the warehouse, but Hedrick refused to allow them access and called the police. Officer Noyes was among the officers who came to the warehouse.

5. On 29 August 2002 Ritz reported to the police that Plaintiffs had stolen software. On 30 August 2002 Hedrick accused Plaintiffs, in Noyes' presence, of stealing Ritz's computer software.

6. On 14 September 2002 Plaintiffs drove to the property and entered the warehouse through the medical records storage area. Employees of the medical practice told them to leave, but Plaintiffs remained about five minutes and removed items from the building.

7. On 20 September 2002 law enforcement officers told Plaintiffs that Hedrick had reported a break in at the commercial or warehouse space that day, and that Hedrick knew Plaintiffs had entered the warehouse on 14 September.

8. Warrants were issued after the police received several reports that Plaintiffs broke into the warehouse, had stolen software, and had trespassed on the property.

" 'Probable cause' . . . 'refers to the existence of a reasonable suspicion in the mind of a prudent person, considering the facts and circumstances presently known.' Thus, to establish probable cause, 'the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith.' " *State v. Bullin*, 150 N.C. App. 631, 638, 564 S.E.2d 576, 582 (2002) (quoting *State v. Sturdivant*, 304 N.C. 293, 298, 283 S.E.2d 719, 724 (1981); and *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973)).

The uncontradicted evidence is sufficient to show that the warrants were issued upon probable cause. Moreover, even without the affidavits and deposition evidence, the allegations of Plaintiffs' own complaint are sufficient to charge Plaintiffs with 2nd degree trespass and felonious breaking or entering and larceny.

The existence of probable cause is not negated by the fact that the charges were ultimately dismissed. "[T]he acquittal of a defendant by a court of competent jurisdiction does not make out a *prima facie* case of want of probable cause." *Hawkins v. Hawkins*, 32 N.C. App. 158, 161, 231 S.E.2d 174, 175 (1977) (citing *Carson v. Doggett*, 231 N.C. 629, 58 S.E.2d 609 (1950)). We conclude that there was no issue of material fact regarding the existence of probable cause for the arrest. Plaintiffs' failure to produce evidence on this issue is a separate basis for the Defendants' entitlement to summary judgment.

[3] Defendants also were entitled to summary judgment on the claim of conspiracy. "The elements of a civil conspiracy are: (1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Privette v. University of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989) (citations omitted).

Plaintiffs complaint states that the Defendants "conspired together to commit the unlawful acts of having Plaintiffs falsely arrested" and asserts that Defendants "knowingly provid[ed] false and misleading affidavits and other false information in order to secure the issuance of the bogus arrest warrants." If we interpret this to allege a conspiracy to provide false testimony in order to secure Plaintiffs' arrest, then Defendants are entitled to dismissal or entry of summary judgment on the grounds that this claim is not recognized in North Carolina. *See Hawkins v. Webster*, 78 N.C. App. 589, 592, 337 S.E.2d 682, 684 (1985) ("A civil action may not be maintained for a conspiracy to give false testimony."). "Perjury and subornation of perjury are criminal offenses[; however] . . . a civil action in tort cannot be maintained upon the ground that a defendant gave false testimony or procured other persons to give false or perjured testimony." *Brewer v. Carolina Coach*, 253 N.C. 257, 260, 116 S.E.2d 725, 727 (1960).

If we construe the claim as alleging conspiracy to commit malicious prosecution, it is still subject to dismissal. Because we conclude that Defendants are entitled to summary judgment on Plaintiffs' claim of malicious prosecution, the ancillary claim for conspiracy to commit malicious prosecution must also fail:

> It is well established that "there is not a separate civil action for civil conspiracy in North Carolina." . . . Plaintiff argues that civil conspiracy should attach to . . . plaintiff's claims for . . . [malicious prosecution]. As we have held that summary judgment for defendants on these claims was proper, plaintiff's claim for civil conspiracy must also fall.

Esposito v. Talbert & Bright, Inc., 181 N.C. App. 742, 747, 641 S.E.2d 695, 698 (2007) (quoting *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005)).

Because we conclude that the municipal Defendants are entitled to summary judgment, we do not reach their other arguments.

Plaintiffs' Appeal

[4] Plaintiffs argue first that the trial court erred by granting Ritz's motion for dismissal under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007). We disagree.

> In its order the court stated in pertinent part that:
>
> . . . [T]he Court finds that plaintiffs complaint fails to state a claim for relief against the Defendant LARRY RITZ.
>
> . . . Regarding Count I alleging Conspiracy, the Court . . . finds that the allegations set forth are insufficient to state a claim against Ritz . . . [and] claims based upon said acts are barred by the applicable statutes of limitation.
>
> Regarding Count II alleging Malicious Prosecution, . . . the Complaint alleges that defendant RITZ testified in Plaintiffs' favor at the criminal proceedings, which Plaintiffs allege were terminated in Plaintiffs' favor on February 11, 2003, and the Court finds, in its discretion, that the Complaint fails to state [a] claim of malicious prosecution . . . against Defendant RITZ.

"When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) (citation omitted). "A motion to dismiss pursuant to Rule 12(b)(6) should not be granted '*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' " *Isenhour v. Hutto*, 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999) (quoting *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970)).

However, "[t]o prevent a Rule 12(b)(6) dismissal, a party must . . . 'state enough to satisfy the substantive elements of at least some legally recognized claim.' " *Hewes v. Johnston*, 61 N.C. App. 603, 604, 301 S.E.2d 120, 121 (1983) (quoting *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 378, 265 S.E.2d 890, 909 (1980) (internal citation omitted)). Additionally, we "are 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)).

On appeal, Plaintiffs contend that "ample facts demonstrate Defendant Ritz's deep involvement in bringing knowingly false charges" against Plaintiffs. However, their argument is based on evidence outside the pleadings. In ruling on a motion for dismissal under Rule 12(b)(6), the trial court considers only the pleadings. N.C. Gen. Stat. § 1A-1, Rule 12(b) ("If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]"). *See also*, *e.g.*, *Peterkin v. Columbus County Bd. of Educ.*, 126 N.C. App. 826, 828, 486 S.E.2d 733, 735 (1997) ("only matters contained in the pleadings are considered in a 12(b)(6) motion to dismiss"). Accordingly, in our review we do not consider evidence outside the pleadings.

We first determine whether the allegations of Plaintiffs' complaint state a claim for malicious prosecution against Ritz. "To recover for malicious prosecution the plaintiff must show that defendant initiated the earlier proceeding, that he did so maliciously and without probable cause, and that the earlier proceeding terminated in plaintiff's favor." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979) (citations omitted).

As discussed above, the allegations of Plaintiffs' complaint admit that: (1) in August 2002 Plaintiffs owed Hedrick money for rent; (2) Plaintiffs sold their business to Ritz, who assumed the lease effective 1 August 2002; (3) Plaintiffs stored personal items in part of a warehouse on the same property as the commercial office they rented; (4) a medical practice used the rest of the warehouse area as a separately enclosed medical records storage facility; (5) on 29 August 2002 Hedrick told Plaintiffs he had changed the locks to the warehouse space and demanded the rent money Plaintiffs owed; (6) on 30 August 2002 Hedrick refused to allow Plaintiffs in the warehouse and called the police; (7) Noyes was among the officers who came to the warehouse, and in Noyes' presence, Hedrick and Ritz accused Plaintiffs of stealing Ritz's computer software; (8) on 14 September 2002 Plaintiffs entered the warehouse through the medical records storage area, remained about five minutes, and removed items from the building, and; (9) on 20 September 2002 law enforcement officers told Plaintiffs that Hedrick had reported that Plaintiffs broke into the sign shop and stole $30,000 worth of software, and that Hedrick was angry that Plaintiffs had been in the warehouse on 14 September.

We conclude that the allegations of Plaintiffs' complaint reveal that they cannot prove the lack of probable cause, which is an element of their claim for malicious prosecution. Moreover, Plaintiffs' complaint does not state any claims against Ritz individually. We reject Plaintiffs' contention that generalized allegations that Hedrick acted with "one or more" other defendants are sufficient to state a claim against Ritz. The allegations of Plaintiffs' complaint generally establish the existence of probable cause to charge Plaintiffs with 2nd degree trespass and felonious breaking or entering and larceny, and Plaintiffs allege no factual basis for a specific claim against Ritz. We conclude that Plaintiffs' allegations that "one or more" Defendants committed these torts is fails to state a claim against Ritz in particular, and that the trial court properly dismissed Plaintiffs' claim of malicious prosecution against Ritz.

We also conclude that the trial court properly dismissed Plaintiffs' claim against Ritz for civil conspiracy. We first note that Plaintiffs' complaint does not allege an agreement between Ritz and any other Defendant. " 'The existence of a conspiracy requires proof of an agreement between two or more persons.' . . . [Plaintiffs] failed to allege, however, that there was an agreement [among the Defendants]. . . . [T]he trial court properly dismissed plaintiff's claim for civil conspiracy." *Dove v. Harvey*, 168 N.C. App. 687, 690-91, 608 S.E.2d 798, 801 (2005) (quoting *Henderson v. LeBauer*, 101 N.C. App. 255, 261, 399 S.E.2d 142, 145 (1991)).

As discussed above, (1) North Carolina does not recognize a claim of conspiracy to commit perjury or to offer false testimony, and; (2) Plaintiffs' conspiracy claim cannot depend upon a malicious prosecution claim that was properly dismissed. We conclude that the trial court properly dismissed Plaintiffs' claims against Ritz for both malicious prosecution and civil conspiracy. We reject the Plaintiffs' argument that the court's order must be reversed because the trial court employed the phrase "in its discretion" in the order. "[Plaintiffs] insist[] . . . an improper legal standard was applied. Assuming arguendo that the trial court's reasoning . . . was incorrect, we are not required on this basis alone to determine that the ruling was erroneous. . . . The question for review is whether the ruling of the trial court was correct[.]" *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (citations omitted). This assignment of error is overruled.

[5] Plaintiffs next argue that the trial court erred by granting Defendant Hedrick's summary judgment motion, on the grounds that there are genuine issues of material fact regarding the claims of conspiracy, malicious prosecution, conversion, and unfair and deceptive trade practices. We disagree.

Hedrick offered an affidavit and sworn deposition testimony, summarized in pertinent part as follows: Hedrick owns the buildings at 218 Anna Lewis Drive, in Lexington, North Carolina. In 2002 he rented commercial space to Plaintiffs, beginning 1 January 2002. He allowed Plaintiffs to leave personal possessions in part of the warehouse area, but did not lease warehouse space to Plaintiffs. In July 2002 Strickland asked to rent the warehouse space, but Hedrick did not agree because she already owed several months back rent. When Ritz assumed the lease, Hedrick changed the warehouse locks.

After Plaintiffs sold their business to Ritz, they no longer held a lease to any part of Hedrick's property, and during August 2002 Hedrick told Plaintiffs several times to remove any personal possessions from the warehouse. When Plaintiffs failed to remove their possessions in a timely manner, Hedrick locked Plaintiffs out of the warehouse and refused to allow them back in unless they paid the money they owed him for rent. On 30 August 2002 Plaintiffs came to the warehouse and demanded access to the warehouse. Hedrick summoned the police, who told Plaintiffs to leave or face arrest for trespassing. Hedrick also told the Plaintiffs not to return. Ritz had told Hedrick that his computer software was missing.

In September 2002, an employee of the medical practice told Hedrick that Plaintiffs had barged into the warehouse on 14 September 2002, shoving her aside. He was also informed by a tenant of the property that another break-in took place on 20 September 2002. Hedrick denied asking anyone to provide false testimony, conspiring to have Plaintiffs arrested, asking Defendants to issue "bogus warrants" or otherwise acting improperly with regard to the charges against Plaintiffs. Hedrick did not sign the arrest warrants, was not notified when the case was in court, and did not testify at Plaintiffs' trial.

Other evidence includes Plaintiffs' Exhibit 1, their lease with Hedrick. The lease is titled "Commercial Lease" and its terms provide in relevant part that:

1. The parties agree to a one year lease of an "office with bay" beginning 1 January 2002.

2. The lease does not include rental of warehouse space. Handwritten notes indicate that on 9 July 2002 the parties "consulted" about the warehouse.

3. As lessee, Ms. Strickland could not assign the lease or sublet the premises without prior written permission from Hedrick, the lessor.

4. Lessee's failure to pay rent is an "event of default" and entitles lessor to terminate the lease.

5. Termination of the lease does not bar lessor from collecting rent owed at the time of termination.

6. Upon lessee's abandonment of the premises, any personal property lessee leaves behind may be considered abandoned and is available to the lessor to use or sell.

7. The lease is the entire agreement between the parties and "may not be modified except by a writing signed by all the parties thereto."

Plaintiffs have claimed a right of entry into the warehouse area. However, the lease corroborates Hedrick's testimony that he did not lease any part of the warehouse to Plaintiffs, and that their brief discussion about the warehouse in July 2002 did not result in any modification of the terms of the lease. Plaintiffs did not produce a signed modification to the lease, an amended lease, or any documentation supporting their claim of a "leasehold" over the warehouse.

Plaintiffs concede that in July 2002 they owed several months rent to Hedrick; that Ritz assumed the lease effective 1 August 2002; and that Ms. Strickland did not obtain Hedrick's permission before transferring the lease to Ritz. Plaintiffs do not dispute that they had access to the commercial office and the warehouse for several weeks after Ritz bought the business, and did not contradict Hedrick's testimony that he told them several times during August 2002 that they were no longer tenants and had to remove their personal belongings from the building. Hedrick's testimony established that Plaintiffs: (1) defaulted on the obligation to pay monthly rent; (2) unilaterally transferred the lease without permission, effective 1 August 2002, and; (3) had not removed their personal belongings from the building by 29 August 2002. Plaintiffs did not dispute any of these facts. It is also uncontradicted that 30 August 2002 was the only occasion on which Hedrick called the police on his own behalf, as opposed to passing on

information obtained from his tenants. "The act of giving honest assistance and information to prosecuting authorities does not render one liable for malicious prosecution." *Williams v. Kuppenheimer Manufacturing Co.*, 105 N.C. App. 198, 201, 412 S.E.2d 897, 900 (1992) (citations omitted).

We conclude that Plaintiffs produced no evidence that Hedrick asked the police to arrest Plaintiffs, gave a sworn statement in the case, spoke with the district attorney, filed an official complaint, or otherwise acted to initiate charges against Plaintiffs, and that the trial court did not err in granting summary judgment for Hedrick. The entry of summary judgment on Plaintiffs' claim of malicious prosecution renders moot their claim for civil conspiracy to engage in malicious prosecution. The pertinent assignments of error is overruled.

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[6] Plaintiffs also argue that the trial court erred by entering summary judgment for Hedrick on their claims of unfair or deceptive trade practices and conversion. We disagree.

Plaintiffs' conversion and abuse of process claims against Hedrick were dismissed on 19 June 2006. Plaintiffs did not appeal this order. " 'Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2.' " *State ex rel. Cooper v. NCCS Loans, Inc.*, 174 N.C. App. 630, 642, 624 S.E.2d 371, 379 (2005) (quoting *Sillery v. Sillery*, 168 N.C. App. 231, 234, 606 S.E.2d 749, 751 (2005)) (citation omitted). The dismissal of Plaintiffs' conversion claim is not properly before us, and this assignment of error is overruled.

In support of their claim for unfair or deceptive trade practices, Plaintiffs assert that Hedrick charged an "exorbitant" rent. However, Plaintiffs neither alleged this in their complaint nor produced any evidence on this issue, and we do not consider it. Plaintiffs also direct our attention to the allegations in their complaint. As discussed above, Plaintiffs cannot rely on their complaint to defeat a properly supported summary judgment motion. Plaintiffs further contend that Hedrick made false allegations of trespass and theft against them. Plaintiffs failed to proffer evidence in support of these assertions. We conclude that the trial court did not err by granting summary judgment for Hedrick on the claim for unfair or deceptive trade practices. This assignment of error is overruled.

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[7] Finally, Plaintiffs attempt to appeal from the 22 May 2006 dismissal of their claims against the municipal defendants under 42 U.S.C. § 1983, for violation of their constitutional rights. We conclude that their appeal of this order is not properly before us.

In their complaint, Plaintiffs brought claims against the municipal Defendants for violation of unspecified Constitutional rights, pursuant to 42 U.S.C. § 1983 (2007). On 22 May 2006 Judge Spivey dismissed Plaintiffs' § 1983 claims, and on 22 June 2006 Plaintiffs filed notice of appeal from this order. On 15 September 2006 the trial court dismissed Plaintiffs appeal from the 22 May 2006 order as untimely. On 6 December 2007 Plaintiffs filed a second notice of appeal from the 22 May 2006 order.

It is well established that

> Under Rule 3(a) of the North Carolina Rules of Appellate Procedure, any party entitled by law to appeal from a judgment . . . may take appeal by filing notice of appeal . . . Appellate Rule 27(c) provides in pertinent part: "Courts may not extend the time for taking an appeal . . . prescribed by these rules or by law." Appellate Rule 21(a)(1) provides: "The writ of *certiorari* may be issued . . . by either appellate court to permit review of the judgments . . . of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." . . . Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by *certiorari* even if the party has failed to file notice of appeal in a timely manner.

Anderson v. Hollifield, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997).

Plaintiffs lost the right to appeal by failing to timely file notice of appeal, and have not filed a petition seeking *certiorari*. "The jurisdictional requirements of N.C.R. App. P. 3(d) may not be waived by this Court, even under the discretion granted by N.C.R. App. P. 2." *Fearrington v. University of North Carolina*, 126 N.C. App. 774, 778, 487 S.E.2d 169, 172 (1997) (citations omitted). Plaintiffs' appeal from the order of 22 May 2006 is dismissed.

For the reasons discussed above, we reverse the court's denial of the municipal Defendants summary judgment motion and remand for entry of summary judgment in favor of Officers Noyes, Gutierrez, Lollis, and the City of Lexington; dismiss Plaintiffs' appeal from the order of 22 May 2002; affirm the trial court's dismissal of Plaintiffs'

claims against Ritz; and affirm the court's order for summary judgment in favor of Hedrick.

Affirmed in part, Dismissed in part, Reversed and Remanded in part.

Judge BRYANT concurs.

Judge WYNN concurs in the result only.

SONIA EDITH CASTANEDA, EMPLOYEE, PLAINTIFF v. INTERNATIONAL LEG WEAR GROUP, EMPLOYER, THE HARTFORD, CARRIER, DEFENDANTS

No. COA08-526

(Filed 2 December 2008)

1. Workers' Compensation— back injury—causation—sufficiency of evidence

The evidence in a workers' compensation case was sufficient to permit the Industrial Commission to find that plaintiff's annular disc tear injury was caused by a work-related accident where it was reasonable to infer from plaintiff's testimony that she suffered a violent motion when she was struck by a box on a conveyor belt and that the motion caused trauma to the spine; plaintiff had a spinal MRI which revealed an annular disc tear; and an orthopedic surgeon testified that it was "quite possible" and "more likely than not" that the tear was caused by plaintiff's work-related accident.

2. Workers' Compensation— ability to find comparable employment—termination

The evidence in a workers' compensation case supported the Industrial Commission's conclusion that plaintiff's inability to find comparable employment is due to her compensable injury where her employment was terminated after her injury. Even if the Commission erred by determining that plaintiff was not terminated for misconduct, she testified that she could not do similar jobs because of medical restrictions, she submitted an exhibit showing her efforts to find employment, and she testified

that she was told by one employer that she could not perform the duties of the position because of her physical limitations.

Judge TYSON dissenting.

Appeal by defendants from Opinion and Award entered 10 January 2008 by Commissioner Buck Lattimore for the North Carolina Industrial Commission. Heard in the Court of Appeals 25 September 2008.

Randy D. Duncan, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for defendants-appellants.

CALABRIA, Judge.

International Leg Wear Group ("ILG") and The Hartford (collectively, "defendants") appeal from the Full Commission of the North Carolina Industrial Commission's ("the Commission") Opinion and Award, which granted Sonia Edith Castaneda ("plaintiff") temporary total disability benefits. We affirm.

I. Facts

Plaintiff, age 41, began to work for ILG in its shipping and packaging department in May 2005. Plaintiff's job duties required her to lift boxes weighing between five and 125 pounds and move them from one conveyor belt to another. On Thursday, 20 October 2005, another employee pushed a "heavy" box down a conveyor belt while plaintiff had her back turned to it, facing the opposite direction. The box struck plaintiff's lower back and caused her to lose her balance. As plaintiff fell, she "[held] onto the rails."

Plaintiff's fellow employees helped her regain her balance since she was unable to stand on her own. Plaintiff testified she felt immediate pain in her lower back and right leg. Plaintiff was transported to the Frye Hospital emergency room where she was prescribed "muscle relaxation medicine" and instructed not to return to work the next day.

The following Monday, 24 October 2005, plaintiff failed to return to work because of severe pain in her back and legs. She informed her supervisors why she was absent. On Tuesday, 25 October 2005, plaintiff returned to work and asked supervisors to send her to a doctor. Plaintiff's supervisor responded by sending plaintiff to the safety pre-

cautions office. After she returned from that office, plaintiff's supervisor asked her to sign a "written verbal" warning concerning her work performance. Plaintiff alleged she was unable to read the warning due to her limited knowledge of English, but understood "it said that [she] was not getting along with other people." Plaintiff believed she was being terminated and refused to sign the paper. Plaintiff placed her initials under the following handwritten sentence: "Refused to sign because she feels that she gets along well with American people." Plaintiff contends her supervisors told her that placing her initials on the paper would show they had presented her with the warning. Plaintiff did not receive any prior warnings before this incident. The facts are disputed whether plaintiff voluntarily resigned or was terminated from her employment with ILG on 25 October 2005.

On 26 October 2005, ILG arranged for plaintiff to seek medical care at the Hart Industrial Clinic. Plaintiff was prescribed pain medication and placed on work restrictions. The work restrictions limited her to lifting five pounds or less and prohibited her from any activity requiring bending or twisting. Plaintiff was subsequently treated by Dr. Myron Smith, III ("Dr. Smith") at Carolina Orthopedic. Dr. Smith determined plaintiff suffered from "low back sprain with lower extremity weakness." Due to the weakness in plaintiff's right leg, Dr. Smith ordered an MRI on the lumbar spine. Dr. Smith left his association with Carolina Orthopedic. Plaintiff's care was transferred to Dr. Christopher Daley ("Dr. Daley"), a board certified orthopedic surgeon, who examined and treated her. Plaintiff was subsequently referred to Dr. Ralph Maxy ("Dr. Maxy"), a board certified orthopedic surgeon specializing in spinal surgery.

On 23 November 2005, a spinal MRI was performed on the plaintiff. The MRI revealed a possible L4-5 annular disc tear. Both Dr. Daley and Dr. Maxy submitted deposition testimony to Deputy Commissioner Ronnie E. Rowell ("Deputy Commissioner Rowell"). Dr. Daley unequivocally opined that plaintiff's "questionable" annular tear was not causally related to the incident that occurred on 20 October 2005. Dr. Daley diagnosed plaintiff with "lumbar spondylosis" associated with degenerative disk disease. Dr. Maxy disagreed and opined that it "was quite possible" plaintiff's annular disc tear resulted from this specific incident.

Deputy Commissioner Rowell accorded greater weight to the testimony of Dr. Maxy and concluded plaintiff had sustained an injury by accident, arising out of and in the course of her employment with

ILG, which resulted in an annular disc tear injury. Deputy Commissioner Rowell further concluded plaintiff was entitled to temporary total compensation benefits beginning 20 October 2005 until further order of the Commission. Defendants were ordered to pay: (1) compensation to plaintiff at the rate of $346.68 per week and (2) all medical expenses incurred by plaintiff as a result of this injury. Without hearing or receiving further evidence, a divided panel of the Full Commission adopted the Opinion and Award of Deputy Commissioner Rowell. Commissioner Dianne C. Sellers dissented on the basis that Dr. Maxy's opinion "amount[ed] to speculation and plaintiff [] failed to carry the burden of proving by competent evidence that a causal relationship exist[ed] between the work-related accident and her annular disc tear." Defendants appeal.

II. Standard of Review

"[W]hen reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether those findings . . . support the Commission's conclusions of law." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (internal brackets and quotations omitted). The Full Commission's findings are conclusive on appeal where based on competent evidence, even when there is evidence to the contrary. *Raper v. Mansfield Sys., Inc.*, 189 N.C. App. 277, 281-82, 657 S.E.2d 899, 904 (2008). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Barbour v. Regis Corp.*, 167 N.C. App. 449, 454-55, 606 S.E.2d 119, 124 (2004) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)). The Commission's conclusions of law are reviewed *de novo*. *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109, 561 S.E.2d 287, 291 (2002). "Where 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 not affect the conclusions." *Meares v. Dana Corp.*, 193 N.C. App. 86, 89-90, ___ S.E.2d ___, ___ (2008) (quoting *Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007)) (internal brackets and quotation marks omitted).

III. Causation

[1] Defendants argue plaintiff failed to establish a causal relationship existed between the work-related accident and plaintiff's annular disc tear. We disagree.

Defendants challenge the following findings of fact entered by the Commission regarding the cause of plaintiff's injury:

> 3. On the morning of October 20, 2005, plaintiff was working with her back to the conveyor line when one of the heavier boxes was being pushed off the conveyor line by another employee. Plaintiff was unaware of the box and was struck in her mid to low back area and was pushed forward, which twisted her spine in the process. As plaintiff was falling to the floor she landed on some racks.
>
> . . . .
>
> 8. On November 23, 2005, plaintiff had a spinal MRI, which revealed an L4-5 annular disc tear. Dr. Maxy testified that more likely than not, plaintiff's injury at work caused the traumatic L4-5 annular disc tear, which is the reason for plaintiff's ongoing pain and plaintiff's absence of symptoms prior to her injury at work.
>
> 9. The Full Commission gives greater weight to the testimony of Dr. Maxy, who specializes in spinal disorders, than to Dr. Daley, who does not specialize in spinal disorders.

Based on these findings, the Commission concluded as a matter of law, "[o]n October 20, 2005, plaintiff sustained an injury by accident, arising out of and in the course of her employment with defendant resulting in an annular disc tear injury."

The burden rests upon the plaintiff to produce competent evidence establishing each element of compensability, including a causal relationship between the work-related accident and his or her injury. *See Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003) ("Plaintiff has the burden to prove each element of compensability." (Citations omitted)). "The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself." *Hodgin v. Hodgin*, 159 N.C. App. 635, 639, 583 S.E.2d 362, 365 (2003) (quotation omitted). Where complicated medical questions are presented before the Commission, "only an expert can give competent opinion evidence as to the cause of the injury." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (quotation omitted).

Expert testimony is insufficient to prove causation when "there is additional evidence or testimony showing the expert's opinion to be a

guess or mere speculation." *Holley*, 357 N.C. at 233, 581 S.E.2d at 753. In *Holley*, the Supreme Court concluded when a doctor's testimony revealed the speculative nature of his opinion, such evidence was insufficient to establish causation. *Id.* In *Holley*, one of plaintiff's doctors testified there was a "low possibility" that plaintiff's accident caused her injury. *Id.* Another doctor testified, "I am unable to say with *any degree of certainty* whether or not [the injury] is related to the development of her [medical condition]" and "I don't really know what caused [plaintiff's medical condition]." *Id.* at 233, 581 S.E.2d at 753-54.

The facts in *Holley* are distinguishable from the case at bar. The Full Commission found that "plaintiff had a spinal MRI, which revealed an L4-5 annular disc tear." This finding was based on competent evidence. Dr. Maxy testified that "[s]he did have an L4/5 annular tear. . . ." Although Dr. Maxy admitted that "you can't tell for sure" what the cause of the annular tear was, this qualifying language goes towards the weight of his testimony and does not rise to the level of "guess" or "speculation" as the doctor's testimony in *Holley*. *See Adams v. Metals USA*, 168 N.C. App. 469, 483, 608 S.E.2d 357, 365 (2005), *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005) ("The fact that the treating physician in the case could not state with reasonable medical certainty that plaintiff's accident caused his disability, is not dispositive—the degree of the doctor's certainty goes to the weight of his testimony."). Dr. Maxy testified it was "quite possible" and "more likely than not" that the tear was caused by plaintiff's work-related injury. *See Kelly v. Duke Univ.*, 190 N.C. App. 733, 739, 661 S.E.2d 745, 749 (June 3, 2008) (No. COA07-874) (concluding doctor's testimony that plaintiff's death was more likely than not caused by her diabetes is competent evidence to support causation) (quoting *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 351, 581 S.E.2d 778, 785 (2003) ("the 'mere possibility of causation,' as opposed to the 'probability' of causation, is insufficient to support a finding of compensability")).

The dissent contends Dr. Maxy's opinion is speculative because he based his opinion in part on the assumption that plaintiff suffered a "violent motion," and there was no competent evidence to find plaintiff "arched her back violently" or otherwise suffered a "violent motion." We respectfully disagree. Dr. Maxy opined that "if she arched her back violently, that would cause violent motion between the two vertebrae which could in fact lead to an annular tear. That's the sense in which it can cause an annular tear, any violent motion

from the box hitting the back." Although no competent evidence supports a finding that plaintiff in fact arched or twisted her back when she was hit by the box, there is other evidence from which the Full Commission could base a finding that plaintiff's injury caused her annular tear. *Estate of Gainey*, *supra*. Dr. Maxy also opined that blunt force trauma, such as being struck forcefully in the back, could cause an annular tear. Plaintiff testified she was hit in the lower back with a heavy box which caused her to lose her balance and grab onto the rails. Viewing the facts in the light most favorable to the plaintiff, it is reasonable to infer that when someone is struck by a heavy box with enough force to push a person forward, that motion can be characterized as a violent motion. *Barbour*, *supra*. Since there was evidence supporting a finding that plaintiff suffered a violent motion, Dr. Maxy's opinion is not based on speculation.

In *Raper v. Mansfield Sys., Inc.*, 189 N.C. App. at 282-83, 657 S.E.2d at 905, this Court concluded that there was no evidence precisely identifying the cause of injury. In that case, the plaintiff developed carpal tunnel syndrome after a work accident. *Id.* A doctor testified that if plaintiff had sprained his wrist as a result of the accident, the wrist sprain "more likely" was the cause of the carpal tunnel syndrome. *Id.*, 189 N.C. App. at 280, 657 S.E.2d at 903. However, there was no evidence supporting a finding that plaintiff sprained his wrist. *Id.*, 189 N.C. App. at 282-83, 657 S.E.2d at 905. In addition, the doctor acknowledged the sprain could have been caused by diabetes or another cause unrelated to the accident. *Id.*

Here, it is reasonable to infer from plaintiff's testimony describing the accident, that she suffered a violent motion when she was hit by the box and that the motion caused trauma to the spine, which resulted in the annular tear. The credibility and weight of Dr. Maxy's testimony is for the Full Commission. *See Martin v. Martin Bros. Grading*, 158 N.C. App. 503, 506, 581 S.E.2d 85, 87 (2003) ("On appeal, this Court may not re-weigh the evidence or assess credibility."). Viewed in the light most favorable to the plaintiff, plaintiff's testimony describing the accident and Dr. Maxy's opinion based on the "objective finding" on the MRI as well as plaintiff's past medical history of no prior symptoms, is competent evidence for the Commission to conclude that the annular tear was a compensable injury. *Barbour*, *supra*. We affirm on this issue.

IV. Inability to Find Suitable Employment

[2] Defendants also argue that because plaintiff was terminated for misconduct, she "terminated any efforts by Employer-Defendant to

satisfy providing any work within any medical restrictions" and she is not entitled to benefits. We disagree.

When an employee has sustained a compensable injury, has been provided light duty or rehabilitative employment, and is terminated for misconduct or other fault of the employee, the termination "does not automatically constitute a constructive refusal to accept employment so as to bar the employee from receiving benefits. . . ." *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 233-34, 472 S.E.2d 397, 401 (1996). "[U]nder the *Seagraves*' test, to bar payment of benefits, an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury." *McRae*, 358 N.C. at 493, 597 S.E.2d at 699. The initial burden is on the employer. *Seagraves*, 123 N.C. App. at 233, 472 S.E.2d at 401.

If the employer meets this burden, the burden shifts to the employee to rebut the presumption that the employee's misconduct was a constructive refusal to perform the work provided, resulting in a forfeiture of benefits for lost earnings. *Id.* at 234, 472 S.E.2d at 401. The employee must show that his or her inability to find other employment at a wage comparable to that earned prior to the injury is due to the work-related disability. *Id.* In deciding these questions, "the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 458, 518 S.E.2d 200, 204 (1999) (citation omitted).

Defendants argue that plaintiff constructively refused employment when she failed to sign the letter and is not entitled to any disability benefits.

In the instant case, the Full Commission found that:

> On October 24, 2005, plaintiff was in severe pain. She called work and stayed out that day. On October 25, 2005, when plaintiff returned to work, she asked to be sent to a doctor. Defendant had plaintiff go to the office where she was requested to sign a "written verbal" warning about work performance. Plaintiff believed she would be terminated if she signed the form, but did initial her name to the form. Defendant was not satisfied and terminated plaintiff. Plaintiff had no prior misconduct or warnings. The

undersigned find that there is insufficient evidence to support a finding that plaintiff was terminated for misconduct.

Even if the Full Commission erred in determining that plaintiff was not terminated for misconduct, if she showed that her inability to find other employment at a wage comparable to the wage she earned prior to the injury is due to a work-related disability, then her payments are not barred. *Seagraves*, *supra*.

The Full Commission found that

> Plaintiff has completed an extensive job search without success at various employers and temporary agencies. Plaintiff's prior jobs all required bending, twisting, and stooping which she can no longer do as a result of her work related injury while employed by defendant. Plaintiff has been on various work restrictions and continues to be assigned restrictions by Dr. Maxy of no lifting more than 15 pounds and no excessive bending, twisting or stooping.

The Full Commission concluded that "Plaintiff has been unable to find suitable employment as a result of her injury, and is entitled to temporary total disability compensation beginning October 20, 2005, and continuing until further order of the Commission. N. C. Gen. Stat. § 97-29."

Plaintiff testified that she could not do "pick-and-pack" jobs because of doctor's restrictions on lifting, bending, twisting and stooping. Plaintiff submitted an exhibit showing that from March 2006 until May 2006 she sought employment from more than twenty employers. Plaintiff also testified that she was told by one employer that due to her physical limitations she could not perform the job duties of the position.

Viewing the evidence in the light most favorable to the plaintiff, we hold that this evidence supports the conclusion of law that plaintiff's inability to find comparable employment is due to her compensable injury.

Affirmed.

Judge McCULLOUGH concurs.

Judge TYSON respectfully dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion erroneously holds plaintiff presented competent evidence to establish a causal relationship between her work-related accident and alleged annular disc tear and affirms the Commission's Opinion and Award granting plaintiff temporary total disability benefits. Dr. Maxy's expert medical opinion concerning the cause of plaintiff's injury was based upon mere speculation and conjecture and is insufficient to meet plaintiff's burden of proof to establish the essential element of causation. I respectfully dissent.

I. Standard of Review

> [W]hen reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether those findings . . . support the Commission's conclusions of law. The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, even though there is evidence that would support findings to the contrary.

McRae v. Toastmaster, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (internal citations and quotations omitted).

The Commission's mixed findings of fact and conclusions of law and its conclusions of law applying the facts are fully reviewable *de novo* by this Court. *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).

II. Causal Relationship

Defendants assign error to the Commission's Opinion and Award and argue plaintiff failed to establish the essential element of a causal relationship between her work-related accident and alleged annular disc tear. I agree and vote to reverse the Commission's Opinion and Award.

A. Speculation and Conjecture

The burden of proof rests upon the plaintiff to produce relevant, probative, and competent evidence to establish a causal relationship exists between the work-related accident and the alleged injury. *See Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) ("In a worker's compensation claim, the employee has the burden of

proving that his claim is compensable." (Citation and quotation omitted)). "The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself." *Hodgin v. Hodgin*, 159 N.C. App. 635, 639, 583 S.E.2d 362, 365 (citation omitted), *disc. rev. denied*, 357 N.C. 578, 589 S.E.2d 126 (2003). "In cases involving 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." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (citation and quotation omitted).

When medical opinion testimony is necessary, "medical certainty is not required, but an expert's speculation is insufficient to establish causation." *Adams v. Metals USA*, 168 N.C. App. 469, 475-76, 608 S.E.2d 357, 362 (citation and quotation omitted), *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005). This Court recently reiterated:

> [Our] Supreme Court has allowed "could" or "might" expert testimony as probative and competent evidence to prove causation. *However*, "*could*" *or* "*might*" *expert testimony is insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation*. An expert witness' testimony is insufficient to establish causation where the expert witness is unable to express an opinion to any degree of medical certainty as to the cause of an illness. Likewise, where an expert witness expressly bases his opinion as to causation of a complex medical condition solely on the maxim *post hoc ergo propter hoc* (after it, therefore because of it), the witness provides insufficient evidence of causation.

Raper v. Mansfield Sys., Inc., 189 N.C. App. 277, 281-82, 657 S.E.2d 899, 904 (2008) (quoting *Adams*, 168 N.C. App. at 476, 608 S.E.2d at 362.) (emphasis supplied)); *see also Holley*, 357 N.C. at 233, 581 S.E.2d at 753 ("Although expert testimony as to the possible cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." (Internal citation and quotation omitted)).

Here, defendants challenge the following findings of fact contained in the Commission's Opinion and Award regarding the issue of causation:

> 3. On the morning of October 20, 2005, plaintiff was working with her back to the conveyor line when one of the heavier boxes was

being pushed off the conveyor line by another employee. Plaintiff was unaware of the box and was struck in her mid to low back area and was pushed forward, which twisted her spine in the process. As plaintiff was falling to the floor she landed on some racks.

. . . .

8. On November 23, 2005, plaintiff had a spinal MRI, which revealed an L4-5 annular disc tear. Dr. Maxy testified that more likely than not, plaintiff's injury at work caused the traumatic L4-5 annular disc tear, which is the reason for plaintiff's ongoing pain and plaintiff's absence of symptoms prior to her injury at work.

9. The Full Commission gives greater weight to the testimony of Dr. Ralph Maxy, who specializes in spinal disorders, than to Dr. Daley, who does not specialize in spinal disorders.

The Commission concluded as a matter of law, "[o]n October 20, 2005, plaintiff sustained an injury by accident, arising out of and in the course of her employment with defendant resulting in an annular disc tear injury." Findings of fact numbered 3 and 8 are not supported by competent evidence in the record before us and do not support the Commission's conclusion of law.

Finding of fact numbered 3 states, "[p]laintiff was unaware of the box and was struck in her mid to low back area and was pushed forward, *which twisted her spine in the process*." (Emphasis supplied). During the hearing, plaintiff offered no testimony or any other evidence tending to support the notion that she had "twisted" her spine as she fell to the ground after being hit with a box. "We are not bound by the findings of the Commission when they are not supported by competent evidence in the record." *English v. J.P. Stevens & Co.*, 98 N.C. App. 466, 471, 391 S.E.2d 499, 502 (1990).

The dispositive issue before this Court becomes whether Dr. Maxy's expert testimony was sufficient to establish a causal relationship between plaintiff's work-place accident and her injury. Dr. Maxy's testimony and other record evidence shows his expert opinion was based upon mere conjecture or speculation. *Holley*, 357 N.C. at 233, 581 S.E.2d at 753.

On direct examination, and after being asked a hypothetical question that paralleled the facts at bar, Dr. Maxy testified that "[i]t

is *quite possible* that [the 20 October 2005 incident] caused the injury noted on the MRI, the annular tear." (Emphasis supplied). Dr. Maxy based his opinion upon "the objective finding on the MRI plus her history, the fact she did not have these symptoms prior to the box hitting her on her back." Dr. Maxy testified he had not reviewed plaintiff's MRI itself, but only the Radiology Report. Dr. Maxy testified that the objective finding he was referring to indicated: "that there are findings that represent—*may represent* an atypical annular tear." (Emphasis supplied). Upon review of the actual Radiology Report, the "objective finding" Dr. Maxy was referencing states, "2. Fluid signal within the left posterolateral aspect of the interverebral L4-5 disc. This *may* represent a somewhat atypical annular tear *or* simply fluid within the substance of the disc material." (Emphasis supplied).

Dr. Maxy further testified that the annular tear "could" cause the symptoms plaintiff was experiencing, but that "[i]t doesn't commonly" and acknowledged that other patients can present with an annular tear based upon a "degenerative change." Dr. Maxy's concerns and plaintiff's non-cooperation were also noted in Dr. Maxy's physical exam:

> Also there were some findings on exam [sic] that seemed to be somewhat perplexing. I couldn't examine her motor function very well because *it seemed as if she was giving me less than full effort*. And so *I couldn't tell whether or not she had any true weakness*. She also seemed to walk with a left-sided antalgic gait, in other words, a left-sided limp when in fact she told us that the pain was worse down the right side than it was on the left. *So there were some inconsistencies.*

(Emphasis supplied). Dr. Maxy testified that if there had not been "an objective finding" on the MRI, he would not have placed plaintiff on any work restrictions.

The following colloquy on cross-examination is quite significant and indicative of the wholly speculative nature of Dr. Maxy's testimony:

> [Defense counsel]: I believe if I understand your testimony correctly and you testified that it certainly was *possible* for the force of a box striking someone's back, I assume that the box striking the back caused enough force to jar the area between the two vertebrae?

> [Dr. Maxy]: Right, exactly. It's not the box itself that hits the disk and causes a rupture. That's not what happens, but the box hitting her in the back could cause a violent, violent motion between two vertebrae. For example, if she arched her back violently, that would cause violent motion between two vertebrae which could in fact lead to an annular tear. That's the sense in which it can cause an annular tear, any violent motion from the box hitting the back.
>
> [Defense counsel]: Again so I'm assuming if a box comes with some significant force and hits you in the back or then throws you forward or in a manner that doesn't cause you to do the violent motion, then it would not cause an annular tear?
>
> [Dr. Maxy]: That's correct. It's not the blunt force of the box itself that causes the tear as much as the violent motion between the two vertebrae that could cause the tear.
>
> [Defense counsel]: So without knowing exactly how [plaintiff] reacted when the box struck her, *can you really tell for sure if that incident is what caused the annular tear*?
>
> [Dr. Maxy]: *Well, you can't tell for sure in any of this, to tell you the truth.* You really can't. I base my opinion on her history and the findings. If she told me she had had a long history of back pain, it would be less likely the cause.

(Emphasis supplied). Dr. Maxy clearly based his expert opinion on the presumption that plaintiff had "arched her back violently" or that some other "violent motion" occurred after she was hit with the box. However, as the majority's opinion correctly states, "no competent evidence supports a finding that plaintiff in fact arched or twisted her back when she was hit by the box[.]" Further, Dr. Maxy frankly acknowledged that without knowing how plaintiff reacted when the box struck her, he could not opine whether the incident at ILG caused the annular tear.

After a review of Dr. Maxy's deposition testimony, I agree with Commissioner Sellers's dissenting opinion and would hold that Dr. Maxy's medical opinion regarding the cause of plaintiff's injury is only "a guess or mere speculation." *Holley*, 357 N.C. at 233, 581 S.E.2d at 753. Dr. Maxy did not review plaintiff's MRI and based his diagnosis in part on a finding in the Radiology Report that "*may* represent an atypical annular tear." (Emphasis supplied). Based solely on his

own physical exam, Dr. Maxy would not have placed plaintiff on any work restrictions.

B. After it, therefore because of it

Dr. Maxy heavily emphasized plaintiff's medical history, "the fact she did not have these symptoms prior to the box hitting her on her back[,]" and implicitly stated that if plaintiff had presented a history of back pain, his diagnosis would have been different. Dr. Maxy's opinion is also pure *post hoc ergo propter hoc* testimony and does not prove causation. *See Raper*, 189 N.C. App. at 281-82, 657 S.E.2d at 904 ("[W]here an expert witness expressly bases his opinion as to causation of a complex medical condition solely on the maxim *post hoc ergo propter hoc* (after it, therefore because of it), the witness provides insufficient evidence of causation.").

On cross-examination, Dr. Maxy testified that without knowing how plaintiff reacted when the box struck her, he "[could not] tell for sure" if the incident at ILG is what caused the annular tear. Nonetheless, Dr. Maxy opined that based upon the "objective finding" in the Radiology Report, in combination with plaintiff's history, plaintiff's work-related accident "more likely than not" caused an annular tear.

Because a majority of the Commission assigned greater credibility to Dr. Maxy's opinion and we are bound by this determination, a review of the quantum of Dr. Maxy's testimony shows it is insufficient to establish to a reasonable medical certainty that plaintiff's accident was causally related to her annular disc tear. *See Holley*, 357 N.C. at 233, 581 S.E.2d at 753 ("Although expert testimony as to the possible cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." (Internal citation and quotation omitted)).

Dr. Maxy's expert testimony is insufficient to support the Commission's conclusion of law that "[o]n October 20, 2005, plaintiff sustained an injury by accident, arising out of and in the course of her employment with defendant resulting with an annular disc tear injury." Because the Commission's Opinion and Award is affected with error on this basis, it is unnecessary to address defendant's remaining assignment of error.

II. Conclusion

Dr. Maxy's testimony is insufficient to establish to a reasonable degree of medical certainty that plaintiff's work-related accident was causally related to her annular disc tear. *Holley*, 357 N.C. at 233, 581 S.E.2d at 753; *Adams*, 168 N.C. App. at 476, 608 S.E.2d at 362. Under *de novo* review, the Commission's conclusion of law that plaintiff sustained an injury by accident, arising out of and in the course of her employment, resulting in an annular disc tear is unsupported by its findings of fact and is erroneous as a matter of law. The Commission's Opinion and Award granting plaintiff temporary total disability benefits is erroneous and should be reversed. I respectfully dissent.

STATE OF NORTH CAROLINA v. KEITH LAVORIS HALL

No. COA07-1412

(Filed 2 December 2008)

1. Criminal Law— motion for appropriate relief on appeal— cumulative evidence—different result not apparent

A motion for appropriate relief on the basis of newly discovered evidence was heard by the Court of Appeals where the evidence before it was sufficient to reach the merits of the motion. The motion was denied because the new evidence was in the form of letters which were merely cumulative and would be introduced for no other reason but to impeach or discredit a witness, and it is impossible to say that the newly discovered letters would cause a jury to reach a different verdict.

2. Evidence— portions of letters—admissibility

The trial court did not err in a prosecution for murder and robbery by allowing the State to introduce photocopied portions of letters that defendant wrote while awaiting trial. Although defendant argued that the evidence should have been excluded because only portions of the letters were available, there is no evidence that the excluded portions were destroyed, defendant was the author of the letters and was in the best position to know whether the excluded portions were relevant or explanatory, and defendant had a duty to obtain those letters during discovery.

3. Robbery— sufficiency of evidence—circumstantial

There was sufficient evidence of robbery with a dangerous weapon where the evidence, though circumstantial, reasonably gave rise to inferences that defendant and an accomplice acted with a mutual understanding or plan and unlawfully took or attempted to take the victim's personal property by use of a firearm.

4. Homicide— first-degree murder—sufficiency of evidence—no physical evidence

The trial court did not err by denying defendant's motion to dismiss a first-degree murder charge where defendant contended that there was no physical evidence to establish that defendant was at the scene, but there was evidence that defendant and an accomplice were there hours before the crime, that defendant admitted having a plan to get some money that had gone badly, that all four victims died from gunshot wounds to the head, that defendant and the accomplice acted suspiciously around and after the time of the crime, that clothing bearing the blood of one of the victims was recovered from a dumpster at defendant's apartment complex, and that defendant told two separate witnesses that he had killed four people.

5. Homicide— felony murder—sufficiency of evidence—substantial evidence of armed robbery

There was sufficient evidence of felony murder where there was substantial evidence to support the underlying charge of armed robbery.

6. Evidence— bloody clothing recovered from dumpster—connection to defendant

The trial court did not abuse its discretion in a robbery and murder prosecution by admitting into evidence a pair of bloody blue jeans recovered from a dumpster in defendant's apartment complex. Although defendant argued that the blue jeans were not sufficiently connected to him, they were stained with the blood of a victim, they were recovered in his apartment complex, and defendant was seen walking toward the dumpster from which the jeans were recovered. These are sufficient links in a chain that would permit, but not require, the jury to infer defendant's involvement in the murder. The fact that there is no direct evidence showing that defendant wore the clothing during the murders goes to its weight rather than its admissibility.

Appeal by defendant from judgments entered 1 December 2006 and 5 December 2006 by Judge Ronald K. Payne in Gaston County Superior Court. Heard in the Court of Appeals 19 August 2008.

Nora Henry Hargrove for defendant appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan Babb, for the State.

McCULLOUGH, Judge.

On 2 September 2003, defendant Keith Lavoris Hall ("defendant") was indicted with four counts of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant's trial commenced at the 23 October 2006 Criminal Session of Gaston County Superior Court. The relevant evidence presented at trial tended to show the following: In August of 2003, Darryl Brown and Billy Collins lived together in a house located at 110 River Buff Lane in Belmont. Brown and Collins made and sold crack cocaine from this house. Brown kept several firearms at this house as well.

Brown met defendant, who he knew as "Blue," in July of 2003. Between July of 2003 and 20 August 2003, defendant had been to Brown's house two or three times. Defendant's girlfriend, Crystal Goins, had accompanied defendant on each of those occasions.

On 20 August 2003, Collins, and three women, Crystal Ellis, Amanda Sossaman, and Melissa Petrie, were at Brown's house for most of the day. At around noon, Brown traveled into town to drop off some cocaine. When Brown returned to his house, defendant and Goins were there. Defendant was purchasing crack cocaine from Collins. During this transaction, in defendant's view, Collins handed Brown $2,000.00 in cash to count. Collins then placed the cash in his pocket.

At approximately 5:30 p.m., Brown left his house and headed to Charlotte to purchase cocaine. At that time, Collins, Ellis, Sossaman, Petrie, Goins, and defendant were still at the house.

At approximately 7:30 p.m., Brown returned to his house. He had tried calling the house several times during his return trip, but there was no answer. When Brown entered his house, he found Collins dead, lying in a pool of blood. The three women were dead as well. In addition, Brown noticed that his dog had been let out of the house.

Brown testified that he panicked, fled his house, and headed to the home of his friend, Robbie Hodge.

After meeting with Hodge, Brown returned to his house, hid the cocaine that he had in his possession, and called 911. Thereafter, law enforcement arrived at the scene and found Crystal Ellis' body lying in the entryway of a bedroom just off of the den. She had been shot once in the back and once in the head. Billy Collins' body was lying in the kitchen, near the living room. He had a gunshot wound in the top of his head. The two other female victims were found seated or slouching on the sofa. Both had gunshot wounds on the top of their heads, among other places. Blood was splattered by the front door, on the coffee table, and in the kitchen. Law enforcement recovered six nine millimeter shell casings in the living room and a Taurus 9 millimeter pistol from underneath the sofa. There were also three .45 shell casings near the body of one of the female victims and one .45 shell casing near the body in the kitchen. Defendant's fingerprints were recovered from a Pepsi bottle found at the scene of the crime.

Wendy Scott, a crime scene investigator with the Gaston County Police, testified that when she arrived on the scene, Brown was nervous and upset, but was also cooperative. Scott did not see any blood on Brown, his clothing, or his shoes. Brown's hands were wiped to test for the presence of gunshot residue, but none was recovered. On cross-examination, Special Agent James Gregory of the North Carolina State Bureau of Investigation (SBI) explained that the fact that no gunshot residue was recovered from Brown's hands did not eliminate the possibility that Brown could have fired a gun, as any gunshot residue could have been removed if he had subsequently washed his hands.

Crystal Reckers, Goins' aunt, testified that she took defendant and Goins to look for an apartment on 21 August 2003 and that she noticed that defendant had a large sum of money to use for the deposit. Leslie Dale, the property manager of Shadow Creek Apartments, testified that on 21 August 2003, defendant and Goins applied for an apartment and paid a security deposit of $395 and prorated rent for August of $165. They paid in cash.

Wanda Willis, Goins' aunt, testified at trial that defendant and Goins had washed clothing and stayed over at her house on either 20 August 2003 or 21 August 2003. Law enforcement recovered several items from the room in Willis' house in which defendant and Goins had stayed, including among other items, a white T-shirt with red

stains on the front that appeared to be bloodstains, a pair of panties stained with blood, a pair of ankle socks, and a lease agreement.

On 22 August 2003, Sgt. Joseph Ramey of the Gaston County Police Department saw defendant walk toward some dumpsters at the end of a parking lot in the Shadow Creek Apartment complex. Ramey testified that defendant was gone for about thirty seconds and then came back towards the apartment complex. Although it had recently rained and everything else in the dumpster was still wet from the rain, Ramey recovered a dry "perfectly folded pair of blue jeans" from the dumpster in the area where defendant had walked. SBI tests revealed that the jeans found in this dumpster were stained with Crystal Ellis' blood. Defendant was subsequently arrested.

While in custody, defendant wrote several letters to Goins. Only portions of these letters were photocopied before they were mailed to Goins. In one letter, read at trial, defendant wrote to Goins that he and Goins "had to stick together." In another letter, read at trial, defendant wrote to Goins:

> I have two out-of-town lawyers. . . . They told me that they didn't have no evidence on me, only evidence they have is your statements. I never wrote a statement. You don't—didn't suppose to write—you didn't suppose to write one without your lawyer being there. Your lawyer knows that, so he should be able to get them destroyed if you tell them you[] was high or [f—ed] up on pills or something. My lawyer also told me you was going to testify against me on trial. Don't do that. Let me ride my own. I'm a thug, a G-unit soldier, and you is still part of my team. Crystal, you know I love you.

Gene Dickens, defendant's cell mate testified that he "pieced together" from his conversations with defendant that defendant had killed four people, three of which, he "took out because they was there." There was evidence, however, that a few weeks before the trial started, defendant and Dickens were involved in an altercation, and Dickens might have testified against defendant in retaliation. Moreover, on cross-examination, Dickens admitted that the Assistant District Attorney had offered to assist Dickens with the Parole Review Commission.

Deputy Sheriff Donny Baynard testified that on 11 August 2005, during a routine frisk, Baynard recovered a foreign object from defendant's shoe. Defendant then yelled to Baynard, "That shank was

meant for you, motherf——er." Defendant stated, "I've killed four people already, what's one more, especially if it's a cop."

Defendant did not testify or present evidence at trial. On 14 November 2006, the jury found defendant guilty of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, two counts of first-degree murder, both on the basis of malice, premeditation, and deliberation, as well as under the felony murder rule, and two counts of first-degree murder, only under the felony murder rule. Defendant was sentenced to consecutive terms of imprisonment of 108 to 139 months for robbery with a dangerous weapon, 42 to 60 months for conspiracy, and four consecutive terms of life imprisonment without parole for the four counts of first-degree murder. Defendant appeals.[1]

On appeal, defendant contends that the trial court erred by: (1) allowing into evidence portions of the letters that defendant wrote to Goins; (2) allowing into evidence the pair of blue jeans that was recovered from the dumpster at defendant's apartment complex; and (3) denying his motions to dismiss the charges for insufficient evidence.

I. Motion for Appropriate Relief

[1] Defendant has moved for appropriate relief, pursuant to N.C. Gen. Stat. § 15A-1418 (2007), on the grounds that newly discovered evidence exists that was not available at trial. *See* N.C. Gen. Stat. § 15A-1415(c) (2007).

A motion for appropriate relief is a motion in the original cause and may be brought before the Court of Appeals if the case is then pending before this Court. N.C. Gen. Stat. §§ 15A-1411, -1418. The appellate court, faced with a motion for appropriate relief, "must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceed-

1. As a preliminary matter, we conclude that the judgments were entered improperly. It is well-settled that where a jury returns its guilty verdict as to first-degree murder, solely on the basis of the felony murder rule, the judgment must be arrested with respect to the underlying felony charge. *State v. Adams*, 331 N.C. 317, 333-34, 416 S.E.2d 380, 389 (1992). Here, the record shows that the jury returned its guilty verdicts as to two counts of first-degree murder solely on the basis of defendant's involvement in the commission of a dangerous felony, namely, the armed robbery of Billy Collins. Thus, while it has no practical effect on the length of defendant's sentence, the trial court erred in failing to arrest judgment as to the robbery with a dangerous weapon charge.

ings." N.C. Gen. Stat. § 15A-1418(b). "If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case." *Id.* We find the evidence before us sufficient to reach the merits of the motion and see no reason to remand the case to the trial court.

In his motion, defendant asserts that he is entitled to a new trial because evidence has come to light, post trial, that demonstrates bias in the testimony of defendant's cell mate, Gene Dickens. At trial, Dickens testified that defendant had bragged to him about how he "clipped a gangster" and how he only spared the life of a dog. After the trial, while Assistant District Attorney William Stevenson was cleaning his office, he discovered two unopened letters that Dickens had written to him. In these letters, Dickens indicates that Stevenson was helping Dickens contact witnesses who had recanted their testimony after Dickens' conviction. Defendant argues that if these letters had been available at trial, they could have been used during cross-examination for impeachment purposes.

A motion for appropriate relief may only be based upon the grounds set forth in N.C. Gen. Stat. § 15A-1415. In pertinent part, this statute provides:

> [A] defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence.

N.C. Gen. Stat. § 15A-1415(c).

Defendant must establish the following to prevail upon a motion for appropriate relief on the ground of newly discovered evidence: (1) that the witness or witnesses will give newly discovered evidence, (2) that such newly discovered evidence is probably true, (3) that it is competent, material and relevant, (4) that due diligence was used and proper means were employed to procure the testimony at the trial, (5) that the newly discovered evidence is not merely cumulative, (6) that it does not tend only to contradict a former witness or to impeach or discredit him, (7) that it is of such a nature as to show that on another trial a different result will probably be reached and

that the right will prevail. *State v. Stukes*, 153 N.C. App. 770, 773, 571 S.E.2d 241, 244 (2002).

Here, the trial transcript reveals that these newly discovered letters are merely cumulative evidence, as defendant introduced other evidence at trial, which tended to demonstrate bias and undermine the credibility of Dickens' testimony:

> [Defense Counsel]: I'm going to ask you to take a look at State's Exhibit 267. Have you looked at that before? Do you recognize it?
>
> [Dickens]: Yes.
>
> [Defense Counsel]: It's a letter dated September 14th, 2006?
>
> [Dickens]: Yes.
>
> [Defense Counsel]: Addressed to you, isn't it?
>
> [Dickens]: Yes, sir.
>
> [Defense Counsel]: Is it from Mr. Stevenson seated over there at the prosecutor's table?
>
> * * * *
>
> [Defense Counsel]: Okay. Did you write him a letter that says you need some help from him, and he promised you some help?
>
> [Dickens]: Well, I wrote him a letter telling him, like, when he came, right, to see me, like I explained to him, I didn't want to come and testify. I just told him what I thought.
>
> [Defense Counsel]: Sir, did you write him a letter telling him you wanted help—
>
> [Dickens]: Yes.
>
> * * * *
>
> [Defense Counsel]: Did you write him a letter that says, "You said; you could help me if I was in appeal court on my case. I'm sending a motion to North Carolina Appeal Court now." Do you remember writing him that?
>
> [Dickens]: Right.
>
> * * * *

> [Defense Counsel]: Okay. Do you remember writing to Mr. Stevenson, "I know you're all for yourself and your case. I'm willing to help you. I know it's the right thing to do, but I've got to look out for myself here. I hope you will write back or show me something that will help you." Do you remember writing that to him?
>
> [Dickens]: Yes.

In addition to the fact that the newly discovered letters are merely cumulative evidence, they would be introduced for no other reason but to impeach or discredit a witness. Furthermore, given that defendant introduced other evidence tending to undermine the credibility of Gene Dickens' testimony at trial, including evidence that Dickens may have testified against defendant in retaliation, we conclude that it is improbable that these newly discovered letters would cause a jury to reach a different result on another trial. Accordingly, we conclude that this newly discovered evidence does not satisfy the fifth, sixth, or seventh requirements for the discovery of new evidence to warrant the granting of a new trial. *Stukes*, 153 N.C. App. at 773, 571 S.E.2d at 244. As such, defendant's motion for appropriate relief is denied.

II. Rule of Completeness

[2] We now turn to defendant's appeal. Defendant first contends that Rule 106 of the North Carolina Rules of Evidence required the State to present all of the letters that defendant wrote to Goins, not just the portion of the letters that had been photocopied before the letters were mailed. We disagree.

When part of a written or recorded statement is introduced by a party, Rule 106, known as the "rule of completeness," allows an opposing party to introduce any other part of that statement "at that time . . . which ought in fairness to be considered contemporaneously with it." N.C. Gen. Stat. § 8C-1, Rule 106 (2007). A trial court's decision in determining whether an excluded portion ought to be admitted under Rule 106 will not be reversed on appeal in the absence of a showing of an abuse of discretion. *State v. Thompson*, 332 N.C. 204, 220, 420 S.E.2d 395, 403 (1992).

Under Rule 106, a defendant bears the burden of contemporaneously seeking to introduce the excluded parts of the statement and demonstrating that the excluded parts are either explanatory or relevant. *See State v. Lloyd*, 354 N.C. 76, 96, 552 S.E.2d 596, 612-13 (2001);

see also Taylor Pipeline Constr. v. Directional Road Boring, 438 F. Supp. 2d 696, 705 (E.D. Tex. 2006) ("While Hypower objects to Plaintiff's submission of the exhibit bearing bates-stamp PDG/TP 007023 (Exhibit E-29), a portion of an e-mail, as being incomplete, it does not attempt to introduce any missing pages that it asserts the court is required to consider for the sake of fairness. Accordingly, Hypower's objection must fail."); *Thompson*, 332 N.C. at 220, 420 S.E.2d at 404 ("[D]efendant must demonstrate that the tapes and transcripts of the two telephone calls were somehow out of context when they were introduced into evidence, and he must also demonstrate that his Duplin County interview was either explanatory of or relevant to the telephone calls.").

Here, the letters at issue were only copied in part before they were mailed to Goins. As such, defendant argues that he could not make an offer of proof as to the contents of the excluded portions. Accordingly, defendant reasons that all of the letters should have been excluded pursuant to Rule 106. In essence, defendant asks us to adopt a *per se* rule of exclusion in situations where only portions of a written or recorded statement are available. We decline, however, to adopt this rule. First, we find it instructive that our Supreme Court has held that even where portions of a recorded statement are inaudible, a trial court may, in its discretion, admit the audible portions of such statement. *See*, *e.g. State v. Womble*, 343 N.C. 667, 688-89, 473 S.E.2d 291, 303-04 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719, *reh'g denied*, 520 U.S. 1111, 137 L. Ed. 2d 322 (1997). Likewise, federal courts have not interpreted Rule 106 to require exclusion where the government has inadvertently destroyed portions of a statement. *See*, *e.g.*, *United States v. Codrington*, 2008 U.S. Dist. LEXIS 35859 (E.D.N.Y. May 1, 2008).

Here, there is no evidence that the excluded portions of defendants' letters to Goins have been destroyed. Given that defendant wrote the letters at issue, he was in the best position to know whether the excluded parts of the letters would have been either explanatory or relevant. To the extent that they would have aided in his defense, defendant had a duty to obtain those letters from Goins during discovery and contemporaneously seek to introduce the excluded portions at trial. Therefore, we hold that defendant has failed to show that the trial court abused its discretion under Rule 106 by allowing the State to introduce the photocopied portions of the letters that defendant wrote to Goins while he was awaiting trial.

III. Motions to Dismiss

Next on appeal, defendant argues that the trial court erred in denying defendant's motions to dismiss the charges of armed robbery, conspiracy to commit armed robbery, and the four counts of first-degree murder. We disagree.

In ruling on a motion to dismiss, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). The Court must find that there is substantial evidence of each element of the crime charged and of defendant's perpetration of such crime. *Id.* "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

Whether the evidence presented is direct or circumstantial or both, the test for sufficiency is the same. *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991). "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). If the evidence supports a reasonable inference of defendant's guilt based on the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965).

A. Robbery with a Dangerous Weapon and Conspiracy

[3] To convict a defendant of the offense of robbery with a dangerous weapon, in violation of N.C. Gen. Stat. § 14-87 (2007), 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. *In re Stowe*, 118 N.C. App. 662, 664, 456 S.E.2d 336, 338 (1995).

"Conspiracy . . . is the agreement of two or more persons to do an unlawful act or to do a lawful act by an unlawful means." *State v. Richardson*, 100 N.C. App. 240, 247, 395 S.E.2d 143, 148, *appeal dismissed and disc. review denied*, 327 N.C. 641, 399 S.E.2d 332 (1990) (citation omitted). "The reaching of an agreement is an essential element of conspiracy." *Id.* However, "[i]n order to prove conspiracy, the State need not prove an express agreement; evidence tending to show

a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). This evidence may be circumstantial or inferred from the defendant's behavior. *State v. Choppy*, 141 N.C. App. 32, 39, 539 S.E.2d 44, 49 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001). Thus, to survive defendant's motion to dismiss with respect to the conspiracy charge required that the State produce substantial evidence, which considered in the light most favorable to the State, would allow a jury to find beyond a reasonable doubt that defendant and Goins had at least an implied understanding that they were going to commit the armed robbery of Billy Collins.

Defendant contends that the State's evidence was insufficient in two respects. First, defendant contends that the State failed to show that defendant committed an unlawful taking of or attempted taking of Collins' personal property because none of Collins' property was recovered from defendant and no witnesses testified that they saw defendant with Collins' property. Second, defendant argues that the State's evidence was insufficient to establish that defendant and Goins agreed to commit the armed robbery of Billy Collins because there were no witnesses who overheard the pair plan to commit the robbery nor did anyone see them commit the crime. We disagree.

Here, the State presented evidence that Collins had $2,000 of cash at his house, which he displayed in front of defendant and Goins on the day that the victims were killed. Auntonius Sims testified that he saw Goins and defendant on 20 August 2003; that the pair was acting suspiciously; that Goins was "shaking out of her mind;" and that defendant admitted to Sims that he and Goins had gone to "get some money, [but] things didn't go right." Leslie Dale testified that on 21 August 2003, defendant and Goins secured a new apartment, paying $560 in cash for the security deposit and prorated rent. On 22 August 2003, payments of $150.27 and $299.32 were made on defendant's past due utility bills. In a letter admitted at trial, defendant wrote to Goins that the two needed to "stick together." Thus, the State's evidence tended to establish that Collins had two thousand dollars in his possession before he was killed; that defendant and Goins were at Collins' home when Collins was last seen alive; that the pair operated with a common plan to "get some money" and needed to "stick together"; that the pair acted suspiciously around the time that Collins was killed; and that on the days immediately following Collins' murder, defendant began spending hundreds of dollars.

While it is true that all of the evidence is circumstantial, this evidence reasonably gives rise to inferences that defendant and Goins (1) acted with a mutual understanding or plan and (2) unlawfully took or attempted to take Collins' personal property. Therefore, there was ample and sufficient evidence to allow the jury to make reasonable inferences of defendant's guilt as to each element of the crimes charged. *See State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001), *cert. denied*, 635 U.S. 1114, 153 L. Ed. 2d 162 (2002) (citations omitted) ("Circumstantial evidence is often made up of independent circumstances that point in the same direction. These independent circumstances are like 'strands in a rope, where no one of them may be sufficient in itself, but all together may be strong enough to prove the guilt of the defendant beyond reasonable doubt. . . . Every individual circumstance must in itself at least *tend* to prove the defendant's guilt before it can be admitted as evidence.' "); *State v. Theer*, 181 N.C. App. 349, 355-57, 639 S.E.2d 655, 660-61, *appeal dismissed*, 361 N.C. 702, 653 S.E.2d 159, *cert. denied*, —— U.S. ——, 653 S.E.2d 159 (2007), *reh'g denied*, —— U.S. ——, 171 L. Ed. 2d 915 (2008) (holding that where the State offered circumstantial evidence of a defendant's extramarital affair, ongoing marital problems, financial status, insurance payout, and suspicious behavior, there was substantial evidence to allow the jury to make reasonable inferences of the defendant's guilt).

B. First-Degree Murder

[4] First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Taylor*, 337 N.C. 597, 607, 447 S.E.2d 360, 367 (1994), *cert. denied*, 533 S.E.2d 475 (1999). Premeditation means that the act was thought over beforehand for some length of time; however, no particular amount of time is necessary for the mental process of premeditation. *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998), *cert. denied*, 351 N.C. 369, 543 S.E.2d 145 (2000), *cert. denied*, 359 N.C. 286, 610 S.E.2d 714 (2005). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by legal provocation or lawful or just cause." *Id.* In *Taylor*, our Supreme Court held that want of provocation on the part of the deceased, the conduct of and statements of the defendant before and after the killing, the brutality of the murder, and attempts to cover up involvement in the crime are among other cir-

cumstances from which premeditation and deliberation can be inferred. *Taylor*, 337 N.C. at 607-08, 447 S.E.2d at 367.

The elements necessary to establish first-degree murder under the felony murder rule are (1) that the killing took place (2) while the accused was perpetrating or attempting to perpetrate (3) one of the enumerated felonies, which includes robbery. *State v. Richardson*, 341 N.C. 658, 666, 462 S.E.2d 492, 498 (1995); N.C. Gen. Stat. § 14-17.

Defendant contends that the State's evidence was insufficient to establish that defendant committed first-degree murder because there was no physical evidence to establish that defendant and Goins were at Collins' house at the time that the victims were killed. We disagree. As previously discussed, the State's evidence tended to establish that defendant and Goins were at Collins' home just hours before the victims were killed; that defendant admitted to Auntonius Sims that he and Goins had a common plan to "get some money," but that things had gone badly; that all four victims died from gunshot wounds to the head; and that the pair acted suspiciously around and after the time of the crime. In addition, police recovered a pair of blue jeans containing the blood of one of the victims from the dumpster at defendant's apartment complex, and the State introduced evidence that defendant told two separate witnesses, Corporal Donny Baynard and inmate Gene Dickens, that he had killed four people. Considered together, there was ample and sufficient evidence to allow the jury to make reasonable inferences that defendant intentionally and unlawfully killed the victims with malice and with premeditation and deliberation.

[5] Defendant further contends that the State's evidence was insufficient to establish charges of first-degree murder with respect to Petrie and Sossaman under the felony murder rule because the State's evidence was insufficient to establish the underlying charge of armed robbery. As previously discussed, viewing the State's evidence in the light most favorable to the State, there was substantial evidence to support the underlying charge of armed robbery. Therefore, there was substantial evidence from which the jury could reasonably infer that the killing of Petrie and Sossaman took place while the defendant was perpetrating or attempting to perpetrate the robbery of Billy Collins. The trial court did not err in denying defendant's motions to dismiss these charges.

IV. Blue Jeans

[6] Finally, defendant contends that the trial court erred in allowing the State to admit into evidence the pair of blue jeans that law enforcement recovered from the dumpster in defendant's apartment complex. Specifically, defendant argues that the blue jeans should have been excluded under Rules 401, 402, and 403 of the North Carolina Rules of Evidence because the State did not prove that the pair of blue jeans was sufficiently connected to defendant. We disagree.

A trial court's decision with regard to the admission of evidence will only be reversed upon a showing of an abuse of discretion. *State v. McCree*, 160 N.C. App. 19, 28, 584 S.E.2d 348, 354, *appeal dismissed and disc. review denied*, 357 N.C. 661, 590 S.E.2d 855 (2003). Defendant must show that the ruling was "manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Brown*, 350 N.C. 193, 209, 513 S.E.2d 57, 67 (1999).

In *State v. Bundridge*, 294 N.C. 45, 57-59, 239 S.E.2d 811, 820-21 (1978), our Supreme Court addressed an argument similar to the one advanced by defendant. In *Bundridge*, the defendant argued that bloodstained clothing that had been collected from the defendant's residence was of no probative value because the State had failed to show that the defendant had worn the clothes on the night of the alleged crime or that the stains on the clothes were from the blood of the victim. *Id.* at 58, 239 S.E.2d at 820. Our Supreme Court rejected that argument and held the fact that there was no direct evidence showing that the defendant had in fact worn the clothing during the assault went to the weight of the evidence rather than its admissibility. *Id.* at 58-59, 239 S.E.2d at 820. The Supreme Court in *Bundridge* explained:

> [I]n a criminal case, any evidence which sheds light upon the supposed crime is admissible. Evidence meets the test of relevancy if it has any logical tendency, however slight, to prove a fact in issue.

Id. at 58, 239 S.E.2d at 820 (citations omitted).

Here, the blue jeans were stained with the blood of one of the murdered victims, they were recovered from a dumpster at defendant's apartment complex, and defendant was seen walking in the direction of that dumpster. These facts create links in a chain of circumstances which would permit, but not require, a jury to infer that

defendant was involved in the murder. We hold that the fact that there is no direct evidence showing that defendant wore the clothing during the murders goes to the weight of the evidence rather than its admissibility. As such, the trial court did not abuse its discretion in allowing the State to admit this evidence at trial.

For the foregoing reasons, we find no error in defendant's convictions, but we arrest judgment with respect to the robbery with a dangerous weapon charge.

As to 03 CRS 18275, robbery with a dangerous weapon: Judgment arrested.

As to 03 CRS 19233, 03 CRS 62555, 03 CRS 62556, 03 CRS 62558, 03 CRS 62559: No error.

Judges McGEE and STROUD concur.

GARY L. PELLOM, PLAINTIFF v. BEVERLEY M. PELLOM, DEFENDANT

No. COA08-113

(Filed 2 December 2008)

1. Divorce— equitable distribution—valuation—marital property—business ownership interest—date of separation

The trial court did not abuse its discretion in an equitable distribution case by using a defense expert's valuation regarding plaintiff husband's normalized income in calculating the value of his ownership interest in Durham Anesthesia Associates (DAA) because: (1) in valuing a marital interest in a business, the task of the trial court is to arrive at a date of separation value which reasonably approximates the net value of the business interest, and the defense expert properly valued the business at the date of separation with the data he had at the time; (2) the fact that the defense expert's projection did not prove completely accurate between the time of the report and the time of trial was not sufficient reason to find an abuse of discretion by the trial court in accepting the expert's opinion; and (3) the trial court's findings of fact regarding plaintiff husband's normalized income were based on competent evidence presented by the defense expert.

2. Divorce— equitable distribution—distributive award—calculation of income

The trial court did not abuse its discretion in an equitable distribution case by utilizing a defense expert's income figure for a similarly situated anesthesiologist to calculate plaintiff husband's income for the distributive award because: (1) even if it would have been better practice to use a more recent version, accepting figures based on the 2003 report of the Medical Group Management Association physician compensation data for anesthesiologists does not rise to an abuse of discretion; (2) there was no ascertainable math error; (3) the trial court was not required to accept the analysis of plaintiff's expert since it determined that the statistics relied on were not appropriate under the facts of this case; and (4) the $275,000 figure was based on competent evidence.

3. Divorce— equitable distribution—future earning capacity

The trial court did not abuse its discretion in an equitable distribution case by accepting a defense expert's assumption that plaintiff will continue to work for Durham Anesthesia Associates (DAA) until he reaches the age of 60 even though plaintiff contends the method of valuing DAA was calculated using post-date of separation (D.O.S.) active efforts because: (1) there was no evidence that the expert used any information concerning plaintiff's post-D.O.S. earnings; (2) the expert was taking into account future earning capacity in order to properly value plaintiff's current interest; and (3) the expert needed a limitation on the future earnings figure, and plaintiff's retirement from DAA served that purpose.

4. Divorce— equitable distribution—marital property valuation—tax consequences

The trial court did not abuse its discretion in an equitable distribution case by allegedly failing to consider the tax consequences when accepting defense expert's valuation regarding the parties' ownership interest of Durham Anesthesia Associates (DAA) because: (1) the trial court complied with N.C.G.S. § 50-20(c)(11) by ordering plaintiff to pay a distributive award rather than liquidate his interest in DAA, which may have had a significant tax consequence; and (2) the defense expert was correct in not taking into account personal taxes that plaintiff had to pay on his income, but did consider DAA's entity taxes by evalu-

ating the capitalization rate of DAA and finding that the company paid little to no taxes since it typically disbursed all of its profits each year.

5. Divorce— equitable distribution—marital property valuation—failure to take into account goodwill or accounts receivable

The trial court did not abuse its discretion in an equitable distribution case by refusing to accept plaintiff's Durham Anesthesia Associates (DAA) valuation of $183,000 based on his expert's failure to account for the goodwill value or accounts receivable of DAA. The trial court is not bound to follow any particular methodology in determining DAA's present value, and the findings of fact regarding value are conclusive in appellate review of a bench equitable distribution trial if there is evidence to support them even if there is also evidence supporting a contrary finding.

6. Divorce— equitable distribution—marital property—in-kind distribution

The trial court did not abuse its discretion in an equitable distribution case by not ordering an in-kind distribution of the parties' 25% interest in Fitness Docs and by allocating the stock in Fitness Docs to plaintiff and requiring him to pay a distributive award because: (1) defendant wife rebutted the presumption of in-kind distribution through evidence that Fitness Docs is a closely-held corporation owned by defendant, plaintiff, and three other physicians who are partners with plaintiff in Durham Anesthesia Associates; (2) defendant would have no way of dealing with the issues that would arise with the company since she was estranged from the other owners; and (3) the nature of the business and plaintiff's relationship with the other doctors revealed that plaintiff was in a much stronger position to benefit from the Fitness Docs investment.

7. Divorce— equitable distribution—findings of fact—ability to pay distributive award

The trial court did not abuse its discretion in an equitable distribution case by failing to make any findings regarding plaintiff's ability to pay a distributive award because: (1) plaintiff did not allege that he would have to liquidate assets or obtain a loan to pay the award; (2) the court made findings regarding plaintiff's substantial income which was a liquid asset he could use to pay the award; (3) plaintiff maintained half of the parties' joint sav-

ings account of $60,604.82; (4) the court did not order plaintiff to liquidate any assets, and plaintiff was given more than ten years to pay the award per his request that it be made payable over time; (5) defendant had additional resources of liquid assets besides his monthly paycheck including savings, stock distributions, and DAA bonuses, and he was allowed to pay the majority of the award over time; and (6) if a party's ability to pay an award with liquid assets can be ascertained from the record, then the distributive award must be affirmed.

8. Divorce— equitable distribution—premarital and third-party contributions

The trial court did not improperly consider premarital and third-party contributions to support its equitable distribution award because, although the trial court made findings that defendant's parents assisted the couple with gas money, furniture, groceries, and the like in the early years of their marriage, there was no indication that the court placed a value on these activities for the purpose of forming the distributive award or in determining that an unequal distribution was justified.

9. Divorce— equitable distribution—unequal distribution—present day dollar for dollar reimbursement for retirement account—support of family unit instead of out-of-pocket direct contribution to spouse's education

The trial court abused its discretion in an equitable distribution case by giving a present day dollar for dollar reimbursement of $65,125.21 for defendant wife's retirement account which she cashed out approximately twenty years prior to the date of separation and used to support the family while plaintiff husband was in medical school, and the case is remanded since the 54% unequal distribution was based in large part on this reimbursement, because: (1) although the trial court made proper findings under N.C.G.S. § 50-20(c)(7) as to why defendant was entitled to an unequal distribution according to the various statutory factors including defendant's contributions to plaintiff's education, defendant also obtained a substantial benefit; (2) although direct out-of-pocket expenses of a non-student spouse in support of a student spouse's education should be considered by the trial court when dividing marital property and ordering a reimbursement of those expenses, the facts of this case revealed that defendant's retirement earnings were used to support the family unit instead of an out-of-pocket direct contribution to plaintiff's

education that would warrant a present day dollar for dollar reimbursement; and (3) defendant reaped the benefits of withdrawing the account both while plaintiff was in school, as she was able to stay home with the parties' daughter, as well as after plaintiff obtained his degree.

Appeal by plaintiff from a judgment entered 12 December 2006 by Judge Ann E. McKown in Durham County District Court. Heard in the Court of Appeals 25 August 2008.

Burton & Ellis, PLLC, by Alyscia G. Ellis, for plaintiff-appellant.

Lewis, Anderson, Phillips & Hinkle, PLLC, by Susan H. Lewis and Beth P. Von Hagen, for defendant-appellee.

HUNTER, Judge.

Gary L. Pellom ("plaintiff") and Beverley M. Pellom ("defendant") were married on 30 December 1972 and physically separated on 9 June 2004. A complaint for equitable distribution, *inter alia*, was filed on 7 February 2005. The parties divorced on 1 September 2005. An equitable distribution judgment was entered 12 December 2006 in Durham County District Court. The court held that defendant was entitled to 54% of the couple's net assets and ordered plaintiff to pay a distributive award in the amount of $839,964.32. Plaintiff appeals from the judgment. After careful review, we vacate in part, affirm in part, and remand for further proceeding.

On appeal, the two property interests in dispute are plaintiff's 11.11% ownership interest in Durham Anesthesia Associates, P.A. ("DAA"), and the parties' 25% ownership interest in Fitness Docs, Inc. ("Fitness Docs"). Plaintiff's expert valued DAA at $183,000.00, while defendant's expert valued the business at $1,267,000.00. The trial court accepted the valuation proposed by defendant's expert. There is no dispute as to the value of Fitness Docs.

All assignments of error in the case relate to equitable distribution of property; therefore, the standard of review is abuse of discretion. Our State Supreme Court has held:

> It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. 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) (internal citations omitted).

In conformity with the standard of review, this Court will not "second-guess values of marital . . . property where there is evidence to support the trial court's figures." *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386, *disc. review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988). We will now address plaintiff's multiple arguments in turn.

A.

[1] Plaintiff first argues that the trial court erred in using the defense expert's valuation of DAA as the method was not sound nor properly applied to the facts at issue. Specifically, plaintiff alleges that in his use of the income approach, discounted cash flow method, defendant's expert, Mr. Pulliam, used an incorrect figure for the " 'normalized' income" of plaintiff. This figure is relevant since it is compared to similarly situated physicians to calculate the value of plaintiff's interest in DAA. "The accuracy of [the income] approach depends significantly upon the accuracy of the 'average' statistics used in the comparison." *Carlson v. Carlson*, 127 N.C. App. 87, 93, 487 S.E.2d 784, 787 (1997) (citation omitted).

Mr. Pulliam used a figure of $525,000.00 as plaintiff's " 'normalized' income," which plaintiff claims was improperly based on his 2003 income alone—the highest salary he received between 1999 and 2005. The record shows that plaintiff's income was steadily rising between 1999 and 2003.[1] Plaintiff is correct in stating that Mr. Pulliam's report does not take into account plaintiff's 2004 and 2005[2] earnings. Mr. Pulliam's report is "[a]s of June 9, 2004," the date the parties separated. This Court has held, " '[i]n valuing a marital interest in a business, the task of the trial court is to arrive at a *date of separation* value which "reasonably approximates" the net value of the business interest.' " *Fitzgerald v. Fitzgerald*, 161 N.C. App.

1. Plaintiff earned $326,935.00 in 1999, $365,598.00 in 2000, $348,443.00 in 2001, $465,958.00 in 2002, and $528,155.00 in 2003.

2. $508,252.00 and $422,815.00 respectively.

414, 419, 588 S.E.2d 517, 521 (2003) (citations omitted; emphasis added). Mr. Pulliam properly valued the business at the date of separation with the data he had at the time.

The trial court addressed plaintiff's allegation in the judgment. The court found that "Mr. Pulliam based his projection on the best information he had at the time he prepared his report." The fact that Mr. Pulliam's projection did not prove completely accurate between the time of the report and the time of trial is not sufficient reason to find an abuse of discretion by the trial court in accepting the expert's opinion.

Upon reviewing the record, we find the trial court's findings of fact regarding plaintiff's "normalized income" were based on competent evidence presented by Mr. Pulliam. Therefore, we find no error as to this portion of the valuation.

B.

[2] Plaintiff also argues that Mr. Pulliam's income figure for a "similarly situated anesthesiolgist [sic]" was incorrectly calculated and the trial court abused its discretion in utilizing it to form the distributive award. The figure accepted by the trial court was $275,000.00, putting plaintiff in the 75th percentile in compensation.

Plaintiff asserts that Mr. Pulliam was not justified in relying on the 2003 version of the Medical Group Management Association ("MGMA") physician compensation data for anesthesiologists since the 2004 version was available at the time of his report, but he does not claim that the 2004 version would have changed the outcome. In fact, the report shows that Mr. Pulliam made a note that the "2004 MGMA corroborates with 73%." Even if it would have been better practice to use a more recent version, accepting figures based on the 2003 report does not rise to an abuse of discretion on the part of the trial court.

Plaintiff further argues that there was a simple math error such that 84% rather than 70% should have been used as the percentage representing compensation for production. The testimony that is quoted in plaintiff's brief is taken out of context. Mr. Pulliam did say at trial that he divided thirty-seven weeks (the number of weeks plaintiff would work if he took all fifteen weeks of vacation allotted to him) by forty-four weeks (the number of weeks the 50th percentile anesthesiologists work). When the questioning attorney called his

attention to the fact that the result is .84, not .70, he stated that he thought those were the right numbers, but that he was unsure and would have to check his report.

In fact, the report shows that Mr. Pulliam placed plaintiff in the 75th percentile in compensation. He then took multiple factors into account, such as clinical hours worked and retirement benefits, and calculated $394,000.00. He then multiplied $394,000.00 by .70 since .70 is between the estimated portion of compensation in MGMA attributable to a compensation range of 60% to 80%. The result is $275,800.00, which was rounded down to $275,000.00. There was no math error that we can ascertain.

Plaintiff also argues that Mr. Pulliam, like Mr. Strange, should have placed plaintiff in the 90th percentile of compensation, instead of the 75th percentile, based on the number of procedures performed by DAA and the corresponding MGMA statistics. As the trial court notes, the MGMA data shows that nationwide the 75th percentile physicians performed an average of 1,153 procedures per year, and the 90th percentile performed 1,400 per year. DAA performed approximately 20,000 procedures per year, or 2,000 per physician. The trial court found that the MGMA, and Mr. Strange, did not take into account how many of these procedures were actually performed by certified registered nurse anesthetists ("CRNAs"). The MGMA does not account for this factor because under the laws of most states, CRNAs are not allowed to perform these procedures. In fact DAA had thirty-one CRNAs, as compared to eleven physicians, performing procedures that were attributed to the practice's overall performance figure of 20,000. The trial court did not err in refusing to accept Mr. Strange's analysis as it determined that the statistics Mr. Strange relied on were not appropriate under the facts of this case.

We find that $275,000.00 as the figure used for a "similarly situated anesthesiolgist [sic]" was based on competent evidence and there was no abuse of discretion on the part of the trial court.

C.

[3] Next, plaintiff argues that the method of valuing DAA was calculated using post-date of separation active efforts. This argument is without merit as the trial court properly notes that Mr. Pulliam "based his valuation on a projection of Dr. Pellom's future income based on his past income . . . . There is no evidence that Mr. Pulliam used any information concerning Dr. Pellom's post-D.O.S. [date of separation] earnings . . . ." This Court has found it proper to value a business at

"the price which an outside buyer would pay for it taking into account its future earning capacity[.]" *Poore v. Poore*, 75 N.C. App. 414, 420, 331 S.E.2d 266, 270, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985). Mr. Pulliam was taking into account future earning capacity in order to properly value plaintiff's current interest.

Plaintiff takes issue with Mr. Pulliam's assumption that plaintiff will continue to work for DAA until he reaches the age of sixty, however, in determining the value of plaintiff's interest in DAA, Mr. Pulliam needed a limitation on the future earnings figure and plaintiff's retirement from DAA served that purpose. The trial court did not abuse its discretion in accepting that explanation as it is based on a reasoned approach to valuing a business.

D.

[4] Plaintiff's final argument with regard to the valuation of DAA is that the trial court abused its discretion because it failed to consider the tax consequences when accepting Mr. Pulliam's valuation.

Plaintiff claims that Mr. Pulliam used plaintiff's gross personal income to value the business interest, which is subject to income taxation, and did not account for the tax consequences. The trial court addressed this issue in finding of fact five where it acknowledged that "Mr. Strange and Mr. Pulliam agreed that personal income taxes are not ever to be considered in any valuation method . . . ." Mr. Pulliam did not consider personal income taxes, but he did consider entity-level tax consequences in his valuation of DAA by using the Ibbotson Build-Up Method to determine the appropriate capitalization rate. The trial court notes that Mr. Pulliam's capitalization rate was within one percentage point of plaintiff's expert, Mr. Strange.

Pursuant to statute, a trial judge shall consider in an equitable distribution matter:

> The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

N.C. Gen. Stat. § 50-20(c)(11) (2007).

In applying the above statute, this Court has held:

> The trial court is not required to consider possible taxes when determining the *value* of property in the absence of proof that a taxable event has occurred during the marriage or *will* occur with the division of the marital property. We construe Section 50-20(c)(11) of the General Statutes as requiring the court to consider tax consequences that will result from the distribution of property that the court actually orders.

Weaver v. Weaver, 72 N.C. App. 409, 416, 324 S.E.2d 915, 920 (1985) (internal citations omitted), *disapproved on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 403-04, 368 S.E.2d 595, 599 (1988).

The trial court complied with the statute by considering the tax consequences to plaintiff. However, plaintiff was ordered to pay a distributive award, not liquidate his interest in DAA, which may have had a significant tax consequence. Furthermore, Mr. Pulliam was correct in not taking into account personal taxes that plaintiff had to pay on his income, but he did consider DAA's entity taxes by evaluating the capitalization rate of DAA and finding that the company paid little to no taxes because it typically disbursed all of its profits every year. Accordingly, we find no abuse of discretion with regard to this assignment of error.

E.

[5] It should be noted that the trial court refused to accept plaintiff's DAA valuation of $183,000.00 as his expert, Mr. Strange, did not account for the goodwill value or accounts receivable of DAA. There is a large discrepancy in the two experts' findings, and the trial judge felt that DAA had a goodwill value and that Mr. Pulliam's report properly accounted for such using the discounted cash flow method. The trial judge was not bound to follow any particular methodology in determining DAA's present value. *Poore*, 75 N.C. App. at 421, 331 S.E.2d at 271 ("[a]ny legitimate method of valuation that measures the present value of goodwill by taking into account past results . . . is a proper method of valuing goodwill"). Furthermore, "[o]n appeal, if it appears that the trial court reasonably approximated the net value of the practice *and its goodwill*, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed." *Id.* at 422, 331 S.E.2d at 272 (emphasis added).

The trial judge, in his or her discretion, must weigh the various experts' opinions and determine which valuation is sound. "In appel-

late review of a bench equitable distribution trial, the findings of fact regarding value are conclusive if there is evidence to support them, even if there is also evidence supporting a finding otherwise." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 197, 511 S.E.2d 31, 34 (1999) (citation omitted). In the present case the trial court's findings of fact detail Mr. Pulliam's analysis of DAA's goodwill value and why the court chose to accept his valuation as opposed to that of plaintiff's expert. After reviewing plaintiff's multiple arguments against the accepted valuation of DAA, we find that the trial court did not abuse its discretion in finding that plaintiff's 11.11% interest in DAA was worth $1,267,000.00 at the date of separation.

II.

[6] Next, plaintiff contends that the trial court committed reversible error in not ordering an in-kind distribution of the parties' 25% interest in Fitness Docs. We disagree. N.C. Gen. Stat. § 50-20(e) states in pertinent part:

> [I]t shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties.

Here, defendant rebutted the presumption of in-kind distribution through evidence that Fitness Docs is a closely held corporation as it is owned by defendant, plaintiff, and three other physicians who are partners with plaintiff in DAA. The court noted in its findings of fact, which were based on defendant's testimony, that defendant would have no way of dealing with the issues that would arise with the company and that she was estranged from the other owners. The court also determined that due to the nature of the business and plaintiff's relationship with the other doctors, "[p]laintiff is in a much stronger position to benefit from the Fitness Docs investment."

Since plaintiff rebutted the presumption of in-kind distribution with regard to the 25% interest in Fitness Docs, we find that the trial court did not abuse its discretion in allocating the stock to plaintiff and requiring him to pay $175,000.00 as a distributive award.

III.

[7] Plaintiff also argues that the trial court erred by not making any findings regarding plaintiff's ability to pay a distributive award. We disagree.

The trial court ordered plaintiff to pay a distributive award with an initial payment of $200,000.00 on 1 January 2007 followed by equal quarterly payments of $15,999.11 from 1 January 2008 through 1 October 2017, plus interest at the legal rate.

Plaintiff cites *Embler v. Embler*, 159 N.C. App. 186, 582 S.E.2d 628 (2003), to support his position that the trial court must consider a spouse's ability to pay a distributive award. In *Embler*, the defendant claimed that he had "no liquid assets from which to pay [the $24,876.00] award . . . ." *Id.* at 187, 582 S.E.2d at 630. The Court found that "[i]f defendant is ordered to pay the distributive award *from a non-liquid asset or by obtaining a loan*, the equitable distribution award must be recalculated to take into account any adverse financial ramifications such as adverse tax consequences." *Id.* at 188-89, 582 S.E.2d at 630 (emphasis added). There, "defendant's evidence [was] sufficient to raise the question of where defendant [would] obtain the funds to fulfill this obligation." *Id.* at 188, 582 S.E.2d at 630.

Unlike in *Embler*, plaintiff in the case at bar did not argue to the trial court, or on appeal, that he would have to liquidate assets or obtain a loan to pay the award. The court made findings regarding plaintiff's substantial income,[3] which is an obvious liquid asset from which he could pay the award. Furthermore, plaintiff maintained half of the parties' joint savings account, a total of $60,604.82. Moreover, the court did not order plaintiff to liquidate any assets, and plaintiff was given more than ten years to pay the award per his request that it be made payable over time.

Plaintiff also cites *Robertson v. Robertson*, 167 N.C. App. 567, 605 S.E.2d 667 (2004), where this Court found that the trial court did not make sufficient findings as to the defendant's ability to pay

3. Plaintiff earned over $508,253.00 in 2004 (the year of separation) and $422,815.00 in 2005. According to the trial court's distribution statement, he was to keep in his possession a post-separation distribution from Fitness Docs in the amount of $52,650.00 (classified as divisible property) and $77,000.00 from an accrued DAA bonus (classified as marital property though distributed after the date of separation). Plaintiff generally received quarterly bonuses from DAA in amounts as high as $95,000.00.

a $52,100.07 distributive award. *Id.* at 571, 605 S.E.2d at 669. In that case, the trial court made a specific finding that the defendant could liquidate assets to pay a distributive award, but did not account for any financial ramifications to the defendant in formulating the award. *Id.* at 571, 605 S.E.2d at 669-70. There, the defendant only had $5,929.38 in two checking accounts, and he was being required to pay the *full award* in ninety days. *Id.* at 569-71, 605 S.E.2d at 669. This Court found the trial court erred in considering the defendant's income, which comprised his sole source of liquid assets, without taking into account his liabilities. *Id.* at 571, 605 S.E.2d at 670. Here, defendant had additional sources of liquid assets besides his monthly paycheck, such as savings, stock distributions, and DAA bonuses. Furthermore, he was allowed to pay the majority of the award over time.

In reviewing the case law, we find that if a party's ability to pay an award with liquid assets can be ascertained from the record, then the distributive award must be affirmed. *See Allen v. Allen*, 168 N.C. App. 368, 376-77, 607 S.E.2d 331, 336-37 (2005) (distributive award was affirmed where findings of fact indicated that the defendant could pay the award from his business and rental income and proceeds from refinancing his house). Conversely, as seen in *Robertson* and *Embler*, if a question is raised as to the ability of the payor spouse to pay the award with liquid assets, then the trial court must make findings regarding the spouse's liquid and non-liquid assets and adjust the award for any financial ramifications.

Thus, we find the trial court did not abuse its discretion in its distributive award order where plaintiff had obvious liquid assets from which to pay the award and he was allowed to do so on a reasonable payment schedule per his request.

IV.

[8] Plaintiff next argues that the court improperly considered premarital and third party contributions to support its equitable distribution award. This argument is without merit.

While plaintiff does not point to any specific finding of the trial court to support this argument, in reviewing the judgment we see that the court made findings that defendant's parents assisted the couple with gas money, furniture, groceries, and the like in the early years of their marriage, but there is no indication that the court placed a value on these activities for the purpose of forming the distributive award

or in determining that unequal distribution was justified. Similarly, the court found that both parties worked after their engagement, but prior to marriage, in order to save money. Again, the court does not place any value on these contributions and does not cite these findings in its conclusion that defendant should receive an unequal share of the assets. In sum, there is no evidence that the court abused its discretion by considering inappropriate facts with regard to premarital or third party contributions.

V.

[9] Plaintiff's last argument is that the court abused its discretion by giving a present-day dollar for dollar reimbursement for defendant's retirement account, which she cashed out approximately twenty years prior to the date of separation and used to support the family while plaintiff was in medical school, thus assisting him in obtaining his medical degree. This reimbursement of $65,125.21, coupled with an undisputed additional $24,487.00, meant that defendant was to receive a total of 54% of the net assets.

Plaintiff contends that a dollar for dollar reimbursement was inappropriate because defendant benefitted from the money she withdrew as her support of plaintiff's education resulted in his higher salary, and allowed defendant the option to forego employment during a significant part of the marriage. Defendant asserts that had she left the money in the State retirement system, instead of using it to support plaintiff's education, she would now be guaranteed a monthly lifetime annuity and health care benefits. Upon review, we agree with plaintiff.

During the first five years of marriage, defendant earned an undergraduate and a graduate degree in speech pathology. She then began working full-time for the state school system and accrued retirement benefits for approximately five years. Defendant withdrew her retirement account once the parties conceived their daughter and jointly decided that defendant would no longer work. Defendant did in fact work part-time once the parties' daughter began pre-school, but she never again worked a full-time job. Approximately twenty years passed between defendant's withdrawal of the retirement account and the parties' separation, during which defendant benefitted financially from the medical degree she helped plaintiff earn. Furthermore, under the equitable distribution judgment, defendant was awarded half of plaintiff's substantial retirement account, which he earned because of his medical degree. Defendant also received

half of plaintiff's interest in his medical practice and all other assets acquired during the marriage.

According to N.C. Gen. Stat. § 50-20(c)(7), in determining an unequal division of marital property, the court must consider, "[a]ny direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse." *Id.* "The trial court is required to consider evidence of such contributions . . . [, but t]here is no language within § [50-20](c) which would indicate that the trial court is required to place a monetary value on any distributional factor . . . ." *Gum v. Gum*, 107 N.C. App. 734, 739, 421 S.E.2d 788, 791 (1992). The value to be awarded is within the discretion of the trial court, but the decision must be reasoned. *See White v. White*, 312 N.C. at 777, 324 S.E.2d at 833. We determine that the judge properly made findings as to why defendant was entitled to an unequal distribution according to the various statutory factors, including defendant's contributions to plaintiff's education, but we find there was an abuse of discretion in giving defendant a full reimbursement for marital property she used to support the family unit and for which she also obtained a substantial benefit.

There is not a breadth of case law available on this topic. However, with regard to one spouse's support of the other's education, the case of *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987), is informative. In *Geer*, the trial court awarded defendant-husband a reimbursement of his direct out-of-pocket contributions to plaintiff-wife's medical school education, but failed to recognize plaintiff's contribution to her own education by withdrawing her retirement account to pay expenses.[4] *Id.* at 479-80, 353 S.E.2d at 431-32.

We find *Geer* to stand for the proposition that direct out-of-pocket expenses of a non-student spouse in support of a student spouse's education should be considered by the trial court when dividing marital property and ordering a reimbursement of those expenses is not an abuse of discretion.

The major distinguishing factor between *Geer* and the present case is that in *Geer* the defendant alleged he received no benefit from his wife's medical degree. *Id.* at 478, 353 S.E.2d at 431. The Court recognized that "[b]ecause the parties separated shortly before plaintiff completed her medical training, defendant was prevented from realizing any of the expected benefits to the marriage of the joint decision

4. Plaintiff in this case does not argue that the trial court failed to recognize his contributions to his own education.

that plaintiff pursue a medical degree with defendant's financial, child care, and homemaking support." *Id.* In contrast, this is not so in the case before us. Here, it is undisputed that defendant benefitted from her contributions to plaintiff's education during the remaining twenty years of their marriage. Due in large part to the retirement account funds, defendant was able to cease working full-time, she had financial security for many years after plaintiff finished medical school due to his advanced degree and increased earning capacity, and she received distribution of half of plaintiff's retirement account and his interest in DAA. Defendant continues to benefit from plaintiff's income through a substantial alimony award.

Based on the facts in the case *sub judice*, we determine that defendant's retirement earnings were used to support the family unit and cannot be classified as an out-of-pocket direct contribution to plaintiff's education that would warrant a present-day dollar for dollar reimbursement. Again, the trial court was correct in acknowledging multiple statutory factors that would justify an unequal distribution of property, including defendant's contributions to plaintiff's education, but the court abused its discretion in awarding defendant a $65,125.21 reimbursement specifically for the cashed in retirement account. Because defendant reaped the benefits of withdrawing the account both while plaintiff was in school, as she was able to stay home with the parties' daughter, as well as after he obtained his degree, she should not be reimbursed 100% of her retirement fund. Since the 54% unequal distribution was due in large part to the $65,125.21, we must remand.

Thus, for the foregoing reasons, we affirm in part, vacate in part, and remand for further proceedings not inconsistent with this opinion.

Affirmed in part, vacated in part, and remanded.

Chief Judge MARTIN and Judge WYNN concur.

STATE OF NORTH CAROLINA v. CHARLES JAMES CONWAY

No. COA08-106

(Filed 2 December 2008)

1. Drugs— manufacturing methamphetamine—sufficiency of evidence—production process

The trial court did not err by denying defendant's motion to dismiss the charge of manufacturing methamphetamine even though defendant contends the State was required to show he participated in every step of the production process because: (1) N.C.G.S. § 90-87(15) provides that manufacturing includes the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means; (2) where a statute contains two clauses which prescribe its applicability and the clauses are connected by a disjunctive, the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them; and (3) the evidence viewed in the light most favorable to the State revealed defendant manufactured methamphetamine as defined by N.C.G.S. § 90-87(15) including evidence that defendant had conversation with his girlfriend about making methamphetamine, the girlfriend testified that defendant was involved in the process of methamphetamine production, and precursor chemicals and other products used in the production of methamphetamine were found after a search of the inside and outside of defendant's residence.

2. Drugs— trafficking methamphetamine—sufficiency of evidence—"mixture" containing detectable but undetermined amount of methamphetamine

The trial court erred by denying defendant's motion to dismiss the charges of trafficking in 400 grams or more of methamphetamine based on the State's failure to show more than a detectable amount of methamphetamine was found in 530 grams of a liquid mixture because: (1) the toxic liquid was a step in the process of manufacturing and could not be ingested, used, or consumed as methamphetamine; (2) the General Assembly's deliberate choice to include the coordinating and disjunctive clause "or any mixture containing such substance" in the definition of trafficking in methaqualone, cocaine, heroin, LSD, and MDA/MDMA and the exclusion or omission of this clause in the definition of

trafficking in methamphetamine, together with the well-established rules of statutory construction, required the reversal of defendant's trafficking convictions; (3) the General Assembly did not intend for the total weight of a "mixture" containing a detectable, but undetermined, amount of methamphetamine to be used to establish and escalate the quantity necessary to charge defendant with trafficking; and (4) the State failed to show defendant possessed 28 grams or more of methamphetamine, which was the minimum amount to support a trafficking charge.

Appeal by defendant from judgment entered 17 May 2007 by Judge Kenneth F. Crow in Onslow County Superior Court. Heard in the Court of Appeals 30 October 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Philip A. Telfer, for the State.

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

TYSON, Judge.

Charles James Conway ("defendant") appeals judgments entered after a jury found him to be guilty of: (1) three counts of possession of an immediate precursor with the intent to manufacture methamphetamine; (2) felonious maintaining and keeping a dwelling for a controlled substance; (3) manufacturing methamphetamine; (4) trafficking by possession of 400 grams or more of methamphetamine; and (5) trafficking by manufacture of 400 grams or more of methamphetamine. We find no error in part, reverse in part, and remand for resentencing.

I. Background

On 1 April 2006, Probation Officer Clay Taylor ("Taylor") visited the residence of defendant and Christine Clark ("Clark") located at 327 Queen's Road, Hubert, North Carolina. Clark had previously been convicted of obtaining property by false pretenses and was placed on supervised probation. After repeated positive drug tests for methamphetamine, Clark was placed on electronic house arrest. Clark had violated the terms of her house arrest by leaving her residence without prior authorization earlier that day.

As Taylor approached the front door, he detected a "very strong chemical smell." Through the window, Taylor observed Clark as

she placed two Mason jars filled with a liquid substance behind a "makeshift bar" separating the kitchen and living room. Taylor entered the residence, detected an even stronger chemical smell, and his eyes began to burn and tear up.

Defendant was located in a bedroom on the right side of the residence with the door shut. Taylor exited the residence and called Onslow County Sheriff's Detective Robert Ides ("Detective Ides") of the narcotics unit to inform him that a possible "meth lab" was located within the residence. Taylor re-entered the residence to arrest Clark for her probation violation. Defendant informed Taylor that he was leaving and "fled the residence."

Once Detective Ides arrived at the residence, he and Taylor conducted a walk-through. Based on his observations, Detective Ides also suspected that a "meth lab" was present within the residence. Detective Ides called State Bureau of Investigation ("SBI") Agent Steven Zawistowski ("Agent Zawistowski") to evaluate the residence and determine whether it was necessary for the special response team to be brought to investigate and "clean up" the location. Agent Zawistowski arrived on the scene, determined that a "meth lab" was being operated at the residence. Detective Ides and Agent Zawistowski subsequently obtained and executed a search warrant for the residence.

The following day, the SBI's special response team arrived at the scene. Lisa Edwards ("Edwards"), a forensic chemist, documented the relevant items found within the residence and gathered samples for SBI lab analysis. Edwards retrieved samples from three glass jars containing a bi-layered liquid. Testing showed each glass jar contained a detectable amount of methamphetamine. The total weight of the liquids in the three jars equaled approximately 530 grams. The exact quantity of methamphetamine located within the liquid was not determined.

The State allowed Clark to plead guilty to one count of "Trafficking in Methamphetamine Level I" and imposed a sentence of a minimum of seventy months to a maximum of eighty-four months active imprisonment. In exchange for the plea bargain, Clark agreed to "provide truthful testimony" against defendant.

At defendant's trial, Clark testified that she and defendant had conversations about making methamphetamine. Clark also testified to defendant's involvement in the production of methamphetamine.

Clark admitted she was addicted to methamphetamine and found it difficult to remember events clearly. Clark testified that defendant purchased Actifed©, a product containing pseudoephedrine, and placed the pills in a 20-ounce soda bottle to "sit" for awhile. Defendant poured the dried contents out of the bottle into a glass bowl and "scrape[d] it out." This process was repeated over the course of an afternoon. Clark further testified that she and defendant had daily visitors at their residence, who would "assist in helping to make the methamphetamine."

Defendant did not testify on his own behalf, call other witnesses, or present any evidence to the trial court. The jury found defendant to be guilty of all charges. The trial court sentenced defendant to consecutive terms of a minimum of sixteen and a maximum of twenty months imprisonment for each of his three possession of an immediate precursor with the intent to manufacture methamphetamine convictions. The trial court consolidated defendant's manufacturing methamphetamine and maintaining a dwelling convictions into one judgment and imposed a consecutive sentence of a minimum of seventy-three months and a maximum of ninety-seven months imprisonment. The trial also consolidated both of defendant's trafficking in methamphetamine convictions and imposed a concurrent sentence of a minimum of 225 months and a maximum of 279 months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to dismiss the charges of manufacturing methamphetamine and trafficking in methamphetamine by manufacture and (2) denying his motion to dismiss the charges of trafficking in 400 grams or more of methamphetamine.

III. Motions to Dismiss

A. Standard of Review

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from

> the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

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

B. Manufacturing Methamphetamine

[1] Defendant argues the trial court erred by denying defendant's motion to dismiss the charge of manufacturing methamphetamine. We disagree.

> "Manufacture" is statutorily defined as:
>
> *the production*, *preparation*, *propagation*, *compounding*, *conversion*, *or processing of a controlled substance by any means*, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and "manufacture" further includes any packaging or repackaging of the substance or labeling or relabeling of its container . . . .

N.C. Gen. Stat. § 90-87(15) (2007) (emphasis supplied). This Court has previously addressed this manufacturing statute in the context of a motion to dismiss a charge of possession with intent to manufacture, sell, and deliver methamphetamine. *State v. Alderson*, 173 N.C. App. 344, 348, 618 S.E.2d 844, 847 (2005). However, the facts and holding of *Alderson* are not particularly instructive because this Court's analysis focused on the circumstances sufficient to establish the intent to sell or deliver. *Id.* Here, our analysis is focused upon whether defendant's actions were sufficient to constitute manufacturing as defined in the statute.

Defendant argues that to be charged and convicted of manufacturing methamphetamine, the State must show he participated in every step of the production process. This contention is without merit. N.C. Gen. Stat. § 90-87(15) clearly states that manufacturing includes "the production, preparation, propagation, compounding, conversion, *or* processing of a controlled substance *by any means* . . . ." (Emphasis supplied). This Court has stated, "[w]here a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. 'or'), the application of the statute is not limited to cases falling within both clauses, but

will apply to cases falling within either of them." *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 296, 542 S.E.2d 296, 300 (2001) (citation and quotation omitted).

The State's evidence at trial tended to show that Clark and defendant had conversations about making methamphetamine. Clark also testified that defendant was involved in the process of methamphetamine production. Defendant purchased a product containing pseudoephedrine, placed the pills in a 20-ounce soda bottle, and conducted a "pill wash." Defendant then dried the contents of the bottle and "scrape[d] . . . out" the remnants. This process was repeated over the course of an afternoon. A search of the inside and outside of defendant's residence revealed the presence of precursor chemicals and other products used in the production of methamphetamine. We note defendant did not appeal his convictions for these separate, but related crimes.

Viewed in the light most favorable to the State, sufficient evidence was presented tending to show defendant manufactured methamphetamine as defined by N.C. Gen. Stat. § 90-87(15). *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. The trial court properly denied defendant's motion to dismiss the charge of manufacturing methamphetamine. This assignment of error is overruled.

C. Trafficking in Methamphetamine

[2] Defendant argues the trial court erred by denying his motion to dismiss the charges of trafficking in 400 grams or more of methamphetamine when the State's evidence failed to show "more than a detectable amount of methamphetamine was found" in 530 grams of a liquid mixture. We agree.

The determinative question before us is whether the entire weight of a liquid containing a detectable, but undetermined, amount of methamphetamine establishes a violation of N.C. Gen. Stat. § 90-95(h)(3b). The North Carolina trafficking statute provides, in relevant part:

> Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:
>
> . . . .

> c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

N.C. Gen. Stat. § 90-95(h)(3b)c (2007). The preceding statute is silent on whether the weight of a liquid mixture containing detectable, but undetermined, amounts of methamphetamine is sufficient to meet the requirements set forth within the statute to constitute "trafficking." This appears to be an issue of first impression in North Carolina and requires us to engage in statutory construction. *See State v. Jones*, 358 N.C. 473, 477, 598 S.E.2d 125, 128 (2004) ("[W]here a statute is ambiguous, judicial construction must be used to ascertain the legislative will." (Citation and quotation omitted)).

i. Rules of Statutory Construction

The rules concerning statutory construction are well established: "[t]he cardinal principle of statutory construction is to discern the intent of the legislature. In discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible." *State v. Jones*, 359 N.C. 832, 835-36, 616 S.E.2d 496, 498 (2005) (internal citations omitted). "Portions of the same statute dealing with the same subject matter are to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment . . . ." *State v. Hollars*, 176 N.C. App. 571, 573, 626 S.E.2d 850, 852 (2006) (citation and quotation omitted).

"Words and phrases of a statute 'must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.' " *Id.* at 574, 626 S.E.2d at 853 (quoting *Underwood v. Howland*, 274 N.C. 473, 479, 164 S.E.2d 2, 7 (1968)). When construing an ambiguous criminal statute, we must apply the rule of lenity, which requires us to strictly construe the statute in favor of the defendant. *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007) (citation and quotation omitted). "However, this [rule] does not require that words be given their narrowest or most strained possible meaning. A criminal statute is still construed utilizing 'common sense' and legislative intent." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citations omitted).

ii. Legislative History

Article 5 of Chapter 90, the North Carolina Controlled Substances Act, was amended in 1979 to include N.C. Gen. Stat. § 90-95(h), which added penalties for "trafficking" in certain types of controlled substances. *State v. Tyndall*, 55 N.C. App. 57, 59, 284 S.E.2d 575, 576 (1981). The legislative history of N.C. Gen. Stat. § 90-95 shows section (h) was added "in response to a growing concern regarding the gravity of illegal drug activity in North Carolina and the need for effective laws to deter the corrupting influence of drug dealers and traffickers." *State v. Proctor*, 58 N.C. App. 631, 635, 294 S.E.2d 240, 243 (1982) (citation and quotation omitted).

Section (h) of N.C. Gen. Stat. § 90-95 contains seven subdivisions each of which define the required elements of trafficking in: (1) marijuana; (2) methaqualone; (3) cocaine; (4) methamphetamine; (5) opium or opiate; (6) Lysergic Acid Diethylamide ("LSD"); and (7) MDA/MDMA. *See* N.C. Gen. Stat. § 90-95(h)(1)-(4). Each subsection establishes the quantity of the controlled substance, which must be proven by the State, in conjunction with the escalating mandatory minimum and maximum terms of imprisonment to be imposed as the quantity of the controlled substance increases. N.C. Gen. Stat. § 90-95(h)(1)-(4).

When defining the quantity of the controlled substance that is sufficient to establish trafficking in methaqualone, cocaine, heroin, LSD, and MDA/MDMA, the General Assembly specifically employed the coordinating and disjunctive clause: "*or* any mixture containing such substance." *See* N.C. Gen. Stat. § 90-95(h)(2), (3), (4), (4a), and (4b) (emphasis supplied). This coordinating and disjunctive clause is conspicuously absent from the trafficking in methamphetamine statute. N.C. Gen. Stat. § 90-95(h)(3b).

iii. Applicable Case Law

This Court has addressed whether the trafficking statute envisioned the use of the total weight of a "mixture" containing some amount of a controlled substance to establish the minimum quantity required to convict a defendant of trafficking. *See State v. McCracken*, 157 N.C. App. 524, 526-28, 579 S.E.2d 492, 494-95 (2003); *State v. Jones*, 85 N.C. App. 56, 68, 354 S.E.2d 251, 258 (1987); *Tyndall*, 55 N.C. App. at 60, 284 S.E.2d at 576-77.

In *Tyndall*, at issue was the construction of the trafficking in cocaine statute, N.C. Gen. Stat. § 90-95(h)(3)(a). 55 N.C. App. at 59,

284 S.E.2d at 576. The defendant asserted that "the provision [did] not prohibit the sale of a mixture unless that mixture contain[ed] 28 grams of cocaine." *Id.* This Court disagreed and stated that it appeared from the General Assembly's usage of the language, "if the quantity of such substances *or mixture* involved is 28 grams or more . . ., such person shall be punished by imprisonment[,]" the quantity of the mixture containing cocaine was sufficient in itself to constitute a violation of N.C. Gen. Stat. § 90-95(h)(3)(a). *Id.* at 60, 284 S.E.2d at 577 (emphasis original). This Court also noted the purpose behind the trafficking statute and stated:

> Our legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale. Large scale distribution increases the number of people potentially harmed by the use of drugs. The penalties for sales of such amounts, therefore, are harsher than those under G.S. 90-95(a)(1).

Id. at 60-61, 284 S.E.2d at 577.

In *State v. Perry*, the defendant challenged the constitutionality of the trafficking in heroin statute and argued:

> that the scheme of punishment provided for in this statute is irrational and violative of the equal protection and due process clauses of the United States Constitution because the scheme would punish more severely the possession of a small amount of heroin when mixed with a large amount of legal materials than for a smaller amount of pure heroin.

316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986). Our Supreme Court rejected the defendant's contention based upon the purpose of the statute and stated "the imposition of harsher penalties for the possession of a mixture of controlled substances with a larger mixture of lawful materials has a rational relation to a valid State objective, that is, the deterrence of large scale distribution of drugs." *Id.* at 101-02, 340 S.E.2d at 459 (citations omitted).

In *State v. Jones*, this Court addressed the construction of the trafficking in opiates or heroin statute, N.C. Gen. Stat. § 90-95(h)(4). 85 N.C. App. 56, 354 S.E.2d 251 (1987). Following the reasoning in *Tyndall*, this Court stated "[c]learly, the legislature's use of the word 'mixture' establishes that the total weight of the dosage units . . . is [a] sufficient basis to charge a suspect with trafficking." *Id.* at 68, 354

S.E.2d at 258. Additionally, this Court noted that this interpretation had been held to be constitutional under Article I § 19 of the North Carolina Constitution and the due process and equal protection clauses of the United States Constitution. *Id.*

These precedents clearly establish that if the General Assembly had chosen to define the quantity of methamphetamine needed to constitute trafficking as 28 grams or more and added, as it did in other subsections of the trafficking statute, the disjunctive clause "or any mixture containing such substance," the total weight of the liquid found with detectable amounts of methamphetamine would be sufficient to establish a violation of N.C. Gen. Stat. § 90-95(h)(3b)c. However, the General Assembly chose not to use or include that operative language in the trafficking in methamphetamine statute. *See* N.C. Gen. Stat. § 90-95(h)(3b) ("Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as 'trafficking in methamphetamine or amphetamine' . . . .").

iv. Statutory Analysis

The State argues the trafficking statute must be read *in pari materia* with N.C. Gen. Stat. § 90-90(3), which classifies methamphetamine as a Schedule II controlled substance and delineates what is included in that term. N.C. Gen. Stat. § 90-90(3) (2007) states:

> The following controlled substances are included in this schedule:
>
> . . . .
>
> (3) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system unless specifically exempted or listed in another schedule:
>
> . . . .
>
> c. Methamphetamine, including its salts, isomers, and salts of isomers.

The State argues that "[b]y definition . . . the controlled substance 'methamphetamine' includes any mixture that contains any quantity of the drug." We disagree.

In *State v. Proctor*, the defendant was charged with trafficking in cocaine pursuant to N.C. Gen. Stat. § 90-95(h)(3). 58 N.C. App. at 633,

294 S.E.2d at 242. The defendant filed a motion for a bill of particulars requesting the State specifically identify the controlled substance at issue. *Id.* The State complied and stated "the substance was 'cocaine which is a derivative of coca leaves.' " *Id.* The defendant subsequently filed a motion to dismiss on the grounds that "a derivative of coca leaves" was not included in the language of N.C. Gen. Stat. § 90-95(h)(3). *Id.*

This Court duly noted that N.C. Gen. Stat. § 90-95(h)(3) omitted certain language included in the definition of cocaine contained in N.C. Gen. Stat. § 90-90(a)4, part of the schedule for controlled substances. *Id.* at 634, 294 S.E.2d at 242. N.C. Gen. Stat. § 90-90(a)4 is now codified as N.C. Gen. Stat. § 90-90(1)d. N.C. Gen. Stat. § 90-90(a)4 included in its definition: "(1) coca leaves; (2) any salts, compound, derivative or preparation of coca leaves; and (3) any salts, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances . . . ." *Id.* At the time the defendant was charged, the trafficking in cocaine statute omitted the second group contained in N.C. Gen. Stat. § 90-90(a)4. *Id.* This omission created uncertainty regarding what was included in the trafficking in cocaine statute. *Id.* This Court held that "the full definition of cocaine in G.S. 90-90(a)4 may be read into the trafficking in cocaine provisions of G.S. 90-95(h)(3)" and further stated:

> [T]he purpose of G.S. 90-95(h)(3) would not be served—indeed, it would be thwarted—by a more restrictive definition of cocaine than that in G.S. 90-90(a)4. Under these circumstances, we believe that the purpose of the trafficking statute must be given effect even if the strict letter thereof must be disregarded in order to do so. The schedules of controlled substances set forth in G.S. 90-89 through 90-94 and all the subsections of G.S. 90-95 deal with the same subject matter, violations of the Controlled Substances Act. Statutes dealing with the same subject matter are to be construed *in pari materia*.

Id. at 635, 294 S.E.2d at 243 (citations omitted). However, this Court carefully limited its holding to "th[o]se circumstances" and articulated the reasoning behind its decision. *Id.* This Court stated, "[i]t is apparent to us that the omission of the second group listed in G.S. 90-90(a)4 from the language of G.S. 90-95(h)(3) was not a deliberate choice by the legislature since it results in an incomplete and confusing definition for the crime of trafficking in cocaine." *Id.* at 634, 294 S.E.2d at 242. N.C. Gen. Stat. § 90-95(h)(3) has since been

amended to include "any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves."

The statutes before us are distinguishable from the statutes at issue in *Proctor*. In that case, N.C. Gen. Stat. §§ 90-90(a)4 and -90(h)(3) contained virtually the same language. The omission of the "second group" from the trafficking in cocaine statute appeared to be no more than a clerical error by the General Assembly. Here, although N.C. Gen. Stat. § 90-90(3) defines methamphetamine for purposes of the schedule for controlled substances, the General Assembly chose not to use and specifically excluded that particular language in the trafficking in methamphetamine statute. *See* N.C. Gen. Stat. §§ 90-90(3), -95(h)(3b). We find it significant that N.C. Gen. Stat. §§ 90-89(3) and (4) and -90(1) define methaqualone, cocaine, heroin, LSD, and MDA/MDMA as "any mixture" containing that substance, for purposes of the schedule for controlled substances, yet the General Assembly still chose to include the coordinating and disjunctive clause "or any mixture containing such substance" in the definition of trafficking for all of these particular drugs. Reading North Carolina's trafficking statute as a whole, and *in pari materia*, a notable difference exists between the portion of the statute defining the quantity required to establish trafficking in methaqualone, cocaine, heroin, LSD, and MDA/MDMA and the portion of the statute defining the quantity required to establish trafficking in methamphetamine.

The omission or exclusion of the coordinating and disjunctive clause "or any mixture containing such substance" in N.C. Gen. Stat. § 90-95(h)(3b) indicates the General Assembly did not envision the use of the total weight of a "mixture" containing a detectable, but undetermined, amount of methamphetamine to establish the quantity required to convict a defendant of "trafficking." *See Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993) ("Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." (Citation omitted)).

Here, the State confiscated 530 grams of liquid in three Mason jars, which contained "detectable" amounts of methamphetamine from defendant's residence. The exact amount of methamphetamine located within the liquid was never determined. This toxic liquid was a step in the process of manufacturing and could not be ingested, used, or consumed as methamphetamine.

Because the State failed to show defendant possessed 28 grams or more of methamphetamine, as required by the trafficking statute, the trial court erred by denying defendant's motion to dismiss both of his trafficking in methamphetamine charges. *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. The trial court's order denying defendant's motion to dismiss his two trafficking in methamphetamine charges was error and the judgment entered upon the jury's verdicts is reversed. This case is remanded to the trial court for resentencing in light of our holding.

IV. Conclusion

Viewed in the light most favorable to the State, sufficient evidence was presented at trial tending to show defendant manufactured methamphetamine as defined by N.C. Gen. Stat. § 90-87(15). The trial court properly denied defendant's motion to dismiss the charge of manufacturing methamphetamine.

The General Assembly's deliberate choice to include the coordinating and disjunctive clause "or any mixture containing such substance" in the definition of trafficking in methaqualone, cocaine, heroin, LSD, and MDA/MDMA and the exclusion or omission of this clause in the definition of trafficking in methamphetamine, together with the well-established rules of statutory construction, requires the reversal of defendant's trafficking convictions. The General Assembly did not intend for the total weight of a "mixture" containing a detectable, but undetermined, amount of methamphetamine to be used to establish and escalate the quantity necessary to charge defendant with trafficking. Because the State failed to show defendant possessed 28 grams or more of methamphetamine, the trial court erred by denying defendant's motion to dismiss both of his trafficking charges. Defendant's trafficking convictions in judgment 06 CRS 052987 are reversed. Defendant's remaining convictions are left undisturbed. This case is remanded to the trial court for resentencing.

No error in part, Reversed in part, and Remanded.

Judges CALABRIA and STROUD concur.

DAVID M. JONES, EMPLOYEE/PLAINTIFF v. MODERN CHEVROLET, EMPLOYER, AND BRENTWOOD SERVICES ADMINISTRATORS, INC., SERVICING AGENT, DEFENDANTS

No. COA08-371

(Filed 2 December 2008)

Workers' Compensation— termination after return to work— temporary disability awarded—remand for further findings

A workers' compensation case was remanded where the Industrial Commission did not make the necessary findings or conclusions to explain why it applied *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228 (1996), and awarded plaintiff temporary total disability after he injured his right knee, developed pain in his left knee, had surgery on the right knee, returned to work but continued to have pain in the left knee, and was terminated.

Judge Wynn dissenting.

Appeal by Defendants from Opinion and Award entered 29 November 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 September 2008.

Lewis & Daggett, P.A., by Christopher M. Wilkie, for Plaintiff-Appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Carla Martin Cobb, for Defendants-Appellants.

ARROWOOD, Judge.

Modern Chevrolet and Brentwood Services, Inc. (Defendants) appeal an Industrial Commission Opinion and Award reversing the Opinion of a Deputy Commissioner and awarding Plaintiff-Appellee temporary total disability and medical benefits. We remand for additional findings of fact.

Plaintiff, who was born in 1955, has a high school education and training as an automobile technician. In March 2004 he was hired by Defendant as an automobile mechanic. On 11 November 2004 Plaintiff caught his right foot in machinery and suffered a compensable injury to his right knee. He was initially treated at Concentra Medical Center, which prescribed pain medication, ice packs, and home exercise. Concentra released Plaintiff to return to work, re-

stricting him from squatting, kneeling, climbing stairs, climbing ladders, or lifting more than 20 pounds. However, Defendant had no light duty work available, so Plaintiff stopped working on 15 November 2004. Plaintiff's right knee did not improve with conservative treatment, and by early December 2004 he had a "decreased range of motion" in his knee.

When an MRI revealed a medial meniscus tear and other damage to his right knee, Plaintiff's treatment was transferred to orthopaedic surgeon Dr. David Martin. Dr. Martin's physicians' assistant, Frank Caruso, recommended arthroscopic surgery on Plaintiff's right knee, and continued the light duty restrictions. On 10 February 2005 Plaintiff was examined by Dr. Martin, to whom he reported left knee pain and the inability to bear weight on his right knee. Dr. Martin recommended arthroscopic surgery for Plaintiff's right knee and a steroid injection in his left knee. Dr. Martin noted that if Plaintiff's left knee continued to be painful then weight bearing x-rays or an MRI might be appropriate.

On 16 February 2005 Plaintiff had arthroscopic surgery on his right knee, which revealed extensive damage and complex tears to the tissues of his knee. Following surgery, Plaintiff was written out of work. On 1 April 2005 he started physical therapy, and on 11 April 2005 Caruso recommended that Plaintiff return to work after several more weeks of physical therapy. Plaintiff returned to work on 25 April 2005 without work restrictions, although he was still being treated by Dr. Martin. Plaintiff's left knee pain continued after he returned to work, and he received a second steroid injection in May 2005. On 13 June 2005 Plaintiff was examined by Dr. Martin, who noted that Plaintiff was suffering from pain and swelling of his left knee. Dr. Martin referred Plaintiff for a left knee MRI, but did not assign work restrictions.

On 1 July 2005 Defendant terminated Plaintiff's employment. The termination notice indicated that Plaintiff was fired for poor workmanship on a recent brake repair. The next day, 2 July 2005, Plaintiff received the results of his left knee MRI, revealing a tear to the medial meniscus and other damage to the left knee. On 7 July 2005 Dr. Martin recommended left knee arthroscopic surgery. Defendants requested an independent medical examination, and in August 2005 Plaintiff was examined by Dr. James Comadoll, who concurred with Dr. Martin's recommendation for surgery. On 27 September 2005 Plaintiff underwent a left knee arthroscopic surgical procedure, which re-

vealed a "large tear" in the meniscus and other damage to his left knee. In October 2005 Plaintiff was released to return to "sedentary work." Plaintiff was evaluated in January 2006, and Dr. Comadoll assigned Plaintiff a 20% permanent partial impairment rating to his right leg, and a 15% permanent partial impairment rating to his left leg. Dr. Martin examined Plaintiff's right knee only, and concurred with the 20% rating.

Defendants initially accepted Plaintiff's 11 November 2004 injury as compensable and he received medical and disability benefits. Defendants suspended Plaintiff's disability benefits on 25 April 2005, when he returned to work at full pay, and discontinued disability benefits when Plaintiff was fired on 1 July 2005. Defendants accepted Plaintiff's left knee injury as compensable and resumed disability payments effective 27 September 2005, the date of Plaintiff's knee surgery. On 28 October 2005 Plaintiff filed an Industrial Commission Form 33 Request for Hearing, seeking disability benefits for the period between 1 July 2005 and 27 September 2005. Defendants denied Plaintiff's claim on the grounds that Plaintiff had been terminated for reasons unrelated to his injury and had not been assigned work restrictions at the time he was terminated. In April 2006 the case was heard by Deputy Commissioner John DeLuca, who in February 2007 issued an Opinion and Award denying Plaintiff's claim for 1 July to 27 September 2005 disability benefits. Plaintiff appealed to the Full Commission, which issued its Opinion and Award on 29 November 2007. The Commission awarded Plaintiff medical benefits and temporary total disability from 1 July 2005 until further order of the Commission. From this Opinion, Defendants have appealed.

Standard of Review

"Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: '(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.' " *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (quoting *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005)). "The Commission's findings of fact 'are conclusive on appeal when supported by competent evidence even though' evidence exists that would support a contrary finding." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982)). However, 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) (citations omitted).

Defendants argue that the Commission erred by "applying a *Seagraves* analysis." The *Seagraves* test, first articulated by this Court in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996), guides the Commission in deciding whether termination of an injured employee bars him from receiving disability benefits.

"[T]he term 'disability' in the context of workers' compensation is defined as the 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' N.C.G.S. § 97-2(9) [(2007).] Consequently, a determination of whether a worker is disabled focuses upon impairment to the injured employee's earning capacity rather than upon physical infirmity." *Johnson*, 358 N.C. at 707, 599 S.E.2d at 513 (citing *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434-35, 342 S.E.2d 798, 804 (1986)).

A totally disabled employee is entitled to weekly compensation under N.C. Gen. Stat. § 97-29 (2007), and a partially disabled claimant may receive benefits under N.C. Gen. Stat. § 97-30 (2007). However, N.C. Gen. Stat. § 97-32 (2007), provides that:

> If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.

"Our appellate decisions have defined 'suitable' employment to be any job that a claimant 'is capable of performing considering his age, education, physical limitations, vocational skills, and experience.' " *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000) (quoting *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994)).

This Court has held that refusal to accept suitable employment may be actual or constructive. "The constructive refusal defense is an argument that the employee's inability to earn wages at pre-injury levels is no longer caused by his injury; rather, the employer argues, the employee's misconduct is responsible for his inability to earn wages at pre-injury levels. Because it is the employer who seeks to discon-

tinue disability payments on this basis, the employer has the initial burden of showing that the employee actually engaged in the misconduct." *Williams v. Pee Dee Electric Membership Corp.*, 130 N.C. App. 298, 301, 502 S.E.2d 645, 647 (1998).

"In *Seagraves* the Court of Appeals examined the question of whether an employee can be deemed to have refused suitable employment, thereby precluding injury-related benefits, if she is terminated for misconduct that is unrelated to her workplace injuries." *McRae*, 358 N.C. at 493, 597 S.E.2d at 698. In *McRae*, the North Carolina Supreme Court adopted the *Seagraves* test:

> [T]he test serves to protect injured employees from unscrupulous employers who might fire them in order to avoid paying [benefits, and] . . . serves employers as a shield against injured employees who engage in unacceptable conduct while employed in rehabilitative settings. . . . [If] the former employee is a victim of job-related injuries, the original employer remains responsible for benefit obligations arising out of the employee's job-related injury[.] . . . [I]f the terminated-for-misconduct employee fails to show by the greater weight of the evidence that his or her inability to find or perform comparable employment is due to the employee's work-related injuries, the employer is then freed of further benefit responsibilities.

McRae, 358 N.C. at 494-95, 597 S.E.2d at 699-700. The Court summarized the principles underlying its holding:

> The test in *Seagraves* is intended to weigh the actions and interests of employer and employee alike. Ultimately, the *Seagraves* rule aims to provide a means by which the Industrial Commission can determine if the circumstances surrounding a termination warrant preclusion or discontinuation of injury-related benefits. As such, we conclude that this test is an appropriate means to decide cases of this nature.

Id. at 495, 597 S.E.2d at 700. Thus, the *Seagraves* test was originally developed to address the issue of "whether an employee, who is disabled as a result of a compensable injury and is provided with light duty employment by the employer, constructively refuses the light duty work and forfeits workers' compensation benefits . . . upon termination of the employment for fault or misconduct unrelated to the compensable injury." *Seagraves*, 123 N.C. App. at 230, 472 S.E.2d at 399.

Plaintiff was released to return to work without restrictions. Defendants argue that, as a matter of law, this precludes the application of the *Seagraves* test. Plaintiff, however, urges that his work was in the "nature" of rehabilitative employment. The issue is whether application of the *Seagraves* analysis was appropriate on the facts of this case.

The Commission has previously applied the *Seagraves* test in cases where the plaintiff did not have work restrictions. For example, in *Hogan v. Terminal Trucking Co.*, 190 N.C. App. 758, 660 S.E.2d 911, 913 (2008), the plaintiff was involved in a May 2004 truck accident and was terminated pursuant to company policy. He was released to return to work without restrictions on 12 August 2004. Plaintiff appealed from the Commission's ruling that Plaintiff was not entitled to disability after this date. On appeal, he argued that the Commission erred by concluding that "defendant-employer terminated the plaintiff for misconduct or fault unrelated to the compensable injury, for which a non-disabled employee would ordinarily have been terminated." This Court did not directly address the use of the *Seagraves* test, but its Opinion upheld the Commission's findings and conclusions on the issue, notwithstanding the Commission's use of the *Seagraves* test.

Plaintiff's situation bears some similarities to that of a claimant who returns to work under light duty restrictions and is later terminated. Plaintiff's position required standing, squatting, kneeling, pushing, pulling, and lifting up to 100 pounds. When Plaintiff returned to work on 25 April 2005 he was still being treated for his right knee injury. His left knee injury was not resolved when he returned to work, and between 25 April 2005 and 1 July 2005 Plaintiff continued to experience pain and difficult movement in his left knee. In May he received a steroid injection in his left knee. On 13 June 2005 Plaintiff reported left knee pain to Dr. Martin, who recommended an MRI. On 2 July 2004 MRI results showed significant damage to Plaintiff's left knee, which his treating physicians agreed was causally related to his right knee injury. Thus, treatment of Plaintiff's left knee injury extended Defendants's obligation to pay workers' compensation benefits beyond the date that Plaintiff returned to work, arguably placing Plaintiff in the vulnerable position discussed in *Toastmaster*:

> [A] rule that would allow employers to evade benefit payments simply because the recipient-employee was terminated for misconduct could be open to abuse. Such a rule could give employ-

> ers an incentive to find circumstances that would constitute misconduct by employees who were previously injured on the job.

McRae, 358 N.C. at 495, 597 S.E.2d at 700.

However, although the record evidence might have supported a decision by the Commission to apply the *Seagraves* test, we cannot resolve this issue because the Commission failed to make the necessary findings or conclusions to explain why it applied *Seagraves* to this case.

Further, because Plaintiff returned to work at his full salary and without work restrictions, there is no presumption of continuing disability after he was terminated. Again, the record contains evidence that might support a finding of disability. For example, in *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 682, 648 S.E.2d 917, 921 (2007), the plaintiff returned to work without restrictions, but an MRI later revealed a torn meniscus requiring surgery. On appeal, the defendant argued that "since plaintiff had not yet been written out of work or assigned any work restrictions, he has not proven that he was disabled" before the date he obtained an MRI. This Court held that the Commission could "reasonably draw the inference that plaintiff's condition on 1 June 2002 was the same as his condition a mere two weeks later on 17 June 2002[.]" Similarly, the day after the instant Plaintiff was terminated he was determined to have significant damage to his left knee, requiring surgery. However, the Commission failed to make findings and conclusions regarding Plaintiff's disability between 1 July and 27 September 2005.

"There are no findings of fact as to medical evidence, evidence of reasonable efforts to obtain employment, or evidence of the futility of plaintiff's seeking employment. . . . Because the Commission's findings of fact are insufficient to enable this Court to determine plaintiff's right to compensation, this matter must be remanded for proper findings on this issue." *Silva v. Lowe's Home Improvement*, 176 N.C. App. 229, 237, 625 S.E.2d 613, 620 (2006) (citations omitted).

Moreover, certain of the Commission's purported findings of fact are summaries or recitations of witness testimony, rather than actual findings of fact. These include the following:

> 19. Upon a return appointment to Dr. Martin on June 13, 2005, Plaintiff was noted to have crepitus, or grinding, in his right knee, as well as popping, weakness and a small amount of right knee swelling. Dr. Martin also noted that Plaintiff

had a moderate effusion in the left knee, tenderness over the inside of the knee on the medial joint line over the medial meniscus, and grinding in the front of the left knee. Dr. Martin also directly related the left knee problems to the original work injury and the overcompensation on the left side due to the problems on the right side. As a result, Plaintiff was referred for a left knee MRI. Dr. Martin noted that Plaintiff was working 'full duty' but did not give any work restrictions at that time.

. . . .

21. Plaintiff was terminated by Defendant-Employer on July 1, 2005. . . . [The termination notice] states that Plaintiff was terminated for poor workmanship on a repair job to a brake fluid supply line[.] . . . Defendant-Employer's service manager Jeff Keith testified that Plaintiff was terminated for overcharging the customer on that same work job and for the workmanship. Mr. Keith also testified that . . . at least one other employee who also worked on that same vehicle overcharged for services and was not terminated. Finally, Mr. Keith testified that Plaintiff's personnel file contained no complaint for poor performance . . . other than the alleged break repair incident on June 25, 2005.

22. Regarding the repair job on June 25, 2005, for which he was terminated, Plaintiff testified that he performed the standard, appropriate service repairs and tests to that same vehicle, as needed and required, and that following the post-repair test drive, no fluid drippage occurred. Plaintiff testified that if fluid drippage occurred after the test drive, it is reparable at no additional cost to the customer, and that he would have repaired the supply line again if drippage had occurred after the test drive. Plaintiff further testified that his co-workers were shocked that he was terminated for such a reason because that is not a reason typically given for termination in the car maintenance industry.

"This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence and the Commission must resolve the conflicting testimony." *Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981)) (other citations omitted). " '[R]ecitations

of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.' " *Winders v. Edgecombe Cty. Home Health Care*, 187 N.C. App. 668, 673, 653 S.E.2d 575, 579 (2007) (quoting *In re Green*, 67 N.C. App. 501, 505 n. 1, 313 S.E.2d 193, 195 (1984)).

"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*, 358 N.C. at 705, 599 S.E.2d at 511 (citations omitted). "Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987). "On remand, the Commission may reopen the proceedings to take additional evidence if it determines on the record that there is insufficient evidence[.]" *Calloway v. Shuford Mills*, 78 N.C. App. 702, 709, 338 S.E.2d 548, 553 (1986).

For the reasons stated above, we remand the instant matter to the Full Commission for findings and conclusions consistent with this opinion.

Remanded.

Judge BRYANT concurs.

Judge WYNN dissents by separate opinion.

WYNN, Judge, dissenting.

The issue on appeal is whether the Industrial Commission was correct in finding and concluding that Defendants failed to demonstrate that Plaintiff's loss of, or diminution in, wages was attributable to his own wrongful act, resulting in the loss of his employment, and not due to his work-related disability. *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996). Contrary to the majority opinion, I would reach the threshold issue of whether the Industrial Commission appropriately applied *Seagraves*, concluding that Plaintiff was wrongfully terminated and is entitled to

receive temporary total disability compensation. Finding that the Commission's application of the *Seagraves* analysis was proper, I would affirm the Commission's decision.

In *Seagraves*, this Court established a test for determining whether an injured employee's right to continuing workers' compensation benefits, after being terminated for misconduct, is appropriate. *Id.* Thereafter, our Supreme Court adopted the *Seagraves* analysis, stating:

> [U]nder *the Seagraves'* test, to bar payment of benefits, an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury.

McRae v. Toastmaster, Inc., 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004) (citation omitted).

The majority appears to intertwine two separate analyses: (1) Did the Commission properly apply *Seagraves?* (2) If not, is the conclusion that Plaintiff is entitled to receive temporary total disability compensation justified by the Commission's findings of fact? The majority concludes that "the Commission failed to make the necessary findings or conclusions to explain why it applied *Seagraves* to this case." However, after careful review of the record, I conclude that the findings made by the Commission support its application of *Seagraves*.

On review of the case law, there are a number of workers' compensation cases in which our courts have applied the *Seagraves* analysis without making a specific finding that plaintiff-employee was on light or rehabilitative duty prior to his termination. In *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 518 S.E.2d 200 (1999), the Court upheld the Industrial Commission's decision, which applied the *Seagraves* inquiry and found that plaintiff was not barred from receiving disability benefits after being terminated. In *Flores*, the plaintiff sustained a compensable injury on 9 April 1992, returned to work on 9 June 1992 without modification, and periodically missed work at the direction of his physician until 16 April 1993, when he was terminated. The Court held, "pursuant to our decision in *Seagraves*, 123 N.C. App. 228, 472 S.E.2d 397, the Commission's findings supported its conclusion that plaintiff was not barred from

receiving disability benefits after 16 April 1993." *Flores*, 134 N.C. App. at 459, 518 S.E.2d at 205. *See also Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 613 S.E.2d 243 (2005) (applying *Seagraves* without requiring a finding of light duty or rehabilitative employment where an employee was fired for periodically missing work due to accident-related symptoms).

Further, our Supreme Court has explained the underlying purpose of the *Seagraves* analysis, stating:

> On the one hand, the test serves to protect injured employees from unscrupulous employers who might fire them in order to avoid paying them their due benefits. On the other hand, according to the lower court, the test simultaneously serves employers as a shield against injured employees who engage in unacceptable conduct while employed in rehabilitative settings.

McRae, 358 N.C. at 494, 597 S.E.2d at 699. The Court's opinion in *McRae* illustrates the intention behind the *Seagraves* analysis: to adopt an inquiry that carefully balances the interest of protecting injured employees who return to work in particularly vulnerable positions while also guarding against potential defendant-employer abuse. Arguably, given this Court's decision in *Flores* and the rationale articulated in *McRae*, the determinative issue is whether the employee, who is urging the application of *Seagraves*, was in the type of vulnerable position the analysis was originally adopted to protect.

Here, while the Commission concluded that Plaintiff's "job was not modified in any way and he did not work under any restrictions," it also concluded that, under *Seagraves*, Defendants "failed to show that plaintiff was terminated for misconduct[,] . . . that the same misconduct would have resulted in the termination of a non-disabled employee, and that the termination was unrelated to her compensable injury." Drawing from the majority opinion, there is competent evidence in the record to support the finding that the Plaintiff was in a position similar to, if not the same as, rehabilitative or light-duty employment prior to his termination. As the majority states, Plaintiff's position required a significant amount of "standing, squatting, kneeling, pushing, pulling and lifting up to 100 pounds." Yet, when Plaintiff returned to work, he was still being treated for his injury. Further, Dr. Martin, his treating physician, testified that the "plan was to return him to work, see him back two to three months later to evaluate his knee, and consider placing him at maximum medical improvement" at a later date.

Given the Plaintiff's vulnerable status at the time he returned to work and the evidence in the record suggesting Plaintiff was still being treated for his injury, I conclude that the application of *Seagraves* was proper and the Commission's decision should therefore be affirmed.

ROBERT CAREY, EMPLOYEE, PLAINTIFF v. NORMENT SECURITY INDUSTRIES, EMPLOYER, SELF-INSURED (GALLAGHER BASSETT SERVICES, SERVICING AGENT) DEFENDANT

No. COA07-1188

(Filed 2 December 2008)

1. Workers' Compensation— causation—cervical condition

The full Industrial Commission did not err in a workers' compensation case by concluding plaintiff employee's cervical disc herniation was caused by his fall at work on 30 April 2004 because: (1) while there was medical testimony that hypothetically turning one's neck could cause herniation, there was testimony that to a reasonable degree of medical certainty plaintiff's fall caused his herniation; and (2) while the record provided evidence of another potential cause of plaintiff's cervical disc herniation, the Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there may be evidence that would support findings to the contrary.

2. Workers' Compensation— temporary total disability—sufficiency of findings of fact

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff was temporarily totally disabled from any employment and was entitled to payment from 15 February 2005 until 8 July 2005, and the case is reversed and remanded for further findings of fact with regard to sporadic days plaintiff missed due to his medical treatment and status of plaintiff's disability between 23 May 2005 and 8 July 2005 because in the light most favorable to plaintiff, the record supported a finding of temporary total disability from 22 February through 23 May 2005, but did not support a finding that plaintiff was temporarily totally disabled between 23 May 2005 and 8 July 2005.

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

Although defendant contends it is entitled to a credit for short-term disability benefits paid to plaintiff in the event the Commission's award of temporary total disability benefits is upheld in a workers' compensation case, this argument is dismissed because defendant failed to raise it below as required by N.C. R. App. P. 10(b)(1).

4. Workers' Compensation— appeal—attorney fees—costs

The Court of Appeals exercised its discretion in a workers' compensation case and declined to award plaintiff employee costs and attorney fees for time spent on this appeal.

Judge WYNN concurring in part and dissenting in part.

Appeal by defendant from judgment entered 28 June 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 March 2008.

Scudder & Hendrick, by April D. Sequin and Samuel A. Scudder, for plaintiff-appellee.

Hendrick, Gardner, Kinchelo & Garofalo, L.L.P., by Vachelle Willis and Dana C. Moody, for defendant-appellants.

BRYANT, Judge.

Defendant Norment Security Industries appeals from an Opinion and Award entered 28 June 2007 by the Industrial Commission (the Commission) awarding Plaintiff Robert Carey temporary total disability compensation at the rate of $495.72 per week from 15 February 2005 until 8 July 2005 and for sporadic days plaintiff missed work due to medical treatment. For the reasons stated below, we reverse and remand the Opinion and Award.

Facts

During April 2004, plaintiff worked for defendant as a field engineer. On 30 April 2004, plaintiff was standing on a ladder approximately three feet above an acoustical tile ceiling installing magnetic locks when his ladder shifted and plaintiff fell. Plaintiff caught his arms on the ceiling grid, landed on his feet, and at the moment noted only bruised arms. But, a week later, plaintiff experienced severe mid back pain.

On 10 May 2004, plaintiff's Urgent Care physician referred him to Raleigh Orthopaedic Rehabilitation Specialist (Raleigh Orthopaedic) for evaluation and treatment of pain in the central and thoracic spine area. Plaintiff's initial evaluation at Raleigh Orthopaedic stated "[p]atient complains of interrupted sleep, very minimal pain during the day, pain is always central in location and thoracic spine levels. . . . It's worthy to note this patient also is complaining of some upper extremity numbness or tingling when questioned about the presence of this." Raleigh Orthopaedic treated plaintiff from 10 June 2004 until December 2004 when he was referred to the Carolina Back Institute. Throughout this time, plaintiff continued to work.

Plaintiff's initial evaluation at Carolina Back Institute by Dr. Catherine Duncan stated "[t]horacic and lumbar plain films and MRI studies had been done with continued complaints of, principally, mid to low thoracic pain which has been midline. [Plaintiff] has had, also, other areas of pain involving the neck, lower back, right leg and right foot that have been variously present . . . ." The impression made upon his treating physicians was that plaintiff suffered from some type of thoracic muscle tear.

Plaintiff underwent therapy at Carolina Back Institute from 5 January 2005 until 10 March 2005. After four sessions, Dr. Duncan declared plaintiff's "[t]horacic and lumbar strain/sprain, totally resolved . . . [and plaintiff] at maximal medical improvement with complete resolution of the above problem. [Plaintiff] has no restrictions for his thoracic or lumbar spine. He has no permanent partial impairment." Later, Dr. Duncan testified that there were indications noted on in-house forms that plaintiff suffered from neck pain. However, there was nothing from the insurance carrier that directed her towards "doing anything with the cervical spine."

On 19 February 2005, plaintiff experienced and later described to his medical case manager, Betty Riddle, what felt like a "pop" in his neck. During her deposition, Ms. Riddle testified as follows:

> Riddle: This was a telephone conference with him on 2/21/05, and I recall that he states that he was—he was just sitting there in his home when he just turned his head to speak to someone and felt a pop and that, you know, it had been bothering him since then.

After the "pop," plaintiff was seen by Rena Hodges at Knightdale Primary Care who, on 22 February 2005, excused plaintiff from work

and referred him to Dr. Timothy Garner, a neurosurgeon at Capital Neurosurgery, Inc. Dr. Garner excused plaintiff from work for "neck problems" until further notice.

Dr. Garner diagnosed plaintiff as suffering from a soft cervical disc herniation at C6-7. In a letter to Rena Hodges, Dr. Garner indicated that he was aware of plaintiff's fall and plaintiff's bruises and scratches, aches and pains as a result of that fall. However, his impression was that plaintiff's trouble with his lower back was related to plaintiff's neck problems. Therapy sessions at Carolina Back Institute helped with plaintiff's lower back ailment but failed to alleviate off-and-on neck pain, numbness, and tingling down plaintiff's left arm, all of which occurred only after plaintiff's fall. Dr. Garner treated plaintiff for the cervical disc herniation and, on 23 May 2005, noted "[plaintiff's] doing great. He has no arm pain."

During his deposition, Dr. Garner testified that to a reasonable degree of medical certainty the fall was the likely cause of plaintiff's herniated disk at C6-7. However, on cross-examination, defense counsel presented Dr. Garner with Betty Riddle's report that on 19 February 2005 plaintiff experienced a "pop" in his neck.

Counsel: From that scenario . . . could that situation cause the herniation that you subsequently diagnosed?

Garner: Yes. Absolutely.

Counsel: Just for further clarification, would you say to a reasonable degree of medical certainty that the scenario that you just read into the record *could have* caused the disk herniation at C6-7 that you diagnosed [plaintiff] as having?

Garner: Yes. Could have.

Before Deputy Commissioner Philip A. Baddour, III, plaintiff testified that by 23 May 2005 he had minimal arm pain and that Dr. Garner released him to return to work. Plaintiff further testified that he "[didn't] recall [Dr. Garner] indicating one way or the other whether [plaintiff] ha[d] any restrictions or not."

After receiving his medical release to return to work, Plaintiff first informed his attorney of his status.

> I wasn't completely back to normal but I was ready to go back to work because I couldn't afford to keep staying out, and [my attor-

> ney] instructed me to wait until I heard from him, and then we went through mediation, and then they told me that I needed to go back to work. And, therefore, that day when I got out of mediation, I called Norment to find out if I could come back to work, and they told me the position was no longer available.

In the interim, plaintiff made "about three or four hundred bucks" doing "odd-and-end stuff here and there" for Carolina Auto Sales. When plaintiff contacted defendant on 24 June 2005, thirty-two days after receiving his medical release, defendant informed plaintiff that his job was no longer available. Two or three weeks later, plaintiff accepted a position at Carolina Wiring Service setting up home automation and installing security, surround sound, phone systems, cable, and networking. And, as of October 2005, plaintiff accepted employment with Southern Security Group doing "the same line of work as Norment . . . the same type of stuff."

On 11 March 2005, plaintiff filed with the Industrial Commission a Form 33—Request that claim be assigned for hearing—alleging that "Defendant[] [has] not paid proper compensation." Defendant filed a Form 33R—Response to request that claim be assigned for hearing—alleging that "Employee-Plaintiff has received all benefits he is entitled to under the North Carolina Workers' Compensation Act; Employee-Plaintiff's cervical spine/neck problems are not related to this compensable injury . . . ." The case was heard on 26 October 2005 before Deputy Commissioner Baddour.

Deputy Commissioner Baddour filed an Opinion and Award 12 April 2006 which denied plaintiff's claim for workers' compensation benefits related to his cervical disc herniation. On 27 April 2006, plaintiff filed a Form 44—Application for review—to appeal to the Full Commission.

The matter was reviewed by Commissioners Laura Mavretic, Buck Lattimore, and Diane Sellers, on 18 January 2007. After reviewing the prior Opinion and Award, the briefs, and the arguments made before Deputy Commissioner Baddour, the Commission reversed the prior Opinion and Award with a split decision.

The Commission majority concluded that "[o]n April 30, 2004, plaintiff sustained an admittedly compensable injury by accident arising out of and in the course of his employment with defendant-employer. N.C. Gen. Stat. § 97-2(6). As the result of the compensable injury by accident, plaintiff sustained injuries to his cervical,

thoracic and lumbar spine." The Commission awarded plaintiff temporary total disability compensation "from February 15, 2005 until July 8, 2005 and for the sporadic days plaintiff missed due to his medical treatment."

Commissioner Lattimore dissented stating plaintiff had not "met his burden of demonstrating that his cervical disc herniation resulted from his compensable workplace injury."

Defendant appeals.

On appeal, defendant raises three issues by asserting that: (I) the Commission erred by concluding plaintiff's cervical condition was caused by his fall at work on 30 April 2004; (II) assuming plaintiff's cervical condition was compensable, plaintiff was not entitled to disability benefits; and (III) assuming the Full Commission's award of temporary total disability benefits is upheld, defendant is entitled to a credit for short-term disability benefits paid to plaintiff. Additionally, plaintiff requests that this Court award plaintiff attorney's fees.

I

[1] Defendant first argues the Full Commission erred by concluding plaintiff's cervical condition was caused by his fall on 30 April 2004 where competent medical testimony fails to support such a finding and conclusion. Specifically, defendant asserts that Dr. Garner's diagnosis that plaintiff's fall caused his cervical condition was based on an incomplete medical history which failed to include the occurrence of a "pop" in plaintiff's neck on 19 February 2005. We disagree.

"Under our Workers' Compensation Act, the Commission is the fact finding body. The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citations and quotations omitted).

> [T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary. The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.

Id. at 681, 509 S.E.2d at 414 (citation and quotations omitted). But, "[i]n cases involving 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." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003).

In *Holley*, our Supreme Court reversed the Opinion and Award of the Commission where an expert testified that though a causal relationship between the employee's accident and her current medical condition was possible he could not say to a reasonable degree of medical probability that such a relationship existed. *Id.* at 233-34, 581 S.E.2d at 753-54. The Court reasoned that "[a]lthough medical certainty is not required, an expert's speculation is insufficient to establish causation." *Id.* at 234, 581 S.E.2d at 754 (citation omitted). Ultimately, the Court held "that the medical evidence as to causation in [that] case was insufficient to support the Industrial Commission's findings of fact and conclusions of law." *Id.*

In *Holley*, the doctor could not opine to any degree of medical certainty as to the causation of the plaintiff's condition, especially where the plaintiff's age and medical history suggested other causes. *Id.* at 233-34, 581 S.E.2d at 753-54. However, in the instant case, while there was medical testimony that hypothetically turning one's neck could cause herniation, there was clear testimony that to a reasonable degree of medical certainty plaintiff's fall caused his herniation.

During his deposition and on direct examination, Dr. Garner testified as follows:

> Attorney: Based on your 20 years of experience, based on looking at the MRI films, based on your examination and treatment of [plaintiff], do you have an opinion to a reasonable degree of medical certainty or medical probability that the fall described to you by [plaintiff], and then redescribed to you today, was the likely cause of his herniated disk at C6-7?
>
> . . .
>
> Garner: Yes
>
> Attorney: And what is your opinion?
>
> Garner: Yes, it was.

After reviewing the prior Opinion and Award issued by the Deputy Commissioner and the briefs and arguments made to the Commission, the Commission made the following pertinent finding:

> Based on Dr. Garner's 20 years of experience, the MRI findings, and his examination and treatment of plaintiff, it was Dr. Garner's expert opinion to a reasonable degree of medical certainty and the Commission finds that the fall from the ladder was a likely cause of plaintiff's herniated disc at C6-7.

While the record provides evidence of another potential cause of plaintiff's cervical disc herniation, "the findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation and quotations omitted). Therefore, we hold the evidence was sufficient to support the Commission's finding and conclusion that plaintiff's 30 April 2004 fall caused his cervical disc herniation. Accordingly, defendant's assignment of error is overruled.

II

[2] Defendant next argues that even assuming plaintiff's cervical condition was compensable, plaintiff was not entitled to disability benefits. We agree in part.

"The standard of review on appeal to this Court of a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact, and whether these findings support the conclusions of the Commission." *Russell v. Lowe's Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citation omitted).

> The Commission may not wholly disregard competent evidence; however, as the sole judge of witness credibility and the weight to be given to witness testimony, the Commission may believe all or a part or none of any witness's testimony. The Commission is not required to accept the testimony of a witness, even if the testimony is uncontradicted. Nor is the Commission required to offer reasons for its credibility determinations.

Hassell v. Onslow County Bd. of Educ., 362 N.C. 299, 306-07, 661 S.E.2d 709, 715 (2008) (citations and quotations omitted).

Under the North Carolina Workers' Compensation Act (the Act), codified under Chapter 97 of our General Statutes, "[t]he term 'dis-

ability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2007). Thus, under the Act, disability is the "impairment of the injured employee's earning capacity rather than physical disablement." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (citation omitted). "The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Id.* (citation omitted).

"Under N.C. Gen. Stat. §§ 97-29 and 97-30, an injured employee who suffers a loss of wage-earning capacity is generally entitled to collect compensation for as long as he or she remains disabled." *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 119, 598 S.E.2d 185, 190 (2004). "An employer may rebut the continuing presumption of total disability either by showing the employee's capacity to earn the same wages as before the injury or by showing the employee's capacity to earn lesser wages than before the injury." *Brown v. S & N Commc'ns, Inc.*, 124 N.C. App. 320, 330, 477 S.E.2d 197, 202 (1996) (citation omitted).

> If the employer offers sufficient evidence to rebut the continuing presumption of disability, the process is not concluded. The burden then switches back to the employee to offer evidence in support of a continuing disability or evidence to prove a permanent partial disability under G.S. 97-30. The employee can prove a continuing total disability by showing either that no jobs are available, no suitable jobs are available, or that he has unsuccessfully sought employment with the employer. If the employee meets this burden, he is entitled to continuing total disability benefits.
>
> If the employee fails to meet this burden, he continues to be disabled but the disability changes from a total disability to a partial disability under N.C.G.S. 97-30.

Id. at 331, 477 S.E.2d at 203 (internal citations omitted).

Here, the parties stipulated that "[p]laintiff has an average weekly wage of $743.54, and a resulting compensation rate of $495.72." The record indicates that on 22 February 2005 Rena Hodges of Knightdale Primary Care issued a medical excuse note for plaintiff's absence from work due to concerns over plaintiff's cervical condition. On 7 March 2005, Dr. Garner issued a note stating that plaintiff

was under his care for a "neck problem" and was to be excused from work until further notice.

On 23 May 2005, Dr. Garner recorded his last visit with plaintiff. Plaintiff testified that by 23 May 2005 he had minimal arm pain and Dr. Garner released him to return to work. Plaintiff further testified that he "[didn't] recall [Dr. Garner] indicating one way or the other whether [plaintiff] ha[d] any restrictions or not." However, plaintiff testified that he first contacted defendant about coming back to work 24 June 2005.

Defendant presented evidence that on 23 May 2005, when plaintiff received his release to return to work authorization from Dr. Garner, plaintiff's position at Norment Security was open and available to him; however, by 24 June 2005, that position was unavailable.

After learning defendant no longer had a position available, plaintiff accepted a permanent position at Carolina Wiring Service. And, at the time he testified before Deputy Commissioner Baddour, plaintiff worked for Southern Security Group doing "the same line of work as Norment . . . the same type of stuff."

The Commission made the following finding:

> 19. As the result of the admittedly compensable injury by accident on April 30, 2004, plaintiff sustained injuries to his cervical, thoracic and lumbar spine and was temporarily totally disabled from any employment from February 15, 2005 until July 8, 2005.

"The Commission may not wholly disregard competent evidence . . . ." *Hassell*, 362 N.C. at 306, 661 S.E.2d at 715 (citations and quotations omitted). On these facts, we hold the Commission erred in finding "plaintiff . . . was temporarily totally disabled from any employment from February 15, 2005 until July 8, 2005." In the light most favorable to plaintiff, the record supports a finding of temporary total disability from 22 February through 23 May 2005, but does not support a finding that plaintiff was temporarily totally disabled between 23 May 2005 and 8 July 2005. Accordingly, we reverse the Commission's conclusion that "plaintiff was temporarily totally disabled from any employment and is entitled to payment by defendant of temporary total disability compensation . . . from February 15, 2005 until July 8, 2005." Additionally, the Commission failed to make findings of fact as to what sporadic dates plaintiff was out of work due to medical treatment prior to 15 February 2005. Therefore, we

reverse the Commission's award and remand the matter for further findings of fact with regard to "sporadic days plaintiff missed due to his medical treatment" and the status of plaintiff's disability between 23 May 2005 and 8 July 2005.

III

[3] Defendant last argues that in the event the Commission's award of temporary total disability benefits is upheld, defendant is entitled to a credit for short-term disability benefits paid to plaintiff.

However, while defendant assigns error to the Commission's temporary total disability award, there is no indication in the record that the issue of credit for short-term disability benefits paid to plaintiff was presented to the Commission; thus, defendant raises this issue for the first time here on appeal. Under our North Carolina Rules of Appellate Procedure, Rule 10(b)(1), "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1) (2008). Defendant's failure to raise the issue below resulted in a waiver of the issue. Accordingly, defendant's argument is dismissed.

[4] Last, plaintiff argues he should be awarded his costs and attorney's fees for the time spent on the appeal. In our discretion, we decline to do so. *See* N.C. Gen. Stat. § 97-88 (2007).

Reversed and remanded.

Judge JACKSON concurs.

Judge WYNN concurs in part and dissents in part.

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

I disagree with that part of the majority's decision that remands this matter because "the Commission failed to make findings of fact as to what sporadic dates plaintiff was out of work due to medical treatment prior to 15 February 2005." In my view, the Commission's Opinion and Award contains adequate findings of fact regarding the days the plaintiff missed because of medical treatment.

The Commission's Opinion and Award contains the following relevant findings of fact:

5. Plaintiff was initially treated on May 10, 2004 . . .

6. On June 10, 2004, Plaintiff began treating with Dr. Cara Siegel . . .

10. On October 28, 2004 an MRI of plaintiff's lumbar spine showed a disc bulge and herniation. On December 14, 2004, plaintiff was treated by Dr. James Fulghum . . .

11. On December 17, 2004, plaintiff was seen by Dr. Duncan with primary complaints of thoracic and low back pain. Plaintiff underwent a series of prolotherapy injections that were administered on January 5, January 19, February 2, and February 16, 2005.

Furthermore, the Commission ordered the parties "to confer and stipulate based upon the payroll and medical records as to the days or partial days for which plaintiff is due compensation." These findings of fact in the Commission's Opinion are sufficient to determine what sporadic dates plaintiff was out of work due to medical treatment prior to 15 February 2005. Accordingly, I respectfully dissent from the portion of the majority's opinion that orders a remand.

DEFEAT THE BEAT, INC., PLAINTIFF v. UNDERWRITERS AT LLOYD'S LONDON AND PETERSEN INTERNATIONAL UNDERWRITERS, INDIVIDUALLY AND COLLECTIVELY, DEFENDANTS

No. COA08-101

(Filed 2 December 2008)

1. Insurance— event cancellation policy—absence of lost profits coverage

An event cancellation insurance policy for a band competition did not cover lost profits from low ticket and program sales, low video disc sales, or low T-shirt and souvenir sales resulting from a 35-minute interruption of the event by a thunderstorm where the policy stated that the insured loss only included profit "where insured and stated in the Schedule," and the schedule of benefits did not include lost profits.

2. Insurance; Unfair Trade Practices— event cancellation policy—adjuster's misrepresentations—unfair claim settlement practices—absence of monetary injury

Plaintiff insured under an event cancellation policy had no claim against defendant underwriters for unfair and deceptive claim settlement practices based upon an adjuster's misrepresentation of coverages by indicating to plaintiff that plaintiff had a valid claim under the policy and that payment was imminent or based upon defendants' failure to deny or affirm coverage of the claim within a reasonable time after proof of loss where plaintiff presented no evidence of any present monetary injury caused by the alleged actions during the settlement phase.

3. Insurance— event cancellation policy—Surplus Lines Act—no private right of action

Plaintiff insured under an event cancellation policy for a band competition had no private right of action against defendant underwriters under the provision of the Surplus Lines Act (N.C.G.S. § 58-21-45(a)) requiring prompt delivery of a policy to the insured based upon defendants' failure to provide insured with a copy of the policy prior to the event.

4. Unfair Trade Practices— event cancellation insurance—failure to promptly deliver policy

Defendant insurance underwriters' mere failure to promptly deliver a copy of an event cancellation policy to the insured does not constitute an unfair or deceptive act as a matter of law.

5. Unfair Trade Practices— event cancellation insurance—agent's erroneous statements

The erroneous statements by an insurance agent to the purchaser of an event cancellation policy that the sole distinction between the basic coverage and the adverse weather coverage was that with basic coverage, only the stadium manager had the authority to cancel or suspend an event due to adverse weather, when combined with defendant underwriters' failure to promptly deliver a copy of the policy to the insured, did not constitute an unfair or deceptive act within the purview of N.C.G.S. § 75-1.1, especially since defendants ultimately provided the purchaser with adverse weather coverage.

6. Insurance— event cancellation policy—bad faith refusal to settle claim—summary judgment

The trial court did not err by granting summary judgment for defendant underwriters with respect to plaintiff insured's claim for bad faith refusal to settle a claim under an event cancellation policy where plaintiff did not forecast evidence tending to establish a valid claim under the policy.

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 12 June 2008.

Caudle & Spears, P.A., by Christopher J. Loebsack and Christopher P. Raab, for plaintiff appellant.

Parker Poe Adams & Bernstein, LLP, by David N. Allen, Lori R. Keeton, and Scott S. Addison; and Of Counsel, Fields Howell Athans & McLaughlin, LLP, by Paul L. Fields, Jr., and Nathan M. Thompson, for defendant appellees.

McCULLOUGH, Judge.

Defeat The Beat, Inc. ("plaintiff") appeals from the entry of summary judgment in favor of Underwriters At Lloyd's London ("Lloyd's London") and Petersen International Underwriters ("Petersen International") (collectively, "defendants").

Under N.C.R. Civ. P. 56(c) (2007), summary judgment is properly granted 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.' " Thus, "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." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted).

The undisputed facts and procedural history pertinent to the instant appeal are as follows: Plaintiff is a North Carolina corporation organized for the purpose of hosting an annual marching band competition for historically black colleges. On or about 6 July 2004, plaintiff, through its Chief Executive Officer Karen Blackmon, contacted

Stacy Fields for assistance in procuring insurance for the 2004 Defeat the Beat Battle of the Bands event, which was scheduled to occur at Memorial Stadium in Charlotte on 21 August 2004 ("the band competition"). Fields worked as an independent contractor for defendants and had procured approximately three insurance policies through Lloyd's London prior to her meeting with Blackmon.

Blackmon communicated to Fields that she was interested in obtaining coverage "to protect . . . the moneys that [she] had put into the event . . . [and to insure] that [she] wouldn't take a loss whatsoever." After discussing various policies, Blackmon filled out an "Application for Cancellation/Abandonment & Non-Appearance Insurance." Blackmon listed budgeted expenses of $540,000.00 and anticipated revenue of $600,000.00 on the application form. She also checked boxes indicating that, if available, she was interested in obtaining loss of net income, adverse weather, and reduced attendance coverage. This application was submitted to defendants on 6 July 2004.

In response to the application, Petersen International on behalf of Lloyd's London sent Fields "A Proposal for Event Cancellation Insurance" ("the proposal"). The proposal expressly provided:

> **Sum Insured**: US$540,000
>
> Cover for Entire Cancellation of the Event Only
>
> Cover for Non Refundable Costs and Expenses only (i.e. no cover for profits)

The proposal set forth three levels of coverage as follows:

> **Basic Premium:** US$8,805
>
> **ADVERSE WEATHER:** Additional Premium to Include Adverse Weather (which endangers Human Life only): US$28,350
>
> **TERRORISM:** Additional Premium to Include TRIA Terrorism: US$8,505

Blackmon elected the basic premium level and paid the requisite $8,805.00 for the policy. Plaintiff did not pay the additional premium for Adverse Weather coverage. Lloyd's London then subscribed to a contract of insurance on 12 August 2008. Plaintiff, however, did not receive a copy of this policy. Blackmon believed that the basic coverage and the adverse weather coverage were essentially the same, with the only distinction between the two policies being that with adverse

weather coverage, Blackmon, rather than the stadium manager, could decide if and when to stop the event due to adverse weather.[1]

At 6:00 p.m. on 21 August 2004, the band competition began, despite a light rain. At around 6:40 p.m., the stadium manager decided to suspend the band competition because of thunder and lightning. The event was interrupted for approximately 35 minutes. At this time, a number of attendees and patrons who had been waiting in line began leaving the stadium. Sometime between 7:15 p.m. and 7:30 p.m., the lightning subsided, and the band competition resumed and continued uninterrupted until its completion at 11:00 p.m. Ultimately, the band competition was not as successful as it had been the prior year. Overall, attendance was down 35% from the year before.

Thereafter, sometime in early September, plaintiff contacted Fields to inquire about the policy, as plaintiff did not have a copy of the policy. Neither Fields nor plaintiff obtained a copy of the policy until this time. Upon notifying defendants, defendants provided plaintiff with a copy of the policy, which provides, in part, as follows:

> 1.1 This insurance is to indemnify the Assured for their **Ascertained Net Loss (as defined herein)**, should the insured Event(s) described in the Schedule, be necessarily Cancelled, Abandoned, Postponed, Interrupted or Relocated, in whole or in part, which necessary Cancellation, Abandonment, Postponement, Interruption or Relocation is the sole and direct result of any cause beyond the control of the Assured and the participants therein (except as hereinafter excluded), subject always to the terms, conditions and exclusions contained herein or endorsed hereon.
>
> * * * *
>
> 2.1 **Ascertained Net Loss means** such sums as represent:— (a) Expenses which have been irrevocably expended in connection with the insured Event(s), less any savings the Assured is able to effect to mitigate such loss, and (b) **Profit (where insured and stated in the Schedule)** which the Assured can satisfactorily prove would have been earned had the insured Event(s) taken place.
>
> * * * *

1. The parties dispute whether Blackmon's belief was based on representations by Stacy Fields.

2.4 Profit **(where insured)** means Gross Revenue less Expenses.

(Emphasis added.)

The schedule of benefits attached to the policy provides in part:

Limit of Indemnity **Excluding Profit**: **US$540,000**

Limit of Indemnity **Including Profit**:

(Profit insured only if this section completed) N/A

* * * *

Exclusion: TERRORISM COVERAGE

(Emphasis added.)

On 15 September 2004, Blackmon submitted a claim to defendants for lost revenue in the amount of $357,128.00, the difference between the $540,000.00 policy limit and the $182,872.00 of actual revenue generated by the band competition.

Despite a recommendation by insurance adjustor, Mike Tocicki, that defendants set aside a "precautionary reserve of up to $124,000" for plaintiff's loss, including reduction in attendee income, lost program income, lost T-shirt income, and lost CD income, defendants determined that plaintiff did not have coverage for the lost profit that plaintiff sought to recover. Although plaintiff did not pay the $28,350.00 premium for adverse weather coverage, the policy fails to list adverse weather as an exclusion on the schedule of benefits. On 3 May 2006, defendants notified plaintiff that they would pay $37,135.20 for non-refundable costs and expenses lost due to the interruption of the insured event because of the adverse weather. Defendants tendered payment of $37,135.20 to plaintiff on 30 May 2006.

On 3 October 2006, plaintiff brought suit against defendants, alleging breach of contract, bad faith, and unfair and deceptive trade practices. Defendants moved for summary judgment, contending that plaintiff sought to recover lost profits, which are not covered under the policy. On 23 August 2007, the trial court granted summary judgment for the defendants. Plaintiff now appeals.

I. Amount of damages

[1] First on appeal, plaintiff contends that the trial court erred in granting summary judgment with respect to the breach of contract

claim because there is an issue of disputed fact as to the amount of damages attributable to the interruption of plaintiff's insured band competition. We disagree, as we find that plaintiff has failed to forecast evidence to bring itself within the terms of the policy.

As previously discussed, upon motion, summary judgment is appropriately entered where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that the non-moving party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *See id.* N.C. Gen. Stat. § 1A-1, Rule 56(e), provides, in part:

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

When examining whether an insurance policy is breached, we begin with the "well-settled principle that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). The insured party "has the burden of bringing itself within the insuring language of the policy." *Hobson Construction Co. v. Great American Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984), *disc. review denied*, 313 N.C. 329, 372 S.E.2d 890 (1985).

Here, in moving for summary judgment, defendant produced evidence demonstrating that an essential element of plaintiff's claims is

nonexistent. Specifically, our examination of the record before us reveals that plaintiff has failed to show that the loss complained of is embraced within the insuring language of the policy. First, defendants produced the document entitled "A Proposal for Event Cancellation Insurance" that expressly provides that the coverage is "for Non Refundable costs and expenses only (i.e. no cover for profits)." Likewise, defendants produced a copy of the policy, and under the terms of Section 2.1 of such policy, it is clear that the insured loss or "ascertained net loss" only includes profit "where insured and stated in the Schedule." Defendants introduced a copy of the schedule of benefits, showing that profit is not stated on such schedule, and therefore, is not insured under the policy. Thus, defendants met their burden in establishing that the lost profit from low ticket sales, low DVD sales, low T-shirt and souvenier sales caused by the 35-minute interruption, which plaintiff asserts as damages under its breach of contract and bad faith claims, are not insured under the terms of the policy.

Given that defendants established that essential elements of the non-moving party's claims are nonexistent, the burden then shifted to plaintiff, the non-moving party, to forecast evidence or specific facts that demonstrate the existence of some sort of loss, insured under the terms of the policy, which defendants refused to pay.[2] Under Section 2.1 of the policy, this would include "[e]xpenses which have been irrevocably expended in connection with the insured Event(s), less any savings the Assured is able to effect to mitigate such loss[.]" While plaintiff alleged in an interrogatory response that "Plaintiff has received $37,135.20, an amount that is woefully less than Plaintiff should have been paid under the insurance policy in question[,]" plaintiff has failed to set forth specific facts or forecast evidence that it incurred any non-refundable expenses and costs as a result of the 35-minute interruption in excess of the $37,135.20 that defendants have already paid. The only facts set forth by plaintiff demonstrate an uninsured loss consisting of lost revenue. Because plaintiff failed to meet this burden of establishing a net loss that defendant was obligated to pay under the terms of the contract, yet refused to pay, there

2. It is clear from the record that plaintiff purchased the basic coverage, rather than the adverse weather coverage; however, because only terrorism and not adverse weather is listed as an exclusion on the schedule of benefits, it is not clear whether adverse weather was an exclusion under the policy. We resolve this ambiguity in favor of the non-moving party and assume that any ascertained net loss which resulted from the adverse weather is insured under Section 1.1 of the Policy. Nonetheless, plaintiffs have produced no evidence demonstrating that the adverse weather resulted in an ascertained net loss, as defined and insured under the terms of the policy.

is no issue of disputed fact with respect to the damages element of the breach of contract claim. Accordingly, the trial court's grant of summary judgment in defendant's favor with respect to this claim was proper. This assignment of error is overruled.

II. Unfair and Deceptive Trade Practices

Causes of action for unfair or deceptive practices are distinct from breach of contract actions. *Boyd v. Drum*, 129 N.C. App. 586, 593, 501 S.E.2d 91, 97 (1998), *aff'd per curiam*, 350 N.C. 90, 511 S.E.2d 304 (1999). An action for unfair or deceptive practices is a creation of statute, and is therefore *sui generis*, so the cause of action exists independently, regardless of whether a contract was breached. *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584 (1984), *disc. review denied*, 311 N.C. 751, 321 S.E.2d 126 (1984). Thus, even if an insurance company rightly denies an insured's claim, and therefore does not breach its contract, as here, the insurance company nevertheless must employ good business practices which are neither unfair nor deceptive.

Trade practices in the insurance business are regulated by Chapter 58, Article 63 of the North Carolina General Statutes. N.C. Gen. Stat. § 58-63-1 (2007). Unfair and deceptive trade practices are prohibited generally, N.C. Gen. Stat. § 58-63-10 (2007); and unfair and deceptive claim settlement practices are prohibited specifically, N.C. Gen. Stat. § 58-63-15(11) (2007).

Although N.C. Gen. Stat. § 58-63-15(11) provides that "no violation of this subsection shall of itself create any cause of action in favor of any person," a plaintiff's remedy for violation of the unfair claim settlement practices statute is the filing of a claim pursuant to N.C. Gen. Stat. § 75-1.1, the unfair or deceptive practices statute. *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 71, 529 S.E.2d 676, 683, *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000). In order to establish a violation of N.C. Gen. Stat. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs; a court may look to the types of conduct prohibited by N.C. Gen. Stat. § 58-63-15(11) for examples of conduct which would constitute an unfair and deceptive act or practice. *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 245-46, 563 S.E.2d 269, 279 (2002).

a. Unfair Claim Settlement Practices

[2] First, plaintiff claims defendants committed unfair and deceptive claim settlement practices, including: that insurance adjustor Mike Tocicki misrepresented pertinent facts or insurance policy provisions relating to coverages at issue by indicating to plaintiff that plaintiff had a valid claim under the policy and that payment was "imminent," in violation of N.C. Gen. Stat. § 58-63-15(11)(a); and that defendants failed to affirm or deny coverage of the claim within a reasonable time after the proof of loss statement had been completed, in violation of N.C. Gen. Stat. § 58-63-15(11)(e). While these actions would satisfy the unfair and deceptive trade act or practice element of the claim, plaintiff has presented no evidence of any present monetary injury caused by these alleged actions during the settlement phase; therefore, plaintiff's evidence does not establish the third element of a claim under N.C. Gen. Stat. § 75-1.1. *See Allen v. Ferrera*, 141 N.C. App. 284, 292, 540 S.E.2d 761, 767 (2000); *Gray*, 352 N.C. at 74-75, 529 S.E.2d at 684-85. Accordingly, these arguments are without merit.

b. Surplus Lines Act

[3] Next, plaintiff contends that defendants committed an unfair trade practice by failing to provide plaintiff with a copy of its insurance policy prior to the band competition in violation of Section 58-21-45(a) of the Surplus Lines Act.[3] Plaintiff contends that if Blackmon had an opportunity to read the policy prior to the band competition, then she would have realized the scope of the policy and would have purchased additional coverage on behalf of plaintiff. We, however, find plaintiff's reliance on N.C. Gen. Stat. § 58-21-45(a) to be misplaced.

First, plaintiff has no private right of action with regard to the provisions of the Surplus Lines Act. Pursuant to § 58-21-105, "any person violating any provision of this Article shall be subject to a civil penalty, payment of restitution, or both, in accordance with G.S. 58-2-70." N.C. Gen. Stat. § 58-21-105(b). Section 58-2-70, however, does not confer to plaintiff a private right of action. Rather, it sets

3. N.C. Gen. Stat. § 58-21-45(a) provides, in part:

> (a) As soon as surplus lines insurance has been placed, the producing broker or surplus lines licensee shall promptly deliver the policy to the insured. If the policy is not then available, the broker or licensee shall promptly deliver to the insured a certificate described in subsection (d) of this section, cover note, binder, or other evidence of insurance.

forth the administrative procedure to be initiated by the Insurance Commissioner. N.C. Gen. Stat. § 58-2-70.

[4] Moreover, plaintiff has not cited any precedent holding that a violation of the Surplus Lines Act of Article 21 is a *per se* unfair and deceptive act or practice under N.C. Gen. Stat. § 75-1.1 (2007); likewise, the failure to promptly deliver a copy of the insurance policy to the insured is not listed as an example of one of the *per se* unfair and deceptive acts or practices listed in Article 63. We decline to hold that a violation of the Surplus Lines Act or the mere failure of an insurer to promptly deliver a copy of the insurance policy to the insured constitutes an unfair or deceptive practice or act as a matter of law.

[5] Having decided that a mere failure to promptly deliver a copy of the insurance policy to the insured is not a *per se* unfair or deceptive act, we now consider whether this failure combined with plaintiff's evidence concerning Stacy Fields' misrepresentations about the terms of the policy constitute an unfair or deceptive act for purposes of N.C. Gen. Stat. § 75-1.1.

"A practice is unfair if it is unethical or unscrupulous[.]" *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). A practice is deceptive "if it has a tendency to deceive," *id.*, but "proof of actual deception is not required." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). The question of what constitutes an unfair or deceptive trade practice is an issue of law. *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 363, 533 S.E.2d 827, 830, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). If the material facts are not disputed, the court should determine whether the defendant's conduct constituted an unfair or deceptive trade practice. *Id.*

The evidence of record, viewed in plaintiff's favor, shows that Blackmon submitted an application for event cancellation and abandonment insurance, on which she checked boxes indicating that, "if available[,]" plaintiff sought coverage for loss of net income, adverse weather, and reduced attendance. Stacy Fields erroneously told Blackmon that the sole distinction between the basic coverage and the adverse weather coverage was that with basic coverage, only the stadium manager had the authority to cancel or suspend an event due to adverse weather. While defendants did not promptly provide Blackmon with a copy of the policy that she purchased, prior to Blackmon's purchase of the policy, defendants provided her with a proposal for the policy that expressly stated that the coverage was

"for Non Refundable costs and expenses only (i.e. no cover for profits)." Ultimately, defendants provided plaintiff with coverage for an interruption caused by adverse weather, even though plaintiff only purchased the basic coverage; however, as clearly expressed in the policy proposal, defendants refused to provide coverage for lost profits. Viewed in the light most favorable to plaintiff, we conclude that defendants' actions in representing the terms of the policy were neither unfair nor did they have a tendency to deceive. This is particularly so given that defendants ultimately provided plaintiff with the adverse weather coverage, the terms of which plaintiff alleges were misrepresented by Fields. As such, plaintiff has failed to establish a necessary element of a claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1. Accordingly, the trial court did not err in granting summary judgment in favor of defendants with respect to this claim. This assignment of error is overruled.

III. Bad Faith

[6] Finally, plaintiff contends that the trial court erred in granting summary judgment to defendants on plaintiff's bad faith claim. We disagree.

"In order to recover punitive damages for the tort of an insurance company's bad faith refusal to settle, the plaintiff must prove (1) a refusal to pay after recognition of a valid claim, (2) bad faith, and (3) aggravating or outrageous conduct." *Lovell v. Nationwide Mutual Ins. Co.*, 108 N.C. App. 416, 420, 424 S.E.2d 181, 184, *aff'd in part, dismissed in part*, 324 N.C. 682, 435 S.E.2d 71 (1993).

As previously discussed, plaintiff did not forecast evidence tending to establish a valid claim under the policy, as there was no evidence that the 35-minute interruption resulted in the type of loss that was covered under the terms of the policy. As such, the undisputed evidence of record does not satisfy any of the elements of a bad faith claim. The trial court did not err in granting summary judgment in favor of defendants with respect to this claim. This assignment of error is overruled.

For the foregoing reasons, we affirm the order of the trial court.

Affirmed.

Judges BRYANT and STEPHENS concur.

STATE OF NORTH CAROLINA v. KIRK ORLANDO SMITH AND BENNIE NATHANIEL THOMPSON, DEFENDANTS

No. COA07-812

(Filed 2 December 2008)

1. Kidnapping— release in safe place—acting in concert

The trial court did not err by denying defendants' motions to dismiss a charge of first-degree kidnapping where defendants argued that the victim was released in a safe place by others with whom they were acting in concert. The fact that the State proceeded upon a theory of acting in concert does not require the conclusion that defendants released the victim in a safe place simply because one of the other perpetrators arguably did so, and the jury could reasonably conclude on the evidence that the repeated threats to kill the victim prompted another perpetrator, acting alone, to take the victim and release him in a parking deck.

2. Kidnapping— jury request for clarification—specific issues—no re-instruction on second-degree kidnapping

The trial court did not abuse its discretion in a kidnapping prosecution in its response to a jury request for clarification by re-instructing on first-degree kidnapping but not second-degree kidnapping. The jury requested clarification on specific issues, to which the court responded.

3. Criminal Law— inquiry into jury division—two and a half hours of deliberation

The trial court did not coerce a verdict when it inquired into the jury's numerical split after only two and a half hours of deliberation. The inquiry came at a natural break in deliberations and was expressed in language more typical of curiosity than irritation, the judge did not ask which votes were for conviction or acquittal, and the judge did not say anything suggesting concern over the failure to reach a verdict at that point.

4. Criminal Law— *Allen* charge—two and a half hours of deliberation

The trial court did not abuse its discretion by giving an *Allen* instruction after only two and a half hours of deliberation where the court did not ask whether the split was in favor of guilt or acquittal, the instruction was given during a natural break in the proceedings, there was nothing to indicate that the judge was

frustrated or annoyed, and there were no remarks beyond the statutory instructions that might be viewed as coercive.

Appeal by defendants from judgments entered 6 October 2006 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 9 January 2008.

Attorney General Roy Cooper, by Assistant Attorneys General Sarah Y. Meacham and John A. Payne, for the State.

Nora Henry Hargrove for defendant-appellant Smith.

Geoffrey W. Hosford for defendant-appellant Thompson.

GEER, Judge.

Defendants Kirk Orlando Smith and Bennie Nathaniel Thompson appeal from their convictions for first degree kidnapping and conspiracy to commit first degree kidnapping. Defendants contend on appeal that the trial court should have dismissed the first degree kidnapping charges and submitted only second degree kidnapping to the jury because the State presented evidence that they were acting in concert with another perpetrator who released the victim in a safe place. We hold that the theory of acting in concert is a basis for imposing criminal liability that cannot be used in the manner urged by defendants. Since the State presented sufficient evidence to permit the jury to reasonably find that defendants did not release the victim in a safe place, the trial court properly denied the motions to dismiss the charge of first degree kidnapping.

Facts

The State's evidence tended to show the following facts. On 18 December 2005, Vernon Russell Harris was at his uncle's home near Apex when he received a cell phone call from Brandon Ingram, who had been a friend since early childhood. Ingram told Harris that he wanted to meet so that he could pay Harris money he owed him from a previous drug deal. When Ingram arrived outside Harris' uncle's home, he called Harris again and asked him to come outside. Harris met Ingram at the back of Ingram's car. Harris could see three other people in the car, but could not identify them because it was dark outside. While pretending to count out the money owed Harris, Ingram pulled out a gun and pointed it at Harris. A man later identified as Smith, jumped out of the back passenger seat also holding a gun, grabbed Harris, and put him in the backseat of the car. Ingram got

into the car and drove away. Smith and another man, identified only as "Tim," sat on either side of Harris in the backseat of the car. The two men blindfolded Harris, forced him to keep his head between his legs, and repeatedly hit him in the face while Ingram drove the car around for approximately six hours.

Ingram ordered Harris to call Harris' cousin, Brandon Hinton, to ask for money and drugs in exchange for his release. On his cell phone, Harris was able to reach Hinton and told him: "[S]ome guys got me and they want $50,000 and a brick[,]" referring to a kilogram of cocaine. Hinton responded that he had no cocaine but that he would try to "round up some money." Because the men repeatedly threatened to kill Harris if their demands were not met, Harris kept calling Hinton, asking him to hurry. Harris also called his girlfriend and another close friend, asking them to call Hinton and tell him to hurry.

Late in the evening of 18 December 2005, Harris' father learned what had happened and took over negotiating with the men. Harris' father also called the police, who came to his house and assisted with the negotiations. According to Harris' father, during the negotiations, defendants Smith and Thompson "did the majority of the talking all the time." Defendants told Harris' father that they would kill Harris if he did not give them money, they burned Harris on the neck and arms with cigarettes so that his father would hear him scream. Because it was a Sunday night, Harris' father told defendants that he could not get the money until the bank opened the next morning. The men then drove Harris to an abandoned house in Durham, took him inside, and duct-taped him to a chair.

On the morning of 19 December 2005, defendants called Harris' father, who had gotten $27,000.00 from a bank, and directed him to drop off the money at a designated location. Defendants Smith and Thompson left the house to pick up the money, leaving Ingram and Tim to watch Harris. Defendants called once to ask what type of car Harris' father drove, but after this call, there were no further communications between defendants and Ingram and Tim.

After defendants left to retrieve the money, Tim told Ingram that they needed to kill Harris. As a "spur-of-the-moment thing," Ingram took Harris in Tim's car and dropped him off in the parking deck of Northgate Mall in Durham. On the way there, Ingram threatened Harris not to say anything about his involvement or he would kill

Harris. Fearing that the other men might find and kill him, Harris hid behind some construction equipment in the parking deck. Shortly after someone let him use their cell phone to call his father, a police patrol car drove through the parking deck broadcasting Harris' name. Although he eventually came out from his hiding place, he did not do so immediately because he was afraid that the men might be nearby looking for him.

After watching Harris' father drop off the money, defendants Smith and Thompson picked it up and drove away. The SBI attempted to apprehend Smith and Thompson, but lost them in traffic. Smith was later caught in Virginia on 24 December 2005 after he sped through a license checkpoint. When arrested, the police found $6,000.00 in cash, which was traced back to the ransom money based on the serial numbers that the SBI had recorded prior to the delivery of the money. When the police arrested Thompson in Durham on 21 January 2006, they recovered no money.

Both Smith and Thompson were charged with first degree kidnapping and conspiracy to commit first degree kidnapping. The jury found them guilty of both charges. The trial court entered a prayer for judgment continued for each defendant on the conspiracy charge because defendants were sentenced under the first degree kidnapping charge. The court, based on each defendant's prior record level, then sentenced Smith to a presumptive-range term of 133 to 169 months imprisonment and Thompson to a presumptive-range term of 73 to 97 months imprisonment. Defendants timely appealed to this Court. They raise identical arguments on appeal.

I

[1] Defendants first argue that the trial court erred in denying their motions to dismiss the charges of first degree kidnapping. According to defendants, the trial court should have submitted to the jury only the charge of second degree kidnapping rather than the charges of both degrees of kidnapping. "Kidnapping is considered to be in the first-degree when the kidnapped person is not released in a safe place or is seriously injured or sexually assaulted during the commission of the kidnapping." *State v. Bell*, 359 N.C. 1, 25, 603 S.E.2d 93, 100 (2004) (citing N.C. Gen. Stat. § 14-39(b) (2003)), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094, 125 S. Ct. 2299 (2005). In contrast, "[i]f the person kidnapped was *released in a safe place by the defendant* and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree . . . ." N.C. Gen. Stat. § 14-39(b) (2007)

(emphasis added). Defendants contend that the evidence established that they released Harris in a safe place.

A defendant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. On review of a denial of a motion to dismiss, the appellate court must view the evidence in the light most favorable to the State, giving it the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869.

Although defendants admit that they did not personally release Harris in a safe place, they argue that because they were acting in concert with Ingram, the fact that Ingram released Harris in a safe place establishes that they also released Harris in a safe place. Defendants cite no authority—and we have found none—supporting use of the doctrine of acting in concert in this manner.

The theory of "acting in concert" is a means of imputing to a defendant the acts of another perpetrator: " 'Under the doctrine of acting in concert, if two or more persons act together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan.' " *State v. McCullers*, 341 N.C. 19, 29-30, 460 S.E.2d 163, 169 (1995) (quoting *State v. Abraham*, 338 N.C. 315, 328-29, 451 S.E.2d 131, 137 (1994)). "Acting in concert" is a theory of criminal liability, just like aiding and abetting. *See State v. Estes*, 186 N.C. App. 364, 372, 651 S.E.2d 598, 603 (2007) (describing acting in concert and aiding and abetting as "two theories of criminal liability"), *appeal dismissed and disc. review denied*, 362 N.C. 365, 661 S.E.2d 883 (2008); *State v. Roberts*, 176 N.C. App. 159, 163, 625 S.E.2d 846, 850 (2006) (describing the theories of acting in concert or aiding and abetting as theories of "vicarious liability"). Indeed, our Supreme Court has explained:

> The only distinction in criminal culpability between one who actually commits the crime and one of the other guilty parties to the offense . . . is the technical difference between being a principal in the first degree and being a principal in the second degree. A principal in the first degree is the person who actually perpetrates the deed and a principal in the second degree is one who is actually or constructively present when the crime is com-

> mitted and aids and abets another in its commission. The law, however, recognizes no difference between a principal in the first degree and a principal in the second; both are equally guilty.
>
> . . . The distinction between aiding and abetting and acting in concert . . . is of little significance. Both are equally guilty, and are equally punishable.

State v. Williams, 299 N.C. 652, 655-56, 263 S.E.2d 774, 777 (1980) (internal citations omitted).

Accordingly, the fact that the State proceeded upon a theory of acting in concert does not require the conclusion that defendants released Harris in a safe place simply because one of the other perpetrators arguably did so. To the contrary, the record, when viewed in the light most favorable to the State, contains substantial evidence that defendants did not undertake "conscious, willful action . . . to assure that [the] victim [wa]s released in a place of safety[,]" as required by N.C. Gen. Stat. § 14-39(b). *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983). Smith, Thompson, and Tim all made statements threatening to kill Harris if they did not get what they wanted. Defendants again threatened to kill Harris just before leaving to pick up the money on the morning of 19 December 2005. In addition, while waiting for defendants to return with the money, Tim told Ingram: "we got to get rid of [Harris]." Ingram, on the other hand, testified that there had been no discussion about what to do with Harris and that he released Harris as a "spur-of-the-moment thing." The jury could reasonably conclude that the repeated threats to kill Harris prompted Ingram, acting alone, to take Harris and release him in the mall parking deck. Based on this evidence, the trial court did not err in denying defendants' motions to dismiss the first degree kidnapping charges.

II

[2] Defendants next argue that the trial court erred in its response to the jury's requests for clarification by re-instructing on first degree kidnapping, but not re-instructing on second degree kidnapping. We disagree.

Defendant Smith points to the trial court's instructions after the jury submitted the following note to the court:

> The jury requests clarification of the following question: To what extent does an individual have to participate in a first-degree kidnapping to be considered a full participant? Please note the jury

> is especially concerned about the section of law that Judge Allen read about this issue.

After returning the jury to the courtroom, the trial court responded: "I assume that you're asking about when I instructed you about acting in concert. Let me go over this again." Without objection from either defendant, the trial court proceeded to re-instruct the jury regarding the elements of both first degree kidnapping and acting in concert.

Defendant Thompson, however, points to the jury's request for clarification "regarding the interpretation of conspiracy. In particular, must a conspiracy have occurred prior to the commission of a felony kidnapping or can it occur once a kidnapping was under way?" The trial court then, without any objection by the parties, repeated its instructions on the charge of conspiracy to commit first degree kidnapping.

Defendants argue on appeal that the trial court should also have re-instructed the jury on second degree kidnapping. Defendants assert that the failure to do so (1) confused the jury as to whether second degree kidnapping was still a viable option as a verdict and (2) unduly emphasized first degree kidnapping over second degree kidnapping, thus tacitly expressing an opinion to the jury that first degree kidnapping was the proper offense for which defendants should be convicted.

After a court instructs the jury initially, it may provide additional instructions in order to respond to jury questions, to correct or clarify erroneous or ambiguous instructions, or to instruct the jury on an erroneously omitted issue. N.C. Gen. Stat. § 15A-1234(a)(1)-(4) (2007). "At any time the judge gives additional instructions, he *may* also give or repeat other instructions to avoid giving undue prominence to the additional instructions." N.C. Gen. Stat. § 15A-1234(b) (emphasis added). "The court is not required to repeat instructions which were previously given to the jury in the absence of some error in the charge but may do so in its discretion." *State v. Bartow*, 77 N.C. App. 103, 110, 334 S.E.2d 480, 484 (1985). The trial court's decision whether to repeat previously given instructions to the jury is reviewed for abuse of discretion. *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986).

Because neither defendant objected at trial, they are limited to arguing plain error on appeal. Our Supreme Court has held, however, that discretionary decisions by the trial court are not subject to

plain error review. *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997, 121 S. Ct. 1131 (2001). In any event, defendants have failed to demonstrate any abuse of discretion.

The defendant in *Prevette*, who was ultimately convicted of first degree murder, argued that the trial court had abused its discretion when, in response to the jury's request for clarification on malice, premeditation, and deliberation, the court only re-instructed the jury on first degree murder rather than on both first degree and second degree murder. 317 N.C. at 163, 345 S.E.2d at 168. In holding that the court's refusal to re-instruct the jury on second degree murder had not unduly emphasized first degree murder or misled the jury, the Court reasoned:

> In view of the jury's specific request for a clarification of elements of first degree murder only, we hold that the trial court did not abuse its discretion in refusing to reinstruct on second degree murder pursuant to defendant's request. We believe it important to note that the trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions.

Id. at 164, 345 S.E.2d at 169.

Here, as in *Prevette*, the jury requested clarification on specific issues. First, they wanted to know: "To what extent does an individual have to participate in a first-degree kidnapping to be considered a full participant?" The trial court's first re-instructions responded to this question regarding liability for first degree kidnapping. On the second occasion, the jury inquired about the conspiracy charge. The trial court re-instructed only on that charge—since the charge was conspiracy to commit first degree kidnapping, the court could reasonably conclude that an instruction on second degree kidnapping was unwarranted and potentially confusing. Under *Prevette*, therefore, the trial court's decision not to re-instruct the jury on second degree kidnapping was not an abuse of discretion, especially in the absence of a request to do so by defendants.

III

[3] Defendants' final argument on appeal is that they are entitled to a new trial because the trial court coerced the jury into reaching a

verdict when it inquired into the jury's numerical split after only two and a half hours of deliberation. The court made the following pertinent statements:

> THE COURT: All right. The jury is still deliberating. They've deliberated now for about—close to three hours. I plan to bring them back in and, in my discretion, ask if there is a numerical split and instruct them on General Statute 15A-1235. I will give either side an opportunity to object. I think I have the authority to do that but I'll hear you.

The prosecutor objected, and Thompson's counsel was voicing his objection when the court interjected: "Well, I tell you, [Defense Counsel], if they come in here and say 6 to 6—I'm not going to sit down here all day. If they come in here and say 11 to 1 or 10 to 2 . . . ." At that point, the bailiff interrupted, indicating that the jury requested clarification on the law regarding conspiracy.

After calling the jury back into the courtroom but before re-instructing them on conspiracy, the court asked:

> I'm wondering if there is a numerical split, not guilty or not—or guilty or not guilty or not to any—any particular defendant, but is there a numerical split: 11 to 1? 10 to 2? 9 to 3? 8 to 4? 7 to 5? Or 6 to 6?
>
> Now, is there a numerical split?
>
> Just [say] yes or no.

When the foreperson responded that the jury was divided, the court then asked for the numerical split. The foreperson responded: "10 to 2." The court then gave the jury the instructions for a deadlocked jury, reciting almost verbatim the language of N.C. Gen. Stat. § 15A-1235(b)(1)-(4) (2007). Less than 30 minutes later, the jury came back with a unanimous verdict.

With respect to a trial court's inquiry into whether and to what extent a jury is split, "the totality of circumstances will be considered in determining whether the jury's verdict was coerced." *State v. Beaver*, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988). "An inquiry as to a division, without asking which votes were for conviction or acquittal, is not inherently coercive." *Id.* "Some of the factors to be considered include whether the trial court conveyed the impression that it was irritated with the jury for not reaching a verdict, whether the trial court intimated that it would hold the jury until it reached a

verdict, and whether the trial court told the jury that a retrial would burden the court system." *State v. Nobles*, 350 N.C. 483, 510, 515 S.E.2d 885, 902 (1999).

Considering, in this case, the trial judge's inquiry into the jury's numerical split in light of all the circumstances, we cannot say that the jury's verdict was coerced. The trial judge did not ask which votes were for conviction or acquittal and did not say anything suggesting concern over the jury's failure to yet reach a verdict. Instead, the inquiry came only after the jury had asked for clarification on one of the issues, a natural break in the jury's deliberations, and the inquiry was expressed in language more typical of curiosity rather than irritation. *See State v. Streeter*, 191 N.C. App. 496, 504-05, 663 S.E.2d 879, 885 (2008) (holding that trial court's inquiry into numerical split two hours into deliberations was not abuse of discretion); *State v. Yarborough*, 64 N.C. App. 500, 503, 307 S.E.2d 794, 795-96 (1983) (holding that trial judge had not coerced jury's verdict by inquiring into their numerical split when "the trial judge made his inquiry as to the numerical split at a natural break in the jury's deliberations . . . and clearly stated that he did not want to know that so many jurors have voted in one fashion and so many in another" (internal quotation marks omitted)). Accordingly, we conclude that the judge's inquiry into the jury's division was not coercive.

[4] Defendants also argue that the judge coerced the verdict by instructing the jury—over both the prosecutor's and defendants' objections—according to N.C. Gen. Stat. § 15A-1235. N.C. Gen. Stat. § 15A-1235(c) provides:

> If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

Whether to give an instruction pursuant to N.C. Gen. Stat. § 15A-1235(c)—called an *Allen* instruction—lies within the discretion of the trial judge. *State v. Williams*, 315 N.C. 310, 326-27, 338 S.E.2d 75, 85 (1986). This Court has held that N.C. Gen. Stat. § 15A-1235(c) "does not require an affirmative indication from the jury that it is having difficulty reaching a verdict, nor does it require that the jury deliberate for a lengthy period of time before the trial court may give the *Allen* instruction." *State v. Boston*, 191 N.C. App.

637, 643, 663 S.E.2d 886, 891 (2008). "[I]n deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985).

In *Boston*, 191 N.C. App. at 644, 663 S.E.2d at 892, this Court held that the trial court did not err in giving the *Allen* instruction two hours after the jury had begun deliberating and two more times over a four-and-a-half-hour period, reasoning:

> In this case, the trial court never inquired as to whether the majority of the jury was in favor of guilt or innocence. In fact, the trial court specifically asked the jury foreman not to provide this information to the trial court. The record gives no indication that the trial court ever appeared frustrated with the jury or annoyed by the jury's failure to reach a verdict. Further, the trial court never threatened to hold the jury until it reached a verdict, and made no mention of the burden and expense of a retrial in the event the jury could not reach a verdict.

The Court also noted that "each of the trial court's inquiries and *Allen* charges either immediately preceded or followed a natural break in jury deliberations . . . [and] [t]he trial court never interrupted jury deliberations merely to inquire as to the jury's numerical division or to repeat the *Allen* charge." *Id. See also Streeter*, 191 N.C. App. at 504-05, 663 S.E.2d at 885 (holding that trial court did not abuse its discretion in giving *Allen* instruction after two hours of deliberation when record did "not show that the trial court attempted to coerce the jury into reaching a verdict").

Likewise, in this case, the trial judge—the same judge as in *Boston* and *Streeter*—did not ask whether the split was in favor of guilt or acquittal. The *Allen* instruction was given during a natural break in the proceedings: after the jury had asked for clarification of the conspiracy instruction. Defendants have pointed to nothing in the record—and we have found nothing—suggesting that the trial judge appeared frustrated or annoyed. In addition, the trial judge did not make any remarks beyond the instructions contained in the statute that might be viewed by a jury as coercive. While we recognize that the trial judge in this case appears to have a practice of giving an *Allen* instruction at an early stage in the deliberations, we can see no meaningful distinction between this case and *Boston* and *Streeter*

and, therefore, conclude that defendants have failed to demonstrate any abuse of discretion. *See also State v. Hunter*, 48 N.C. App. 689, 692-93, 269 S.E.2d 736, 739 (1980) (finding no abuse of discretion when, after one hour of deliberation, trial court inquired into numerical split of jury and instructed jury in accordance with N.C. Gen. Stat. § 15A-1235(c)).

No Error.

Judges McCULLOUGH and STEELMAN concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. REGINALD LEE ROGERS, DEFENDANT

No. COA08-188

(Filed 2 December 2008)

1. Criminal Law— request for substitute counsel—careful scrutiny not required

State v. Thacker, 301 N.C. 348 did not require careful scrutiny before granting defendant's request for substitute counsel in a prosecution for felonious breaking and entering and other offenses.

2. Criminal Law— waiver of counsel—motion to withdraw—not allowed

The trial court did not abuse its discretion when it denied defendant's eleventh-hour motion to withdraw his waiver of counsel. Defendant did not show either sufficient facts supporting his motion to withdraw the waiver or good cause for his delay in seeking the withdrawal.

3. Constitutional Law— adequacy representation of counsel—pro se representation

A defendant convicted of felonious breaking and entering and other offenses could not complain on appeal that his self-representation was inadequate where counsel was appointed four times for defendant, one was required to withdraw for conflict of interest, three were "fired" by defendant, and defendant sought to represent himself over the advice of more than one judge. Defendant made his choice, as was his constitutional right; he is

entitled to no special exception for the quality of his particular self-representation or his lack of access to legal materials.

Appeal by defendant from judgments entered on or about 17 August 2007 by Judge W. David Lee in Davidson County Superior Court. Heard in the Court of Appeals 26 August 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jennie W. Hauser, for the State.

Irving Joyner, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments entered pursuant to jury verdicts finding him guilty of felonious breaking and entering, habitual misdemeanor assault, second degree rape and second degree sexual offense. Defendant contends he is entitled to a new trial because the trial court refused to appoint an attorney to represent him, and then failed to provide him with basic legal materials to effectively represent himself. We disagree and conclude instead that defendant received a fair trial, free of reversible error.

I. Background

Defendant married Lisa[1] in 1995. They separated in 2004. Defendant moved out of the house but Lisa retained custody of their two children. On 19 November 2005 defendant forcibly entered the home Lisa shared with the two children and forced Lisa to have sex with him. Lisa reported the incident to the police and defendant was arrested on 20 November 2005.

On or about 21 November 2005, Lori I. Hamilton-Dewitt was appointed to represent defendant. On 12 December 2005, defendant wrote a letter to Ms. Hamilton-Dewitt, stating, "I, Reginald Rogers, notice the conflict of interest in my case with your representation, so in others [sic] words YOU ARE FIRED!" (Emphasis in original.) In response, Ms. Hamilton-Dewitt filed a motion to withdraw from representation of defendant based on her belief that defendant had "unequivocally terminated the attorney-client relationship in writing." The motion to withdraw was granted on 19 December 2005.

On 21 December 2005, the trial court appointed Paul Bollinger to represent defendant. By a letter dated 4 January 2006 defendant fired

1. A pseudonym is used to protect the identity of the victim.

Mr. Bollinger for "conflict of interest and insignificant counsel." On the very next day, defendant fired Mr. Bollinger again, on the grounds of "racial tensions" and "unprofessional conduct." Mr. Bollinger also moved to withdraw as counsel.

On 9 January 2006 defendant was indicted by the Davidson County Grand Jury for second degree rape, felonious breaking and entering, assault on a female, and habitual misdemeanor assault. At a hearing held 11 January 2006, the trial court specifically inquired into defendant's reasons for writing the letters accusing Mr. Bollinger for racism. Defendant responded that "my wife [Lisa] is a Caucasian and I am [a] black African American . . . [and because of] the Kobe Bryant case . . . I felt that [an African-American] should represent me on these charges." The trial court found no "evidence whatsoever that . . . Mr. Bollinger [had] expressed any racist comments toward [defendant]." Accordingly the trial court denied the motion to withdraw and directed defendant to cooperate with his attorney.

Within two weeks after the 11 January 2006 hearing, defendant wrote five more letters purporting to fire Mr. Bollinger on the grounds of racism. On 31 January 2006 Mr. Bollinger again moved to withdraw as counsel. At a hearing held 7 February 2006, the trial court denied defendant's request for a new court-appointed lawyer, advising defendant of his right to represent himself and his right to a court-appointed attorney, but not a court-appointed attorney of defendant's choice. The trial court gave defendant the choice of accepting Mr. Bollinger's representation or proceeding *pro se*. Defendant chose to proceed *pro se*. The trial court granted the motion to withdraw and appointed Mr. Bollinger as standby counsel.

On 9 February 2006[2] the State moved the trial court to withdraw defendant's jail phone privileges. After granting the State's motion, the trial court set the trial date for 13 March 2006 and again inquired if defendant wanted a lawyer to represent him. Defendant insisted on court-appointed representation but refused the appointment of Mr. Bollinger. The trial court noted, "I shouldn't do this[,]" before removing Mr. Bollinger completely from the case and appointing Jim McMillan to represent defendant. On 4 April 2006, Mr. McMillan moved to withdraw from representing defendant on the grounds that he had previously represented one of the State's witnesses. The trial court allowed the motion and appointed David Freedman as defendant's counsel.

2. The transcript is dated "February 9, 2007" but we believe this to be a mistake because the written order of assignment of counsel is dated 2-9-06.

From 21 April 2006 through 16 July 2007, defendant wrote a number of letters to the Davidson County Clerk of Court requesting that his case be set for trial, some of which included complaints regarding the services of Mr. Freedman. On 25 July 2007, the Davidson County Grand Jury indicted defendant for second degree sexual offense, also arising out of the events on 19 November 2005. Defendant sent a letter dated 26 June 2007 to notify Mr. Freedman that he had been fired as defendant's counsel. On 5 July 2007 defendant appeared before Judge Wayne L. Michael and executed a "voluntary, knowing and intelligent" waiver of the right to assistance of counsel with regard to the second degree sexual offense charge.

On 10 July 2007 Mr. Freedman filed a motion requesting that he be allowed to withdraw as counsel for defendant because of defendant's termination letter and because defendant had filed a complaint with the State Bar regarding Mr. Freedman's representation. On 16 July 2007 Judge Steve Balog held a hearing on the matter, at which he conducted a thorough inquiry into defendant's desire to proceed *pro se* and advised him of the dangers of so doing. After the inquiry, defendant waived assistance of counsel in open court and declared that he wanted to represent himself. Defendant then executed a written Waiver of Counsel. The trial court appointed Shawn Fraley to serve as standby counsel. The trial court recommended a trial date of 8 October 2007 to give defendant "enough time to be prepared for trial[.]" However, at defendant's request and with the State's consent, the trial was set for the 13 August 2007 term of superior court. On 17 July 2007 defendant wrote a letter to the court complaining that "Mr. Shawn Fraley is of no help[.]" The trial court held an administrative hearing regarding discovery in defendant's case on 20 July 2007. At the hearing defendant again indicated his desire to proceed *pro se*. The trial court then conducted a careful and thorough inquiry, advising defendant of the seriousness of the charges he faced and of the benefits of being represented by counsel. At the end of the trial court's inquiry, defendant was asked, "What do you wish to do?" Defendant replied, "I wish to represent myself totally." Defendant then executed another Waiver of Counsel.

On 13 August 2007 defendant's case was called for trial as defendant had requested before Judge Balog on 16 July 2007. The State moved to join for trial 05CRS61448, felonious breaking and entering; 05CRS61449, assault on a female and habitual misdemeanor assault; 05CRS61451, second degree rape; and 07CRS5067, second degree sexual offense, because all four offenses were from the same

transaction and supported by the same operative facts. When the trial court asked if defendant objected to the charges being joined for trial, he responded, "I didn't have adequate time to prepare for this" and moved for continuance on the grounds that he had not timely received evidence of photographs and lab reports from the State and had not had time to obtain all his witnesses. The trial court then conducted a thorough hearing, found "that either counsel, who were then counsel of record, or the defendant were timely provided information by the State with respect to all of these matters," that there were no material witnesses within the trial court's jurisdiction who could not be brought to the court, and denied the motion to continue the trial. The trial court then held a hearing on defendant's motion to suppress evidence.

Just before the trial court adjourned for the day, defendant moved in open court to withdraw his waiver of counsel:

> THE DEFENDANT: I have one question. I feel like I want to know if I can religuish [sic] my six [sic] amendment right to counsel, you know—
>
> THE COURT: My understanding is that you have relinquished your six [sic] amendment right to counsel.
>
> THE DEFENDANT: I'm saying for the State to appoint me [an attorney], I mean, for the Court to appoint me one.
>
> . . . .
>
> THE COURT: You have been through how many lawyers?
>
> THE DEFENDANT: I have this new evidence of medical stuff [lab reports] that I don't understand. I found I'm incompetent to do the trial.
>
> THE COURT: I will not delay the trial for [the] issue of attorneys.
>
> . . . .
>
> THE DEFENDANT: With regard to the medical report, I don't understand these papers and charge itself. It has graphs that I don't understand. I need a medical expert or some type of forensic examiner to look at this stuff to go over with me to understand it. . . . I need a court-appointed attorney, I want to do this case but I don't have the knowledge and know how to see, you know, I am just asking, could you court [sic] appoint me an attorney for this case?

The trial court took the motion under advisement until the next day, taking time to review defendant's file that evening.

On 14 August 2007, the trial court again heard from defendant on the issue of waiver of counsel. The trial court made extensive findings of fact before concluding in open court "that there has been a forfeiture of counsel on [defendant's] part, [and] there is no good reason to set aside the last waiver that [defendant] executed on July the 20th[.]" On 16 August 2007, the trial court entered a written order *nunc pro tunc* 14 August 2007 "den[ying] defendant's oral motion for appointed counsel."

Defendant was tried before a jury from 14 to 17 August 2007 in Superior Court, Davidson County. On 17 August 2007 the jury returned guilty verdicts for felonious breaking and entering, habitual misdemeanor assault, second degree rape and second degree sexual offense. Defendant was sentenced to consecutive sentences of 11 to 14 months for felonious breaking and entering, 11 to 14 months for assault on a female and habitual misdemeanor assault, and 133 to 169 months for second degree rape and second degree sexual offense. Defendant was also ordered to enroll in lifetime monitoring as a sex offender at the completion of his sentence. Defendant appeals.

II. The Right to Counsel

Defendant contends that the trial court erred by (1) appointing a substitute counsel at defendant's request, and (2) denying defendant the right to counsel.

A. Substitute Counsel

[1] Defendant cites *State v. Thacker*, 301 N.C. 348, 271 S.E.2d 252 (1980) to argue that a trial court must conduct "careful scrutiny" before it *grants* substitute counsel to a defendant who requests it. Defendant reasons that he is entitled to a new trial on this basis because

> there were no facts presented in the record which support Judge Balog's several earlier decisions to replace the Attorneys who were appointed to represent [defendant]. Judge Balog's actions represented a mere surrender and concession to [defendant's] assertions that he did not want to be represented by the Attorneys appointed to him and these decisions were not supported by . . . careful scrutiny.

However, *Thacker* affords defendant no relief for two reasons. First, *Thacker* expressly rejected the defendant's argument that "that failure to make a *detailed* inquiry [into an alleged conflict with appointed counsel] amounts to *a per se* violation of defendant's right to counsel[,]" 301 N.C. at 353, 271 S.E.2d at 255 (emphasis added), holding that "when faced with a claim of conflict and a request for appointment of substitute counsel, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective[,]" *id.*, 271 S.E.2d at 256. Second, in *Thacker*, the defendant's request for substitute counsel was *denied*. *Id.* In the case *sub judice*, defendant's requests for substitute counsel were *granted* three different times, and "[a] defendant is not prejudiced by the granting of relief which he has sought . . . ." N.C. Gen. Stat. § 15A-1443(c) (2007). Accordingly, this argument is overruled.

B. Denial of Appointed Counsel

[2] The trial court set forth two alternative legal grounds for its order denying defendant's request for appointed counsel: (1) defendant "clearly, unequivocally, and knowingly waived his right to counsel after being fully informed by the Court as required by G.S. 15A-1242 [and] failed to offer sufficient evidence on which the Court might consider setting aside the waivers previously executed by the defendant[;]" and (2) "defendant has engaged in an obvious and consistent pattern of purposely and willfully undertaking to discharge appointed counsel, thereby obstructing, delaying and frustrating the orderly process of his court proceedings . . . result[ing] in his forfeiture of right to counsel."

Defendant argues vigorously that the trial court's legal conclusion of forfeiture was error because:

> In each of these so called "firing situations," the Presiding Judges chose, without a hint of scrutiny, to relieve counsel and appoint another attorney. . . . [T]he Judge's [sic] decisions to change counsel were not justified. Appellant should not be held responsible or punished for unjustified actions taken by a Presiding Judge. . . . It was those past improper decisions by other Judges which allowed for the appointment of a succession of counsels, but not because of Appellant's conduct that Judge Lee relied upon in reaching his determination that Appellant had forfeited his right to the invaluable right to counsel. . . . Appellant

> was appointed five attorneys to assist him in preparing and presenting his defense. The exact reasons that the Court allowed withdrawals is not clear. . . . No reasonable explanation existed to explain why any of the court appointed attorneys were allowed to withdraw . . . .

However, forfeiture was an alternative basis for the trial court's decision; the trial court also concluded that defendant's withdrawal of his waiver of the right to counsel was ineffective. This distinction is important because "courts must indulge every reasonable presumption against" the forfeiture of a constitutional right by misconduct, *Illinois v. Allen*, 397 U.S. 337, 343, 25 L. Ed. 2d 353, 358 (1970) (holding that the defendant forfeited his constitutional right to be present at his own trial when he tore up his attorney's files and threatened the trial judge); *see also State v. Montgomery*, 138 N.C. App. 521, 525, 530 S.E.2d 66, 69 (2000) (releasing two court-appointed counsels, disrupting the courtroom on two occasions and assaulting a privately retained attorney was sufficient misconduct to forfeit the right to counsel). On the other hand, the defendant bears the "burden of showing sufficient facts entitling him to a withdrawal of the waiver of right to counsel[.]" *State v. Atkinson*, 51 N.C. App. 683, 686, 277 S.E.2d 464, 466 (1981). Furthermore, when a defendant waits until near the beginning of his trial to move to withdraw his waiver of the right to counsel, as here, "the burden is on the defendant . . . to show good cause for the delay." *State v. Smith*, 27 N.C. App. 379, 381, 219 S.E.2d 277, 279 (1975); *see also Atkinson*, 51 N.C. App. at 686, 277 S.E.2d at 466.

The trial court must weigh the cause for which defendant requests to withdraw his waiver, with due consideration to the defendant's timing of the motion and the court's need to conduct its business in an orderly and timely fashion. *State v. Hoover*, 174 N.C. App. 596, 598, 621 S.E.2d 303, 305 (2005) (finding no error in the denial of a motion to withdraw waiver of counsel when the "defendant had four counsel appointments and requested change of counsel four times in approximately eighteen months[,] sought to withdraw his waiver of counsel two weeks prior to the beginning of trial[, and] failed to clearly state a request to withdraw his waiver of counsel"), *cert. denied*, 360 N.C. 488, 632 S.E.2d 766 (2006); *Atkinson*, 51 N.C. App. at 686, 277 S.E.2d at 466; *Smith*, 27 N.C. App. at 381, 219 S.E.2d at 279 ("In this case the defendant delayed until the day his case was scheduled for trial before moving to withdraw the waiver and have counsel assigned. If this tactic is employed successfully, defendants will be

permitted to control the course of litigation and sidetrack the trial."). The trial court's denial of a motion to withdraw a waiver of the right to counsel is reviewed for abuse of discretion. *State v. Blankenship*, 337 N.C. 543, 553, 447 S.E.2d 727, 733 (1994), *overruled on other grounds*, *State v. Barnes*, 345 N.C. 184, 230, 481 S.E.2d 44, 69 (1997); *accord U.S. v. Woodard*, 291 F.3d 95, 111 (1st Cir. 2002) ("In light of [the trial] court's superior vantage point for evaluating matters such as these, we owe considerable deference to that finding." (Citation and quotation marks omitted.)).

Defendant argued to the trial court that the assistance of counsel became necessary when he was faced at the last minute with lab reports that he did not understand. However, the record shows that when the specific issue of the State's provision of lab reports and other discovery came before the trial court during the hearing on 20 July 2007, the following colloquy ensued:

> THE COURT: You apparently deny that you have gotten all of your discovery?
>
> THE DEFENDANT: Yes, sir, I do.
>
> THE COURT: So the DA will make an effort to research all the discovery materials on you through your standby counsel.
>
> THE DEFENDANT: I don't want counsel. I want to represent myself. I deny counsel. I waive counsel right now because there is problems [sic] right now. . . . I don't want a standby counsel. I want to represent myself and control my own fate and destiny.

Additionally, though the lab reports themselves do not appear in the record, during the hearing on defendant's motion to suppress on 23 July 2007, the trial court noted that "Defendant's Exhibit 8 is a copy of a case supplement report [from the S.B.I.], Defendant's Exhibit Number 9 is a laboratory disposition of report." Because defendant flatly refused standby counsel for the purpose of researching discovery materials and because there is evidence in the record that defendant had copies of the materials related to the lab reports in advance of the trial, we conclude the trial court did not abuse its discretion when it concluded that defendant "failed to offer sufficient evidence on which the Court might consider setting aside the waivers previously executed by the defendant."

The record further indicates that defendant did not show any good cause for waiting until the eve of his trial to move to with-

draw his waiver of counsel. Defendant had already delayed his trial for months as he fired three different appointed attorneys and a standby counsel. The judges before whom defendant appeared worked hard to accommodate defendant, protect defendant's right to counsel and bring the case to trial in a timely manner. In fact, before denying defendant's motion to withdraw his waiver of counsel, the trial court noted:

> It is amazing to me. I haven't [in] the time that I have been on the bench seen this effort on the part of judges and lawyers to offer assistance to a defendant. I really haven't seen it. I haven't seen it in the time I have been on the bench. You have the best in the State.

Because we conclude that defendant did not show either sufficient facts supporting his motion to withdraw the waiver of counsel or good cause for his delay in seeking to withdraw his waiver, we hold the trial court did not abuse its discretion when it denied defendant's eleventh hour motion to withdraw his waiver of counsel. Accordingly, this argument is overruled.

III. Provision of Legal Materials to *Pro Se* Defendant

[3] Defendant further contends that he is entitled to a new trial because "[t]he many rules and procedures which licensed attorneys have been educated and trained to understand and apply became a court imposed axe which swung with vengeance against this Appellant as he struggled mightily against every odd to present his case and have his day in court." Defendant acknowledges that "[t]he general rule is that an individual who represents himself is held to the same standards and knowledge as that of a licensed attorney[,] but contends that "[w]hile this standards [sic] might properly apply to many *pro se* litigants, he [sic] should not be literally applied in this case[,]" because defendant did not have access to "any information, documents or books regarding the North Carolina Rules of Evidence or trial practice and strategy materials" during his pre-trial incarceration.

Defendant's brief concedes that "Appellant can not make the claim that our Court has declared that these materials are required by North Carolina statutes or [the] [C]onstitution to be presented to an un-represented defendant[,]" but argues the spirit of the constitutional rights to counsel, confrontation, due process, and freedom from cruel and unusual punishment require that "the Court should

provide basic legal materials to an incarcerated defendant who is representing himself."

To the contrary, this Court has held that

> [w]hen a defendant elects to represent himself in a criminal action, the trial court is not required to abandon its position as a neutral, fair and disinterested judge and assume the role of counsel or advisor to the defendant. The defendant *waives counsel at his peril* and by so doing acquires no greater rights or privileges than counsel would have in representing him.

State v. Brincefield, 43 N.C. App. 49, 52, 258 S.E.2d 81, 83-84, *disc. review denied*, 298 N.C. 807, 262 S.E.2d 2 (1979) (emphasis added). Defendant chose to represent himself over the advice of more than one judge who sought to warn him of the seriousness of the charges against him and the perils of proceeding *pro se*. The trial court could not force defendant to accept representation if he did not want it. *Faretta v. California*, 422 U.S. 806, 836, 45 L. Ed. 2d 562, 582 (1975); *Thacker*, 301 N.C. at 354, 271 S.E.2d at 256. We concluded *supra* that defendant did not offer the court a sufficient reason to withdraw his wavier of counsel. Four times the trial court appointed counsel for defendant, one time counsel was required to withdraw on account of a conflict of interest, defendant "fired" the other three for no good reason appearing in the record. Defendant made his choice, as was his constitutional right. He is entitled to no special exception for the quality of his particular self-representation or his lack of access to legal materials. *See Brincefield*, 43 N.C. App. at 52, 258 S.E.2d at 84 ("Whatever else a defendant may raise on appeal, when he elects to represent himself he cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel."). Accordingly, this argument is overruled.

IV. Conclusion

The trial court did not abuse its discretion when it denied defendant's motion to withdraw waiver of counsel. Furthermore, defendant may not complain on appeal that his self-representation was inadequate. Defendant received a fair trial, free of prejudicial error.

No Error.

Judges McGEE and McCULLOUGH concur.

IN RE S.N., X.Z.

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

IN THE MATTER OF: S.N., X.Z.

No. COA08-624

(Filed 2 December 2008)

1. Termination of Parental Rights— subject matter jurisdiction—service on guardian ad litem

The trial court had subject matter jurisdiction in a termination of parental rights proceeding where the children were named in the caption of the summons but the guardian ad litem was named as a respondent and accepted service. Service on the guardian ad litem constituted service on the children for purposes of N.C.G.S. § 7B-1106(a).

2. Termination of Parental Rights— foster care without reasonable progress—limited progress—evidence for termination sufficient

The trial court did not err by terminating respondent's parental rights on the ground that the children had been left in foster care for over twelve months without reasonable progress to correct the circumstances that led to removal. Respondent's attempts to correct the conditions that led to removal came after she was in jeopardy of losing them, and her extremely limited progress was not reasonable.

Chief Judge MARTIN dissenting.

Appeal by respondent-mother from orders entered 14 March 2008 by Judge Lawrence McSwain in Guilford County District Court. Heard in the Court of Appeals 29 September 2008.

James A. Dickens, for petitioner-appellee Guilford County Department of Social Services.

Susan J. Hall, for respondent-appellant mother.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for guardian ad litem.

STEELMAN, Judge.

Where the minor children were named in the caption of the summons in a proceeding to terminate parental rights, and the children's guardian *ad litem* was named as a respondent and accepted service of the summons, the trial court had subject matter jurisdiction. The

trial court's uncontested findings of fact supported its conclusion that grounds existed for termination of respondent's parental rights based upon the minor children being willfully left in foster care for twelve months (N.C. Gen. Stat. § 7B-1111(a)(2)).

I. Factual and Procedural Background

Respondent is the mother of S.N. and X.Z. Respondent was incarcerated from December 2004 to February 2006. While she was incarcerated, she allowed her mother, P. Barnes (Barnes), to take custody of S.N. Respondent gave birth to X.Z. while in prison and allowed Barnes to take custody of X.Z. Respondent was released from prison in February 2006 and did not assume custody of the children.

X.Z. was born with spina bifida and has special needs. He is able to walk with the aid of leg braces, he has to be catheterized four times per day, and he has a shunt in his brain that drains fluid.

On 16 June 2006, the Guilford County Department of Social Services ("DSS") became involved in the case. A petition was filed that alleged the following: (1) respondent was addicted to crack cocaine; (2) Barnes was an alcoholic; (3) domestic violence occurred in the home of Barnes; and (4) X.Z. had unexplained burns on his foot. Barnes entered into a safety plan with DSS on 7 July 2006, but she failed to comply with its terms. The juveniles were placed in DSS custody on 27 July 2006 and have been in DSS custody since that date. S.N. and X.Z. were adjudicated neglected and dependent by consent on 7 September 2006.

On 15 May 2007, respondent entered into a case plan with DSS for reunification. The case plan required her to: (1) establish a verifiable source of income; (2) complete a medication and parenting assessment and follow all recommendations; (3) complete a drug and alcohol assessment and provide proof of completion; (4) remain drug and alcohol free and submit to random drug screens; and (5) establish stable and suitable housing for the return of the children and not be evicted due to nonpayment of rent or mortgage. Respondent entered into a second case plan on 17 August 2007, which reiterated the previous objectives and contained an additional condition that she obtain counseling.

On 4 September 2007, DSS filed a petition to terminate respondent's parental rights to S.N. and X.Z. The petition also sought to terminate the parental rights of the father of X.Z. The father of S.N. was deceased. The petition alleged the following grounds for termi-

nation: (1) neglect, (2) willful abandonment, (3) willfully leaving the children in foster care for over twelve months without showing reasonable progress in correcting the conditions which led to removal, and (4) willful failure to pay a reasonable portion of the cost of care for the juveniles.

The trial court conducted hearings in the matter on 5 November 2007, 3 December 2007, 14 January 2008, 17 January, 24 January, and 11 February 2008. Melissa Fox, a Licensed Clinical Social Worker, and Christopher Hines, the Child Protective Services ("CPS") case worker assigned to the children's case, testified for DSS. Mr. Hines testified that DSS was unable to make contact with respondent for a long period of time after the children were taken into DSS custody, and that respondent failed to keep appointments with DSS. Mr. Hines further testified that, after entering into the 15 May and 17 August 2007 case plans, respondent continued to change her residence and was twice incarcerated. Respondent's whereabouts were unknown to DSS for several months in the summer and fall of 2007. Finally, Mr. Hines testified that respondent had not met the objectives in her case plan. Ms. Fox began treating S.N. for anxiety on 26 September 2006. She felt that it was not in S.N.'s best interest to return to live with respondent. Respondent testified about her problems with drug and alcohol abuse, her new job, and her attempts to meet the objectives of her case plan.

On 14 March 2008, the trial court entered an order terminating respondent's parental rights to S.N. and X.Z. on the grounds of (1) neglect under N.C. Gen. Stat. § 7B-1111(a)(1); (2) willfully leaving the children in foster care under N.C. Gen. Stat. § 7B-1111(a)(2); and (3) willfully failing without justification to pay a reasonable portion of the cost of care for the children under N.C. Gen. Stat. § 7B-1111(a)(3). From these orders, respondent appeals. X.Z.'s father's parental rights were terminated, and he did not appeal.

II. Subject Matter Jurisdiction

[1] In her first argument, respondent contends that the trial court lacked subject matter jurisdiction over this case on the grounds that the summons for the petition to terminate parental rights did not list the minor children as respondents. We disagree.

The standard of appellate review for a question of subject matter jurisdiction is *de novo*. *Raleigh Rescue Mission, Inc. v. Bd. of Adjust. of City of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002).

N.C. Gen. Stat. § 7B-1106 (2007) governs the issuance of a summons in a termination of parental rights case and requires that the juvenile be named as a respondent. The statute provides, however, that "the summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem . . ." *Id.* "The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him." *Latham v. Cherry*, 111 N.C. App. 871, 874, 433 S.E.2d 478, 481 (1993) (quotation omitted). "Service of summons on the guardian *ad litem* . . . constitutes service on the juvenile, as expressly stated in N.C. Gen. Stat. § 7B-1106(a)." *In re J.A.P.*, 189 N.C. App. 683, 687, 659 S.E.2d 14, 17 (2008).

On 4 September 2007, a summons was issued that named the children's guardian *ad litem* as a respondent. S.N.'s and X.Z.'s names were included in the caption of the summons, but S.N. and X.Z. were not named as respondents. Chet Zukowski, the guardian *ad litem* appointed on 10 August 2006, accepted service on behalf of the children on or about 14 September 2007.

The summons' deviation from the requirements of N.C. Gen. Stat. § 7B-1106(a) are akin to a nonjurisdictional irregularity and not a defect that deprives the trial court of subject matter jurisdiction. *See In re A.F.H-G.*, 189 N.C. App. 160, 161, 657 S.E.2d 738, 742 (2008) (Stephens, J., concurring). Further, we are bound by the holding of this Court in *J.A.P. See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we hold that service of the summons upon the children's guardian *ad litem* constituted service on S.N. and X.Z. for purposes of N.C. Gen. Stat. § 7B-1106(a). The trial court had subject matter jurisdiction over these proceedings.

This argument is without merit.

III. Willfully Leaving Children in Foster Care

[2] In her second argument, respondent contends that the trial court erred in terminating her parental rights on the grounds that the evidence did not support the trial court's conclusion that her parental rights should be terminated. We disagree.

Standard of Review

Termination of parental rights is a two-step process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001) (citation omitted). In the first phase of the termination hearing, the petitioner must show by clear, cogent and convincing evidence that a

statutory ground to terminate exists. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997) (citation omitted). The trial court must make findings of fact which are supported by this evidentiary standard, and the findings of fact must support the trial court's conclusions of law. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). "The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (2004) (quoting *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). The trial court's conclusions of law "are fully reviewable *de novo* by the appellate court." *Mann Contr'rs, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999) (citation omitted). "So long as the findings of fact support a conclusion [that one of the enumerated grounds exists] the order terminating parental rights must be affirmed." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) (quotation omitted).

Once the trial court has found a ground for termination, the court then considers the best interests of the child in making its decision on whether to terminate parental rights. *Blackburn* at 610, 543 S.E.2d at 908. We review this decision on an abuse of discretion standard, and will reverse a court's decision only where it is "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

N.C. Gen. Stat. § 7B-1111(a)(2)

In considering the ground for termination under Section 7B-1111(a)(2), the trial court must employ a two-part analysis and determine: (1) that a child has been willfully left by the parent in foster care or placement outside the home for over 12 months; and (2) as of the time of the hearing, that the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. *In re O.C. & O.B.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005), *cert. denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). Willfulness under this section means something less than willful abandonment, and "does not require a finding of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996) (citation omitted).

Respondent first argues that findings of fact numbers 25/26 are not supported by clear, cogent and convincing evidence. These

two findings are nearly identical, but are listed in two separate orders.[1] Finding of fact number 25/26 states that respondent "has not presented any documentation that she has in fact completed [the] objectives [of her case plan]."

The trial court entered the following findings, which are binding on this Court due to respondent's failure to challenge their sufficiency. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

13/14. The circumstances that brought the juvenile into DSS custody were that the mother was incarcerated from December 2004 until February 2006, and while she was incarcerated, the mother allowed her mother, P. Barnes, to take custody of the juvenile while she was in prison.

. . .

15/16. The maternal grandmother entered into a safety plan with DSS on July 7, 2006, but the grandmother subsequently broke the safety plan, and the juvenile was placed into DSS custody on July 27, 2006.

16/17. The mother was released from prison in February 2006, but she did not assume custody of the juvenile from the maternal grandmother.

17/18. Although the mother testified that the maternal grandmother refused to return custody of the juvenile to her, the Court finds that the mother did not take any reasonable steps to regain custody of the juvenile, such as contacting law enforcement or filing a complaint for custody in the district court.

. . .

1. The trial court entered two separate orders terminating respondent's parental rights: one terminating her parental rights to S.N. and one terminating her parental rights to X.Z. The two orders are nearly identical in substance, with any major differences being attributed to the differences between the two juveniles. A majority of the findings pertinent to this opinion are identical in both orders, but the numbering is slightly different in each. Unless otherwise specified, our citations to the findings of fact include citations to both the S.N. order and to the X.Z. order. The first number in our citations corresponds to the S.N. order and the second number corresponds to the X.Z. order.

19/20. Although the juvenile was placed into DSS custody on July 27, 2006, the mother did not enter into a case plan with DSS to reunify with the juvenile until May 15, 2007.

. . .

21/22. The juvenile has been in DSS custody for over 12 months, and the mother has not successfully completed the plan of reunification.

22/23. The mother and her boyfriend have been residing at [a] hotel in [Greensboro,] North Carolina since October 2007, and although she has not been forced to move due to non-payment of rent, the Court finds that the mother does not have a stable housing situation suitable and appropriate for the return of the juvenile to her at this time.

23/24. The mother's parenting assessment recommended that she attend parenting classes; however, she has not successfully completed the parenting classes recommended by DSS as of the date of this hearing.

24/25. The mother has not successfully completed her substance abuse treatment, because although the mother completed all of the class requirements for her substance abuse treatment program, she has not taken the final drug test in order to receive her certificate of completion.

. . .

27/28. Although the mother maintained stable employment, the mother did not pay any sums of money to DSS for the care and maintenance of the juvenile, and by virtue of her stable employment, she was able to pay a sum greater than zero . . .

The trial court's uncontested findings demonstrate that respondent willfully left her children in foster care for over twelve months and had not made reasonable progress in correcting the conditions which led to the removal of the minor children from her care.

Respondent next argues that her parental rights should not have been terminated because she made limited progress. However, the fact that respondent made some efforts to correct the situation does not preclude a finding of willfulness. *See*, *e.g.*, *In Re Oghenekevebe* at 440, 473 S.E.2d at 398 ("[W]illfulness is not precluded just because

respondent has made some efforts to regain custody of the child."); *In Re Tate*, 67 N.C. App. 89, 94, 312 S.E.2d 535, 539 (1984) ("The fact that appellant made some efforts within the two years does not preclude a finding of willfulness or lack of positive response.").

Although respondent made some attempts to correct the conditions which led to the removal of her children, she did not make any attempt to regain custody of her children until *after* she was in jeopardy of losing them, and termination of her parental rights was proper. *See Oghenekevebe* at 437, 473 S.E.2d at 397 (finding grounds existed to terminate respondent's parental rights and noting that respondent failed to show any progress until her parental rights were in jeopardy).

We hold that there was sufficient evidence to support the trial court's finding that respondent's extremely limited progress was not reasonable progress. We further hold that the trial court's findings were sufficient to support its conclusion that respondent's lack of progress justified termination of her parental rights under Section 7B-1111(a)(2). Respondent has not challenged the court's determination that termination of her parental rights was in the children's best interests. The trial court's termination of respondent's parental rights is affirmed.

Having concluded that one ground for termination of parental rights exists, we need not address the additional grounds found by the trial court. *See In re Brim*, 139 N.C. App. 733, 743, 535 S.E.2d 367, 373 (2000).

AFFIRMED.

Judge ELMORE concurs.

Chief Judge MARTIN dissents in a separate opinion.

MARTIN, Chief Judge, dissenting.

The trial court in the present case did not issue summonses naming juveniles S.N. and X.Z. as respondents to the petition filed by the Guilford County Department of Social Services ("DSS"). N.C.G.S. § 7B-1106(a)(5) requires that, "upon the filing of the petition [to terminate parental rights], *the court shall cause a summons to be issued* . . . [which] shall be directed to the following person[] or agency, not otherwise a party petitioner, *who shall be named as*

respondent[]: . . . [t]he juvenile." N.C. Gen. Stat. § 7B-1106(a)(5) (2007) (emphasis added). Because the trial court did not comply with this express requirement of N.C.G.S. § 7B-1106(a)(5), I do not believe the trial court had subject matter jurisdiction to hear the petition filed by the Guilford County DSS, and I would vote to vacate the order terminating respondent-mother's parental rights.

The majority concludes that it is bound to follow *In re J.A.P. & I.M.P.*, 189 N.C. App. 683, 659 S.E.2d 14 (2008), by the holding of *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37 ("[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."). *J.A.P.* has recently been interpreted by this Court to hold that the requirement of N.C.G.S. § 7B-1106(a)(5) is satisfied and subject matter jurisdiction is conferred when (1) there is service of the summons on either the guardian ad litem or the guardian ad litem's attorney advocate which constitutes service on the affected juvenile, and (2) the juvenile is "nam[ed]" in the caption of the summons. *See In re N.C.H., G.D.H., D.G.H.*, 192 N.C. App. 445, 665 S.E.2d 812 (2008) (citing *J.A.P.*, 189 N.C. App. at 488-89, 659 S.E.2d at 17). However, prior to *J.A.P.*, this Court decided *In re K.A.D.*, 187 N.C. App. 502, 653 S.E.2d 427 (2007), *In re I.D.G.*, 188 N.C. App. 629, 655 S.E.2d 858 (2008), and *In re A.F.H-G.*, 189 N.C. App. 160, 657 S.E.2d 738 (2008), which strictly interpreted N.C.G.S. § 7B-1106(a)(5) and held that when the affected juvenile "was not listed as a respondent in the summons, as required by [N.C.G.S.] § 7B-1106(a)[(5)], and no summons was issued to [that juvenile], . . . an order terminating parental rights must be vacated for lack of subject matter jurisdiction." *K.A.D.*, 187 N.C. App. at 504, 653 S.E.2d at 428-29 (citation omitted); *see also I.D.G.*, 188 N.C. App. at 630-31, 655 S.E.2d at 859; *A.F.H-G.*, 189 N.C. App. at 161, 657 S.E.2d at 739-40. Based on *In re Civil Penalty*, I believe this Court is bound by the decisions preceding *J.A.P.* which strictly interpreted N.C.G.S. § 7B-1106(a)(5).

Therefore, because I believe we are still bound by this Court's earlier decisions in *K.A.D.* and its progeny, and for the reasons ably and thoroughly discussed in Judge Stroud's dissent in *In re N.C.H., G.D.H., D.G.H.*, No. COA08-413, slip op. at 4-17 (N.C. Ct. App. Sept. 2, 2008) (Stroud, J., dissenting), I respectfully dissent.

STATE OF NORTH CAROLINA v. TERRY LEE DIX

No. COA07-1440

(Filed 2 December 2008)

1. Confessions and Incriminating Statements— right to counsel—ambiguous invocation of right

The trial court erred in a multiple statutory sex offense, multiple indecent liberties with a child, and secret peeping case by concluding that defendant's statement "I'm probably gonna have to have a lawyer" constituted an unambiguous invocation of his right to counsel requiring suppression of his recorded statement because: (1) although when a suspect makes an ambiguous statement it will often be good police practice for the interviewing officer to clarify whether he actually wanted an attorney, such clarifying questions are not required; (2) defendant's statement, taken out of context, cannot be the sole determinate of whether defendant unambiguously invoked his right to counsel when defendant had already expressed a desire to "tell his side of the story" to a detective, was asked by the detective to wait until they were back at the station, and yet gave a brief, unsolicited oral confession to a sergeant en route to the station; (3) after being told about defendant's confession to the sergeant, the detective reasonably expected defendant to continue their formal conversation and proceed with the statement defendant apparently wished to make; (4) defendant's statement was ambiguous since no reasonable officer under the circumstances would have understood defendant's words as an unambiguous actual request for an attorney at that moment, as opposed to a mere comment about the likelihood that defendant would eventually require the services of an attorney in this matter; and (5) the detective's attempt to clarify what defendant wanted to do evidenced the ambiguous nature of defendant's statement under the circumstances.

2. Confessions and Incriminating Statements— right to counsel—resolution of ambiguity in favor of defendant not required

The trial court was not required in a multiple statutory sex offense, multiple indecent liberties with a child, and secret peeping case to resolve any ambiguity in defendant's statement about the need for counsel in defendant's favor because: (1) the detective did not dissuade defendant from exercising his right to have

an attorney, and the detective's attempt to clarify what defendant wanted to do could not be equated to badgering, intimidating, threatening, or even ignoring defendant; (2) this case involved an ambiguous reference to an attorney that a reasonable officer under the circumstances would have only understood might be an invocation of the right to counsel, and thus, neither the complete cessation of questioning nor the limitation of questioning to clarifying questions was required; and (3) the detective was not required to ask clarifying questions.

Appeal by the State from judgment entered 15 August 2007 by Judge John O. Craig in Randolph County Superior Court. Heard in the Court of Appeals 25 August 2008.

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

Appellate Defender Staples Hughes, *by Anne M. Gomez*, *Assistant Appellate Defender*, *for defendant-appellee.*

MARTIN, Chief Judge.

The State appeals, pursuant to N.C.G.S. § 15A-979(c), from an order suppressing statements made by Terry Lee Dix ("defendant") to Detective McMasters of the Asheboro Police Department. The evidence before the trial court at the hearing upon the motion to suppress tended to show that, on March 22, 2006, Detective McMasters and Sergeant Cook of the Randolph County Sheriff's Department served defendant with warrants charging him with three counts of statutory sex offense, three counts of taking indecent liberties with a child, and one count of secret peeping. Detective McMasters and Sergeant Cook located defendant at his residence, where they placed him under arrest. Before being transported to the police station, defendant indicated his willingness to talk with Detective McMasters and tell his story. However, Detective McMasters told defendant to wait until they arrived at the jail. Detective McMasters indicated to defendant that, once at the station, she would first advise defendant of his rights and then listen to his side of the story, "[c]ause there's two sides to every story."

Defendant was then transported in custody to the Randolph County Jail by Sergeant Cook. While he was being transported, defendant made a brief unsolicited oral confession to Sergeant Cook, who related this information to Detective McMasters. At the police

station, defendant was taken to an interrogation room and "mirandized" by Detective McMasters. When Detective McMasters asked defendant if he understood his rights, defendant replied, "yeah." Immediately thereafter, Detective McMasters and defendant engaged in the following conversation:

McMasters: Okay. And will you answer some questions for me?

Defendant: I'm probably gonna have to have a lawyer.

McMasters: Okay but, ya know, I mean, okay. But, ya know, I mean, it's up to you if you wanna answer questions or not. I mean, you can answer till you don't feel comfortable, whatever and then not answer. Ya know, that's totally up to you. I know earlier you said you was wanting to talk to me because . . . .

Defendant: Yeah.

McMasters: . . . of course there's two sides . . .

Defendant: Yeah.

McMasters: . . . to every story.

Defendant: But, no . . .

McMasters: Uhm . . .

Defendant: I . . .

McMasters: You wanna talk, ok.

Defendant: Yeah.

Thereafter, defendant signed a Waiver of Miranda Rights form and Detective McMasters proceeded to conduct a recorded interview with defendant which lasted approximately fifteen minutes.

At trial, Detective McMasters testified that, from defendant's statement, "I'm probably gonna have to have a lawyer," she "was unclear whether he wanted to talk to me or not with the way he approached me at the address on Brittain. He was wanting to tell me what was going on or what had went on." Detective McMasters was then asked what her purpose was in saying to defendant, "I know, I mean, it's up to you if you want to answer questions or not. I mean, you can answer till you don't feel comfortable, whatever, and then not

answer. You know, it's totally up to you. I know . . . you said you was wanting to talk to me." Detective McMasters replied, "I was wanting to clarify what he was wanting to do."

After hearing evidence and arguments, the trial court made findings of fact and conclusions of law, including, *inter alia*, the following:

> 5) Immediately following advisement of his Miranda Rights, the defendant invoked his right to counsel by stating to the detective, "I'm probably gonna have to have a lawyer";
>
> 6) Detective McMasters did not ask defendant any questions seeking to clarify his request for an attorney after defendant made his statement. The Court concludes that it is required to resolve any ambiguity in defendant's statement in favor of the individual. *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992);[1]
>
> 7) After defendant's invocation of his right to counsel, the Waiver secured by Detective McMasters cannot be considered valid. *Edwards v. Arizona*, 451 U.S. 477, 68 L.E.2d 378 (1981).

Based on these conclusions of law, the trial court ordered the defendant's recorded statement to Detective McMasters suppressed.

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[1] On appeal, the State contends the trial court's suppression of defendant's statement was error for the following reasons: 1) defendant's statement was ambiguous and thus not an invocation of his right to counsel; 2) Detective McMasters did seek clarification following defendant's ambiguous statement, but was not required to do so; and 3) the trial court was not required to resolve any ambiguity in defendant's favor. We will first address whether defendant's statement constituted an invocation of his right to counsel.

The trial court's findings of fact after a hearing concerning the admissibility of a confession are conclusive and binding on this Court when supported by competent evidence. *See Barber*, 335 N.C. at 129, 436 S.E.2d at 111. The trial court's conclusions of law, however, are reviewable *de novo*. *See id.* Under this standard, the legal significance

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1. Although denominated as conclusions of law, conclusions 5 and 6 contain mixed findings of fact, which do not involve the application of legal principles, *see Coble v. Coble*, 300 N.C. 708, 713, 268 S.E.2d 185, 189 (1980), and conclusions of law. To the extent the trial court's conclusions contain findings of fact, these findings are binding upon us if supported by competent evidence. *See State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993), *cert. denied*, 512 U.S. 1239, 129 L. Ed. 2d 865 (1994). Otherwise, we review these conclusions de novo. *See id.*

of the findings of fact made by the trial court is a question of law for this Court to decide. *See State v. Davis*, 305 N.C. 400, 415, 290 S.E.2d 574, 583 (1982).

The *Miranda* right to counsel is the right of a defendant to have an attorney present during custodial interrogation "[i]f . . . he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking." *Miranda v. Arizona*, 384 U.S. 436, 444-45, 16 L. Ed. 2d 694, 707 (1966). In *Davis v. United States*, 512 U.S. 452, 129 L. Ed. 2d 362 (1994), the United States Supreme Court held that to invoke his right to counsel, "the suspect must unambiguously request counsel." *Id.* at 459, 129 L. Ed. 2d at 371. The invocation of the right to counsel " 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' " *Id.* (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178, 115 L. Ed. 2d 158, 169 (1991)). The test is an objective one that assesses whether a reasonable officer under the circumstances would have understood the statement to be a request for an attorney. *See id.* This test examines more than the mere words used by a defendant. *See Barber*, 335 N.C. at 130, 436 S.E.2d at 111 ("In deciding whether a person has invoked her right to counsel, therefore, a court must look not only at the words spoken, but the context in which they are spoken as well.") (citations omitted). In fact, the understanding of the officer to whom a defendant's statement is made may be indicative of how a reasonable officer under the circumstances would have interpreted the defendant's statement. *See State v. Jackson*, 348 N.C. 52, 57, 497 S.E.2d 409, 412 (1998), *abrogated on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). As such, "the *likelihood* that a suspect would wish counsel to be present is not" the proper standard. *McNeil*, 501 U.S. at 178, 115 L. Ed. 2d at 168 (emphasis in original). While "there are no 'magic words' which must be uttered in order to invoke one's right to counsel," *Barber*, 335 N.C. at 130, 436 S.E.2d at 111, "a statement either is such an assertion of the right to counsel or it is not." *Davis*, 512 U.S. at 459, 129 L. Ed. 2d at 371. It is well settled that, during custodial interrogation, once a suspect invokes his right to counsel, all questioning must cease until an attorney is present or the suspect initiates further communication with the police. *See Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 386 (1981). However, "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Davis*, 512 U.S. at 461-62, 129

L. Ed. 2d at 373. Thus, unless the in-custody suspect "actually requests" an attorney, and thus invokes his right to counsel, lawful questioning may continue. *Davis*, 512 U.S. at 462, 129 L. Ed. 2d at 373; *State v. Hyatt*, 355 N.C. 642, 655, 566 S.E.2d 61, 70 (2002); *State v. Barnes*, 154 N.C. App. 111, 118, 572 S.E.2d 165, 170 (2002); *see also State v. Ash*, 169 N.C. App. 715, 721, 611 S.E.2d 855, 860 (2005). Although the *Davis* Court noted in dicta that, "when a suspect makes an ambiguous statement it will often be good police practice for the interviewing officer[] to clarify whether or not he actually wants an attorney," such clarifying questions are not required. *Davis*, 512 U.S. at 461, 129 L. Ed. 2d at 373.

In *Davis*, the Court held that a suspect's statement, "Maybe I should talk to a lawyer," was not a request for counsel. *See id.* at 462, 129 L. Ed. 2d at 373. In reaching this conclusion, the Court emphasized the importance of context. The defendant in *Davis* made the statement about an hour and a half into his interrogation, at which point officers asked the defendant whether he was asking for a lawyer or just making a comment about a lawyer. *See id.* at 455, 129 L. Ed. 2d at 368. Because a reasonable officer under the circumstances would not have understood the *Davis* defendant's statement to be a request for an attorney, the Court ruled the defendant's right to an attorney was not violated when defendant responded that he did not want a lawyer and officers resumed questioning. *See id.* at 459, 129 L. Ed. 2d at 371.

In the case at bar, defendant's statement, "I'm probably gonna have to have a lawyer," taken out of context, cannot be the sole determinate of whether defendant unambiguously invoked his right to counsel. Defendant had already expressed a desire to "tell his side of the story" to Detective McMasters, was asked by the detective to wait until they were back at the station, and yet gave a brief, unsolicited oral confession to Sergeant Cook en route to the station. After being told about defendant's confession to Sergeant Cook, Detective McMasters reasonably expected defendant to continue their former conversation and proceed with the statement defendant apparently wished to make. Thus, when defendant remarked, "I'm probably gonna have to have a lawyer," Detective McMasters was understandably unsure of defendant's purpose. By this statement, defendant neither refused nor agreed to answer Detective McMasters's questions without an attorney present. In this context, defendant's statement was ambiguous because no reasonable officer under the circumstances would have understood defendant's

words as an unambiguous, "actual request" for an attorney at that moment, as opposed to a mere comment about the likelihood that defendant would eventually require the services of an attorney in this matter, which he surely anticipated would involve criminal proceedings. Detective McMasters's attempt to "clarify what he wanted to do" evidences the ambiguous nature of defendant's statement under the circumstances. Accordingly, we hold the trial court's conclusion that defendant's statement was an unambiguous invocation of his right to counsel was error.

[2] We turn next to the trial court's conclusion that it was required to resolve any ambiguity in defendant's statement in favor of the individual. The trial court cites language from *State v. Torres*, a case which predates *Davis*, as authoritative on the matter. *See State v. Torres*, 330 N.C. 517, 530, 412 S.E.2d 20, 27 (1992). In *Torres*, our Supreme Court held that the defendant invoked her right to counsel when she twice inquired of sheriff's officials whether she needed an attorney. *See id.* However, in that case, police dissuaded defendant from exercising her right to have counsel present during interrogation. *See id.* Although the *Torres* court concluded that the defendant's statement was unambiguous, the majority noted "even if defendant's invocation in this case is termed ambiguous," the result should remain the same under the rule utilized in a majority of jurisdictions. *See id.* at 529, 412 S.E.2d at 27. This rule provided that, when faced with an ambiguous invocation of counsel, interrogation must immediately cease except for narrow questions designed to clarify the suspect's true intent. *See id.* at 529, 412 S.E.2d at 27. However, the rule enunciated in *Davis* that, "[u]nless the in-custody suspect 'actually requests' an attorney, lawful questioning may continue," abrogated the then-majority rule discussed in *Torres*. *See Hyatt*, 355 N.C. at 655, 566 S.E.2d at 70 (citing *Davis*, 512 U.S. at 462, 129 L. Ed. 2d at 373). The *Davis* rule imposes the burden of resolving any ambiguity as to whether a suspect wishes to invoke his right to counsel upon the individual, rather than leaving the question up to the interrogating officer. *See Davis*, 512 U.S. at 475, 129 L. Ed. 2d at 381-82.

Although the officer is not required to ask any clarifying questions when an ambiguous statement is made, we note that Detective McMasters did not dissuade defendant from exercising his right to have an attorney. As discussed above, it was reasonable for Detective McMasters to expect defendant to continue their former conversation and proceed with the statement defendant apparently wished to make. Accordingly, Detective McMasters's confusion after defend-

ant's ambiguous statement was also reasonable. She responded, "It's up to you if you wanna answer questions or not. I mean, you can answer till you don't feel comfortable, whatever and then not answer. Ya know, that's totally up to you. I know earlier you said you was wanting to talk to me because . . . ." While we do not disturb the trial court's finding that Detective McMasters asked no clarifying questions, we note that the detective's response reflects her confusion. The detective's subsequent testimony further evidences her desire to clarify defendant's statement. Detective McMasters's attempt to "clarify what he wanted to do" cannot be equated to badgering, intimidating, threatening, or even ignoring the defendant. Thus, the facts of this case more closely resemble the facts of *Davis* than those described in *Torres*. Because this case, like *Davis*, involves an ambiguous reference to an attorney that a reasonable officer under the circumstances would have only understood *might* be an invocation of the right to counsel, neither the complete cessation of questioning nor the limitation of questioning to clarifying questions was required. *See Davis*, 512 U.S. at 459, 129 L. Ed. 2d 369. Accordingly, the trial court's assumption that Detective McMasters was required to ask clarifying questions, and its subsequent conclusion that it was required to resolve any ambiguity in the defendant's favor were error.

In his brief, defendant argues that Detective McMasters's response to defendant's ambiguous statement, if not a violation of defendant's rights under *Davis*, did violate defendant's rights under Article I, Section 23 of the North Carolina Constitution. That section provides in part, "every person charged with a crime has the right . . . not to be compelled to give self-incriminating evidence." N.C. Const. art. I, § 23.

Defendant's argument relies heavily on the concurring opinion of Justice Harry Martin in *Torres*. In that case Justice Martin reasoned, based solely on state constitutional grounds, that continued questioning after an individual's invocation of the right to counsel violates the right not to give self-incriminating evidence. *See Torres*, 330 N.C. at 531, 412 S.E.2d at 28. However, defendant's reliance on this portion of *Torres* is ill-founded because Justice Martin, like the majority, concluded that the defendant's request for an attorney in that case was unambiguous and thus tantamount to an invocation of the right to counsel. *See id.* at 533, 412 S.E.2d at 30. As such, Justice Martin's reasoning does not apply to the facts of this case.

In sum, the trial court's findings of fact do not support a conclusion that defendant's waiver of rights was involuntary or that his

recorded statement should have been suppressed. Based on the evidence presented at the motion to suppress hearing, the trial judge should have ruled defendant's statement admissible. Accordingly, we reverse the trial judge's order suppressing defendant's recorded statement and remand this case for further proceedings.

Reversed and remanded.

Judges WYNN and HUNTER concur.

SEAN FARRELL, MINOR BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, WILLIAM FARRELL AND SUZANNE FARRELL; WILLIAM FARRELL, INDIVIDUALLY; AND SUZANNE FARRELL, INDIVIDUALLY, PLAINTIFFS v. TRANSYLVANIA COUNTY BOARD OF EDUCATION; TERRY HOLLIDAY, FORMER SUPERINTENDENT OF TRANSYLVANIA COUNTY SCHOOLS IN HIS OFFICIAL CAPACITY; PATRICIA MORGAN, FORMER PRINCIPAL OF BREVARD ELEMENTARY SCHOOL, IN HER OFFICIAL CAPACITY; RON KIVINIEMI, FORMER ASSISTANT PRINCIPAL OF BREVARD ELEMENTARY SCHOOL AND PRINCIPAL OF PISGAH FOREST ELEMENTARY SCHOOL IN HIS OFFICIAL CAPACITY; KATHY HAEHNEL, DIRECTOR OF FEDERAL PROGRAMS AT TRANSYLVANIA COUNTY SCHOOLS IN HER INDIVIDUAL AND OFFICIAL CAPACITIES; DONNA GARVIN, FORMER SPECIAL EDUCATION TEACHER AT BREVARD ELEMENTARY SCHOOL IN HER INDIVIDUAL AND OFFICIAL CAPACITIES; AND JANE WOHLERS, FORMER TEACHER'S AIDE AT BREVARD ELEMENTARY SCHOOL IN HER INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA08-310

(Filed 2 December 2008)

1. Appeal and Error— appealability—interlocutory order—substantial right—immunity

Although defendant public school teacher's appeal from the denial of her motion for summary judgment in an action brought by plaintiffs related to the physical and emotional abuse of their son in defendant's special needs classroom was an appeal from an interlocutory order, defendant was entitled to an immediate appeal because claims of public official and qualified immunity affect a substantial right.

2. Immunity— public official—inapplicable for public school teacher

Defendant public school teacher was not entitled to public official immunity with respect to State tort claims in an action brought by plaintiffs related to the physical and emotional abuse

of their son in defendant's special needs classroom because: (1) contrary to defendant's assertion, a teacher's position was not created by statute under either N.C.G.S. §§ 115C-307 or 115C-325; and (2) teachers do not meet the test for public official immunity when their duties are not considered in the eyes of the law to involve the exercise of the sovereign power, but instead are historically characterized as ministerial.

3. Immunity— qualified—inapplicable for public school teacher—individual capacity

Defendant public school teacher was not entitled to qualified immunity with respect to federal claims against her in her individual capacity relating to the physical and emotional abuse of plaintiffs' son in defendant's classroom.

Appeal by Defendant Donna Garvin from an order entered 30 October 2007 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 10 September 2008.

The Law Office of Stacey B. Bawtinhimer by Stacey B. Bawtinhimer; and The Foster Law Firm by Jeffery B. Foster, for plaintiffs-appellees.

Roberts & Stevens, P.A. by Christopher Z. Campbell and K. Dean Shatley, II, for Donna Garvin, defendant-appellant.

JACKSON, Judge.

Donna Garvin ("defendant") appeals the trial court's denial of her motion for summary judgment in an action brought against her and other defendants by William and Suzanne Farrell ("plaintiffs") related to the physical and emotional abuse of their son, Sean Farrell ("Sean") in defendant's special needs classroom. For the reasons stated below, we affirm.

This case previously has been appealed to this Court. In our 7 February 2006 opinion, we dismissed as interlocutory defendant's appeal of the denial of her motion to dismiss. *See Farrell v. Transylvania Cty. Bd. of Educ.*, 175 N.C. App. 689, 690, 625 S.E.2d 128, 130 (2006) (*Farrell I*).

During the 2001 school year, Sean was a student with severe disabilities in defendant's self-contained, special needs classroom. Sean became the victim of physical and emotional abuse at the hands of one of defendant's teacher's aides, Jane Wohlers ("Wohlers").

According to the complaint, Wohlers (1) force fed Sean on a regular basis, at times to the point of choking; (2) yelled at him and used abusive language; (3) violently jerked back his head and pulled his hair while washing his face; and (4) used a stuffed animal she knew that Sean was terrified of to intimidate him to stay on his mat for naptime.

Defendant received other complaints about Wohlers' abusive behavior towards the students in her classroom. One aide witnessed Wohlers (1) yell at the children; (2) pinch them behind their ears and squeeze them under the arms causing bruises; (3) stuff food into students' mouths, hold their heads in a headlock and continue to stuff food into students' mouths until they gagged during which time one student projectile vomited; (4) verbally intimidate the children by yelling at them until they broke down crying; (5) hold their foreheads roughly and yank their heads back in order to wash their faces in the bathroom; and (6) make inappropriate sexual and lewd comments in front of the children. Another aide reported that Wohlers stated, "I can say whatever I want because these kids can't talk so they can't tell their parents" and that she could "do whatever she wanted to one of the black children in the room because his bruises wouldn't show."

As a result of the alleged abuse, Sean stopped eating. His condition became so severe that he was admitted to Mission Hospital from 16 January through 24 January 2002 for intravenous therapy and a thorough medical work-up to find a cause for his severe anxiety associated with food. The tests indicated that there was no physical reason for Sean's failure to eat and drink. The attending pediatric physician and residents from Mission Hospital, including the gastrointestinal doctor and occupational therapists all agreed that his eating problems were consistent with severe anxiety and depression due to suspected child abuse in the classroom. Ultimately, a feeding tube was inserted for a period of approximately six months.

Plaintiffs brought suit against defendant, Wohlers, several school administrators, and the county school board. The instant appeal involves only defendant Donna Garvin, the classroom teacher.

Among other claims, plaintiffs sued defendant in her individual capacity for negligent infliction of emotional distress on Sean and themselves pursuant to the State Tort Claims Act, and for federal civil rights violations pursuant to section 1983 of Title 42 of the United States Code.

On 8 March 2007, defendant filed a joint motion for summary judgment with other of the defendants seeking, *inter alia*, to have the court dismiss the claims against her in her individual capacity. Defendant alleged she was entitled to public official immunity on the State claims and qualified immunity on the federal claim. By order filed 30 October 2007, defendant's motion was denied as "issues of material fact remain[ed]" as to the claims against her in her individual capacity, although it was granted with respect to the section 1983 claims against all defendants in their official capacities.

[1] The order in this case did not dispose of the entire case; therefore, it is interlocutory. *See Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (per curiam) (order granting partial summary judgment is interlocutory). However, an interlocutory order may be appealed immediately if it affects a substantial right of the parties. N.C. Gen. Stat. § 1-277 (2007). This Court has held that claims of immunity affect a substantial right entitled to immediate appeal. *See e.g.*, *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001) (citations omitted) (holding public official immunity affects a substantial right and is immediately appealable).

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). One means of doing so is to show that the non-moving party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted).

A trial court's rulings on summary judgment motions are reviewed by this Court *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citing *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006)). In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004).

[2] We first discuss defendant's second argument, in which she contends that the trial court erred in denying her summary judgment with respect to the State tort claims against her. She argues she is entitled to public official immunity to shield her from suit. We disagree.

"It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952) (citations omitted). "Our courts have recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (citations omitted).

Defendant contends that a teacher's position is created by statute, satisfying the first prong of the public official test. She cites North Carolina General Statutes, sections 115C-307 and 115C-325 for support. However, section 115C-307 does not create the position of teacher; it defines the duties of teachers, student teachers, substitute teachers, and teacher assistants. In contrast, as this Court explained in *Farrell I*, section 115C-287.1(a)(3) creates the position of "school administrator" which includes principals, assistant principals, supervisors, and directors. *See Farrell I*, 175 N.C. App. at 696, 625 S.E.2d at 133-34 (holding that Haehnel, as the director of federal programs for the county school system, was a public official who qualifies for public official immunity as a "school administrator" pursuant to section 115C-287.1(a)(3)). Further, subsection 115C-325(a) merely sets forth the definitions used in section 115C-325 which governs the "system of employment for public school teachers." Subsection (a)(6) defines a "teacher" as used in that section, as opposed to a "career employee," "case manager," or "school administrator;" it does not create the position of public school teacher.

In *Mullis v. Sechrest*, 126 N.C. App. 91, 484 S.E.2d 423 (1997), *rev'd on other grounds*, 347 N.C. 548, 495 S.E.2d 721 (1998), this Court declined to grant a teacher public official status, stating that he was not entitled to public official immunity "because his duties at the time the alleged negligence occurred are not considered in the eyes of the law to involve the exercise of the sovereign power; instead, while we dislike the term applied, defendant's duties as a public

employee are historically characterized as 'ministerial.' " *Id.* at 98, 484 S.E.2d at 427 (citing *Daniel v. City of Morganton*, 125 N.C. App. 47, 55, 479 S.E.2d 263, 268 (1997)).

Defendant contends that if animal control officers, prison guards, and social workers are public officials, surely teachers are as well. We disagree because there is a clear statutory basis for the grant of public official immunity in two of the three cases.

In *Kitchin v. Halifax Cty.*, 192 N.C. App. 559, 665 S.E.2d 760 (2008), this Court concluded that an animal control officer was a public official because

> [t]he position of animal control officer is created by statute, N.C. Gen. Stat. § 67-30, and is given authority to, *inter alia*, impound and euthanize dogs or cats, N.C. Gen. Stat. § 130A-192 and destroy stray dogs or cats in quarantine districts, N.C. Gen. Stat. § 130A-195. An animal control officer is a position created by statute, exercises a portion of sovereign power, and exercises discretion.

Id. at 568, 665 S.E.2d at 766.

In *Hobbs v. N.C. Dep't of Hum. Res.*, 135 N.C. App. 412, 520 S.E.2d 595 (1999), this Court recognized that statutory language "creates a structure under which department of social services staff members *may* function as public officers." *Id.* at 421, 520 S.E.2d at 602 (emphasis added). It did not hold that *all* social workers were public officials. There, a director of social services, a public official, had statutory authority to " 'delegate to one or more members of his staff the authority to act as his representative.' " *Id.* (quoting N.C. Gen. Stat. § 108A-14(b)). The issue before the Court was whether his staff members also were entitled to public official immunity. The Court held that the staff members were acting as public officials because they were acting for and representing the director of social services. *Id.* at 422, 510 S.E.2d at 602.

In the third case, *Price v. Davis*, 132 N.C. App. 556, 512 S.E.2d 783 (1999), this Court held that a correctional sergeant and an assistant superintendent at a correctional facility were "protected by public official immunity from individual liability for alleged violations of State statutes and prison regulations." *Id.* at 562, 512 S.E.2d at 787. This case did not discuss the *Isenhour* criteria. However, we note that North Carolina General Statutes, section 143B-260 creates the Department of Correction and section 143B-261 governs its duties,

among them the duty to provide supervision of criminal offenders. This duty is delegated to prison guards, who exercise discretion in carrying it out.

Further, the Supreme Court of the United States has recognized that "the exercise of police authority calls for a very high degree of judgment and discretion[.]" *Foley v. Connelie*, 435 U.S. 291, 298, 55 L. Ed. 2d 287, 294 (1978). "The Supreme Court clearly and emphatically said that police 'are clothed with authority to exercise an almost infinite variety of discretionary powers' and are vested with 'plenary discretionary powers.' " *State v. Pendleton*, 339 N.C. 379, 386, 451 S.E.2d 274, 278-79 (1994), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280 (1995) (quoting *Foley*, 435 U.S. at 297-98, 55 L. Ed. 2d at 293-94).

In *Kitchin*, *Hobbs*, and *Price*, the party being sued was either employed in a position created by statute, or delegated a statutory duty by a person or organization created by statute. Each defendant exercised discretion in carrying out the sovereign's power. Although teachers serve a vital role in the public education of the children of this state, they do not meet the test for public official immunity. *See Mullis*, 126 N.C. App. at 98, 484 S.E.2d at 427. Therefore, defendant is not entitled to such protection and her argument is without merit.

[3] Defendant also argues that the trial court erred in denying her summary judgment with respect to the federal claim against her. Defendant contends that as to the federal claim, she is entitled to qualified immunity to shield her from suit. We disagree.

In *Farrell I*, Kathy Haehnel, the director of federal programs for the school board, successfully argued that she was entitled to qualified immunity in her individual capacity. *Farrell I*, 175 N.C. App. at 696, 625 S.E.2d at 133-34. As this Court stated, " '[q]ualified immunity protects *public officials* from personal liability for performing official, discretionary functions if the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id.* at 697, 625 S.E.2d at 134 (emphasis added) (quoting *Vest v. Easley*, 145 N.C. App. 70, 75, 549 S.E.2d 568, 573 (2001)).

Just as defendant is not a public official entitled to the protections of public official immunity, she also is not entitled to the protections of qualified immunity for claims against her in her individual capacity. Therefore, this argument is without merit.

Affirmed.

Judge BRYANT concurs.

Judge ARROWOOD concurs in the result only.

IN THE MATTER OF: DRH

No. COA08-349

(Filed 2 December 2008)

1. Juveniles— disposition—multiple offenses—consolidation

Juvenile dispositional orders for felony conspiracy and robbery with a dangerous weapon adjudicated the same day were remanded for consolidation into a single disposition for robbery, pursuant to the plain language of N.C.G.S. § 7B-2508(h).

2. Juveniles— disposition—delinquency points and delinquency level—stipulation through failure to object

The trial court did not err in a juvenile dispositional hearing by finding delinquency points and the delinquency level as indicated in a court counselor's report where the juvenile stipulated to the report through his attorney's failure to object.

Appeal by juvenile from adjudication order entered 13 August 2007 and disposition and commitment orders entered 27 August 2007 by Judge Anna F. Foster in District Court, Cleveland County. Heard in the Court of Appeals 24 September 2008.

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

Appellate Defender Staples Hughes by Assistant Appellate Defender Matthew D. Wunsche, for juvenile-appellant.

STROUD, Judge.

Juvenile was adjudicated for robbery with a dangerous weapon and felony conspiracy. Juvenile claims the trial court erred by (1) entering two separate dispositions when juvenile was adjudicated for both offenses in the same session of court, and (2) finding that juve-

nile had six delinquency history points and a high delinquency history level. For the following reasons, we vacate and remand for resentencing as to issue one and find no error as to issue two.

I. Background

The State's evidence tended to show the following: On 15 May 2007, Abe[1] and Shawn were at Jamie's apartment in Kings Mountain. Adam called and said "he got some girls." Adam met Abe and Shawn at Jamie's apartment in a car with at least three other boys, including juvenile, whom Shawn knew from school. Abe and Shawn followed Adam to the Royal Motel.

Adam spoke with the girls and said they were at the Waffle House. Abe and Shawn then followed Adam and the other boys, including juvenile, to another apartment complex where juvenile, Adam, and one other individual were dropped off by the driver (juvenile, Adam, and the unknown individual will hereinafter be referred to as "the other boys"). The other boys, Abe, and Shawn were walking through the apartments when Adam told them to "get down." Adam and the unknown individual pulled out guns. The unknown individual pointed his gun at Abe, and Adam and juvenile hit Shawn. Shawn got down on the ground as the other boys kicked and hit him. Shawn also felt his shoes come off his feet. Juvenile pulled out a gun. Abe "took off running" and hid in some bushes until he heard the other boys stop talking.

The other boys told Shawn to get up and asked where Abe went. Juvenile went through Shawn's pockets. Adam threatened to kill Shawn and said they wanted money. The other boys had Shawn call Abe, but Shawn could not reach him. The other boys and Shawn looked for Abe, and Shawn gave juvenile his cell phone to call Abe. Shawn asked for his phone back, but juvenile refused. Shawn pushed juvenile and ran to Jamie's apartment, approximately two miles away. Abe later ran behind some houses and called 911.

Officer Stacy Hudspeth and Sergeant Brad Bumgardner of the Kings Mountain Police Department responded to Abe's 911 call. Abe received several phone calls, but eventually Shawn called to say he was at Jamie's apartment. The police and Abe went to Jamie's apartment. Later in the week, the police had Abe and Shawn review a photo lineup, and they identified juvenile.

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1. We will use pseudonyms to protect the identities of the juveniles other than DRH who were involved in the incident.

On 22 May 2007, juvenile petitions were filed for assault with a deadly weapon, assault by pointing a gun, and robbery with a dangerous weapon. On 31 May 2007, juvenile first appeared and was informed of the allegations against him in the petitions. On 29 June 2007, an order was filed regarding juvenile's probable cause hearing; probable cause was found for at least one felony and at least one misdemeanor, and a hearing was ordered regarding whether the case should be transferred to Superior Court. On 10 July 2007, the trial court concluded juvenile's case would not be transferred and would remain in juvenile court. On or about 25 July 2007, three more juvenile petitions were filed alleging juvenile had committed first degree kidnapping, conspiracy to commit a felony, and attempted robbery with a dangerous weapon.

On 13 August 2007, the trial court filed an adjudication order which dismissed the petitions for assault by pointing a gun, assault with a deadly weapon, attempted robbery with a dangerous weapon, and first degree kidnapping. The trial court further found juvenile had committed the offenses of robbery with a dangerous weapon and felony conspiracy. On 27 August 2007, the trial court filed two "JUVENILE LEVEL 3 DISPOSITION AND COMMITMENT" orders, one for the offense of robbery with a dangerous weapon and one for the offense of felony conspiracy. The trial court found juvenile had six delinquency history points and that his delinquency history level was high and ordered juvenile to an indefinite commitment as to each offense for a minimum of six months and a maximum of until juvenile's eighteenth birthday. Juvenile appeals. Juvenile claims the trial court erred by (1) entering two separate dispositions when juvenile was adjudicated for the offenses in the same session, and (2) finding that juvenile had six delinquency history points and a high delinquency history level.

II. Separate Dispositions

[1] Juvenile first argues that the trial court was required to consolidate his two offenses into one disposition pursuant to N.C. Gen. Stat. § 7B-2508(h) (2007). The State concedes defendant is correct, and we agree.

N.C. Gen. Stat. § 7B-2508(h) reads,

> If a juvenile is adjudicated of more than one offense during a session of juvenile court, the court shall consolidate the offenses for disposition and impose a single disposition for the consolidated offenses. The disposition shall be specified for

> the class of offense and delinquency history level of the most serious offense.

N.C. Gen. Stat. § 7B-2508(h) (2007). "Session" is not defined within the definitions section of the Juvenile Code, but is defined in case law as that which "designates the typical one-week assignment to a particular location during the term." *State v. Smith*, 138 N.C. App. 605, 607-08, 532 S.E.2d 235, 237 (citation omitted), *disc. review allowed*, 352 N.C. 682, 545 S.E.2d 726 (2000).

Here the trial court adjudicated defendant for robbery with a dangerous weapon and felony conspiracy on the same day, but entered two disposition orders. Pursuant to the plain language of N.C. Gen. Stat. § 7B-2508(h) the trial court was required to consolidate juvenile's adjudications for robbery with a dangerous weapon and felony conspiracy into a single disposition for robbery with a dangerous weapon, juvenile's most serious offense. *See* N.C. Gen. Stat. § 7B-2508(h); *see also* N.C. Gen. Stat. § 14-2.4 (2007) ("Unless a different classification is expressly stated, a person who is convicted of conspiracy to commit a felony is guilty of a felony that is one class lower than the felony he or she conspired to commit . . . ."). Therefore, we vacate the trial court disposition and commitment orders and remand for a single disposition order consistent with N.C. Gen. Stat. § 7B-2508(h).

III. Delinquency History Points and Level

[2] Juvenile next contends that "the trial court erred when it found, in the absence of a stipulation by the juvenile or any evidence presented by the [S]tate, that . . . [juvenile] had six delinquency history points and a high delinquency history level." Juvenile contends he is entitled to a new disposition hearing. We disagree.

N.C. Gen. Stat. § 7B-2507(f) requires in pertinent part,

> A prior adjudication 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 adjudication.
>
> (3) A copy of records maintained by the Division of Criminal Information or by the Department.
>
> (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 7B-2507(f) (2007).

Furthermore,

> [t]he dispositional hearing may be informal, and the court may consider written reports or other evidence concerning the needs of the juvenile. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

N.C. Gen. Stat. § 7B-2501(a) (2007).

N.C. Gen. Stat. § 7B-2507(f), addressing proof of prior adjudications, is the juvenile analog to N.C. Gen. Stat. § 15A-1340.14(f), which addresses proof of prior criminal convictions. *See* N.C. Gen. Stat. §§ 7B-2507(f), 15A-1340.14(f) (2007). As we find no controlling case law regarding § 7B-2507(f), we turn to cases addressing § 15A-1340.14(f).

"[O]ur Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure and therefore no objection is required to preserve the issue for appellate review." *State v. Jeffery*, 167 N.C. App. 575, 579, 605 S.E.2d 672, 674 (2004) (citations, quotation marks, and brackets omitted). "[O]ur standard of review is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *Jeffery* at 578, 605 S.E.2d at 674 (citation, quotation marks, and brackets omitted).

In the criminal context, a worksheet alone is not sufficient to establish a defendant's prior convictions, but the defendant's apparent agreement with the worksheet may give rise to a stipulation. *See, e.g.*, *State v. Boyce*, 175 N.C. App. 663, 667, 625 S.E.2d 553, 556 (2006) (citations, quotation marks, and brackets omitted), *affirmed and disc. review improvidently allowed*, 361 N.C. 670, 651 S.E.2d 879 (2007).

> There is no question that a worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions. Therefore, we must review the dialogue between counsel and the trial court to determine whether there was a "stipulation" of the prior convictions listed on the worksheet the State presented. Counsel need not affirmatively state what a defendant's prior record level is

> for a stipulation with respect to that defendant's prior record level to occur.

Id.

In *State v. Eubanks*, the defendant argued "that the trial court erred in determining that defendant had twelve prior record points and a prior record level of four . . [as] the only evidence presented by the State was a prior record level worksheet . . . ." *State v. Eubanks*, 151 N.C. App. 499, 504, 565 S.E.2d 738, 742 (2002). In *Eubanks*,

> [t]he following colloquy transpired immediately prior to the State's submission of this document:
>
> THE COURT: Evidence for the State?
>
> THE PROSECUTOR: If Your Honor please, under the Structured Sentencing Act of North Carolina, the defendant has a prior record level of four in this case, Your Honor.
>
> THE COURT: Do you have a prior record level worksheet?
>
> THE PROSECUTOR: Yes, sir, I do.
>
> THE COURT: All right. Have you seen that, Mr. Prelipp, [attorney for defendant]?
>
> MR. PRELIPP: I have, sir.
>
> THE COURT: Any objections to that?
>
> MR. PRELIPP: No, sir.

Id. at 504-05, 565 S.E.2d 742 (brackets omitted). From this exchange this Court held

> that the statements made by the attorney representing defendant in the present case may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet. We also note that defendant has not asserted in his appellate brief that any of the prior convictions listed on the worksheet do not, in fact, exist.

Eubanks at 506, 565 S.E.2d at 743.

In *Boyce*, again, "the only evidence presented by the State [as to defendant's prior convictions] was a prior record level worksheet purporting to list three prior convictions." *Boyce* at 667, 625 S.E.2d at 556.

Following the State's summation of the prior record level worksheet, the trial court conducted a bench conference, after which the judge stated:

> Madam Court Reporter, let the record reflect that the district attorney has handed up, after it was reviewed by the defense counsel, AOC-600 form, the worksheet of the prior record level for felony sentencing and a prior conviction level for misdemeanor sentencing. He's handed that up to the Court, indicating the defendant had four points against him prior to this, placing him in a prior record Level 2.

Id. at 668, 625 S.E.2d at 556-57. This Court concluded,

> The fact defense counsel did not object to the trial court's statement that he had reviewed the prior record level worksheet and the judge's summation of the point level is tantamount to an admission or stipulation that defendant had the prior convictions asserted by the State. . . . [and] [w]e also note that defendant has not asserted in his appellate brief that any of the prior convictions listed on the worksheet do not, in fact, exist.

Id. at 668, 625 S.E.2d at 557.

Here, the court counselor, Edward Marler, prepared a report which showed three prior adjudications, including assault inflicting serious injury, communicating threats, and simple assault. The report further showed six delinquency history points due to the three previous adjudications and a delinquency history level of "high," as juvenile had more than four points. At the deposition hearing, the trial court specifically asked juvenile's attorney, "Have you had an opportunity to view the report?" to which juvenile's attorney responded, "Yes[,]" without any further inquiry or comments regarding the report. Pursuant to the reasoning in *Eubanks* and *Boyce*, we conclude that juvenile stipulated to the court counselor's report, as juvenile's attorney received and reviewed the report and failed to object to it. *See Boyce* at 668, 625 S.E.2d at 557; *Eubanks* at 505-06, 565 S.E.2d at 742-43. Here also, as in *Eubanks* and *Boyce*, juvenile "has not asserted in his appellate brief that any of the prior [adjudications] listed [in the report] do not, in fact, exist." *Boyce* at 668, 625 S.E.2d at 557; *Eubanks* at 506, 565 S.E.2d at 743. Therefore, this argument is overruled.

IV. Conclusion

In conclusion, we vacate the trial court's dispositional orders and remand for a disposition order consistent with N.C. Gen. Stat. § 7B-2508(h), and we conclude the trial court did not err in its determination of juvenile's delinquency history points and delinquency history level.

NO ERROR IN PART, VACATED IN PART, REMANDED.

Judges STEELMAN and JACKSON concur.

STATE OF NORTH CAROLINA v. JAMES McKINLEY BRANCH

No. COA08-20

(Filed 2 December 2008)

1. Arrest— traffic stop—further detention without probable cause—attempt to drive away—assault on the officer

Defendant had the right to use such force as reasonably appeared necessary to prevent an unlawful restraint where an officer attempted to extend a traffic stop beyond the time required to check license and registration without reasonable suspicion, but reacted with more force than was necessary when he accelerated rapidly with the officer hanging from the passenger door. Officers then had probable cause to arrest defendant for assault and to search the vehicle pursuant to that arrest.

2. Sentencing— 24 months probation—exceeding statutory mandate—no finding as to necessity

A sentence of 24 months of supervised probation was remanded for resentencing or for entry of findings as to why it was necessary to sentence defendant to a period of probation longer than mandated by N.C.G.S. § 15A-1343.2(d)(1).

Appeal by defendant from order entered 1 October 2007 by Judge Thomas H. Lock in Superior Court, Cumberland County. Heard in the Court of Appeals 18 August 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert T. Hargett, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

WYNN, Judge.

Although "every person has the right to resist an unlawful arrest[,]" that right is limited to the use of "such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty."[1] Because we find that attempting to flee in a motor vehicle while a police officer is holding onto that vehicle constituted unreasonable force to prevent an unlawful restraint of liberty, we affirm the trial court's denial of Defendant's motion to suppress evidence. Regarding the sentence imposed, however, we must remand because the trial court failed to make a finding that it was necessary to sentence Defendant to a period longer than that mandated by statute.

On 6 September 2006, Officer Phillip Young of the Fayetteville Police Department was patrolling a high-crime area in Fayetteville when he observed a blue Hyundai Excel, with the driver inside, parked in front of a residence he knew to be involved in drug activity. Officer Young passed by the vehicle without stopping and turned onto another street; a few minutes later, he saw the vehicle travel past him back on the same road where the house was located. At that point, Officer Young observed that the vehicle was occupied by two black males and that it had a thirty-day temporary registration license plate. Because he was unable to read the expiration date on the temporary tags, Officer Young initiated a traffic stop of the vehicle.

After approaching the vehicle, Officer Young asked Defendant, who was the driver, for his license and registration. Officer Young testified that he believed Defendant was "overly nervous" for a regular traffic stop, and that he could "visibly see [Defendant's] chest rising and falling from his breathing," as well as his hands shaking. Because he "believed there might be narcotics on [Defendant]" or the passenger in the vehicle, Officer Young called for another officer, David West, to meet him at the scene. The check of Defendant's license and registration showed that everything was in order, and Officer Young returned the documents to Defendant. Officer Young then asked Defendant if he had anything illegal in the car, and Defendant re-

1. *State v. Mobley*, 240 N.C. 476, 478-79, 83 S.E.2d 100, 102 (1954) (citations omitted).

sponded that he did not. Officer Young requested Defendant's consent to search the vehicle; when Defendant refused, Officer Young replied he would call for a canine unit, which would take approximately ten minutes, and walked back to his own vehicle.

When Officer Young came back to Defendant's vehicle to return his license and registration, Officer West positioned himself on the passenger side of the vehicle to "watch the defendant and passenger's hands to make sure they weren't going for any weapons or trying to conceal any narcotics." He remained there as Officer Young returned to his vehicle to call for a canine unit. With the engine of Defendant's car still running, Officer West "observed the defendant reach over the gear shift to place it in drive." Officer West ordered him not to do so, but Defendant continued, and Officer West reached inside the car to try to get the ignition key. According to Officer West, Defendant's response was to "hit the accelerator and [Officer West] had no choice but to grab the vehicle door or get [his] armed [sic] ripped off."

Officer West recounted that the car "started accelerating rapidly so . . . [he] clamped the door and ordered [Defendant] to stop." Defendant refused, and Officer West drew his weapon and again ordered him to stop or he would fire. However, Officer West felt that he could not safely discharge his weapon without risking that Defendant would lose control of the vehicle. Moreover, Officer West testified that he "couldn't let go. Defendant was going too fast. I would have got [sic] injured." After traveling approximately 758 feet, Defendant brought the vehicle to a stop and opened the door. Officer West jumped on the hood, and Officer Young, who was previously at his vehicle, returned to the scene; the two officers took Defendant to the ground and arrested him. Officer West sustained no serious injuries requiring medical attention, but his boots and pants were damaged. He estimated that about thirty seconds had passed from the time he reached in to grab the keys to the time when Defendant stopped the vehicle. A search of the vehicle following Defendant's arrest uncovered twelve individual bags of what was later determined to be marijuana and $220 in cash.

Following the conclusion of the *voir dire* testimony on Defendant's motion to suppress the evidence found in his car, the trial court found that the officers "had no lawful authority to try to detain the vehicle and the defendant at the scene," as they lacked sufficient evidence "to create a reasonable and articulable suspicion" that Defendant was engaged in criminal activity after finding that

Defendant's license and registration were in order. Nevertheless, although the trial court noted that Defendant had the right to "use reasonable force to resist an unlawful detention," the trial court also found that "a reasonable person should have known [that] accelerating rapidly while the officer was reaching inside your vehicle would jeopardize the officer's safety and indeed his life." Accordingly, the trial court concluded that Defendant had "reacted with more force than was reasonably permitted to resist the unlawful detention by the officers." As such, the officers had probable cause to arrest Defendant for assault, and the subsequent search of his vehicle was lawful pursuant to that arrest. The trial court denied Defendant's motion to suppress, and Defendant then pled guilty to possession of marijuana and assault on a government officer; he received a suspended sentence of forty-five days in prison on the former charge and seventy-five days on the latter charge, to be served consecutively, with twenty-four months of supervised probation.

Defendant now appeals the denial of his motion to suppress, arguing that (I) he did not use excessive force to resist his unlawful detention, and (II) the trial court erred by failing to find that a longer period of probation than that provided for by statute was necessary, entitling him to a new sentencing hearing.

I.

[1] Defendant first argues that his motion to suppress should have been granted, as he used reasonable force to resist his unlawful detention, namely, the portion of the traffic stop beyond the time necessary to determine that his temporary license tags were valid. We disagree.

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

> Our Supreme Court has long held:
>
> It is axiomatic that every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense. True the right of a person to use force in resisting an illegal arrest is not unlimited. He may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty. And where excessive force is exerted, the person seeking to avoid arrest may be convicted of assault, or even of homicide if death ensues. . . .

State v. Mobley, 240 N.C. 476, 478-79, 83 S.E.2d 100, 102 (1954) (citations omitted). In applying this rule of law, this Court has engaged in the following analytical framework:

> Since the initial arrest . . . [was] illegal, plaintiff was entitled to use a reasonable amount of force to resist. Under this analysis, if the amount of force used by plaintiff was unreasonable . . ., then the officers had probable cause to arrest him under G.S. § 14-33(b)(8) [the statute criminalizing an assault on a law enforcement or government officer]. However, [the officers] did not have probable cause to arrest plaintiff for assault on an officer if, at the time, plaintiff was using a reasonable amount of force to resist the illegal arrests. . . . Furthermore, if the amount of force used by plaintiff was reasonable, he had a clearly established right, as a matter of law, not to be arrested for a violation of G.S. § 14-33(b)(8).

Roberts v. Swain, 126 N.C. App. 712, 725-26, 487 S.E.2d 760, 769, *disc. review denied*, 347 N.C. 270, 493 S.E.2d 746 (1997) (citation omitted). Moreover, the General Assembly has also provided that an individual "is not justified in using a deadly weapon or deadly force to resist an arrest by a law-enforcement officer using reasonable force," when the individual knows that it is a true law enforcement officer who is attempting to make the arrest. N.C. Gen. Stat. § 15A-401(f)(1) (2005).[2]

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2. We recognize the majority trend "toward abrogation of the common law right to use reasonable force to resist an unlawful arrest." *Commonwealth v. Hill*, 570 S.E.2d 805, 809 n.2 (Va. 2002); *see also* Andrew P. Wright, *Resisting Unlawful Arrest: Inviting Anarchy or Protecting Individual Freedom?*, 46 Drake L. Rev. 383, 388 n.49 (1997) (noting that, as of 1997, thirty-six states had abolished the common law right to resist an unlawful arrest either by judicial decision [16 states] or statutory fiat [20 states]). However, this Court is bound by the precedent set in *Mobley*, and only our Supreme Court or the General Assembly can take steps towards abrogation of the common law rule in North Carolina.

In the instant case, as found by the trial court, the authority of Officer Young's traffic stop of Defendant's vehicle was limited to the "articulated facts and reasonable suspicion concerning the 30 day tag," namely, that the expiration date was not clearly visible. We agree with the trial court that Officer Young's detention of Defendant beyond the time it took to check his license and registration was unlawful, as Officer Young lacked reasonable suspicion to justify the detention until the arrival of a canine unit. As such, Defendant did have the right to use "such force as reasonably appear[ed] to be necessary to prevent the unlawful restraint of his liberty." *Mobley*, 240 N.C. at 479, 83 S.E.2d at 102 (citation omitted).

Nevertheless, we affirm the trial court's conclusion that, by "accelerating rapidly while the officer was reaching inside [the] vehicle," Defendant "reacted with more force than was reasonably permitted to resist the unlawful detention by the officers." Indeed, the trial court's findings of fact as to Defendant's "accelerating rapidly with Officer [] West hanging out of the passenger side door" are supported by competent evidence and, in turn, support the trial court's conclusion that Defendant acted with unreasonable force to resist the unlawful detention. Further, the trial court correctly concluded that the officers had probable cause to arrest Defendant for assault and to search his vehicle pursuant to that arrest. *See Roberts*, 126 N.C. App. at 725, 487 S.E.2d at 769. Accordingly, we affirm the trial court's denial of Defendant's motion to dismiss.

II.

[2] Defendant also challenges his sentence to twenty-four months of supervised probation, arguing that the trial court failed to make a finding that it was necessary to sentence him to a period longer than that mandated by statute for his offense. *See* N.C. Gen. Stat. § 15A-1343.2(d)(1) (2007) (providing that unless a sentencing court finds that a longer period of probation is necessary, a defendant who is sentenced to community punishment for a misdemeanor shall be placed on probation for no less than six months and no more than eighteen months); *see also State v. Love*, 156 N.C. App. 309, 317-18, 576 S.E.2d 709, 714 (2003) (remanding for resentencing when the trial court exceeded the statutory amounts outlined in N.C. Gen. Stat. § 15A-1343.2(d)(1) without making the necessary findings, despite the defendant's failure to object at sentencing). We agree.

As in *Love*, the trial court here made no findings as to why the probationary period imposed was in excess of the statutory frame-

work laid out in section 15A-1343.2(d)(1). The State concedes that the facts of this case cannot be distinguished from those in *Love*. Accordingly, we remand Defendant's case to the trial court for resentencing or for entry of findings of fact as to why a longer probationary period is necessary.

Remanded for resentencing.

Chief Judge MARTIN and Judge HUNTER concur.

CAROLYN DOLORIS TAYLOR, PLAINTIFF v. HOSPICE OF HENDERSON COUNTY, INC., D/B/A FOUR SEASONS HOSPICE & PALLIATIVE CARE; JOANIE BURNS; AND JEANNETTE KUTT, DEFENDANTS

No. COA08-530

(Filed 2 December 2008)

1. Appeal and Error— appealability—dismissal of NCPWDA claims—remaining claims—possibility of inconsistent verdicts

An interlocutory order dismissing plaintiff's claim under the North Carolina Persons With Disabilities Act was immediately appealable where the trial court denied defendants' motion to dismiss plaintiff's remaining claims and there was a risk that two trials and possibly inconsistent verdicts could result.

2. Statutes of Limitation and Repose— relation back—amended summons—name change—not a substitution of parties

The trial court erred by dismissing claims under the North Carolina Persons With Disabilities Act where the alleged discriminatory conduct took place on 14 December 2006; the applicable 180 day statute of limitations expired on 12 June 2007; plaintiff's original summons was issued on that date; an amended summons was issued on 1 August 2007; and the trial court held that the amended summons did not relate back. The amended summons changed "Four Seasons Hospice & Palliative Care, Inc" to "Hospice of Henderson County, Inc., d/b/a Four Seasons Hospice & Palliative Care," a change that did not amount to a substitution of parties.

Appeal by plaintiff from order entered 8 February 2008 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 23 October 2008.

Law Offices of Glen C. Shults, by Glen C. Shults, for plaintiff-appellant.

McGuire, Wood & Bissette, P.A., by Rendi Mann-Stadt, for defendant-appellees.

TYSON, Judge.

Carolyn Doloris Taylor ("plaintiff") appeals order entered, which dismissed her claim under the North Carolina Persons With Disabilities Protection Act ("NCPWDPA") against Hospice of Henderson County, Inc. d/b/a Four Seasons Hospice & Palliative Care. We reverse and remand.

I. Background

On 12 June 2007, plaintiff filed a complaint, which named the defendants as: "Four Seasons Hospice & Palliative Care, Inc.; Jamie Burns; and Jeannette Keith, Defendants." Plaintiff's complaint asserted claims of: (1) a violation of the NCPWDPA against Four Seasons Hospice & Palliative Care, Inc.; (2) wrongful discharge in violation of public policy against Four Seasons Hospice & Palliative Care, Inc.; (3) negligent infliction of emotional distress against all defendants; and (4) gross negligence against all defendants. A summons was issued to the named defendants on 12 June 2007. Plaintiff served the complaint, but the summons was never served.

On 1 August 2007, plaintiff filed an amended complaint, which named the defendants as: "Hospice of Henderson County, Inc., d/b/a Four Seasons Hospice & Palliative Care; Joanie Burns; and Jeannette Kutt, Defendants." Plaintiff's amended complaint stated an additional claim of tortious interference with contract against all defendants. An alias and pluries summons was issued on 1 August 2007. An amended alias and pluries summons was issued on 2 August 2007. Hospice of Henderson County, Inc. d/b/a Four Seasons Hospice & Palliative Care and Joanie Burns were served on 3 August 2007. Jeannette Kutt was served on 8 August 2007.

On 10 September 2007, plaintiff "moved, pursuant to Rule 4(i) and 15(a), North Carolina Rules of Civil Procedure, for an order allowing her to file the First Amended Complaint for Damages Injunctive

Relief, And Jury Demand, and to amend the summons, and/or alias and pluries summons issued in this case, by changing the names of the defendants . . . ." Defendants answered plaintiff's amended complaint on 2 October 2007 and moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2), (4), (5), and (6).

Plaintiff's "Motion to File a First Amended Complaint and to Amend Summonses Previously Issued and Served in this Case" and defendants' Motion to Dismiss were heard on 5 February 2008. On 8 February 2008, the trial court filed its order, which: (1) granted plaintiff's Motion to File First Amended Complaint; (2) granted, in part, plaintiff's Motion to Amend the 1 August 2007 Alias and Pluries Summonses; (3) held the amended summonses constituted the original summonses; (4) denied plaintiff's motion to amend the 12 June 2007 summonses; (5) held that the statute of limitations on plaintiff's NCPWDPA claim had expired before plaintiff commenced her action on 1 August 2007; (6) granted defendants' motion to dismiss plaintiff's NCPWDPA claim; and (7) denied defendants' motion to dismiss plaintiff's remaining claims. Plaintiff appeals.

II. Interlocutory Appeal

[1] As a preliminary matter, we note that this appeal is interlocutory. The trial court's order did not dispose of the entire case. *See Veazey v. Durham*, 231 N.C. 354, 361-62, 57 S.E.2d 377, 381 (1950) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." (Citations omitted)). Our Supreme Court has stated:

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

Davis v. Davis, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006) (internal citations and quotation omitted). The record does not show the trial court entered a Rule 54(b) certification after it dismissed plaintiff's NCPWDPA claim. Appellate review is unavailable to plaintiff on that basis. *Id.*

In *Bowling v. Margaret R. Pardee Mem'l Hosp.*, this Court held:

> [The plaintiff]'s North Carolina Disabilities Act claim and his claim for wrongful discharge in violation of public policy, which remains at the trial court level, unquestionably involve the same facts and circumstances, namely, his termination by [the defendant]. If we refuse his appeal, two trials and possibly inconsistent verdicts could result. We therefore address the merits of [the plaintiff]'s arguments . . . .

179 N.C. App. 815, 818, 635 S.E.2d 624, 627 (2006), *disc. rev. denied*, 361 N.C. 425, 648 S.E.2d 206 (2007). Based on this Court's holding in *Bowling*, the trial court's order affects a substantial right: the risk that "two trials and possibly inconsistent verdicts could result." 179 N.C. App. at 818, 635 S.E.2d at 627. The trial court's order is immediately appealable. *Davis*, 360 N.C. at 525, 631 S.E.2d at 119. We review the merits of plaintiff's appeal.

III. Issues

[2] Plaintiff argues the trial court erred when it: (1) found the amended 1 August 2007 summonses constituted "original summonses" and "[p]laintiff's action commenced on August 1, 2007 with the issuance of the August 1, 2007 summonses, as amended" and (2) dismissed her NCPWDPA claim based upon the expiration of the applicable statute of limitations.

IV. Misnomer

Plaintiff argues "the amended complaint and alias [and] pluries summonses only corrected a misnomer, and they did not seek to add, or change, the parties in the case." We agree.

A. Standard of Review

> Rule 4(i) of the Rules of Civil Procedure permits trial courts to allow in their discretion the amendment of any process or proof of service thereof unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued. [Our Supreme] Court has stated that *the discretionary powers of amendment permit the courts to allow amendment to correct a misnomer or mistake in the name of a party. If the amendment amounts to a substitution or entire change of parties, however, the amendment will not be allowed.*

Harris v. Maready, 311 N.C. 536, 545-46, 319 S.E.2d 912, 918 (1984) (internal citations and quotation omitted) (emphasis supplied).

B. Analysis

In *Franklin v. Winn Dixie Raleigh, Inc.*, this Court held "[the] plaintiffs' attempt to amend the original summons was prohibited because it constituted a substitution or entire change of parties." 117 N.C. App. 28, 36, 450 S.E.2d 24, 29 (1994) (citation and quotation omitted), *aff'd per curiam*, 342 N.C. 404, 464 S.E.2d 46 (1995). This Court stated:

> The record shows . . . that "Winn-Dixie Stores, Inc." was not a corporate entity on record with the Secretary of State. It further shows that at no time pertinent to this action did Winn-Dixie Stores, Inc. ever own, lease or operate the store located at 651 Western Boulevard Extension. Moreover, while Winn-Dixie Stores, Inc. and Winn-Dixie Raleigh, Inc. are both Florida corporations authorized to do business in North Carolina, they have been and were separate and distinct corporations at the time the cause of action accrued.
>
> Therefore, we hold that the named defendant in the original summons and complaint, "Winn Dixie Stores, Inc.", was not a mistake or misdescription permitting the amendment of the summons. Rather, Winn Dixie Stores, Inc. was the correct name of the wrong corporate party defendant, a substantive mistake which is fatal to this action. Quite simply, [the] plaintiffs sued the wrong corporation.

Id. at 34-35, 450 S.E.2d at 28.

In *Kimbrell's of Sanford v. KPS, Inc.*, this Court held that "the use of the name Kendale Pawn Shop to refer to the defendant in the complaint was a mere misnomer . . . ." 113 N.C. App. 830, 833, 440 S.E.2d 329, 331 (1994) (citation omitted). This Court stated:

> The record reveals that there is no separate legal entity known as Kendale Pawn Shop; there is only KPS, Inc., which does business under the name Kendale Pawn Shop. . . . It is therefore immaterial that the judgment was entered in favor of KPS, Inc. d/b/a Kendale Pawn Shop while the initial caption of the case referred only to Kendale Pawn Shop.

Id.

Here, the record reveals and the North Carolina Secretary of State's records show that there is no North Carolina chartered legal entity known as "Four Seasons Hospice & Palliative Care, Inc." The

chartered entity of "Hospice of Henderson County, Inc." does business under the name "Four Seasons Hospice & Palliative Care."

Based on this Court's reasoning in *Franklin* and *Kimbrell's of Sanford*, the amendment did not "amount[] to a substitution or entire change of parties," but was a "correct[ion] [of] a misnomer or mistake in the name of a party." *Franklin*, 117 N.C. App. at 34-35, 450 S.E.2d at 28; *Kimbrell's of Sanford*, 113 N.C. App. at 833, 440 S.E.2d at 331; *Harris*, 311 N.C. at 546, 319 S.E.2d at 918. Plaintiff did not "sue[] the wrong corporation[,]" but rather used a "misnomer or mistake in the name of" the corporate entity. *Franklin*, 117 N.C. App. at 35, 450 S.E.2d at 28; *Harris*, 311 N.C. at 546, 319 S.E.2d at 918. The trial court erred when it failed to find that the amendment constituted a correction of the original 12 June 2007 summons and denied plaintiff's motion to amend the 12 June 2007 summons. *Harris*, 311 N.C. at 546, 319 S.E.2d at 918.

V. Statute of Limitations

Plaintiff argues the trial court erred when it found "[her] action commenced on August 1, 2007 with the issuance of the August 1, 2007 summonses, as amended . . . ." We agree.

A. Standard of Review

"Ordinarily, a dismissal predicated upon the statute of limitations is a mixed question of law and fact. But where the relevant facts are not in dispute, all that remains is the question of limitations which is a matter of law." *Udzinski v. Lovin*, 159 N.C. App. 272, 273, 583 S.E.2d 648, 649 (2003), *aff'd*, 358 N.C. 534, 597 S.E.2d 703 (2004) (citations omitted). We review a trial court's decision to dismiss an action based on the statute of limitations *de novo*. *Id.*

B. Analysis

N.C. Gen. Stat. § 168A-12 (2007) provides:

> A civil action regarding employment discrimination brought [under the NCPWDPA] shall be commenced within 180 days after the date on which the aggrieved person became aware of or, with reasonable diligence, should have become aware of the alleged discriminatory practice or prohibited conduct. A civil action brought [under the NCPWDPA] regarding any other complaint of discrimination shall be commenced within two years after the date on which the aggrieved person became aware of or, with rea-

sonable diligence, should have become aware of the alleged discriminatory practice or prohibited conduct.

It is undisputed that the alleged discriminatory conduct took place on 14 December 2006 and the applicable 180-day statute of limitations expired on 12 June 2007. Having held that the N.C. Gen. Stat. § 1A-1, Rule 4(i) amendment constituted a correction of the original 12 June 2007 summons, plaintiff's action commenced on 12 June 2007. The trial court erred when it dismissed plaintiff's NCPWDPA claim and found that "[t]he statute of limitations for [p]laintiff to bring her [NCPWDPA] [c]laim . . . expired before [p]laintiff commenced her action . . . ."

VI. Conclusion

The trial court erred when it found that the amended 1 August 2007 summonses "constitute[d] original summonses as to Hospice of Henderson County, Inc. d/b/a Four Seasons Hospice & Palliative Care" and denied plaintiff's motion to amend the 12 June 2007 summons. The amendment corrected a "misnomer or mistake" and did not "amount[] to a substitution or entire change of parties . . . ." *Harris*, 311 N.C. at 546, 319 S.E.2d at 918.

Plaintiff's action commenced on 12 June 2007, within the applicable 180-day statute of limitations for her NCPWDPA claim. The corporate defendant cannot claim prejudice because it was served with plaintiff's 12 June 2007 complaint prior to the 1 August 2007 amendment. The trial court's dismissal of plaintiff's NCPWDPA claim is reversed.

The trial court dismissed plaintiff's NCPWDPA claim based upon the expiration of the applicable statute of limitations after it found that the "original summons[]" was issued on 1 August 2007 and the amendment did not relate back to the 12 June 2007 summons. We express no opinion on the merits, if any, of this claim, or plaintiff's remaining claims. This case is remanded to the trial court for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

Judges McCULLOUGH and CALABRIA concur.

THELMA GAINEY, PLAINTIFF v. HERBERT F. GAINEY, DEFENDANT

No. COA07-1573

(Filed 2 December 2008)

Firearms and Other Weapons— surrendered pursuant to domestic violence protective order—motion to return—statutory inquiry not conducted

An order for the return of firearms surrendered pursuant to a domestic violence protective order was remanded where the court did not conduct the inquiry required by N.C.G.S. § 50B-3.1(f), but made findings on the legality of the seizure, which was not raised by the motion and on which no relevant evidence was presented.

Appeal by Guilford County Sheriff from order entered 31 August 2007 by Judge Linda L. Falls in Guilford County District Court. Heard in the Court of Appeals 26 August 2008.

Office of Guilford County Attorney, by Matthew L. Mason, for Guilford County Sheriff, BJ Barnes, appellant.

No brief filed on behalf of plaintiff.

No brief filed on behalf of defendant.

STROUD, Judge.

The Guilford County Sheriff ("the Sheriff") contends that the trial court erred when it granted defendant's motion for the return of weapons surrendered pursuant to a domestic violence protective order because defendant is prohibited from owning or possessing any firearm pursuant to 18 U.S.C. § 922. We reverse and remand.

I. Factual Background

On 4 December 2006 plaintiff filed a complaint pursuant to Chapter 50B seeking a domestic violence protective order ("DVPO"). The complaint alleged that on 3 December 2006 defendant "grabbed [plaintiff] by [the] neck and dug into [her] with his fingernails" and that defendant had physically and emotionally abused plaintiff throughout their forty-eight year marriage. Furthermore, the complaint alleged that defendant had "several guns" and had threatened plaintiff with a gun in the past.

Judge Lawrence C. McSwain found that plaintiff had been "placed in fear of imminent serious bodily injury" and entered an *ex parte* DVPO against defendant. The order prohibited defendant, *inter alia*, from threatening plaintiff, visiting plaintiff's residence or workplace, and "*possessing, owning, . . . or purchasing a firearm for the effective period of th[e] Order.*" (Emphasis added.) However, the order did not specifically direct that defendant surrender his firearms to the sheriff. Guilford County Deputy Sheriff B. K. Henderson served the DVPO upon defendant on 4 December 2006. At Deputy Henderson's request, defendant surrendered seven (7) firearms. The *ex parte* DVPO was dissolved on 13 December 2006.

On 5 April 2007, defendant filed a *pro se* Motion for Return of Weapons Surrendered Under Domestic Violence Protective Order. Defendant filed an amended motion prepared by his counsel, which included a listing of the firearms in the Sheriff's custody, on 25 April 2007. The motion was heard on 29 August 2007. The Sheriff was represented by counsel at the hearing and opposed the motion, offering evidence that defendant had been committed to a mental institution in 2004 and arguing that he was thus precluded from receiving the firearms. The trial court entered an order on 31 August 2007 directing the Sheriff to return defendant's firearms. The Sheriff appeals.[1]

II. Legal Analysis

On appeal, the Sheriff argues that the trial court erred by (1) finding that the Sheriff improperly seized defendant's firearms, (2) failing to conduct an inquiry as required by N.C. Gen. Stat. § 50B-3.1(f) before ordering return of the firearms, and (3) ordering the return of the firearms to a person who was prohibited by the law from possessing them. We agree.

The appeal of an order for the return of firearms pursuant to N.C. Gen. Stat. § 50B-3.1(f)[2] appears to be one of first impres--

1. The Sheriff filed a motion to dismiss this appeal as moot on 6 August 2008 because defendant died during the pendency of this appeal. However, the trial court must conduct the statutorily required inquiry for return of firearms to either the defendant, N.C. Gen. Stat. § 50B-3.1(f), or to a third party, N.C. Gen. Stat. § 50B-3.1(g). The Sheriff must still comply with the provisions of N.C. Gen. Stat. § 50B-3.1 in either returning the firearms to defendant's estate or heirs or in obtaining permission of the court for other disposition of the firearms. Thus, because the sheriff continues to hold the firearms, defendant's death does not moot the issue raised in this appeal.

2. The court shall determine whether the defendant is subject to any State or federal law or court order that precludes the defendant from owning or possessing a firearm. The inquiry shall include:

sion. Therefore, our first task is to determine the appropriate standard of review.

When the trial court sits as fact-finder without a jury: "it must (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly." *Stachlowski v. Stach*, 328 N.C. 276, 285, 401 S.E.2d 638, 644 (1991) (citing N.C. Gen. Stat. § 1A-1, Rule 52).

> The standard of appellate review for a decision rendered in a nonjury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.

Sessler v. Marsh, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citations omitted), *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001).

The trial court's order contains only one substantive finding:

> The Ex Parte Domestic Violence Order of Protection signed by the Honorable Lawrence C. McSwain and entered on 12-4-06 did not order defendant to surrender to the Sheriff firearms or other items pursuant to Paragraph 13, page 5 at said Order. Defendant's property was seized without an order of the court and such seizure was improper.

According to the statute, the trial court was required to conduct an inquiry before returning defendant's firearms and find facts as to the only substantive issue raised by the motion: "[W]hether the defendant [was] subject to any State or federal law or court order

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> (1) Whether the protective order has been renewed.
>
> (2) Whether the defendant is subject to any other protective orders.
>
> (3) Whether the defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any State law.
>
> (4) Whether the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order.
>
> The court shall deny the return of firearms, ammunition, or permits if the court finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law . . . .

N.C. Gen. Stat. § 50B-3.1(f) (2007).

that preclude[d] the defendant from owning or possessing a firearm." N.C. Gen. Stat. § 50B-3.1(f); *see also State v. Oaks*, 163 N.C. App. 719, 725-26, 594 S.E.2d 788, 792 (2004) (affirming the trial court's refusal to return seized firearms to a known drug user because "the trial court cannot issue an order that would place the court and defendant in violation of federal law"); *Fayetteville Publ'g Co. v. Advanced Internet Tech, Inc.*, 190 N.C. App. ——, ——, 665 S.E.2d 518, 524 (2008) ("In order to prevail in [his] action for return of the [property], plaintiff needed to show that [he] was entitled to *immediate possession of the property*." (Emphasis added.)); *accord* Fed. R. Crim. P. 41(g) ("A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. . . . The court must receive evidence on any factual issue necessary to decide the motion."); *United States v. Bein*, 214 F.3d 408, 411 (3rd Cir. 2000) ("It is well settled that the Government may seize evidence for use in investigation and trial, but that it must return the property once the criminal proceedings have concluded, *unless it is contraband* or subject to forfeiture." (Emphasis added.)), *cert. denied*, 534 U.S. 943, 151 L. Ed. 2d 240 (2001). However, rather than comply with the statute and squarely address the only substantive issue raised by the motion, the trial court made findings on the legality of the Sheriff's seizure of the firearms, an issue which was not raised by defendant's motion and on which no relevant evidence was presented. *See McDevitt v. Stacy*, 148 N.C. App. 448, 451, 559 S.E.2d 201, 205 (2002) ("[A] pleading must give sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and to get any additional information he may need to prepare for trial." (Citation, quotation marks and ellipses omitted.)). Indeed, defendant did not challenge the propriety of the Sheriff's seizure of his firearms in either of his two motions for return and as best we can tell from the record, he voluntarily turned them over to the deputy.

There was highly persuasive evidence in the record that defendant had been committed to a mental institution in 2004, which under federal law would have precluded defendant from receiving a firearm. *See* 18 U.S.C. § 922(g)(4) (2006). Furthermore, there was no evidence in the record to indicate that the seizure of defendant's firearms by the Guilford County Sheriff's Department was illegal. Because the trial court did not make the findings required by the statute, and because the findings that it did make were not raised in the motion and were not supported by any relevant evidence, we

reverse and remand in order for the trial court to conduct a proper inquiry as required by N.C. Gen. Stat. § 50B-3.1.

Reversed and remanded.

Judges McGEE and McCULLOUGH concur.

LIAM PATRICK WALLIS, INDIVIDUALLY, PLANTATION PROPERTY MANAGEMENT, LLC AND LIAM PATRICK WALLIS, AS REPRESENTATIVE SHAREHOLDER ON BEHALF OF CHARTWELL HOMES, INC., PLAINTIFFS v. ANDREW CAMBRON, RICHARD M. GREENE, BAY POINT, LLC, AND BIG BALD MOUNTAIN, LLC, DEFENDANTS

No. COA08-178

(Filed 2 December 2008)

1. Appeal and Error— appealability—failure to timely file notice of appeal

Plaintiffs' appeal from the trial court's order entered 7 September 2007 should have been dismissed for failure to timely file a notice of appeal under N.C. R. App. P. 3(c) because: (1) motions entered under Rule 60 do not toll the time for filing a notice of appeal; (2) while the record did not reflect when plaintiffs were served a copy of the trial court order, plaintiffs were in possession of the order as their N.C.G.S. § 1A-1, Rule 60 motion filed 17 September 2007 included a copy of the 7 September 2007 order, and plaintiffs then appealed from the 7 September 2007 order on 7 November 2007, which was more than thirty days after the trial court order was filed; and (3) the provisions of Rule 3 are jurisdictional, and a jurisdictional default precludes the appellate courts from acting in any manner other than to dismiss the appeal.

2. Civil Procedure— Rule 60 motion—misapplication of law requires appeal

The trial court did not err by denying plaintiffs' N.C.G.S. § 1A-1, Rule 60 motion even though plaintiffs contend the trial court's 7 September 2007 order effectively precluded any shareholder derivative claim and amounted to a misapplication of the law where the trial court found that the shareholder demand requirement under N.C.G.S. § 55-7-42(a) had not been met and no

action for civil conspiracy existed under North Carolina law because: (1) a Rule 60(b) order does not overrule a prior order but, consistent with statutory authority, relieves parties from the effect of an order; and (2) judgments involving misapplication of the law may be corrected only by appeal and Rule 60(b) motions cannot be used as a substitute for appeal.

Appeal by plaintiffs from orders entered 10 September 2007 and 22 October 2007 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 7 October 2008.

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

Mary K. Nicholson for Andrew Cambron and Bay Point, LLC. defendant-appellees.

Richard M. Greene pro se.

BRYANT, Judge.

Plaintiffs Liam Wallis, individually and as representative shareholder on behalf of Chartwell Homes, Inc., and Plantation Property Management, LLC, (PPM) appeal from an order entered 10 September 2007, which granted in part defendants' Rule 12(b)(6) motion to dismiss plaintiffs' claims, and from an order entered 22 October 2007, which denied plaintiffs' Rule 60 motion for relief from the order entered 10 September 2007. For the reasons stated below, we dismiss plaintiffs' appeal in part and affirm in part.

The dispute between these parties arose from an agreement between Defendant Andrew Cambron and Plaintiff Liam Wallis to enter into a joint venture for the purpose of acquiring, developing, and selling real estate. Cambron was an officer and shareholder of Chartwell Homes, Inc. Plaintiffs alleged that pursuant to the agreement Cambron was responsible for raising capital, soliciting investors, and marketing, while Wallis was to be president and a 40% shareholder of Chartwell.

Later, Wallis alleged that Cambron refused to share internal Chartwell documents, usurped corporate opportunities, and failed to raise funds, bring in investors, and market properties to third parties per their agreement. Therefore, in an effort to market Chartwell properties, Wallis formed PPM but was unsuccessful as a result of the alleged conduct of defendants Cambron and Richard Greene.

In a complaint filed 18 September 2006 and amended 30 August 2007, plaintiffs raised twelve causes of action, including breach of contract, derivative shareholder claims against Cambron and Greene, the imposition of a trust, and a claim of civil conspiracy. In their answer, defendants' asserted that plaintiffs failed to set forth claims upon which relief could be granted which subjected the complaint to dismissal under Rule 12(b)(6).

In an order entered 7 September 2007, the trial court granted in part and denied in part defendants' motion to dismiss. As grounds for dismissal of plaintiffs' derivative shareholder claims, the trial court concluded plaintiffs failed to satisfy the shareholder demand requirement under N.C. Gen. Stat. § 55-7-42(a). Furthermore, the trial court concluded "no action for 'civil conspiracy' really exists in law" and dismissed that claim.

On 17 September 2007, plaintiffs filed a Motion For Relief From Order pursuant to North Carolina Civil Procedure Rule 60. Plaintiffs attached as "Exhibit A" a copy of the order entered 7 September 2007. On 17 October 2007, the trial court entered an order denying plaintiffs' Rule 60 motion. On 7 November 2007, plaintiffs filed a notice of appeal from both the 7 September 2007 order and the 17 October 2007 order.

On appeal, plaintiffs raise four issues: whether, in its 7 September 2007 order, the trial court erred by (I) concluding that the demand requirement under N.C. Gen. Stat. § 55-7-42(a) had not been met and (II) concluding no action for civil conspiracy exists under North Carolina law; whether the trial court erred by (III) dismissing plaintiffs' claim for cancellation of a notice of lis pendens filed by defendants; and (IV) denying plaintiffs' Rule 60 motion.

I & II

[1] Defendants argue that plaintiffs' appeal from the trial court's order entered 7 September 2007 should be dismissed for failure to timely file a notice of appeal pursuant to the North Carolina Rules of Appellate Procedure, Rule 3(c). We agree.

Under our North Carolina Rules of Appellate Procedure, Rule 3(c), "Time for Taking Appeal," states, in pertinent part, the following:

> In civil actions and special proceedings, a party must file and serve a notice of appeal:

> (1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) 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) (2007). "The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997) (citation omitted). Motions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal. *See* N.C. R. App. P. 3(c) (2007).

On 7 September 2007, the trial court entered an order which granted in part[1] and denied in part defendants' motion to dismiss plaintiffs' twelve causes of action. On 17 September 2007, plaintiffs filed a Rule 60 motion. In the motion, plaintiffs incorporated as "Exhibit A" a copy of the order entered on and bearing a file date stamp of 7 September 2007. On 17 October 2007, the trial court entered an order denying plaintiffs' Rule 60 motion. On 7 November 2007, plaintiffs filed a notice of appeal from both the 7 September 2007 order and the 17 October 2007 order.

While the record does not reflect when plaintiffs were served a copy of the trial court order, it is clear plaintiffs were in possession of the order as their Rule 60 Motion filed 17 September 2007 included a copy of the 7 September 2007 order. Plaintiffs then appealed from the 7 September 2007 order on 7 November 2007—more than thirty days after the trial court order was filed, and more than thirty days after plaintiffs filed the Rule 60 Motion. Therefore, plaintiffs have failed to comply with appellate procedure Rule 3(c).

As previously stated, "[t]he provisions of Rule 3 are jurisdictional." *Abels*, 126 N.C. App. at 802, 486 S.E.2d at 737 (citation omitted). And, "[a] jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal."

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1. The following claims were dismissed: 1) all derivative shareholder claims raised on behalf of Chartwell; 2) unfair and deceptive trade practices, except as based on allegations of defamation; 3) tortious interference with prospective contract; 4) defamation of PPM; 5) all derivative shareholder claims against Cambron and Greene individually; 6) cancellation of notice of lis pendens; and 7) imposition of "equitable, parole or resulting trust."

Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (citations omitted). Accordingly, plaintiffs' appeal from the trial court order entered 7 September 2007 is dismissed.

III

Prior to oral argument the parties stipulated that issue (III) had been resolved. Accordingly, the issue is no longer before us.

IV

[2] Last, plaintiffs argue that the trial court erred in denying plaintiffs' Rule 60 motion. Plaintiffs assert that the trial court's 7 September 2007 order effectively precludes any shareholder derivative claim and amounted to a misapplication of the law where the trial court found that the shareholder demand requirement under N.C. Gen. Stat. § 55-7-42(a) had not been met and no action for civil conspiracy existed under North Carolina law. Plaintiffs' argument is misplaced.

Our review of a trial court's ruling on a Rule 60(b) motion is limited to a determination of whether the trial court abused its discretion. *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004). Therefore, a trial court's decision to grant or deny relief pursuant to Rule 60(b) will not be overturned absent an abuse of discretion. *Id.*

Under North Carolina General Statutes section 1A-1, Rule 60,

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2008). "A 60(b) order does not overrule a prior order but, consistent with statutory authority, relieves parties from the effect of an order." *Charns v. Brown*, 129 N.C. App. 635, 639, 502 S.E.2d 7, 10 (1998) (citation omitted). However, "judgments involving misapplication of the law may be corrected only by appeal and Rule 60(b) motions cannot be used as a

substitute for appeal." *Spangler v. Olchowski*, 187 N.C. App. 684, 689, 654 S.E.2d 507, 512 (2007) (citation omitted). Accordingly, we hold the trial court did not err in denying plaintiffs' Rule 60(b) motion.

Dismissed in part and affirmed in part.

Judges WYNN and ARROWOOD concur.

IN THE MATTER OF: C.S.B., A MINOR CHILD

No. COA08-881

(Filed 2 December 2008)

Termination of Parental Rights— lack of notice—motion in the cause—waiver

The trial court did not lack subject matter jurisdiction even though respondent mother was never served with the notice required by N.C.G.S. § 7B-1106.1 for motions in the cause seeking termination of parental rights because respondent waived any objection to noncompliance with N.C.G.S. § 7B-1106.1 when she filed a verified response, without objecting to the lack of proper notice, and participated in the termination proceeding.

Appeal by respondent from order entered 8 May 2008 by Judge David V. Byrd in Yadkin County District Court. Heard in the Court of Appeals 24 November 2008.

J. Gregory Matthews for petitioner-appellee.

Jon W. Myers for respondent-appellant.

Tracie M. Jordan for Guardian ad Litem.

GEER, Judge.

Respondent mother appeals from the trial court's termination of her parental rights as to her minor child C.S.B. In her sole argument on appeal, respondent asserts that the trial court lacked subject matter jurisdiction because she was never served with the notice required by N.C. Gen. Stat. § 7B-1106.1 (2007) for motions in the cause seeking termination of parental rights. We hold, however, that

respondent waived any objection to noncompliance with § 7B-1106.1 when she filed a verified response and participated in the termination proceeding. Accordingly, we affirm.

Facts

Petitioner Yadkin County Department of Social Services ("DSS") filed juvenile petitions on 27 June 2006, alleging that respondent's three minor children, J.R.R., S.E.R., and C.S.B., were neglected juveniles in that they did not receive proper care, supervision, or discipline from respondent. The trial court entered an order on 15 August 2006 in which it found the juveniles to be neglected as defined in N.C. Gen. Stat. § 7B-101(15) (2007), granted custody of the juveniles to DSS, and ordered DSS to continue reasonable efforts toward reunification of the juveniles with respondent.

After periodic review hearings, the trial court relieved DSS of further reunification efforts in an order entered 24 September 2007. DSS subsequently filed a motion in the cause on 10 December 2007, seeking termination of respondent's parental rights as to C.S.B., but not as to J.R.R. or S.E.R. Although respondent was properly served with the motion for termination of parental rights, DSS acknowledges that it failed to give respondent the notice of the motion required by N.C. Gen. Stat. § 7B-1106.1(a). Respondent filed a verified answer on 13 February 2008. The termination of parental rights hearing was conducted on 9 April 2008, and, in an order entered 8 May 2008, the trial court terminated respondent's parental rights as to C.S.B. Respondent timely appealed to this Court.

Discussion

The Juvenile Code provides two means by which proceedings to terminate an individual's parental rights may be initiated: "(1) by filing a *petition* to initiate a new action concerning the juvenile; or (2) in a pending child abuse, neglect, or dependency proceeding in which the district court is already exercising jurisdiction over the juvenile and parent, by filing a *motion* to terminate pursuant to N.C. Gen. Stat. § 7B-1102." *In re S.F.*, 190 N.C. App. 779, 783, 660 S.E.2d 924, 927 (2008) (emphasis added). When a motion is filed, as opposed to a petition, N.C. Gen. Stat. § 7B-1106.1(a) provides that the movant "shall prepare a notice" directed to the parents of the juvenile, any guardian of the juvenile's person, the custodian of the juvenile, the county department of social services charged with the juvenile's placement, the juvenile's guardian ad litem, and the juvenile (if 12

years of age or older at the time the motion is filed). The notice shall include the following information:

(1) The name of the minor juvenile.

(2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.

(3) Notice that any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.

(4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.

(5) Notice that the date, time, and place of hearing will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.

(6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

N.C. Gen. Stat. § 7B-1106.1(b).

Respondent contends that DSS' failure to serve her with the notice required by N.C. Gen. Stat. § 7B-1106.1 deprived the trial court of subject matter jurisdiction. This Court has previously held that "where a movant fails to give the required notice [under N.C. Gen. Stat. § 7B-1106.1], prejudicial error exists, and a new hearing is required." *In re Alexander*, 158 N.C. App. 522, 526, 581 S.E.2d 466, 469 (2003). *See also In re D.A., Q.A., & T.A.*, 169 N.C. App. 245, 248, 609 S.E.2d 471, 473 (2005) ("Because DSS failed to give the statutorily required notice, prejudicial error exists and a new hearing is warranted."). Nevertheless, this Court has also held that a party entitled to notice under § 7B-1106.1 "waives that notice by attending the hearing of the motion and participating in it without objecting to the lack thereof." *In re B.M., M.M., An.M., & Al.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005); *accord In re J.S.L.*, 177 N.C. App. 151, 155, 628 S.E.2d 387, 389 (2006).

In this case, after respondent and her trial counsel were served with the termination of parental rights motion, respondent signed

and filed a verified reply to the motion. In her verified reply, respondent asserted two affirmative defenses and moved to dismiss DSS' motion, without objecting to the lack of proper notice under N.C. Gen. Stat. § 7B-1106.1. Respondent was not present at the termination of parental rights hearing, but her trial counsel explained to the trial court that respondent knew of the hearing and intended to be there, but was having "transportation problems." Respondent's counsel did not raise any objection to the lack of proper notice under N.C. Gen. Stat. § 7B-1106.1 at any point during the hearing and fully participated in the proceeding.

By responding to DSS' motion in a verified reply and participating, through counsel, in the termination proceeding, respondent waived any objection to the lack of proper notice under N.C. Gen. Stat. § 7B-1106.1. *See J.S.L.*, 177 N.C. App. at 155, 628 S.E.2d at 389 (finding waiver of objection to adequate notice under N.C. Gen. Stat. § 7B-1106.1 where respondent mother appeared with counsel at termination hearing and failed to object to any lack of notice); *B.M.*, 168 N.C. App. at 356, 607 S.E.2d at 702 (holding respondents waived objection to lack of proper notice by appearing with counsel and participating in termination proceeding without objection). Respondent, therefore, failed to preserve for appellate review her objection to lack of adequate notice. *See* N.C.R. App. P. 10(b)(1).

Respondent argues that the waiver cases are distinguishable from this appeal because she has argued that the lack of notice under N.C. Gen. Stat. § 7B-1106.1 deprives the trial court of subject matter jurisdiction, an argument not specifically addressed in the prior opinions. We disagree. The failure to provide proper notice under N.C. Gen. Stat. § 7B-1106.1 cannot affect the trial court's subject matter jurisdiction "because the court has already acquired subject matter jurisdiction over the juvenile and parents because of the ongoing proceedings . . . ." *S.F.*, 190 N.C. App. at 783, 660 S.E.2d at 927.

Neither *Alexander* nor *D.A.*, the authority relied upon by respondent, held that the failure to comply with the statutory requirements of N.C. Gen. Stat. § 7B-1106.1 deprives the trial court of subject matter jurisdiction. In both *Alexander* and *D.A.*, we remanded for rehearing. If, as respondent contends, failure to comply with the notice requirements of N.C. Gen. Stat. § 7B-1106.1 divested the trial court of subject matter jurisdiction, this Court would have been required to dismiss the termination of parental rights action without further proceedings. *See In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d

787, 790 (2006) ("Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]"). Thus, the fact that we remanded the cases to the trial court for rehearing on the termination of parental rights motions necessarily means that DSS' failure to give respondent proper notice under N.C. Gen. Stat. § 7B-1106.1 did not deprive the court of subject matter jurisdiction.

In sum, while DSS violated N.C. Gen. Stat. § 7B-1106.1, respondent waived any objection to that violation by failing to raise the issue below and by participating in the termination of parental rights proceedings. Since respondent presents no other argument for reversal, we affirm the decision below.

Affirmed.

Judges HUNTER and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 DECEMBER 2008

DEBERRY v. KELLOGG SALES CO. No. 08-498	Guilford (07CVS4583)	Affirmed
FINK v. GOODYEAR TIRE & RUBBER CO. No. 07-1371	Ind. Comm. (I.C. No. 344463)	Affirmed
IN RE A.B.W. & A.F.W. No. 08-626	Catawba (05JA88-89)	Affirmed
IN RE A.N.J.-H. & L.A.J.-H. No. 08-740	Gaston (07JT353-54)	Vacated and remanded
IN RE C.B.G. No. 08-668	Mecklenburg (07JB962)	No error
IN RE H.P., C.P., M.P., HE.P. No. 08-776	Henderson (01J84-87)	Affirmed
IN RE J.C. No. 08-727	Brunswick (07J176T)	Affirmed
IN RE J.T.W. No. 08-383	Mecklenburg (07J438)	Affirmed
IN RE L.H., A.B., S.W. No. 08-882	Buncombe (93J27) (07JA323-24)	Affirmed
IN RE R.C. No. 08-130	McDowell (06J50)	Affirmed
IN RE T.P. No. 08-649	Mecklenburg (07J583)	Affirmed
LANGLEY v. SUE-LYNN TEXTILES, INC. No. 08-117	Ind. Comm. (I.C. No. 290443)	Affirmed
LYTLE v. RICE No. 08-226	Buncombe (06CVS6374)	Reversed in part and affirmed in part
MORRIS v. DIXON No. 08-187	Dare (07CVS41)	Reversed
STATE v. CLOUD No. 08-555	Forsyth (06CRS64103) (07CRS3067)	Affirmed
STATE v. COGGINS No. 08-233	Jackson (06CRS50626)	No error

STATE v. FUTRELL No. 08-416	Hertford (02CRS3194) (07CRS1378)	Vacated in part, and affirmed in part
STATE v. GARDNER No. 07-1548	Pitt (06CRS61286)	No error
STATE v. GIONET No. 08-723	Harnett (07CRS55434)	No error
STATE v. GRAHAM No. 08-334	Forsyth (06CRS56614) (06CRS20438)	No error
STATE v. GUILLEN-MARTINEZ No. 08-213	Rowan (07CRS50972)	No error
STATE v. JORDAN No. 08-142	Forsyth (98CRS41731-32)	No error at trial. Vacated and remanded for sentencing.
STATE v. MAY No. 08-146	Beaufort (05CRS50155) (05CRS50268)	No error in part; reversed in part and remanded
STATE v. PAYNE No. 08-563	Henderson (07CRS52537)	No error
STATE v. PERRY No. 08-278	Franklin (05CRS51360)	No error
STATE v. ROBBS No. 08-621	Buncombe (01CRS9787) (01CRS58967-73)	No error
STATE v. RONZIO No. 08-245	Wake (04CRS1593-94)	No error
STATE v. SCHREIBER No. 08-250	Guilford (05CRS91905) (05CRS93359)	No error
STATE v. SIMMONS No. 08-65	Cumberland (05CRS67217) (06CRS12994)	No error
STATE v. STOVALL No. 08-678	Iredell (07CRS3277-81)	No error
STATE v. WATSON No. 08-315	Johnston (06CRS53635-36) (06CRS54139)	New trial in case number 06CRS54139. No error as to all other cases.
STATE v. WILLIAMS No. 08-554	Pender (07CRS50015-16)	Affirmed and remanded for correction of clerical errors

STATE v. WRIGHT No. 08-93	Nash (05CRS55248)	No error
STATE v. WRIGHT No. 07-1300	Guilford (06CRS91219-21) (06CRS91227)	No error
THOMAS v. HERRING No. 08-405	Guilford (05CVD7720)	Affirmed
TURNER v. CUSTOM RETAIL SERVS., INC. No. 08-300	Ind. Comm. (I.C. No. 497930)	Affirmed
WALLIS v. CAMBRON No. 08-481	Mitchell (07CVS73)	Affirmed
WATTS v. E.I. DUPONT DE NEMOURS No. 08-267	Ind. Comm. (I.C. No. 401888)	Affirmed
WELLIVER McGUIRE, INC. v. MEMBERS INTERIOR CONSTR., INC. No. 08-408	Mecklenburg (06CVS6517)	Affirmed

DARVELLA JONES, Plaintiff v. HARRELSON AND SMITH CONTRACTORS, LLC, a North Carolina Corporation, and RODNEY S. TURNER, d/b/a Rodney S. Turner Housemovers, Defendants

No. COA05-1183-2

(Filed 16 December 2008)

1. Appeal and Error— rules violations—not substantial—citation to record and authority

Appellate Rules violations were not sufficient to warrant dismissal of the appeal or the imposition of sanctions beyond the refusal to review an assignment of error involving prejudgment interest; consideration of that assignment of error was not necessary to prevent manifest injustice to a party. Violations that were not jurisdictional did not warrant sanctions; those violations involved citing to the transcript but not the record and not setting forth the basis of the claim sufficiently.

2. Fraud— sale of house following flood—relocation of house—flood plain

The trial court erred by granting a motion for judgment notwithstanding the verdict by defendant H&S on a claim for fraud arising from the sale of a house after a flood and the disputed relocation of the house to a new lot. Viewed in the light most favorable to plaintiff, both knowledge and intent could be attributed to defendant concerning the requirement that the houses be relocated outside the flood plain.

3. Damages— sale of house after fraud—fraud and conversion—election

Plaintiff must elect between damages for fraud and damages for conversion in an action arising from the sale and subsequent move of a house after a flood. It is apparent from the court's instructions that the jury's award represented overlapping damages; plaintiff is not entitled to recover the fair market value of the house twice.

4. Unfair Trade Practices— fraud or conversion—damages

The trial court erred by dismissing on a directed verdict motion an independently pled unfair practices claim where plaintiff was then allowed to argue that UDTP principles should apply in the calculation of damages for fraud or conversion. However, the jury found for plaintiff on the fraud claim and defendant made

no attempt to argue that it was exempt from Chapter 75, so that the matter was remanded for entry of judgment for plaintiff on her UDTP claim and for trebling of her fraud damages.

5. Damages— punitive—unfair trade practices election

The issue of punitive damages was moot where plaintiff, confronted with the possibility of foregoing favorable jury verdicts and retrying her substantive claims, stated on appeal that she elected to receive treble damages pursuant to her UDTP claim.

Judge TYSON concurring in the result in part and dissenting in part.

Appeal by plaintiff from judgment entered 10 May 2005 by Judge Jerry Braswell in Pamlico County Superior Court. This case was originally heard in the Court of Appeals 29 March 2006. Upon remand by order from the North Carolina Supreme Court, filed 7 March 2008.

William F. Ward, III, P.A., by William F. Ward, III, for plaintiff-appellant.

Hopf & Higley, P.A., by Donald S. Higley, II, for defendant-appellee Harrelson and Smith Contractors, LLC.

GEER, Judge.

This litigation arose out of efforts to remove houses from the 100-year flood plain in Pamlico County following widespread destruction from Hurricane Floyd. A jury below found that defendant Harrelson and Smith Contractors, LLC ("H&S"), who contracted with Pamlico County to remove such homes, committed fraud and conversion in its actions with respect to a house that H&S sold to plaintiff Darvella Jones. The trial court (1) left the conversion verdict intact, (2) granted a directed verdict in favor of H&S on Jones' unfair and deceptive trade practices ("UDTP") claim, and (3) granted judgment notwithstanding the verdict ("JNOV") to H&S on the fraud claim. Finally, the trial court granted judgment in favor of H&S with respect to Jones' claim for punitive damages. Jones appealed to this Court.

On 19 December 2006, a divided panel of this Court dismissed Jones' appeal for violations of the North Carolina Rules of Appellate Procedure. *See Jones v. Harrelson & Smith Contractors, LLC*, 180 N.C. App. 478, 638 S.E.2d 222 (2006). On 7 March 2008, the North Carolina Supreme Court reversed that decision and remanded for reconsideration in light of the Court's decisions in *Dogwood Dev. &*

Mgmt. Co. v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361 (2008), and *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007). *See Jones v. Harrelson & Smith Contractors, LLC*, 362 N.C. 226, 227, 657 S.E.2d 352, 353 (2008) (per curiam).

Upon reconsideration, we conclude that the appellate rules violations committed by Jones are nonjurisdictional violations for which dismissal of Jones' appeal is not appropriate. We further hold that these violations do not rise to the level of gross or substantial violations that warrant any other type of sanction.

On the merits, we reverse the trial court's entry of judgment in favor of H&S on Jones' fraud and UDTP claims. We, therefore, remand for entry of judgment in the amount of $31,815.00 on the fraud claim, entry of an award of treble damages, and, in the trial court's discretion, an award of attorney's fees under N.C. Gen. Stat. § 75-16.1 (2007).

Facts and Procedural History

Hurricane Floyd struck North Carolina in September 1999, causing catastrophic flooding in the eastern portions of our State, including Pamlico County. Following the hurricane, Pamlico County, using funds provided by the state and federal governments, instituted a Flood Acquisition Program, which involved buying out landowners who had property located in the 100-year flood plain. One house purchased by the County belonged to Ray and Virginia Respers and was located at 439 Jones Road in the town of Vandemere. The County paid approximately $45,000.00 for the house, which was roughly equal to its appraised value.

The Flood Acquisition Program included a Demolition and Clearance Project designed to clear lots in the flood plain and thus reduce the possibility of property damage from future hurricanes and floods. As part of this project, the County solicited bids for the removal and/or demolition of homes that it had purchased in the flood plain. During the bidding process, H&S submitted a demolition bid in the amount of $60,797.00. Based on this bid, the County awarded H&S the demolition contract for a group of houses in the flood plain, including the Respers' former house.

The County signed a contract with H&S, which included, among other provisions, an option allowing H&S to salvage houses scheduled for demolition by severing them from their current lots and relocating them to lots outside the state-designated flood plain. H&S

decided to exercise that option and salvage several of the houses that the County had designated for removal, including (1) the Respers' former house, (2) another house that belonged to Herman Garrison, and (3) a third house that belonged to the O'Neil family.

Plaintiff Darvella Jones gave John Harrelson of H&S $500.00 in cash for the Respers' former house. She showed Harrelson the piece of land nearby on Swan Point Road where she was currently living in a trailer and where she hoped to eventually place the house. Although it was apparent that the lot she showed Harrelson was inside the flood plain, Harrelson did not mention the contract restriction requiring that the house be relocated outside the flood plain. Instead, Harrelson asked Jones if she knew of anyone who moved houses. When Jones replied that she did not, Harrelson recommended his friend, defendant Rodney Turner.

H&S succeeded in selling the O'Neil house to Clyde Potter and the Garrison house to Herbert Kent. Kent testified at trial that he paid H&S $5,000.00 for his house and that H&S never told him the house would need to be relocated outside the flood plain. Following their purchases, Potter, Kent, and Jones all employed defendant Turner to relocate their houses elsewhere inside the flood plain.

Prior to the move, H&S had not entered into written contracts with any of the purchasers. On 10 September 2002, however, H&S sent a letter to RSM Harris Associates, the consulting firm hired by the County to oversee the buy-out program, in which H&S asserted: "We would like to assure you that the three owners that purchased the houses . . . were informed with a written contract that the houses were to be relocated above the 100-year floodplain and they were to accept all expense & responsibility."

On 13 September 2002, after all three houses had been moved off their original lots and after sending the letter to RSM Harris Associates, H&S mailed a short form to Potter, Kent, and Jones, requesting that each owner sign and return it. The form read as follows:

> I, _____, acknowledge all responsibility and expense for the moving and relocation for the house presently located at _____ in _____ County. I undersand the house becomes my property and responsibility as of _____. I understand the house has to be relocated outside the 100 year flood plain.

Jones' form had the blanks completed with the information relating to her house. She signed it because H&S said it needed the form for its records.

On or about 20 September 2002, the County's inspectors learned that the Potter, Kent, and Jones houses had been relocated from their original lots to other lots inside the flood plain.[1] According to a County official, the North Carolina Division of Emergency Management gave the County three possible ways to resolve the issues with the three houses: (1) the houses could be removed to a location outside the flood plain, (2) the houses could be demolished, or (3) the houses could be removed from the buy-out program by reimbursement of the County for the full amount it had paid to the original owners. The County, in turn, informed H&S that the house relocations violated the terms of the Demolition and Clearance contract, explained the three choices, and gave H&S a deadline of 10 December 2002 to "complete corrective action." The County later threatened legal action against H&S if it did not bring the salvaged houses into compliance with the contract.

H&S ultimately dealt with each house in a different manner. With respect to Potter's house, H&S paid more than $22,000.00 to cover the cost of relocating the house to another lot that Potter owned outside the flood plain and putting it on a foundation. Kent, however, refused to move his house a second time, so H&S was forced to reimburse the County in the amount of $52,757.00—the amount paid by the County to the original owner of the house in the buy-out program.

As for Jones' house, Harrelson met with Jones to inform her of the problem. He told her that he had found a lot outside the flood plain on Water Street in the town of Bayboro and offered to relocate her house there at H&S' expense. He told her that the owner of the lot was willing to sell the lot to Jones for $12,000.00, but that H&S would make the first two months' payments for her. Jones told Harrelson she did not want to live on Water Street. Instead, she contacted a realtor and began to make arrangements to purchase a lot in the town of Reelsboro with the intent of moving the house there. On 5 December

1. It is unclear from the record when RSM Harris Associates learned that the houses were not in compliance with the County contract. H&S' managing member, Kenneth Smith, acknowledged in an affidavit admitted into evidence that H&S "had been notified" by an unnamed entity that Jones' house was still in the flood plain at some time between the moving of the house on 19 August 2002 and the sending of the 13 September 2002 form.

2002, she provided H&S with written certification that the Reelsboro lot was outside the flood plain.

The next day, 6 December 2002, four days before the County's deadline, H&S hired defendant Turner to move Jones' house from her Swan Point lot to the Water Street lot that H&S had rented at its own expense. Harrelson acknowledged at trial that Jones had never given him permission to move the house, but said that H&S was under pressure to bring the three houses into compliance by 10 December 2002. Jones was driving to work when she discovered that her house was missing.

On 9 December 2002, H&S sent a letter to the County, requesting payment on its contract with the County and stating: "Please consider this request and its urgency because [H&S] has incurred considerable expense in trying to resolve these issues." The County, however, was not satisfied because "the house was still in a potential movable position, still had steel underneath of it, and . . . could still easily be moved back into the flood zone."

On 13 January 2003, H&S' attorney sent a letter to Jones' attorney, requesting "that your client make satisfactory arrangements for governmental approval of the location of this house by securing approval at its current location, by moving it to an appropriate location, or otherwise, putting the controversy to rest before January 29, 2003." The letter also stated that "[a]bsent governmental approval, [H&S] must have the house removed by February 6, 2003. The time period between January 29, 2003 and February 6, 2003 will be used to raze the house if your client fails to make arrangements as set forth above." On 4 February 2003, when Jones had not responded, H&S demolished the house where it sat on the Water Street lot.

Jones filed suit on 10 November 2003 against H&S and Turner, asserting claims for fraud, negligent misrepresentation, conversion, and unfair and deceptive trade practices. H&S filed an answer on 20 January 2004. When Turner made no appearance, Jones obtained an entry of default against him on 2 March 2004.

Both Jones and H&S unsuccessfully moved for summary judgment, and the case was set for trial in February 2005. Upon motion of H&S, the compensatory and punitive damages stages of the trial were bifurcated pursuant to N.C. Gen. Stat. § 1D-30 (2007). At the conclusion of Jones' evidence in the liability phase of the trial, H&S moved for a directed verdict on all issues. The trial court denied H&S'

motion, and the case proceeded with H&S' evidence. At the close of all the evidence, the trial court denied H&S' renewed motion for a directed verdict. At that time, Jones voluntarily dismissed her negligent misrepresentation claim, leaving for decision her claims for fraud, conversion, and UDTP. During the charge conference, however, the trial judge stated that he was revisiting his decision on H&S' motion for a directed verdict and had decided to grant that motion with respect to Jones' UDTP claim.

Jones' claims for fraud and conversion were submitted to the jury. The verdict sheet returned by the jury read:

> We, the jury, by unanimous verdict, find as to the Issues as follows:
>
> ISSUE ONE: Was the Plaintiff damaged by the fraud of the Defendant? Answer: Yes
>
> ISSUE TWO: What amount of damages is the Plaintiff entitled to recover? Answer: $31,815
>
> ISSUE THREE: Did the Defendant convert the house relocated at Swan Point Road by the Plaintiff? Answer: Yes
>
> ISSUE FOUR: Did the Plaintiff abandon the home? Answer: No
>
> ISSUE FIVE: What amount is the Plaintiff entitled to recover for the damages for the conversion of the property of the Plaintiff? Answer: $30,000

The morning after the verdict, H&S moved (1) for JNOV as to both claims, (2) for "judgment as a matter of law on the issue of punitive damages," or, in the alternative, (3) for a new trial on all issues. The trial court orally granted H&S' motion for JNOV as to the fraud claim, but denied it as to the conversion claim. The court also entered judgment for H&S as to Jones' claim for punitive damages. Lastly, the court denied H&S' motion for a new trial. Jones then also unsuccessfully moved for a new trial.

On 18 March 2005, Jones filed a motion pursuant to N.C.R. Civ. P. 52, requesting that the trial court make specific findings of fact and conclusions of law with respect to its rulings. The court denied Jones' motion and, instead, on 10 May 2005, entered a short judgment specifying the jury's verdict, setting forth the court's rulings on the parties' various motions, and entering judgment in favor of Jones in the amount of $30,000.00. Jones filed a notice of appeal on 1 June 2005.

Appellate Rules Violations

[1] In *Dogwood Dev. & Mgmt. Co.*, our Supreme Court set out the framework for deciding whether to sanction a party for appellate rules violations. The Supreme Court explained that appellate rules violations fall into three 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. If the error is a nonjurisdictional default, the appellate court "possesses discretion in fashioning a remedy to encourage better compliance with the rules." *Id.* at 198, 657 S.E.2d at 365.

Significantly, "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* Instead, a court may consider other sanctions for such violations. Nevertheless, the *Dogwood* Court cautioned that "the appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a 'substantial failure' or 'gross violation.' " *Id.* at 199, 657 S.E.2d at 366. The Court directed that "[i]n such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible." *Id.*

This Court originally dismissed Jones' appeal for two violations of the appellate rules. First, it held that Jones' assignments of error violated Rule 10(c)(1) by failing to state the legal basis for Jones' contention that the trial court erred in making its rulings with regard to the claims for fraud, UDTP, punitive damages, and prejudgment interest. *Jones*, 180 N.C. App. at 487, 638 S.E.2d at 229. Second, the Court held that Jones further violated Rule 10(c)(1) by failing to include, after each assignment of error, citations to the record. *Id.* at 487-88, 638 S.E.2d at 229. Under *Dogwood*, neither of these bases for the initial dismissal are jurisdictional, and they do not warrant dismissal of the appeal. The question remains whether any further action by this Court is warranted.

Turning first to the issue of citations to the record, Rule 10(c)(1) provides that "[a]n 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." We note that Jones did not completely disregard this requirement of Rule 10(c)(1). She included appropriate references to the transcript for each of the trial court's rulings challenged on appeal, but either omitted a reference to the record or included an

incorrect citation to the record. Jones' citations to the transcript constitute substantial compliance with Rule 10(c)(1), while her typographical errors in the record citations do not constitute a substantial error or gross violation warranting any sanction.

With respect to the substance of the assignments of error, Jones assigned error to the trial court's (1) granting defendant's motion for a directed verdict on the UDTP claim, (2) granting defendant's motion for JNOV as to the fraud claim and award of compensatory damages, (3) allowing defendant's motion to dismiss plaintiff's claim for punitive damages for conversion, (4) refusal to find conversion to be a UDTP "as a matter of law," and (5) refusal to award interest from the date of conversion of Jones' house. As an initial matter, we hold that the conversion/UDTP assignment of error, although not as precise as it could be, adequately states a legal basis when it asserts that conversion in this case constituted a UDTP "as a matter of law."

The remaining assignments of error, however, simply recite that the trial court erred without explaining why. Rule 10(c)(1) provides that "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned."

As for the assignments of error relating to the trial court's rulings *granting* a directed verdict on the UDTP claim, JNOV on the fraud claim, and judgment as a matter of law on punitive damages, we note that the only legal ground that could be relied upon by Jones is that sufficient evidence existed for those claims to go to the jury. *See Alberti v. Manufactured Homes, Inc.*, 94 N.C. App. 754, 758, 381 S.E.2d 478, 480 (1989) ("Motions for directed verdict or judgment notwithstanding the verdict are properly granted only if the evidence is insufficient to support a verdict for the nonmovant as a matter of law."), *aff'd in part, reversed in part, and vacated in part on other grounds*, 329 N.C. 727, 407 S.E.2d 819 (1991). As a result, the omission of the legal basis from these assignments of error—that the evidence was sufficient to go to the jury—does not impair our ability to review the merits of the appeal and could not have prejudiced H&S.

In deciding whether these assignments of error substantially violate Rule 10(c)(1), we are guided by the decisions of the Supreme Court in considering assignments of error asserting that a trial court erred in granting summary judgment. In *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987), the Supreme Court reversed the Court of

Appeals when it dismissed an appeal because the appellant had failed to include in the record on appeal any assignments of error at all as to a summary judgment order. The Supreme Court held:

> The purpose of summary judgment is to eliminate formal trial when the only questions involved are questions of law. Thus, although the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases, summary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones. It would appear, then, that notice of appeal adequately apprises the opposing party and the appellate court of the limited issues to be reviewed. Exceptions and assignments of error add nothing.
>
> This result does not run afoul of the expressed purpose of Rule 10(a). Exceptions and assignments of error are required in most instances because they aid in sifting through the trial court record and fixing the potential scope of appellate review. We note that the appellate court must carefully examine the *entire record* in reviewing a grant of summary judgment. Because this is so, no preliminary "sifting" of the type contemplated by the rule need be performed. Also, as previously observed, the potential scope of review is already fixed; it is limited to the two questions of law automatically raised by summary judgment. Under these circumstances, exceptions and assignments of error serve no useful purpose. Were we to hold otherwise, plaintiffs would be required to submit assignments of error which merely restate the obvious; for example, "The trial court erred in concluding that no genuine issue of material fact existed and that defendants were entitled to summary judgment in their favor." At best, this is a superfluous formality.

Id. at 415-16, 355 S.E.2d at 481 (internal citations omitted). The Supreme Court reversed the Court of Appeals and remanded for this Court to review the case on its merits. *Id.* at 417, 355 S.E.2d at 482.

Our Supreme Court recently reaffirmed *Ellis*:

> This Court has long held, *and the law has not been changed*, that for purposes of an appeal from a trial court's entry of summary

> judgment for the prevailing party, the appealing party is not required under Rule 10(a) of the Rules of Appellate Procedure to make assignments of error for the reason that on appeal, review is necessarily limited to whether the trial court's conclusions as to whether there is a genuine issue of material fact and whether the moving party is entitled to judgment, both questions of law, were correct.

Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., 362 N.C. 269, 276-77, 658 S.E.2d 918, 923 (2008) (emphasis added).

To deny consideration of Jones' assignments of error regarding the fraud, UDTP, and punitive damages claims because of her failure to state the only possible basis for review would amount to requiring, in the language of *Ellis*, that Jones engage in a "superfluous formality." *Ellis*, 319 N.C. at 416, 355 S.E.2d at 481. We, therefore, hold that Jones' challenges to the trial court's rulings on her fraud, UDTP, and punitive damages claims are properly before this Court for appellate review.

We reach a different conclusion with respect to Jones' prejudgment interest assignment of error. The legal basis for that claim of error is neither set out in the assignment of error nor apparent from the nature of the error challenged. We do not believe that consideration of this error is necessary "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C.R. App. P. 2. Accordingly, we decline to exercise our discretion under Rule 2 to review this assignment of error.

In sum, in accordance with the Supreme Court's mandate, we have reconsidered this panel's prior dismissal of the appeal in light of *Dogwood* and *Hart*. We hold that no sanction is warranted and that this Court should review Jones' appeal on the merits with the exception of the prejudgment interest assignment of error.[2]

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2. H&S filed a motion to dismiss the appeal as interlocutory since the default judgment against Rodney Turner, the house mover, was not entered until after Jones appealed to this Court. In this Court's initial opinion, the majority denied the motion because although the appeal was indeed interlocutory at the time it was filed, judgment had since been entered against Turner, leaving nothing to be resolved at the trial level. *See Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 508, 593 S.E.2d 808, 811 (declining to dismiss appeal as interlocutory when plaintiff took voluntary dismissal of remaining claims pending in the trial court after giving notice of appeal but before case was heard in the Court of Appeals), *disc. review denied*, 358 N.C. 739, 603 S.E.2d 126 (2004). We see no reason to revisit that conclusion.

The Merits of the Appeal

A. Grant of JNOV on Fraud Claim

[2] Jones' first argument is that the trial court erred in granting H&S' motion for JNOV on the fraud claim. A motion for JNOV is a renewal of an earlier motion for a directed verdict, and the standards of review are the same. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985). "In considering any motion for directed verdict, the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor." *Id.* at 369, 329 S.E.2d at 337-38.

"The essential elements of actionable fraud are: '(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 793, 561 S.E.2d 905, 910 (2002) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). In this case, the parties have centered their arguments around the third element of fraud, the intent to deceive. The required scienter for fraud is not present without both knowledge and an intent to deceive, manipulate, or defraud. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988).

Here, when the evidence is viewed in the light most favorable to Jones, with all inferences drawn in her favor, both knowledge and intentional deception can be attributed to H&S. There is no dispute that H&S had knowledge of the requirement that the houses be relocated outside the flood plain. Further, Jones showed Harrelson where she planned to move the house, which would permit a jury to infer that H&S knew she intended to move the house within the flood plain. Jones offered evidence that, despite this knowledge, Harrelson said nothing about the requirement that the house be moved outside of the flood plain, but rather helped her find a house mover to move the house to the new location.

Jones' evidence also suggested that once H&S learned that the County was aware that the salvaged houses had not been moved outside the flood plain, H&S falsely told the County's agent that it had

written contracts requiring the new owners to comply with the flood plain requirement. H&S then, according to Jones' evidence, created after-the-fact "contracts" designed to cover-up H&S' failure to disclose the flood plain requirement and failure to have a written contract. Finally, there was evidence in the record that H&S fabricated documents pertaining to other elements of its contract with the County and similarly misled two other purchasers of houses—evidence from which the jury could conclude that H&S had an overall scheme of deceit with respect to the County contract in order to maximize its profit. We hold that a jury could infer an intent to deceive from this evidence.

Apart from challenging the sufficiency of the evidence to prove an intent to deceive, H&S argues on appeal that the form signed by Jones, stating that it was her responsibility to move the house outside the flood plain, amended the parties' contract. According to H&S, Jones was, therefore, limited to suing for breach of contract. H&S, however, cites no authority supporting its assumption that a plaintiff cannot sue for fraud if she has a breach of contract claim. The law is, in fact, to the contrary: a plaintiff may assert both claims, although she may be required to elect between her remedies prior to obtaining a verdict. *See First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 256-57, 507 S.E.2d 56, 65 (1998) (discussing principle that a person who was fraudulently induced to purchase property may elect between contract or tort remedy).

Moreover, Jones contends that the form represented an attempt by H&S to cover up its fraud in the sales of the houses and, therefore, is evidence of H&S' intent to deceive. Our courts have acknowledged that evidence insufficient to establish a breach of contract may nonetheless be admissible to prove that a contract was fraudulently induced or that the defendant committed unfair and deceptive trade practices. *See McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 413, 466 S.E.2d 324, 333 (holding that evidence of the parties' negotiations was inadmissible on the breach of contract claim, but was admissible to prove fraud and unfair and deceptive trade practices), *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72-73 (1996). It was for the jury to decide what inferences should be drawn from the form and what weight to give it. Accordingly, we reverse the trial judge's entry of JNOV with respect to the jury's fraud verdict.

B. Damages for Fraud and Conversion

[3] The parties dispute the amount of damages that Jones is entitled to recover in the event of reinstatement of the fraud verdict. Jones

argues that she is entitled to recover both the damages awarded for conversion and the damages awarded for fraud, for a total amount of $61,815.00. H&S contends, however, that recovery of both verdicts would amount to a double recovery. We agree with H&S that Jones is not entitled to both awards, but rather must elect between them.

Jones' fraud claim arose out of H&S' failure to inform Jones that she would need to move the house outside the flood plain, while her conversion claim arose out of H&S' removal and eventual destruction of her house. H&S' fraudulent actions were separate and apart from its acts of conversion and required separate damages instructions. As to Jones' damages from the fraud, the trial court instructed the jury: "The plaintiff's actual damages are equal to the fair market value of the property . . . at the time that the plaintiff was defrauded." It then instructed the jury to award damages for conversion based on the "fair market value of the property at the time it was converted."[3]

It is apparent from these instructions that the jury's awards of $31,815.00 for fraud and $30,000.00 for conversion—each involving the fair market value of the same property at a different point in time—represent overlapping damages. Jones is not entitled to recover the fair market value of the house twice. The doctrine of the election of remedies prevents " 'double redress for a single wrong.' " *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 191, 437 S.E.2d 374, 379 (1993) (quoting *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954)). "[T]he underlying basis" of this rule is "the maxim which forbids that one shall be twice vexed for one and the same cause." *Smith*, 239 N.C. at 368, 79 S.E.2d at 885. Accordingly, we hold that Jones is entitled to judgment in the amount of $31,815.00, the greater of the two overlapping amounts awarded by the jury.

C. Unfair and Deceptive Trade Practices

[4] Jones next assigns error to the trial court's entry of a directed verdict on Jones' UDTP claim. The basis of that ruling is not entirely clear since the trial judge stated that he was dismissing only Jones' independently pled UDTP claim, but would still allow Jones to argue, during the punitive damages stage of the bifurcated trial, that UDTP principles should apply in the calculation of damages, if the jury found liability on the basis of either fraud or conversion.

3. The parties have not challenged these instructions on appeal, and therefore we express no opinion regarding whether they were a correct articulation of the measure of damages for each claim.

The court's ruling appears to reflect a misunderstanding of the nature of a claim brought under N.C. Gen. Stat. § 75-1.1 (2007). A UDTP claim is a substantive claim, the remedy for which is treble damages. N.C. Gen. Stat. § 75-16 (2007). Chapter 75 is not a remedial scheme for other substantive claims. *See Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) (noting that N.C. Gen. Stat. § 75-1.1 "was enacted to establish an effective private cause of action for aggrieved consumers in this State" (internal quotation marks omitted)). As this Court has stated, "[p]laintiffs can assert both UDTP violations under N.C. Gen. Stat. § 75-1.1 and fraud based on the same conduct or transaction. Successful plaintiffs may receive punitive damages or be awarded treble damages, but may not have both." *Compton v. Kirby*, 157 N.C. App. 1, 21, 577 S.E.2d 905, 918 (2003). The approach followed by the trial court in this case of dismissing the UDTP claim, but allowing counsel to argue it in connection with punitive damages, was in error.

With respect to the trial court's dismissal of Jones' substantive UDTP claim, we need not address Jones' argument that the conversion verdict was sufficient to meet the requirements of that claim because it is well-settled that "a plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred." *Bhatti*, 328 N.C. at 243, 400 S.E.2d at 442. *See also Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975) ("Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts . . . ."); *State Props., LLC v. Ray*, 155 N.C. App. 65, 74, 574 S.E.2d 180, 187 (2002) ("[A] finding of fraud constitutes a violation of N.C. Gen. Stat. § 75-1.1."), *disc. review denied*, 356 N.C. 694, 577 S.E.2d 889 (2003). "Once the plaintiff has proven fraud, thereby establishing prima facie a violation of Chapter 75, the burden shifts to the defendant to prove that he is exempt from the provisions of N.C.G.S. § 75-1.1." *Bhatti*, 328 N.C. at 243-44, 400 S.E.2d at 442 (internal citation omitted).

Because the jury found in favor of Jones on the fraud claim and because H&S has made no attempt to argue that it is exempt from the provisions of N.C. Gen. Stat. § 75-1.1, Jones is entitled, under *Bhatti*, to recover treble damages under N.C. Gen. Stat. § 75-16. We, therefore, remand for entry of judgment in favor of Jones on her UDTP claim and for trebling of her fraud damages. Upon remand, the trial court must also consider whether to exercise its discretion to award attorney's fees under N.C. Gen. Stat. § 75-16.1. *Bhatti*, 328 N.C. at 247, 400 S.E.2d at 444.

D. Punitive Damages

[5] Jones also challenges the trial court's decision, rendered between the two phases of the bifurcated trial, to grant H&S' "motion for judgment as a matter of law" as to her claim for punitive damages.[4] In *Lindsey v. Boddie-Noell Enters., Inc.*, 147 N.C. App. 166, 177, 555 S.E.2d 369, 377 (2001), *disc. review denied in part*, 355 N.C. 213, 559 S.E.2d 803, *rev'd in part on other grounds*, 355 N.C. 487, 562 S.E.2d 420 (2002) (per curiam), this Court stated that "where an appellate court concludes that a case that was bifurcated at trial pursuant to N.C. Gen. Stat. § 1D-30 must be remanded for a new trial on the issues relating to punitive damages, we believe the statute requires that the case must also be remanded for a new trial on the issues of liability for compensatory damages and the amount of compensatory damages, so that the same jury may try all of these issues."

In other words, under the bifurcated procedure set forth in § 1D-30, this Court cannot direct a trial court, on remand, to conduct only the punitive damages phase of the bifurcated trial. Rather, any remand requires that the trial court start over at the beginning with the liability phase before proceeding to the punitive damages phase.

We need not address Jones' argument that the motion for "judgment as a matter of law" as to punitive damages was inappropriately timed. *But see Gibbs v. Mayo*, 162 N.C. App. 549, 558-59, 591 S.E.2d 905, 911-12 (holding that trial court did not err in dismissing plaintiff's punitive damages claim *ex mero motu* at the close of plaintiff's evidence during the liability phase when "[t]he only new evidence plaintiffs may have presented in the punitive damages stage was the amount of punitive damages they sought"), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 45 (2004). Confronted with the prospect of foregoing her favorable jury verdicts and retrying her substantive claims, Jones has stated on appeal that she elects to receive treble damages pursuant to her UDTP claim rather than punitive damages. *See Compton*, 157 N.C. App. at 21, 577 S.E.2d at 918 ("Successful plaintiffs may receive punitive damages or be awarded treble damages [under Chapter 75], but may not have both."). Jones has, therefore, rendered the punitive damages issue moot.

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4. "Judgment as a matter of law" is a phrase used in the federal court system. *See* Fed.R. Civ. P. 50(a). Counsel did not, in his oral motion, cite a rule under the North Carolina Rules of Civil Procedure pursuant to which his motion was made. We presume the motion was, in essence, one for a directed verdict.

Conclusion

In summary, we conclude that, under the test set forth by the Supreme Court in *Dogwood*, any appellate rules violations committed by Jones are insufficient to warrant dismissal of the appeal or the imposition of any other sanctions beyond refusal to review the pre-judgment interest assignment of error. As to the merits of this appeal, the trial court's grant of H&S' JNOV motion is reversed, and the jury verdict finding H&S liable for fraud in the amount of $31,815.00 is reinstated. The trial court's entry of judgment as to Jones' UDTP claim is reversed, and this case is remanded for entry of judgment in the amount of $95,445.00 and for the court to consider, in its discretion, whether to award attorney's fees under N.C. Gen. Stat. § 75-16.1.

We note that H&S, in its brief, requested that this Court remand this case for a new trial. H&S did not, however, cross-assign error to the trial court's denial of its motion for a new trial. Further, H&S has not cited any authority at all supporting the grant of a new trial to H&S. Without the citation of any authority, we decline to grant H&S a new trial.

Affirmed in part, reversed in part, and remanded.

Judge JACKSON concurs.

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

TYSON, Judge concurring in the result in part and dissenting in part.

We all agree that plaintiff violated multiple nonjurisdictional requirements of the North Carolina Rules of Appellate Procedure. *Dogwood Dev. & Mgmt Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008) (hereinafter referred to as *Dogwood I*). The majority's opinion erroneously disregards prior precedents that impose sanctions for similar violations to those at bar and concludes plaintiff's violations do not rise to the level of "gross" or "substantial" warranting *any type* of sanction. *See Dogwood Dev. & Mgmt Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 119, 665 S.E.2d 493, 499 (2008) (hereinafter referred to as *Dogwood II*); *Odom v. Clark*, 192 N.C. App. 190, 193, —— S.E.2d ——, —— (2008). Nevertheless, as addressed later in this opinion, the majority dismisses one of plain-

tiff's assignments of error and declines to invoke Appellate Rule 2, despite finding no other sanctions are warranted for plaintiff's multiple rule violations. This holding shows the inherent inequity and danger in non-uniform application of the Rules of Appellate Procedure for all appellate litigants.

Plaintiff's assignments of error numbered 1 through 5 fail to state any legal basis upon which error is assigned in violation of Rule 10(c)(1) and subjects plaintiff's broadside and ineffective assignments of error to dismissal. Consistent with our Supreme Court's mandate in this case and *Dogwood I*, in order to achieve the appropriate disposition of this appeal, this Court should invoke Appellate Rule 2 and proceed to the merits of plaintiff's appeal. 362 N.C. at 196, 657 S.E.2d at 364.

On the merits, the majority's opinion: (1) reverses the lower court's entry of judgment in favor of defendant on plaintiff's fraud and unfair and deceptive trade practices ("UDTP") claims and (2) remands this case to the trial court for (a) entry of judgment in the amount of $31,815.00 on plaintiff's fraud claim; (b) entry of an award of treble damages; and (c) in the trial court's discretion, entry of an award for attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 (2005).

I agree that the trial court erroneously granted defendant's motion for judgment notwithstanding the verdict regarding plaintiff's fraud claim and failed to reach plaintiff's UDTP claim on that basis. The trial court correctly addressed plaintiff's UDTP claim based upon defendant's act of conversion. Here, plaintiff's trial was bifurcated pursuant to N.C. Gen. Stat. § 1D-30 (2005). The trial court deprived plaintiff and defendant of the opportunity to submit their evidence to the jury regarding punitive damages and defendant was also denied the opportunity to show it was exempt from the UDTP statute or its non-applicability to these facts. The only appropriate remedy for plaintiff and defendant is to remand this case for a new trial on plaintiff's fraud claim and after the jury's verdict is returned, plaintiff's UDTP claim should be re-considered by the trial court. I respectfully concur in the result in part and dissent in part.

I. Application of the Rules of Appellate Procedure

In *Dogwood I*, our Supreme Court re-stated that the " 'rules of procedure are necessary . . . in order to enable the courts properly to discharge their dut[y]' of resolving disputes. It necessarily follows that failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the

administration of justice." 362 N.C. at 193, 657 S.E.2d at 362 (quoting *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930)) (alteration original). Non-uniformity and inequality in the application of the Rules of Appellate Procedure and the imposition of sanctions thereunder may raise Federal and State constitutional Due Process and Equal Protection issues and strikes at the heart of fair, impartial, and equal administration of justice to all parties. *See State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007) ("Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority. . . . [I]f the Rules are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly."). "It is, therefore, necessary to have rules of procedure and to adhere to them, and if we relax them in favor of one, we might as well abolish them." *Bradshaw v. Stansberry*, 164 N.C. 356, 357, 79 S.E. 302, 302 (1913).

With these principles in mind, our Supreme Court set forth a framework in which North Carolina appellate courts analyze violations of the appellate rules. *Dogwood I*, 362 N.C. at 193, 657 S.E.2d at 362. The 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." *Id.* at 194, 657 S.E.2d at 363. Here, defendant's noncompliance falls within the third category.

> [W]hen a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

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

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 non-

compliance with nonjurisdictional requirements of the rules does not rise to the level of a 'substantial failure' or 'gross violation.' " *Id.* at 199, 657 S.E.2d at 366.

> In 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. The court may also consider the number of rules violated, although in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review.

Id. at 200, 657 S.E.2d at 366-67 (internal citations omitted).

Here, plaintiff failed to: (1) state any legal basis upon which error is assigned in her assignments of error numbered 1 through 5; (2) cite any record page reference to the order she appealed from; and (3) argue or present any reasons or authority in support of her assignments of error numbered 6 and 7.

Plaintiff's assignments of error numbered 6 and 7 are specifically abandoned in plaintiff's brief. Plaintiff states, "Based upon the stated requested relief, the appellant chooses to abandon and forego these last assignments of error." These assignments of error are abandoned and dismissed. *See* N.C.R. App. P. 28(b)(6) (2005) ("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.").

Initially, this Court must determine whether plaintiff substantially failed to comply with or grossly violated Appellate Rule 10(c)(1). N.C.R. App. P. 10(c)(1) (2005) provides, in relevant part:

> Each assignment of error . . . shall state plainly, concisely and without argumentation *the legal basis upon which error is assigned*. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.

(Emphasis supplied).

> There is a presumption in favor of the regularity and validity of judgments in the lower court, and the burden is upon appellant

> to show prejudicial error. Without preserved, assigned, and argued assignments of error that identify the pages where the alleged error occurred, the appellate court can only rummage through the record to ascertain error.

Dogwood II, 192 N.C. App. at 118, 665 S.E.2d at 497 (internal citations and quotations omitted).

Plaintiff submitted the following assignments of error to this Court:

> 1. Did the Trial Court, . . . err in . . . granting, . . . the defendant's prior Motion for Directed Verdict on the plaintiff's unfair and deceptive trade practice claim . . . ?
>
> 2. . . . [D]id the Trial Court err:
>
> (a) by . . . granting defendant's Motion for Judgment Notwithstanding the Verdict as to the fraud claim and award of compensatory damages; and
>
> (b) by considering and allowing the defendant's Motion to dismiss plaintiff's claim for punitive damages for conversion;
>
> 3. Did the trial court err by refusing to make specific findings of fact and conclusions of law in its Judgment and order addressing the rulings on the defendant's Motion for Directed Verdict, Judgment Notwithstanding the verdict, and plaintiff's request to find the conversion by the defendants of plaintiff's house to be an unfair and deceptive trade practice after plaintiff had specifically moved, pursuant to North Carolina Rules of Civil Procedure 52(a)(2) and N.C. General Statute § 1D-50, for such findings?
>
> 4. Did the Trial Court err by refusing to find the conversion of plaintiff's house by the defendant, in commerce, to be an unfair and deceptive trade practice, as a matter of law, and refusing to award treble damages and consider plaintiff's request for attorney's fees?
>
> 5. Did the Trial Court err by refusing to award, in its judgment, interest from the date of the conversion of the plaintiff's house?

Plaintiff's assignments of error numbered 1 through 5 fail to state any legal basis upon which error is assigned. N.C.R. App. P. 10(c)(1); *see also Walker v. Walker*, 174 N.C. App. 778, 781, 624 S.E.2d 639, 641 (2005) ("[A]ssignments of error that are . . . broad, vague, and unspecific . . . . do not comply with the North Carolina Rules of Appellate

Procedure." (Citation and quotation omitted)), *disc. rev. denied*, 360 N.C. 491, 632 S.E.2d 774 (2006), *cert. denied*, 362 N.C. 92, 657 S.E.2d 31 (2007). Plaintiff's assignments of error "[are] designed to allow counsel to argue anything and everything they desire in their brief on appeal" because "like a hoopskirt—[it] covers everything and touches nothing." *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005) (quoting *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970)).

In applying *Dogwood I* and *Hart* to other remanded cases, this Court has repeatedly held that an appellant's failure to state any legal basis upon which error is assigned constitutes a "substantial failure" or "gross violation" of the North Carolina Rules of Appellate Procedure. *See Dogwood II*, 192 N.C. App. at 120, 665 S.E.2d at 499; *Odom*, 192 N.C. App. at 198, —— S.E.2d at ——. Under these precedents, this Court must decide what sanction should be imposed under Appellate Rule 34.

Rule 34 of the North Carolina Rules of Appellate Procedure provides:

> 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) (2005). Our Supreme Court has stated, "[i]n most situations when a party substantially or grossly violates nonjurisdictional requirements of the rules, the appellate court should impose a sanction other than dismissal and review the merits of the appeal." *Dogwood I*, 362 N.C. at 200, 657 S.E.2d at 366. However, our Supreme Court held that dismissal of an appeal remains appropriate for the most egregious instances of nonjurisdictional default. *See id.* ("Noncompliance with the rules falls along a continuum, and the sanction imposed should reflect the gravity of the violation. We clarify, however, that only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate." (Citation omitted)).

North Carolina appellate courts have historically and consistently dismissed "broadside" and "ineffective" assignments of error

because the appellant failed to bring forward or present any arguable issue for the appellate court to consider and failed to overcome the presumption of correctness in the trial court's judgment. *See Kirby*, 276 N.C. at 131, 171 S.E.2d at 422; *see also London v. London*, 271 N.C. 568, 570, 157 S.E.2d 90, 92 (1967) ("There is a presumption in favor of the regularity and validity of judgments in the lower court, and the burden is upon appellant to show prejudicial error." (Citation omitted)). "Our Supreme Court's opinion in [*Dogwood I*] did not validate hoopskirt assignments of error nor alter the Supreme Court's precedent in *Kirby* or this Court's numerous precedents dismissing broadside and ineffective[] assignments of error." *Dogwood II*, 192 N.C. App. at 124, 665 S.E.2d at 500-01 (citations and quotations omitted). In *Hart* and *Dogwood I*, our Supreme Court neither cited nor discussed *Kirby* and the long line of cases following it. *See Kirby*, 276 N.C. at 131, 171 S.E.2d at 422; *State v. Patterson*, 185 N.C. App. 67, 72-73, 648 S.E.2d 250, 254 (2007), *disc. rev. denied*, 362 N.C. 242, 660 S.E.2d 538 (2008); *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 602, 632 S.E.2d 563, 574 (2006), *disc. rev. denied*, 361 N.C. 350, 644 S.E.2d 5 (2007); *State v. Mullinax*, 180 N.C. App. 439, 443, 637 S.E.2d 294, 297 (2006); *Wetchin*, 167 N.C. App. at 759, 606 S.E.2d at 409.

Although appellate jurisdiction is invoked through the filing and serving of a proper notice of appeal, if an appellant fails to bring forward or present any arguable issue for the appellate court to consider, the presumption of correctness in the trial court's judgment remains and the appeal should be dismissed. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 ("It is not the role of the appellate courts . . . to create an appeal for an appellant."), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). The majority's opinion's attempt to liken plaintiff's assignments of error on these issues to the single issue in an appeal from entry of summary judgment is neither persuasive nor validated by any precedent.

In accordance with our Supreme Court's mandate and following the analysis of *Dogwood I*, *Hart*, and the aforementioned authority, plaintiff's "broadside" and "ineffective" assignments of error subjects her appeal to dismissal. To be consistent and follow our precedents for imposing sanctions for similar "substantial" and "gross" rule violations, plaintiff's attorney should pay double the printing costs of this appeal. *See Dogwood II*, 192 N.C. App. at 121, 665 S.E.2d at 500 ("Defendant's 'broadside and ineffective[]' assignments of error numbered 1 and 2 should be dismissed. In the exercise of our discretion,

defendant's attorney is ordered to pay double the printing costs of this appeal."); *Odom*, 192 N.C. App. at 197, —— S.E.2d at —— (imposing double printing costs against the defendant's attorney for violations of Rule 10(c)(1)).

B. Appellate Rule 2

Once it is determined that a party's "substantial" or "gross" noncompliance with nonjurisdictional requirements warrants dismissal of the appeal, this Court must decide whether to invoke Appellate Rule 2 to attempt to review the merits of plaintiff's appeal. *Dogwood I*, 362 N.C. at 201, 657 S.E.2d at 367. Appellate Rule 2 states:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2 (2005). The decision whether to invoke Appellate Rule 2 is purely discretionary and is to be limited to "rare occasions" in which a fundamental purpose of the appellate rules is at stake. *Dogwood I*, 362 N.C. at 201, 657 S.E.2d at 367. Although Appellate Rule 2 has been applied more frequently in criminal cases where severe punishments were imposed, it has also been invoked in a limited number of civil cases. *Hart*, 361 N.C. at 316, 644 S.E.2d at 205 (citing *Potter v. Homestead Pres. Ass'n*, 330 N.C. 569, 576, 412 S.E.2d 1, 5 (1992); *Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 500, 238 S.E.2d 607, 609 (1977)).

Similar to the issue at bar, in *Elec. Serv., Inc.*, our Supreme Court invoked Appellate Rule 2 to review the merits of the appeal after the defendant failed to except to the trial court's "crucial" finding of fact upon which he based his entire appeal. 293 N.C. at 500, 238 S.E.2d at 609. The Court stated "[w]hile we note the defendant's 'broadside' exception fails to comply strictly with the requirement of Rule 10(b)(2) of the Rules of Appellate Procedure, appropriate disposition of this appeal requires that we nevertheless proceed to the merits of the case." *Id.* (citing N.C.R. App. P. 2; *City of King's Mountain v. Cline*, 281 N.C. 269, 188 S.E.2d 284 (1972)). Our Supreme Court's decision to invoke Appellate Rule 2 was based primarily upon the necessity to reverse this Court's erroneous decision. *Id.*

Here, after a thorough review of the record, transcript, and briefs, the "appropriate disposition of this appeal requires that we . . . proceed to the merits of the case." *Id.* Appellate Rule 2 should be invoked to suspend the Appellate rules in order "[t]o prevent manifest injustice to" plaintiff. N.C.R. App. P. 2.

III. Issues

Plaintiff argues the trial court erred by: (1) granting defendant's motion for directed verdict regarding plaintiff's UDTP claim; (2) granting defendant's motion for judgment notwithstanding the verdict regarding plaintiff's fraud claim and dismissing plaintiff's punitive damages claims; (3) refusing to enter specific findings of fact and conclusions of law in its judgment addressing its rulings as specifically requested by counsel pursuant to Rule 52; (4) refusing to find that the conversion of plaintiff's house by defendant constituted an UDTP; and (5) by refusing to award interest from the date of the conversion of plaintiff's house. As noted above, plaintiff specifically abandoned her assignments of error numbered 6 and 7 in her appellate brief.

IV. Directed Verdict

Plaintiff argues the trial court erred by granting defendant's motion for a directed verdict regarding her UDTP claim.

At the close of all the evidence, during the charge conference, the trial court revisited defendant's motion for directed verdict on the issue of UDTP and stated "[t]he court is of the opinion that after consideration of all the evidence in this case, that the conduct alleged by the plaintiff against the defendant [sic] does not constitute a practice that so offends the public policy by being either unethical, unscrupulous or injurious that it poses a threat to the consuming public." The trial court initially granted defendant's motion for directed verdict regarding plaintiff's UDTP claim. However, after further exchange with plaintiff's counsel, the trial court agreed to revisit this issue after the jury's verdicts were returned:

> [Plaintiff's counsel]: . . . So if we come back and the jury comes back and finds either/or, let's say fraud or conversion, will the court then consider the legal remedies allowable under the UDTP finding to address whether that is an unfair trade practice?
>
> [Trial court]: The court will consider those at that time.

This ruling was entirely proper because unless and until the jury returned a verdict holding defendant liable and awarded plaintiff compensatory damages, there were no "damages" for the trial court to consider trebling under the UDTP statute. Any alleged error in the trial court's initial decision to grant defendant's motion for directed verdict regarding plaintiff's UDTP claim was harmless and cured when the trial court announced that it would reserve its ruling on this claim until after the jury's verdicts were returned. This assignment of error is without merit.

V. Actionable Fraud

A. Judgment Notwithstanding the Verdict

Plaintiff argues the trial court erred by granting defendant's motion for judgment notwithstanding the verdict regarding plaintiff's fraud claim. I agree.

1. Standard of Review

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

Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 368-69, 329 S.E.2d 333, 337-38 (1985) (internal citations omitted). "On appeal our standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury." *Whitaker v. Akers*, 137 N.C. App. 274, 277, 527 S.E.2d 721, 724 (internal citations and quotations omitted), *disc. rev. denied*, 352 N.C. 157, 544 S.E.2d 245 (2000). A judgment notwithstanding the verdict may also be entered when the trial court determines a fatal flaw exists in the proceedings or a jury's verdict to prevent a judgment from being entered thereon. *See generally* N.C. Gen. Stat. § 1A-1, Rule 50 (2005).

2. Analysis

Here, the trial court considered the sufficiency of the evidence to submit plaintiff's fraud claim to the jury on two separate occasions. The trial court first denied defendant's motion for directed verdict on the issue of fraud at the close of plaintiff's evidence and expressly stated, "[t]here is . . . some evidence from which at this point the court concludes that the jury may be able to infer that the concealment of this material fact might be fraudulent[.]" At the close of all the evidence, the trial court again denied defendant's renewed motion for directed verdict on all of plaintiff's claims.

Our Supreme Court has stated:

> When plaintiffs have made out a case sufficient to go to the jury . . . it is error for the trial court to enter judgment for the defendant notwithstanding the verdict. *Since plaintiffs' evidence was sufficient to withstand defendant's earlier motion for a directed verdict, the trial court's entry of judgment notwithstanding the verdict was improper* . . . .

Bryant, 313 N.C. at 378, 329 S.E.2d at 342 (citations omitted) (emphasis supplied). The issues before us center upon whether plaintiff's evidence was sufficient to withstand defendant's earlier motions for a directed verdict on the question of actionable fraud.

> While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 568-69, 374 S.E.2d 385, 391 (1988) (citation omitted) (original emphasis omitted), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989).

North Carolina courts are extremely hesitant to allow plaintiffs to attempt to manufacture a tort action and allege UDTP out of facts that are properly alleged as a breach of contract claim. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 346 (4th Cir. 1998) ("In this, plaintiffs' case is remarkably like *Strum v. Exxon Company*, where we found a similar 'attempt by the plaintiff to manufacture a tort dispute out of what is, at bottom, a simple breach of

contract claim' to be 'inconsistent both with North Carolina law and sound commercial practice.' " (Quoting *Strum v. Exxon Company*, 15 F.3d 327, 329 (4th Cir. 1994)). This hesitancy remains even if defendant's actions in breaching the contract were intentional. *See Watson Elec. Constr. Co. v. Summit Cos.*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003) ("[I]t is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under [N.C. Gen. Stat.] § 75-1.1." (Citation and quotation omitted)).

Here, undisputed evidence tends to show that defendant had knowledge of the specific contractual requirement that the salvaged houses had to be relocated to property situated outside the 100 year flood plain. During the trial, defendant conceded multiple times that he had failed to disclose this requirement to plaintiff. Defendant further testified that "there [was] nowhere in the documents" or "public access" where plaintiff could have discovered this requirement. Defendant assisted plaintiff in making arrangements for the relocation of her house and recommended she contact defendant Turner to provide this service for her.

Additional evidence presented at trial tended to show that after defendant was notified by the County that it had breached the terms of the demolition contract, defendant sent a responsive letter dated 10 September 2002, which falsely stated "it had written contracts with each of the three owners of the houses that required the houses to be relocated outside the 100-Year Flood Plain." At that time, defendant did not have written contracts with any of the three owners, including plaintiff. On 13 September 2002, over a month after plaintiff had purchased and relocated her house to Swan Point Road, defendant requested she sign a document stating, "I understand the house has to be relocated outside the 100 year flood plain." Plaintiff testified she complied with this request based upon defendant's assertion that they needed her to sign the document "for [their] records." As a result of defendant's non-compliance with the mandatory provisions of the demolition contract, plaintiff's house was further relocated to Bayboro, North Carolina, without her knowledge or permission, where it was subsequently demolished. Viewed in the light most favorable to plaintiff and giving her the benefit of every reasonable inference that may legitimately be drawn from the evidence, plaintiff presented sufficient evidence to submit her fraud claim to the jury. *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337-38.

"Since [plaintiff's] evidence was sufficient to withstand defendant's earlier motion for a directed verdict, the trial court's entry of judgment notwithstanding the verdict was improper[.]" *Id.* at 378, 329 S.E.2d at 342. I concur with the majority's holding that the trial court's order granting defendant's motion for judgment notwithstanding the verdict regarding plaintiff's fraud claim should be reversed.

B. UDTP

Because the trial court erroneously granted defendant's motion for judgment notwithstanding the verdict, it never revisited the issue of plaintiff's UDTP claim on the basis of defendant's fraudulent conduct. Our Supreme Court has repeatedly held that proof of fraud necessarily constitutes a *prima facie* violation of the prohibition against unfair and deceptive acts pursuant to N.C. Gen. Stat. § 75-1.1. *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975); *see also Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) ("The case law applying Chapter 75 holds that a plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred."); *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470, 343 S.E.2d 174, 180 (1986) ("It is axiomatic that proof of fraud itself necessarily constitutes a violation of the prohibition against unfair or deceptive trade practices." (Citation omitted)). "Once the plaintiff has proven fraud, thereby establishing *prima facie* a violation of Chapter 75, *the burden shifts to the defendant to prove that he is exempt from the provisions of [N.C. Gen. Stat.] § 75-1.1*." *Bhatti*, 328 N.C. at 243, 400 S.E.2d at 442 (citations omitted) (emphasis supplied).

Here, when the jury returned a verdict in favor of plaintiff for fraud and awarded compensatory damages in the amount of $31,815.00, a *prima facie* violation of N.C. Gen. Stat. § 75-1.1 was established. *Id. Bhatti* requires that the burden of proof shift to defendant "to prove that he is exempt from the provisions of [N.C. Gen. Stat.] § 75-1.1." *Id.* Because the trial court erroneously granted defendant's motion for judgment notwithstanding the verdict on plaintiff's fraud claim, it did not consider plaintiff's UDTP claim pertaining to defendant's fraudulent conduct. Since defendant was the prevailing party at trial on this issue, defendant was never afforded the opportunity to prove it was exempt from N.C. Gen. Stat. § 75-1.1. The majority's opinion erroneously holds that it may impose treble damages by appellate fiat, denies defendant the opportunity to prove it was exempt from the UDTP statute, and usurps the trial court's duty to rule on plaintiff's UDTP claim on remand.

C. Punitive Damages

The majority's opinion's holding on this issue is also erroneous because plaintiff asserted a claim for punitive damages based upon defendant's fraudulent conduct. Defendant's motion for a bifurcated trial was granted.

"Our appellate courts have clearly held that actions may assert both [N.C. Gen. Stat. §] 75-1.1 violations and fraud based on the same conduct or transaction and that *plaintiffs in such actions may receive punitive damages or be awarded treble damages, but may not have both*." *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 426, 344 S.E.2d 297, 301 (citations omitted) (emphasis supplied), *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986); *see also Compton v. Kirby*, 157 N.C. App. 1, 21, 577 S.E.2d 905, 918 (2003) ("Plaintiffs can assert both UDTP violations under N.C. Gen. Stat. § 75-1.1 and fraud based on the same conduct or transaction. Successful plaintiffs may receive punitive damages or be awarded treble damages, but may not have both." (Citation omitted)). In *Mapp*, this Court addressed the question of when a plaintiff in such cases must elect the basis of recovery and stated: "We hold that it would be manifestly unfair to require plaintiffs in such cases to elect before the jury has answered the issues *and* the trial court has determined whether to treble the compensatory damages found by the jury and that such election should be allowed in the judgment." 81 N.C. App. at 427, 344 S.E.2d at 301 (emphasis original).

Here, the trial court erroneously: (1) granted defendant's motion for judgment notwithstanding the verdict regarding plaintiff's fraud claim; (2) dismissed the jury before it was allowed to consider plaintiff's claim for punitive damages; and (3) dismissed plaintiff's punitive damages claim. After the jury returned a verdict in favor of plaintiff for fraud and awarded compensatory damages, the trial court should have proceeded to Phase II, where plaintiff and defendant would have been afforded the opportunity to submit evidence to the jury relating to punitive damages.

N.C. Gen. Stat. § 1D-30 (2005) provides:

> Upon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, *shall be tried separately* from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admis-

> sible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. *The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages.*

(Emphasis supplied). The trial court's erroneous actions caused plaintiff to be denied the opportunity for the jury to consider punitive damages on her fraud claim and for plaintiff to elect the basis of her recovery after "the jury ha[d] answered the issues *and* the trial court ha[d] determined whether to treble the compensatory damages found by the jury[.]" *Mapp*, 81 N.C. App. at 427, 344 S.E.2d at 301 (emphasis original).

Based upon N.C. Gen. Stat. § 1D-30 and prior governing precedent, the only remedy for the trial court's erroneous granting of the judgment notwithstanding the verdict is to remand plaintiff's fraud claim for a new trial. This Court has stated:

> where an appellate court concludes that a case that was bifurcated at trial pursuant to N.C. Gen. Stat. § 1D-30 must be remanded for a new trial on the issues relating to punitive damages, we believe the statute requires that the case must also be remanded for a new trial on the issues of liability for compensatory damages and the amount of compensatory damages, so that *the same jury may try all of these issues.*

Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 177, 555 S.E.2d 369, 377 (2001) (emphasis supplied), *disc. rev. denied in part*, 355 N.C. 213, 559 S.E.2d 803, *per curium rev'd on other grounds*, 355 N.C. 487, 562 S.E.2d 420, *reh'g denied*, 355 N.C. 759, 565 S.E.2d 668 (2002). Further, prior to the codification of N.C. Gen. Stat. § 1D-30, our Supreme Court stated:

> A bifurcated trial is particularly appropriate where separate submission of issues avoids confusion and promotes a logical presentation to the jury and where resolution of the separated issue will potentially dispose of the entire case. *The better practice is to retain the same jury for all issues, even though it may hear the issues at different times.*

In re Will of Hester, 320 N.C. 738, 743, 360 S.E.2d 801, 804 (internal citations omitted) (emphasis supplied), *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987).

The trial court's erroneous granting of defendant's motion for judgment notwithstanding the verdict and dismissal of the jury before it heard evidence relating to punitive damages requires us to remand this case to the trial court for a new trial "on the issues of liability for compensatory damages and the amount of compensatory damages" regarding plaintiff's fraud claim. *Lindsey*, 147 N.C. App. at 177, 555 S.E.2d at 377; N.C. Gen. Stat. § 1D-30. *If* the jury returns a verdict in favor of plaintiff and awards compensatory damages for fraud, the trial court shall then proceed to Phase II and the parties shall be allowed to submit evidence to the jury regarding punitive damages. After the jury renders its decision on punitive damages, the trial court shall consider whether defendant's actions constituted UDTP as a matter of law. If defendant fails to prove that it is exempt from the provisions of N.C. Gen. Stat. § 75-1.1, plaintiff must then elect the basis of her recovery between punitive and treble damages. *Bhatti*, 328 N.C. at 243, 400 S.E.2d at 442. The trial court's order granting defendant's motion for judgment notwithstanding the verdict regarding plaintiff's fraud claim is properly reversed and, under controlling case law and statutes, this case must be remanded for a new trial. *Lindsey*, 147 N.C. App. at 177, 555 S.E.2d at 377; N.C. Gen. Stat. § 1D-30.

D. Erroneous Jury Instructions

Because our statutes and case law require this Court to award plaintiff a new trial on her fraud claim, I note in passing that the trial court erroneously instructed the jury on the measure of actual damages, if any, to be awarded for fraud. Here, the trial court stated:

> The second issue reads: What amount is the plaintiff entitled to recover for damages for the fraud of the defendant.
>
> If you have answered the first issue yes in favor of the plaintiff, the plaintiff is entitled to recover nominal damages, even without proof of actual damages. Nominal damages consist of some trivial amount, such as one dollar, in recognition of the technical damages incurred by the plaintiff. The plaintiff may be entitled to recover actual damages.
>
> On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove by the greater weight of the evidence the amount of actual damages caused by the fraud of the defendant. *The plaintiff's actual damages are equal to the fair market*

> *value of the property at the time it was—at the time that the plaintiff was defrauded. . . .*

(Emphasis supplied). It appears the trial court was reading the North Carolina Pattern Jury Instruction 810.60 regarding "property damage" in relation to plaintiff's fraud claim. However, plaintiff never alleged that her property had been damaged by defendant's fraudulent conduct.

At trial, plaintiff testified that had she been informed of the contractual provision requiring the relocation of the house to property situated outside the 100 year flood plain, she would not have purchased the house from defendant. Plaintiff explained that the lot on Swan Point Road, where she originally moved the house, was "family" property and she did not possess the money required to buy a separate lot.

This Court has stated:

> It is elementary that a plaintiff in a fraud suit has a right to recover an amount in damages which will put him in the same position as if the fraud had not been practiced on him. *The measure of damages for fraud in the inducement of a contract is the difference between the value of what was received and the value of what was promised, and is potentially trebled by N.C.G.S. § 75-16.* It is the jury's responsibility to determine the exact amount of damages from the evidence presented at trial.

Godfrey v. Res-Care, Inc., 165 N.C. App. 68, 79, 598 S.E.2d 396, 404 (internal citations and quotations omitted) (emphasis supplied), *disc. rev. denied*, 359 N.C. 67, 604 S.E.2d 310 (2004).

The majority's opinion correctly states, "[defendant's] fraudulent actions were separate and apart from its acts of conversion and required separate damages instructions." Here, the undisputed evidence shows plaintiff purchased the house from defendant for the price of $500.00 and paid defendant Turner the sum of $4,300.00 to relocate the house to Swan Point Road. A jury verdict in the amount of $4,800.00 would place plaintiff "in the same position as if the fraud had not been practiced on [her]." *Id.* Although the record does not disclose the precise reason the trial court granted defendant's motion for judgment notwithstanding the verdict, it is possible the trial court used defendant's motion to correct its instructional error on fraud in the inducement.

VI. Conversion

A. Punitive Damages

Plaintiff further argues the trial court erred by granting defendant's motion to dismiss plaintiff's claims for punitive damages regarding her conversion claim.

Our Supreme Court has stated, "where sufficient facts are alleged to make out an identifiable tort, . . . the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." *Newton v. Insurance Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976) (citation omitted).

> The aggravated conduct which supports an award for punitive damages when an identifiable tort is alleged may be established by allegations of behavior extrinsic to the tort itself . . . [o]r it may be established by allegations sufficient to allege a tort where that tort, *by its very nature*, encompasses any of the elements of aggravation.

Id. (internal citation omitted) (emphasis original). In *Morrow v. Kings Department Stores*, this Court held that "[c]onversion is not a tort which by its very nature contains elements of aggravation." 57 N.C. App. 13, 24, 290 S.E.2d 732, 739 (citation omitted), *disc. rev. denied*, 306 N.C. 352, 294 S.E.2d 210 (1982). Plaintiff's complaint is devoid of any allegations of aggravating circumstances regarding defendant's act of conversion. *Id.* This assignment of error is without merit. The trial court's ruling on this issue is properly affirmed.

B. UDTP

Plaintiff also argues the trial court erred by refusing to find the conversion of plaintiff's house to be an UDTP as a matter of law. I disagree.

"Under [N.C. Gen. Stat. §] 75-1.1, an act or practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. An act or practice is deceptive if it has the capacity or tendency to deceive." *Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C. App. 237, 247, 446 S.E.2d 100, 106 (1994) (internal citations and quotations omitted). Here, plaintiff contends the act of defendant moving her house from Swan Point Road to a lot located in Bayboro, North Carolina and its subsequent destruction are sufficient to establish a claim for UDTP. However, with regards to her conversion claim, plaintiff failed to allege any aggravating factors or offer

any evidence tending to establish defendant engaged in an act or practice that meets the definition of unfair or deceptive as defined by our appellate courts. *Id.* Plaintiff failed to show the trial court erred in concluding that defendant's act of conversion did not constitute an UDTP. This assignment of error is without merit. The trial court's ruling on this issue is properly affirmed.

C. Interest

The majority's opinion inexplicably and erroneously holds that plaintiff's assignments of error violate nonjurisdictional requirements of the Appellate Rules, but finds these violations are not a "substantial failure" or "gross violation" of the appellate rules to warrant sanctions. Nonetheless, it essentially dismisses plaintiff's assignment of error relating to the accrual of interest. In its mandate to this Court, our Supreme Court remanded this case to us "for reconsideration in light of *Dogwood Development & Management Co. v. White Oak Transport Co.*, 362 N.C. [191], [657] S.E.2d [361] (2008) (303A07), and *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007)." *Jones v. Harrelson and Smith Contr'rs, LLC*, 362 N.C. 226, 227, 657 S.E.2d 352, 353 (2008). In light of that mandate and consistent with *Dogwood I*, I address this assignment of error.

Plaintiff argues the trial court erred by refusing to award interest from the date of the conversion of plaintiff's house. I disagree.

Plaintiff's argument in support of this contention misconstrues the holding in *Lake Mary Ltd. Partnership v. Johnston*, 145 N.C. App. 525, 551 S.E.2d 546, *disc. rev. denied*, 354 N.C. 363, 557 S.E.2d 546 (2001). In *Lake Mary*, the trial court entered a directed verdict against the defendant for conversion, breach of contract, and unfair and deceptive practices arising from the retention of tenant rent checks. *Id.* at 530, 551 S.E.2d at 551. On appeal, the defendant argued, *inter alia*, that the trial court erred by "awarding interest from the date each check was 'converted,' as opposed to the date the complaint was filed." *Id.* at 532, 551 S.E.2d at 552.

This Court emphasized that the trial court had entered directed verdict against the defendant for breach of contract and conversion and stated "the breach occurred on the dates that [the defendant] deposited or converted each check." *Id.* at 532-33, 551 S.E.2d at 552. This Court held that pursuant to N.C. Gen. Stat. § 24-5(a), the trial court properly awarded interest "from the date of breach." *Id.* at 532, 551 S.E.2d at 552; *see also* N.C. Gen. Stat. § 24-5(a) (2005) ("In an

action for breach of contract . . . the amount awarded on the contract bears interest from the date of breach.").

Here, plaintiff alleged claims for fraud, negligent misrepresentation, conversion, and UDTP. Plaintiff failed to allege any claim for breach of contract. N.C. Gen. Stat. § 24-5(b) (2005) provides that "[i]n an action *other than contract*, 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." (Emphasis supplied). This assignment of error is without merit. The trial court's ruling on the date of accrual of interest on plaintiff's conversion claim is properly affirmed.

VII. Conclusion

Plaintiff's failure to state any legal basis for her assignments of error numbered 1 through 5 constitutes a "substantial failure" or "gross violation" of the North Carolina Rules of Appellate Procedure. *Dogwood II*, 192 N.C. App. at 121, 665 S.E.2d at 499; *Odom*, 192 N.C. App. at 198, ––– S.E.2d at –––. Plaintiff's "broadside" and "ineffective" assignments of error numbered 1 through 5 subjects her appeal to dismissal. *Kirby*, 276 N.C. at 131, 171 S.E.2d at 422. Pursuant to our Supreme Court's mandate remanding this case and in the exercise of this Court's discretion, Appellate Rule 2 should be invoked to review the merits of plaintiff's appeal.

Viewed in the light most favorable to plaintiff and giving her the benefit of every reasonable inference that may legitimately be drawn from the evidence, sufficient evidence was presented to submit plaintiff's fraud claim to the jury. *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337-38. We all agree the trial court erroneously granted defendant's motion for judgment notwithstanding the verdict regarding plaintiff's fraud claim.

The trial court also erroneously dismissed the jury prior to its consideration of plaintiff's punitive damages claim based on defendant's fraudulent actions. *See Newton*, 291 N.C. at 112, 229 S.E.2d at 301 ("[F]raud is . . . one of the elements of aggravation which will permit punitive damages to be awarded." (Citation omitted)).

The only remedy available to plaintiff under N.C. Gen. Stat. § 1D-30 and prior precedents is to remand this case to the trial court for a new trial "on the issues of liability for compensatory damages and the amount of compensatory damages" regarding plaintiff's fraud claim. *Lindsey*, 147 N.C. App. at 177, 555 S.E.2d at 377. If the jury

returns a verdict for plaintiff and awards punitive damages, the trial court must conduct a hearing to allow defendant to show it is exempt from the UDTP statute. If the trial court rules as a matter of law that defendant's conduct constituted UDTP, plaintiff must then elect the basis of her recovery. Plaintiff must choose between the punitive damages verdict or the trebling of the jury's award of compensatory damages.

The trial court's entry of judgment on plaintiff's conversion claim should remain undisturbed and its ruling on the accrual of interest is properly affirmed. I vote to affirm in part, reverse in part, and remand for a new trial on plaintiff's fraud and UDTP claims. I respectfully dissent.

JANE P. HELM, PLAINTIFF v. APPALACHIAN STATE UNIVERSITY, AND KENNETH E. PEACOCK, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF APPALACHIAN STATE UNIVERSITY, DEFENDANTS

No. COA08-30

(Filed 16 December 2008)

1. Public Officers and Employees— whistleblower action—termination of university employee—refusal to purchase real estate option

The trial court properly dismissed a whistleblower action for failure to state a claim where plaintiff was terminated as a university vice chancellor for business after she objected to the purchase of a real estate option from a friend of a trustee when she knew that the university would not have the funds to purchase the property within the option period. Although plaintiff argued that the chancellor's pursuit of the option constituted misappropriation of state resources, an option has an inherent, intrinsic value distinct from the purchaser's ability to exercise it. Plaintiff did not sufficiently allege that she was engaged in a protected activity under the Act.

2. Constitutional Law— objection to real estate option purchase—transaction not misconduct—adequate state remedy

It was not necessary to consider plaintiff's constitutional claims arising from her dismissal as a university vice chancellor after she refused to buy an option on real estate for the univer-

sity. It was decided elsewhere in the opinion that the option had value and that defendants' pursuit of the option did not constitute misconduct; moreover, the Whistleblower Act creates an adequate state remedy and precludes plaintiff's claims.

3. Immunity— sovereign—whistleblower claim against university—12(b)(6) dismissal

The issue of whether a whistleblower claim against a state university was properly dismissed on sovereign immunity was not reached where it had already been determined that the trial court properly dismissed plaintiff's complaint for failure to state a claim under Rule 12(b)(6).

4. Pleadings— motion to amend—not properly made

The trial court did not err by denying plaintiff the opportunity to amend her complaint where she did not make a proper motion to amend, either orally or in writing. Moreover, assuming a motion to amend, plaintiff did not show any abuse of discretion in its denial.

5. Civil Procedure— 12(b)(6) dismissal—no findings or conclusions

The trial court did not err by refusing to make findings and conclusions explaining a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6).

Judge CALABRIA concurring in part and dissenting in part.

Appeal by plaintiff from order entered 28 August 2007 by Judge Mark E. Powell in Watauga County Superior Court. Heard in the Court of Appeals 20 August 2008.

Patterson Harkavy, LLP, by Jessica E. Leaven and Burton Craige, for plaintiff.

Attorney General Roy Cooper, by Assistant Attorney Generals John P. Scherer II and Kimberly D. Potter, for defendants.

ELMORE, Judge.

Jane P. Helm (plaintiff) asserted claims against her former employer, Appalachian State University (defendant Appalachian State or the university) and its Chancellor, Kenneth E. Peacock (defendant Peacock), in his official capacity for violations of the North Carolina Whistleblower Act (the Whistleblower Act) and the

North Carolina Constitution. She appeals from a 28 August 2007 order dismissing her complaint with prejudice. For the reasons stated below, we affirm the order of the trial court.

I. Background

Plaintiff alleged the following facts in her 31 May 2007 complaint: Plaintiff became the Vice Chancellor for Business Affairs at defendant Appalachian State in 1994. Her duties included managing the university's business and financial affairs, including oversight of some campus construction. During her tenure at the university, plaintiff performed her professional duties in a satisfactory manner and her employment file contained no complaints or disciplinary actions. In 2004, defendant Peacock became plaintiff's supervisor.

In early May 2006, defendant Peacock asked plaintiff to issue a non-refundable $10,000.00 check from the University Endowment Fund to Michael Cash "to obtain an option to purchase real property for $475,000 that could be exercised on or before September 1, 2006." In 2005, Cash had approached James M. Deal, Jr., who was a member of the university's Board of Trustees, to ask if the university was interested in purchasing a 10.889 acre property in Boone (the property). Cash and Deal had a prior business or personal relationship and, in May 2006, either Cash or Deal informed defendant Peacock that "Cash was in need of funds to pay his mortgage on this real property."

Plaintiff informed defendant Peacock that "there were insufficient funds for [the university] to exercise the option on or before September 1, 2006." Defendant Peacock instructed "plaintiff to pay Mr. Cash the $10,000 because Mr. Cash needed the money to pay his mortgage." Plaintiff again refused, explaining that the University Endowment Fund did not have sufficient funds to exercise the option and that "paying $10,000 to Mr. Cash under these circumstances would be an inappropriate use of state funds."

Plaintiff then complained to a university attorney, David Larry, and expressed her belief that "paying $10,000 to Mr. Cash would be an inappropriate use of state funds because the $10,000 would be used to pay his mortgage and there were insufficient funds to exercise the option." Larry responded, "Do you think he would ever admit he said that in a court of law?"

Defendant Peacock's Chief of Staff, Lorin Baumhover, later informed plaintiff that "he could obtain the $10,000 for the option from the Provost if plaintiff could come up with the $465,000 to exer-

cise the option." Plaintiff maintained that there were insufficient funds to exercise the option and that sufficient funds would not be available by September 2006, when the option expired. "Mr. Baumhover responded that defendant Peacock wanted this to happen. He also stated that Mr. Cash had sent several e-mails saying he needed to make his mortgage payment."

On 2 June 2006, the Endowment Committee of the university's Board of Trustees approved the purchase of the option for $10,000.00; plaintiff abstained from the vote. That day, defendant Peacock requested a meeting with plaintiff, during which he told her that he had been "uncomfortable" working with her for a year and a half. Plaintiff expressed surprise, noting that defendant Peacock had made only positive comments to her about her work performance. Plaintiff told defendant Peacock that she wished to continue working and asked how she could improve their working relationship; defendant Peacock replied that there was nothing that she could do and that she was "not a team player." Defendant Peacock then asked plaintiff for her resignation effective 30 June 2006. Plaintiff responded that she was "devastated" and concerned that she would not be able to find another comparable job because she was sixty-three years old. "Defendant Peacock explained that this decision had nothing to do with her work performance, which was outstanding."

Plaintiff chose early retirement over resignation and informed defendant Peacock via the following e-mail:

> I have decided to retire rather than resign from [the university]. Because of the time required to process both the state retirement and social security payments, I am requesting that I be placed on paid administrative leave for three months. It is critical that I have benefits during this time.

Defendant Peacock replied by e-mail that he would honor her request for continued benefits and prepare her administrative leave paperwork. Plaintiff maintains that she "was forcibly separated, not voluntarily retired," from the university and that her termination has caused her to suffer ongoing financial hardship. She also alleged in her complaint that the university purchased the option from Cash for $10,000.00 but did not exercise the option.

In her complaint, plaintiff alleged that defendants violated the Whistleblower Act by unlawfully retaliating against her, discriminating against her, and discharging her because she reported defendant Peacock's inappropriate conduct to Larry and refused to "carry out

defendant Peacock's directive to pay Mr. Cash $10,000," which she characterized as an "inappropriate use of state funds." Plaintiff also asserted violations of her rights to equal protection, due process, and freedom of speech under sections 14, 19, and 32 of Article I of the North Carolina Constitution.

Defendants then moved to dismiss for failure to state a claim. Plaintiff voluntarily dismissed her due process claim pursuant to Rule 41(a)(1). After a hearing, the trial court dismissed the remainder of plaintiff's claims by written order. Plaintiff now appeals, alleging (1) that her complaint stated valid claims for relief under the Whistleblower Act and the North Carolina Constitution, (2) that defendants are not entitled to sovereign immunity, (3) that the trial court should have permitted plaintiff to amend her complaint under Rule 15(a), (4) that the trial court should have granted plaintiff's request that the dismissal be entered without prejudice, and (5) that the trial court erred by refusing to make findings of fact and conclusions of law.

II. Failure to State a Claim

[1] We review the trial court's dismissal for failure to state a claim by inquiring

> 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. Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. Dismissal is proper, however, when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the 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 the plaintiff's claim.

Newberne v. Department of Crime Control & Pub. Safety, 359 N.C. 782, 784-85, 618 S.E.2d 201, 203-04 (2005) (quotations and citations omitted).

A. Whistleblower Act

Plaintiff first argues that she sufficiently pled all three elements of her Whistleblower Act claim. We disagree. The Whistleblower Act provides, in relevant part:

> (a) No . . . State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee . . . because the State employee . . . reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.
>
> (a1) No State employee shall retaliate against another State employee because the employee . . . reports or is about to report, verbally or in writing, any activity described in G.S. 126-84.
>
> (b) No . . . State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee . . . because the State employee has refused to carry out a directive which in fact constitutes a violation of State or federal law, rule or regulation or poses a substantial and specific danger to the public health and safety.
>
> (b1) No State employee shall retaliate against another State employee because the employee has refused to carry out a directive which may constitute a violation of State or federal law, rule or regulation, or poses a substantial and specific danger to the public health and safety.

N.C. Gen. Stat. § 126-85(a)-(b1) (2007). Section 126-84 states as policy that State employees are encouraged to report "evidence of activity by a State agency or State employee constituting . . . [a] violation of State or federal law, rule or regulation[,] . . . [m]isappropriation of State resources[,] or . . . [g]ross mismanagement, a gross waste of monies, or gross abuse of authority." N.C. Gen. Stat. § 126-84(a)(1), (3), (5) (2007).

Accordingly, to sufficiently state a claim under the Whistleblower Act, a plaintiff must allege the following elements: "(1) that the plaintiff engaged in a *protected activity*, (2) that the defendant took adverse action against the plaintiff in his or her employment, *and* (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff." *Newberne*, 359 N.C. at 788, 618 S.E.2d at 206 (emphases added).

Plaintiff has not sufficiently alleged that she was engaged in any "protected activity" within the meaning of the statute. She avers that because there were insufficient funds *to exercise* the option and that no sufficient funds would become available before the option

expired, "the option was essentially worthless" to the university. Plaintiff argues that defendant Peacock's pursuit of this "worthless option" constituted a misappropriation of state resources, gross mismanagement, gross abuse of authority, and a violation of the exclusive emoluments clause of the North Carolina Constitution.[1] Because the option was not "worthless," we cannot agree that its pursuit or purchase constituted a protected activity under the Whistleblower Act.

> An option . . . is a contract by which the owner of property agrees with another that he shall have the right to purchase the same at a fixed price within a certain time. It is in legal effect an offer to sell, coupled with an agreement, to hold the offer open for acceptance for the time specified, *such agreement being supported by a valuable consideration*, or, at common law, being under seal, so that it constitutes a binding and irrevocable contract to sell if the other party shall elect to purchase within the time specified.

Kidd v. Early, 289 N.C. 343, 360, 222 S.E.2d 392, 404 (1976) (quotations and citations omitted; alteration in original; emphasis added). This Court has previously explained that "[a]n option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value." *Rainbow Props. v. Wilkinson*, 147 N.C. App. 520, 523, 556 S.E.2d 11, 13-14 (2001) (quoting *Texaco, Inc. v. Creel*, 310 N.C. 695, 706, 314 S.E.2d 506, 512 (1984)) (additional citation omitted). In other words, an option to buy or sell land has an inherent, intrinsic value distinct from its purchaser's ability to exercise it: the purchaser may specifically enforce a sale upon the terms of the option. That the university may or may not have had the funds in the future to exercise the option at the time it was purchased did not affect the option's value. Likewise, that plaintiff did not anticipate acquiring sufficient funds to exercise the option before its expiration also did not affect the option's value.

Accordingly, we hold that plaintiff's complaint failed to sufficiently allege that she was engaged in a "protected activity" and, therefore, the trial court properly dismissed her Whistleblower Act action for failure to state a claim.

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1. The exclusive emoluments clause states, "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. Art. I, § 32.

B. Constitutional Claims

[2] Plaintiff next argues that she adequately alleged a free speech claim, an equal protection claim, and an exclusive emoluments claim, and that she has no adequate state remedy for these violations. Again, we disagree. The basis for all of these claims is that defendant Peacock's pursuit of the option constituted some form of misconduct or that the option's purchase was a sham transaction. Having determined that the option had value and that therefore defendant Peacock's pursuit of the option did not constitute misconduct, mismanagement, or misappropriation, it is unnecessary to further address plaintiff's constitutional claims based on that alleged misdeed.

Moreover, we note that the Whistleblower Act creates an adequate remedy under state law and thereby precludes any action at common law, including defendant's constitutional claims. "[O]fficials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been violated." *Corum v. University of North Carolina*, 330 N.C. 761, 783-84, 413 S.E.2d 276, 290 (1992) (citations omitted).

In *Swain v. Elfland*, we held that the plaintiff's contested case hearing for wrongful termination under N.C. Gen. Stat. §§ 126-34.1 and 126-86 was an adequate state remedy that precluded a direct cause of action for violation of the plaintiff's right to free speech under the North Carolina Constitution. 145 N.C. App. 383, 391, 550 S.E.2d 530, 536 (2001). Here, plaintiff's claim under N.C. Gen. Stat. § 126-86 is an adequate state law remedy for her alleged free speech violation. Similarly, her claim of misappropriation of state funds is expressly covered by N.C. Gen. Stat. § 126-84 and thus is an adequate state law remedy for her exclusive emoluments clause claim. Finally, because her equal protection claim alleges discrimination based on activities protected by the Whistleblower Act, it is also precluded.

II. Sovereign Immunity

[3] Plaintiff next argues that to the extent that the trial court based dismissal upon the ground of sovereign immunity, the dismissal was in error. The order does not specify the grounds upon which it based its dismissal; it states only that the "matter came on for hearing on August 13, 2007, on Defendants' Motion to Dismiss pursuant to N.C.R. Civ. P. Rule 12(b)(1), 12(b)(2), and 12(b)(6)," and that "[h]aving considered the complaint," the trial court granted defendants' motion and dismissed plaintiff's complaint with prejudice. Having already

determined that the trial court properly dismissed plaintiff's complaint for failure to state a claim under Rule 12(b)(6) of our Rules of Civil Procedure, it is unnecessary to determine whether the trial court had a second valid ground on which to base its dismissal. *See Estate of Fennell v. Stephenson*, 354 N.C. 327, 334, 554 S.E.2d 629, 633 (2001) (stating that the trial court erred by dismissing the plaintiff's complaint on the ground of sovereign immunity, but nevertheless upholding the dismissal on other grounds).

III. Motion to Amend

[4] Plaintiff next argues that the trial court erred by denying her "the opportunity to amend her complaint to address any allegations which were omitted." During the 13 August 2007 motion to dismiss hearing, plaintiff's counsel made the following request to amend the complaint:

> [I]f for some reason [plaintiff's claims] were going to be dismissed, Plaintiff would ask that we be allowed the opportunity to allege more specific items if the Court felt that is necessary. Plaintiff does not feel that is the case, because she has specifically alleged violations of her rights to free speech, her fundamental rights under the protection clause, as well as her rights of the emoluments provision.

After plaintiff learned that the trial court planned to dismiss the complaint, she drafted a written notice to amend in the form of a letter to Judge Powell. The 15 August 2007 letter states, in relevant part:

> As requested during oral argument on the Motion, plaintiff again asks for the opportunity to amend the complaint under Rule 15(a) prior to entry of dismissal. Plaintiff respectfully requests your grounds for the dismissal so that plaintiff may address the deficiencies in her complaint "without prejudice" and specifying that a new action based on the same claims may be commenced within one year after the dismissal as permitted by Rule 41(b) of the North Carolina Rules of Civil Procedure.

Rule 15(a) provides:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. *Otherwise a party*

> *may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2007) (emphasis added). Plaintiff argues that the trial court disregarded her motion to amend and improperly ruled on defendant's motion to dismiss before ruling on plaintiff's oral and written requests to amend. Defendant counters that plaintiff never made an oral motion to amend or filed a proper written motion to amend.

" 'A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse.' " *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486, 593 S.E.2d 595, 601 (2004) (quoting *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)). In *Hunter*, we held that the "plaintiffs' oral offer that they 'would be willing to amend the petition and get more facts' at the Rule 12(b)(6) hearing is not a sufficient request for leave to amend." *Id.* at 486, 593 S.E.2d at 602. The ambiguous language of plaintiff's alleged oral motion is similar to the rejected language in *Hunter*. Here, plaintiff's alleged request to amend was contingent upon the trial court's dismissal of the case and did not adequately inform either the trial court or defendants that she truly intended to amend her complaint; instead, as in *Hunter*, she indicated a mere willingness to amend her complaint. Moreover, the trial judge did not comment on plaintiff's alleged request before adjourning the hearing. The alleged request came in the middle of a four-page monologue by plaintiff's counsel and it does not appear from the transcript that counsel expected any response from the trial judge. She did not raise the issue again during the hearing. *See Wood v. Wood*, 297 N.C. 1, 6-7, 252 S.E.2d 799, 802 (1979) (holding that the trial court erred by denying the plaintiff's oral motion to vacate a divorce judgment on the basis of the oral motion's failure to meet the requirements of motion practice because "the judge was fully aware of the basis for plaintiff's motion" and so indicated during the hearing).

Plaintiff's written motion to amend must conform with Rule 7(b), which states, in relevant part:

> (1) An application to the court for an order shall be by motion which . . . shall be made in writing, shall state with par-

> ticularity the grounds therefor, and shall set forth the relief or order sought.
>
> (2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

N.C. Gen. Stat. § 1A-1, Rule 7(b)(1)-(2) (2007). Rule 10 sets out the form requirements for pleadings, which also apply to motions as stated in Rule 7(b)(2). Rule 10 states, in relevant part:

> (a) *Caption; names of parties.*—Every pleading shall contain a caption setting forth the division of the court in which the action is filed, the title of the action, and a designation as in Rule 7(a). . . . [I]t is sufficient to state the name of the first party on each side with an appropriate indication of other parties.
>
> (b) *Paragraphs; separate statement.*—All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings.

N.C. Gen. Stat. § 1A-1, Rule 10(a)-(b) (2007).

Here, plaintiff's alleged motion took the form of a letter addressed to the trial judge and copied to defense counsel. The letter contains no designation, caption, or numbered paragraphs. According to the record on appeal, the letter was not filed with the trial court. Plaintiff's alleged written motion did not meet the requirements of a written motion to amend under Rules 7 and 10 of our Rules of Civil Procedure and there is no evidence in the record on appeal to indicate that the trial judge interpreted the letter as a written motion to amend. Accordingly, we hold that the trial court did not err by failing to address plaintiff's alleged motions to amend. Even assuming *arguendo* that the letter could be construed as a motion to amend, plaintiff has failed to show any abuse of discretion in the trial court's decision to not allow the amendment.

V. Dismissal Without Prejudice

Plaintiff next argues that the trial court erred by failing to grant plaintiff's request that the dismissal be entered without prejudice. Again, plaintiff bases her argument on her 15 August 2007 letter to the

trial judge. As explained above, the trial judge did not rule on this communication because it was not a motion. Accordingly, we overrule this assignment of error.

VI. Findings of Fact and Conclusions of Law

[5] Plaintiff last argues that the trial court erred by refusing to make findings of fact and conclusions of law explaining its dismissal. Plaintiff requested that the court make findings of fact and conclusions of law as provided in Rule 52(a). Rule 52(a) provides, in relevant part, that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b)." N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2007). However, we have held that "Rule 52(a)(2) does not apply to the trial court's dismissal of plaintiff's *quantum meruit* claim since it was based only on plaintiff's pleadings under Rule 12(b)(6)." *G & S Business Services v. Fast Fare, Inc.*, 94 N.C. App. 483, 490, 380 S.E.2d 792, 796 (1989) (citation omitted). In *G & S Business Services*, the trial court refused the plaintiff's request for findings of fact and conclusions of law explaining the court's dismissal of its *quantum meruit* claim. *Id.* at 489, 380 S.E.2d at 796. Here, as in *G & S Business Services*, the trial court's decision was based only on plaintiff's pleadings under Rule 12(b)(6). Furthermore, because we review a dismissal for failure to state a claim *de novo*, we would have disregarded any findings of fact or conclusions of law drafted by the trial court. Accordingly, we hold that the trial court did not err by declining to draft findings of fact and conclusions of law explaining its decision to dismiss plaintiff's complaint pursuant to Rule 12(b)(6).

Affirmed.

Judge TYSON concurs.

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

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

I concur with the majority affirming the trial court's dismissal of plaintiff's constitutional claims. However, since plaintiff's allegations were sufficient to support her claim that she was engaged in a protected activity as defined by the Whistleblower Act, N.C. Gen. Stat.

§ 126-85 (2007), I respectfully dissent from the majority's holding that plaintiff failed to state a claim under the Act.

The majority holds that as a matter of law the formation of an option contract, or the receipt of any value at all, precludes a finding that defendant Peacock violated state law, committed fraud, misappropriated state resources, committed gross mismanagement or a gross waste of public funds. The majority further holds that the reporting of this conduct by plaintiff is not protected conduct under the Whistleblower Act. Such a bright line rule is contrary, not only to the intent, but also to the plain language of the statute, and therefore I disagree.

Plaintiff alleges that she was asked to resign for two reasons: she refused to issue a check for $10,000 from the University Endowment Fund to purchase an option that she knew the University had insufficient funds to exercise, and she reported her objection to the transaction to David Larry, a University attorney.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007) the trial court must deny a motion to dismiss a claim if, "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Newberne v. Dep't of Crime Control and Public Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997). "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). I would hold that plaintiff's allegations, if accepted as true, are sufficient to show a violation of state law, a misappropriation of state resources, or a gross waste of public funds, and therefore the trial court erred by granting defendants' motion.

Misappropriation of State Resources/Waste of Public Funds

I agree with the majority opinion that an option contract has value as a matter of law because it confers a legally enforceable right to the holder of the option. However, contrary to the holding of the majority, a contract with a corresponding value to the state does not, by law, make that contract an appropriate use of state resources and public funds. If we were presented facts showing that the administrator had asked plaintiff to purchase a hammer from Michael Cash

for $10,000, instead of an option contract to purchase land, the majority's reasoning would still mandate a dismissal of plaintiff's Whistleblower Act claim. In exchange for the State's $10,000, the State would receive the legally enforceable right to possess a hammer that has some value, even though spending $10,000 for a hammer would be a misappropriation of state resources and a gross waste of public funds.

If, as plaintiff alleges, the University was financially incapable of exercising the option contract before it expired, it would not hold any more value to the University than would the hammer in the above hypothetical. While the enforceable right to purchase does have theoretical value, its value under the facts as alleged by the plaintiff does not justify the expenditure of $10,000 from the public funds. Furthermore, the majority reasoning is at odds with the intent of the Whistleblower Act, and in effect prohibits its application to employees reporting the mismanagement of public funds.

The Endowment Fund

N.C. Gen. Stat. § 116-36 authorizes the board of trustees of each constituent institution of the University of North Carolina, such as defendants, to establish an endowment fund for that institution "to the end that the institution may improve and increase its functions, may enlarge its areas of service, and may become more useful to a greater number of people." N.C. Gen. Stat. § 116-36(b) (2007). "The proceeds and funds described by this section are appropriated and may be used only as provided by this section." N.C. Gen. Stat. § 116-36(l) (2007).

In the instant case, plaintiff alleged the option could not improve or increase the functions of the University, could not enlarge its areas of service, or become useful to a greater number of people. If plaintiff's allegations are accepted as true, the option to purchase real property failed to fulfill the purposes for endowment fund appropriations and proceeds as outlined in N.C. Gen. Stat. § 116-36, and therefore violates state law.

Exclusive Emoluments Clause

N.C. Const. Art. I, § 32 ("Exclusive Emoluments Clause") states that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." In interpreting this clause our Supreme Court has said "[t]his constitutes a specific constitutional prohibition against

gifts of public money . . . ." *Brown v. Board of Comm'rs*, 223 N.C. 744, 746, 28 S.E.2d 104, 105 (1943).

Even if the University had the ability to exercise the option before the September 2006 expiration date, plaintiff alleged facts tending to show that this option contract was not in consideration of obtaining the option, but rather a gift to Michael Cash to enable him to pay his mortgage. If true, this too would be a misappropriation of state resources, and a violation of the Exclusive Emoluments Clause.

The present case is a factual dispute over whether the business transaction to obtain the option to purchase land was a violation of state law, a misappropriation of state resources or a gross waste of public funds. If plaintiff proves any one of these three, her refusal to take part in the transaction and her report of the transaction are protected activities. There is a genuine issue of material fact that should be resolved by the trier of fact. The trial court erred in granting defendants' motion to dismiss plaintiff's claims under the Whistleblower Act, and should be reversed.

Constitutional Claims

While I concur with the majority affirming the trial court's dismissal of plaintiff's constitutional claims, I disagree with the majority's reasoning that plaintiff's constitutional claims were properly dismissed because she failed to allege misconduct on the part of defendants and thus failed to allege that her constitutional rights were violated. I concur in the court's dismissal of those claims because the Whistleblower Act creates an adequate remedy under state law and thus precludes any action at common law.

The common law creates a direct cause of action against the State for violation of state constitutional rights when there is no other adequate remedy under state law. *Corum v. Univ. of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). The plaintiff in *Corum* alleged that he was dismissed from his position as Dean of Learning Resources at Appalachian State University for criticizing the University's decision to relocate an historic collection of books and artifacts in such a way that it would separate the artifacts from the rest of the collection. *Id.* at 767-69, 413 S.E.2d at 281-82. In reversing the trial court's entry of summary judgment for the defendants, our Supreme Court held that the plaintiff had offered sufficient evidence to support a direct claim under N.C. Const. Art. I, § 14, the free

speech clause of this State's Declaration of Rights. *Id.* at 786, 413 S.E.2d at 292.

However, in *Swain v. Elfland*, 145 N.C. App. 383, 550 S.E.2d 530 (2001), this Court held that the plaintiff's contested case hearing for wrongful termination under N.C. Gen. Stat. § 126-34.1 and N.C. Gen. Stat. § 126-86 in the Office of Administrative Hearings, was an adequate state remedy that precluded a direct cause of action for violation of the plaintiff's right to free speech under the North Carolina Constitution. *Swain*, 145 N.C. App. at 391, 550 S.E.2d at 536. The plaintiff in *Swain*, like the plaintiff in the present case, cited *Corum* to support his cause of action. *Id. Corum*, however, predates the Whistleblower Act. The Court did not require the plaintiff's success in the administrative hearing nor did the Court require that the state remedy provide the same or more relief than that available under a direct constitutional claim. *Id.*

The present case is similar in its facts to both *Swain* and *Corum*. Indeed, were it not for the advent of the Whistleblower Act, I would conclude that plaintiff has adequately stated a direct claim under both the free speech and Exclusive Emoluments clauses of this State's Constitution. However, the Whistleblower Act, which the majority concludes does not apply to plaintiff, does constitute an adequate statutory remedy for the alleged violation of plaintiff's constitutional rights.

Plaintiff's claim under N.C. Gen. Stat. § 126-86 adequately addresses each of her constitutional claims. Because the report of state agency misconduct is a protected activity under N.C. Gen. Stat. § 126-85(a), there is an adequate statutory remedy for the violation of her free speech rights. Since reporting of misappropriations of state funds is expressly protected by N.C. Gen. Stat. § 126-84, the Whistleblower claim is an adequate state law remedy for her claim under the Exclusive Emoluments Clause. Finally, because the only form of discrimination alleged by the plaintiff is that based on her engagement in activities protected under N.C. Gen. Stat. § 126-85, her equal protection claim is also precluded by this remedy.

For this reason, the trial court's dismissal of all Helm's constitutional claims should be affirmed.

Conclusion

I concur with the majority in affirming the court's dismissal of plaintiff's constitutional claims, but only because the claims are

precluded by the adequate state law remedy provided by the Whistleblower Act, not because they are without substantive merit. I respectfully dissent from the majority's holding that plaintiff failed to state a claim under the Whistleblower Act. Therefore, I would reverse the trial court's judgment and remand the case for further consideration of plaintiff's claims under the Whistleblower Act.

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

No. COA07-1572

(Filed 16 December 2008)

Contracts— tobacco settlement—payments to trust—payments for end of price support—offset

The trial court erred by denying summary judgment for Philip Morris and granting summary judgment for Maryland and Pennsylvania in an action arising from the settlement of litigation over the health effects of tobacco. Maryland and Pennsylvania had sought an order requiring that the tobacco companies be required to continue payments to a trust for the benefit of their farmers after the tobacco companies stopped making those payments under an offset provision in the trust when they began payments under a separate program to end the federal system of price supports and quotas for growing tobacco. Maryland and Pennsylvania had not participated in the price support system, and their farmers did not receive payments under the act ending the system.

Judge ELMORE dissenting.

Appeal by defendants from order entered 17 August 2007 by Judge Ben F. Tennille in Wake County Superior Court. Heard in the Court of Appeals 20 August 2008.

Attorney General of Maryland Douglas F. Gansler, by Special Assistant to the Attorney General Marlene Trestman and Assistant Attorneys General David S. Lapp and Craig A. Nielsen and Attorney General of Pennsylvania Thomas W.

Corbett, Jr., by Chief Deputy Attorney General Joel M. Ressler and Deputy Attorney General Tracey Dey Tubbs, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr. and Charles F. Marshall, III, for defendant-appellants.

Smith Moore, L.L.P., by Larry B. Sitton, Gregory G. Holland and Jonathan P. Heyl, for defendant-appellant Philip Morris USA Inc.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by William G. Scoggin, for amicus curiae North Carolina Citizens for Business and Industry.

TYSON, Judge.

Philip Morris USA, Inc., R.J. Reynolds Tobacco Company, and Lorillard Tobacco Company (collectively, "Settlors") appeal order entered, which denied their motion for summary judgment and granted the motion for summary judgment submitted by Maryland Certification Entity ("Maryland") and Pennsylvania Certification Entity ("Pennsylvania"). We reverse and remand.

I. Background

During litigation over the health effects of tobacco and its impact on state funding in the 1990s, Settlors and their predecessors-in-interest entered into a Master Settlement Agreement ("MSA") with various states and territories. *State v. Philip Morris USA, Inc.*, 359 N.C. 763, 765, 618 S.E.2d 219, 221 (2005) ("*Philip Morris I*"). One of the MSA's aims was to reduce the public's consumption of tobacco and its related health impacts on state budgets. The parties anticipated that reduced consumption "could cause tobacco growers and quota holders ('tobacco farmers') significant economic hardship." *Id.* To address this problem, the MSA required Settlors "to devise a plan for mitigating the MSA's potentially negative economic consequences." *Id.* The result of this plan was a Trust Agreement, signed by the parties, under which "Settlors pledged to spend approximately $5.15 billion on economic assistance to tobacco farmers in Grower States." *Id.* The tobacco grower states listed in the Trust Agreement were: Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia. *Id.*

The Trust Agreement provides economic assistance to tobacco farmers through annual distributions. Settlors fund the Trust through scheduled base payments and the Trustee distributes money in the Trust to the Grower States based on a percentage allocation schedule contained in the agreement. Each Grower State established a Certification Entity to receive these payments from the Trustee. Each Certification Entity distributes the funds as it deems appropriate to tobacco growers located within its state.

Schedule A of the Trust Agreement contains a Tax Offset Adjustment ("TOA") provision. The TOA provision "entitles Settlors to reduce their Annual Payment in response to the imposition of a 'Governmental Obligation,' which is a new or increased cigarette tax used in whole or in part for the benefit of tobacco farmers." *Id.* at 767, 618 S.E.2d at 222. Our Supreme Court, in *Philip Morris I* resolved the issue of whether the TOA is "contingent upon [an] actual payment of a Governmental Obligation." 359 N.C. at 771, 618 S.E.2d at 224.

That previous appeal arose after Congress's October 2004 passage of the Fair and Equitable Tobacco Reform Act of 2004 ("FETRA"). Pub. L. No. 108-357, 118 Stat. 1521 (codified as amended in scattered sections of 7 U.S.C.). FETRA "terminated the price control/quota system for U.S. tobacco beginning with the 2005 crop," and "direct[ed] the U.S. Secretary of Agriculture to offer tobacco farmers annual payments during fiscal years 2005 through 2014 in exchange for ending marketing quotas and related price supports." *Philip Morris I*, 359 N.C. at 769-70, 618 S.E.2d at 223.

All Grower States listed in the Trust Agreement, except Maryland and Pennsylvania, had participated in the federal system of quotas and price supports that FETRA eliminated. "As part of the transition to a free-market, FETRA directed the Secretary of Agriculture to offer payment contracts to tobacco quota holders and tobacco producers who had operated under the old system." *Neese v. Johanns*, 518 F.3d 215, 217 (4th Cir. 2008) (citing 7 U.S.C. §§ 518a, 518b). FETRA made $6.7 billion available to tobacco quota holders and $2.9 billion available to tobacco producers. *Id.* It is undisputed that the amounts Settlors are required to pay to tobacco farmers under FETRA exceeds the amounts they were due to pay under the Trust Agreement.

Maryland and Pennsylvania tobacco farmers received no FETRA payments because those states had chosen not to participate in the federal tobacco quota and price support system. Settlors paid all sums due under the Trust Agreement until they were required to

begin payments under FETRA. Maryland and Pennsylvania stopped receiving Trust benefits in 2005, after Settlors asserted they were no longer required to fund the Trust due to the TOA provision because of their payment obligations under FETRA. In the trial court, Maryland and Pennsylvania sought to require Settlors to continue making Trust payments for the benefit of their states' tobacco farmers, despite the TOA provision both states had agreed to in the Trust Agreement.

On 17 December 2004, Maryland and Pennsylvania moved the trial court to enter an order that either clarifies or modifies the Trust Agreement to ensure that Settlors will continue to make annual Trust payments for the benefit of Maryland and Pennsylvania tobacco growers. Maryland and Pennsylvania alleged that FETRA "raise[d] a situation not anticipated by the parties to the Trust Agreement—a federal Governmental Obligation that benefits tobacco farmers in some states but not others." Both parties moved for summary judgment. The trial court granted Maryland and Pennsylvania's motion for summary judgment and denied Settlors' motion. Settlors appeal.

II. Issue

Settlors argue the trial court erred when it disregarded the plain and unambiguous language of the Trust Agreement, denied their motion for summary judgment, and granted summary judgment for Maryland and Pennsylvania.

III. Standard of Review

In *Philip Morris I*, our Supreme Court stated: "this case is one of contract interpretation, and we review the trial court's conclusions of law *de novo*." 359 N.C. at 773, 618 S.E.2d at 225 (citing *Register v. White*, 358 N.C. 691, 693, 599 S.E.2d 549, 552 (2004)).

IV. Intention of the Parties

Settlors argue the trial court "misunderstood and misapplied the Supreme Court's decision" by failing to follow or apply the principles of contract interpretation set forth in established case law and by the Supreme Court in *Philip Morris I*. We agree.

Our Supreme Court stated in *Philip Morris I*:

> Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution. *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). "If the plain language of a contract is clear, the intention of the parties is inferred from the

words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("A consent judgment is a court-approved contract subject to the rules of contract interpretation."). Intent is derived not from a particular contractual term but from the contract as a whole. *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) (" 'Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.' ") (citation omitted).

359 N.C. at 773, 618 S.E.2d at 225 (footnote omitted).

The TOA provision contained in Schedule A of the Trust Agreement states:

> Except as expressly provided below, the *amounts to be paid by the Settlors* in each of the years 1999 through and including 2010 *shall also be reduced* upon the occurrence of *any change in a law or regulation or other governmental provision that leads to a new*, or an increase in an existing, federal or state excise tax on Cigarettes, or any other tax, fee, assessment, or *financial obligation of any kind . . .* imposed by any governmental authority ("Governmental Obligation") that is based on the purchase of tobacco or tobacco products or on production of Cigarettes or use of tobacco in the manufacture of Cigarettes at any stage of production or distribution or *that is imposed on the Settlors, to the extent that all or any portion of such Governmental Obligation is used to provide:*
>
> > (i) *direct payments to Tobacco Growers or Tobacco Quota Owners*;
> >
> > (ii) direct or indirect payments, grants or loans under any program designed in whole or in part for the benefit of Tobacco Growers, Tobacco Quota Owners or organizations representing Tobacco Growers or Tobacco Quota Owners . . .;
> >
> > (iii) payments, grants or loans to Grower States to administer programs designed in whole or in part to benefit Tobacco Growers, Tobacco Quota Owners or organizations representing Tobacco Growers or Tobacco Quota Owners . . .; or
> >
> > (iv) payments, grants or loans to any individual, organization, or Grower State for use in activities which are designed

> in whole or in part to obtain commitments from, or provide compensation to, Tobacco Growers or Tobacco Quota Owners to eliminate tobacco production.

(Emphasis supplied).

The Settlor's FETRA payments clearly result from a "Governmental Obligation" that "provide[s] . . . direct payments to Tobacco Growers or Tobacco Quota Owners . . . ." "FETRA payments to tobacco farmers between 2005 and 2014 will approach $9.6 billion." *Id.* at 769, 618 S.E.2d at 223. As noted earlier, it is undisputed that the amounts Settlors must pay under FETRA exceeds the amounts Settlors are to pay under the Trust Agreement. FETRA payments are a "Governmental Obligation" that fit squarely under the plain and unambiguous terms of the TOA provision contained in Schedule A of the Trust Agreement.

Our Supreme Court recognized in *Philip Morris I* that:

> Problems with the tobacco industry prompted members of Congress to introduce more than twenty tobacco buyout bills from 1997 through 2004. The parties to the Phase II Trust understood they had much to gain from legislation ending quotas and price controls. The Grower States recognized a federal buyout program would almost certainly offer larger payments to tobacco farmers than those available under the Trust.

359 N.C. at 769, 618 S.E.2d at 223. At the time the TOA provision was drafted and agreed to by all parties, attorneys for Settlors and Maryland and Pennsylvania knew or should have known that FETRA or a similar national tobacco grower payment plan was not only a possibility, but a probability. With the October 2004 passage of FETRA, a "Governmental Obligation" was created, which "provide[s] . . . direct payments to Tobacco Growers or Tobacco Quota Owners . . . ."

No language in the Trust Agreement suggests that an obligation imposed by the federal government would not offset Settlor's obligations under the Trust Agreement or trigger a state-by-state application of the TOA to some grower states and not others, as Maryland and Pennsylvania argue we should hold. If the parties to the Trust Agreement had intended for a state-by-state application of the TOA be based upon a "Governmental Obligation" imposed by the federal government, the agreement would have included or incorporated such a provision. *See Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40

S.E.2d 198, 201 (1946) ("It must be presumed the parties intended what the language used clearly expresses and the contract must be construed to mean what on its face it purports to mean." (Citations omitted)). None of the other Grower States have challenged the Settlors' right to offset the FETRA payments against those which would have otherwise been due under the Trust Agreement.

The parties to the agreement clearly understood the significance of offsets to one state and not another and included a state-by-state adjustment clause in the TOA provision. A state-by-state adjustment provision for any "Governmental Obligation" imposed by a "Grower State" is specifically stated:

> If the Governmental Obligation results from a law or regulation or other governmental provision adopted by a Grower State, or by a political subdivision within such Grower State, the amount that a Settlor may reduce its payment to the Trust in any one year shall not exceed the product of the amount the Settlor otherwise would have paid to the Trust in that year in the absence of the Tax Offset Adjustment multiplied by the allocation percentage for the pertinent Grower State set forth in Section 1.03.

Our Supreme Court stated in *Philip Morris I* that "[g]iven the degree of lawyerly scrutiny each word of the Trust Agreement doubtless underwent, we are not inclined to interpret the terms of Schedule A in a fashion that deviates from the meaning commonly ascribed to them." 359 N.C. at 775, 618 S.E.2d at 227. Our Supreme Court's prior interpretation of this provision and the plain language of the TOA provision contained in Schedule A compels us to hold that Settlors are entitled to offset amounts paid under FETRA against the amounts due to all Grower States under the Trust Agreement. *Id.*; *see Walton*, 342 N.C. at 881, 467 S.E.2d at 411 ("If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.").

Our adherence to the plain and unambiguous language of the TOA provision is not contrary to the express purpose of the trust. "The preamble announces the purpose of the Trust: '[T]o provide aid to Tobacco Growers and Tobacco Quota Owners and thereby to ameliorate potential adverse economic consequences to the Grower States.' " *Philip Morris I*, 359 N.C. at 766, 618 S.E.2d at 221.

In *Philip Morris I*, our Supreme Court stated, "we hold that Settlors must actually assume the burden of FETRA before being

relieved of this obligations to the Phase II Trust. In so doing, we adhere to the plain language of the Tax Offset Adjustment provision and the express purpose of the Trust." 359 N.C. at 781, 618 S.E.2d at 230. Settlors have now "assum[ed] the burden of FETRA" and are entitled to the benefit and relief they bargained for under the TOA provision. *Id.* FETRA is a "Governmental Obligation," which "provide[s] aid to Tobacco Growers and Tobacco Quota Owners[,]" and fits squarely under the plain and unambiguous meaning of the terms of the TOA provision. The trial court erred when it granted Maryland and Pennsylvania's motion for summary judgment and denied Settlors' motion for summary judgment.

V. Conclusion

Considering the agreement as a whole, FETRA payments are a "Governmental Obligation," which fit squarely under the plain and unambiguous terms of the TOA provision contained in Schedule A of the Trust Agreement. *Id.* The amounts that Settlors must pay under FETRA to tobacco producers and tobacco quota owners exceeds the amounts due to be paid under the Trust Agreement. The TOA provision expressly and unambiguously states that settlors are entitled to offset any "Governmental Obligation" paid under FETRA against the amounts due under the Trust Agreement. The trial court's order is reversed and this case is remanded for entry of judgment in favor of Settlors.

Reversed and Remanded.

Judge CALABRIA concurs.

Judge ELMORE dissents by separate opinion.

ELMORE, Judge, dissenting.

For the following reasons, I respectfully dissent from the majority opinion reversing the Business Court.

This Court is bound by any decision issued by the Supreme Court. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Even when we question a defunct holding or line of reasoning—which is not the case here—we cannot overrule the Supreme Court. *See Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (vacating a Court of Appeals decision after observing "that the panel of Judges of the Court of Appeals to which this case was assigned has

acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court"). Here, we have been asked to interpret a contract that our Supreme Court has already interpreted. Accordingly, I believe that we, like the Business Court, are bound by the Supreme Court's interpretation of that contract.

Settlors argue that the Business Court "misunderstood and misapplied the Supreme Court's decision" by failing to follow or apply the principles of contract interpretation set forth by the Supreme Court in *Philip Morris I*. "Instead of applying the Trust's plain language, the Business Court went immediately to the 'purpose' of the Trust and held that purpose would be defeated if growers in Maryland and Pennsylvania did not receive their Trust payments." Settlors contend that the Business Court should have "look[ed] first to the plain language of the TOA provision to discern the parties' intent—and improperly began its analysis with what it perceived to be the Trust's 'general purpose.' " Settlors posit that the Business Court "rewrote the terms of the parties' agreement to impose upon Settlors an additional payment obligation that does not appear in *any* provision of the Trust" and thereby "effectively wrote the TOA out of the Trust entirely as to Maryland and Pennsylvania."

Settlors characterize the Supreme Court's opinion as looking to the Trust's purpose as an afterthought, and by doing so imply that a contract's express purpose should have no effect on a court's interpretation of that contract. Instead, they argue, meaning should be gleaned only by parsing that contract's component pieces. I disagree with Settlors' characterization and find it to be in opposition to both the Supreme Court's opinion in *Philip Morris I* and traditional notions of contract interpretation.

The Supreme Court began its opinion by briefly reviewing the background of the Master Settlement Agreement and the Trust Agreement's origins. In describing how the Trust Agreement operates, the Supreme Court started with the preamble, which "announces the purpose of the Trust: '[T]o provide aid to Tobacco Growers and Tobacco Quota Owners and thereby to ameliorate potential adverse economic consequences to the Grower States.' " *Philip Morris I*, 359 N.C. at 766, 618 S.E.2d at 221 (citation omitted; alteration in original). The Court then explained that "[t]he Trust accomplishes this objective through annual distributions to the beneficiaries. These distributions supplement the declining incomes of tobacco farmers as they

adapt to an economy in which the MSA has dulled the appetite for tobacco." *Id.* (citation omitted).

After explaining the Trust's operation and the passage and impact of FETRA, the Court began its analysis by laying out the following ground rules for contract interpretation:

> Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution. If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract. *Intent is derived not from a particular contractual term but from the contract as a whole.*

Id. at 773, 618 S.E.2d at 225 (quotations and citations omitted; emphasis added).

The Court then set out to "carefully inspect the provisions of the Phase II Trust to ascertain the parties' intention at the time it was executed." *Id.* at 773, 618 S.E.2d at 226. As Settlors point out in their briefs, the Court "look[ed] first to the plain language of the Tax Offset Adjustment provision to discern the intent of the parties." *Id.* at 773, 618 S.E.2d at 227. After reviewing relevant portions of the TOA provision, the Court concluded that the trial court's construction was improper and that the Trustees' interpretation was correct. The Court then continued,

> Furthermore, we very much doubt the trial court's construction of the wording on pages A-5 to A-6 reflects the original understanding of the parties. The court would allow a Tax Offset Adjustment even if the government never collects the assessments due under a qualifying change of law and hence never spends them for the benefit of *tobacco farmers*. Under those circumstances, *tobacco farmers* would receive reduced distributions (or no distributions) from the Phase II Trust and nothing from the government. The negative financial implications of this scenario for *tobacco farmers* are obvious.

Id. at 777, 618 S.E.2d at 228 (emphases added). In its opinion, the Court repeatedly returned to how each party's interpretation of the TOA provision would impact tobacco farmers. The TOA provision does not constitute the entire agreement between the parties; it constitutes one part of the larger Trust Agreement. The Court recognized that the proper interpretation of the TOA provision had to be consistent with the purpose and intent underlying the Trust Agreement.

The Court's review of the Trust Agreement's purpose and the parties' intent was not perfunctory, as Settlors claim; the Court stated that its interpretation "*must be* [considered] in the context of the entire Trust Agreement." *Id.* (citation omitted; emphasis added).

The Court continued,

> Certainly the *most compelling reason* for rejecting the trial court's holding is that, taken to its logical extreme, it could defeat the express purpose of the Phase II Trust. As previously explained, *the Trust was crafted to protect tobacco farmers from economic harm caused by the MSA*. The Trust achieved this goal through annual distributions to the beneficiaries. These distributions were scheduled to furnish tobacco farmers a steady stream of supplemental income until at least 2010.

Id. at 779, 618 S.E.2d at 229 (emphases added). Two paragraphs later, the Court again emphasized the paramount importance of the Trust Agreement's purpose:

> [T]he Grower States entered into the Trust Agreement to obtain a regular source of supplemental income for tobacco farmers hurt by the economic repercussions of the MSA. Interpreting the Trust Agreement in a manner that could leave those individuals without this extra income for years runs squarely counter to the express purpose of the Trust.

Id. at 780, 618 S.E.2d at 229.

The Business Court read the Supreme Court's opinion as "concise and unequivocal in its holding that the purpose of the Trust viewed as a whole was to provide a safety net for farmers impacted by the MSA." *North Carolina v. Philip Morris USA, Inc.*, 2007 NCBC LEXIS 7, at *9, 98 CVS 14377 (2007). The Business Court characterized Settlors' interpretation of the TOA provision as unequivocally stating that there could be no state-by-state accounting:

> The tobacco companies contend that under the Agreement they are obligated to pay up to a fixed amount and that if any Grower Governmental Obligation exceeds the balance then due under the Trust Agreement the companies have no further obligation under the Trust, even if some beneficiaries do not receive benefits under the Grower Governmental Obligation.

Id. at *13. The States, however, argued that the TOA provisions unequivocally state that, if farmers do not receive the benefits of a

Governmental Obligation, then the value of that Governmental Obligation is zero and the corresponding reduction in trust payments is zero. *Id.* The Business Court admitted that "[t]he TOA can be logically read to support the position of the tobacco companies" by "provid[ing] a cap on their total liability." *Id.* However, the Business Court held that "such reading defeats the purpose of the Trust as far as the individual states that signed releases are concerned." *Id.* The Business Court concluded that Settlors' interpretation could not be correct because it violates the Trust's express purpose, and therefore a state-by-state accounting of actual Governmental Obligations is appropriate.

Settlors point out that the Business Court based its decision almost exclusively on the Trust's purpose as articulated by the Supreme Court. Although the Business Court's decision does lack significant textual analysis, the absence of that analysis does not mean that the Business Court reached the wrong conclusion or that its reliance on the Trust's express purpose was misplaced.

There is no ambiguity as to the Trust Agreement's purpose or the parties' intentions; our Supreme Court has clearly set out both. As the Business Court noted, however, "the parties each read the same language, claiming it to be unambiguous, to support their interpretation of the Trust Agreement." *Id.* at *11. Our Supreme Court has observed that

> [w]hile [t]he fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is at best, ambiguous, ambiguity . . . is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which [his opponent] asserts is not its meaning.

Brown v. Lumbermens Mut. Casualty Co., 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990) (quotations and citations omitted). The ambiguity, if there is any, arises here only in the context of whether the TOA provision explicitly mandates or prohibits a state-by-state accounting of reductions resulting from Grower Governmental Obligations. When the contract is read *as a whole*, however, it is clear that the parties intent was to protect tobacco farmers from the economic harm caused by the MSA. I believe that the Business Court properly interpreted the Trust Agreement *as a whole* and concluded that the TOA requires Settlors to continue making payments to the

Trust sufficient to meet the annual amounts allocated to Maryland and Pennsylvania under Section 1.03 of the Trust Agreement.

Had the Business Court concluded otherwise, the effective result would be that Maryland and Pennsylvania tobacco growers would receive no distributions. The Supreme Court rejected this outcome in *Philip Morris I* by looking at the potential economic effects if the TOA were read to allow "Tax Offset Adjustments absent the actual payment of a Governmental Obligation" as Settlors urged. *Philip Morris I*, 359 N.C. at 778, 618 S.E.2d at 228. The Court noted that the Business Court would have given

> Settlors a Tax Offset Adjustment for 2004 regardless of when FETRA assessments are actually paid. Thus, had FETRA assessments been delayed until 2010, tobacco farmers would have been forced to endure the adverse economic consequences of the MSA for six years without the regular financial support the Phase II Trust was designed to supply.

Id. at 779, 618 S.E.2d at 229. The Court scorned this potential outcome as "run[ning] squarely counter to the express purpose of the Trust." *Id.* at 780, 618 S.E.2d at 229. It seems incongruous to now change course and find this result acceptable.

Accordingly, I would hold that the trial court properly granted Maryland and Pennsylvania's motion for summary judgment and properly denied Settlors' motion for summary judgment.

STATE OF NORTH CAROLINA v. TRACY BRAXTON LAWSON

No. COA07-1507

(Filed 16 December 2008)

1. Appeal and Error— brief—statement of facts—motion to strike—denied

A motion to strike the State's statement of facts in its brief was denied where none of the contested facts were relevant to the matters being appealed.

2. Criminal Law— prosecutor's argument—burden of proof

There was no abuse of discretion in a first-degree murder prosecution in allowing the prosecutor to make an argument to

the jury that defendant contended was an attempt to shift the burden, but in context the argument was an explanation that defendant would try to rebut the State's evidence. Furthermore the court correctly instructed the jury on the burden of proof.

3. Criminal Law— prosecutor's argument—comments—not unduly prejudicial

The trial court did not abuse its discretion in a first-degree murder prosecution by allowing the prosecutor to make certain comments about a witness and about forensics tests defendant did not have done. None of the statements had such an unduly prejudicial effect as to require a new trial.

4. Criminal Law— prosecutor's argument—reasons to believe State's evidence—no intervention ex mero motu

The trial court did not err by not intervening ex mero motu in a first-degree murder prosecution where the prosecutor made statements which defendant contend improperly stated his personal opinion of defendant's credibility. The prosecutor was merely giving reasons to the jury as to why it should believe the State's evidence over defendant's testimony, and none of the statements were so grossly improper that defendant was denied due process of law.

5. Evidence— first-degree murder—Board of Nursing records—loss of license and financial difficulties—probative of motive

There was no abuse of discretion in a first-degree murder prosecution in admitting defendant's Board of Nursing records and her use of pain medications where the State asserted that the evidence was probative of financial difficulties and a motive. The trial court excused the jury, heard both parties, excluded much of the evidence, and explained its reasons for allowing portions of the records.

6. Criminal Law— instructions—self-defense—partial pattern jury instruction—no plain error

There was no plain error in a first-degree murder prosecution where the court gave a partial pattern jury instruction on self-defense. The court conveyed the substance of the omitted instruction and properly instructed the jury on elements of self-defense and that the State had the burden to prove each element.

7. Homicide— first-degree murder—directed verdict for defendant denied—evidence sufficient

There was no error in denying a request for a directed verdict for defendant in a first-degree murder prosecution. The evidence was sufficient to find defendant guilty of that charge.

8. Homicide— first-degree murder—short-form indictment—constitutionality

Short-form indictments for murder are constitutional, and the indictment in this case properly complied with N.C.G.S. § 15-144.

Appeal by defendant from judgment entered 13 June 2007 by Judge James C. Spencer, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 19 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Sofie W. Hosford for defendant appellant.

McCULLOUGH, Judge.

On 13 June 2007, a jury convicted Tracy Braxton Lawson ("defendant") of first-degree murder for killing her husband, Andy Lawson. On appeal, defendant contends that the trial court erred by (1) allowing the prosecutor to make improper statements during the State's opening statement and closing argument, (2) failing to exclude defendant's records with the Board of Nursing and her use of prescribed pain medications, (3) failing to instruct the jury with the complete pattern jury instruction on self-defense, (4) denying defendant's request for a directed verdict of not guilty, and (5) allowing a fatally defective indictment. We will also address defendant's motion to strike the State's statement of facts contained in its appellate brief. After careful review, we deny defendant's motion and find no prejudicial error in her trial.

I. Defendant's Motion to Strike

[1] We begin by addressing defendant's motion to strike the State's statement of facts section in its appellate brief. Defendant argues that many of the alleged facts contained in the State's brief are unsupported by the evidence at trial and are argumentative in nature in violation of Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure. Rule 28(b)(5) requires that an appellant's brief contain a

"nonargumentative summary of all material facts underlying the matter in controversy[.]" N.C. R. App. P. 28(b)(5) (2008). We deny defendant's motion and note that none of the contested facts are relevant in our determination of the matters being appealed.

II. Background

On 17 July 2006, defendant was indicted for first-degree murder by an Alamance County Jury for the 11 June 2006 killing of her husband, Andy Lawson. Defendant was tried at the 4 June 2007 Criminal Session of Alamance County Superior Court, the Honorable James C. Spencer, Jr., presiding. On 13 June 2007, a jury found defendant guilty of first-degree murder and defendant was sentenced to life imprisonment without parole.

The State's evidence at trial tended to show the following: On 11 June 2006, the Alamance County Sheriff's Department responded to a disturbance call at 3110 Newlin Road in Snow Camp ("the Lawson home"). The police arrived at the Lawson home at 4:20 a.m. and found Mr. Lawson, who was later determined to be dead, lying at the top of the stairs with wounds to his head. Mr. Lawson's right hand and head were partially in the hallway and the rest of his body was in the master bedroom.

In the master bedroom, the police found a small table overturned and a telephone lying on the floor. The bedding was balled up and there was a bloodstain at the top of the bed. There was a loaded .357 revolver in the dresser and there were five rifles, most of which were antiques, in the closet.

In the adjacent bedroom, police found a post driver, with a red sweater wrapped around it. The police also found clothes that defendant had worn that night with bloodstains.

An autopsy revealed that Mr. Lawson had died as a result of blunt force trauma and at least two blows to his head. It was later determined that the abrasions on Mr. Lawson's head were consistent with the woven pattern of the red sweater that was wrapped around the post driver.

Subsequent testing revealed that there was no blood on the post driver but that the blood on the red sweater wrapped around it belonged to Mr. Lawson. The blood on one of defendant's shirts matched defendant's and to a lesser degree, Mr. Lawson's.

At the time of Mr. Lawson's death, he and defendant (collectively "the Lawsons") had been married for approximately seven years and had a four-year-old daughter. Defendant suffered from arthritis, spinal stenosis, and chronic back pain. Defendant's physician prescribed her medications to alleviate her pain.

The State offered several witnesses who testified that the Lawsons had been experiencing financial problems. The Lawsons had declared bankruptcy in April 2002. After defendant's nursing license was suspended in January of 2006, her income from her job at Wal-Mart was significantly less than her previous income as a nurse.

Upon Mr. Lawson's death, defendant was the beneficiary of his retirement and life insurance benefits, which were provided through his employer. His retirement benefits were worth nearly $40,000.00 and his life insurance benefits were about $57,000.00. Three or four weeks before Mr. Lawson's death, in the wake of a family member's hospitalization, the Lawsons discussed life insurance. Mr. Lawson's brother testified that Mr. Lawson said that he had good life insurance and that defendant and their daughter would be taken care of if anything ever happened to him. Defendant then told Mr. Lawson, "you better hope and pray nothing ever happens to [you.]" Mr. Lawson's brother testified that defendant sounded "halfway" joking when she made the statement.

At trial, defendant claimed that she killed Mr. Lawson completely in self-defense. She testified that Mr. Lawson was physically abusive and described an incident within six months of his death where he hit her in the face with his elbow. A few months prior to Mr. Lawson's murder, defendant began telling some of her coworkers at Wal-Mart about the physical abuse. Defendant said that Mr. Lawson kept several loaded guns in their home and also provided testimony from his ex-wife that he was violent. Defendant claimed that she was not aware of Mr. Lawson's life insurance policies.

On 10 June 2006, defendant discovered the post driver in her dining area after it had fallen onto the floor near her daughter's doll house. She carried the post driver upstairs with a pile of clothes in order to keep it away from her daughter. She placed the post driver near the doorway in the spare bedroom and wrapped her red sweater around it to cover the rough edges.

Around midnight that evening, she and Mr. Lawson went to bed in the master bedroom with their daughter. After a while, defendant

became uncomfortable and went downstairs to watch television. Mr. Lawson later came downstairs and told defendant that she needed to come to bed. After having further difficulty sleeping, defendant returned downstairs. Mr. Lawson came downstairs again accusing defendant of talking on the telephone and slapped her on the back of her head. He started cursing and shoved her against the wall as she tried to go upstairs. Mr. Lawson's eyes became red and the veins in forehead and neck were bulging out.

When Mr. Lawson walked up the stairs, he told defendant he was going to put her out of her misery and she believed that he was going to kill her. Mr. Lawson walked towards the dresser in the master bedroom which contained a handgun. In response, defendant grabbed the first thing she could see which was the post driver lying in the doorway. As Mr. Lawson reached for the dresser drawer, defendant struck him in the back of the head with the post driver. Mr. Lawson then pushed defendant to the foot of the bed and a struggle ensued causing the Lawsons to roll onto the floor. When Mr. Lawson began to reach towards defendant, she grabbed the post driver and hit him in the back of the head again. After Mr. Lawson collapsed, defendant called 911 and told the dispatcher that her husband was trying to kill her, she had hit him, and was unsure if he was dead. Defendant took her daughter and drove to her sister's house, leaving Mr. Lawson lying face down on the floor.

At trial, the State asserted that the substantial decrease in defendant's income, which resulted from her dependency to pain medications and loss of her nursing license, related to her financial motive to kill Mr. Lawson. Defendant objected to introduction of her records with the Board of Nursing, which the trial court denied. Jean Carter, a registered nurse and administrator at White Oak Manor testified that she employed defendant in June of 2005 and that defendant was compensated between $22.00 to $25.00 an hour. During this time, defendant was being prescribed Vicoprofen and Alprazolam for her pain. Her physician directed her to take one to two Vicoprofen tablets every six hours as needed and prescribed her 100 pills with three refills.

Ms. Carter testified that on one occasion she felt that defendant appeared "drugged or something." As a condition of defendant's employment, defendant submitted to a drug test and told her employer that she expected the drug test to be positive due to her prescription medications. Because the drug testing facility did not have information verifying defendant's prescriptions, it reported to

defendant's employer that she had tested positive for drugs. As a result, Ms. Carter filed a complaint with the North Carolina Board of Nursing on 10 August 2005. Defendant did not attempt to clear her drug test or apply for a restricted license.

On 19 August 2005, defendant wrote a letter to the Board of Nursing surrendering her nursing license "due to need for treatment of chemical dependency" and requested "to be evaluated and considered for the alternative program that may assist me in treatment and recovery of this disease." Defendant enrolled in an alternative program for chemical dependency with the Board of Nursing on 14 September 2005. The trial court allowed the State to introduce documents that defendant had completed through this program in which defendant admitted to abusing pain medications. In one of the documents, defendant stated that the following incidents had resulted from her addiction: "Lost nursing license, lost job, financial difficulties." Defendant continued to work with the alternative program until she contacted the Board of Nursing on 4 January 2006 and requested to terminate her contract with the program because of financial problems. As a result, defendant would not be permitted to regain her nursing license without completing a year-long reinstatement process and paying anywhere from $750.00 to $1,400.00 for the costs of the program Kay McMullan, the Director of Investigations and Monitoring Department at the North Carolina Board of Nursing, testified that defendant's nursing license was suspended on 10 January 2006. Defendant started working at the Wal-Mart in Mebane on 3 January 2006 and earned between $7.40 and $7.80 an hour.

III. Prosecutor's Statements

In her first argument on appeal, defendant claims that the trial court erred in allowing the prosecutor to make improper and unethical statements to the jury during his opening statement and closing argument. After careful review, we do not find prejudicial error.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). This Court will only find an abuse of discretion if we determine that the trial court's ruling could not have been the result of a reasoned decision. *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996).

When a defendant fails to object during the State's closing argument, " 'our review is limited to whether the argument was so grossly

improper as to warrant the trial court's intervention *ex mero motu*.' " *State v. Nicholson*, 355 N.C. 1, 41, 558 S.E.2d 109, 137 (citation omitted), *remanded*, 355 N.C. 209, 560 S.E.2d 355, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002), *cert. denied*, 359 N.C. 855, 619 S.E.2d 859 (2005). Such action is required of the trial court only if the State's " 'argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial.' " *State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41 (1999) (citation omitted), *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000).

"[C]ounsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). However, "[a] prosecutor should refrain from making characterizations relating to a defendant which are calculated to cause prejudice before the jury 'when there is no evidence from which such characterizations may legitimately be inferred.' " *State v. Thompson*, 118 N.C. App. 33, 43, 454 S.E.2d 271, 277 (quoting *State v. Britt*, 288 N.C. 699, 712, 220 S.E.2d 283, 291 (1975)), *disc. review denied*, 340 N.C. 262, 456 S.E.2d 827 (1995).

[2] Defendant first assigns error to a remark made by the prosecutor in the State's opening statement. Defendant asserts that the State attempted to shift the burden to defendant when the prosecutor said, "Use your reason and your common sense because for everything that I've put forth, for every detail, for every fact the State puts forth, [defendant's] got to answer for or she will attempt to answer for." Defendant provided a timely objection at trial, which the trial court overruled. In context, it appears that the prosecutor was simply trying to explain to the jury that defendant was going to try to rebut the State's evidence. Furthermore, the record indicates that the trial court correctly instructed the jury that the State had the burden of proof and therefore, we cannot find an abuse of discretion.

[3] Defendant also assigns error to several statements made by the prosecutor during the State's closing argument, claiming that the prosecutor improperly commented on defendant's character and veracity, expressed his personal beliefs, appealed to the jury's sympathies, and argued facts outside the record.

Defendant assigns error to the prosecutor's statement about witness Sherman Betts when he stated, "[t]he fact that Sherman Betts thought that much of Andy Lawson, I believe he probably can see a

little bit beyond what somebody presents in their exterior." When the prosecutor pointed out that defendant's attorney did not have some of defendant's clothing tested, defendant asserts that it was improper for the prosecutor to say "[t]he reason he didn't have it tested is because he knows what he's going to find." Additionally, defendant assigns error to the following statement:

> You let her get go now, she's untouchable, untouchable. All she's got to do is get past you, ladies and gentlemen. You're like the goalie in hockey. If she can get the puck past you, she's home free. And not only is she home free, it's up to you as to whether or not she collects $98,000 in addition to being set free.

" 'Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred.' " *State v. Gibbs*, 335 N.C. 1, 64, 436 S.E.2d 321, 357 (1993) (citations omitted), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). In the context of the entire argument, we do not believe that any statements in the closing argument had an unduly prejudicial effect as to require a new trial.

[4] Defendant also assigns error to several additional statements made by the prosecutor, which defendant did not object to during trial. Defendant contends that the prosecutor improperly stated his personal opinion on defendant's credibility when referring to defendant's testimony when he said that "[y]ou ain't ever seen a work of fiction sit that long since Gone With the Wind." He also compared defendant's version of the events to the Friday the 13th movies stating that:

> Do you really using your common sense believe that [Mr. Lawson] appeared to be a threat to [defendant] when he received that hematoma and the four by six-inch bruise to his skull?
>
> To believe that, you would have to pretty much believe in all of the Friday the 13th movies where the man goes from looking dead to springing right back up and into action, and that's just not the case.

In the case *sub judice*, it was permissible for the prosecutor to argue to the jury as to why it should not believe defendant. *See State v. Bunning*, 338 N.C. 483, 489-90, 450 S.E.2d 462, 464-65 (1994) (holding no error when the prosecutor asked the jury to conclude the defendant was lying). Even when a prosecutor's remarks are clearly improper, "defendant carries the heavy burden of showing that the

trial court erred in not intervening on his behalf." *See State v. Nance*, 157 N.C. App. 434, 442-43, 579 S.E.2d 456, 461-62 (2003) (finding that although the prosecutor should not have called the defendant a "liar," it did not result in sufficient prejudice to warrant a new trial). It appears that the prosecutor was just giving reasons to the jury, in his closing argument as to why it should believe the State's evidence over defendant's testimony. None of these statements, individually or collectively, are so grossly improper that defendant was denied due process of law; therefore, we cannot find that the trial court erred in failing to intervene *ex mero motu*.

IV. Failure to Exclude Evidence

[5] In her second argument on appeal, defendant argues that the trial court erred by failing to exclude certain evidence. Specifically, defendant contends that allowing her records with the Board of Nursing and her use of prescription pain medications into evidence was unduly prejudicial. After careful review of the record, we do not find an abuse of discretion.

Rule 403 of this State's Rules of Evidence excludes relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (2007). "Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). "[T]he trial court's ruling should not be overturned on appeal unless the ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999) (citation omitted).

Over defendant's objection, the trial court accepted into evidence approximately ten exhibits, as well as defendant's testimony about the suspension of her nursing license and her prior abuse of pain medications. Defendant argues that the prejudicial nature of this evidence exceeded its probative value as the State attempted to portray defendant as a "desperate drug addict."

At trial, the State asserted that defendant's loss of employment, surrender of her nursing license, and financial problems were all probative of her motive to kill Mr. Lawson for his retirement and life insurance money. Before admitting this evidence, the jury was excused and the trial court carefully considered the State's evidence

and allowed both parties to speak on the matter. The trial court reviewed approximately 90 pages of documentary evidence and heard in *voir dire* the potential testimony of Kay McMullan. The trial court excluded much of the evidence presented by the State, but explained its reasons for allowing portions of defendant's records with the Board of Nursing and her history of using prescription pain medications when it stated the following:

> [T]he Court believes that that evidence [regarding] the reason for the loss of [defendant's] job, the reason for the result of the loss of nursing license and consequence of her inability to secure a comparable job . . . is evidence [of] defendant's need for money, which would be admissible to show motive as well as possible intent and to rebut the claim of self-defense in as far as the need for money is concerned.

The trial court permitted the State to introduce defendant's self-report that she had completed after enrolling in the alternative program. The trial court found it relevant that in her self-report, she disclosed that her history of prescription drug abuse resulted in the loss of her job and financial problems. She also disclosed that her "family and financial issues/relationships [were] strained but slowly improving" and that her support system was "strained due to two immediate family members with acute health problems" but that her "[s]pouse [was] more supportive." The State asserts that this evidence was admissible to show that defendant did not report Mr. Lawson's alleged abuse and that contrary to her testimony, she referred to Mr. Lawson as "supportive." Due to the trial court's explanation that this evidence demonstrated motive as well as the extensive consideration that it gave each exhibit, we cannot hold that the trial court's ruling was not the result of a reasoned decision. We overrule this assignment of error.

III. Jury Instructions

[6] Defendant contends that, because the trial court abused its discretion by failing to provide the complete requested pattern jury instruction on self-defense, defendant argues that as a result of this error, she was denied a fair trial and due process of law. Assuming *arguendo* that this assignment of error is properly before this Court, we find no error.

As defendant failed to object to the alleged instructional error at trial, this Court's review is limited to whether the trial court's instructions amounted to plain error. *See* N.C. R. App. P. 10(c)(4). "In decid-

ing whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983).

In the case *sub judice*, the trial court gave the pattern jury instruction, which defendant requested, but omitted the last paragraph which provided the following:

> 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.

N.C.P.I. Crim. 206.10. If a request for a special instruction is made and is supported by the evidence, the court is not required to give the requested instruction verbatim; rather, it suffices if the requested instruction is given in substance. *State v. Dodd*, 330 N.C. 747, 753, 412 S.E.2d 46, 49 (1992). In this case, the trial court properly instructed the jury on elements of self-defense and that the State had the burden to prove each element. Specifically, the trial court conveyed the substance of the omitted instruction when it told the jury that "defendant would not be guilty of any murder or manslaughter, if she acted in self-defense as I've just defined it to be[.]" We hold that there was no error in the omission of the specified language and overrule this assignment of error.

IV. Failing to Enter Directed Verdict

[7] Defendant asserts that the trial court erred in denying her request for a directed verdict of not guilty. She argues that the State was unable to present sufficient evidence that she did not act in self-defense. We disagree.

The standard of review for a motion for a directed verdict is the same as that for a motion to dismiss. *See State v. Ingle*, 336 N.C. 617, 630, 445 S.E.2d 880, 886 (1994) (stating that "it is well settled that a motion to dismiss and a motion for a directed verdict have the same effect"), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995). A trial court should deny a motion to dismiss if, considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, "there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is

relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* "[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981).

The elements required for conviction of first-degree murder are (1) the unlawful killing of another human being, (2) with malice, and (3) with premeditation and deliberation. *State v. Haynesworth*, 146 N.C. App. 523, 531, 553 S.E.2d 103, 109 (2001). "The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). A killing is premeditated if "the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). " 'Deliberation' means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.*

The evidence, when looked at in the light most favorable to the State, is sufficient. Evidence of malice could be inferred from the fact that defendant admitted to killing Mr. Lawson by hitting him in the back of the head with a post driver. The fact that defendant had brought the post driver upstairs earlier in the day could support an inference of premeditation and deliberation. The State also put forth evidence that the Lawsons had been experiencing financial problems and that defendant was aware that she was the beneficiary to Mr. Lawson's retirement and life insurance benefits. This evidence was sufficient to allow a jury to decide whether defendant was guilty of first-degree murder. As such, the trial court acted properly in denying defendant's motion, and we overrule this assignment of error.

V. Short-Form Indictment

[8] Defendant contends that the short-form indictment charging her with first-degree murder is fatally defective. The indictment at issue alleges that defendant "unlawfully, willfully and feloniously and of malice aforethought did kill and murder ANDY LAWSON[.]" This indictment properly complies with N.C. Gen. Stat. § 15-144, the statute authorizing the use of short-form indictments for murder, which provides that "it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice afore-

thought, did kill and murder (naming the person killed)[.]" N.C. Gen. Stat. § 15-144 (2007). Our Supreme Court has consistently held that indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions. *See State v. Braxton*, 352 N.C. 158, 174-75, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 504-05, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *cert. denied*, 360 N.C. 76 (2005); *State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996). Therefore, this assignment of error is overruled.

VI. Conclusion

Based on the aforementioned reasons, we find no error in defendant's trial.

No error.

Judges McGEE and STROUD concur.

TERESA LYNN ALLRED AND HUSBAND, DANIEL HILLIKER, PLAINTIFFS v. CAPITAL AREA SOCCER LEAGUE, INC.; CASL SOCCER PROPERTIES LLC; WAKE COUNTY, NORTH CAROLINA; WOMEN'S UNITED SOCCER ASSOCIATION AND ALL SUCCESSORS IN INTEREST; TIME WARNER INC., FORMERLY KNOWN AS AOL TIME WARNER, INC., D/B/A TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP D/B/A CAROLINA COURAGE AND ALL SUCCESSORS IN INTEREST; AND TIME WARNER INC., FORMERLY KNOWN AS AOL TIME WARNER, INC., D/B/A TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP D/B/A NEW YORK POWER AND ALL SUCCESSORS IN INTEREST, DEFENDANTS

No. COA07-647

(Filed 16 December 2008)

1. Negligence— spectator struck by soccer ball—duty to warn—dismissal for failure to state a claim—error

The trial court erred by granting a Rule 12(b)(6) dismissal of a negligence complaint arising from plaintiff spectator being struck in the head by a soccer ball while sitting in the stands at a professional women's soccer game. Plaintiffs' allegations were sufficient to establish a duty to warn, a breach of that duty, and resultant damages; while defendants' duty to warn is quali-

fied to the extent the danger is known or obvious, the complaint did not contain allegations establishing actual or constructive knowledge.

2. Negligence— spectator struck by soccer ball—assumption of risk—dismissal for failure to state claim—error

A negligence complaint by a spectator who was struck by a soccer ball while sitting in the stands at a professional soccer match should not have been dismissed with a Rule 12(b)(6) motion based on assumption of the risk. The allegations of the complaint do not establish either actual or constructive knowledge of the danger and dismissal at this stage was not proper.

3. Negligence— spectator struck by soccer ball—duty to provide protective netting—dismissal for failure to state claim—error

A negligence complaint concerning a spectator who was struck by a soccer ball while watching a professional soccer match should not have been dismissed on a Rule 12(b)(6) motion on the issue of protective netting. While the body of law dealing with the duty to provide protective screening at a baseball game is well-developed, there are no reported decisions pertaining to an owner's duty at a soccer match and the scope of the owner's duty cannot be determined at this stage.

Appeal by plaintiffs from judgment entered 28 February 2007 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 14 January 2008.

Hartsoe & Associates, PC, by R. Anthony Hartsoe and Joseph R. Schmitz, for plaintiffs-appellants.

Ellis & Winters LLP, by Stephen C. Keadey, for defendant-appellee CASL Soccer Properties, LLC.

Brown, Crump, Vanore & Tierney, L.L.P., by Derek M. Crump, for defendant-appellee Capital Area Soccer League, Inc.

STEELMAN, Judge.

The trial court erred in granting defendants' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The complaint adequately alleges several causes of action in negligence against defendants and does not contain alle-

gations which on their face present an insurmountable bar to plaintiffs' recovery.

I. Factual Summary and Procedural Background

On 26 April 2003, Teresa Lynn Allred (hereinafter "plaintiff") attended a professional women's soccer match at State Capital Soccer Park in Cary, North Carolina. Prior to the commencement of the match, plaintiff was in the stands located behind one of the goals when she was struck in the head by a soccer ball. Plaintiff sustained substantial head injuries.

On 25 April 2006, plaintiff and her husband (together, "plaintiffs") filed a complaint in Orange County Superior Court[1] which sought monetary damages for plaintiff's injuries and her husband's loss of consortium based upon the alleged negligence of defendants. On 23 June 2006, Wake County filed an answer to the complaint. On 18 July 2006 and 1 August 2006, Capital Area Soccer League, Inc. and CASL Soccer Properties LLC ("appellees") filed answers to the complaint denying the allegations of negligence, raising the affirmative defenses of contributory negligence and assumption of risk, and moving to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The motions to dismiss were heard in Wake County Superior Court on 12 February 2007.[2] On 28 February 2007, the trial court dismissed the claims of plaintiff and her husband against Capital Area Soccer League, Inc. and CASL Soccer Properties LLC, with prejudice. That same day, plaintiffs entered into a stipulation with Wake County that they would be bound by the decision of the appellate courts of North Carolina on the appeal of the 28 February 2007 order. Plaintiffs appeal.

II. Standard of Review

> On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121 (1999). Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law

1. The case was later transferred to Wake County.

2. On the same date, plaintiff and her husband voluntarily dismissed their claims against all of the Time Warner defendants. The record in this appeal is devoid of any service on defendant, Women's United Soccer Association, and they were thus not properly before the trial court or this Court.

> supports the 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 the plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

Wood v. Guilford County, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). We "consider plaintiff's complaint to determine whether, when liberally construed, it states enough to give the substantive elements of a legally recognized claim." *Governor's Club Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 246, 567 S.E.2d 781, 786 (2002) (citations omitted), *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003). On a Rule 12(b)(6) motion, plaintiff's factual allegations are treated as true. *Id.*

The appellate court's review of the trial court's granting of a motion to dismiss pursuant to Rule 12(b)(6) is *de novo*. *Acosta v. Byrum*, 180 N.C. App. 562, 566, 638 S.E.2d 246, 250 (2006).

III. Factual Allegations of Complaint

Plaintiffs' complaint alleged that she attended a women's professional soccer match. Plaintiff was in the stands located immediately behind one of the soccer goals during the players' pre-game warm-ups. During the warm-ups "many balls were directed towards the nets in a relatively short period of time." One of these balls sailed over the soccer goal, into the stands, striking plaintiff and causing serious injury. Plaintiff alleged that she "had never attended a soccer game at the subject facility prior to her injury, had no knowledge or underlying information that there was a significant risk of being struck by a soccer ball."

Plaintiffs' complaint asserts that defendants were negligent in: (1) failing to warn patrons of the risk of being struck by a soccer ball leaving the field of play; (2) failing to provide a safe environment for patrons; and (3) failing to install protective netting behind the goals to protect spectators.

IV. North Carolina Law of Spectator Injuries at Baseball Games

There are no North Carolina cases dealing with spectators injured as a result of being struck by a ball at a soccer match. The cases previously decided in North Carolina deal with spectators being struck by balls at baseball games. These cases have been uniformly decided against the spectator, either on the basis that the stadium

operator was not negligent or that the spectator assumed the risk of being hit by a baseball. *Erickson v. Baseball Club*, 233 N.C. 627, 65 S.E.2d 140 (1951); *Cates v. Exhibition Co.*, 215 N.C. 64, 1 S.E.2d 131 (1939); *Hobby v. City of Durham*, 152 N.C. App. 234, 569 S.E.2d 1 (2002).

V. General Duty of Sporting Facility Operators to Patrons

In the case of *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), our Supreme Court abolished the common law trichotomy distinguishing a landowner's duty to licensees, invitees, and trespassers. In lieu thereof, the Supreme Court imposed upon landowners "only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Id.* at 632, 607 S.E.2d at 892. Thus, consistent with the baseball cases, *supra*, the owner of a public facility has a duty of reasonable care under the circumstances to its invitees. *See Manganello v. Permastone, Inc.*, 291 N.C. 666, 672, 231 S.E.2d 678, 681 (1977) (swimming lake operator has duty of reasonable care to paying guests); *Aaser v. Charlotte*, 265 N.C. 494, 498, 144 S.E.2d 610, 614 (1965) ("One who . . . invites others to come upon his premises to view, for a price, an athletic event being carried on therein has the duty to be reasonably sure that he is not inviting them into danger and must exercise reasonable care for their safety.") (citing *Dockery v. Shows*, 264 N.C. 406, 142 S.E.2d 29 (1965)).

We further note that the cases in this area have tended to intermingle the legal concepts of the duty owed by the sports facility owner to the patron and the patron's assumption of known and obvious risks of attending a sporting event. While these legal theories are interrelated and contain common concepts, *see* 62 Am. Jur. 2d Premises Liability § 173 (2005), they are nonetheless separate. We will treat the duty of the facility owner and the patron's assumption of risk as separate concepts.

VI. Duty to Patrons at Baseball Games

A. "No Duty" Rule

The duty of the operator of a baseball park to exercise reasonable care to protect its patrons does not extend to "the common hazards incident to the game." *Erickson* at 629, 65 S.E.2d at 141. This concept was articulated in the case of *Brown v. San Francisco Ball Club*, 99 Cal. App. 2d 484, 222 P.2d 19 (1950):

> In baseball, . . . the patron participates in the sport as a spectator and in so doing subjects himself to certain risks necessarily and usually incident to and inherent in the game; risks that are obvious and should be observed in the exercise of reasonable care. This does not mean that he assumes the risk of being injured by the proprietor's negligence but that by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks and hazards inherent in and incident to the game.

Id. at 487, 222 P.2d at 20.

The law in this area was summarized by Professor Timothy Davis in the Marquette Sports Law Review:

> Thus, the prevailing principle is that "there is no legal duty to protect or warn spectators about the 'common, frequent, and expected' inherent risks of observing a sporting event such as being struck by flying objects that go into the stands." With respect to the role of knowledge, generally "adult spectators of ordinary intelligence" who are familiar with the sports at issue will be presumed to possess an awareness of the normal risk of watching a sport, such as baseball. Another general rule that can be derived from the spectator cases is that while an owner may not owe a duty of care to spectators for inherent risks, the owner or facility operator must do nothing to enhance the risks that are inherent to a particular sport.

Timothy Davis, *Symposium: National Sports Law Institute Board of Advisors: Avila V. Citrus Community College District: Shaping the Contours of Immunity and Primary Assumption of the Risk*, 17 Marq. Sports L. Rev. 259, 271-72 (2006) (internal footnotes citing authorities omitted).

The "no duty" rule has been followed in North Carolina:

> As a general proposition, there is no duty to protect a lawful visitor against dangers which are either known to him or so obvious and apparent that they reasonably may be expected to be discovered. *Wrenn v. Convalescent Home*, 270 N.C. 447, 448, 154 S.E.2d 483, 484 (1967); *see* 62 Am. Jur. 2d Premises Liability § 147 (1990) (owner liable only if condition known or should have been known by him and not known or should not have been known by the injured visitor).

Lorinovich v. K Mart Corp., 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 (1999). The footnote in *Lorinovich* points out that "[a]lthough

this 'no duty' rule for obvious dangers 'bears a strong resemblance to the doctrine of contributory negligence,' 62 Am. Jur. 2d Premises Liability § 149 (1990), it in fact negates the defendant's duty of care and eliminates any occasion for reliance on the defense of contributory negligence." *Lorinovich* at 162, 516 S.E.2d at 646, footnote 1; *see also* 62 Am. Jur. 2d Premises Liability § 173 (2005) (stating that the "no duty" rule is technically distinguishable from the doctrine of assumption of risk, or the "volenti doctrine.").

The courts of North Carolina have also applied the "no duty" doctrine in the context of a defendant's duty to warn, holding that there is no duty to warn against dangers either known or so obvious and apparent that they should have reasonably been discovered by plaintiff. *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 604, *disc. rev. denied*, 356 N.C. 297, 570 S.E.2d 498 (2002).

It is apparent from the baseball cases decided in other jurisdictions that it has been accepted as a matter of law that a patron's being struck in the stands by an errant baseball was an inherent and obvious risk of attending the game. The only exceptions appear to be from unusual events not inherent in the game. *E.g.*, *Jones v. Three Rivers Management Corp.*, 483 Pa. 75, 87, 394 A.2d 546, 552 (1978) (holding that the "no duty" rule did not apply to a spectator struck by a baseball while using an interior walkway).

The "no duty" rule was not abolished when the distinction between duties owed by landowners to licensees and invitees was abolished by *Nelson v. Freeland*, *supra*. *Lorinovich* at 162, 516 S.E.2d at 646; *see also* 62 Am. Jur. 2d Premises Liability § 170 (2005).

B. Providing Some Screened Spectator Seating Discharges Duty

When an operator of a baseball facility provides some seating which has a screen to protect patrons from errant baseballs, they "are held to have discharged their full duty to spectators in safeguarding them from the danger of being struck by thrown or batted balls[.]" *Cates*, 215 N.C. at 66, 1 S.E.2d at 133. This rule applies even if there is an unusually large crowd, and patrons desiring screened seating are unable to obtain it. *Erickson*, 233 N.C. at 628, 65 S.E.2d at 141. In *Hobby v. City of Durham*, this Court followed *Cates*, holding that plaintiff failed to sufficiently allege negligence on the part of an operator of a baseball facility where a portion of the stands was protected by screening. 152 N.C. App. at 237, 569 S.E.2d at 2-3.

VII. Assumption of Risk

Assumption of risk is an affirmative defense which must be pled by the party seeking to invoke it. *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998); N.C. Gen. Stat. § 1A-1, Rule 8(c). The party asserting an affirmative defense has the burden of proof to establish all elements of the defense. *Price v. Conley*, 21 N.C. App. 326, 328, 204 S.E.2d 178, 180 (1974).

The concept of assumption of risk has frequently been utilized in sports spectator injury cases to bar recovery by plaintiffs. This was the basis for the affirmation of nonsuit at the close of plaintiffs' evidence in *Erickson*, *supra*, 233 N.C. at 630, 65 S.E.2d at 142 ("plaintiff, with full knowledge of all the dangers of the occasion, voluntarily assumed the risks of his situation, or failed to exercise due care to protect himself from the natural dangers inherent to his situation.").

The two elements of the common law defense of assumption of risk are: (1) actual or constructive knowledge of the risk, and (2) consent by the plaintiff to assume that risk. Charles E. Daye and Mark W. Morris, North Carolina Law of Torts § 19.22, at 328 (2nd ed. 1999) ("Under this doctrine, the plaintiff is barred from recovery if he knew of the risk created by the defendant and knowingly placed himself in a position to be injured by it."); *see also Cobia v. R. R.*, 188 N.C. 487, 491, 125 S.E. 18, 21 (1924) (" 'Assumed risk is founded upon the knowledge . . . either actual or constructive, of the risks to be encountered, and his consent to take the chance of injury therefrom.' ") (quoting *Horton v. R. R.*, 175 N.C. 472, 475, 95 S.E. 883, 884 (1918) and 1 Labatt on Master and Servant §§ 305 and 306).

The case of *Schentzel v. Phila. Nat'l League Club*, 173 Pa. Super. 179, 96 A.2d 181 (1953), is instructive:

> It is clear that plaintiff did not expressly consent to accept the hazard which caused her injury. However, consent may be implied from conduct under the circumstances. We quote at length from Prosser on Torts at pages 383-384: "By entering freely and voluntarily into any relation or situation which presents obvious danger, the plaintiff may be taken to accept it, and to agree that he will look out for himself, and relieve the defendant of responsibility. *Those who* participate or *sit as spectators at sports* and amusements *assume all the obvious risks of being hurt by* roller coasters, *flying balls*, ...

Id. at 186-87, 96 A.2d at 185 (citations omitted) (emphasis in original). Thus, a plaintiff's consent to assume a risk may be either express or implied.

The principles of assumption of risk apply not only to being struck during the course of a game, but also to preliminary or warm-up activities. *Taylor v. Baseball Club of Seattle*, 132 Wn. App. 32, 39, 130 P.3d 835, 838 (2006) (holding that "it is undisputed that the warm-up is part of the sport, that spectators . . . purposely attend that portion of the event, and that the Mariners permit ticket holders to view the warm-up.").

VIII. Application of Law to Allegations in Plaintiff's Complaint

[1] In their first argument, plaintiffs contend that the trial court erred in dismissing their complaint because they properly pled that defendants owed plaintiff a duty of reasonable care, that the duty was breached, and plaintiff suffered damages as a proximate cause of that breach. We agree.

A. Defendants' Negligence

As noted above, defendants owed plaintiff a duty of reasonable care. *Nelson v. Freeland*, 349 N.C. at 632, 607 S.E.2d at 892; *Cates*, 215 N.C. at 65-66, 1 S.E.2d at 132-33. Plaintiffs assert that the defendants were negligent in failing to warn patrons of the danger from soccer balls leaving the field of play, failure to provide a safe environment, and failure to install protective netting behind the goals. Plaintiffs also alleged that defendants had superior knowledge of the risks that led to her injuries and that their negligence caused those injuries. These allegations are adequate to establish a duty, a breach of that duty, and damages arising out of the alleged breach of duty.

The defendants' duty to warn is qualified to the extent that the danger is known or so obvious that the plaintiff should have been aware of it. The question thus becomes whether plaintiffs' complaint contains allegations which affirmatively establish actual or constructive knowledge, *e.g.*, that the danger was either known to the plaintiff or so open and obvious that it should have been known to the plaintiff. We hold that it does not.

Regarding actual knowledge, plaintiffs' complaint specifically alleged that plaintiff "had no knowledge or underlying information that there was a significant risk of being struck by a soccer ball when

attending such events at this facility." **(R. 11, ¶ 21).** We hold that this allegation is sufficient to withstand defendants' Rule 12(b)(6) motion on the basis of plaintiff's actual knowledge.

Regarding constructive knowledge, defendants argue that other allegations in plaintiffs' complaint clearly demonstrate that the danger of a patron being struck by a soccer ball was open and obvious:

> . . . it was reasonably foreseeable by each of the defendants that a soccer ball could fly into the stands, especially behind the goals, especially during practice when many balls were directed toward the nets in a relatively short period of time.

(R. 11-12, ¶ 23). This allegation by plaintiffs was made in support of their argument that defendants should have provided netting behind the goals. Defendants contend that if it was reasonably foreseeable to the defendants that this was a danger to spectators, then it must have also been reasonably foreseeable to the plaintiff, and thus an "open and obvious" condition.

We disagree for two reasons. First, this allegation was specifically qualified and based upon defendants' "particular knowledge of the sport of soccer." Nothing in the complaint intimates that plaintiff possessed this particularized knowledge, or that a reasonable person attending a soccer match would possess such particularized knowledge. Second, on a motion to dismiss pursuant to Rule 12(b)(6), plaintiff's allegations are to be liberally construed and treated as true. *Wood v. Guilford County*, 355 N.C. at 166, 558 S.E.2d at 494. Applying this standard, we cannot say that the complaint alleges an open and obvious condition. *Lorinovich*, 134 N.C. App. at 162, 516 S.E.2d at 646; *see also* 62 Am. Jur. 2d Premises Liability §§ 147, 171 (considering plaintiff's knowledge and owner's superior knowledge in determining defendant's duty to warn).

Finally we note that, while plaintiffs' allegation of no knowledge of the danger based on not having been to an event at this particular stadium is sufficient to withstand a motion to dismiss at this stage of the proceedings, it may not be sufficient to withstand a motion for summary judgment or a motion to dismiss at trial. Whether the plaintiff had knowledge of the danger is not limited to her experience at this particular stadium, but would encompass her knowledge of soccer in general, and of the sport derived from attendance at other venues. Further, the issue of whether a condition was open and obvious is also to be analyzed by whether the conditions were "so obvi-

ous and apparent that they reasonably may be expected to be discovered." *Lorinovich, supra*, 134 N.C. App. at 162, 516 S.E.2d at 647.

B. Assumption of Risk by Plaintiff

[2] Defendants contend that plaintiffs' complaint clearly reveals that she assumed the risk of being struck by the soccer ball when she attended the soccer match. We first note that assumption of risk is an affirmative defense upon which defendants have the burden of proof. Second, the first element of assumption of risk is the plaintiff's actual or constructive knowledge of the risk. As discussed above, the allegations of plaintiffs' complaint do not affirmatively establish either actual or constructive knowledge of the danger. Thus, it was improper for the trial court to dismiss the plaintiffs' complaint at the motion to dismiss stage of the proceedings.

In North Carolina, the doctrine of assumption of risk has been generally limited to cases where there was a contractual relationship between the parties. *Goode v. Barton*, 238 N.C. 492, 496, 78 S.E.2d 398, 402 (1953); *Cobia v. R. R.*, 188 N.C. at 491, 125 S.E. at 21. We have discussed assumption of risk in detail because it was raised and discussed extensively by the parties in their briefs. Plaintiffs' complaint alleges that she was "a lawful visitor and spectator at the soccer match" **(R. 11, ¶ 20)** and makes a passing reference to ticket stubs. **(R. 12, ¶ 25).** At this early stage of the proceedings, we treat these allegations as sufficient to support some type of contractual relationship which would make the doctrine of assumption of risk applicable.

C. Duty to Provide Protective Netting for Spectators

[3] Plaintiffs contend that defendants were negligent in failing to provide protective netting behind the soccer goals. It is clear from the baseball cases that the owner of a sports facility is not required to provide screening for all seats, only a portion of the seats. *Erickson*, 233 N.C. 627, 65 S.E.2d 140; *Cates*, 215 N.C. 64, 1 S.E.2d 131; *Hobby*, 152 N.C. App. 234, 569 S.E.2d 1. While the fact of some screening would bar recovery, *id.*, plaintiffs' complaint does not affirmatively disclose whether there was *any* protective screening at State Capital Soccer Park.

Thus, the appropriate standard remains the facility owner's general duty of reasonable care, which varies with the circumstances. *Aaser v. Charlotte*, 265 N.C. at 498-99, 144 S.E.2d at 614.

> Since what constitutes reasonable care varies with the circumstances, the vigilance required of the owner of the arena in discovering a peril to the invitee and the precautions which he must take to guard against injury therefrom will vary with the nature of the exhibition, the portion of the building involved, the probability of injury and the degree of injury reasonably [foreseeable].
>
> The duty of the owner extends to the physical condition of the premises, themselves, and to contemplated and foreseeable activities thereon by the owner and his employees, the contestants and the spectators. The amount of care required varies, but the basis of liability for injury to the invitee from any of these sources is the same—the failure of the owner to use reasonable care under the circumstances.

Id. We consider the rationale in *Hagerman v. City of Niagara Falls* to be persuasive:

> As to what constitutes reasonable protection, Courts have looked to the protection customarily provided in facilities designed for the viewing of a particular sport: *see Klyne v. Town of Indian Head et al.* (1979), 107 D.L.R. (3d) 692, [1980] 2 W.W.R. 474, 1 Sask. R. 347; *Murray et al. v. Harringay Arena Ltd.*, [1951] 2 K.B. 529, and *Elliott v. Amphitheatre*, *supra*.

Hagerman, 29 O.R.2d 609, 614 (Ont. S.C. (H.C.J.) 1980). While the body of law dealing with the duty to provide protective screening at a baseball game is well-developed, there are no reported decisions pertaining to an owner's duty at a soccer match. The scope of an owner's duty should be determined in accordance with the standard set forth in *Hagerman* and *Aaser*. Based upon the allegations contained in plaintiffs' complaint, this cannot be done at the pleadings stage of the proceedings.

IV. Conclusion

A review of the cases dealing with spectator injuries at sporting events reveals that the overwhelming number of these cases are resolved at the summary judgment or trial stage of the proceedings. One exception to this is the *Hobby* case, a baseball case resolved upon a Rule 12(b)(6) motion. However, the law concerning spectator injuries at baseball games has been more fully developed than that at soccer games. A review of cases throughout the United States reveals only two cases dealing with spectator injuries at soccer matches. *Sutton v. E. New York Youth Soccer Ass'n*, 8 A.D.3d 855, 779 N.Y.S.2d

149 (2004); *Honohan v. Turrone*, 297 A.D.2d 705, 747 N.Y.S.2d 543 (2002). Each of these cases was decided upon a motion for summary judgment and not upon a motion to dismiss.

It is rare that a negligence claim should be dismissed upon the pleadings. *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 491, 411 S.E.2d 916, 920 (1992). Such dismissals should be limited to cases where there is a clear, affirmative allegation of a fact that necessarily defeats a plaintiff's claims. *See Wood v. Guilford County*, 355 N.C. at 166, 558 S.E.2d at 494. We hold that the trial court's dismissal of plaintiffs' claims in the instant case was premature.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA v. THOMAS EDWARD ANDERSON

No. COA08-67

(Filed 16 December 2008)

1. Criminal Law— consolidating charges for trial—child pornography—possessing and receiving computer files—secret peeping

The trial court did not abuse its discretion by consolidating for trial felony charges involving possessing and receiving computer files containing child pornography and a misdemeanor charge of secret peeping with a camera connected to defendant's computer. Although each charge alleges that defendant used the computer in a different manner, the use of the same tool to accomplish similar goals is sufficient to provide evidence of a common modus operandi. Further, the two types of offenses appear to have occurred during the same period of time.

2. Sentencing— greater sentence for not pleading guilty—not supported by evidence

Defendant failed to show a reasonable inference that his sentence was based, even in part, on his insistence on a jury trial. Although defendant contended that certain statements by the judge implied that defendant would face jail if he did not plead

guilty, his sentence was within the statutory limit and the evidence did not support defendant's contention.

3. Constitutional Law; Pornography— double jeopardy—possession and receipt of child pornography

Possession and receipt are separate and distinct acts because receipt is a single, specific act while possession is a continuing offense, and this defendant's double jeopardy rights were not violated where the court proceeded on charges of second-degree exploitation of a minor for receiving computer files containing child pornography and third-degree exploitation of a minor for possessing those computer files.

4. Evidence— information on computer—hard drive not available for examination

The trial court did not err in a prosecution for exploiting minors through receiving and possessing computer files containing child pornography by admitting evidence retrieved from defendant's hard drive even though the State had negligently damaged the hard drive. Defendant did not put forth evidence that the State acted in bad faith, and exculpatory evidence on the hard drive was speculative at best.

5. Evidence— chain of custody—sufficiency

The State's chain of custody of certain exhibits was sufficient in a prosecution for exploiting minors by receiving and possessing computer files containing child pornography.

6. Witnesses— expert qualification denied—no error

The trial court did not err by denying defendant's motion to qualify a witness as an expert in computers where there was evidence that the witness had worked in several jobs using computers and had built several computers, but did not indicate any particular expertise with regard to hard drives or the erasure of files, the issue in this case.

7. Pornography; Sexual Offenses— exploitation of minor—child pornography—secret peeping—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges of exploiting minors by receiving and possessing computer files containing child pornography and secret peeping by using a hidden camera he placed in his stepdaughter's room to observe her.

Appeal by defendant from judgment entered 17 May 2007 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 21 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Richard E. Jester for defendant appellant.

McCULLOUGH, Judge.

FACTS

On 28 April 2005, Clare Anderson ("Clare") found a camera in an HVAC vent in her bedroom. After telling her mother, Deborah Anderson ("Ms. Anderson"), about the camera, the two examined the camera and found a cord leading from the camera in Clare's room to a computer located in the family's computer room. The computer belonged to Thomas Edward Anderson ("defendant"), Clare's stepfather. Clare and Ms. Anderson confronted defendant, and asked him if he was aware of the camera. Defendant admitted to placing the camera in the room, but argued that he had installed the camera to ensure that Clare did not get into trouble. Ms. Anderson requested defendant leave the house, and he did so a short time afterward.

Following the discovery of the camera, Ms. Anderson asked a neighbor, Cheryl Christman, to remove defendant's computer. Ms. Christman removed the computer from the Anderson's home, placed it first in her trunk, and then delivered it to the Office of Special Investigations (OSI) at the local Air Force Base on 2 May 2005. Although defendant was a member of the Air Force Reserve, the officials at OSI determined that the matter should be left to the Wayne County Sheriff's Office ("Sheriff's Office"). Accordingly, OSI turned the computer over to the Sheriff's Office. On 3 May 2005, Sergeant Tammy Odom of the Sheriff's Office interviewed Clare regarding the camera she found in her room. Defendant was later arrested for peeping at Clare.

A short time after defendant's arrest, Agent John Rea of the State Bureau of Investigations ("SBI") contacted Sergeant Odom and informed the sergeant that the SBI was investigating defendant. Defendant was being investigated because his computer had been detected sharing child pornography on the internet. On 8 June 2005, the Sheriff's Office released defendant's computer to Agent Rea to allow the SBI to further conduct their investigation. Agent Rea

alerted defendant of the property he had seized and requested defendant's consent to allow the SBI to examine the contents of the hard drive of the computer in question. Defendant consented to the SBI's examination.

On 10 June 2005, SBI Special Agent Eric Hicks conducted a forensic preview examination on defendant's computer. On one of the computer's hard drives ("defendant's hard drive"), Agent Hicks discovered approximately twenty-five movie files containing images of underage individuals engaged in sexual acts. Many of these files were given labels indicative of the explicit images they contained. Although the movie files were recovered from a single folder and had all been deleted, Agent Hicks determined that the files had previously been stored in a number of different folders on defendant's hard drive. Because the examination was only a preview, however, Agent Hicks did not attempt to determine if the files had ever been viewed.

On 15 June 2005, Agent Rea and Agent Kelly Moser interviewed defendant regarding the files he had been downloading online. Defendant stated that he had used file-sharing software to download movies, and that some of the files he had downloaded contained images of child pornography. Further, defendant stated that he had specifically searched for movie files containing these types of images. Eventually, defendant stated that he no longer wanted these files on his computer, so he performed a search and deleted those movie files located by the search. After this discussion, defendant began to discuss the camera his stepdaughter had found in her room. According to defendant, he put the camera in his stepdaughter's room to act as a video nanny, and did not have any inappropriate intentions.

On 28 November 2008, Agent Ricks attempted to perform a full forensic examination on defendant's hard drive. The examination was unsuccessful, however, as the hard drive did not work. The SBI then sent the hard drive to a private company for the purpose of recovering the data contained thereon. This too proved fruitless, and the SBI was unable to perform a full forensic examination or to determine in any more detail the contents of defendant's hard drive.

On 22 July 2005, defendant was convicted of misdemeanor secret peeping for his role in placing the camera in his stepdaughter's room. Defendant filed notice of appeal on that date. On 26 September 2006, defendant was indicted on ten felony counts of third-degree exploitation of a minor for the possession of the files containing child pornography. On 5 March 2007, under a superseding indictment, defendant

was charged with both the original ten counts of third-degree exploitation of a minor as well as an additional ten felony counts of second-degree exploitation of a minor for receiving the aforementioned files. Defendant's appeal of his misdemeanor charge was joined with his twenty felony charges pursuant to a motion by the State, and the two matters were heard before Judge Jerry Braswell in Wayne County Superior Court. On 17 May 2007, defendant was found guilty of all the charges against him. Defendant now appeals.

I.

[1] In his first argument on appeal, defendant argues the trial court erred by joining defendant's two types of offenses for trial. We disagree.

"Two or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2007). "In considering a motion to join, the trial judge must first determine if the statutory requirement of a transactional connection is met." *State v. Williams*, 355 N.C. 501, 529-30, 565 S.E.2d 609, 626 (2002). In making this determination, the trial judge may consider various factors including the presence of a common *modus operandi* and the time lapse between the offenses. *Id.* at 529-30, 565 S.E.2d at 627. Should the trial judge determine the offenses have the requisite transactional connection, the court must then determine if the defendant "can receive a fair hearing on each charge if the charges are tried together." *State v. Huff*, 325 N.C. 1, 23, 381 S.E.2d 635, 647 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). Our Supreme Court has held that

> [i]f consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated. However, the trial judge's decision to consolidate for trial cases having a transactional connection is within the discretion of the trial court and, absent a showing of abuse of discretion, will not be disturbed on appeal.

Huff, 325 N.C. at 23, 381 S.E.2d at 647 (citations omitted).

After hearing the State's motion to join the two offenses for trial, the trial court found "that there appear[ed] to be a common thread in that both offenses, both the felony and the misdemeanor offenses, seem[ed] to involve sexual exploitation involving young females, that

a computer was used in both cases to view females." Accordingly, the trial court granted the State's motion. On appeal, defendant argues the trial court incorrectly determined that defendant's two offenses contained the requisite transactional connection for joinder.

Upon review, we are unpersuaded by defendant's contention. Defendant exhibited a similar *modus operandi* in both types of crimes charged. In each instance, defendant used the same personal computer for the purpose of viewing pictures of young women. Although we note that each charge alleges defendant used the computer in a different manner, we find the use of the same tool to accomplish similar goals is sufficient to provide some evidence of a common *modus operandi*. *See Williams*, 355 N.C. at 529-30, 565 S.E.2d at 627. Further, the two types of offenses appear to have occurred during the same period of time. According to testimony proffered by defendant, he did not delete many of the illicit images he downloaded until after his stepdaughter found the camera in her room. Therefore, defendant possessed the illicit images at the same time the camera was in place to record his stepdaughter. After reviewing these factors, as well as the additional circumstances surrounding the two types of offenses, we hold the trial court was presented with sufficient evidence to support a determination that the two types of offenses shared a transactional connection. As we can find no evidence that defendant was deprived of his ability to present his defense, we hold the trial court did not abuse its discretion in consolidating the offenses for trial.

II.

[2] In his second argument on appeal, defendant argues the trial court issued his sentence in error. According to defendant, the trial court imposed a greater sentence upon defendant because he chose to proceed to trial rather than enter a guilty plea. We disagree.

"Although a sentence within the statutory limit will be presumed regular and valid, such a presumption is not conclusive." *State v. Gantt*, 161 N.C. App. 265, 271, 588 S.E.2d 893, 897 (2003), *disc. review improvidently allowed*, 358 N.C. 157, 593 S.E.2d 83 (2004). "If the record discloses that the court considered irrelevant and improper matter[s] in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant's rights." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "A defendant has the right to plead not guilty, and 'he should not and cannot be punished for exercising that right.' " *Gantt*,

161 N.C. App. at 271, 588 S.E.2d at 897 (citation omitted). "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).

In the case *sub judice*, the record indicates that a conference was held in the judge's chambers between defense counsel, the prosecutor, and the trial judge. When the trial resumed, the trial judge made a record entry regarding that conference. According to the trial judge, during the conference he indicated to the prosecutor and defense counsel that if the two sides were engaged in plea discussions, he would be "amenable to a probationary sentence." Defense counsel lodged an objection to the trial judge's comments during this conference, claiming that it could be inferred from such comments that the trial judge would be less likely to give defendant probation if he did not plead guilty. In response, the trial judge stated he had not meant to make any such implication, but rather to encourage the two sides to enter into plea negotiations.

On appeal, defendant again asserts that the judge's statements clearly implied that defendant would face jail time if he did not plead guilty to the charges against him. A review of the record does not support this contention. Here, defendant was given a sentence within the statutory limit for the corresponding crime. Thus, defendant must overcome the presumption of regularity. *See Gantt*, 161 N.C. App. at 271, 588 S.E.2d at 897. Although defendant argued at trial, and again argues on appeal, that the judge's comments clearly indicated that defendant would be sentenced more harshly if he did not plead guilty, the evidence in the record is insufficient to support such an assertion. Accordingly, we find that defendant has failed to show that it can be reasonably inferred that his sentence was based, even in part, on his insistence on a jury trial. Defendant's assignment of error is, therefore, without merit.

III.

[3] In his third argument on appeal, defendant argues the trial court violated his right to be free from double jeopardy as guaranteed by the Constitutions of the United States and the State of North Carolina. Specifically, defendant argues the trial court erred in proceeding on Counts 11 through 20 for second-degree exploitation of a minor in defendant's indictment numbered 05CRS55290. According to defendant, these counts were identical to counts 1

through 10, respectively, for third-degree exploitation of a minor. We disagree.

> It is well-established that when a defendant is indicted for a criminal offense he may be lawfully convicted of the offense charged therein or of any lesser offense if all the elements of the lesser offense are included within the offense charged in the indictment, and if all the elements of the lesser offense could be proved by proof of the facts alleged in the indictment. He may not, upon trial under that indictment, be lawfully convicted of any other criminal offense.

State v. Davis, 302 N.C. 370, 372, 275 S.E.2d 491, 493 (1981). Further, "[t]he constitutional prohibition against double jeopardy protects a defendant from 'additional punishment and successive prosecution' for the same criminal offense." *State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 658-59 (2008) (citations omitted).

Here, defendant was charged with ten counts of third-degree exploitation of a minor and ten counts of second-degree exploitation of a minor. The two charges were not identical, however. The counts of third-degree exploitation were based on defendant's possession of the illicit images of minors, while the counts of second-degree exploitation were based on defendant's receipt of these images. According to defendant, because possessing these images and receiving these images amounted to the same offense, punishing defendant for both possessing and receiving the same illicit images violated his right to be free from double jeopardy. We are unpersuaded by defendant's argument.

Our Supreme Court was previously asked to determine if possession and receipt amounted to the same act in *Davis*, where a defendant was charged with both receiving and possessing stolen property. According to the *Davis* Court, "[a]lthough at first glance possession may seem to be a component of receiving, it is really a separate and distinct act." *Davis*, 302 N.C. at 374, 275 S.E.2d at 494. The *Davis* Court went on to explain that "the unlawful receipt of stolen property is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment." *Id.* On review of the instant case, we find the reasoning employed by our Supreme Court in *Davis* to be instructive. Accordingly, we hold that the acts of possession and receipt, with regard to these illicit images, amounted to separate and distinct acts. Therefore, the fact that defendant was charged and convicted of

both possessing and receiving the aforementioned images did not amount to double jeopardy. Defendant's assignment of error is without merit.

IV.

[4] In his fourth argument on appeal, defendant argues the trial court erred in admitting evidence retrieved from defendant's hard drive. According to defendant, this evidence should have been suppressed because the State negligently destroyed the hard drive, and the admission of the evidence shifted the burden of proof from the State to defendant. We disagree.

Our Supreme Court has "upheld the admission of evidence subsequently lost or destroyed where the exculpatory value of tests a defendant seeks to perform on that evidence is speculative and there is no showing of bad faith or willful intent on the part of any law enforcement officer." *State v. Hyatt*, 355 N.C. 642, 663, 566 S.E.2d 61, 75 (2002), *cert. denied*, 362 N.C. 90, 656 S.E.2d 594 (2007).

In the case *sub judice*, the State presented evidence of twenty child pornography movie files that were discovered on defendant's hard drive. However, because of damage that had occurred to the hard drive, the State was unable to determine if these files had ever been viewed or copied. The damage to the hard drive also prevented defendant from performing his own tests. While we recognize that the destruction of the hard drive may have precluded defendant from performing tests on the hard drive, the value of such evidence is speculative at best. The State presented evidence at trial that defendant purposefully downloaded and watched movie files containing child pornography. Although defendant argued that he accidentally retrieved these movies as the result of a search, he admitted that he would view a movie and, if it contained child pornography, he would delete it "[a]s soon as it was over."

On appeal, defendant fails to provide any authority for his claim that the State's introduction of this evidence amounted to a shifting of the burden of proof. Defendant's own testimony at trial indicated that even if the hard drive could be recovered, it would not show whether defendant had ever viewed the aforementioned movie files. Therefore, any exculpatory evidence that may have been on the hard drive is speculative at best. Further, defendant acknowledges that he did not put forward any evidence that the State acted in bad faith. Accordingly, we find defendant's arguments to be without merit.

V.

[5] In his fifth argument on appeal, defendant argues the trial court erred by admitting State's Exhibits 2A and 7 into evidence. According to defendant, the State failed to present a proper chain of custody for this evidence, and thus, this evidence should not have been admitted. We disagree.

Our Supreme Court has previously examined the chain of custody requirements in North Carolina. In *State v. Fleming*, 350 N.C. 109, 131, 512 S.E.2d 720, 736, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999), our Supreme Court held:

> Before real evidence may be received into evidence, the party offering the evidence must first satisfy a two-pronged test. "The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change." *State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984). Determining the standard of certainty required to show that the item offered is the same as the item involved in the incident and that it is in an unchanged condition lies within the trial court's sound discretion. *Id.* at 388-89, 317 S.E.2d at 392. "A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *Id.* at 389, 317 S.E.2d at 392. Any weak links in the chain of custody pertain only to the weight to be given to the evidence and not to its admissibility. *Id.*

Here, defendant has failed to present any authority to support his claim that the State put forward an insufficient chain of custody. After reviewing defendant's claims, we hold the State presented a chain of custody sufficient to allow the State's exhibits to be admitted at trial. *See Campbell*, 311 N.C. at 388, 317 S.E.2d at 392. Defendant's assignment of error is overruled.

VI.

[6] In his sixth argument on appeal, defendant argues the trial court erred by denying defendant's motion that witness Claude Lee David, Jr., be qualified as an expert. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 702 (2007) provides that a witness must be qualified by "knowledge, skill, experience, training, or education" for his testimony to be admissible as expert testimony. *State*

v. Davis, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993) ("Whether the witness qualifies as an expert is exclusively within the trial judge's discretion 'and is not to be reversed on appeal absent a complete lack of evidence to support his ruling.' "). *Id.* (citations omitted).

Here, defendant presented testimony from Mr. David, an airway transportation specialist for the Federal Aviation Administration. Mr. David testified at trial that he had worked as, *inter alia*, a computer field service technician, a precision measurement equipment laboratory specialist, and a yard manager. Mr. David further testified that he had built several computers, including one he recently built for his 11-year-old son. When defendant moved to have Mr. David qualified as an expert in computers, a bench conference was held and defendant's motion was denied.

On appeal, defendant argues the trial court erroneously rejected defendant's motion to qualify Mr. David as an expert witness. After reviewing the record, we hold the trial court was presented with sufficient evidence to support its ruling. Although Mr. David testified that he had worked in several jobs involving the use of computers, and that he had built several computers, the record does not indicate that Mr. David possessed any particular expertise with regard to hard drives or the erasure of files. Therefore, we hold the trial court did not abuse its discretion in denying defendant's motion. As such, defendant's assignment of error is without merit.

VII.

[7] In his seventh argument on appeal, defendant argues the trial court erred in denying his motion to dismiss the charges due to the insufficiency of the evidence. We disagree.

When a defendant challenges the sufficiency of the evidence against him, the question before this Court 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. 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." . . . If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be

allowed. This is true even though the suspicion so aroused by the evidence is strong.

State v. Earnhardt, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citations omitted). In making a determination on the issue of sufficiency, this Court will consider the evidence in the light most favorable to the State. *Id.* at 67, 296 S.E.2d at 653.

Here, when viewed in the light most favorable to the State, the evidence presented at trial was sufficient to show (1) that defendant used his computer to knowingly download and view movies of minors engaged in sexual activity and (2) that defendant placed a hidden camera in his stepdaughter's room and used the camera to observe her. Thus, we find the State presented substantial evidence of each essential element of the crimes charged, and that defendant was the perpetrator of those crimes. *See Lynch*, 327 N.C. at 216, 393 S.E.2d at 814. Accordingly, the trial court did not err in failing to grant defendant's motion to dismiss.

No error.

Judges HUNTER and JACKSON concur.

JANET W. EAKES v. DAVID W. EAKES

No. COA08-248, 08-290

(Filed 16 December 2008)

1. Child Support, Custody, and Visitation— support—fund created to pay obligation—accounting—jurisdiction in district court

The district court had exclusive jurisdiction over an action involving a fund used for child support obligations where plaintiff had argued that the issue involved trust accounting and that exclusive jurisdiction rested with the clerk of superior court. The fund was created by the district court, with the consent of the parties, for the sole purpose of providing a supplemental source of funding defendant's child support obligations, and the district court is the proper division for proceedings for child support.

2. Child Support, Custody, and Visitation— support—contempt motion—standing

Defendant had standing to bring a contempt order concerning a fund for payment of child support obligations, and the trial court had jurisdiction, where plaintiff argued that defendant was not a beneficiary and was not the proper party to bring the action. Defendant had a substantial interest affected by plaintiff's failure to account for use of the fund and by improper use of the fund because he had ongoing child support obligations paid wholly or partly by the fund. Additionally, a consent order required that plaintiff account for use of the fund.

3. Civil Procedure— motion to dismiss—failure to prosecute motion—denied—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiff's motion to dismiss for failure to prosecute defendant's motion to show cause in a child support matter. The trial court found that considerable time had passed since the filing of the motion, but that numerous other issues had been undertaken to ready the issue for hearing, and that defendant had not sought delay to prejudice plaintiff. Plaintiff did not demonstrate prejudice, and there was nothing to suggest that the ruling was manifestly not supported by reason.

4. Child Support, Custody, and Visitation— support—contempt—use of fund intended for payment

The findings were sufficient to support a conclusion of contempt in a child support proceeding involving plaintiff's misuse of a fund intended for partial or full payment of defendant's child support obligation.

5. Child Support, Custody, and Visitation— support—fund for payment—intended only for specific purposes

The trial court in a child support proceeding correctly concluded that a consent order that created a fund for payment of defendant's obligation provided that the fund could only be used for specific purposes.

6. Costs— attorney fees—child support—misuse of funds—contempt

The trial court had the statutory authority to award attorney fees against plaintiff as a condition to being purged of contempt in an action arising from her misuse of a fund created to pay all

or part of defendant's child support obligation. Contrary to plaintiff's contention, the fund was not separate and apart from the child support obligation.

7. Costs— attorney fees—findings—insufficiency

The trial court erred in its award of attorney fees in a child support contempt proceeding where it did not find that defendant had insufficient means to defray the expense of the suit.

Appeal by plaintiff from judgments entered 21 November and 13 December 2007 by Judge Vinston M. Rozier, Jr. in Wake County District Court. Heard in the Court of Appeals 8 October 2008.

Sokol, McLamb, Schilawski, Oliver, Ladd & Grace, by Helen M. Oliver, for plaintiff-appellant.

No brief filed by defendant-appellee.

STEELMAN, Judge.

Where defendant brought an action related to child support, the trial court did not err in concluding that it had subject matter jurisdiction. Where defendant had a substantial interest in plaintiff's use and accounting of the monies in the Child Support Fund, the court did not err in concluding that defendant had standing. Where plaintiff has not shown that she was prejudiced by the trial court's denial of her motion to dismiss for failure to prosecute, or that such denial was an abuse of discretion, the trial court's ruling is affirmed. Where the trial court's findings of fact support its conclusion that plaintiff was in civil contempt, the trial court did not err in holding plaintiff in civil contempt for her willful failure to comply with the Child Support Order. Where the trial court failed to make adequate findings to support an award of attorneys' fees, the attorneys' fees award is vacated.

I. Factual and Procedural Background

Janet W. Cherry (formerly Eakes) ("plaintiff") and David W. Eakes ("defendant") were married on 16 February 1980. Three children were born of the marriage. Plaintiff and defendant were separated on 20 June 1999 and subsequently divorced. Plaintiff and defendant entered into a separation agreement on 19 July 2000, which was incorporated into a court order on 1 December 2000. The Separation Agreement provided that defendant was to pay plaintiff child support in the amount of $300.00 per month, plus "one-half payment for any medical treatment, psychiatric, psychological or other

counseling that any of the children may require so long as child support is owing pursuant to this agreement." On 12 July 2002, a Child Support Order was entered that modified the parties' Separation Agreement. The court found defendant to be in arrears on his child support payments, and also that plaintiff was in possession of the sum of $75,000 that belonged to defendant. The order directed that the $75,000 be used to satisfy defendant's child support arrearages, as well as "any outstanding unreimbursed medical, psychiactric, psychological or other expenses for the minor children as set forth in the Separation Agreement . . .," and to make monthly child support payments in the event that defendant became unemployed (hereinafter referred to as "Fund"). The order further provided that "[d]efendant shall not have the right to seek the return of any portion of the $75,000 in plaintiff's possession.

On 23 July 2004, a Consent Order for Child Support and Child Custody was entered. Pursuant to this order, defendant was required to pay $772.00 per month in child support. This was to be paid by defendant paying $675.00 per month to plaintiff and plaintiff's withdrawing $97.00 per month from the Fund. This Order further provided that "[p]laintiff mother shall provide an accounting of the monies in the constructive trust established pursuant to the Child Support Order entered on 12 July 2002 which was initially funded with seventy-five thousand dollars ($75,000) of defendant father's money within sixty days (60) of the entry of this Order . . . and every two years thereafter. . . ." Plaintiff used monies from the Fund for vacations, vehicles, and personal bills, nearly depleting it.

On 2 September 2005, the trial court entered an Order to Compel Accounting requiring plaintiff to provide an accounting of the Fund. On 14 December 2005, defendant filed a Motion to Show Cause, alleging plaintiff was in contempt of (1) the Order to Compel Accounting, (2) the 12 July 2002 Child Support Order, and (3) the 23 July 2004 Consent Order for Child Support and Child Custody; and seeking a replenishment of any misappropriated funds, and attorney's fees. No show cause order was ever entered by the trial court. On 20 March 2007, plaintiff filed a Motion to Dismiss defendant's claims for failure to prosecute. On 21 November 2007, an order was entered denying plaintiff's motion to dismiss and holding her in contempt for using the funds in the Fund for "purposes other than those set forth in the parties' Separation Agreement and set forth in the parties' child support orders . . ." On 13 December 2007, the court entered a separate order awarding defendant attorney's fees in the amount of $900.00. Plaintiff

appeals the 21 November 2007 Contempt Order and the 13 December 2007 Attorney's Fees Order.

II. Subject Matter Jurisdiction

In her first argument, plaintiff contends that the trial court erred by concluding that it had jurisdiction over the parties and subject matter involved in this case. We disagree.

A. Jurisdiction of the District and Superior Courts

[1] Plaintiff first contends that this case involved an issue of a trust accounting, and that the superior court had original and exclusive jurisdiction over the case. Plaintiff cites N.C. Gen. Stat. § 36C-2-203 (2007) for the proposition that, "[t]he clerks of superior court of this State have original jurisdiction over all proceedings concerning the internal affairs of trusts. . . . the clerk of superior court's jurisdiction is exclusive."

Contrary to plaintiff's assertions, this case addressed the issue of contempt in the context of a child support action, and the alleged violations of prior orders entered by the Wake County District Court. While the subsequent orders of the District Court refer to the Fund as a "constructive trust," this appellation does not place the administration and accounting of the Fund under the provisions of Chapter 36C of the General Statutes. The Fund was created by the district court, with the express consent of the parties, to provide a supplemental source of funding for defendant's child support obligations.

N.C. Gen. Stat. § 7A-244 (2007) provides that "[t]he district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for . . . child support . . . and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof."

Since the sole purpose of the Fund was for child support, the District court had exclusive jurisdiction over the Fund.

This argument is without merit.

B. Standing

[2] Plaintiff further contends that defendant was not a beneficiary of the "trust" and was thus not the proper party to bring the accounting action. We disagree.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324,

560 S.E.2d 875, 878 (2002) (citation omitted). The party invoking jurisdiction has the burden of establishing standing. *Neuse River Found. v. Smithfield Foods*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citation omitted). *Street v. Smart Corp.* defined standing as follows:

> Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter. . . . The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court.

Street v. Smart Corp., 157 N.C. App. 303, 305-06, 578 S.E.2d 695, 698 (2003) (internal citations and quotations omitted).

We hold that defendant had a "substantial interest affected" by plaintiff's failure to account for the funds in the Fund, and by her improper use of those funds. The youngest child of the marriage was born 26 July 1996. Thus, defendant had an ongoing child support obligation at least through 26 July 2014. Under the 23 July 2004 Consent Order, $97.00 per month of defendant's child support obligation was being paid from the Fund. In addition, under the 11 July 2002 order, the Fund was to be used to pay outstanding medical expenses of the children, and could be a source of paying defendant's entire monthly child support obligation if he was unemployed. These provisions provided defendant with a substantial interest in the Fund.

In addition, the 23 July 2004 Consent Order required plaintiff to render an accounting within sixty days, and also provided that "Plaintiff Mother shall provide to Defendant Husband an updated accounting" every two years. These provisions constitute an additional and separate basis for defendant's standing in this matter.

Defendant had standing in this matter, and the trial court correctly concluded that it had jurisdiction over the parties and the subject matter.

This argument is without merit.

III. Failure to Prosecute

[3] In her second argument, plaintiff contends that the trial court erred in denying her motion to dismiss for failure to prosecute. We disagree.

"North Carolina Civil Procedure Rule 41 (b) . . . authorizes dismissal with prejudice of a plaintiff's claim for failure to prosecute." *Green v. Eure*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 600 (1973). However, "mere lapse of time does not justify dismissal if the plaintiff has not been lacking in diligence[,]" but instead "is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion." *Id.* at 672, 197 S.E.2d at 601. "Dismissal under Rule 41(b) is within the discretion of the trial court." *Jones v. Stone*, 52 N.C. App. 502, 506, 279 S.E.2d 13, 15 (1981). Where a ruling of a trial court is discretionary, the 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 omitted).

In the instant case, the trial court made the following findings of fact regarding plaintiff's motion to dismiss:

> 7A. Although considerable time has passed since the Defendant filed his *Motion to Show Cause (Replenishment and appropriate relief)*, the file indicates that numerous other issues have been undertaken in this file, in attempts to ready the issue for hearing, since the filing.
>
> 7B. The Defendant has not sought to delay this hearing to prejudice the Plaintiff, nor to [sic] any improper purpose, and no material prejudice to the Plaintiff has resulted from the delay.

Plaintiff has cited no authority for her argument that the court abused its discretion in denying her motion to dismiss. Further, plaintiff has failed to demonstrate that she was prejudiced by the court's ruling.

There is nothing in the record to suggest the trial court's ruling was "manifestly unsupported by reason." We hold that the trial court did not abuse its discretion in denying plaintiff's motion to dismiss.

This argument is without merit.

IV. Contempt

In her third argument, plaintiff contends that the trial court erred in holding her in contempt. We disagree.

N.C. Gen. Stat. § 5A-21(a)(2a) states that "[f]ailure to comply with an order of a court is a continuing civil contempt as long as . . . [t]he noncompliance by the person to whom the order is directed is willful[.]" N.C. Gen. Stat. § 5A-21(a)(2a) (2007). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002) (citation omitted). The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997) (citation omitted). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (citation omitted).

A. Findings of Fact

[4] Plaintiff first contends that there is no evidence to support the trial court's findings of fact numbers 6, 12, 13, 14, 16, 18, and 19.

Although plaintiff assigned error to findings of fact numbers 12, 13, and 18, she has failed to argue in her brief that they are not supported by competent evidence. These findings are therefore binding on appeal. N.C. R. App. P. 28(b)(6) (2008). As to the remaining findings, plaintiff does not challenge their evidentiary basis, but instead argues that "the 21 November 2007 order holding Ms. Eakes in contempt not only fails to provide adequate findings to show Ms. Eakes acted in bad faith and purposely and deliberately ignored an order of the court, but it fails to provide any findings to support its finding and ultimate holding that Ms. Eakes' actions were willful."

The trial court made the following findings: (1) that the Fund was established by the parties for certain limited expenses, including uninsured medical, psychiatric, and psychological expenses, for the benefit of the minor children; (2) that plaintiff used the monies in the Fund for purposes other than those established by the court orders; (3) that plaintiff's use of these monies was willful; and (4) that despite being ordered to provide a full accounting of her use of the funds within one week of the court's Order to Compel Accounting, plaintiff failed to produce a timely accounting, and the limited accounting that she provided to the court "d[id] not provide with specificity the time, use and purpose of the expenditures claimed."

We hold that the court's findings were adequate to support its conclusion that plaintiff was in contempt. To the extent that the challenged findings were actually conclusions of law, we find that they were supported by the trial court's findings of fact.

This argument is without merit.

B. Construction of the Fund

[5] Plaintiff next contends that the court erred in holding her in contempt on the grounds that she willfully failed to comply with the 23 July 2004 Order. Plaintiff does not contest that she spent the monies from the Fund for purposes other than those agreed upon by the parties in the Separation Agreement that was incorporated into a later order of the court and in the Child Support Order. Rather, plaintiff argues that the trial court erred in concluding that the 23 July 2004 Consent Order provided that the Fund could only be used for specific purposes. Plaintiff relies on the language of the 23 July 2004 Consent Order, which states that "[t]he constructive trust established . . . *may* continue to be used as originally described."

In the 21 November 2007 Contempt and Replenishment Order, the trial court found that "[n]o additional expenses nor liberties were intended nor given by the use of 'may' instead of 'shall' in the July 23 *Consent Order*." This finding is actually a conclusion of law, and we review it *de novo*. *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). The Consent Order provided that a portion of the Fund was to be used for defendant's monthly child support payments. If that same Consent Order modified the previous child support orders and agreements of the parties by allowing plaintiff unchecked discretion to spend the monies in the Fund as she desired, there would be no monies left in the Fund to supplement defendant's child support obligation. Further, if plaintiff could spend the monies in the Fund at her discretion, a periodic accounting to the court detailing her expenditures would have been unnecessary.

The trial court's conclusion that plaintiff failed to comply with the Order by using monies from the Fund for purposes other than unreimbursed medical expenses and defendant's support obligation was supported by the record and was proper. This argument is without merit.

V. Attorney's Fees

In her fourth argument, plaintiff contends that the trial court erred in awarding defendant attorney's fees. We agree.

"It is settled law in North Carolina that ordinarily attorneys fees are not recoverable as an item of damages or of costs, absent express statutory authority for fixing and awarding them." *Baxley v. Jackson*, 179 N.C. App. 635, 640, 634 S.E.2d 905, 908 (2006) (quoting *Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602 (1973)). North Carolina courts have held that the contempt power of the trial court includes the authority to require the payment of reasonable attorney's fees to opposing counsel as a condition to being purged of contempt for failure to comply with a child support order. *Blair v. Blair*, 8 N.C. App. 61, 63, 173 S.E.2d 513, 514 (1970). Where an award of attorney's fees is granted, the trial court must make adequate findings as to the reasonableness of the award. *Gowing v. Gowing*, 111 N.C. App. 613, 620, 432 S.E.2d 911, 915 (1993).

A. Statutory Authority

[6] Plaintiff first contends that the child support obligations were separate and distinct from the Child Support Fund, and therefore the trial court lacked statutory authority to award attorney's fees as a condition to being purged of contempt. We disagree.

Plaintiff relies on *Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991) in support of this argument. In *Powers*, the parties entered into a consent judgment which provided that the defendant would pay for the parties' child's college education. The trial court found defendant to be in contempt for failing to comply with this provision, and additionally awarded plaintiff attorney's fees. On appeal, this Court vacated the award of attorney's fees on the grounds that the case "involve[d] neither a child support order (the child support provision under the consent judgment expired when the child reached 18 years of age and the provision here was made separate and apart from the child support provision) nor an equitable distribution award." *Powers* at 707, 407 S.E.2d at 276.

Powers is distinguishable from the instant case. The Fund created here was not "separate and apart" from defendant's child support obligation. To the contrary, a portion of defendant's monthly child support payments was to be taken directly out of the Fund. Thus, the trial court had the statutory authority to award attorneys' fees as a condition to being purged of contempt for failure to comply with the child support order. *See Blair* at 63, 173 S.E.2d at 514.

B. Findings of Fact

[7] Plaintiff next contends that the trial court's findings do not support its award of attorney's fees. We agree.

> Before awarding attorney's fees, the trial court must make specific findings of fact concerning:
>
> (1) the ability of the intervenors to defray the cost of the suit, *i.e.*, that the intervenors are unable to employ adequate counsel in order to proceed as a litigant to meet the other litigants in the suit;
>
> (2) the good faith of the intervenors in proceeding in this suit;
>
> (3) the lawyer's skill;
>
> (4) the lawyer's hourly rate;
>
> (5) the nature and scope of the legal services rendered.

In re Baby Boy Scearce, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413 (citations omitted), *cert. denied*, 318 N.C. 415, 349 S.E.2d 590 (1986); *see also* N.C. Gen. Stat. § 50-13.6 (2007).

In the instant case, although the trial court did not make findings as to defendant's good faith, the evidence shows that he is an interested party acting in good faith. *Lawrence v. Tice*, 107 N.C. App. 140, 153, 419 S.E.2d 176, 184 (1992) (while the better practice is to make express findings as to an interested party's good faith, the lack of such findings is not fatal where the evidence is undisputed). However, the trial court failed to make a finding that defendant had insufficient means to defray the expense of the suit. *See Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723-24 (1980).

We hold that the trial court's findings of fact were inadequate to support its award of attorneys' fees to defendant. The award of attorneys' fees is vacated and the matter is remanded for additional findings.

Appeal 08-248 is AFFIRMED.

Appeal 08-290 is VACATED and REMANDED.

Judges WYNN and JACKSON concur.

STATE OF NORTH CAROLINA v. BOBBY LEE ENGLISH

No. COA08-613

(Filed 16 December 2008)

Criminal Law— final closing argument—cross-examination—new evidence not introduced

A defendant in a first-degree murder prosecution was erroneously deprived of his right to make the final closing argument where he did not introduce new evidence during cross-examination, as the trial court ruled. A detective was cross-examined about possession of a gun stolen from the victim after testifying on direct examination about a codefendant's statements concerning the gun. Credibility was an issue because the codefendants were accusing each other, and the cross-examination of the detective could have been an attempt to impeach the codefendant.

Appeal by defendant from judgments entered on or after 11 September 2007 by Judge Robert C. Ervin in Burke County Superior Court. Heard in the Court of Appeals 9 October 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General L. Michael Dodd, for the State.

Marilyn G. Ozer, for defendant-appellant.

TYSON, Judge.

Bobby Lee English ("defendant") appeals judgments entered after a jury found him to be guilty of: (1) first-degree murder; (2) first-degree burglary; (3) conspiracy to commit first-degree burglary; (4) robbery with a dangerous weapon; and (5) conspiracy to commit robbery with a dangerous weapon. Because the trial court erroneously deprived defendant of his right to make the final closing argument to the jury, we hold defendant is entitled to a new trial.

I. Background

On 5 February 2004, Henry Gibson ("Gibson"), an eighty-two-year-old military veteran, was beaten to death in his home during the course of a burglary and robbery. At trial, the State's evidence tended to show Leiah Helton ("Helton"), Cristal Perryman ("Perryman"), and defendant had spent the week prior to the burglary and robbery

"smoking crack" and had exhausted their money. Helton had robbed Gibson previously and knew that he kept a large sum of cash in a "sack" inside his recreational vehicle. On 4 February 2004, Helton devised a plan to rob Gibson a second time and recruited Perryman and defendant to assist her in the robbery. Sometime after midnight on 5 February 2004, Helton, Perryman, and defendant were driven to Gibson's residence by Adrianna Juarez ("Juarez").

Helton instructed Juarez to "drive around for about 15 or 20 minutes, [and] then come back." Helton retrieved the ax handle she had brought along to subdue Gibson and handed it to defendant to conceal under his sweatshirt. As Helton, Perryman, and defendant approached Gibson's residence, Helton instructed defendant to strike Gibson with the ax handle on her signal.

Helton disguised her appearance and knocked on Gibson's door three times before he answered. Helton gave Gibson a false name and stated that her car had run out of gas and that she needed money. Gibson opened the door and invited Helton, Perryman, and defendant inside his residence. Helton subsequently signaled for defendant to attack Gibson. Defendant pulled the ax handle from underneath his sweatshirt, dropped it to the ground, and punched Gibson in the face. Gibson remained unconscious for approximately two to three minutes. While Gibson remained unconscious, Helton asked him repeatedly where he kept his money. After Gibson failed to respond, Helton hit him in the face with the ax handle multiple times.

Helton and defendant searched through Gibson's clothes and found a gun wrapped in newspaper. Helton threw the gun on the floor near the door so she could retrieve it on the way out. In the meantime, Perryman searched Gibson's residence and found money hidden under the couch. Perryman stated "I found the money. Let's go." Perryman walked out the door and began putting money into her pockets.

The sequence of events that follow are disputed. Perryman testified defendant exited Gibson's residence three to four seconds after her. Approximately four minutes later, Helton exited Gibson's residence holding a knife and stated, "It's done. It's over . . . I slit his throat."

Defendant's account of what transpired during and after the robbery varied slightly with Perryman's trial testimony. Defendant stated it took Helton approximately thirty to forty-five seconds to exit Gibson's residence with a knife in hand. Defendant's statement to

police was introduced through testimony from State Bureau of Investigations ("SBI") Agent Charlie Morris.

Helton testified that after Perryman exited Gibson's residence, she followed to ensure Perryman would not hide the stolen money from her. Helton testified that she stopped Perryman and asked her "[w]here's it at?" Helton informed Perryman that the group needed to stay together and walked back to the entrance of Gibson's residence. Helton testified that defendant met her at the door and stated "[w]ait out here." After approximately three to five minutes, defendant exited the residence and stated, "I took care of it." The group subsequently split $5,000.00 in cash they had stolen and drove back to Helton's apartment to purchase more "crack."

Laura Rolland, Gibson's neighbor, called law enforcement the following evening after she noticed Gibson's door had remained open all day while the temperature outside was thirty degrees. Burke County deputy sheriffs found Gibson deceased, lying on the floor of his residence. Gibson's chest, sternum, and six ribs had been crushed by blunt force trauma, which caused massive internal bleeding.

Perryman, Helton, and defendant subsequently confessed to their involvement in these crimes through written statements to various law enforcement officers. Helton pleaded guilty to first-degree murder and agreed to testify on behalf of the State. In exchange, the State agreed not to seek the death penalty against her. Perryman pleaded guilty to second-degree murder and agreed to testify on behalf of the State. In exchange, the State dismissed other charges pending against her.

On 4 September 2007, defendant's case proceeded to trial. Defendant did not testify on his own behalf or call other witnesses. On 11 September 2007, the jury found defendant to be guilty of: (1) first-degree murder; (2) first-degree burglary; (3) conspiracy to commit first-degree burglary; (4) robbery with a dangerous weapon; and (5) conspiracy to commit robbery with a dangerous weapon. Because defendant's first-degree murder conviction was based on felony murder, the trial court arrested judgment on the first-degree burglary conviction.

The trial court found defendant to be a prior record level III offender and sentenced him to life imprisonment without parole for his first-degree murder conviction. Defendant's remaining charges were consolidated and the trial court imposed a consecutive sentence

of a minimum of 96 to a maximum of 125 months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying defendant the right to make a final closing argument to the jury; (2) denying defendant's motion to dismiss both conspiracy charges based upon insufficiency of the evidence; (3) entering judgment on two counts of conspiracy; and (4) instructing the jury on the theory of acting in concert. Defendant also argues a mandatory sentence of life imprisonment without the possibility of parole violates the Eighth Amendment to the United States Constitution.

III. Right to Closing Argument

The dispositive issue before this Court is whether the trial court committed reversible error by denying defendant the right to make the final closing argument to the jury.

Rule 10 of the General Rules of Practice for the Superior and District Courts confers upon the defendant in a criminal trial the right to both open and close the final arguments to the jury, provided that "no evidence is introduced by the defendant[.]" N.C. Super. and Dist. Ct. R. 10 (2007). This right has been deemed to be critically important and the improper deprivation of this right entitles a defendant to a new trial. *State v. Shuler*, 135 N.C. App. 449, 455, 520 S.E.2d 585, 590 (1999) (citing *State v. Hall*, 57 N.C. App. 561, 565, 291 S.E.2d 812, 815 (1982) (footnote omitted)); *see also State v. Hennis*, 184 N.C. App. 536, 539, 646 S.E.2d 398, 400 (2007) ("[Defendant] did not "introduce" evidence within the meaning of Rule 10. As in *Bell* and *Wells*, we must conclude the trial court's error in denying defendant the final argument entitles defendant to a new trial." (Citations omitted)), *disc. rev. denied*, 361 N.C. 699, 653 S.E.2d 148 (2007); *State v. Bell*, 179 N.C. App. 430, 433, 633 S.E.2d 712, 714 (2006) ("Defendant did not introduce any evidence within the meaning of Rule 10, and the trial court therefore erred in depriving him of the right to the closing argument to the jury . . . [W]e conclude that this error entitles Defendant to a new trial."); *State v. Wells*, 171 N.C. App. 136, 140, 613 S.E.2d 705, 708 (2005) ("Because defendant did not introduce any evidence within the meaning of Rule 10, the court erred in depriving him of the right to the closing argument to the jury. As we did in *Shuler*, we conclude that this error entitles defendant to a new trial."), *disc. rev. denied and appeal dismissed*, 362 N.C. 179, 658 S.E.2d 661 (2008).

North Carolina law regarding whether a defendant "introduced" evidence at trial pursuant to Rule 10 has evolved over the past twenty-five years. In *Hall*, this Court stated:

> the proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness. If the party shows it to a witness to refresh his recollection, it has not been offered into evidence.

57 N.C. App. at 564, 291 S.E.2d at 814. Our Supreme Court subsequently adopted the test enunciated in *Hall* and applied it to a case in which the cross-examination of the State's witness resulted in the admission of the contents of the defendant's post-arrest statement. *State v. Macon*, 346 N.C. 109, 114, 484 S.E.2d 538, 541 (1997). The defendant's statement had not otherwise been offered into evidence. *Id.* Our Supreme Court held:

> Although the writing was not itself introduced into evidence by defendant, Officer Denny's reading of its contents to the jury satisfies the requirement in Rule 10 of the General Rules of Practice for the Superior and District Courts that evidence has to be introduced by defendant in order to deprive him of the opening and closing arguments to the jury. The jury received the contents of defendant's statement as substantive evidence without any limiting instruction, not for corroborative or impeachment purposes, as defendant did not testify at trial and the statement did not relate in any way to Officer Denny.

Id.

Following our Supreme Court's analysis in *Macon*, this Court stated that "[a]lthough not formally offered and accepted into evidence, evidence is also 'introduced' when [a] new matter is presented to the jury during cross-examination and that matter is *not* relevant to any issue in the case." *Shuler*, 135 N.C. App. at 453, 520 S.E.2d at 588 (citation omitted) (emphasis original). This Court further stated:

> New matters raised during the cross-examination, which are relevant, do not constitute the "introduction" of evidence within the meaning of Rule 10. To hold otherwise, would place upon a defendant the intolerable burden of electing to either refrain

> from the exercise of his constitutional right to cross-examine and thereby suffer adverse testimony to stand in the record unchallenged and un-impeached or forfeit the valuable procedural right to closing argument.

Id. at 453, 520 S.E.2d at 588-89 (internal citations and quotations omitted).

Here, at the close of all the evidence, the State argued defendant had waived his right to make the final closing argument to the jury based upon his introduction of substantive evidence through defense counsel's cross-examination of Burke County Sheriff's Detective Dean Hennessee ("Detective Hennessee") concerning the statement of Jerry Perryman. The following colloquy represents the testimony relied upon by the State to show defendant "introduced" evidence pursuant to Rule 10:

> [Defense counsel]: . . . You filed a report, did you not—there's one—and I would be happy to show you my copy if you have difficulty locating yours—activity date February 10, 2004, a conversation with Jerry Perryman?
>
> [Detective Hennessee]: Yes sir.
>
> [Defense counsel]: Now, Jerry Perryman is the fellow whose residence . . . Helton was found in, is that correct?
>
> [Detective Hennessee]: That's correct.
>
> [Defense counsel]: And you were present when she was located there?
>
> [Detective Hennessee]: Yes, I was.
>
> [Defense counsel]: And because she was located there, I think you indicated in the first paragraph or so you found it necessary and important as part of you investigation to interview Jerry Perryman as well?
>
> [Detective Hennessee]: Yes, sir.
>
> . . . .
>
> [Defense counsel]: Directing your attention, please, sir, to paragraph 3 on that first page, that first sentence, did Perryman report that . . . Helton told them they had done something bad?
>
> [Detective Hennessee]: Yes, sir.

> [Defense counsel]: Directing your attention please, sir, to the top of the following page. Did Perryman report to you and to then-investigator—that's John Suttle, is that correct?
>
> [Detective Hennessee]: Yes.
>
> . . . .
>
> [Defense counsel]: And Suttle—that on Saturday before [Helton] brought the gun to his house, he noticed that the knuckles on [Helton's] hand were scratched, is that correct?
>
> [Detective Hennessee]: Yes, sir.

The trial court relied upon our Supreme Court's decision in *Macon* and ruled that the preceding testimony "constitute[d] actually offering evidence, and . . . the State ha[d] the right to open and close."

The facts presented in *Macon* are clearly distinguishable from those at bar. In *Macon*, the State's witness read the notes of another officer concerning the defendant's post-arrest statement on cross-examination. 346 N.C. at 114, 484 S.E.2d at 541. The defendant had not testified and the State had not presented any evidence regarding the defendant's post-arrest statement. *Id.* As this Court has recognized, "[i]n *Macon*, the evidence at issue involved a new matter, not relevant to Officer Denny's testimony on direct, as the State's witnesses had not previously mentioned anything about the defendant's post-arrest statement." *Wells*, 171 N.C. App. at 140, 613 S.E.2d at 707.

Here, on direct examination Detective Hennessee testified at length regarding the course of his investigation. Detective Hennessee initially observed the crime scene and collected evidence later processed by the SBI. Shortly thereafter, Perryman voluntarily gave law enforcement officers information about these crimes. Perryman agreed to allow officers to record her telephone conversations with Helton. Detective Hennessee testified that these recorded conversations tended to support Perryman's account of what had transpired on 5 February 2004. Detective Hennesse also testified that Perryman identified several items that had been stolen from Gibson's residence during the course of his murder, including a hand gun and coins.

Detective Hennessee also provided testimony regarding his visit with Helton at the Women's Correctional Center in which he obtained her statement. Detective Hennessee testified to the substance of Helton's statement, the relevant portions of which are as follows: during the attack, defendant started to pull Gibson's clothes off and

handed them to Helton. Helton searched the pockets and found a gun wrapped in "some kind of paper." Helton then threw the gun toward the door. After the group had finished committing these crimes and arrived back at Helton's apartment, defendant showed Helton the gun. Helton purchased the gun from defendant. Helton "carried the gun around . . . and point[ed] it at [her crack dealer]." Helton subsequently "passed out" and when she awoke, the gun and her "scales" were missing.

Based upon the evidence introduced by the State on direct examination, we hold Detective Hennessee's cross-examination testimony regarding Helton's possession of Gibson's gun clearly did not present a "new matter" to the jury. *Shuler*, 135 N.C. App. at 453, 520 S.E.2d at 588.

The State concedes in its brief that "[t]he only disputed issue in this case among the co-defendants was whether Helton or defendant actually killed the victim by crushing his rib cage and rupturing his lungs. Both accused the other of [Gibson's] murder." Helton's credibility as a witness and co-defendant was a critical matter at issue in the case at bar. Because we have held that Detective Hennessee's cross-examination testimony that Helton possessed Gibson's gun when she arrived at Jerry Perryman's residence did not constitute "a new matter," defense counsel's solicitation of such evidence could have been an attempt to impeach Helton's earlier testimony that Gibson's gun was missing after she had fallen asleep.

Because Detective Hennessee's cross-examination testimony did not present a "new matter" to the jury, defendant did not introduce evidence pursuant to Rule 10. *Id.* The trial court erroneously deprived defendant of his right to make the final closing argument to the jury. Based upon numerous precedents set by this Court reviewing the consequences of and the remedy for this error, defendant is entitled to a new trial. *Id.* at 455, 520 S.E.2d at 590; *Hennis*, 184 N.C. App. at 539, 646 S.E.2d at 400; *Bell*, 179 N.C. App. at 433, 633 S.E.2d at 714; *Wells*, 171 N.C. App. at 140, 613 S.E.2d at 708. In light of our holding, it is unnecessary to address defendant's remaining assignments of error.

IV. Conclusion

Defendant did not "introduce" evidence at trial pursuant to N.C. Super. and Dist. Ct. R. 10. The trial court erroneously deprived defendant of his right to make the final closing argument to the jury.

Due to prior precedents stating the remedy for this error, defendant is entitled to a new trial.

New Trial.

Judges CALABRIA and STEELMAN concur.

DIANNA S. FLOYD, EMPLOYEE, PLAINTIFF v. EXECUTIVE PERSONNEL GROUP, EMPLOYER, NATIONAL BENEFITS AMERICA, INC., CARRIER, AND PENCO PRODUCTS, INC., EMPLOYER, ACE USA/ESIS, CARRIER, DEFENDANTS

No. COA08-439

(Filed 16 December 2008)

1. **Workers' Compensation— employer-employee relationship—temporary worker applying for permanent job—car accident**

The Industrial Commission's findings in a workers' compensation case supported its conclusion that plaintiff did not prove the requisite employer-employee relationship where she was working as a temporary employee of Penco and was injured in a car accident as she was going home after a physical examination required for permanent employment. The greater weight of the evidence was that successful completion of the physical and drug test did not guarantee employment.

2. **Workers' Compensation— employment with temporary agency—car accident after applying for permanent job—not compensable**

The Industrial Commission properly concluded that a workers' compensation plaintiff did not suffer an accident arising from the course of her employment with a temporary agency, and that her injuries were not compensable, where she was injured in a car accident while going home from a physical exam required for an application for permanent employment at her work site. Plaintiff's temporary employment did not require her to attend the physical and did not require her to drive her personal vehicle. This was not a risk to which plaintiff was exposed because of the nature of her employment.

3. Appeal and Error— preservation of issues—issues first raised on appeal—not addressed

Issues in a workers' compensation case raised for the first time on appeal were not addressed.

4. Workers' Compensation— findings-sufficient

The Industrial Commission made sufficient findings in a workers' compensation case to support its conclusions, even though plaintiff contended that there were matters which were not addressed. The Commission is not required to find facts on all credible evidence.

Appeal by plaintiff from Opinion and Award entered 4 December 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 September 2008.

Horn & Vosburg, PLLC, by Martin J. Horn, for plaintiff appellant.

Cranfill Sumner & Hartzog, L.L.P., by David A. Rhoades and Meredith Taylor Berard for Penco Products, Inc. and ACE USA/ESIS defendant appellees.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce A. Hamilton, for Executive Personnel Group and National Benefits America, Inc., defendant appellees.

McCULLOUGH, Judge.

Dianna S. Floyd ("plaintiff") appeals from an Opinion and Award of the North Carolina Industrial Commission ("the Commission") denying her claim for benefits under the North Carolina Workers' Compensation Act for injuries sustained during an automobile collision. We affirm.

"[W]hen reviewing Industrial Commission decisions, appellate courts must examine 'whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law.' " *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (citation omitted). "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.' " *Id.* (citation omitted). In addition, findings of fact not assigned as error are binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579

S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). The Commission's conclusions of law are reviewed *de novo*. *McRae*, 358 N.C. at 496, 597 S.E.2d at 701.

Plaintiff has only challenged a portion of one of the Commission's findings, Finding of Fact 12. The Commission's remaining unchallenged findings establish the following:

Defendant Executive Personnel Group ("EPG") is a placement agency that supplies temporary workers to various companies, including, among others, defendant Penco Products, Inc. ("Penco"). Penco is a storage product manufacturer. EPG is insured by defendant National Benefits America, Inc. ("National Benefits"), and Penco is insured by defendant Ace USA/ESIS ("Ace USA").

Pursuant to an arrangement between Penco and EPG, Penco paid EPG a fee that was approximately thirty-two percent higher than the wages paid to the temporary workers. In return, EPG paid the temporary workers hourly wages, handled administrative matters, and obtained a reasonable profit. EPG agreed to provide workers' compensation insurance for all temporary workers that it supplied to Penco.

Once an EPG temporary worker accrued a certain number of hours working for Penco, usually between 500 to 1500 hours, the EPG temporary worker became eligible for permanent employment with Penco. A temporary worker's eligibility for permanent employment, however, was contingent upon a Penco supervisor's assessment of Penco's staffing needs and the worker's ability. EPG did not participate in Penco's hiring decisions.

All applicants for permanent employment with Penco were required to undergo a pre-employment physical examination and drug screening. After passing the physical examination and drug screening, the prospective employee was required to complete insurance and tax forms, among other paperwork. Moreover, there had been occasions where applicants had completed and passed the pre-employment physical and drug screening, but were never hired by Penco.

Plaintiff began working for EPG in April of 2003 and had worked "off and on" as a temporary worker at Penco for about two years.[1] In

1. The Full Commission did not expressly find this fact; however, there is evidence in the record to support it. We include it solely to help establish the factual background of the case.

February of 2004, plaintiff completed an application for permanent employment with Penco. In June of 2004, Penco supervisors advised plaintiff that she would have to complete a drug screening and physical examination. Penco scheduled the physical examination with Dr. Domingo Rodriguez-Cue in Williamston, North Carolina. The Commission found that:

> [p]laintiff understood that the physical would be on her own time and that she would not be paid for attending or for the mileage incurred by attending the exam. Defendant EPG did not require plaintiff to undergo the physical examination or drug testing to maintain her temporary employment.

On 17 June 2004, at 10:50 a.m., plaintiff underwent a pre-employment physical examination and drug screen at Dr. Rodriguez-Cue's office. On the way home from the examination, at 12:51 p.m., plaintiff was involved in an automobile collision.

On 21 July 2004, plaintiff filed a Form 18 claim for workers' compensation benefits for wrist, ankle, and knee injuries sustained during the collision pursuant to N.C. Gen. Stat. §§ 97-22 to -24 (2007). This claim was denied. The matter was first heard before a Deputy Commissioner on 20 July 2006. On 26 April 2007, the Deputy Commissioner entered an Opinion and Award finding that plaintiff was not an employee of Penco at the time of the automobile accident, but that plaintiff did have an employment relationship with EPG and that EPG was liable for plaintiff's injuries.

After a hearing on the matter, the Full Commission affirmed the Deputy's determination that Penco was not plaintiff's employer at the time of the collision and was therefore not liable for plaintiff's injuries; however, the Commission concluded that plaintiff's collision did not arise out of, and was not in the course of, her employment with EPG. Therefore, the Commission reversed the Deputy's determination that EPG was liable under the Workers' Compensation Act for plaintiff's injuries. Plaintiff appeals.

I. Liability of Penco

[1] First, we address plaintiff's contention that the Commission erred in concluding that the motor vehicle accident did not arise from and did not occur in the scope and course of plaintiff's employment with Penco. We find our decision in *Huntley v. Howard Lisk Co.*, 154 N.C. App. 698, 573 S.E.2d 233 (2002), *disc. review denied*, 357 N.C. 62, 579 S.E.2d 389 (2003), to be controlling on the facts of this case.

It is well established that our Workers' Compensation Act ("the Act"), N.C. Gen. Stat. §§ 97-1 to -200 (2007), applies only when an employer-employee relationship exists. *Hicks v. Guilford County*, 267 N.C. 364, 365, 148 S.E.2d 240, 242 (1966). The Act defines "employee" as:

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

N.C. Gen. Stat. § 97-2(2) (2007) (emphasis added). Thus, the existence of an employment agreement is essential for the formation of an employer-employee relationship. *Huntley*, 154 N.C. App. at 702, 573 S.E.2d at 235.

In *Huntley*, the plaintiff, a prospective employee, was injured while taking a driving test that was part of the job application process for a position with the defendant. *Id.* at 702, 573 S.E.2d at 236. The plaintiff argued that the North Carolina Industrial Commission, not the trial court, had exclusive original jurisdiction over plaintiff's claims against the defendant. In rejecting this argument, we reasoned that because there was "no agreement, written or oral, between the parties, or, for that matter, a promise of employment conditioned upon the pre[-] employment inspection[,]" the requisite employer-employee relationship did not exist between the parties. *Id.* Accordingly, we held that the plaintiff's injury was not compensable under the Act, and the North Carolina Industrial Commission had no subject matter jurisdiction over the matter. *Id.* ("Allowing plaintiff to seek benefits under the Act would be akin to allowing *every person* who is injured in the course of a job interview to seek benefits. This is clearly not the purpose of the Act.") *Id.*

Here, the Commission found that "[a]lthough it was plaintiff's understanding that she was going to be hired as a permanent employee by Penco . . . if she passed the physical and drug screen, the greater weight of the evidence shows that the successful completion of Penco's pre-employment physical and drug test did not guarantee employment." The Commission also found that there had been instances where employees had passed the pre-employment physical exam and drug screen, but were never hired by Penco. Plaintiff did not assign error to these findings of fact, and they are, therefore,

binding on appeal. *Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118. Accordingly, the Commission's factual findings support the Commission's conclusion that plaintiff failed to prove the requisite employer-employee relationship necessary to recover workers' compensation benefits from Penco under the Act.

II. Liability of EPG

[2] Next, we turn to plaintiff's argument that the Commission erred in determining that plaintiff's car accident did not arise from or occur within the scope of her employment with EPG. Plaintiff contends that EPG directly benefited from having plaintiff obtain permanent employment with Penco. She argues that Penco's hiring of EPG workers furthered EPG's business relationship with Penco and served as incentive for temporary workers to seek employment with EPG. Therefore, plaintiff reasons that plaintiff's doctor's appointment was related to and was within the scope of her employment with EPG. We disagree.

For an injury to be compensable under the Act, it must be an "injury by accident arising out of and in the course of employment[.]" N.C. Gen. Stat. § 97-2(6). "Whether an injury arises out of and in the course of . . . employment is a mixed question of fact and law, and our review is thus limited to whether the findings and conclusions are supported by the evidence." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997).

> The phrase "arising out of" refers to the requirement that there be some causal connection between the injury and claimant's employment. "In the course of" refers to the time and place constraints on the injury; **the injury must occur**
>
> **"during the period of employment at a place where an employee's duties are calculated to take him[.]"**

Id. at 552-53, 486 S.E.2d at 481 (citation omitted) (emphasis added). The controlling test when determining whether an injury "arises out of the employment" is whether the injury is the natural and probable consequence of the nature of the employment. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 404, 233 S.E.2d 529, 532-33 (1977).

Here, the Commission found as fact in Finding of Fact 12:

> [P]laintiff's having her pre-employment physical on June 17, 2004 was solely for the purpose of the possibility of employment with defendant Penco and was not in furtherance of or related to her

> employment as a temporary worker with defendant EPG. **Plaintiff's temporary employment through defendant EPG and assignment to defendant Penco did not require plaintiff to attend the pre-employment physical and testing**. . . . [The physical and drug screen were] not related to her duties for defendant EPG. Defendant EPG was not involved in the payment of or scheduling of the physical exam and drug testing. **In addition, plaintiff's job duties with defendant EPG did not require plaintiff to drive her personal vehicle to fulfill her employment duties.**[2]

There is competent evidence in the record to support this finding of fact. There is evidence in the record that EPG is a temporary placement agency that placed plaintiff to work at the Penco manufacturing plant and that plaintiff's placement with Penco did not require her to drive from worksite to worksite. Likewise, Eleanor Gardner, the Human Resources Manager at Penco, testified that Penco does not require temporary workers to pursue permanent employment. There is evidence that EPG did not pay for plaintiff's doctor's visit, nor did EPG have any role in scheduling the visit. Likewise, plaintiff testified that "she wasn't on company time" at the time of the collision.

The Commission's finding that plaintiff's job duties with EPG did not require her to drive an automobile, supports the conclusion that the risk of an automobile collision was not a risk to which plaintiff was exposed because of the nature of her employment with EPG. As such, plaintiff's employment with EPG was not a contributing proximate cause of plaintiff's injury; therefore, plaintiff's injury did not "arise from" her employment with EPG. *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 533. Moreover, the Commission's findings of fact also support the conclusion that plaintiff's injury did not occur within the scope of her employment with EPG, as the injury occurred on "her own time" rather than on company time, and it did not occur at a place where plaintiff's duties were "calculated to take [her]." *Creel*, 126 N.C. App. at 552-53, 486 S.E.2d at 478. Thus, the Commission properly concluded that plaintiff's automobile accident did not arise out of or in the course or her employment with EPG, and plaintiff's injuries are, therefore, not compensable under the Act.

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2. Finding of Fact 12 is the only finding of fact that plaintiff challenges on appeal. Plaintiff only assigns error, however, to the extent that the "Commission distinguishes between the employers EPG (the temporary personnel service) and Penco (the manufacturing business.)" While it is not clear to which portion of Finding of Fact 12 plaintiff objects, we assume *arguendo*, that plaintiff has assigned error to all of Finding of Fact 12.

III. Arguments Not Before the Commission

[3] Plaintiff raises two additional arguments in support of her contention that the Commission erred in concluding that the automobile accident did not occur during the course of plaintiff's employment with EPG and Penco. First, relying on the common law loaned servant doctrine,[3] plaintiff contends that she was an employee of both the temporary agency EPG and Penco, the special employer, at the time of the collision. Second, plaintiff contends that although her work for Penco usually required her to work inside of the manufacturing plant, the automobile accident occurred during the scope of her employment with Penco under the special errand exception.[4]

Plaintiff, however, raises these arguments for the first time on appeal. The "law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). We briefly note that we find neither of these arguments persuasive; however, because these arguments were not raised before the Full Commission, we will not address them on appeal.

IV. Sufficiency of Factual Findings

[4] By her final assignments of error, plaintiff contends that the Commission erred by failing to make findings of fact regarding the consequences of not submitting to a pre-employment physical examination and drug screening, the details surrounding the scheduling of plaintiff's doctor appointment, and the benefits to both employers of having their employees submit to such examinations. We disagree.

" '[T]he Commission is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead the Commission must find those facts which are necessary to support its conclusions of law.' " *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000) (citation omitted). As previously discussed, the Commission made sufficient findings of fact to support its conclu-

3. Under the loaned servant doctrine, "a general employee of one can also be the special employee of another while doing the latter's work and under his control." *Henderson v. Manpower*, 70 N.C. App. 408, 413, 319 S.E.2d 690, 693 (1984).

4. The "special errand" exception "allows an employee to recover for injuries sustained while traveling to or from work if the injuries occur while the employee is engaged in a special duty or errand for his employer." *Dunn v. Marconi Communications, Inc.*, 161 N.C. App. 606, 612, 589 S.E.2d 150, 155 (2003).

sions of law. Therefore, its findings of fact are sufficient. This assignment of error is overruled.

For the foregoing reasons, we affirm the Commission's Opinion and Award denying plaintiff's claim for workers' compensation benefits for the injuries sustained during her automobile collision.

Affirmed.

Judges TYSON and CALABRIA concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. SHANNON COWAN, DEFENDANT

No. COA08-470

(Filed 16 December 2008)

1. Evidence— crimes of family member—irrelevant but not prejudicial

Testimony about the drug trafficking conviction of defendant's aunt was irrelevant but not prejudicial in defendant's drug trafficking trial. There was no evidence that the aunt's activities had any relationship to the crimes with which defendant was charged, the evidence was minimal, and there was sufficient other evidence to convict defendant.

2. Drugs— constructive possession—sufficiency of evidence

Motions to dismiss several drug trafficking and possession of firearms by a felon charges in which possession was challenged were correctly denied where the evidence supported circumstances allowing an inference of constructive possession. Items were found at the house that was searched with defendant's name and the address of the house (including his birth certificate in a closet with the controlled substances), defendant was seen coming out of the bedroom where the controlled substances and firearms were found, defendant was arrested in the house, and defendant told police that he resided at that address.

3. Drugs— maintaining dwelling—sufficiency of evidence

The trial court did not err by not dismissing a charge of maintaining a dwelling for keeping or selling controlled substances where there was evidence that defendant resided at the house

and possessed controlled substances, related items, and firearms at that house.

Appeal by defendant from judgments entered on or about 14 November 2007 by Judge John L. Holshouser, Jr. in Superior Court, Rowan County. Heard in the Court of Appeals 8 October 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Thomas H. Moore, for the State.

D. Tucker Charns, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of eight different offenses related to controlled substances and firearm possession. Defendant appeals arguing the trial court erred in (1) allowing "irrelevant and highly prejudicial" testimony, (2) failing to dismiss six of the charges as the State did not prove the element of "possession," and (3) failing to dismiss the charge of maintaining a dwelling for keeping or selling controlled substances when the State did not prove defendant "ke[pt] or maintained" the property and how he was "using" the property.

I. Background

On 27 September 2006, members of the Rowan County Sheriff's Department executed a search warrant at 1763-B Flat Rock Road. Defendant was the subject of the search warrant. In the residence, the police found marijuana, cocaine, methamphetamine, firearms, thousands of dollars, and drug paraphernalia including razor blades and digital scales.

On or about 4 December 2006, defendant was indicted for (1) trafficking in cocaine, (2) possession of cocaine with intent to sell, (3) possession of marijuana with intent to sell, (4) possession of methamphetamine with intent to sell and deliver, (5-7) three counts of possession of a firearm by a felon, and (8) maintaining a dwelling used for keeping or selling controlled substances. Defendant was found guilty of all eight offenses. Defendant appeals arguing the trial court erred in (1) allowing "irrelevant and highly prejudicial" testimony, (2) failing to dismiss six of the charges as the State did not prove the element of "possession," and (3) failing to dismiss the charge of maintaining a dwelling for keeping or selling controlled substances when the State did not prove defendant "ke[pt] or maintained" the property and how he was "using" the property.

II. Testimony Regarding Marlene Chambers

[1] Defendant's first two arguments contend that the trial court erred by allowing testimony, over defendant's objections, from Rahesia Chambers and defendant regarding the drug trafficking trial and conviction of defendant's aunt, Marlene Chambers. Defendant argues that this evidence was "irrelevant and highly prejudicial[.]" We agree that the evidence was irrelevant, but do not conclude that it prejudiced defendant's case.

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the "abuse of discretion" standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted).

" '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." N.C. Gen. Stat. § 8C-1, Rule 402. We conclude that evidence about defendant's aunt's prior trial and conviction is irrelevant as it does not "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." *See* N.C. Gen. Stat. § 8C-1, Rule 401. There was no evidence that Marlene Chambers' criminal activities had any relation whatsoever to the crimes for which defendant was charged. As we deem the testimony regarding Marlene Chambers drug trial and conviction irrelevant, the testimony was inadmissible. *See* N.C. Gen. Stat. § 8C-1, Rule 402.

However,

> [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.

N.C. Gen. Stat. § 15A-1443(a) (2005). "If the other evidence presented was sufficient to convict the defendant, then no prejudicial error occurred." *State v. Bodden*, 190 N.C. App. 505, 510, 661 S.E.2d 23, 26 (2008). We first note that the evidence contested by defendant regarding Marlene Chambers was very minimal: (1) The State asked Ms. Rahesia Chambers about her mother, Marlene Chambers: "The same mom that I just prosecuted about three months ago for drug trafficking. . . . That's your relative, isn't it?" to which Rahesia stated, "That's my mom." (2) The State asked defendant "Did you give Marlene Chamber's name [to Officer Bebber as your nearest relative] because she's involved in the drug business with you?" Defendant answered, "No, I didn't." The State then asked, "You know she was convicted of trafficking, don't you? . . . And that's why you gave the name, didn't you? She was going to help you out, wasn't she, if you helped her out[,]" to which defendant responded, "No, I wasn't and, no, I didn't." In the course of an eight day trial, these are the only instances of evidence regarding Marlene Chambers or her convictions which defendant has brought to our attention. The irrelevant evidence defendant contested was minimal, and there was sufficient evidence to convict defendant based upon the controlled substances and firearms found in the residence. We therefore do not find that there was a reasonable possibility that the jury would have reached a different result in the absence of this evidence; so defendant was not prejudiced by the irrelevant testimony. *See* N.C. Gen. Stat. § 15A-1443(a); *Bodden* at 510, 661 S.E.2d at 26.

III. Motions to Dismiss

Defendant contends the trial court erred by failing to grant his motion to dismiss as to six of the charges.

A. Standard of Review

Our standard of review for the denial of a defendant's motion to dismiss is

> whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable

> inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Estes, 186 N.C. App. 364, 369, 651 S.E.2d 598, 601-02 (2007) (citation and ellipses omitted), *appeal dismissed and disc. review denied*, 362 N.C. 365, 661 S.E.2d 883 (2008).

B. Possession

[2] Defendant's next three arguments contend that the trial court erred in failing to grant defendant's motion to dismiss the charges of trafficking in cocaine, possession of marijuana with intent to sell or deliver, and the three charges of possession of a firearm by a felon, because the State failed to prove the element of "possession" as to all of these charges. Defendant contends that

> [t]he State presented a very weak case of constructive possession. There was no surveillance of this apartment, no eyewitnesses, and no confidential informants. Although there were two envelopes addressed to . . . [defendant] at that address and days later the police said he gave that address when he was arrested, there was nothing to tie him to drugs and guns and the occupancy of Ms. Bennett's apartment the day of the raid.
>
> None of . . . [defendant's] clothes were in that apartment but there was testimony that the clothing of other men were [sic] in that closet. There was no evidence that . . . [defendant] had been in that apartment around the time of the raid but there was testimony that at least four other people were in that apartment around this time and had access to that closet. No toiletries belonging to . . . [defendant] were found in that apartment. . . . [Defendant] had no key. The lease was not in his name as were none of the utilities. Even in the light most favorable to the State, the State failed to prove the element of possession for these offenses.

However,

> [i]f the defendant is not in actual possession of contraband when it is discovered, the State may survive a motion to dismiss by presenting substantial evidence of constructive possession. Evidence of constructive possession is sufficient to support a

> conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the drugs.

State v. Miller, 191 N.C. App. 124, 126, 661 S.E.2d 770, 772-73 (2008) (citations and quotation marks omitted). "When the substance is found on premises under the exclusive control of the defendant, this fact alone may support an inference of constructive possession. If the defendant's possession over the premises is nonexclusive, constructive possession may not be inferred without other incriminating circumstances." *State v. Autry*, 101 N.C. App. 245, 252, 399 S.E.2d 357, 362 (1991) (citation omitted).

> Constructive possession depends on the totality of circumstances in each case. . . . [A] showing by the State of other incriminating circumstances permits an inference of constructive possession. Incriminating circumstances which have been identified by this Court and the North Carolina Supreme Court as relevant to constructive possession include evidence that defendant: (1) owned other items found in proximity to the contraband, (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 . . . .

See Miller at 127, 661 S.E.2d at 773 (citations, quotations, ellipses, and brackets omitted).

Here, the evidence supported at least two of the "incriminating circumstances" which allow an inference of constructive possession. *See id.* First, the State presented evidence that at 1763-B Flat Rock Road the police found, *inter alia*, defendant's birth certificate and a bill with defendant's name on it and noting his address as 1763-B Flat Rock Road in the same closet where the controlled substances were found. The police also found a show cause order directed to defendant and an insurance policy in defendant's name issued only days prior to the search which showed 1763-B Flat Rock Road as his home address. Second, defendant was also arrested at 1763-B Flat Rock Road and was seen coming out of the bedroom where the controlled substances and firearms were found. Defendant also told the police that he resided at 1763-B Flat Rock Road. Viewing the evidence "in the light most favorable to the State[,]" *Estes* at 369, 651 S.E.2d at 602,

we conclude the State presented sufficient evidence of constructive possession through incriminating circumstances, including that defendant "owned other items found in proximity to the contraband," and "resided in, had some control of, or regularly visited the premises where the contraband was found . . . ." *See Miller* at 127, 661 S.E.2d at 773. Therefore, the trial court did not err in denying defendant's motion to dismiss. These arguments are overruled.

C. Maintaining a Dwelling

[3] Lastly, defendant argues the trial court erred in failing to dismiss the charge of maintaining a dwelling for keeping or selling controlled substances because

> [t]here was absolutely no evidence that . . . [defendant] contributed in any way to the maintenance of Ms. Bennett's apartment. None of the factors under *Bowens*, *supra*, are present: no ownership of the property; no occupancy of the property; no repairs to the property; no payment of taxes; no payment of utility expenses; no payment of repair expenses; and no payment of rent. There was no testimony that any of . . . [defendant's] clothing or personal effects were present but there was testimony of other men's clothing. The State failed to prove that . . . [defendant] used Ms. Bennett's apartment in any unlawful way.

Thus, defendant argues the State failed to prove that he "ke[pt] or maintain[ed]" the property and how he was using the property.

> N.C. Gen. Stat. § 90-108(a)(7) reads,
>
> It shall be unlawful for any person:
>
> To knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article[.]

N.C. Gen. Stat. § 90-108(a)(7) (2005). *State v. Bowens*, lays out several factors which indicate that an individual is "keep[ing] or maintain[ing]" property pursuant to N.C. Gen. Stat. § 90-108(a)(7) which includes: "ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of repair expenses; and payment of rent." 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000) (citation omitted), *disc.*

review denied, 353 N.C. 383, 547 S.E.2d 417 (2001). "[O]ccupancy, without more, will not support the element of 'maintaining' a dwelling. However, evidence of residency, standing alone, is sufficient to support the element of maintaining." *State v. Spencer*, 192 N.C. App. 143, 148, 664 S.E.2d 601, 605 (2008) (citations omitted). In *State v. Spencer*, this Court determined that "a purported confession by defendant to police, that defendant resided at the home at 178 Loggerhead Road. . . . was substantial evidence that defendant maintained the dwelling." *Spencer* at 148, 664 S.E.2d at 605 (citation omitted). Here defendant told the police that he resided at 1763-B Flat Rock Road, and thus this is "substantial evidence that defendant maintained the dwelling." *See id.*

Furthermore, as to "use," "[t]he determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances." *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994). In *State v. Rich*, this Court concluded that

> [t]he evidence showing that defendant resided in the house, that she was cooking dinner, and that she possessed cocaine and materials related to the use and sale of cocaine, is sufficient to allow conviction under G.S. 90-108(a)(7) for maintaining a dwelling used for the keeping or selling of controlled substances.

87 N.C. App. 380, 384, 361 S.E.2d 321, 324 (1987).

Here, as in *Rich*, there is evidence defendant resided at 1763-B Flat Rock Road. *See id.* There is also evidence that defendant possessed controlled substances, "materials related to the use and sale" of controlled substances, and firearms at 1763-B Flat Rock Road which "is sufficient to allow conviction under [N.C.]G.S. [§] 90-108(a)(7) for maintaining a dwelling used for the keeping or selling of controlled substances." *See id.* Therefore, the trial court did not err in denying defendant's motion to dismiss as to the charge of maintaining a dwelling for keeping or selling controlled substances, and this argument is overruled.

IV. Conclusion

For the foregoing reasons, we find no prejudicial error.

NO PREJUDICIAL ERROR.

Judges STEELMAN and JACKSON concur.

HENRY J. WILKINS, PLAINTIFF v. CSX TRANSPORTATION, INC., DEFENDANT

No. COA08-181

(Filed 16 December 2008)

1. Railroads— railroad worker—FELA action—foreseeability—directed verdict denied

The trial court did not err by denying defendant railroad's motion for a directed verdict on the issue of negligence in the injury of a railroad worker. The worker was injured while lifting a 65 to 75 pound water cooler when a co-worker dropped his side of the cooler; the injury was foreseeable by the co-worker and the foreseeability of harm is imputed from the employee to the employer under the Federal Employers' Liability Act.

2. Railroads— railroad worker—FELA action—lifting injury—voluntary change of partner—contributory negligence

The trial court did not err by denying plaintiff's motion for a directed verdict on the issue of contributory negligence where plaintiff was a railroad worker who injured his back when a co-worker dropped his side of a water cooler that they were lifting. Plaintiff had a regularly assigned partner on the water crew but chose to ask for assistance from another employee who had never performed this task.

3. Railroads— railroad worker—FELA action—offset to award—collateral source

The trial court erred by offsetting an award received by an injured railroad worker by the amount received for Railroad Retirement Board Benefits. Those payments were a collateral source and were not subject to being offset, despite defendant's contention that an amendment to the Railroad Retirement Act changed the funding of the benefits. The collateral source rule depends less upon the source of funds than the character of the benefits, and the purpose and nature of these benefits did not significantly change.

Appeal by plaintiff and cross-appeal by defendant from a judgment entered 22 August 2007 by Judge William C. Griffin in Northampton County Superior Court. Heard in the Court of Appeals 27 August 2008.

Shapiro, Cooper, Lewis & Appleton, P.C., by Randall E. Appleton; and John J. Korzen, for plaintiff-appellant/ cross-appellee.

Millberg, Gordon & Stewart, P.L.L.C., by John C. Millberg and Jonathan P. Holbrook, for defendant-appellee/cross-appellant.

CALABRIA, Judge.

Henry J. Wilkins ("plaintiff") sustained back injuries while working as a maintenance of way worker for CSX Transportation, Inc. ("defendant"). He filed a complaint in Northampton County Superior Court under the Federal Employers' Liability Act 45 U.S.C. § 51 *et seq.* ("FELA"), which makes railroads liable to their employees for injuries "resulting in whole or in part from the negligence" of the railroad, §51. Contributory negligence is not a bar to recovery under FELA, but damages are reduced "in proportion to the amount of negligence attributable to" the employee, §53. Plaintiff was awarded $61,500 by a jury. Judge William C. Griffin ("Judge Griffin") awarded an offset against the verdict of $7,437.90, an amount equal to what defendant had paid for plaintiff's injury in the form of "Tier II" Railroad Retirement Board disability payments. This reduced plaintiff's recovery to $54,062.10, and judgment for that amount was entered by Judge Griffin on 10 September 2007.

Plaintiff appeals Judge Griffin's order denying his motion for a directed verdict on the issue of contributory negligence as well as Judge Griffin's order offsetting his award for Railroad Retirement Board disability benefits he received. Defendant cross-appeals Judge Griffin's order denying their motion for a directed verdict on the issue of defendant's negligence. We find no error in part, and reverse the offset of plaintiff's award.

Plaintiff was injured while performing his duties as a maintenance of way worker for defendant. On 27 August 2003, plaintiff was tasked with placing water coolers weighing an estimated 65-75 pounds onto machines for his coworkers. This task required water coolers to be removed from a pickup truck and manually loaded onto a platform on each machine. This was plaintiff's normal assignment and he was assisted by Willie Dailes ("Dailes") at the time of his injury, although plaintiff was normally assisted by C.A. Gillis ("Gillis") for this task.

At the time of his injury plaintiff and Dailes were attempting to lift a water cooler onto railroad machinery when Dailes unexpectedly

dropped his side of the cooler. Plaintiff was pulled to the ground, injuring his back. Although plaintiff knew he had injured his back, he continued to work through the remainder of the week. Upon returning to work the following Monday, plaintiff was unable to continue working and reported his injury to his supervisor. Plaintiff was diagnosed with a lumbosacral sprain, and occupationally disabled due to his injuries.

[1] Defendant argues the trial court erred in denying their motion for a directed verdict on the issue of defendant's negligence. They argue that the evidence failed to establish the elements of foreseeability and breach of duty. We disagree.

We review this assignment of error *de novo*. In *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 1 L. Ed. 2d 493 (1957) a railroad employee tasked with burning vegetation growing along the tracks was injured when a passing train fanned the flames around him causing him to retreat and fall causing serious injury. The Supreme Court, while recognizing that the trial court could have found for the Railroad on the issue of negligence, held that "the decision was exclusively for the jury to make." *Id.* at 504, 1 L. Ed. 2d at 498.

"Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought." *Id.* at 506, 1 L. Ed. 2d at 499. "[F]or practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." *Id.* at 508, 1 L. Ed. 2d at 500.

Under FELA an employer is liable if an injury resulted "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. To uphold the trial court's order denying defendant's motion for a directed verdict we must find that defendant, through its employee "played any part, however small" in the injury suffered by plaintiff.

Defendant argues that plaintiff's accident was not foreseeable, prohibiting a finding of negligence. We disagree. While "[r]easonable foreseeability of harm is an essential ingredient of FELA negligence," *Brown v. CSX Transp.*, 18 F.3d 245, 249 (4th Cir. W. Va. 1994), this foreseeability analysis is not limited to the management of the employer railroad. Just as the negligence of employees is imputed to the employer railroad in FELA actions, so to is the foreseeability of

harm. The question is not whether CSX management should have foreseen that loading water coolers in the manner they were being loaded could result in injury, the question is whether Dailes should have foreseen that dropping the water cooler without warning could result in injury to plaintiff. This injury was foreseeable, and sufficient evidence was presented to allow the jury to determine if Dailes breached his duty to complete the lift, or alternatively, give warning to plaintiff that he would be unable to do so.

[2] Plaintiff argues that the trial court erred in denying his motion for a directed verdict on the issue of contributory negligence. We disagree.

FELA provides that contributory negligence is not a bar to recovery, but merely diminishes the amount of damages recovered by the injured employee, essentially creating a comparative negligence structure. 45 U.S.C. § 53. In *Norfolk Southern R. Co. v. Sorrell*, the United States Supreme Court held that the causation standards for employer negligence and employee contributory negligence are the same. 549 U.S. 158, 166 L. Ed. 2d 638 (2007). To find error in the trial court's order we must find that the employee played no part, "even the slightest, in producing the injury." *Rogers*, 352 U.S. at 506, 1 L. Ed. 2d at 499. The defendant is entitled to an instruction on contributory negligence "if there is any evidence at all of contributory negligence." *Taylor v. Burlington N. R.R.*, 787 F.2d 1309, 1314 (9th Cir. 1986).

The trial testimony established that plaintiff had a safe procedure for handling the water coolers and that he voluntarily departed from this procedure. Plaintiff had a regularly assigned partner, Gillis, on the water crew to help him prepare and load the coolers. Plaintiff and Gillis performed this task together every morning. On the morning of the accident Gillis was on duty with plaintiff and sat in the truck while the water coolers were being unloaded.

Plaintiff chose to depart from this procedure when he asked another employee who had never previously assisted with this task, to help load a cooler onto a high platform. This evidence alone is sufficient to meet the burden of showing any evidence of contributory negligence. The trial court did not err in instructing the jury on contributory negligence.

[3] Plaintiff argues that the trial court erred in offsetting plaintiff's recovery by the amount defendant had paid for Railroad Retirement Board Benefits received by plaintiff. We agree.

Following the jury verdict and award, the court offset plaintiff's award by $7,437.90, an amount equal to the sum defendant paid into Tier II of the Railroad Retirement Account. The sum represented the amount of Tier II benefits the plaintiff had received through occupational disability and covered the time from the award of the benefits by the Railroad Retirement Board until the plaintiff qualified for a regular annuity under the Act. This was error.

In 1974, Congress enacted the current version of the Railroad Retirement Act, which altered the prior Act enacted in 1937. The Railroad Retirement Act establishes two tiers of benefits. Tier I benefits are roughly equivalent to Social Security benefits. Tier II "provides retirement benefits over and above social security benefits and operates similarly to other industrial pension systems." *CSX Transp., Inc. v. Gardner*, 874 N.E.2d 357, 362 (Ind. Ct. App. 2007). Railroad employees who are injured and unable to perform their duties may receive either an occupational disability annuity or a total disability annuity. 45 U.S.C § 231a(a)(1)(iv),(v). Payments under the Railroad Retirement Act are not based upon an injury due to the negligence of the railroad employer. To qualify for an occupational disability under the Railroad Retirement Act, the employee must have performed 240 months of railroad service and be permanently disabled from his normal railroad job, or be at least 60 years old with 120 months of service with the same level disability. A total disability is granted if the employee has at least 120 months of service and is disabled from all occupations. 45 U.S.C § 231a(a)(1). The amount of the annuity depends upon the length of the employee's railroad employment. *Gardner*, 874 N.E.2d at 362. Annuity payments by the Railroad Retirement Board are not subject to assignment, tax, legal process, or anticipation. 45 U.S.C § 231m(a).

Plaintiff argues that the collateral source rule prohibits an offset of plaintiff's award. "According to this rule a plaintiff's recovery may not be reduced because a source collateral to the defendant . . . paid the plaintiff's expenses. *Cates v. Wilson*, 321 N.C. 1, 5, 361 S.E.2d 734, 737 (1987).

Historically, courts have held that benefits received from the Railroad Retirement Board are from a collateral source and therefore not subject to setoff. However, the most influential case on the matter, *Eichel v. New York Cent. R. Co.*, 375 U.S. 253, 11 L. Ed. 2d 307 (1963), was determined before the Railroad Retirement Board split the Railroad Retirement Act benefits into two tiers. Defendant

argues that the Tier I benefits are comparable to the benefits as determined by *Eichel*, but the Tier II benefits are distinct, and not a collateral source as it is explained in *Eichel*, and therefore subject to setoff. We disagree.

The United States Supreme Court in *Eichel* held that "[t]he Railroad Retirement Act is substantially a Social Security Act for employees of common carriers . . . . The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer." *Id.* at 254, 11 L. Ed. 2d at 308-09. The *Eichel* Court, in making this statement relied on *New York, N. H. & H. R. Co. v. Leary*, 204 F.2d 461, 468 (1st Cir. 1953), which held that offset was not authorized for these benefits because of the Social Security nature of the benefits, and because the benefits received were not directly attributable to contributions made by the employer. We must determine whether the form of the Tier II benefits under the revised Act are so significantly changed that the *Eichel* reasoning no longer applies.

The Railroad Retirement Act, at the time of the *Eichel* decision, was funded equally by taxes between employers and employees. Any shortfall in the fund was supplemented by additional taxes against the employers. Currently, the Railroad Retirement Act is funded in part by taxes paid by the employer and employee. The Tier I taxes equal Social Security tax rates. The Tier II rate varies and is higher for the employer than the employee. The remainder of the fund is made up of fund transfers under the financial interchange with the Social Security system, investment earnings from the trust fund, general revenue appropriations for vested due benefit payments, income taxes on benefits and a work hour tax paid by railroad employees under the Railroad Retirement Tax Act. *Gardner*, 874 N.E.2d at 362.

Under both the 1936 act, and under Tier II of the current act, benefits are available to employees regardless of the source of the injury that caused the disability. Under both schemes benefits are based on any disability despite the cause, and on the years of service the employee has accrued in the system.

While the funding of Tier II benefits has changed, with the employer being responsible for a greater percentage of the cost, the purpose and availability of Tier II benefits has not changed in any significant way. Federal case law indicates that the latter is the more important factor. In determining whether a payment is from a collat-

eral source, "courts should look at the purpose and nature of the fund and of the payments, and not merely at their source." *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1020 (9th Cir. 1973) (internal citations and quotations omitted). "[T]he collateral source rule depends less upon the source of the funds than upon the character of the benefits received." *Reed v. E.I. du Pont de Nemours & Co.*, 109 F. Supp. 2d 459, 467 (S.D. W. Va. 2000).

The purpose and nature of Tier II benefits was not significantly changed by the 1974 amendment to the Act. Further, while the current Act places greater financial responsibility upon the employer for funding Tier II benefits, it does not change the nature of the payments, or the manner in which those payments will be apportioned to applicable employees.

The trial court erred in offsetting plaintiff's recovery by the amount defendant had paid for the Railroad Retirement Act benefits received by plaintiff. Plaintiff's payments from the Railroad Retirement Act were a collateral source, and were not subject to be offset. This portion of the trial court's judgment is reversed and this case is remanded for entry of judgment without the offset for the Tier II payments.

No error in part, reversed in part and remanded.

Judges TYSON and ELMORE concur.

DENIS VENTRIGLIA, PLAINTIFF v. RENNY W. DEESE AND REID, LEWIS, DEESE, NANCE & PERSON, LLP, DEFENDANTS

No. COA08-457

(Filed 16 December 2008)

1. Appeal and Error— preservation of issues—failure to rule on motion

Plaintiff did not preserve for appellate review the question of the trial court's duty to rule on his motion to amend his complaint before ruling on defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). Plaintiff argued at trial that his complaint did not need amendment to withstand the motion to dismiss and neither sought a ruling on his motion to amend nor

argued that the trial court was required to hear his motion to amend before the motion to dismiss.

2. Statutes of Limitation and Repose— legal malpractice— accrual of claim

The trial court did not err by dismissing plaintiff's complaint for legal malpractice as barred by the statute of limitations where the complaint was filed more than three years after the trial. Plaintiff contented that the complaint alleged malpractice at the post-trial phase, as well as pre-trial and at trial, but the acts alleged necessarily occurred before or during trial.

3. Attorneys— negligence—failure to raise argument on appeal—issue not raised below

Defendant attorneys did not act negligently by failing to challenge the validity of a prenuptial agreement on appeal where the agreement was not challenged at trial. Defendants were therefore precluded from raising it as an appellate issue.

Appeal by Plaintiff from judgment entered 7 February 2008 by Judge John E. Nobles, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 21 October 2008.

Law Office of Charles M. Putterman, by Charles M. Putterman, for Plaintiff-Appellant.

Vaiden P. Kendrick, for Defendant-Appellees.

ARROWOOD, Judge.

Plaintiff (Denis Ventriglia) appeals the dismissal under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of his legal malpractice claim against Defendants (attorney Renny W. Deese, and law firm Reid, Lewis, Deese, Nance & Person, LLP). We affirm.

The factual background of this case is summarized as follows:

> [Plaintiff and Linda Wilson] "were married 4 September 1988. Two children were born of the marriage. The parties separated on 27 October 2000 and plaintiff filed for absolute divorce on 29 October 2001. Defendant counterclaimed for equitable distribution and alimony. An absolute divorce was granted on 7 December 2001. . . . Prior to their marriage the parties, then both licensed attorneys, had jointly drafted and entered into a prenuptial agreement . . . which plaintiff proffered as a defense to

> defendant's counterclaim. Both parties stipulated that the prenuptial agreement was valid and binding.

Wilson v. Ventriglia, 2005 N.C. App. LEXIS 1476 (unpublished) (*Ventriglia I*).

The domestic trial was conducted in August 2003. The trial court ruled that, although the prenuptial agreement did not preclude equitable distribution, its terms expanded the definition of separate property, such that there was no marital property to distribute. The order denying Plaintiff's claim for equitable distribution was rendered in August 2003 and filed 12 January 2004. On appeal, this court reversed the trial court's ruling that the prenuptial agreement did not preclude equitable distribution, holding that:

> [T]he language used by the parties [in the prenuptial agreement] is sufficient to communicate their intent to dispose of all of their property under the terms of the agreement unless it was held to be unenforceable. This paragraph clearly does not apply as it was stipulated by the parties that the prenuptial agreement was valid and binding on them both. Accordingly, we hold that . . . the agreement fully disposes of the parties' property, and that the agreement acts as a bar to equitable distribution.

Ventriglia I. However, this Court upheld the court's determination that, under the terms of the prenuptial agreement, there was no marital property to divide. The opinion in *Ventriglia I* was filed in August 2005.

On 10 January 2007 Plaintiff filed suit against Defendants for damages arising from alleged legal malpractice. Plaintiff asserted that Defendants were negligent in their representation of Plaintiff in the domestic lawsuit between Plaintiff and Wilson. In their answer filed 24 September 2007, Defendants denied the material allegations of the complaint and moved to dismiss Plaintiff's claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), on the grounds that Plaintiff's claims were barred by the statute of limitations. Defendants also moved to dismiss Plaintiff's claim under N.C. Gen. Stat. § 1A-1, Rule 41(b) for failure to prosecute. In January 2008 Plaintiff moved to amend his complaint.

Following a hearing on 4 and 5 February 2008, the trial court on 7 February 2008 entered orders granting Plaintiff's motion for dismissal under Rule 12(b)(6), and denying Plaintiff's dismissal motion

under Rule 41. The trial court did not rule on Plaintiff's motion to amend his complaint. Plaintiff appealed from the court's dismissal of his claim, and Defendants filed a cross-assignment of error asserting error in the trial court's denial of their motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 41(b).

Standard of Review

Plaintiff appeals from the entry of dismissal under Rule 12(b)(6) (2007).

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the 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 the plaintiff's claim."

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)) (other citations omitted).

"On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court 'conducts 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.' " *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (quoting *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003)).

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[1] Following a hearing on the parties' pretrial motions, the trial court granted Defendants' motion for dismissal of Plaintiff's claim under Rule 12(b)(6). On appeal Plaintiff argues that the trial court erred by ruling on Defendants' motion to dismiss under Rule 12(b)(6) "prior to hearing and ruling on Plaintiff's motion to amend his complaint." However, the hearing transcript reveals that Plaintiff never argued to the trial court that his amendment motion should be heard first and failed to object to the court's hearing the Rule

12(b)(6) motion first. Indeed, Plaintiff never made a clear request for any ruling on his motion, even when asked directly by the trial court whether there were other matters to be considered. Consequently, we conclude that Plaintiff failed to preserve this issue for appellate review.

The hearing on pretrial motions was conducted on 4 February 2008. Defendants informed the trial court that they had filed motions for dismissal under Rule 12(b)(6) and Rule 41(b). Plaintiff then told the judge that Defendants had opposed his motion to amend, and asked the court not to consider certain evidentiary materials that Defendants had submitted in opposition to the amendment motion. The Defendants assured the court that as they were "going forward with the 12(b)(6)" the challenged evidence would not be introduced, and that this evidence would be pertinent only "if we get to the motion to amend." (T p 6-9) Plaintiff failed to ask that the court rule on his motion prior to the Rule 12(b)(6) motion. Defendants then argued to the court that the allegations of Plaintiff's complaint all referenced acts alleged to have been taken outside the relevant statute of limitations.

After the Defendants had presented their arguments, the trial court asked if Plaintiff wanted to argue the Rule 12(b)(6) motion. Plaintiff disputed the Defendants' interpretation of certain precedent, but did not ask for a ruling on the amendment motion. Defendants responded:

> So, your Honor we think that the contentions of the plaintiff are hinged upon allegations that just aren't in this complaint. And the complaint as drafted and as your Honor finds it today is barred by the statute of limitations, because it alleges acts which occurred more than three years before the suit was filed. (T p 40)

This argument put the content of Plaintiff's complaint squarely at issue, but Plaintiff still did not seek a ruling on his amendment motion. Instead, he returned to various legal arguments, before stating:

> One other matter, your Honor. I hate to raise this, but I'm going to raise it anyway. I do believe if the Court is going to consider the argument that the specific allegation of what the attorney might have done is not in this complaint, and that for that reason 12(b)(6) ought to be granted, if that is going to form the basis of it, I would ask, then, that the Court, in fact, consider the amended complaint. . . .

Defendants then pointed out to the court that "[t]here is no amended complaint. This is simply a motion to amend. . . . and we have serious objections to it[.]" (T p 46) Plaintiff did not ask the Court to rule on his motion to amend. Indeed, when the trial court asked before the morning recess whether there were any remaining matters to be considered, Plaintiff said, "No, your Honor, I think we've covered all bases."

That afternoon, the court conducted a hearing on Defendants' motion to dismiss Plaintiff's claim under Rule 41(b), for failure to prosecute. At the close of this hearing, the parties and the trial court engaged in the following dialogue:

> THE COURT: All right, sir, thank you. Anything else for me to decide?
>
> DEFENSE COUNSEL: No, sir.
>
> THE COURT: Did you say you had a motion to amend?
>
> PLAINTIFF'S COUNSEL: There is a motion to amend, your Honor.
>
> THE COURT: Why don't we hold that in abeyance and let me look at—I've got enough to deal with.
>
> PLAINTIFF'S COUNSEL: I understand.
>
> THE COURT: At this stage, that would confuse me. The rulings that I would make now wouldn't have anything to do with that.
>
> PLAINTIFF'S COUNSEL: I appreciate that, your Honor.
>
> . . . .
>
> PLAINTIFF'S COUNSEL: The only thing, your Honor, just to remind the Court, this is something I've already apprised the Court of, and that is if ultimately there is some question about the 12(b)(6) and it's relevant to a particular allegation not being present in the original complaint, under those circumstances I would ask the Court to delay ruling on the 12(b)(6) until the motion to amend the complaint has been heard. Does that make sense, your Honor?
>
> THE COURT: Yeah, that does make sense.
>
> DEFENSE COUNSEL: Your Honor, that's giving them the benefit of the motion, and I think the motion has been argued on the

> complaint as it exists, and I would ask the Court to rule on it as it exists. . . .
>
> . . . .
>
> THE COURT: All right. I am in a quandry about the appropriateness of hearing the motion to amend at this stage.
>
> PLAINTIFF'S COUNSEL: If I may, your Honor, I don't want to complicate things. I am—it would be my argument that the complaint as it stands is adequate to sustain—you know, to go forward, and for the 12(b)(6) motion to be denied. I'm only giving that one—what I consider to be a very small possibility that there is—based on noticed pleadings, I don't think it's necessary. But I suspect that there may be some possibility the Court would have some question and want to look at that amended complaint, in which case I think it would be appropriate for the Court to hear that motion before. But I don't think it's necessary. My opinion is that the original complaint is satisfactory.

In sum, Plaintiff argued that his complaint did not need amendment to withstand Defendants' Rule 12(b)(6) motion, and neither argued to the trial court that it was required to hear his amendment motion first, nor sought a ruling on this issue.

N.C.R. App. P. 10(b)(1) provides in pertinent part that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make." We conclude that Plaintiff failed to comply with Rule 10, and thus did not preserve for appellate review the question of the trial court's duty to rule on his amendment motion before ruling on Defendants' dismissal motion.

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[2] Plaintiff argues next that the court erred by dismissing his complaint under Rule 12(b)(6) for failure to state a claim for relief. We disagree.

Defendants' motion to dismiss asserted that Plaintiff's complaint was barred by the statute of limitations.

> 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. Once a defendant raises a statute of limitations defense, the burden of showing that

> the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired.

Horton v. Carolina Medicorp, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996); citing *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994); and *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985).

Plaintiff asserts that in his complaint he alleged acts of malpractice "which occurred at the pre-trial, trial, and post-trial phases of the case[.]" (Dfn Br p. 16) We disagree, and conclude that, as argued by Defendants, the complaint "shows upon its face that the action was commenced more than three (3) years from the last alleged act of the Defendants giving rise to the claim." (R p 22)

"A legal malpractice action is subject to a three-year statute of limitations. N.C.G.S. § 1-15(c) [(2007)]." (citing *Garrett v. Winfree*, 120 N.C. App. 689, 692, 463 S.E.2d 411, 414 (1995)) N.C. Gen. Stat. § 1-15(c) (2007) provides in pertinent part that:

> . . . [A] cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action

Count I of Plaintiff's complaint alleges the following areas of negligence by Defendants: (1) Defendants did not challenge the validity of the prenuptial agreement; (2) Defendants urged Plaintiff to sign the pretrial stipulation without fully explaining the significance of the stipulation; (3) Defendants failed to conduct adequate pretrial discovery, and; (4) Defendants failed to present adequate evidence at trial. The complaint thus asserts that Defendants were negligent in the choice of trial strategy regarding the prenuptial agreement, their response to the pretrial stipulation, and their conduct of discovery and of the presentation of evidence. These are acts or omissions that necessarily occurred before or during trial. It is undisputed that the trial ended in August 2003 and that Plaintiff's complaint was not filed until January 2007, more than three years later. Therefore, Count I of Plaintiff's claim was barred by the statute of limitations.

[3] In Count II, Plaintiff alleges that Defendants were negligent for failing to challenge the validity of the prenuptial agreement on appeal. As discussed above, N.C.R. App. P. 10 requires that "to pre-

serve 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." It is undisputed that Defendants did not challenge the prenuptial agreement at trial, and thus were precluded from raising it as an appellate issue by the North Carolina Rules of Appellate Procedure. Therefore, Plaintiff essentially alleges only that Defendants adhered to the applicable rules of court, which does not constitute legal malpractice.

We conclude that Plaintiff's claim was barred by the three year statute of limitations. Accordingly, we do not reach the issue of Defendants' dismissal motion under Rule 41. The trial court's order is

Affirmed.

Judges WYNN and BRYANT concur.

FRANCES HUFFMAN, ROGER D. KENNEDY, MARILYN DAWN KIDD, THOMAS P. MARSH, FRANKIE McCASKILL, DEBORAH K. ROGERS, SHARON P. SCOTT, EMPLOYEES, PLAINTIFFS v. MOORE COUNTY, EMPLOYER, AND SEDGWICK OF THE CAROLINAS, INC., CARRIER, DEFENDANTS

No. COA08-128

(Filed 16 December 2008)

Workers' Compensation— findings—recitation of testimony—general finding of credibility

A workers' compensation case involving toxin exposure in a building was remanded for further findings, with the possibility of taking new evidence due to medical developments since the original filing. The Commission's findings recited or summarized testimony, but did not state the facts the Commission was finding, and general statements that the Commission finds a witness credible do not reveal the part of the testimony the Commission finds as a fact.

Appeal by Plaintiffs from Opinion and Award entered 27 September 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 October 2008.

Lennon & Camak, PLLC, by George W. Lennon, and Michael W. Bertics, for Plaintiffs-Appellants.

Teague, Campbell, Dennis & Gorham, L.L.P., by George W. Dennis, III, and J. Matthew Little, for Defendants-Appellees.

ARROWOOD, Judge.

The Plaintiffs in this case are Frances Huffman, Roger D. Kennedy, Marilyn Dawn Kidd, Thomas P. Marsh, Frankie McCaskill, Deborah K. Rogers, and Sharon P. Scott, former Moore County employees who worked in the Community Services Building owned by the County. The Defendants in this case are Moore County and its insurance carrier, Sedgwick of the Carolinas, Inc.

> From February 1995 to April 1996, Plaintiffs filed workers' compensation claims alleging multiple effects of toxin exposure that occurred while they occupied the Community Services Building owned by Moore County. Defendants denied all of the claims on the basis that no injury occurred and Plaintiffs' complaints did not arise from causes and conditions characteristic of and peculiar to their respective employments to which members of the general public were not equally exposed.
>
> Plaintiffs' claims were consolidated for hearing and heard before Deputy Commissioner Crystal R. Stanback . . . [who] awarded Plaintiffs Scott, McCaskill, Kidd, Huffman, and Rogers permanent and total disability compensation at their respective compensation rates; and awarded Plaintiffs Marsh and Kennedy temporary total disability compensation at their respective compensation rates. Defendants' appeal to the full Commission resulted in an order denying Plaintiffs' claims. From that denial, Plaintiffs appeal[ed] to this Court.

Huffman v. Moore County, 184 N.C. App. 187, 645 S.E.2d 899 (2007) (unpublished) (hereinafter *Huffman I*).

In *Huffman I*, this Court "reach[ed] only the issue regarding the Commission's failure to make proper findings of fact related to the issue of spoilation of relevant evidence." The Court held that the Commission failed to make findings of fact resolving the conflicting evidence on the issue, and instead "merely recited what [the witnesses] testified to[.]" This Court reversed and remanded for proper findings of fact. On remand, the Commission issued a new opinion which stated that:

> In accordance with the directives of the North Carolina Court of Appeals, the Full Commission has added Findings of Fact numbers 29 and 30 and modified Finding of Fact number 32. In all other respects the October 25, 2005 Opinion and Award of the Full Commission remains the same.

The Commission's Opinion and Award, filed 27 September 2007, again denied Plaintiffs' claims for workers' compensation benefits. Plaintiffs have appealed to this Court. We reverse and remand for "specific findings of fact as to each material fact upon which the rights of the parties . . . depend." *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981) (citations omitted).

"Findings of fact are statements of what happened in space and time." *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987). For example in the present case, Finding No. 11 states in part that "Dr. Roy Fortmann and Russ Clayton of Acurex Environmental visited the CSB and met with Philip Boles, Sam Fields and Bobby Lake[.]" However, "[a] determination which requires the exercise of judgment or the application of legal principles is more appropriately a conclusion of law." *Guox v. Satterly*, 164 N.C. App. 578, 582, 596 S.E.2d 452, 455 (2004) (citing *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)). Thus, the statement in Finding No. 104 that "plaintiffs have not proven that their symptoms were caused by or significantly aggravated by their employment with defendant-employer" is more properly designated a conclusion of law.

"This Court has long recognized that the Industrial Commission is the sole fact finding agency in cases in which it has jurisdiction and that the finding of facts is one of the primary duties of the Commission." *Vieregge v. N.C. State University*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992) (citations omitted). In *Thomason v. Cab Co.*, 235 N.C. 602, 605-06, 70 S.E.2d 706, 709 (1952), the North Carolina Supreme Court stated that:

> It is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the Workmen's Compensation Act. The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. . . . [T]he

court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.

Moreover, "findings of fact must be more than a mere summarization or recitation of the evidence and the Commission must resolve the conflicting testimony." *Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981)) (other citation omitted.).

In the instant case, the Commission filed an Opinion with more than 100 findings of fact. Many of these recited or summarized the witness testimony, but did not state the facts that the Commission found to exist based on that testimony. By way of example, we note the following excerpts from the findings of fact:

3. Budd Hill Shirer . . . testified . . . that he witnessed substances being poured down the drain in the CSB . . . including trichloroethylene, toluene, . . . and other chemical solvent degreasing agents. . . .

. . . .

6. On June 21, 1994, William Pate, an industrial hygiene consultant . . . inspected the CSB. . . . [In his] testimony, Mr. Pate explained that carbon dioxide concentrations were well below the acceptable limit of 1000 parts per million. . . . Mr. Pate testified that he did not see anything during his inspection that would have caused him concern for the safety of the employees.

. . . .

10. . . . [William Pate] testified that on July 20, 1994, he . . . conduct[ed] air sampling for residual pesticide concentration in the air and for volatile organic compounds. . . . The test results of the volatile organic compounds were below the limits specified by [OSHA] . . . and according to William Pate, may be related to the new paint, carpet and vinyl flooring. Mr. Pate testified that these levels would decrease over time.

. . . .

12. . . . [P]eppermint oil was poured into the sewer line . . . to determine if there were any leaks in the septic system. According to Mr. Boles . . . no peppermint odor [was] detected inside the building. This indicated, according to Mr. Boles, that . . . the sewer line was pushing air out of the building[.]

. . . .

15. . . . Acurex Environmental's report stated, "it is unlikely that any of the 72 volatile organic compounds targeted for analysis occur at concentrations of concern in the soil near the locations where the samples were collected. . . ."

. . . .

17. . . . [Roy Fortmann, PhD.] testified that volatile organic compounds were detected in the indoor air samples, but . . . the concentrations were what would be considered "typical" of . . . an office building. . . .

. . . .

24. . . . [Flint Worrell] conducted a sampling of two septic tanks and two soil samples from the area. . . . According to Mr. Worrell's deposition testimony, it would be likely to find some amount of chemicals inside a septic tank. . . .

. . . .

26. Samuel W. Fields . . . testified that no volatile organic compounds or other toxic or pathogenic substances were ever detected in the CSB at a level in excess of OSHA's permissible exposure limits or the ACIGH's threshold limits value.

. . . .

33. Joyce Hendricks . . . testified that Antex Exterminating had a contract for monthly pesticide applications in . . . Moore County office buildings [and] . . . testified that neither safrotin nor boric acid aerosols were ever used[.]

. . . .

39. . . . [P]laintiff [Huffman] testified that her first episode of sickness occurred when the insulation was being taken out of the ceiling. She stated that she experienced a choking sensa-

tion and felt as if she could not breathe. Plaintiff further testified that she has had similar episodes of bronchial spasms and swelling since then[.]

. . . .

41. Although Dr. Bell testified that plaintiff's symptoms could be related to the environment in the CSB, he admitted that each and every symptom of multiple chemical sensitivity, chronic fatigue syndrome, and fibromyalgia can be explained by some other illness, either psychological or physiological. According to Dr. Bell, causes of fatigue other than chemical exposure could include post Epstein-Barr virus infection, metabolic abnormalities such as hypothyroidism, anemia, diabetes, chronic liver and kidney disease; malignant syndromes, depression and, in his opinion, obesity and sleep apnea.

42. On September 29, 1998, plaintiff [Huffman] presented to Dr. Howard Jones[.] . . . Dr. Jones opined that there was insufficient evidence to support a diagnosis other than an obstructive lung disease, such as recurrent bronchitis.

43. In his report, Dr. Jones stated, "there is a substantial debate in the scientific community regarding whether chronic fatigue syndrome or multiple chemical sensitivity syndrome are diagnosable entities *per se*, given that in many of these case[s], substantial functional overlay exists."

. . . .

45. Dr. John B. Winfield, a professor at the University of North Carolina School of Medicine . . .[reviewed] plaintiffs' medical records and . . . opined that plaintiff's illness was not caused by environmental agents to which she may have been exposed while employed in the CSB[.] . . . Dr. Winfield opined that factors . . . such as obesity, habitual inactivity, iron-deficiency anemia and psychological variables are more likely causes of her symptoms.

. . . .

72 . . . [P]laintiff [Scott] testified that her symptoms included difficulty breathing, sinus infections, fatigue, fibromyalgia, chemical sensitivity, loss of sleep, cognitive difficulties, and rashes. She testified that upon returning to the building

twice after renovations, she started having trouble breathing again. . . .

73. . . . [Dr.] Staudenmayer conducted an independent psychological evaluation of plaintiff[,] . . . [and] opined that [Scott] is a "hard-driving woman with personality traits of obsessiveness and repressed hostility. . . . She also had identifiable traits associated with obsessive-compulsive personality disorder." Dr. Staudenmayer opined that to a reasonable degree of psychological certainty plaintiff's complaints are psychogenic and are not causally related to exposures to environmental agents during her employment in the CSB.

74. . . . Dr. John Winfield opined with a reasonable degree of medical certainty that [Scott's] illness was not caused by environmental agents to which she may have been exposed while working in the CSB.

. . . .

80. Dr. John Winfield reviewed plaintiff [Roger's] medical records and opined that plaintiff's illness was not caused by environmental agents to which she may have been exposed while employed in the CSB since a toxic exposure was not established and the opinions of other doctors were not supported by the facts of the case or generally accepted information in medical and scientific literature. . . . Dr. Winfield opined that more likely than not plaintiff's fatigue was psychologically based.

. . . .

91. Dr. Charles Lapp, an internist and a certified independent medical examiner, . . . testified that the diagnosis of multiple chemical sensitivity is not a scientifically valid diagnosis. . . . Dr. Lapp testified that it was "well-accepted that we don't have a lot of data in this regard as to the exact cause of multiple chemical sensitivities" and that it is not yet scientifically proven and at the present time, it is an idiosyncratic condition caused by unexplained reasons.

94. Dr. John B. Winfield . . . conduct[ed] a study of 400 patients with fibromyalgia. In his opinion, the ongoing chronic stress and distress from almost purely psychological factors is at the heart of the physical illnesses exhibited by the plaintiffs in this case. Dr. Winfield further opined that very likely plain-

tiffs would have had the same symptoms whether or not they had worked in the CSB.

95. . . . Dr. Winfield stated, "scientific medicine does not accept the pseudoscience and speculation of illness and causation upon which the opinions of certain health professionals involved in [this case] have been based. . . . "

These findings merely recite or summarize witness testimony, but do not state what the Commission finds the facts to be. Additionally, general statements by the Commission that it finds a witness "credible" do not reveal what part of that witness's testimony the Commission finds as fact.

We conclude that the Opinion and Award of the Commission must be reversed and remanded for proper findings of fact. We reiterate that the above quoted findings of fact are examples only, not a complete listing of the findings of fact that require review by the Commission. We also note that expert testimony in this case reflects the uncertainty about fibromyalgia and multiple chemical sensitivity that existed when the depositions were taken. However, Plaintiffs originally filed their workers' compensation claims more than ten years ago, and in the intervening years the medical community may have gained a greater understanding of these conditions. Accordingly, the Commission may, in its discretion, reopen the case for new evidence.

Reversed and Remanded.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. BILLY JOE BARE

No. COA08-221

(Filed 16 December 2008)

Evidence— photographs of murder victim—admissibility

There was no abuse of discretion in a first-degree murder prosecution in the admission of photographs of the dismembered and decomposed body of the victim. The photos were introduced to illustrate the testimony of an SBI agent about the

condition of the body. Although there was no limiting instruction, none was requested.

Appeal by Defendant from judgments entered 10 August 2007 by Judge A. Moses Massey in Alleghany County Superior Court. Heard in the Court of Appeals 21 October 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General H. Dean Bowman, for the State.

Kathryn L. VandenBerg, for Defendant.

ARROWOOD, Judge.

Billy Joe Bare (Defendant) appeals from judgments entered on his convictions of first-degree murder, conspiracy to commit murder, and felony breaking and entering. We find no error.

In August 2006 Defendant was indicted on charges of the first-degree murder of Juan Lopez. He was later indicted on additional charges of conspiracy to commit first-degree murder, robbery with a dangerous weapon, and felony breaking and entering.

Defendant was tried before an Alleghany County jury in August 2007. The State's evidence at trial, summarized as pertinent to this appeal, tended to show the following: In 2006 Carol Caudill and her husband owned a trailer on Chevy Lane, in rural Alleghany County. Behind the trailer was a small creek bordered by an old barbed wire fence, and a wooded area beyond that. Her son, Tim Caudill, stayed in the trailer; another son, Mark Caudill, lived next door. Tim moved out in early March and on 4 March 2006 Carol Caudill rented the trailer to Juan Lopez. She never saw Lopez again. At the end of March, a friend of Lopez's asked Carol to help her find him. They went to the trailer and found the door open, a car in the yard, and untouched food on the counter. There were no signs of a struggle, but Carol asked the Alleghany County Sheriff to investigate.

In May 2006 Carol Caudill rented the trailer to James Murray. On 6 May 2006, while Murray was moving into the trailer, he noticed an unpleasant odor and looked outside the trailer. He discovered a decomposing body, later identified as that of Juan Lopez, lying face down on the creek bank. The body, which Murray described as "gruesome" and consisting of "partial flesh and bones," was covered with broken pine branches. Murray immediately called the police to the scene.

The testimony of Lonnie Dale Love was the strongest evidence of Defendant's involvement in the murder. Love testified that in March 2006 he was staying at Mark Caudill's house. Over the weekend of 18 March 2006, Mark's house was the scene of a drug party that included Mark, Love, Defendant, and several other men. The group used cocaine extensively over the weekend, and Defendant played a major role in keeping the party supplied with drugs. Love testified that Defendant left the party repeatedly, each time disappearing briefly and returning in about ten minutes with more cocaine. Defendant told Love that he was buying the cocaine from Lopez, who had advanced the cocaine on credit, with the understanding that Defendant would sell it to others and then repay Lopez. By Sunday evening Defendant owed Lopez more money than he had available. Defendant told Love that he might break into Lopez's house and steal some money with which to repay Lopez for the drugs, and also said that if he followed this plan he might "have to kill" Lopez.

On Monday, 20 March 2006, Love and Defendant broke into Lopez's trailer and stole cocaine and a gun. After using the cocaine, Defendant telephoned Lopez and asked him to meet Defendant at Lopez's trailer. When Lopez arrived, Defendant was outside the trailer with the stolen gun concealed in his sleeve, and Love was watching from nearby. Love saw Defendant and Lopez talk briefly before walking up onto the porch to the front door. As they moved out of sight around the doorway, Love heard a gunshot and then what he believed to be Lopez's body falling to the ground. Defendant ran into the yard waving the gun. He was agitated and shaking, and told Love he "had to kill" Lopez. When Love got to the porch, he saw that Lopez had been shot in the back of the head and was lying in a pool of blood. Love testified that they carried Lopez's body to the creek bank and covered it with branches. Love returned to Mark's house, while Defendant stayed to clean up the murder scene. Defendant later burned certain items of evidence and washed his clothes.

Defendant threatened to kill Love if he told anyone about Defendant murdering Lopez. Love was frightened of Defendant and went to stay with his girlfriend in Moore County. When Lopez's body was discovered in May, Love panicked and drove back to Alleghany County in his girlfriend's car. Several days later, law enforcement officers arrested Love for the unauthorized use of his girlfriend's car. On the way to the police station, Love volunteered information about Lopez's killing, and later gave police a statement detailing the circumstances of the shooting. Love testified that he had been charged

with the same offenses as the Defendant, and that he had not been promised any leniency or plea bargain.

Love's testimony was corroborated in part by other evidence. Several witnesses testified about the drug party at Mark Caudill's, corroborating Love's testimony that Defendant left the party numerous times, returning in a few minutes with more cocaine. Defendant's former girlfriend corroborated Love's testimony that Lopez had advanced cocaine to Defendant on credit, and that Defendant discussed robbing and killing Lopez. The North Carolina Medical Examiner verified that Lopez died from a gunshot to the back of the head. Additionally, Love's statement to the police, which largely corroborated his trial testimony, was read aloud to the jury.

Defendant's evidence tended to show that he was at work when Lopez was killed, and that a Robert Billings may have been involved in killing or robbing Lopez.

Following the presentation of evidence, the court dismissed the charge of robbery with a dangerous weapon. On 10 August 2007 Defendant was found guilty of the remaining charges. With respect to the jury's verdict on the murder charge, the jury found defendant guilty of first-degree murder on the basis of both the theory of malice, premeditation, and deliberation and under the felony murder rule. He was sentenced to life in prison without parole for first-degree murder, and received a consolidated sentence of 225 to 279 months for the convictions of breaking and entering and conspiracy to commit murder, that sentence to run at the expiration of the life sentence for murder. Defendant appeals from these judgments and convictions.

Defendant raises a single issue on appeal, arguing that the trial court erred by overruling his objection to the admission of certain photographs of the deceased. Defendant contends that "the admission of photographs showing the decedent's dismembered and decomposed body strewn through the surrounding woods was prejudicial error, as this evidence was irrelevant, excessive, and inflammatory." We disagree.

The standard of review of a court's admission of photographs is well known:

> We review the trial court's decision to admit the evidence pursuant to Rule 403 for an abuse of discretion. . . "In our review,

> we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record."

State v. Peterson, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007) (citing *State v. Al-Bayyinah*, 359 N.C. 741, 747-48, 616 S.E.2d 500, 506-07 (2005); and quoting *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007)). "Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each likewise lies within the discretion of the trial court. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citing *State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979); and *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985)).

"We have held that '[p]hotographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words.' " *State v. Lloyd*, 354 N.C. 76, 98, 552 S.E.2d 596, 513 (2001) (quoting *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984)) (internal citation omitted). Moreover, " '[p]hotographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury.' " *State v. Blakeney*, 352 N.C. 287, 309-10, 531 S.E.2d 799, 816 (2000) (quoting *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526).

In the instant case, Defendant objected to the introduction of State's exhibits thirteen through twenty-three, photographs of Lopez's body in a state of partial decomposition, on the grounds that the photos were prejudicial and served no evidentiary purpose. The trial court ruled that:

> The Court has examined the tendered exhibits. The Court—it does not appear that the exhibits are unnecessarily duplicative. It does appear that the exhibits illustrate different objects that were discovered at the scene that appeared to have a connection with the subject of this case.
>
> The Court—it does not appear that there is anything about these tendered photos that would be likely to inflame the jury, and it does not appear to the Court that the photos would be unfairly

prejudicial to the defendant. The Court respectfully overrules [the] objection to the tendering of these photos.

The challenged exhibits include the following: (1) three photographs of Lopez's trunk and lower body, depicting the remains of a fire, the mummification and decay of his flesh, the branches placed over the body, and the blue jeans and shoes Lopez was wearing; (2) two photos of a skull and jawbone, and four pictures of other bones, all largely devoid of flesh; (3) one photograph of a hand that is partially decayed, and; (4) two photographs showing the underbrush where Lopez was found, without a clear view of the body itself.

These photographs were introduced to illustrate testimony by SBI Special Agent Van Williams about the condition of Lopez's body when it was discovered. Williams testified without objection that, by the time Lopez's remains were found, "some of the bones were actually exposed and the body was in a state of mummification." His body had been partially eaten by animals, and was missing "a part of [an] arm, fingers, and a head." These body parts were found "in close proximity to the body." Items of clothing were found near the body.

The exhibits at issue are necessarily unappealing and unfortunate. However, we conclude that the trial court's decision to admit them was not an abuse of discretion. " 'Even where a body is in advanced stages of decomposition and the cause of death and identity of the victim are uncontroverted, photographs may be exhibited showing the condition of the body and its location when found.' " *State v. Gregory*, 340 N.C. 365, 387, 459 S.E.2d 638, 650-51 (1995) (quoting *State v. Wynne*, 329 N.C. 507, 517, 406 S.E.2d 812, 816-17 (1991)). "This Court has rarely held the use of photographic evidence to be unfairly prejudicial, and the case presently before us is distinguishable from the few cases in which we have so held." *State v. Robinson*, 327 N.C. 346, 357, 395 S.E.2d 402, 409 (1990). "By admitting the photographs, the trial court implicitly determined that any undue prejudice resulting from the admission of the photographs was substantially outweighed by their probative value. The trial court did not abuse its discretion, and this assignment of error is rejected." *State v. Roache*, 358 N.C. 243, 286, 595 S.E.2d 381, 410 (2004).

Defendant also notes that the jury was not given a limiting instruction on the photos. "The jury should be instructed to consider photographs for illustrative purposes only; however, where the defendant does not request that the limiting instruction be given, as he did not in this case, it is not error when the instruction is not

given." *State v. Handsome*, 300 N.C. 313, 319, 266 S.E.2d 670, 675 (1980) (citations omitted).

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

No Error.

Judges WYNN and BRYANT concur.

KENNETH E. ROSS, PLAINTIFF v. LINDA O. ROSS (NOW OSBORNE), DEFENDANT

No. COA08-285

(Filed 16 December 2008)

Appeal and Error— amount of bond—underlying matter remanded—appeal moot

An appeal from the amount of a supersedeas bond was dismissed as moot where underlying matter was remanded for further proceedings. To avoid repetition, the Court of Appeals also decided that the trial court was without jurisdiction to reduce the bond because that amount was the subject of the appeal; furthermore, plaintiff's motion to stay should have been dismissed because the relief sought had already been granted by the Court of Appeals.

Appeal by plaintiff from judgments entered 19 October 2007 by Judge Paul M. Quinn in Carteret County District Court. Heard in the Court of Appeals 9 October 2008.

Ludwig, Willis, & Lashley, PLLC, by Constance M. Ludwig, for plaintiff appellant.

Judith K. Guibert for defendant appellee.

McCULLOUGH, Judge.

Plaintiff-husband, Kenneth E. Ross ("plaintiff-husband") appeals the trial court's order setting the amount of an appeal bond pursuant to N.C. Gen. Stat. § 1-292 (2007). Defendant-wife, Linda O. Ross ("defendant-wife") moves to dismiss plaintiff-husband's appeal.

The complete facts of this case are set forth in *Ross v. Ross*, 2008 N.C. App. LEXIS 1801 (2008) (unpublished) ("Ross I"), a prior appeal involving the same parties. That appeal involved the actual merits of the claims between the parties, whereas this appeal concerns only the trial court's order setting the bond required for a stay pending appeal.

The facts and procedural background relevant to this appeal are as follows: On 5 March 2007, the trial court entered judgment ("the March 2007 judgment") on claims for equitable distribution, postseparation support, alimony, and attorney's fees. As part of its ruling, the trial court ordered *inter alia* that plaintiff-husband vacate the parties' Emerald Isle residence on or before 1 April 2007. Plaintiff-husband filed a notice of appeal with respect to the March 2007 judgment on 3 April 2007, and on 23 April 2007, plaintiff-husband moved to stay execution pending appeal of such judgment. On 8 May 2007, a hearing was held in Carteret County District Court before the Honorable Paul Quinn on that motion to stay.

By 1 June 2007, there had been no ruling issued by the trial court on plaintiff-husband's motion to stay. Pursuant to Rule 23 of the North Carolina Rules of Appellate Procedure, plaintiff-husband petitioned this Court for a Writ of Supersedeas to stay the March 2007 judgment pending appeal. *See* N.C. R. App. P. 23(b) (2008). By order entered 4 June 2007, this Court entered a temporary stay of the March 2007 judgment, and by order entered 19 June 2007, this Court entered a Writ of Supersedeas ("the Writ of Supersedeas"), ordering that the trial court set the amount of the supersedeas bond within 30 days, at which point the temporary stay entered 4 June 2007 would be dissolved.

On 19 October 2007, the trial court entered two orders. In its first order, the trial court ruled on plaintiff-husband's original motion to stay that had been heard on 8 May 2007 ("the Stay Order"), setting a bond in the amount of $250,000, staying only the portion of the March 2007 judgment that required plaintiff-husband to vacate the Emerald Isle Property, and ordering plaintiff-husband to make monthly reimbursement payments to defendant-wife for various expenses associated with the Emerald Isle property, pending appeal. The Stay Order expressly provides "[t]he remaining terms of the Final Judgment . . . shall not be stayed." In the second order ("the Bond Order"), which was entered three minutes after the Stay Order, the trial court set a supersedeas bond in the amount of

$250,000 pursuant to the Writ of Supersedeas and ordered plaintiff-husband to pay all expenses related to his occupancy of the Emerald Isle property pending appeal.

On 1 November 2007, plaintiff-husband filed a notice of appeal with respect to the Stay Order and the Bond Order ("*Ross II*"). In the instant appeal, *Ross II*, defendant contends that: (1) the $250,000 bond amount is excessive and is not supported by competent evidence of record; and (2) the trial court lacked subject matter jurisdiction to order the plaintiff-husband to reimburse defendant-wife for expenses incurred with respect to the Emerald Isle property.

While the instant appeal, *Ross II*, was pending with this Court, on 30 January 2008, plaintiff moved the trial court pursuant to N.C. Gen. Stat. § 1-294 (2007) to reduce the amount of the bond because he was unable to raise and encumber sufficient collateral. On 12 March 2008, the trial court found that it had subject matter jurisdiction pursuant to N.C. Gen. Stat. § 1-294, and granted plaintiff-husband's motion and reduced the amount of the supersedeas bond to $25,000 ("the Bond Reduction Order"). The Bond Reduction Order does not address the reimbursement provisions contained in the Stay Order.

Defendant-wife argues that plaintiff-husband's *Ross II* appeal is moot and plaintiff-husband's decision to proceed with the *Ross II* appeal notwithstanding the entry of the Bond Reduction Order was for the improper purposes of harassing defendant and constitutes frivolous litigation. Defendant-wife further argues that plaintiff-husband's *Ross II* appeal should be dismissed because the Stay Order and Bond Order are interlocutory orders that do not adversely affect a substantial right. We agree with defendant-wife that this appeal should be dismissed as moot; however, we reach this conclusion for reasons other than those advanced by defendant-wife.

I. Mootness

It is a well-settled rule that:

> "Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law. . . .
>
> Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the com-

> mencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action."

Womack Newspapers, Inc. v. Town of Kitty Hawk, 181 N.C. App. 1, 8, 639 S.E.2d 96, 101, *disc. review withdrawn*, 361 N.C. 370, 644 S.E.2d 564 (2007) (quoting *Pearson v. Martin*, 319 N.C. 449, 451, 355 S.E.2d 496, 497, *reh'g denied*, 319 N.C. 678, 356 S.E.2d 789 (1987)).

A. Validity of Bond Reduction Order

First, because of the likelihood of repetition, we address defendant-wife's contention that the trial court's entry of the Bond Reduction Order, which was entered pursuant to N.C. Gen. Stat. § 1-294, rendered this appeal moot.

N.C. Gen. Stat. § 1-294 provides:

> **When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from**. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars ($50,000), where it would otherwise exceed that sum.

Id. (emphasis added).

The rule codified by N.C. Gen. Stat. § 1-294 is that once an appeal is perfected, the lower court is divested of jurisdiction. *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422, *disc. review denied in part*, 334 N.C. 162, 432 S.E.2d 358, *aff'd*, 335 N.C. 158, 436 S.E.2d 821 (1993). The lower court only retains jurisdiction to take action which aids the appeal and to hear motions and grant orders that do not concern the subject matter of the suit and are not affected by the judgment that has been appealed. *Id.* Likewise, while a trial court may ordinarily "suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise . . . it considers proper for the security of the rights of the adverse party" while an appeal is pending, N.C. Gen. Stat. § 1A-1, Rule

62(c) (2007), here, the amount of the security and terms of the Stay Order and Bond Order are the subject matter of plaintiff-husband's appeal. Thus, once plaintiff-husband perfected his appeal of the Stay Order and the Bond Order, the trial court was divested of jurisdiction to enter an order modifying the terms of those orders. N.C. Gen. Stat. § 1-294. Accordingly, the trial court was without jurisdiction to reduce the supersedeas bond amount to $25,000, and the Bond Reduction Order is void. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 793 (2006). Since the Bond Reduction Order is void, it does not resolve the controversy at issue in this appeal and does not render this appeal moot.

B. Validity of Stay Order

We also note that at the time the trial court ruled on plaintiff-husband's motion to stay and entered the Stay Order, this Court had already issued a temporary stay, which stayed the entire March 2007 judgment. Because the relief sought had already been granted by this Court, plaintiff-husband's motion to stay was rendered moot and should have been dismissed. *Womack Newspapers, Inc.*, 181 N.C. App. at 8, 639 S.E.2d at 101. Furthermore, the district court had no authority to modify the terms or otherwise enter an order inconsistent with the Orders previously entered by this Court. *See Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117, *cert. denied, appeal dismissed*, 303 N.C. 319, 281 S.E.2d 659 (1981) ("A judge of the District Court cannot modify a judgment or order of another judge of the District Court"); *In re Royster*, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007) ("It is well established that one superior court judge may not ordinarily modify, overrule, or change the judgment or order of another superior court judge previously entered in the same case."); N.C. R. App. P. 23 (2008).

C. Appeal No Longer Pending

Nonetheless, because *Ross I* is no longer pending on appeal as the matter has been remanded to the district court for a reclassification and revaluation of the property at issue, plaintiff-husband's appeal from the order setting the supersedeas bond is moot. *Putman Constr. & Realty Co. v. Byrd*, 632 So. 2d 961, 968 (Ala. 1992).

For the sake of judicial economy, we refrain from considering any remaining issues. Because of the previously discussed errors and the fact that the Bond Reduction Order does not expressly address the payment provisions to which plaintiff-husband assigns error, we do

not find that plaintiff-husband has pursued a frivolous appeal. In our discretion, defendant-wife's motion for sanctions pursuant to N.C. R. App. P. 34 (2008) is denied.

Dismissed.

Judges TYSON and CALABRIA concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 DECEMBER 2008)

BYRD FAMILY, LLC v. CAMERON L. SMITH & SON PROPS., L.L.C. No. 08-263	Columbus (07CVS667)	Affirmed
CITIBANK, S.D., N.A. v. BOWEN No. 08-392	Harnett (07CVD497)	Affirmed
COSTON v. SMITHFIELD PACKING, INC. No. 08-355	Ind. Comm. (I.C. No. 605852)	Affirmed
CUMBO v. CUMBO No. 08-574	Beaufort (04CVD1174)	Affirmed
ELDER BROACH PROPS., INC. v. MCNEEL No. 08-202	Mecklenburg (05CVD6956)	Affirmed in part, reversed in part
EMICK v. SUNSET BEACH & TWIN LAKES, INC. No. 08-184	Brunswick (03CVS2008)	Affirmed
EVERGREEN CONSTR. CO. v. CITY OF KINSTON No. 08-390	Lenoir (07CVS1023)	Reversed and remanded
HAMILTON v. NORTON DOORS/YALE SEC., INC. No. 08-548	Ind. Comm. (I.C. No. 589494)	Affirmed
HINCEMAN v. FOOD LION No. 08-538	Ind. Comm. (I.C. No. 391486)	Affirmed in part, remanded in part
IN RE A.K., M.K., L.R., V.R., J.R. No. 08-905	Wilson (06JA118-21) (08JA35)	Affirmed in part, reversed and remanded in part
IN RE A.M. No. 08-808	Guilford (08JA1)	Affirmed
IN RE B.M.A. No. 08-454	Burke (05JT131)	Affirmed
IN RE D.N. No. 08-870	Mecklenburg (06JT1247)	Affirmed
IN RE J.M.E. No. 08-821	Harnett (05J39)	Affirmed
IN RE J.T.F. & S.L.F. No. 08-814	Caldwell (06J135) (06J137)	Affirmed

IN RE J.Y. & N.Y. No. 08-900	Cumberland (05JT688-89)	Affirmed
IN RE K.E., Jr. No. 08-825	Buncombe (07JA454)	Vacated
IN RE T.L.A., E.A., T.R.A. No. 08-880	Mecklenburg (06JT923-24) (06JT1251)	Affirmed
IN RE V.M.C. No. 08-934	Gaston (05JT332)	Affirmed
IN RE WALKER v. NEW HANOVER CTY. BD. OF CTY. COMM'RS No. 08-218	New Hanover (07CVS1116)	Affirmed
JONES v. FOOD LION No. 08-451	Ind. Comm. (I.C. No. 545151)	Affirmed
MOSER v. SMITH No. 07-1508	Catawba (06CVS3386)	Affirmed
N.C. DEP'T OF LABOR v. SUTTON No. 08-311	Wake (07CVS13159)	Affirmed
SKERRETT v. SKERRETT No. 08-494	Transylvania (07CVD473)	Affirmed
STALLINGS v. N.C. DEP'T OF THE STATE TREASURER No. 08-165	Ind. Comm. (TA-18810)	Affirmed in part and reversed in part
STATE v. BELL No. 08-567	Onslow (06CRS53781-82)	No error
STATE v. BREWER No. 08-303	Buncombe (04CRS8963-71) (04CRS8973-78) (04CRS8983) (04CRS52140)	Affirmed
STATE v. BRITO No. 08-330	Forsyth (04CRS38529) (03CRS57535)	No error as to trial, remanded for re-sentencing on 04CRS38529
STATE v. CAVINESS No. 08-212	Guilford (07CRS24696-97) (07CRS77676-77)	No error
STATE v. CHERRY No. 08-677	Pitt (07CRS52627-29)	Dismissed
STATE v. COFFIN No. 08-539	Durham (01CRS50252)	No error

STATE v. COLEMAN No. 08-136	Rowan (06CRS50585)	No prejudicial error
STATE v. DAVIS No. 08-414	Burke (04CRS1324)	No error
STATE v. FERGUSON No. 08-735	Mecklenburg (06CRS235798) (06CRS241687) (06CRS241691) (07CRS214062)	Remanded for new sentencing hearing
STATE v. GAMBLE No. 08-502	Forsyth (06CRS60817) (06CRS15967)	No error
STATE v. GATLING No. 08-607	Hertford (94CRS577)	Affirmed
STATE v. GLADDEN No. 08-726	Rowan (05CRS53978-80) (06CRS5010)	Affirmed
STATE v. GOLDSTON No. 08-340	Durham (04CRS50797)	No error
STATE v. GRANT No. 08-292	Mecklenburg (05CRS244094-95) (05CRS76342)	No error
STATE v. GRIER No. 08-84	Granville (07IFS952)	No error
STATE v. HAMMONDS No. 08-350	Robeson (05CRS50311-13)	Affirmed
STATE v. HARLOW No. 08-878	Columbus (07CRS50032)	No error
STATE v. HARVEY No. 08-658	Johnston (04CRS55808)	No error
STATE v. HERNANDEZ-MADRID No. 04-294-2	Wake (02CRS209) (02CRS51220) (02CRS51222) (02CRS51225)	No error
STATE v. HICKS No. 08-393	Gaston (05CRS51705) (05CRS3250)	No error
STATE v. HILL No. 08-417	Mecklenburg (07CRS210305)	No error
STATE v. HOUSE No. 08-377	Forsyth (07CRS50562) (06CRS37790)	No error

STATE v. INGRAM No. 08-447	Nash (06CRS50724-26)	No error
STATE v. JACKSON No. 08-455	Wake (06CRS88878)	No error
STATE v. JONES No. 08-208	Forsyth (06CRS63871) (06CRS31289)	No error
STATE v. JONES No. 08-606	Mecklenburg (06CRS229547)	No prejudicial error
STATE v. JONES No. 08-866	Iredell (06CRS61968)	No error in part; vacate in part; and remand
STATE v. KIDD No. 08-273	Wake (06CRS62260)	No error
STATE v. LEWIS No. 08-661	Buncombe (06CRS9858) (06CRS57491) (06CRS57494) (06CRS57496) (06CRS57498)	No error
STATE v. MAYSONET No. 08-566	Iredell (06CRS11618-19) (06CRS57792) (06CRS57798-99) (06CRS57795) (06CRS57801)	No error
STATE v. McKINNEY No. 08-243	Guilford (03CRS84998)	Affirmed
STATE v. McNEILL No. 08-228	Lee (07CRS51043)	No error
STATE v. MORRIS No. 08-389	Wake (05CRS35227) (05CRS35229) (05CRS37632)	No prejudicial error
STATE v. PATTON No. 08-199	Henderson (05CRS6239-42)	Affirmed
STATE v. PEGUES No. 08-545	Sampson (07CRS50240)	No error
STATE v. SILVA No. 07-1345	Wake (05CRS101793-94) (05CRS101796-97)	No error

STATE v. SILVER No. 08-291	Pitt (07CRS2525) (07CRS50226)	No error
STATE v. SMITH No. 08-160	Wake (05CRS9374-75) (05CRS59140-41)	No error
STATE v. SPARKS No. 08-319	Caldwell (04CRS1202) (04CRS8000) (05CRS4231)	Dismissed
STATE v. STEPHENS No. 08-590	Forsyth (07CRS54983)	No error
STATE v. VILLARREAL No. 08-244	Forsyth (07CRS52285)	No error
STATE v. WAGNER No. 08-240	Forsyth (06CRS36461) (06CRS57682)	No error
STATE v. WHEELER No. 08-694	Cabarrus (07CRS8244-45)	No error
STATE v. WILDS No. 08-375	Columbus (06CRS51616-17)	No error
STATE v. WOOD No. 08-429	Guilford (07CRS90975) (07CRS90977)	No error
STATE v. WOODS No. 08-596	Catawba (06CRS1887)	No error

FORMAL ADVISORY OPINION: 2009-03

March 31, 2009

QUESTION:

May a judge utilize an internet listserv through which the judge could pose questions, discuss issues of general interest and seek/provide advice?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined that while a judge may make use of various internet applications, such as a listserv, for a variety of purposes, it would be inappropriate for a judge to utilize a listserv for the specific purpose of obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge.

DISCUSSION:

Canon 3A(4) of the North Carolina Code of Judicial Conduct provides "[a] judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge." The language clearly conveys the understanding that judges may occasionally need assistance in understanding legal issues in matters before them. Such assistance is permissible so long as it is provided by a "disinterested expert on the law".

The language of Canon 1 or the Code directs judges to "uphold the integrity and independence of the judiciary" by establishing, maintaining, enforcing and personally "observing appropriate standards of conduct". A judge's decision should be reached independent of influences outside of the facts of a particular case and applicable law.

The process of posting an issue on a listserv, thereby inviting open comment by all who may have access to the post provides opportunities for these principals to be abused. Every person who responds to a listserv posting may not be considered an expert on the law in question. Concerns arise over the actual or perceived lose of independence to group thought. Issues of the security and confidentiality

of such inquiries arise due to the inability to immediately and positively identify those who post responses.

References:
North Carolina Code of Judicial Conduct
Canon 1
Canon 3A(4)

FORMAL ADVISORY OPINION: 2009-04

March 31, 2009

QUESTION:

May a judge preside over matters involving an attorney, while the judge's spouse is an employee of a title insurance agency owned by said attorney?

COMMISSION CONCLUSION:

The Judicial Standards Commission concluded that, in every matter in which the attorney appears before the judge, the judge should either disqualify, or disclose, on the record and in open court, the employment relationship between the judge's spouse and the attorney, and give the parties an opportunity to move for the judge's disqualification. Should any party move for the judge's disqualification, the judge should grant the motion. If all parties agree to waive the potential basis for the judge's disqualification, then the judge may preside. The remittal of disqualification procedures of Canon 3D of the Code of Judicial Conduct should be followed.

DISCUSSION:

Canon 3C(1) of the Code reads, *inter alia*, "[O]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned ...". Clearly, one could reasonably question the impartially of a judge when a member of the judge's family is in and employee/employer relationship with an attorney, and said attorney appears in a contested matter before the judge.

Although such a situation reasonably calls the judge's impartially into question, all parties and their counsel may waive the basis for the judge's potential disqualification, and the judge may preside. Canon 3D of the Code reads:

> "Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon his the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding.

> The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, pro se parties shall be considered lawyers."

It should be noted in this situation, the title insurance agency was a small business. But for the efforts of the attorney, the agency and the accompanying employment opportunity would not exist. The judge's spouse and the attorney frequently interacted while conducting the business of the title insurance agency.

References:
North Carolina Code of Judicial Conduct
Canon 3C(1)
Canon 3D

FORMAL ADVISORY OPINION: 2009-05

April 3, 2009

QUESTION:

Is a sitting district court judge required to resign the judge's judicial office before becoming a candidate in a public primary or general election for the office of clerk of superior court?

COMMISSION CONCLUSION:

The Judicial Standards Commission concluded a judge is not required to resign the judge's judicial office before becoming a candidate in a public primary or general election for the office of clerk of superior court.

DISCUSSION:

Canon 7B(5) of the Code of Judicial Conduct provides a judge may "become a candidate either in a primary or in a general election for a judicial office provided that the judge should resign the judge's judicial office prior to becoming a candidate either in a party primary or in a general election for a non-judicial office".

The office of clerk of superior court is a judicial office of the General Court of Justice as set forth in N.C. Const. art. IV, § 9 (3) and N.C. Gen. Stat. §7A, Art. 12.

Reference:
North Carolina Constitution
Article 12, § 9 (3)
North Carolina General Statutes
§7A, Art. 12
North Carolina Code of Judicial Conduct
Canon 7B(5)

FORMAL ADVISORY OPINION: 2009-06

June 12, 2009

QUESTION:

May a judge hold membership in the Charlotte-Mecklenburg Black Political Caucus?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined a judge may hold membership in the Charlotte-Mecklenburg Black Political Caucus.

DISCUSSION:

The Charlotte-Mecklenburg Black Political Caucus is an organization dedicated to promoting and enhancing the influence and welfare of the African American community in the areas of education, economics, political activity, and cultural, social and civic welfare.

Canon 2C of the Code of Judicial Conduct reads, "[a] judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin." There is no indication that the Caucus practices "unlawful discrimination", by arbitrarily excluding from membership, on the basis of race, religion, sex, or national origin those individuals who would otherwise be admitted to membership. Thus, on the understanding that the inquiry was directed solely to the practice of limiting membership to "African Americans of Black descent", the Commission did not perceive an ethical impediment to membership.

Reference:
North Carolina Code of Judicial Conduct
Canon 2C

FORMAL ADVISORY OPINION: 2009-07

September 24, 2009

QUESTION:

While in private practice, a judge represented Mr. X in a criminal trial which resulted in a conviction of first-degree murder and the pronouncement of a sentence of death. Mr. X is now awaiting execution and is a party, along with four other inmates, to litigation pending before the Court, which involves the legality of the execution protocol. The proceeding in question is an appeal from an order dismissing the petitioners' petition for judicial review of the decision on the legality of the execution protocol.

The specific inquiry is whether the judge's prior representation of Mr. X requires the judge's disqualification in the present case, and, if so, whether such disqualification may be waived by the parties. In addition the judge inquired as to whether the judge would be able to participate in the decision as to the other four petitioners if they submitted briefs and arguments separately from Mr. X's brief and argument.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined that, upon motion of a party pursuant to Canon 3C of the Code of Judicial Conduct or upon the judge's own motion pursuant to Canon 3D of the Code, the judge should disqualify from participating in the current matter before the Court.

As an alternative to disqualification on the judge's own motion pursuant to Canon 3D, the judge may disclose on the record the basis of the potential disqualification. If the parties and their attorneys, independent of any request or participation by the judge, agree in writing that the basis for the judge's potential disqualification is immaterial or insubstantial, the judge may participate in the matter.

Finally, because the issues involving each of the five petitioners appear to be identical and a decision as to any one of them would control the outcome of the appeals of each of the others, the severance of Mr. X's appeal from those of the remaining petitioners would have no effect on the judge's disqualification.

DISCUSSION:

The inquiry implicates the following provisions of the Code of Judicial Conduct: Canon 2B, "a judge shall not allow the judge's . . . relationships to influence the judge's judicial conduct or judgment . . ." and Canon 3C(1), "a judge should disqualify himself/herself in a pro-

ceeding in which the judge's impartiality may reasonably be questioned . . ." particularly subsections (a) and (b). Initially, the Commission recognizes that the issues involved in the criminal matter in which the judge represented Mr. X, and those involved in the action currently before the Court, are not precisely the same. Regardless, the Commission is of the opinion that due to the former attorney-client relationship which existed between the judge and Mr. X, coupled with the nature of the prior representation, the judge's participation in the current proceeding before the Court could provide reasonable grounds to question the judge's impartiality and create the appearance of impropriety.

Reference:
North Carolina Code of Judicial Conduct
Canon 2B
Canon 3C(1)(a)
Canon 3C(1)(b)
Canon 3D

FORMAL ADVISORY OPINION: 2009-08

December 11, 2009

QUESTION:

May a judge accept the gift of a portrait of the judge from a local county bar association to recognize the judge's service following the judge's retirement? Following the judge's retirement, the judge accepted a commission and serves as an emergency judge. The county bar association is not a party in any matter pending before the court.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined the judge may accept the gift of a portrait of the judge on the occasion of the judge's retirement. In the event the value of the portrait exceeds $500, the judge should report the gift as per Canons 5C(4)(c) and 6C of the Code of Judicial Conduct.

DISCUSSION:

The Code authorizes judges to accept gifts under circumstances where the gift is "incident to a public testimonial to the judge" (Canon 5C(4)(a)), "a wedding, engagement or other special occasion gift" (Canon 5C(4)(b)), and "any other gift only if the donor is not a party presently before the judge and, if its value exceeds $500, the judge reports it in the same manner as the judge reports compensation in Canon 6C" (Canon 5C(4)(c). The gift of a portrait from a local bar association falls within each of the three Code provisions cited.

Reference:
North Carolina Code of Judicial Conduct
Canon 5C(4)(a)
Canon 5C(4)(b)
Canon 5C(4)(c)

FORMAL ADVISORY OPINION: 2010-01

January 8, 2010

QUESTION:

May a judge enter an *ex parte* order for an attorney to be admitted to practice *pro hac vice*?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined the judge may enter an *ex parte* order for an attorney to be admitted to practice *pro hac vice*, provided all parties receive notice of the motion as required by law and have an opportunity to object.

DISCUSSION:

Motions for attorneys to be admitted to practice *pro hac vice* are procedural issues which do not go to the merits of an action. The admission of counsel *pro hac vice* in North Carolina is not by right, but is rather a discretionary privilege, the determination of which is vested within the judgement of the court. Notice and an opportunity to object cure any potential objection to entering a *pro hac vice* order *ex parte*.

Reference:
North Carolina Code of Judicial Conduct
Canon 3A(4)

IN RE K.J.L.

[194 N.C. App. 386 (2008)]

IN THE MATTER OF: K.J.L.

No. COA08-284-2

(Filed 16 December 2008)

Termination of Parental Rights— lack of subject matter jurisdiction—failure to serve summons on juvenile or guardian ad litem for juvenile

The trial court lacked subject matter jurisdiction to terminate respondent mother's parental rights, and the order adjudicating the juvenile as neglected is vacated as well as the termination order, because: (1) failure to issue a summons is a matter of subject matter jurisdiction; (2) the purported summonses to the parents in the neglect and dependency proceedings were not signed and dated by the clerk of court, or a deputy or assistant clerk of court, and thus they were not legally issued under N.C.G.S. § 7B-406(a); (3) without a legally issued summons, the trial court did not have jurisdiction over the subject matter of the neglect and dependency proceeding; and (4) even if the trial court had subject matter jurisdiction over the neglect and dependency action, the trial court still did not have subject matter jurisdiction over the termination of parental rights action since no case has held that the trial court has subject matter jurisdiction in a termination of parental rights case where, as here, no summons was issued to the juvenile and no summons was served upon or accepted by the guardian ad litem for the juvenile.

Judge HUNTER dissenting.

Appeal by respondent mother from an order entered on or about 15 January 2008 by Judge Mary F. Covington in Davidson County District Court. Heard in the Court of Appeals 23 July 2008. A petition for rehearing was allowed on 30 September 2008 and amended to allow for additional briefs on 1 October 2008. This opinion replaces the opinion filed on 19 August 2008.

Charles E. Frye, III, for petitioner-appellee Davidson County Department of Social Services; Laura B. Beck, for appellee Guardian ad Litem.

Robert W. Ewing, for respondent-appellant.

STROUD, Judge.

I. Background

K.J.L., the minor child, was born on 18 July 2005. On 28 March 2006, the Davidson County Department of Social Services ("DSS") filed a petition alleging that K.J.L. was a neglected and dependent juvenile. Summonses naming the father and mother ("respondent") as respondents pursuant to the neglect and dependency petition were filed on 29 March 2006. The father and respondent were served with the petition and respective summonses on 30 March 2006. However, neither the summons to the respondent nor to the father was signed or dated by the clerk of court's office. On 8 September 2006, the district court adjudicated K.J.L. a neglected juvenile based on a stipulation between the parties.

On 12 April 2007, DSS filed a petition for termination of the parental rights ("TPR") of respondent and the juvenile's father. On the same day, a summons regarding the TPR proceeding was issued to both parents and to the guardian ad litem for respondent, but no TPR summons was issued to the juvenile as required by N.C. Gen. Stat. § 7B-1106(a)(5). The TPR petition and summons were served on respondent on 12 April 2007. The guardian ad litem for the respondent accepted service of the TPR petition and summons on 12 July 2007. The record contains no indication that the TPR summons was ever served upon the juvenile or a guardian ad litem for the juvenile. On or about 15 January 2008, the trial court terminated the parental rights of both father and respondent. Respondent appeals.

II. Jurisdiction

The threshold issue for this Court to consider on appeal is whether the trial court acquired jurisdiction of the subject matter of this juvenile action without the proper issuance of summonses. We hold that it did not.

Petitioner cites *In re Howell*, 161 N.C. App. 650, 589 S.E.2d 157 (2003), to contend that any jurisdictional deficiencies arising from the failure to issue summonses in either the abuse and neglect proceeding or the termination proceeding were strictly a matter of *personal jurisdiction* which were cured by waiver when respondent appeared and fully participated at the TPR hearing. Respondent cites *In re Mitchell*, 126 N.C. App. 432, 485 S.E.2d 623 (1997), to contend that the trial court did not acquire *subject matter jurisdiction* over the underlying juvenile file, which gave custody to the petitioner and

adjudicated the minor child as neglected, because the civil summons in the neglect and dependency proceeding was not issued by the clerk of court. The distinction between the two types of jurisdiction is important *sub judice*, because as *Howell* correctly stated, defects in personal jurisdiction may be cured by waiver, 161 N.C. App. at 655-56, 589 S.E.2d at 160, but "[s]ubject matter jurisdiction cannot be conferred upon a court by . . . waiver. . . ." *In re T.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895, 896 (2006) (citation and quotation marks omitted).

A. Summons in a Neglect and Dependency Proceeding

A juvenile action, including a proceeding in which a juvenile is alleged to be neglected, is commenced by the filing of a petition. N.C. Gen. Stat. § 7B-405 (2007). "Immediately after a petition has been filed alleging that a juvenile is abused, neglected, or dependent, *the clerk shall issue a summons to the parent* . . . requiring [him] to appear for a hearing at the time and place stated in the summons." N.C. Gen. Stat. § 7B-406(a) (2007) (emphasis added); *see also* N.C. Gen. Stat. § 1A-1, Rule 4(a) ("A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so."). Rule 4 of the Rules of Civil Procedure further provides: "Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days."[1] N.C. Gen. Stat. § 1A-1, Rule 4(a). The comment to Rule 4(a) makes clear that "[t]he five-day period was inserted to mark the outer limits of tolerance in respect to delay in issuing the summons." N.C. Gen. Stat. § 1A-1, Rule 4(a) cmt.

"Where a complaint has been filed *and* a proper summons does not issue within the five days allowed under the rule, the action is *deemed never to have commenced*." *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984) (citation omitted and emphasis added); *see also Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 18, 351 S.E.2d 779, 781 (1987) ("The record shows that the plaintiff had a summons issued on 17 September 1982, the same day the complaint was filed. Thus, the action did in fact commence."). It follows that where an action is deemed never to have commenced, "a trial court necessarily lacks

1. N.C. Gen. Stat. § 7B-406(a) does not state a specific time for issuance of the summons but only that it shall be issued "[i]mmediately after a petition has been filed[.]" If there is any substantive difference between Section 7B-406(a) and Rule 4(a), it is not relevant in the case *sub judice*, as no summons was ever issued at any time after the filing of the petition.

subject matter jurisdiction." *In re A.B.D.*, 173 N.C. App. 77, 86, 617 S.E.2d 707, 713 (2005); *In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997) ("Where no summons is issued [in a juvenile action] the court acquires jurisdiction over *neither the persons nor the subject matter* of the action." (Emphasis added.)).

In the case cited by respondent, *Howell*, the respondent mother contended that "no summons was issued in the petition to terminate her parental rights and she was not served with the petition to terminate parental rights." 161 N.C. App. at 655, 589 S.E.2d at 160. *Howell* addressed the two issues raised by the respondent mother together, stating that they were "similar." *Id. Howell* inquired only into the trial court's jurisdiction over the *person* of the defendant and determined that the respondent mother had waived the defense of lack of personal jurisdiction by filing an answer without raising the defense and by making a general appearance. *Id.* at 656, 589 S.E.2d at 160.

However, *Howell* did not inquire into the jurisdiction of the trial court over the *subject matter* of the action, which cannot be waived. *See T.B.*, 177 N.C. App. at 791, 629 S.E.2d at 896. While failure *to serve* a properly issued summons is a matter of personal jurisdiction, *A.B.D.*, 173 N.C. App. at 83-84, 617 S.E.2d at 712, failure *to issue* a summons is a matter of subject matter jurisdiction, *Mitchell*, 126 N.C. App. at 433, 485 S.E.2d at 624; *County of Wayne*, 72 N.C. App. at 157, 323 S.E.2d at 461; *see also A.B.D.*, 173 N.C. App. at 86, 617 S.E.2d at 713. Therefore we believe *Howell* was controlled by *Mitchell* and *Wayne County* and that the *Howell* court should have also inquired into the trial court's subject matter jurisdiction. *See In re 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.").

We therefore conclude that the case *sub judice* is controlled by *Mitchell* rather than by *Howell* and that we must inquire into the trial court's subject matter jurisdiction. The purported summonses to the parents in the neglect and dependency proceedings *sub judice* were not signed and dated by the clerk of court, or a deputy or assistant clerk of court. When a summons is not signed by one of those individuals it has not been legally issued. N.C. Gen. Stat. § 7B-406(a); *see also* N.C. Gen. Stat. § 1A-1, Rule 4(b). Without a legally issued summons, the trial court did not have jurisdiction over the subject matter

of the neglect and dependency proceeding.[2] *Mitchell*, 126 N.C. App. at 433, 485 S.E.2d at 624. Because we conclude that the trial court lacked subject matter jurisdiction, we accordingly vacate the order of the trial court adjudicating the juvenile as neglected. Vacating the adjudication order also requires that we vacate the termination order, because the adjudication order was essential to the trial court's subject matter jurisdiction in the proceeding to terminate respondent's parental rights. N.C. Gen. Stat. § 7B-1110(a) (2007) ("After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest."); *In re C.W.*, 182 N.C. App. 214, 218, 641 S.E.2d 725, 729 (2007) ("If the court finds at least one ground [for termination] to exist, then the proceeding continues to disposition phase.").

B. Summons to Juvenile in a Termination Proceeding

Even if the trial court had subject matter jurisdiction over the neglect and dependency action, as the dissent would hold, the trial court still did not have subject matter jurisdiction over the action for termination of parental rights. N.C. Gen. Stat. § 1106(a)(5) requires that a summons be issued to the juvenile in actions to terminate parental rights. We recognize that there is a split of authority in prior cases from this court, as some hold that a summons must be issued to the juvenile for the court to have subject matter jurisdiction, *see In re C.T. & R.S.*, 182 N.C. App. 472, 643 S.E.2d 23 (2007); *In re K.A.D.*, 187 N.C. App. 502, 653 S.E.2d 427 (2007); *see also In re N.C.H.*, *G.D.H.*, *D.G.H.*, 192 N.C. App. 445, 446, 665 S.E.2d 812, 815-17 (2008) (Stroud, J., dissenting) (discussing and attempting to reconcile some of this Court's prior decisions regarding the issuance of a summons to the juvenile), while others hold that as long as a summons is served upon or accepted by the guardian ad litem for the juvenile, the court does have subject matter jurisdiction. *N.C.H.*, 192 N.C. App. at 450, 665 S.E.2d at 813; *In re S.D.J.*, 192 N.C. App. 478, 665 S.E.2d 818. Even if

2. This case can also be distinguished from those in which a summons was issued, but not served for some extended period of time. A summons, once issued, dies a relatively slow death, and its life can be extended repeatedly. N.C. Gen. Stat. § 1A-1, Rule 4(e); *see also Bryson v. Cort*, 193 N.C. App. ——, ——, —— S.E.2d ——, —— (2008) (holding that the action "commenced" under Rule 4 on the date of an alias and pluries summons issued after the previous summons had expired, not on the date of filing the complaint approximately 16 months earlier). However, in this case, the summons was never born. DSS could have had summonses issued at any point in time, in which case the action would have been deemed to have commenced on the date of the issuance of the summons, but this was not done. *In re D.B.*, 186 N.C. App. 556, 559-60, 652 S.E.2d 56, 58-59 (2007), *aff'd per curiam*, 362 N.C. 345, 661 S.E.2d 734 (2008).

we were to accept as settled law the proposition that service on the guardian ad litem would cure the failure to issue a summons to the juvenile, no case has held that the trial court has subject matter jurisdiction in a termination of parental rights case where, as here, no summons was issued to the juvenile and no summons was served upon or accepted by the guardian ad litem for the juvenile. Accordingly, even if respondent could have waived any objection to the jurisdictional defect caused by the failure of the clerk of court, an assistant clerk or a deputy clerk to sign the neglect and dependency summonses, we conclude that the trial court did not have subject matter jurisdiction to terminate respondent's parental rights.

III. Conclusion

For the foregoing reasons, we vacate the order terminating respondent's parental rights.

VACATED.

Judge McGEE concurs.

Judge HUNTER dissents in a separate opinion.

HUNTER, Judge, dissenting.

I respectfully dissent from the majority opinion's conclusion that this Court is bound by *In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997), and that the trial court lacked subject matter jurisdiction to terminate respondent's parental rights. For the reasons set out herein, I believe that *In re Howell*, 161 N.C. App. 650, 589 S.E.2d 157 (2003), is controlling and that Rule 12 of the North Carolina Rules of Civil Procedure is applicable. Therefore, I conclude that the trial court had subject matter jurisdiction, and acquired personal jurisdiction over respondent by respondent's general appearance. Moreover, I conclude that the trial court acquired personal jurisdiction over the juvenile through the guardian ad litem's general appearance in this case on the juvenile's behalf. Finally, because I believe that there were sufficient grounds to support the termination of respondent's parental rights, and that respondent was sufficiently represented by her counsel and guardian ad litem, I would affirm.

I. BACKGROUND

On 28 March 2006, the Davidson County Department of Social Services ("DSS") filed a petition alleging that K.J.L. was a neglected

and dependent juvenile. DSS stated that it had provided case management services to respondent since September 2005 "in an effort to alleviate chronic neglect." According to DSS, respondent was found to be in need of services due to her inability to parent K.J.L., as well as her inability to protect the child. DSS alleged that respondent had "significant mental health issues" and cited a 8 March 2006 psychological evaluation which diagnosed respondent as suffering from "Anxiety Disorder, Depression, and Other Personality Disorder with Immature and Passive Dependent Features." DSS further alleged that respondent suffered from "diabetes mellitus, type 1[,]" and "[a]s a result of mismanagement of her disease, there are concerns that she cannot take proper care of herself, much less her child."

DSS claimed that respondent had received counseling services but shown no improvement in her parenting skills. DSS further claimed that respondent had "received instruction from various professionals since [K.J.L.'s] birth regarding techniques for the care of her child; however, she has displayed significant difficulty in retaining such information and putting it into practice with the child." DSS asserted that respondent's inability to develop and retain parenting skills had impacted K.J.L.'s development.

DSS further stated in the petition that respondent and K.J.L. had resided in a homeless shelter since September 2005. DSS claimed that shelter staff had "voiced numerous concerns about [respondent's] ability to live on her own and have advised against her moving into independent housing." The staff expressed concerns about respondent's "lack of parenting capacity" and believed allowing her to leave the shelter would place K.J.L. at risk of harm. DSS alleged that the staff had "often 'overlooked' the [respondent's] problematic behaviors because of their concern that, on her own, she could not appropriately parent her child."

DSS further alleged that respondent had no income for the three months prior to the petition filing and had been deemed " 'unemployable,' due to her limited commitment to securing and maintaining employment." Additionally, DSS noted respondent's relationship with K.J.L.'s father, a registered sex offender and alcoholic. DSS stated that homeless shelter staff had smelled alcohol on his breath on occasion when he was transporting respondent, and respondent had maintained a relationship with the father despite DSS's concerns about K.J.L.'s safety when in his presence. On 3 April 2006, DSS obtained custody by non-secure custody order.

On 8 September 2006, K.J.L. was adjudicated neglected based on stipulations made by respondent and the father. The court continued custody of K.J.L. with DSS. The court ordered that the permanent plan for the child be reunification, but further ordered that if "significant progress is not made by . . . respondent in the next six (6) months, an alternative option sh[ould] be considered." To address respondent's issues, the court ordered that respondent: (1) attend individual counseling with Daymark Recovery Services; (2) maintain a suitable residence; (3) maintain gainful employment; and (4) follow any and all recommendations of her physician, and sign a release so that DSS could monitor her medical conditions.

A permanency planning review hearing was held on 8 January 2007. The trial court found that respondent: (1) had been padlocked out of her apartment for nonpayment of rent; (2) had lost her job at National Wholesale and had not worked since; (3) had not exhibited that she could take proper care of herself; and (4) continued to exhibit her lack of parenting skills, noting that respondent attempted to feed K.J.L. inappropriate foods, had to be prompted to tend to K.J.L. during visitation, and was easily distracted. Accordingly, the court authorized DSS to cease reunification efforts with respondent and changed the plan for the child to termination of parental rights and adoption.

On 12 April 2007, DSS filed a petition to terminate respondent's parental rights. DSS alleged that respondent had neglected K.J.L. within the meaning of N.C. Gen. Stat. § 7B-101(15), and that it was probable that there would be a repetition of neglect if the child was returned to respondent's care. Additionally, DSS alleged that K.J.L. had been placed in the custody of DSS and that respondent, for a continuous period of six months immediately preceding the filing of the petition, had failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so, pursuant to N.C. Gen. Stat. § 7B-1111(a)(3).

Hearings were held on the petition to terminate respondent's parental rights on 6 and 13 December 2007. The trial court concluded that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (3) to terminate respondent's parental rights. The court further concluded that it was in the juvenile's best interests that respondent's parental rights be terminated.

II. Legal Analysis—Jurisdiction

I agree with the majority that the threshold issue for this Court to consider on appeal is whether the trial court acquired jurisdiction of the subject matter of this juvenile action. I further agree that it appears that no summons was issued in this case. However, I disagree with the majority's conclusion that the failure to issue a summons deprived the trial court of subject matter jurisdiction.

The question is whether the lack of summons deprived the court of subject matter jurisdiction, or whether the failure to issue summonses were merely procedural irregularities that related to personal jurisdiction, in which case the irregularities could have been waived by respondent's general appearance in the case. Recent cases demonstrate that there is an irreconcilable conflict concerning this issue. *See In re N.C.H.*, *G.D.H.*, *D.G.H.*, 192 N.C. App. 445, 446, 665 S.E.2d 812 (2008) (Stroud, J., dissenting); *In re Howell*, 161 N.C. App. 650, 589 S.E.2d 157; *In re Mitchell*, 126 N.C. App. at 433, 485 S.E.2d at 624. "Until such time as either our legislature or our Supreme Court directly addresses and resolves the confusion in this area, it is incumbent upon this Court to attempt to clarify the law." *Knight v. Wal-Mart Stores*, *Inc.*, 149 N.C. App. 1, 13, 562 S.E.2d 434, 443 (2002), *affirmed per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003). Having thoroughly reviewed the Juvenile Code and case law, I conclude that the failure to issue a summons is a defect affecting personal jurisdiction that may be waived by general appearance.

A. Concepts and Rules

"Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment." *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953). "Personal jurisdiction refers to the Court's ability to assert judicial power over the parties and bind them by its adjudication." *In re A.B.D.*, 173 N.C. App. 77, 83, 617 S.E.2d 707, 711 (2005) (citing *Adams*, *Kleemeier*, *Hagan*, *Hannah & Fouts*, *PLLC v. Jacobs*, 158 N.C. App. 376, 378, 581 S.E.2d 798, 800-01 (internal quotations and citations omitted), *reversed on other grounds*, 357 N.C. 651, 588 S.E.2d 465 (2003)). "[A] court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods." *Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999); *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) ("[j]urisdiction of

the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent") (citation omitted).

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (citing 1 Restatement (Second) of Judgments § 11, at 108 (1982)), *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). " 'Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial.' " *In re T.B., J.B., C.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895, 896 (2006) (quoting *Stark v. Ratashara*, 177 N.C. App. 449, 451-52, 628 S.E.2d 471, 473 (citations omitted), *disc. review denied*, 360 N.C. 536, 633 S.E.2d 826 (2006)).

In *Peoples v. Norwood*, our Supreme Court stated:

> The purpose of the summons is to bring the parties into, and give the Court jurisdiction of them, and of the pleadings, to give jurisdiction of the subject matter of litigation and the parties in that connection, and this is orderly and generally necessary; but when the parties are voluntarily before the Court, and by agreement, consent or confession, which in substance are the same thing, a judgment is entered in favor of one party and against another, such judgment is valid, although not granted according to the orderly course of procedure.

Peoples v. Norwood, 94 N.C. 167, 172 (1886) (emphasis omitted) (citing *Farley v. Lea*, 20 N.C. 307 (1838); *State v. Love*, 23 N.C. 264 (1840); *Stancill v. Gay*, 92 N.C. 455 (1885)). Although *Peoples* predates the adoption of the Rules of Civil Procedure, it is evidence of the principle that the pleadings, which in this case is the petition, is used to establish the subject matter jurisdiction of the court, and the summons is used to establish personal jurisdiction. *Peoples* further establishes that when the party makes a general appearance, it waives defects in the process, i.e., issuance of the summons.

Other North Carolina cases predating adoption of the Rules of Civil Procedure similarly hold that failure to issue a summons is an irregularity that can be waived. *See Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955) ("[c]ivil actions and special proceedings are begun by the issuance of summons. Here no summons was issued. Even so, this is not a fatal defect for the reason that defendant's appearance and demurrer *ore tenus* to the petition con-

stituted a general appearance which waived any defect in or nonexistence of a summons"); *In re Blalock*, 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951) ("[a] general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof"); *Hatch v. R. R.*, 183 N.C. 618, 628, 112 S.E. 529, 534 (1922) ("appearance in an action dispenses with the necessity of process. . . . Indeed, there are numerous cases that although there has been no summons at all issued, a general appearance, by filing an answer or otherwise, makes service of summons at all unnecessary. Irregularity in service of summons is waived by defendant answering . . . . Irregularity of summons is waived by appearance and plea in bar"); *Moore v. R. R.*, 67 N.C. 209, 210 (1872) ("[t]he Clerk of the Superior Court of Mecklenburg has no right to issue a summons returnable to the Superior Court of Cabarrus. The defendant nevertheless appeared and answered in bar. We are of [the] opinion that the irregularity was thereby waived. If no summons at all had been issued, the filing of a complaint and answer would have constituted a cause in Court").

Since 1 January 1970, the effective date of our Rules of Civil Procedure, a civil action is no longer commenced by issuance of summons, but by filing a complaint with the court. N.C. Gen. Stat. § 1A-1, Rule 3 (2007). Pursuant to Rule 4(a), "[u]pon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." N.C. Gen. Stat. § 1A-1, Rule 4(a). Rule 12 of the North Carolina Rules of Civil Procedure requires that the defenses of jurisdiction over the person, *insufficiency of process*, and insufficiency of service of process must be raised by a pre-answer motion or in a responsive pleading. N.C. Gen. Stat. § 1A-1, Rule 12(h) (2007). Failure to do so waives these defenses. *Id.* "This Court has held that the North Carolina Rules of Civil Procedure do 'not provide parties in termination actions with procedural rights not explicitly granted by the juvenile code.' " *In re B.L.H., Z.L.H.*, 190 N.C. App. 142, 145-46, 660 S.E.2d 255, 257 (2008) (quoting *In re S.D.W. & H.E.W.*, 187 N.C. App. 416, 421, 653 S.E.2d 429, 432 (2007)). With regard to juvenile cases, "[t]he Rules of Civil Procedure will, however, apply to fill procedural gaps where Chapter 7B requires, but does not identify, a specific procedure to be used in termination cases." *Id.* (citing *In re S.D.W. & H.E.W.*, 187 N.C. App. at 421, 653 S.E.2d at 432); *see also In re L.O.K., J.K.W., T.L.W., & T.L.W.*, 174 N.C. App. 426, 431, 621 S.E.2d 236, 240 (2005) ("the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only

to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code").

The question remains whether, under the Rules of Civil Procedure and the Juvenile Code, failure to issue a summons affects personal jurisdiction or subject matter jurisdiction, and whether the failure to raise the issue by a pre-answer motion or in a responsive pleading waives the defense. In *In re Howell*, 161 N.C. App. 650, 589 S.E.2d 157, the respondent asserted that no summons was issued with the petition to terminate her parental rights and she was not served with the petition to terminate parental rights. Respondent, however, failed to object to either a lack of personal jurisdiction over her or insufficiency of process or service of process at any point prior to or during the termination hearing. Respondent made a general appearance at the adjudicatory hearing and at the dispositional hearing. This Court, relying on and applying Rule 12 of the North Carolina Rules of Civil Procedure, held that respondent waived these issues as defenses and that the trial court gained jurisdiction through respondent's waiver. *Id.* at 656, 589 S.E.2d at 160. By implication, the Court's holding signified that issuance of a summons affects personal jurisdiction, not subject matter jurisdiction, and that it had jurisdiction over the subject matter even though no summons had been issued.

Another case on point, although not a juvenile matter, is *Hemby v. Hemby*, 29 N.C. App. 596, 225 S.E.2d 143 (1976). In *Hemby*, the defendant argued that a consent judgment was a nullity for the reason that no summons was issued and no pleadings were filed in the action. The Court noted that the record was contradictory as to whether a summons was actually issued. Nevertheless, the Court concluded that:

> Assuming, *arguendo*, that no summons was issued or no complaint or answer filed, we think defendant is still bound by the consent judgment. While jurisdiction may not be conferred upon a court by waiver or consent of the parties, *where the court has jurisdiction of the subject of the action and the parties are before the court, objections as to the manner in which the court obtained jurisdiction of the person or to mere informalities in the procedure or judgment may be waived*, and a party may be estopped to attack the judgment on such grounds by failure to object in apt time and by acquiescence in the judgment after rendition.

Id. at 598, 225 S.E.2d at 145 (emphasis added) (citing *Pulley v. Pulley*, 255 N.C. 423, 121 S.E.2d 876 (1961)).

Other cases, however, state that issuance of the summons does affect subject matter jurisdiction. In *In re Mitchell*, 126 N.C. App. at 433, 485 S.E.2d at 624, cited in the majority opinion, the trial court concluded that because respondents appeared with counsel at an initial non-secure custody hearing, respondent had actual notice, and issuance and service of the summons was not required. This Court disagreed, holding that because no summons had ever been issued, the trial court did not acquire jurisdiction, and respondents' motion to dismiss should have been allowed. This Court noted that "[i]n a juvenile action, the petition is the pleading; the summons is the process. The issuance and service of process is the means by which the court obtains jurisdiction." *Id.* (citations omitted). If one were to stop reading *In re Mitchell* at this point, one might conclude that summons solely related to personal jurisdiction, or process, and could be waived. However, *In re Mitchell* then specifically states that "[w]here no summons is issued the court acquires jurisdiction over *neither the persons nor the subject matter* of the action." *Id.* (emphasis added) (citing *Swenson v. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977)). I find that this Court's statement that issuance of the summons related to subject matter jurisdiction to be non-binding *dicta*. It was clear that the trial court in *In re Mitchell* lacked personal jurisdiction, therefore it was not necessary to reach the issue of subject matter jurisdiction. Furthermore, the Court clearly considered that the petitioner's failure to issue a summons could be waived by respondents' participation in the case, but declined to find waiver because "respondents cannot be held to have voluntarily submitted to the jurisdiction of the court by their appearance at the initial hearing, since they timely raised the issue of *insufficiency of process* at that hearing by their oral motion to dismiss." *Id.* at 434, 485 S.E.2d at 624 (emphasis added).

I note that *In re Mitchell* cites *Swenson v. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793, in support of its proposition that issuance of the summons affects both personal and subject matter jurisdiction. In *Swenson*, a shareholder sought to restrain the holding of a stockholders' meeting for the election of directors. The shareholder argued that his action was proper under N.C. Gen. Stat. § 55-71, which did not require a summons. The Court held that the summary proceedings under N.C. Gen. Stat. § 55-71 were not applicable, and then sought to determine whether there was a civil action pending in which the court acquired jurisdiction to enter an order granting any relief. The Court cited Rule 4 of the Rules of Civil Procedure and stated that it "is clear and unambiguous in its requirement that '(u)pon the filing of

the complaint, summons shall be issued forthwith, and in any event within five days . . . [.]' " *Id.* at 465, 235 S.E.2d at 797 (emphasis omitted) (citing N.C. Gen. Stat. § 1A-1, Rule 4). Importantly, the Court stated that " '[s]ervice of summons, *unless waived*, is a jurisdictional requirement.' " *Id.* (emphasis added) (quoting *Kleinfeldt v. Shoney's Inc.*, 257 N.C. 791, 794, 127 S.E.2d 573, 575 (1962)). The Court then held that "the court acquired no jurisdiction over the person of respondent or the subject matter of the action and hence was without authority to enter any order granting any relief." *Id.* Again, as in *In re Mitchell*, I find that this Court's statement that issuance of the summons related to subject matter jurisdiction to be non-binding *dicta*. Nowhere in *Swenson* does this Court cite any support for its proposition that failure to issue a summons affects subject matter jurisdiction. The Court does cite *Freight Carriers v. Teamsters Local*, 11 N.C. App. 159, 180 S.E.2d 461, *cert. denied*, 278 N.C. 701, 181 S.E.2d 601 (1971), and describe the case as analogous, noting that "[n]o complaint was filed and no summons issued." *Swenson*, 33 N.C. App. at 464, 235 S.E.2d at 797. In *Freight Carriers*, this Court found that "when a complaint is not filed or summons is not issued . . . , an action is not properly instituted and the court does not have jurisdiction." *Freight Carriers*, 11 N.C. App. at 161, 180 S.E.2d at 463. However, the Court failed to distinguish between personal and subject matter jurisdiction. Moreover, because no complaint was filed, the trial court in *Freight Carriers* clearly lacked subject matter jurisdiction, irrespective of the summons. Thus, *Freight Carriers* is not instructive.

The only other case cited in *Swenson* relating to jurisdiction was *Kleinfeldt*. As noted previously herein, *Kleinfeldt* states the proposition that "[s]ervice of summons, unless waived, is a jurisdictional requirement." *Kleinfeldt*, 257 N.C. at 794, 127 S.E.2d at 575 (citing *Dunn v. Wilson*, 210 N.C. 493, 187 S.E. 802 (1936); *Stancill v. Gay*, 92 N.C. 462). In *Dunn*, our Supreme Court stated that "[s]ervice of summons or original process, unless waived, is a jurisdictional requirement. Hence, a judgment *in personam* rendered against a defendant without voluntary appearance or service of process is void." *Dunn*, 210 N.C. at 494, 187 S.E. at 803 (citations omitted). Thus, looking back from *In re Mitchell* to *Dunn*, I conclude *In re Mitchell* does not properly support the proposition that issuance of a summons affects subject matter jurisdiction, and any language suggesting otherwise is merely non-binding *dicta*.

B. Recent Cases

More recently, this Court has held that defects in a summons affects subject matter jurisdiction in termination of parental rights cases. This Court held in *In re C.T. & R.S.*, 182 N.C. App. 472, 643 S.E.2d 23 (2007), that the failure to issue a summons referencing R.S. deprived the trial court of subject matter jurisdiction over R.S. Based on this Court's holding in *In re C.T. & R.S.*, this Court has held that issuance of the summons to the juvenile is required to obtain subject matter jurisdiction in termination cases. *See In re A.F.H-G*, 189 N.C. App. 160, 657 S.E.2d 738 (2008); *In re I.D.G.*, 188 N.C. App. 629, 655 S.E.2d 858 (2008); *In re K.A.D.*, 187 N.C. App. 502, 653 S.E.2d 427 (2007). Subsequently, this Court has held that service of the summons on the guardian ad litem for the juvenile, or the attorney advocate for the guardian ad litem, is sufficient to establish subject matter jurisdiction when combined with naming the juvenile in the caption of the summons. *See In re N.C.H.*, *G.D.H.*, *D.G.H.*, 192 N.C. App. 445, 665 S.E.2d 812; *In re J.A.P.*, *I.M.P.*, 189 N.C. App. 683, 659 S.E.2d 14 (2008).

In re C.T. & R.S. cites three cases as authority for its proposition that failure to issue summons to the juvenile deprives the trial court of subject matter jurisdiction. First, the Court cited the statement in *In re Mitchell* that "[w]here no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action." *In re Mitchell*, 126 N.C. App. at 433, 485 S.E.2d at 624. However, as discussed previously herein, I find this statement to be non-binding *dicta*. The second case cited is *Conner Bros. Mach. Co. v. Rogers*, 177 N.C. App. 560, 561, 629 S.E.2d 344, 345 (2006). However, *Conner Bros*. relies primarily on *In re Mitchell* for its holding.

The third case cited by the Court in *In re C.T. & R.S.* is *In re A.B.D.*, 173 N.C. App. 77, 617 S.E.2d 707. This Court stated in *In re C.T. & R.S.* that *In re A.B.D.* held that the trial court had no subject matter jurisdiction over a proceeding for termination of parental rights where the summons was not timely served. *In re C.T. & R.S.*, 182 N.C. App. at 475, 643 S.E.2d at 25. This appears to be an oversimplification of the holding in *In re A.B.D.* In *In re A.B.D.*, the respondent argued that the trial court erred and abused its discretion in refusing to set aside a 1999 termination of parental rights order because process was served after forty-one days had passed, the court lacked jurisdiction, and the order was thus void. *In re A.B.D.*, 173 N.C. App. at 80, 617 S.E.2d at 710. This Court agreed, holding that

> because the summons was served more than thirty days after its issuance, *and because Respondent made no general appearance* in the action, the trial court lacked personal jurisdiction over Respondent. And because no endorsement, extension, or alias/pluries summons was obtained within ninety days of the summons' issuance, the termination action, for all intents and purposes, was not filed after ninety days past the summons' 23 July 1999 issuance. The trial court therefore had no subject matter jurisdiction to enter the termination order. Because the trial court lacked both personal and subject matter jurisdiction at the time it entered the termination order, the order is clearly void, and the trial court abused its discretion in denying Respondent's motion to set aside the termination order as void pursuant to Civil Procedure Rule 60(b)(4).

Id. at 87-88, 617 S.E.2d at 714 (internal citations omitted; emphasis added). Thus, it appears that subject matter jurisdiction lapsed due to the petitioner's failure to obtain personal jurisdiction within the required timelines. When the action abated, and petitioner failed to properly revive it, the Court considered the action discontinued, and as if no petition had been filed. Without a petition, there was no subject matter jurisdiction. I disagree that *In re A.B.D.* stands for the proposition that the failure to issue a summons, alone, results in a lack of subject matter jurisdiction. The Court explicitly stated that if respondent had made a general appearance in the action, it would have acquired personal jurisdiction over the respondent. Moreover, if respondent had appeared, thus giving the trial court personal jurisdiction over respondent, *subject matter jurisdiction would never have lapsed*. Therefore, I conclude that *In re C.T. & R.S.* and its progeny were not bound by *In re Mitchell*. Instead, I believe *In re C.T. & R.S.* and its progeny were bound by *In re Howell*, that Rule 12 of the North Carolina Rules of Civil Procedure is applicable, and issuance of a summons in juvenile cases relates to personal jurisdiction, not subject matter jurisdiction.

A logical reading of the juvenile code supports these conclusions. N.C. Gen. Stat. § 7B-401 states that "[t]he pleading in an abuse, neglect, or dependency action is the petition. The process in an abuse, neglect, or dependency action is the summons." N.C. Gen. Stat. § 7B-401 (2007). N.C. Gen. Stat. § 7B-1106(a) lists all the potential parties to a termination proceeding and directs that summons be issued to them. Nothing in the statute relates to the subject matter of a termination of parental rights case. Instead, N.C. Gen. Stat. § 7B-1104 states the requirements to be set forth in the petition, which if fol-

lowed would establish subject matter jurisdiction. *See In re Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993) ("[w]e find that, like the verified pleadings in divorce and juvenile actions, verified petitions for the termination of parental rights are necessary to invoke the jurisdiction of the court over the subject matter").

C. Application *Sub Judice*

Applying *In re Howell* to the instant case, I conclude that the trial court acquired personal jurisdiction over the parties. Although no summons may have been issued, respondent failed to object, by motion or otherwise under Rule 12 of the North Carolina Rules of Civil Procedure, to the insufficiency of process. Respondent made a general appearance at the adjudicatory hearing, at the dispositional hearing, and filed an answer to the termination petition. I further believe that allowing respondent to cause further delay in this matter, based on her own failure to act in accordance with Rule 12, does not comport with the guiding principles of the Juvenile Code to act in the best interests of the juvenile and find permanence for the child within a reasonable amount of time. *See* N.C. Gen. Stat. § 7B-100 (2007), N.C. Gen. Stat. § 7B-1100 (2007); *In re T.H.T.*, 362 N.C. 446, 665 S.E.2d 54 (2008). Accordingly, I would hold that respondent waived as a defense the failure of petitioner to issue a summons, and the trial court acquired personal jurisdiction through respondent's waiver.

Regarding the alternative ground raised by the majority opinion, the failure to issue or serve summons to the juvenile in the termination action, I believe the above analysis still applies. As stated previously herein, I believe that *In re C.T. & R.S.* and its progeny were bound by *In re Howell*, and not by *In re Mitchell*. Therefore, whether relating to the original petition alleging neglect, or in the termination action, I conclude that issuance and service of summons to the juvenile affects only personal jurisdiction, not subject matter jurisdiction. Applying this legal principle to the instant case, I believe that the failure to issue a summons to the juvenile was waived by the guardian ad litem's general appearance in this case on the juvenile's behalf. *See In re S.D.J.*, 192 N.C. App. 478, 481, 665 S.E.2d 818, 821 (2008) ("[u]pon appointment by the court, it is the responsibility of the guardian ad litem to represent the juvenile in court and in all respects 'to protect and promote the best interests of the juvenile[.]' ") (citing N.C. Gen. Stat. § 7B-601(a) (2007)).

Furthermore, even assuming *arguendo* that the trial court lacked personal jurisdiction over the juvenile, I believe that respondent is

not the proper party to raise this issue. " '[O]nly a "party aggrieved" may appeal from an order or judgment of the trial division.' " *In re J.A.P., I.M.P.*, 189 N.C. App. at 687, 659 S.E.2d at 17 (quoting Culton v. Culton, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990)). " 'An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court.' " *Id.* Respondent is not the party aggrieved by the failure to issue a summons to the juvenile. *See In re Finnican*, 104 N.C. App. 157, 160, 408 S.E.2d 742, 744 (1991) (father sought to void a termination of parental rights for lack of jurisdiction over his person by filing a motion to set aside the judgment pursuant to N.C.R. Civ. P. 60(b)(4) and (b)(6). This Court stated that the father was the "proper party who may contest the lack of personal jurisdiction"), *overruled on other grounds by Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992). Thus, respondent is not entitled to raise this issue on appeal. I conclude that the juvenile, through the guardian ad litem, who is charged with the duty of protecting the juvenile's best interests, is the proper party to assert this issue.

III. Grounds For Termination

Having determined that the trial court had subject matter jurisdiction, I would next address respondent's argument that the trial court erred by concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) to terminate her parental rights. Respondent contends that the trial court failed to make sufficient findings of fact to support its conclusion that she neglected the juvenile. Specifically, respondent asserts that the trial court failed to make a finding that K.J.L. was neglected at the time of the termination hearing. I am not persuaded by respondent's argument.

N.C. Gen. Stat. § 7B-1111 sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support a termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (*citing In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9, 10 (2001)).

A "neglected juvenile" is defined in N.C. Gen. Stat. § 7B-101(15) as:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2007). "A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). However, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984).

In the instant case, K.J.L. was adjudicated a neglected juvenile on 31 July 2006. In the dispositional order, the trial court ordered respondent to take certain actions in order to be reunified with K.J.L. However, respondent failed to abide by the dispositional order. The trial court found in the termination order that since the dispositional hearing, respondent had "failed to take significant and meaningful action to comply with the prior Orders of the Court." First, the trial court found that respondent had failed to maintain a stable residence. Of note, the trial court found that respondent was often in arrears on her rent, and since 31 August 2006, there had been seven summary ejectment actions filed against respondent. Second, respondent was ordered to attend parenting classes. However, the trial court found that respondent had been terminated from the Community Links Program because she failed to "follow through" with the program's services. The court further found that respondent failed to attend or complete any other parenting classes. Third, respondent was ordered to maintain gainful employment. The trial court found that respondent failed to do so. Based on these findings, the court concluded that because of respondent's conduct, there likely would be a repetition of neglect should K.J.L. be returned to her care.

Although respondent challenged the validity of the court's findings regarding the adjudication of neglect due to the trial court's alleged lack of jurisdiction, as discussed previously herein, I believe that the trial court did have jurisdiction to enter the adjudicatory order. Otherwise, respondent does not argue that the trial court erred

in making any of the findings of fact supporting its conclusion of neglect. Therefore, the findings of fact are deemed to be supported by sufficient evidence, and are binding on appeal. N.C.R. App. P. 28(b)(6); *see also In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (concluding respondent had abandoned factual assignments of error when she "failed to specifically argue in her brief that they were unsupported by evidence"). Accordingly, I conclude that the trial court's findings of fact were sufficient to support its conclusion that respondent had neglected the juvenile, and there was a probability of repetition of neglect should the child be returned to respondent's care.

Since grounds exist pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) to support the trial court's order, the remaining ground found by the trial court to support termination need not be reviewed by the Court. *Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34.

IV. Ineffectiveness of Counsel and Guardian Ad Litem

Next, I would address respondent's arguments that she received ineffective assistance of counsel and that her guardian ad litem breached his duty to protect her legal interests. Respondent bases her arguments on the following statement made by counsel during closing arguments at the termination hearing:

> Uh, this child was taken into custody, as I recall, it was basically because [respondent] had nowhere to live, and because there [were] concerns about her medical condition, seizures, and leaving the child unattended. The Court has heard this evidence. There still seems to be two major concerns, and—and while, uh, *I cannot argue that there's not statutory grounds that exist for termination*, uh, I would hope the Court would find that those are not sufficient to be in the best interests.

(Emphasis added.) Respondent asserts that counsel "capitulated to the petitioner's allegations" and deprived her of a right to have a trial on the merits. Respondent further asserts that her guardian ad litem failed to protect her interests when he did not object to counsel's stipulation. *See* N.C. Gen. Stat. § 7B-1101.1(e) (2007) (a guardian ad litem should "ensure that the parent's procedural due process requirements are met"). Again, I am not persuaded by respondent's arguments.

"Parents have a 'right to counsel in all proceedings dedicated to the termination of parental rights.' " *In re L.C., I.C., L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (quoting In re Oghenekevebe, 123

N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996)), *disc. review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007). "This statutory right includes the right to effective assistance of counsel." *In re Dj.L.*, *D.L.*, *& S.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007) (citing *In re L.C.*, *I.C.*, *L.C.*, 181 N.C. App. at 282, 638 S.E.2d at 641; *In re Oghenekevebe*, 123 N.C. App. at 436, 473 S.E.2d at 396). "To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005) (citing *In re Oghenekevebe*, 123 N.C. App. at 436, 473 S.E.2d at 396).

In *In re Dj.L.*, this Court stated that:

> This Court has previously determined that alleged deficiencies did not deprive the respondent of a fair hearing when the respondent's counsel "vigorously and zealously represented" her, was familiar "with her ability to aid in her own defense, as well as the idiosyncrasies of her personality," and "the record contain[ed] overwhelming evidence supporting termination[.]"

In re Dj.L., *D.L.*, *S.L.*, 184 N.C. App. at 86, 646 S.E.2d at 141 (quoting *In re J.A.A. & S.A.A.*, 175 N.C. App. at 74, 623 S.E.2d at 50). As in *In re Dj.L* and *In re J.A.A.*, I conclude that "[c]ounsel's representation, while not perfect, was vigorous and zealous." *In re Dj.L.*, *D.L.*, *S.L.*, 184 N.C. App. at 86, 646 S.E.2d at 141. Counsel represented respondent at every stage of this case, beginning with the adjudicatory hearing. Counsel presented two witnesses at the hearing, including the respondent, and cross-examined each witness presented by petitioner. Regarding counsel's supposed "capitulation," it is clear from the record that the court did not consider counsel's statement an admission. Foremost, I conclude that respondent has failed to demonstrate any prejudice from her alleged deficient representation in light of the overwhelming evidence of the existence of grounds to terminate her parental rights. Thus, I would hold that respondent's ineffective assistance of counsel claim fails, as does her related claim concerning her guardian ad litem.

V. Conclusion

I believe that *In re Howell*, not *In re Mitchell*, is controlling, and that the failure to issue summons affected personal jurisdiction, not subject matter jurisdiction. Moreover, I believe that respondent

waived as a defense the failure of petitioner to issue a summons, and the trial court acquired personal jurisdiction through respondent's waiver. Additionally, I believe that *In re C.T. & R.S.* and its progeny were bound by *In re Howell*, and not by *In re Mitchell*. Thus, I conclude the failure to issue a summons to the juvenile was waived by the guardian ad litem's general appearance in this case on the juvenile's behalf, and the trial court acquired personal jurisdiction over the juvenile through the guardian ad litem's waiver. Even assuming *arguendo* that the trial court lacked personal jurisdiction over the juvenile, I believe that the guardian ad litem, and not respondent, is the proper party to raise this issue.

On the merits, I conclude there were sufficient grounds to support termination of respondent's parental rights, and she was sufficiently represented by counsel and guardian ad litem. Accordingly, I would affirm. I respectfully dissent.

CAMBRIDGE HOMES OF NORTH CAROLINA LIMITED PARTNERSHIP, PLAINTIFF v. HYUNDAI CONSTRUCTION, INC.; EX DECO, INC. A/K/A SEHWA/EXDECO, INC., SEWHA DECOVISION KOREA; SEDECO CO., LTD.; HANWHA CHEMICAL CORPORATION; AND HANWHA L&C CORPORATION, DEFENDANTS

No. COA08-242

(Filed 16 December 2008)

1. Appeal and Error— appealability—interlocutory order—jurisdiction immediately appealable

The denial of a motion to dismiss for lack of jurisdiction is immediately appealable.

2. Jurisdiction— long-arm statute—products, materials, or things processed, serviced, or manufactured and used or consumed in North Carolina in ordinary course of trade

The trial court did not err by determining that the long-arm statute conferred jurisdiction over defendants HCC and HLCC in an action seeking damages for repair and replacement of vinyl siding on homes constructed by plaintiff because: (1) defendants were subject to personal jurisdiction under N.C.G.S. § 1-75.4(4)(b); and (2) construing the long-arm statute liberally, the resins and the chemical compounds used to manufacture the vinyl siding constituted products, materials, or things processed,

serviced, or manufactured by HCC and HLCC which were used or consumed in North Carolina in the ordinary course of trade.

3. Jurisdiction— personal jurisdiction—lack of minimum contacts—due process—general jurisdiction

The trial court erred by denying defendant HCC's motion to dismiss based on lack of minimum contacts with North Carolina (NC) to satisfy the due process prong of personal jurisdiction because: (1) the findings of fact did not support a conclusion that HCC purposefully availed itself of NC's jurisdiction; (2) conspicuously absent from the trial court's order was a finding that HCC initiated contact with Hyundai or any other NC company or otherwise solicited business activities in NC; (3) the mere fact that HCC was connected to the manufacture and distribution of vinyl siding was not sufficient to support a conclusion that HCC purposely availed itself of NC jurisdiction by injecting its product into the stream of commerce; (4) the evidence did not support a finding that HCC reasonably or should have reasonably anticipated its product would be sold in NC; (5) although plaintiff contends Hyundai's and Ex Deco's verified answer was competent evidence to support the finding that HCC was connected with the distribution and manufacture of vinyl siding in the stream of commerce, admissions in the answer of one defendant are not competent evidence against a codefendant; (6) there was no evidence that HCC exported its product for distribution in the United States; (7) HCC's only connection to NC arose from its relationship with HLCC; and (8) the trial court made no findings to support a conclusion that HCC had continuous and systematic contacts with NC for general jurisdiction.

4. Jurisdiction— personal jurisdiction—lack of minimum contacts—due process

The trial court erred by denying defendant HLCC's motion to dismiss based on lack of minimum contacts with North Carolina (NC) to satisfy the due process prong of personal jurisdiction because: (1) only after Hyundai requested that HLCC travel to NC to fix the siding did HLCC enter NC; (2) the findings that HLCC dealt directly with Hyundai, an NC company, were not supported by competent evidence and the other findings were insufficient to conclude HLCC purposefully availed itself of NC's jurisdiction; (3) HLCC's activities of shipping products to NC were after the complaint was filed, and thus these contacts were insufficient to determine HLCC reasonably anticipated being summoned into

NC courts in March 2006; and (4) although a subsidiary of HLCC operated a plant in Alabama that supplied bumpers, no evidence was presented to support the finding that those products were sold or distributed outside of Alabama.

Appeal by defendants from order entered 26 September 2007 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2008.

Nexsen Pruet, PLLC by David A. Senter and Gregory T. Higgins for plaintiff-appellee.

Nelson Mullins Riley & Scarborough, LLP by Tracy E. Tomlin and Joseph S. Dowdy for defendants-appellants Hanwha Chemical Corporation and Hanwha L&C Corporation.

CALABRIA, Judge.

Hanwha Chemical Corporation ("HCC") and Hanwha L&C Corporation ("HLCC") (collectively referred to as "defendants") appeal an order denying their motions to dismiss plaintiff's complaint for lack of personal jurisdiction. We reverse and remand.

In 2003 and 2004, Cambridge Homes of North Carolina Limited Partnership ("plaintiff") contracted with Hyundai Construction, Inc. ("Hyundai"), a North Carolina company, to provide and install vinyl siding for homes constructed by plaintiff in Mecklenburg and surrounding counties. Hyundai installed vinyl siding manufactured by a Korean company, Sedeco Co., Ltd. ("Sedeco"). Sedeco used chemicals provided by HLCC and HCC in manufacturing the vinyl siding it sold to Hyundai. HCC and HLCC are also Korean companies.

Plaintiff received complaints about the vinyl siding and reported the problems to Hyundai. Hyundai asked HLCC to travel to North Carolina to assist in correcting problems with the siding. In February of 2004, S.M. Lee of HLCC traveled to Charlotte, North Carolina and met with representatives of Hyundai and Sedeco. On 30 March 2004, Seong-Min Lee of "Hanwha General Chemicals" sent a memorandum analyzing the components in the siding for HLCC. Plaintiff alleges it incurred damages from repair and replacement of the siding.

On 28 March 2006, plaintiff filed a complaint against Hyundai, Ex Deco, Inc. a/k/a Sehwa/ExDeco, Inc. ("Ex Deco"), Sewha Decovision Korea, Sedeco, and HCC. Plaintiff asserted claims of breach of implied warranty of merchantability, breach of warranty of fitness for a

particular purpose, and negligence against the Hanwha defendants.[1] Sedeco filed an answer to the complaint. Hyundai and Ex Deco filed a joint verified answer to the complaint. HCC moved to dismiss the complaint for lack of personal jurisdiction. Plaintiff filed a motion to amend the complaint to add HLCC as a party. The trial court granted the motion and plaintiff amended its complaint to add HLCC as a party on 31 August 2006. In the amended complaint, plaintiff alleged defendants provided the chemicals used by Sedeco to manufacture the allegedly defective vinyl siding. Motions to dismiss plaintiff's amended complaint for lack of personal jurisdiction were filed by HCC on 3 October 2006 and HLCC on 4 December 2006. On 26 September 2007, the trial court denied defendants' motions to dismiss. From this order, defendants appeal.

I. Grounds for the Appeal

[1] "The denial of a motion to dismiss for lack of jurisdiction is immediately appealable." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614, 532 S.E.2d 215, 217 (2000) (citing N.C. Gen. Stat. § 1-277(b); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982)).

II. Standard of Review

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999) (citation omitted).

Our review of the trial court's order also depends on the procedural posture of the challenge to personal jurisdiction:

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

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

1. Plaintiff also asserted six other claims against the other named defendants in the complaint.

Plaintiff argues the procedural posture in the instant case does not fit neatly into any of the categories, but is most similar to the second category. When HCC moved to dismiss the original complaint on 30 June 2006, it submitted an affidavit in support of the motion to dismiss. On 3 October 2006, HCC filed a motion to dismiss without any affidavits or supporting materials. On 4 December 2006, HLCC also filed a motion to dismiss without any supporting affidavits. On 18 May 2007, HLCC and HCC both filed affidavits in support of their motions to dismiss. The record also contains "Exhibits attached to Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss." A hearing on the motions to dismiss was held on 29 May 2007. The trial court relied upon affidavits, discovery, and other materials presented in ruling on the motion.

> When, as here, the defendant presents evidence in support of his motion, the " 'allegations [in the complaint] can no longer be taken as true or controlling and plaintiff[ ] cannot rest on the allegations of the complaint.' " In that event, to determine whether there is sufficient evidence to establish personal jurisdiction, the court must consider: "(1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence)."

Dailey v. Popma, 191 N.C. App. 64, 69, 662 S.E.2d 12, 16 (2008).

III. Analysis

This Court applies a two-step analysis to determine whether a nonresident defendant is subject to personal jurisdiction in North Carolina. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986); *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006); *Cox v. Hozelock, Ltd.*, 105 N.C. App. 52, 53, 411 S.E.2d 640, 641-42 (1992). First, jurisdiction must be authorized by our "long-arm" statute, N.C. Gen. Stat. § 1-75.4. *Tom Togs, Inc.*, 318 N.C. at 364, 348 S.E.2d at 785; *Skinner*, 361 N.C. at 119, 638 S.E.2d at 208; *Cox*, 105 N.C. App. at 53, 411 S.E.2d at 642. "Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Skinner*, 361 N.C. at 119, 638 S.E.2d at 208.

There are two types of long-arm jurisdiction. *Tom Togs*, 318 N.C. at 366, 348 S.E.2d at 786. "Specific jurisdiction exists when

the cause of action arises from or is related to defendant's contacts with the forum." *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210. The Court considers several factors in deciding whether specific jurisdiction exists: "(1) the extent to which the defendant purposely availed itself of the privilege of conducting activities in the State; (2) whether the plaintiff's claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable." *Woods Intern., Inc. v. McRoy*, 436 F. Supp. 2d 744, 748-49 (M.D.N.C. 2006) (internal quotation marks omitted). "General jurisdiction exists when the defendant's contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently continuous and systematic." *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210 (internal quotation marks omitted). "The threshold level of minimum contacts sufficient to confer general jurisdiction is significantly higher than for specific jurisdiction." *Woods Intern., Inc.*, 436 F. Supp. 2d at 748 (quoting *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 715 (4th Cir. 2002) (internal brackets and quotation marks omitted)).

The long-arm statute "is a legislative attempt to allow the courts of this State to assert *in personam* jurisdiction to the full extent permitted by the Due Process Clause of the United States Constitution, and is accorded a liberal construction in favor of finding personal jurisdiction, subject only to due process limitations." *Kaplan School Supply v. Henry Wurst, Inc.*, 56 N.C. App. 567, 570, 289 S.E.2d 607, 609 (1982) (citations omitted). "When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry-whether defendant has the minimum contacts necessary to meet the requirements of due process." *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 671, 541 S.E.2d 733, 736 (2001) (quotation and internal brackets omitted).

"In determining whether the exercise of personal jurisdiction comports with due process, the crucial inquiry is whether the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.*

> The factors to consider when determining whether defendant's activities are sufficient to establish minimum contacts are: (1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the

contacts; (4) the interests of the forum state, and (5) the convenience to the parties.

Cooper v. Shealy, 140 N.C. App. 729, 734, 537 S.E.2d 854, 857-58 (2000) (citation and internal quotation marks omitted). "Minimum contacts do not arise *ipso facto* from actions of a defendant having an effect in the forum state." *DeSoto Trail, Inc. v. Covington Diesel, Inc.*, 77 N.C. App. 637, 639, 335 S.E.2d 794, 796 (1985) (quotation omitted). "[W]hile application of the minimum contacts standard will vary with the quality and nature of defendant's activity, it is essential in each case that there be some act by which defendant purposely avails itself of the privilege of conducting activities within the forum state . . . ." *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979) (internal quotation marks and ellipses omitted) (citation omitted).

Even if a defendant's contact with the forum state is direct and intentional, where the defendant's involvement with the contact is "passive," personal jurisdiction may be lacking. *Skinner*, 361 N.C. at 124, 638 S.E.2d at 211 (concluding no personal jurisdiction over a non-resident trust created for the purpose of being assigned income from mortgage notes, where the only contact with North Carolina is that some of the notes happen to be secured with North Carolina property). "Which party initiates the contact is taken to be a critical factor in assessing whether a nonresident defendant has made purposeful availment of the privilege of conducting activities within the forum State." *Banc of Am. Secs. LLC*, 169 N.C. App. at 698, 611 S.E.2d at 185 (quoting *CFA Medical, Inc. v. Burkhalter*, 95 N.C. App. 391, 395, 383 S.E.2d 214, 216 (1989)) (internal brackets and quotation marks omitted). "Nonresident defendants must engage in acts by which they purposely avail themselves of the privilege of conducting activities within the forum State to support a finding of minimum contacts." *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 279, 646 S.E.2d 129, 133 (2007) (internal quotation marks and brackets omitted) (citation omitted). "The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or unilateral activity of another party or a third person." *Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs*, 158 N.C. App. 376, 381, 581 S.E.2d 798, 802, *rev'd on other grounds by*, 357 N.C. 651, 588 S.E.2d 465 (2003) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528, 542 (1985)) (internal ellipses, brackets and quotation marks omitted).

A. Personal Jurisdiction under the Long-Arm Statute

[2] Defendants argue that the trial court erred in determining that the long-arm statute conferred jurisdiction over HCC and HLCC. We disagree.

Plaintiff contends defendants are subject to jurisdiction under N.C. Gen. Stat. §§ 1-75.4(1)(d) & (4)(b) (2007). We agree that defendants are subject to personal jurisdiction under N.C. Gen. Stat. § 1-75.4(4)(b). The relevant portion of the statute provides:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . . .
>
> (4) Local Injury; Foreign Act.—In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury . . . :
>
> . . . .
>
> b. Products, materials or things processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade;

N.C. Gen. Stat. § 1-75.4(4)(b) (2007).

Defendants contend the trial court's findings of fact in support of personal jurisdiction are not supported by competent evidence. Defendants did not assign error to finding of fact number six. In its order, the trial court found

> The vinyl siding was manufactured by Sedeco and it incorporated chemical compounds created by Hanwha L&C and resins sold by Defendant Hanwha Chemical Corporation ("HCC") to Hanwha L&C.

Findings of fact that are not assigned as error are presumed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Construing the long-arm statute liberally, we conclude that the resins and the chemical compounds used to manufacture the vinyl siding constitute products, materials, or things processed, serviced

or manufactured by HCC and HLCC which were used or consumed in North Carolina in the ordinary course of trade. N.C. Gen. Stat. § 1-75.4(4)(b); *see also DeSoto Trail, Inc.*, 77 N.C. App. at 639, 335 S.E.2d at 796 (construing the long-arm statute liberally, installation of an engine by defendant in New Jersey was a product serviced and used in North Carolina within the ordinary course of trade). This assignment of error is overruled.

B. Due Process Analysis

[3] Defendants next argue that HCC and HLCC lack certain minimum contacts with North Carolina to satisfy the due process prong of the personal jurisdiction analysis. We agree.

1. HCC's Contacts

The trial court made the following findings of fact with regard to HCC's contacts with North Carolina:

> 6. The vinyl siding was manufactured by Sedeco and it incorporated chemical compounds created by Hanwha L&C and resins sold by Defendant Hanwha Chemical Corporation ("HCC") to Hanwha L&C.
>
> 7. Hanwha L&C and HCC are related companies.
>
> . . . .
>
> 10. Hanwha L&C and HCC were connected in the manufacture and distribution of vinyl siding products into the stream of commerce.
>
> 11. Products, materials or things processed, serviced or manufactured by Defendants Hanwha L&C and HCC were used or consumed within this State.
>
> 12. Hanwha L&C and HCC injected their products into the stream of commerce without any indication that they desired to limit the area of distribution of their product so as to exclude North Carolina.
>
> . . . .
>
> 14. Plaintiff's causes of action arise directly from the intended use of Hanwha L&C's and HCC's products in North Carolina, by which Cambridge, a North Carolina resident, was allegedly injured.
>
> . . . .

16. On March 29, 2004, HCC R&D Center Analysis Group, which is owned by HCC, produced a memorandum reporting test results of a sample of the allegedly defective vinyl siding. The memorandum was drafted by Mr. Seong-Min Lee, who is an employee of Hanwha L&C, and the test analysis results page was signed by Messrs, Bong-Keun Seo, Hee Bock Yoon, and Young-Choon-Kwon, who are employees of HCC R&D Center and who conducted testing on the vinyl siding product sample. The test/analysis results report was furnished by HCC R&D Center in both Korean and English.

These findings do not support a conclusion that HCC purposely availed itself of North Carolina's jurisdiction. Conspicuously absent from the trial court's order is a finding that HCC initiated contact with Hyundai or any other North Carolina company or otherwise solicited business activities in North Carolina. *Lulla v. Effective Minds, LLC, supra.*

Findings ten and twelve are conclusions of law and subject to *de novo* review. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006). The mere fact that HCC was "connected" to the manufacture and distribution of vinyl siding is not sufficient to support a conclusion that HCC purposely availed itself of North Carolina jurisdiction by injecting its products into the stream of commerce. Arguably, HCC was "connected" to the production of vinyl siding by the fact that HCC manufactured a resin which was sold to HLCC which was then incorporated into a component used to manufacture the vinyl siding. However, under these facts, in order to assert personal jurisdiction, HCC's connection must be more than fortuitous, random, or *ipso facto*. *Adams, Kleemeier, supra.*; *DeSoto Trail, Inc.*, 77 N.C. App. at 639, 335 S.E.2d at 796.

Plaintiff argues that by manufacturing a resin that was sold to HLCC, HCC injected its product into the stream of commerce without limiting its distribution, thereby availing itself of North Carolina jurisdiction. Plaintiff also argues that because finding number twelve was not specifically challenged in defendants' brief, this finding should be affirmed. We disagree.

Plaintiff cites *Liberty Finance Co. v. North Augusta Computer Store*, 100 N.C. App. 279, 395 S.E.2d 709 (1990), in support of this argument. In that case the defendant alleged the trial court relied on incompetent evidence to support its findings. *Id.* at 283, 395 S.E.2d at 711. This Court determined since defendant had "not directed this Court in its brief to any particular place in the record which would

support its position" it did not meet its burden of showing error on the trial court's part. *Id.* The *Liberty* Court also determined defendant's affidavit constituted competent evidence to support the trial court's findings in favor of asserting personal jurisdiction. *Id.* at 283-85, 395 S.E.2d at 712.

Here, defendants properly assigned error to "finding" number twelve and argue that the trial court erred in determining personal jurisdiction over defendants was proper. Since we determined finding number twelve is really a conclusion of law, it is subject to *de novo* review.

Purposeful availment has been found where a corporation "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 502 (1980). A foreign manufacturer cannot shield itself from liability for injuries caused by a defective product in the forum state where it has no direct contacts by simply funneling its products through a completely separate and uncontrolled subsidiary. *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 50, 306 S.E.2d 562, 568 (1983). Foreign manufacturers who export their products to the United States for distribution throughout the United States and neither intend nor anticipate the distribution to be limited to a particular state or states or attempts to limit its distribution, may be subject to personal jurisdiction in any U.S. state. *Id.* at 49, 306 S.E.2d at 567-68 (citing *McCombs v. Cerco Rentals*, 622 S.W.2d 822 (1981)). The foreseeability that is "critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.*, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501. The stream of commerce theory applies to products liability cases such as this one. *Considine v. West Point Dairy Products*, 111 N.C. App. 427, 430, 432 S.E.2d 412, 414 (1993).

After careful review, we conclude the evidence does not support a finding that HCC reasonably anticipated or should have reasonably anticipated its product would be sold in North Carolina. In HCC's affidavit, HCC denies that it provided chemicals to siding manufacturers, asserts that HCC did not solicit any business in North Carolina, nor did it contract with any North Carolina resident or a North Carolina distributor. HCC also asserted that it did not have any knowledge that

its resins would be used to manufacture the siding. Plaintiff did not present affidavits or other evidence to contradict HCC's assertions.

Plaintiff contends that Hyundai's and Ex Deco's Verified Answer is competent evidence to support the finding that HCC was connected with the distribution and manufacture of vinyl siding in the stream of commerce. We disagree. Hyundai and Ex Deco's Answer admits plaintiff's allegation that HCC and HLCC were in the business of providing chemicals to siding manufacturers, the chemicals were used in North Carolina and they knew or reasonably should have known that the chemicals were being used and would be used in products shipped and installed throughout the United States. Admissions in the answer of one defendant are not competent evidence against a codefendant. *Manufacturing Co. v. Construction Co.*, 259 N.C. 649, 652, 131 S.E.2d 487, 489 (1963); *see also Barclays American v. Haywood*, 65 N.C. App. 387, 389, 308 S.E.2d 921, 923 (1983) ("Facts admitted by one defendant are not binding on a co-defendant.").

Furthermore, there is no evidence that HCC exported its product for distribution in the United States. HCC admits it manufactured a chemical resin which was incorporated into another product manufactured by another Korean company. HCC's "products" were the resins sold to HLCC, a Korean company. HLCC's affidavit asserted it does not have any distributors in North Carolina. HLCC's chemical compound was sold to another Korean company, Sedeco. There is no evidence of any agreement between HCC and HLCC or HCC and Sedeco to distribute HCC's products in the United States. *Cf. Warzynski v. Empire Comfort Systems*, 102 N.C. App. 222, 229, 401 S.E.2d 801, 805 (1991) (concluding foreign manufacturer purposely injected its product into the stream of commerce without any indication it desired to limit the area of distribution by entering sales agreement with distributor). HCC's connection to Hyundai was through two separate Korean companies: HLCC and Sedeco. During oral arguments, counsel for plaintiff conceded that HCC's involvement in supplying the resins was another step removed from the manufacturing process when compared to HLCC's involvement. "Although contacts that are isolated or sporadic may support specific jurisdiction if they create a substantial connection with the forum, the contacts must be more than random, fortuitous or attenuated." *Havey v. Valentine*, 172 N.C. App. 812, 815, 616 S.E.2d 642, 647 (2005) (internal quotation marks omitted) (citation omitted). Under these facts, HCC's connection with North Carolina is too attenuated to make it reasonably foreseeable that it would be summoned into court here.

Although finding number sixteen indicates HCC was connected to a memorandum analyzing the chemical components in the siding, this memorandum was drafted in March of 2004, after problems were reported with the siding. Plaintiff argues this finding is relevant because it shows an intent by HCC to serve consumers in North Carolina. However, this finding shows that HCC conducted an analysis of its product after it had been sold and incorporated into another product. HCC's only connection to North Carolina arises from its relationship with HLCC. *See Buying Group, Inc. v. Coleman*, 296 N.C. at 517, 251 S.E.2d at 615 (defendant whose only contact in North Carolina consisted of his signature on a conditional promissory note to guarantee payment for a North Carolina creditor was an "isolated, fortuitous contact"); *Sola Basic Industries v. Electric Membership Corp.*, 70 N.C. App. 737, 321 S.E.2d 28 (1984) (no personal jurisdiction where defendant's only contact with North Carolina was when plaintiff removed a transformer purchased by defendant to North Carolina; defendant did not choose the repair location); *see also Skinner*, *supra*.

Plaintiff also argues there is general jurisdiction over HCC. We disagree. "The test for general jurisdiction is more stringent [than the test for specific jurisdiction] as there must be continuous and systematic contacts between the defendant and forum state." *Havey*, at 819, 616 S.E.2d at 649 (quotation marks and citations omitted). The trial court made no findings to support a conclusion that HCC had continuous and systematic contacts with North Carolina.

Since we determined HCC lacks the minimum contacts necessary to support a conclusion that HCC purposely availed itself of North Carolina's jurisdiction, we need not reach whether the exercise of jurisdiction comports with fair play and substantial justice. *See Buying Group, Inc.*, 296 N.C. at 515, 251 S.E.2d at 614 (it is essential that defendant purposeful avail itself of business activities in the forum state); *Tejal Vyas, LLC v. Carriage Park, Ltd. P'ship.*, 166 N.C. App. 34, 38, 600 S.E.2d 881, 885 (2004) (citations omitted) ("To generate minimum contacts, the defendant must have purposefully availed itself of the privilege of conducting activities within the forum state and invoked the benefits and protections of the laws of North Carolina."); *see also CFA Medical, Inc.*, 95 N.C. App. at 394-95, 383 S.E.2d at 216. Accordingly, we reverse the trial court's denial of HCC's motion to dismiss.

2. HLCC's Contacts

[4] The trial court made the following findings of fact relating to HLCC's contacts:

> 3. Hyundai contacted Defendant Hanwha L&C Corporation ("Hanwha L&C") and Defendant Sedeco, which are both Korean companies, and requested that Hanwha L&C and Sedeco produce vinyl siding samples with specific colors, strengths and other features.
>
> 4. Thereafter, Hanwha L&C and Sedeco produced vinyl siding samples and provided them to Hyundai.
>
> . . . .
>
> 6. The vinyl siding was manufactured by Sedeco and it incorporated chemical compounds created by Hanwha L&C and resins sold by Defendant Hanwha Chemical Corporation ("HCC") to Hanwha L&C.
>
> 7. Hanwha L&C and HCC are related companies.
>
> 8. Hyundai, Sedeco and Hanwha L&C discussed Plaintiff's vinyl siding requirements; produced, reviewed and approved vinyl siding samples; and knew that Hyundai was a United States company.
>
> 9. Hanwha L&C knew that its chemical compound would be used in the manufacture of vinyl siding.
>
> . . . .
>
> 10. Hanwha L&C and HCC were connected in the manufacture and distribution of vinyl siding products into the stream of commerce.
>
> 11. Products, materials or things processed, serviced or manufactured by Defendants Hanwha L&C and HCC were used or consumed within this State.
>
> 12. Hanwha L&C and HCC injected their products into the stream of commerce without any indication that they desired to limit the area of distribution of their product so as to exclude North Carolina.
>
> . . . .

14. Plaintiff's causes of action arise directly from the intended use of Hanwha L&C's and HCC's products in North Carolina, by which Cambridge, a North Carolina resident, was allegedly injured.

15. From February 12 through February 15, 2004, Mr. S.M. Lee, who is a representative of Hanwha L&C, traveled to Charlotte, North Carolina to meet with Hyundai's and Sedeco's representatives regarding the allegedly defective vinyl siding.

. . . .

18. Upon learning of certain alleged quality problems associated with the vinyl siding, Hyundai, Sedeco and Hanwha L&C met to discuss improving the quality of the vinyl siding. Thereafter, Sedeco continued to manufacture vinyl siding for Hyundai, which incorporated Hanwha L&C's chemical compounds.

Defendants argue findings of fact numbers three, four, eight, ten, eleven and fourteen are not supported by the record or are supported by inadmissible documents. Findings number three, four, and eight would support a conclusion that HLCC purposely availed itself of North Carolina jurisdiction because these findings indicate HLCC designed its product for Hyundai and was aware it was dealing with a North Carolina company. *See Banc of Am. Secs., LLC*, *supra* (sufficient contacts found where defendant entered into contract with North Carolina plaintiff and knew contract would be performed in North Carolina). We therefore examine whether these findings are supported by competent evidence.

Plaintiff's amended complaint alleged that both HCC and HLCC "had reason to know of the particular purpose for which the Sedeco Siding and Hanwha Chemicals were required—use in and for exterior siding on homes in the southeastern United States." HLCC's affidavit asserted HLCC had no knowledge of what would become of its chemical compound beyond the general knowledge that it would be used to manufacture siding in Korea. HLCC's affidavit also asserted that HLCC "does not design any of its products, including the product at issue, specifically for the North Carolina market." These assertions contradict plaintiff's allegations in its unverified complaint, therefore there must be other competent evidence to base a finding that HLCC was aware it was dealing with a North Carolina company. *See Bruggeman*, 138 N.C. App. at 615-16, 532 S.E.2d at 218; *cf. Liberty Finance*, *supra* (evidence in defendant's affidavit was competent to

support trial court's findings). HLCC admitted it knew its chemical compound would be used in the manufacture of vinyl siding by Sedeco in its responses to plaintiff's interrogatories. However, there is no competent evidence to support a finding that HLCC was aware that the siding would be sold outside of Korea or that HLCC provided samples of the chemical compound to Hyundai.

Plaintiff argues that Sedeco's answer constitutes competent evidence to support findings three, four and eight. However, Sedeco's answer is unverified and, as previously noted, answers of co-defendants are not admissible evidence against another defendant. *Manufacturing Co.*, *supra; Barclays American*, *supra.*; *see also Brown v. Refuel Am.*, *Inc.*, 186 N.C. App. 631, 634, 652 S.E.2d 389, 392 (2007) ("Factual allegations in Defendants' unverified answer are not competent evidence[.]") and *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715 (2005) (denials in an unverified answer are not sufficient to defeat a summary judgment motion).

We find the facts of this case similar to *Charter Med.*, *Ltd. v. Zigmed*, *Inc.*, 173 N.C. App. 213, 617 S.E.2d 352 (2005). In *Charter Medical*, this Court affirmed the trial court's dismissal of plaintiff's complaint for lack of personal jurisdiction over a foreign defendant because there was no evidence in the record that defendant attempted to benefit from the laws of North Carolina by entering the market here. In that case, plaintiff submitted a purchase order to defendant for a medical machine in New Jersey. Later, plaintiff asked defendant to ship the machine to its North Carolina facility. After delivery of the machine, defendant sent technicians to North Carolina for eight days to install the machine. This Court concluded since a substantial portion of the work was performed outside of North Carolina, these were not sufficient minimum contacts to subject defendant to North Carolina jurisdiction. *Id.*

Similarly here, only after Hyundai requested HLCC travel to North Carolina to fix the siding did HLCC enter North Carolina. Essential to asserting personal jurisdiction over a non-resident is a finding that a defendant's conduct made it foreseeable it could be summoned into court in North Carolina. Other cases have found minimum contacts where a foreign defendant contracted with a North Carolina resident or was otherwise aware that its activities would impact the North Carolina market. *See Tom Togs*, *Inc.*, 318 N.C. at 367, 348 S.E.2d at 787 (concluding defendant clothing distributor purposely availed itself of North Carolina jurisdiction where defendant

initiated contact with plaintiff and was told when he purchased plaintiff's clothing that it would be specially cut and shipped from North Carolina); *Cox v. Hozelock, Ltd.*, 105 N.C. App. at 55-56, 411 S.E.2d at 643 (defendant injected its products into the stream of commerce by selling products to distributor who resold them to retail stores in North Carolina); *Banc of Am. Secs. LLC*, *supra.*

Here, the findings that HLCC dealt directly with Hyundai, a North Carolina company, are not supported by competent evidence. The other findings are insufficient to conclude HLCC purposely availed itself of North Carolina's jurisdiction.

We next examine whether HLCC's other business activities in North Carolina would satisfy the due process requirement. The trial court also found that:

> 20. Hanwha L&C has had the following additional contacts with the State of North Carolina.
>
> A. In June, 2006, Hanwha L&C sold and shipped more than $20,000.00 worth of construction products to Charlotte, North Carolina.
>
> B. From October 29, 2006 until November 3, 2006, several representatives of Hanwha L&C were present in North Carolina to conduct due diligence concerning the potential purchase of a company that maintained a factory in North Carolina.
>
> C. In December, 2006, Hanwha L&C sold and delivered more than $25,000 worth of construction products to Waynesville, North Carolina.
>
> 21. Hanwha L&C's meeting in February 2004 with Sedeco and Hyundai, its sales and shipments to consumers in North Carolina in June and December 2006, and the due diligence it conducted in North Carolina relating to the purchase of a company that maintains a factory in North Carolina in October and November of 2006 indicate an intent to serve consumers in the North Carolina market specifically.
>
> . . . .
>
> 23. Although not disclosed in discovery, Hanwha L&C owns a manufacturing plant, or has a division or subsidiary (e.g. Maxforma Plastics, LLC) that owns a manufacturing plant in Opelika, Alabama. The plant in Alabama is one factory in its oper-

ations network and it manufactures bumper beams and bumper cores for automobiles. Both Hanwha L&C America Corporation and Max Forma Plastics, LLC are registered as corporations in Alabama. Maxforma Plastics, LLC manufactures products for Hyundai Motor Manufacturing that are incorporated into Hyundai's automobiles. Hyundai's automobiles are sold in dealerships throughout North Carolina.

HLCC produced invoices indicating "Hanwha Corporation" shipped products to Waynesville, North Carolina in December 2006 and to Charlotte, North Carolina in June 2006. HLCC admits in its affidavit that it shipped products to North Carolina after the date of service of the complaint. From 29 October 2006 to 3 November 2006, HLCC conducted due diligence regarding the potential purchase of a company that owns a factory in North Carolina. Since these activities occurred after the complaint was filed and after the date of injury, we conclude these contacts are insufficient to determine HLCC reasonably anticipated being summoned into North Carolina courts in March 2006. In addition, although a subsidiary of HLCC operates a plant in Alabama that supplies bumpers to Hyundai Motor Manufacturing of Alabama, no evidence was presented to support the finding that those products are sold or distributed outside of Alabama. Accordingly, we reverse.

IV. Conclusion

The trial court's findings relating to HCC's contacts do not support a conclusion that HCC purposely availed itself of North Carolina's jurisdiction. The trial court's findings of fact in support of asserting jurisdiction over HLCC are not supported by competent evidence. For the foregoing reasons, we reverse and remand the trial court's denial of HCC's and HLCC's motions to dismiss for lack of personal jurisdiction.

Reversed and remanded.

Judges TYSON and ELMORE concur.

DONALD P. EDMUNDS, PLAINTIFF v. PHYLLIS M. EDMUNDS, DEFENDANT

No. COA08-246

(Filed 16 December 2008)

1. Judgments— default judgment—Rule 60 motion for relief—standing—original party

The trial court erred in a declaratory judgment action seeking to quiet title by denying defendant's motion for relief based on her standing to contest the default judgment, and the portion of the trial court's order holding that defendant lacked standing to bring her motion for relief is reversed and remanded, because: (1) N.C.G.S. § 1A-1, Rule 60(b) requires that only a party to the original action may seek relief; and (2) defendant was an original party to the action.

2. Judgments— default judgment—Rule 60 motion for relief—nonparty

The trial court did not err in a declaratory judgment action seeking to quiet title by denying Ms. High's motion for relief from the default judgment because: (1) High was not an original party to the action as required by N.C.G.S. § 1A-1, Rule 60; and (2) High has not shown that she is entitled to any exception to Rule 60 such as being uniquely situated to function as a defendant in this case.

3. Parties— motion to join—no interest in property

The trial court did not err in a declaratory judgment action seeking to quiet title by denying defendant's motion to join Ms. High even though defendant claimed she had conveyed her right, title, and interest in the pertinent property to Ms. High because: (1) the plain language of the deceased's will did not support the proposition that defendant took any remainder interest in the property; (2) if the deceased had intended to alter the remainder clause which was incorporated into the will and instead leave half the remainder to defendant, he could have said so expressly in the will, and the fact that he did not strongly suggested that he intended to leave plaintiff's remainder interest intact; and (3) defendant had no interest in the property when she executed the quitclaim deeds, and thus conveyed no interest in the property to Ms. High.

4. Appeal and Error— appealability—issue not considered by trial court appropriate for remand

The issue of defendant's motion to join Cox as a plaintiff was not properly before the Court of Appeals, but instead is more appropriately addressed by the trial court on remand if necessary, because the trial court did not reach this issue.

Appeal by defendant from order entered 31 August 2007 by Judge Nancy C. Phillips in Columbus County District Court. Heard in the Court of Appeals 10 September 2008.

The McGougan Law Firm, by Paul J. Ekster and Dennis T. Worley, for plaintiff-appellee.

Williamson, Walton & Scott, L.L.P., by Benton H. Walton, III, C. Martin Scott, II, and Thomas L. Odom, Jr., for defendant-appellant.

CALABRIA, Judge.

This appeal arises from an order denying a motion for relief under Rules 54, 55, 58, and 60 of our Rules of Civil Procedure filed by Phyllis M. Edmunds ("defendant") and Elizabeth E. High ("Ms. High"). The trial court held that both defendant and Ms. High lacked standing to bring the motion and also denied Ms. High's motion to be joined as a defendant. For the reasons stated below, we affirm in part and reverse in part.

I. Background

On 1 August 1986, William Seymour Edmunds ("the deceased") and defendant executed a pre-marital agreement. The agreement reserved to each party the "right to dispose of any or all of [each party's] Separate Property by deed, will, or otherwise on that [party's] sole signature, without any involvement or control by the other party, and the other party hereby ratifies and consents to any such disposition." The agreement also stated, in relevant part:

> The Husband further agrees that should he predecease the Wife during the marriage and while the parties are neither legally nor voluntarily separated that the Wife shall receive a life estate in the separate real property owned by the Husband as his residence in the Town of Lake Waccamaw, North Carolina. The life estate shall entitle the Wife to hold, use, and benefit from this property so long as she does not re-marryk [*sic*] and so long as she maintains

> the real property as her primary residence, pays all taxes and assessments that may becom [*sic*] due, keeps the residence adequately insured, and provides such maintenances [*sic*] to the property as may be necessary to maintain the fair market value of the property. Upon the death of the Wife, or if she should re-marry or fail to perform any of the provisions stipulated herein, the remainder interest in the aforementioned real property shall pass to Donald P. Edmunds, son of the Husband or as directed by the Husband's will.

The property in question, 1800 Lake Cove Rd., Lake Waccamaw, North Carolina ("the property"), is comprised of two and a half lots, located on the lakefront that includes a house, shed, pier, and boathouse. In 1999, the Town of Lake Waccamaw valued the property at $165,700.00.

On 22 April 1996, the deceased executed a last will and testament ("the will"), which stated, in relevant part:

> **ITEM EIGHT.** I direct that my wife, Phyllis McLain Edmunds, retain a life estate in my residence located at 1800 Lake Cove Road, Lake Waccamaw, North Carolina. She shall have the exclusive use and benefit of the residence so long as she lives there on a full-time basis subject to the terms and conditions set forth in the Pre-Marital Agreement that she and I executed on August 1, 1986, said document being incorporated herein by reference.
>
> **ITEM NINE.** I direct that all of the rest, residue, and remainder of my estate be divided equally between my wife, Phyllis McLain Edmunds, and my son, Donald P. Edmunds, by my Executor as nearly equally as possible.

The deceased died testate on 10 September 1996, survived by defendant and his son, Donald P. Edmunds ("plaintiff").

On 12 July 2000, plaintiff filed an action for quiet title and declaratory judgment. He alleged that since the deceased's death, defendant claimed the life estate in the property and "maintained possession of the house and land . . . thereby excluding Plaintiff from enjoyment and possession of his interest in said lands." He also alleged that defendant did not maintain the property as her primary residence, "failed to pay all taxes and assessments when they became due," "failed to maintain adequate insurance," and "failed to provide such maintenance to the property as is necessary to maintain the fair market value of the property." Plaintiff further alleged

that plaintiff "wrongfully refused to execute a deed transferring the life estate conferred pursuant to the Pre-Marital Agreement and Last Will and Testament" of the deceased to plaintiff. Plaintiff sought the following relief:

> WHEREFORE, the Plaintiff prays judgment that the cloud of said adverse claim of the Defendant be removed from his said title to said property and that the Plaintiff be declared the owner in fee simple of said property, free from the claim of the Defendant, and for the cost of this action to be taxed by the Clerk against the Defendant. In the alternative, Plaintiff prays that the Plaintiff be declared the owner in fee simple of said property, free from the claim of the Defendant through a Declaratory Judgment action.

A copy of the summons and complaint was mailed by certified mail to defendant at her Georgia address. Defendant signed the return receipt on 24 July 2000 and plaintiff filed an affidavit of return of service. When defendant did not respond, plaintiff filed a motion for entry of default on 30 August 2000. On the same day, the Clerk of Superior Court filed an entry of default against defendant. Plaintiff then filed a motion for entry of default judgment, alleging that he was "entitled to a judgment to quiet title and for a declaratory judgment in his favor[.]" On 16 November 2000, Judge Nancy C. Phillips entered a default judgment against defendant. Judge Phillips held:

> 1. That the Defendant's life estate, right, title, and interest in the land herein described, by reason of her failure to comply with the requirements of the Pre-Nuptial Agreement and the Last Will and Testament of William Seymour Edmunds, deceased, has terminated, and that *the same is now vested in fee simple* in the Plaintiff, Donald P. Edmunds, free from any right, title, or claim, by the Defendant or on account of any person claiming under the Defendant.
>
> 2. That this order shall be recorded in the Office of the Register of Deeds of Columbus County, terminating the life estate of the Defendant and vesting the fee simple ownership of the property in the Plaintiff.

(Emphasis added.)

Nearly four years later, in October 2004, defendant, in two separate quitclaim deeds, conveyed all of her "right, title, claim, and interest" in the property to Ms. High. The second quitclaim deed, clarified that it was defendant's "expressed intent and desire to reaffirm and

ratify" the first quitclaim deed by this second deed in order to "confirm [her] intentions." On 21 October 2004, defendant also signed a power of attorney appointing Ms. High as her attorney in fact to "sell, convey, mortgage, lease, rent, or in any other way to manage, deal with, or dispose of" the property. "Th[e] power [was] given specifically for the purpose of acting as [defendant's] agent at any court proceedings, signing any pleadings and appearing at any hearings[.]"

Defendant explained, in the 21 October 2004 affidavit, that she "received a communication from Alan High ("Mr. High") in the middle part of September, 2004 regarding signing a quitclaim deed" for the property. Mr. High, a Columbus County attorney, is Ms. High's husband. Defendant continued,

> 4. I knew that I was coming to North Carolina this week to be with my sister-in-law who was having surgery, and I decided that I would deliver the quitclaim deed to Mr. High personally after meeting him, and I did drop in on him at his office on Monday, October 18, 2004 unannounced;
>
> . . . .
>
> 6. [A]fter meeting with Mr. High, and after recalling what kind of a person Donald P. Edmunds was and is and how he treated my husband, his adopted father, and me previously, I have recommitted that I would like for Mr. High's family to have any interest in this property that I may have, rather than see it go to Donald P. Edmunds;
>
> 7. I have therefore returned to his office unannounced this date and have requested that he draft any documents necessary to confirm my conveyance of my interest to Elizabeth Elkins High and to empower her to act in my place and stead regarding any lawsuit over this property or otherwise and specifically regarding File # 00 CVD 1172, Columbus County wherein Donald P. Edmunds sued me to extinguish my life estate only in the property[.]

Defendant moved for relief from the default judgment on 7 June 2005. She alleged that a copy of the default judgment was never served on her and that there was no certificate of service of the default judgment in the official court file. She argued that there was no adversity or controversy between plaintiff and defendant with respect to their remainder interests as tenants in common and that the trial court lacked jurisdiction to determine the parties' rights with

respect to their remainder interest as tenants in common. Accordingly, she asked the trial court to declare the default judgment void and set it aside.

On 7 June 2005, Defendant filed a motion, pursuant to Rule 25(d), seeking an order joining Ms. High in her action because she alleged Ms. High had acquired defendant's interest by the two quitclaim deeds. Defendant also moved to substitute Kyle A. Cox ("Cox") for plaintiff because plaintiff had conveyed his right, title, and interest in the property to Cox on or about 1 February 2007 by a non-warranty deed.

The trial court denied defendant's motion. It found as fact that defendant's claim of possessing a one-half undivided interest in the property through the residuary clause of the deceased's will was without merit; that only $1.00 in tax stamps was paid on the quitclaim deed, indicating that Ms. High paid, at most, $500.00 for the property; and that the property was worth $500,000.00 to $750,000.00. The court also made the following findings of fact to which defendant now excepts:

> 25. Neither Alan High nor his wife, Elizabeth High were original parties to this action and it appears to this Court that by filing the Motions in this case the defense is attempting to establish privity between Elizabeth High and Phyllis Edmunds in order to claim a one-half (½) undivided interest in the property under the residuary clause of the Will of William Seymour Edmunds.
>
> 26. It is the position of this Court that at the time that Phyllis Edmunds signed quitclaim deeds to Elizabeth High, Ms. Edmunds had no interest or rights in the subject property and it follows that she could have conveyed no interest or rights to Elizabeth or Alan High.
>
> 27. At the time that Ms. Edmunds filed the Motion for Relief under Rules 54, 55, 58 and 60 she had no interest or rights in the subject matter of this proceeding sufficient to grant standing to seek relief from the Default Judgment dated November 7, 2000.
>
> 28. At the time the Motion for Relief under Rules 54, 55, 58 and 60 was filed along with the Motion to Join Assignee as Defendant (Elizabeth High), Ms. High owned no interest in the subject matter of this proceeding sufficient to grant standing to seek relief from the Default Judgment dated November 7, 2000.

> 28. [*sic*] Ms. Edmunds should also be barred from bringing Motions for Relief in that even after Default Judgment was entered against her in November of 2000 and duly recorded in the Office of the Clerk of Court and the Registry of Columbus county [*sic*], she thereafter signed two quitclaim deeds to the property and further that the Petition to Partition filed by the Highs also indicates that Ms. Edmunds had no interest to the property at the filing of said Petition.

The court also concluded as a matter of law that both defendant and Ms. High lacked standing to seek relief from the court's previous default judgment. Accordingly, the court denied defendant's motion for relief for lack of standing and denied both joinder motions. Defendant appealed the denials of all three motions.

Defendant's arguments raise the following legal issues: (1) did defendant have standing to bring a Rule 60(b) motion? (2) did Ms. High have standing to bring a Rule 60(b) motion? (3) did the trial court err by denying Ms. High's motion to be joined as a defendant? (4) did the trial court err by denying defendant's motion to join Kyle Cox as a plaintiff?

II. Defendant's Standing

[1] Defendant argues that the trial court erred by denying her motion for relief because she had standing to contest the default judgment. We agree.

Defendant sought relief under Rule 60(b)(4) and (b)(6), which allow a court to relieve a party from a final judgment if the judgment is void or for "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007). Rule 60(b) also requires that "[t]he motion shall be made within a reasonable time." *Id.* "[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006).

"In general, only a party or his legal representative has standing to request that an order be set aside under Rule 60(b); a stranger to the action may not request such relief." *Barnes v. Taylor*, 148 N.C. App. 397, 399, 559 S.E.2d 246, 248 (2002) (citation omitted). "[T]he only manner in which a non-party to an action may seek relief from an underlying judgment affecting the non-party's rights or property is to file an independent action to attack the judgment." *Watson v. Ben*

Griffin Realty & Auction, 128 N.C. App. 61, 63, 493 S.E.2d 331, 332 (1997) (citation omitted). However, there are exceptions.

In *Bowling v. Combs*, an estate administrator filed a wrongful death suit on behalf of the decedent and then settled the case "without either approval of a superior court judge or written consent of all persons entitled to receive damages," including the decedent's widow. 60 N.C. App. 234, 235, 298 S.E.2d 754, 755 (1983). The administrator then filed a voluntary dismissal with prejudice in the wrongful death action. *Id.* Two years later, the widow succeeded the original administrator as administratrix. *Id.* She moved to set aside the voluntary dismissal and be substituted as a party plaintiff. *Id.* The trial judge granted the widow's motion to set aside the voluntary dismissal, but did not substitute her as party plaintiff until three months later. *Id.* at 238-39, 298 S.E.2d at 757. On appeal, we explained that under these "discrete" circumstances, the widow could not "properly be regarded as a stranger to the action." *Id.* at 239, 298 S.E.2d at 757. The widow "was, by virtue of her capacity as administratrix, the only person entitled to function as plaintiff in the action[,]" and thus she was the only person who could be substituted as the party plaintiff. *Id.* at 239, 298 S.E.2d at 758. Accordingly, we held that the delay in naming the widow a party plaintiff was a mere technicality that did not provide a sufficient basis for reversal. *Id.*; *see also Williams v. Walker*, 185 N.C. App. 393, 397, 648 S.E.2d 536, 539 (2007) ("An intervening party thus has standing to seek relief from a judgment pursuant to Rule 60(b)." (citation omitted)).

As noted above, we have strictly construed Rule 60(b)'s requirement that only a party to the original action may seek relief. In keeping with that approach, we hold that defendant had standing to bring her Rule 60(b) motion because she was an original party to the action. Accordingly, we reverse and remand only that portion of the trial court's order holding that defendant lacked standing to bring her motion for relief.

III. Ms. High's Standing

[2] Ms. High was not an original party to the action and has not shown that she is entitled to any exception to Rule 60, such as being uniquely situated to function as a defendant in this case. Because Ms. High is a non-party, she had no standing to seek a Rule 60(b) motion for relief.

IV. Joinder of Ms. High

[3] Defendant moved to join Ms. High as a defendant, claiming that defendant had "conveyed her right, title and interest" in the property to Ms. High. The trial court denied this motion, finding that defendant "had no interest or rights in the subject property and . . . could have conveyed no interest or rights to" Ms. High. Defendant argues that, at the time of the default judgment, she possessed a one-half interest in the property in fee simple as a tenant in common with plaintiff and conveyed that interest to Ms. High by quitclaim deed. We disagree and affirm the trial court's ruling.

The trial court read the will as devising a defeasible life estate to defendant with remainder in fee simple absolute to plaintiff. Defendant argues that the trial court erred in its construction of the will and that the will instead devised a remainder interest in fee simple to both defendant and plaintiff as tenants in common, each with a one-half undivided interest in the estate. Because the plain language of the deceased's will does not support the proposition that defendant took any remainder interest in the property, we disagree.

"It is an elementary rule in this jurisdiction that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy." *Pittman v. Thomas*, 307 N.C. 485, 492, 299 S.E.2d 207, 211 (1983) (internal quotation omitted). In determining the testator's intention, the primary source is the language used by the testator. *Id.* Isolated clauses are not to be considered out of context, but rather the entire will is to be examined as a whole so as to ascertain the general plan of the testator. *Id.*

The deceased's will provides in Item Eight:

> I direct that my wife, Phyllis McLain Edmunds, retain a life estate in my residence located at 1800 Lake Cove Road, Lake Waccamaw, North Carolina. She shall have the exclusive use and benefit of the residence so long as she lives there on a full-time basis subject to the terms and conditions set forth in the Pre-Marital Agreement that she and I executed on August 1, 1986, *said document being incorporated herein by reference.*

(Emphasis Added)

The relevant portion of the Pre-Marital Agreement provides:

> The Husband further agrees that should he predecease the Wife during the marriage and while the parties are neither legally nor voluntarily separated that the Wife shall receive a life estate in the separate real property owned by the Husband as his residence in the Town of Lake Waccamaw, North Carolina . . . so long as she does not re-marryk [*sic*] and so long as she maintains the real property as her primary residence, pays all taxes and assessments that may become due, keeps the residence adequately insured, and provides such maintenances to the property as may be necessary to maintain the fair market value of the property. Upon the death of the Wife, or if she should re-marry or fail to perform any of the provisions stipulated herein, the remainder interest in the aforementioned real property shall pass to Donald P. Edmunds, son of the Husband or as directed by the Husband's will.

Defendant argues that Item Eight of the will does not dispose of the remainder interest. Defendant is mistaken. A writing incorporated by reference into a will becomes an integral part of that will, as effectively as if the writing was set out in full in the will. *Godwin v. Trust Co.*, 259 N.C. 520, 526, 131 S.E.2d 456, 460 (1963). The fact that the text of Item Eight itself does not mention plaintiff's remainder is immaterial; the Pre-Marital Agreement disposes of the remainder as if its language was copied directly into the will.

Defendant also points to the final clause of paragraph thirty-seven of the Pre-Marital Agreement, "the remainder interest in the aforementioned real property shall pass to [plaintiff] *or as directed by the Husband's will*," to support her argument that the deceased intended that the remainder pass under Item Nine of the will rather than under the remainder clause in the Pre-Marital Agreement. (emphasis added) There is nothing in the will that suggests that the testator intended to do any such thing.

Item Nine provides, "I direct that all of the rest, residue, and remainder of my estate be divided equally between my wife, Phyllis McLain Edmunds, and my son, Donald P. Edmunds. . . ." The clearest interpretation of Item Nine is that it is exactly what it appears to be, a residuary clause. There is nothing in the language of Item Nine that suggests that it was in any way intended to revoke or supplant the remainder clause which was incorporated into Item Eight. Because the remainder was already disposed of in Item Eight, it does not pass through the residuary clause.

This situation is somewhat similar to *Brown v. Brown*, 195 N.C. 315, 142 S.E. 4 (1928). In that case, the testator's original will explicitly stated that his two sons were not to take any property under the will as they had been "amply provided for" by advancements during the testator's lifetime. *Id.* at 318, 142 S.E. at 5. The testator later executed a codicil that included a residuary clause which left the remainder of the testator's estate to his "heirs at law," which happened to include the two sons. *Id.* at 319, 142 S.E. at 6. The Supreme Court held that the residuary clause in the codicil did not supercede the language of the original will, and that the sons took nothing under the will. *Id.* "If anything more was intended to be given [the sons under the codicil], the testator could have so said." *Id.* at 320, 142 S.E. at 6.

Here, too, if the deceased had intended to alter the remainder clause which was incorporated into the will and instead leave half the remainder to defendant, he could have said so expressly in the will. That he did not, strongly suggests that he intended to leave the plaintiff's remainder interest intact.

For these reasons, we agree with the trial court that defendant had no interest in the property when she executed the quitclaim deeds, and thus conveyed no interest in the property to Ms. High. We affirm the trial court's ruling denying defendant's motion to join Ms. High.

V. Joinder of Kyle Cox

[4] In dismissing plaintiff's and Ms. High's motions for relief from the default judgment for lack of standing, the trial court did not reach the issue of defendant's motion to join Cox as a plaintiff. Therefore, this issue is not properly before this Court, but instead is more appropriately addressed by the trial court on remand if necessary.

VI. Conclusion

We hold that defendant, as the original party, had standing to bring her motion for relief from the default judgment under Rule 60(b). We affirm the trial court's ruling that Ms. High, as a stranger to the original action, lacked standing to bring a motion for relief from the default judgment in her own right.

Furthermore, we affirm the trial court's ruling denying defendant's motion to join Ms. High as a defendant. We hold that, as a matter of law, defendant inherited only a defeasible life estate from the will, with plaintiff as the sole remainderman. She was divested of this

life estate when she failed to fulfill the conditions set forth in the premarital agreement. This defeasance occurred automatically and without further judicial action upon her failure to meet those conditions. At this time, plaintiff's remainder interest became possessory and he became the sole tenant in fee simple absolute. Having no further interest in the property, defendant conveyed no interest to Ms. High when she executed the quitclaim deed. Based upon the record before us, Cox is the sole owner of the property in fee simple absolute. Ms. High owns no interest in the property, and therefore we hold that defendant's motion for her joinder was properly denied.

Therefore, we affirm the trial court's order with the exception of that portion of the order holding that defendant lacked standing. We reverse that portion of the trial court's order holding that defendant lacked standing and remand for reconsideration consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judge TYSON concurs.

Judge ELMORE dissents by a separate opinion.

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

For the reasons stated below, I respectfully dissent from that part of the majority opinion holding that the trial court properly denied defendant's motion to join Elizabeth High as a necessary party.

Defendant moved to join Elizabeth High as a defendant pursuant to Rule 25(d) because plaintiff had conveyed her right, title, and interest in the property to Elizabeth High by quitclaim deeds. The trial court denied defendant's joinder motion in its 31 August 2007 order. This decree is supported by the following challenged findings of fact:

> 15. The Defendant herein, Ms. Edmunds, contends through counsel that she still maintains an ownership interest in the subject property by and through the residuary clause of the Will of William Seymour Edmunds, such interest being a one-half (½) undivided interest along with Donald P. Edmunds, the son of the testator, which this Court finds to be without merit.
>
> 26. It is the position of this Court that at the time that Phyllis Edmunds signed quitclaim deeds to Elizabeth High, Ms. Edmunds

> had no interest or rights in the subject property and it follows that she could have conveyed no interest or rights to Elizabeth or Alan High.
>
> 28. At the time the . . . Motion to Join Assignee as Defendant (Elizabeth High) [was filed], Ms. High owned no interest in the subject matter of this proceeding sufficient to grant standing to seek relief from the Default Judgment dated November 7, 2000.

Defendant argues that "at the time of the default judgment, [she] owned a one-half (½) undivided interest as a tenant in common and continued to own that interest until [she] deeded it to Elizabeth High."

I would agree with defendant that the trial court misinterpreted the will and pre-marital agreement. The trial court read the will as granting to defendant a life estate in the property and granting to plaintiff the entire remainder. I do not believe that this reading is consistent with the plain language of the will.

"The intent of the testator is the polar star that must guide the courts in the interpretation of a will." *Coppedge v. Coppedge*, 234 N.C. 173, 174, 66 S.E.2d 777, 778 (1951) (citations omitted). "The court looks at every provision of the will, weighing each statement, and gathering the testator's intent from the four corners of the instrument." *Hammer v. Hammer*, 179 N.C. App. 408, 410, 633 S.E.2d 878, 881 (2006) (citing *Holland v. Smith*, 224 N.C. 255, 257, 29 S.E.2d 888, 889-90 (1944)). In this case, we look to Items Eight and Nine of the will and paragraphs twenty-three and thirty-seven of the pre-marital agreement to determine the testator's intent as to the property's disposition.

William Edmunds's will, executed fewer than four months before his death, clearly devised to defendant a life estate in the property "subject to the terms and conditions set forth in the Pre-Marital Agreement . . . ." Those terms, located in paragraph thirty-seven of the pre-marital agreement, entitled defendant "to hold, use, and benefit" from the property so long as she met five conditions. If defendant should fail to perform any of those conditions, "the remainder interest in the aforementioned real property shall pass to [plaintiff] . . . *or as directed by the Husband's will*." When Edmunds drafted the pre-marital agreement, he left open the possibility that someone other than plaintiff could receive the remainder interest in the property through his will by including those last seven words. Paragraph 23 of

the pre-marital agreement specifies that Edmunds had the "right to dispose of any or all of [his] Separate Property by deed, *will*, or otherwise on [his] sole signature . . . ." (Emphasis added.) Edmunds was free to specify a different recipient of the remainder interest in the property in his will; I believe that Item Eight of the will so specifies.

Item Eight of the will only gives defendant a life estate; like the pre-marital agreement, it does not dispose of the remainder. It incorporates paragraph 37 of the pre-marital agreement, but as stated above, paragraph 37 leaves open the possibility that Edmunds could dispose of the remainder differently in his will. The will's residuary clause, Item Nine, states that "all of the rest, residue, and remainder of [Edmunds's] estate be divided equally between" defendant and plaintiff. Edmunds divided the property into two separate interests—the life estate and the remainder—but specifically bequeathed only the life estate; the remainder passed into his residuary and, under Item Nine, should have been divided equally between plaintiff and defendant.

Plaintiff argues that such a division is nonsensical; his father could not have intended to give a one-half remainder interest in the property to defendant after she failed to maintain her life estate. Several reasons belie this argument: First, the will's plain language supports sweeps the remainder into the residuary clause. Second, the pre-marital agreement provided that defendant would lose her life estate if she failed to meet Edmunds's conditions *or upon her death*, meaning that the life estate's expiration was not solely dependent upon her lack of care. Third, defendant had exclusive use of the property while she held her life estate, but would become tenants in common with plaintiff after her life estate expired; such an arrangement would be appropriate if defendant chose to use the lake house only as a vacation home because plaintiff also would have access to the property as a vacation home. And, finally, our Supreme Court has previously recognized a similar bequest. In *Lee v. Lee*, our Supreme Court interpreted a will that devised a life estate to the testators' cousin. 216 N.C. 349, 349, 4 S.E.2d 880, 881 (1939). The will's residuary clause provided that all of the estate's residue would also pass to the testators' cousin. *Id.* at 350, 4 S.E.2d at 881. The Court held that the will perfected title in the cousin because "he took only a life estate by Item 2, [and] the remainder passed to him by the inclusive terms of the residuary clause in Item 9." *Id.* In *Lee*, the will's simultaneous separation of the life estate interest from the remainder interest and bequest of the separate interests to the same person did not render the residuary

clause void. Instead, the Court deemed the remainder interest to pass through the residuary clause to the designated recipient, the testators' cousin. Because he also owned the life estate, his interests united. Here, as in *Lee*, defendant received a life estate *as well as* a remainder interest. Unlike the cousin in *Lee*, however, defendant shared her remainder interest with plaintiff, and, thus, her life estate and remainder interest did not become united into a fee simple. Nevertheless, contrary to the trial court's findings of fact, defendant acquired a one-half remainder interest in the property under Edmunds's will.

The trial court's findings that defendant had no interest to transfer to Elizabeth High are, therefore, also unfounded. The default judgment could not strip defendant of her remainder interest, and, thus, she still had an interest to convey to Elizabeth High. *See Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 440, 527 S.E.2d 40, 44 (2000) (holding that with respect to default judgments, "[a]n adjudication that extinguishes property rights without giving the property owner an opportunity to be heard cannot yield a 'valid judgment' "). Accordingly, if the trial court were to grant defendant's motion for relief from the default judgment, Elizabeth High would become tenants in common with Kyle Cox. She is a necessary party who should have been joined as a defendant. Accordingly, I would hold that the trial court erred by denying defendant's motion to so join her.

IN THE MATTER OF: J.W.S., A MINOR CHILD

No. COA08-576

(Filed 16 December 2008)

Child Support, Custody, and Visitation— motion to set aside adjudication—UCCJEA—lack of subject matter jurisdiction—home state—convenient forum—temporary nonsecure custody orders—trial court required to make contact with foreign court

The trial court abused its discretion by denying respondent father's motion to set aside the 2 April 2007 adjudication order that found a juvenile to be neglected and dependent because the trial court lacked subject matter jurisdiction under the UCCJEA when: (1) a custody order regarding the juvenile was entered on

4 January 2000 by a New York court, and thus the North Carolina trial court did not have jurisdiction under N.C.G.S. § 50A-201 regarding initial child custody determinations; (2) even though North Carolina qualified as the home state of the child, N.C.G.S. § 50A-203 provides that a party seeking to modify a custody determination must obtain an order from the original decree state stating that it no longer has jurisdiction, and there was no order from the New York court stating that New York no longer had jurisdiction; (3) there was no determination by the New York court that North Carolina would be a more convenient forum under N.C.G.S. § 50A-207; (4) N.C.G.S. § 50A-203(2) was not satisfied even though respondent and the juvenile left New York and moved to North Carolina since the juvenile's mother continued to live in New York; (5) although the trial court had authority under N.C.G.S. § 50A-204(a) to enter temporary nonsecure custody orders since the juvenile was present in North Carolina when the nonsecure custody orders were entered and such orders were based on evidence gathered by DSS that the juvenile was abused, neglected, and dependent, there was no record evidence that the trial court ever communicated with the New York court as mandated by N.C.G.S. §§ 50A-204(d) and 50A-110 or as ordered by the trial court on 9 February 2007 to determine if the New York court opted not to exercise jurisdiction; and (6) the fact that DSS made efforts to contact the New York court did not meet the requirement of N.C.G.S. § 50A-204(d), and the trial court must make the contact with the New York court.

Appeal by Respondent from order entered 7 February 2008 by Judge Jerry Waddell in Carteret County District Court. Heard in the Court of Appeals 15 September 2008.

Debra Gilmore for Petitioner-Appellee Carteret County Department of Social Services.

The Diener Law Office, P.A., by Marc K. Haggard, for Respondent-Appellant.

Pamela Newell Williams for Respondent-Appellee Guardian ad Litem.

STEPHENS, Judge.

Respondent, the biological father of J.W.S. ("the juvenile"), appeals from order entered 7 February 2008 denying his motion to

set aside a juvenile adjudication order entered 2 April 2007 wherein the trial court adjudicated the juvenile neglected and dependent. The overriding issue on appeal is whether the Carteret County District Court ("trial court") had subject matter jurisdiction to enter the adjudication order. For the reasons stated herein, we conclude the trial court lacked subject matter jurisdiction to enter the adjudication order. Accordingly, we reverse the order of the trial court denying Respondent's motion to set aside the 2 April 2007 adjudication order.

I. Facts

On 4 January 2000, the Family Court of Allegany County, New York ("New York court") entered an order granting the juvenile's biological mother temporary custody of the juvenile "pending the criminal court action" whereupon "either party [could then] petition for custody." Sometime during 2001 or 2002, Respondent moved with the juvenile to North Carolina and lived in Onslow County, North Carolina, until at least mid-December 2005.

On 19 January 2006, Respondent filed a complaint in Onslow County District Court for divorce from the juvenile's mother and for custody of the juvenile. The district court granted the divorce but "reserved for later determination" the issue of custody.

On 10 April 2006, Respondent signed a one-year lease for an apartment in Emerald Isle, North Carolina. During April of 2006, Respondent lived in this apartment with Wayne and Tracey Eggers. On 20 April 2006, the Eggers went to the Emerald Isle police station and reported to Lieutenant James Reese that Respondent had assaulted the juvenile. Lieutenant Reese contacted the Carteret County Department of Social Services ("DSS" or "Petitioner") and relayed the information concerning the possible assault on the juvenile. That evening, Lieutenant Reese responded to a call from the Eggers who alleged that Respondent was threatening them. Lieutenant Reese went to the apartment and subsequently arrested Respondent for communicating threats. A DSS social worker also went to the apartment that night and, after interviewing the Eggers, believed the juvenile to be abused, neglected, and dependent.

The trial court, via an after-hours magistrate, authorized Petitioner to take nonsecure custody of the juvenile on 20 April 2006 based on allegations of abuse, neglect, and dependency contained in

a juvenile petition filed by DSS on 21 April 2006.[1] Nonsecure custody was maintained with Petitioner by order entered 24 April 2006. Petitioner filed a second juvenile petition on 25 April 2006. Subsequent nonsecure custody orders maintaining the juvenile in Petitioner's custody were entered 28 April and 19 May 2006. While in the custody of Petitioner over the course of these proceedings, the juvenile has been placed in a series of treatment facilities including the John Umstead Hospital in Butner, North Carolina, the Yahweh Center in Wilmington, North Carolina, Holly Hill Hospital in Raleigh, North Carolina, the Pines Residential Treatment Center in Norfolk, Virginia, and therapeutic foster homes in North Carolina.

On 24 May 2006, Respondent filed a *pro se* motion in the United States District Court for the Eastern District of North Carolina, seeking to remove the proceeding to federal court and claiming to be a permanent resident of Texas. The trial court stayed the proceeding pending the outcome of the federal action. On 26 May 2006, the United States District Court entered an order wherein the court determined that it did not have original jurisdiction over the matter and remanded the case to the District Court of Carteret County. By order entered 26 May 2006, the trial court continued nonsecure custody of the juvenile with Petitioner.

On 15 August 2006, Respondent filed an answer and moved to dismiss the petitions for failure to state a claim, lack of personal jurisdiction, and lack of subject matter jurisdiction. Respondent's motion to dismiss these two petitions was heard on 22 September 2006, and the trial court denied the motion by order entered 16 November 2006.

Petitioner filed a third juvenile petition on 16 August 2006. On 23 October 2006, Respondent filed three responses and motions to dismiss the petition for failure to state a claim, lack of personal jurisdiction, and lack of subject matter jurisdiction wherein Respondent claimed that he and the juvenile had been residents of Texas since February 2006. On 31 October 2006, Petitioner filed a response opposing Respondent's motions to dismiss, contending the trial court had temporary emergency jurisdiction pursuant to N.C. Gen. Stat. § 50A-204(a) to make the initial decision as to nonsecure custody. Petitioner's response included a copy of the 4 January 2000

1. The nonsecure custody order was signed by Jerry Guthrie, Judge's designee, by telephonic approval at 11:25 p.m. on 20 April 2006. The juvenile petition alleging the juvenile to be abused, neglected, and dependent was filed with the court the following morning after the court opened for business.

order from the New York court granting the juvenile's mother temporary custody over the juvenile.

After a hearing on 8 December 2006, the trial court suspended Respondent's visitation with the juvenile. On 22 January 2007, Judge Andy Morales of the District Court of Bexar County, Texas, issued an *ex parte* temporary restraining order to keep the juvenile's mother from removing the juvenile from Respondent or any other location. The Texas court further ordered a law enforcement officer to remove the juvenile from the Pines Treatment Center in Virginia and to deliver him to Respondent.

Upon receiving notice of the Texas order, the trial court issued an order to show cause as to why Respondent should not be held in contempt of court for attempting to thwart the trial court's custody order. The trial court drafted a letter to Judge Morales and sent the letter, along with a copy of the show cause order, to the Texas court requesting to discuss the issue of jurisdiction between the two courts. Judge Morales never responded to this request.

Following a hearing on 17 November 2006, the trial court entered an order on 9 February 2007 denying Respondent's 23 October 2006 motions to dismiss. The trial court concluded that it had temporary, emergency jurisdiction over the matter pursuant to N.C. Gen. Stat. § 50A-204(a) in that the juvenile

> was present in North Carolina at the time of initiation of these proceedings and that [DSS] properly filed abuse/neglect/dependency petitions and requested nonsecure custody to protect [the juvenile] from alleged mistreatment and abuse.

The trial court then concluded that "New York made an initial child-custody determination in January 2000, and the child's mother . . . continues to reside in New York" so, pursuant to N.C. Gen. Stat. § 50A-204(d), the trial court would

> immediately communicate with the court in Allegany County, New York to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of this Court's orders.

On 16 February 2007, the Texas court, Judge John D. Gabriel, Jr., presiding, entered a temporary order declaring that it had jurisdiction over the case. It further stated that the juvenile had been illegally restrained in Virginia and ordered the Pines Treatment Center to "immediately surrender" the juvenile to Respondent.

Respondent filed a petition in the Circuit Court of the City of Norfolk, Virginia, seeking enforcement of the Texas court's orders. However, after consultation with the trial court, the Virginia court issued a final order on 23 February 2007 refusing to enforce the Texas orders.

In March 2007, the trial court spoke with Judge Gabriel of the Texas court. Upon receiving information regarding the background and history of the case in North Carolina, Judge Gabriel agreed that North Carolina rather than Texas was the appropriate jurisdiction and informed the trial court that he would issue an order dismissing the Texas action at the next scheduled Texas court hearing. The context of this communication was shared at the scheduled court hearing on 9 March 2007 but there is no evidence that such order was ever entered.

On 28 March 2007, Judge Janet Littlejohn of the Texas court issued an Order and Writ of Attachment expressly holding that Texas had jurisdiction over the juvenile's custody and ordering the child to be returned to the custody of Respondent.

On 2 April 2007, the trial court entered an order adjudicating the juvenile neglected and dependent. The trial court found that the North Carolina court had properly exercised emergency jurisdiction pursuant to N.C. Gen. Stat. § 50A-204 and that "[s]ince the issuance of the [trial court's] decision denying the motions to dismiss, the State of New York has not opted to exercise jurisdiction[.]" The court concluded:

> Whereas the State of New York has opted to not exercise jurisdiction, whereas the subject juvenile is in the legal custody of [DSS] and has been for approximately eleven (11) months, and whereas this Court has now communicated with multiple States on the issue of jurisdiction and the States have reached the mutual conclusion that it is in [the juvenile's] best interests for North Carolina to continue to exercise jurisdiction, with this Court being the most appropriate forum, this Court shall continue to exercise jurisdiction over this matter.

On 2 May 2007, Judge Littlejohn entered a Final Order in the District Court of Bexar County, Texas. Even though the juvenile had been in DSS custody since 20 April 2006, Judge Littlejohn found that "Texas is currently the 'Home State' of [the juvenile] and has so been since February 1, 2006[,]" and that Texas had jurisdiction over the

custody of the juvenile. The order appointed Respondent to be the Sole Managing Conservator of the juvenile.

On 4 May 2007, the trial court held a combined dispositional and permanency planning hearing and entered an order wherein reunification with Respondent with a concurrent plan of adoption was ordered as the primary permanent plan for the juvenile. After a hearing on 13 July 2007, the trial court entered a permanency planning and review order on 24 July 2007 changing the juvenile's permanent plan to adoption and ordering Petitioner to move for termination of parental rights within sixty days.

On 21 August 2007, Petitioner filed a motion to terminate the parental rights of both Respondent and the juvenile's mother based on the grounds set forth in N.C. Gen. Stat. §§ 7B-1111(a)(1),(2),(6) and (7) (2007). Respondent filed a response to the motion on 16 November 2007, denying that a basis to terminate his parental rights to the juvenile existed and further arguing, *inter alia*, that the trial court lacked subject matter jurisdiction over the proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").

On 28 December 2007, Respondent filed a motion to set aside the 2 April 2007 adjudication order pursuant to North Carolina Rules of Civil Procedure 60(b)(4) and (6), again arguing that the trial court lacked subject matter jurisdiction over the adjudication proceedings under the UCCJEA. By order entered 7 February 2008, the trial court denied Respondent's motion. On 10 March 2008, Respondent filed notice of appeal from the order denying his motion to set aside.

II. Discussion

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b), "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [if] . . . [t]he judgment is void [or for] . . . [a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rules 60(b)(4) and (6) (2007). Appellate review of a trial court's denial of a Rule 60(b) motion is for abuse of discretion. *State ex rel. Davis v. Adams*, 153 N.C. App. 512, 571 S.E.2d 238 (2002). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Id.* at 515, 571 S.E.2d at 240 (quotation marks and citations omitted).

Subject matter jurisdiction is the threshold requirement for a court to hear and adjudicate a controversy brought before it. *In re McKinney*, 158 N.C. App. 441, 581 S.E.2d 793 (2003). Although the North Carolina Juvenile Code grants the district courts of North Carolina "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent[,]" N.C. Gen. Stat. § 7B-200(a) (2007), the jurisdictional requirements of the UCCJEA and the Parental Kidnapping Prevention Act ("PKPA") must also be satisfied for a court to have authority to adjudicate petitions filed pursuant to our juvenile code.[2] *In re Brode*, 151 N.C. App. 690, 566 S.E.2d 858 (2002). The UCCJEA, codified at Chapter 50A of the North Carolina General Statutes, is designed to "provide[] a uniform set of jurisdictional rules and guidelines for the national enforcement of child custody orders[.]" *In re Q.V.*, 164 N.C. App. 737, 739, 596 S.E.2d 867, 869, *cert. denied*, 358 N.C. 732, 601 S.E.2d 859 (2004).

The first provision of the UCCJEA, N.C. Gen. Stat. § 50A-201 (2007), addresses the jurisdictional requirements for initial child-custody determinations. An "initial determination" is defined as "the first child-custody determination concerning a particular child." N.C. Gen. Stat. § 50A-102(8) (2007). In the present case, a custody order regarding the juvenile was entered on 4 January 2000 by the New York court. Thus, the North Carolina trial court did not have jurisdiction under N.C. Gen. Stat. § 50A-201 to enter the adjudication order.

The third provision of the UCCJEA, N.C. Gen. Stat. § 50A-203 (2007), addresses the jurisdictional requirements for the modification of child-custody determinations. A "modification" is defined as "a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination." N.C. Gen. Stat. § 50A-102(11) (2007). A North Carolina court cannot modify a child-custody determination made by another state unless two requirements are met. N.C. Gen. Stat. § 50A-203. First, the North Carolina court must have jurisdiction to make an initial determination. *Id.* N.C. Gen. Stat. § 50A-201(a)(1) provides for jurisdiction if North Carolina is the "home state of the child on the date of the commencement of the proceeding[.]" N.C. Gen. Stat. § 50A-201(a)(1) (2007). "Home state" is defined as

2. Because we conclude the trial court lacked subject matter jurisdiction under the UCCJEA, we need not address whether the trial court lacked subject matter jurisdiction under the PKPA.

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. . . . A period of temporary absence of any of the mentioned persons is part of the period.

N.C. Gen. Stat. § 50A-102(7) (2007). In this case, juvenile petitions were filed 21 and 25 April and 16 August 2006. Respondent moved with the juvenile from New York to North Carolina in approximately 2002. They remained in North Carolina until approximately January 2006, when they began traveling back and forth between Texas and North Carolina. Respondent signed a one-year lease on a North Carolina residence in April 2006, which he used as his home address. As Respondent's temporary absences from North Carolina during the months of January through April are part of the required period of residency, N.C. Gen. Stat. § 50A-102(7), the home state requirement was satisfied here.

Even where North Carolina is the home state of the child, however, in order for a North Carolina court to modify a custody determination of another state, one of the following requirements must also be met:

> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203.

A. Jurisdiction Under N.C. Gen. Stat. § 50A-203(1)

1. Exclusive, Continuing Jurisdiction Under N.C. Gen. Stat. § 50A-202

The court of the other state would no longer have exclusive, continuing jurisdiction under N.C. Gen. Stat. § 50A-202 if:

> (1) [that court] determines that . . . the child, the child's parents, and any person acting as a parent [no longer have] a significant connection with this State and that substantial evidence is no

> longer available in this State concerning the child's care, protection, training, and personal relationship; or
>
> (2) [that court] or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

N.C. Gen. Stat. § 50A-202(a).

"The official comment to [subsection (1)] clarifies that 'the original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction.' Official Comment to N.C.G.S. § 50A-202." *In re N.R.M.*, 165 N.C. App. 294, 300, 598 S.E.2d 147, 151 (2004). In the case before this Court, although the trial court found that "the State of New York has not opted to exercise jurisdiction[,]" there is no order from the New York court in the record before us stating that New York no longer has jurisdiction. Moreover, while the record contains a letter from the New York court stating that "[i]t appears that North Carolina has exclusive and continuing jurisdiction over the custody of [the juvenile,]" this letter was faxed on 19 December 2007, more than eight months after the 2 April 2007 adjudication order was entered. Furthermore, the letter was directed to DSS in response to DSS's inquiry into a matrimonial action in the state of New York and was not an order directed to the trial court in the juvenile matter in this case. Accordingly, the New York court did not lose jurisdiction under N.C. Gen. Stat. § 50A-202(a)(1).

Furthermore, at the time of the petition herein, the juvenile's mother continued to reside in New York. Thus, New York did not lose continuing jurisdiction based on N.C. Gen. Stat. § 50A-202(a)(2).

2. More Convenient Forum Under N.C. Gen. Stat. § 50A-207

Under N.C. Gen. Stat. § 50A-203(1), New York could relinquish jurisdiction to North Carolina if the New York court determined that a North Carolina court would be a more convenient forum under N.C. Gen. Stat. § 50A-207. Again, however, there is no order from the New York court in the record showing that New York made such a determination.

Accordingly, neither method of obtaining jurisdiction under N.C. Gen. Stat. § 50A-203(1) is satisfied.

B. Jurisdiction Under
N.C. Gen. Stat. § 50A-203(2)

N.C. Gen. Stat. § 50A-203(2) provides for jurisdiction if either the issuing state or the state attempting to modify the order determines that the child, the child's parents, and any person acting as a parent have left the issuing state. In the case before this Court, at the time of the petition, the record shows the juvenile's mother was residing in New York. Because the juvenile's mother continued to live in New York, N.C. Gen. Stat. § 50A-203(2) was not satisfied even though Respondent and the juvenile had left New York and moved to North Carolina.

Consequently, the trial court did not have jurisdiction to enter the adjudication order under N.C. Gen. Stat. § 50A-203(1) or (2).

C. Temporary Emergency Jurisdiction
Under N.C. Gen. Stat. § 50A-204

A North Carolina court that does not have jurisdiction under N.C. Gen. Stat. §§ 50A-201 or 50A-203 has temporary emergency jurisdiction

> if the child is present in this State and . . . it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

N.C. Gen. Stat. § 50A-204(a). The statute further provides:

> (c) If there is a previous child-custody determination that is entitled to be enforced under this Article, . . . any order issued by a court of this State under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction . . . . The order issued in this State remains in effect until an order is obtained from the other state within the period specified or the period expires.
>
> (d) A court of this State which has been asked to make a child-custody determination under this section, upon being informed that a . . . child-custody determination has been made by [] a court of [another] state . . . shall immediately communicate with the [other court].

N.C. Gen. Stat. §§ 50A-204(c)-(d) (2007). Additionally, a record of the trial court's communication mandated by N.C. Gen. Stat.

§ 50A-204(d) must be made and the parties must be promptly informed of the communication and granted access to the record. N.C. Gen. Stat. § 50A-110 (2007).

Here, the juvenile was present in North Carolina when the nonsecure custody orders were entered and such orders were based on evidence gathered by DSS that the juvenile was abused, neglected, and dependent. The trial court, therefore, had authority under N.C. Gen. Stat. § 50A-204(a) to enter the temporary nonsecure custody orders.

However, the trial court became aware of the New York custody order on 17 November 2006 at the hearing on Respondent's motions to dismiss the 16 August 2006 juvenile petition. In the 9 February 2007 order denying Respondent's motions to dismiss, the trial court concluded that although "New York made an initial child-custody determination in January 2000, and the child's mother . . . continues to reside in New York[,]" the trial court had "temporary, emergency jurisdiction over this matter and the parties pursuant to [N.C. Gen. Stat. § 50A-204.]" The trial court then concluded that, pursuant to N.C. Gen. Stat. § 50A-204(d), it would "immediately communicate with the court in Allegany County, New York to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of this Court's orders."

The trial court then held an adjudicatory hearing on 26 January 2007 and 9 March 2007. In its 2 April 2007 adjudication order, the trial court found, *inter alia*:

> Since the issuance of the [trial court's] decision denying the motions to dismiss, the State of New York has not opted to exercise jurisdiction . . . .
>
> . . . .
>
> Whereas the State of New York has opted not to exercise jurisdiction . . . this Court shall continue to exercise jurisdiction over this matter.

However, there is no record evidence that the trial court ever communicated with the New York court, as mandated by N.C. Gen. Stat. §§ 50A-204(d) and 50A-110 or as ordered by the trial court on 9 February 2007, to determine if the New York court "opted not to exercise jurisdiction[.]"

In its order denying Respondent's motion to set aside the adjudication order, the trial court found, *inter alia*:

1. On January 4, 2000, in the Family Court of Allegany County, New York (hereinafter "New York Court"), [the juvenile's] mother [] was granted temporary custody of [the juvenile] "pending the criminal court action. Thereafter, either party may petition for custody." (Order dated January 4, 2000, Docket No. V-2-00, New York Court). [The juvenile's mother] continues to reside in New York.

2. There are no other known proceedings pertaining to [the juvenile's] custody that occurred in the State of New York, and there is no evidence that the January 4, 2000 order is currently enforceable. Further, it appears from this Court's record that [Respondent] left New York with [the juvenile] a couple of years later—the exact date is unknown.

. . . .

26. At the conclusion of the hearing [on Respondent's motions to dismiss the juvenile petitions], this Court found *inter alia* that: (1) this Court had temporary, emergency jurisdiction pursuant to §50A-204; (2) [Respondent] resided in North Carolina with [the juvenile] continuously for four to five years prior to the petitions having been filed, and moved between Texas and North Carolina from February 2006 through April 2006. This Court entered an order consistent with its findings, directing that it would communicate with the State of New York to resolve the emergency and determine a period for the duration of this Court's orders.

. . . .

58. In December 2007, after receiving information that [Respondent] had filed a matrimonial action in the State of New York, the [Carteret County Department of Social Services ("CCDSS")] attorney contacted the New York Court. The CCDSS attorney filed the New York Court's December 19, 2007 faxed letter of response on December 19, 2007. That response states in pertinent part, "It appears that North Carolina has exclusive and continuing jurisdiction over the custody of [the juvenile]."

While there is evidence in the record of the trial court's communications with the Texas and Virginia courts regarding jurisdictional conflicts, the record is devoid of evidence that the trial court ever communicated with the New York court to determine if the New York court wished to exercise jurisdiction, to determine whether "the January 4, 2000 order is currently enforceable[,]" or "to . . . determine a period for the duration of [the trial court's] orders."

In *In re Malone*, 129 N.C. App. 338, 498 S.E.2d 836 (1998),[3] where a Florida court had previously exercised jurisdiction over the custody of the juvenile at issue, this Court determined that the trial court had emergency jurisdiction to enter a temporary nonsecure custody order, but at the point at which the order was entered, " 'the trial court was required to defer any further proceedings in the matter pending a response from [Florida] as to whether that state was willing to assume jurisdiction to resolve the issues of abuse[.]' " *Id.* at 344, 498 S.E.2d at 840 (quoting *In re Van Kooten*, 126 N.C. App. 764, 771, 487 S.E.2d 160, 164 (1997)). Although the Durham County Department of Social Services ("DCDSS") had contacted the Florida Department of Human Rehabilitative Services ("HRS") as well as the Sheriff's Department in Collier County, and HRS indicated to DSS that it had no jurisdiction over the child since she no longer lived in Florida, this Court held that

> this is not sufficient contact under the mandate of our state statute that requires the *trial court* to directly contact the Florida court to determine if Florida is willing to exercise jurisdiction in this case. . . . The *trial court* must make the contact with the Florida court.

Id. at 345, 498 S.E.2d at 840 (emphasis added). Accordingly, this Court reversed and remanded to the trial court "to directly contact the appropriate Florida court to determine if Florida is willing to assume jurisdiction to resolve the issue." *Id.*

In this case, although a DSS attorney contacted the New York court more than eight months after the adjudication order had been entered, and the response from the New York court indicated that North Carolina had jurisdiction over the custody of the juvenile, "this is not sufficient contact under the mandate of our state statute that requires the trial court to directly contact the [New York] court to

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3. This case applied N.C. Gen. Stat. §§ 50A-6(b) and (c) (1989) of the former Uniform Child Custody Jurisdiction Act. Section (b) stated that before hearing a petition for child custody, the court shall check the pleadings and other available resources to determine if any such proceedings are pending in another state and that "[i]f the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state." N.C. Gen. Stat. § 50A-6(b).

Section (c) mandated that when a trial court hearing a child custody matter is informed that a proceeding concerning custody of the child was pending in another state before the trial court assumed jurisdiction, it "shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum[.]" N.C. Gen. Stat. § 50A-6(c).

determine if [New York] is willing to exercise jurisdiction in this case." *Id. See* N.C. Gen. Stat. § 50A-204(d). "The fact that DSS made efforts to contact [the New York court] does not meet the requirement of the statute. The trial court must make the contact with the [New York] court." *Malone*, 129 N.C. App. at 345, 498 S.E.2d at 840.

Petitioners attempt to distinguish the present case from *Malone* by asserting that "the State of New York's custodial order was no longer an enforceable order." However, there is no record evidence that the 4 January 2000 temporary custody determination made by the New York court was not "currently enforceable." While the order granted custody of the child to the child's mother "pending the criminal court action[,]" there is no evidence showing that the criminal action ever concluded or that the order expired for any other reason.

Accordingly, while the trial court had temporary jurisdiction to enter the nonsecure custody orders, the trial court did not have jurisdiction, exclusive or temporary, to enter the juvenile adjudication order. We thus reverse the trial court's order entered 7 February 2008 denying Respondent's motion to set aside the juvenile adjudication order entered 2 April 2007. As a result of this decision, we need not address Respondent's remaining arguments on appeal.

REVERSED.

Judges McCULLOUGH and JACKSON concur.

IN THE MATTER OF: I.T.P-L., A MINOR CHILD

No. COA08-622

(Filed 16 December 2008)

1. Appeal and Error— appealability—failure to sign initial notice of appeal—untimely amended notice of appeal—writ of certiorari

The motions filed on 26 June 2008 by juvenile's guardian ad litem for the juvenile and on 14 July 2008 by petitioner seeking to dismiss respondents' appeals for failure to abide by N.C. R. App. P. 3A are denied because: (1) although neither respondent signed

the initial notice of appeal and the amended notices of appeal were filed outside the thirty-day deadline imposed by N.C.G.S. § 7B-1001(b), the Court of Appeals exercised its discretion under N.C. R. App. P. 21(a)(1) to allow respondent parents' petitions for writ of certiorari to permit consideration of their appeal on the merits so as to avoid penalizing respondents for their attorneys' errors; and (2) DSS timely filed its notice of appeal on 31 March 2008 prior to the 5 April 2008 deadline imposed by N.C.G.S. § 7B-1001(b), and thus DSS's petition for writ of certiorari was unnecessary and dismissed.

2. Termination of Parental Rights— subject matter jurisdiction—failure to issue summons naming juvenile as respondent

The trial court had subject matter jurisdiction over the termination of parental rights case even though no summons was issued naming the juvenile as a respondent as required by N.C. G.S. § 7B-1106 because: (1) even if a summons does not name the juvenile as a respondent, the trial court will retain subject matter jurisdiction over the termination proceeding where the caption of an issued summons refers to the juvenile by name and a designated representative of the juvenile certifies the juvenile was served with the petition; and (2) the record showed the caption of the summons had the juvenile's name and also reflected that copies of the summons and petition were served on the juvenile's guardian ad litem.

3. Termination of Parental Rights— grounds—felony assault

The trial court did not err by concluding that grounds existed to terminate respondent mother's parental rights based on a finding that the parent has committed a felony assault that resulted in serious bodily injury to the child, another child of the parent, or other child residing in the home under N.C.G.S. § 7B-1111(a)(8) because: (1) respondent did not assign error to the findings of fact, and thus they are presumed to be supported by competent evidence and are binding on appeal; and (2) respondent did not assign error to the pertinent conclusion of law thus precluding its review.

4. Termination of Parental Rights— best interests of child—abuse of discretion standard

The trial court did not abuse its discretion by determining that it was in the best interest of the child to terminate respond-

ent mother's parental rights because of: (1) respondent's violent and inconsistent behavior, inability to parent appropriately, and inability to follow the recommendations of medical personnel to improve her mental health and parenting abilities; and (2) the minor child's young age, the fact that she has been in DSS custody almost her whole life, and her need for permanency.

5. Termination of Parental Rights— appointment of guardian ad litem for parent—timeliness

The trial court did not err in a termination of parental rights case by allegedly failing to timely appoint respondent mother a guardian ad litem under N.C.G.S. § 7B-1101.1(c) because: (1) the trial court appointed a guardian ad litem for respondent seventeen days after the petition for termination was filed and more than three months before the first hearing in the termination proceeding took place; and (2) although respondent contends N.C.G.S. § 7B-1101.1(c) required the trial court to have appointed her a guardian ad litem when the minor child was first taken into DSS custody, the statute only mandates timely appointment of a guardian ad litem during a termination of parental rights proceeding.

6. Appeal and Error— preservation of issues—failure to argue—failure to cite legal authority

The assignments of error that respondent father failed to argue or support with legal authority are deemed abandoned under N.C. R. App. P. 28(b)(6).

7. Termination of Parental Rights— placement of minor child—legal and physical custody vested in DSS

The trial court lacked jurisdiction to place the minor child in a termination of parental rights case, and the trial court's order placing her with her maternal grandmother must be vacated, because: (1) the minor child was in the custody of DSS when the trial court terminated respondents' parental rights, and thus legal and physical custody of the minor child vested in DSS upon the termination; and (2) when legal and physical custody of the minor child vested in DSS, DSS was then authorized to proceed in its discretion with placing the minor child.

Appeal by Petitioner and Respondents from order entered 28 February 2008 by Judge Carol Jones Wilson in Duplin County District Court. Heard in the Court of Appeals 15 September 2008.

Elizabeth Myrick Boone for Petitioner Duplin County Department of Social Services.

Winifred H. Dillon for Respondent-Father.

Patricia Kay Gibbons for Respondent-Mother.

Pamela Newell Williams for the Juvenile's Guardian as Litem.

STEPHENS, Judge.

Respondent-Mother ("Mother") and Respondent-Father ("Father") (collectively "Respondents") are the biological parents of I.T.P-L. ("Ivy"),[1] born in 2006. Mother has four other children under the age of seven who have been removed from her care due to abuse, neglect, and dependency. Father is the biological father of two of the four children, and the children have been removed from his care as well. In 2004, a report prepared by Sampson Regional Hospital indicated that two of the children had numerous lacerations, marks, and bruises at various stages of healing. The hospital staff also indicated that Respondents' report of how the injuries occurred was not consistent with the injuries. In October 2005, Respondents entered Alford pleas[2] to felony child abuse and were placed on three years supervised probation after having served ten months in jail. Under the terms of the pleas, Mother was not to have contact with minor children unless agreed to by the Duplin County Department of Social Services ("DSS") and Father was not to reside in any home with a minor child. The maternal grandmother has guardianship of all four of the children.

In violation of Father's probation, Respondents had been living together with Ivy since her birth.[3] On 25 September 2006, when Ivy was two months old, Mother contacted DSS because of a hostile verbal altercation with Father. Mother advised DSS that Father had taken Ivy from her at night without milk, blankets, or supplies. When DSS responded to Mother's home, Father announced that he was leaving the residence with Ivy. After a lengthy standoff, Father agreed to leave Ivy with Mother.

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1. A pseudonym has been used to protect the identity of the child.

2. "[A]n 'Alford plea' constitutes a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea." *State v. Alston*, 139 N.C. App. 787, 792, 534 S.E.2d 666, 669 (2000) (quotation marks and citation omitted).

3. The record is silent as to whether Mother had obtained permission from DSS to have contact with Ivy.

On 26 September 2006, DSS filed a juvenile petition alleging that Ivy was neglected and dependent, and the trial court entered a nonsecure custody order granting legal and physical custody of Ivy to DSS. Although DSS attempted to place Ivy with the maternal grandmother, who was present during the altercation the previous day, the maternal grandmother refused as she "had her hands full" with Mother's four other children. DSS placed Ivy in foster care. By orders entered 20 October and 1 November 2006, the trial court continued nonsecure custody of Ivy with DSS.

On 26 November 2006, the trial court adjudicated Ivy neglected and dependent. The order placed the juvenile in the legal custody of DSS, giving DSS "full responsibility for the placement and care of the juvenile." Respondents were ordered to obtain mental health assessments and follow any recommendations, complete anger management classes through U-Care, comply with their probation judgments, and have no visitation with Ivy.

Based on a mental health evaluation performed on Mother by Michael B. Jones of Tar Heel Human Services in January 2007, Mother was diagnosed with Antisocial Personality Disorder and mild mental retardation. The report recommended that she be involved in outpatient therapy and indicated that "the Court System and Department of Social Services should consider the overwhelming evidence questioning [Mother's] need for assistance in parenting or ability to parent." Mother submitted to a second evaluation with Scott Allen of Waynesborough Psychological Services in April 2007. The report from that evaluation concurred with the above-stated observation and concluded that "it is unlikely that [Mother] will be capable of providing a safe and healthy environment for her children."

In a review order entered 8 May 2007, the trial court found, *inter alia*, that Respondents had moved but had not advised DSS of their new address, had attended some anger management classes but had not completed them, had not contacted DSS or attended appointments at DSS since January 2007, and had not contacted their probation officers or paid their probation fees. The trial court continued custody with DSS.

On 12 May 2007, Respondents got into an argument with each other. Mother put a pan of grease on the stove, heated it up, and threw the hot grease on Father. He was transported to Duplin General Hospital with burns to the left side of his body and was later transferred to the burn unit at UNC Hospitals in Chapel Hill. Mother was

arrested and placed in the Duplin County Jail. She pled guilty and received a prayer for judgment.

At a permanency planning hearing on 25 July 2007, the trial court found, *inter alia*, that Respondents had not completed anger management classes and, despite Mother's attack, were still residing together. Reunification efforts with Respondents were terminated and the permanent plan for Ivy was changed from reunification to adoption. Custody of Ivy remained with DSS, and Ivy remained in foster care.

On 24 August 2007, DSS filed a petition to terminate Respondents' parental rights to Ivy. On motion by DSS, a guardian *ad litem* was appointed for Mother on 10 September 2007.

After a hearing on 6 February 2008, the trial court entered an order on 28 February 2008, terminating Respondents' parental rights to Ivy. The trial court found and concluded that grounds existed to terminate Respondents' parental rights based on neglect under N.C. Gen. Stat. § 7B-1111(a)(1), placement of the juvenile with DSS for a continuous period of six months preceding the filing of the petition to terminate while willfully failing to pay a reasonable portion of the costs for the minor child under N.C. Gen. Stat. § 7B-1111(a)(3), and commission of a felony assault that resulted in serious bodily injury to another child of the parent or other child residing in the home under N.C. Gen. Stat. § 7B-1111(a)(8). The trial court then found and concluded that it would be in the child's best interests for Respondents' parental rights to be terminated. The order granted legal and physical custody of Ivy to DSS but ordered the juvenile be placed with her maternal grandmother.

On 22 February 2008, Petitioner filed a motion to set aside and stay the portion of the trial court's order placing the juvenile with her maternal grandmother. The trial court filed a temporary stay of that portion of its order on 6 March 2008, but dissolved the stay by order entered 25 April 2008. Petitioner and Respondents appeal from the trial court's termination order.

I. Motions to Dismiss

[1] We first address two motions, one filed 26 June 2008 by the juvenile's Guardian *ad Litem* for the juvenile and one filed 14 July 2008 by Petitioner, seeking to dismiss Respondents' appeals for failure to abide by Rule 3A of our Rules of Appellate Procedure. In response to the motions to dismiss, Respondents filed petitions for writ of certiorari.

Rule 3A provides:

> Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required.

N.C. R. App. P. 3A(a). Pursuant to N.C. Gen. Stat. § 7B-1001(b), "notice of appeal shall be given in writing . . . and shall be made within 30 days after entry and service of the order" from which the party is appealing. N.C. Gen. Stat. § 7B-1001(b) (2007). "It is well established that '[f]ailure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed.' " *In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538, 538 (2004) (quoting *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988)). Rule 3A further states, "[i]f the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal." N.C. R. App. P. 3A(a). The signature requirement of Rule 3A provides record evidence that the appellant desired to pursue the appeal, understood the nature of the appeal, and cooperated with counsel in filing the notice of appeal. *See Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 536 S.E.2d 349 (2000) (noting that defendants' counsel's signature on a notice of appeal from an order granting sanctions indicated participation in the appeal).

Here, the trial court entered its order terminating Respondents' parental rights to Ivy on 28 February 2008, and the order was served on Respondents by depositing a copy in the United States mail on 6 March 2008. Accordingly, the deadline for filing notice of appeal from the trial court's order was 5 April 2008. Respondents both filed notices of appeal on 26 March 2008, within the statutory period. However, neither Respondent signed the initial notice of appeal. Respondents filed amended notices of appeal bearing their signatures, Father on 8 April 2008 and Mother on 25 April 2008, outside the thirty-day deadline imposed by N.C. Gen. Stat. § 7B-1001(b). As proper and timely notice of appeal is jurisdictional, we must dismiss Respondents' appeal. *A.L.*, 166 N.C. App. 276, 601 S.E.2d 538.

Nevertheless, as the timely, albeit incomplete, notices of appeal together with the amended notices of appeal provide record evidence that Respondents desired to pursue the appeal, understood the nature of the appeal, and cooperated with counsel in filing the notice of appeal, we exercise our discretion pursuant to N.C. R. App. P. 21(a)(1) and allow Respondents' petitions for writ of certiorari to permit consideration of their appeals on the merits so as to avoid penalizing Respondents for their attorneys' errors.[4]

On 14 July 2008, DSS, concerned its notice of appeal might have been untimely, filed a petition for writ of certiorari in this matter. However, DSS filed its notice of appeal on 31 March 2008, prior to the 5 April 2008 deadline imposed by N.C. Gen. Stat. § 7B-1001(b). As DSS timely filed notice of appeal, DSS's petition for writ of certiorari is unnecessary and is thus dismissed.

II. Subject Matter Jurisdiction

[2] Respondents first argue that the trial court lacked subject matter jurisdiction over the termination proceedings because no summons was issued naming the juvenile as a respondent as required by N.C. Gen. Stat. § 7B-1106.

This Court has held that the failure to issue a summons regarding the juvenile in a termination of parental rights proceeding deprives the trial court of subject matter jurisdiction. *In re C.T.*, 182 N.C. App. 472, 643 S.E.2d 23 (2007). This Court later construed *C.T.* to mean that the failure to issue a summons to the juvenile in a termination of parental rights proceeding deprives the trial court of subject matter jurisdiction. *In re S.F.*, 190 N.C. App. 779, 660 S.E.2d 924 (2008) (citing *In re K.A.D.*, 187 N.C. App. 502, 653 S.E.2d 427 (2007)). However, even if a summons does not name the juvenile as a respondent, the trial court will retain subject matter jurisdiction over the termination proceeding where the caption of an issued summons refers to the juvenile by name and a designated representative of the juvenile certifies the juvenile was served with the petition. *See In re J.A.P.*, *I.M.P.*, 189 N.C. App. 683, 659 S.E.2d 14 (2008) (holding that service of the summons on the guardian *ad litem's* attorney advocate combined with naming the juvenile in the caption of the summons is sufficient to establish subject matter jurisdiction).

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4. Additionally, Father's Motion to Amend Petition for Writ of Certiorari to allow him to file a Verification of the original petition, as required by N.C. R. App. P. 21(c), filed 11 July 2008, is hereby allowed.

In *In re S.D.J.*, 192 N.C. App. 478, 665 S.E.2d 818 (2008), this Court concluded that the trial court had subject matter jurisdiction where, even though a summons was not issued to the juvenile, "the captions of the summonses naming the parents as respondents state[d] the name of the juvenile, and the guardians ad litem for the juvenile certified that they accepted service of the petition on the juvenile's behalf[.]" *Id.* at 481, 665 S.E.2d at 821.

In *In re N.C.H.*, *G.D.H.*, *D.G.H.*, 192 N.C. App. 445, 665 S.E.2d 812 (2008), the record contained summonses captioned in the names of the juveniles and certifications from the guardian *ad litem* for the juveniles that she was served with copies of the summonses. This Court found that, in accordance with *J.A.P.* and *S.D.J.*, the trial court had subject matter jurisdiction over the proceedings.

Here, the record before us shows a summons captioned as follows: "In the Matter of: [I.T.P-L.]" The record also reflects that copies of the summons and petition were served on the juvenile's guardian *ad litem*, Patrick Giddeons, at the Duplin County Courthouse. We find no significant distinctions between the facts of this case and those in *S.D.J.* or *N.C.H.* Therefore, in accordance with our holdings in those cases, we conclude the trial court had subject matter jurisdiction over these proceedings. Respondents' arguments are overruled.

III. Grounds for Termination

[3] By various assignments of error, Mother argues the trial court erred in its conclusion that grounds exist to terminate her parental rights.

A termination of parental rights proceeding involves a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001) (citation omitted). The initial stage is the adjudicatory stage whereby the petitioner must establish by clear, cogent, and convincing evidence that at least one of the statutory grounds for termination listed in N.C. Gen. Stat. § 7B-1111 exists. N.C. Gen. Stat. § 7B-1109 (2007); *In re Anderson*, 151 N.C. App. 94, 564 S.E.2d 599 (2002) (citation omitted). A finding of any one of the grounds enumerated in N.C. Gen. Stat. § 7B-1111 will support a trial court's order of termination. *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 630 S.E.2d 673 (2006). Appellate review of a trial court's determination at the adjudicatory stage is whether the trial court's findings of fact are based upon clear, cogent, and convincing evidence and whether the findings support the conclusions of law. *In re Pope*, 144 N.C. App. 32, 547 S.E.2d 153,

aff'd, 354 N.C. 359, 554 S.E.2d 644 (2001). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Furthermore, on appeal, the scope of review is limited to those issues presented by assignment of error in the record on appeal. N.C. R. App. P. 10(a).

The trial court may terminate parental rights upon a finding that the parent "has committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home[.]" N.C. Gen. Stat. § 7B-1111(a)(8).

In its order terminating Mother's parental rights, the trial court made the following findings of fact:

> 19. The respondent mother also took an Alford plea to felony child abuse on or about October 18, 2005, and under the terms of her probation is not to have contact with minor children unless agreed to by the Duplin County Department of Social Services.
>
> . . . .
>
> 22. The respondent mother and the respondent father were incarcerated from January 2005 through October 2005 for felony child abuse. They both continue to deny that they had anything to do with the injuries inflicted on those minor children.

As Mother did not assign error to these findings of fact, the findings are presumed to be supported by competent evidence and are binding on appeal. *Koufman*, 330 N.C. 93, 408 S.E.2d 729. Based on these findings of fact, the trial court concluded, *inter alia*:

> 6. The respondent parents have committed a felony assault that resulted in serious bodily injury to another child in their care.

The trial court's findings of fact support this conclusion of law. Furthermore, Mother did not assign error to this conclusion of law, thus precluding review of the conclusion on appeal. N.C. R. App. P. 10(a). Accordingly, the trial court did not err in determining that grounds exist to terminate Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(8). Having concluded that at least one ground for termination of parental rights exists, we need not address the additional grounds for termination found by the trial court. *In re B.S.D.S.*, 163 N.C. App. 540, 594 S.E.2d 89 (2004). Mother's argument is overruled.

IV. Best Interests of the Child

[4] Mother next argues that the trial court erred in determining that it was in the best interests of the child to terminate Mother's parental rights.

"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." *Anderson*, 151 N.C. App. at 98, 564 S.E.2d at 602 (citation omitted).

> In making this determination, the court shall consider the following:
>
> (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). A trial court's determination at the dispositional stage is reviewed on appeal for abuse of discretion. *Anderson*, 151 N.C. App. 94, 564 S.E.2d 599.

The trial court made the following relevant findings of fact regarding the best interests of the child:

> 14. The minor child has been in foster care since September 26, 2006 due to the respondent mother and the respondent father providing an injurious environment due to a hostile verbal altercation between the parties while the child was in the home. The minor child remains in the same placement she has been in since she was placed in foster care.
>
> . . . .
>
> 21. The respondent mother has a history of mental illness and violent behavior. . . .
>
> . . . .

> 23. The Department of Social Services has a long history with respondent mother dating back to 2001 after her first child was born in regard to abuse and neglect. The respondent mother has a long history of violent behavior and instability.
>
> . . . .
>
> 25. The . . . Department of Social Services had serious concerns about the mental stability of the respondent mother . . . during the investigation. . . .
>
> . . . .
>
> 28. There are numerous concerns about the violent tendencies of the respondent mother and her lack of truthfulness. The respondent mother admitted that she was kicked out of high school for stabbing someone who "bothered her."
>
> . . . .
>
> 47. The conduct of the respondent mother has been such as to demonstrate that she did not provide the degree of care which will promote the healthy and orderly, physical and emotional well-being of the minor child.
>
> . . . .
>
> 49. The minor child is in need of a permanent plan of care at the earliest possible age, which can be obtained only by the severing of the relationship between the child and the respondent mother by termination of parental rights.
>
> . . . .
>
> 54. It is in the best interest of the minor child that the parental rights of [Mother] be terminated.

As Mother did not assign error to findings of fact numbers 21, 28, 47, 49, and 54, these findings are binding on appeal. *Koufman*, 330 N.C. 93, 408 S.E.2d 729. Furthermore, a thorough review of the record reveals that findings of fact numbers 14, 24, and 25 are supported by clear, cogent, and convincing evidence. Based on these findings of fact, the trial court concluded:

> 9. It is in the best interest of the minor child that the parental rights of [Mother] be terminated.

Mother argues that she "presented ample evidence in her statement of facts that she was not neglecting the minor child when the child was removed by DSS" and that "there was no clear, cogent, or convincing evidence of neglect or abuse." However, as stated above, the trial court had sufficient grounds to terminate Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(8), and thus, Mother's argument is misplaced.

Given the abundant evidence of Mother's violent and inconsistent behavior, inability to parent appropriately, and inability to follow the recommendations of medical personnel to improve her mental health and parenting abilities, as well as Ivy's young age, the fact that she has been in DSS custody almost her whole life, and her need for permanency, we conclude the trial court did not abuse its discretion in concluding that it was in Ivy's best interests to terminate Mother's parental rights. Accordingly, Mother's argument is overruled.

V. Appointment of Guardian *ad Litem* for Mother

[5] Mother next argues that the trial court erred in failing to timely appoint her a guardian *ad litem* pursuant to N.C. Gen. Stat. § 7B-1101.1(c).

N.C. Gen. Stat. § 7B-1101.1(c) mandates appointment of a guardian *ad litem* to represent a parent in proceedings to terminate that parent's parental rights

> 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.

N.C. Gen. Stat. § 7B-1101.1(c) (2007).

Here, the petition to terminate Mother's parental rights was filed on 24 August 2007. On 7 September 2007, DSS filed a Motion for Appointment of a Guardian *ad Litem* for Mother and the trial court appointed a guardian *ad litem* for Mother on 10 September 2007. There was no court hearing on the termination proceeding scheduled until 31 October 2007, and that hearing was continued until 12 December 2007. Thus, the trial court appointed a guardian *ad litem* for Mother seventeen days after the petition for termination was filed and more than three months before the first hearing in the termination proceeding took place. Mother argues that N.C. Gen. Stat. § 7B-1101.1(c) required the trial court to have appointed her a guardian *ad litem* when Ivy was first taken into DSS custody. We

disagree. N.C. Gen. Stat. § 7B-1101.1(c) only mandates timely appointment of a guardian *ad litem* during a termination of parental rights proceeding. We thus hold that the trial court complied with the statutory mandate in N.C. Gen. Stat. § 7B-1101.1(c). Mother's argument is overruled.

VI. Assignments of Error Deemed Waived

[6] Father set out twenty-two assignments of error in the Record, but argues only one of these in his brief to this Court.[5] The assignments of error not argued or supported by legal authority in Father's brief are deemed abandoned. N.C. R. App. P. 28(b)(6).

VII. Subject Matter Jurisdiction to Place the Child

[7] Petitioner argues that, pursuant to N.C. Gen. Stat. § 7B-1112, since DSS had legal and physical custody of Ivy when the trial court terminated Respondents' parental rights, DSS retained legal and physical custody of the child and, thus, had the exclusive authority to place the child.

Pursuant to N.C. Gen. Stat. § 7B-1112:

> If the juvenile had been placed in the custody of . . . a county department of social services or licensed child-placing agency and is in the custody of the agency at the time of the filing of the petition or motion, including a petition or motion filed pursuant to G.S. 7B-1103(6), that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of the juvenile as the agency would have acquired had the parent whose rights are terminated released the juvenile to that agency pursuant to the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes, including the right to consent to the adoption of the juvenile.

N.C. Gen. Stat. § 7B-1112(1) (2007). Part 7 of Article 3 of Chapter 48 provides:

> [A] relinquishment by a parent or guardian . . . to place a minor for adoption:
>
> (1) Vests legal and physical custody of the minor in the agency; and

5. This assignment of error has been addressed in this opinion in Section II. Subject Matter Jurisdiction.

> (2) Empowers the agency to place the minor for adoption with a prospective adoptive parent selected in the manner specified in the relinquishment.

N.C. Gen. Stat. § 48-3-705(b) (2007).

In applying the above-stated law in *In re Asbury*, 125 N.C. App. 143, 479 S.E.2d 229 (1997),[6] this Court determined that since the minor child was in the Mecklenburg County Department of Social Services' custody when her parents' rights were terminated, legal and physical custody of the child vested in the Department of Social Services upon the trial court's entering the order of termination. When legal and physical custody of the child vested in the Department of Social Services, the Department of Social Services was then authorized to proceed in its discretion with placing the child for adoption, and the trial court had no authority to interfere with the Department of Social Services' decision to place the child.

Here, DSS was granted nonsecure custody of Ivy on 26 September 2006. The trial court entered orders on 20 October and 1 November 2006 continuing nonsecure custody with DSS. On 26 November 2006, the trial court adjudicated Ivy neglected and dependent and ordered that "legal custody of the juvenile shall remain with [DSS] with [DSS] having full responsibility for the placement and care of the juvenile." Subsequent review and permanency planning orders continued legal custody with DSS. The order terminating Respondents' parental rights found as fact that

> 6. The Petitioner in this action is the duly constituted Duplin County Department of Social Services, which has been given legal and physical custody of the minor pursuant to N.C. Gen. Stat. § 7B-1103(a)(3).

As Ivy was in the custody of DSS when the trial court terminated Respondents' parental rights, legal and physical custody of Ivy vested in DSS upon the termination. Thus, when legal and physical custody of Ivy vested in DSS, DSS was then authorized to proceed in its discretion with placing Ivy. Accordingly, the trial court lacked jurisdiction to place Ivy and the trial court's order placing Ivy with her maternal grandmother must be vacated. In light of this conclusion, we need not reach Petitioner's remaining assignments of error.

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6. *Asbury* applied N.C. Gen. Stat. § 7A-289.33 (1995), the previous version of N.C. Gen. Stat. § 7B-1112. However, the language of the two statutes is identical.

For the above-stated reasons, we

AFFIRM IN PART AND VACATE IN PART.

Judges McCULLOUGH and JACKSON concur.

STATE OF NORTH CAROLINA v. MICHAEL ALLEN FORD

No. COA08-277

(Filed 16 December 2008)

1. Robbery— dangerous weapon—firearm—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon based on alleged insufficient evidence of the use of a firearm during the robbery because: (1) our Supreme Court has held that when a person perpetrates a robbery by brandishing an instrument which appears to be a firearm or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be; (2) the evidence tended to show that two men entered the pertinent store and one was carrying a silver handgun; and (3) no evidence presented demonstrated that a lighter which looked like a handgun found in the coparticipant's yard was used in the robbery, and absent evidence to the contrary, the instrument was presumed to be a firearm or other dangerous weapon.

2. Robbery— dangerous weapon—failure to instruct on lesser-included offense of common law robbery

The trial court did not commit plain error in a robbery with a dangerous weapon case by failing to instruct the jury on the lesser-included offense of common law robbery because: (1) the critical distinction between the two crimes is a defendant's use of a dangerous weapon; (2) the evidence presented tended to show two men entered a convenience store, one of the men pointed a silver handgun at the clerk telling her to open the cash registers, and the men left after taking cash and some cigarettes; (3) police found what appeared to be a silver handgun outside a bedroom

window after the search of the residence of the coparticipant even though it turned out to be some type of lighter; and (4) no evidence was presented establishing the lighter found outside the residence was the handgun used in the robbery.

3. Confessions and Incriminating Statements— motion to suppress statements to detective—failure to file a written motion prior to trial

The trial court did not err in a robbery with a dangerous weapon case by denying defendant's motion to suppress his statement to a detective because: (1) under N.C.G.S. § 15A-975(a), in superior court, defendant may move to suppress evidence only prior to trial unless defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c); and (2) the trial court's findings of fact revealed that defendant failed to file a written motion to suppress his statement prior to trial, the State notified defendant more than 20 working days prior to trial of its intention to use evidence of a statement made to the detective, and defendant had a full and reasonable opportunity to make a motion to suppress before trial.

4. Robbery— dangerous weapon—sufficiency of indictment

The trial court did not err in a robbery with a dangerous weapon case by denying defendant's motion to dismiss based upon an alleged defective indictment because the indictment alleged all of the essential elements of the offense, and defendant could have moved for a bill of particulars if he needed further information.

5. Criminal Law— instruction—flight

The trial court did not err in a robbery with a dangerous weapon case by instructing the jury on defendant's flight because there was sufficient evidence presented such that the jury could consider the evidence with other facts and circumstances in determining whether all of the circumstances amounted to an admission of guilt or reflected a consciousness of guilt.

Judge JACKSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 5 October 2007 by Judge W. Douglas Albright in Richmond County Superior Court. Heard in the Court of Appeals 10 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for defendant-appellant.

BRYANT, Judge.

Defendant Michael A. Ford appeals from a judgment and commitment entered after a jury found him guilty of robbery with a firearm in violation of North Carolina General Statute section 14-87. For the reasons set out below, we affirm.

The evidence presented at trial tended to show that on the evening of 15 March 2006, two men entered the ALCO convenience store on Highway 74 in Rockingham, North Carolina. The men wore hooded sweatshirts tied around their faces and toboggans. One of the men wore a dark blue bandana around his neck. The other pointed a silver gun at a store clerk while both men walked behind the counter to the cash registers. On demand, the clerk opened the registers, and the robber with the gun took the money. The robber with the bandana took Newport cigarettes. The robbers left, and the clerk saw two cars leave the ALCO parking lot. The second car, a clerk described as a new model silver-blue Mustang.

That evening, at approximately 9:45 p.m., off-duty police officer Odom of the Rockingham Police Department was driving past the ALCO in a blue 2006 GT Mustang. He observed two people leaving the ALCO wearing all black with toboggans over their faces and a clerk running to lock the doors behind them. Officer Odom suspected a robbery had taken place and watched as the suspects got into a small burgundy car. The officer then followed the suspects after they exited the ALCO parking lot until they turned onto a dead end street at which time he blocked the road and called for backup. Police dispatch confirmed that an armed robbery had occurred at the ALCO.

Officer Odom later testified that when the suspects left the ALCO parking lot "the vehicle was traveling at a high rate of speed." The speed limit was 45 miles per hour, but the suspects were traveling approximately 75 to 80 miles per hour. The officer lost sight of the suspects when they turned from the road and drove behind a residence.

A short time later, the vehicle emerged from behind the residence, the driver looked at the Mustang, gave a peace sign, and drove

past Officer Odom. Officer Odom observed only one person in the car. On-duty police officers then stopped defendant within sight of the off-duty officer. The arresting officer conducted a search of the stopped vehicle and found $177.00 in the driver's side door, a toboggan and bandanna on the passenger side front seat, and several packs of Newport cigarettes in the back seat. A call was then placed to Detective Mark Baysek.

At trial, Det. Baysek testified that he read defendant his Miranda rights and defendant refused to sign a written waiver of those rights. But, defendant did not request counsel and agreed to answer Det. Baysek's questions.

Over objection, Det. Baysek testified to the content of the conversation.

> Det. Baysek: I asked [defendant] had he been at the 74 west ALCO.
>
> . . .
>
> He told me that he took Jeremy Flowers to that store.
>
> . . .
>
> I asked him if he went in. [Defendant] said he did not go in the store; that only Mr. Flowers went inside the store.
>
> . . .
>
> [Defendant] continued to say that he thought that the Mustang that followed him from the store was a police car.
>
> . . .
>
> I asked him to show me where he dropped Jeremy Flowers out . . . [and] [h]e directed me toward the house where he dropped Jeremy Flowers off. . . . That was located on Short Street.
>
> . . .
>
> I asked [defendant] if he knew there was any money in the car. . . . [Initially, defendant] stated that any money in the car that he was driving belonged to his

> mother. He told me he did not know there was money in the car. . . . [Later, defendant] changed his statement to me and said that the money in the door of the car was his.

Det. Baysek relayed this information to Detective Sergeant Robert Heaton to begin canvassing the area for the second suspect. Det. Heaton soon found Jeremy Flowers in a mobile home. The mobile home belonged to a young woman who, upon being informed the officers were investigating the armed robbery of a local convenience store, gave her consent for officers to search the residence for a firearm.

Det. Heaton testified that during his search, he observed a black jacket in the bedroom and upon further inspection found $130.00 in the jacket pocket. Outside the residence, Det. Heaton observed what appeared to be a silver gun laying on the ground. However, the "gun" was not a true firearm but rather some type of lighter.

Defendant was indicted for robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87. After a trial, the jury found defendant guilty of robbery with a firearm. The trial court entered judgment against defendant for robbery with a dangerous weapon and committed him to a term of 77 to 102 months in the custody of the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant raises the following seven issues: whether the trial court erred by (I & VII) denying defendant's motion to dismiss for insufficient evidence; (II) failing to instruct the jury properly on the lesser included offense of common law robbery; (III & IV) denying defendant's motion to suppress his statement to Det. Baysek; (V) denying defendant's motion to dismiss based upon a defective indictment; and (VI) instructing the jury on defendant's flight.

I & VII

[1] Defendant argues that the trial court erred by denying defendant's motion to dismiss based upon insufficient evidence of the use of a firearm during the robbery. Specifically, defendant argues that evidence presented indicating the gun used during the robbery was not a firearm precluded the jury from finding him guilty of robbery with a dangerous weapon as a matter of law. We disagree.

"[I]n ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of

the crime and whether the defendant is the perpetrator of that crime." *State v. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244 (2007) (citation omitted). "As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence." *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007) (citation omitted). "When reviewing claims of sufficiency of the evidence, an appellate court must . . . view[] all the evidence in the light most favorable to the State and resolv[e] all contradictions and discrepancies in the State's favor." *Everette*, 361 N.C. at 651, 652 S.E.2d at 244 (citation omitted). "A case should be submitted to a jury if there is any evidence tending to prove the fact in issue or reasonably leading to the jury's conclusion as a fairly logical and legitimate deduction." *Harris*, at 402-03, 646 S.E.2d at 528 (citation omitted).

Under North Carolina General Statute section 14-87(a),

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, . . . where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of [robbery with a firearm or other dangerous weapon].

N.C. Gen. Stat. § 14-87(a) (2007). "Whether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the manner in which defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use." *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985) (citations omitted).

In *State v. Thompson*, 297 N.C. 285, 254 S.E.2d 526 (1979), a victim testified that during a robbery of One Hour Valet Cleaners in Raleigh, North Carolina one defendant held a shotgun to her forehead. *Id.* at 288, 254 S.E.2d at 527. On cross-examination, the victim testified that she "did not know whether the shotgun was a real gun, a fake gun, a toy gun or what kind of gun, it was metal and did not look like a toy." *Id.* Our Supreme Court held that

> [w]hen a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will pre-

> sume the instrument to be what his conduct represents it to be—a firearm or other dangerous weapon.

Id. at 289, 254 S.E.2d at 528.

Here, the evidence tended to show that two men entered the ALCO on Highway 74 in Richmond County, one of whom carried a silver handgun. The men took money from the cash registers and cigarettes, then left. Later, after police seized defendant and his companion, Jeremy Flowers, police found what appeared to be a silver handgun lying on the ground outside of the residence in which Jeremy Flowers was found. However, Det. Heaton testified that "it was about the size that it was consistent with a small caliber handgun. It was weighted pretty heavy. . . . When I seen it, until I actually picked it up and observed it, it did appear to be a handgun." Defendant offered no evidence.

After the close of the evidence, the trial court instructed the jury on the crime of robbery with a firearm. In describing the elements of robbery with a firearm, the trial court instructed the jury as follows:

> [T]he State must prove that the defendant had a firearm in his possession at the time he obtained the property, or that it reasonably appeared to the victim that a firearm was being used, in which case you, the jury, may infer that the said instrument was what the defendant's conduct represented it to be.

Here, no evidence presented demonstrated that the handgun found in the yard was used in the robbery. And, absent evidence to the contrary, "the law will presume the instrument to be what [defendant's] conduct represents it to be—a firearm or other dangerous weapon." *Id.* at 289, 254 S.E.2d at 528. Accordingly, we overrule defendant's assignment of error.

II

[2] Defendant argues that the trial court failed to instruct the jury on the lesser included offense of common law robbery. We disagree.

Initially, we note that defendant failed to object to the instruction proffered by the trial court out of the presence of the jury; therefore, this issue is not properly preserved for our review. *See* 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.").

> [However,] [t]he imperative to correct fundamental error . . . may necessitate appellate review of the merits despite the [failure to preserve an issue for appellate review]. For instance, plain error review is available in criminal appeals for challenges to jury instructions and evidentiary issues. Our decisions have recognized plain error only in truly exceptional cases when absent the error the jury probably would have reached a different verdict.

Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (internal citations and quotations omitted).

"The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor." *State v. Williams*, 275 N.C. 77, 88, 165 S.E.2d 481, 488 (1969) (citation and emphasis omitted).

The elements of robbery with a dangerous weapon or firearm were stated under (I). "Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear." *State v. Watson*, 283 N.C. 383, 385, 196 S.E.2d 212, 214 (1973) (citation omitted). The critical distinction between the two is a defendant's use of a dangerous weapon. *See State v. Hinton*, 361 N.C. 207, 211-12, 639 S.E.2d 437, 440 (2007) ("Considering the purpose of N.C.G.S. § 14-87 is to provide for more severe punishment when the robbery is committed with the use or threatened use of firearms or other dangerous weapons, we conclude the General Assembly intended to require the State to prove that a defendant used a[] . . . dangerous weapon before conviction under the statute is proper. To hold otherwise would remove the critical distinction between common law robbery and N.C.G.S. § 14-87 . . . .) (internal citation and quotations omitted).

Here, the evidence presented tended to show that two men entered the ALCO convenience store on Highway 74 in Rockingham. One of the men pointed a silver handgun at the clerk and told her to open the cash registers. Upon taking the cash and some cigarettes, the men left. Soon after, police arrested defendant and Jeremy Flowers. In a search of the area around the residence in which

Jeremy Flowers was found, police found what appeared to be a silver handgun outside a bedroom window but was not a true firearm; rather it was some type of lighter.

Despite this, no evidence was presented which established that the handgun found outside the residence in which Jeremy Flowers was found was the handgun used in the robbery. Therefore, we hold the trial court did not err by not instructing the jury on the lesser included offense of common law robbery. Accordingly, defendant's assignment of error is overruled.

III & IV

[3] Defendant next argues the trial court erred by denying defendant's motion to suppress his statement to Det. Baysek.

"In reviewing a trial judge's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Brewington*, 170 N.C. App. 264, 271, 612 S.E.2d 648, 653 (2005) (citation omitted). "The trial court's findings upon conflicting evidence are accorded great deference upon appellate review . . . . If the findings are supported by competent evidence, they are conclusive on appeal. The conclusions of law which the court draws from those findings are fully reviewable." *State v. Barnard*, 184 N.C. App. 25, 28, 645 S.E.2d 780, 783 (2007) (internal citations omitted).

Under North Carolina General Statutes section 15A-975(a), "[i]n superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c)." N.C. Gen. Stat. § 15A-975(a) (2007).

Here, defendant objected to Det. Baysek's testimony regarding defendant's statements made on the night he was arrested. The trial court removed the jury and allowed defendant's counsel to voir dire Det. Baysek regarding the circumstances and statements of defendant. At the conclusion of the voir dire, defendant made an oral motion to suppress Det. Baysek's testimony. The trial court made the following inquiries of defense counsel:

The Court: Was there any written motion to suppress filed in ample time, in accordance with Chapter 15A?

The Defense: No, sir, there wasn't.

The Court: So you're making this as a verbal motion—

The Defense: As a verbal motion.

The Court: —for the first time at trial?

The Defense: Yes, sir.

The Court: Do you contend you didn't have time to make a written motion?

The Defense: No, sir. I will contend I didn't know entirely what Officer Baysek's testimony was going to be before trial.

The Court: Well, were you on notice that they were going to use a statement of your client?

The Defense: Yes, I was, Your Honor.

The Court: When were you notified?

The Defense: I was notified when I received my discovery package, Your Honor. It was in ample time to make a motion.

The Court: Well, I believe you've had time to make this motion.

The Defense: Yes, Your Honor.

Following this, the trial court dictated an order in which it made the following findings of fact:

(1) The defendant filed no written motion to suppress the defendant's statement, or to suppress evidence of the defendant's statement in apt time prior to the trial as required under General Statutes 15A. This fact is undisputed.

(2) The State notified the defendant more than 20 working days prior to trial of its intention to use evidence of a statement made by the defendant to Detective Baysek. This fact is undisputed.

(3) The defendant had a full and reasonable opportunity to make a motion to suppress before trial.

(4) The defendant's objection and motion are not timely made under General Statutes 15A-976. And the defendant's objection and motion to suppress have not met the procedural requirements of General Statutes 15A.

(5) No written motion and required affidavits were filed prior to trial complying with General Statutes 15A-975.

(6) The defendant's objection and motion are procedurally barred.

(7) The defendant's oral motion at trial is not timely or in compliance with General Statutes 15A-975.

(8) The objection and motion to suppress is subject to summary denial.

Based on these findings of fact, the trial court "ordered, adjudged and decreed that the defendant's objection and motion to suppress evidence of the defendant's statement be, and the same are, hereby denied and the objection is overruled."

We hold the trial court's findings of fact were supported by competent evidence and we affirm its conclusion of law. Accordingly, we overrule defendant's assignments of error.

V

[4] Defendant next argues that the trial court erred by denying defendant's motion to dismiss based upon a defective indictment. We disagree.

"Jurisdiction to try an accused for a felony depends upon a valid bill of indictment . . . . An indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (internal citations omitted).

> In an indictment for robbery with firearms or other dangerous weapons (G.S. 14-87), the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapon. While an indictment for robbery (or attempted robbery) with a dangerous weapon need not allege actual legal ownership of property the indictment must at least name a person who was in charge or in the presence of the property at the time of the robbery, if not the actual, legal owner. If the defendant needs further information, he should move for a bill of particulars.

State v. Burroughs, 147 N.C. App. 693, 696, 556 S.E.2d 339, 342 (2001) (internal citations omitted).

Here, the indictment states the following:

> The jurors for the State upon their oath present that on or about the date of offense shown and in [Richmond County] the defendant . . . unlawfully, willfully and feloniously did steal, take, and carry away and attempt to steal, take and carry away another's personal property, US Currency and Cigarettes of the value of $350.00 dollars, from the presence, person, place of business, and residence of Alco #11. The defendant committed this act having in possession and with the use and threatened use of firearms and other dangerous weapons, implements, and means, weapon was described by victim as small silver colored semi automatic handgun whereby the life of [Alco #11 store clerk] was endangered and threatened.

We hold that the indictment is not fatally defective, and accordingly, we overrule defendant's assignment of error.

VI

[5] Defendant last argues that the trial court erred by instructing the jury on defendant's flight.

In North Carolina, "evidence of flight by the accused may be used as some evidence of guilt. Such evidence creates no presumption of guilt, but may be considered with other facts and circumstances in determining whether all the circumstances amount to an admission of guilt or reflect a consciousness of guilt." *State v. Patterson*, 332 N.C. 409, 420, 420 S.E.2d 98, 104 (1992) (internal citations and quotations omitted).

Here, off-duty Police Officer Odom of the Rockingham Police Department was driving past the ALCO at approximately 9:45 p.m. He observed two people leaving the ALCO wearing all black with toboggans over their faces and a clerk running to lock the doors behind them. The officer suspected a robbery had taken place and watched as the suspects got into a small burgundy car. Officer Odom followed the suspects after they exited the ALCO parking lot until they turned onto a dead end street. Officer Odom later testified that when the suspects left the ALCO parking lot "the vehicle was traveling at a high rate of speed"; the speed limit was 45 miles per hour, but the suspects were traveling approximately 75 to 80 miles per hour.

Furthermore, Det. Baysek testified to defendant's statements after defendant was taken into police custody. "[Defendant] continued to say that he thought that the Mustang that followed him from the store was a police car."

We hold there was sufficient evidence presented such that the jury could consider such evidence with other facts and circumstances in determining whether all the circumstances amounted to an admission of guilt or reflected a consciousness of guilt. Accordingly, defendant's assignment of error is overruled.

Affirmed.

Judge ARROWOOD concurs.

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

JACKSON, Judge, concurring in part, dissenting in part.

Although I concur with the majority opinion in nearly all respects, I respectfully dissent from Part II in which the majority holds that the trial court did not err in failing to instruct the jury on common law robbery. Because the issue was not preserved for our review, I would vote to dismiss it.

Pursuant to the North Carolina Rules of Appellate Procedure, "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto . . . ." N.C. R. App. P. 10(b)(2) (2007). The majority concedes that defendant failed to object in order to preserve the matter for our review.

Although Rule 10 permits a criminal defendant to assign error to jury instructions despite having failed to object, the Rules require the defendant to "specifically and distinctly" contend that the jury instructions amount to plain error. N.C. R. App. P. 10(c)(4) (2007). Further, even when criminal defendants assign plain error, an "empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule." *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

Here, defendant failed to object to the jury instructions, failed to "specifically and distinctly" contend plain error in his assignments of error, and failed to argue prejudicial impact in his brief. Therefore, he has waived plain error review and I would dismiss this assignment of error.

WIGGS v. PEEDIN

[194 N.C. App. 481 (2008)]

DONNIE C. WIGGS, DONNIE F. WIGGS, AND KENNETH R. PARNELL, PLAINTIFFS v. GWENDOLYN HILL PEEDIN, DEFENDANT

No. COA08-578

(Filed 16 December 2008)

1. Appeal and Error— appealability—grant of summary judgment—interlocutory order—Rule 54 certification

Plaintiffs' appeal from the trial court's grant of summary judgment in favor of defendant ordering plaintiffs' claims to be dismissed but stating it was not a final judgment regarding defendant's counterclaims was an appeal from an interlocutory order entitled to immediate appellate review because: (1) the trial court certified the appeal for immediate review under N.C.G.S. § 1A-1, Rule 54; and (2) even though the Court of Appeals is not bound by the trial court's certification, in its discretion it decided to review the interlocutory order since there was no just reason for delay and in order to avoid piecemeal litigation.

2. Partnerships— summary judgment—imputed partnership—partnership by estoppel—agency theory of apparent authority

The trial court erred by granting summary judgment in favor of defendant on the issue of a partnership between plaintiffs and defendant for the purpose of operating a commercial hog farm, and the case is remanded for further proceedings not inconsistent with this opinion because: (1) substantial evidence tended to establish a partnership existed between plaintiffs and defendant's deceased husband Peedin based upon the proposed terms contained in the document Peedin drafted and signed, and the parties' subsequent compliance with these terms; and (2) although the general rule is that partnerships dissolve upon the death of any partner unless expressed otherwise in the partnership agreement, the evidence in the light most favorable to plaintiffs revealed that there was a genuine issue of material fact whether the partnership may be imputed to defendant under the legal principle of partnership by estoppel or the agency theory of apparent authority, including evidence in the pertinent document of intent for the business relationship with plaintiffs to continue in the event of Peedin's death and the fact that from 1999 to 2004, plaintiffs continued to perform their obligations under the 1995 agreement and defendant also reaped the benefits of this continued arrangement for the five years after Peedin's death.

Appeal by plaintiffs from order entered 10 December 2007 by Judge Jack W. Jenkins in Wayne County Superior Court. Heard in the Court of Appeals 23 October 2008.

Glenn A. Barfield, for plaintiff-appellants.

H. Jack Edwards and Burrows & Hall, by Richard L. Burrows, for defendant-appellee.

TYSON, Judge.

Donnie C. Wiggs, Donnie F. Wiggs, and Kenneth R. Parnell (collectively, "plaintiffs") appeal order entered granting Gwendolyn Hill Peedin's ("defendant") motion for summary judgment. We reverse and remand.

I. Background

On 22 July 2004, plaintiffs filed a complaint against defendant and alleged: in approximately 1995 defendant and defendant's deceased husband, Donnie Peedin ("Peedin"), formed and entered into an oral partnership with plaintiffs for the development and use of a certain tract of land located in Wayne County for the purpose of operating a commercial hog farm. Peedin reduced the proposed terms of the partnership into a handwritten and signed document and delivered it to plaintiffs.

Plaintiffs agreed to contribute their collective knowledge, experience and labor to the partnership and Peedin agreed to contribute the property and secure financing for the hog farm. The property upon which the hog farm was to be developed was owned by defendant and Peedin as tenants by the entirety, per deed recorded in Book 1219, Page 644 of the Wayne County Registry. Peedin and defendant used this property as collateral to obtain a loan in order to develop and begin operation of the hog farm. Both Peedin and defendant signed the documents establishing the debt, which encumbered their property.

The terms contained in Peedin's document provided that after ten years of operation if the debt had been repaid, each plaintiff would acquire a ten percent interest in the profits, surplus, and assets of the partnership, while defendant and her husband were to own the remaining sixty percent. Each plaintiff's interest was defined as "1 hog house each and approx. 10 acres [of] land."

On 16 May 1999, Peedin died of a brain tumor and leukemia. Defendant became the sole record owner of the subject property.

Plaintiffs allege the partnership did not dissolve upon Peedin's death and his continuing partnership interest passed to defendant by will or intestate succession. On 18 June 2004, over five years after Peedin's death, defendant barred plaintiffs from entering the property "to carry out their duties under the partnership agreement[.]" Plaintiffs further alleged defendant had misappropriated funds and failed to account for the profits and surplus of the partnership.

Plaintiffs requested the trial court: (1) declare the existence and dissolution of a partnership between plaintiffs and defendant; (2) enjoin defendant from acting further on behalf of the partnership or taking any action to impair the partnership assets; (3) enter an order directing the winding up of the partnership affairs and distribution of the partnership assets; (4) order the real estate be sold as a part of the winding up or partition and distribute it to the partners; and (5) declare an equitable lien in favor of plaintiffs against the real estate at issue. Plaintiffs also filed a Notice of Lis Pendens referencing defendant's property.

On 28 September 2004, defendant filed an answer, which denied the material allegations of the complaint and raised six defenses, "a further answer and defense," and a counterclaim. The allegations contained in defendant's answer can be summarized as follows: the property located in Wayne County passed solely to defendant upon Peedin's death. Defendant used the proceeds from the hog farming operation to make payments on the debt encumbering the property and other various expenses involved in the operation. Any net profits from the operation were retained solely by defendant.

Defendant denied that a partnership agreement existed and alleged that any interest plaintiffs might have received in the hog farm operation was not to occur before March 2005. Further, plaintiffs' alleged interests were conditioned upon the debt being fully paid and Prestage Farms, Inc. ("Prestage") being satisfied with the hog farm's operation. At the commencement of this action, neither of these conditions had been satisfied. Defendant further alleged that plaintiffs should be estopped from claiming any interest in the hog farming operation based upon their fraudulent actions involving the sale of defendant's hogs without her knowledge and retaining the funds for their personal use. Defendant's answer also contained a motion to dismiss for failure to state a claim for which relief could be granted.

On 10 May 2005, defendant filed an amended answer alleging the following additional defenses of: (1) the statute of frauds; (2) the

statute of limitations; (3) estate notice to creditors; (4) laches; (5) breach of contract; (6) impossibility of performance; and (7) defective description/void for vagueness. Defendant also asserted counterclaims for: (1) larceny/embezzlement; (2) punitive damages; and (3) "[s]lander of [t]itle and [a]ction to [r]emove [c]loud from [t]itle."

On 20 July 2007, defendant moved for summary judgment and specifically re-asserted the affirmative defenses of:

> the statute of frauds, statute of limitation, and alternatively, in the event a partnership is established, a material breach of the plaintiffs' fiduciary duties to the defendant and/or partnership, by stealing pigs from the farm valued in excess of $100,000.00, and failure to perform their duties to the point of jeapordizing [sic] the grower contract between Peedin and Prestage Farms.

On 10 December 2007, the trial court entered an order granting defendant's motion and ordering plaintiffs' claims be dismissed with prejudice. The trial court stated its order was not a final judgment regarding defendant's counterclaims. Plaintiffs appeal.

II. Interlocutory Nature of the Appeal

[1] Plaintiffs' appeal is interlocutory. *See Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 ("Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." (Citation omitted)), *reh'g denied*, 350 N.C. 385, 536 S.E.2d 70 (1999). An interlocutory order is immediately appealable in only two instances: (1) if the trial court certifies that there is no just reason to delay the appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) or (2) when the challenged order affects a substantial right the appellant would lose without immediate review. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001).

Here, the trial court certified plaintiffs' appeal as immediately appealable pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Even though this Court is not bound by the trial court's certification, in our discretion we review this interlocutory appeal because there is no just reason for delay and our review will avoid piece-meal litigation. *See First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) ("[T]he trial court's determination that there is no just reason to delay the appeal, while accorded great deference, cannot bind the appellate courts

because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." (Citations and quotation omitted)). We address the merits of plaintiffs' appeal.

III. Issue

[2] Plaintiffs argue the trial court erred by granting defendant's motion for summary judgment because a genuine issue of material fact exists regarding whether there was a partnership between plaintiffs and defendant.

IV. Summary Judgment

A. Standard of Review

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

Wilkins v. Safran, 185 N.C. App. 668, 671-72, 649 S.E.2d 658, 661 (2007) (internal citations and quotations omitted).

B. Analysis

We must initially decide whether a valid partnership existed between plaintiffs and Peedin. The Uniform Partnership Act as

adopted in North Carolina statutorily defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. § 59-36(a) (2003); *see also Zickgraf Hardwood Co. v. Seay*, 60 N.C. App. 128, 133, 298 S.E.2d 208, 211 (1982) ("A partnership is a combination of two or more persons of their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits or losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business." (Citation omitted)).

It is well-established that an express agreement is not required to prove the existence of a partnership. *Wike v. Wike*, 115 N.C. App. 139, 141, 445 S.E.2d 406, 407 (1994). Our Supreme Court has stated:

> A contract, express or implied, is essential to the formation of a partnership. . . . *Partnership is a legal concept but the determination of the existence or not of a partnership . . . involves inferences drawn from an analysis of all the circumstances attendant on its creation and operation[.]*
>
> Not only may a partnership be formed orally, but it may be created by the agreement or conduct of the parties, either express or implied . . . . *A voluntary association of partners may be shown without proving an express agreement to form a partnership*; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such.

Eggleston v. Eggleston, 228 N.C. 668, 674, 47 S.E.2d 243, 247 (1948) (internal citations and quotations omitted) (emphasis supplied). N.C. Gen. Stat. § 59-37 sets forth the statutory rules to be used to determine whether a partnership exists. North Carolina appellate courts "have clearly held that co-ownership and sharing of any actual profits are indispensable requisites for a partnership." *Wilder v. Hobson*, 101 N.C. App. 199, 202, 398 S.E.2d 625, 627 (1990) (citing *Sturm v. Goss*, 90 N.C. App. 326, 368 S.E.2d 399 (1988)).

Evidence presented at the summary judgment hearing tended to show: in approximately 1995 Peedin sent a handwritten and signed document to plaintiffs proposing that they enter into a business relationship regarding the development and operation of a commercial

hog farm. Peedin's document set forth in detail the proposed terms of this business relationship: Peedin would receive the first nine dollars and Jamie Wiggs would receive one dollar for each hog sold. Any profit over ten dollars would be used to defray operational expenses including "labor, fencing, cows, irrigation equip, etc." If Prestage, the company purchasing the hogs from the farm, became "unhappy" with this operation and withdrew its contract, this agreement would be cancelled.

If Prestage was "pleased" with this operation, plaintiffs would "each be deeded 10% of [the hog farm] operation if [the] venture [was] paid for—1 hog house each and approx. 10 acres [of] land" in March 2005. Peedin's document also stated the "shareholders" had the right to first refusal to purchase the shares of other shareholders. Additionally, if both Peedin and defendant died before March of 2005, their surviving children would equally divide their sixty percent interest in the partnership. Plaintiffs allege that "[t]he written proposal was augmented by additional oral discussions, and the Plaintiffs accepted the substance of the proposal[.]"

It is undisputed that from 1995 to 2004, Jamie Wiggs managed the farm and the remaining plaintiffs worked one weekend a month to comply with their obligations under the agreement. Based upon the proposed terms contained in the document Peedin drafted and signed and the parties' subsequent compliance with these terms, we hold substantial evidence tends to establish a partnership existed between plaintiffs and Peedin. We must now decide whether the partnership may be imputed to defendant under the legal principle of partnership by estoppel or the agency theory of apparent authority.

As a general rule partnerships dissolve upon the death of any partner, unless expressed otherwise in the partnership agreement. N.C. Gen. Stat. § 59-61(4) (2003). Here, Peedin proposed that his and defendant's partnership interest be passed to their surviving children if both of them died prior to March 2005. Although *both* Peedin and defendant did not die before March 2005, this provision shows an intent for the business relationship with plaintiffs to continue in the event of Peedin's death. This intent is also evidenced by the provision in the document which states their children "will not be allowed to break this agreement." Presumably, upon Peedin's death, the benefits and burdens of his interest in the partnership passed to defendant.

i. Partnership by Estoppel

North Carolina recognizes partnership by estoppel. *See* N.C. Gen. Stat. § 59-34(b) (2003) ("The law of estoppel shall apply under this Act."); N.C. Gen. Stat. § 59-46 (2003) (setting forth the conditions of liability against a partner by estoppel); *see also Volkman v. DP Associates*, 48 N.C. App. 155, 268 S.E.2d 265 (1980) (holding summary judgment was improper where the claimants may have been able to show that the alleged partners should have been liable as a partner by estoppel or under the agency theory of apparent authority).

> The essentials of equitable estoppel or estoppel *in pais* are a representation, either by words or conduct, made to another, who reasonably believing the representation to be true, relies upon it, with the result that he changes his position to his detriment. It is essential that the party estopped shall have made a representation by words or acts and that someone shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction.

DP Associates, 48 N.C. App. at 158, 268 S.E.2d at 267 (internal citation and quotation omitted) (alteration omitted).

ii. Apparent Authority

In addition to the legal principle of partnership by estoppel, defendant may also be bound to the partnership under the agency theory of apparent authority. *Id.* at 159, 268 S.E.2d at 268. This Court has stated:

> There is virtually no difference between estoppel and apparent authority. Both depend on reliance by a third person on a communication from the principal to the extent that the difference may be merely semantic. Despite its title, "Partner by Estoppel," [N.C. Gen. Stat. §] 59-46 "provides for a form of liability more akin to that of apparent authority than to estoppel." Painter, *Partnership by Estoppel*, 16 Vand. L.J. 327, 347 (1963). If this view is taken, the liability of the person seeking to deny partner status is not based on estoppel to deny agency or authority but on the objective theory of contract law, i.e., a person should be bound by his words and conduct.

Id.

Here, a partnership may have resulted from either: (1) defendant's spoken words or (2) plaintiff and defendant's continued conduct

after Peedin's death. *Id.* Deposition testimony in the record tends to show defendant made several oral representations to Donnie C. Wiggs ("Wiggs") indicating that after Peedin's death the operation of the hog farm "would go just like it was." Wiggs acknowledged that no further written agreement was ever formulated, but alleged defendant had represented that she would produce another agreement and that "everything would be just like [Peedin] had drew [sic] the agreement up."

Although defendant denies that she had knowledge of the exact terms of the agreement between Peedin and plaintiffs, her deposition testimony indicates that she was fully aware there was some sort of arrangement for plaintiffs to work for the hog farm operation. Defendant denied speaking to or having meetings with any of the plaintiffs after Peedin's death regarding the operation of the hog farm.

However, it is undisputed that from 1999 to 2004, plaintiffs continued to perform their obligations under the 1995 agreement. Defendant specifically testified that "from [1999] through 2004, . . . the arrangement did not change in terms of [plaintiffs'] involvement with the farm and [defendant's] involvement in the farm." Defendant also reaped the benefits of this continued arrangement for the five years after Peedin's death. The record shows that from 2001 to 2004, the hog farm operation was generating a net cash flow between $150,000.00 and $200,000.00 per year.

Viewing the evidence in the light most favorable to plaintiffs, a genuine issue of material fact exists regarding whether defendant should be held to be a partner by estoppel or is liable under the theory of apparent authority. *Id.* at 160, 268 S.E.2d at 268; *see also Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) ("In a motion for summary judgment, the evidence presented . . . must be viewed in a light most favorable to the nonmoving party."). The trial court's order granting defendant's motion for summary judgment is reversed.

V. Conclusion

Viewing the evidence submitted to the trial court in the light most favorable to plaintiffs, a genuine issue of material fact exists regarding whether a partnership was established between plaintiffs and defendant based upon the legal principles of partnership by estoppel or apparent authority. *DP Associates*, 48 N.C. App. at 160, 268 S.E.2d

at 268. The trial court's grant of summary judgment in favor of defendant is reversed.

None of defendant's counterclaims are before us and we express no opinion on the merits, if any, of those claims. This case is remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

Judges McCULLOUGH and CALABRIA concur.

HAROLD CORNETT, ADMINISTRATOR OF THE ESTATE OF DIANNE M. MORIN (DECEASED), PLAINTIFF v. WATAUGA SURGICAL GROUP, P.A., AND FRANK Y. CHASE, M.D., DEFENDANTS

No. COA08-485

(Filed 16 December 2008)

1. Witnesses— qualifications—motion to exclude expert witness—applicable standard of care—failure to meet requirements

The trial court did not err in a medical malpractice case by granting defendant's motion to exclude plaintiff's expert witness doctor on the basis that he did not meet the requirements of N.C.G.S. § 8C-1, Rule 702(b) because: (1) although the doctor was a licensed physician with the same specialty as defendants, his testimony revealed that he was not devoting a majority of his professional time to clinical surgery or instruction surgery in the year prior to the pertinent occurrence; (2) contrary to plaintiff's assertion, the trial court did consider the doctor's occasional performance of minor surgeries; and (3) even if the doctor could have testified to causation, without an expert to testify to the applicable standard of care, plaintiff did not forecast evidence to defeat the summary judgment motion.

2. Medical Malpractice— refusal to hear N.C.G.S. § 8C-1, Rule 702(e) motion—timeliness—failure to establish prejudicial error

The trial court did not abuse its discretion in a medical malpractice case by refusing to hear plaintiff's N.C.G.S. § 8C-1, Rule 702(e) motion to permit standard of care testimony by plaintiff's

witness based upon extraordinary circumstances because: (1) plaintiff failed to timely request a Rule 702(e) hearing until after the case was called for trial and after the hearing on the motion to exclude and motion for summary judgment had begun; (2) assuming arguendo that the trial court erred by determining it did not have authority to rule on the motion, plaintiff failed to establish prejudicial error when the trial court specifically found it would have denied the motion if heard; and (3) plaintiff did not demonstrate extraordinary circumstances to support his Rule 702(e) motion at the hearing before the trial court.

3. Trials— denial of motion to continue—abuse of discretion standard—notice

The trial court did not abuse its discretion in a medical malpractice case by denying plaintiff's motion to continue the trial in order to have the Rule 702(e) motion heard and reopen discovery because: (1) plaintiff did not contend he did not receive notice that his expert witness's qualifications were being challenged at the 12 November 2007 civil session; and (2) plaintiff had notice to investigate his expert's qualifications, opportunity to find a qualified expert, and time to file a Rule 702(e) motion prior to trial.

4. Medical Malpractice— summary judgment—failure to provide expert witness to testify regarding standard of care

The trial court did not err in a medical malpractice case by granting summary judgment in favor of defendants because: (1) plaintiff's expert witness was properly excluded under N.C.G.S. § 8C-1, Rule 702(b), and thus plaintiff was without an expert witness to testify regarding the standard of care; and (2) contrary to plaintiff's assertion, defendant doctor's testimony did not establish the relevant standard of care and breach of the standard of care.

Appeal by plaintiff from judgment and order entered 30 November 2007 by Judge John W. Smith in Watauga County Superior Court. Heard in the Court of Appeals 23 October 2008.

Charles G. Monnett III & Associates, by Charles G. Monnett III for plaintiff-appellant.

Carruthers & Roth, P.A., by Richard L. Vanore, Robert N. Young, and Norman F. Klick, Jr., for defendants-appellees.

CALABRIA, Judge.

Harold Cornett, administrator of the estate of Dianne M. Morin, ("plaintiff") appeals the trial court's order and judgment granting Watauga Surgical Group, P.A.'s ("Watauga Surgical") and Frank Y. Chase's ("Dr. Chase") (collectively referred to as "defendants") motion to exclude plaintiff's expert witness and motion for summary judgment. We affirm.

Plaintiff alleges that on 13 March 2004, Dianne Morin ("the deceased") was admitted to the emergency room of Watauga Medical Center complaining of abdominal pain, nausea and vomiting. After Dr. Chase evaluated her, he performed a surgical procedure. Following surgery, the deceased remained in the hospital for nine days and experienced an increase in abdominal symptoms. On 22 March 2004, Dr. Chase performed exploratory surgery on the deceased and found further complications in her bowels. On 24 March 2004, Dr. Chase placed two drains in her abdomen. On 28 March 2004, the deceased was transferred to Wake Forest University Baptist Medical Center for treatment. On 2 April 2004, the deceased passed away.

On 28 March 2006, plaintiff filed a negligence complaint against Dr. Chase and Watauga Surgical. Pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure, plaintiff certified in his complaint that the deceased's medical care was reviewed by a person reasonably expected to qualify as an expert witness willing to testify that "the medical care provided did not comply with the applicable standard of care."

On 14 August 2007, defendants deposed Dr. Martin Litwin, M.D. ("Dr. Litwin"), plaintiff's proposed expert witness. On 1 November 2007, defendants moved to exclude Dr. Litwin, and moved for summary judgment. The case was called for trial on 12 November 2007. The trial court granted defendants' motions. At the pre-trial hearing on the motion to exclude, plaintiff moved under North Carolina Rules of Evidence, Rule 702(e), for the court to permit Dr. Litwin's standard of care testimony upon showing extraordinary circumstances and a determination that justice requires it. The trial court refused to hear the motion because the trial court judge was not a resident superior court judge as required by Rule 702(e). The trial court judge also stated in his order that if he had reached the motion, he would have denied it because plaintiff did not show either extraordinary circumstances or that justice required allowing a non-qualified expert witness to testify. Plaintiff also moved to continue the trial. This motion was denied. Plaintiff appeals.

I. Exclusion of Plaintiff's Expert Witness

[1] Plaintiff contends the trial court erred in excluding Dr. Litwin as an expert witness on the basis that he did not meet the requirements of N.C. Gen. Stat. § 8C-1, Rule 702(b). We disagree.

Where the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*. *See FormyDuval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99, *review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000); *Smith v. Serro*, 185 N.C. App. 524, 527, 648 S.E.2d 566, 568 (2007).

This Court also determines "(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." *FormyDuval*, 138 N.C. App. at 385, 530 S.E.2d at 100 (quoting *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)).

The relevant portion of N.C. Gen. Stat. § 8C-1, Rule 702 provides:

> (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:
>
> (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
>
> b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.
>
> (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
>
> a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony

> is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
>
> b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. Gen. Stat. § 8C-1, Rule 702(b) (2007).

It is undisputed that Dr. Litwin is a licensed physician specializing in the same specialty as defendants. In order to satisfy the threshold requirements of N.C. Gen. Stat. § 8C-1, Rule 702(b), Dr. Litwin must have devoted the majority of his professional time to either clinical practice in the speciality of surgery ("clinical surgery") or, instructing medical students in the specialty of surgery ("instructing surgery") or both clinical surgery and instructing surgery from March 2003 until March 2004. *Id.*

Dr. Litwin's testimony revealed that he was not devoting a majority of his professional time to clinical surgery or instructing surgery in the year prior to the occurrence at issue. Dr. Litwin testified that he ceased practicing general surgery in 2000 or 2001, except for minor cases once or twice a month. In 2002, Dr. Litwin took a medical leave of absence to undergo surgery for the removal of a pituitary tumor. Dr. Litwin returned to work in either the early part of 2004, or the latter part of 2003. Dr. Litwin worked half days for a month and then returned to a full-time schedule. Dr. Litwin's full-time work schedule consisted of sixty hours a week at this time.

A. Clinical Surgery

Although Dr. Litwin did not perform any minor cases in 2003, he performed minor surgeries once a month in early 2004. Therefore, from March 2003 until March 2004, his clinical surgery consisted of an occasional minor surgery once or twice a month for up to two hours at a time. At the most, in a sixty-hour work week, the total time Dr. Litwin devoted to clinical surgery was one hour a week.

Although plaintiff contends the trial court failed to consider Dr. Litwin's occasional performance of minor surgery, it appears from the trial court's order that the court did consider Dr. Litwin's minor surgeries. In finding of fact number nine, the trial court states, "[t]he court has considered whether Dr. Litwin's teaching time together with the 'minor surgeries' performed without general anesthesia and his other duties are sufficient to meet the requirements of Rule 702(b), and the court finds that they are not."

B. Instructing Surgery

Dr. Litwin was employed as a professor of surgery at Tulane Medical School. In 2004, he assisted residents on one case per month and personally performed one case a month. Dr. Litwin participated in grand rounds with residents once a week which lasted an hour at a time. Twice a week, for two to three hours at a time, Dr. Litwin attended hospital rounds with residents. Dr. Litwin testified his teaching duties totaled from two to four hours per week. The remainder of his time was spent performing administrative functions, attending conferences and participating in committee meetings.

Plaintiff also argues Dr. Litwin's teaching activities amounted to all of his professional time. However, as previously noted, Dr. Litwin testified he spent significant time performing administrative duties such as attending committee meetings. Even considering all of his teaching time, it does not amount to more than half of his professional time.

The trial court did not err in determining that Dr. Litwin did not meet the requirements of Rule 702(b), since, in a sixty-hour work week, at the most, Dr. Litwin spent five hours a week in clinical surgery and instructing surgery. This was less than half of his professional time.

After the trial court excluded Dr. Litwin as an expert witness, plaintiff submitted an affidavit by Dr. Litwin contradicting his deposition testimony. Dr. Litwin asserted in his affidavit that his work schedule in the year preceding the alleged malpractice consisted of a thirty-four hour work week. Dr. Litwin's affidavit was not considered by the trial court because it was filed after the trial court entered its order excluding Dr. Litwin as an expert witness. Accordingly, we do not consider the affidavit in reviewing the order on appeal.[1] *See also*

1. Plaintiff attached the affidavit to a Motion to Reconsider Ruling on Defendants' Motion to Exclude and Motion for Summary Judgment. After plaintiff filed a notice of appeal, he requested the trial court rule on his Motion to Reconsider. The trial court

Pinczkowski v. Norfolk S. Ry. Co., 153 N.C. App. 435, 440, 571 S.E.2d 4, 7 (2002) (party opposing summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting his sworn testimony).

We conclude the trial court's determination that Dr. Litwin did not qualify as an expert witness under N.C. Gen. Stat. § 8C-1, Rule 702(b) was supported by its findings of fact and those findings are supported by competent evidence. This assignment of error is overruled.

C. Causation

Plaintiff also argues Dr. Litwin was qualified to testify about causation and such testimony would establish a genuine issue of material fact. We disagree.

Summary judgment is appropriate when the defendant shows the plaintiff cannot support an essential element of his claim and the plaintiff does not "produce a forecast of evidence showing the existence of a genuine issue of material fact with respect to the issues raised by the movant." *Huffman v. Inglefield*, 148 N.C. App. 178, 182, 557 S.E.2d 169, 172 (2001) (citation omitted). Evidence of the standard of care is an essential element to plaintiff's medical malpractice claim. *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998).

In the instant case, even if Dr. Litwin could have testified to causation, without an expert to testify to the applicable standard of care, plaintiff did not forecast evidence to defeat the summary judgment motion. The trial court did not err in excluding Dr. Litwin's testimony. This assignment of error is overruled.

II. Rule 702(e) Motion

[2] Plaintiff next argues the trial court erred by refusing to hear plaintiff's N.C. Gen. Stat. § 8C-1, Rule 702(e) motion.

The trial court found that plaintiff failed to timely request a Rule 702(e) hearing until after the case was called for trial and after the hearing on the motion to exclude and motion for summary judgment had begun. The trial court judge noted that the undersigned was a special superior court judge and declined to rule on the Rule

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determined it did not have jurisdiction over the Motion to Reconsider. Plaintiff's sole assignment of error regarding the Motion to Reconsider was stricken by an order by this Court on 17 June 2008. As a result, neither the Motion to Reconsider nor the affidavit attached are within the scope of our review. *See* N.C. R. App. P. 10(a)-(b) (2007).

702(e) motion on that basis, but entered a finding that if the trial court judge had ruled on it he would have denied it.

N.C. Gen. Stat. § 8C-1, Rule 702(e) provides:

> Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

Since the rule provides a trial judge "may" allow the testimony, the standard of review is abuse of discretion. *See also Burrell v. Sparkkles Reconstr. Co.*, 189 N.C. App. 104, 113, 657 S.E.2d 712, 718-19 (2008) ("We review a trial court's ruling as to the admissibility of an expert witness's testimony for an abuse of discretion.").

Plaintiff asserts the standard of review of this issue is *de novo* because the trial court judge incorrectly interpreted the statute to provide that the only judges allowed to rule on Rule 702(e) motions are resident superior court judges. Plaintiff also argues that the trial court judge incorrectly presumed the Rule 702(e) motion must have been set for hearing before Dr. Litwin was disqualified. However, even if the trial court erred in determining it could not rule on the motion, plaintiff must still show he was prejudiced by the trial court's failure to rule on the motion. *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) (citations omitted)) (" 'The 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.' ").

Plaintiff asserts that the trial court judge was authorized to rule on the motion pursuant to N.C. Gen. Stat. § 7A-47 (2007). This statute provides that regular superior court judges duly assigned to hold court, or holding such court by exchange, shall have the same powers in that district as the resident judge. *Id.* Read in conjunction with Rule 702(e), plaintiff argues this provides authority for the judge to have heard his motion. *See also Best v. Wayne Mem'l Hosp., Inc.*, 147 N.C. App. 628, 636, 556 S.E.2d 629, 634 (2001) (concluding a Rule 9(j)

extension motion is to be heard by a resident judge when one is available, but when the resident judge is unavailable or nonexistent, it is proper for the duly appointed presiding superior court judge to hear and sign the motion) and *Howard v. Vaughn*, 155 N.C. App. 200, 204, 573 S.E.2d 253, 256 (2002) (concluding trial court erred in dismissing medical malpractice complaint on the basis that the Rule 9(j) extension granted by a non-resident judge was invalid). Plaintiff also argues he was not required to set his Rule 702(e) motion for hearing until after the motion to exclude his expert witness was ruled upon.

We do not address these arguments because assuming *arguendo* the trial judge erred in determining he did not have authority under N.C. Gen. Stat. § 8C-1, Rule 702(e) to rule on the motion, plaintiff failed to establish prejudicial error. The trial court judge specifically found he would have denied the motion if he had heard it. Plaintiff contends the error is not harmless because whether Dr. Litwin qualified as an expert "literally came down to counting minutes spent between his different activities in a given month," "disbelieving Dr. Litwin's sworn testimony to the contrary," and these are "extraordinary circumstances" contemplated under the rule. We disagree. Plaintiff did not demonstrate extraordinary circumstances to support his Rule 702(e) motion at the hearing before the trial court. *See Knox v. University Health Sys. of E. Carolina, Inc.*, 187 N.C. App. 279, 283, 652 S.E.2d 722, 725 (2007). This assignment of error is overruled.

III. Motion to Continue

[3] Plaintiff also argues the trial court erred in denying his motion to continue the trial. We disagree.

"The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion." *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976). Absent a manifest abuse of discretion, this Court will not disturb the trial court's decision to grant or deny a motion to continue. *Atlantic & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 754, 594 S.E.2d 425, 430 (2004) (quotation omitted).

Here, on the day of trial, counsel for plaintiff requested a continuance in order to have the Rule 702(e) motion heard and reopen discovery. Plaintiff contends the trial court abused its discretion in

denying the motion because there was good cause shown for a continuance and granting the motion would have promoted substantial justice. We disagree. Plaintiff does not contend he did not receive notice that his expert witness's qualifications were being challenged at the 12 November 2007 civil session. Plaintiff had notice to investigate his expert's qualifications, opportunity to find a qualified expert, and time to file a Rule 702(e) motion prior to the trial. We conclude the trial court did not abuse its discretion in denying the motion to continue.

IV. Summary Judgment

[4] Plaintiff contends the trial court erred in granting summary judgment for defendants. We disagree.

The standard of review on a summary judgment motion is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980); *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 256 (1978). "The record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences reasonably arising therefrom." *Ausley v. Bishop*, 133 N.C. App. 210, 214, 515 S.E.2d 72, 75 (1999) (citation omitted). "[A] defendant may show he is entitled 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." *Kinesis Advertising, Inc. v. Hill*, 187 N.C. App. 1, 10, 652 S.E.2d 284, 292 (2007) (citations and internal quotations omitted).

In a medical malpractice action, a plaintiff has the burden of showing "(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Weatherford*, 129 N.C. App. at 621, 500 S.E.2d at 468.

Since we conclude Dr. Litwin was properly excluded under N.C. Gen. Stat. § 8C-1, Rule 702(b), plaintiff was without an expert witness to testify to the standard of care. Summary judgment for defendant was proper. *See Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 478, 624 S.E.2d 380, 384 (2006) (concluding that in

the absence of establishing that an expert witness is competent to testify to the standard of care, summary judgment for defendant is proper). Plaintiff argues Dr. Chase's testimony established the relevant standard of care and breach of the standard of care. We disagree.

In answering a hypothetical question, Dr. Chase testified cutting and removing the common bile duct during a gastrectomy would be considered a procedure that is below the standard of care. Dr. Chase testified the deceased's bile duct was not severed and removed. Without Dr. Litwin's testimony, plaintiff did not establish that there was a genuine issue of material fact whether the bile duct was severed and removed, therefore, summary judgment was not in error. Dr. Chase also testified that "it's possible to adhere to the standard of care and injure things that are close to the area in which you will be operating." Dr. Chase's testimony did not establish that he breached the standard of care. We affirm the trial court's order.

Affirmed.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA v. MARLON DAMON CHARLES

No. COA08-601

(Filed 16 December 2008)

1. Drugs— trafficking—erroneous instructions on weight—not plain error

Erroneous jury instructions on trafficking in marijuana did not constitute plain error where the jury was instructed that it should find defendant guilty if he sold between ten and fifty pounds (rather than in excess of ten pounds but less that fifty pounds), but the evidence was that the marijuana involved in the transactions weighed eleven pounds and thirteen pounds.

2. Drugs— sufficiency of evidence—distinct from credibility

It is not the duty of the trial court to weigh the evidence or determine credibility on a motion to dismiss, and the trial court here correctly denied defendant's motion to dismiss a prosecution for marijuana trafficking.

3. Evidence— irrelevant—prejudice not shown

The trial court did not err in a prosecution for trafficking in marijuana by admitting a piece of paper found in a search of defendant's girlfriend's house as being corroborative of the State's informant. Defendant argued that the evidence was irrelevant and prejudicial, but defendant did not show unfair prejudice. Irrelevant evidence is harmless unless the defendant shows that a different result would have ensued otherwise, which defendant did not do.

Appeal by defendant from judgment entered 2 November 2007 by Judge R. Allen Baddour, Jr., in Wake County Superior Court. Heard in the Court of Appeals 9 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley Jr., for the State.

Kimberly P. Hoppin for defendant appellant.

McCULLOUGH, Judge.

On 2 November 2007, a jury convicted Marlon Damon Charles ("defendant") on six charges of trafficking in marijuana: by sale, by delivery, and by possession. On appeal, defendant contends that the trial court erred by (1) entering judgment on convictions which were the product of ambiguous jury verdicts, (2) denying defendant's motion to dismiss, and (3) admitting a paper writing into evidence over defendant's objection. After careful review of the record, we find no prejudicial error.

I. Background

On 3 April 2007, defendant was indicted on two charges of trafficking in marijuana by sale, two charges of trafficking in marijuana by delivery, and two charges of trafficking in marijuana by possession. The charges were related to transactions that occurred on 29 January 2007 and 9 February 2007. All of the indictments alleged that the amount of marijuana involved was "10 pounds or more but less than 50 pounds[.]" The case was tried before a jury at the 29 October 2007 Criminal Session of Wake County Superior Court, before the Honorable R. Allen Baddour, Jr.

The State's evidence at trial tended to show the following: Frederico "Fred" Johnson ("Johnson") began working as a paid police informant in April of 2006 after he was charged with trafficking in

cocaine. Johnson first met defendant in 2005, when Johnson was involved in selling marijuana. Johnson bought marijuana from defendant on numerous occasions, generally in amounts weighing 10 to 20 pounds. After Johnson's arrest in 2006, he continued to purchase marijuana from defendant and agreed to cooperate with the police in providing information about drug transactions.

On 18 January 2007, Johnson met with Agent Jeffrey Morales of the North Carolina State Bureau of Investigation ("SBI"). Johnson told Agent Morales that defendant, whom he knew as "Lion," was trafficking marijuana and had directed the delivery of some packages containing marijuana. Based on this information, Agent Morales contacted Special Agent Kathy O'Brien and started an investigation.

Under supervision of the SBI, Johnson engaged in a series of controlled buys with defendant. At defendant's trial, Johnson testified about his dealings with defendant in January and February of 2007. Before each meeting with defendant, the SBI provided Johnson with money to purchase marijuana, conducted a search of Johnson, and installed a recording device on his person.

Johnson met with defendant on 29 January 2007 at 5512 Wood Pond Court in Raleigh, North Carolina, the residence of defendant's girlfriend, Sasha Fox ("Fox's house"). Special Agent O'Brien testified that the SBI was unable to view Johnson entering and departing from Fox's house and could only hear small portions of Johnson's conversation with defendant over the monitor. Johnson paid defendant $2,000.00 to satisfy a prior debt, and defendant gave Johnson a packaged box containing what Johnson believed to be 12 pounds of marijuana. After this exchange, Johnson returned to the SBI lab, where the SBI took possession of the box and submitted the contents for testing. A forensic drug chemist from the City County Bureau of Investigation (CCBI) testified that she had determined the contents of the box to be marijuana in an amount weighing 11 pounds.

Johnson returned to Fox's house on 7 February 2007 to meet with defendant a second time. During this meeting, Johnson gave defendant $9,000.00 to pay for the 29 January 2007 transaction. After waiting at Fox's house for a few hours, Johnson and defendant drove to a few other locations, but were unable to obtain any marijuana. The SBI was unable to hear any of the conversations over the monitor between Johnson and defendant.

Johnson met defendant for a third time at Fox's house on 9 February 2007. The SBI observed Johnson entering and leaving Fox's

house. After Johnson entered the house, defendant went into a bedroom and returned with a Christmas tree box and a Pampers box, which Johnson believed to contain 16 pounds of marijuana. A forensic drug chemist from the CCBI testified that the two packages collectively contained 13 pounds of marijuana.

On 16 February 2007, the SBI obtained search warrants for Fox's house as well as defendant's residence at 5605 Cilantro Drive in Raleigh. The SBI seized about $8,000.00 in cash from defendant's residence and approximately three pounds of marijuana from Fox's house. At Fox's house, the SBI also found a piece of paper with the notation, "Fred 12" written on it.

The CCBI examined fingerprints lifted from the various items of packaging involved in the drug transactions between defendant and Johnson. An evidence technician from CCBI identified three of the prints as belonging to defendant and one of the prints as belonging to Johnson.

At the close of the State's evidence, defendant moved to dismiss all charges for insufficiency of evidence, which the trial court denied. Defendant renewed his motion to dismiss, which was also denied by the trial court.

On 2 November 2007, the jury returned unanimous verdicts of guilty on all six charges. The trial court entered judgment and sentenced defendant to a term of 25 to 30 months' imprisonment and imposed fines in the amount of $13,000.00. Defendant gave notice of appeal in court on 2 November 2007.

II. Jury Instructions

[1] Defendant assigns error to all of his trafficking in marijuana convictions under N.C. Gen. Stat. § 90-95(h)(1), arguing that due to the overly broad jury instructions, his convictions were the product of ambiguous jury verdicts. We disagree.

Our State Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. Art. I, § 24. "To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982). "If the trial court instructs a jury that it may find the defendant guilty of the crime charged on either of two alternative grounds, some jurors may

find the defendant guilty of the crime charged on one ground, while other jurors may find the defendant guilty on another ground." *State v. Petty*, 132 N.C. App. 453, 460, 512 S.E.2d 428, 433, *appeal dismissed and disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999).

"Submission of an issue to the jury in the disjunctive is reversible error if it renders the issue ambiguous and thereby prevents the jury from reaching a unanimous verdict." *State v. Diaz*, 317 N.C. 545, 553, 346 S.E.2d 488, 494 (1986).

Defendant was convicted of six counts of trafficking in marijuana by possession, sale, and delivery, pursuant to N.C. Gen. Stat. § 90-95(h)(1), which reads:

> Any person who sells, manufactures, delivers, transports, or 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:
>
> a. *Is in excess of 10 pounds*, but less than 50 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000).

N.C. Gen. Stat. § 90-95(h)(1)(a) (2007) (emphasis added). "Weight of the marijuana is an essential element of trafficking in marijuana under G.S. [§] 90-95(h)." *State v. Goforth*, 65 N.C. App. 302, 306, 309 S.E.2d 488, 492 (1983). "The weight element upon a charge of trafficking in marijuana becomes more critical if the State's evidence of the weight approaches the minimum weight charged." *State v. Anderson*, 57 N.C. App. 602, 608, 292 S.E.2d 163, 167, *disc. review denied*, 306 N.C. 559, 294 S.E.2d 372 (1982).

In this case, the trial court deviated from the language used in N.C. Gen. Stat. § 90-95(h)(1) to describe the weight element of trafficking in marijuana. Specifically, the trial court instructed the jury that it should find defendant guilty if it found that defendant sold "between ten and fifty pounds" of marijuana. Defendant claims these erroneous instructions permitted the jury to find him guilty if it found the weight of the marijuana to be exactly 10 pounds, which does not qualify as a trafficking offense under the statute.

Because defendant did not object to this aspect of the jury instructions at trial, the challenged instructions are reviewable only

for plain error. *See* N.C. R. App. P. 10(b)(2); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). The plain error rule is always to be applied cautiously and only in the exceptional case. *Id.* Under this standard, defendant has the burden of showing " '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.' " *State v. Stanfield*, 134 N.C. App. 685, 689, 518 S.E.2d 541, 544 (1999) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)). In deciding whether a defect in the jury instructions constitutes plain error, we must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt. *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79.

Defendant relies on our decision in *State v. Trejo*, 163 N.C. App. 512, 594 S.E.2d 125 (2004), in support of his argument. In *Trejo*, the trial court instructed the jury that if it found that the defendant possessed "ten pounds or more but less than fifty pounds" of marijuana, it should find him guilty of trafficking in marijuana. *Trejo*, 163 N.C. App. at 517-18, 594 S.E.2d at 129. The State provided evidence that the box of marijuana transported by the defendant weighed 18 pounds, while the defendant testified that the box only weighed 6 or 7 pounds. *Id.* at 518, 594 S.E.2d at 129. Because the evidence in *Trejo* could have supported an inference that the defendant possessed exactly ten pounds of marijuana, we reversed his convictions. *Id.*

Contrary to the facts in *Trejo*, there was not any evidence presented at defendant's trial which would support an inference that defendant sold, delivered, or possessed exactly 10 pounds of marijuana. Here, the State provided evidence that weight of the marijuana involved in Johnson's transactions with defendant was 11 pounds and 13 pounds. Defendant did not contradict this evidence, nor did he offer any evidence regarding the weight of the marijuana involved. The jury was not presented with any evidence that the weight of marijuana involved was exactly 10 pounds, and therefore, it is not probably that the instructional error had a probable impact on the jury's verdicts. Thus, defendant has failed to show any plain error in the instructions to the jury.

III. Motion to Dismiss

[2] Defendant also appeals the trial court's denial of his motion to dismiss. Defendant moved to dismiss all charges at the close of the State's evidence and again at the close of all evidence, both of which

were denied. Defendant argues that there was insufficient evidence to convict him of trafficking in marijuana by possession, sale, and delivery. We find no error.

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 a conclusion." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). 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 99, 261 S.E.2d at 117.

"[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981). Any contradictions or discrepancies arising from the evidence are for the jury to resolve and do not warrant dismissal. *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996), *cert. allowed in part*, 348 N.C. 507, 506 S.E.2d 252 (1998).

In the present case, the evidence, viewed in the light most favorable to the State, tends to show the following: On 29 January 2007, Johnson gave defendant $2,000.00 and received 11 pounds of marijuana from him. Johnson paid defendant $9,000.00 in exchange for two boxes containing 13 pounds of marijuana, which he received on 9 February 2007. A latent print examiner from the CCBI determined that three fingerprints on the boxes of marijuana were made by defendant. Based on the above-mentioned evidence, we conclude that the trial court was presented with sufficient evidence to satisfy all elements for each of defendant's convictions.

Defendant claims that the above-mentioned evidence is insufficient because it is solely based on the uncorroborated testimony of Johnson. Defendant contends that Johnson was a "witness of questionable reliability" due to his prior drug convictions, his belief that his testimony would get his sentence reduced for cooperating with law enforcement, and the fact that he was being paid by law enforcement for his participation in undercover drug transactions.

Defendant's arguments are misplaced in that the arguments do not concern the sufficiency of evidence but instead relate to the cred-

ibility of Johnson. On a motion to dismiss, it is not the duty of the trial court to weigh the evidence or determine any witness' credibility. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002) (citation omitted). "When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455-56, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). We conclude that the State presented sufficient evidence to survive defendant's motion to dismiss and therefore find no error.

IV. Admission of Evidence

[3] Defendant contends that the trial court erred in admitting State's Exhibit No. 1 ("Exhibit 1") into evidence. Exhibit 1 was a piece of paper containing the notation "Fred 12" that the police found at Fox's house, pursuant to a search warrant. During trial, the State moved to introduce Exhibit 1 to corroborate the testimony of Johnson, who goes by the name "Fred," that he purchased 12 pounds of marijuana from defendant on 29 January 2007. Defendant's objections were overruled.

The trial court's decision to exclude or admit evidence is generally reviewed for an abuse of discretion. *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (citations omitted), *cert. denied*, 360 N.C. 575, 635 S.E.2d 429 (2006). Defendant argues that the trial court erred in admitting Exhibit 1 because it was not properly authenticated,[1] irrelevant, and prejudicial. These arguments have no merit.

Irrelevant evidence is harmless unless the defendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded. *State v. Harper*, 96 N.C. App. 36, 42, 384 S.E.2d 297, 300 (1989). Defendant has not met this burden. Furthermore, defendant's claim that Exhibit 1 was not admissible because it was prejudicial has no merit. It is assumed that evidence which is probative in the State's case will have a prejudicial effect on a defendant; the question, then, is one of degree. *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986). Relevant evidence is properly admissible unless the court determines

1. We do not reach the merits of this argument and dismiss because it does correspond with the assignments of error set out in the record on appeal. *See* N.C. R. App. P. 10(a) (stating that "the scope of review on appeal is confined to consideration of those assignments of error set out in the record on appeal").

that it must be excluded, for instance, because of the risk of unfair prejudice. *Id.* at 94, 343 S.E.2d at 889. Defendant has failed to show unfair prejudice. Thus, we overrule this assignment of error.

V. Conclusion

For the above-mentioned reasons, we find no error warranting the reversal of defendant's convictions.

No error.

Judges TYSON and CALABRIA concur.

IN THE MATTER OF THE ESTATE OF: J. DANIEL SEVERT, DECEASED

No. COA08-203

(Filed 16 December 2008)

Estates— letters of administration—grounds for revocation—domiciliary administration in another state

Valid letters of administration of an estate issued by a clerk of superior court could be revoked only pursuant to the statutory grounds set forth in N.C.G.S. § 28A-9-1(a), and the establishment of a domiciliary estate in Virginia was not a proper ground for the revocation of one co-administrator's letters of administration in an action brought by decedent's sister.

Appeal by respondent from an order entered 31 August 2007 by Judge Edgar B. Gregory, Jr. in Ashe County Superior Court. Heard in the Court of Appeals 27 August 2008.

Allman Spry Leggett & Crumpler, P.A., by R. Bradford Leggett, for petitioner-appellee.

Parker Poe Adams & Bernstein L.L.P., by William L. Rikard, Jr. and Michael G. Adams, for respondent-appellant.

JACKSON, Judge.

Edward F. Greene ("Greene") appeals the trial court's reversal of the order of the Clerk of Ashe County denying dismissal of domicil-

iary administration of the Estate of J. Daniel Severt ("the estate") in Ashe County. For the reasons stated below, we reverse.

J. Daniel Severt ("decedent") died intestate on 21 May 1998. On 1 June 1998, an agreement regarding the administration of decedent's estate was entered into, in which the following individuals were named as co-administrators of the estate: (1) Greene; (2) Thomas Severt ("Severt"), decedent's brother; (3) Mary Severt, decedent's sister-in-law; (4) Mary S. Yearick ("Yearick"), decedent's sister; and (5) Christopher D. Lane ("Lane"), Greene's and decedent's attorney. As it was unclear at that time whether decedent was legally domiciled in North Carolina or in Virginia, it was agreed that the domiciliary, or original, administration of the estate would be in Ashe County, North Carolina, with an ancillary administration in Virginia.

Letters of administration were issued on 2 June 1998 in Ashe County, North Carolina. On 24 July 1998, a Certificate/Letter of Qualification was filed in Roanoke County, Virginia qualifying the five North Carolina co-administrators, as well as Frank W. Rogers, Jr. ("Rogers"), of Virginia, as co-ancillary administrators of the estate. On 27 January 1999, the Virginia administrators were converted from co-ancillary administrators to co-domiciliary administrators in Virginia.

On 28 January 1999, all six co-administrators of the Virginia estate applied to the Roanoke County Commissioner of Accounts for payment of commissions at five percent (5%) or greater of the receipts and disbursements of the estate. The Commissioner of Accounts informed them that he was not authorized to approve such fees and that "the estate itself had to make the decision on the fee arrangement." Between 16 and 24 February 1999, a total of $7,850,000.00 in commissions was paid to the co-administrators from the estate.

On or about 22 July 1999, an annual accounting was filed in Ashe County, North Carolina listing total estate assets of $103,105,215.78 and total disbursements of $56,564,210.43, including administrator commission disbursements totaling $7,850,000.00, $1,570,000.00 of which was paid to Greene. The accounting was audited and approved on or about 11 August 1999. On 3 November 1999, an estate inventory was filed in Virginia stating the total estate assets were $101,218,941.00. No subsequent accountings were filed in either North Carolina or Virginia until 2006

On or about 23 August 1999—after the filing of the North Carolina accounting, but before the filing of the Virginia accounting—estate tax returns were filed in both North Carolina and Virginia. A federal estate tax return also was filed. Decedent's Virginia gross estate was reported as $101,578,059.00, with .002447 percent attributable to assets located outside Virginia. The North Carolina gross estate was reported as $248,605.00. The federal gross estate was reported as $101,578,059.00, $248,605.00 of which was attributable to North Carolina.

The estate's federal tax return was audited by the Internal Revenue Service in 2002. As a result, a negotiated settlement was reached pursuant to which, *inter alia*, the deduction for aggregate executor commissions was reduced from $7,850,000.00 to $3,950,000.00. Because of the changes made to the federal estate tax return, additional taxes became due. Pursuant to a 31 May 2002 agreement entered into between all co-administrators except Yearick—who was not immediately available—Greene tendered to the estate $59,670.00, representing his proportional share of the increased federal estate taxes due. A federal estate tax closing letter was issued on 27 June 2002, effectively closing the account. The North Carolina Department of Revenue issued a certificate on 9 May 2003 indicating that any North Carolina inheritance and estate tax liability had been fully satisfied.

The 31 May 2002 agreement was mailed to Yearick on 3 June 2002 for her signature. On 17 June 2002, Yearick informed Lane, the estate's accountant, and Rogers, that she opposed the payment of administrator commissions to Greene and Lane. She filed an "Objection to Payment of Executor's Commissions and Attorney's Fees" in Ashe County on 6 August 2002, seeking to have Greene and Lane removed as co-administrators of the estate.

On 20 January 2005, Yearick filed an amendment to her objection alleging (1) undue influence, (2) constructive fraud, and (3) breach of fiduciary duty. On 15 August 2006, Yearick filed a memorandum of facts and law in support of her objections. On or about 25 August 2006, Yearick presented to the Clerk a statement of twelve issues to be determined at a hearing on the matter. Greene filed a similar statement on 5 September 2006, listing nine issues. He also objected to Yearick attempting to bring before the court any issues other than the twelve listed in her statement.

On 26 October 2006, Yearick filed a notice of withdrawal of her objections and asserted that the Ashe County Clerk of Superior Court had no jurisdiction to adjudicate the issues. She further asserted that she would raise the issues in Virginia. Also on 26 October 2006, Yearick filed an objection to a petition for approval of attorney's and accountant's fees, based upon the alleged lack of jurisdiction over the estate except as to ancillary matters. On 27 October 2006, Yearick filed a motion to recuse the clerk of superior court from hearing any further matters in the case. On 30 October 2006, Greene filed a brief in opposition to the motion to recuse. Also on 30 October 2006, Yearick filed a motion seeking to have the North Carolina domiciliary proceeding dismissed and the Virginia domiciliary proceeding given full faith and credit. The case was ordered to mediation on 1 November 2006. Nothing was resolved via mediation.

On 16 January 2007, Yearick, Severt, and Lane's law firm petitioned the court to allow the law firm to resign from representing the estate. Also on 16 January 2007, Yearick, Severt, and Lane petitioned the court to allow Lane to resign from representing the estate and from serving as a co-administrator. The 16 January petitions were calendared for hearing on 26 February 2007. On 12 February 2007, Greene petitioned the court to compel a final accounting or, in the alternative, to allow him to resign as co-administrator of the estate. Greene's petition also was calendared for hearing on 26 February 2007. On 20 February 2007, Yearick sought to limit the 26 February 2007 hearing to the jurisdictional issue raised by her 30 October 2006 motion, and requested that all motions be held in abeyance until such time as the issue of jurisdiction was resolved. The 16 January 2007 motions were granted by orders filed 26 February 2007.

Yearick's motion to dismiss was denied in open court on 26 February 2007, and by order filed 14 March 2007. Yearick filed timely notice of appeal with the superior court assigning error to twelve of the clerk's findings of fact, and ten of the clerk's conclusions of law. On 31 August 2007, the trial court reversed the clerk's order, and remanded the case for the purpose of finalizing the administration of the estate not inconsistent with its order. Greene appeals.

Greene first argues that the superior court exceeded its authority as an appellate court. We agree.

North Carolina General Statutes, section 1-301.3 sets forth the standard of review when appeal is taken of a clerk's order in probate matters.

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining *only the following*:
>
> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of facts.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

N.C. Gen. Stat. § 1-301.3(d) (2007) (emphasis added). However, the superior court "only reviews those 'findings of fact *which the appellant has properly challenged by specific exceptions*.' " *In re Estate of Whitaker*, 179 N.C. App. 375, 382, 633 S.E.2d 849, 854 (2006) (citations omitted) (emphasis in original).

In the instant case, Yearick assigned error to twelve of the clerk's findings of fact. Rather than determining whether these twelve findings of fact were supported by the evidence, the superior court made its own findings of fact. Although some of the superior court's findings of fact were essentially the same as those of the clerk's unchallenged findings of fact, others re-characterized the findings made by the clerk. For example, in the clerk's order, finding of fact number 8, which had been challenged by Yearick, states:

> On January 27, 1999, the Co-Administrators moved to convert [the] Virginia estate to a co-domiciliary estate. Virginia Circuit Court Judge Roy Willet entered an order, finding that [the] Ashe County, North Carolina, domiciliary administration was properly commenced and converting [the] Virginia administration from ancillary to domiciliary. The order did not find that Virginia was an exclusive domiciliary jurisdiction.

The corresponding finding of fact in the superior court's order states:

> On January 27, 1999, the Virginia Circuit Court, after considering all the information before it, including the affidavits of all the North Carolina Co-Administrators, issued an Order that Virginia was the decedent's domicile at the time of his death. The Co-Administrators then were administered oaths as Co-Domiciliary Administrators and were qualified as the same on January 29, 1999.

There is no language in the superior court's order that tells this Court whether or not the clerk's findings of fact were supported by the evidence. Even if the superior court had made such a determination, our statutes make no provision for the trial court to make such a modification to the clerk's findings of fact. Here, the superior court appears to have ignored completely those findings of fact made by the clerk that were challenged by Yearick, and substituted its own in their place. In doing so, the trial court exceeded its statutorily proscribed standard of review.

This Court has thoroughly reviewed the over 1500 pages of evidence of record before it. Each of the twelve findings of fact to which Yearick objected that is contained in the clerk's order is supported by evidence included within the extensive record. The clerk's findings of fact in turn support the conclusion that the Ashe County Clerk has subject matter jurisdiction over the estate and all proceedings related to its administration.

Pursuant to North Carolina General Statutes, section 28A-2-1, "[t]he clerk of superior court of each county, *ex officio* judge of probate, shall have jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to, . . . [g]ranting of letters . . . of administration[.]" N.C. Gen. Stat. § 28A-2-1 (2007). The application and granting of letters of administration are governed by North Carolina General Statutes, section 28A-6-1, which requires that the applicant's affidavit must allege, *inter alia*, "[t]he name, *and to the extent known*, the domicile and the date and place of death of the decedent[,]" and "[i]f the decedent was not domiciled in this State at the time of his death, a schedule of his property located in this State, and the name and mailing address of his domiciliary personal representative, *or if there is none*, whether a proceeding to appoint one is pending." N.C. Gen. Stat. § 28A-6-1(a)(1), (6) (2007) (emphasis added). Here, the application for letters of administration disclosed that decedent was domiciled in either Ashe County, North Carolina or Roanoke, Virginia and that there were no probate proceedings pending in any other jurisdiction.

Once the clerk determines that the application and supporting evidence complies with statutory requirements, "he *shall* issue letters of administration . . . to the applicant" unless he determines the best interests of the estate would be served by delaying the appointment. N.C. Gen. Stat. § 28A-6-1(b) (2007) (emphasis added). The letters of administration issued in this case authorize the co-

administrators to "administer *all of the assets* belonging to the estate" (emphasis added).

> [I]t may be safely said in reference to granting letters . . . of administration, that if under any circumstances the court of probate could grant them, then it would have jurisdiction of the subject and its act is not void; if, on the contrary, in no possible state of things it could grant the letters, then are they void and conveyed no authority to any one to act under them.

Hyman v. Gaskins, 27 N.C. 267, 272-73 (1844). Here, the North Carolina letters of administration were valid when issued; thus, the Ashe County Clerk of Court had jurisdiction over the estate. Pursuant to the letters themselves, that jurisdiction was over "all of the assets belonging to the estate."

"[T]he letters . . . being granted by a court of competent authority and having jurisdiction, [are] binding . . . until duly and properly repealed." *Id.* at 275 (citation omitted). Once issued, letters of administration may be revoked pursuant to North Carolina General Statutes, section 28A-9-1. The statutory grounds for revocation are:

> (1) The person to whom they were issued was originally disqualified under the provisions of G.S. 28A-4-2 or has become disqualified since the issuance of letters.
>
> (2) The issuance of letters was obtained by false representation or mistake.
>
> (3) The person to whom they were issued has violated a fiduciary duty through default or misconduct in the execution of his office, other than acts specified in G.S. 28A-9-2.
>
> (4) The person to whom they were issued has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration. The relationship upon which the appointment was predicated shall not, in and of itself, constitute such an interest.

N.C. Gen. Stat. § 28A-9-1(a) (2007). Yearick failed to pursue these grounds to revoke Greene's letters of administration. Further, revocation of Greene's letters would not serve to change the manner of estate administration in this state because the remaining four letters of administration still would be in effect. Establishment of a domiciliary estate in another state is not among the grounds provided for

revoking letters of administration. In addition, the validity of letters of administration are not subject to collateral attack. N.C. Gen. Stat. § 28A-6-5 (2007).

As to the effect of the conversion of the Virginia estate from an ancillary proceeding to a domiciliary one,

> Domicile is . . . a question of fact. Different courts may reach different conclusions with respect to this factual question. An express adjudication by the probate court of [another state] in a proceeding to probate in common form a paper as [a decedent's] will that she was a resident of that state would not be binding on the courts of this state. If that question be raised on an offer to probate in North Carolina, our court, on evidence presented to it, might reach a different factual conclusion without invading constitutional rights. Nor would comity compel us to accept a finding so made.

In re Will of Marks, 259 N.C. 326, 331, 130 S.E.2d 673, 676-77 (1963) (citations omitted). Although there was evidence that decedent was domiciled in Virginia, there also was evidence that he was domiciled in North Carolina: (1) he spent four to five days per week in the North Carolina residence; (2) he transacted most of his business in North Carolina; (3) litigation was centered in North Carolina; (4) his investments were primarily in North Carolina; (5) he regarded North Carolina as his "home"; (6) he was buried in North Carolina; and (7) he filed a tax return in North Carolina. As the duly issued letters of administration authorized the co-administrators to administer "all of the assets belonging to the estate," and the letters were never revoked, decedent's domicile is irrelevant.

Because the superior court exceeded the scope of the statutorily proscribed standard of review, and pursuant to that standard of review the clerk's order is without error, the order of the superior court is reversed.

Reversed.

Judges BRYANT and ARROWOOD concur.

STATE OF NORTH CAROLINA v. SAQUAN DEVEL HUSSEY

No. COA08-620

(Filed 16 December 2008)

1. Robbery— dangerous weapon—alleged fatal variance between indictment and evidence

The trial court did not err by failing to dismiss the charge of robbery with a dangerous weapon even though defendant contends there was a fatal variance between the indictment and the evidence offered because: (1) although the indictment alleged the victim was robbed with the threatened use of a revolver whereas the evidence and jury instructions described the weapon as a pistol, gun, or firearm, the distinctions between each are not so great as to make the indictment unclear as to the nature of the crime charged; and (2) regardless of whether the indictment said firearm or revolver, defendant was on notice that the State would present evidence that he threatened the victim with a handheld weapon.

2. Robbery— dangerous weapon—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon based on alleged insufficient evidence because: (1) the eighty-two-year-old victim provided evidence that defendant aimed a pistol at his head, demanded money, and then took money from him; and (2) although no evidence was presented showing defendant verbally threatened the life of the victim or actually used the weapon to strike the victim, viewing the evidence in the light most favorable to the State revealed that a jury could reasonably infer that aiming a gun at someone and demanding money was sufficient evidence to show both that defendant threatened the use of a firearm and that the victim's life was endangered and threatened.

3. Firearms and Other Weapons— possession of firearm by felon—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a felon because: (1) the State was required to provide substantial evidence that defendant had a prior felony conviction and a firearm in his possession; and (2) a certified copy of defendant's prior felony con-

viction was admitted into evidence, and the victim testified that defendant had a gun in his hand in the restroom.

4. Identification of Defendants— in-court identification—refusal to identify before trial

The trial court did not err in a robbery with a dangerous weapon and possession of a firearm by a felon case by refusing to strike the victim's testimony regarding his in-court identification of defendant as his assailant even though the victim did not identify his assailant prior to trial because: (1) defendant's only argument that his in-court identification was impermissibly suggestive was that the victim saw defendant sitting across from him in the courtroom, and this evidence alone was insufficient to show that such a confrontation tainted the in-court identification; (2) identification of defendant by the victim immediately prior to the beginning of the trial, without law enforcement involvement or suggestion, is not impermissibly suggestive; and (3) the fact that the victim had refused to attempt a pretrial identification goes to the weight rather than the competency of the testimony and is thus a matter to be considered by the jury.

5. Sentencing— prior record level—stipulation

The trial court did not err in a robbery with a dangerous weapon and possession of a firearm by a felon case by its sentencing even though defendant contends that nothing was offered to support the prior record level finding because: (1) prior convictions may be proved by several methods under N.C.G.S. § 15A-1340.14(f)(1) including a stipulation by the parties; and (2) sufficient evidence in the record showed defendant's prior record level was properly proven by stipulation.

Appeal by defendant from judgment entered 16 January 2008 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 9 October 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

John T. Hall, for defendant-appellant.

CALABRIA, Judge.

Saquan Devel Hussey ("defendant") appeals from a judgment entered upon jury verdicts finding him guilty of robbery with a danger-

ous weapon and possession of a firearm by a felon. He also appeals his sentence based on the method of determining his prior record level. We find no error.

The State presented evidence that on 22 December 2006 at approximately 4 P.M., George Walker ("Mr. Walker" or "the victim"), an 82-year-old retiree, went to McDonald's restaurant ("the restaurant" or "McDonald's") with his wife. Mr. Walker testified that after entering the restaurant, he went into the restroom. The defendant was already in the restroom. When Mr. Walker looked up, defendant pointed a pistol at his head and demanded money. Mr. Walker responded "what did you say?" The defendant responded "don't ask no questions, just do what I tell you to do." The defendant told Mr. Walker to give him his money. Mr. Walker explained what happened:

> Got it right in my pocket book, right in there and I handed it to him just like this here . . . and he opened it with his right hand, took it up under his arm like that, took the money out of the pocket book and put it in his pocket. And I said now give me my pocketbook back because my social security card. I reached over and took my pocketbook from him, put it my pocket like this. He said, you've got more money than that, give me that damn pocketbook back. I said, well you ought to know, you looked in it. I took it out of my pocket and handed it back to him. He looked in it again and thumbed through it, thumbed through it. I kept noticing that gun, that gun was dead on me and so he shut it back up like that and I reached over and took the pocketbook and put it back in my pocket. He said, give me that damn pocketbook back, you telling a damn lie, you've got more money than that. I said, you ain't getting that damn pocketbook cause I forgot he got a gun to my head and I shouldn't have said that and I looked up and that gun was still pointed at my head. And all at once everything just went out like it blew a lamp out. I just hit the floor, I reckon, and so in a few minutes—I don't know how long I was down there . . . . But anyway, I tried to get up and I couldn't get up so I laid back down there a minute or two. In a few minutes I reached up there and got a hold of the urinal like this here, and pulled myself up on my knees and my head stopped swimming a little bit and so I got up from there and I went on out and I went and told my wife what had happened . . . .

Although prior to trial Mr. Walker chose not to attempt to identify defendant through a photo lineup, at trial he immediately and confi-

dently identified the defendant as his attacker. Several other State witnesses confirmed that one of defendant's two friends arrived at the McDonald's in a grey car and also left in a grey car. The driver of the grey car was Montrell Sumlin ("Sumlin"). Sumlin told a detective later that upon entering the car defendant told him he knocked a man out in the restroom and took ten dollars from him.

The jury returned verdicts finding defendant guilty of robbery with a dangerous weapon and possession of a firearm by a felon. During the sentencing phase, the prosecution presented a worksheet used to calculate defendant's prior record level. The worksheet listed defendant's prior convictions and defendant's points were calculated for a total of eleven points which classified defendant's prior record level as a level IV. Section III of the worksheet was entitled "STIPULATION" and stated that defense counsel stipulated that the information on the worksheet was accurate. Both the prosecutor and defendant's counsel signed this worksheet.

Defendant was sentenced to a minimum of 117 to a maximum of 150 months for robbery and a minimum of 20 to a maximum of 24 months for possession of a firearm by a felon, both sentences were to be served in the North Carolina Department of Correction. Defendant appeals.

I. Variance in the Indictment

[1] The defendant contends that there was a fatal variance between the indictment and the evidence offered. The indictment alleges that Mr. Walker was robbed "with the threatened use of a revolver, a dangerous weapon." The evidence presented at trial, as well as the jury instructions, described the weapon as a "pistol," "gun," or "firearm." The defendant contends that this distinction between a firearm and a revolver is fatal to his conviction. We disagree.

The purpose of the criminal indictment is "[f]irst, to make clear the offense charged so that the investigation may be confined to that offense, that proper procedure may be followed, and applicable law invoked; second, to put the defendant on reasonable notice so as to enable him to make his defense." *State v. Palmer*, 293 N.C. 633, 636, 239 S.E.2d 406, 409 (1977). Therefore, "[t]he allegations [in the indictment] and the proof must correspond." *State v. Rhome*, 120 N.C. App. 278, 298, 462 S.E.2d 656, 670 (1995) (citation omitted).

The General Statutes of North Carolina, under the heading "Firearm Regulation" define a firearm as "[a] handgun, shotgun, or

rifle which expels a projectile by action of an explosion." N.C. Gen. Stat. § 14-409.39 (2007). A handgun is defined as "[a] pistol, revolver, or other gun that has a short stock and is designed to be held and fired by the use of a single hand." *Id.* This statute indicates that a revolver is a handgun and a handgun is included in the definition of a firearm. To the extent there are distinctions between each, these distinctions are not so great as to make the indictment unclear as to the nature of the crime charged. Whether the indictment said firearm or revolver the defendant was on notice that the State would present evidence that he threatened the victim with a handheld weapon. That level of specificity is sufficient, and there was no fatal variance between the indictment and the evidence.

II. Sufficiency of the Evidence

[2] The defendant argues that the trial court erred by denying defendant's motion to dismiss the charges based on insufficiency of the evidence. We disagree.

The standard of review for the court's denial of a motion to dismiss for insufficient evidence is whether when considered in the light most favorable to the State, there is substantial evidence of each essential element of the offense charged and that defendant is the perpetrator. *State v. Robbins*, 309 N.C. 771, 774-75, 309 S.E.2d 188, 190 (1983). "Substantial evidence is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981) (internal quotations and citations omitted).

The elements of robbery with a dangerous weapon are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of the person is endangered or threatened." *State v. Mann*, 355 N.C. 294, 303, 560 S.E.2d 776, 782 (2002) (internal citations omitted).

Mr. Walker provided evidence that the defendant aimed a pistol at his head, demanded money, then took money from him. Defendant argues the testimony that the 82-year-old victim took his pocket book back from his assailant and said "You ain't getting that damn pocket book" shows that the victim's life was not threatened or endangered. Although no evidence was presented showing the defendant verbally threatened the life of the victim, or actually used the weapon to strike the victim, viewing the evidence in the light most favorable to the

State, a jury could reasonably infer that aiming a gun at someone and demanding money is sufficient evidence to show both that defendant threatened to use a firearm and that the victim's life was endangered and threatened. Therefore, there was substantial evidence presented on each element of the charge of robbery with a dangerous weapon.

[3] The crime of possession of a firearm by a felon states "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c)." N.C. Gen. Stat. § 14-415.1 (2007). Therefore there are two elements to the offense. The State must provide substantial evidence that the defendant has a prior felony conviction, and a firearm in his possession. A certified copy of defendant's prior felony conviction was admitted into evidence, and the victim testified that the defendant had a gun in his hand in the restroom. Viewed in the light most favorable to the State, there was sufficient evidence presented on each element of the offense of possession of a firearm by a felon. This assignment of error is overruled.

III. In-Court Identification

[4] The defendant argues that the trial court erred by refusing to strike the victim's testimony regarding his in-court identification of the defendant as his assailant.

The victim did not identify his assailant prior to trial. When contacted for a photo lineup the victim refused to view the pictures. It was not until he was seated in the courtroom prior to the beginning of the trial that he viewed the defendant for the first time since the robbery. Defendant was seated at the defense table, and the victim recognized the defendant as his assailant.

An identification at an unnecessarily suggestive pretrial identification procedure is not inadmissible unless the procedure employed was so suggestive that there is a substantial likelihood of irreparable misidentification. *State v. Flowers*, 318 N.C. 208, 220, 347 S.E.2d 773, 781 (1986). "Even though a pretrial identification procedure may be suggestive, it will be impermissibly suggestive only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983).

> We have held that the viewing of a defendant in the courtroom during the various stages of a criminal proceeding by wit-

> nesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so unnecessarily suggestive and conducive to irreparable mistaken identification as would deprive defendant of his due process rights.

State v. Covington, 290 N.C. 313, 324, 226 S.E.2d 629, 638 (1976). As in *Covington*, the defendant's only argument that his in-court identification was impermissibly suggestive was that the victim saw the defendant sitting across from him in the courtroom. This alone is insufficient to show that such a confrontation tainted the in-court identification.

In *State v. Bass*, 280 N.C. 435, 186 S.E.2d 384 (1972), the North Carolina Supreme Court was presented with similar facts. The victim in *Bass* did not attempt to identify one of her attackers prior to a preliminary hearing. She saw one of the defendants for the first time after her attack when she walked into the courtroom for the preliminary hearing. She testified that she recognized the defendant "as soon as I came into the room. He was seated over on one side of the room against the wall." *Id.* at 452, 186 S.E.2d at 395-96. The trial court in *Bass* held that this procedure was not impermissibly suggestive, and the Supreme Court agreed stating that nothing in the record indicated "that the preliminary hearing was rigged for the purposes of identifying [the defendant]." *Id.* at 452, 186 S.E.2d 395. Further the Court held

> Her positive in-court identification of [defendant] suffices to carry the case to the jury. The fact that she failed to identify him from photographs and the fact that there were discrepancies and contradictions in her testimony at the preliminary hearing, if such there were, goes to the weight rather than the competency of the testimony and is thus a matter to be considered by the jury.

Id. at 452, 186 S.E.2d at 396.

Pursuant to *Bass*, we hold that the identification of the defendant by the victim, immediately prior to the beginning of the trial, without law enforcement involvement or suggestion, is not impermissibly suggestive. The victim's in-court identification is competent evidence. The fact that the victim had refused to attempt a pretrial identification "goes to the weight rather than the competency of the testimony and is thus a matter to be considered by the jury." *Id.* We find no error.

IV. Record Level Findings

[5] Defendant contends that the trial court erred in sentencing because nothing was offered to support the prior record level finding. We disagree.

Prior convictions may be proved, by several methods, including a stipulation of the parties. N.C. Gen. Stat. § 15A-1340.14(f)(1) (2007). Here, defendant's prior record level was properly proven by stipulation. Included in the record on appeal is form AOC-CR-600 entitled "Prior Record Level For Felony Sentencing." In Section I, defendant was found to have accumulated eleven points for prior felony and misdemeanor convictions and was classified as a prior record level IV offender. Section IV lists the defendant's prior convictions. Section III is entitled "Stipulation" and states:

> 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.

Both the prosecutor and defense counsel signed this stipulation.

It has been established "[t]he State does not satisfy its burden of proving defendant's prior record level merely by submitting a prior record level worksheet to the trial court." *State v. Jeffery*, 167 N.C. App. 575, 579, 605 S.E.2d 672, 675 (2004). However, in *Jeffery*, and the cases on which *Jeffery* relies, the prior record level worksheet that was submitted to the trial court did not include the stipulation that is now found in Section III. The prior record level worksheet was modified in 2003 to include the stipulation section. A signed stipulation is adequate to establish a prior record level so long as "its terms . . . [are] definite and certain in order to afford a basis for judicial decision . . . ." *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005).

Sufficient evidence in the record shows defendant stipulated to his prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14(f)(1). Both the prosecutor and defense counsel signed this stipulation. The trial court did not err by determining defendant's prior record level was a level IV. This assignment of error is overruled.

Defendant has failed to bring forth any arguments regarding his remaining assignments of error, and therefore has abandoned these assignments of error pursuant to N.C.R. App. P. 28(b)(6) (2007).

No error.

Judges TYSON and McCULLOUGH concur.

STATE OF NORTH CAROLINA, v. ROBERT LEE WOOTEN

No. COA08-734

(Filed 16 December 2008)

1. Indecent Liberties— eligibility for satellite-based monitoring—subject matter jurisdiction

The trial court had subject matter jurisdiction in a taking indecent liberties with a minor case to determine whether defendant was eligible for satellite-based monitoring (SBM) under N.C.G.S. § 14-208.40B even though defendant contends he had not yet achieved the status required for enrollment because: (1) a literal reading of the statute would prevent a court from making the SBM determination until the offender is released from prison, locates a residence, and registers their address with the local sheriff's department under the sex offender registry; (2) 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; (3) defendant is a person who fits the criteria the Legislature intended for participation in the SBM program since he completed his sentence for a Class F felony and was eligible for release but not eligible for post-release supervision after the effective date of the legislation; and (4) the statute sought to encompass multiple categories of offenders at different stages in the judicial process, and the notice provisions in N.C.G.S. § 14-208.40B are merely to protect the due process rights of offenders who are not currently incarcerated.

2. Sentencing— prior convictions—reportable offense—recidivist status—sexually violent offense

The trial court did not err in a taking indecent liberties with a minor case by relying on defendant's 1989 conviction to determine his status as a recidivist in establishing his eligibility for satellite-based monitoring because: (1) contrary to defendant's assertion, a prior conviction is not required to be a reportable offense to be considered by the trial court when making the recidivism determination; (2) defendant did not challenge that his 2006 conviction was a reportable conviction as defined by N.C.G.S. § 14-208.6(4); (3) a reportable offense under N.C.G.S. § 14-208.6(4)(a) includes a sexually violent offense such as the offense of taking indecent liberties with a child under N.C.G.S. § 14-202.1; and (4) the prior conviction must be for an offense that is described in the statute defining reportable offenses, and the offense on which defendant's recidivism determination was made was described in N.C.G.S. § 14-208.5 even though it was not reportable since it predated the act.

3. Constitutional Law— effective assistance of counsel—alleged failure to present legally sound argument—violation of *ex post facto* guarantees

Defendant did not receive ineffective assistance of counsel in a taking indecent liberties with a minor case based on his trial counsel's alleged failure to present a legally sound argument that the satellite-based monitoring (SBM) program violated the *ex post facto* guarantees of the United States and North Carolina Constitutions because: (1) trial counsel did argue that the statute violated the *ex post facto* guarantees of the United States and North Carolina Constitutions regarding the trial court's recidivism determination, and the trial court understood the argument was directed at the statute as applied to defendant and not limited to his 1989 conviction; (2) while trial counsel may have inartfully presented his constitutional arguments, trial counsel's performance did not rise to the level of deficiency particularly when trial counsel presented essentially the same arguments as those presented on appeal; and (3) defendant failed to show a different result would have been reached absent trial counsel's alleged error.

Appeal by defendant from an order entered 24 January 2008 by Judge Jay D. Hockenbury in Greene County Superior Court. Heard in the Court of Appeals 30 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

CALABRIA, Judge.

Robert Lee Wooten ("defendant") appeals the Honorable Jay D. Hockenbury's order enrolling defendant in satellite-based monitoring ("SBM") for his natural life pursuant to N.C. Gen. Stat. § 14-208.40B. We affirm the trial court's order.

On 23 October 2006 defendant entered a no contest plea to the offense of taking indecent liberties with a minor in violation of N.C. Gen. Stat. § 14-202.1 in connection with an incident that occurred 31 October 2001. Pursuant to the plea agreement, the State dismissed three counts of engaging in first-degree statutory sex offense and one count of committing a lewd and lascivious act. Defendant was sentenced to a minimum term of 20 months to a maximum term of 24 months to be served in the North Carolina Department of Correction.

On 24 January 2008, four days prior to defendant's expected release from prison, a hearing was held pursuant to N.C. Gen. Stat. § 14-208.40B to determine his eligibility for SBM. The parties stipulated at the hearing that defendant had been convicted on 25 April 1989 for taking indecent liberties with a minor. Based on this prior conviction, defendant was classified as a "recidivist" as defined by N.C. Gen. Stat. § 14-208.6(2b). Because defendant was a recidivist and because his 2006 conviction for taking indecent liberties with a minor constituted a "sexually violent offense" as defined in N.C. Gen. Stat. § 14-208.6(5) the court determined the defendant was subject to SBM for the duration of his life following his release from custody. Defendant appeals.

I. Jurisdiction

[1] Defendant argues the trial court lacked subject matter jurisdiction to determine whether he was eligible for SBM because defendant had not yet achieved the status required for enrollment. While defendant concedes that he was given proper notice of his hearing, was represented by counsel, and had an opportunity to present evidence and question witnesses, he argues the failure to follow the statutory notice provisions is a jurisdictional flaw that requires vacating the trial court's order. We disagree.

Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." Black's Law Dictionary 869 (8th ed. 2004). The court must have subject matter jurisdiction, or "[j]urisdiction over the nature of the case and the type of relief sought," in order to decide a case. *Id.* at 870. "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).

The General Assembly "within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State." *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), overruled on other grounds by *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

Defendant's eligibility hearing for SBM was held pursuant to N.C. Gen. Stat. § 14-208.40B(b) which reads:

> If the Department determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the Department shall schedule a hearing in the court of the county in which the offender resides. The Department shall notify the offender of the Department's determination and the date of the scheduled hearing by certified mail sent to the address provided by the offender pursuant to G.S. 14-208.7. The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed. Receipt of notification shall be presumed to be the date indicated by the certified mail receipt.

N.C. Gen. Stat. § 14-208.40B(b) (2007). A literal reading of the statute could prevent a court from making the SBM determination until the offender is released from prison, locates a residence, and registers their address with the local sheriff's department pursuant to the sex offender registry. "[W]here 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 v. Southwestern Motors*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979).

The Legislature intended the SBM program apply to

> any person sentenced to intermediate punishment on or after [the effective date] and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole.

An Act to Protect North Carolina's Children/Sex Offender Law Changes, ch. 247, sec. 15(l), 2006 N.C. Sess. Laws 1074, 1079.

The legislation became effective 16 August 2006. Defendant completed his sentence for a Class F felony and was eligible for release, but not eligible for post-release supervision after the effective date of the legislation. Therefore, defendant is a person who fits the criteria the legislature intended for participation in the SBM program.

The statute seeks to encompass multiple categories of offenders at different stages in the judicial process, the notice provisions found in N.C. Gen. Stat. § 14-208.40B(b) are merely that, notice provisions to protect the due process rights of offenders who are not currently incarcerated. Defendant's interpretation would create a situation where the court would lack subject matter jurisdiction over an entire class of offenders to whom the legislature intended the statute applied. Therefore, defendant's interpretation is rejected. The trial court properly exercised jurisdiction in the present case.

II. Reportable Conviction

[2] Defendant argues that the court's reliance on his 1989 conviction to determine his status as a recidivist was error. Defendant argues that the statute requires the prior conviction that determines recidivism must be a reportable conviction as defined in N.C. Gen. Stat. § 14-208.6(4). Defendant bases his argument on the enrollment requirement since only those offenders convicted of indecent liberties after 1 January 1996 are required to enroll in the sex offender registry, and therefore defendant's 1989 conviction is not reportable. We disagree with defendant's argument that a prior conviction must be reportable to be considered by the trial court when making the recidivism determination.

SBM is applicable to

> [a]ny offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under

> Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.

N.C. Gen. Stat. § 14-208.40(a)(1) (2007). The defendant does not challenge that his 2006 conviction was a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4). Nevertheless, defendant argues that he cannot be considered a recidivist under the statute. Recidivist is defined as "a person who has a prior conviction for an offense that *is described in* G.S. 14-208.6(4)." N.C. Gen. Stat. § 14-208.6(2b) (2007) (emphasis added). A reportable offense is defined as

> A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.

N.C. Gen. Stat. § 14-208.6(4)(a) (2007). A sexually violent offense includes the offense of taking indecent liberties with a child as described in N.C. Gen. Stat. § 14-202.1. Contrary to defendant's assertion, there is nothing in the statutory language that requires the prior conviction in a recidivism determination must be for a reportable offense. The code is clear that the prior conviction must be for an offense that *is described in* the statute defining reportable offenses. The interpretation offered by defendant would give no effect to the words "is described in" found in the statute. The court determined the defendant was a recidivist because the offense on which defendant's recidivism determination was made is clearly one described in N.C. Gen. Stat. § 14-208.5, even though it is not reportable because it predates the act. "We are bound by well-accepted rules of statutory construction to give effect to this plain and unambiguous meaning and we therefore decline any attempt to ascertain a contrary legislative intent." *State v. Oglesby*, 361 N.C. 550, 556, 648 S.E.2d 819, 822 (2007).

III. Ineffective Assistance of Counsel

[3] Defendant argues that he received ineffective assistance of counsel because trial counsel failed to present a legally sound argument that the SBM program violated the *ex post facto* guarantees of the United States and North Carolina Constitutions. We disagree.

Trial counsel did argue before the trial court that the statute violated the *ex post facto* guarantees of the United States and North Carolina Constitutions regarding the trial court's recidivism determination. Defendant contends that the argument presented was not legally sound, and therefore rendered counsel's assistance ineffective.

In asserting what the defendant contends is the proper *ex post facto* argument regarding the SBM scheme, defendant argues that the monitoring equipment is a modern day scarlet letter, intended to shame the offender. He also argues that offenders subject to SBM are restricted in where they may go and work. He further argues that the lifetime duration shows the punitive purpose of the SBM statute. Defendant's trial counsel forwarded these same arguments at defendant's hearing.

Defendant contends that trial counsel only presented these arguments regarding defendant's 1989 conviction. However, if the enhanced penalty existed at the time of the commission of the crime to which the penalty will attach, it does not offend the *ex post facto* guarantees if the enhancement is based on crimes committed prior to the enactment. *Gryger v. Burke*, 334 U.S. 728, 732, 92 L. Ed. 1683, 1687 (1948). While the issue being contested at the time trial counsel made his various *ex post facto* arguments was defendant's recidivism status, trial counsel's arguments wavered between defendant's 1989 conviction and his 2006 conviction. The trial court understood trial counsel's argument regarding *ex post facto* was directed at the statute as applied to defendant and not limited to defendant's 1989 conviction. Specifically, the trial court held

> [t]hat counsel for Defendant, contends that the statute requiring the Defendant to be enrolled in a lifetime satellite based monitoring program as well as lifetime registration is unconstitutional in violation of the following provisions of both the North Carolina and United States Constitutions:
>
> . . .
>
> e. that the statute's implementation is ex post facto as applied to this Defendant."

Defendant does not challenge this finding of fact and it is binding on appeal. The trial court then concluded "the Defendant's arguments to dismiss the State's motion based on the language of the statute and the constitutionality of the statute are without merit . . . ." Defendant does not challenge the court's conclusion of law.

Defendant must show two things to prevail on an ineffective assistance of counsel claim. First, defendant must show that his counsel's performance was "deficient," such that the errors committed were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Second, defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Prejudice is established by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 80 L. Ed. 2d at 693.

Defendant cannot prove either element of an ineffective assistance of counsel claim. While trial counsel may have been a bit disorganized, and may have inartfully presented his constitutional arguments, trial counsel's performance did not rise to the level of deficient as it is explained in *Strickland*, particularly when counsel at trial presented essentially the same arguments as presented here. Further, based on the trial judge's findings and holding, it is clear that even if defendant's trial counsel had presented the exact *ex post facto* argument to the trial court, that he now presents to us, the trial court would have reached the same result. Without a showing that absent trial counsel's errors a different result would have been reached, defendant did not receive ineffective assistance of counsel.

While defendant asserts in his brief that the SBM statute violates the *ex post facto* guarantees of the United States and North Carolina Constitutions, he does not assign as error the trial court's holding denying that argument and therefore it is not properly before this court and we cannot address it.

Affirmed.

Judges TYSON and STROUD concur.

DARA LYNN HACKOS, PLAINTIFF v. DAVID CURTIS SMITH, DAVID CURTIS SMITH & ASSOCIATES, PLLC, MICHELLE C. MARK, DEFENDANTS

No. COA07-1543

(Filed 16 December 2008)

1. Appeal and Error— gross violations of appellate rules— violations of Revised Rules of Professional Conduct

Although the Court of Appeals denied defendants' motion to dismiss this appeal based upon gross violations of the North Carolina Rules of Appellate Procedure, the Court of Appeals elected to tax double the costs of this appeal against plaintiff's attorney under N.C. R. App. P. 25 and 34, because: (1) even though the omission of assignments of error from the proposed record on appeal was not fatal since the notice of appeal from an order granting summary judgment was sufficient, the record on appeal filed with the Court of Appeals was at variance with what was presented to defendants as the proposed record on appeal; and (2) a record on appeal presented to the Court of Appeals that differed materially from what was proposed to opposing counsel was a false statement of material fact or law in violation of Rules 3.3(a)(1), 3.4(a), and 8.4(c) of the Revised Rules of Professional Conduct.

2. Attorneys— legal malpractice—summary judgment—burden of proof

The trial court did not err in a legal malpractice case stemming from an underlying personal injury lawsuit by granting summary judgment in favor of defendants because: (1) defendants met their burden of showing that an essential element of plaintiff's case did not exist, a breach of duty owed to the client, based on the affidavit of a personal injury lawyer in Raleigh; (2) it then became incumbent upon plaintiff to forecast rebuttal evidence showing the existence of a genuine issue of material fact as to whether there was a breach of duty owed to her, and she failed to do so; and (3) plaintiff neither showed up at the summary judgment hearing nor filed a response to the motion for summary judgment, no affidavits were presented on her behalf, and her motion to continue the matter was denied in open court.

Appeal by plaintiff from an order entered 16 July 2007 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 May 2008.

Goodman, Allen & Filetti, PLLC, by Kerri Borchardt Taylor, Pro Hac Vice, and A. William Charters, and Elliott Pishko Morgan, P.A. by David C. Pishko, for plaintiff-appellant.

Patterson Dilthey, LLP, by Ronald C. Dilthey and Wyrick Robbins Yates & Ponton, LLP, by Charles George, for defendants-appellees.

JACKSON, Judge.

Dara Lynn Hackos ("plaintiff") appeals the 16 July 2007 granting of summary judgment in favor of David Curtis Smith ("Smith"), Michelle C. Mark ("Mark"), and David Curtis Smith & Associates, PLLC (collectively "defendants"). Plaintiff also appeals the 28 September 2007 denial of her motion to reconsider, which is the subject of a companion opinion in file 08-63.[1] For the reasons stated below, we affirm.

Plaintiff was injured in an automobile accident in Pittsylvania County, Virginia on or about 25 August 2001. She brought the instant legal malpractice suit against defendants on 23 June 2006, stemming from an underlying personal injury lawsuit related to plaintiff's 2001 accident. On 29 June 2007, defendants filed a motion for summary judgment alleging that they had not breached the applicable standard of care. Although both plaintiff and her Virginia counsel filed motions for a continuance, neither had been granted by the time of the summary judgment hearing on 12 July 2007.[2] Neither plaintiff nor her counsel appeared at the 12 July 2007 hearing. Neither motion for continuance included an affidavit explaining why affidavits opposing summary judgment were not available. No opposing affidavits were presented at the summary judgment hearing. Defendants' motion for summary judgment was granted on 16 July 2007. Plaintiff filed notice of appeal on 16 August 2007.

[1] As a preliminary matter, we note that defendants have brought motions to dismiss this appeal, as well as the companion appeal in file number 08-63, based upon violations of the North Carolina Rules of

1. Defendants filed a motion to consolidate these appeals on 4 April 2008. On 22 April 2008, this Court issued an order as follows: "The appeals in case numbers COA 07-1543 and COA 08-63 will be heard before the same panel on May 21, 2008."

2. The motion by plaintiff's attorney was erroneously marked "granted" on 10 July 2007; however, that order was not filed until 13 July 2007. Plaintiff's motion was denied at the summary judgment hearing. No appeal was taken as to the erroneously marked motion.

Appellate Procedure. Specifically, defendants argue that the records on appeal filed with this Court are at variance with the proposed records on appeal served upon defendants, in violation of Rule 11.

Plaintiff filed no response to these motions prior to the hearing date for these cases. This Court, *ex mero motu*, issued orders on 29 July 2008 as to each appeal, ordering plaintiff to file responses to defendants' motions within ten days. As plaintiff's attorney was on secured leave, she filed a motion as to this appeal to extend the deadline. The motion as to this appeal was granted and the ten day period was to begin upon the expiration of secured leave. The response was filed 25 August 2008.

A proposed record on appeal was provided to defendants on 10 November 2007. A proposed record on appeal in the companion appeal was provided to defendants on 27 November 2007. On 10 December 2007, defendants sent a letter to plaintiff expressing their understanding that the second proposed record on appeal replaced the first proposed record on appeal. Also on 10 December 2007, defendants sent a letter to plaintiff noting their objections and amendments to the proposed record on appeal.[3] On 17 December 2007, counsel for plaintiff wrote to defendants' counsel to inform them that the second proposed record on appeal did not replace the first proposed record on appeal, but that it related to a second and separate appeal. No further objections and amendments were made.

Defendants objected to the omission from the proposed record on appeal of a copy of the hearing transcript, which was attached as an exhibit for admission in the record on appeal. Defendants also stated that the proposed record on appeal and exhibit should be labeled with a cover page with an index of contents pursuant to Rule 9 of the North Carolina Rules of Appellate Procedure.

The final record on appeal in this appeal was filed with this Court on 20 December 2007. It included a "Statement of Transcript Option" to address defendants' first objection and a cover page with an index of contents to address the second.

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3. It is unclear to this Court whether defendants intended the objections and amendments to pertain to this appeal or to the companion appeal. Due to defendants' assumption that the second proposed record on appeal replaced the first proposed record on appeal, it appears the objections and amendments related to the second proposed record on appeal, file number 08-63 on appeal. However, both sides treat the objections and amendments as though they were as to this appeal. Therefore, we treat them as such.

The record on appeal filed with this Court is at variance with what was presented to defendants as the proposed record on appeal. When objections or amendments to the proposed record on appeal are filed, in addition to those items from the proposed record that are required by Rule 9(a) of the North Carolina Rules of Appellate Procedure, the record on appeal shall consist of any item "that is requested by any party to the appeal[,]" unless not all parties agree to the inclusion of requested items, in which case such items are included in the "Rule 11(c) Supplement to the Printed Record on Appeal." N.C. R. App. P. 11(c) (2007).

The proposed record did not include: (1) a statement of organization of the trial court, (2) a statement of jurisdiction, (3) a stipulation of service and settlement of record, (4) assignments of error, and (5) identification of counsel for appeal, all of which are required by Rule 9.

Defendants argue that the lack of assignments of error in the proposed record on appeal requires dismissal. Pursuant to Rule 9, our scope of appellate review is "solely upon the record on appeal, the verbatim transcript of proceedings, . . . and any items filed with the record on appeal pursuant to Rule 9(c) [(testimonial evidence)] and 9(d) [(models, diagrams, and exhibits of material)]." N.C. R. App. P. 9(a) (2007). Appellate Rule 10 limits the scope of appellate review to "a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P. 10(a) (2007). Absent any assignments of error in the record on appeal, there is nothing within the scope of our review.

However, counsel for plaintiff argues that the omission of assignments of error from the proposed record on appeal is not fatal because the notice of appeal from an order granting summary judgment is sufficient. We agree with plaintiff.

In *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987), our Supreme Court held that

> summary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones. It would appear, then, that notice of appeal adequately apprises the opposing party and the appellate

> court of the limited issues to be reviewed. Exceptions and assignments of error add nothing.

Id. at 415, 355 S.E.2d at 481 (citations omitted). Subsequently in *Shook v. County of Buncombe*, 125 N.C. App. 284, 480 S.E.2d 706 (1997), a panel of this Court stated that "[i]n our view, *Ellis* is no longer the law." *Id.* at 285, 480 S.E.2d at 707. However, our Supreme Court recently reaffirmed *Ellis* in *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 658 S.E.2d 918 (2008), stating:

> This Court has long held, *and the law has not been changed*, that for purposes of an appeal from a trial court's entry of summary judgment for the prevailing party, the appealing party is not required under Rule 10(a) of the Rules of Appellate Procedure to make assignments of error for the reason that on appeal, review is necessarily limited to whether the trial court's conclusions as to whether there is a genuine issue of material fact and whether the moving party is entitled to judgment, both questions of law, were correct.

Id. at 276-77, 658 S.E.2d at 923 (citing *Ellis*, 319 N.C. at 415-17, 355 S.E.2d at 481-82) (emphasis added).

Although plaintiff's lack of assignments of error is not fatal, we are gravely concerned by counsel's lack of transparency in serving one version of the record on appeal on opposing counsel and a materially different version of that record on this Court. "It is well-settled that an attorney's responsibilities extend not only to his client but also to the court[s]." *N.C. State Bar v. Key*, 189 N.C. App. 80, 85, 658 S.E.2d 493, 497 (2008) (citing *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 306 (1965)). The courts have inherent power to regulate attorneys. *Beard v. N.C. State Bar*, 320 N.C. 126, 130, 357 S.E.2d 694, 696 (1987). Within its power, our Supreme Court has adopted rules governing the professional conduct of attorneys in this state. We caution that as attorneys, we all are guided by the Rules of Professional Conduct.

We note that pursuant to Rule 3.3(a) a lawyer is prohibited from knowingly making a "false statement of material fact or law" to a tribunal or failing to correct such a statement previously made to the tribunal by the lawyer. Revised Rules of Professional Conduct, Rule 3.3(a)(1) (2007). A record on appeal presented to this Court that differs materially from what was proposed to opposing counsel is such a "false statement of material fact or law." Further, Rule 3.4(a) states

that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." Revised Rules of Professional Conduct, Rule 3.4(a) (2007). "The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." *Id.* at cmt. [1]. Although the record on appeal is not "evidence" *per se*, its purpose is to inform opposing counsel of the nature and scope of appellant's appeal. The record on appeal and other testimonial and material evidence is the only "evidence" this Court has to review the rulings of lower courts. A lawyer must not be permitted to present one set of documents to opposing counsel yet present a different set of documents to this Court.

Finally, Rule 8.4(c) reminds us that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Revised Rules of Professional Conduct, Rule 8.4(c) (2007). By not filing the same record on appeal with this Court that was served upon defendants, plaintiff's counsel misrepresented what the record on appeal contained. We cannot condone such conduct.

We hold that the actions of plaintiff's counsel constitute gross violations of our appellate rules; therefore, pursuant to Rules 25 and 34, we elect to tax double the costs of this appeal against plaintiff's attorney. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008) ("In the event of substantial or gross violations of the nonjurisdictional provisions of the appellate rules, however, the party or lawyer responsible for such representational deficiencies opens the door to the appellate court's need to consider appropriate remedial measures."). We direct the clerk of this court to enter an order accordingly.

[2] Plaintiff first argues that the trial court erred in granting defendants' motion for summary judgment because there were genuine issues of material fact. We disagree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of

law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Texaco, Inc. v. Creel*, 310 N.C. 695, 314 S.E.2d 506 (1984)). One method of meeting this burden is by showing that an essential element of the non-moving party's claim is nonexistent. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted). Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *See Id.* (citation omitted).

In an action for legal malpractice, "the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client . . . and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985) (citation omitted).

Here, defendants' motion for summary judgment was accompanied by the affidavit of Nicholas A. Stratas, Jr. ("Stratas"), a personal injury attorney in Raleigh. Stratas stated that he had reviewed the complaint and discovery materials and that, in his professional opinion, Smith had "at all times complied with the standards of practice for lawyers practicing personal injury law in Durham, North Carolina or similar communities in his representation of Ms. Hackos." Stratas further stated that in his opinion, Mark had insufficient involvement in the case and thus no standard of care was applicable to her. Upon this affidavit, defendants met their burden of showing that an essential element of plaintiff's case did not exist—breach of a duty owed to the client.

It then became incumbent upon plaintiff to forecast evidence showing the existence of a genuine issue of material fact as to whether there was a breach of a duty owed to her. She failed to do so. Plaintiff neither showed up at the summary judgment hearing, nor filed a response to the motion for summary judgment. No affidavits were presented on her behalf. Although she filed a motion to continue the matter, it was denied in open court.

We recognize that "[a] trial court is not required to assign credibility to a party's affidavits merely because they are uncontradicted." *Lewis v. Blackman*, 116 N.C. App. 414, 419, 448 S.E.2d 133, 136 (1994) (citing *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976)). Here, however, the affidavit was credible and plaintiff failed to present any rebuttal evidence to show that a material issue of fact

existed. Accordingly, the trial court did not err in granting summary judgment for defendant.

Plaintiff makes two other arguments in her brief. However, because our review is limited to the granting of summary judgment, we do not address plaintiff's remaining arguments.

Affirmed.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. LYNN EDWARD ISENHOUR

No. COA08-478

(Filed 16 December 2008)

Search and Seizure— motion to suppress evidence— *Mendenhall* test—reasonable person—reasonable suspicion—consent

The trial court did not err in a possession of methadone case by denying defendant's motion to suppress evidence obtained during the search of his vehicle even though defendant contends it was an illegal search and seizure because: (1) the objective standard in *Mendenhall*, 446 U.S. 544 (1980), revealed that the officer's actions would not lead a reasonable person to believe that he was not free to leave at any time when defendant was free to drive away from the scene at any time during the encounter since the officer parked his patrol car eight feet away from defendant's car, and there was no suggestion in the record that the officer's car physically blocked defendant's car; nothing else in the officer's behavior or demeanor amounted to the "show of force" necessary for a seizure to occur; there was no evidence that the officer created any real "psychological barriers" to defendant's leaving such as using his police siren, turning on his blue strobe lights, taking his gun out of his holster, or using threatening language; and the testimonies of both defendant and the officer indicated that the encounter proceeded in a non-threatening manner and that defendant was cooperative at all times; (2) no reasonable suspicion was required for the officer to approach defendant's car and ask him questions when the offi-

cer's actions did not constitute a seizure of defendant, and defendant was free to not answer the officer's questions; and (3) defendant's consent to search the vehicle was given voluntarily and was not the product of an illegal seizure since the officer did not unlawfully seize defendant.

Appeal by defendant from judgment entered 3 January 2008 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 October 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

HUNTER, Judge.

This is an appeal from the trial court's denial of defendant's motion to suppress evidence. Subsequent to the trial court's denial, defendant pled guilty to one count of possession of methadone, preserving his right to appeal under *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). After careful review, we affirm the trial court's denial of the motion to suppress and therefore the judgment.

On 5 May 2006, Lynn Edward Isenhour ("defendant") was arrested after a search of his car revealed methadone pills that were not prescribed to him. Prior to the arrest, defendant and a passenger were sitting in a car in the back corner of a fast food restaurant parking lot, bordered by a fence and wooded area. Charlotte-Mecklenburg Police Officers Ferguson and Gaskins were patrolling the area near the parking lot, which was known for having a lot of drug and prostitution activity. The officers observed that neither defendant nor his passenger had exited from the car during a ten minute period. The officers then pulled up to defendant's car in a marked patrol car. The officers parked their patrol car approximately eight feet away from defendant's car.

Officers Ferguson and Gaskins exited their patrol car and approached defendant's vehicle. The officers were in full police uniform and were armed. Officer Ferguson asked defendant to roll down his window, but defendant informed him that his window did not roll down. Instead, defendant opened his car door to speak with Officer Ferguson.

Officer Ferguson became suspicious of defendant because "the stories of the defendant driver and the passenger were different—the general information they gave to Officer Ferguson about the reason for their being there was not the same." At this point, Officer Ferguson asked defendant to exit his car. Next, Officer Ferguson patted down defendant, and then asked for consent to search defendant's car. Defendant consented to the search. While searching the car, Officer Ferguson found a pill bottle containing eight methadone pills. Officer Ferguson testified that defendant was very cooperative and did not seem at all nervous during their entire interaction.

Defendant moved to suppress the evidence obtained during the search of his vehicle, claiming the evidence was obtained as a result of an illegal search and seizure. At a hearing on 3 January 2008, the trial judge denied defendant's motion to suppress. On the same day, defendant entered an *Alford* plea to the charge of possession of methadone, reserving the right to appeal from the trial court's denial of his motion to suppress.

Defendant argues that the trial court erred in concluding that he was free to leave the scene at any time during the encounter between himself and Officer Ferguson. Defendant argues that, contrary to the trial court's conclusion, when Officer Ferguson parked his patrol car eight feet away from defendant's car and approached him while armed and in full police uniform, Officer Ferguson created a situation in which a reasonable person would not feel free to leave. Defendant therefore argues that Officer Ferguson's actions in approaching his vehicle constituted a "seizure" under the Fourth Amendment. Defendant next argues that since Officer Ferguson did not have a reasonable and articulable suspicion that a crime was underway, this "seizure" was unjustified and therefore unconstitutional. The final step in defendant's argument is that while he seemingly consented to the search of his vehicle, the consent was given involuntarily, since it was the result of an illegal seizure. Therefore, defendant argues that the trial court erred in denying his motion to suppress the results of the search of his vehicle. We disagree.

The standard of review in determining whether a trial court properly denied a motion to suppress evidence is "whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (2003). The trial court's conclusions of law " 'are fully reviewable on appeal[,]' " *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994) (citation omitted), in

order to determine whether they reflect a " ' "correct application of applicable legal principles to the facts found." ' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations omitted).

Defendant first argues that Officers Ferguson and Gaskins illegally seized him without a reasonable and articulable suspicion that he was involved in criminal activity, in violation of the Fourth Amendment to the United States Constitution, which prohibits "unreasonable searches and seizures[.]" U.S. Const. amend. IV. Defendant's contention requires us first to determine whether there was, in fact, a "seizure." If there was indeed a "seizure," only then need we reach the question of whether that seizure was unreasonable, and therefore illegal.

Defendant contends that Officer Ferguson's actions, in parking his patrol car near defendant's and approaching defendant while armed and in full police uniform, constituted a "seizure" under the Fourth Amendment. Defendant argues that when Officer Ferguson parked his patrol car eight feet away from defendant's vehicle, Officer Ferguson restrained defendant's freedom of movement, making it difficult, if not impossible, for defendant to drive away. Furthermore, defendant argues that the fact that Officer Ferguson and his partner were both in full uniform, that they were both carrying weapons, and the way they approached the car on either side would have been intimidating, if not threatening, to the average reasonable person.

Our United States Supreme Court has held that law enforcement officers do not violate the Fourth Amendment's prohibition against unreasonable seizures "merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *United States v. Drayton*, 536 U.S. 194, 200, 153 L. Ed. 2d 242, 251 (2002); *see also Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968) ("[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons"). Even when police officers have no reason to suspect that a person is engaged in criminal behavior, they may "pose questions, ask for identification, and request consent to search . . . provided they do not induce cooperation by coercive means." *United States v. Drayton*, 536 U.S. at 201, 153 L. Ed. 2d at 251.

A police officer does effectuate a seizure when he " ' "by means of physical force or show of authority," ' terminates or restrains [that person's] freedom of movement[.]" *Brendlin v. California*, —— U.S.

——, ——, 168 L. Ed. 2d 132, 138 (2007) (citations omitted). It is clear that whenever an officer has applied physical force to a person, he has seized that person within the meaning of the Fourth Amendment. *See California v. Hodari D.*, 499 U.S. 621, 624, 113 L. Ed. 2d 690, 696 (1991) (holding that "the mere grasping or application of physical force with lawful authority" constitutes a seizure); *see also State v. Fleming*, 106 N.C. App. 165, 169, 415 S.E.2d 782, 784 (1992). However, it is also possible for an officer to "seize" a person without ever laying his hands on that person. *See Terry v. Ohio*, 392 U.S. at 19 n.16, 20 L. Ed. 2d at 905 n.16 ("when the officer, by means of physical force or *show of authority*, has in some way restrained the liberty of a citizen [we may] conclude that a 'seizure' has occurred") (emphasis added). Defendant urges that this second type of (non-physical) seizure occurred when Officer Ferguson approached his vehicle.

Absent actual physical force, the operative question in determining whether a police officer has "seized" a person is "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980) (footnote omitted). This Court has held that the *Mendenhall* test requires an objective analysis of police officers' behavior, most importantly whether the officers "create[d] by their actions or appearances either physical or psychological barriers" to the defendant's freedom to leave the scene. *State v. Christie*, 96 N.C. App. 178, 184, 385 S.E.2d 181, 184 (1989). Moreover, the *Mendenhall* test does not take into account a defendant's subjective impressions of an encounter with police officers, but instead asks whether the police officers' actions would have led a "reasonable person" to believe that he was not free to leave the scene. *Id.* (reasoning that "[w]hile defendant may have felt restrained from leaving . . . by the officers' presence, he had no reason to feel such restraint").

In general, some factors that might lead a reasonable person to believe that he was not free to leave include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509. In *State v. Christie*, this Court found there was no seizure because police officers "did not display any weapons; they did not use threatening language or a compelling tone of voice; and they did not block or inhibit defendant in any way from refusing to

answer their questions or leave the [scene]." *Christie*, 96 N.C. App. at 184, 385 S.E.2d at 184.[1]

The facts of the present case closely resemble that of *State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579, where our Supreme Court held that the behavior of a police officer who parked his patrol car, approached an individual sitting in a parked car on the other side of a drainage ditch, and questioned him through an opened car door "did not amount to an investigatory 'stop' and certainly was not a 'seizure.' " *Id.* at 142, 446 S.E.2d at 586. The Court based this conclusion on the fact that there was nothing in the evidence which might indicate "that a reasonable person in the position of the defendant would have believed that he or she was not free to leave or otherwise terminate the encounter[,]" nor was there evidence that "defendant submitted to any show of force." *Id.*

Here, the trial court correctly concluded that defendant was free to drive away from the scene at any time during the encounter. The trial court based its conclusion, in part, on its finding that Officer Ferguson parked his patrol car eight feet away from defendant's car. There is no suggestion in the record that Officer Ferguson's car physically blocked defendant's car, thus preventing him from driving away. Furthermore, nothing else in Officer Ferguson's behavior or demeanor amounted to the "show of force" necessary for a seizure to occur. There is no evidence that Officer Ferguson created any real "psychological barriers" to defendant's leaving such as using his police siren, turning on his blue strobe lights, taking his gun out of his holster, or using threatening language. The testimonies of both defendant and Officer Ferguson indicate that the encounter proceeded in a non-threatening manner and that defendant was cooperative at all times. Under the objective *Mendenhall* standard, the trial court correctly concluded that Officer Ferguson's actions would not lead a reasonable person to believe that he was not free to leave at any time.

Since Officer Ferguson's actions do not at the first level constitute a "seizure" of defendant's person, we need not reach the question of whether there was an "unreasonable seizure." In any event, no reasonable suspicion was required for Officer Ferguson to approach defendant's car and ask him questions. *See Brooks*, 337

1. Defendant's brief relies heavily on *State v. Icard*, a plurality opinion from this Court. *State v. Icard*, 190 N. C. App. —, 660 S.E.2d 142 (2008). However, this reliance is misplaced since our State Supreme Court has recently stayed the Court of Appeals' decision pending appeal. *State v. Icard*, 362 N.C. 367, 662 S.E.2d 668 (2008).

N.C. at 142, 446 S.E.2d at 586. Defendant was free not to answer Officer Ferguson's questions and indeed was free to leave the scene at any time.

Defendant's argument that his consent to search his vehicle was invalid since it was given involuntarily is similarly without merit. Defendant's argument rests on the proposition that consent to search given to a police officer following an illegal seizure is invalid. *See Florida v. Royer*, 460 U.S. 491, 75 L. Ed. 2d 229 (1983). However, since Officer Ferguson did not unlawfully seize defendant, we find that defendant's consent to search the vehicle was given voluntarily and not the product of an illegal seizure.

Therefore, since there was no seizure when the police officers pulled up in their patrol car and approached defendant, the trial court did not err in denying defendant's motion to suppress the evidence recovered from the voluntary search of the vehicle.

Affirmed.

Judges ELMORE and GEER concur.

DARVIN TREAT, EMPLOYEE, PLAINTIFF-APPELLANT v. MECKLENBURG COUNTY, EMPLOYER, SELF-INSURED, DEFENDANT-APPELLEE

No. COA08-56

(Filed 16 December 2008)

Workers' Compensation— disability—burden of proof—Form 62—failure to argue any specific findings of fact

The full Commission did not err in a workers' compensation case by placing the burden on plaintiff employee to prove he is disabled even though plaintiff contends the 8 March 2004 order entered by a deputy commissioner established a presumption of disability in his favor because: (1) plaintiff failed to argue that any specific findings of fact made by the full Commission were not based upon sufficient evidence in the record, and thus the findings are binding on appeal under N.C. R. App. P. 28(b)(6); (2) a Form 21 was not executed in this case that would have shifted the burden of persuasion concerning the employee's disability from the employee to the employer; (3) the deputy commissioner rati-

fied an agreement between the parties whereby defendant agreed to, upon the fulfillment of certain conditions by plaintiff, reinstate plaintiff's temporary total disability benefits under Form 62; and (4) the submission of a Form 62 does not shift the burden from plaintiff to prove continuing disability under the Act, and to hold otherwise would have a chilling effect on employers' willingness to enter into agreements reinstating disability benefits and offend the public policy of this state which encourages settlements.

Appeal by Plaintiff from opinion and award entered 27 August 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 September 2008.

The Law Office of G. Lee Martin, P.A., by G. Lee Martin, for Plaintiff-Appellant.

Jones, Hewson & Woolard, by R.G. Spratt III, for Defendant-Appellee.

McGEE, Judge.

Plaintiff sustained an injury by accident in the course of his employment with Defendant on 20 May 2002. Plaintiff's claim was accepted as compensable pursuant to a Form 60 agreement dated 6 June 2002. Plaintiff was treated and evaluated for his injuries between 20 May 2002 and 12 November 2003. Plaintiff was released to return to sedentary work on 5 November 2002, and reached maximum medical improvement on 17 December 2002, with permanent restrictions that consisted of: (1) no ladder climbing, (2) no standing or walking over thirty minutes per hour, and (3) limited work on uneven surfaces. Plaintiff received temporary total disability benefits from Defendant from 21 May 2002 until 5 November 2002. Plaintiff worked for Defendant in a sedentary position from 6 November 2002 until 31 January 2003. Plaintiff and Defendant disputed whether Plaintiff was entitled to disability benefits for the period from 1 February 2003 to 3 April 2004. Plaintiff and Defendant entered into a partial compromise settlement agreement on 5 January 2004, whereby Defendant agreed to pay Plaintiff a lump sum reimbursement for benefits and all disputed expenses for the period from 1 February 2003 through 31 October 2003, and further agreed to reinstate temporary total disability compensation from 1 November 2003 by filing a Form 62, which it did on 6 April 2004. Plaintiff agreed to cooperate with all vocational efforts offered by Defendant, and further agreed that failure to coop-

erate with the vocational efforts would subject Plaintiff to suspension or termination of temporary total disability benefits. Deputy Commissioner Edward Garner, Jr. issued an order approving this agreement on 8 March 2004.

Defendant paid all disability benefits owed Plaintiff from the period between 1 November 2003 and the entry of the opinion and award of the Full Commission on 27 August 2007. In its opinion and award, the Full Commission found as fact, *inter alia*, the following: "Plaintiff was employed by [D]efendant as a real estate appraiser from 1985 until May 20, 2002. The job required an ability to make mathematical calculations and considerable analytical skills. Plaintiff received good employment reviews from his supervisors and several merit raises." Plaintiff worked sedentary employment with Defendant from 6 November 2002 until 31 January 2003, and never complained that his disability caused him any difficulties in performing that job. Two doctors, one on 5 November 2002 and one on 28 February 2003, advised that Plaintiff could perform sedentary work. The Full Commission also found that "plaintiff has not made reasonable efforts to find employment and there is insufficient evidence to show by the greater weight that it would be futile for [P]laintiff to seek employment . . . ."

The Full Commission ordered that: (1) Defendant pay Plaintiff temporary total disability benefits from the date Plaintiff left employment with Defendant until 20 January 2005, (2) Defendant pay all medical expenses resulting from Plaintiff's injury by accident, and (3) Defendant pay the costs of the action. The Full Commission further ordered that all temporary total disability benefits remain suspended for as long as Plaintiff refused to seek suitable employment with Defendant or another employer. Plaintiff appeals. [R. p. 30]

In Plaintiff's fourth argument, he contends the Full Commission erred in placing the burden on him to prove he is disabled. We disagree.

> "Disability," within the meaning . . . of the North Carolina Workers' Compensation Act [the Act], is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9) (1999). To show the existence of a disability under this Act, an employee has the burden of proving:
>
> (1) that [he] was incapable after [his] injury of earning the same wages [he] had earned before [his] injury in the same employ-

> ment, (2) that [he] was incapable after [his] injury of earning the same wages [he] had earned before [his] injury in any other employment, and (3) that [his] incapacity to earn was caused by [his] injury.
>
> The employee may meet [his] initial burden of production by producing:
>
> (1) . . . medical evidence that [he] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) . . . evidence that [he] is capable of some work, but that [he] has, after a reasonable effort on [his] part, been unsuccessful in [his] effort to obtain employment; (3) . . . evidence that [he] is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) . . . evidence that [he] has obtained other employment at a wage less than that earned prior to the injury.
>
> Once an employee meets [his] initial burden of production, the burden of production shifts to the employer to show "that suitable jobs are available" and that the employee is capable of obtaining a suitable job "taking into account both physical and vocational limitations." The burden of proving a disability, however, remains on the employee.

Demery v. Perdue Farms, Inc., 143 N.C. App. 259, 264-65, 545 S.E.2d 485, 489-90 (2001) (citations omitted). " 'Whether the [F]ull Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony.' " *Johnson v. Southern Tire Sales and Service*, 358 N.C. 701, 711, 599 S.E.2d 508, 515 (2004) (citation omitted). "The Commission's findings of fact 'are conclusive on appeal when supported by competent evidence even though' evidence exists that would support a contrary finding." *Id.* at 705, 599 S.E.2d at 512. "As a result, appellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Id.* (citation omitted).

In his brief, Plaintiff fails to argue that any specific findings of fact made by the Full Commission were not based upon sufficient evi-

dence in the record. The findings of the Full Commission are thus binding on appeal. *Bass v. Morganite, Inc.*, 166 N.C. App. 605, 609, 603 S.E.2d 384, 386-87 (2004) (citation omitted).

Plaintiff argues that due to the "Partial Agreement and Release" entered into by Plaintiff and Defendant on 5 January 2004, which was approved by Deputy Commissioner Garner by his "order approving partial compromise settlement agreement[,]" filed 8 March 2004, Plaintiff was presumed to be disabled as defined by the Act, and the burden was on Defendant to rebut this presumption. In light of Plaintiff's argument, he contends the following conclusion of law in the Full Commission's opinion and award was erroneous as a matter of law:

> Assuming *arguendo* that the job offered by [D]efendant was not suitable employment, [P]laintiff also failed to prove continuing disability as a result of the compensable injury by accident. Plaintiff was not taken out of work by any doctor, was capable of some work but failed to show that he made a reasonable but unsuccessful effort to find employment, and he did not show that it was futile for him to seek employment due to other factors.

Plaintiff's sole argument concerning this conclusion of law was that the burden was improperly placed upon him to prove continuing disability, because the 8 March 2004 order entered by Deputy Commissioner Garner established a presumption of disability in his favor.

> "[A] presumption of disability in favor of an employee arises only in limited circumstances." Those limited circumstances are (1) when there has been an executed Form 21, "AGREEMENT FOR COMPENSATION FOR DISABILITY"; (2) when there has been an executed Form 26, "SUPPLEMENTAL AGREEMENT AS TO PAYMENT OF COMPENSATION"; or (3) when there has been a prior disability award from the Industrial Commission. Otherwise, the burden of proving "disability" remains with plaintiff, even if the employer has admitted "compensability."

Clark v. Wal-Mart, 360 N.C. 41, 44, 619 S.E.2d 491, 493 (2005) (citations omitted). It is uncontroverted that neither a Form 21 nor a Form 26 has been executed in this matter. Plaintiff argues that the 8 March 2004 order entered by Deputy Commissioner Garner constituted a "prior disability award from the Industrial Commission." Plaintiff cites *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 181 S.E.2d

588 (1971) and *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 476 S.E.2d 434 (1996) in support of his argument.

In *Watkins*, our Supreme Court stated that an "agreement between the parties on Form 21, approved by the Commission on 16 June 1967, provided for payment of compensation at the rate of $37.50 per week 'for necessary weeks.' This constituted an award by the Commission enforceable, if necessary, by a court decree. G.S. 97-87[.]" *Watkins*, 279 N.C. at 138, 181 S.E.2d at 593. In *Kisiah*, this Court held that a

> Form 21 agreement " 'for the payment of compensation, [once] approved by the Commission, [was] as binding on the parties as an order, decision or award of the Commission unappealed from.' " Once the Form 21 agreement was reached and approved, " 'no party . . . [could] thereafter be heard to deny the truth of the matters therein set forth . . . .' "

Kisiah, 124 N.C. App. at 77, 476 S.E.2d 434, 436 (citations omitted).

In the instant case, Plaintiff and Defendant entered into an agreement on 5 January 2004, whereby Defendant agreed to submit a Form 62 and resume temporary total disability benefits for as long as Plaintiff cooperated with all Defendant's vocational efforts. Deputy Commissioner Garner approved this agreement by order filed 8 March 2004, stating:

> the Partial Compromise Settlement Agreement is deemed by the Commission to be fair and just, and in the best interest of all parties. The Agreement is incorporated by reference and is approved in a lump sum amount of $15,320, together with the Employer's agreement to reinstate temporary total disability benefits effective November 1, 2003, in accordance with a Form 62.

The 5 January 2004 agreement entered into between Plaintiff and Defendant makes clear Defendant "admitted [Plaintiff's] right to compensation for [Plaintiff's] leg injuries by submitting a Form 60, dated June 6, 2002[.]" Further, Defendant "agreed to reinstate [Plaintiff's] temporary total disability benefits effective November 1, 2003, pursuant to a Form 62, and Defendant "agrees to submit a Form 62 indicating a resumption of temporary total disability benefits effective November 1, 2003."

Watkins and *Kisiah* both involved orders of the Commission ratifying agreements by employers to reinstate employees' disability

benefits pursuant to Form 21. Both of these opinions are consistent with the holding in *Clark* stating that Form 21 agreements entered into between employers and employees, when ratified by the Commission, shift the burden of persuasion concerning the employee's disability from the employee to the employer. *Clark*, 360 N.C. at 44, 619 S.E.2d at 493. In the instant case, Deputy Commissioner Garner ratified an agreement between Plaintiff and Defendant whereby Defendant agreed to, upon the fulfillment of certain conditions by Plaintiff, reinstate Plaintiff's temporary total disability benefits pursuant to Form 62. The submission of a Form 62 does not shift the burden from Plaintiff to prove continuing disability under the Act. *See Id.* We hold that the burden remained on Plaintiff to prove continuing disability under the Act. We hold the language in *Clark* stating that "a prior disability award from the Industrial Commission" shifts the burden of persuasion to employers to rebut a presumption of disability does not encompass orders entered by the Commission ratifying agreements specifically based upon Form 62. To hold otherwise would have a chilling effect on employers' willingness to enter into agreements reinstating disability benefits, and offend the public policy of this State, which encourages settlement of disputes between parties. *North Carolina Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 533, 374 S.E.2d 844, 846 (1988). The burden remained upon Plaintiff to prove he was disabled as defined in the Act.

Plaintiff has failed to argue that the Full Commission's findings of fact do not support its conclusion that:

> [P]laintiff . . . failed to prove continuing disability as a result of the compensable injury by accident. Plaintiff was not taken out of work by any doctor, was capable of some work but failed to show that he made a reasonable but unsuccessful effort to find employment, and he did not show that it was futile for him to seek employment due to other factors.

Because Plaintiff fails to make this argument in violation of North Carolina Rules of Appellate Procedure, Rule 28(b)(6), and because our review of the Full Commission's findings of fact shows the Full Commission's findings of fact support this conclusion of law, we hold that the Full Commission did not err in concluding that Plaintiff had failed to prove continuing disability. This argument is without merit.

Because we hold the Full Commission's opinion and award contains sufficient findings of fact and appropriate conclusions of law to support its award, we do not address Plaintiff's additional arguments.

Affirmed.

Judges McCULLOUGH and STROUD concur.

TOWN OF MATTHEWS, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFF v. LESTER E. WRIGHT AND WIFE, VIRGINIA J. WRIGHT, DEFENDANTS

No. COA08-270

(Filed 16 December 2008)

Highways and Streets— public street versus private road— implied dedication—retroactive resolution—summary judgment

The trial court erred by granting partial summary judgment in favor of defendants and concluding that a road in Matthews was a private streeet, and the case is remanded for further findings of fact as to whether the road was impliedly dedicated as a public street, because: (1) the record indicated that no findings of fact were made as to whether the road was impliedly dedicated to the public, and thus, there was no final adjudication as to whether the road was a public or private street; and (2) although plaintiffs contend the Town of Matthews Board of Commissioners' resolution, adopted *nunc pro tunc* 25 March 1985, added the road to the Matthews street system and established the road as a public street, it was invalid since it amounted to a retroactive resolution to change the street system previously imposed, and therefore, it did not preclude the adjudication of the road as a private road.

Appeal by plaintiff from order entered 11 December 2007 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2008.

Buckley, McMullen & Buie, P.A., by Charles R. Buckley, III, for plaintiff-appellant.

Blanco, Tackabery, Combs & Matamoros, P.A., by Peter J. Juran, for defendant-appellees.

BRYANT, Judge.

Plaintiff appeals from the trial court's order of partial summary judgment entered 11 December 2007 ordering that "Home Place" is a

private road. The trial court certified the order as a final order pursuant to North Carolina Rules of Civil Procedure, Rule 54(b). For the reasons stated below, we reverse and remand.

On 19 April 2007, plaintiff filed a complaint in Mecklenburg County Superior Court which alleged that defendants erected two signs and a fence in the right-of-way of a Town street designated "Home Place." Plaintiff further alleged that it notified defendants the obstructions were to be removed within twenty days and that defendants failed to comply.

Defendants answered plaintiff's complaint and counterclaimed. Defendants raised the defenses of *res judicata*, collateral estoppel, unclean hands, denial of due process, estoppel, failure to state a claim, and misconduct. Under the defense of *res judicata*, defendants asserted that the issue of whether Home Place was a public road had been fully litigated through final judgment and appeal, with a ruling from this Court on 4 April 2006.[1] Defendants counterclaimed on grounds of trespass and sought an injunction against further action by plaintiff to prevent the use of Home Place as private property.

Defendants filed a request for admissions referencing *Wright I*. In *Wright I*, this Court reversed a trial court's order entered 10 July 2006, which upheld the decision of the Town of Matthews Board of Adjustment that Home Place was a public road, and remanded the matter for further findings of fact as to "whether Home Place became a public street by means of implied dedication." *Id.* at 16, 627 S.E.2d at 661. On remand, the trial court concluded in an order entered 11 July 2006 that "the decision of the Matthews Zoning Board of Adjustment [was] invalid" and further reversed and remanded the matter to the Matthews Board of Adjustment.

In response to defendants' request for admissions, plaintiff acknowledged that after entry of the 11 July 2006 trial court order the Matthews Board of Adjustment held a meeting on 10 August 2006 and adopted said order. After the trial court order declared invalid the Matthews Board of Adjustment decision declaring Home Place a public road, the Board determined that "the issue of Implied Dedication was no longer an issue." The Board further "admitted that the North Carolina Court of Appeals' Opinion [was] not a part of the record of the Matthews Board of Adjustment."

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1. *Wright v. Town of Matthews*, 177 N.C. App. 1, 627 S.E.2d 650 (2006), referred to hereinafter as *Wright I*.

Also, in response to defendant's interrogatories, plaintiff admitted that, absent notice to defendants, the Matthews Board of Commissioners adopted, on 9 October 2006, a "Resolution Adding Streets To The Matthews Street System (*NUNC PRO TUNC* [25 March 1985])" which added the street known as "Home Place" as a public road.

On 19 October 2007, defendants filed an affidavit, plaintiff's responses to defendant's interrogatories, and a motion for partial summary judgment. The affidavit, by defendant Virginia Wright, gave a history of the matter from the initial hearing before the Matthews Board of Adjustment to the eventual remand to the Board from the North Carolina Court of Appeals. The motion for partial summary judgment asserted the following:

1. The prior adjudication by the North Carolina Court of Appeals which has become final and is binding determined that Home Place did not become a public street either by express dedication or by prescription.

2. The passage of time since the Court of Appeals ruling has not changed the rights of the parties.

3. The third and final way in which a road can become public, other than express dedication or prescription, is implied dedication.

4. Home Place has never been impliedly dedicated as a public road.

After a review of the record, the trial court made the following finding: "the record before [the trial court] including but not limited to the ruling of the Court of Appeals of April 4th, 2006, the Ruling of [the Superior Court] of July 10th, 2006, and the action of the [plaintiff] on August 10th, 2006, establishes that Home Place is a private road." Furthermore, the trial court concluded that "Defendants have established that Home Place is a private road, and Partial Summary Judgment should be granted as to that issue." The trial court's order dismissed plaintiff's claim. The trial court ruled that a genuine issue a material fact remained as to defendants' remedies, but that "there is no just reason for delay in the certification of the dismissal of Plaintiff's claim as a final Order . . . ." Plaintiff appeals.

Standard of Review

An entry of summary judgment by the trial court is fully reviewable by this Court. A party is entitled to summary judgment as a

> matter of law when there is no genuine issue of material fact as to any triable issue. Following a motion for summary judgment, where the forecast of evidence available for trial demonstrates that a party will not be able to make out a *prima facie* case at trial, there is no genuine issue of material fact and summary judgment is appropriate.

Roten v. Critcher, 135 N.C. App. 469, 472, 521 S.E.2d 140, 143 (1999) (internal citations omitted).

On appeal, plaintiff raises the following two issues: (I) Did the trial court err in granting summary judgment in favor of the defendants and dismissing plaintiff's claim; and (II) did the trial court err in determining that Home Place is a private road.

I & II

Plaintiff argues that the trial court erred in granting summary judgment in favor of defendants and dismissing plaintiff's claim. Plaintiff contends that this Court's opinion in *Wright I* did not amount to an adjudication of Home Place as a private street, and the *nunc pro tunc* 25 March 1985 resolution by the Town of Matthews Board of Commissioners, which added Home Place to the Town of Matthews' street system, precluded the adjudication of Home Place as a private road. We agree in part and disagree in part.

As noted in *Wright I*, "[a] private right-of-way or street may become a public street by one of three methods: (1) in regular proceedings before a proper tribunal . . .; (2) by prescription; or (3) through action by the owner, such as a dedication, gift, or sale." *Wright*, 177 N.C. App. at 10, 627 S.E.2d at 658. We determined that "[t]here [was] no evidence in the record that Home Place was ever the subject of a condemnation proceeding or any other proceeding regularly constituted before the proper tribunal" or was "ever the subject of a gift or sale." *Id.* at 10-11, 627 S.E.2d at 658. There was insufficient evidence of prescription. *Id.* at 16, 627 S.E.2d at 661. And, in a discussion regarding express dedication, we stated that there was "no evidence to support the Board [of Adjustment's] findings that in March of 1985 there was a resolution by the Town of Matthews to take over Home Place from the State system . . . ." *Id.* at 13, 627 S.E.2d at 660. And, as such, there was insufficient evidence of an express dedication of Home Place. *Id.* As a result, we concluded that

> the findings made by the Board [of Adjustment] and the trial court do not support the conclusion that Home Place is a public

> street. . . . The Board [of Adjustment] and the trial court made no findings of fact or conclusions of law [as to] whether Home Place was impliedly dedicated to the public. We therefore reverse the decision of the trial court and remand this case for further findings detailing whether or not Home Place became a public street by means of implied dedication.

Id. at 16, 627 S.E.2d at 661. The record before us indicates that no findings of fact were made as to whether Home Place was impliedly dedicated to the public; therefore, there was no final adjudication as to whether Home Place was a public or private street.

In the current appeal, plaintiffs argue that the Town of Matthews Board of Commissioners resolution, adopted *nunc pro tunc* 25 March 1985, added Home Place to the Matthews' street system and established Home Place as a public street. We disagree.

In *Chowan County v. Commissioner of Banks*, 202 N.C. 672, 163 S.E. 808 (1932), our Supreme Court held that while a board of county commissioners were welcome to "correct an erroneous entry upon the minutes so that the record shall, in the language of the law, 'speak the truth' " the board could not with "retroactive effect" change what had been "purposely imposed in the way the law prescribes[.]" *Id.* at 675, 163 S.E. at 810 (citation omitted).

Here, the Board of Commissioners of the Town of Matthews adopted a resolution *nunc pro tunc* 25 March 1985 to add Home Place to the Town's street system. This amounts to a retroactive resolution to change the street system previously imposed and is thus invalid. Therefore, this resolution does not preclude the adjudication of Home Place as a private road.

For the aforementioned reasons, we hold the trial court erred in granting summary judgment and concluding that Home Place was a private road. Consistent with the holding in *Wright I*, we remand for further findings of fact as to whether Home Place was impliedly dedicated as a public street.

Reversed and remanded.

Judges JACKSON and ARROWOOD concur.

DARA LYNN HACKOS, PLAINTIFF v. DAVID CURTIS SMITH, DAVID CURTIS SMITH & ASSOCIATES, PLLC, MICHELLE C. MARK, DEFENDANTS

No. COA08-63

(Filed 16 December 2008)

Appeal and Error— gross violation of appellate rules—dismissal of appeal—records on appeal filed with Court of Appeals at variance with proposed records on appeal—untimely appeal—lack of assignments of error

Plaintiff's appeal from the 28 December 2007 denial of her motion to reconsider the 16 July 2007 granting of summary judgment in favor of defendants in a legal malpractice case arising from an underlying personal injury lawsuit is dismissed based on gross violations of the North Carolina Rules of Appellate Procedure, and costs of this appeal are taxed against plaintiff's attorney in accordance with N.C. R. App. P. 25 and 34, because: (1) the records on appeal filed with the Court of Appeals are at variance with the proposed records on appeal served upon defendants in violation of N.C. R. App. P. 11; (2) assuming arguendo that plaintiff's response to the companion appeal on 25 August 2008 was as to both appeals, it was not timely filed as to this appeal since there was no extension of time granted for this appeal; and (3) even if the final record on appeal presented to the Court of Appeals was consistent with the proposed record on appeal which was presented to opposing counsel, the lack of assignments of error alone would be fatal to plaintiff's appeal under N.C. R. App. P. 10(a).

Appeal by plaintiff from an order entered 28 September 2007 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 May 2008.

Goodman, Allen & Filetti, PLLC, by Kerri Borchardt Taylor, Pro Hac Vice, and A. William Charters, and Elliott Pishko Morgan, P.A. by David C. Pishko, for plaintiff-appellant.

Patterson Dilthey, LLP, by Ronald C. Dilthey and Wyrick Robbins Yates & Ponton, LLP, by Charles George, for defendants-appellees.

JACKSON, Judge.

This is a companion appeal to 07-1543 filed simultaneously herewith.[1] Dara Lynn Hackos ("plaintiff") appeals the 28 September 2007 denial of her motion to reconsider the 16 July 2007 granting of summary judgment in favor of David Curtis Smith, David Curtis Smith & Associates, PLLC, and Michelle C. Mark ("defendants") which is the subject of her companion appeal. For the reasons stated below, we dismiss the appeal.

The factual background of the case is set forth more fully in our opinion in the companion appeal. Plaintiff brought the instant legal malpractice suit against defendants on 23 June 2006, stemming from an underlying personal injury lawsuit related to a 2001 automobile accident.

On 16 July 2007, the trial court granted defendants' motion for summary judgment, from which plaintiff appealed on 16 August 2007.[2] That same day, she filed a motion to reconsider the matter in Durham County Superior Court.[3] On 28 September 2007, plaintiff's motion to reconsider was denied. Plaintiff filed notice of appeal on 26 October 2007.

Defendants have brought motions to dismiss both of plaintiff's appeals due to violations of the North Carolina Rules of Appellate Procedure. Defendants argue, *inter alia*, that the records on appeal filed with this Court are at variance with the proposed records on appeal served upon defendants, in violation of Rule 11.

As explained in our opinion in the companion appeal, plaintiff filed no response to these motions prior to the hearing date for these cases. This Court, *ex mero motu*, issued separate orders on 29 July 2008 ordering plaintiff to file a response to each of defendants' motions within ten days. Because the deadline fell during a period of secured leave, plaintiff's attorney filed a motion to extend the deadline as to the companion appeal. The motion was granted as to the companion appeal and the ten day period was to begin upon the expiration of secured leave. The response as to the companion appeal

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1. Defendants filed a motion to consolidate these appeals on 4 April 2008. On 22 April 2008, this Court issued an order as follows: "The appeals in case numbers COA 07-1543 and COA 08-63 will be heard before the same panel on May 21, 2008."

2. The 16 July 2007 order is the subject of the companion appeal.

3. Plaintiff indicates that the motion to reconsider was filed 10 August 2007; however, it is file stamped 16 August 2007.

was filed 25 August 2008. No response was received as to the instant appeal.[4] Assuming *arguendo* that plaintiff's response is as to both appeals, it was not timely filed as to this appeal because no extension of time was granted as to this appeal.

The proposed record on appeal in the companion appeal was provided to defendants on 10 November 2007. The proposed record on appeal in the instant appeal was provided to defendants on 27 November 2007. On 10 December 2007, defendants sent a letter to plaintiff expressing their understanding that the second proposed record on appeal replaced the first proposed record on appeal. Also on 10 December 2007, defendants sent a letter to plaintiff noting their objections and amendments to the proposed record on appeal.[5] On 17 December 2007, defendants were informed that the second proposed record on appeal did not replace the first proposed record on appeal, but that it related to a second and separate appeal. No further objections and amendments were made. The final record on appeal in the instant appeal was filed on 17 January 2008.

Pursuant to Rule 11 of the North Carolina Rules of Appellate Procedure, when no objections, amendments, or proposed alternative records on appeal are filed—as was the case here—"appellant's proposed record on appeal thereupon constitutes the record on appeal." N.C. R. App. P. 11(b) (2007). Here, the record on appeal filed with this Court is at variance with what was presented to defendants as the proposed record on appeal in that the following items were not in the proposed record: (1) statement of organization of the trial court, (2) statement of jurisdiction, (3) stipulation of service and settlement of record, (4) *assignments of error*, (5) identification of counsel for the appeal, and (6) two notices of appeal for file 07-1543.

As explained in our opinion in file number 07-1543, assignments of error are not required for this Court to review the granting of summary judgment. *See Schenkel & Shultz, Inc. v. Herman F. Fox & Assocs.*, 362 N.C. 269, 276-77, 658 S.E.2d 918, 923 (2008). However,

4. We reiterate that the two appeals were not consolidated; they were placed on the same calendar for the purpose of oral argument. Two orders to respond were issued, one for each appeal.

5. It is unclear to this Court whether defendants intended the objections and amendments to pertain to the companion appeal or this appeal. Due to defendants' assumption that the second proposed record on appeal replaced the first proposed record on appeal, it appears the objections and amendments related to the second proposed record on appeal, which was for the instant appeal. However, both sides treat the objections and amendments as though they were as to the appeal in file number 07-1543. Therefore, we treat them as such.

this appeal does not concern the granting of summary judgment. Had the final record on appeal presented to this Court been consistent with the proposed record on appeal which was presented to opposing counsel—as it should have been—the lack of assignments of error alone would be fatal to plaintiff's appeal. Rule 10 of the North Carolina Rules of Appellate Procedure limits the scope of appellate review to "a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P. 10(a) (2007). Absent any assignments of error, there is nothing within the scope of our review.

As set forth more fully in our opinion in the companion appeal, we are gravely concerned by counsel's lack of transparency in serving one version of the record on appeal on opposing counsel and a materially different version of that record on this Court. Counsel's actions implicate Rules 3.3, 3.4, and 8.4 of the rules governing attorney conduct in this State. Pursuant to *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008), we find these actions to be grossly violative of our appellate rules; therefore, in accordance with Appellate Rules 25 and 34, in addition to dismissing the appeal, we elect to tax the costs of this appeal against plaintiff's attorney. We direct the clerk of this court to enter an order accordingly.

Dismissed.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY D/B/A DOMINION NORTH CAROLINA POWER, COMPLAINANTS-APPELLEES AND PUBLIC STAFF—NORTH CARLLINA UTILITIES COMMISSION, INTERVENOR-APPELLEES v. TOWN OF KILL DEVIL HILLS, INTERVENOR-APPELLANT

No. COA08-42

(Filed 6 January 2009)

1. Utilities— electrical transmission lines—siting—jurisdiction of Utilities Commission

The Utilities Commission had jurisdiction to hear a dispute over the siting of a high capacity electrical transmission line where defendant town argued that a more recent statutory provision divested the Commission of jurisdiction by negative implication. Repeals by implication are not favored, the Commission correctly reasoned that the statutes serve different purposes and can be reconciled, and giving full effect to any municipal ordinance could result in a chaotic condition interfering with the ability of the utility to render equal service.

2. Utilities— electrical transmission lines—siting—jurisdiction of Utilities Commission—exhaustion of remedy

The Utilities Commission was the appropriate body to hear a dispute concerning high capacity electrical transmission lines on the Outer Banks where defendant town argued that Dominion (the utility) failed to exhaust its administrative remedies. Although the town could have granted a variance to allow Dominion to build the proposed new line, the town has cited no authority or precedent that would require Dominion to seek such a variance where an administrative agency specifically designed to handle such disputes has jurisdiction.

3. Utilities— electrical transmission lines—siting—municipal ordinances—Commission authority

The Utilities Commission did not err by directing that new electrical power lines be placed in Kill Devil Hills in contravention of municipal ordinances. Although defendant town argued that their ordinances were consistent with public welfare and were within their general police power, the issue was whether the town's ordinances were consistent with state law, and not whether they were reasonable.

4. Utilities— electrical transmission lines—siting—burden of proof

In a case involving the siting of electrical transmission lines, the Utilities Commission appropriately placed the burden of proof on the utility (Dominion) as to whether defendant town's ordinances were invalid given the Commission's authority and duty to compel certain improvements in accordance with the purposes of the Public Utilities Act.

5. Utilities— electrical transmission lines—siting—factors—not mandatory

The Utilities Commission did not err by failing to apply the factors applicable to transmission line siting disputes. The case relied upon by defendant town simply addressed the arguments raised in that case and did not establish mandatory factors.

6. Utilities— electrical transmission lines—siting—sea side

The Utilities Commission did not err in a case involving the disputed placement of an electrical transmission line on the Outer Banks by determining that the line should be placed along the east or ocean side of Kill Devil Hills. There was competent, substantial and material evidence to support findings that other options were not reasonable, practical, or feasible.

Judge JACKSON dissenting.

Appeal by intervenor Town of Kill Devil Hills from an order entered 18 September 2007 by the North Carolina Utilities Commission. Heard in the Court of Appeals 21 May 2008.

McGuire Woods, LLP, by E. Duncan Getchell, Jr., Stephen H. Watts, II, Robert L. Hodges, and Kristian Mark Dahl; Law Office of Robert W. Kaylor, P.A., by Robert W. Kaylor; Dominion Resources Services, Inc. by Vishwa B. Link and Pamela Johnson Walker, for complainant-appellee Virginia Electric and Power Company d/b/a Dominion North Carolina Power.

Chief Counsel Antoinette R. Wike and Staff Attorney Robert S. Gillam, for intervenor-appellee Public Staff—North Carolina Utilities Commission.

Williams Mullen Maupin Taylor, by M. Keith Kapp, Kevin W. Benedict, and Jennifer A. Morgan; Sharp, Michael, Graham and Evans, LLP, by Steven D. Michael, for intervenor-appellant Town of Kill Devil Hills.

HUNTER, Judge.

The Town of Kill Devil Hills ("the Town" or "Kill Devil Hills") appeals from an order by the North Carolina Utilities Commission ("the Commission") which preempted the Town's zoning ordinances and directed Dominion North Carolina Power ("Dominion") to site an overhead transmission line through Kill Devil Hills. After careful review, we affirm the ruling of the Commission.

Kill Devil Hills is a municipality on the Outer Banks of North Carolina, a narrow barrier island. Dominion provides electrical services to the northern Outer Banks, including Kill Devil Hills, and also provides wholesale service to Cape Hatteras Electric Membership Corporation ("Cape Hatteras EMC"), which serves Hatteras Island. Dominion's transmission facilities currently include two 230-kilovolt ("kV") overhead lines extending from the Fentress Substation in southeastern Virginia to the Shawboro Substation in Currituck County and on to the Kitty Hawk Substation in Dare County, a short distance north of the Town. A 115 kV overhead line extends from the Kitty Hawk Substation through the Town's corporate limits to the Nags Head Substation, where Dominion's facilities connect with those of Cape Hatteras EMC. This 115 kV line passes through a residential area on the west side (sound side) of the Town.

Dominion has determined that there is a need for additional transmission facilities in the area. The customer load on the existing 115 kV line is already in excess of Dominion's reliability guideline, and it is forecast to exceed the line's maximum load capacity by 2013. Therefore, Dominion proposed to build a new 115 kV overhead line extending eastward from the Kitty Hawk Substation to the U.S. Highway 158 Bypass and then southward along the Bypass to Structure 127 in northern Nags Head, where it will connect with the existing line. The proposed line would run along the east side (ocean side) of the Town.

The Town's Board of Commissioners ("the Board") objected to Dominion's proposal, and on 14 August 2006, the Board adopted an ordinance amending the zoning chapter of the Kill Devil Hills Town Code. The ordinances provide that all above-ground electric transmission lines within Town limits must be built in a single corridor. Underground transmission lines are not subject to this requirement. The stated purposes of the ordinances are, among others, to "preserve and enhance scenic views . . . and historical venues[,]" to "pre-

vent the proliferation of unsightly overhead transmission lines," and to "safeguard and enhance property values[.]"

Following the adoption of the ordinances, Dominion filed a complaint with the Commission seeking to preempt the ordinances and to allow Dominion to site a second overhead transmission line in a new corridor through the Town. However, Dominion did not apply to the Town's Board for a conditional use permit or a variance. Dominion also filed suit against the Town in Dare County Superior Court, but that action was stayed.

On 2-3 May 2007, the Commission heard evidence on the siting of Dominion's proposed second transmission line. Thereafter, the Commission issued an order, which: directed Dominion to complete improvements pursuant to N.C. Gen. Stat. § 62-42 (2007); preempted the Town's ordinances; and directed Dominion to site a 115 kV overhead transmission line in a new transmission corridor along the east side (ocean side) of the Town.

Upon appeal from this order, Kill Devil Hills presents the following issues to this Court: (1) whether the Commission lacked jurisdiction to preempt the Town's ordinances; and (2) whether the Commission erred in concluding that the ordinances were invalid.

I. Jurisdiction

The Town advances two arguments that the Commission lacked jurisdiction to enter the order. We address each in turn.

A.

[1] First, the Town argues that the superior court had sole and exclusive jurisdiction to determine the validity of the Town's municipal ordinance. We disagree.

Section 12 of Article IV of the North Carolina Constitution provides that: "Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State." N.C. Const. art. IV, § 12. Consistent with this language, Section 3 of Article IV provides: "The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, § 3. The general grant of judicial power by the General Assembly to the Commission is found in N.C. Gen. Stat. § 62-60 (2007).

N.C. Gen. Stat. § 62-42 provides the Commission with jurisdiction to hear petitions for extensions of services and facilities. That statute provides:

> (a) Except as otherwise limited in this Chapter, whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds:
>
> (1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or
>
> (2) That persons are not served who may reasonably be served, or
>
> (3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made, or
>
> (4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or
>
> (5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity,
>
> the Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order. This section shall not apply to terminal or terminal facilities of motor carriers of property.
>
> (b) If such order is directed to two or more public utilities, the utilities so designated shall be given such reasonable time as the Commission may grant within which to agree upon the portion or division of the cost of such additions, extensions, repairs, improvements or changes which each shall bear. If at the expiration of the time limited in the order of the Commission, the utility or utilities named in the order shall fail to file with the Commission a statement that an agreement has been made for division or apportionment of the cost or expense, the Commission shall have the authority, after further hearing in the same proceeding, to make an order fixing the portion of such cost

> or expense to be borne by each public utility affected and the manner in which the same shall be paid or secured.
>
> (c) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State.

Id. Until 1991, it was uncontroverted that this statute was the basis under which the Commission heard all transmission line siting disputes. *In re State ex rel. Util. Comm. v. Mountain Elec. Cooperative*, 108 N.C. App. 283, 287, 423 S.E.2d 516, 518 (1992).

In 1991, the General Assembly passed Article 5A which, on its face, appears to deal exclusively with the siting of high voltage transmission lines, specifically lines that have a capacity of at least 161 kilovolts. N.C. Gen. Stat. §§ 62-100—62-107 (2007). N.C. Gen. Stat. § 62-106 explicitly states that the Commission has the power to preempt local ordinances to allow for the siting of transmission lines with a capacity of at least 161 kV. The proposed line in this case is only 115 kV, and the Town argues that the more general provision of N.C. Gen. Stat. § 62-42 can no longer serve as a basis to hear any transmission line siting disputes because N.C. Gen. Stat. § 62-106 has divested the Commission of jurisdiction by negative inference. Although this is an issue of first impression, this Court has stated that:

> North Carolina public utilities law makes explicit provision for the Commission to resolve some disputes over the siting by public utilities . . . of electrical transmission lines. *See* N.C.G.S. §§ 62-100—62-107 (Supp. 1991). A statutory resolution process exists only for disputes involving lines designed to carry 161 kilovolts or more. *See* N.C.G.S. § 62-101(c)(1) (Supp. 1991). Where one statute deals with a particular situation in detail but another "deals with it in general and comprehensive terms, the particular statute will be construed as controlling absent a clear legislative intent to the contrary." *Merritt v. Edwards Ridge*, 323 N.C. 330, 337, 372 S.E.2d 559, 563 (1988) . . . . We are not convinced that a conflict necessarily exists between the more general statutory framework construed hereinabove to permit the Commission to hear disputes about electrical line siting and the more recent statutes which govern in detail the resolution of such disputes about lines carrying 161 or more kilovolts.

Mountain Elec. Cooperative, 108 N.C. App. at 287, 423 S.E.2d at 518.

Thus, we must determine whether N.C. Gen. Stat. § 62-106 is in conflict with N.C. Gen. Stat. § 62-42. When determining whether a conflict between statutes exists, "[r]epeals by implication are not favored . . . and *the presumption is always against implied repeal.*" *McLean v. Board of Elections*, 222 N.C. 6, 8, 21 S.E.2d 842, 844 (1942) (emphasis added). Instead, "[r]epeal by implication results only when the statutes are inconsistent, necessarily repugnant, utterly irreconcilable, or wholly and irreconcilably repugnant[.]" *Id.* at 9, 21 S.E.2d 844 (internal citations omitted). When interpreting statutes on the same subject, they "are to be reconciled if this can be done by giving effect to the fair and reasonable intendment of both acts[] or by reasonable construction of the statutes." *Id.* at 8-9, 21 S.E.2d 844 (internal citation omitted). Moreover, the "several provisions [of the public utilities statutes] must be construed together so as to accomplish its primary purpose . . . that the public is entitled to adequate service at reasonable rates[.]" *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 680, 208 S.E.2d 681, 687 (1974).

The Commission concluded that there was no conflict between the two statutes because they "serve different purposes and can be reconciled." The Commission reasoned that the provisions of N.C. Gen. Stat. §§ 62-100-107 "deal with the siting of certain large transmission lines and are not applicable here. [Instead,] G.S. 62-42 is much broader in scope: it deals with compelling any type of needed improvement to a public utility system." We agree with the Commission's interpretation because, as Dominion points out, the siting of lines of at least 161 kV is often controversial and the legislature's decision to require specialized procedures for the siting of these lines is a logical one.

Moreover, if N.C. Gen. Stat. § 62-106 is interpreted as denying the Commission all power to disregard municipal ordinances for the siting of lines that are less than 161 kV, the Commission would be required to give full effect to any municipal ordinance in all instances, no matter how clearly the ordinance conflicts with the Public Utilities Act and/or hinders the State's efforts to regulate utilities. However, as our Supreme Court has held:

> To invest each of the towns served by [the limited number of power companies] with the power to regulate and prescribe the manner in which service may be rendered . . . might well lead to a chaotic condition seriously interfering with the ability of the utility to render equal service to all [residents].

Power Co. v. Membership Corp., 253 N.C. 596, 605, 117 S.E.2d 812, 818 (1961). Additionally, the Public Utilities Act "clearly indicate[s] . . . a legislative delegation of power to the Utilities Commission to say when and under what conditions power companies shall furnish service, and this authority relates to service inside of as well as outside of municipalities." *Id. See also Power Co. v. City of High Point*, 22 N.C. App. 91, 99, 205 S.E.2d 774, 780 (1974) (holding that the power of municipalities must yield to the right of the state to regulate public utilities through the Utilities Commission).

Given the presumption against an implied legislative repeal and our Supreme Court's and this Court's holdings regarding the power of the Commission to regulate the field of utilities, we hold that the Commission had jurisdiction to hear the dispute under N.C. Gen. Stat. § 62-42. Therefore, the Town's arguments to the contrary are rejected.

B.

[2] The Town next argues that the Commission did not have jurisdiction to adjudicate this dispute because Dominion failed to exhaust its administrative remedies before filing its complaint with the Commission, therefore rendering the dispute unripe for judicial review. Specifically, the Town asserts that because Dominion did not first seek relief from the ordinances via the Town's Board of Adjustment, the Commission was divested of jurisdiction.[1] We disagree.

"As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). The purpose of the doctrine is to ensure that "matters of regulation and control are first addressed by commissions or agencies *particularly qualified for the purpose*." *Id.* (emphasis added).

While the siting dispute between Dominion and the Town implicates a local zoning issue, the real issue decided by the Commission was whether the improvements Dominion sought to undertake were

1. In support of this argument the Town cites to *Hanson Aggregates Southeast, Inc. v. City of Raleigh*, 165 N.C. App. 705, 601 S.E.2d 331 (2004), an unpublished opinion. The North Carolina Rules of Appellate Procedure clearly state that citation to unpublished opinions are disfavored, but "[i]f a party believes . . . that an unpublished opinion has precedential value . . . the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court[.]" N.C.R. App. P. 30(e)(3). The Town has failed to do this; therefore, we do not consider this case.

necessary and needed to be compelled pursuant to section 62-42, a decision which the Commission is uniquely qualified to address. "[U]nder G.S. 62-32 and G.S. 62-42, the Utilities Commission is given the power and the duty to compel utility companies to render adequate service and to set reasonable rates for such service." *State ex rel. Utilities Com. v. Edmisten*, 294 N.C. 598, 605, 242 S.E.2d 862, 867 (1978) (citation omitted); *see also Utilities Comm. v. Telephone Co.*, 21 N.C. App. 408, 411, 204 S.E.2d 529, 531, *reversed on other grounds*, 285 N.C. 671, 208 S.E.2d 681 (1974).

Here, there was an issue as to whether Dominion would be able to provide adequate services at reasonable rates, especially given the restrictions contained in the Town's ordinances. Although the Town could have granted a variance to allow Dominion to build the proposed new line, the Town has cited no statutory authority or precedent that would require Dominion to seek such a variance where an administrative agency specifically designed to handle such disputes has jurisdiction. Indeed, under our Supreme Court's interpretation of Chapter 62 in *Edmisten* and this Court's interpretation in *Telephone Co.*, we think it is clear that the Commission was the appropriate body to hear this dispute. Therefore, we reject the Town's assignments of error as to this issue.

II. The Commission's Order

A.

[3] The Town next argues that the Commission erred in entering the order directing the placement of new transmission lines in Kill Devil Hills in contravention of its municipal ordinances. We disagree.

The Town asserts that because their ordinances are consistent with the public welfare and are within their general police power, the ruling of the Commission must be set aside. The Town is quite correct that passing ordinances is within its police power so long as those ordinances are reasonable. *Massey v. City of Charlotte*, 145 N.C. App. 345, 349, 550 S.E.2d 838, 842 (2001). The issue here, however, is not whether the ordinances were reasonable. Rather, the issue is whether the local ordinances were consistent with state law, particularly when considered in conjunction with the Commission's authority and duty to compel the provision of adequate services at reasonable rates as " '[t]he Commission is . . . vested *with all power necessary* to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to fur-

nish[.]' " *Telephone Co.*, 285 N.C. at 681, 208 S.E.2d at 687 (citation omitted). Here, the Commission compelled Dominion to provide power to the Town, and as we held *supra*, this is within the Commission's power.

B.

[4] Next, the Town argues that the Commission applied the burden of proof incorrectly. We disagree.

Here, the Town asserts that

> the Commission only required Dominion [to] show that its proposed "additions, extensions, repairs, or improvements ought reasonably to be made," and that "it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of [the utility's] patrons, employees, and the public," and to "serve the public convenience and necessity."

(Alteration in original.)

The passages quoted by the Town from the Commission's order, however, are not statements as to the burden of proof but instead are paraphrases or quotations from N.C. Gen. Stat. § 62-42, the statute on which the proceeding was based. The issue was whether the ordinances, as applied to Dominion's proposed transmission line, were invalid given the Commission's authority and duty to compel Dominion to complete certain improvements in accordance with the purposes of the Public Utilities Act. Here, the Commission appropriately placed the burden of proof as to this issue on Dominion. Moreover, as the Commission correctly noted, once the Commission became aware of hazardous conditions affecting a public utility or its service to the public, the Commission was obligated to remedy the situation. *See State ex rel. Utilities Comm. v. Seaboard Coast Line Railroad*, 62 N.C. App. 631, 639, 303 S.E.2d 549, 554 (1983). The Town's arguments to the contrary are therefore rejected.

C.

[5] The Town also contends that the Commission improperly applied or failed to apply the factors applicable to transmission line siting disputes. We disagree.

In reviewing an order of the Utilities Commission, this Court " 'look[s] to the findings of fact and conclusions of the Commission and determine[s] whether the Commission has considered the factors

required by law and whether its findings are supported by competent, substantial and material evidence in view of the whole record.' " *State ex rel. Utils. Comm'n v. Wardlaw*, 179 N.C. App. 582, 586-87, 634 S.E.2d 898, 900 (2006) (quoting *Utilities Comm. v. Springdale Estates Assoc.*, 46 N.C. App. 488, 490-91, 265 S.E.2d 647, 649-50 (1980)). " 'When applying the whole record test, the [reviewing] court may not replace the Commission's judgment with its own when there are two reasonably conflicting views of the evidence.' " *Id.* at 587, 634 S.E.2d at 900 (citation omitted). Instead, " '[t]he weighing of the evidence and the drawing of the ultimate conclusion therefrom . . . is for the Commission, not the reviewing court.' " *State ex rel. Utilities Comm. v. Public Staff*, 323 N.C. 481, 491, 374 S.E.2d 361, 367 (1988) (citation omitted).

The Town argues that *Dixon v. Duke Power*, 94 N.C.U.C. 307 (2004), is controlling and that the six factors used in that case must be applied here. At the outset, we note that *Dixon* is a Utilities Commission order and is not precedent in this Court. In any event, in *Dixon* the Commission did not establish mandatory factors; rather, it simply addressed the six arguments that the complainants raised in that proceeding. Furthermore, we have found no authority supporting such a proposition or any list of mandatory factors that must be considered. Accordingly, the Town's arguments to the contrary are rejected.

D.

[6] The Town also asserts that the Commission erred in determining that the line should be placed along the east side (ocean side) of the Town. We disagree.

In support of this conclusion of law, the Commission made findings of fact that there was "not enough room in the right-of-way of the existing [l]ine . . . and the proposed new line." In other words, simply adding another line along the west side (sound side) of the Town was not a viable option. Moreover, even if an additional right-of-way were obtained, "[i]nstalling new structures to hold a double-circuit line along the sound-side corridor would involve either lengthy outages or unacceptable safety risks." In sum, the Commission found as fact that "[l]ocating both the existing line and the proposed new line along the sound-side corridor is not reasonable, practical, or feasible."

As to burying the line, the Commission found that this option "would be excessively and unreasonably costly, would require

[the acquisition of an] additional right-of-way, [and] would raise greater reliability and construction impact concerns than the overhead line[.]" As discussed *supra*, the cost of any proposed utilities project is particularly important as the Commission is charged with maintaining reasonable rates for the public. Further, even if this option were pursued, the Commission found that it "might not be completed before [the] existing [l]ine . . . reaches its maximum load capacity."

As to the other options presented by the Town, rebuilding the existing line to 230 kV or constructing a new line reaching from Riders Creek across the Alligator River and the Croatan and Roanoke Sounds, into Whalebone and north to the Nags Head Substation, the Commission found that these two options were not reasonable, practical, or feasible.

We find competent, substantial and material evidence to support these findings of fact and therefore, these findings are binding on this Court. Specifically, the Commission heard evidence from Steve Bollinger, a Dominion witness, that the new line proposed by Dominion is necessary to accommodate growing customer demand on the Outer Banks and that it will relieve the projected overload on the existing line. Mr. Bollinger also testified that if a new circuit were added to the existing line, the existing line would have to be taken out of service, which would result in a major power outage affecting most of the Outer Banks. Furthermore, while it is possible to transfer the existing line to a temporary structure without cutting off service, this approach would be extremely hazardous to the public safety. There was also evidence presented that because the existing line is located on a narrow corridor, an additional right-of-way would have to be obtained in order to add a new circuit, which would result in increased costs.

With regard to burying the line, the Commission heard testimony from Dominion's witness, Donald E. Koonce, that underground lines have a detrimental effect on the reliability of service, primarily because of the time required to repair damages. Mr. Koonce stated that when an underground line fails, the process of determining the exact location of the failed cable and bringing in specialized contractors to make the necessary repairs is too time consuming to be practical. Outages in underground lines typically last for a week or longer, whereas overhead line outages can usually be repaired within hours. Furthermore, construction operating, and maintenance costs of underground lines are six to seven times higher than overhead lines.

Finally, in addition to having no right-of-way for the construction of underground lines, their construction is far more disruptive than overhead lines.

We also find substantial, competent, and material evidence supporting the Commission's conclusion that the Town's proposed alternate route was not reasonable, practical, or feasible. Specifically, the Commission heard testimony that Dominion would have to obtain a right-of-way over a thirty-six mile corridor, which would be much longer and much more expensive than Dominion's proposed line for which it already had a right-of-way. Moreover, this proposal would require Dominion to run a line across the Alligator River, Croatan Sound, Roanoke Sound, and the Alligator River National Wildlife Refuge, which would raise many complex environmental issues. Finally, the Commission heard testimony that pursuing the Town's proposed alternative would require costly upgrades to Dominion's existing transmission facilities located to the north and west of Riders Creek.

In sum, given the substantial, competent, and material evidence presented on these and all other issues presented to the Commission, which support its finding of facts and which in turn support its conclusions of law, we can find no error in the Commission's order. The Town's arguments to the contrary are therefore rejected, and the decision of the Commission is affirmed.

Affirmed.

Judge STEPHENS concurs.

Judge JACKSON dissents in a separate opinion.

JACKSON, Judge dissenting.

I respectfully dissent from the majority's holding that the Commission had jurisdiction both to review Dominion's premature appeal and to preempt the Town's ordinance.

Preliminarily, because Dominion has failed to apply for a conditional use permit or variance, I would dismiss the matter for Dominion's failure to exhaust its administrative remedies. "If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed." *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 369, 595 S.E.2d

773, 775 (2004) (citing *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999)).

Here, Dominion failed to seek a conditional use permit from the Town's Planning Board and Board of Commissioners, failed to seek a variance from the Town's Board of Adjustment, and, assuming adverse rulings from the local boards, failed to seek relief from the superior court. *See Laurel Valley Watch, Inc. v. Mountain Enters. of Wolf Ridge, LLC*, 192 N.C. App. 391, 399, 665 S.E.2d 561, 569-70 (2008) (holding this Court is without subject matter jurisdiction to hear plaintiff's claims because plaintiff failed exhaust administrative remedies by failing to seek and to receive an adverse ruling from county zoning officials or to appeal the adverse ruling to the county Planning Board before prematurely seeking relief in the trial court); *Ward v. New Hanover Cty.*, 175 N.C. App. 671, 679, 625 S.E.2d 598, 603 (2006) (summary judgment affirmed for defendant county when plaintiff failed to exhaust administrative remedies without having sought special use permits from the Board of Adjustment). Instead, Dominion attempted to circumvent the municipal ordinance and appropriate administrative process through the Commission. It long has been established that "plaintiffs are not permitted to change horses in the middle of the stream . . . ." *Pue v. Hood, Comr. of Banks*, 222 N.C. 310, 313, 22 S.E.2d 896, 898 (1942) (citations omitted) (internal quotation marks omitted).

Next, I read North Carolina General Statutes, section 62-106 as creating in the Commission a limited power to preempt municipal ordinances only when the siting of electrical transmission lines carrying 161 kilovolts or more is at issue. Although I agree that the Commission has jurisdiction to adjudicate disputes involving less than 161 kilovolts pursuant to North Carolina General Statutes, section 62-42, I cannot believe that the General Assembly intended section 62-42 to give the Commission an implicit power to preempt a valid municipal ordinance when the siting of an electrical transmission line carrying less than 161 kilovolts is at issue. Because the Commission was not vested properly with jurisdiction over Dominion's premature appeal, pursuant to North Carolina General Statutes, section 62-94(b)(2), I would hold the Commission's order null and void as *ultra vires*. *See* N.C. Gen. Stat. § 62-94(b)(2) (2007).

North Carolina General Statutes, section 160A-174 enables cities and towns to enact ordinances to provide for "the health, safety, or welfare of its citizens and the peace and dignity of the [town] . . . ." N.C. Gen. Stat. § 160A-174(a) (2007). Furthermore,

> [a] [town] ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when . . . [t]he ordinance purports to regulate a field for which a State or federal statute *clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation*[.]

N.C. Gen. Stat. § 160A-174(b)(5) (2007) (emphasis added).

In pertinent part, North Carolina General Statutes, section 62-42 provides:

> (a) . . . whenever the Commission . . . finds:
>
> . . . .
>
> (4) That it is reasonable and proper that new structures should be erected to promote the . . . convenience . . . of its patrons, employees and the public, or
>
> (5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity,
>
> the Commission shall enter and serve an order directing that such additions, . . . improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order.
>
> . . . .
>
> (c) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State.

N.C. Gen. Stat. § 62-42 (2007). Thus, section 62-42 grants the authority to the Commission both to make findings and to draft orders implementing the results of those findings.

This Court has held that the Commission has jurisdiction to hear complaints against the proposed siting of electrical transmission lines pursuant to section 62-42. *See In re State ex rel. Util. Comm. v. Mountain Elec. Cooperative*, 108 N.C. App. 283, 423 S.E.2d 516 (1992), *aff'd*, 334 N.C. 681, 435 S.E.2d 71 (1993) (per curiam).

In *Mountain Electric*, the "sole issue presented . . . [was] whether the . . . Commission . . . lacked jurisdiction over a dispute arising from

the proposed siting of an electrical transmission line." *Mountain Elec. Cooperative*, 108 N.C. App. at 283, 423 S.E.2d at 516. The facts of *Mountain Electric*, however, did not raise the issue of whether the Commission has jurisdiction to preempt a local ordinance during a dispute involving the siting of an electrical transmission line carrying less than 161 kilovolts. In fact, this Court specifically limited its holding by explaining that

> [w]e are not convinced that a conflict necessarily exists between the more general statutory framework construed hereinabove to permit the Commission to hear disputes about electrical line siting and the more recent statutes which govern in detail resolution of such disputes about lines carrying 161 or more kilovolts. *Nevertheless, we leave for another day the question of whether the statutes permit the Commission after the effective date of [North Carolina General Statutes, sections] 62-100 et seq. to continue to resolve, in the same manner as before, disputes involving lines carrying less than 161 kilovolts.*

Mountain Elec. Cooperative, 108 N.C. App. at 287, 423 S.E.2d at 518 (emphasis added).

Sections 62-100 *et seq.* form article 5A of Chapter 62 of the General Statutes, which became effective 1 December 1991. In relevant part, section 62-100(7) defines "transmission line" as "an electric line designed with a capacity of at least 161 kilovolts." N.C. Gen. Stat. § 62-100(7) (2007). Thus, article 5A expressly concerns higher voltage lines. "No public utility or any other person may begin to construct a new transmission line [of 161 kilovolts or more] without first obtaining from the Commission a certificate of environmental compatibility and public convenience and necessity." N.C. Gen. Stat. § 62-101(a) (2007). However, "[a] certificate is not required for construction of . . . [a] line designed to carry less than 161 kilovolts[.]" N.C. Gen. Stat. § 62-101(c)(1) (2007). Therefore, the more general provision of section 62-42 continues to govern electric transmission lines carrying less than 161 kilovolts.

In contrast to the broad grant of authority in section 62-42, section 62-106 provides express authority to the Commission to preempt local ordinances and sets forth the necessary procedures. Specifically, section 62-106 provides that

> [w]ithin 30 days after receipt of notice of an application as provided by [North Carolina General Statutes, section] 62-102, a

> municipality or county shall file with the Commission and serve on the applicant the provisions of an ordinance that may affect the construction, operation, or maintenance of the proposed transmission line in the manner provided by the rules of the Commission. If the municipality or county does not serve notice as provided above of any such ordinance provisions, the provisions of such ordinance may not be enforced by the municipality or county. If the applicant proposes not to comply with any part of the ordinance, the applicant may move the Commission for an order preempting that part of the ordinance. Service of the motion on the municipality or county by the applicant shall make the municipality or county a party to the proceeding. If the Commission finds that the greater public interest requires it, the Commission may include in a certificate issued under this Article an order preempting any part of such county or municipal ordinance with respect to the construction, operation or maintenance of the proposed transmission line.

N.C. Gen. Stat. § 62-106 (2007).

Thus, in North Carolina General Statutes, section 62-106, the General Assembly has provided detailed procedures for the permissible preemption of local ordinances only when transmission lines carrying 161 kilovolts or more are at issue. Notwithstanding its broad scope, section 62-42 does not contain such an express grant of a power to preempt. Indeed, section 62-42 contains no synonym for, or derivative of "preempt." *See* N.C. Gen. Stat. § 62-42 (2007).

Although the majority argues that section 62-106 does not implicitly repeal or otherwise abrogate section 62-42, I believe "[t]his amendment to Chapter 62 reflects an acknowledgement [sic] by the legislature that it was creating a right in the Commission that did not previously exist." *Mountain Elec. Cooperative*, 108 N.C. App. at 288, 423 S.E.2d at 518 (Greene, J., dissenting) (citing *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968) ("The presumption is that the legislature intended to change the original act by creating a new right or withdrawing any existing one.") (citation and internal quotation marks omitted)). Because the only "statute [that] clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation" is North Carolina General Statutes, section 62-106, I cannot join the majority's view that section 62-42 enables the Commission to preempt the Town's ordinance. N.C. Gen. Stat. § 160A-174(b)(5) (2007). The legislative bal-

ance of the scope of permissible action by the Commission with the authority of the Town allows the Commission to displace local ordinances only when siting electrical transmission lines carrying 161 kilovolts or more.

Therefore, in view of our limited holding in *Mountain Electric* as well as the General Assembly's demonstrated ability to provide a limited power of preemption to the Commission in article 5A of Chapter 62 of the General Statutes—a power not expressed in the Commission's purported jurisdictional base, section 62-42—I would hold that the Commission did not have jurisdiction to preempt the Town's valid municipal ordinance. " 'The Utilities Commission, being an administrative agency created by statute, has no regulatory authority except such as is conferred upon it by Ch[apter] 62 of the General Statutes.' " *Mountain Elec. Cooperative*, 108 N.C. App. at 284, 423 S.E.2d at 516-17 (brackets in original) (quoting *Utilities Comm. v. Merchandising Corp.*, 288 N.C. 715, 722, 220 S.E.2d 304, 308 (1975)).

For the foregoing reasons, I respectfully dissent.

MICHAEL DEWAYNE PUTMAN, EMPLOYEE, PLAINTIFF v. RANDY ALEXANDER AND/OR MAJESTIC MOUNTAIN CONSTRUCTION, INC., EMPLOYERS (NONINSURED), AND MARSHA PATTERSON-JONES, INDIVIDUALLY, AND/OR RANDY ALEXANDER, DEFENDANTS

DARRELL THOMPSON, EMPLOYEE, PLAINTIFF v. RANDY ALEXANDER AND/OR MAJESTIC MOUNTAIN CONSTRUCTION, INC., EMPLOYERS (NONINSURED), AND MARSHA PATTERSON-JONES, INDIVIDUALLY, AND/OR RANDY ALEXANDER, DEFENDANTS

No. COA08-306
No. COA08-332

(Filed 6 January 2009)

1. Appeal and Error— appealability—untimely notice of appeal—writ of certiorari

Although plaintiff's motion to dismiss defendants' appeal on the ground that defendants failed to timely serve their notice of appeal on plaintiff under N.C. R. App. P. 3 was granted, the Court of Appeals exercised its discretion to grant defendants' petition for writ of certiorari.

2. Workers' Compensation— uninsured subcontractor—injuries to employees—general contractor as statutory employer

The evidence before the Industrial Commission in a workers' compensation case was sufficient to establish that defendant construction company was the statutory employer under N.C.G.S. § 97-19 of two carpenters who were injured while working for an uninsured subcontractor on a townhome construction project where it showed that the owner of the construction company entered into an agreement with the developer that the construction company would serve as the general contractor for the project; the site manager for the project who hired the uninsured subcontractor worked for the construction company rather than for the developer; and the owner of the construction company was not a part owner of the townhome project at the time of the accident.

3. Workers' Compensation— injuries to employees of unlicensed subcontractor—civil penalty on statutory employer

The Industrial Commission did not err by assessing civil penalties under N.C.G.S. § 97-94(d) against the owner of the statutory employer of two carpenters who were injured while working for an uninsured subcontractor because a civil penalty may be assessed against the person who had the ability and authority to bring a statutory employer in compliance with N.C.G.S. § 97-93 but who willfully failed or neglected to do so.

4. Workers' Compensation— civil penalty—disability compensation—compensation for medical expenses

The Industrial Commission did not err in a workers' compensation case by decreeing that the amount of the civil penalty assessed against the owner of the statutory employer could be determined based on plaintiffs' disability compensation and plaintiffs' compensation for medical expenses because N.C.G.S. § 97-94(d) confers upon the Commission the discretion to assess civil penalties against a person who violates that subsection based upon any compensation, including medical compensation, due the injured employee.

Appeal by defendants from Opinions and Awards entered 5 December 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 September 2008.

Judith C. Fraser, for plaintiff-appellee Michael Dewayne Putman.

Melrose, Seago & Lay, P.A., by Kimberly C. Lay, for plaintiff-appellee Darrell Thompson.

Leicht & Olinger, by Gene Thomas Leicht, for defendants-appellants Majestic Mountain Construction, Inc. and Marsha Patterson-Jones.

MARTIN, Chief Judge.

Majestic Mountain Construction, Inc. and Marsha Patterson-Jones (collectively "defendants") appeal from Opinions and Awards by the North Carolina Industrial Commission ("Commission") (1) awarding disability benefits, medical expenses, and attorney's fees and costs to Michael Dewayne Putman and Darrell Thompson (collectively "plaintiffs") and (2) assessing additional civil penalties against defendant Marsha Patterson-Jones. We affirm each of the Commission's awards.

While defendants have maintained separate appeals, both appeals involve common questions of law, as evidenced by defendants' decision to submit virtually identical appellate briefs in each case. Therefore, upon our own initiative, we consolidate these appeals for the purpose of rendering a single opinion on all issues properly before the Court. *See* N.C.R. App. P. 40 (2008) ("Two or more actions which involve common questions of law may be consolidated for hearing . . . upon the initiative of th[e appellate] court.").

On 16 June 2005, plaintiffs were injured by an accident arising out of and in the course of their employment with Randy Alexander. Plaintiffs were doing carpentry work "on a second-story deck that collapsed and broke away from [a] town home [that was under construction], causing plaintiff[s] to fall approximately 15 to 16 feet onto a lower deck, then fall to the ground approximately 10 feet below the lower deck, and then down an embankment." Both plaintiffs sustained injuries which required varying degrees of continued medical treatment and rehabilitative or therapeutic care, and which restricted their ability to return to work. At the time of the accident, plaintiffs' employer, Randy Alexander, did not have workers' compensation insurance.

In June 2005, plaintiffs were working on the construction site for a residential development project named the Villas of Provence in

Glenville, North Carolina. At that time, William Allen Patterson was the title owner of the 9.5 acre tract on which the residential units were being constructed. Marsha Patterson-Jones, Mr. Patterson's daughter, was the owner and "qualifier" of Majestic Mountain Construction, Inc. ("MMC"), which was the licensed general contractor for the Villas of Provence project. Mrs. Patterson-Jones was also a licensed realtor and owned Majestic Mountain Realty, which listed two of the first four units sold in the Villas of Provence. Ben Jones, Mrs. Patterson-Jones's husband, served as the "site manager for the property on which defendant [MMC] was developing and plaintiff[s were] working," and was responsible for "hir[ing] the subcontractors, [telling] them what to do, check[ing] to make sure the work was being done properly, and report[ing] back to his wife on what materials needed to be ordered" for the project. However, whether Ben Jones was retained by his wife's company, MMC, or by his father-in-law is one of the issues before this Court. Ben Jones was also responsible for hiring Randy Alexander and was the person to whom Randy Alexander and plaintiffs reported on the Villas of Provence construction site.

On 23 October 2006, both plaintiffs' cases were presented in one hearing before a deputy commissioner. On 30 May 2007, the deputy commissioner filed Opinions and Awards which determined that plaintiffs sustained compensable injuries by an accident arising out of and in the course of their employment with Randy Alexander. The deputy commissioner concluded that MMC was the general contractor on the job where plaintiffs were injured and that Randy Alexander was a subcontractor to MMC. He also concluded that: (1) MMC was plaintiffs' statutory employer pursuant to N.C.G.S. § 97-19; (2) MMC was "required to have workers' compensation insurance to cover their subcontractors' employees since they did not require proof of insurance from subcontractor Randy Alexander"; and (3) a civil penalty should be assessed against Mrs. Patterson-Jones pursuant to N.C.G.S. § 97-94(d) for her failure to bring MMC into compliance under N.C.G.S. § 97-93 when she had the ability and authority to do so. Defendants appealed to the Full Commission. On 5 December 2007, the Commission entered Opinions and Awards which adopted the deputy commissioner's decisions, with minor modifications. This appeal follows.

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[1] We first consider plaintiff Thompson's motion to this Court to dismiss defendants' appeal on the grounds that defendants failed to

timely serve their notice of appeal on plaintiff Thompson pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure. We also consider defendants' petition for writ of certiorari filed in response to plaintiff Thompson's motion to dismiss. For the reasons discussed below, we grant plaintiff Thompson's motion to dismiss defendants' appeal, and we grant defendants' petition for writ of certiorari.

"In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal. In addition, the rules of the Supreme Court that regulate appeals, such as Rule 3, are mandatory and must be observed." *Id.* (citation omitted).

Rule 3(c) of the North Carolina Rules of Appellate Procedure requires that, within the time limitations specified by the rule, "a party must file and serve a notice of appeal." N.C.R. App. P. 3(c) (2008). According to Appellate Rule 3(e), "[s]ervice of copies of the notice of appeal may be made as provided in Rule 26 of [the appellate] rules," *see* N.C.R. App. P. 3(e), and that service "*may be so made upon a party or upon his attorney of record.*" *See* N.C.R. App. P. 26(c) (2008) (emphasis added).

In the present case, defendants timely filed their notice of appeal to this Court from the 5 December 2007 Opinion and Award in favor of plaintiff Thompson on 18 December 2007. However, instead of mailing a copy of that notice to plaintiff Thompson's counsel of record, who appeared on his behalf before both the deputy commissioner and the Full Commission, service was made upon plaintiff Putman's counsel of record. Plaintiff Thompson subsequently moved to dismiss defendants' notice of appeal on 6 February 2008 for failing to comply with the service requirements of Appellate Rule 3. Although defendants filed a second "amended" notice of appeal on 7 February 2008 which complied with the service requirements of Rule 3, the "amended" notice of appeal was untimely. *See* N.C.R. App. P. 3(c)(1) ("In civil actions and special proceedings, 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 of the Rules of Civil Procedure . . . ."). Therefore, defendants' appeal from the Opinion and Award entered as to plaintiff Thompson's claims must be dismissed.

Nevertheless, this Court may issue a writ of certiorari "when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1) (2008). Having determined that defendants lost their right to prosecute their appeal as to plaintiff Thompson by their failure to file a timely notice of appeal that fully complies with Appellate Rule 3(c), we exercise our discretion to grant defendants' petition for writ of certiorari.

The issues before this Court are as follows: (I) whether the Commission erred by concluding that MMC was plaintiffs' statutory employer under N.C.G.S. § 97-19; (II) whether the Commission erred by assessing civil penalties against Mrs. Patterson-Jones under N.C.G.S. § 97-94(d); and (III) whether the Commission erred by decreeing that the amount of the civil penalty assessed against Mrs. Patterson-Jones could be determined based on both plaintiffs' disability compensation *and* plaintiffs' compensation for medical expenses.

I.

[2] Defendants first contend the Commission erred by concluding that MMC was plaintiffs' statutory employer under N.C.G.S. § 97-19. The parties agree that Ben Jones hired Randy Alexander who, in turn, hired plaintiffs to work on the Villas of Provence development project. However, defendants assert that no employment relationship existed between plaintiffs and MMC to implicate N.C.G.S. § 97-19 and, thus, argue that the Commission lacked subject matter jurisdiction to hear plaintiffs' claims against MMC and Mrs. Patterson-Jones. We do not agree.

When it has jurisdiction to hear the claims before it, " '[t]he findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999); *see also* N.C. Gen. Stat. § 97-86 (2007) (providing, in part, that an award of the Industrial Commission "shall be conclusive and binding as to all questions of fact").

However, "[w]hether a defendant is a statutory employer within the meaning of [N.C.G.S.] § 97-19 is a jurisdictional matter." *Masood v. Erwin Oil Co.*, 181 N.C. App. 424, 426, 639 S.E.2d 118, 120 (citing *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 309, 392

S.E.2d 758, 759 (1990)), *aff'd by an equally divided court*, 361 N.C. 579, 650 S.E.2d 595 (2007). Accordingly, because "the Commission has no jurisdiction to apply the [Workers' Compensation] Act to a party who is not subject to its provisions," *Williams v. ARL, Inc.*, 133 N.C. App. 625, 628, 516 S.E.2d 187, 190 (1999) (citing *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 364 S.E.2d 433, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 923 (1988)), "[n]otwithstanding [N.C.G.S. §] 97-86, the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding." *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976). Instead, "[t]he reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Id.*; *see also Cook*, 99 N.C. App. at 309, 392 S.E.2d at 759 ("[W]e are required to review the evidence of record and make independent findings of jurisdictional facts established by the greater weight of the evidence with regard to plaintiff's employment status.").

N.C.G.S. § 97-19 provides, in relevant part:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with [N.C.G.S. §] 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service fewer than three employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under this Article.

N.C. Gen. Stat. § 97-19 (2007). This statute "is an exception to the general definitions of 'employment' and 'employee' set forth in [N.C.G.S.]

§ 97-2, and provides that a principal contractor, intermediate contractor, or subcontractor may be held liable as a statutory employer where two conditions are met." *Williams*, 133 N.C. App. at 629, 516 S.E.2d at 190. First, " 'the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor,' and[, second,] 'the subcontractor does not have workers' compensation insurance coverage covering the injured employee.' " *Id.* (quoting *Rich v. R.L. Casey, Inc.*, 118 N.C. App. 156, 159, 454 S.E.2d 666, 667, *disc. review denied*, 340 N.C. 360, 458 S.E.2d 190 (1995)). Since the parties do not dispute that Randy Alexander did not have workers' compensation insurance at the time of the accident, we need only examine whether the first condition has been met.

A.

In their brief, defendants do not contest the determination that Randy Alexander worked as a subcontractor, rather than as an independent contractor. So, in order to determine that the Commission correctly concluded that MMC was plaintiffs' statutory employer, after our consideration of all of the evidence in the record, we must find (1) that Mrs. Patterson-Jones, on behalf of MMC, entered into an agreement with Mr. Patterson, which provided that MMC would serve as the general contractor for the project, and (2) that Ben Jones worked for MMC and hired Randy Alexander as a subcontractor for MMC, rather than for Mr. Patterson.

1.

Although she was present during the proceedings, Mrs. Patterson-Jones did not testify at the 23 October 2006 hearing. However, Mr. Patterson, her father, and Ben Jones, her husband, each gave testimony before the deputy commissioner. Both Mr. Patterson and Ben Jones testified that Mrs. Patterson-Jones was the sole owner and "qualifier" of MMC, that a contractor's license for the State of North Carolina was held in the name of MMC, and that MMC was the general contractor for the Villas of Provence development project.

In addition, Mr. Patterson testified that his daughter formed MMC at least two years before construction began on the Villas of Provence project in 2004. Mr. Patterson further testified that he knew he needed a licensed contractor on the project, and that neither he nor Ben Jones hold a general contractor's license. Mr. Patterson testified that he wanted his daughter's company to take on that role because "[s]he's had her [general contractor's] license for a number

of years . . . [and t]here's a benefit to the Villas of Provence that *she has*, *through her corporation*, *a contractor's license*." (Emphasis added.) Mr. Patterson also testified that, in exchange for receiving the benefit of his daughter's license and labor through MMC as the general contractor, they both agreed that Mrs. Patterson-Jones, MMC's owner, would be compensated only upon the sale of each unit.

After reviewing all of the evidence in the record, we find from that evidence and by its greater weight, as did the Commission, that Mrs. Patterson-Jones, on behalf of and through her company MMC, agreed to and did serve as the general contractor on the Villas of Provence project.

2.

Defendants also assert that Ben Jones did not work for MMC, but instead served as Mr. Patterson's "independent construction management consultant" on the project. They claim that Ben Jones was paid for his work by checks drawn from Mr. Patterson's bank account. However, the record contains no evidence—e.g., copies of bank statements or cancelled checks payable from Mr. Patterson to Ben Jones, or payable from Ben Jones to Randy Alexander or plaintiffs—that Randy Alexander was paid by monies from an account owned by Mr. Patterson. In fact, evidence was presented that, although Ben Jones signed the checks, Randy Alexander thought he remembered that the checks were drawn from an account belonging to MMC, where "Majestic Mountain Construction" may have been printed on the top of the checks.

The evidence in the record also tended to show that both plaintiffs believed that Ben Jones worked for MMC. Plaintiffs also testified that, to their knowledge, the other carpentry crews with whom they worked on the same units were working for MMC. Plaintiff Thompson further testified that he understood that he was "working for Ben Jones and Majestic Mountain Construction" and that he thought Ben Jones actually owned MMC. When questioned about why plaintiff Thompson may have thought Ben Jones was working for MMC, Mr. Jones said, "No. I mean, I guess he—I don't know. I mean—." When asked, "Did you tell him that?," Ben Jones responded, "Not that—not to my knowledge. No." However, when asked about whether he "had that authority from Majestic Mountain Construction on [the Villas of Provence] project" to discharge individual workers from any of the subcontractors' crews, Ben Jones admitted, "Anybody *that I work for*. I have to have that." (Emphasis added.)

Plaintiff Thompson's wife also testified that, while Ben Jones and Mrs. Patterson-Jones waited with her at the hospital for news about her husband, Ben Jones "give [sic] me a business card the night of the accident, with the construction name, his name, address, phone numbers, and told me to call him if I needed anything." When asked what information was on the business card, she testified that the card said, " 'Majestic Mountain Construction, Incorporated. Ben Jones,' has their physical address, cell number and office number." She also testified that she took Ben Jones's comment and the information on the card to mean that MMC "was his employer and that he would have workman's comp or, if there was anything further that we needed, to contact him." On cross-examination, Ben Jones admitted that the business card he gave to plaintiff Thompson's wife shows his name, the name of Majestic Mountain Construction, Inc., the physical address for MMC, MMC's company office number, and his cell phone number. When asked in what capacity he used the business card, Ben Jones said, "That one there, I use—I gave it—made it up and put it in the office at Majestic Mountain office so if people comes [sic] in there, wants [sic] a house built" "that maybe they could call me and, you know, I could tell them what I do and they could hire me."

After considering all of the evidence in the record, we find by the greater weight thereof that Ben Jones worked for MMC. Accordingly, since Ben Jones hired Randy Alexander to serve as a subcontractor for MMC, and since both conditions of N.C.G.S. § 97-19 were met, *see Williams*, 133 N.C. App. at 629, 516 S.E.2d at 190, we hold that the Commission correctly determined that MMC was plaintiffs' statutory employer.

B.

Defendants further assert that MMC was not plaintiffs' statutory employer because they claim that, in addition to her ownership of MMC, Mrs. Patterson-Jones was a "part owner" of the Villas of Provence development project. Thus, defendants argue that Mrs. Patterson-Jones could not have "contracted with herself as principal of [MMC] to legally force herself to build a house on the property of the Villas of Provence." Accordingly, defendants argue that the Commission's application of N.C.G.S. § 97-19 was erroneous under *Purser v. Heatherlin Properties*, 137 N.C. App. 332, 527 S.E.2d 689, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 428 (2000). However, we conclude that *Purser* does not control in the present case.

In *Purser*, Mr. and Mrs. McMahan "rented properties and constructed new homes under the business name of Heatherlin Properties," which "employed" Mr. McMahan, who held his general contractor's license. *See Purser*, 137 N.C. App. at 333, 527 S.E.2d at 690. "When building a house, Mr. McMahan listed himself as the general contractor on the building permit and listed Heatherlin Properties as the owner of the property . . . ." *Id.*

In our analysis in *Purser*, this Court emphasized that "it is unreasonable to assume that a person could contract with himself to do something for his own benefit, thereby making himself a general contractor if he should then contract that job to another person." *Id.* at 336, 527 S.E.2d at 692. Since we determined that Mr. McMahan "was on both sides of the equation," we stated that it was "unreasonable to think that Mr. McMahan as owner of the property contracted with himself as a partner or sole proprietor of Heatherlin Properties to legally force himself to build a house on the property." *Id.* at 336-37, 527 S.E.2d at 692. Accordingly, we concluded that "Mr. McMahan was not a general contractor" and that the plaintiff's company "was not a subcontractor, but was instead an independent contractor," and so held that "[t]he Industrial Commission erred when it found that Mr. Purser was covered by N.C.[G.S.] § 97-19." *Id.* at 337, 527 S.E.2d at 692; *see also Cook*, 99 N.C. App. at 310, 392 S.E.2d at 760 ("G.S. § 97-19, by its own terms, cannot apply unless there is first a contract for the performance of work which is then sublet. Consequently, G.S. § 97-19 may apply as between two independent contractors, one of whom is a subcontractor to the other; but it does not apply as between a principal, *i.e.*, an owner, and an independent contractor.") (citing *Beach v. McLean*, 219 N.C. 521, 14 S.E.2d 515 (1941)).

In the present case, there was no evidence in the record to document that Mrs. Patterson-Jones was a part owner of the Villas of Provence at the time plaintiffs were injured. The evidence tended to show that the property was never titled in Mrs. Patterson-Jones's name, and no evidence was presented to demonstrate that Mrs. Patterson-Jones contributed any monies to the purchase of the property. While Mr. Patterson testified that ownership of the property was transferred to Provence Villas, LLC—a company for which Mr. Patterson served as the managing member and Mrs. Patterson-Jones served as a member—he also conceded that this company was not registered with the Secretary of State until July 2005, less than one month *after* the accident in which plaintiffs were injured.

Mr. Patterson testified that Mrs. Patterson-Jones was an "undisclosed principal" in the property prior to the formation of Provence Villas, LLC, and that she acquired a fifteen-percent interest in the property prior to the time of the accident, "somewhere in 2004." However, when asked "what, if anything, was significant in 2004 that [Mr. Patterson] decided to verbally tell [Mrs. Patterson-Jones] that she had this fifteen-percent interest in land," Mr. Patterson testified that "[i]t was basically because we were formulating our plans as to what we were going to do with the property, and [Mrs. Patterson-Jones] was involved." He also testified that "I didn't—we didn't—we didn't transfer anything and—. . . [i]t was purely a personal quasi-business situation," which he stated meant that "[i]t was business and it was personal and it was done in 2004." Nonetheless, after our consideration of all of the evidence in the record, we cannot find by its greater weight that Mrs. Patterson-Jones was a part owner in the Villas of Provence at the time of the accident; rather, we find that she was not. Therefore, we conclude that *Purser* does not control the present case, and hold that the Commission correctly determined that MMC was plaintiffs' statutory employer pursuant to N.C.G.S. § 97-19.

II.

[3] Defendants next contend the Commission erred by assessing civil penalties against Mrs. Patterson-Jones under N.C.G.S. § 97-94(d). Defendants do not deny that Mrs. Patterson-Jones was the person "with the ability and authority to bring [MMC] in compliance with [N.C.G.S. §] 97-93," *see* N.C. Gen. Stat. § 97-94(d) (2007), but instead argue that a statutory employer is not subject to the civil penalty provision of N.C.G.S. § 97-94(d). We disagree.

N.C.G.S. § 97-94 provides, in part:

> (a) Every employer subject to the compensation provisions of this Article shall file with the Commission . . . evidence of its compliance with the provisions of G.S. 97-93 and all other provisions relating thereto.
>
> . . . .
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> (d) Any person who, with the ability and authority to bring an employer in compliance with G.S. 97-93, willfully fails to bring the employer in compliance, shall be guilty of a Class H felony. Any person who, with the ability and authority to bring an employer in compliance with G.S. 97-93, neglects to bring the employer in compliance, shall be guilty of a Class 1

> misdemeanor. Any person who violates this subsection may be assessed a civil penalty by the Commission in an amount up to one hundred percent (100%) of the amount of any compensation due the employer's employees injured during the time the employer failed to comply with G.S. 97-93.

N.C. Gen. Stat. § 97-94(a), (d). In other words, based on its "clearly expressed language," *see Deese v. Se. Lawn & Tree Expert Co.*, 306 N.C. 275, 277, 293 S.E.2d 140, 143, *reh'g denied*, 306 N.C. 753, 303 S.E.2d 83 (1982), the civil penalty provision of N.C.G.S. § 97-94(d) may be applied when an employer fails to comply with the requirements of N.C.G.S. § 97-93. Similarly, when a statutory employer fails to insist on the compliance of its subcontractors with the requirements of N.C.G.S. § 97-93, it, too, is liable under the Act "to the same extent as such subcontractor would be if he were subject to the provisions of this Article." *See* N.C. Gen. Stat. § 97-19.

In their brief, defendants assert that N.C.G.S. § 97-94(d) is not applicable to statutory employers because N.C.G.S. § 97-19 does not "magically transform" the relationship between plaintiffs and MMC into that of employer-employee. Nevertheless, as we discussed in section I above, an examination of whether one party is another's statutory employer "raises the jurisdictional question of whether an *employment relationship within the Act* existed" at the time of the injury giving rise to the action. *See Cook*, 99 N.C. App. at 309, 392 S.E.2d at 759 (emphasis added).

In addition, N.C.G.S. § 97-19 "was enacted by the Legislature *to deliberately bring specific categories of conceded nonemployees within the coverage of the Act* for the purpose of protecting such workers from 'financially irresponsible sub-contractors who do not carry workmen's compensation insurance,' " and "to prevent principal contractors . . . from relieving themselves of liability under the Act by doing through sub-contractors what they would otherwise do through the agency of direct employees.' " *Id.* at 310, 392 S.E.2d at 759 (emphasis added) (quoting *Withers v. Black*, 230 N.C. 428, 53 S.E.2d 668 (1949)); *see also Greene v. Spivey*, 236 N.C. 435, 443, 73 S.E.2d 488, 494 (1952) ("[The] manifest purpose of . . . [N.C.G.S. § 97-19] is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on principal contractors . . . who, presumably being financially responsible, have it within their power, in choosing subcontractors, to pass upon their financial responsibility and insist upon appropriate compensation protection for their workers.").

Accordingly, we conclude that, when circumstances arise that implicate N.C.G.S. § 97-19 because a subcontractor fails to comply with the requirements of N.C.G.S. § 97-93, the Industrial Commission may assess civil penalties pursuant to N.C.G.S. § 97-94(d) against the person who had the ability and authority to bring a *statutory* employer in compliance with N.C.G.S. § 97-93 but who willfully failed or neglected to do so. Therefore, we hold that the Commission did not err by assessing civil penalties against Mrs. Patterson-Jones under N.C.G.S. § 97-94(d) for failing to bring MMC in compliance with N.C.G.S. § 97-93.

III.

[4] Finally, defendants contend the Commission erred by decreeing that the amount of the civil penalty assessed against Mrs. Patterson-Jones could be determined based on plaintiffs' disability compensation and plaintiffs' compensation for medical expenses. Defendants argue that amounts due for plaintiffs' medical expenses may not be included in the Commission's determination of the amount of the civil penalty assessed under N.C.G.S. § 97-94(d).

Defendants assert that N.C.G.S. § 97-94(d) "unambiguously" states that a civil penalty may be assessed "based upon 'compensation' due to the employee." Consequently, defendants argue that the Legislature meant only to grant the Industrial Commission the discretion to assess civil penalties based on "compensation," as defined in N.C.G.S. § 97-2(11), and purposely withheld from the Commission the power to include any amounts based also on "medical compensation," as defined in N.C.G.S. § 97-2(19). *Compare* N.C. Gen. Stat. § 97-2(11) (2007) ("The term 'compensation' means the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein."), *with* N.C. Gen. Stat. § 97-2(19) ("The term 'medical compensation' means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . ."). Defendants claim that if the Legislature had intended to allow the Commission to include medical compensation as part of the amount assessed for civil penalties under N.C.G.S. § 97-94(d), then it would have expressly referenced "medical compensation" in the statute. For the reasons discussed below, we disagree.

N.C.G.S. § 97-94(d) confers upon the Commission the discretion to assess civil penalties in an amount, not based merely on "compensation" due to the injured employee, but rather based on "*any* compensation" due to the injured employee. More specifically, N.C.G.S. § 97-94 provides that any person who violates subsection (d) "*may be assessed* a civil penalty by the Commission *in an amount up to* one hundred percent (100%) of *the amount of any compensation* due the employer's employees injured during the time the employer failed to comply with G.S. 97-93." N.C. Gen. Stat. § 97-94(d) (emphasis added).

As we consider the interpretation of this provision, we are mindful that "the Workers' Compensation Act should be liberally construed," *see Deese*, 306 N.C. at 277, 293 S.E.2d at 142-43, and that "the underlying purpose of the North Carolina Workers' Compensation Act is to 'provide compensation to workers whose earning capacity is diminished or destroyed by injury arising from their employment.' " *See McRae v. Toastmaster, Inc.*, 358 N.C. 488, 493, 597 S.E.2d 695, 699 (2004) (quoting *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 233, 472 S.E.2d 397, 401 (1996)).

The term "compensation" was already among the list of defined terms in Article 1 of the Workers' Compensation Act when the term "medical compensation" was added to N.C.G.S. § 97-2 in 1991. *See* ch. 703, § 1, 1991 N.C. Sess. Laws 2268. Subsection (d) of N.C.G.S. § 97-94 was added three years later when the General Assembly amended this and other provisions of Chapter 97 by the Workers' Compensation Reform Act of 1994. *See* ch. 679, § 8.1, 1994 N.C. Sess. Laws 412. Further, although N.C.G.S. § 97-94 has been amended twice since subsection (d) was first added, the Legislature has never amended the "any compensation" language. *See* ch. 215, § 115, 1998 N.C. Sess. Laws 1388; ch. 353, § 2, 1997 N.C. Sess. Laws 869. Since, at the time the Legislature added N.C.G.S. § 97-94(d), both "medical compensation" and "compensation" were among the existing defined terms for the Act, we find it relevant that the Legislature chose to expressly provide that "any compensation" may be considered in determining the amount of the civil penalty, rather than stating that the penalty could be determined based *only* on what would have been the more limiting term of "compensation." Consequently, we conclude that it does not "enlarge the ordinary meaning of the terms used by the [L]egislature" to interpret the term "any compensation" in N.C.G.S. § 97-94(d) to allow the inclusion of amounts due for "medical compensation." *See Deese*, 306 N.C. at 277, 293 S.E.2d at 143.

Moreover, while we recognize that the Commission's legal interpretation of a particular provision is not binding, *see id.* at 278, 293 S.E.2d at 143, the Commission's decisions in this and other cases to assess civil penalties pursuant to N.C.G.S. § 97-94(d) that include medical compensation in its determinations of the amounts to be assessed are persuasive authority on the issue. *See*, *e.g.*, *Earl Williams v. James Lloyd*, I.C. Nos. 652563 & PH-1785, 2008 WL 2764610 (July 10, 2008); *Kirk Sprinkles v. Dinnertainment, Inc.*, I.C. Nos. 542926 & PH-1538, 2008 WL 2764604 (July 2, 2008); *Michael Grouse v. DRB Baseball Mgmt., Inc.*, I.C. Nos. 832331 & PH-1715, 2007 WL 4415478 (Dec. 4, 2007); *Carlton Boone v. A.D. Vinson, Sr.*, I.C. Nos. 513936 & PH-1346, 2007 WL 4375806 (Nov. 6, 2007); *Brenda D. Boisvert v. IFE, Inc.*, I.C. Nos. 582866 & PH-1607, 2007 WL 2385997 (July 18, 2007); *Billy Clark v. Henry Locklear*, I.C. Nos. 450535 & PH-1334, 2006 WL 2993091 (Sept. 19, 2006); *Billy Marshall v. Larry Pleasants*, I.C. Nos. 365891 & PH-0983, 2006 WL 2388220 (July 13, 2006); *Latasha Lowe v. R "N" S Enter., Inc.*, I.C. Nos. 259365 & PH-0910, 2006 WL 1355458 (Apr. 12, 2006); *Sherron Rae Beatty v. Michelle Loftis*, I.C. Nos. 274571 & PH-0905, 2005 WL 630205 (Feb. 10, 2005); *Kenneth Hayes v. Derek Fozart*, I.C. Nos. 231326 & PH-0673, 2003 WL 22753373 (Oct. 20, 2003); *N.C. Indus. Comm'n v. Herbie's Place, L.L.C.*, I.C. No. PH-0307, 2001 WL 1614076 (Nov. 16, 2001).

Therefore, we conclude that N.C.G.S. § 97-94(d) allows the Commission the discretion to assess civil penalties against persons who violate that subsection based upon any compensation, including medical compensation, due the injured employee and hold that the Commission did not err when it assessed civil penalties against Mrs. Patterson-Jones based on amounts calculated from both plaintiffs' disability compensation and compensation for medical expenses.

Accordingly, we affirm the Commission's Opinions and Awards.

Affirmed.

Judges McGEE and STEPHENS concur.

STATE OF NORTH CAROLINA v. DAMENON ROPMELE EARLY

No. COA08-68

(Filed 6 January 2009)

1. Evidence— photographs—autopsy of murder victim—nature of wounds—probative of self-defense

The trial court did not abuse its discretion by admitting eight autopsy photographs of a murder victim where self-defense was an issue and the nature of the wounds was probative of that issue.

2. Evidence— prior statement—corroborative—limiting instruction—admissibility

The trial court did not abuse its discretion in a first-degree murder prosecution by admitting a prior statement about the crime by a State's witness. The prior statement described events in the same manner as his testimony during the trial, the State offered the prior statement for corroborative purposes, and the court gave a limiting instruction at the time the evidence was offered and at the conclusion of the trial.

3. Search and Seizure— disputed consent—evidence cumulative and not prejudicial

There was competent evidence that the legal occupants of the residence where defendant was living consented to a search, but it is not clear whether the court found that defendant consented to the search of the bedroom closet in issue. Assuming that the trial court erred in failing to suppress the gun box and bullets seized from the closet, the evidence was merely cumulative and it is highly improbable that the evidence had any effect on the outcome of the trial.

4. Discovery— surprise witness—failure to object—contention not considered

Defendant did not object to a witness at trial and could not properly contend that the trial court abused its discretion by failing to impose sanctions for the State not complying with discovery.

5. Criminal Law— jury inquiry—instructions repeated—no plain error

Defendant did not object at trial, and there was no plain error, where the jury in a first-degree murder trial inquired about

the difference between second-degree murder and voluntary manslaughter and the trial court reread the pattern jury instructions for second-degree murder, voluntary manslaughter, and self-defense.

6. Homicide— shooting—malice, premeditation and deliberation—sufficiency of evidence

There was sufficient evidence of malice, premeditation, and deliberation in a first-degree murder prosecution, and the trial court did not err by denying defendant's motion to dismiss, based on the nature and number of shots, the fact that defendant raised and aimed his gun at the victim, the statements made prior to the shooting, and the fact that the victim walked away before defendant shot him.

Appeal by defendant from judgment entered 23 August 2007 by Judge Timothy S. Kincaid in Cleveland County Superior Court. Heard in the Court of Appeals 22 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Christy E. Wilhelm for defendant appellant.

McCULLOUGH, Judge.

Defendant Damenon Ropmele Early ("defendant") was tried before a jury at the 13 August 2007 Criminal Session of Cleveland County Superior Court after being charged with one count of first-degree murder. The State's evidence tended to show the following: On 17 April 2006, Paras Samuel, Jared Smith, Omar Wilson and Dedrick Wilson were at Jared Smith's house playing cards and drinking alcohol. At around 7:30 p.m. or 8:00 p.m., Samuel drove them all to Michael Degree's house, which is in the Robertsdale neighborhood. After speaking to Orlando Ager, Samuel and Jared Smith joined the others who were walking toward Miss Sarah's house. Miss Sarah, who is called the "Candy Lady," sold candy, soft drinks, and cigarettes from her house.

When Samuel, Jared Smith, Omar and Dedrick Wilson approached Miss Sarah's house, defendant, along with Ryan Smith and Sherwood Allen, were all standing in Miss Sarah's front yard. At this time, everyone greeted each other and shook hands except defendant would not greet or shake hands with Samuel. Ryan Smith testified he could tell Samuel had been drinking.

Defendant and Samuel began arguing with each other and the argument escalated. Samuel began to circle defendant and pulled a gun from his side.[1] Samuel then put the gun away and walked away.

After Samuel walked away, defendant pulled his gun out and pointed it towards Samuel. Samuel then turned around. Samuel and defendant walked towards each other and defendant pointed the gun at Samuel. Samuel said, "If you're gone pull [that] gun out, you better use it." Defendant shot Samuel. At the time he was shot, Samuel was not holding his gun. Samuel then pulled out his gun and shot defendant. After several shots were fired, defendant ran and Samuel struggled to walk across the street to the parking lot where he fell to the ground.

Shortly thereafter, the police and Cleveland County EMS arrived at the scene. Samuel had been shot in the chest, did not have a pulse, and was not breathing. The autopsy revealed that Samuel suffered three gunshot wounds. The locations of the gunshot wounds were in the left chest, abdomen and right leg. Samuel had an entrance wound on the left part of his chest, with an exit wound much lower on the back. This was likely the fatal wound. Samuel also had an entrance wound on the right portion of his back, with a corresponding exit wound on the front part of his abdomen. The wound on the right leg was an entrance wound, with a corresponding exit wound on the right buttocks.

Jackie Cunningham, defendant's stepfather, approached the police officers at the scene and told the officers they could go to Cunningham's residence at 407 Piedmont Avenue to look for defendant. When they arrived at his residence, Cunningham opened the door to let Officer Benefield and Sergeant Smith come inside. Defendant was in the kitchen bleeding from his chest. Officer Benefield asked defendant where his gun was, and defendant's mother walked to the living room closet and handed him defendant's gun. The gun had two spent shell casings in the cylinder. Defendant's mother also handed Officer Benefield two other spent shell casings from the front porch.

Investigators photographed the crime scene and collected clothing and samples of bloodstains. Projectiles, clothing, and ammunition were also collected. Later, pursuant to consent forms signed by the

1. There was conflicting evidence as to whether Samuel pointed his gun at defendant. Jared Smith testified at trial that Samuel pointed the gun at defendant. Ryan Smith and Allen testified that Samuel did not point the gun at anyone and instead, pointed the gun toward the ground or just "flashed it."

Cunninghams and defendant, another search was conducted of Cunningham's residence at 407 Piedmont Avenue. Evidence which was photographed and seized included live and spent ammunition, boxes for handguns, and three plastic bags.

At the close of the State's evidence, the defense moved to dismiss the first-degree murder charge. The trial court denied that motion.

Defendant's evidence tended to show the following: On 17 April 2006, defendant's stepfather, Cunningham, asked defendant to go to Miss Sarah's house to buy a pack of cigarettes. Defendant took a gun with him because it was a dangerous neighborhood. While defendant was speaking with Miss Sarah, Ryan Smith, and Allen, Samuel and his friends approached. Everyone shook hands with each other except for defendant and Samuel. Samuel began yelling and cursing at defendant, pulled out his gun, and put it in defendant's face. Defendant could smell alcohol on Samuel's breath. Defendant believed Samuel was "out of control" and was afraid that Samuel was going to shoot him. Defendant then turned and began to walk away from Samuel when Samuel called his name and defendant turned around. Samuel then shot defendant in the chest. At this point, defendant shot back at Samuel. Defendant then ran inside Miss Sarah's house, exited through the back door, and went home.

Officer Benefield responded to the call reporting the incident. After he arrived at the scene, Officer Benefield walked with Cunningham to his residence to find defendant. Defendant's mother then handed him a .357 Taurus revolver and spent shell casings from her front porch.

When EMS arrived, it was determined that Samuel had a large wound in his chest and did not have a pulse. Samuel was removed from the scene immediately. The breathalyzer scale reading at the time of Samuel's autopsy was 0.07. Defendant was also transported to the hospital and treated for the gunshot wound.

Defendant was found guilty of voluntary manslaughter and sentenced to a term of imprisonment of 72 to 96 months less credit for 490 days spent in confinement prior to the date of the judgment.

On appeal, defendant argues the trial court erred by: (1) allowing the State to introduce eight autopsy photographs at trial in violation of N.C. Rule of Evidence 403; (2) admitting an out-of-court statement made by one of the State's witnesses; (3) denying defendant's motion to suppress certain evidence; (4) allowing the State to intro-

duce surprise testimony; (5) answering certain questions from the jury; and (6) denying defendant's motion to dismiss for insufficient evidence.

I. Autopsy Photographs

[1] Defendant first contends the trial court erred in allowing the State to introduce into evidence, for illustrative purposes, eight autopsy photographs during the testimony of Dr. Gulledge, a forensic pathologist. Defendant claims that the photographs were repetitive and unnecessary, and that using a monitor to display the photographs exacerbated the prejudicial effect. Defendant further contends the photographs were not probative of any fact at issue in the case and served no evidentiary purpose and thus were admitted in violation of N.C. Rule of Evidence 403. We disagree.

North Carolina Rules of Evidence allow any party to introduce a photograph for substantive purposes after laying the proper foundation and also allow a party to introduce a photograph solely for the purpose of illustrating testimony. N.C. Gen. Stat. § 8-97 (2007). However, even if the evidence is relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2007).

In *State v. Hennis*, our Supreme Court explained:

> Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words and properly authenticated photographs of a homicide victim may be introduced into evidence under the trial court's instructions that their use is to be limited to illustrating the witness's testimony. Thus, photographs of the victim's body may be used to illustrate testimony as to the cause of death. Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death. Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury.

323 N.C. 279, 283-84, 372 S.E.2d 523, 526 (1988) (citations omitted). It is within the trial court's discretion to determine whether evidence should be excluded under the balancing test of Rule 403 of the North Carolina Rules of Evidence. *Id.* at 285, 372 S.E.2d at 527. This includes determining whether the photographs' probative value outweighs their prejudicial effects and whether the photographs are excessively repetitive. *Id.*

> A matter committed to the discretion of a trial court is not subject to review except upon a showing of an 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. Thompson, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985) (citations omitted).

In the case *sub judice*, while there was not an issue of the cause of death, there was an issue as to whether defendant shot Samuel in self-defense. The eight autopsy photographs depicted location of wounds and whether they were entrance or exit wounds. Because these photos tended to illustrate the manner of the killing and were in fact probative to the issue of self-defense, the trial court did not abuse its discretion in allowing these photographs to be introduced at trial. Therefore, defendant's argument is without merit, and defendant's assignment of error is overruled.

II. Prior Statement

[2] Defendant next asserts the trial court erred in admitting a prior out-of-court statement made by the State's witness, Ryan Smith, for impeachment purposes. Defendant argues the court erred by not clearly ruling whether the statement was admitted as a consistent or inconsistent statement, that it failed to immediately give a limiting instruction, and that the State offered the statement for substantive purposes. We disagree.

As previously discussed, the proper standard of review for reviewing a trial court's decision to admit or exclude evidence is abuse of discretion. *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753, *cert. denied*, 360 N.C. 575, 635 S.E.2d 429 (2006).

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove

the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2007). Generally, hearsay is not admissible unless it is offered for a purpose other than proving the truth of the matter stated. *State v. Irick*, 291 N.C. 480, 498, 231 S.E.2d 833, 844 (1977). However, prior consistent statements of a witness are admissible for corroborative purposes. *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983). It is also accepted that slight variances between a prior statement and current testimony do not render the corroborative evidence inadmissible. *State v. Burns*, 307 N.C. 224, 230, 297 S.E.2d 384, 387 (1982).

"When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." N.C. Gen. Stat. § 8C-1, Rule 105 (2007).

In this case, the State called Ryan Smith as a witness who testified regarding the events of 17 April 2006. After questioning Ryan Smith about what occurred, the State sought to introduce a prior statement Smith made to the police regarding the events of 17 April 2006 for corroborative purposes. Defense counsel objected, claiming it was an inconsistent statement, not corroborative, and sought to have a limiting instruction pursuant to N.C. Gen. Stat. § 8C-1, Rule 105, stating that the statement be admitted for impeachment purposes only. The trial court reviewed the prior statement and ruled as follows:

> It is admitted for any purpose other than the truth. It can be used for inconsistencies or corroboration. [The State] is offering it for corroboration. Should [the defendant] wish to use it for inconsistencies, that's fine.

When the jury returned, the court gave a limiting instruction which informed the jury they could not use the previous statement as "substantive proof" but could "consider the conflicts in it or the consistency in it in determining whether to believe or disbelieve the witness's testimony at this trial[.]"

It is clear from the record that Ryan Smith's prior statement described the events of 17 April 2006 in the same manner as he testified during trial. Further, the State offered the prior statement for corroborative purposes, and the court gave a limiting instruction at the time the evidence was offered, and at the conclusion of the trial.

The limiting instruction explained the evidence could not be considered as substantive evidence. Therefore, admitting the prior statement given by Ryan Smith for corroborative purposes was proper under Rule 801(c), and the trial court did not abuse its discretion in admitting that statement. This assignment of error is overruled.

III. Motion to Suppress

[3] Defendant contends that the trial court erred by denying his motion to suppress evidence obtained from a closet inside the bedroom in which defendant was staying in the Cunninghams' residence at 407 Piedmont Avenue. Although the Cunninghams signed a consent form, defendant claims the Cunninghams did not realize what they were signing. Further, defendant claims that he does not recall signing a consent form, but if he did sign one, it had to have been while he was being treated in the hospital for a gunshot wound. As a result, defendant asserts the consent obtained from him and the Cunninghams was not consensual, voluntary or informed, making the consent invalid, and therefore, the evidence inadmissible. While we find that the trial court's findings of fact as to whether the Cunninghams consented to the search are supported by competent evidence, we are unable to determine from the record whether the trial court's findings support its conclusion that the search of the closet in defendant's bedroom was lawful. Nonetheless, we conclude that if the trial court erred in failing to suppress this evidence, this error was harmless.

> Our review of a denial of a motion to suppress by the trial court is "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. Barden, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). "At a suppression hearing, conflicts in the evidence are to be resolved by the trial court. The trial court must make findings of fact resolving any material conflict in the evidence." *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003) (citation omitted).[2] " 'Once this Court con-

2. The State contends that this issue was not preserved for appellate review because defendant only objected to the evidence during the *voir dire* hearing, rather than when the evidence was introduced during trial. *See T&T Development Co. v.*

cludes that the trial court's findings of fact are supported by the evidence, then this Court's next task "is to determine whether the trial court's conclusion[s] of law [are] supported by the findings." ' " *State v. Brewington*, 352 N.C. 489, 498-99, 532 S.E.2d 496, 502 (2000) (citations omitted), *cert denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001).

Generally, searches inside a home without a warrant are unreasonable unless lawful consent to the search is given. *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997). This Court has previously determined that officers may rely on the consent of third-parties who have apparent control over the area requested to be searched. *See State v. Jones*, 161 N.C. App. 615, 620, 589 S.E.2d 374, 377 (2003), *disc. review denied*, *appeal dismissed*, 358 N.C. 379, 597 S.E.2d 770 (2004) (" 'One who shares a house or room or auto with another understands that the partner, may invite strangers[, and that his] privacy is not absolute, but contingent in large measure on the decisions of another. Decisions of *either* person define the extent of the privacy involved[.]' ") (citations omitted). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973). Consent to a search or seizure need not be express and it is ordinarily sufficient where the officers reasonably believe that consent has been given. 79 C.J.S. Searches, § 152 (2008).

As a general rule, the owner of the property or the person who is apparently entitled to give or withhold consent to search premises may give consent, and a person who has common authority over the premises may also give valid consent to search the premises. *State v. Washington*, 86 N.C. App. 235, 246-47, 357 S.E.2d 419, 427 (1987), *cert. denied*, 322 N.C. 485, 370 S.E.2d 235 (1988); *State v. Kellam*, 48 N.C. App. 391, 394, 269 S.E.2d 197, 199 (1980). A legal property interest in the premises is not dispositive in determining whether a third party has the authority to consent to a search, but rather a third party's authority to consent rests on mutual use, access, or control of the property at issue:

Southern Nat. Bank of S.C., 125 N.C. App. 600, 602, 481 S.E.2d 347, 349, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997) (holding 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)"). However, the transcript reveals the trial court noted defendant's continuing objection to the evidence at issue at trial.

> "The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

Georgia v. Randolph, 547 U.S. 103, 110, 164 L. Ed. 2d 208, 219 (2006) (citations omitted).

Likewise, joint occupants generally have common authority to consent, but a joint occupant may not consent to the search of an area designated for another occupant's exclusive use. *See, e.g.*, *U.S. v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990), *cert. denied*, 499 U.S. 947, 113 L. Ed. 2d 466 (1999) ("[C]ourts are understandably reluctant to approve third-party consent searches of an enclosed space in which the family member targeted for the search has clearly manifested an expectation of exclusivity.").

Moreover, even an overnight guest has a reasonable expectation of privacy in the home in which he stays. 79 C.J.S., *Searches and Seizures*, § 157 (2006). In the case of a guest occupant, a host's authority to consent to a search extends to most objects in plain view within the area of the guest room, but does not extend to "the interiors of every discrete enclosed space capable of search within the area." *United States v. Block*, 590 F.2d 535, 541 (4th Cir. 1978) (holding that where a defendant was a guest occupant in his mother's house, his mother had authority to consent to a search of the bedroom in which the defendant was staying, but did not have authority to consent to a search of a footlocker within that bedroom); *United States v. Buckner*, 473 F.3d 551, 554 (4th Cir. 2007), *cert. denied*, ––– U.S. –––, 167 L. Ed. 2d 830 (2007).

Here, the trial court found that defendant lived with his girlfriend up until September of 2005, but after that point, he came to live with his mother at 407 Piedmont Avenue. Thus, it appears that the trial court found that defendant was not merely an overnight guest occupant, but was living at 407 Piedmont; however, the trial court also found that the only "legal occupants" were those listed on the record of Shelby Housing Authority as legal occupants, which included Mrs. Cunningham, Mr. Cunningham, and several grandchildren.

As to the issue of consent, the trial court found that Deputy Lee presented the Cunninghams with a consent to search form at the hospital; that while Mrs. Cunningham claimed that she didn't read the form before signing it, Mrs. Cunningham at least looked at the form because she was the person who wrote the address on the top of the form; and that Mr. Cunningham signed the consent to search form as well. There was competent evidence presented at the hearing to support the findings that the Cunninghams consented. It is not clear from the record, however, whether the trial court found as a fact that defendant consented to the search of the bedroom closet at issue, and defendant denied signing the consent form.[3]

The court then concluded as follows:

> As to the other four items that were recovered from the purported bedroom of the defendant, the Court finds that Mrs. Cunningham as well as Mr. Cunningham, lawful occupants of the residence, gave consent to search the residence and that since [defendant] was not a lawful resident but was merely occupying the room in the residence that he cannot have an expectation [of] privacy that cannot be overruled by his mother or Mr. Cunningham or another lawful resident.

It appears that the trial court may have misinterpreted the law in concluding that the Cunninghams as co-occupants of the residence could waive defendant's expectation of privacy in a room that was devoted exclusively to his use. There are, however, no express findings as to whether the room and closet were used exclusively by defendant, which makes appellate review difficult.

While we are not able to engage in meaningful appellate review based upon the trial court's findings of fact, we need not remand for additional findings. Assuming *arguendo* that the trial court erred in failing to suppress the gun box and bullets that were seized from such closet, not every error, even of a constitutional magnitude, requires reversal. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2007). Here, the State's

3. The trial court merely found as follows: "The name of the defendant appears on the form but he has no recollection of signing it and denies that is his signature. For credibility purposes, he's also denied that and other items were signed by him that have been presented in court and then he recanted . . . the testimony."

properly admitted evidence included, *inter alia*, the testimony of several witnesses who saw defendant shoot the victim, the gun that Mrs. Cunningham voluntarily retrieved from the living room closet which contained two spent shell casings in the cylinder, as well as two spent shell casings that Mrs. Cunningham retrieved from the front porch. Thus, the additional ammunition and gun box seized from defendant's closet was merely cumulative evidence, and it is highly improbable that the introduction of this evidence had any effect on the outcome of the trial. Given the overwhelming evidence that defendant shot the victim with his gun, the State has carried its burden in establishing that any constitutional error was harmless beyond a reasonable doubt. This assignment of error is overruled.

IV. Discovery

[4] Defendant next contends that the State failed to provide exculpatory material to the defense upon request. Four months prior to the trial, pursuant to N.C. Gen. Stat. §§ 15A-902, -903 (2007), defendant requested that the State provide all exculpatory evidence, including a complete list of all persons interviewed by law enforcement or the district attorney. Defendant claims there is no evidence that defendant was provided with notice that witness Sherwin Allen would testify at trial, that defendant had no knowledge of this evidence prior to trial, and that Allen's testimony for the State was exculpatory in nature. Defendant, however, did not make an objection to Sherwin Allen's testimony during trial nor did he raise any objection regarding allegedly suppressed exculpatory evidence. "Having failed to draw the trial court's attention to the alleged discovery violation, the defendant denied the court an opportunity to consider the matter and take appropriate steps." *State v. Herring*, 322 N.C. 733, 748, 370 S.E.2d 363, 373 (1988). As such, defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion. *State v. Taylor*, 332 N.C. 372, 384, 420 S.E.2d 414, 421 (1992). This assignment of error is overruled.

V. Jury Inquiries

[5] Defendant next argues the trial court erred in responding to the jury's inquiries during deliberation by reinstructing the jury on second-degree murder and voluntary manslaughter. Specifically, defendant claims the jury's inquiry reflected that the jurors were confused regarding the appropriate burden of proof for the self-defense theory and that the trial court offered no guidance to the jury on this question.

Here, approximately forty minutes after the jury retired to deliberate, the following note was received from the jury stating, "We need a reading of the difference between second-degree murder and voluntary manslaughter." The trial court then suggested to both parties that it reread the pattern jury instructions for second-degree murder, voluntary manslaughter, and self-defense. The State did not object. Defense counsel likewise did not object and even stated, "I think that's it[.]" The judge then re-read the jury charge for second-degree murder, voluntary manslaughter, and the burden for self-defense. The jury then returned to the jury room to resume deliberations, and neither the State nor defense counsel requested any corrections be made to the charge. Because the record indicates that defendant made no objection at trial to these instructions, this argument has not been preserved for our review. N.C. R. App. P. 10(b)(1) (2008). Defendant does not argue plain error, and we hold that there is none. N.C. R. App. P. 10(c)(4). This assignment of error is therefore overruled.

VI. Motion to Dismiss

[6] By his final assignment of error, defendant contends that the trial court erred by denying his motion to dismiss the first-degree murder charge for insufficiency of the evidence. Specifically, defendant argues that the State's evidence was insufficient to establish that defendant acted with premeditation, deliberation or malice. We disagree.

When a defendant in a criminal case makes a motion to dismiss based on insufficiency of the evidence, it must be determined "whether substantial evidence of each essential element of the offenses charged has been presented." *Herring*, 322 N.C. at 738, 370 S.E.2d at 367.

> Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. In determining this issue, the evidence must be viewed in the light most favorable to the State, giving the State every reasonable inference which may be drawn therefrom. If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, a motion to dismiss should be denied.

Id. However, "if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss

should be allowed." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982).

"Murder in the first degree is the unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). "Malice is implied in law from the intentional killing with a deadly weapon." *State v. McCain*, 6 N.C. App. 558, 561, 170 S.E.2d 531, 533 (1969).

> No fixed length of time is required for the mental processes of premeditation and deliberation constituting first-degree murder. Premeditation means thought beforehand for some length of time however short. Deliberation does not require brooding or reflection for any applicable length of time but connotes the execution of intent to kill in a cool state of blood without legal provocation in furtherance of a fixed design. Premeditation and deliberation are seldom susceptible of direct proof, but they may be inferred from the circumstantial evidence.

State v. Hutchins, 303 N.C. 321, 344, 279 S.E.2d 788, 802 (1981).

In the case *sub judice*, when viewing the evidence of malice, premeditation, and deliberation in the light most favorable to the State, we find there was sufficient evidence. The State's evidence tended to establish that there was an argument between defendant and Samuel in which Samuel took out his gun, put it back in his pocket, and then walked away. Jared Smith testified that defendant said to his friends, "I know [Samuel] just didn't." Defendant then "got in Samuel's face," pulled out his gun and put it to Samuel's head. Samuel said to defendant, "You're gone have to shoot me." Defendant then shot Samuel. The shots were fired continuously.

Based on the nature and number of shots, the fact that defendant raised and aimed his gun at Samuel, the statements made prior to the shooting and the fact that Samuel walked away before defendant shot him, there was substantial evidence to support a finding of malice, premeditation and deliberation. As such, the trial court did not err in denying defendant's motion to dismiss. This assignment of error is without merit and is overruled.

Having reviewed each of defendant's assignments of error carefully, we find no prejudicial error in defendant's conviction of voluntary manslaughter.

No prejudicial error.

Judges BRYANT and STEPHENS concur.

Concurred prior to 31 December 2008.

STATE OF NORTH CAROLINA v. MARK NEWLYN PATTERSON

No. COA08-518

(Filed 6 January 2009)

1. Larceny— sufficiency of indictment—church—failure to indicate legal entity capable of owning property

An indictment charging the larceny of property from the First Baptist Church of Robbinsville was fatally defective because: (1) larceny requires that the perpetrator take the personal property of another, and thus there must be a showing that "the other" is a natural person or legal entity from whom property can be taken; and (2) the indictment did not indicate that the First Baptist Church of Robbinsville was a legal entity capable of owning property.

2. Possession of Stolen Property— sufficiency of indictment—showing of entity capable of owning property not required

The trial court did not err by failing to dismiss the charge of possession of stolen goods even though defendant contends the indictment was defective because an indictment for this crime is not required to signify that the entity who is allegedly wronged is capable of owning property.

3. Appeal and Error— preservation of issues—failure to offer proof—irrelevant transcript page numbers

Although defendant contends the trial court erred in a breaking and entering, larceny, and felonious possession of stolen goods case by allowing statements to be made at trial regarding other property found in a camper that was believed to be stolen, defendant abandoned this assignment of error under N.C. R. App. P. 28(b)(6) because: (1) defendant failed to point to any specific trial testimony in his brief; and (2) the transcript

page numbers he cited in the assignment of error were not relevant to his argument.

4. Evidence— denial of motion in limine—possession of another stolen item

The trial court did not err or commit plain error in a possession of a stolen video camera and breaking or entering case by denying defendant's motion in limine or by allowing the testimony of a witness identifying a digital camera found in a camper used by defendant as the camera stolen from her work because: (1) contrary to defendant's argument, the evidence tended to show that defendant possessed stolen items instead of showing he acted in conformity with the propensity to steal; (2) the trial court specifically stated that evidence of defendant's prior convictions was inadmissible and that only evidence that there were identified stolen items in the camper was admissible; and (3) the fact that defendant had multiple stolen items in the camper he was using to store his property was relevant to the charges brought in this case since it went directly to the elements of the crime of felonious possession of stolen goods, which the prosecution bore the burden of proving.

5. Burglary and Unlawful Breaking or Entering— motion to dismiss—sufficiency of evidence—doctrine of recent possession

The trial court did not err by denying defendant's motion to dismiss the charge of breaking and entering because: (1) the doctrine of recent possession was applicable, and along with other facts and circumstances presented at trial, there was sufficient evidence to present the charge to the jury; (2) the evidence showed that defendant was in possession of multiple items of stolen property, including a video camera stolen from the victim in this case, and tools often used for breaking and entering; (3) although defendant contends that twenty-one days was too long a time interval to be considered "recent" for purposes of the doctrine of recent possession, the nature of the property is a factor and the question is ordinarily a question of fact for the jury; (4) while a video camera is an item frequently traded in commerce, there was a substantial probability under the circumstances of this case that the stolen item could only have come into defendant's possession by his own act; and (5) a jury could find that defendant had constructive and exclusive possession of the camper in which the stolen items were found and its contents.

6. Constitutional Law— effective assistance of counsel— claim dismissed without prejudice to seek motion for appropriate relief

Defendant's claim of ineffective assistance of counsel in a breaking and entering, larceny, and felonious possession of stolen goods case based on his trial attorney failing to question a witness regarding evidence acquired during defendant's prior trial for breaking and entering into a different business is dismissed without prejudice to allow defendant to seek a motion for appropriate relief in the superior court because: (1) the evidence defendant pointed to was outside the record since it involved testimony from a prior trial; and (2) the verbatim transcript containing the evidence defendant described was not in the record before the Court of Appeals.

7. Possession of Stolen Property— failure to instruct on lesser-included charge of misdemeanor possession of stolen goods

The trial court did not err in a possession of stolen property and breaking and entering case by refusing to submit the lesser-included charge of misdemeanor possession of stolen goods because: (1) the crime of possession of stolen property is a felony if the possession was subsequent to a breaking and entering, even if the person in possession was not the perpetrator of the breaking and entering; (2) there was no evidence in the record that defendant presented an alternative reason for his possession of the stolen goods, other than as a result of the breaking and entering of a church; (3) there was no evidence that he obtained the property at a later date or that he had no knowledge that the items were stolen; and (4) all evidence tended to show that defendant possessed the items stolen along with tools commonly used for breaking and entering.

8. Possession of Stolen Property— instruction—doctrine of recent possession

The trial court did not err in a breaking and entering case by overruling defendant's objection and instructing the jury on the doctrine of recent possession because: (1) there was sufficient evidence to show that defendant recently and exclusively possessed the stolen goods after the breaking and entering occurred; (2) the jury, as the trier of fact, was properly charged with weighing all the evidence; and (3) while the jury was instructed on the

inference of guilt, the jurors were free to find that defendant's possession of the stolen items did not mean he committed a breaking and entering to obtain them.

9. Sentencing— habitual felon—constitutionality of enhanced sentence

The trial court did not commit constitutional error in a possession of stolen property and breaking and entering case by sentencing defendant as a habitual felon because: (1) defendant was sentenced within the presumptive range; and (2) sentence enhancement based on habitual felon status does not constitute cruel and unusual punishment under the Eighth Amendment.

Appeal by defendant from judgments entered 4 December 2007 by Judge Laura J. Bridges in Graham County Superior Court. Heard in the Court of Appeals 8 October 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Thomas R. Miller, for the State.

Daniel F. Read for defendant-appellant.

HUNTER, Judge.

Mark Newlyn Patterson ("defendant") appeals from multiple judgments entered on 4 December 2007. At trial, the State sought to prove that defendant broke into the First Baptist Church of Robbinsville on 21 October 2005 and committed larceny therein by stealing a digital video camera. The State further charged defendant with felonious possession of stolen goods.

Officer Gregg Jones ("Officer G. Jones") and Officer Bryan Jones ("Officer B. Jones") responded to the alleged breaking and entering. Officer G. Jones testified that the perpetrator gained entrance to the church through a window on the lower level. The pastor of the church informed the officers that a video camera and a DVD player belonging to the church were missing.[1]

According to Officer G. Jones' testimony, Mr. Kyle Boring ("Mr. Boring") called him on or about 11 November 2005 and informed him that he allowed defendant to use a camper on his property and that there may be items of interest to the police in the camper. At that time, Officer B. Jones went to inspect the camper. Mr. Boring had a

1. Defendant was only indicted for larceny of the video camera.

key to the camper and allowed the officer to enter. Upon inspection of the contents of the camper, Officer B. Jones called Officer G. Jones and both officers took inventory of the camper. Officer G. Jones testified that they recovered a video camera and a DVD player matching the description of the items stolen from the church, a digital camera, tools typically used in breaking and entering, as well as personal documents and papers belonging to defendant. Based upon this evidence, a warrant for defendant's arrest was issued on 14 November 2005.

On 4 December 2007, defendant was convicted of breaking and/or entering, larceny pursuant to breaking and entering, and felonious possession of stolen goods pursuant to breaking and entering.[2] Defendant was found to be a habitual felon and sentenced to 116 to 149 months in prison. Defendant appeals these convictions and his sentence. After careful review, we vacate in part, find no error in part, dismiss in part, and remand for resentencing.

I.

[1] Defendant first argues that the charges of larceny and possession of stolen goods must be dismissed because the larceny indictment does not indicate that the First Baptist Church of Robbinsville is a legal entity capable of owning property and is thus fatally defective. We agree with defendant as to the larceny charge.

The record does not indicate that defendant objected to the indictment of larceny at the trial court.[3] However, this Court has held:

> Where there is a fatal defect in the indictment, verdict or judgment which appears on the face of the record, a judgment which is entered notwithstanding said defect is subject to a motion in arrest of judgment. A defect in an indictment is considered fatal if it "wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." When such a defect is present, it is well established that a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal.

2. The trial court arrested judgment as to the felonious possession of stolen goods conviction.

3. Because defendant did not object to the indictment at trial and did not present to the trial court any evidence concerning the corporate status of the church, the record before us is devoid of such evidence.

State v. Wilson, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (footnotes omitted), *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998). Thus we must address the merits of this assignment of error if the omission of the legal status of the church in the indictment is a fatal defect. We find that it is.

" 'The crime of larceny requires the "taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use." ' " *State v. Jones*, 177 N.C. App. 269, 271-72, 628 S.E.2d 436, 438, *disc. review denied*, 360 N.C. 580, 636 S.E.2d 190 (2006) (citations omitted). The requirement that the perpetrator take the personal property "of another" requires a showing that "the other" is a natural person or legal entity from whom property can be taken.

Our Supreme Court directly addressed this issue in the case of *State v. Thornton*, 251 N.C. 658, 111 S.E.2d 901 (1960). In reviewing the then limited North Carolina case law and case law from other jurisdictions, the Court found:

> "Larceny after trust is a species of larceny and in prosecutions for the former offense, as in those for the latter, it is necessary to allege ownership of the property in a person, corporation, or other legal entity capable of owning property, in order to enable the accused to know exactly what charge he will be called upon at the trial to meet, and to enable him, if such should be the case, to plead a former acquittal or conviction. . . . If the property alleged to have been stolen is that of . . . a corporation, the name of the corporation should be given, and the fact that it is a corporation stated, unless the name itself imports a corporation."

Id. at 661-62, 111 S.E.2d at 903 (quoting *Nickles v. State*, 71 S.E.2d 578 (Ga. App. 1952)). According to *Thornton*, if a defendant is charged with committing larceny or embezzlement against a corporation, the indictment must indicate that the corporation is capable of owning property. If the name of the corporation itself indicates that the entity is a corporation, through use of the word "incorporated" or the like, then the requirement of *Thornton* has been satisfied. However, if the name of the corporation does not clearly import a corporation, then the indictment must not only state the corporate name, it must also allege that it is a legal entity capable of owning property. If the indictment fails in this regard, it is fatally defective.

In the present case, the indictment alleged that defendant committed larceny against First Baptist Church of Robbinsville, but did not indicate that the church was a legal entity capable of owning property. Similarly, in the case of *State v. Cathey*, 162 N.C. App. 350, 590 S.E.2d 408 (2004), the indictment for larceny named "Faith Temple Church of God," as the party from whom property was stolen, as opposed to its corporate name, "Faith Temple Church-High Point, Incorporated." *Id.* at 352, 590 S.E.2d at 410. This Court found that the indictment was "fatally defective," and therefore the trial court erred in allowing the State to amend the larceny indictment to state the proper corporate name of the church. *Id.* at 353, 590 S.E.2d at 411.

Conversely, in *State v. Cave*, 174 N.C. App. 580, 621 S.E.2d 299 (2005), this Court found that the company name, " 'N.C. FYE, Inc.,' " listed in the indictment was sufficient to import a legal entity capable of owning property as it was the company's corporate name. *Id.* at 583, 621 S.E.2d at 301. The Court reasoned, "[o]ur courts have held that the words 'corporation,' 'incorporated,' 'limited,' and 'company,' are sufficient to import a corporation in an indictment[,]" pursuant to *Thornton* and its progeny. *Id.* (citations omitted). An abbreviation of these enumerated terms is also sufficient. *Id.* The indictment in the present case failed to meet this standard.

Pursuant to *Thornton*, the indictment must show on its face that the church is a legal entity capable of owning property and it clearly does not. If the church was in fact a corporation, the indictment would have been without defect had it: (1) stated a corporate name that clearly showed the church was a corporation, such as use of the word "incorporated," or "Inc."; or (2) stated a corporate name that did not itself import a corporation and then further alleged that it was an entity capable of owning property. *See Cave*, 174 N.C. App. at 583, 621 S.E.2d at 301; *see also Thornton*, 251 N.C. at 661-62, 111 S.E.2d at 903.

As in *Cathey*, and pursuant to the controlling case law of *Thornton*, we must find that the indictment in the case *sub judice* was fatally flawed and therefore the judgment with regard to larceny must be vacated. *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). Accordingly, we remand for resentencing.

[2] Because the crime of possession of stolen goods does not require the taking of personal property from another, an indictment for this

crime is not required to signify that the entity who is allegedly wronged is capable of owning property. *See generally State v. Burroughs*, 147 N.C. App. 693, 696, 556 S.E.2d 339, 342 (2001). Therefore, this charge stands in the present case.

II.

[3] Next, defendant argues that the trial court erred in allowing statements to be made at trial regarding other property found in the camper that was believed to be stolen. He claims such statements were hearsay, speculative, irrelevant, and unduly prejudicial. However, defendant does not point to any specific testimony in his brief that he finds objectionable for this assignment of error.

Further, the assignment of error lists pages twelve and twenty-two in the transcript as the places where defendant objected. Page twelve contains arguments concerning the motion *in limine* (addressed in the following section). On page twenty-two, defendant objects to Officer G. Jones' testimony that after investigating the church robbery he searched for other similar breaking and entering crimes in the area and found that two others had occurred in a similar manner. There was no statement or implication by the officer that he believed Mr. Patterson committed these other crimes. Accordingly, we find that defendant abandoned this assignment of error as he failed to point to any specific trial testimony in his brief and the transcript page numbers he cites in the assignment of error are not relevant to his argument. N.C.R. App. P. 28 (b)(6).

III.

[4] Defendant next contends that the trial court erred by denying defendant's motion *in limine* and allowing the testimony of Ms. Tonya Sellers ("Ms. Sellers"). Defendant did not further object at trial when Ms. Sellers' testimony was offered.

Our Courts have long held that " '[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial.' " *State v. Tutt*, 171 N.C. App. 518, 520, 615 S.E.2d 688, 690 (2005) (alteration in original; citation omitted); *see also State v. Wilson*, 289 N.C. 531, 537, 223 S.E.2d 311, 314-15 (1976).

We recognize that the North Carolina General Assembly amended N.C. Gen. Stat. 8C-1, Rule 103(a) in 2003, to say "[o]nce the court makes a definitive ruling on the record admitting or excluding evi-

dence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." N.C. Gen. Stat. § 8C-1, Rule 103(a) (2007); 2003 N.C. Sess. Laws ch. 101, §§ 1-2. However, this Court in *Tutt* found the amendment to be unconstitutional to the extent it conflicts with N.C.R. App. P. 10(b)(1).[4] *Tutt*, 171 N.C. App. at 523-24, 615 S.E.2d at 691-93. Our Supreme Court has since upheld the holding in *Tutt*. *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007). Therefore, the general rule remains: To preserve the matter for appeal, a defendant must object to the admission of evidence at trial despite a previously submitted motion *in limine*.

Having failed to make a general objection at the time of Ms. Sellers' testimony, defendant asks this Court to review the admission of her testimony under the plain error standard. *See State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 846 (1995) (plain error standard utilized where defendant failed to object to admission of evidence at trial after denial of a motion *in limine*). " '[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 . . . ." ' " *State v. Cummings*, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000) (alteration in original; citations omitted).

Upon denial of defendant's motion *in limine* to suppress Ms. Sellers' testimony, she testified at trial that she worked for Robbinsville Head Start in the fall of 2005 when a digital camera was stolen during a breaking and entering. She identified the digital camera found in the camper as the camera stolen from Robbinsville Head Start.

Defendant claims that Ms. Sellers' testimony violated Rule 404(b) of the North Carolina Rules of Evidence, which forbids evidence of other crimes, wrongs, or acts from being introduced as character evidence to show that defendant acted in conformity therewith. N.C.

4. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal." N.C.R. App. P. 10(b)(1).

Gen. Stat. § 8C-1, Rule 404(b) (2007). We do not find a violation of Rule 404(b) as the evidence presented only tended to show that defendant possessed stolen items, not that he was acting in conformity with a propensity to steal. In denying the motion *in limine*, the trial court specifically stated that evidence of defendant's prior convictions was inadmissible; only evidence that there were identified stolen items in the camper was admissible. Ms. Sellers simply identified the camera as the one stolen and made no supposition as to who took it.

The fact that defendant had multiple stolen items in the camper he was using to store his property was relevant to the charges brought in this case. Specifically, defendant was indicted for felonious possession of stolen goods. *See* N.C. Gen. Stat. § 14-72(c) (2007) ("[t]he crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen . . . ," subsequent to a breaking and entering, is a felony). Possession of multiple items that are known to be stolen goes directly to the elements of this crime, which the prosecution bore the burden of proving.

Therefore, we find that the trial court's denial of defendant's motion *in limine* was not error, much less plain error, as Ms. Sellers' testimony was not character evidence to show that defendant acted in conformity therewith, but rather was evidence that the items in defendant's possession were known to be stolen. The verdicts for possession of stolen property and breaking and entering should not be disturbed on the grounds argued by defendant.

IV.

[5] Defendant further argues the trial court erred in denying defendant's motion to dismiss the charge of breaking and entering, as the evidence was insufficient to submit the charge to the jury.[5] We disagree and find that the doctrine of recent possession was applicable, and along with other facts and circumstances presented at trial, there was sufficient evidence to present the charge of breaking and entering to the jury.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential

5. Because we have already vacated the larceny charge, we do not address the denial of the motion to dismiss that charge. Furthermore, defense counsel did not move to dismiss the charge of felonious possession of stolen property at the close of the evidence and thus did not preserve that argument for appeal. N.C.R. App. P. 10(b)(3).

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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citation omitted). "The evidence is to be considered in the light most favorable to the State[.]" *Id.* at 99, 261 S.E.2d at 117.

The evidence in this case tended to show that defendant was in possession of multiple items of stolen property and tools often used for breaking and entering. The officers located these items in the camper used by defendant approximately twenty-one days after the breaking and entering of the church. The State in this case presented no physical evidence that defendant was the perpetrator of the breaking and entering; however, even when a case hinges on circumstantial evidence, " '[o]nce the court determines that a reasonable inference of the defendant's guilt may be drawn from the circumstances, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Clark*, 159 N.C. App. 520, 524, 583 S.E.2d 683 (2003) (citation omitted). The doctrine of recent possession creates such a reasonable inference of guilt. The doctrine of recent possession states that:

> [W]hen there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering.
>
> . . .
>
> [T]he presumption spawned by possession of recently stolen property arises when, and only when, the State shows beyond a reasonable doubt: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

State v. Maines, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981) (internal citations omitted).

Defendant claims that twenty-one days was too long a time interval to be considered "recent" for purposes of the doctrine of recent possession. With regard to the time interval between the theft of an item and when it is recovered in the defendant's possession, this Court has determined that:

> [T]he nature of the property is a factor in determining whether the recency is sufficient to raise a presumption of guilt. Thus, if the stolen property is of a type normally and frequently traded in lawful channels, a relatively brief time interval between the theft and the finding of an accused in possession is sufficient to preclude an inference of guilt from arising. Conversely, when the article is of a type not normally or frequently traded in lawful channels, then the inference of guilt may arise after the passage of a longer period of time between the larceny of the goods and the finding of the goods in the accused's possession.

State v. Hamlet, 316 N.C. 41, 44, 340 S.E.2d 418, 420 (1986).

> " 'In either case the circumstances must be such as to manifest a substantial probability that the stolen goods could only have come into the defendant's possession by his own act, to exclude the intervening agency of others between the theft and the defendant's possession, and to give reasonable assurance that possession could not have been obtained unless the defendant was the thief. . . . *The question is ordinarily a question of fact for the jury.*

State v. Waller, 11 N.C. App. 666, 669, 182 S.E.2d 196, 198, *cert. denied*, 279 N.C. 513, 183 S.E.2d 690 (1971) (emphasis added; citations omitted).

Despite the guidelines presented in *Hamlet* and *Waller*, there is no bright line rule concerning what is deemed "recent possession." "The term ["recent"] is a relative one and depends on the circumstances of the case." *State v. Holbrook*, 223 N.C. 622, 624, 27 S.E.2d 725, 726 (1943). Our Supreme Court has held that thirty days was not sufficiently recent where the defendant was in possession of, and later sold, a stolen television. *Hamlet*, 316 N.C. at 45-46, 340 S.E.2d at 421. The Court found that the television and linens that were allegedly stolen from the same place, were items "normally and frequently traded in lawful channels[,]" and the evidence did not support a presumption of guilt of breaking and entering. *Id.*

In *Hamlet*, which defendant relies on, the time frame was approximately thirty days as opposed to the twenty-one days in this case. Another distinguishing factor between *Hamlet* and the case at bar is that the items stolen in *Hamlet* were first seen by an officer in the trunk of someone else's car. *Id.* at 41, 340 S.E.2d at 418. There, the defendant was driving a car owned by the passenger's wife with the television in the trunk. *Id.* An officer pulled the car over and arrested the passenger on a matter unrelated to the stolen property. *Id.* He then asked the defendant about the ownership of the property and the defendant claimed it was his and he was just moving it. *Id.* at 41, 340 S.E.2d at 419. After he subsequently sold the television and was arrested, the defendant claimed that the first time he saw the television was when his friend asked him to drive the car. *Id.* at 42, 340 S.E.2d at 419. In *Hamlet*, the stolen items were of a type often traded in commerce, the defendant was not in exclusive possession of the goods when first questioned about them by law enforcement, and thirty days had lapsed since the breaking and entering. In the present case, the items were stolen, the owner of the camper called police to say there were potentially items of interest being kept there by defendant, and the items were subsequently recovered from defendant's exclusive control. There was no evidence that would indicate the items were stolen by anyone other than defendant who possessed them.

Defendant attempts to persuade the Court that the camper was in fact not in his exclusive control as Mr. Boring was the actual owner and had access to the camper. However, Mr. Boring testified that he never used the camper and was not aware of anyone other than defendant using the camper. He further testified that defendant installed a lock on the camper and Mr. Boring only had a key to assist defendant if he lost his copy. Moreover, defendant kept personal documents in the camper, which shows an expectation of privacy on his part. We find that under these facts a jury could find that defendant had constructive and exclusive possession of the camper and its contents. *See Clark*, 159 N.C. App. at 525, 583 S.E.2d at 683 (" '[a] person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition' ") (citation omitted).

In sum, we find that while a video camera is an item frequently traded in commerce, under the circumstances of this case, we find that there was a substantial probability that the stolen item could only have come into defendant's possession by his own act. Twenty-

one days, while not a short amount of time, was not so long under the circumstances as to prevent an inference that defendant committed the breaking and entering. We further find that defendant was in exclusive possession of the items found in the camper.

In addition to the doctrine of recent possession, there were other attendant facts and circumstances that provided sufficient evidence to present the case to the jury. Not only were the stolen electronics from the church found in his possession, but the digital camera stolen from Robbinsville Head Start in early November was as well, along with tools for breaking and entering and defendant's personal documents. All of the evidence, taken in the light most favorable to the State was sufficient to present the case to the jury. Therefore, we find that the trial court did not err in denying defendant's motion to dismiss the charge of breaking and entering.

V.

[6] Defendant next argues that he was not provided effective assistance of counsel because his trial attorney failed to question Ms. Sellers regarding evidence acquired during his prior trial for breaking and entering into Robbinsville Head Start. The evidence defendant points to is outside the record in the present case as it involves testimony from a prior trial. The verbatim transcript containing the evidence defendant describes is not in the record before us.

Ineffective assistance of counsel "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." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (emphasis added). "This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in 'the record on appeal and the verbatim transcript of proceedings, if one is designated.' " *Id.* at 166, 557 S.E.2d at 524-25 (quoting N.C.R. App. P. 9(a)).

Accordingly, we cannot rule on defendant's claim of ineffective assistance of counsel as the transcript from defendant's prior trial is not before us. We must therefore dismiss this claim without prejudice to allow defendant to seek a motion for appropriate relief in the superior court on the issue of ineffective assistance of counsel. *Id.* at 167, 557 S.E.2d at 525.

VI.

[7] Defendant further contends that the trial court erred in refusing to submit the lesser charge of misdemeanor possession of stolen goods as the jury could have found that defendant did not commit breaking and entering, but merely had possession of the stolen goods at some point afterwards. We disagree.

"It is well-established in North Carolina that the trial court is under a duty to instruct the jury upon, and to submit for its consideration, a lesser included offense only when there is evidence tending to show the commission of such lesser included offense." *State v. Rinck*, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981) (citation omitted). The crime of possession of stolen property is a felony if the possession was subsequent to a breaking and entering, even if the person in possession was not the perpetrator of the breaking and entering. N.C. Gen. Stat. § 14-72(c).

In this case, there is no evidence in the record that defendant presented an alternative reason for his possession of the stolen goods, other than as a result of the breaking and entering of the church. There was no evidence that he obtained the property at a later date or that he had no knowledge that the items were stolen due to a breaking and entering. All evidence at trial tended to show that there was a breaking and entering at the church and that defendant possessed the items stolen along with tools commonly used for breaking and entering. Therefore, the trial court did not err in refusing to instruct the jury on the lesser included offense of misdemeanor possession of stolen goods as evidence for such an offense was lacking.

VII.

[8] Defendant next argues that the trial court erred by overruling defendant's objection and instructing the jury on the doctrine of recent possession, as the evidence was insufficient to support the instruction.

As discussed above, in accord with *Maines*, there was sufficient evidence to show that defendant recently and exclusively possessed the stolen goods after the breaking and entering occurred. The jury, as the trier of fact, was properly charged with weighing all the evidence. While the jury was instructed on the inference of guilt, the members were free to find that defendant's possession of the stolen items did not mean he committed a breaking and entering to obtain them. Therefore, we find no error in the instruction.

VIII.

[9] Finally, defendant argues that the trial court committed constitutional error by sentencing defendant as a habitual felon, as the cumulative sentence of 232 to 298 months constituted cruel and unusual punishment under the circumstances. We disagree.

Defendant was found to be a habitual felon and was sentenced within the presumptive range authorized under N.C. Gen. Stat. § 15A-1340.17(c) (2007). This Court has held, "[s]entence enhancement based on habitual felon status does not constitute cruel and unusual punishment under the Eighth Amendment." *State v. Dammons*, 159 N.C. App. 284, 298, 583 S.E.2d 606, 615 (2003) (citations omitted). Accordingly, we find no constitutional violation in this sentence.

Vacated in part, dismissed in part, no error in part, remanded for resentencing.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. LLYOD GREEN, JR. A/K/A LLOYD GREEN, JR.

No. COA08-144

(Filed 6 January 2009)

Searches and Seizures— car stopped and searched—informant's tip—probable cause

The trial court did not err by denying defendant's motion to suppress heroin seized from his car pursuant to a tip where defendant contended that the reliability of the informant was not sufficiently established to support the trial court's finding of probable cause to stop and search defendant's vehicle.

Judge JACKSON dissenting.

Appeal by defendant from judgments entered 4 June 2007 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 20 August 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joseph Finarelli, for the State.

Gilda G. Rodriquez for defendant-appellant.

BRYANT, Judge.

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress evidence based upon his contention that the stop and search was illegal. For the reasons stated herein, we affirm the ruling of the trial court.

On 1 February 2006, Detective Leslie M. Wyatt, III ("Detective Wyatt") of the New Hanover County Sheriff's Office initiated a narcotics "sting" operation. Between approximately 10:30 and 11:00 a.m. that morning, Detective Wyatt, in the company of Detective Jonathan Hart ("Detective Hart"), instructed an informant to call a man the informant had stated was a heroin dealer. Detective Wyatt had never personally used this informant before; however, his knowledge of the informant's reliability came from Detective Hart who had arrested the informant in the past. The informant had previously given reliable information that led to the arrest of another individual for trafficking in 1,200 bags of heroin. The informant made the call as requested using a speaker phone. Both detectives Wyatt and Hart listened to the call. Detective Wyatt testified that he heard a man agree to deliver one-half ounce of heroin, along with one-half ounce of "cutting" agent, to the informant in Wilmington in return for $1,600.00. The man stated that he would begin his trip to Wilmington approximately thirty minutes after the termination of the call, and that the trip would take him a while. A KFC restaurant on Dawson Street was the predetermined location for the heroin transaction.

The informant told Detective Wyatt he did not know the true name of the man whose number he called and knew him only as "Junior." He described "Junior" as an older black male, probably in his fifties; that "he possibly would be driving an older model Mercedes or a newer model mid-size SUV, both possibly brown in color and both having South Carolina registrations"; and that he believed "Junior" lived in Charleston, and that would be his point of origin for the arranged transaction.

At approximately 1:30 p.m., Detective Wyatt met with other officers and organized a plan to attempt the arrest of "Junior" for drug related activities. "The plan was to have detectives scattered about

Highway 74/76 from about . . . the Cape Fear Memorial Bridge, Third and Dawson, back a little ways past Leland." The officers took their positions between 2:00 p.m. and 2:30 p.m. Detective Wyatt further testified that he had around six additional officers involved in the operation, and that Detective James Gore was stationed the farthest outside of Wilmington, "approximately 10 to 15 miles[.]" Detective Gore was waiting on Highway 17, where it intersects with Highway 87. Because it is possible to arrive from Charleston into Wilmington from either route, other officers were stationed both along Highway 17 to the south, and along Highway 74/76, to a distance of approximately 6.5 miles to the east. Detective Wyatt estimated an arrival time in Wilmington between 3:30 p.m. and 4:00 p.m.

At approximately 3:15 p.m., Detective Wyatt instructed the informant to call "Junior" and obtain a more definite estimate for his time of arrival. The informant told him "Junior" said he was approximately thirty to forty minutes away. At approximately 3:35 p.m., Detective Gore observed a brown Dodge Durango SUV with South Carolina registration pass him heading towards Wilmington on Highway 17. Detective Gore informed Detective Wyatt, then followed the Durango, which he observed an older black male was driving, and read out the registration tag information to Detective Wyatt. Detective Wyatt determined from the registration information that the Durango was registered to defendant, who lived in North Charleston. Other officers, including Detective Wyatt, joined Detective Gore in following defendant.

Shortly after defendant crossed from Brunswick County into New Hanover County, several officers stopped defendant's vehicle, and used their own vehicles to box in defendant's Durango. The officers removed defendant from the Durango and placed him in handcuffs. Detective Wyatt went to the Durango, climbed inside, opened up the center console, and discovered a black bag. The contents of the bag were later determined to be heroin and a cutting agent.

Defendant was indicted on 3 April 2006 for trafficking in heroin by transportation, possession and manufacturing, maintaining a vehicle to keep and sell heroin, possession of marijuana, and possession of drug paraphernalia. Defendant moved to suppress the evidence found pursuant to his stop, which motion was denied by order entered 30 November 2006. Defendant was tried by jury at the 28 May 2007 Criminal Session of New Hanover County Superior Court. The trial court dismissed the manufacturing charge, and defendant was convicted on all remaining charges. By order entered 4 June 2007,

defendant was sentenced to a cumulative 140 months minimum and 168 months maximum prison term. Defendant appeals.

Standard of Review

> It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The trial court's conclusions of law, however, are fully reviewable.

State v. Nixon, 160 N.C. App. 31, 33, 584 S.E.2d 820, 822 (2003) (citation omitted). This Court discussed the standard of review applicable to warrantless searches of vehicles at some length in *Nixon*. *Id.* at 34-37, 584 S.E.2d at 822-24. The *Nixon* Court made the following relevant determinations with regard to assessing the existence of probable cause in the search of a motor vehicle on a public roadway:

> 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). Information from a [confidential reliable informant] can form the probable cause to justify a search. *State v. Holmes*, 142 N.C. App. 614, 544 S.E.2d 18, *cert. denied*, 353 N.C. 731, 551 S.E.2d 116 (2001). "In utilizing an informant's tip, probable cause is determined using a 'totality-of-the circumstances' analysis which 'permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip.' " *Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (quoting *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999)). This standard was established in [*Illinois v.*] *Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983).

Nixon, 160 N.C. App. at 37, 584 S.E.2d at 824.

> The standard for determining whether probable cause existed to conduct a warrantless search of defendant's person and vehicle is basically the same for information received from either an anonymous tip or a confidential informant. Both situations must be scrutinized under a "totality of the circumstances" test to determine "basis of knowledge" and "reliability" or "veracity" of the information as a basis for probable cause.

Id. at 34, 584 S.E.2d at 822.

When probable cause is based on an informant's tip a totality of the circumstances test is used to weigh the reliability or unreliability of the informant. Several factors are used to assess reliability including: "(1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police." *State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003).

Defendant contends the reliability of the informant was not sufficiently established to support the trial court's findings of fact and conclusions of law. We disagree.

In denying defendant's Motion to Suppress the trial court made the following pertinent findings of fact:

2. That on February 1, 2006, Detective L.M. Wyatt, III of the New Hanover County Sheriff's Office received information from a confidential informant that he could obtain a quantity of heroin from an individual named "Junior" who was from the Charleston, S.C. area.

3. That other detectives with the Sheriff's Office had dealt with this informant before and said informant had provided reliable and correct information which led to an arrest for trafficking in heroin of over 1200 bags of heroin.

4. Detective Wyatt received this information from the confidential informant at about 10:30 or 11:00 A.M. and at that time was also in the presence of Detective J. Hart who had personally dealt with this informant and knew of the reliability of said informant.

5. That at about that time, Detective Wyatt had the informant call a telephone with the number (843) 475-5374 and request one-half ounce of heroin and one-half ounce of cutting agent to be delivered to the informant, and this call was on speaker phone and monitored by both Detective Wyatt and Detective Hart.

6. That Detective Wyatt heard the person on the other end of the phone agree to bring the heroin for an agreed upon price of $1600 and that he would be leaving in about 30 minutes and it would take him a while to get to Wilmington, and this call was placed at about 11:00 A.M. on February 1, 2006.

7. After the placing of the call, Detective Wyatt was told by the informant that the person on the phone went by the name "Junior", that he was an older black male in his 50's, and that he would be driving either an older model Mercedes or a newer model mid-size SUV, both brown in color, with South Carolina registration.

8. Later that day, after estimating that the travel time from Charleston would have the subject delivering the heroin to arrive in Wilmington about 3:30 or 4:00 P.M., Detective Wyatt had other detectives along the likely route to be used to be on the lookout for the described vehicles with South Carolina registration.

9. Detective Wyatt also had the informant place a call to the subject who was to deliver the heroin at about 3:15 P.M. in which the subject advised that he was about 30 to 40 minutes away from Wilmington.

10. Detective Gore with the New Hanover County Sheriff's Office was looking for a vehicle matching the description given by the informant beginning at about 2:15 or 2:30 P.M. and was conducting this lookout from a position at the intersection of Highway 17 and Highway 87 in Brunswick County.

11. During the period from about 2:15 to 3:35 P.M., Detective Gore did not see any vehicles matching the description given by the informant as the vehicles which might be delivering the heroin.

12. Detective Gore was told by Detective Wyatt of the information given by the informant regarding the distance from Wilmington of [sic] the suspect's car.

13. At about 3:30 or 3:35, Detective Gore saw a brown SUV with South Carolina registration pass his location. Detective Gore got close to the brown SUV and was able to see that it was a brown Dodge Durango with South Carolina registration 509 UYC and that it was being driven by an older black male.

14. Detective Wyatt then checked the registration of the brown Dodge Durango and determined that that vehicle was registered to a Lloyd Green of North Charleston, South Carolina.

15. Detectives stopped the brown Dodge Durango at the intersection of 3rd Street and Dawson Streets in the City of

> Wilmington, and upon getting the defendant out of the car, searched the center console and found what later proved to be 13.4 grams of heroin and another bag of cutting agent in a black pouch inside the console, as well as a small blue bag containing marijuana.

Based upon these Findings the trial court reached the following pertinent conclusions of law:

2. That the informant utilized by Detective Wyatt in this matter was a known and reliable informant who had previously provided information which led to an arrest involving 1200 bags of heroin and [was] not an anonymous tipster.

3. That the officers were able to verify and corroborate much of the information provided by the known and reliable informant, relating to time of arrival, vehicle being operated by the suspect, and physical description of the suspect.

4. The corroboration and verification of this information, together with the monitored phone call gave the detectives, when seeing the defendant's car and confirming that it was from the Charleston, S.C. area, being driven by an older black male, a brown later model mid-size SUV, with South Carolina registration, arriving at the time which it was expected, and being the only such vehicle to pass along the main route from Charleston to Wilmington on that day during an approximately 1 and ½ hour time period, probable cause to believe that a felony was being committed by the defendant in their presence and that a stop and search of this defendant was justified and not in violation of defendant's State or Federal constitutional rights.

5. The stop of the defendant's vehicle on February 1, 2006 was supported by probable cause, as was the subsequent search of said vehicle.

. . .

7. Upon the search of the vehicle and the discovery of what the officers believed based upon their training and experience to be the ½ ounce of heroin that the confidential and reliable informant had ordered upon the officers' instructions, the arrest of the defendant was also supported by probable cause.

We review a trial court's ruling on a motion to suppress to determine whether the findings of fact are supported by competent evidence. If so they are binding on appeal, even there if there is evidence to the contrary. In determining whether the trial court's findings are supported by the evidence we look at the entire record. *State v. Moore*, 316 N.C. 328, 333, 341 S.E.2d 733, 737 (1986) (citation omitted). After reviewing the record in the instant case, it is clear there is competent evidence to support each of the trial court's findings of fact set forth above. Thus they are binding on appeal.

In cases involving an informant's tip probable cause is determined by a totality of the circumstances test after balancing the various indicia of reliability and unreliability attendant to the informant's tip. *See Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003); *see also State v. Chadwick*, 149 N.C. App. 200, 203, 560 S.E.2d 207, 209 (2002) (citation omitted). Applying the balancing test for probable cause based on an informant's tip, as set forth in *Collins*, *supra*, the evidence of record in the instant case supports the trial court's findings and conclusions that there existed probable cause to stop and search the defendant's vehicle.

Therefore, the trial court did not err in denying defendant's motion to suppress.

AFFIRMED.

Judge ARROWOOD concurs.

Judge JACKSON dissents in a separate opinion.

Judge ARROWOOD concurred in this opinion prior to 31 December 2008.

JACKSON, Judge dissenting.

At issue is the propriety of the trial court's denial of defendant's motion to suppress evidence obtained as a result of a warrantless search of his vehicle. I would hold that the informant's tip in the case *sub judice* was insufficient under the totality of the circumstances to establish probable cause to justify the warrantless search of defendant's vehicle. Therefore, I dissent.

We review the trial court's ruling on defendant's motion to suppress by asking whether the trial court's findings of fact are sup-

ported by competent evidence and whether those findings support the court's conclusions of law. *See State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (citing *State v. McHone*, 158 N.C. App. 117, 120, 580 S.E.2d 80, 83 (2003)), *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). We review a trial court's conclusions of law on a motion to suppress *de novo*. *See id.* (citing *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209, *disc. rev. denied*, 355 N.C. 752, 565 S.E.2d 672 (2002)).

In the case *sub judice*, the trial court made the following relevant conclusions of law:

> 4. The corroboration and verification of this information, together with the monitored phone call gave the detectives, when seeing the defendant's car and confirming that it was from the Charleston, S.C. area, being driven by an older black male, a brown later model mid-size SUV, with South Carolina registration, arriving at the time which it was expected, and being the only such vehicle to pass along the main route from Charleston to Wilmington on that day during an approximately 1 and ½ hour time period, probable cause to believe that a felony was being committed by the defendant in their presence and that a stop and search of this defendant was justified and not in violation of defendant's State or Federal constitutional rights.
>
> 5. The stop of defendant's vehicle on February 1, 2006 was supported by probable cause, as was the subsequent search of said vehicle.
>
> Our Supreme Court has explained that
>
> [a] search of a motor vehicle which is on a public roadway or in a public vehicular area is not in violation of the [F]ourth [A]mendment 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) (citing *United States v. Ross*, 456 U.S. 798, 809, 72 L. Ed. 2d 572, 584). *See also State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 ("A search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search."), *appeal dismissed*, 351 N.C. 112, 540 S.E.2d 372 (1999). Probable cause may be established by an informant's tip. *State v. Holmes*, 142 N.C. App. 614, 620-21, 544 S.E.2d 18, 22-23, *cert. denied*, 353 N.C. 731, 551 S.E.2d 116 (2001). Whether the tip is

received from an anonymous informant or a confidential informant, "a totality of the circumstances test" must be employed "to determine [the] basis of knowledge and reliability or veracity of the information as a basis for probable cause." *State v. Nixon*, 160 N.C. App. 31, 34, 584 S.E.2d 820, 822 (2003) (internal quotation marks omitted). *See also Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983); *State v. Hughes*, 353 N.C. 200, 203, 539 S.E.2d 625, 628 (2000). When an informant is without sufficient reliability to be considered a confidential, reliable informant, the informant is treated as an anonymous informant. *Hughes*, 353 N.C. at 205, 539 S.E.2d at 629. To the extent that reliability is wanting, independent corroboration by police officers "or [a] greater level of detail" is required. *See Hughes*, 353 N.C. at 209, 539 S.E.2d at 631; *Nixon*, 160 N.C. App. at 34, 584 S.E.2d at 822. This Court has indicated that more evidence may be required when the officer is acting without a warrant. *See Nixon*, 160 N.C. App. at 34, 584 S.E.2d at 823.

Initially, in the case *sub judice*, Detective Hart vouched for the informant's reliability to Detective Wyatt. Detective Hart had worked with the informant before. Detective Wyatt, however, had not worked with the informant, and he relied solely upon Detective Hart's endorsement that the informant had provided reliable information in an earlier drug arrest. Detective Hart did not testify in the hearing on defendant's motion to suppress. We have held that when probable cause is based upon an informant's tip, "[p]robable cause may not be established by the testimony of only the arresting officer that he or she was told by another officer that the information was reliable." *Nixon*, 160 N.C. App. at 37, 584 S.E.2d at 824. *See also Hughes*, 353 N.C. at 204, 539 S.E.2d at 628-29. Accordingly, on these facts, I would hold that the informant's tip could not have established probable cause to justify the warrantless search. Because Detective Wyatt acted without a warrant and because he had no independent basis upon which to classify the informant as reliable, Detective Wyatt bore a heavier burden to corroborate independently the informant's information to justify the warrantless search and seizure. *See Hughes*, 353 N.C. at 205, 539 S.E.2d at 629; *Nixon*, 160 N.C. App. at 34, 584 S.E.2d at 823.

Next, the informant's tip was comparatively nonspecific in view of precedent established by the United States Supreme Court, the North Carolina Supreme Court, and this Court. In *Hughes*, our Supreme Court analyzed precedent from the United States Supreme Court by explaining that

> [i]n *Alabama v. White*, 496 U.S. 325, 110 L. Ed. 2d 301 (1990), the United States Supreme Court concluded that an anonymous tip could, under the totality of the circumstances, be sufficiently reliable to pass constitutional muster. *Id.* at 332, 110 L. Ed. 2d at 310. In *White*, a case described by the Court as "close," the anonymous caller indicated that an individual, Vanessa White, would have in her possession an ounce of cocaine in a brown attaché case. During the call, the informant told the police the precise apartment building and apartment number from which White would be leaving and the particular time she would leave, and also gave detailed information as to White's car and her final destination, Dobey's Motel. The police then observed White leave the specified apartment building, get into the car described in detail by the informant, and take the most direct route to the motel before they finally stopped White just short of her destination. *Id.* at 327, 110 L. Ed. 2d 306-07.

Hughes, 353 N.C. at 205, 539 S.E.2d at 629. In *Hughes*, the Court held that the anonymous informant's tip failed to provide reasonable suspicion—"a less demanding standard than probable cause." *White*, 496 U.S. at 330, 110 L. Ed. 2d at 309; *Hughes*, 353 N.C. at 209, 539 S.E.2d at 632. In pertinent part, the Court provided that

> [i]n this case, a review of the facts shows that Detectives Bryan and McAvoy had a physical description of a dark skinned Jamaican whose name and clothing description could not be recalled, who was going to North Topsail Beach, who "sometimes" came to Jacksonville on weekends before dark, who "sometimes" took a taxi, and who "sometimes" carried an overnight bag. The only other information the officers had was that defendant might be arriving on the 5:30 p.m. bus.
>
> . . . .
>
> Even more important for purposes of its reliability, the information provided did not contain the "range of details" required by *White* and *Gates* to sufficiently predict defendant's specific future action, but was instead peppered with uncertainties and generalities. The tipster stated that "Markie" "sometimes" came to Jacksonville on weekends, "sometimes" took a taxi from the bus station, "sometimes" carried an overnight bag, and would be headed to North Topsail Beach. As well as being vague, these statements are broad enough to be applied to many of the bus station patrons. It is highly likely that any number of weekend

> travelers to Jacksonville, where a large military base is located, would take a bus; that they might bring an overnight bag; and that unless they had someone pick them up from the station, they would take a taxi to their final destination, which could include North Topsail Beach. Because we find that the tip taken as a whole was insufficient to create a reasonable suspicion, we next look to see if it was made sufficient by independent police corroboration.
>
> It appears from the record that the only items of the informant's statement actually confirmed by the officers before the stop were that they saw a man meeting the suspect's description come from around a bus that had arrived in Jacksonville at approximately 3:50 p.m., that he was carrying an overnight bag, and that he left the station by taxi. Without more, these details are insufficient corroboration because they could apply to many individuals. . . .
>
> Likewise, *reasonable suspicion does not arise merely from the fact that the individual met the description given to the officers*. . . .
>
> . . . .
>
> Here, before stopping the taxi, the officers did not seek to establish the reliability of the assertion of illegality. They did not confirm the suspect's name, the fact that he was Jamaican, or whether the bus from Rocky Mount had originated in New York City. Moreover, because the officers stopped the taxi before it reached the Triangle area,[1] they failed to corroborate whether the individual might be headed to North Topsail Beach, as the informant had stated, or to Wilmington, Richlands, Kinston, or some other destination.

Hughes, 353 N.C. at 208-09, 539 S.E.2d at 631-32 (emphasis added) (internal citation omitted). *See also Earhart*, 134 N.C. App. at 134, 516 S.E.2d at 887 (concluding that probable cause existed upon an anonymous tip that a white Trans Am carrying marijuana would arrive at a specific residence on 27 or 28 April and might be accompanied by a blue Subaru coupled with a tip from an agent of the State Bureau of Investigation "that a person whose name sounded like 'Airhart' was

1. In *Hughes*, the Court described the Triangle area as an area where "Highway 17 [South] splits in two directions—towards Wilmington and Topsail Beach, North Carolina, or towards Richlands, North Carolina. A person must pass through the Triangle before it can be determined in which of these directions he or she is going." *Hughes*, 353 N.C. at 202, 539 S.E.2d at 628.

selling cocaine and marijuana from his home on North Spot Road and that he drove a white Trans Am, a blue Chevrolet Cavalier, and a rust Jeep"); *State v. Collins*, 160 N.C. App. 310, 318, 585 S.E.2d 481, 487 (2003) (concluding that probable cause existed upon an informant's tip that directed police to a scheduled meeting at a particular time at a local convenience store with "Doug," a black man in his thirties who drove a late 1980's model, white, four-door Cadillac Brougham with spoke or wire hubcaps).

In the case *sub judice*, the informant provided that a man he knew as "Junior" would come that afternoon to a KFC restaurant located at the intersection of 16th Street and Dawson Street in Wilmington, North Carolina. "Junior" was described as an older black man, probably in his fifties, who "*possibly* would be driving an older model Mercedes or newer model mid size SUV, both *possibly* brown in color and both having South Carolina registrations." (Emphasis added). The informant's description of "Junior" and his "possible" vehicles was vague, and served to cast too-wide a net of potential suspects. "Junior's" route of travel also was unknown. Furthermore, Charleston is a substantial city, and must necessarily include many older black males, older model Mercedes, and newer mid-size SUV's—likely including some which are "possibly" brown in color. From Detective Wyatt's testimony, the State proved only that—according to the anonymous tipster—the make, model, and color of "Junior's" vehicles, and whether "Junior" actually would be driving either an older model Mercedes or a newer model mid-size SUV were only "possibilities." Thus, it is possible that "Junior" would be driving an entirely different vehicle.

At the suppression hearing, the following exchange took place between defense counsel and Detective Wyatt:

> Q: So it would be fair to say you all were looking for an older black man driving a dark-colored SUV or a Mercedes with South Carolina tags going through Wilmington. That would be all of the information, a summary of all of the information that you had in hand?
>
> A: Correct.

Furthermore, even though Detective Wyatt had obtained a specific location—the KFC at 16th Street and Dawson Street in Wilmington—for the arranged transaction, he decided not to place any of his officers at that location. Instead, Detective Wyatt stopped

defendant at 3rd Street, not 16th Street. Allowing defendant to arrive at the predetermined location or else stopping defendant just short of the predetermined location would have provided significantly more corroboration of the informant's tip. *Compare Hughes*, 353 N.C. at 209, 539 S.E.2d at 632 ("[B]ecause the officers [prematurely] stopped the taxi before it reached the Triangle area, they failed to corroborate whether the individual might be headed to North Topsail Beach, as the informant had stated, or to Wilmington, Richlands, Kinston, or some other destination.") *with White*, 496 U.S. at 326-28, 110 L. Ed. 2d at 306-07 (holding that an officer had reasonable suspicion when he stopped defendant "just short" of a predicted motel after an anonymous tipster provided specific details regarding the apartment from which defendant would depart, defendant's time of departure, defendant's brown attaché case containing cocaine, and defendant's brown Plymouth station wagon with a broken right taillight, in addition to police observations of defendant leaving the specified apartment at the designated time in a car matching the tipster's description).

I believe the informant's reliability in the case *sub judice* pales in comparison to that of the informant in *White*—a "close" case in which only reasonable suspicion was found upon a tip from an anonymous tipster who provided a host of specific facts. I believe this case is much closer to *Hughes*—a case in which reasonable suspicion, and, therefore, probable cause, was lacking. Accordingly, without any better information as to (1) "Junior's" real name; (2) "Junior's" distinguishing physical features; (3) the make, model, color, year, or other identifying features of "Junior's" vehicle—beyond mere "possibilities;" or (4) "Junior's" course of travel, and without sufficient independent, pre-stop corroboration of the informant's tip, I would hold that the trial court erred in concluding that the detectives had probable cause in the case *sub judice*.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. DAVID C. BLEVINS, DEFENDANT

No. COA08-266

(Filed 6 January 2009)

1. Appeal and Error— preservation of issues—post-judgment interest not ordered—not raised below

The issue of whether there was constitutional error in failing to order DOT to pay post-judgment interest was not preserved for appeal where it was not raised at trial.

2. Eminent Domain— road widening—effect of median on remaining property

The trial court did not abuse its discretion in an action arising from a road-widening by admitting evidence of the effect of the new median on the value of the remainder of convenience store property. Although DOT argues that this was an exercise of police power and not a compensable injury, the evidence could have been considered in the context of the purpose and use of the taking as well as generally in determining whether the taking rendered the property less valuable.

3. Eminent Domain— road-widening—expert testimony—properly excluded

The trial court did not err by excluding the testimony of an expert witness for DOT in a case involving a road-widening project where the notice of the witness was late and the witness's voir dire testimony revealed that his proffered method of proof was not sufficiently reliable.

4. Evidence— study—use in cross-examination of expert

The trial court did not abuse its discretion in an action concerning a road-widening project by allowing a witness to be cross-examined about a damage study prepared for DOT. An expert may be cross-examined about material reviewed but not relied upon.

5. Witnesses— expert—voir dire about basis of opinion—between direct and cross-examination

There was no error in an action concerning a road widening project where the trial court denied DOT's request to voir dire a witness until after the witness testified about the value of the

property, and then allowed a voir dire about the facts and data underlying the opinion before cross-examination.

Judge JACKSON concurring in part and dissenting in part.

Appeal by plaintiff from order entered 23 February 2006 by Judge J. Marlene Hyatt in Haywood County Superior Court. Appeal by plaintiff and cross-appeal by defendant from judgment entered 17 September 2007 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 10 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Jones P. Byrd and Matthew W. Kitchens, for defendant-appellee and cross-appellant.

BRYANT, Judge.

The North Carolina Department of Transportation (DOT) appeals from an order entered 23 February 2006 in Haywood County Superior Court which compelled a revision to the plat depicting the boundaries of the subject property. DOT appeals and Defendant David Blevins cross-appeals from a judgment entered 17 September 2007 in Haywood County Superior Court following a jury award to Blevins in the amount of $74,000.01. For the reasons stated below, in part we affirm the judgment of the trial court and in part dismiss the appeal.

Blevins owned a convenience store bordered on two sides by the intersection of Highway 23 and Howell Mill Road in Haywood County. Both were two lane roads without medians or other obstructions between the lanes. Traffic was controlled by a stop sign halting traffic coming from Howell Mill Road onto Highway 23. Traffic moving along Highway 23 was able to turn into Blevins' convenience store parking lot from either direction along approximately 285 feet of unobstructed frontage. Traffic along Howell Mill Road was also able to turn into Blevins' convenience store from either direction.

On 16 April 2001, DOT filed a complaint, as well as a declaration of taking and notice of deposit, to facilitate the widening of Highway 23 from two lanes to five in front of Blevins' convenience store. DOT's project affecting Blevins' property included the placement of a guardrail along Highway 23, a right turn lane along Highway 23 onto Howell Mill Road, a traffic light at the intersection of Highway 23 and

Howell Mill Road, and a traffic island placed at the top of Howell Mill Road at the intersection of Highway 23. DOT anticipated the taking of a new right of way to comprise 279 square feet and a temporary drainage easement of 1023 square feet. Therefore, DOT estimated $2,375.00 to be just compensation to Blevins and deposited that amount with the Haywood County Superior Court. In answer to DOT's complaint, Blevins denied that the amount deposited represented just compensation.

Pursuant to a request by both parties, the trial court held a hearing on 18 January 2006 to resolve all issues other than damages with regard to the taking. And, on 23 February 2006, the trial court filed an order which increased the area of Blevins' property to be considered subject to the taking to 2,849 square feet and the temporary drainage easement to 1,739 square feet.

On 21 August 2007, a jury trial in Haywood County Superior Court commenced to determine "the amount of just compensation David C. Blevins [was] entitled to recover from [DOT] for the taking of his property[.]" Prior to the presentation of evidence, DOT made an oral motion in limine to prohibit testimony relating to damages premised on the median constructed on Highway 23 as well as the channelization of access to the convenience store. Blevins responded that the jury should be allowed to consider any factors that impact the fair market value of the property which involve the size and shape of the property, the ability to access the convenience store after the taking, and the impediments put upon the property by the roadway project. The trial court stated that it would rule on the evidence as the witnesses testified.

At trial, David Blevins testified over objection to the impact of the project on the accessibility of his convenience store and its fair market value. Blevins testified as follows:

Blevins: [O]ne of the attributes of a convenient store is that it's easy to get in, easy to get out, easy to park, it's easy to get your stuff and get back in the car and go home.

Attorney: How has that been changed by the roadway project?

Blevins: Well, we're not as open. We don't have the open frontage that we once had. We have traffic signals that block traffic. . . . The continuous right turn movement makes it more difficult and not quite as safe for people to get in and out. [Because of the traffic island] [w]e

> are being denied the Howell Mill Road traffic coming from Russ Avenue. It's harder to do business.

Blevins also called witnesses Charles Brown, Carroll Mease, and Bobby Joe McClure to testify to the convenience store's change in fair market value due to the DOT project. Brown, Mease, and McClure testified that the fair market value of Blevins' property dropped between $99,705.04 and $88,795.00.

DOT called Gary Faulkner as an expert witness in traffic management, but after a voir dire by Blevins, the trial court denied Faulkner the opportunity to testify. DOT called appraisal witness Marty Reece. During cross-examination, Blevins questioned Reece about a report created for DOT to "analyze[] the effect of modification of access, limited parking and proximity of highways to buildings on the impact of the value of the property." The report was never admitted, and Reece testified that while he was aware of the report he did not use it in analyzing the property.

After the presentation of evidence, the jury awarded Blevins $74,000.01. On 17 September 2007, the trial court entered a judgment consistent with the jury award and stated further that Blevins was "entitled to a judgment against the [DOT] for interest on the sum of seventy one thousand six hundred and twenty five dollars and one cent ($71,625.01) at the rate of eight percent (8%) per annum from August 16, 2001 up to and including the date of this Judgment." DOT appeals from the 17 September 2007 judgment as well as the order entered 23 February 2006. Blevins cross-appeals.

On appeal, DOT raises the following four issues: whether the trial court erred (I) in admitting evidence of the effect of the median on the value of the remainder of Blevins' property; (II) in excluding the testimony of Gary Faulkner; (III) in permitting Blevins to cross examine Marty Reece based upon the DOT report; and (IV) in denying the DOT's request to voir dire Blevins' witnesses Charles Brown, Carroll Mease, and Bobby McClure.

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[1] On cross appeal, Blevins raises the issue of whether the trial court committed reversible constitutional error by failing to order DOT to pay post-judgment interest. Because Blevins raises a constitutional issue for the first time on appeal, we hold this issue is not properly preserved for our review and dismiss Blevins cross-appeal. *See Daniels v. Hetrick*, 164 N.C. App. 197, 200, 595 S.E.2d 700, 702

(2004) (constitutional issues not raised before the trial court are not properly preserved for appeal) (citation omitted).

I

[2] DOT asserts that the trial court erred in admitting evidence of the effect of the median on the value of the remainder of Blevins' property. DOT argues that the construction of a median by DOT to separate lanes of traffic is an exercise of the State's police power and is not a compensable injury; therefore, the trial court abused its discretion by not prohibiting Blevins, his witnesses, and his counsel from mentioning the island in testimony or in argument to the jury. We disagree.

"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." *Cameron v. Merisel Props., Inc.*, 187 N.C. App. 40, 51, 652 S.E.2d 660, 668 (2007) (citation and quotations omitted). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Wachovia Bank, N.A. v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (2006) (citation and emphasis omitted).

In *Barnes v. North Carolina State Highway Comm'n*, 257 N.C. 507, 126 S.E.2d 732 (1962), our Supreme Court addressed the compensability of a taking by the State Highway Commission to widen a highway and insert a median between the northbound and southbound lanes. *Id.* at 513-14, 126 S.E.2d at 737. At trial, the petitioner, who owned a filling station and bulk oil premises and another business called the Frozen Custard Place, alleged that his property "was *greatly damaged* by the division of the lanes of travel in such a manner that said property [could] only attract and serve potential customers traveling in [one direction] along [the] highway." *Id.* at 514, 126 S.E.2d at 737 (emphasis added). "[The] Petitioner offered evidence, which . . . tended to show that the . . . damage to the remainder of his tract which was not taken consisted *primarily* of diminution in value because of the way in which the highway was constructed, particularly the construction of what has been referred to as a median strip . . . ." *Id.*

Our Supreme Court reasoned that while "[t]he state must compensate for property rights taken by eminent domain[,] damages resulting from the exercise of police power are noncompensable." *Id.*

at 514, 126 S.E.2d at 738 (citations omitted). On these grounds, our Supreme Court awarded the State Highway Commission a new trial. *Id.* at 522, 126 S.E.2d at 743.

Following the reasoning in *Barnes*, this Court in *City of Concord v. Stafford*, 173 N.C. App. 201, 618 S.E.2d 276 (2005), upheld the partial summary judgment of a trial court for the plaintiffs where "[the] Defendants presented an appraisal that showed the reduction in value of their property due to the road widening project to be $103,890. The majority of this amount ($98,665) was attributable to the restriction of access to lanes in only one direction of travel by the median." *Id.* at 203, 618 S.E.2d at 277. In both *Barnes* and *Stafford* the Court denied the award of compensation based on the construction of a median which was the primary cause of diminution of property value. *See Barnes*, 257 N.C. at 518, 126 S.E.2d at 740; *Stafford*, 173 N.C. App. at 205, 618 S.E.2d at 278-79.

Here, the challenged issue is not whether the award was primarily or substantially based on testimony regarding the median. In fact, there was substantial testimony as to the effect the taking of 279 square feet of property and a temporary drainage easement had on the fair market value of the property considering the reduction in access and parking. The challenge is to the exercise of the trial court's discretion.

Evidence of the construction of the traffic median near Blevins' property could have been considered in the context of the purpose and use of the taking as well as generally considered in determining whether the taking rendered Blevins' property less valuable. *E.g.*, *DOT v. M.M. Fowler, Inc.*, 361 N.C. 1, 14, 637 S.E.2d 885, 895 (2006) (a jury may consider the adverse effects of a condemnation on a business, not as a separate item of damage but rather a circumstance tending to show the diminution in the over-all fair market value of the property). Therefore, the trial court's ruling was not manifestly unsupported by reason. Accordingly, this assignment of error is overruled.

II

[3] Next, DOT argues that the trial court erred in excluding the testimony of Gary Faulkner as an expert witness. We disagree.

> [North Carolina General Statute section] 8C-1, Rule 702(a) permits the admission of expert testimony if it will assist the trier of fact to understand the evidence or to determine a fact in issue.

> The determination of the admissibility of expert testimony is within the sound discretion of the trial judge and will not be disturbed on appeal absent abuse of discretion.

Floyd v. McGill, 156 N.C. App. 29, 38, 575 S.E.2d 789, 795 (2003) (citation and quotations omitted).

Our Supreme Court has established a three-step inquiry for evaluating the admissibility of expert testimony as follows: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004).

Here, DOT notified Blevins of its intent to call Faulker as an expert witness on the day jury selection began. Blevins objected. The trial court granted Blevins the opportunity to voir dire Faulkner prior to deciding whether the witness should testify. On voir dire, Faulkner testified that he was called by DOT the week before the trial. He was asked to "look at the [property] from a circulation traffic flow perspective and render an opinion if the site had reasonable, suitable internal circulation and access to the adjacent highway system."

However, Faulkner's first visit to Blevins' property was the day before he was called to testify. At that time, he observed the flow of traffic in and around the convenience store for approximately four or five hours. Faulkner did not have available to him the dimensions of Blevins' property prior to the taking. And, Faulkner's diagrams and aerial photo of the site did not reflect modifications made during construction of the site.

After voir dire, the trial court denied Faulkner the opportunity to testify based on the late notice to Blevins about calling Faulkner as a witness as well as the discrepancies between Faulkner's testimony regarding the roadway plans and what was actually constructed. Therefore, because the notice of Faulkner as an expert witness was indeed late and because Faulkner's voir dire testimony revealed that his proffered method of proof was not sufficiently reliable, the trial court did not err in excluding Faulkner's testimony. Accordingly, we overrule this assignment of error.

III

[4] Next, DOT argues that the trial court erred in permitting Blevins to cross-examine Marty Reece with the Naeger Report. We disagree.

> [T]he trial court controls the nature and scope of the cross-examination in the interest of justice and confines the testimony to competent, relevant and material evidence. Evidence that is not otherwise admissible may be offered to explain or rebut evidence elicited by the defendant, and this evidence is admissible even though such latter evidence would be incompetent or irrelevant had it been offered initially. In determining relevant rebuttal evidence, we grant the trial court great deference, and we do not disturb its rulings absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.

Williams v. CSX Transp., Inc., 176 N.C. App. 330, 338, 626 S.E.2d 716, 724 (2006) (internal citations and quotations omitted). "Furthermore, an expert may be . . . cross-examined with respect to material reviewed by the expert but upon which the expert does not rely." *Id.* at 336, 626 S.E.2d at 723.

Here, DOT called Marty Reece as an expert witness in appraisals. Reece had been commissioned to perform an appraisal of Blevins' property which he accomplished by "look[ing] for land sales in the area, . . . try[ing] to find as many comparable sales as [he] [could] as similar as possible to the subject property, and then . . . make adjustments for differences in those properties as compared to the subject to determine a land rate, a land value."

On cross-examination, Blevins' counsel presented Reece with a copy of a damage study that Fran Naeger of Asheville, North Carolina prepared for DOT. Reece testified that he was aware of the Naeger report.

> Reece: The purpose of the report in my opinion was to analyze properties to determine whether or not proximity of the highways have a negative effect on the property, and basically what Mr. Naeger did is he went into the market and looked at various properties, compared them, contrasted the differences in the properties and tried to derive damages, and every property is different.
>
> If you will look at the report, the damage percentage [sic] are drastically different, they change depending on the property, the location, the area, a lot of things.

Counsel: So the percentages range from what to what?

. . .

Reece: That I don't know.

Counsel: Well, would something like 12.3 percent to 43 percent roughly be the range of harm as found in this report?

. . .

Reece: [Counselor] I don't recall. I will take you word for it, that sounds accurate for these particular properties, but that is for these particular properties.

Counsel: Well, the purpose of the report was to give the appraisal department sort of a rule of thumb to go by for determining not only proximity but restrictive access to buildings that were commercial and industrial properties and also adverse impacts from limited parking; isn't that right?

Reece: Yes, sir, that's correct.

Counsel: And you didn't use this DOT document?

Reece: No, sir, I did not, did not feel it was necessary.

As "an expert may be . . . cross-examined with respect to material reviewed by the expert but upon which the expert does not rely[,]" *Id.* at 336, 626 S.E.2d at 723, we hold the trial court's ruling to allow Blevins, over objection, to cross-examine Reece regarding his knowledge of the Naeger report was not an abuse of discretion. Accordingly, this assignment of error is overruled.

IV

[5] Next, DOT argues that the trial court erred in denying DOT's request to voir dire Blevins' witnesses Charles Brown, Carroll Mease, and Bobby Joe McClure. Specifically, DOT argues that the trial court erred in denying DOT's request to voir dire Charles Brown until after Brown had submitted his testimony on direct. DOT argues this substantially prejudiced DOT by forcing it to either accept the witness's opinion of the fair market value of Blevins' property after the taking or risk waiving appellate review by eliciting this information from the witness. We disagree.

> [T]rial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testi-

> mony. Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion.

Howerton, 358 N.C. at 458, 597 S.E.2d at 686 (internal citations and quotations omitted).

Under the North Carolina Rules of Evidence, Rule 705,

> [t]he expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

N.C. R. Evid. 705 (2007). Though Rule 705 provides for an expert's disclosure of the facts or data underlying the expert's opinion, it also permits the trial court to require such disclosure on direct examination or voir dire or on cross-examination. *Id.*

Here, DOT objected and requested permission to voir dire Charles Brown while he was testifying to the fair market value of Blevins' property on the date of the taking. The trial court denied the request. Brown then testified that the fair market value of Blevins' property on the date of the taking was $664,958, and he further testified as to how he arrived at that figure. Thereafter, DOT was permitted an opportunity to voir dire Brown prior to cross-examination of him regarding the underlying facts or data supporting his opinion. Therefore we overrule this assignment of error.

Also, we note that DOT did not request voir dire for Carroll Mease or Bobby Joe McClure. Therefore, the issue of the trial court's denial as to those witnesses is not properly before us, and we dismiss DOT's assignments of error as it applies to a denial of a request to voir dire Mease and McClure.

Constitutional issues not raised before the trial court are not properly preserved for appeal. *See Daniels*, 164 N.C. App. at 200, 595 S.E.2d at 702 (citation omitted). Accordingly, we hold this issue is not properly before us and dismiss Blevins' cross-appeal.

Affirmed in part; dismissed in part.

Judge ARROWOOD concurs.

Judge JACKSON concurs in part and dissents in part.

Judge ARROWOOD concurred in this opinion prior to 31 December 2008.

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

I concur in sections *II*, *III*, and *IV* of the majority's opinion. However, I respectfully dissent from the majority's holding in section *I* because I believe it departs from precedent established by our Supreme Court in *Barnes v. Highway Commission*, 257 N.C. 507, 126 S.E.2d 732 (1962) as well as this Court's precedent in *City of Concord v. Stafford*, 173 N.C. App. 201, 618 S.E.2d 276 (2005). In view of *Barnes* and *Stafford*, I would hold that the trial court abused its discretion by admitting evidence regarding the effect of the median on the diminution in value of Blevins' property.

The facts in the case *sub judice* are substantially similar to the facts presented in both *Barnes* and *Stafford*. In *Barnes* and *Stafford*, as here, (1) a governmental body used its power of eminent domain to take a portion of a property owner's land to widen a public road; (2) the governmental body installed a median as a part of the roadway project to facilitate safe traffic flow pursuant to its police powers; (3) the median limited the accessibility of the property owner's land; and (4) the property owner sought to recover compensation for the property's diminution in value effected as a result of the median's installation in addition to compensation for the taking. *See Barnes*, 257 N.C. 507, 126 S.E.2d 732; *Stafford*, 173 N.C. App. 201, 618 S.E.2d 276. In both *Barnes* and *Stafford*, the property owners' attempts to recover compensation for the diminution in value resulting from the medians' installations were denied because the installations were held to be proper exercises of police power for which no compensation was required. *See Barnes*, 257 N.C. at 518, 126 S.E.2d at 740; *Stafford*, 173 N.C. App. at 204-05, 618 S.E.2d at 278-79.

In *Barnes*, our Supreme Court concluded

> that the instruction that injury, if any, caused [by the restricted flow of traffic as a result of the installation of the median] was for consideration by the jury as an element of petitioner's damages, and the admission of evidence as to the injury to the remaining

> portion . . . of petitioner's property caused thereby, were erroneous and entitle the Highway Commission to a new trial.

Barnes, 257 N.C. at 518, 126 S.E.2d at 740 (original emphasis omitted). In *Stafford*, we held that the trial court properly granted partial summary judgment to the City of Concord on the issue of whether the diminution in value suffered as a result of the installation of a median was a noncompensable action taken pursuant to the exercise of the city's police power. *Stafford*, 173 N.C. App. at 204-05, 618 S.E.2d at 278-79.

In the case *sub judice*, the majority states that the jury could have considered evidence of the median within the context of the purpose of the taking and generally could have considered evidence of the median in determining whether the taking diminished Blevins' property value. I believe this conclusion contradicts the settled law in North Carolina.

Our Supreme Court already has held that consideration of the diminution in value resulting from noncompensable action pursuant to a governmental body's police power may *not* be considered in conjunction with the otherwise compensable diminution in value resulting from eminent domain. *See Barnes*, 257 N.C. at 518, 126 S.E.2d at 740. Furthermore, our affirmation of partial summary judgment in *Stafford* signals that, as a matter of law, the installation of a median is a noncompensable exercise of a governmental body's police power. *See Stafford*, 173 N.C. App. at 205, 618 S.E.2d at 278-79. While a jury may consider the lost business profits resulting from the State's exercise of eminent domain, a jury may not consider the noncompensable effects of the State's proper exercise of its police power. *Compare Department of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 14, 637 S.E.2d 885, 895 (2006), *with Barnes*, 257 N.C. at 518, 126 S.E.2d at 740. Therefore, in light of the settled law of the State, I would hold that the trial court abused its discretion by admitting testimony regarding the diminution in value of the subject property resulting from the installation of the median—a noncompensable, proper exercise of the State's police power. Based upon my holding as to issue *I*, I also would hold that this matter must be remanded for a new trial. *See Barnes*, 257 N.C. at 518, 126 S.E.2d at 740.

MEDICAL STAFFING NETWORK, INC., PLAINTIFF v. THOMAS DEAN RIDGWAY AND TRINITY HEALTHCARE STAFFING GROUP, DEFENDANTS

No. COA07-1486

(Filed 6 January 2009)

1. Contracts— novation—merger clause

The trial court did not err by holding a 2000 Agreement was legally binding on the parties and had not been superseded by a 2001 Agreement because: (1) North Carolina recognizes several methods by which a contract may be discharged, including a novation which is the substitution of a new contract; (2) although merger clauses create a rebuttable presumption that the writing represents the final agreement between the parties, the one exception to this general rule applies when giving effect to the merger clause would frustrate the parties' true intentions; (3) although plaintiff has not presented any evidence of fraud, bad faith, unconscionability, negligent omission or mistake in fact to rebut the presumption of novation created by a merger clause in the 2001 Agreement, the covenants of both agreements are not wholly inconsistent but can be enforced consistently; and (4) the two agreements were executed for two distinct purposes since the 2000 Agreement was executed to govern the employment relationship of all employees whereas the 2001 Agreement was executed as part of a stock purchase agreement offered to only select employees.

2. Employer and Employee— covenant not to compete—non-solicitation clause—failure to show legitimate business interest

The trial court erred by failing to conclude that the restrictive covenants in a 2000 Agreement were invalid as a matter of law, and the breach of contract claim is reversed, because: (1) plaintiff presented no evidence and the trial court made no findings that plaintiff had any legitimate business interest in preventing competition with, foreclosing the solicitation of clients and employees of, and protecting the confidential information of an unrestricted and undefined set of plaintiff's affiliated companies that engage in business distinct from the medical staffing business in which defendant individual had been employed; and (2) on its face, the bar extended beyond any legitimate interest plaintiff might have in this case.

3. Employer and Employee; Wrongful Interference— tortious interference with contract—overbroad

The trial court erred by finding defendants liable for tortious interference with a contract, and this claim is reversed because the 2000 Agreement was so overbroad as to be unenforceable.

4. Trade Secrets— misappropriation—access and opportunity to use

The trial court did not err by finding that defendants misappropriated two categories of trade secrets, including information about per diem nurses and business strategies and marketing plans, because: (1) plaintiff has not rested on bare allegations and speculation, but instead introduced evidence that defendant company, through defendant individual, had access to plaintiff's trade secrets as well as the opportunity to use them; (2) there was evidence of a substantial turnaround in defendant company's business, as well as a concurrent, substantial decrease in plaintiff's business in the same market, during the same time period; and (3) viewing all of these circumstances together, there was sufficient evidence to sustain a finding that defendants knew of plaintiff's confidential information, had an opportunity to acquire it, and did so, causing plaintiff harm.

5. Unfair Trade Practices— violation of trade secret protection—injury

The trial court did not err by holding that defendant company had committed unfair and deceptive trade practices in violation of N.C.G.S. § 75-1.1 because: (1) the trial court's findings that defendant violated the Trade Secret Protection Act and caused injury to plaintiff are supported by competent evidence; and (2) these findings supported the court's conclusion that defendant committed unfair and deceptive trade practices.

6. Trade Secrets— misappropriation—measure of damages

Plaintiff medical staffing company was entitled to recover as damages for misappropriation of its trade secrets by its competitor and its former employee the greater of the extent to which plaintiff has suffered economic loss or the extent to which the competitor has unjustly benefitted from use of plaintiff's marketing strategy and per diem nurse information, including nurses' home phone numbers, pay rates, specializations, and preferences regarding shifts and facilities.

Appeal by defendants from judgment entered 2 March 2007 by Judge James C. Spencer in Wake County Superior Court. Heard in the Court of Appeals 9 September 2008.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Christopher G. Smith and Heather Adams, for plaintiff appellee.

Ellis & Winters, LLP, by Paul K. Sun, Jr., for defendant appellants.

McCULLOUGH, Judge.

Thomas Dean Ridgway ("Ridgway") and Trinity Healthcare Staffing Group ("Trinity"), (collectively "defendants"), appeal from a judgment entered 2 March 2007, finding defendants jointly and severally liable to Medical Staffing Network, Inc. ("MSN") for breach of contract, misappropriation of trade secrets, unfair and deceptive trade practices, and tortious interference with a contract. MSN was awarded injunctive relief and damages in the amount of $1,104,495.60, plus prejudgment interest in the amount of $62.09 per day on the compensatory damages.[1]

" 'It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *Keel v. Private Bus., Inc.*, 163 N.C. App. 703, 707, 594 S.E.2d 796, 799 (2004) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)).

The relevant facts and procedural background are as follows: MSN, based in Boca Raton, Florida, and Trinity, based in Florence, South Carolina, are competitors in the market for healthcare staffing. In the Raleigh, North Carolina market, specifically, MSN and Trinity compete for the placement of *per diem* nurses, which are nurses that are available for hire by hospitals or other healthcare providers for specific shifts. MSN's two largest clients in the Raleigh market were WakeMed and Duke, which historically, comprised 85% of MSN's business in the Raleigh market. WakeMed was Trinity's first client and has historically been its largest client.

1. The trial court found actual damages in the amount of $283,300.00, which were trebled, pursuant to N.C. Gen. Stat. § 75-16 (2007) for a total amount of $849,900.00 in damages. The court also awarded attorneys' fees and costs in the amount of $254,595.62.

In May of 2000, MSN hired Ridgway as manager of its Raleigh branch. Prior to joining MSN, Ridgway had worked in the staffing industry since 1997 and had worked as the Raleigh branch manager for another staffing company, Scientific Staffing, Inc. Upon commencement of his employment relationship with MSN, Ridgway signed an "Agreement Regarding Confidential Information, Non-Competition, and Non-solicitation" ("the 2000 Agreement"). The 2000 Agreement is between MSN and "any parent, division, subsidiary, affiliate, predecessor, successor or assignee hereof[.]" The 2000 Agreement includes restrictive covenants, addressing nondisclosure of MSN's confidential information, non-solicitation of MSN employees and clients, and non-competition with MSN Business.

With Ridgway on its team, MSN's Raleigh Branch became one of MSN's most successful branches. In 2004, the Raleigh Branch set records for revenue and net income, and Ridgway was named MSN's Branch Manager of the Year.

Sometime prior to 23 June 2005, Trinity hired Keith Metts, a former MSN employee, knowing he had a non-competition agreement with MSN. Metts began soliciting Ridgway to join Trinity. MSN introduced evidence at trial that shortly before 23 June 2005, Ridgway accessed a number of confidential documents on MSN's computer network, including MSN's Market Action plan. Ridgway was authorized to access these documents, but in the past, he had done so only occasionally.

On 23 June 2005, Ridgway met with Trinity's president and others at the Angus Barn restaurant in Raleigh to discuss his interest in joining Trinity. Trinity was aware that Ridgway had a non-competition agreement with MSN, but did not ask to see the agreement and did not know its terms.

On 1 July 2005, Ridgway gave MSN two weeks' notice of his intent to resign. MSN informed Ridgway that he did not need to work his two-week notice period and instructed him to leave on 5 July 2005.

Several of MSN's employees testified that, after Ridgway's resignation, Ridgway attempted to recruit them to join Trinity. From August 2005 through the time of trial, ten nurses resigned from MSN and began working for Trinity. Ridgway also attempted to solicit MSN's clients, including WakeMed. Ridgway's relationship with WakeMed predated his employment with MSN.

In the year following Ridgway's departure, MSN's revenue declined, and Trinity's revenue increased significantly. WakeMed, however, is the only client that MSN claims it lost to Trinity.

I. Novation

[1] First on appeal, defendants contend that the trial court erred by holding that the 2000 Agreement was legally binding on the parties. Defendants argue that the 2000 Agreement was superseded by a Confidentiality and Noncompetition Agreement, which was executed in 2001 as part of a 2001 Incentive Stock Option Agreement ("2001 Agreement"). The 2001 Agreement is between MSN's corporate parent, MSN Holdings, Inc. ("MSN Holdings"), and Ridgway, and includes restrictive covenants concerning nondisclosure of confidential information, non-solicitation of employees and clients, and noncompetitions. We disagree.

North Carolina recognizes several methods by which a contract may be discharged, including a novation, which is the substitution of a new contract. *Equipment Co. v. Anders*, 265 N.C. 393, 400, 144 S.E.2d 252, 257 (1965). It is well established that

> " '[t]he essential requisites of a novation are [1] a previous valid obligation, [2] the agreement of all the parties to the new contract, [3] the extinguishment of the old contract, and [4] the validity of the new contract' . . . . 'Ordinarily . . . in order to constitute a novation, the transaction must have been so intended by the parties.' "

Bowles v. BCJ Trucking Servs., Inc., 172 N.C. App. 149, 153, 615 S.E.2d 724, 727, *disc. review denied*, 360 N.C. 60, 623 S.E.2d 579 (2005) (citations omitted).

> If the parties do not say whether a new contract is being made, the courts will look to the words of the contracts, and the surrounding circumstances, if the words do not make it clear, to determine whether the second contract supersedes the first. If the second contract deals with the subject matter of the first so comprehensively as to be complete within itself or if the two contracts are so inconsistent that the two cannot stand together a novation occurs.

Whittaker General Medical Corp. v. Daniel, 324 N.C. 523, 526, 379 S.E.2d 824, 827, *reh'g denied*, 325 N.C. 277, 384 S.E.2d 531 (1989).

Additionally, the presence of a merger clause in a second contract may cause a novation in a second contract. "Merger clauses create a rebuttable presumption that the writing represents the final agreement between the parties. Generally, in order to effectively rebut the presumption, the claimant must establish the existence of fraud, bad faith, unconscionability, negligent omission or mistake in fact." *Zinn v. Walker*, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987), *disc. review denied*, 321 N.C. 747, 366 S.E.2d 871 (1988).

The one exception to this general rule applies when giving effect to the merger clause would frustrate the parties' true intentions. *Id.* Under this exception, the court can look to "the parties' overall intended purposes of the transaction in each case and whether admission of parol evidence will contradict or support those intentions as expressed in the writing(s)." *Id.* at 333, 361 S.E.2d at 319.

In the case at bar, while the 2001 Agreement does not include express language indicating that it was intended to supersede the 2000 Agreement, it does contain the following merger clause:

> 5. Entire Agreement. This Agreement reflects the entire agreement between the parties with regard to its subject matter and may not be modified or amended except in a writing signed by both parties.

Because MSN has not presented any evidence of fraud, bad faith, unconscionability, negligent omission or mistake in fact to rebut the presumption of novation created by the above merger clause, the determinative issue is whether the trial court properly concluded that giving effect to the 2001 merger clause would frustrate the parties' true intentions.

Here, the trial court concluded that the "2001 Agreement goes beyond the 2000 Agreement and places additional—but not inconsistent—restrictions upon Mr. Ridgeway." We agree that the covenants of the 2000 Agreement and 2001 Agreement are not wholly inconsistent, but rather, can be enforced consistently.

Likewise, the trial court found that the 2000 Agreement and 2001 Agreement were executed for different purposes. We agree that the contexts in which the two agreements were executed are distinguishable. The evidence shows that the 2000 Agreement was executed to govern the employment relationship between Ridgway, as an employee, and MSN, as his employer. This type of agreement was

signed by all MSN employees upon commencement of the employment relationship; whereas, the 2001 Agreement was executed as part of a stock purchase agreement, between MSN Holdings, as a seller of stock, and Ridgway, as the purchaser of that stock. Only select employees were invited to participate in Holding's stock plan.

The trial court's findings that the agreements were executed for two distinct purposes and can be enforced consistently supports the trial court's conclusion that the two agreements were not intended to be substitutes, but rather, were to be construed together, the merger clause notwithstanding. *See Generally Davis v. National Medical Enterprises, Inc.*, 253 F.3d 1314, 1320 (11th Cir. 2001) (Distinguishing employment agreements and stock purchase agreements based upon the divergent purposes and the parties involved in each). Accordingly, the trial court did not err in concluding that the 2000 Agreement had not been superseded by the 2001 Agreement.

II. Restrictive Covenants

[2] Next, defendants contend that the restrictive covenants in the 2000 Agreement are invalid as a matter of law. We agree.

"When considering the enforceability of a covenant not to compete, a court examines the reasonableness of its time and geographic restrictions, balancing the substantial right of the employee to work with that of the employer to protect its legitimate business interests." *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 86, 638 S.E.2d 617, 618 (2007). The reasonableness of a non-competition covenant is a matter of law for the court to decide. *Shute v. Heath*, 131 N.C. 281, 282, 42 S.E. 704, 704 (1902). Such agreements are disfavored by the law. *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 121-22, 516 S.E.2d 879, 883, *disc. review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999), *cert. denied*, 528 U.S. 1155, 145 L. Ed. 2d 1072 (2000).

To be enforceable under North Carolina law, a non-competition agreement must be: (1) in writing; (2) part of an employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) designed to protect a legitimate business interest. *See Farr Assocs. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000). The party who seeks enforcement of the covenant has the burden of proving the reasonableness of the agreement. *Hartman v. Odell and Assoc., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995).

To be valid, the restrictions "must be no wider in scope than is necessary to protect the business of the employer." *Manpower v. Hedgecock*, 42 N.C. App. 515, 521, 257 S.E.2d 109, 114 (1979). In North Carolina, "[t]he protection of customer relations against misappropriation by a departing employee is well recognized as a legitimate interest of an employer." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 651, 370 S.E.2d 375, 381 (1988), *disc. review granted in part*, 330 N.C. 123, 409 S.E.2d 610 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993). Additionally, a covenant is reasonably necessary for the protection of a legitimate business interest " 'if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers[.]' " *A.E.P. Industries v. McClure*, 308 N.C. 393, 408, 302 S.E.2d 754, 763 (1983) (citations omitted)).

This Court has held that restrictions barring an employee from working in an identical position for a direct competitor are valid and enforceable. *See Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 638-39, 568 S.E.2d 267, 273 (2002) (finding a one-year, two-state restriction against employment with a direct competitor to be reasonable and within a legitimate business interest). However, we have held that restrictive covenants are unenforceable where they prohibit the employee from engaging in future work that is distinct from the duties actually performed by the employee. *See, e.g., Paper Co. v. McAllister*, 253 N.C. 529, 534-35, 117 S.E.2d 431, 434 (1960) (finding a non-compete covenant overbroad and unenforceable where the employee's employment duties were confined exclusively to the *sale and distribution* of *fine* paper products, yet the restrictive covenant contained in his employment agreement sought to prevent him from engaging in the manufacture or distribution of *all* paper or paper products); *see also VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508-09, 606 S.E.2d 359, 362-63 (2004) (finding a two-year restriction against employment with "similar businesses" throughout the Southeast to be unreasonable). Likewise, we have held that one franchisee has no legitimate interest in preventing an employee from competing with franchisees in other cities or states. *Manpower*, 42 N.C. App. at 522-23, 257 S.E.2d at 115.

Here, defendants contend that the restrictive covenants are facially overbroad and unenforceable because they are not limited to the protection of the interests of Medical Staffing Network,

Inc., Ridgway's employer, but, rather, the 2000 Agreement defines "MSN" to include "any parent, division, subsidiary, affiliate, predecessor, successor, or assignee." As drafted, the covenant not to compete would prevent Ridgway from working in any business within a 60-mile radius of Raleigh that competes with MSN's parent, or any of its divisions, subsidiaries, affiliates, predecessors, or assignees, even if Ridgway's employment duties for MSN had nothing to do with that business.

Likewise, as drafted, the non-solicitation clause contained in Section 9(b) of the 2000 Agreement prevents Ridgway not only from engaging in business with current or former clients of MSN with whom he developed a relationship, but also prohibits him from soliciting the business of any "MSN client," which as defined by the agreement, includes clients of any of MSN's affiliates or divisions outside of the medical staffing business with whom Ridgway would not have had contact. *See Electrical South, Inc. v. Lewis*, 96 N.C. App. 160, 167, 385 S.E.2d 352, 356 (1989), *disc. review denied*, 326 N.C. 504, 393 S.E.2d 876 (1990) (interpreting the word "or" in its conjunctive sense so as to construe the restriction against the drafter).

MSN presented no evidence, and the trial court made no findings that MSN had any legitimate business interest in preventing competition with, foreclosing the solicitation of clients and employees of, and protecting the confidential information of an unrestricted and undefined set of MSN's affiliated companies that engage in business distinct from the medical staffing business in which Ridgway had been employed. We conclude that on its face, this bar extends beyond any legitimate interest MSN might have in this case.[2] As such, the restrictive covenants in the 2000 Agreement are unenforceable, and we reverse with respect to MSN's breach of contract claim. *Accord Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d 667, 682-85, (S.D. Ind. 1997); *Brenneman v. NVR, Inc.*, 2007 U.S. Dist. LEXIS 12761 (S.D. Ohio 2007); *Industrial Techs. v. Paumi*, 1997 Conn. Super. LEXIS 1499 (Conn. Super. Ct. 1997).

2. There is also evidence that the restrictive covenants at issue are overbroad as applied to the facts of this case. For instance, one of MSN Holding's divisions, General Staffing Network ("GSN"), engages in clerical, administrative, and industrial staffing. GSN does not engage in medical staffing and is managed separately from MSN. As applied, the 2000 Agreement would foreclose Ridgway's opportunity to work in or solicit, every company in any of these industries, within 60 miles of Raleigh, despite the fact that the nature of Ridgway's employment with MSN was not such as to have brought him in personal contact with GSN's customers or to have enabled him to acquire valuable information as to the nature and character of GSN's business or the names and requirements of GSN's customers.

III. Interference with Contract

[3] By their third assignment of error, defendants argue that the trial court erred in finding defendants liable for tortious interference with a contract because the 2000 Agreement was not a valid contract. We agree. As previously discussed, the 2000 Agreement is so overbroad as to be unenforceable. Accordingly, we reverse with respect to MSN's tortious interference with a contract claim.

IV. Misappropriation of Trade Secrets

[4] By their fourth assignment of error, defendants challenge the trial court's finding that defendants misappropriated two categories of trade secrets, information about *per diem* nurses and business strategies and marketing plans. Defendants contend that (1) there was insufficient evidence to support the trial court's findings that Ridgway copied or transmitted any information from MSN's database; and (2) MSN failed to prove it was damaged by any of the alleged misappropriation of trade secrets. We disagree.

In order to establish a *prima facie* case for trade secret misappropriation, MSN must offer substantial evidence that the defendant "(1) knows or should have known of the trade secret, and (2) has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed or used it without the express or implied consent of the owner." N.C. Gen. Stat. § 66-155 (2007).

Defendants place great weight on the fact that MSN has no direct evidence that Ridgway copied or transmitted any information from MSN's database, which contained MSN's nurses' phone numbers, pay rates, specializations, and preferences regarding shifts and facilities. Likewise, defendants argue that although there was evidence that Ridgway accessed marketing information and client order documents during his last thirty days at MSN, MSN presented no evidence that Ridgway used information about MSN's business strategies and marketing plans once he joined Trinity. Direct evidence, however, is not necessary to establish a claim for misappropriation of trade secrets; rather, such a claim may be proven through circumstantial evidence. *See Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 376-77, 542 S.E.2d 689, 693 (2001) (holding that the plaintiff's circumstantial evidence was sufficient to support a trade secret misappropriation cause of action); *Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC*, 174 N.C. App. 49, 57-58, 620 S.E.2d 222, 229 (2005), *disc. review denied*, 360 N.C. 296, 629 S.E.2d 289 (2006) (holding that cir-

cumstantial evidence of the defendant's access to trade secrets combined with a substantial increase in the defendant's business, and concurrent, substantial decrease in the plaintiff's business in the same locations, during the same time period, was sufficient to establish a *prima facie* case of misappropriation of trade secrets); *see also Static Control Components v. Darkprint Imaging*, 200 F. Supp. 2d 541, 545-46 (2002).

Here, MSN has not rested on bare allegations and speculation. Instead, MSN introduced evidence that Trinity, through Ridgway, had access to MSN's trade secrets as well as the opportunity to use them. There is evidence that shortly before the Angus Barn dinner with Trinity and repeatedly after the dinner, Ridgway accessed MSN's "game plan" and other confidential documents from MSN's network with unusual frequency. MSN also introduced evidence that following Ridgway's resignation, Ridgway began calling nurses in an effort to recruit them to join Trinity. Thus, there is evidence that Ridgway had access to and was using MSN's confidential nurse contact information after he left MSN. In addition to defendants' access to MSN's game plan and marketing information, there is evidence of a substantial turnaround in Trinity's business, as well as a concurrent, substantial decrease in MSN's business in the same market, during the same time period. Viewing all of these circumstances together, there was sufficient evidence to sustain a finding that defendants knew of MSN's confidential information, had an opportunity to acquire it, and did so, causing MSN harm. This assignment of error is overruled.

V. Unfair and Deceptive Trade Practices

[5] By their fifth assignment of error, defendants contend that the trial court erred in holding that Trinity committed unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 (2007). We disagree.

Under N.C. Gen. Stat. § 75-1.1, a plaintiff must prove "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

A violation of the Trade Secrets Protection Act constitutes an unfair act or practice under N.C. Gen. Stat. § 75-1.1. N.C. Gen. Stat. § 66-146 (2007). Here, as previously discussed, the trial court's findings that Trinity violated the trade secret protection act and caused injury to MSN are supported by competent evidence. These findings

support the court's conclusion that Trinity committed unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1. N.C. Gen. Stat. § 66-146.

VI. Damages

[6] Finally, defendants contend that MSN's proof and the trial court's award were based on an improper measure of damages. We agree.

Since we have concluded that the 2000 Agreement is overbroad and unenforceable as a matter of law, MSN's breach of contract claim and tortious interference with a contract claim fail. The proper measure of damages for MSN's claim for misappropriation of trade secrets is the "economic loss or the unjust enrichment caused by misappropriation of a trade secret, whichever is greater." N.C. Gen. Stat. § 66-154(b) (2007). The damages award, as stated in the trial court's order, does not specify the portion of damages that is attributable to the misappropriation claim. Thus, we vacate the portion of the order awarding damages and remand for a new calculation and award of the greater of either the extent to which MSN has suffered economic loss or the extent to which Trinity has unjustly benefitted from the use of MSN's (1) marketing strategy information and (2) *per diem* nurse information, including nurses' home phone numbers, pay rates, specializations, and preferences regarding shifts and facilities.

We note, however, that the party seeking damages bears the burden of showing that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 585, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). While the reasonable certainty standard does not require absolute certainty, it requires something more than "hypothetical or speculative forecasts." *Southern Bldg. Maintenance v. Osborne*, 127 N.C. App. 327, 332, 409 S.E.2d 892, 896 (1997).

We agree with defendants that the trial court's use of Trinity's total revenue as a basis for calculating MSN's lost profits[3] was too speculative to constitute a proper measure of damages. In addition to the arbitrary "midpoint" used in this calculation, this measure of dam-

3. The trial court's order provides that to calculate lost profit, the trial court used the mid-point between Trinity's approximate total revenues and MSN's approximate decreased revenue since Trinity hired Ridgway, and then, multiplied that number by a 12 percent profit margin. The trial court noted that 12 percent was "a conservative profit percentage given that the actual operating profit of the MSN Raleigh Branch during the relevant time period was 12.3 percent."

ages was based on the faulty premise that MSN would have gained all of Trinity's revenue but for defendant's wrongful conduct. *See Olivetti*, 319 N.C. at 548, 356 S.E.2d 587. We conclude that Trinity's revenue could have increased for a number of reasons unrelated to defendants' conduct. For example, if any of Trinity's former clients simply expanded their operations and began placing larger nurse orders, Trinity's revenue would increase, and such increase would not have been proximately caused by defendants' conduct.

We conclude that a more reasonably certain measure of the economic loss or the unjust enrichment proximately caused by Trinity's misappropriation of MSN's nurse information would be the profit that Trinity gained from the ten nurses that Trinity acquired from MSN. Likewise, to measure the economic loss or the unjust enrichment proximately caused by Trinity's misappropriation of MSN's marketing strategy information, the trial court should consider whether MSN's and Trinity's respective market shares have changed since Trinity acquired MSN's marketing information and "game plan"; if so, the court should measure profits attributable to such changes in the respective market shares. In calculating profit with reasonable certainty, the trial court must take into account all relevant factors, which in this case, would include, for instance, the rates paid by MSN's and Trinity's clients as well as the rates paid to the nurse employees during the relevant time period. *See McNamera v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 411-12, 466 S.E.2d 324, 332, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996) (vacating and remanding for a new trial on damages where the damages award was not based on all relevant factors).

For the foregoing reasons, we reverse in part and vacate and remand for a new trial on the issue of damages.

Reversed in part and vacated and remanded in part.

Judges McGEE and STROUD concur.

Concurred prior to 31 December 2008.

DOROTHY HUNT, EMPLOYEE, PLAINTIFF v. NORTH CAROLINA STATE UNIVERSITY, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, ADMINISTERING AGENT), DEFENDANT

No. COA07-1374

(Filed 6 January 2009)

1. Workers' Compensation— vocational report—findings regarding documents used during depositions not required

The full Industrial Commission did not improperly disregard in a workers' compensation case the expert opinions of a vocational expert by not mentioning his vocational report in its 13 April 2007 opinion and award because: (1) the expert did not testify either at the hearing or by deposition, but instead the report was relied upon by two testifying doctors; and (2) the Commission did make findings of fact regarding the doctors' deposition testimony and opinions, and it was not necessary for the Commission to make further findings regarding the documents used during the depositions.

2. Workers' Compensation— change of condition—burden of proof on party claiming change

The full Industrial Commission did not err in a workers' compensation case by concluding in its 13 April 2007 opinion and award that plaintiff employee has not suffered a change of condition because: (1) the depositions of two doctors did not indicate that plaintiff has developed a new condition, but instead seemed to indicate that plaintiff has been permanently and totally disabled since before the 6 February 2002 opinion and award; (2) even when the responses indicated that plaintiff has developed a new condition, the dialogue indicated it was not necessarily causally related to the injury but instead due to plaintiff's retirement and sedentary lifestyle; (3) the burden was upon plaintiff to prove a change in condition, and as the doctors were presented with lengthy hypotheticals and appeared to rely mostly, if not solely, on plaintiff's subjective history and current feelings, the Commission did not err by giving little weight to the depositions; and (4) although plaintiff contends several of the other findings of fact and conclusions of law are erroneous, it was irrelevant in light of the fact that plaintiff failed to establish a change in condition and the 6 February 2002 opinion and award could not be modified without a change in condition.

3. Workers' Compensation— medications—reasonableness for requirement of treatment

The full Industrial Commission did not err in a workers' compensation case by concluding medications prescribed by the authorized treating physician for plaintiff's fibromyalgia and its sequelae are not reasonably required for the treatment of plaintiff's compensable conditions because: (1) although plaintiff contends the Commission's consideration of an unsworn report denied her due process of law, there was no evidence that plaintiff was prevented from cross-examining the doctor who wrote the report through a deposition, but instead plaintiff chose not to do so and never objected to the evidence; and (2) the findings of fact supported the conclusion of law that the prescription of Mucinex, Armour Thyroid, and Belladonna were not reasonably required for the treatment of the injuries.

Appeal by plaintiff from opinion and award entered 13 April 2007 and opinion and award entered 20 August 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 August 2008.

Lennon & Camak, P.L.L.C., by George W. Lennon and Michael W. Bertics, for plaintiff appellant.

Attorney General Roy Cooper, by Assistant Attorney General Gary A. Scarzafava, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff appeals from an opinion and award and order from the Full Commission of the North Carolina Industrial Commission. For the following reasons, we affirm.

I. Background

The procedural background of this case is quite extensive as plaintiff has already been before this Court on a prior appeal, and thus we will only recite the background pertinent for an understanding of the appeal currently before us.[1] "On May 22, 1998, plaintiff sustained an admittedly compensable injury by accident arising out of and in the course and scope of her employment with defendant-employer when she fell on a wet floor, catching herself with her

1. *See Hunt v. N.C. State Univ.*, 159 N.C. App. 111, 582 S.E.2d 380, *disc. review of additional issues denied*, 357 N.C. 505, 587 S.E.2d 668 (2003).

right hand and falling on the right side of her posterior." In its 13 April 2007 opinion and award the Full Commission found that:

> 12. On February 6, 2002, the Full Commission entered an Opinion and Award finding that plaintiff "sustained injury to her right wrist and low back and developed symptoms of fibromyalgia" and that plaintiff *was not permanently and totally disabled as a result of the May 22, 1998 accident*. The Full Commission's Opinion and Award was affirmed by the Court of Appeals.

(Emphasis added.) The Full Commission further found "[i]n the matter at hand, plaintiff contends that she has sustained a change of condition[.]"

II. Standard of Review

On 20 August 2007, the Full Commission filed an order denying plaintiff's motion to compel medical treatment. Plaintiff appeals from the 13 April 2007 opinion and award and the 20 August 2007 order. Plaintiff presents several issues on appeal, arguing that the Full Commission erred in its failure to consider certain evidence, that it erred as to certain findings of facts and legal conclusions, that it relied on incompetent evidence, and that it failed to apply the law properly. For the following reasons, we affirm.

Standard of Review

> Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." This Court reviews the Commission's conclusions of law *de novo*.

Ramsey v. Southern Indus. Constructors, Inc., 178 N.C. App. 25, 29-30, 630 S.E.2d 681, 685 (citations omitted), *disc. review denied*, 361 N.C. 168, 639 S.E.2d 652 (2006). " 'Where 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 not affect the conclusions.' " *Meares v. Dana Corp.*, 193 N.C. App. 86, 89-90, 666 S.E.2d 819, 823 (2008) (citation omitted).

III. Consideration of Evidence

[1] Plaintiff first contends "the Full Commission improperly disregarded the expert opinions of the vocational expert, Stephen

Carpenter [("Mr. Carpenter")]" by not considering or mentioning Mr. Carpenter's vocational report in its 13 April 2007 opinion and award. Plaintiff cites to *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 541 S.E.2d 510 (2001); *Pittman v. International Paper Co.*, 132 N.C. App. 151, 510 S.E.2d 705, *aff'd per curiam*, 351 N.C. 42, 519 S.E.2d 524 (1999); and *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 486 S.E.2d 252 (1997), arguing that this Court has formerly determined it was error for the Industrial Commission not to indicate or even mention in its opinion and award that it considered certain evidence presented before it.

However, *Jenkins*, *Pittman*, and *Lineback* are all distinguishable from the present case because in each of those cases the issue concerned the Industrial Commission's alleged failure to mention or indicate that it considered testimony or depositions. *See Jenkins*, 142 N.C. App. at 79, 541 S.E.2d at 515 ("[W]e hold that the Commission erred in failing to indicate that it considered the testimony of Dr. Downes. Consequently, the opinion and award of the Industrial Commission must be vacated, and the proceeding 'remanded to the Commission to consider all the evidence, make definitive findings and proper conclusions therefrom, and enter the appropriate order.' ") (citation omitted); *See Pittman*, 132 N.C. App. at 157, 510 S.E.2d at 709 ("Although the Commission did not explicitly find that it rejected the opinions expressed by Dr. Markworth in his first deposition, its opinion and award clearly demonstrates that it accepted the testimony given by Dr. Markworth in his second deposition, and thereby rejected the contrary testimony found in Dr. Markworth's first deposition. It is obvious that the Commission considered all the evidence before it and was not required to make an express finding that it did so."); *Lineback*, 126 N.C. App. at 681, 486 S.E.2d at 254 ("Dr. Comstock's testimony corroborates the information on plaintiff's Form 19 that the injury was caused by a "twisting motion" when he exited the rescue vehicle. However, in finding facts, the Commission made no definitive findings to indicate that it considered or weighed Dr. Comstock's testimony with respect to causation. Thus, we must conclude that the Industrial Commission impermissibly disregarded Dr. Comstock's testimony, and, in doing so, committed error.").

Here, unlike in *Jenkins*, *Pittman*, and *Lineback*, Mr. Carpenter did not testify either at the hearing or by deposition. *See Jenkins*, 142 N.C. App. at 79, 541 S.E.2d at 515; *Pittman*, 132 N.C. App. at 157, 510 S.E.2d at 709, *Lineback*, 126 N.C. App. at 681, 486 S.E.2d at 254. Thus, plaintiff is contending that we should extend the *Jenkins*, *Pittman*,

and *Lineback* line of cases to require findings of fact regarding a report, which was used by Dr. Hedrick and Dr. Kittelberger; we refuse to do so. Physicians frequently rely upon a variety of documents by other medical professionals in their diagnosis and treatment of patients as well as in forming their opinions and giving expert testimony. The Commission did make findings of fact regarding Dr. Hedrick's and Dr. Kittelberger's deposition testimony and opinions. It was not necessary for the Commission to make further findings regarding the documents used during the depositions. *See Graham v. Masonry Reinforcing Corp. of Am.*, 188 N.C. App. 755, 763-64, 656 S.E.2d 676, 682 (2008) ("[T]he commission is not required to make findings as to each fact presented by the evidence[.]"). This argument is overruled.

IV. Change of Condition

[2] Plaintiff also contends that the Full Commission erred in concluding that "[p]laintiff has not suffered a change of condition" in its 13 April 2007 opinion and award. Plaintiff contends that "Dr. Kittelberger and Dr. Hedrick were the only medical experts to testify after the prior final Opinion and Award[,]" and thus essentially only their testimony should be considered on this issue.

"Whether there has been a change of condition is a question of fact; whether the facts found amount to a change of condition is a question of law." *West v. Stevens Co.*, 12 N.C. App. 456, 460, 183 S.E.2d 876, 879 (1971).

> 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, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

N.C. Gen. Stat. § 97-47 (2007).

Section 97-47 of the North Carolina General Statutes provides that upon the application of an interested party "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." *A change of condition for purposes of N.C. Gen. Stat. § 97-47, is "a substantial change in physical capacity to earn wages, occurring after a final award of compensation, that is different from that existing when the award was made.*" A change in condition may consist of either: a change in the claimant's physical condition that impacts his earning capacity"; "a change in the claimant's earning capacity even though claimant's physical condition remains unchanged"; "or a change in the degree of disability even though claimant's physical condition remains unchanged."

"*The party seeking to modify an award based on a change of condition bears the burden of proving that a new condition exists and that it is causally related to the injury upon which the award is based.*" *A plaintiff must prove the element of causation "by the greater weight of the evidence*[.]"

Shingleton v. Kobacker Grp., 148 N.C. App. 667, 670-71, 559 S.E.2d 277, 280 (2002) (citations omitted) (emphasis added). "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) (citations omitted). Thus, in order to modify the 6 February 2002 opinion and award which found "that plaintiff was not permanently and totally disabled" plaintiff must prove "that a new condition exists" and must also prove "by the greater weight of the evidence[,]" "that it is causally related to the injury[.]" *See Shingleton*, 148 N.C. App. at 670-71, 559 S.E.2d at 280; *see also Blair*, 124 N.C. App. at 423, 477 S.E.2d at 192.

Furthermore,

"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."

. . . 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." 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."

Meares, 193 N.C. App. at 91, 666 S.E.2d at 823-24 (citations omitted).

The Full Commission found as fact:

24. Dr. Kittelberger, an anesthesiologist, initially testified during his deposition that plaintiff was disabled. However, this opinion was given following hypothetical questions posed by plaintiff's counsel based on the assumption that plaintiff was removed from her light duty position by Dr. Yellig. The undersigned hereby find that the facts forming the basis of the hypothetical posed by plaintiff's counsel are not supported by the record in this case and are not found as facts herein.

. . . .

26. Dr. Kittelberger determined that plaintiff was disabled because she was deconditioned as a consequence of her leaving work and assuming a sedentary lifestyle and that her deconditioning is not necessarily due to her injury. Dr. Kittelberger was unable to opine as to whether plaintiff could have continued to work had she not elected to retire on State Retirement System disability. The undersigned hereby find that Dr. Kittelberger's testimony does not establish that plaintiff was not and is not able to engage in any employment as a result of her compensable injury.

. . . .

30. Dr. Hedrick testified that his opinions were based on the assumption that plaintiff could not work. The hypothetical questions posed to Dr. Hedrick asked him to assume that plaintiff was attempting to return to highly modified work when Dr. Yellig took her off from work and she was found to be qualified for State Retirement System disability. The hypothetical incorrectly assumed that plaintiff had an unsuccessful return to work, that

she returned to a highly modified job, and that she was in fact removed from this position by Dr. Yellig. Further, Dr. Hedrick's opinions were based on plaintiff's subjective history. Accordingly, the undersigned give little weight to Dr. Hedrick's opinion.

. . . .

36. The opinions of Dr. Kittelberger and Dr. Hedrick that plaintiff is not able to work are given little weight as they did not perform a functional capacity evaluation or other testing to measure plaintiff's ability to work. The opinions of these doctors relied on inaccurate information (including Dr. Kittelberger's belief that the FCE results indicated that plaintiff could not work) and on plaintiff's subjective history, and are not given as much weight as the functional capacity evaluation.

The Full Commission concluded that "[p]laintiff has not suffered a change of condition."

As to Dr. Kittelberger, in his deposition he indicates plaintiff is "totally disabled" and "unemployable[.]" However, these responses, as noted by the Full Commission, are immediately preceded by approximately a two and one-half page hypothetical question.

The following dialogue also took place,

Q. (By Mr. Scarzafava) so that we can understand you, a person such as Mrs. Hunt, who has degenerative disc disease, who has fibromyalgia, if they become a couch potato, or otherwise very sedentary in their daily lifestyles, they may have de-conditioning of the muscles, of the joints, and thus it would be more painful and difficult for them to engage in increased activity, would that be correct?

A. Yes.

Q. Okay. When you first saw her in March 2002, Mrs. Hunt had retired from employment since 1999, so she had been out two or three years, is that correct?

A. She had been two or three years, yes.

Later Dr. Kittelberger was also asked:

Q. Okay. Doctor, in your making the assessment that she was not employable during the time period that you were treating her from March 2002 through August 2003, was one of the factors that

you took into consideration, the fact that she hadn't worked for a couple of years?

A. That was one—one factor.

Q. Okay. Was another factor that it appeared that she had de-conditioning, which may be related to her lack of activity since retirement?

A. One factor.

Furthermore, Dr. Kittelberger was also asked, "Likewise, you can't tell us today that if Mrs. Hunt had continued to work as opposed to retiring on long-term disability whether she'd be able to work at this point in time?" to which Dr. Kittelberger responded, "No, I don't think anyone can."

Dr. Kittelberger was also asked,

Q. And, Doctor, so we can understand it, your opinion that she's had a change in her wage earning capacity since 1999 to now, if I understand your testimony earlier today, you don't know whether or not she'd have that change if she had continued to work as opposed to electing to go out on state long-term disability?

A. No. I can't definitely say that.

In his deposition Dr. Kittelberger was also asked, "As I understand it, you performed no actual testing on Mrs. Hunt to determine what her physical capabilities were, is that correct?" Dr. Kittelberger responded, "That's correct."

Dr. Hedrick was asked, over halfway through his deposition, "In formulating your opinions in this case, have you assumed that Dorothy Hunt was unable to perform any employment?" Dr. Hedrick responded, "That's correct." Also, as noted by the Full Commission, some of Dr. Hedrick's responses were in response to an extremely long hypothetical question. Dr. Hedrick also admitted that he did not send plaintiff for a functional capacity evaluation.

Also, the following dialogue took place during Dr. Hedrick's deposition,

Q. Okay. So, as to your actual personal knowledge [in regard to plaintiff's living arrangements and daily activities], all you know is what she's told you?

A. That's right.

Q. And she hasn't told you very much.

A. Right.

Again we reiterate:

> Our review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." "*The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings.*" This Court reviews the Commission's conclusions of law *de novo*.

Ramsey, 178 N.C. App. at 29-30, 630 S.E.2d at 685 (citations omitted) (emphasis added).

After a thorough review of Dr. Kittelberger's and Dr. Hedrick's depositions, we conclude that "there is . . . competent evidence to support the findings of fact[.]" *Id.* at 29, 630 S.E.2d at 685. Overall, the depositions do not indicate that plaintiff has developed a "new condition[,]" but instead seem to indicate that plaintiff has been permanently and totally disabled since before the 6 February 2002 opinion and award. *Shingleton*, 148 N.C. App. at 670, 559 S.E.2d at 280. Furthermore, even when the responses indicate that plaintiff has developed a "new condition" the dialogue indicates it is not necessarily "causally related to the injury[,]" but instead due to plaintiff's retirement and sedentary lifestyle. *See id.* As the doctors were presented with lengthy hypotheticals and appeared to rely mostly, if not solely, on plaintiff's subjective history and current feelings, we do not conclude that the Commission erred in giving their depositions "little weight[.]"

Here, the burden was upon plaintiff to prove a change in condition. *See id.* As "little weight" was given to Dr. Kittelberger's and Dr. Hedrick's testimony, we conclude that " 'the findings of fact justify the conclusion[] of law[,]' " *Ramsey*, 178 N.C. App. at 29, 630 S.E.2d at 685 (citation omitted), that "[p]laintiff has not suffered a change of condition." This argument is overruled.

Plaintiff also argues that several of the Full Commission's other findings of fact and conclusions of law are erroneous; however, this is irrelevant in light of the fact that plaintiff failed to establish a change in condition because without a change in condition, the 6

February 2002 opinion and award cannot be modified. *See Shingleton*, 148 N.C. App. at 670, 559 S.E.2d at 280. As " 'there are sufficient findings of fact based on competent evidence to support the [Commission's] conclusion[] of law[] [that "[p]laintiff has not suffered a change of condition"], the [award] will not be disturbed because of other erroneous findings which do not affect [this determinative] conclusion[]." *Meares*, 193 N.C. App. at 89-90, 666 S.E.2d at 823. Thus, plaintiff's second, third, and sixth briefed arguments are also overruled.

V. Competency of Evidence

[3] Lastly, plaintiff contends that "the Full Commission erred in concluding medications prescribed by the authorized treating physician, Dr. Hedrick, for plaintiff's fibromyalgia and its sequelae are not 'reasonably required for the treatment' of plaintiff's compensable conditions." Plaintiff argues that "[t]he only evidence that disputes Dr. Hedrick's opinions is the unsworn report of Dr. Jeffrey Siegel . . . [which is] incompetent." Plaintiff analogizes her case with *Allen v. K-Mart* in which this Court reversed and remanded a Full Commission opinion and award, according to plaintiff, "for findings based on reports alone without any opportunity for cross-examination." 137 N.C. App. 298, 528 S.E.2d 60 (2000). Plaintiff further contends that the Commission's consideration of this unsworn report has denied her due process of law.

However, plaintiff fails to mention that in the *Allen* case "defendants filed five separate objections to the Commission's allowance of the independent medical examinations[.]" *Id.* at 302, 528 S.E.2d at 63-64. Here, during Dr. Hedrick's second deposition, defendant's attorney specifically reopened the record solely to offer two exhibits, one of which was Dr. Siegel's report, to which plaintiff's attorney responded, "and the plaintiff has no objection." Thus, when defendant submitted an exhibit that read in pertinent part,

> [t]he available literature does <u>not</u> support the use of hormonal analogs (such as Armour thyroid), nor mucinex (and note that Ms. Hunt's sinusitis preexisted her workplace injury). I cannot locate any randomized controlled studies which indicate an appropriate role for these meds, or other meds not specifically included in the synopsis given above. Accordingly, it would not be medically prudent or appropriate to Rx these meds for FMS[,]

plaintiff's attorney specifically stated he had no objections. Furthermore, unlike in *Allen*, there is no evidence that plaintiff was

prevented from cross-examining Dr. Siegel through a deposition. *See Allen*, 137 N.C. App. at 302-03, 528 S.E.2d at 63-64. Instead it appears that plaintiff simply chose not to do so. From the record before us it appears plaintiff never objected to the evidence, so the Commission did not err by considering the evidence.

The Full Commission found from the report,

> 9. The Employer had the recommended use of Mucinex and Armout [sic] Thyroid reviewed by Jeffrey Siegel, M.D. a board certified Neurologist. Dr. Siegel reported that the accepted treatment for fibromyalgia includes: (1) daily exercise regimen, (2) sleep hygiene, (3) attention to depression, and (4) pain medications. Dr. Siegel did not find any evidence based medical research to support the treatment of fibromyalgia with Mucinex, Armour Thyroid, or other medications not used for sleep hygiene, depression, or pain management. After giving his initial report, Dr. Siegel had the opportunity to examine Mrs. Hunt and explained to her, as stated in his 24 March 2005 report, that isolated case reports and internet literature are not of a high evidential value, and that he recommends relying upon evidence based medicine, such as double-blind research studies.

This finding and the other findings of fact by the Full Commission are supported by competent evidence. *See Ramsey*, 178 N.C. App. at 29, 630 S.E.2d at 685. Furthermore, the findings of fact support the conclusion of law that "[t]he prescription of Mucinex, Armour Thyroid, and Belladonna is not reasonably required for the treatment of the injuries[.]" This argument is overruled.

VII. Conclusion

For the aforementioned reasons, we affirm the 13 April 2007 opinion and award and the 7 August 2007 opinion and order from the Full Commission.

Affirmed.

Judges McGEE and STROUD concur.

Concurred prior to 31 December 2008.

JOHN R. McDONNELL, PLAINTIFF v. TRADEWIND AIRLINES, INC., DEFENDANT

No. COA07-634

(Filed 6 January 2009)

1. Employer and Employee— at-will employee—refusal to fly non-revenue flight—firing not in contravention of North Carolina public policy

The trial court did not err in a wrongful termination in violation of public policy case by concluding defendant's termination of plaintiff at-will employee based on his refusal to fly a nonrevenue flight (or ferry flight) from Vermont to North Carolina on 27 February 2000 was not in contravention of North Carolina public policy because: (1) contrary to plaintiff's assertion, 14 C.F.R. § 91.13 and N.C.G.S. § 63-13 do not constitute public policy exceptions, and N.C.G.S. § 63-13 was not applicable to the facts in this case; (2) the plain meaning of N.C.G.S. § 63-20 and the holding in *Mann*, 261 N.C. 338 (1964), address licensing to operate aircraft and do not speak to declarations of public policy or a public policy exception to the law governing at-will employment; and (3) the Court of Appeals rejected plaintiff's attempt to have his vagueness challenge, based on a motor vehicle statute, applied to the facts of this case.

2. Employer and Employee— wrongful termination—federal aviation regulations—inapplicability to ferry flights

Defendant airline's discharge of plaintiff flight engineer after he refused to fly a nonrevenue (ferry) flight from Vermont to North Carolina did not violate federal regulations requiring an airman who had flown more than eight hours during any consecutive 24 hour period to be given at least 16 hours of rest before being assigned to any duty with the airline, even though plaintiff had flown more than eight hours in the prior 24 hours and had not had 16 hours of rest, because those regulations did not apply to nonrevenue (ferry) flights.

3. Evidence— exclusion of exhibits—company documents

The trial court did not abuse its discretion in a wrongful termination case by excluding from evidence exhibits which were excerpts from defendant's company documents containing definitions of terminology within 14 C.F.R. 121.521 and 121.503 because: (1) the trial court concluded the statutes were to be inter-

preted as written and not as the company's materials defined the terms in issue; and (2) a different result would not have occurred had the policies been admitted.

4. Costs— award of deposition costs—failure to show abuse of discretion

The trial court did not err in a wrongful termination case by awarding defendant deposition costs of $1,596.93 because: (1) plaintiff failed to show the trial court abused its discretion; and (2) although the General Assembly addressed inconsistencies within our case law by providing effective 1 August 2007 that N.C.G.S. § 7A-305 was a complete and exclusive limit on the trial court's discretion to tax costs under N.C.G.S. § 6-20, this case was not governed by the newly enacted legislation.

Appeal by plaintiff from directed verdict entered 20 October 2006 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 11 December 2007.

Smith, James, Rowlette, & Cohen, L.L.P., by Seth R. Cohen and J. David James, for plaintiff-appellant.

Tuggle, Duggins, & Meschan, P.A., by J. Reed Johnston, Jr. and Ryan S. Luft, for defendant-appellee.

BRYANT, Judge.

Tradewind Airlines, Inc. (defendant) terminated John R. McDonnell (plaintiff) from his position as a flight engineer after he refused an assignment to ferry a plane from Burlington, Vermont to Greensboro, North Carolina. Plaintiff alleges that his flight schedule preceding the termination of employment violated several Federal Aviation Regulations (FARS), and, as a result, he was too fatigued to execute his duties safely. For the reasons stated herein, we affirm the judgment of the trial court.

FACTS/PROCEDURAL HISTORY

Plaintiff began working as a flight engineer for Defendant Tradewind Airlines in December 1997. On 26 February 2000, plaintiff reported for duty at 6:45 a.m. and remained on duty until 10:15 a.m. the next morning. While plaintiff was resting in his motel room in Burlington, Vermont defendant requested that plaintiff fly the plane without passengers (a.k.a. "ferry flight") back to Greensboro, North Carolina at midnight the evening of 27 February 2000. Plaintiff indi-

cated he was too tired, refused to make the flight, and was terminated from employment with defendant.

Plaintiff filed a wrongful termination suit against defendant in Guilford County Superior Court. Defendant removed the action to federal court, alleging federal question jurisdiction based on preemption of the claim by the Federal Aviation Act (FAA). Defendant moved to dismiss the case. Plaintiff filed a motion to remand alleging the federal court lacked subject matter jurisdiction. On 9 March 2004, the case was remanded to Guilford County Superior Court from the U.S. District Court, Middle District of North Carolina by Judge N. Carlton Tilley, Jr. who determined that

> because the federal courts are of limited jurisdiction and because all doubts should be resolved in favor of remand, this Court finds that the FAA does not completely preempt state law. As such, this Court has no subject matter jurisdiction and the case is remanded to state court for further proceedings.

On 15 July 2004, Superior Court Judge Lindsay R. Davis, Jr. found that plaintiff's claim was not preempted by the FAA and denied defendant's Rule 12(b)(6) motion to dismiss. Defendant filed an answer on 29 July 2004, and filed a motion for summary judgment on 16 June 2006. Plaintiff filed a motion to amend his complaint on 18 August 2006.

On 7 September 2006, defendant's summary judgment motion was denied, and this case came on for trial on 25 September 2006 before Superior Court Judge Stuart Albright in Guilford County. At the close of plaintiff's evidence, defendant moved for a directed verdict which was granted on 20 October 2006. From the trial court's order granting defendant's motion, plaintiff appeals.

Both parties raise several issues on appeal. The issues presented by plaintiff are whether the trial court erred in: (I) granting defendant's motion for a directed verdict and concluding, as a matter of law, that 14 C.F.R. § 91.13 and N.C. Gen. Stat. § 63-13 are too vague and ambiguous to constitute a public policy exception to North Carolina's at-will employment doctrine; (II) granting defendant's motion for a directed verdict, and concluding, as a matter of fact, that no reasonable jury could conclude that defendant violated 14 C.F.R. § 121.521 and 14 C.F.R. § 121.503; (III) excluding from evidence several of plaintiff's exhibits; and, (IV) awarding defendant deposition costs.

On cross-appeal, the issues presented by defendant are whether the trial court erred in: (V) failing to conclude that the public policy exception to the at-will employment doctrine is limited to express statements within North Carolina's statutes or constitution; and (VI) denying defendant's motion to dismiss, and finding that plaintiff's wrongful discharge claim was not preempted by federal law.

Standard of Review

On review, a motion for a directed verdict presents the question of whether the evidence taken in a light most favorable to the plaintiff was sufficient for submission to the jury. *Helvy v. Sweat*, 58 N.C. App. 197, 199, 292 S.E.2d 733, 734 (1982) (citation omitted). The motion should be denied "if there is more than a scintilla of evidence to support all the elements of plaintiff's *prima facie* case." *Southern R. Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 4, 318 S.E.2d 872, 875 (1984). The standard of review for the granting of defendant's directed verdict motion is whether "when viewing the evidence in the light most favorable to plaintiff no reasonable juror could find for plaintiff." *Allen v. Weyerhaeuser, Inc.*, 95 N.C. App. 205, 207, 381 S.E.2d 824, 826 (1989) (citing *West v. Slick*, 313 N.C. 33, 40, 326 S.E.2d 601, 606 (1985)).

I

[1] The critical question this Court is being asked to address is whether defendant's termination of plaintiff based on his refusal to fly a non-revenue flight (or ferry flight) back to Greensboro on 27 February 2000 was in contravention of North Carolina public policy. We conclude it was not.

In North Carolina, employment is generally terminable by either the employer or employee for any reason where no contract exists specifying a definite period of employment. *Rucker v. First Union Nat'l Bank*, 98 N.C. App. 100, 102, 389 S.E.2d 622, 624 (1990) (citation omitted). This is a bright-line rule with very limited exceptions. An at-will employee may not be terminated: "(1) for refusing to violate the law at the employers [sic] request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy." *Ridenhour v. IBM*, 132 N.C. App. 563, 568-69, 512 S.E.2d 774, 778 (1999) (internal citations omitted).

Here, it is undisputed that plaintiff was an at-will employee, and the first issue on appeal is whether defendant's actions violated the public policy of North Carolina. To prevail on a claim for unlawful ter-

mination in violation of public policy "a plaintiff must identify a specified North Carolina public policy that was violated by an employer in discharging the employee." *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 694, 575 S.E.2d 46, 52 (2003) (citation omitted).

In *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989), our Supreme Court first recognized a public policy exception to the employment-at-will doctrine:

> [W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Id. at 175, 381 S.E.2d at 447 (quoting *Sides v. Duke Hospital*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826 (1985)). In *Coman*, the plaintiff brought suit for wrongful discharge, alleging he was terminated from his employment as a long-distance truck driver after refusing to falsify driving records, a violation of federal transportation regulations. *Id.* at 173-74, 381 S.E.2d at 446. The Court held the actions of the defendant violated the public policy of North Carolina as set out in certain general statutes that promulgate highway safety and regulation. *Id.* at 175, 381 S.E.2d at 447. "[P]ublic policy has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 175 n.2, 381 S.E.2d at 447 n.2 (citing *Petermann v. Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P. 2d 25 (Cal. App. 2d Dist, 1959)).

While *Coman* establishes the availability of a tort action for wrongful discharge in violation of public policy, the Court did not otherwise define what constituted "public policy" for purposes of such a claim. *Id.* at 177, 381 S.E.2d at 448. The public policy exception, under which plaintiff in the instant case brings this suit, is not encapsulated by an enumerated list. *Garner v. Rentenbach Constructors, Inc.*, 129 N.C. App. 624, 628, 501 S.E.2d 83, 86 (1998). Rather, this exception is applicable where (1) the public policy of North Carolina is clearly expressed within our general statutes or state constitution, or (2) potential harm to the public is created by defendant's unlawful actions. *See Considine v. Compass Group USA, Inc.*, 145 N.C. App. 314, 321, 551 S.E.2d 179, 184 (2001); *see also Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992) ("Although

the definition of 'public policy' approved by this Court does not include a laundry list of what is or is not 'injurious to the public or against the public good,' at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.").

Plaintiff argues that the trial court erred in finding that 14 C.F.R. § 91.13 and N.C.G.S. § 63-13 are too ambiguous and vague as a matter of law to constitute North Carolina public policy. We disagree.

Under 14 C.F.R. § 91.13, "Careless or reckless operation":

> (a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another, (b) Aircraft operations other than for the purpose of air navigation. No person may operate an aircraft, other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce (including areas used by those aircraft for receiving or discharging persons or cargo), in a careless or reckless manner so as to endanger the life or property of another.

14 C.F.R. § 91.13 (2007). Under the North Carolina General Statutes, Section 63-13, "Lawfulness of flight":

> Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable as provided in G.S. 63-14.

N.C.G.S. § 63-13 (2007). Plaintiff asserts that 14 C.F.R. § 91.13 and N.C.G.S. § 63-13 constitute a public policy exception.

We acknowledge the basic premise that we are bound to enforce federal safety regulations where they may be applicable. *See Charlotte v. Spratt*, 263 N.C. 656, 665, 140 S.E.2d 341, 347 (1965) ("[o]ur statutes . . . contemplate full cooperation and compliance with federal statutes and rules and regulations of appropriate federal agen-

cies"); *Mann v. Henderson*, 261 N.C. 338, 341, 134 S.E.2d 626, 628 (1964) (applicable FAS regulations are binding on state courts). However, unlike in *Coman* where the defendant's conduct violated federal regulations and North Carolina public policy, in the instant case 14 C.F.R. § 91.13, in and of itself, is not sufficient to constitute an express statement of our public policy. *See Coman*, 325 N.C. at 178, 381 S.E.2d at 449 ("[W]e do not bottom our opinion upon federal public policy. . . .").

Plaintiff also contends that N.C. Gen. Stat. § 63-13 sufficiently delineates a public policy of aviation safety in this state. However, to the extent the statute mentions air safety, the General Assembly has limited its application to airspace within our state's sovereignty. *See* N.C. Gen. Stat. § 63-11 (2007) (North Carolina retains sovereignty over air space above this State "except where granted to and assumed by the United States."). As a result, N.C.G.S. § 63-13 is not applicable to the facts in the instant case. See 49 U.S.C. § 40103 (b) (1) (2007) ("Administrator of the [FAA] shall develop plans and policy for the use of the navigable airspace[.]"); 49 U.S.C. § 40102(a)(32) (2007) (" 'navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations . . . including airspace needed to ensure safety in the takeoff and landing of aircraft").

Within the North Carolina General Statutes, we have found no express policy declarations indicating that the public policy of North Carolina was contravened when defendant terminated plaintiff from his at-will employment. Plaintiff, however, points to N.C. Gen. Stat. § 63-20 which requires any person operating aircraft in this state to have a federal license, and to case law stating "[f]ederal laws and regulations where applicable, are, of course, binding on state courts and subject to judicial notice by state courts." *Mann*, 261 N.C. at 341, 134 S.E.2d at 628-29 (1964). Plaintiff claims this is the express language that indicates his termination was in contravention of public policy because the Federal Aviation Regulations are binding on North Carolina. However, in that regard, we are not persuaded.

The plain meaning of N.C.G.S. § 63-20 and the holding in *Mann* address licensing to operate aircraft and do not speak to declarations of public policy or a public policy exception to the law governing at-will employment. *See* N.C.G.S. § 63-20 (2007); *Mann*, 261 N.C. at 341, 134 S.E.2d at 628-29 (1964). Plaintiff also urges this court to review our careless and reckless statute (N.C.G.S. § 20-140) with regard to the trial court's ruling that 14 C.F.R. § 91.13 is too vague and ambiguous to constitute North Carolina public policy.

However, we reject plaintiff's attempt to have his vagueness challenge, based on a motor vehicle statute, applied to the facts of this case. Plaintiff's claim for wrongful termination fails as a matter of law. The trial court did not err in granting defendant's motion for directed verdict. This assignment of error is overruled.

II

[2] Plaintiff next argues the trial court erred by finding that no reasonable jury could conclude, as a matter of fact, that defendant violated 14 C.F.R. § 121.521 or 14 C.F.R. § 121.503. We disagree.

The trial court determined that 14 C.F.R. § 121 did not apply to the "ferry flight." *See* 14 C.F.R. § 91.501 (ferry flights are among those flights not covered by part 121). Nevertheless, we acknowledge that the evidence, viewed in the light most favorable to plaintiff, showed that when defendant ordered plaintiff to fly from Burlington, Vermont to Greensboro, North Carolina plaintiff had been on duty for all or part of thirteen consecutive days from 14 February 2000 through 27 February 2000. Plaintiff contends this was in violation of 14 C.F.R. § 121.521(b) which states that an airman must be relieved of all duties for at least 24 consecutive hours during any seven consecutive days. 14 C.F.R. § 121.521(b). Plaintiff's evidence further shows plaintiff had been aloft as a member of a flight crew for 20 or more hours during any 48 consecutive hours and therefore should have been given at least 18 hours of rest before being assigned to any duty with defendant.

> (a) No certificate holder conducting supplemental operations may schedule an airman to be aloft as a member of the flight crew in an airplane that has a crew of two pilots and at least one additional flight crew member for more than 12 hours during any 24 consecutive hours.
>
> (b) If an airman has been aloft as a member of a flight crew for 20 or more hours during any 48 consecutive hours or 24 or more hours during any 72 consecutive hours, he must be given at least 18 hours of rest before being assigned to any duty with the certificate holder. In any case, he must be relieved of all duty for at least 24 consecutive hours during any seven consecutive days.

14 C.F.R. § 121.521(a)-(b) (2007). "Each pilot who has flown more than eight hours during any 24 consecutive hours must be given at least 16 hours of rest before being assigned to any duty with the certificate holder." 14 C.F.R. § 121.503(b) (2007). "In any operation in

which one flight engineer is serving[,] the flight time limitations in §§ 121.503 and 121.505 apply to that flight engineer." 14 C.F.R. § 121.511(a) (2007).

Plaintiff's evidence also shows plaintiff had flown more than eight hours in the prior 24 hours and would not have had 16 hours of rest before the flight to Greensboro, as required by 14 C.F.R. § 121.503(b). Therefore, plaintiff urges this Court to adopt the plain meaning of each regulation in question which would apparently restrict defendant from assigning plaintiff to any duty during a required rest period. *See* 14 C.F.R. §§ 121.521, 121.503 (2007).

The FAA Office of Chief Counsel offers legal interpretations of Federal Aviation Regulations, and has consistently refused to apply an interpretation that ferry flights occurring after Part 121 flights count toward flight time limitations and rest requirements. While we note that currently there is debate to change the FAA's interpretation of the rest requirements under these types of circumstances, we will accept the FAA's reading of their regulations.

Therefore, despite the hours plaintiff logged prior to being required to fly the ferry flight, the federal regulations cited by plaintiff were not applicable to defendant's directive to plaintiff to make a ferry flight. Thus, the trial court did not err in finding that since plaintiff's claim was based on regulations that were not applicable to plaintiff's flight, such evidence could not support a verdict for plaintiff. Accordingly, plaintiff's assignments of error as to his claims under sections 121.521 and 121.503 are overruled.

III

[3] Plaintiff next argues that the trial court erred in excluding from evidence exhibits 2 and 5 which are excerpts from defendant's company documents containing definitions of terminology within 14 C.F.R. 121.521 and 121.503. We disagree.

We review the trial court's admission of evidence for an abuse of discretion and overturn the decision only if it was so arbitrary that it could not have been the result of a reasoned decision. *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006).

It is undisputed that: (1) each passenger flight preceding the Burlington flight operated under Part 121 of the Federal Aviation Regulations, and (2) the Burlington flight was a ferry flight operating under Part 91. First, Exhibit 2 (the Operations Manual) states that "For company operations actual block time will be used whenever

the term 'aloft' appears in the FARs." Second, Exhibit 5 (the Flight Deck Crew Policy Handbook) states that flight time is defined as "the time from the moment the aircraft first moves for the purpose of flight until it comes to rest at the point of landing (block to block)."

Plaintiff seems to argue that because the FAA was "required to go through [the company's policies] word for word, line by line and page for page" the FAA has ratified the definition of "aloft" that is favorable to plaintiff's position. However, plaintiff has failed to cite any law for this proposition. The trial court excluded the company's documents reasoning that the statutes were to be interpreted as written, not as the company's materials defined the terms in issue. Nevertheless, a different result would not have occurred had the policies been admitted. Therefore, we hold that the exclusion of plaintiff's evidence was not an abuse of discretion by the trial court. See *State v. Sloan*, 180 N.C. App. 527, 532-33, 638 S.E.2d 36, 40 (2006). Accordingly, this assignment of error is overruled.

IV

[4] Last, plaintiff argues that the trial court erred in awarding defendant deposition costs. We disagree.

As a starting point for our analysis we note that some panels of this Court have chosen to use an abuse of discretion standard due to the language under N.C. Gen. Stat. § 6-20, which leaves costs in the discretion of the trial court. *See Cosentino v. Weeks*, 160 N.C. App. 511, 516, 586 S.E.2d 787, 789-90 (2003) (reviewing under an abuse of discretion standard).

In *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516, *disc. review denied*, 360 N.C. 648, 636 S.E.2d 808 (2005), deposition costs were upheld and our Court applied the three-part test stated in *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 596 S.E.2d 891 (2004):

> First, if the costs are items provided as costs under N.C. Gen. Stat. § 7A-305, then the trial court is required to assess these items as costs. Second, for items not costs under N.C. Gen. Stat. § 7A-305, it must be determined if they are "common law costs" under the rationale of [Department of Transp. v.] Charlotte Area [Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780 (2003)]. Third, as to "common law costs" we must determine if the trial court abused its discretion in awarding or denying these costs under N.C. Gen. Stat. § 6-20.

Lord, 164 N.C. App. at 734, 596 S.E.2d at 895 (quoted in *Morgan*, 173 N.C. App. at 581, 619 S.E.2d at 519). In applying these factors in *Morgan*, we noted that while deposition costs are not specifically enumerated in the applicable (pre-2007) version of section 7A-305, they were common law costs that could be awarded under section 6-20, and as such the question on appeal was whether the trial court abused its discretion in awarding them. *Morgan*, 173 N.C. App. at 581-82, 619 S.E.2d at 519-20.

Here, the trial court awarded defendant, the prevailing party, deposition costs of $1,596.93. While there is divergent case law with respect to whether deposition costs are recoverable, *see Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 13, 607 S.E.2d 25, 32-33 (2005), plaintiff has not shown the trial court abused its discretion in awarding deposition costs.

Effective 1 August 2007, the General Assembly addressed the inconsistencies within our case law by providing that N.C. Gen. Stat. § 7A-305 is a "complete and exclusive . . . limit on the trial court's discretion to tax costs pursuant to G.S. 6-20." *See* 2007-212. no. 3 N.C. Advance Legis. Serv. 162-63. However, the present case is not governed by this newly enacted legislation, and thus, we have reviewed the costs pursuant to our current case law. Furthermore, since the *Handex* decision, this Court has decided *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 391, 618 S.E.2d 838, 843 (2005) (unpublished) (the trial court did not abuse its discretion in awarding deposition costs). This assignment of error is overruled. Accordingly, the trial court's order granting defendant deposition costs is affirmed.

As we have overruled plaintiff's assignments of error argued on appeal and affirmed the trial court's judgment in favor of defendant, we decline to reach defendant's arguments on cross appeal. For the reasons stated herein the judgment of the trial court is affirmed.

AFFIRMED.

Judge ELMORE concurs.

Judge WYNN concurs in the result only.

STATE OF NORTH CAROLINA v. CHRIS RANDOLPH MORSE

No. COA08-663

(Filed 6 January 2009)

Criminal Law— instruction—entrapment

The trial court did not err by denying defendant's request to instruct the jury on entrapment in a prosecution for knowingly soliciting a person believed to be a child by computer with intent to commit an unlawful sex act because: (1) the essence of entrapment is a two-step inquiry involving evidence tending to show both inducement by government agents and that the intention to commit the crime originated not in the mind of defendant, but with law enforcement officers; (2) assuming arguendo that defendant's evidence met the first prong of the entrapment defense, uncontroverted evidence showed that defendant had previously engaged in sexually explicit communications with other users in adults only chat rooms and even met with one of those users to engage in sexual contact, defendant admitted he had previously chatted with underage juveniles, and defendant took the more active role in both the sexually charged conversation and in planning the meeting in the instant case; (3) defendant's lack of record of molestation or other similar offensive conduct did not constitute credible evidence that defendant lacked predisposition to commit the specific crime of soliciting a child by computer with intent to commit an unlawful sex act, nor did the fact that the deputies found no evidence of child pornography; and (4) even viewing all the evidence in the light most favorable to defendant, there was no credible evidence from which a jury might reasonably infer that the criminal design originated in the minds of the government officials, and instead the evidence indicated that undercover deputies merely provided the opportunity for defendant to violate N.C.G.S. § 14-203.2.

Appeal by defendant from judgment entered 29 November 2007 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 17 November 2008.

Roy Cooper, Attorney General, by Caroline Farmer, Deputy Director, N.C. Department of Justice, and Lindsey Deere, Assistant Special Counsel, for the State.

Duncan B. McCormick for defendant-appellant.

JOHNSON, Judge.

Chris Randolph Morse ("defendant") appeals from conviction and judgment of knowingly soliciting a person believed to be a child by computer with intent to commit an unlawful sex act, in violation of N.C.G.S. § 14-202.3. He argues on appeal that the trial court committed reversible error by denying his request to instruct the jury on the defense of entrapment. We disagree and affirm the trial court's ruling.

The evidence at trial tended to show that, on Wednesday, 30 August 2006, defendant, a twenty-two-year-old enlisted man stationed at Fort Bragg, entered an adults-only Yahoo chat room under the screen name "chris morse." Although Yahoo required its users to be at least eighteen years of age, and listed this chat room under the categories of "Romance" and "Adult," Yahoo did not require users to confirm their ages to gain access to the chat room. Each user in the chat room had a public profile containing personal information entered by the user and accessible by other users in the chat room. Upon entering the chat room, defendant began chatting with another user known by the screen name "baywatch142000." Baywatch142000's profile indicated that she was a student named Jill Watson, and listed her age as "114" years old. Her profile also included a photograph of a young blonde woman. In a section of the profile labeled "latest news," baywatch142000 wrote, "Actually 14."

Within the first minute of chatting, the following exchange occurred:

chris morse: what r u up to todaY

baywatch142000: JUs hanginout . . . school . . . just got home . . .

chris morse: cool

chris morse: yoru in college then

baywatch142000: 14

chris morse: lol u look like yoru 21 at least

baywatch14200: wish i was . . .

Within minutes, defendant sent baywatch142000 the address of his MySpace.com page, which included his name, address, personal photographs, and information about his service in the military. Defendant asked baywatch142000 whether she liked older guys, to which she responded, "I do . . . . guys my age are too immature."

Defendant then asked baywatch142000 if she was a virgin. When she replied yes, defendant asked about her bra size and what she was doing for the weekend. Baywatch142000 responded that her parents might leave town for the weekend, and the two began discussing meeting somewhere. Defendant initially suggested a hotel "with one bed not two." At one point in the conversation, baywatch142000 commented, "me bein 14 . . . probably wouldnt be good idea to take me back to base . . . . What u think?" Defendant replied, "prolly not. So your house would be the best right if your parents go right." Later in their chat, defendant asked baywatch142000 if she had pubic hair. Baywatch142000 indicated that she did, then told defendant that she was inexperienced and looking for an older "friend." Defendant responded that she could practice by doing sexual favors for him and asked her to promise that she would give him her virginity.

Over the next two days, defendant continued to chat online with baywatch142000, in anticipation of their upcoming weekend rendezvous. Defendant told baywatch142000 that he would bring a digital camera to take "pics" that he could show to his buddies in Kuwait. He also asked baywatch142000, "what high school do u go to in greensboro," to which she responded, "Western Guilford." The two arranged to meet on the evening of Friday, 1 September 2006 in Greensboro after defendant got off work. After defendant left the Fayetteville area on Friday, he kept in touch with baywatch142000 by chatting with her on his cell phone, which had Internet capabilities. The two chatted until defendant was outside baywatch142000's parent's apartment, at which point defendant asked baywatch142000 to come to the door. A young woman fitting baywatch142000's description opened the apartment door, and defendant entered to find another woman, who identified herself as a local news reporter, sitting in an armchair. The reporter told defendant to sit down on a couch across from her, which he did. The reporter then told defendant that she was aware of his chats with a girl whom defendant believed to be fourteen years old. The reporter asked defendant why he would engage in such sexually explicit chats with someone he believed to be fourteen years old and then drive to meet that person, believing that her parents were out of town. In response to the reporter's questions, defendant apologized and admitted it was wrong for him to be there.

After several minutes of this sort of conversation between the reporter and defendant, law enforcement officers entered the apartment and placed defendant under arrest. After his arrest, defendant

signed a written *Miranda* waiver and gave two statements to Detective Eaton of the Guilford County Sheriff's Department. From defendant's statements, Detective Eaton drafted two non-verbatim written confessions, which defendant then reviewed and signed. The written confessions provided in part:

> It was during this first chat that she told me she was 14 years old, and lived in Greensboro. I told her I was 22 years old. . . . I suggested we should meet . . . at her parent's apartment and I might even spend the night. . . . I wasn't sure what to expect when I got there. I was hoping for a good time, maybe involving sex or just cuddling. I have not done this before with a juvenile. I have chatted with young girls before, but I have never arranged to meet them. I have met with three (3) adult females before whom I have met in chat rooms. These have all been within the last two years and one of the in-person meetings even resulted in sex. For tonight, I knew what I was doing and am not under the influence of any drug or alcohol. I am embarrassed and take full responsibility for my actions.
>
> . . . .
>
> I admit that I said some very sexual things and had talked about engaging in sexual acts with Jill. The acts may have been touching each others genitals and/or even full on sexual intercourse. But again, I admit I was the one chatting with the 14 year old girl . . . .

Subsequent to defendant's arrest, deputies obtained a search warrant to search defendant's residence. A detective examined defendant's computer, external hard drive, and digital camera card. The officers did not locate any child pornography or other evidence that defendant had previously chatted online with a minor. However, the day after he was taken into custody, defendant called his mother through the Pay-Tel system at the jail. During defendant's conversation with his mother, which was recorded and transcribed for the record, defendant admitted believing that the person with whom he had been chatting online was fourteen years old.

At trial, it was revealed that baywatch142000 had been created by Deputy Gordy, a thirty-seven-year-old male employee of the Guilford County Sheriff's Department. Deputy Gordy created the profile for baywatch142000 as part of a law enforcement sting operation designed to catch adults who solicit children on the Internet for

purposes of meeting for sexual acts. The photograph used for baywatch142000's profile was actually a photograph of Deputy Luther, a female employee of the Guilford County Sheriff's Department, who was twenty-two years old at the time the photo was taken. Deputy Luther also served as the decoy who answered the door of the apartment. Before defendant's arrival in Greensboro, the Sheriff's department had placed cameras inside and outside the apartment where defendant went to meet baywatch142000. Footage of defendant's admissions to the reporter and subsequent arrest were shown to the jury and included in the record on appeal.

Upon taking the witness stand, defendant was asked why he didn't stop when Baywatch142000 responded, "14" to his question about whether she was in college. Defendant responded:

> I blew right by it. I wasn't focused on anything but what I saw in her profile, the picture. People . . . people lie all the time online. And nobody's age is true until you meet them in person. They can say all day long they're one age, and it's not true, until you see them in person. So . . . .

Defendant also testified that the photograph on baywatch142000's profile was blurry and that, to him, this indicated that she must be older, since, in defendant's experience with online chat rooms, younger users tend to be more computer savvy and exhibit better-looking pictures. Defendant also testified that he asked baywatch142000 for more pictures but did not receive any.

At the close of evidence, defendant requested that the jury receive instructions including the entrapment defense. The trial court denied defendant's motion to include jury instructions on entrapment, on the grounds that there was insufficient evidence "to show anything beyond merely providing opportunity to commit the crime." Thereafter, the jury returned a verdict finding defendant guilty of violating N.C.G.S. § 14-202.3. Defendant received an active sentence of 6-8 months. From this judgment and conviction, defendant appeals, arguing the trial court erred by refusing to instruct the jury on the defense of entrapment. We disagree.

"Entrapment is a complete defense to the crime charged." *State v. Branham*, 153 N.C. App. 91, 99-100, 569 S.E.2d 24, 29 (2002). In general:

> [t]he defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement offi-

> cers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

State v. Walker, 295 N.C. 510, 513, 246 S.E.2d 748, 749-50 (1978); *see also State v. Redmon*, 164 N.C. App. 658, 662, 596 S.E.2d 854, 858 (2004). We note that this is a two-step test and the absence of one element does not afford the defendant the luxury of availing himself of the affirmative defense of entrapment. *See State v. Hageman*, 307 N.C. 1, 28, 296 S.E.2d 433, 449 (1982).

To be entitled to an instruction on entrapment, the defendant must produce "*some credible evidence* tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law." *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d 191, 197 (1955) (emphasis added). In determining whether a defendant is entitled to a jury instruction on entrapment, the trial court must view the evidence in the light most favorable to the defendant. *See State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983). "The instruction should be given even where the [S]tate's evidence conflicts with defendant's." *Id.* (citations omitted).

In *State v. Luster*, 306 N.C. 566, 295 S.E.2d 421 (1982) (Exum, J., dissenting), our Supreme Court noted that, "the essence of entrapment, then, is the inducement by law enforcement officers or their agents of a person to commit a crime when, but for the inducement, that person would not have committed the crime." *Id.* at 587, 295 S.E.2d at 433. A clear distinction is to be drawn between inducing a person to commit a crime he did not contemplate doing, and the setting of a trap to catch him in the execution of a crime of his own conception. *See State v. Salame*, 24 N.C. App. 1, 6-7, 210 S.E.2d 77, 81 (1974) (citing *Burnette*, 242 N.C. at 169, 87 S.E.2d at 194), *cert. denied*, 286 N.C. 419, 211 S.E.2d 800 (1975). The determinant is the point of origin of the criminal intent. *See id.* at 7, 210 S.E.2d at 81. Because of its significance in determining the origin of the criminal intent, "when the defense of entrapment is raised, defendant's predisposition to commit the crime becomes the central inquiry." *Id.* at 10, 210 S.E.2d at 83. *See also United States v. Russell*, 411 U.S. 423, 436, 36 L. Ed. 2d 366, 376 (1973) (holding that a finding of predisposition is fatal to defendant's claim of entrapment). Our Supreme Court has made clear the following:

> It is well settled that the defense of entrapment is not available to a defendant who has a predisposition to commit the crime independent of government inducement and influence. The fact that governmental officials merely afford opportunities or facilities for the commission of the offense is, standing alone, not enough to give rise to the defense of entrapment.
>
> . . . .
>
> Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant the opportunity to commit the crime.

Hageman, 307 N.C. at 29-31, 296 S.E.2d at 449-51 (citations omitted). Although the entrapment defense is not available to a defendant who is predisposed to commit the crime, a defendant's assertion of the defense does not impose the burden of proving defendant's predisposition upon the State. *See State v. Cook*, 263 N.C. 730, 733, 140 S.E.2d 305, 308 (1965) (noting that the trial court's instruction, which placed the burden of disproving entrapment upon the State, was error). Instead, the burden of production remains on the defendant. *See Hageman*, 307 N.C. at 27, 296 S.E.2d at 448 (noting that, because entrapment is not a defense which negates an essential element of crime, but is an affirmative defense in the nature of confession and avoidance, defendants who seek to avail themselves of this affirmative defense bear the burden of production); *see also State v. Braun*, 31 N.C. App. 101, 103, 228 S.E.2d 466, 467 (noting that, "[t]hough the question of entrapment was raised by the State's evidence, the burden of proving that defendant was not entrapped did not rest upon the State."), *disc. review denied*, 291 N.C. 449, 230 S.E.2d 766 (1976). In this respect, the defendant's "burden [to produce credible evidence of entrapment] acts as a screening device." John Rubin, *The Entrapment Defense in North Carolina*, § 6.2(b) (Institute of Government, University of North Carolina at Chapel Hill, 2001). "It serves to prevent the defendant from obtaining instructions on defenses supported by mere conjecture or speculation but is not intended to be so rigorous as to keep the jury from receiving instructions on and deciding defenses for which supporting evidence exists." *Id.*

In the case at bar, defendant, pointing to his lack of a criminal record, record of molestation or other similar offensive acts, contends that, though he chatted with baywatch142000, whom he admittedly believed to be a fourteen-year-old girl, in a sexually explicit

manner and arranged to meet with her for sexual contact, he was not predisposed to commit this act. Defendant argues that his lack of a history of such conduct, along with deputies' failure to find any evidence of child pornography or prior chats with minors upon their search of defendant's residence, raises the inference that defendant lacked predisposition. Accordingly, defendant contends, he was entitled to a jury instruction on entrapment. Assuming, *arguendo*, that defendant's evidence has met the first prong of the entrapment defense, defendant's argument on the second prong misconstrues precedent from this Court and our Supreme Court regarding evidence of predisposition as it pertains to the origin of criminal intent.

First of all, as discussed above, the burden of production for the defense of entrapment lies with the defendant. "In the absence of evidence tending to show *both* inducement by government agents *and* that the intention to commit the crime originated not in the mind of the defendant, but with the law enforcement officers, the question of entrapment has not been sufficiently raised to permit its submission to the jury." *Walker*, 295 N.C. at 513, 246 S.E.2d at 750. Where a defendant has not met this initial burden of production, the State need not present any evidence regarding predisposition. *See Cook*, 263 N.C. at 733, 140 S.E.2d at 308. Thus, it is the defendant's burden to produce some credible evidence of lack of predisposition. *See Hageman*, 307 N.C. at 27, 296 S.E.2d at 448. In support of the premise that a lack of a criminal record, record of molestation, or other offensive conduct may act as some credible evidence that the intention to commit the crime originated with law enforcement officers, defendant cites several cases from federal and other state courts. However, after a thorough review of these authorities, we determine that they are either not binding upon us or distinguishable from the case at bar. Furthermore, defendant's argument overlooks the clear language of *Hageman*, which provides that "predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant the opportunity to commit the crime." *Id.* at 31, 296 S.E.2d at 450.

Although defendant did not have a criminal record, record of molestation, or record of other similar offensive acts, uncontroverted record evidence shows that defendant had previously engaged in sexually explicit communications with other users in adults only chat rooms and even met with one of those users to engage in sexual contact. Furthermore, defendant admitted that he had previously chatted

with underage juveniles. Defendant was familiar, not only with the ease with which an underage juvenile could access the adults only chat room, but also with the idea that other users can and often do falsely represent their names, age, and appearance. At trial, defendant admitted that he had looked at baywatch142000's profile, which listed her age as "114" and included, under the recent news section, "Actually 14." Defendant testified, however, that he looked at the profile merely to view baywatch142000's photograph and thus initially overlooked her age. Defendant further contended that he was not thinking about age at all, but rather was in a "sexual mindframe" when chatting with baywatch142000.

In spite of this testimony, defendant admittedly did not hesitate to initiate sexually charged conversation with baywatch142000 within the first few minutes of chatting, or to begin making arrangements to meet for sexual contact. Furthermore, defendant did not, at any time during their chats, express reluctance to meet with baywatch142000, despite baywatch142000's repeated references to her age. Baywatch142000 made it clear that she was a fourteen-year-old high school student, a virgin, and interested in finding an older friend in order to gain sexual experience. She indicated that her age would make it difficult for them to meet at Fort Bragg, but that her parents were out of town for the weekend. Throughout their chats, baywatch142000 was, for the most part, merely responsive to defendant's suggestions, while defendant took the more active role in both the sexually charged conversation and in planning their meeting.

The crime with which defendant was subsequently charged, knowingly soliciting a person believed to be a child by computer with intent to commit an unlawful sex act, is a violation of N.C.G.S. § 14-202.3. N.C.G.S. § 14-202.3 provides in part:

> (a) A person is guilty of solicitation of a child by a computer if the person . . . *knowingly*, with the intent to commit an unlawful sex act, *entices*, *advises*, *coerces*, *orders*, *or commands*, by means of a computer, . . . a person the defendant believes to be a child who is less than 16 years of age and who the defendant believes to be at least 3 years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act.

N.C. Gen. Stat. § 14-202.3 (2005) (emphasis added).

Solicitation, as the term is utilized in N.C.G.S. § 14-202.3, elementally involves some impetus on defendant's part, rather than mere

acquiescence. The statute provides that an individual who "entices, advises, coerces, orders, or commands" is guilty of solicitation. Our precedent indicates that a trial court may properly refuse to instruct a jury on entrapment when "defendant required little urging before acquiescing" to requests by undercover officers. *See State v. Thompson*, 141 N.C. App. 698, 707, 543 S.E.2d 160, 166 (2001). Here, the record contains ample evidence which tends to show that defendant did *more* than merely acquiesce and cooperate with a plan formed by police. Transcripts of defendant's chat with baywatch142000, along with defendant's written statements and trial testimony, show that he initiated all sexually charged conversation, formulated and detailed the plan for meeting to have sexual contact, and even followed through on that plan with "little urging" from undercover deputies. Such initiative goes far beyond the mere "compliance, acquiescence in, or willingness to cooperate" which is sufficient to show predisposition. *See Hageman*, 307 N.C. at 31, 296 S.E.2d at 450. Thus, although the State did not bear the burden of producing evidence of defendant's predisposition to solicit a person believed to be a child by computer with intent to commit an unlawful sex act, such evidence is present in the record.

Furthermore, defendant's lack of a record of molestation or other similar offensive conduct does not constitute credible evidence that defendant lacked predisposition to commit the specific crime of soliciting a child by computer with intent to commit an unlawful sex act. The same may be said for the fact that deputies found no evidence of child pornography. Such evidence may be relevant to whether or not defendant was predisposed to commit acts of overt molestation or illegally possess child pornography, but are not directly indicative of defendant's predisposition to commit the crime at issue here. With respect to the fact that deputies found no evidence of prior chats with minors, the lack of such evidence is negated by defendant's own admission that he had chatted with underage juveniles in the past.

Even viewing all of the evidence in the light most favorable to defendant, there is no credible evidence from which a jury might reasonably infer that the criminal design originated in the minds of the government officials, rather than defendant, such that the crime was the product of the creative activity of the government. Instead, the evidence indicates that undercover deputies merely provided the opportunity for defendant to violate N.C.G.S. § 14-203.2 and, when presented with that opportunity, defendant pursued it

with little hesitance. Because defendant did not produce some credible evidence in support of each element of the defense of entrapment, the trial court properly denied defendant's request to instruct the jury on entrapment.

No error.

Judges WYNN and STEPHENS concur.

HOSPIRA INCORPORATED, PLAINTIFF v. ALPHAGARY CORPORATION, DEFENDANT

No. COA08-487

(Filed 6 January 2009)

1. Fraud— manufacturing material—sale to subcontractor rather than directly to plaintiff

The trial court did not err by granting summary judgment on fraud claims for a company which supplied resin for use in manufacturing IV administration kits. The transaction and the communications in issue involved the sale of resin pellets from defendant to Moll, the subcontractor that manufactured the part which used the resin, not from defendant to plaintiff.

2. Fraud— negligent misrepresentation—manufacturing material—third-party—no direct reliance

The trial court did not err by granting summary judgment on negligent misrepresentation claims for a company which supplied resin for use in manufacturing IV administration kits. The record does not show a direct reliance by plaintiff on any statements or documents from defendant about the nature of the compounds sold to Moll, a third party vendor.

3. Unfair Trade Practices— misrepresentation—manufacturing material—no capacity to deceive

The trial court did not err by granting summary judgment on unfair trade practice claims for a company which supplied resin for use in manufacturing IV administration kits. These claims were based on an alleged misrepresentation, but plaintiff provided no evidence to indicate that the representations made by defendant to a third-party vendor had the capacity to deceive plaintiff or that plaintiff actually relied on them.

4. Contracts— breach—third party beneficiary—summary judgment

The trial court did not err by granting summary judgment in favor of defendant on plaintiff's third party beneficiary breach of contract claim arising from defendant's provision of resin to a third party, Moll, to be used in manufacturing IV administration kits. While the evidence suggests that plaintiff may have coordinated the agreement between Moll and defendant, and that defendant knew about the agreement between plaintiff and Moll to manufacture the part used in the kits, this alone is insufficient to establish plaintiff as a third party beneficiary without demonstration of plaintiff's active and direct involvement.

5. Negligence— economic loss rule—no contractual privity

The trial court erred by not reinstating a negligence claim originally dismissed under the economic loss rule. Under *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, the rationale for barring recovery under the economic loss rule is not advanced by barring a claim for negligence where no contractual privity exists between the parties. The parties agreed that there was no contract between plaintiff and defendant.

Appeal by plaintiffs from orders entered 16 February 2006, 16 August 2007, and 9 November 2007 by Judge Albert Diaz in Superior Court, Mecklenburg County. Heard in the Court of Appeals 21 October 2008.

Reinhart Boerner Van Deuren S.C., by Allen C. Schlinsog, Jr. and Colleen E. Fielkow; Robinson, Bradshaw & Hinson, P.A., by R. Steven DeGeorge and Jonathan C. Krisko, for plaintiff-appellant.

McGuirewoods, LLP, by Bradley R. Kutrow and Brian Kahn, for defendant-appellee.

WYNN, Judge.

Plaintiff Hospira Incorporated[1] appeals from summary judgment granted in favor of Defendant AlphaGary Corporation on Hospira's claims for fraud, negligent misrepresentation, violations of the Unfair and Deceptive Trade Practices Act, and third party beneficiary breach

1. Before 12 April 2004, Hospira Incorporated was known as Abbott Laboratories' Hospital Products Division.

of contract. Hospira also appeals from the 16 February 2006 order dismissing its negligence claim and from the 16 August 2007 order denying its motion to reinstate the negligence claim in light of *Lord v. Customized Consulting Speciality, Inc.*, 182 N.C. App. 635, 643 S.E.2d 28, *disc. review denied*, 361 N.C. 694, 652 S.E.2d 647 (2007). We affirm summary judgment on the fraud, negligent misrepresentation, violations of the Unfair and Deceptive Trade Practices Act, and third party beneficiary breach of contract claims. However, we reverse the trial court's dismissal of Hospira's negligence claim.

Hospira manufactures medical devices known as sight chambers, which are small transparent tubes that attach to intravenous (IV) lines and allow the monitoring of fluids. Hospira sells sight chambers to healthcare providers as part of IV administration kits. To manufacture the sight chambers, Hospira uses a specially formulated polyvinyl chloride (PVC) compound known as Ashland Dry-Blend (ADB) or 50-0218. ADB is a "radiation grade" material, meaning that the resin can withstand sterilization by irradiation. Hospira converts the ADB into pellets in a process called "pelletizing" which involves heating the plastic powder ADB and extruding it into pellets for use in injection molding. The pellets are then used in molding the chambers.

Hospira previously formulated and pelletized ADB, and molded the sight chambers itself; however in 1999, Hospira began to contract with Moll Industries, Inc. to manufacture its sight chambers. In late 2001, Hospira retained AlphaGary to pelletize the ADB for use in the molding process. AlphaGary signed a specification letter, prepared by Hospira, for the production of ADB pellets, material number 75-1648. The letter included a continuing guarantee that the pellets be manufactured in accordance with Hospira's specifications. The letter did not address the specifications for pellets ordered by third party vendors.

In November 2001, Hospira again retained Moll to manufacture some of its sight chambers. However, Hospira did not supply the ADB pellets directly to Moll as it had done in previous orders; rather, Hospira instructed Moll to purchase the pellets from AlphaGary. But, instead of using ADB to make the pellets sold to Moll, AlphaGary used its own proprietary non-radiation grade PVC resin. Thereafter, Moll, using the pellets provided by AlphaGary, manufactured millions of sight chambers, which Hospira purchased and incorporated into its IV administration kits. Over time, Hospira learned that the cham-

bers were becoming severely discolored after repeated sterilization. Upon discovering that the pellets Moll used to make the chambers were not "radiation grade" ADB, Hospira recalled, replaced, and destroyed the sight chambers and accompanying kits.

On 5 April 2005, Hospira brought an action against AlphaGary for fraud, negligent misrepresentation, negligence, estoppel, third party beneficiary breach of contract, and violation of the North Carolina Unfair and Deceptive Trade Practices Act. Hospira alleged that AlphaGary intentionally concealed its use of an "unapproved" compound substitute and made false and misleading statements to Moll and Hospira's management in an attempt to cover-up the switch. In response, AlphaGary moved to dismiss the action under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. By order dated 16 February 2006, the trial court granted AlphaGary's motion regarding Hospira's claim for negligence and estoppel but denied its motion regarding the remaining four claims.

On 1 May 2007, AlphaGary moved for summary judgment on the remaining claims. The trial court granted summary judgment for AlphaGary and denied Hospira's Rule 60(b)(6) motion to reinstate its negligence claim in light of *Lord*. Hospira appeals arguing that the trial court erred by (I) granting summary judgment in favor of AlphaGary and (II) failing to reinstate its negligence claim, originally dismissed as barred under the economic loss rule, in light of *Lord*.

I.

This Court reviews an appeal from summary judgment to determine "whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). Reviewing the evidence presented in the light most favorable to the non-moving party, summary judgment is appropriate when "(1) an essential element of the other party's claim or defense is non-existent; (2) the other party cannot produce evidence to support an essential element of its claim or defense; or (3) the other party cannot overcome an affirmative defense which would bar the claim." *Caswell Realty Assocs. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998) (citation omitted).

In its appeal, Hospira argues that the trial court erred in granting summary judgment for AlphaGary on its claims of (A) fraud and neg-

ligent misrepresentation; (B) violation of the North Carolina Unfair and Deceptive Trade Practices Act, and (C) third party beneficiary breach of contract. We disagree.

A.

[1] Hospira first argues that the trial court erred by granting summary judgment in favor of AlphaGary on its claims of fraud and negligent misrepresentation. To survive a motion for summary judgment on the charge of fraud, the record must show evidence of the following: "(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party." *Harrold v. Dowd*, 149 N.C. App. 777, 782, 561 S.E.2d 914, 918 (2002) (citing *Ragsdale v. Kennedy*, 286 N.C. 130, 138-39, 209 S.E.2d 494, 500 (1974)). After careful review, we find no error.

Although the record reflects significant communications between AlphaGary and Moll, there is no evidence in the record that AlphaGary concealed or misrepresented to Hospira the composition of the pellets supplied to Moll or that AlphaGary acted with intent to deceive either party. An essential element of actionable fraud is that the false representation or concealment be made *to the party acting thereon*. *See, e.g.*, *Shreve v. Combs*, 54 N.C. App. 18, 282 S.E.2d 568 (1981). The transaction and communications at issue here involved the sale of pellets from AlphaGary to Moll, not from AlphaGary to Hospira. Absent an agency or fiduciary relationship between Moll and Hospira, there are no grounds on which Hospira can maintain a claim based on allegations of direct false representation.

Nonetheless, Hospira argues that, based on the specification letter and continuing guarantee, AlphaGary agreed to follow certain specifications and that the agreement applied to all purchases of "75-1648" or ADB pellets, whether by Hospira or a third party vendor. However, the record reflects that the specification letter was binding only as to transactions between Hospira and AlphaGary. The specification letter includes nothing to indicate that the specifications were also intended to apply to transactions between AlphaGary and Moll. Accordingly, this argument is without merit.

Further, Hospira argues that AlphaGary's misrepresentations, conveyed through Moll, are actionable. Hospira relies on the Court's holding in *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 418 S.E.2d 648 (1992), in which a school district was found to

have an actionable fraud claim against the defendant because the school district's architect relied on the false representations made by the defendant. However, in *Rowan County*, the architect to whom the misrepresentation was made was an *agent* of the plaintiff. The architect relied on the statements in the defendant's sales brochure, which claimed that the building material was "ideal for ceilings in schools" and failed to discuss the known health hazards associated with the use of asbestos. *Id.* at 17, 418 S.E.2d at 659. Later, having discovered that the insulation contained harmful asbestos and had to be removed, the school sued the manufacturer for fraud. Throughout the opinion in *Rowan County*, the issue of whether the school proved the element of reliance is framed in terms of whether the school or its *agent* relied on the defendant's misrepresentations in choosing the building materials. Specifically, the Court stated that the defendant's liability for fraud was based on the fact that "the agent of Rowan responsible for ordering . . . installation" relied on the misrepresentations in the defendant's literature. *Id.* at 21, 418 S.E.2d at 661.

Here, there is no evidence to suggest that Moll acted as Hospira's agent in purchasing the compounds for pelletization from AlphaGary; in fact, Hospira denied that Moll was its agent. Still, Hospira points out that the decision in *Rowan County* does not explicitly define "agent" or analyze the degree of control the school district exercised over the architect. However, we believe that the context of the decision indicates that the Court intended to give the term "agent"—a term of art—its legal meaning: "one who, with another's authority, undertakes the transaction of some business or the management of some affairs on behalf of such other, and to render an account of it." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 435, 617 S.E.2d 664, 669 (2005) (citation omitted); *see also State v. Weaver*, 359 N.C. 246, 258, 607 S.E.2d 599, 606 (2005) ("Two essential elements of an agency relationship are: (1) the authority of the agent to act on behalf of the principal, and (2) the principal's control over the agent."). There is nothing to suggest that the holding in *Rowan County* should be read to allow misrepresentations, conveyed through a non-agent party, to be actionable fraud. Accordingly, *Rowan County* has no application to this case.

[2] Similarly, Hospira's claim for negligent misrepresentation fails. To establish a claim for negligent misrepresentation, a party must show that he: "[(1)] justifiably relies [(2)] to his detriment [(3)] on information prepared without reasonable care [(4)] by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry*,

Bekaert & Holland, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991).

In *Raritan*, the plaintiff brought a negligent misrepresentation suit against a defendant, a certified public accountant, who published a report containing financial information about a company to whom the plaintiff later extended credit. *Id.* at 200, 367 S.E.2d at 609. However, the plaintiff was suing the defendant under the theory that it relied to its detriment on a third party's estimate of the company's net worth, which, in turn, was based on information the third party obtained from the defendant's report. *Id.* at 205, 367 S.E.2d at 612. Our Supreme Court concluded, "a party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information." *Id.* at 206, 367 S.E.2d at 612.

Here, evidence in the record suggests that while Hospira may have relied on the certifications provided by Moll, Moll was not a passive intermediary. The specification numbers and information provided by Moll to Hospira were materially inconsistent with the certifications AlphaGary provided to Moll. Moll's quality supervisor testified that Moll's certification records were not properly and consistently prepared, noting that the raw material descriptions contained in the certifications prepared by Moll often varied within the same lot of material. Indeed, Hospira presented no evidence of direct reliance on AlphaGary's certification documents.

In sum, under a theory of negligent misrepresentation, liability cannot be imposed when the plaintiff does not *directly* rely on information prepared by the defendant, but instead relies on altered information provided by a third party. Because the record fails to show a direct reliance on any statements or documents from AlphaGary about the nature of the compounds then sold to it by Moll, we uphold the trial court's grant of summary judgment on this issue.

B.

[3] Hospira next argues that the trial court erred in granting summary judgment for AlphaGary on Hospira's claim for unfair and deceptive trade practices. We disagree.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plain-

tiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). In making a claim of unfair and deceptive trade practices on a theory of misrepresentation or fraud, a plaintiff must show that a defendant's words or conduct possessed "the tendency or capacity to mislead" or create the likelihood of deception. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). "Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show 'actual reliance' on the alleged misrepresentation in order to establish that the alleged misrepresentation 'proximately caused' the injury of which plaintiff complains." *Tucker v. Blvd. at Piper Glen L.L.C.*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002) (citation omitted); *cf. Cullen v. Valley Forge Life Ins. Co.*, 161 N.C. App. 570, 589 S.E.2d 423 (2003) (holding that actual reliance is not required to establish injury under N.C. Gen. Stat. § 58-63-15(1) (2001), which governs the unfair methods of competition and unfair and deceptive acts or practices in the business of insurance), *disc. review denied sub nom. Santomassimo v. Valley Forge Life Ins. Co.*, 358 N.C. 377, 598 S.E.2d 138 (2004).

Again, Hospira provided no evidence in the record to indicate that representations made by AlphaGary to Moll had the capacity to deceive Hospira or that Hospira actually relied on them. As discussed regarding Hospira's fraud and negligent misrepresentation claims, Hospira offered no evidence of its actual reliance on the alleged misrepresentations. Additionally, the evidence presented to the trial court reveals that documents AlphaGary provided Moll contained the "3006-85" compound description. Hospira's own employee testified that, had he seen the technical data sheet AlphaGary gave Moll, he would have known that "PVC 3006-85" was not the radiation grade material Hospira wanted Moll to use. Although Hospira argues that the use of a different number and description was deceptive, the evidence suggests that the use of a non-ADB code and description should have disclosed the confusion to Moll. Accordingly, we find no error.

C.

[4] Hospira further argues that the trial court erred in granting summary judgment in favor of AlphaGary on its third party beneficiary breach of contract claim. "To establish a claim based on the third party beneficiary contract doctrine, a complaint's allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his *direct*, and not incidental, benefit." *Leasing*

Corp. v. Miller, 45 N.C. App. 400, 405-06, 263 S.E.2d 313, 317 (emphasis added) (citation omitted), *cert. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). " 'A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person. It is not enough that the contract, in fact, benefits the [third party], if, when the contract was made, the contracting parties did not intend it to benefit the [third party] directly.' " *Revels v. Miss Am. Org.*, 182 N.C. App. 334, 336, 641 S.E.2d 721, 723 (2007) (quoting *Holshouser v. Shaner Hotel Grp. Props. One*, 134 N.C. App. 391, 400, 518 S.E.2d 17, 25 (1999)). In determining whether the parties intended to benefit a third party, we must consider the surrounding circumstances as well as the language of the contract. *Revels*, 182 N.C. App. at 336, 641 S.E.2d at 723.

Hospira contends that it provided sufficient evidence that the contracts between Moll and AlphaGary were for its direct benefit. However, Hospira provides no evidence to suggest that it was an intended beneficiary of the contract between Moll and AlphaGary. The invoices, emails, and phone communications regarding the transactions are exclusively between representatives from Moll and AlphaGary. They do not involve the type of "active and direct dealings" which courts have required to confer third party beneficiary status on a party not contemplated by the contract itself. *See CF Industries v. Transcontinental Gas Pipe Line*, 448 F. Supp. 475, 481 (W.D.N.C. 1978) (holding that plaintiff's claim for third party beneficiary status was supported by evidence in the record of active and direct dealings between the plaintiff and a party to the contract). While the evidence suggests that Hospira may have coordinated the agreement between Moll and AlphaGary, and that AlphaGary knew about the agreement between Moll and Hospira to manufacture sight chambers, this alone, without demonstration of Hospira's "active and direct" involvement, is insufficient to establish that Hospira was a third party beneficiary.

Additionally, the facts presented here are similar to *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E.2d 273 (1970), where the Court held that a landowner was not entitled to sue as a third party beneficiary to a contract between a general contractor and a subcontractor. The Court reasoned:

> In our view the subcontract here was not intended for the benefit of the plaintiff landowner. Plaintiff benefits only incidentally or indirectly because performance of the subcontract was rendered in fulfillment of Reed's obligation to the general contractor.

> Hence, any benefit derived from the subcontract by the landowner would necessarily accrue indirectly, *i.e.*, through the general contractor.

Id. at 129, 177 S.E.2d at 279. Although *Vogel* involved a subcontractor and a general contractor, the facts of *Vogel* parallel those presented here. Moll and AlphaGary established a contractual relationship whereby AlphaGary provided Moll with PVC compound pellets. Moll then used the pellets to manufacture goods it sold to Hospira. As in *Vogel*, any benefit received by Hospira would "necessarily accrue indirectly" through Moll. *Id.* Based on our review of governing case law and the lack of evidence presented by Hospira, we find no error.

II.

[5] Finally, Hospira contends that the trial court erred in failing to reinstate its negligence claim, originally dismissed as barred under the economic loss rule, in light of the Court's decision in *Lord*.[2] We agree.

In *Lord*, plaintiffs brought suit against defendants for negligence, including the group referred to as "84 Lumber Defendants," who were subcontracted to provide the wooden trusses used in the construction of the plaintiffs' residence. *Lord*, 182 N.C. App. at 637, 643 S.E.2d at 29. Because the defendants were subcontractors, no contractual privity existed between the two parties. In assessing whether the economic loss rule barred plaintiffs' negligence claim, this Court discussed the origin and evolution of the rule in North Carolina, explaining:

> As previously stated by this Court, "[t]he rationale for the economic loss rule is that the sale of goods *is accomplished by contract* and the parties are free to include, or exclude, provisions as to the parties' respective rights and remedies, should the product prove to be defective." Thus, the rule encourages contracting parties to allocate risks for economic loss themselves, because the promisee has the best opportunity to bargain for coverage of that risk or of faulty workmanship by the promisor.

Id. at 639, 643 S.E.2d at 30 (internal citations omitted) (emphasis added). Thus, where no contractual privity exists between parties,

2. Although Hospira assigns the original motion to dismiss its claim for negligence in its assignments of error and arguments in its brief, Hospira only argues that the decision was in error in light of *Lord*. Accordingly, this Court need only consider the order denying Hospira's motion to reinstate.

the rationale for barring recovery under the economic loss rule is not advanced by barring a claim for negligence. *See Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 499 S.E.2d 772 (1998) (holding that owners of a recreational vehicle were barred from recovering for pure economic loss from all defendants under the economic loss rule, including the component part manufacturer, who was not in privity with plaintiff, but where the Court concluded the remote supplier was covered under the subsidiary manufacturer's limited warranty).

Given the holding in *Lord* and both parties' agreement that there was no contract between Hospira and AlphaGary, we hold that the trial court erred in failing to reinstate Hospira's negligence claim.

Affirmed in part; Reversed and remanded in part.

Judge BRYANT concurs.

Judge ARROWOOD concurs prior to 31 December 2008.

STATE OF NORTH CAROLINA v. JAMIE ANTWON MITCHELL

No. COA08-666

(Filed 6 January 2009)

1. Criminal Law— continuance denied—discovery provided shortly before trial

The trial court did not err in a murder prosecution by denying defendant's motions for a continuance where the trial began on the Monday after Thanksgiving and the State provided witness interviews on the Tuesday before Thanksgiving and at 5:15 p.m. on the Wednesday before Thanksgiving. The majority of discovery was provided two weeks before the trial, the supplemental discovery was provided during the week before trial, defendant had the opportunity to review the materials before jury selection, none of the materials pertained to the State's first three witnesses, and defense counsel indicated to the court that reserving his opening statement partially resolved the issue. Moreover, defendant did not include any of the discovery materials in the record on appeal.

2. Appeal and Error— preservation of issues—crime scene diagram—prior testimony without objection

A defendant in a murder prosecution waived any objection to a crime scene diagram by not objecting to preceding testimony about the essential content of the exhibit.

3. Appeal and Error— preservation of issues—photographs-prior testimony without objection

A murder defendant waived his objection to photographs depicting the scene where the weapon was recovered by not objecting to prior testimony about the circumstances surrounding the recovery of the gun.

4. Evidence— photograph—murder victim and family—irrelevancy—other testimony about family—admission not plain error

There was no prejudice and no plain error in a murder prosecution in the admission of an irrelevant photograph of the victim with his family where other evidence was heard regarding his family life.

5. Criminal Law— prosecutor's argument—comment on self-defense

The trial court did not abuse its discretion in a murder prosecution by allowing the prosecutor to comment in the closing argument on defendant's use of self-defense. The issue was before the jury, the comment was consistent with the evidence, and defendant could not show such gross error that intervention ex mero motu was required.

Judge STROUD concurring.

Appeal by defendant from judgment entered 30 November 2007 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 20 November 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Lars F. Nance, for the State.

Paul F. Herzog, for defendant-appellant.

STEELMAN, Judge.

Where defendant has not demonstrated prejudice from the trial court's refusal to postpone the trial, or that the admission of evidence

was plain error, a new trial is not warranted. Where the prosecutor's closing argument was proper, the trial court did not abuse its discretion in failing to intervene *ex mero motu*.

I. Factual and Procedural Background

On the evening of 20 January 2007, Jamie Mitchell ("defendant") and his girlfriend, Tenika Utley, attended a party in Apex, North Carolina. Ms. Utley left the party and went to the home of defendant's cousin, Sequina Sidney. Some time later, defendant went to Ms. Sidney's house, where he proceeded to get into an argument with Ms. Utley. The argument escalated and Ms. Utley decided to leave in her car. Defendant followed her outside, and before she could get into her car, defendant pushed her down, grabbed her necklaces, and began choking her. Ms. Sidney called Kevin Dodd and asked him to come to her house to assist in ending defendant's assault on Ms. Utley. Mr. Dodd, along with Timothy Baily, Frank Horton (the decedent), and Charles Horton, arrived at Ms. Sidney's house and witnessed defendant straddling Ms. Utley and holding her down. The men asked defendant to release Ms. Utley, but he told them to "mind [their] own business." When defendant finally released her, the decedent advised Ms. Utley to leave. Defendant told the decedent that he did not "get into your and [your wife's] business" and slapped the decedent. The two men began to fight, at which point defendant shot decedent in the head. Decedent died from the gunshot wound.

On 6 February 2007, defendant was indicted for first-degree murder. On 20 March 2007, defendant was indicted for possession of a firearm by a felon. The cases went to trial on 26 November 2007. The jury found defendant guilty of second-degree murder and possession of a firearm by a felon. The trial court found defendant to be a prior record level III for felony sentencing purposes. Defendant was sentenced to an active term of 220 to 273 months imprisonment on the second-degree murder charge. A consecutive active sentence of 16 to 20 months was imposed for the firearm charge. Defendant appeals.

II. Motions to Continue

[1] In his first argument, defendant contends that the trial court erred by denying his motions to continue on the grounds that his trial counsel was unprepared for trial. Defendant contends that the trial court's ruling amounted to a denial of his right to effective assistance of counsel, as guaranteed by the federal and state constitutions,

because his counsel was prevented from preparing an adequate defense. We disagree.

Ordinarily, a motion for a continuance is a matter within the sound discretion of the trial court, and the court's ruling on the motion is not subject to review absent a showing of abuse of discretion. *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981) (citation omitted). However, where a motion to continue raises constitutional issues, it is "fully reviewable by an examination of the particular circumstances of each case." *Id.* Denial of a motion to continue is grounds for a new trial "only upon a showing by defendant that the denial was erroneous and that this case was prejudiced thereby." *Id.*

> To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. To demonstrate that the time allowed was inadequate, the defendant must show 'how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.'

State v. Williams, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002) (internal citations and quotes omitted). "[W]hat constitutes a reasonable length of time for defense preparation must be determined upon the facts of each case." *Searles* at 154, 282 S.E.2d at 433 (citations omitted). "While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed 'without inquiry into the actual conduct of the trial' when 'the likelihood that any lawyer, even a fully competent one, could provide effective assistance' is remote." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 336 (1993) (quoting *United States v. Cronic*, 466 U.S. 648, 659-60, 80 L. Ed. 2d 657, 668 (1984)).

In August 2007, defendant filed a motion for the following discovery materials: (1) a copy of any recorded or written statement and a transcription of any oral statements by defendant or any co-defendants; (2) defendant's criminal record; (3) documents and tangible objects; (4) reports of any examinations and tests made in connection with the case; and (5) any exculpatory information. On 16 November 2007, the trial court ordered the State to produce discovery, including any Rule 404(b) evidence. Approximately two weeks before trial, the State informed the court that it was still interviewing witnesses, and that it would provide those interviews to defendant

and his attorney. The trial began on the Monday following the Thanksgiving Holiday. On the Tuesday before Thanksgiving, the State provided defendant's counsel with supplemental discovery consisting of witness interviews, and indicated that additional interviews would be provided the following day. At approximately 5:15 p.m. on the Wednesday before Thanksgiving, the State delivered supplemental discovery consisting of witness interviews to defendant's counsel via facsimile.

Defendant's counsel asserted that he came into possession of the supplemental discovery materials on the morning of trial. Defendant acknowledges that the record does not reveal the exact content of the materials, but he suggests that the new discovery included "re-interviews of old witnesses," interviews of "new witnesses," and "ballistic reports." Defense counsel requested that the trial be postponed until the following day so that he could review the materials and discuss them with defendant. The State informed the trial court that its first three witnesses were law enforcement officers, and that there was no supplemental discovery provided for those three witnesses. The court did not rule on defendant's request for postponement of the trial and took a brief recess. Upon reconvening, defense counsel requested fifteen minutes to finish reading the material and to confer with defendant. The trial court denied defendant's request and began jury selection. After the jury was selected, the court revisited the discovery issue. Defense counsel pointed out that the State's opening statement would not be affected by the discovery issue, and suggested that he and defendant could examine the supplemental discovery during the State's opening statement. Defense counsel also reserved his opening statement and indicated that this "sort of solves the problem in that regard." Further, defense counsel acknowledged that there was no new discovery information pertaining to the State's first three witnesses, but requested that these witnesses not be released following their testimony.

Defendant contends on appeal that the "voluminous new materials" provided by the State "went to the heart of the State's case," and that "no one can be certain how trial counsel might have been able to perform if he had had adequate time to prepare." Defendant argues that due to the "peculiar circumstances" of his case, this Court should presume prejudice and grant a new trial.

Defendant contends that the circumstances of this case are analogous to those in *State v. Rogers*, 352 N.C. 119, 529 S.E.2d 671 (2000).

Rogers was a capital case in which the defendant moved to dismiss his attorney one week prior to the scheduled trial. The court continued the trial, and, thirty-four days prior to the start of the trial, appointed two new attorneys for defendant. Defendant's attorneys discovered that none of the witnesses had been interviewed. Despite this problem, the trial court denied two additional motions for continuance, and the trial proceeded as scheduled. The North Carolina Supreme Court held that, under the circumstances of that case, it was "unreasonable to expect that any attorney, no matter his or her level of experience, could be adequately prepared to conduct a bifurcated capital trial for a case as complex and involving as many witnesses as the instant case." *Id.* at 125, 529 S.E.2d at 675-76.

Rogers is distinguishable from the instant case. In the instant case, there is no issue concerning the timing of the appointment of trial counsel. The majority of the State's discovery was provided two weeks before the scheduled commencement of the trial. The supplemental discovery was provided during the week prior to trial, and defense counsel had an opportunity to review these materials prior to the selection of the jury. As acknowledged by defendant, none of the supplemental discovery pertained to the State's first three witnesses, and defense counsel indicated to the trial court that the reservation of his opening statement partially resolved the continuance issue. Defendant has not demonstrated that the circumstances surrounding the trial court's refusal to postpone the trial merit a presumption of ineffective assistance of counsel and a presumption of prejudice arising therefrom. *See Tunstall* at 329, 432 S.E.2d at 336.

Further, on appeal, defendant has not included any of the discovery materials in question in the record on appeal, and asks this Court to presume prejudice based upon his vague description of what was contained in these materials. It is the duty of the appellant to include in the record all materials necessary for this Court to consider the issues raised in his appeal. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983) (citations omitted). It is impossible for this Court to evaluate how defendant was prejudiced, if at all, or whether his attorney would have been better prepared had the continuance been granted.

The trial court did not commit error in its denial of defendant's motions for continuance.

This argument is without merit.

III. Evidence

In his second argument, defendant contends that the trial court erred by admitting into evidence State's exhibits 3, 24, 25, 26, and 27, in violation of the Due Process Clause and our discovery statutes, N.C. Gen. Stat. §§ 15A-901-910. We disagree.

A. State's Exhibit 3: Crime Scene Diagram

[2] Defendant first contends that the trial court erred in admitting State's exhibit 3, a diagram of the crime scene.

At trial, Agent Phillip Flood, a crime scene investigator for the City County Bureau of Identification, testified regarding the crime scene and the evidence collected from the crime scene. The State subsequently sought to introduce exhibit 3 as illustrative of Agent Flood's testimony. Defense counsel objected to the admission of this exhibit on the grounds that it had not been provided in discovery prior to the beginning of the trial. The trial court overruled defendant's objection and the diagram was admitted.

Although defendant objected to the admission of the diagram, he failed to object to the preceding testimony from Agent Flood. Because the essential content of this exhibit was admitted without objection, defendant waived any objection he subsequently raised as to the admissibility of the crime scene diagram. *See*, *e.g.*, *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989) (benefit of objection lost when same or similar evidence has been previsouly admitted or is later admitted without objection).

Defendant has not argued that admission of the crime scene diagram constituted plain error, and such an argument could not prevail in light of the rigorous standard for plain error and the illustrative nature of the diagram. *See State v. Simpson*, 327 N.C. 178, 192, 393 S.E.2d 771, 779 (1990).

This argument is without merit.

B. State's Exhibits 24, 25, and 26: Photographs Depicting Scene Where Weapon Was Recovered

[3] Defendant next contends that the trial court's admission of three photographs depicting the scene where the weapon was recovered was error.

At trial, the State's witness, Luke Pyles, testified regarding the circumstances surrounding the recovery of defendant's gun. Mr. Pyles

testified that, on the morning of 30 January 2007, he was supervising children at a bus stop near his home. A young child found the gun in the vicinity of the bus stop, and Mr. Pyles then contacted the police. The gun was subsequently taken into evidence. The State sought to admit the photographs to illustrate Mr. Pyles's testimony. Defendant objected to the admission of the photographs on the grounds that they were not provided in discovery prior to trial. However, defendant failed to object to the testimony of Mr. Pyles and, as previously discussed, he has waived his objection to the admission of the photographs. Defendant has not argued plain error, and we hold that there was none.

This argument is without merit.

B. State's Exhibit 27: Photograph of Decedent and Family

[4] Defendant next contends that the court erred in admitting State's exhibit number 27, which was a photo of the decedent with his family.

At trial, counsel for defendant objected to the picture being introduced into evidence on the grounds that it was irrelevant and unfairly prejudicial. The trial court overruled defendant's objection.

We agree with defendant that the picture of the decedent with his family was irrelevant in that it did not "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2007). However, admission of this evidence was harmless due to the fact that, following defendant's objection to the picture, Charles Horton testified about the decedent's family life and described his family, including his wife and two young children, without objection. Admission of the photograph could not have prejudiced defendant, given that other evidence was heard regarding his family life. Defendant has demonstrated no reasonable possibility that had the photographs been excluded at trial, the jury would have reached a different result. *See* N.C. Gen. Stat. § 15A-1443(a) (2007).

Defendant acknowledges that he failed to object to the testimony of Charles Horton. However, he argues that it was plain error to admit this testimony. In order to establish plain error "[d]efendant must show that the error was so fundamental that it had a probable impact on the result reached by the jury." *State v. Campbell*, 340 N.C. 612, 640, 460 S.E.2d 144, 159 (1995) (citation omitted).

Even assuming *arguendo* that the trial court erred in admitting Charles Horton's testimony, defendant cannot demonstrate that this testimony had a probable impact on the result reached by the jury. *See id.*

This argument is without merit.

IV. Argument by Prosecutor

[5] In his third argument, defendant contends that the trial court erred in allowing the prosecutor to comment on defendant's use of self-defense. We disagree.

It is well-settled that counsel is entitled to argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom. *See, e.g., State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41 (2000). A trial court is not required to intervene during a closing argument "unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *Id.* Where a defendant does not object to the statements, the standard of review on appeal is whether the prosecutor's remarks were so grossly improper that the trial court's failure to intervene *ex mero motu* constituted an abuse of discretion. *State v. Barden*, 356 N.C. 316, 356, 572 S.E.2d 108, 134 (2002).

In the State's closing argument, the prosecutor argued to the jury:

> [Defense counsel] did not talk to you about self-defense and I would submit to you that it's because it's incredulous the defendant believed he needed to defend himself on this occasion.

Defendant contends that the comments were improper and that the prosecutor's remarks "incurably prejudiced the jury's deliberations" such that the verdict was unreliable and he is therefore entitled to a new trial. Defendant cites *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986) in support of his argument. In *Williams*, this Court vacated the defendant's death sentence and remanded the case for a new sentencing hearing based upon the improper submission of an aggravating circumstance that the victim's killing was motivated by defendant's desire to eliminate her as a potential witness, despite there being no evidence to support the theory. *Id.* at 480, 346 S.E.2d at 409. At the second sentencing hearing, the prosecutor again repeatedly argued witness elimination, despite the fact that there was no evidence to support it. The North Carolina Supreme Court held that the trial court should have intervened *ex mero*

motu, and granted defendant a third sentencing hearing. *Id.* at 483, 346 S.E.2d at 411.

The instant case is distinguishable from *Williams*. Read in the context of the entire closing argument, it appears that the prosecutor discussed the necessary elements of self-defense, and then asserted that it was not likely that defendant met those elements. The prosecutor's comment was consistent with the evidence presented that (1) defendant was the aggressor throughout the entire situation, (2) multiple witnesses heard defendant's threats that he intended to kill anyone who interfered with his assault of Ms. Utley, and (3) these same witnesses observed defendant shoot and kill Mr. Horton after he issued these threats. It was reasonable in this context to infer that defendant did not act in self-defense. Further, the trial court charged the jury on self-defense. Since the issue of self-defense was before the jury, it was proper for the State to argue to the jury that it was not supported by the evidence.

We hold that the prosecutor's arguments were proper. However, even if there was any error in this argument, it was not so grossly improper that the trial court's failure to intervene *ex mero motu* constituted an abuse of discretion. *See Barden* at 356, 572 S.E.2d at 134.

NO PREJUDICIAL ERROR.

Judge CALABRIA concurs.

Judge STROUD concurs in a separate opinion.

STROUD, Judge, concurring.

Although I concur fully in the holdings of the majority opinion, I write separately to note that this opinion should not be construed as approval of the State's failure to produce certain evidence in response to defendant's discovery request and the court's discovery order.

As the majority opinion notes, the State did not provide the crime scene diagram (State's exhibit 3) and the photographs depicting the scene where the weapon was recovered (State's exhibits 24, 25, and 26) to defendant prior to trial, despite defendant's timely motion for discovery and the court's 16 November 2007 order requiring discovery. At trial, after defendant's objection to the State's presentation of

these exhibits, the judge asked the assistant district attorney ("ADA"), "[w]hy were they not produced to the defense earlier and why were they not produced as of Monday when they were received by you [from Detective Booth]?" The ADA responded,

> I guess in my experience, Judge, photographs like this are not something that we generally give to [sic] in discovery. . . . I didn't give him or hand over any—the gun or the earrings or the bracelets. Those kind of things. Photographs are the [sic] similar types of items. I gave him the other photographs because I happened to have them on a disk to do so and he doesn't have those. So I provided those to him.

Essentially, counsel's argument likened the photographs to the murder weapon and indicated that the Wake County District Attorney's Office ("we") *generally* did not provide this "kind of thing" to defense counsel, despite a discovery order.

> Defendant argues before this court that
>
> [i]t seems . . . absurd (especially in a First Degree Murder case) for presumably experienced prosecutors to tell the trial court that it just wasn't the custom of the Wake County District Attorney's Office to comply with the dictates of the general statutes and court orders when it came to tangible exhibits.

I agree. The State prevails in this case only for the reasons stated in the majority opinion. I write separately to stress that the State provided no valid reason to withhold discovery of the crime scene diagram and photographs and to clarify any misunderstanding which the State may have regarding types of photographs or diagrams to produce in response to a discovery order. The differences between a murder weapon or other physical evidence recovered from a murder victim and a copy of a photograph are too obvious to belabor. The State is obligated to produce the photographs or other evidence as requested and ordered in the discovery order—no more, no less.

BRENDA B. MARTIN, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA08-259

(Filed 6 January 2009)

Public Assistance— Medicaid—benefits denied—income eligibility—definition of family

The trial court did not err by reversing DHHS and reinstating petitioner's benefits under Medicaid for the Qualified Beneficiary Part B (MQB-B) where petitioner and her spouse were both disabled and depended on her social security disability income. DHHS's interpretation of the federal statutes concerning MQB eligibility utilizes social security (SSI) methodology in determination of the meaning of family, but that methodology does not define "a family of the size involved." The termination of petitioner's benefits may effectively prevent petitioner from being able to afford medical care, a result that cannot be reconciled with the purpose of the Medicaid Act.

Appeal by respondent agency from order entered 21 November 2007 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 6 October 2008.

Legal Aid of North Carolina, by Angeleigh Dorsey and Emma G. Clark, and Legal Services of Southern Piedmont, by Douglas Stuart Sea, for petitioner-appellee.

Roy Cooper, Attorney General, by Belinda A. Smith, Special Deputy Attorney General, for respondent-appellant Department of Health and Human Services.

MARTIN, Chief Judge.

The North Carolina Department of Health and Human Services ("DHHS") appeals from the 21 November 2007 order reversing the final agency decision to terminate Medicaid for the Qualified Beneficiary Part B ("MQB-B") benefits of petitioner-appellee Brenda Martin ("petitioner"). We affirm.

On 1 March 2006, petitioner applied for MQB-B for herself and Medicaid for the Disabled ("MA-D") for herself and her husband at the Buncombe County Department of Social Services ("DSS"). Petitioner is a Medicare beneficiary and MQB-B is a Medicaid eligi-

bility category for Medicare beneficiaries who need help paying their Medicare Part B premiums. At the time of her application, petitioner's Medicare premiums were $88.50 per month and her only income was a monthly Social Security Disability check for $1,216. Petitioner's husband, a veteran who receives no pension, is not a Medicare beneficiary, is not eligible for Social Security Disability because he did not work enough quarters in the private sector, and has no income. Additionally, petitioner's husband is not eligible for benefits from the Veteran's Administration ("VA") or for Supplemental Security Income ("SSI"), an indigent disability program of the Social Security Administration ("SSA"), due to his wife's disability income. However, the VA does pay for most of his medical care. Otherwise, petitioner supports herself and her husband, the only members of their household, with her monthly $1,216 Social Security check.

While the MA-D applications were pending, petitioner received a notice from DHHS approving her MQB-B application and indicating that her Medicare Part B premiums for the period 1 December 2005 through 28 February 2007 would be paid. As part of the application process for the MA-D Medicaid assistance, petitioner's husband was determined disabled by the Disability Determination Service, the state agency charged with making disability determinations in North Carolina for the state Medicaid and the federal SSA programs. However, on 23 May 2006, DSS notified petitioner and her husband that their applications for full MA-D were denied because, given petitioner's income, their medical expenses did not indicate they would meet the deductible of $5,274 within the six month certification period. Buncombe County DSS also informed petitioner that her MQB-B benefits would terminate on 30 June 2006 because her monthly income of $1,216 was over the MQB-B income limit of $980 per month for a single individual.

In terminating petitioner's MQB-B benefits, Buncombe County DSS acted pursuant to administrative rules promulgated by DHHS. Under these rules, "income counted in the determination of financial eligibility is based on standards and methodologies in Title XVI of the Social Security Act[, the SSI program]." N.C. Admin. Code 10A 21B.0312(c) (June 2004). Pursuant to these SSI methodologies, the rules provide that "[t]he income level to be applied for Qualified Medicare Beneficiaries described in 42 U.S.C. 1396d . . . is based on the income level for one; or two for a married couple who live together and both receive Medicare." N.C. Admin. Code 10A 21B.0312(e)(4) (June 2004). DHHS's State Adult Medicaid Manual

incorporates these rules, acting as a functional guide to DHHS employees for the administration of the MQB-B program. According to the manual, a "Medicaid couple" consists of Medicaid applicants or recipients who are married and living together. If the total combined income of the spouses exceeds $1,320, they will be ineligible for MQB-B benefits. However, if only one spouse is eligible for Medicare, the manual provides that the spouse is considered a "Medicaid individual with an Ineligible Spouse." In this case, the income of the ineligible spouse will be "deemed," or imputed, to the eligible spouse. If the total combined income of the eligible spouse and ineligible spouse exceeds $980, the eligible spouse will receive no MQB-B benefits. Because petitioner's husband's MA-D application was denied, Buncombe County DSS reassessed petitioner's MQB-B eligibility utilizing the income limit for an individual with an ineligible spouse, and consequently denied petitioner MQB-B benefits.

Petitioner subsequently appealed the termination of benefits at the local and state agency levels. Both local and state hearing officers affirmed Buncombe County DSS's decision. Petitioner then appealed to DHHS's chief hearing officer, and the final agency decision, issued 8 December 2006, also affirmed the termination of benefits. Pursuant to N.C.G.S. § 108A-79(k), petitioner appealed the final agency decision to the Buncombe County Superior Court. In her petition for judicial review, petitioner argued that DHHS erred by incorrectly calculating petitioner's income and resources as an individual rather than by her actual family size as established by 42 U.S.C. § 1396d. The appeal was heard by the superior court on 5 September 2007. On 21 November 2007, the court issued an order reversing DHHS's final decision. The superior court's order included the following conclusions of law:

> 2. The federal Medicaid statute applicable to a qualified medicare beneficiary directs the state to measure an applicant's income against the official poverty level for the number of family members. 42 U.S.C. 1396d(p).
>
> 3. A "family of the size involved" as found at 42 U.S.C. 1396d(p) includes an MQB-B applicant and the applicant's spouse living in the same household who is dependent on the applicant for financial support.
>
> 4. Substantial evidence of the record established that Petitioner and her spouse were both disabled, married to each other, and

dependent on her social security disability income within the meaning of 42 U.S.C. § 1396d(p) and 20 C.F.R. § 416.120.

5. [DHHS]'s policy of determining income and resource eligibility for married individuals applying for the MQB-B program violates federal Medicaid statutes and regulations found at 42 U.S.C. § 1396d and 20 C.F.R. § 416.120.

6. Based on the foregoing, [DHHS] acted erroneously when it terminated Petitioner's MQB-B benefits.

Subsequent to the superior court's order, DHHS filed notice of appeal.

On appeal, DHHS assigns error to the superior court's conclusion that DHHS's policy for determining income and resource eligibility violates federal statutes and regulations. Specifically, DHHS argues that, as found in 42 U.S.C. § 1396d, "family size" is a term of art and thus petitioner's income level should be based on a family size of one. We disagree.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. *See id.* Moreover, we must be guided by the "fundamental rule of statutory construction that statutes in pari materia, and all parts thereof, should be construed together and compared with each other." *Redevelopment Comm'n v. Sec. Nat'l Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960). Such statutes should be reconciled with each other when possible and any irreconcilable ambiguity should be resolved in a manner which most fully effectuates the true legislative intent. *See Duncan v. Carpenter & Phillips*, 233 N.C. 422, 426, 64 S.E.2d 410, 413 (1951), *overruled on other grounds by Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980).

"Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding." *Total Renal*

Care of N.C., LLC v. N.C. Dep't. of Health & Hum. Servs., 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005). "The weight of such an interpretation in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* A "state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes." *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *Three Lower Counties Cmty. Health Servs., Inc. v. Maryland*, 498 F.3d 294, 302 n.2 (4th Cir. 2007). However, where terms of a statute have been interpreted by the governing federal agency in a published regulation, that interpretation is entitled to great deference. *See Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 703 (1984).

Medicaid is a federal program designed to provide health care funding for the needy. *See Luna v. Div. of Soc. Servs.*, 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004). Medicaid is a joint program administered by participating states and overseen by the federal government. *See id.* Although Medicaid is funded in part by the states, North Carolina must abide by federal eligibility requirements or risk losing its Medicaid reimbursement from the federal government. *See* 42 U.S.C. § 1396a (2000); *see also Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 3 (2006). North Carolina's Medicaid plan describes the nature and scope of its Medicaid program and gives assurance that it will be administered in conformity with specific federal statutory requirements and other applicable official issuances of the federal Department of Health and Human Services. *See* 42 C.F.R. § 430.10 (2006). The State Plan does not incorporate the State Adult Medicaid Manual; the manual acts instead as an internal instructional reference for DHHS employees in the application of DHHS policy and interpretation of federal Medicaid requirements.

North Carolina's participation in the Medicaid program includes the administration of the Medicare Savings Programs known as MQB-Q and MQB-B programs. MQB-Q pays a recipient's Part B premium, deductibles and copayments. 42 U.S.C. § 1396a(a)(10)(E)(i) (2000). MQB-B pays a recipient's Medicare Part B premium only. *See* 42 U.S.C. § 1396a(a)(10)(E)(iii). The MQB-B program requires the State to purchase Medicare Part B premiums for individuals who receive Medicare and whose family income is under 120 percent of the Federal Poverty Level. *See id.* The criteria set forth by Congress

for MQB eligibility can be found in Title 42 of the U.S. Code. Section 1396d(p) of that title provides:

> (1) The term "qualified medicare beneficiary" means an individual—
>
> . . . .
>
> (B) whose income (as determined under section 1612 [42 U.S.C. § 1382a] for purposes of the supplemental security income program, except as provided in paragraph (2)(D)) does not exceed an income level established by the State consistent with paragraph (2), and
>
> (C) whose resources (as determined under section 1613 [42 U.S.C. § 1382b] for purposes of the supplemental security income program) do not exceed twice the maximum amount of resources that an individual may have and obtain benefits under that program . . . .
>
> (2)(A) The income level established under paragraph (1)(B) shall be at least the percent provided under subparagraph (B) (but not more than 100 percent) of the official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Reconciliation Act of 1981 [42 U.S.C. § 9902(2)]) *applicable to a family of the size involved.*

42 U.S.C. § 1396d(p) (2000) (emphasis added). This portion of Title 42 defines eligibility requirements for the MQB-Q program. Congress later directed states to provide MQB-B coverage to individuals who qualify for MQB-Q benefits as described above, save for the fact that their family income exceeds 100% of poverty but is less than 120% of the federal poverty guidelines "for a family of the size involved." *See* 42 U.S.C. § 1396a(a)(10)(E)(iii) (2000). Thus, to determine MQB-B eligibility, the State must measure an MQB-B applicant's countable income against 120% of the official poverty level for "a family of the size involved." *See id.*

We note that DHHS's interpretation of 42 U.S.C. § 1396d(p) utilizes SSI methodology in its determination of the meaning of "family of the size involved." The SSI methodology referred to in paragraphs(1)(B) and (1)(C) of 42 U.S.C. § 1396d(p) is the language upon which DHHS has based its promulgation of 10A N.C.A.C. 21B.0312(e)(4). This methodology does not address the meaning of

"family," but rather treats applicants and recipients in terms of "eligible individuals" who may or may not have eligible spouses. *See* 42 U.S.C. § 1382(a) (2000). Under SSI regulations, "couple means an eligible individual and his eligible spouse." 20 C.F.R. § 416.120(c)(5) (2006). Under 20 C.F.R. § 416.1801(c), a person is only considered to be married to an eligible spouse for SSI methodology purposes if the spouse is eligible for SSI. *See* 20 C.F.R. § 416.1801(c) (2006). The SSI definition of "couple" thus functions as a term of art rather than a descriptive or practical reference.

Our reading of 42 U.S.C. § 1396d(p) reveals, however, that SSI methodology applies only to determinations of *income* discussed in paragraphs (1)(B) and (1)(C). *Income level*, as provided for in paragraph (2)(A), is not determined by SSI methodology, but instead is to be determined in part by "the percent provided under subparagraph (B) . . . of the official poverty line . . . applicable to a family of the size involved." 42 U.S.C. § 1396d(p)(2)(A). This aspect of the statute is not ambiguous. However, Title 42 does not define "a family of the size involved."

Where a statute does not define a term, we must rely on the common and ordinary meaning of the words used. *See Lafayette Transp. Serv., Inc. v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973). A family is defined as "a group consisting of parents and their children; a group of persons who live together and have a shared commitment to a domestic relationship." Black's Law Dictionary 637 (8th ed. 2004). Under this definition, petitioner's family would include her disabled husband who lives with her and relies on her for financial support. This plain reading of the statute is supported by a mandate to liberally construe the statute in order to provide disability payments for all qualified persons. *See Rowe v. Finch*, 427 F.2d 417, 419 (4th Cir. 1970). Such a reading is also supported by our Supreme Court's holding that "courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve." *Burgess*, 326 N.C. at 216, 388 S.E.2d at 141.

The most recent addition to the Medicare program, Medicare Part D, utilizes language identical to that of 42 U.S.C. § 1396d(p)(2)(A) to determine eligibility for that program. The relevant portion of the Medicare Part D statute provides: "In the case of a subsidy eligible individual . . . who is determined to have income that is below 135 percent of the poverty line *applicable to a family of the size in-*

volved and who meets the resource requirement . . . ." 42 U.S.C. § 1395w-114(a)(1) (2003) (emphasis added). Like U.S.C. § 1395(p)(2)(A), this portion of 42 U.S.C. § 1395w-114 makes no reference to SSI methodology. The federal Department of Health and Human Services has published regulations interpreting 42 U.S.C. § 1395w-114(a)(1) as follows:

> family size means the applicant, the spouse who is living in the same household, if any and the number of individuals who are related to the applicant or applicants, who are living in the same household and who are dependent on the applicant or the applicant's spouse for at least one-half of their financial support.

42 C.F.R. § 423.772 (2005). Although the federal Department of Health and Human Services' interpretation of 42 U.S.C. § 1395w-114(a)(1) does not control our interpretation of 42 U.S.C. § 1395(p)(2)(A), we find it persuasive, due to its similarity to our understanding of the plain meaning of "family of the size involved" as found in 42 U.S.C. 1395(p)(2)(A).

We also note that, in the case before us, DHHS's interpretation of 42 U.S.C. § 1396d and 20 C.F.R. § 416.120 has led to absurd results. Here, pursuant to DHHS policy, DSS first denied petitioner's husband MA-D benefits based on the deductible and income amounts for a couple. Next, still acting pursuant to DHHS policy, DSS reassessed petitioner's MQB-B application based on the income level for an individual and subsequently terminated petitioner's MQB-B benefits, knowing that petitioner and her husband were both disabled and solely dependent on petitioner's monthly income from Social Security Disability. Although, because of VA assistance, petitioner's husband does not have medical bills, petitioner assuredly does. The termination of petitioner's benefits may effectively prevent petitioner from being able to afford medical care. We cannot reconcile such a result with the Medicaid Act's purpose of furnishing medical assistance to disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services. *See* 42 U.S.C. § 1396 (2000).

DHHS contends that, should we affirm the superior court's ruling that DHHS's policy of determining income eligibility for married individuals applying for the MQB-B program violates 42 U.S.C. § 1396d and 20 C.F.R. § 416.120, DHHS would be in violation of its federally approved Medicaid plan. This argument is without merit.

First of all, the State is protected from losing its federal funding by federal Medicaid regulations, which provide that federal financial participation is available for expenditures for services provided under a court order. *See* 42 C.F.R. § 431.250(b)2 (2006) (providing that federal financial participation is available in expenditures for "services provided within the scope of the Federal Medicaid program and made under a court order."). Here, DHHS opposed the expenditure of providing petitioner with MQB-B benefits until the superior court issued its order overturning DHHS's final agency decision. As such, there is no risk of the State losing federal funding due to noncompliance with its Medicaid State plan as a result of this case.

We also note that, on 9 August 2006, DHHS gave notice of a final decision in a case, marked as Case No. Q46310 in the record on appeal, with facts similar to the case at bar. DHHS's decision in that case was inapposite to its final decision in the case now before us. In the 2006 case, DHHS concluded that the "Federal Medicaid statute directs the state to measure an MQB applicant's income against the poverty level for the number of family members the applicant must support." "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30, 94 L. Ed. 2d 434, 457 n.30 (1987). As such, DHHS's current interpretation of 42 U.S.C. § 1396d, viewed in light of its 2006 decision and the pronouncements of the federal Department of Health and Human Services, is entitled to significantly less deference than DHHS asserts.

Because we find that DHHS's interpretation is not in keeping with the plain meaning of the language used in 42 U.S.C. § 1396d and 20 C.F.R. § 416.120 as well as contrary to the purpose of the Medicaid Act, we must conclude that it violates the federal guidelines for Medicaid. Accordingly, the superior court correctly reversed DHHS's decision and ordered MQB-B benefits reinstated to petitioner.

Affirmed.

Judges McGEE and STEPHENS concur.

STATE OF NORTH CAROLINA v. JAMES McQUEEN BUIE, DEFENDANT

No. COA07-1522

(Filed 6 January 2009)

1. Evidence— victim's good character—harmless error

The trial court committed harmless error in a first-degree sexual assault, robbery with a dangerous weapon, second-degree kidnapping, and first-degree rape case by admitting evidence of the victim's good character because: (1) although the State should not have been allowed to introduce evidence in its case-in-chief about the victim's good character merely based on the fact that defense counsel forecast the introduction of evidence of the victim's bad character during his opening statement, there was sufficient evidence in the record including testimony by the victim, physical evidence from the crime scene, and testimony by another woman who had also been approached by defendant in the same parking lot that afternoon; and (2) there was no reasonable possibility that the jury would have reached a different verdict absent this error.

2. Evidence— impermissible lay opinion—narration of surveillance tapes by detective without firsthand knowledge or perception

The trial court committed harmless error in a first-degree sexual assault, robbery with a dangerous weapon, second-degree kidnapping, and first-degree rape case by allowing the State's witness, a detective, to narrate the surveillance tapes from a bank and hospital, and to offer his opinion of what the tapes depict, because: (1) although the evidence was narrative testimony about the depiction of two poor quality surveillance videos constituting an inadmissible lay opinion invading the province of the jury since it was not based on any firsthand knowledge or perception by the officer, but rather solely on the detective's viewing of the surveillance video, it was only applicable to the robbery with a dangerous weapon and second-degree kidnapping charges; (2) the jury heard other testimony supporting the victim's claim that she was kidnapped; (3) the trial court, despite wrongfully admitting the detective's testimony, also repeatedly instructed the jury that it was charged with evaluating the images on the videotape and was free to disagree with the detective's interpretation, thus likely curing any impermissible

reliance by jurors on the detective's statements; and (4) the victim's own testimony about what happened in the parking lot and at the bank, the knife recovered from the crime scene, and the victim's report of her rape and abduction constituted sufficient evidence to support the jury's decision independent from the detective's testimony.

Judge ARROWOOD concurred prior to 31 December 2008.

Appeal by defendant from judgments entered 13 March 2007 by Judge Mark E. Powell in Superior Court, Buncombe County. Heard in the Court of Appeals 21 October 2008.

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

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

WYNN, Judge.

Defendant James McQueen Buie appeals his convictions for first-degree sexual assault, robbery with a dangerous weapon, second-degree kidnapping, and first-degree rape. He argues that the trial court erred in allowing the admission of character evidence about the alleged victim and the narration of video surveillance tapes by a police detective. After careful review of the record, we hold that the trial court committed error in the admission of this evidence; however, finding the error to be harmless, we affirm.

At trial, the State presented evidence tending to show the following: On the afternoon of 28 June 2006, Defendant approached a female in the parking lot of Mission Hospital in Asheville, North Carolina. Defendant forced his way into her car at knife point. Defendant, with the female in the passenger's seat, drove to a nearby automatic teller machine (ATM) and withdrew cash using her ATM card and pin number. During the stop at the ATM, the female attempted to get out of the car but was only able to get her right leg out of the vehicle before Defendant pulled her back into the car, pointing the knife at her face.

Using the money he obtained from the female's bank account, Defendant drove to a nearby apartment complex where he purchased crack cocaine. After Defendant smoked some of the crack cocaine in

the car, he drove the female to a secluded, wooded area. Defendant ordered the female out of the car, telling her he was going to make her smoke with him and then let her go. Defendant, leaving the knife inside the car and handing the female the keys, pushed her into the woods.

Over the course of a number of hours, Defendant smoked the crack cocaine and blew the smoke into the female's mouth approximately ten to fifteen times. At some point, after Defendant ran out of crack cocaine, he began groping her chest and groin and kissing her. Despite her pleas to stop, Defendant yanked her hair, reached inside her pants, and put his fingers inside her vagina. Then, after forcibly removing her pants and telling her to lie down on the ground, Defendant "put his penis into [her] vagina."

After a few minutes, Defendant got up, dressed, and told the female "we can leave now." She dressed and followed Defendant back to the car. Defendant got into the driver's seat, tossed the knife out of the car window, and drove to a friend's apartment where they arrived after 11:30 p.m. The female testified that Defendant told her that the people in the apartment "were his friends, that I should not tell them anything that was going on . . . and if he told them that I had money that they would want money, that they would help him."

During the approximately two hours the female was at the apartment with Defendant and two others, Defendant took her into a back bedroom and repeatedly "forced" her "to ingest cocaine by blowing the smoke into her mouth." Although Defendant had previously told the female that as soon as his friend came to pick him up she would be free to leave, Defendant eventually asked her to drop him off somewhere nearby. At that point, the female told the man and woman in the apartment that Defendant had kidnapped and raped her. Shortly thereafter, the woman in the apartment escorted the female out to her car where the female called her husband, and then drove herself to the emergency room.

After a jury trial, Defendant was convicted of first-degree sexual assault, robbery with a dangerous weapon, second-degree kidnapping, and first-degree rape. Appealing his conviction, Defendant argues that the trial court erred by (I) admitting evidence of the female's good character and (II) allowing a police officer to offer narrative testimony of the surveillance footage from the bank and site of the alleged kidnapping.

I.

[1] Defendant first argues that the trial court erred by admitting evidence of the female's good character.[1] As a general rule, relevant evidence is "admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly" or by the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 402 (2007). Further, Rule 403 adds: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2007).

In addition to the general rules of relevancy, the North Carolina Rules of Evidence set out specific rules for the admission of character evidence. "Evidence of a person's character or a trait of his character is *not* admissible for the purpose of proving that he acted in conformity therewith on a particular occasion" unless one of the following circumstances apply:

> (2) Character of victim.—Evidence of a pertinent trait of character of the victim of the crime offered by an accused, *or by the prosecution to rebut the same*, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

N.C. Gen. Stat. § 8C-1, Rule 404(a) (2007) (emphasis added). Thus, in cases where character evidence of the victim is *not* offered to rebut evidence that the victim was the first aggressor, "the rule allows the prosecution to introduce evidence of a victim's character only to rebut defendant's evidence calling it into question." *State v. Quick*, 329 N.C. 1, 26, 405 S.E.2d 179, 194 (1991).

Here, Defendant argues that the trial court erred in allowing testimony by the female and her mother regarding her good character, community service, academic achievements, and family involvement. The State contends that the defense "opened the door" to the admission of this testimony under Rule 404(a)(2) by calling into question the female's character during its opening statement. In the opening

1. Defendant-Appellant's assignments of error and objections at trial also cite inadmissibility under N.C. Gen. Stat. § 8C-1, Rule 610; however, Appellant's brief contains no discussion of inadmissibility on these grounds. In accordance with the North Carolina Rules of Appellate Procedure Rule 28(a) (2007), Appellant's Rule 610 argument is deemed abandoned.

statement, the defense counsel stated that Defendant and the female decided to leave the parking lot together; she voluntarily gave him her ATM card to withdraw money; they smoked crack cocaine together; they had consensual sex; and the female subsequently fabricated her allegations of kidnapping, rape, and robbery. Thus, the threshold issue before us is whether statements made by the defense counsel during his opening statement are sufficient to constitute "evidence" under Rule 404(a)(2), allowing the prosecution to offer rebuttal evidence of the female's character. We find *State v. Faison*, 330 N.C. 347, 411 S.E.2d 143 (1991), to be instructive.

In *Faison*, our Supreme Court held that, under Rule 404(a)(2), the prosecution may not introduce evidence of the victim's peaceful character until the Defendant has submitted evidence that the victim was the first aggressor. *Id.* Additionally, the Court found that opening statements by counsel are not "evidence" for the purposes of Rule 404 and thus "the prosecution should have waited until rebuttal to introduce its evidence concerning the peacefulness of [Defendant]." *Faison*, 330 N.C. at 356, 411 S.E.2d at 148. *Cf. State v. Murillo*, 349 N.C. 573, 600, 509 S.E.2d 752, 768 (1998) (holding that the trial court did not abuse its discretion in a capital first-degree murder case by allowing the admission of "character evidence concerning the victim's performance as a school teacher" to rebut the claim in defendant's opening statement that victim was an "irresponsible," "violent," and abusive alcoholic), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

In light of *Faison*, we hold that the State should not have been allowed to introduce evidence in its case-in-chief about the female's good character merely because the Defendant forecast the introduction of evidence of the female's bad character. *Faison*, 330 N.C. at 355, 411 S.E.2d at 147. Since the Defendant offered no evidence in his case-in-chief of the female's bad character, we agree with Defendant that the admission of character evidence regarding the female's good character was in error.

However, in order for an error to be prejudicial to a Defendant, there must be "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2007). In this case, there is sufficient evidence in the record and trial transcripts, including testimony by the female, physical evidence from the crime scene, and testimony by another woman, who had also been approached by Defendant in the parking lot that afternoon,

to refute Defendant's claim that, but for the admission of the character evidence, there is a reasonable possibility that the jury would have reached a different verdict. Accordingly, we hold that the erroneous admission of the character evidence was harmless.

II.

[2] Defendant further argues that the trial court erred in allowing the State's witness, Detective Welborn, to narrate the surveillance tapes from the bank and hospital, and to offer his opinion of what the tapes depict. "When reviewing a trial court's rulings on the admission or exclusion of lay witness or expert testimony, we review for abuse of discretion." *State v. Llamas-Hernandez*, 189 N.C. App. 640, 743, 659 S.E.2d 79, 81 (2008).

Under the North Carolina Rules of Evidence, the jury is charged with determining what inferences and conclusions are warranted by the evidence. *State v. Peterson*, 225 N.C. 540, 543, 35 S.E.2d 645, 646 (1945), *overruled in part on other grounds by State v. Hill*, 236 N.C. 704, 73 S.E.2d 894 (1953). However, the introduction of lay opinion testimony may be admissible under certain circumstances.

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2007).

The current national trend is to allow lay opinion testimony identifying the person, usually a criminal defendant, in a photograph or videotape "where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact—finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony." Brent G. Filbert, Annotation, *Admissibility of Lay Witness Interpretation of Surveillance Photograph or Videotape*, 74 A.L.R.5th 643, 653 (1999); *see also Robinson v. People*, 927 P.2d 381, 384 (Colo. 1996) ("[A] lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there was some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.").

Defendant challenges the admissibility of Detective Welborn's testimony interpreting the surveillance videotape from the hospital where the female worked and from the bank during the time the female's card was used at the ATM.[2] At trial, the State questioned Detective Welborn extensively about both tapes, asking him whether the actions depicted by the surveillance videotapes were "consistent with" the testimony of the female. Over Defendant's objections, the State repeatedly asked Detective Welborn whether the admittedly "poor quality" images from the surveillance tapes were consistent with the female's prior testimony. Specifically, Detective Welborn testified that the bank's surveillance video was consistent with the female's testimony that, while Defendant was using her ATM card to withdraw cash from her account, she attempted to exit the vehicle.

Q: Are you able to see that image?

A: Yes.

Q: Is that consistent with a door being opened?

Defense Counsel: Objection, your Honor. It's for the jury to decide that [sic] the tape shows.

Court: Overruled.

A: It does appear to be a door opening on the vehicle.

Q: Right there. (Indicating with laser pointer.) (Playing some more of the tape).

Q: Is this consistent with the door being closed?

Defense Counsel: Objection, your Honor.

Court: Overruled.

A: Yes.

Q: And did it drive away?

A: Yes, the vehicle drove away.

The State argues that this testimony was properly permitted by the trial court as a "shorthand statement of facts" in which the wit-

2. The State acknowledges that Detective Welborn was not testifying as an expert. Rather, Detective Welborn offered his lay opinion, based on his review of the surveillance tapes under his investigation, as to what was shown.

ness's "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time" have been held to be admissible. *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975) (internal quotation marks and citation omitted), *vacated in part on other grounds by Spaulding v. North Carolina*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976); *see also State v. Shaw*, 322 N.C. 797, 370 S.E.2d 546 (1988) (finding no error in the admission of an officer's shorthand statement that the pattern of wear on defendant's shoes was similar to the pattern on the shoes found behind the victim's home).

In support of its position, the State relies on *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994). In that case, the Court found that the admission of testimony by a police officer, stating that the small openings visible from a photograph of the victim's arm appeared to be buckshot wounds, was not in error, despite the officer not having firsthand knowledge of whether the wounds were in-fact caused by buckshot. *Alexander*, 337 N.C. at 190-91, 446 S.E.2d at 88. However, the evidence at issue in *Alexander* was a still photograph of a discrete object and a single isolated statement that the photograph depicted a buckshot wound. *Id.*

The evidence at issue here is narrative testimony about the depiction of two poor quality surveillance videos, each several minutes in length. Rather than identifying a type of wound in a still photograph, Detective Welborn offered his opinion, at length, about the events depicted in the surveillance tapes, concluding that the video corroborated the female's testimony. Thus, we find that the testimony offered by Detective Welborn was not a shorthand statement of facts, but rather an inadmissible lay opinion testimony that invaded the province of the jury.

We observe in passing that this Court has upheld the admission of similar testimony by law enforcement officials only when their interpretations were based in part on firsthand observations. In *State v. Mewborn*, 131 N.C. App. 495, 499, 507 S.E.2d 906, 909 (1998), the court permitted the testimony of an officer that the markings on the defendant's shoes were "very consistent" with shoes worn by the perpetrator in a video of the robbery. However, in *Mewborn*, the officer's testimony was based on his comparison between the defendant's shoes, which the officer had the opportunity to observe when the defendant was brought in for questioning, and the shoe markings visible in the videotape. *Id.*

Further, in *State v. Thorne*, 173 N.C. App. 393, 618 S.E.2d 790 (2005), the Court upheld the admission of testimony by a police officer that the gait of the perpetrator, observed from a lost surveillance video, was similar to defendant's gait. Once again, the officer in *Thorne* was not only " 'trained to notice differences in the actual ways people walk[ed]' " but, he also testified that he had observed the defendant's gait in the past. *Thorne*, 173 N.C. App. at 399, 618 S.E.2d at 795.

The evidence at issue here is distinguishable from that in *Mewborn* and *Thorne* in that it was not based on any firsthand knowledge or perception by the officer, but rather solely on the detective's viewing of the surveillance video. Indeed, Detective Welborn was not offering his interpretation of the similarities between evidence he had the opportunity to examine firsthand and a videotape, but rather offering his opinion that the actions depicted in the surveillance video were similar to the female's recollection of the alleged kidnapping and robbery. Accordingly, we find that the admission of Detective Welborn's testimony was in error.

Having found the trial court's admission in error, we must determine whether the error was prejudicial toward the Defendant. N.C. Gen. Stat. § 15A-1443(a); *State v. Wilson*, 121 N.C. App. 720, 723, 468 S.E.2d 475, 478 (1995) ("A defendant wishing to overturn a conviction on the basis of error relating to non-constitutional rights has the burden of showing a reasonable possibility that a different result would have been reached at trial absent the error."). Defendant argues that this error was prejudicial since the jury was tasked with resolving two conflicting accounts of that day's events. Given the poor quality of the images on the videotape, he argues the narration by Detective Welborn greatly influenced the jury's decision in finding Defendant guilty on the charges of first-degree sexual assault, robbery with a dangerous weapon, second-degree kidnapping, and first-degree rape. However, Detective Welborn's testimony is only potentially relevant to two of the issues before the jury, robbery with a dangerous weapon and second-degree kidnapping, as the wrongfully admitted testimony only addressed the surveillance video from the bank and hospital. After careful review of the evidence, we conclude that the trial court did not commit prejudicial error.

First, the jury heard other testimony supporting the female's claim that she was kidnapped. Katherine Michelson, who was not harmed, testified that on the same afternoon the female was kidnapped, she also was approached by Defendant in the hospital park-

ing lot, and that Defendant similarly claimed to have locked his keys in his car and requested her assistance. Further, the trial court, despite wrongfully admitting Detective Welborn's testimony, also repeatedly instructed the jury that they were charged with evaluating the images on the videotape and were free to disagree with the detective's interpretation. The transcript reflects the following statements by the Court: "Members of the jury, as you hear this witness testify about what these images are consistent with you may agree or disagree. That's up to you to decide . . . Members of the jury, it's up to you to decide what the video shows. Please keep that in mind." While the court committed error by allowing Detective Welborn's testimony, as he was in no better position than the jury to determine what the videotapes did or did not illustrate, the trial court's instruction to the jury likely cured any impermissible reliance by jury members on the detective's statements. Further, the female's own testimony about what happened in the parking lot and at the bank, the knife recovered from the crime scene, and the female's report of her rape and abduction constitute sufficient evidence to support the jury's decision, independent from the testimony by Detective Welborn.

Accordingly, we hold that the error of admitting Detective Welborn's testimony regarding the surveillance videos was harmless.

No prejudicial error.

Judge BRYANT concurs.

Judge ARROWOOD concurs prior to 31 December 2008.

STATE OF NORTH CAROLINA v. JOEL AMONE LIGGONS

No. COA08-238

(Filed 6 January 2009)

1. Assault— intent to kill—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the element of "intent to kill" from the assault charge pertaining to the female victim even though defendant contends there was insufficient evidence that defendant threw a rock toward the victim's windshield intending to kill her because: (1)

defendant and his accomplice had discussed intentionally forcing motorists off the highway in order to rob them; and (2) it was foreseeable that such deliberate action could result in death, either from the impact of the rock on the victim or from the victim's losing control of her vehicle and becoming involved in a deadly automobile accident.

2. Appeal and Error— preservation of issues—failure to argue

Although defendant assigned error to the trial court's denial of his motions to set aside the verdict of guilty on the charge of assault with a deadly weapon with intent to kill inflicting serious injury and for a new trial, this assignment of error is deemed abandoned under N.C. R. App. P. 28(b)(6) because defendant failed to argue this assignment of error in his brief.

3. Robbery— instruction—acting in concert—unidentified person

The trial court did not abuse its discretion in a robbery with a dangerous weapon case by instructing the jury on the doctrine of acting in concert because: (1) the two victims testified that two men participated in the robbery; (2) defendant told a detective that he and an accomplice planned a robbery; (3) the prosecutor's theory was that defendant acted in concert even though the State was never able to clearly establish who the other person would have been; and (4) the sufficiency of the evidence against a codefendant was irrelevant, and a defendant may be found to be acting in concert with an unidentified person.

4. Assault— deadly weapon with intent to kill inflicting serious injury—rock a deadly weapon—failure to instruct on lesser-included offense

The trial court did not err by determining as a matter of law that the rock used to assault the female victim was a deadly weapon and by failing to instruct the jury on assault inflicting serious injury as a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury because: (1) the instrument used to assault the victim was a rock which, when thrown at the driver's side windshield of the victim's car as she was driving 55 or 60 miles per hour, was large enough to shatter the windshield, bend the steering wheel, and fracture her skull; and (2) the size of the rock and the manner in which it was used led to the sole conclusion that the rock was a deadly weapon.

5. Evidence— expert opinion testimony—serious injury

The trial court did not abuse its discretion by permitting a doctor specialiizing in radiology to offer her opinion that the female victim's head injuries were serious because: (1) the testimony was admissible under N.C.G.S. § 8C-1, Rule 702 since it could assist the jury in determining a fact at issue, namely whether serious injury was inflicted upon the victim; (2) the witness was competent to offer her expert opinion on the diagnosis of the victim's injuries based upon her review of the victims C.T. scans, including the severity of those injuries; and (3) the doctor's expert opinion testimony was not rendered inadmissible on the basis that it embraced an ultimate issue to be determined by the jury.

Appeal by Defendant from judgments and commitments entered 20 November 2007 by Judge Thomas H. Lock in Cumberland County Superior Court. Heard in the Court of Appeals 28 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

Geoffrey W. Hosford for Defendant.

STEPHENS, Judge.

On 3 January 2006, Defendant Joel Amone Liggons was indicted for assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and assault with a deadly weapon inflicting serious injury. The case came on for trial at the 13 November 2007 Criminal Session of Cumberland County Superior Court. The jury returned verdicts of guilty on all charges. The trial court sentenced Defendant to consecutive prison terms of 133 to 169 months, 105 to 135 months, and 41 to 59 months. From these judgments and commitments, Defendant appeals.

Facts

In the late evening of 29 August 2005, Edith Underwood was driving in her car with Harold Pope on Highway 24. They had left a club in Fayetteville and were heading toward their home in Autryville. Their car was traveling at about 55 or 60 miles per hour. Underwood saw a black male on the side of the road wearing a grey sweatshirt and blue jeans and holding a rock, which he looked like he was about to throw. Then a rock crashed through

Underwood's windshield, hitting the steering wheel, and hitting her in the head. She lost control of the car. Pope took control of the steering wheel and eventually brought the car to a stop on the side of the road. Pope covered Underwood's head injury with tissues in an attempt to stop the heavy bleeding. Then a man hit the side of the car and told Pope to get out of the car because he knew who had thrown the rock. Pope got out of the car holding a beer bottle in his hand.

The man grabbed Pope around the neck, threw Pope on the ground, and kicked him. Pope tried to hit the man with his beer bottle. Eventually, the man seized the beer bottle from Pope and started hitting him in the head with it. Underwood picked up the rock that had been thrown through the windshield, got out of the car, and threw the rock at the man, telling him to leave Pope alone. The rock hit the man in the hand. Underwood then kicked the man in the leg. The man hit Underwood in the face and knocked her to the ground. He rolled Pope over, took his wallet, and fled.

Underwood and Pope got back into the car and locked the doors. Pope called the highway patrol, who advised him to drive to the Fuel Zone gas station nearby. A few seconds later, two men showed up and began banging on the windows of the right side of the car. Underwood and Pope drove off and headed to the gas station.

An ambulance picked up Underwood and Pope at the Fuel Zone and took them to the hospital. Underwood had a severe skull fracture and underwent surgery to remove the pieces of bone and rock lodged in her brain. In addition to her head injury, Underwood suffered a broken nose and broken bones near her eye socket. After her brain surgery she spent a week in the hospital. Pope had hemorrhaging in his eye and head from being hit with the beer bottle and spent three days in the hospital.

The morning after the attack, Cumberland County deputy sheriffs located the crime scene on the shoulder of NC 24, not far from Interstate 95. They found a rock with what appeared to be blood on it, Pope's cigarettes, glasses, and nitroglycerine pills, and a broken beer bottle.

A sheriff's department K-9 team followed a scent trail from the crime scene to a point farther up the road. The scent trail then turned left into the woods and continued to the edge of a neighborhood known as Bladen Circle.

Deputies found Pope's wallet, containing Pope's identification cards and credit cards, on the ground near Bladen Circle. The wallet also contained Defendant's driver's license.

In the early evening of 30 August 2006, while deputies were still in the neighborhood, Defendant went to the home of his former foster mother, Letha Ray. Ms. Ray noticed that his hand was swollen. He told her and Mildred Boykin, also of Bladen Circle, that he was the one who had attacked the two motorists the night before. He said he wanted to turn himself in. Ms. Ray called the Sheriff's Department. Deputies soon arrived and took Defendant into custody.

After he was taken into custody, Defendant advised Cumberland County Sheriff's Detective Steve Ranew that Antoine Henry Ackin was the one who had thrown the rock through Underwood's windshield. Defendant admitted to robbing Pope. He said that earlier in the evening, he and Ackin had been consuming marijuana and realized they needed more money for drugs. He told Ranew that they decided to commit a robbery by making a car swerve off the highway.

Defendant showed Ranew the injury to his left hand where he had been hit by the rock thrown by Underwood. He said Ackin took the wallet from Pope and then gave it to him. Defendant said he eventually threw the wallet into the woods off Bladen Circle at the suggestion of a friend. Prior to trial, Defendant recanted his statements about Ackin's participation in the crime.

After the State presented its evidence, Defendant moved to dismiss the charges. The motion was denied. Defendant presented no evidence and renewed his motion to dismiss, which was again denied. The jury found Defendant guilty on all charges.

I. Motion to Dismiss

[1] By his first assignment of error, Defendant argues that the trial court erred in denying his motion to dismiss the element of "intent to kill" from the assault charge pertaining to Underwood because the State failed to offer sufficient evidence that Defendant threw a rock toward her windshield intending to kill her.

When a defendant moves to dismiss based on insufficiency of the evidence, the trial court must determine whether there is substantial evidence (1) of each element of the crime charged and (2) that the defendant is the perpetrator. *State v. Scott*, 356 N.C. 591, 573 S.E.2d 866 (2002). "Substantial evidence is evidence from which any rational

trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998) (quotation marks and citations omitted). The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence. *State v. Graves*, 343 N.C. 274, 278, 470 S.E.2d 12, 15 (1996) (citation omitted). Whether the evidence presented is direct or circumstantial or both, the test for sufficiency is the same. *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991); *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (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). If the evidence supports a reasonable inference of defendant's guilt based on the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965).

"Proof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill." *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972). Instead, the intent to kill must be found as fact from the evidence. *State v. Ferguson*, 261 N.C. 558, 135 S.E.2d 626 (1964). A defendant's intent is seldom provable by direct evidence and must usually be proved through circumstantial evidence. *State v. Cauley*, 244 N.C. 701, 94 S.E.2d 915 (1956). "However, the nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred." *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982). The surrounding circumstances include the foreseeable consequences of a defendant's deliberate actions as a defendant "must be held to intend the normal and natural results of his deliberate act." *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973).

Here, Defendant and his accomplice had discussed intentionally forcing motorists off the highway in order to rob them. Defendant or his accomplice then deliberately threw a very large rock or concrete chunk through the driver's side windshield of Underwood's automobile as it was approaching at approximately 55 or 60 miles per hour. It is easily foreseeable that such deliberate action could result in death, either from the impact of the rock on Underwood or from

Underwood's losing control of her vehicle and becoming involved in a deadly automobile accident. Defendant's argument lacks merit and is thus overruled.

[2] Defendant also assigns as error the trial court's denials of his motion to set aside the verdict of guilty on the charge of assault with a deadly weapon with intent to kill inflicting serious injury and for a new trial. However, Defendant failed to argue this assignment of error in his brief, and it is thus deemed abandoned pursuant to Rule 28(b)(6) of the Rules of Appellate Procedure.

II. Jury Instruction on Acting in Concert

[3] By Defendant's next assignment of error, he argues that the trial court abused its discretion in instructing the jury on the doctrine of acting in concert as no evidence supported this instruction.

> "[A]n instruction about a material matter not based on sufficient evidence is erroneous. In other words, it is error to charge on an abstract principle of law not raised by proper pleading and not supported by any view of the evidence." *Dunlap v. Lee*, 257 N.C. 447, 126 [S.E.2d] 62 [(1962)]. Our Court has said "it is an established rule of trial procedure with us that an abstract proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury" and "[]an instruction about a material matter not based on sufficient evidence is erroneous." *Childress v.* [*Johnson Motor Lines, Inc.*], 235 N.C. 522, 70 S.E. 558 [(1952),] and many cases therein cited.

Vann v. Hayes, 266 N.C. 713, 715, 147 S.E.2d 186, 187 (1966).

A defendant can be found guilty of a crime under a theory of acting in concert where "he is present at the scene and acting together with another or others pursuant to a common plan or purpose to commit the crime." *State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994), *cert. denied*, 533 S.E.2d 475 (1999). "If the defendant is present with another and with a common purpose does some act which forms a part of the offense charged, the judge must explain and apply the law of 'acting in concert.' " *State v. Mitchell*, 24 N.C. App. 484, 486, 211 S.E.2d 645, 647 (1975).

In this case, Underwood testified that she saw a black male wearing a grey sweatshirt and blue jeans standing on the side of the road holding a rock, which he looked like he was about to throw. Underwood did not identify Defendant as the person she had seen

preparing to throw the rock. After the rock had been thrown through the windshield and the victims had stopped the car on the side of the road, Defendant approached their car and stated that the person who had thrown the rock was just up the road. Underwood and Pope were then attacked and robbed. Underwood and Pope gave significantly different descriptions of the assailant's weight and the type of shoes the assailant was wearing. They also testified that, following the robbery, two men returned to the car and started beating on the windows after the victims had closed and locked the doors.

Defendant told Detective Ranew that he and Antoine Henri Ackin planned the robbery and that Ackin told him, "[w]atch this," just before hurling the rock at Underwood's windshield. Defendant also stated that Ackin took the wallet from Pope and later gave it to him. We conclude that this evidence was sufficient to warrant an instruction on the doctrine of acting in concert.

Defendant argues further, however, that "[t]he State's theory was that [Defendant] committed these offenses all by himself[,]" and "[t]hus, the prosecutors dismissed the charges against Antoine Ackin." This is incorrect. In his opening argument, the prosecutor stated:

> One of the things I think [the judge] is going to tell you about this is a part of the law we call acting in concert. Amongst the things he's going to tell you, that in order for you to be guilty of a crime, it's not necessary that you do all of the crime, only that you do a part in conjunction with another person for a common purpose. And just keep that in mind as y'all listen to these deliberations because there are going to come up other names about people who were involved in this offense.

Furthermore, in his closing argument, the prosecutor stated, "Our position is that [Defendant] acted in concert but we were never able to clearly establish who the other person would have been." Moreover, the sufficiency of the evidence against a co-defendant is irrelevant and, contrary to Defendant's contention that the State cannot "seek a conviction based upon the presence of some unidentified person[,]" a defendant may be found to be acting in concert with an unidentified person. Defendant's assignment of error, therefore, fails.

III. Jury Instruction on Lesser-Included Offense

[4] Defendant next argues that the trial court erred by failing to instruct the jury on assault inflicting serious injury on Underwood as

a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant contends that the trial court erred in determining as a matter of law that the rock used to assault Underwood was a deadly weapon.

"A trial court must give instructions on all lesser-included offenses that are supported by the evidence, even in the absence of a special request for such an instruction; and the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense." *State v. Bumgarner*, 147 N.C. App. 409, 417, 556 S.E.2d 324, 330 (2001) (quoting *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001)). However, a trial court must submit a lesser-included offense to the jury "when, and only when, there is evidence from which the jury can find that [the] defendant committed the lesser-included offense." *State v. Summitt*, 301 N.C. 591, 596, 273 S.E.2d 425, 427 (1981). "[W]hen all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser-included offense, the court should refuse to charge on the lesser-included offense." *Id.* (citation omitted).

The essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are "(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death." *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). "Misdemeanor assault inflicting serious injury . . . [is a] lesser[-]included offense[] of assault with a deadly weapon with intent to kill inflicting serious injury . . . ." *State v. Lowe*, 150 N.C. App. 682, 685, 564 S.E.2d 313, 315 (2002). The elements of this lesser-included offense are (1) an assault (2) inflicting serious injury. *See* N.C. Gen. Stat. § 14-33(c)(1) (2007).

A deadly weapon "is generally defined as any article or substance which is likely to produce death or great bodily harm." *State v. Torain*, 316 N.C. 111, 120, 340 S.E.2d 465, 470, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). "[T]he evidence in each case determines whether a certain kind of [weapon] is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 726 (1981). "Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing defini-

tion is one of law, and the Court must take the responsibility of so declaring." *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924) (citation omitted).

Here, the instrument used to assault Underwood was a rock which, when thrown at the driver's side windshield of Underwood's car as she was driving 55 or 60 miles per hour, was large enough to shatter the windshield, bend the steering wheel, and fracture Underwood's skull. We agree with the trial court that the size of the rock and the manner in which it was used leads to the sole conclusion that the rock was a deadly weapon. Accordingly, the trial court did not err in determining as a matter of law that the rock used to assault Underwood was a deadly weapon and did not err in refusing to charge the jury as to the lesser-included offense of assault inflicting serious injury.

IV. Expert Testimony

[5] Finally, Defendant argues that the trial court abused its discretion in permitting Dr. Terri Zacco to offer her opinion that Underwood's head injuries were serious. Defendant contends that as an expert in the field of radiology, Dr. Zacco was not qualified to offer such an opinion based solely upon her review of Underwood's C.T. scans.

Trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2007). Trial courts are afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony." *Bullard*, 312 N.C. at 140, 322 S.E.2d at 376. "Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004).

Dr. Zacco testified that she is a radiologist with Carolina Regional Radiology and has been a radiologist for 11 years. In order to become licensed to practice medicine in the state of North Carolina, she completed four years of undergraduate school, four years of medical school, a year of rotating internship, and four years of radiology residency. The trial court explained to the jury that Dr. Zacco would "be allowed to testify as an expert witness in the [field] of medicine specializing in radiology." Defendant made no objection to this at trial and admits in his brief that "Dr. Zacco was a radiologist and, as such, specialized in reading x-rays and other diagnostic scans."

North Carolina Rule of Evidence 702 provides, in pertinent part:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2007).

Dr. Zacco testified that, based on her reading of Ms. Underwood's C.T. scan, "Ms. Underwood's trauma was definitely very serious intracranial trauma with serious brain injury and serious orbital injury with all the bone damage that was suffered." Such testimony could assist the jury in determining a fact at issue—whether serious injury was inflicted upon Underwood. Defendant asserts that "[w]hile [Dr.] Zacco could make a diagnosis based upon the C.T. scans, she was not qualified to offer an opinion on the ultimate legal question in this matter—whether Underwood suffered 'serious' injury." Defendant's argument borders on being frivolous. Without objection, Dr. Zacco was qualified as an expert in the field of medicine specializing in radiology. She was, therefore, competent to offer her expert opinion on the diagnosis of Ms. Underwood's injuries, including the severity of those injuries, and Dr. Zacco's "expert opinion testimony is not rendered inadmissible on the basis that it embraces an ultimate issue to be determined by the jury." *State v. Boyd*, 343 N.C. 699, 710, 473 S.E.2d 327, 332, (1996) (citing N.C. Gen. Stat. § 8C-1, Rule 704). Defendant's argument is without merit and is overruled.

We conclude Defendant received a fair trial free of error.

NO ERROR.

Judges STEELMAN and GEER concur.

GEORGE LUKE, PLAINTIFF v. OMEGA CONSULTING GROUP, LC, D/B/A OMEGA CONSULTING GROUP, LLC, DEFENDANT

No. COA08-521

(Filed 6 January 2009)

1. Judgments— default—entry—refusal to set aside—lack of attention—advice of out-of-state counsel

The trial court did not abuse its discretion in an action claiming unpaid sales commissions by refusing to set aside an entry of default. Defendant demonstrated a continuous lack of attention to the matter for a significant length of time; it was defendant's decision to consult with its Florida attorneys and not file a responsive pleading or take any action to avoid the entry of default.

2. Evidence— motion in limine—default entry—trial on damages—evidence disputing liability—properly excluded

The trial court did not err by granting plaintiff's motion in limine in a trial to determine damages following an entry of default in an employment dispute. Defendant's proffered evidence was an attempt to dispute its liability for liquidated damages, and defendant had waived its right to defend against liability through entry of default.

3. Employer and Employee— nonjury trial on damages—findings and conclusions—no error

There was no error in the trial court's judgment in a nonjury trial to determine damages in an employment dispute following entry of default. Plaintiff sufficiently stated a claim under the North Carolina Wage and Hour Act and was not required to refute defendant's defense; additionally, defendant waived its chance to assert good faith by not responding to the complaint.

Appeal by defendant from order entered 23 January 2008 by Judge Michael R. Morgan in Wake County Superior Court and judgment entered 29 January 2008 by Judge Henry W. Hight in Wake County Superior Court. Heard in the Court of Appeals 9 October 2008.

Merritt, Flebotte, Wilson, Webb & Caruso, PLLC by Joy Rhyne Webb, for plaintiff appellee.

Steven A. Boyce for defendant appellant.

McCULLOUGH, Judge.

Omega Consulting Group, LC, d/b/a Omega Consulting Group, LLC ("defendant") appeals from an order and judgment entered in favor of George Luke ("plaintiff"). Defendant contends that the trial court erred by (1) denying defendant's motion to set aside entry of default, (2) granting plaintiff's motion *in limine* to exclude evidence, and (3) entering judgment when the findings of fact were not supported by the evidence. For the reasons discussed herein, we affirm.

I. Background

On 7 June 2007, plaintiff filed an amended complaint against defendant, his former employer, claiming that it owed him for unpaid sales commissions. Defendant furnishes consulting services for health care providers and has its principal office in Fort Lauderdale, Florida.

In February of 2002, plaintiff began working as an independent contractor for defendant. On 15 October 2002, the parties executed a written agreement entitled "Non-Exclusive Sales Representative Agreement" ("the agreement"). The agreement provided that plaintiff's territory was North Carolina and South Carolina and that he would be compensated by a monthly retainer fee and commission on the revenues derived from any consulting contract he developed for defendant. The agreement provided that his commission payments would be equal to five percent (5%) of the gross revenues derived from any contract he initiated and closed for defendant within his territory. The term of the agreement was from 15 October 2002 to 15 October 2003. The agreement would automatically renew each year unless terminated by either party with sixty (60) days written notice of the period's termination date or otherwise extended or shortened by an addendum signed by both parties. The agreement further provided that "[i]n the event that [defendant] declines to extend this Agreement past its original Term, except for a willful violation of any of the terms and conditions of this Agreement, [plaintiff] will be entitled to receive the Commissions for the balance of the Commission Period."

On or around 30 June 2003, plaintiff was hired by defendant as an employee. On 29 September 2004, plaintiff received a letter from defendant ("the termination letter"), stating that "our relationship with you as a Regional Representative is not working out. Effective immediately, your employment with Omega is terminated." The termination letter provided that plaintiff would continue to receive com-

mission on the revenues generated within his territory and the revenues generated from any additional contracts that he had initiated and were closed by defendant before 31 December 2004.

Plaintiff initially filed suit against defendant in August of 2005, alleging he was owed commissions on several accounts in his territory. He filed his amended complaint on 7 June 2006, and defendant was served by publication on 17 June 2006.

When defendant learned of plaintiff's lawsuit in North Carolina, it reviewed plaintiff's compensation records and consulted with its attorneys licensed in Florida. Defendant contends that when plaintiff became an employee after June of 2003, he began receiving an annual salary and his commission rate was reduced to 2.5%. During defendant's review of plaintiff's compensation records, it discovered that due to an employee error, plaintiff had continued to be paid a commission rate of 5% after being employed by defendant and as a result, had been overpaid by $32,766.70. After consulting with its Florida attorneys and determining that it did not owe plaintiff any compensation, defendant concluded that it would incur substantial costs in defending plaintiff's lawsuit. Defendant did not file a responsive pleading to plaintiff's complaint and plaintiff obtained an entry of default on 4 August 2006.

On 13 November 2006, plaintiff filed a motion for default judgment seeking $175,654.36 in damages. Defendant filed an answer and a motion to set aside entry of default on 13 December 2006. On 23 January 2007, the trial court denied defendant's motion to set aside entry of default and granted its motion for a jury trial on damages. Plaintiff's motion for summary judgment was subsequently denied.

On 11 January 2008, plaintiff filed a motion *in limine* to exclude the following evidence proffered by defendant: plaintiff was only entitled to a commission rate of 2.5% after July of 2003; plaintiff had been overpaid by defendant; plaintiff was not entitled to commission generated after his termination because he was terminated for poor performance; and plaintiff forfeited his commissions by willfully violating the terms and conditions of the agreement. After hearing arguments from both parties' counsel, the trial court granted the motion *in limine*. Both parties subsequently waived their requests for a jury trial. On 29 January 2008, the trial court filed a judgment, which contained its decision on plaintiff's motion in *limine*, and ordered defendant to pay plaintiff $167,771.61 in unpaid commissions and an equal amount in liquidated damages. Defendant appeals.

II. Motion to set aside entry of default

[1] Defendant's first assignment of error is that the trial court erred in denying its motion to set aside entry of default and argues that it showed good cause to support its motion. Defendant asserts that the decision not to respond to plaintiff's complaint was based on the advice of its Florida attorneys and should not have been imputed to defendant. We find that the trial court properly denied defendant's motion and affirm.

A trial court's decision of whether to set aside an entry of default, will not be disturbed absent an abuse of discretion. *Automotive Equipment Distributors, Inc. v. Petroleum Equipment & Service, Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896 (1987). "A judge is subject to a reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 374, 432 S.E.2d 394, 398 (1993) (citation omitted).

Pursuant to Rule 55(d) of the North Carolina Rules of Civil Procedure, the trial court may set aside an entry of default for good cause. N.C. Gen. Stat. § 1A-1, Rule 55(d) (2007). "What constitutes 'good cause' depends on the circumstances in a particular case, and . . . an inadvertence which is not strictly excusable may constitute good cause, particularly 'where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant.' " *Peebles v. Moore*, 48 N.C. App. 497, 504, 269 S.E.2d 694, 698 (1980) (citations omitted), *modified and affirmed*, 302 N.C. 351, 275 S.E.2d 833 (1981). "This standard is less stringent than the showing of 'mistake, inadvertence, or excusable neglect' necessary to set aside a default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)." *Brown v. Lifford*, 136 N.C. App. 379, 382, 524 S.E.2d 587, 589 (2000) (citation omitted).

The defendant carries the burden of showing good cause to set aside entry of default. *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 487, 586 S.E.2d 791, 794 (2003). Our Court considers the following factors when determining if the defendant has shown good cause: "(1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action." *Automotive Equipment Distributors, Inc.*, 87 N.C. App. at 608, 361 S.E.2d at 896-97. This Court "give[s] consideration to the fact that default judgments are not favored in the law. . . . [I]t is also true that

rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity." *Howell v. Haliburton*, 22 N.C. App. 40, 42, 205 S.E.2d 617, 619 (1974).

In this case, the trial court ordered an entry of default because defendant did not file an answer or attempt to defend against plaintiff's complaint. Defendant still claims that it was diligent in the matter because it consulted with its Florida attorneys and reviewed plaintiff's compensation records as soon as it became informed of plaintiff's suit in North Carolina. Defendant asserts that its decision not to respond to plaintiff's complaint was based on the advice of its out-of-state attorneys as well as its conclusion that plaintiff was not owed any further compensation. Furthermore, defendant argues that a "grave injustice" has occurred because it is now saddled with a $335,000.00 judgment when its records show that it overpaid plaintiff by $32,766.70.

The degree of attention or inattention shown by the defendant is a compelling factor in our consideration to set aside entry of default. *Brown*, 136 N.C. App. at 384, 524 S.E.2d at 590. In *Automotive Equipment Distributors, Inc.*, we found that the defendant had shown good cause to justify setting aside entry of default. 87 N.C. App. at 609, 361 S.E.2d at 897. In that case, the defendant had consulted with his attorney twice about a breach of contract action and his attorney agreed to file an answer. *Id.* at 608-09, 361 S.E.2d at 897. Due to a family emergency, the attorney did not file a responsive pleading and the court made an entry of default. *Id.* at 606, 361 S.E.2d at 895. We reversed and held that the defendant had demonstrated good cause reasoning that "when a defendant employs counsel and diligently confers with him and generally tries to keep informed of the proceedings, the attorney's negligence will not be imputed to the defendant." *Id.* at 609, 361 S.E.2d at 897.

In *Howell*, we affirmed the denial of defendant's motion to set aside entry of default. 22 N.C. App. at 42, 205 S.E.2d at 619. The defendant in *Howell* had informed his insurer that a complaint had been filed against him and mailed a copy of the complaint to his insurer. *Id.* at 42, 205 S.E.2d at 618-19. The insurer took no action, and there was no further contact between the defendant and his insurer until eight months later when plaintiff's counsel notified the defendant about the entry of default. *Id.* We affirmed the trial court's judgment and explained that we could not make a determination of good

cause due to the defendant's continued inattention to the suit for over eight months. *Id.*

Similar to the facts in *Howell*, defendant demonstrated a continuous lack of attention to the matter for a significant amount of time. Even though the trial court made the entry of default on 4 August 2006, defendant did not respond to the matter until 13 December 2006, after plaintiff had moved for default judgment. We cannot find that defendant acted diligently. Contrary to the facts in *Automotive Equipment Distributors, Inc.*, the trial court's entry of default was not solely attributable to the inaction of counsel. We acknowledge that defendant reviewed plaintiff's compensation records and consulted with its Florida attorneys after learning of the suit. However, it was defendant's decision not to file a responsive pleading or take any action to avoid the entry of default. Furthermore, defendant was being sued in North Carolina but did not attempt to consult with North Carolina counsel and instead conferred only with its Florida attorneys. *See Harrell v. Welstead*, 206 N.C. 817, 175 S.E. 283 (1934) (finding that the defendant's failure to answer was attributable to his own negligence because he entrusted his case to an attorney not licensed in North Carolina).

Defendant has failed to show the trial court abused its discretion when it denied its motion to set aside entry of default. The assignment of error is overruled.

III. Motion *in limine* to exclude evidence

[2] Next, defendant argues that the trial court erred in granting plaintiff's motion *in limine* to exclude certain evidence at trial.[1] We disagree.

A motion *in limine* seeks "pretrial determination of the admissibility of evidence proposed to be introduced at trial" and is recognized in both civil and criminal proceedings. *State v. Tate*, 44 N.C. App. 567, 569, 261 S.E.2d 506, 508, *rev'd on other grounds*, 300 N.C. 180, 265 S.E.2d 223 (1980). A trial court's ruling on a motion *in limine* will not be reversed absent an abuse of discretion. *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 619, 504 S.E.2d 102, 105 (1998).

1. Plaintiff argues that defendant did not properly preserve this matter for appellate review. We find this issue to be properly preserved as the trial court's order specifically noted defendant's exception to this ruling.

When the trial court granted plaintiff's motion *in limine*, it excluded defendant from introducing the following evidence: (1) plaintiff forfeited his commissions by willfully violating the terms and conditions of the agreement; (2) plaintiff was not entitled to commission generated after his termination because he was terminated for poor performance; (3) plaintiff was only entitled to a 2.5% commission rate after he became an employee of defendant; and (4) plaintiff had been overpaid by defendant. Defendant contends that the proffered evidence was admissible because it pertained to the sufficiency of plaintiff's claim, the amount of damages, and defendant's good faith defense to liquidated damages.

When default is entered due to a defendant's failure to answer, the substantive allegations contained in plaintiff's complaint are no longer in issue, and for the purposes of entry of default and default judgment, are deemed admitted. *Blankenship v. Town & Country Ford, Inc.*, 174 N.C. App. 764, 767, 622 S.E.2d 638, 640 (2005). Upon entry of default, the defendant will have no further standing to defend on the merits or contest the plaintiff's right to recover. *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991). Defendant is, however, entitled to a hearing on the issue of damages. *Potts v. Howser*, 274 N.C. 49, 61, 161 S.E.2d 737, 746 (1968).

In the present case, defendant attempted to introduce evidence that plaintiff had forfeited his commissions by willfully violating the terms and conditions of the agreement and that he was terminated for poor performance. The agreement provides that, "[i]n the event that [defendant] declines to extend this Agreement past its original Term, *except for a willful violation of any terms and conditions of this Agreement*, [plaintiff] will be entitled to receive the Commissions for the balance of the Commission Period." (Emphasis added.)

Defendant argues that plaintiff's claim for unpaid commissions was insufficient because plaintiff did not assert that he did *not* willfully violate the agreement. Defendant's argument does not relate to the sufficiency of plaintiff's claim, but is an attempt by defendant to assert a defense after entry of default. Plaintiff sufficiently stated his claim for unpaid sales commissions under the North Carolina Wage and Hour Act and was not required to refute any defenses that had not been raised by defendant at that time. Furthermore, defendant has already been deemed to have admitted the following allegation contained in plaintiff's complaint: "Defendant Omega has no policy or practice that would call for the forfeiture of any such commission by

Plaintiff." Therefore, defendant is not permitted to introduce evidence contesting that allegation.

Similarly, the remaining evidence that defendant attempted to introduce was properly excluded by the trial court because defendant was attempting to defend on the merits of the case and refute plaintiff's allegations, which it was deemed to have admitted. Defendant intended to show that plaintiff's commission rate was reduced to 2.5% after June of 2003 and that due to an employee error, plaintiff continued to be compensated at his previous commission rate of 5% and was overpaid by $32,766.70. However, plaintiff's complaint alleged that he was "entitled to the same commission rate he had previously had as an independent contractor, specifically commissions of five percent (5%) of Omega's gross revenues for sales made by Plaintiff." By nature of defendant's default, it was deemed to have admitted that fact, and therefore, is prohibited from providing evidence to the contrary.

Defendant also claims that it was entitled to present the excluded evidence as a good faith defense to liquidated damages. Under the North Carolina Wage and Hour Act, an employer is liable to the employee for liquidated damages in an amount equal to the wages due. N.C. Gen. Stat. § 95-25.22(a) (2007). The trial court is only permitted to reduce the award of liquidated damages if "the employer had reasonable grounds for believing that the act or omission was not a violation of this Article[.]" N.C. Gen. Stat. § 95-25.22(a1). Defendant's proffered evidence is an attempt to dispute its liability for liquidated damages. Defendant waived its right to defend against liability after default was entered. As such, the trial court properly granted plaintiff's motion *in limine*. The assignment of error is overruled.

IV. Judgment

[3] Defendant asserts that the trial court's judgment filed on 29 January 2008, should be set aside and assigns error to many of the trial court's findings of fact and conclusions of law. We find no error and affirm the judgment of the trial court.

On an appeal from a judgment entered after a non-jury trial, this Court reviews the trial court's findings of fact for whether they are supported by competent evidence in the record. *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176, *disc. review denied*, 356

N.C. 434, 572 S.E.2d 428 (2002). We review the trial court's conclusions of law to determine if the conclusions are supported by the factual findings and are consistent with applicable law. *Id.*

Defendant assigns error to the finding of fact and conclusions of law which state that plaintiff is owed commissions by defendant. Defendant argues again that there was insufficient evidence to support this determination because plaintiff failed to show that he did not willfully violate the agreement. We have already held that plaintiff sufficiently stated a claim under the North Carolina Wage and Hour Act and was not required to refute this defense in order to recover from defendant.

Additionally, defendant assigns error to the finding of fact and conclusions of law which state that because defendant did not show that it failed to pay plaintiff in good faith, plaintiff was entitled to liquidated damages. As discussed above, defendant waived its right to introduce evidence of good faith. Thus, the trial court correctly determined that plaintiff was entitled to recover liquidated damages from defendant because it waived its chance to assert a good faith defense, by failing to respond to plaintiff's complaint. The assignment of error is overruled.

V. Conclusion

For the reasons discussed above, we affirm the trial court's order and judgment.

Affirmed.

Judges TYSON and CALABRIA concur.

Concurred prior to 31 December 2008.

STATE OF NORTH CAROLINA v. JOSHUA CARLEN MOORE

No. COA08-345

(Filed 6 January 2009)

1. Criminal Law— instruction—self-defense—defense of family member

The trial court did not err in a voluntary manslaughter case by denying defendant's request for a jury instruction on self-defense and on the defense of a family member because: (1) the right to kill in defense of another cannot exceed such other's right to kill in his own defense as that other's right reasonably appeared to defendant; and (2) the record included evidence that defendant did not reasonably believe he or his wife were in danger of death or great bodily harm from the decedent at the time of the shooting.

2. Appeal and Error; Discovery— motion for access to victim's juvenile records—failure to include in record for appellate review

Although defendant contends the trial court erred in a voluntary manslaughter case by denying his motion and request for access to the victim's juvenile records, this assignment of error is dismissed because: (1) generally an appellate court reviews the motion and request for access to juvenile records of a victim de novo to determine whether they contain information that is favorable or material to defendant's guilt or punishment; and (2) defendant failed to include the juvenile records in his record on appeal, making it impossible for the Court of Appeals to examine whether the evidence was favorable or material.

3. Evidence— exclusion of repetitive questioning—trial court's discretion

The trial court did not err in a voluntary manslaughter case by sustaining the State's objections to repetitive questioning by defense counsel because: (1) the record indicated the inquiries made by defense counsel on direct, redirect, and cross-examination were repetitive since counsel had just asked, and the witness had just answered, the same questions either on direct examination or only moments earlier on cross-examination; and (2) while counsel would have been permitted to ask clarifying questions on redirect or cross-examination, it was within the trial court's discretion to limit such repetitious witness inquiries.

4. Constitutional Law— effective assistance of counsel—failure to show prejudice

Defendant was not deprived his right to effective assistance of counsel in a voluntary manslaughter case based on his trial counsel's failure to call a witness to the stand, trial counsel's performance on redirect examination of defendant and another witness, and trial counsel's failure to object and move to strike several statements, because none of these alleged errors were serious enough to have deprived defendant of a fair trial.

Judge ARROWOOD dissenting prior to 31 December 2008.

Appeal by defendant from judgment entered 17 October 2007 by Judge Frank R. Brown in Superior Court, Edgecombe County. Heard in the Court of Appeals 23 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Jane Ammons Gilchrist, for the State.

Thomas & Farris, P.A., by Albert S. Thomas, Jr. and Newton Lee & Boyd, by Eldon S. Newton, III, for defendant-appellant.

WYNN, Judge.

Defendant-Appellant Joshua Carlen Moore appeals a jury conviction for voluntary manslaughter. We find no merit in his arguments on appeal.

At trial, the State presented evidence tending to show that on 8 July 2006, Defendant-Appellant Moore, then sixty-four years old, and his wife Carol Moore worked at their produce stand. The street-side stand consisted of a U-shaped configuration of tables arranged in front of Mr. Moore's cargo truck. A cash box was bolted to a folding table, located behind the truck. Sometime that morning, the decedent, sixteen-year-old Emmanuel Harris, approached the couple's stand. He walked over to the meat container where he indecisively picked up and then put back various packages of meat, ostensibly looking for a particular selection.

Soon thereafter, a struggle between Ms. Moore and Mr. Harris broke out when Mr. Harris attempted to take money out of the cash box. Ms. Wilkins, a customer who was attempting to pay for her salad during this time, testified that the struggle began when Ms. Moore went to the cash box to make change. She stated that Ms. Moore "[l]ifted up the top of the cash box and that's when [Mr. Harris]

reached his arm and they was tussling over the cash box." Further, she testified that she saw Defendant come down from the back of the truck during the struggle with a gun, and that at the time she heard the shot fired by Defendant, she thought Mr. Harris still had his hands on the cash box. Additionally, Mr. Jasper Lindsey, who also was present during the incident, testified that Mr. Harris's hands were on the cash box when Defendant shot Mr. Harris. Defendant admitted to shooting Mr. Harris.

Mr. Harris died as a result of a gunshot wound to the chest. Defendant was indicted, tried, and convicted of the voluntary manslaughter of Mr. Harris and sentenced to a term of not less than 64 months and not more than 86 months. He appeals, arguing (I) the trial court erred by denying his motion and failing to instruct the jury on killing in lawful defense of a family member and self-defense; (II) the trial court erred by denying his motion and request for access to the juvenile records of the victim; (III) the trial court erred by improperly limiting his examination of witnesses; and (IV) he was deprived of his right to effective assistance of counsel.

I.

[1] Defendant argues that the trial court erred in denying his request for a jury instruction on self-defense and on the defense of a family member. "[B]efore the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable?" *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). Further, "in exercising the right of self-defense one can use no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm." *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971).

This Court's review of Defendant's request for instruction on the defense of a family member is similar. "[T]he right to kill in defense of another cannot exceed such other's right to kill in his own defense as that other's right reasonably appeared to the defendant." *State v. Perry*, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994) (internal quotation marks and citation omitted). This Court has stated, "Where there is no evidence from which the jury could find that the defendant reasonably believed a third person was in immediate peril of death or serious bodily harm at the hands of another, it would be improper for

the Court to instruct on defendant's defense of a third person as justification for the assault." *State v. Moses*, 17 N.C. App. 115, 116, 193 S.E.2d 288, 289 (1972). Thus, the question before the Court is whether there was evidence, taken in the light most favorable to the Defendant, that Defendant formed a reasonable belief that it was necessary to kill Mr. Harris to protect either himself or his wife from death or great bodily harm.

We find no error in the trial court's decision to deny Defendant's request for instructions on self-defense and defense of another. The record on appeal and transcript show insufficient evidence to support the conclusion that Defendant believed his or his wife's life was in danger, and no evidence to suggest that this belief, even if formed, was reasonable. Prior to being shot by Defendant, Mr. Harris had made no attempt to harm Defendant or his wife in any way. In fact, according to both Defendant and Ms. Moore, Mr. Harris never threatened them. Ms. Moore testified that, even during their struggle, Mr. Harris never threatened her physically, and his only contact with her was to push her hand and arm away from the cash box. Further, she testified that she had no reason to believe Mr. Harris was interested in anything other than the cash box. Ms. Moore stated, "No, he didn't threaten me. He was only trying to get the cash box."

Accordingly, we find that the trial court committed no error in denying Defendant's requests for instruction on self-defense or defense of another because the record includes evidence that Defendant did not reasonably believe he or his wife was in danger of death or great bodily harm from the decedent at the time of the shooting.

II.

[2] Defendant next argues that the trial court erred by denying his motion and request for access to the victim's juvenile records. Generally, an appellate court reviews the motion and request for access to juvenile records of a victim *de novo* by examining the sealed records to determine whether they contain information that is "favorable" or "material" to defendant's guilt or punishment. *See State v. Taylor*, 178 N.C. App. 395, 408, 632 S.E.2d 218, 227 (2006). However, in this case, Defendant failed to include the juvenile records in his record on appeal, making it impossible for this Court to examine whether or not the evidence was favorable or material. Accordingly, we decline to address this assignment of error.

III.

[3] Defendant next argues that the trial court erred by sustaining the State's objections to repetitive questioning by defense counsel. First, Defendant argues that the trial court erred by limiting counsel's redirect examination of Defendant on how he "felt" when he saw Mr. Harris coming back toward the produce stand, the same inquiry the trial court disallowed as repetitive on direct examination. Next, Defendant argues that the trial court erred by cutting off defense counsel's cross-examination of Ms. Wilkins, after counsel asked Ms. Wilkins, for a third time, if she had grabbed her daughter and fled from the produce stand when Mr. Harris first approached Ms. Moore. Last, Defendant argues the trial court erred by sustaining the State's objection to defense counsel's redirect examination of Ms. Moore, despite having questioned Ms. Moore extensively on the same issue during direct examination.

Generally, the trial court has a duty to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence" in order to "avoid needless consumption of time." N.C. Gen. Stat. § 8C-1, Rule 611(a) (2007). In keeping with this principle, trial judges may properly sustain objections to witness examination where they find an inquiry to be repetitious or unnecessary. *State v. Jetton*, 1 N.C. App. 567, 568, 162 S.E.2d 102, 104 (1968) (concluding that because the witness had answered questions on the same issue previously, the defendant was not prejudiced by not being allowed to have the witness repeat his testimony). Similarly, the record in this case indicates that the inquiries made by defense counsel on direct, redirect, and cross-examination were repetitive, since counsel had just asked, and the witnesses had just answered, the same questions either on direct examination or only moments earlier on cross-examination. While counsel would have been permitted to ask clarifying questions on redirect or cross-examination, it was well within the trial judge's discretion to limit such repetitious witness inquiries. Therefore, we find no error.

IV.

[4] Finally, Defendant argues that he was deprived of his right to effective assistance of counsel. This Court reviews a criminal defendant's claim of ineffective assistance of counsel by considering (1) whether counsel's performance was "deficient" and (2) whether the performance deficiency was " '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)). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. Further, the U.S. Supreme Court has noted, "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691, 80 L. Ed. 2d at 695.

Here, Defendant presents three major arguments for trial counsel's deficient performance; however, none of these arguments depict errors serious enough to have deprived Defendant of a fair trial. First, Defendant cites counsel's failure to call Roy Wooten to the stand. Defendant contends that Mr. Wooten would have provided important evidence regarding Defendant's state of mind at the time of the shooting. While the record reflects that the witness was present and prepared to testify, and that he told Ms. Moore on the morning of the shooting that her produce stand was going to be robbed, trial counsel decided to not call him as a witness. However, the decision not to call a witness is the very type of trial tactic that warrants great deference on appeal. Our state Supreme Court has held, "[T]he decisions on what witnesses to call . . . and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client. Trial counsel are necessarily given wide latitude in these matters." *State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979) (citations and quotation marks omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983).

There are a number of reasons Defendant's trial counsel may have chosen to not have Mr. Wooten testify. The record shows that the State had filed a motion to exclude Mr. Wooten's testimony as inadmissible hearsay. Further, there is no evidence to suggest that Mr. Wooten's testimony, if admitted, would have lead to a different jury verdict. It is unclear that Defendant had knowledge of Mr. Wooten's statement at the time of the shooting or that the testimony would have favorably influenced the trial court's ruling on the instruction of self-defense. In light of the strong deference given to trial counsel's strategic decisions, Defendant fails to establish that trial counsel's performance was deficient.

Next, Defendant argues that trial counsel's performance on redirect examination of Defendant and Ms. Moore was deficient.

Defendant contends that trial counsel failed to properly clarify statements by both witnesses that Mr. Harris had not verbally "threatened" Mr. or Ms. Moore at any point during the incident. Defendant provides no evidence to suggest that this was the true objective for counsel's redirect or that Defendant suffered any prejudice as a result. Throughout the course of the trial, the jury heard testimony of alleged physical threats by Mr. Harris, including the altercation between Ms. Moore and Mr. Harris and Ms. Moore's testimony that she was "frightened" by Mr. Harris. This testimony suggests that the court already had heard evidence that Ms. Moore and Defendant perceived Mr. Harris to be a physical threat. Given the existence of such evidence elsewhere in the record, there is a reasonable probability that trial counsel's "error" had a minimal effect on the trial judge's decision to not allow a jury instruction on self-defense and defense of another, and no effect on the jury's final decision.

Lastly, Defendant cites as error trial counsel's failure to object to and move to strike: (1) Ms. Telexio Parker's statement that Mr. Harris was right-handed; (2) the State's description of the area where the event occurred as "a crime scene"; (3) Frederick Harrison's reaction to the shooting; and (4) the State's statement during closing arguments that Mr. Harris's most serious offense was possible attempted misdemeanor larceny. There is no evidence to suggest that there is a reasonable probability that, in the absence of counsel's errors, a different result would have been reached by the jury even if trial counsel had properly objected.

First, Ms. Parker's statement regarding Mr. Harris's dominant hand was rendered irrelevant by the trial judge's decision to not instruct the jury on self-defense or defense of another. Second, the State's reference to the area surrounding the produce stand as a "crime scene" came after two officers had already referred to the area as a crime scene in their testimony and pictures of the scene, which included visible "crime scene" tape, were introduced into evidence. Third, Defendant contends that the "emotional monologue" offered by Mr. Harrison was irrelevant and prejudicial. However, there is no evidence to suggest that admitting these statements prejudiced Defendant or that the trial court would not have allowed the testimony even if counsel had objected. The witness's testimony is arguably relevant to explain why Mr. Harrison left the scene without first giving his statement to the police. Fourth, Defendant cites counsel's failure to object to the State's statement during closing that Mr. Harris's "most serious" offense would have been attempted misde-

meanor larceny, rather than attempted common law robbery as Defendant argues.

Historically, our state courts have given counsel broad allowance in making their argument to the jury. *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976) (holding that counsel must be allowed wide latitude in jury arguments). Further, there is no evidence to suggest that the lack of objection by counsel prejudiced Defendant. It is highly improbable that the jury, as Defendant argues, would have known the difference between the two crimes, principally that attempted common law robbery is a felony, or that this distinction would have lead the jury to reach a different decision. If anything, the State's admission that Mr. Harris was likely committing a crime at the time of the shooting favors Defendant.

In summary, we find each of Defendant's assignments of error with regard to ineffective assistance of counsel to be without merit.

No error.

Judge BRYANT concurs.

Judge ARROWOOD dissents in a separate opinion prior to 31 December 2008.

ARROWOOD, Judge dissenting.

I respectfully dissent.

In determining whether to instruct on a defense the trial court must consider the evidence in the light most favorable to the defendant. *State v. Withers*, 179 N.C. App. 249, 257, 633 S.E.2d 863, 868 (2006). Failure to include an instruction on self-defense or defense of a family member where there is sufficient evidence to warrant such an instruction is prejudicial error. *See State v. Williams*, 154 N.C. App. 496, 571 S.E.2d 886 (2002).

In the light most favorable to the Defendant the evidence showed the following: Emmanual Harris (the deceased) who was approximately six feet tall and weighed approximately one hundred and eighty (180) pounds approached a produce stand operated by Joshua Moore (Defendant), his wife (Mrs. Moore), and grandson. After acting suspiciously for some amount of time, Harris pretended to want to make a purchase. When Mrs. Moore attempted to make change,

Harris tried to grab the cash box she was opening. The cash box was bolted to the produce table. A struggle ensued and Harris struck at Mrs. Moore. As the struggle continued Mrs. Moore became more fearful and testified she was "scared to death". She yelled for the Defendant who was in the back of the produce truck. He saw Harris "tussling" with his wife and Defendant ordered Harris to back off. Harris initially backed off, but then placed his hand in the left pocket of his baggy pants. Defendant then reached for a gun that was in the back of the truck. Harris began to advance toward Defendant and his wife moving his hand in his pocket. When Harris' hand reached the top of the pocket, Defendant fired one shot which killed Harris. Defendant further testified that at the time he feared for the safety of his wife, his grandson and himself.

"A defendant is entitled to an instruction on self-defense if there is any evidence in the record which establishes that it was necessary or that it reasonably appeared to the defendant to be necessary to kill in order to protect himself from death or great bodily harm. When defendant's evidence is sufficient to support an instruction on self-defense, the instruction must be given even though the State's evidence is contradictory." *State v. Hughes*, 82 N.C. App. 724, 727, 348 S.E.2d 147, 150 (1986) (internal citations omitted). Self-defense includes the right to defend another in a family relationship with the defendant. *See State v. Carter* 254 N.C. 475, 119 S.E.2d 461 (1961).

Taking the evidence in the light most favorable to the Defendant, I believe it is sufficient to require the trial court to instruct on self-defense and defense of other. Therefore, I dissent and vote to remand the case for a new trial.

TOWN OF N. TOPSAIL BEACH v. FORSTER-PEREIRA

[194 N.C. App. 763 (2009)]

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. JANICE M. FORSTER-PEREIRA, ET AL., DEFENDANTS

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. JANICE FORSTER-PEREIRA, ET AL., DEFENDANTS

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. ANDREW TONKIN, ET AL., DEFENDANTS

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. JACK WHITE, ET AL., DEFENDANTS

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. LANCE J. UBERSEDER, DEFENDANT

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. BRYAN SCOTT TREW, ET AL., DEFENDANTS

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. ANDREW G. TONKIN, ET AL., DEFENDANTS

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. PETER R. MACRIE, DEFENDANT

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. JAMES R. EWALT, ET AL., DEFENDANTS

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. MICHAEL A. MONTANARO, ET AL., DEFENDANTS

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. CAROL A. MELLING, DEFENDANT

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. MICHAEL MADONNA, ET AL., DEFENDANTS

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. PETER R. MACRIE, DEFENDANT

TOWN OF NORTH TOPSAIL BEACH, PLAINTIFF v. ROBERT WILLIAM SEMMLER, ET AL., DEFENDANTS

No. COA08-39

(Filed 6 January 2009)

1. Costs— attorney fees—supporting material—objection at trial on different grounds

The trial court's decision about the amount of attorney fees to award the defendants in voluntarily dismissed condemnation actions was supported by competent evidence where the amounts were supported by affidavits and billing documents. Plaintiffs contended on appeal that the billing documents were not properly authenticated and were not competent evidence, but did not raise authentication at trial. Plaintiff's argument concerning the affidavits was moot since the trial court properly considered the billing documents. N.C.G.S. § 40A-8(b).

2. Costs— attorneys fees and costs for appeal—order allowing petition—not a justiciable controversy

The question of whether the trial court exceeded its jurisdiction by allowing attorney fees and costs for an appeal was not ripe for consideration. The court's order merely permitted defendants to petition the trial court for consideration of the matter, but defendants have not done so.

Appeal by plaintiff from order entered 6 July 2007 by Judge Benjamin G. Alford in Onslow County Superior Court. Heard in the Court of Appeals 9 September 2008.

Robert W. Kilroy for plaintiff appellant.

Ronald E. vonLembke for defendant appellees.

McCULLOUGH, Judge.

Plaintiff appeals trial court's order entered on 6 July 2007. For reasons discussed herein, we affirm.

I. Background

In May of 2006, Town of North Topsail Beach ("plaintiff") filed fourteen separate condemnation actions against defendants listed above (collectively "defendants"). Pursuant to a joint motion, the matters were placed on inactive status on 9 November 2006. On 22 March 2007, defendants filed a motion to consolidate plaintiff's fourteen separate actions and a calendar request to have a jury trial during the 4 June 2007 Session of Onslow County Superior Court. On 9 April 2007, plaintiff voluntarily dismissed each of the fourteen condemnation actions against defendants.

On 16 May 2007, defendants filed a motion for payment of attorney's fees and costs pursuant to N.C. Gen. Stat. §§ 40A-8(b), 1.209.1, and 7A-305(d). On 4 June 2007, the matter was heard before Judge Benjamin Alford. At the hearing, defendants submitted fourteen (14), four-page affidavits ("the affidavits"). Each affidavit, included an invoice itemizing attorney's fees, appraiser's fees, and engineering fees. In each affidavit, defendants' attorney stated that (1) he had personally reviewed the costs and attorney's fees billed to each defendant, (2) he had subtracted all attorney's fees and costs not associated with plaintiff's condemnation complaint, such as those associated with inverse condemnation matters brought by defend-

ants, and (3) the attorney's fees identified in the attached invoice are "true and accurate."

Plaintiff did not contest the statutory basis of defendants' claim for attorney's fees but did argue that the affidavits were not sufficiently detailed to support the amount of attorney's fees listed. In response, defendants' attorney provided the trial court with several hundred pages of billing and expense records ("the billing documents"), supporting the amount of fees listed in the affidavits. The trial court gave plaintiff a few days to review the billing documents.

After plaintiff reviewed the billing documents, it filed an amended response to defendants' motion for attorney's fees on 8 June 2007. In its amended response, plaintiff claimed that the billing documents commingled the attorney's "time and effort" in other cases and attached a list, referencing each instance in which defendants' attorney had failed to segregate the fees. Plaintiff urged the trial court to deny defendants' motion for attorney's fees.

On 6 July 2007, the trial court filed an order awarding attorney's fees and costs to defendants, pursuant to N.C. Gen. Stat. §§ 40A-8(b), 1.209.1, and 7A-305(d), in the total amounts listed in the affidavits. The order also provided that defendants "may petition this Court for any additional attorney fees and costs expended after the date of this Order arising from the enforcement or appeal of this matter." Plaintiff filed notice of appeal on 3 August 2007 and objected to the billing statements being included in the record on appeal. Pursuant to Rule 11(c) of the North Carolina Rules of Appellate Procedure, the trial court settled the record on appeal. In its order, dated 28 December 2007, the trial court included the billing documents in the record. Plaintiff filed a Petition for Writ of Certiorari on that order, which we denied on 28 January 2008.

II. Amount of Attorney's Fees Awarded

[1] Plaintiff argues that the trial court abused its discretion in awarding attorney's fees to defendants in the amounts identified in the affidavits.[1] Specifically, plaintiff claims that the trial court did not have competent evidence to support the amount of attorney's fees it awarded and assigns error to several findings of fact. We disagree.

1. Defendants claim that we have previously decided this issue. On 28 January 2008, we denied plaintiff's petition for certiorari of the trial court's order to include the billing documents in the record. Defendants are incorrect, as our denial of a petition for certiorari does not constitute a decision on the merits of the case.

Defendants are entitled to be reimbursed for their reasonable attorney's fees because plaintiff voluntarily dismissed its condemnation actions. N.C. Gen. Stat. § 40A-8(b), provides that:

> [I]f the condemnor abandons the action, the court with jurisdiction over the action shall after making appropriate findings of fact award each owner of the property sought to be condemned a sum that, in the opinion of the court based upon its findings of fact, will reimburse the owner for: his reasonable costs; disbursements; expenses (including reasonable attorney, appraisal, and engineering fees)[.]

N.C. Gen. Stat. § 40A-8(b) (2007). The award of attorney's fees is within the sound discretion of the trial judge and is not reviewable except for abuse of discretion. *Concrete Machinery Co. v. City of Hickory*, 134 N.C. App. 91, 100, 517 S.E.2d 155, 160 (1999). Our review is " 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *Robinson v. Shue*, 145 N.C. App. 60, 65, 550 S.E.2d 830, 833 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

The trial court is required to include findings of fact to support the attorney's fees awarded. *See* N.C. Gen. Stat. § 40A-8(b). When determining the reasonableness of the amount of attorney's fees in this type of action, our decision " 'does not depend solely upon hourly rates and the number of hours devoted to the case.' " *Concrete Machinery Co.*, 134 N.C. App. at 100, 517 S.E.2d at 160 (citation omitted). This Court will also examine factors such as "the nature of litigation . . . nature of the award, difficulty, amount involved, skill required in its handling, skill employed, attention given, [and] the success or failure of the attorney's efforts." *Id.* (quoting McQuillin Mun. Corp. § 32.96 (3d Ed.)).

In this case, plaintiff stipulated to the customary fee, experience, and ability of defendants' counsel. In support of their motion for attorney's fees, defendants submitted fourteen sworn affidavits, each of which included an invoice listing the amount of attorney's fees each defendant incurred. In each affidavit, defendants' counsel stated that he personally reviewed the attorney's fees billed to each defendant, subtracted all fees not associated with plaintiff's condemnation complaint, and that the amounts listed in the affidavits were true and

accurate. At that time, plaintiff claimed that the affidavits were not sufficiently detailed to support an award of attorney's fees.

In order to support the specific amount of attorney's fees listed in the affidavits, defendants' attorney submitted a box containing several hundred pages of billing and expense records ("the billing documents"). The billing documents showed, in detail, the legal work performed for each defendant in six-minute increments and indicated the number of hours billed to each defendant. The trial court allowed plaintiff to have a few days to review the billing documents before responding to the court.

After reviewing the billing documents, plaintiff filed an amended response to defendant's motion for attorney's fees. Plaintiff asserted that the billing documents were "commingled with Defendants' attorneys time and effort in two inverse condemnation matters brought by Defendants" and that "Defendants' attorney has failed to segregate and account for fees and expenses related only to [plaintiff's] condemnation actions[.]" Plaintiff attached a list to its amended response which indicated the specific portions of the billing documents which plaintiff claimed to show commingling of the attorney's time and effort with unrelated matters. Plaintiff urged the trial court not to award attorney's fees to defendants and argued that the affidavits alone fail to demonstrate the time and effort of defendants' attorney.

In its order, the trial court made several findings of fact based on the billing documents and awarded defendants attorney's fees in the amounts listed in the affidavits. The trial court admitted the billing documents into evidence in its order stating that, "[t]he detailed billing sheets and invoices in support of the affidavits are incorporated by reference."

On appeal, plaintiff asserts that because the billing documents were not competent evidence, the trial court was not permitted to use them to support its of findings of fact. Plaintiff contends that the affidavits were the only competent evidence presented and that the affidavits alone were not sufficiently detailed to support the amount of attorney's fees awarded.

Plaintiff contends that the billing documents were not competent because they were not properly authenticated or identified by a witness under oath, pursuant to Rules of Evidence 603 and 901. *See* N.C. Gen. Stat. § 8C-1, Rule 603 (2007) (requiring every witness "to declare that he will testify truthfully, by oath or affirmation"); N.C. Gen. Stat. § 8C-1, Rule 901(a),(b)(1) (2007) (providing that "the requirement of

authentication or identification as a condition precedent to admissibility is satisfied by . . . [t]estimony that a matter is what it is claimed to be"). Defendant has failed to preserve this issue for appeal. "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[.]" N.C.R. App. P. 10(b)(1) (2008). In the case before us, plaintiff is precluded from raising this issue on appeal because it did not object, on this specific ground, during trial.

Plaintiff's contention that it had no opportunity to object to the admission of the billing documents is unfounded. Plaintiff had sufficient opportunity to raise any objections to the billing documents before the trial court made an evidentiary ruling in its order. As soon as defendants submitted the billing documents, the trial court granted plaintiff a few days to review the documents and specifically told plaintiff that it could submit a written response to the court after its review.

Plaintiff was permitted to raise any objections it had on the admissibility of those billing documents in its response to the court, which it did. In its amended reply, plaintiff claimed that the billing documents did not support the amount of attorney's fees, because the documents failed to segregate the fees from this case with the fees from other matters. The trial court disagreed with plaintiff's contentions and stated so in its findings of fact.

However, plaintiff did not object to the authenticity of the billing documents and has therefore waived its right to raise the issue on appeal. It is well established that "where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court].' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)), *cert. denied*, 350 N.C. 848, 539 S.E.2d 647 (1999). "The defendant may not change his position from that taken at trial to obtain a 'steadier mount' on appeal." *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11, *appeal dismissed*, *disc. review denied*, 329 N.C. 504, 407 S.E.2d 550 (1991) (citation omitted). We find that the billing documents were competent evidence to support awarding attorney's fees in the amounts listed in the affidavits.

Plaintiff further argues that the affidavits alone were not sufficient to support the amount of attorney's fees awarded. This assign-

ment of error is now moot as we find that the trial court properly considered the billing documents to support its award.

We have reviewed plaintiff's other arguments and find them to be without merit. We hold that the trial court's decision to award the amount of attorney's fees listed in the affidavits was supported by competent evidence and affirm the order of the trial court.

III. Attorney's Fees for Appeal

[2] Plaintiff also argues that the trial court exceeded its jurisdiction under N.C. Gen. Stat. § 40A-8B, by allowing defendants to recover attorney's fees and costs arising from appeal of this matter. We need not decide this issue as it is not ripe for our consideration.

Defendant assigns error to the following paragraph in the trial court's order:

> Named-Defendants may petition this Court for any additional attorney fees and costs expended after the date of this Order arising from the enforcement or appeal of this matter. This Court shall retain jurisdiction over the above-subject cases for this purpose.

Contrary to plaintiff's contention, the trial court did not award attorney's fees arising from appeal to defendants. The order only permitted defendants to petition the trial court for consideration of the matter. Defendants have not done so and therefore there is no justiciable controversy at this time. *See Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 381-82 (1994) (explaining that it is not proper for appellate courts to issue opinions where there is no genuine controversy between the parties). We cannot review this issue until the trial court makes its decision as it is not the proper function of this Court to give advisory opinions. *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978). We find that this issue is premature for appellate review.

IV. Conclusion

For the reason discussed above, we affirm the order of the trial court.

Affirmed.

Judges McGEE and STROUD concur.

Concurred prior to 31 December 2008.

IN RE APPEAL OF EAGLE'S NEST FOUND.

[194 N.C. App. 770 (2009)]

IN THE MATTER OF: APPEAL OF: EAGLE'S NEST FOUNDATION FROM THE ORDER OF THE TRANSYLVANIA COUNTY BOARD OF COUNTY COMMISSIONERS CONCERNING TAX EXEMPT STATUS FOR TAX YEAR 2006

No. COA08-316

(Filed 6 January 2009)

1. Taxation— ad valorem—exemption denied—summer camp and school—primarily recreational rather than educational

The Property Tax Commission did not err by affirming the denial of an exemption from ad valorem property taxes by the local Board of Equalization and Review where the taxpayer operated a summer camp and winter school and claimed that it exclusively dedicated its property to educational endeavors. The summer use was primarily recreational; any educational aspect was incidental to the recreational purposes. N.C.G.S. § 105-278.4.

2. Taxation— ad valorem—exemption denied—summer camp and school—not charitable

The Property Tax Commission did not err by affirming the denial of an exemption from ad valorem property taxes by the local Board of Equalization and Review where the taxpayer contended that it was a charitable association or institution. The conclusion that the taxpayer did not meet its burden of proving that it is a charitable association or institution was supported by substantial evidence about the finances of the summer camp and winter high school operated by the taxpayer.

Appeal by taxpayer from Final Decision entered 21 December 2007 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 11 September 2008.

Bell, Davis & Pitt, P.A., by John A. Cocklereece and Kevin G. Williams, for Taxpayer-Appellant.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker, for Appellee, Transylvania County.

STEPHENS, Judge.

Taxpayer Eagle's Nest Foundation ("Foundation") appeals a decision of the Property Tax Commission ("Commission") affirming the decision of the Transylvania County Board of Equalization and Review which denied the Foundation's request to be exempt from *ad*

valorem property taxes. Because the Foundation's property is not "wholly and exclusively" used for educational purposes, N.C. Gen. Stat. § 105-278.4 (2005), and because the Foundation is not a "charitable association or institution[,]" N.C. Gen. Stat. § 105-278.7 (2005), we affirm.

BACKGROUND

The Foundation applied to the County's tax assessor for a property tax exemption for the 2006 tax year. The assessor denied the Foundation's request, and the Board of Equalization and Review affirmed the assessor's decision. The Foundation appealed to the Commission, contending that its property was exempt under Sections 105-278.4 and 105-278.7. The Commission heard the appeal on 15 November 2007. At the conclusion of the Foundation's evidence, the County moved to dismiss on the ground that the Foundation failed to carry its burden of showing entitlement to an exemption. On 21 December 2007, the Commission entered a Final Decision which contained the following findings of fact:

> 1. Eagle's Nest Foundation is a non-profit corporation organized under the laws of the State of North Carolina. The Foundation has been granted exemption from Federal income taxes under Section 501(c)(3) of the Internal Revenue Code since at least December 1, 1994. The Foundation and its predecessor camp have been in existence for decades but never have been exempt from *ad valorem* taxation in North Carolina.
>
> 2. The Foundation runs three programs: (a) a summer camp called Eagle's Nest Camp; (b) a two-semester winter 10th grade school called the Outdoor Academy, and (c) Hante[,] which sponsors trips outside of Transylvania County including travel overseas.
>
> 3. Eagle's Nest Camp has a capacity of 158 campers per session and serves over 300 campers each summer. The winter school has a capacity of 35 students per semester. The most students attending the school during any one semester was 32.
>
> 4. Eagle's Nest Camp uses all the buildings and land owned by the Foundation in Transylvania County.
>
> 5. The Foundation's facilities are typical for those of a summer camp—cabins for sleeping, a lake for swimming, three ponds for water activities, horses for riding and large natural

areas for a variety of outdoor activities. The summer camp's activities include hiking, swimming, canoeing, horse riding, tennis, and all kinds of arts, crafts and music. The summer camp also emphasizes community building and fellowship.

6. While the winter school is accredited as a school, Eagle's Nest Camp is not accredited as a school. Rather[,] the summer camp is accredited by the American Camp Association. Many of the Camp's counselors are college students.

7. The Eagle's Nest Camp director testified that each camper is assigned to four activities which are intended to be part of the Foundation's philosophy to provide "experiential education." These activities include sports, crafts, art, music and the like. The director also testified that (a) grades are not given for the activities, (b) the activities do not count as course work for schools, and (c) there is no standardized end-of-activity testing. The winter school, on the other hand, does have course work and studies typical of a high school.

8. Eagle's Nest Camp provides a varied and interesting summer camping experience including recreation, arts, crafts, music and fellowship. The Eagle's Nest brochure refers to the summer attendees as "campers."

9. The charge for Eagle's Nest Camp is approximately $150 per day per camper, which is within the range of what other nearby summer camps charge.

10. For the year ending December 31, 2005, the Eagle's Nest Camp revenues were $1,137,000.68. The total expenses were $746,892.61. The surplus was $390,108.07. After interfund transfers to the Foundation, the net surplus for the camp was $135,715.88. The Foundation periodically has conducted capital campaigns to acquire land and build structures. The Foundation also requests contributions for operating expenses each year.

11. Eagle's Nest Camp in 2005 made charge reductions of $106,179 for "referral discounts" to families referring other campers to the Camp and for other business purposes. Financial assistance to campers for that year was about $20,000, which was approximately 2% of the Camp's revenues.

Primarily on these findings, the Commission granted the County's motion to dismiss the appeal, affirmed the Board's decision, and

denied the Foundation's request for an exemption. The Foundation appealed to this Court.

ANALYSIS

In appeals to the Commission, the taxpayer bears the burden of proving that its property is entitled to an exemption under the law. *In re Appeal of Southeastern Baptist Theological Seminary, Inc.*, 135 N.C. App. 247, 520 S.E.2d 302 (1999). "This burden is substantial and often difficult to meet because all property is subject to taxation unless exempted by a statute of statewide origin." *In re Appeal of Atl. Coast Conference*, 112 N.C. App. 1, 4, 434 S.E.2d 865, 867 (1993) (citation omitted), *aff'd per curiam*, 336 N.C. 69, 441 S.E.2d 550 (1994). "Statutory provisions providing for exemptions from taxes are to be strictly construed, and all ambiguities are to be resolved in favor of taxation." *In re Appeal of Totsland Preschool, Inc.*, 180 N.C. App. 160, 164, 636 S.E.2d 292, 295 (2006) (citing *In re Appeal of Pavillon Int'l*, 166 N.C. App. 194, 198, 601 S.E.2d 307, 309 (2004); *Southminster, Inc. v. Justus*, 119 N.C. App. 669, 673-74, 459 S.E.2d 793, 796 (1995)).

On appeal, the standard of review for a decision of the Commission is controlled by Section 105-345.2 of our General Statutes. N.C. Gen. Stat. § 105-345.2 (2005). *See also In re Appeal of Southview Presbyterian Church*, 62 N.C. App. 45, 302 S.E.2d 298 (describing the scope of review as dictated by Section 105-345.2), *disc. review denied*, 309 N.C. 820, 310 S.E.2d 354 (1983). Subsection (b) of that statute provides, in part, that the appellate court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C. Gen. Stat. § 105-345.2(b) (2005). Subsection (b) further provides that the appellate court may grant various forms of relief

> 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). Pursuant to subsection (c), the appellate court must "review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105-345.2(c) (2005).

Under the "whole record test," this Court may not "substitute its judgment for that of the agency when two reasonable conflicting results could be reached[.]" *Southview*, 62 N.C. App. at 47, 302 S.E.2d at 299. "While the weighing and evaluation of the evidence is in the exclusive province of the Commission, where the evidence is conflicting, the appellate court must apply the 'whole record' test to determine whether the administrative decision has a rational basis in the evidence." *Id.* (internal citations and citation omitted). In evaluating whether the record supports the Commission's decision, "this Court must evaluate whether the decision is supported by substantial evidence, and if it is, the decision cannot be overturned." *In re Appeal of Interstate Income Fund I*, 126 N.C. App. 162, 165, 484 S.E.2d 450, 452 (1997) (citing *In re Appeal of Perry-Griffin Found.*, 108 N.C. App. 383, 394, 424 S.E.2d 212, 218, *disc. review denied*, 333 N.C. 538, 429 S.E.2d 561 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977) (citation omitted).

Section 105-278.4

[1] The Foundation first argues that the Commission erred in concluding that the Foundation is not entitled to an exemption under N.C. Gen. Stat. § 105-278.4. That statute provides, in part:

> (a) Buildings.—Buildings, the land they actually occupy, and additional land reasonably necessary for the convenient use of any such building shall be exempted from taxation if all of the following requirements are met:
>
> (1) Owned by either of the following:
>
> a. An educational institution; or
>
> b. A nonprofit entity for the sole benefit of a constituent or affiliated institution of The University of North

Carolina, an institution as defined in G.S. 116-22, a North Carolina community college, or a combination of these;

(2) The owner is not organized or operated for profit and no officer, shareholder, member, or employee of the owner or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services;

(3) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and

(4) Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution and wholly and exclusively used by the occupant for nonprofit educational purposes.

(b) Land.—Land (exclusive of improvements); and improvements other than buildings, the land actually occupied by such improvements, and additional land reasonably necessary for the convenient use of any such improvement shall be exempted from taxation if:

(1) Owned by an educational institution that owns real property entitled to exemption under the provisions of subsection (a), above;

(2) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and

(3) Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution (as defined herein) and wholly and exclusively used by the occupant for nonprofit educational purposes.

. . . .

(f) Definitions.—The following definitions apply in this section:

(1) Educational institution.—The term includes a university, a college, a school, a seminary, an academy, an

industrial school, a public library, a museum, and similar institutions.

(2) Educational purpose.—A purpose that has as its objective the education or instruction of human beings; it comprehends the transmission of information and the training or development of the knowledge or skills of individual persons. The operation of a student housing facility, a student dining facility, a golf course, a tennis court, a sports arena, a similar sport property, or a similar recreational sport property for the use of students or faculty is also an educational purpose, regardless of the extent to which the property is also available to and patronized by the general public.

N.C. Gen. Stat. § 105-278.4. The Foundation contends that it met its burden of proof under this statute because, *inter alia*, it "exclusively dedicates its property to educational endeavors." We disagree.

The record contains substantial evidence that the Foundation's property is not "wholly and exclusively" used for educational purposes. Indeed, during the summer months when the Foundation operates Eagle's Nest Camp, the Foundation's property is primarily used for recreational purposes. The Camp's brochure, which refers to Camp attendees as "campers," states that "[a]ctivities at Eagle's Nest Camp are driven by the landscape. A fresh, clean lake, green meadows, gardens, orchards, hilltops, trails, forests, streams, rivers and mountains provide campers with unlimited *recreation* opportunities." (Emphasis added.) Activities at the Camp include, among others, rock climbing, arts and crafts, whitewater paddling, ceramics, photography, woodworking, archery, horseback riding, and swimming. As the Commission concluded, any educational aspect of these activities is incidental to the activities' recreational purposes. The Commission properly concluded that the Foundation did not meet its burden of proof under Section 105-278.4.

Section 105-278.7

[2] The Foundation next argues that the Commission erred in concluding that the Foundation is not entitled to an exemption under N.C. Gen. Stat. § 105-278.7. That statute provides, in part:

(a) Buildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building

shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:

(1) Wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes as defined in subsection (f), below; or

(2) Occupied gratuitously by an agency listed in subsection (c), below, other than the owner, and wholly and exclusively used by the occupant for nonprofit educational, scientific, literary, charitable, or cultural purposes.

. . . .

(c) The following agencies, when the other requirements of this section are met, may obtain property tax exemption under this section:

(1) A charitable association or institution.

. . . .

(f) Within the meaning of this section:

(1) An educational purpose is one that has as its objective the education or instruction of human beings; it comprehends the transmission of information and the training or development of the knowledge or skills of individual persons.

. . . .

(4) A charitable purpose is one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward.

N.C. Gen. Stat. § 105-278.7. The Foundation argues, *inter alia*, that it is a "charitable association or institution." Again, we disagree.

"The first step in an analysis under section 105-278.7(a) is to determine that the entity seeking an exemption qualifies as one of the types of agencies entitled to an exemption pursuant to section 105-278.7(c)." *Totsland*, 180 N.C. App. at 164, 636 S.E.2d at 295. Relying exclusively on *Totsland*, the Foundation argues that it is an agency entitled to an exemption because its articles of incorporation and bylaws state that the Foundation is to "use its funds exclusively

for . . . charitable purposes[,]" and because the Foundation is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. Although the *Totsland* Court concluded that the taxpayer in that case was a charitable institution based in part on the purposes stated in the taxpayer's organizational documents and on the fact that the taxpayer was a 501(c)(3) organization, the *Totsland* Court also noted that the taxpayer

> provides day care services to the children of low-income individuals. The day care services are offered at significantly reduced rate[s] to the parents, all of whom qualify for government subsidies. The parents are required only to pay a small portion of the cost of the day care services, and the county Department of Social Services ("DSS") provides subsidies for the remaining portion of the cost of care. Totsland's services are not limited to a specific segment of the community, and are available to parents in three counties. Totsland does not have any control over how much it charges for day care services, or how much each parent is required to pay, as the cost of its day care services is set by DSS. In addition, Totsland does not operate its child care center for the purpose of making money, and it is not engaged in commercial competition with other area child care centers.

Id. at 166, 636 S.E.2d at 297. In the case at bar, by contrast, the Foundation operates a semester-long school for select high school students, charging each student approximately $15,000.00 per semester. The Foundation also operates a camp which, according to the Foundation's executive director, charged campers "[m]arket rate[.]" Furthermore, the Commission found that the Camp charged its campers $150.00 per day and that, from the Camp's revenue of $390,108.07, the Foundation provided only about $20,000.00, or approximately 2% of the Camp's revenues, to campers in the form of financial aid. Finally, although neither "charitable association" nor "charitable institution" are defined in Section 105-278.7, "charitable purpose" is defined as a purpose "that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward." N.C. Gen. Stat. § 105-278.7(f)(4) (2005). The Commission's conclusion that the Foundation did not meet its burden of proving that it is a charitable association or institution is supported by substantial evidence in the record. The Foundation, therefore, is not entitled to a property tax exemption under Section 105-278.7.

The Commission's decision is

AFFIRMED.

Judges STEELMAN and GEER concur.

JACINDA BURTON, ADMINISTRATRIX OF THE ESTATE OF MICHAEL C. BURTON, PLAINTIFF v. PHOENIX FABRICATORS AND ERECTORS, INC. AND DAVIS, MARTIN, POWELL & ASSOCIATES, INC., DEFENDANTS

DONNA DAVIS, ADMINISTRATRIX OF THE ESTATE OF CHARLES M. DAVIS, PLAINTIFF v. PHOENIX FABRICATORS AND ERECTORS, INC. AND DAVIS, MARTIN, POWELL & ASSOCIATES, INC., DEFENDANTS

No. COA06-1195-2

(Filed 6 January 2009)

Wrongful Death— election of workers' compensation benefits—Indiana Workers' Compensation Act

Plaintiff wives of husbands killed in work-related accidents in North Carolina while employed in their employer's Indiana office were barred by the exclusive remedy provision of the Indiana Workers' Compensation Act from bringing an intentional tort action in North Carolina against the employer where they had accepted benefits for their husbands' deaths under the Indiana Workers' Compensation Act.

Appeal by defendant from orders entered 16 May 2006 by Judge W. Osmond Smith, III in Granville County Superior Court. This case was originally heard in the Court of Appeals 27 March 2007. Upon remand by order from the North Carolina Supreme Court filed 10 April 2008.

Price, Smith, Hargett, Petho & Anderson, by William Benjamin Smith, for plaintiffs-appellees.

Carruthers & Roth, P.A., by Kenneth R. Keller, J. Patrick Haywood, and William J. McMahon, IV, for defendant-appellant Phoenix Fabricators and Erectors, Inc.

GEER, Judge.

Defendant Phoenix Fabricators and Erectors, Inc. ("Phoenix") appeals from the denial of its motions to dismiss the complaints of plaintiffs Jacinda Burton and Donna Davis pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. Burton and Davis brought wrongful death actions alleging that the deaths of their husbands, who were employees of Phoenix's Indiana office, were the result of intentional tortious conduct while the husbands were working for Phoenix in North Carolina. The critical issue for this appeal is whether Indiana or North Carolina law applies. Under Indiana law, because Burton and Davis received workers' compensation benefits, they would be barred from bringing a civil action against their employer, Phoenix. Plaintiffs, however, contend that North Carolina law applies and allows them to proceed under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

We agree with Phoenix that *Braxton v. Anco Elec., Inc.*, 330 N.C. 124, 409 S.E.2d 914 (1991), mandates that we apply Indiana law because plaintiffs' husbands were covered by Indiana's Workers' Compensation Act. Accordingly, we must hold that the trial court erred in denying Phoenix's motions to dismiss for lack of subject matter jurisdiction, and we reverse.

Facts

Michael Burton and Charles Davis, plaintiffs' decedents, were killed on 30 October 2002 while helping construct a water tower on property owned by Granville County. Both men were employed by Phoenix, an Indiana corporation, worked out of the Indiana office, and were covered by Indiana workers' compensation.

Plaintiffs' complaint alleges that decedents were assigned to work on the exterior of the water tower at a height of over 80 feet above the ground without having any "fall arrest protection." The men were knocked from the structure and fell to their deaths after a crane, which was lifting a section of the water tower into place, failed, causing the section being lifted to strike the previously erected portion of the tower.

On or about 30 October 2002, Amerisure Insurance Company, the workers' compensation insurance carrier for Phoenix, filed "First Report of Employee Injury, Illness" forms for both decedents with the Workers' Compensation Board for the State of Indiana. One month later, Jacinda Burton signed an "Agreement to Compensation Be-

tween the Dependents of Deceased Employee and Employer." The record does not contain a similar document signed by Donna Davis. Thereafter, Amerisure commenced the payment of benefits to the Estates of Michael Burton and Charles Davis in accordance with the Indiana Worker's Compensation Act. As of 19 January 2006, Amerisure had paid $312,270.47 in medical expenses to the Estate of Charles Davis and $487.00 in medical expenses to the Estate of Michael Burton. Additionally, Amerisure has made weekly death benefit payments of $588.00 to both plaintiffs. As of 25 January 2006, Jacinda Burton had received $104,284.00 and Donna Davis had received $104,784.00 in death benefit payments. The death benefit payments will continue for a total of 500 weeks until each plaintiff has received $294,000.00.

On 10 June 2004, plaintiffs filed companion tort actions in Granville County Superior Court against three defendants: Phoenix; Granville County; and Davis, Martin, Powell & Associates, one of the project's contractors. Plaintiffs alleged that Phoenix "intentionally engaged in conduct with regard to lack of tie off protection which was substantially certain to cause injury or death and said conduct was intentional, gross, willful, wanton, and recklessly negligent." As for defendants Granville County and Davis, Martin, Powell & Associates, plaintiffs alleged negligence consisting of a failure to certify the safety of Phoenix's equipment and work practices and breach of a non-delegable duty of providing a safe work site.

All of the defendants filed motions for summary judgment. Subsequently, Phoenix also filed motions to dismiss plaintiffs' actions pursuant to Rule 12(b)(1), asserting that the trial court lacked subject matter jurisdiction. The trial court granted summary judgment for defendants Granville County and Davis, Martin, Powell & Associates, but denied Phoenix's motions for summary judgment and for dismissal.

Phoenix filed an appeal from the denial of its Rule 12(b)(1) motion that this Court dismissed as improperly interlocutory. *See Burton v. Phoenix Fabricators & Erectors, Inc.*, 185 N.C. App. 303, 648 S.E.2d 235 (2007). Our Supreme Court allowed Phoenix's petition for discretionary review of this decision for the sole purpose of reversing this Court's dismissal based on the Court's determination that the denial of Phoenix's motions affected a substantial right. The Supreme Court remanded for consideration of the merits of Phoenix's appeal. *Burton v. Phoenix Fabricators & Erectors, Inc.*, 362 N.C. 352, 661 S.E.2d 242 (2008).

Discussion

When considering a motion to dismiss for lack of subject matter jurisdiction, a trial court is not limited to the pleadings, " 'but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing.' " *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (quoting 2 James W. Moore et al., *Moore's Federal Practice*, § 12.30(3) (3d ed. 1997)), *appeal dismissed*, 348 N.C. 284, 501 S.E.2d 913 (1998). On appeal from the denial of a motion to dismiss for lack of subject matter jurisdiction, this Court applies a de novo standard of review. *Id.* ("An appellate court's review of an order of the trial court denying or allowing a Rule 12(b)(1) motion is *de novo*, except to the extent the trial court resolves issues of fact and those findings are binding on the appellate court if supported by competent evidence in the record.").

Phoenix claims that plaintiffs, by electing to accept benefits under Indiana's Workers' Compensation Act, are barred from pursuing this action under the exclusive remedy provision of that Act. For that reason, Phoenix argues, North Carolina courts lack subject matter jurisdiction over these actions. *See McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988) ("The issue of whether plaintiff's claim is barred by the Workers' Compensation Act is a question of subject matter jurisdiction.").

Plaintiffs argue, however, that the rule of *lex loci* applies to their tort action. *See Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 854 (1988) ("For actions sounding in tort, the state where the injury occurred is considered the situs of the claim. . . . This Court has consistently adhered to the lex loci rule in tort actions."). According to plaintiffs, North Carolina law governs because it is the state where the injury occurred.

Our Supreme Court addressed an analogous situation in *Braxton*, 330 N.C. at 125, 409 S.E.2d at 914, in which a North Carolina resident, employed by a North Carolina plumbing subcontractor, was injured while working on a construction site in Virginia due to the alleged negligence of an electrical subcontractor. The plaintiff received benefits pursuant to North Carolina's workers' compensation statute and also filed suit in North Carolina against the electrical subcontractor, seeking punitive and compensatory damages. *Id.* at 125-26, 409 S.E.2d at 914-15. Under Virginia workers' compensation law, the action was barred, but under North Carolina law, it was not. *Id.* at 126, 409 S.E.2d at 915. The Supreme Court observed that the appeal

presented it with a "novel question of first impression" regarding which State's law to apply. *Id.*

The Court first acknowledged that the principal set out in *Boudreau* applied, and Virginia law governed "as to the tort law controlling the rights of the litigants in the lawsuit allowed by this decision . . . ." *Id.* at 126-27, 409 S.E.2d at 915. Nevertheless, the Court held that a different rule applied "in regard to the 'exclusive remedy bar' imposed by statute . . . ." *Id.* at 127, 409 S.E.2d at 915. The Court held: "To determine whether the law says that plaintiff, in return for collecting workers' compensation benefits, has traded away his right to sue in this situation, we look to the law which guarantees his receipt of those benefits, which is the law of North Carolina." *Id.*

In other words, the law of the state providing the workers' compensation benefits determines whether the workers' compensation statute of that state provides an exclusive remedy barring additional recovery through a tort action. The Court explained:

> Public policy considerations point to the same result. All the parties are North Carolina citizens; the plaintiff's contract of employment and the contracts giving rise to the workers' compensation coverage were signed here; and the plaintiff was receiving benefits under our workers' compensation statute. Under these circumstances, North Carolina's interests in implementing the protections afforded by our statute are paramount.

Id., 409 S.E.2d at 916. As a result, even though the injury in *Braxton* occurred in Virginia, the Supreme Court held that "the workers' compensation law of North Carolina governs the question of whether this action has been precluded by statute . . . ." *Id.* at 129, 409 S.E.2d at 916.

We are bound by *Braxton*. In this case, there is no dispute that plaintiffs' husbands were covered by the Indiana Workers' Compensation Act and, indeed, plaintiffs have each received significant amounts in workers' compensation benefits as beneficiaries of the particular bargain that Indiana struck between employers and employees. Since the law of Indiana guarantees the deceased employees' receipt of workers' compensation benefits, *Braxton* requires that we look to the law of Indiana to determine whether plaintiffs' claims are precluded by Indiana's workers' compensation statutes.

Indiana's Workers' Compensation Act, similar to North Carolina's, contains an exclusive remedy provision that bars employees' actions

for accidental injury or death. *See* Ind. Code § 22-3-2-6 (2006). Indiana courts have, however, interpreted this exclusive remedy provision as preserving employees' rights to bring actions for *intentional* torts against their employers. *See Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271, 1273 (Ind. 1994) ("[W]e hold that the [workers' compensation] act itself does not include employers' intentional torts within its coverage. The exclusivity provision is expressly limited to personal injury or death . . . which occurs 'by accident.' . . . [T]he intentional torts of an employer are necessarily beyond the pale of the act.").

Nevertheless, the Indiana Court of Appeals held in *Williams v. Delta Steel Corp.*, 695 N.E.2d 633, 635 (Ind. Ct. App.) (internal citations omitted), *transfer denied*, 706 N.E.2d 174 (Ind. 1998), that "an employee, by accepting and receiving compensation under the Act, concedes that the injury was accidental in nature . . . . Thus, the employee is precluded from repudiating that position by claiming that his injury was not accidental but was instead caused by the employer's intentional acts." The court observed that the Workers' Compensation Act allows an employee to recover both compensation benefits and tort damages "only in situations in which the action at law is brought against a third person. In all other cases, an employee may recover at law, if such an action is maintainable, or under the Act, but he may not recover under both." *Id.* at 636 (internal citation omitted). The court, therefore, affirmed the trial court's order dismissing the action for lack of subject matter jurisdiction. *Id.* at 637. *See also Bailor v. Salvation Army*, 854 F. Supp. 1341, 1355 (N.D. Ind. 1994) ("Once Bailor collected her worker's compensation payments she relinquished her option to collect tort damages against any party liable for her worker's compensation award."), *aff'd on other grounds*, 51 F.3d 678 (7th Cir. 1995).

In this case, application of Indiana law compels the conclusion that plaintiffs' action is barred by the Indiana workers' compensation exclusive remedy provision. It is undisputed that plaintiffs accepted workers' compensation benefits pursuant to Indiana's workers' compensation statute. Although the trial court's orders denying Phoenix's motions to dismiss found that plaintiffs have "not signed any final settlement agreement indicating consideration for or release of any other claims" against Phoenix, this fact is inconsequential under Indiana law. Under *Williams*, an employee elects his or her remedy "by accepting and receiving compensation under the Act . . . " 695 N.E.2d at 635. Since plaintiffs accepted benefits under Indiana's

Workers' Compensation Act, they are precluded, under Indiana law, from bringing an intentional tort claim. The Workers' Compensation Act now "affords the exclusive remedy" for plaintiffs against Phoenix. *Id.* at 637.

Plaintiffs, however, contend *Braxton* is a "results oriented" opinion that seeks to maximize North Carolina employees' rights rather than to establish a conflict of laws rule regarding exclusive remedy provisions. Insofar as *Braxton* is susceptible of a reading that establishes such a rule, plaintiffs suggest that *Braxton* is an anomalous departure from the well-established doctrine of *lex loci*. Regardless, only the Supreme Court may revisit *Braxton*. We are bound by *Braxton* and nothing in that opinion suggests that its rule applies only when it would expand the remedies available to the plaintiff.

Moreover, *Braxton* and our application of *Braxton* to the facts of this case are consistent with the weight of authority. As Professor Larson has stated, "[i]t is generally held that, if a damage suit is brought in the forum state by the employee against the employer or statutory employer, the forum state will enforce the bar created by the exclusive-remedy statute of a state that is liable for workers' compensation as the state of employment relation, contract, or injury." 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 144.01 (2008). Failure to enforce the exclusive remedy defense of a foreign state, Professor Larson observes, can result in "irremediable harm to the employer . . . . Because of this [], then, a foreign exclusive-remedy defense to common-law suit against the employer will usually be honored . . . ." *Id.*

The Restatement (Second) of Conflict of Laws § 184 (1971) reaches the same conclusion: "Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which (a) the plaintiff has obtained an award for the injury . . . ." Comment (b) states the rationale for this rule, echoing the public policy concerns identified in *Braxton*:

> It is thought unfair that a person who is required to provide insurance against a risk under the workmen's compensation statute of one state which gives him immunity from liability for tort or wrongful death should not enjoy that immunity in a suit brought in other states. Also to deny a person the immunity granted him by a workmen's compensation statute of a given state would frus-

> trate the efforts of that state to restrict the cost of industrial accidents and to afford a fair basis for predicting what these costs will be. All states are sympathetic with the policies underlying workmen's compensation, and all states grant certain persons immunity from liability for tort or wrongful death, although the provisions of the various statutes do differ in matters of detail. For all of these reasons, a state will not hold a person liable for tort or wrongful death under the circumstances stated in the present rule.
>
> Under the rule of this Section, a defendant will be accorded immunity from tort or wrongful death liability if he is given such immunity by the workmen's compensation statute of any state under which he is required to provide insurance against the particular risk and under which the plaintiff has already obtained an award for the injury. A person who accepts an award under the workmen's compensation statute of a given state may justly be held bound by the provisions of that statute insofar as immunity from tort and wrongful death liability is concerned.

Id. cmt. b.

In this case, denying Phoenix the benefit of Indiana's exclusive remedy provision would, in the words of the Restatement, "frustrate the efforts" of Indiana to restrict the costs of industrial accidents. It would add a layer of unpredictability to a workers' compensation framework designed to "afford a fair basis for predicting what these costs will be." *Id.* Such a result would not be consistent with the reasoning in *Braxton*.

Because *Braxton* requires us, when determining exclusive remedy issues, to look to the law that guarantees an employee his receipt of workers' compensation benefits and because Indiana law bars plaintiffs' actions, we hold that the trial court erred in denying Phoenix's 12(b)(1) motions to dismiss for lack of subject matter jurisdiction. Accordingly, we reverse.

Reversed.

Chief Judge MARTIN and Judge WYNN concur.

HELMS v. LANDRY

[194 N.C. App. 787 (2009)]

BRYAN TATE HELMS, PLAINTIFF v. ANGELIQUE LANDRY, DEFENDANT

No. COA08-33

(Filed 6 January 2009)

1. Appeal and Error— preservation of issues—no objection at trial

The issue of whether sufficient evidence existed for the trial court to find that plaintiff was the biological father of the minor child was not preserved for appellate review where the trial court was not presented with a timely request, objection, or motion.

2. Paternity— motion for test—erroneously denied

The trial court erred by not granting defendant's motion for a paternity test where plaintiff and defendant were never married and plaintiff never obtained a judicial judgment of paternity and never acknowledged paternity by signing an affidavit of paternity.

Judge JACKSON concurring in part and dissenting in part.

Appeal by defendant from order entered 13 September 2007 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 20 August 2008.

Thurman, Wilson & Boutwell, P.A., by John D. Boutwell, Esq., for plaintiff-appellee.

Angelique Landry pro se.

BRYANT, Judge.

Defendant appeals from an order denying defendant's motion for a paternity test and waiving parent education and custody mediation. For the reasons stated herein, we reverse the trial court's order.

The record evidence shows the minor child was born 27 August 1999 to defendant. Defendant and plaintiff were dating around the time defendant became pregnant but never married. The initial complaints for custody were filed in June and July 2001. Each party filed a separate complaint and neither party answered the complaint of the opposing party. The trial court combined the cases. In her complaint, defendant requested the following relief: "(1) custody/visitation of the minor child awarded to defendant; (2) that plaintiff be ordered to pay reasonable child support; (3) that plaintiff be taxed with the cost

of the action; and (4) that plaintiff have and recover such other and further relief as the court may deem just and proper." In his complaint seeking child custody, plaintiff asserted that the parties were never married, but they are the parents of the minor child and that no other persons other than plaintiff and defendant would claim custody of the minor child. Plaintiff requested joint primary care, custody, and control of the parties' minor child.

On 29 January 2002, the trial court signed an order in which it found that the plaintiff and defendant "are the biological father (Plaintiff) and mother (Defendant) of the minor child . . . ." The trial court concluded that "[defendant] is a fit and proper person to be given permanent legal and physical custody of the minor child." "[Plaintiff] is entitled to visitation of the minor child . . . [and] has an obligation to pay permanent child support . . . ." Three and one-half years later, on 12 July 2005, the trial court entered an order in which it concluded a substantial change in circumstances had occurred, and at least temporarily, the minor child should live primarily with plaintiff. On 28 December 2005, the trial court entered an order granting permanent legal and physical custody of the minor child to plaintiff, with defendant receiving visitation.

On 3 July 2007, defendant filed a motion for proof of paternity. Defendant asserted that plaintiff never acknowledged paternity by signing a "Father's Acknowledgment of Paternity" (under N.C. Gen. Stat. § 110-132(A)), or an "Order of Paternity." Defendant asserted that plaintiff neither legitimated the minor child pursuant to N.C.G.S. § 49-10 nor sought a judicial determination of paternity as provided for in N.C. Gen. Stat. § 49-14.

In an order entered 13 September 2007, the trial court found that defendant presented no basis for an order requiring a DNA test, that defendant's motion for paternity testing is not timely filed, and has no basis in law or in fact. The trial court ordered that defendant's motion to have DNA testing in the matter be dismissed with prejudice. Defendant appeals.

On appeal, defendant raises the following two issues: (I) did the trial court err by allowing plaintiff to claim to be the biological father of defendant's son without a mother's affirmation of paternity, with no proof of paternity, and no action legitimating the minor child; and (II) is defendant entitled to a paternity test when there is no prior litigation of paternity and defendant contests paternity of plaintiff.

I

[1] On appeal, defendant argues there was insufficient evidence for the trial court to find that plaintiff was the biological father of the minor child. This finding was initially made in a trial court order authorized on 24 January 2002 and has been referenced at each stage of the proceedings through September 2007 without objection. It was not until 2005, after she lost custody of the minor child, that defendant contested this finding.

We dismiss the first issue for failure to preserve a question for appellate review by presenting the trial court with a timely request, objection, or motion. *See* N.C. R. App. P. 10(b)(1) (2008); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008) ("This Court has repeatedly emphasized that Rule 10(b) prevent[s] unnecessary new trials caused by errors . . . that the [trial] court could have corrected if brought to its attention at the proper time."). Accordingly, we dismiss the assignment of error.

II

[2] Next, defendant argues she is entitled to a paternity test where there is no prior litigation of paternity and the mother contests the paternity of the father. We agree.

> Under North Carolina General Statute section 8-50.1(b1),
>
> In the trial of any civil action in which the question of parentage arises, the court shall, on motion of a party, order the mother, the child, and the alleged father-defendant to submit to one or more blood or genetic marker tests, to be performed by a duly certified physician or other expert.

N.C. Gen. Stat. § 8-50.1(b1) (2007). However, "when the issue of paternity has already been litigated, or when the father has acknowledged paternity in a sworn written statement[,]" this Court has held "the individual questioning paternity is estopped from re-litigating the issue." *Ambrose v. Ambrose*, 140 N.C. App. 545, 546, 536 S.E.2d 855, 857 (2000) (citations omitted); *Cf. Durham Cty Dep't of Social Services v. Williams*, 52 N.C. App. 112, 277 S.E.2d 865 (1981) (acknowledgment of paternity not accepted when not simultaneously supported by the mother's written affirmation of paternity). "In cases where the issue of paternity has not been litigated, however, or in cases where the alleged father has never admitted paternity, G.S. § 8-50.1 controls and the request for a paternity test will be allowed."

Ambrose, 140 N.C. App. at 546, 536 S.E.2d at 857; *see also Wright v. Wright*, 281 N.C. 159, 172, 188 S.E.2d 317, 326 (1972) (whether the putative father of a child conceived during wedlock should be estopped to raise the issue of paternity after some fixed time is a matter for consideration by the General Assembly).

In *Withrow v. Webb*, 53 N.C. App. 67, 280 S.E.2d 22 (1981), this Court affirmed the dismissal of a father's motion to compel a paternity test on the grounds of *res judicata* where the child was "born of the marriage between [the mother] and [the father,]" and the father previously admitted paternity and requested child support during an action for alimony, child support, and custody. *Id.* at 70, 280 S.E.2d at 25.

In *Jones v. Patience*, 121 N.C. App. 434, 466 S.E.2d 720 (1996), a mother informed her husband that he was not the father of her minor child and unilaterally terminated his visitation. *Id.* at 436, 466 S.E.2d at 721. A voluntary blood test excluded the husband as the child's father. *Id.* at 437, 466 S.E.2d at 721. Still, the husband filed a complaint seeking visitation. *Id.* On appeal, this Court held that the marital presumption the husband was the natural father of the child was not rebutted where no other man had formally acknowledged paternity. *Id.* at 440, 466 S.E.2d at 723. Therefore, the husband had standing to seek visitation. *Id.*

In *Ambrose*, a minor child was also born to a husband and wife during wedlock. *Ambrose*, 140 N.C. App. at 545, 536 S.E.2d at 856. After separating, the wife brought an action for child custody, child support, and past child support. *Id.* The husband requested a genetic test to establish the minor child's paternity. *Id.* at 546, 536 S.E.2d at 856. This Court held that "[the father] is not barred from contesting paternity because the issue had not been litigated and because defendant never formally acknowledged paternity in the manner prescribed by G.S. § 110-132." *Id.* at 548, 536 S.E.2d at 857.

Here, plaintiff and defendant were never married. Defendant asserted and plaintiff does not contest that plaintiff has never obtained a judicial judgment of paternity and never acknowledged paternity by signing an affidavit of paternity pursuant to N.C. Gen. Stat. § 110-132(a) ("[i]n lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written affidavits of parentage executed by the putative father and the mother of the dependent child shall constitute an admission of paternity"). Now, defendant contests paternity.

Under N.C.G.S. § 8-50.1 (b1), "the court shall, on motion of a party, order the mother, the child, and the alleged father[] to submit to one or more blood or genetic marker tests . . . ." *Id.* We hold the trial court erred by failing to order the mother, the child, and the alleged father to submit to a paternity test upon the motion of the mother. Accordingly, we reverse and remand this issue to the trial court for entry of an order consistent with this opinion.

Reversed and remanded.

Judge ELMORE concurs.

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

JACKSON, Judge concurring in part and dissenting in part.

I concur in section *I* of the majority's opinion. However, I dissent from the majority's holding in section *II*. In the case *sub judice*, plaintiff's paternity was established judicially on 29 January 2002 by an order from the trial court. Defendant failed to appeal that order in a timely manner and failed to seek relief properly pursuant to the North Carolina Rules of Civil Procedure, Rule 60(b). Therefore, I would affirm the trial court's dismissal of defendant's motion for a paternity test.

North Carolina Rules of Civil Procedure, Rule 60 provides for the method of relief from a judgment or order. In pertinent part, Rule 60(b) provides that

> [o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . . .

> (6) Any other reason justifying relief from the operation of the judgment.
>
> *The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.* A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. *The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.*

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007) (emphasis added).

In the case *sub judice*, on 29 January 2002, the trial court entered an order that found as fact "[t]hat the [p]laintiff and [d]efendant, who are not married and have never held themselves out as husband and wife, are the biological father ([p]laintiff) and mother ([d]efendant) of the minor child, namely Devon Helms, born on 8-27-99." The trial court's conclusions of law and decree also refer to plaintiff as the child's father. Defendant did not appeal from this order. Instead, on 3 July 2007, defendant filed a motion for proof of plaintiff's paternity.

Defendant's motion is well-beyond the one year limit to seek relief from a judgment or order pursuant to the reasons set forth in Rule 60(b)(1)-(3); it also is unreasonably late to seek relief pursuant to Rule 60(b)(6). *See* N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007). Furthermore, defendant has not sought relief from alleged fraud on the court pursuant to an independent action within the meaning of Rule 60(b). *See id.*

Accordingly, I would hold that the trial court's judicial determination of plaintiff's paternity remains in effect pursuant to the order entered on 29 January 2002. Because defendant failed to challenge the trial court's order entered on 29 January 2002 pursuant to timely appeal, and because defendant failed to seek relief from the order pursuant to the North Carolina Rules of Civil Procedure, Rule 60(b), I would affirm the trial court's dismissal of defendant's improper and untimely motion.

JAMES R. CULBERSON AND WIFE, CATHERINE R. CULBERSON, PLAINTIFFS v. REO PROPERTIES CORP., AMERICA'S SERVICING CO., & SUBSTITUTE TRUSTEE SERVICES, INC., DEFENDANTS

No. COA07-1546

(Filed 6 January 2009)

Arbitration and Mediation— valid arbitration agreement—sufficiency of findings of fact and conclusions of law

The trial court's order is remanded for further findings of fact and conclusions of law regarding the existence of a valid arbitration agreement, whether the parties' dispute falls within the substantive scope of the agreement, and whether defendants' delay in requesting arbitration prejudiced plaintiffs to such an extent that defendants have waived their right to arbitration.

Appeal by defendants REO Properties Corp. and America's Servicing Co. from order entered 31 August 2007 by Judge Karl Adkins in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 September 2008.

The Odom Firm, PLLC, by Thomas L. Odom, Jr., for plaintiffs-appellees.

Kennedy Covington Lobdell & Hickman, L.L.P., by Amy Pritchard Williams and Todd W. Billmire, for defendant-appellants.

STROUD, Judge.

Defendants REO Properties Corp. and America's Servicing Co. appeal the trial court order denying their motion to dismiss or in the alternative to compel arbitration and stay the action pending arbitration. The dispositive question before us is whether defendants waived the right to arbitrate. For the following reasons, we remand for further findings.

I. Background

On 31 August 2007, the trial court filed an order regarding defendants'[1] motion to dismiss plaintiffs' action or in the alternative compel arbitration and stay the action pending arbitration.

1. As only defendants REO Properties Corp. and America's Servicing Co. filed the motion at issue and appealed from the resulting order, "defendants" throughout this opinion refers only to these two defendants and not to Substitute Trustee Services, Inc.

The trial court order read in pertinent part:

This matter came before the Court on July 11, 2007, on the motion by Defendant America's Servicing Company ("ASC" and together with REO Properties Corporation ("REO"), "Defendants"), for an order dismissing this action or in the alternative compelling arbitration and staying this action pending arbitration. Based upon the submissions of all parties and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

1. Plaintiffs initiated this action on or about March 27, 2006, in order to enjoin a foreclosure sale scheduled to take place in April, 2006. The original complaint filed by Plaintiffs also contained claims for monetary relief. The foreclosure sale was preliminarily enjoined.

2. Defendants timely responded to the complaint in July, 2006. The answer filed and served did not reference a right to arbitration.

3. Plaintiffs have served two sets of written interrogatories and requests for production of documents on Defendants. Defendants have not served any written discovery on Plaintiffs. No depositions have been taken.

4. On November 17, 2006, the Culbersons participated in mediation with the Defendants that resulted in an impasse. Plaintiffs paid a mediation fee of $630.00.

5. On January 25, 2007, based upon discovery Plaintiffs received, Plaintiffs moved to amend the complaint in this action to add a number of additional claims seeking additional damages and asserting additional grounds for relief against the Defendants ASC and REO.

6. Plaintiffs' motion was heard on February 6, 2007. At the hearing on the motion to amend, Defendants did not raise the issue of a right to arbitrate disputes.

7. The Court granted Plaintiffs' motion to amend the complaint by Order dated February 9, 2007. The Court allowed Defendants 60 days from February 6, 2007, within which to respond to the Amended Complaint.

8. During the month of March, 2007, Defendants ASC and REO obtained new counsel.

9. On April 2, 2007, Plaintiffs tendered a payoff of the loan in question with a reservation of rights to protect their ability to assert the claims in the Amended Complaint and to contest that the payoff required by REO as the lender was not correct. REO accepted the tender of the payoff and released the Deed of Trust but reserved its asserted rights under the promissory note signed by Plaintiffs to collect any future legal fees and costs in this action. REO has not marked the note satisfied and asserts that it has refrained from doing so in order to preserve its asserted rights.

10. On April 6, 2007, in response to the Amended Complaint, Defendants ASC and REO filed the Motion that is the subject of this Order and an Answer and Conditional Counterclaim.

11. The Motion was originally scheduled to be heard on May 23, 2007, but was continued at the request of Plaintiffs due to a scheduling conflict. The Motion was then re-noticed for hearing on July 11, 2007.

12. Defendants REO and ASC assert that at the time that Plaintiffs took out the mortgage loan at issue in this case, Plaintiffs executed an Arbitration Rider to the Deed of Trust. The Deed of Trust executed by Plaintiffs contained a Balloon Payment Rider, Prepayment Penalty Rider and the Arbitration Rider at issue. The Deed of Trust executed by Plaintiffs, including the Riders, was recorded in the land records of Mecklenburg County. A certified copy of the recorded Deed of Trust with the Arbitration Rider was introduced at the hearing without objection.

13. Plaintiffs submitted affidavit testimony that they have incurred attorney fees and costs in excess of $69,000 in this action, of which approximately $25,000 have been paid.

14. The Plaintiffs have been prejudiced by Defendant ASC and REO's delay, actions and inactions inconsistent and incompatible with arbitration in failing to timely request enforcement of the putative arbitration agreement as follows:

a. On March 26, 2006, the Culbersons were required to file the original complaint and obtain a temporary restraining order to stop foreclosure on their home. No request for arbitration was made.

b. On April 6, 2006, a consent order continuing the March 27, 2006 temporary restraining order was entered. No request for arbitration was made.

c. Plaintiffs served upon Defendants Plaintiffs' First Set of Interrogatories and Request for Production of Documents on May 22, 2006. No request for arbitration was made.

d. On July 26, 2006, all Defendants filed a motion to dismiss, answer and affirmative defense to the complaint. No request for arbitration was made.

e. On November 17, 2006, the Culbersons participated in mediation with the Defendants that resulted in an impasse. Plaintiffs paid a mediation fee of $630.00. No request for arbitration was made.

f. On January 26, 2007, based upon the discovery Plaintiffs had received, the Plaintiffs filed a motion to amend complaint which was granted at the hearing on February 6, 2007 with an order dated February 9, 2007. In the order, Plaintiffs' motion to compel discovery was continued to allow the Plaintiffs and Defendants to attempt to resolve the discovery issues. No request for arbitration was made.

g. The motion to compel arbitration was filed on April 6, 2006 [sic], approximately 13 months after original complaint and 2 months after the amended complaint.

h. As shown by the uncontested Affidavit of Thomas L. Odom, Jr. and Affidavit of James R. Culberson, the Culbersons have incurred significant and substantial attorneys fees and cost in excess of $69,000.00 and have paid attorneys fees of $25,132.00 in this action to enjoin the foreclosure, and assert claims against the Defendants.

Based upon the foregoing findings of fact, the court concludes as a matter of law that Defendants waived the right to arbitrate by not raising the arbitration rider earlier in the case and in any event by not raising it at the hearing on the Motion to Amend Complaint that was held in February, 2007, and if the Court enforced the arbitration rider now, it would cause the Plaintiffs prejudice.

Based upon the foregoing, the Court hereby Orders that the Motion is denied.

On 13 September 2007, defendants filed an amended notice of appeal. The dispositive question before this Court is whether defendants waived their right to arbitrate. For the following reasons, we remand for further findings.

II. Waiver of Right to Arbitrate

All of the arguments presented to this Court by defendants address the denial of their motion to compel arbitration and not defendants' motion to dismiss, which the trial court does not directly address. Therefore, we will only address the motion to compel arbitration.

> As a preliminary matter, we note the denial of a motion to compel arbitration is interlocutory in nature. This Court, however, has held the right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable.

Moose v. Versailles Condo. Ass'n, 171 N.C. App. 377, 381, 614 S.E.2d 418, 422 (2005) (citations and quotation marks omitted).

When there is a dispute as to whether a valid arbitration agreement exists, in order for the trial court to determine defendants have waived their right to arbitrate it must first determine "(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." *See id.* (citation and quotation marks omitted). "Only when a valid arbitration agreement exists can a matter be settled by arbitration. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes." *See id.* at 381-82, 614 S.E.2d at 422 (citations, quotation marks, and brackets omitted).

Plaintiffs argued before the trial court that the arbitration agreement was unconscionable; however, the trial court failed to address the initial questions before it: "(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." *See id.* at 381, 614 S.E.2d at 422 (citation and quotation marks omitted). In finding number 12 the trial court notes that "the Arbitration Rider was introduced at the hearing without objection[,]" but did not make a finding that it was a valid agreement. The trial court goes on in finding number 14 to refer to the arbitration agreement as merely "putative[.]" However, the trial court did conclude that defendants had waived their right to arbitrate, which would be a logical conclusion only if there was a

valid agreement to arbitrate. Therefore, clarification is needed as to whether there was a valid agreement to arbitrate. Furthermore, there was no determination as to "whether the specific dispute falls within the substantive scope of [the arbitration] agreement." *See id.*

Assuming there was a valid arbitration agreement, "a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration." *Prime South Homes v. Byrd*, 102 N.C. App. 255, 259, 401 S.E.2d 822, 825 (1991) (citation omitted).

> A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of delay in the seeking of arbitration; a party's opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

See Moose at 382, 614 S.E.2d at 422 (citation omitted).

Furthermore, this Court has also determined that when waiver is based upon delay that causes "a party . . . [to] expend[] significant amounts of money[,]" *see id.* at 382, 614 S.E.2d at 422, we must then consider whether the party "could have avoided these expenses through an earlier request for arbitration, or [whether] such expenses were incurred after the right to demand arbitration accrued." *McCrary v. Byrd*, 148 N.C. App. 630, 639, 559 S.E.2d 821, 827 (2002), *disc. review and cert. denied*, 356 N.C. 674, 577 S.E.2d 625 (2003); s*ee also Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 545, 342 S.E.2d 853, 854-55 (1986) (emphasis added) (The North Carolina Supreme Court determined "[a]lthough plaintiff's counsel stated in oral argument before this Court that it had incurred large expenses in answering defendant's interrogatories, the record is barren of evidence supporting this statement. In any event, we are of the opinion that *evidence of expenses related to defendant's interrogatories would have been irrelevant since plaintiff has failed to demonstrate that the judicial discovery procedures used by defendant, or their equivalent, would be unavailable in arbitration. Thus plaintiff might well have incurred the same expense during arbitration.*").

Here, the trial court found in finding number 13 that plaintiffs "have incurred attorneys fees and cost in excess of $69,000 in this action[.]" This finding could support a conclusion of prejudice to

plaintiffs because "by reason of [defendants'] delay [in requesting arbitration], . . . [plaintiffs] ha[ve] taken steps in litigation to [their] detriment or expended significant amounts of money thereupon." *See Moose* at 382, 614 S.E.2d at 422. However, the trial court made no findings regarding whether plaintiffs "could have avoided these expenses through an earlier request for arbitration, or [whether] such expenses were incurred after the right to demand arbitration accrued." *McCrary* at 639, 559 S.E.2d at 827. As there is no finding regarding whether plaintiffs "could have avoided these expenses through an earlier request for arbitration, or [whether] such expenses were incurred after the right to demand arbitration accrued[,]" *id.*, the findings of fact do not support the conclusion of law that plaintiffs were prejudiced. *See Moose* at 382, 614 S.E.2d at 422. Without a proper determination that plaintiffs were prejudiced, the trial court could not conclude that defendants waived their right to arbitrate. *See id.* Therefore, we must remand.

III. Conclusion

In conclusion, we remand the trial court order for further findings of fact and conclusions of law regarding the existence of a valid arbitration agreement, whether the parties' dispute falls within the substantive scope of the agreement, and whether defendants' delay in requesting arbitration prejudiced plaintiffs to such an extent that defendants have waived their right to arbitration.

REMANDED.

Judges McCULLOUGH and STEPHENS concur.

The judges concurred prior to 31 December 2008.

IN RE: W.W. JARVIS & SONS, A NORTH CAROLINA GENERAL PARTNERSHIP

No. COA08-605

(Filed 6 January 2009)

1. Appeal and Error— appealability—arbitration—substantial right

An order denying arbitration of two issues affected a substantial right and was immediately appealable.

2. Arbitration and Mediation— arbitration—partial referral of issues—broad and inclusive agreement—exceptions not applicable

The trial court erred by not referring all disputes in the dissolution of a partnership to arbitration under the broad and inclusive language of the arbitration agreement. While the appellee argued that exceptions applied for a liquidated damages clause and a clause concerning the means of dissolution, no authority was cited for the proposition that a trial court can short-cut arbitration proceedings when only one viable arbitration conclusion is possible, and the clause concerning the means of dissolution is properly read more narrowly rather than as a broad exception to arbitration.

Appeal by petitioners from order entered 28 February 2008 by Judge Thomas D. Haigwood in Currituck County Superior Court. Heard in the Court of Appeals 17 November 2008.

Trimpi & Nash, LLP, by John G. Trimpi, for petitioners-appellants.

Baker, Jones, Daly & Carter, P.A., by Ronald G. Baker and Roswald B. Daly, Jr., for respondent-appellee.

MARTIN, Chief Judge.

Petitioners-appellants William W. Jarvis, III and Charles D. Jarvis appeal from an order denying in part their petition to compel arbitration on several disputes arising out of the W. W. Jarvis & Sons partnership. While the court below referred most of the disputes to arbitration, it resolved two on their merits, namely the applicability of a partnership withdrawal penalty clause and the necessity to distribute the partnership's assets by means of sale. Appellants contend that the trial court erred by holding that these two issues were not subject to arbitration, and in the alternative, even if not subject to arbitration, the court was premature in entering a judgment on the merits. We reverse and remand for entry of an order compelling arbitration on all disputes.

W. W. Jarvis & Sons is a North Carolina general partnership primarily in the business of managing farms in Currituck County. The partnership was formed by a written operating agreement dated 14 December 1976, which was amended on 27 December 1976 to exist for a specified term of ten years. After the term expired, the partner-

ship nevertheless continued operations in the same manner as during the ten-year term.

At present, over 80% of the partnership is owned by the three Jarvis brothers, with the remainder owned by the estate of Margaret Jarvis, wife of the late W. W. Jarvis, Jr., founder of the partnership. Relations within the partnership have deteriorated, culminating in a demand for dissolution by partner William W. Jarvis, III and the petition for arbitration by him and partner Charles D. Jarvis.

A petition for arbitration of twenty-four itemized disputes was filed on 12 December 2007, pursuant to an arbitration clause included within the partnership agreement:

> 21. All disputes which arise under this agreement shall be referred to a single arbitrator if the partners can unanimously agree with him, otherwise, to a board of three (3) arbitrators composed of two (2) arbitrators chosen by a majority vote of the partnership interests and a third arbitrator to be chosen by the other two (2) arbitrators. The decision of the single arbitrator or of any two (2) members of such board shall bind the parties to the controversy, as well as their representatives. Such decision shall be enforced with the same force and effect as a decree of a court of competent jurisdiction. The csto [sic] of the arbitration shall be borne by the partnership; provided, however, the arbitrators by unanimous vote shall have the power to tax any and all expense of the arbitration to the losing party or parties if the arbitrators decide that the arbitration was brought for a frivolous and/or non-meritorious reason.

In his answer, respondent James M. Jarvis admitted that the arbitration clause was effective for a number of the disputed matters. He also filed a counterclaim for declaratory judgment on three controversies: (1) whether a penalty clause should be enforced against petitioners, punitively reducing their partnership interests by 20% each; (2) whether the partnership assets had to be sold prior to distribution; and (3) whether petitioners could pay their legal expenses with partnership funds. Petitioners responded to this counterclaim with a motion to compel arbitration as to the issues raised by the counterclaim and a motion to stay proceedings.

Following a hearing, the trial court entered an order referring all matters to arbitration except the first and second controversies above. As to those issues, the court concluded that the penalty clause remained binding and that withdrawal of a partner demands sale of

partnership assets if no agreement is reached otherwise. The trial court ordered that the partnership be dissolved by sale, that the penalty clause be enforced, and that all other matters be arbitrated. Petitioners appeal, assigning error to the trial court's conclusion and order that the partnership must be dissolved by sale, that the penalty clause remains in effect, and that the merits of these matters were rightly decided without arbitration.

Petitioners argue the trial court erred in concluding that disputes over a dissolution penalty clause and the necessity of liquidation by sale need not be referred to arbitration. We agree and reverse.

Standard of Review

The parties do not challenge the existence of an arbitration clause, but rather what disputes are covered by that arbitration clause. We review de novo a trial court's determination of whether any given dispute is governed by a particular arbitration clause. *See Ellis-Don Const., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 634, 610 S.E.2d 293, 296 (2005); *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citing *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001)).

Interlocutory Appeal

[1] As an initial matter, we note the interlocutory nature of the order below. Appellate review of an interlocutory order is permitted under N.C.G.S. § 7A-27(d)(1) when the order "[a]ffects a substantial right," and review is permitted under N.C.G.S. § 1-277(a) of any order "involving a matter of law or legal inference . . . which affects a substantial right." It is well established that "[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *Edwards v. Taylor*, 182 N.C. App. 722, 724-25, 643 S.E.2d 51, 53 (2007); *accord Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999); *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991).

Applicability of Arbitration Clause

[2] In general, a two-pronged analysis is required to determine whether a dispute is subject to arbitration: (1) whether a valid arbitration agreement exists, and (2) whether the particular dispute is within the agreement's substantive scope. *See Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). Here, the trial court's

finding that an arbitration agreement exists is not contested, so only the second prong requires further analysis. To determine if a particular dispute is subject to arbitration, this Court must examine the language of the agreement, including the arbitration clause in particular, and determine if the dispute falls within its scope. *See Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 225, 606 S.E.2d 708, 710 (2005) (citing *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23-24, 331 S.E.2d 726, 731 (1985)). Any uncertainty as to the scope of the arbitration clause should be resolved in favor of arbitration, and "[u]nless it can be said with confident authority that the arbitration clause cannot be read to include the asserted dispute, the court should grant a parties' motion to arbitrate the particular grievance." *Id.* at 225-26, 606 S.E.2d at 710. This standard reflects this state's "strong public policy favoring the settlement of disputes by arbitration." *See Johnston County v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992).

Here, the disputes at issue implicate three clauses in the partnership agreement, as amended. The first is the arbitration clause itself which provides that "[a]ll disputes which arise under this agreement shall be referred to" arbitration. The others relate directly to the challenged items in the trial court's order. The first, in the amendment to the partnership agreement, states:

> Partners Voluntary Withdraw-Liquidated Damages
>
> 3. Paragraph 17 of the original agreement allows for the withdrawal or retirement from the partnership by any partner thereby bringing about the dissolution of the partnership. The parties agree that any partner withdrawing or retiring without the agreement of all the parties during the term of this agreement shall be deemed to have breached the partnership agreement as amended. Under such circumstances, the procedure set forth under Paragraph 18 of the original partnership agreement shall apply subject to the imposition of a liquidated damage penalty which shall reduce the withdrawing or retiring partner's interest in an amount equal to 20% of his or her partnership interest as defined under the original and amended partnership agreement.

The second, in the main agreement, provides:

> [18]D. If, within one (1) year [of] the notice of withdrawal the remaining partners do not elect to purchase the interest of the retiring or withdrawing partner in the partnership, then the

> remaining partners shall proceed with reasonable promptness to liquidate the business of the partnership and the retiring or withdrawing partner *shall have the right to force such compulsory dissolution by court order* and/or other alternate legal remedies. The procedure as to such compulsory liquidation and distribution shall be the same as stated in paragraph 16 of this agreement with reference to Dissolution by Agreement.

(Emphasis added.)

From the outset, we recognize that "all disputes which arise under this agreement" is broad and inclusive language. Broad arbitration clauses contained within a partnership agreement will govern any dispute concerning the partnership amongst the parties to the agreement. *See Sloan Financial Group, Inc. v. Beckett*, 159 N.C. App. 470, 480-84, 583 S.E.2d 325, 331-33 (2003) (noting that, had the arbitration clause been in the partnership agreement instead of an operating agreement, the partners would have been required to arbitrate a series of non-contract claims). Accordingly, unless exceptions apply, the arbitration clause would govern all the existing disputes amongst the Jarvis partners.

In the matter of the liquidated damages clause, appellee argues that the dispute over its continued effectiveness need not be submitted to arbitration, as for the arbitrator to rule otherwise would necessitate the court setting the arbitrator's decision aside. Appellee cites no authority for the proposition that a trial court can short-cut arbitration proceedings when only one viable arbitration conclusion is possible, nor is it clear that this is such a case where there is only one such conclusion. The purposes of arbitration would be substantially diluted if courts could freely resolve otherwise arbitratable disputes whenever a clear outcome is asserted. *Cf.* N.C.G.S. § 1-567.2 (2002) (providing that arbitration is enforceable "without regard to the justiciable character of the controversy").[1] Accordingly, the enforceability of the liquidated damages clause is a matter properly submitted to arbitration.

In the dispute over the means of dissolution of the partnership, appellee points to language in paragraph 18 of the partnership agreement that the "withdrawing partner shall have the right to force such

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1. N.C.G.S. § 1-567.2 was repealed in 2003; however, it remains applicable to the instant dispute because the agreement was entered into before 1 January 2004. N.C.G.S. § 1-569.3 (2003); *Edwards v. Taylor*, 182 N.C. App. 722, 725 n.1, 643 S.E.2d 51, 53 n.1 (2007).

compulsory dissolution by court order" as exempting the means of dissolution from arbitration. In general, the means and process of dissolution of a partnership can be determined by arbitration. *See In re Cohoon*, 60 N.C. App. 226, 231, 298 S.E.2d 729, 732 (1983) (holding that since the partnership agreement detailed the manner of dissolution, a dispute about dissolution would be covered by an arbitration agreement). It is incorrect to read the language of paragraph 18 as a broad exception to arbitration. First, in light of the strong public policy favoring arbitration, the clause in paragraph 18 is properly read narrowly as permitting a court to order the partnership be dissolved generally, while reserving the specifics of how the dissolution should proceed for arbitration. Additionally, given the substantial portion of the partnership agreement, seven of thirteen pages, that concern various dissolution scenarios, to permit this language to allow court orders governing all aspects of dissolution would risk trivializing the arbitration clause. Finally, by the very terms of paragraph 18, a "*withdrawing partner* shall have the right to force such compulsory dissolution by court order." (Emphasis added.) In the dispute at hand, the non-withdrawing partner is seeking to avoid arbitration by means of a court order, and the withdrawing partner has sought no orders beyond those incidental to forcing arbitration. Thus, to the extent that paragraph 18 limits arbitration, it does not apply in the dispute at hand.

Accordingly, as the entire dispute between the Jarvis partners was properly a matter for arbitration, the trial court erred in not referring all disputes to arbitration. As such, we need not reach the alternative argument raised by appellants that the trial court was premature in concluding as a matter of law that the penalty clause remained in effect and that a sale of assets must precede dissolution. We reverse and remand to the trial court for entry of an order granting petitioners' motion to compel arbitration.

Reversed and Remanded.

Judges WYNN and STEPHENS concur.

ESTATE OF MONROE M. REDDEN, JR. DECEASED, BY E.K. MORLEY, ADMINISTRATOR CTA, PLAINTIFF V. BARBARA JEAN REDDEN, DEFENDANT

No. COA05-1202-2

(Filed 6 January 2009)

Evidence— Dead Man's Statute—applicability—evidence offered by defendant

Considered on remand from the North Carolina Supreme Court, the protections of the Dead Man's Statute applied to an action by an estate against a spouse who opened a bank account in her name and used her power of attorney to transfer funds to that account from another account held only by decedent, who was then hospitalized, allegedly pursuant to decedent's oral instructions. Decedent's oral communications with defendant were offered by defendant in her deposition, not by the estate, and the estate timely objected and moved to strike.

On remand to the Court of Appeals from an order of the Supreme Court of North Carolina remanding the decision of this Court in *Estate of Redden v. Redden*, 179 N.C. App. 113, 632 S.E.2d 794 (2006) for consideration of whether plaintiff's admission of defendant's deposition and failure to object to incompetent portions of said deposition evidence, during the partial summary judgment hearing, constituted a waiver of the protections of the North Carolina Dead Man's Statute, North Carolina General Statutes, section 8C-1, Rule 601(c). Appeal by defendant from an order entered 27 June 2005 by Judge Laura J. Bridges in Henderson County Superior Court. Originally heard in the Court of Appeals on 29 March 2006.

Law Offices of E.K. Morley, by E.K. Morley, for plaintiff-appellee.

Long, Parker, Warren & Jones, P.A., by Philip S. Anderson, defendant-appellant.

JACKSON, Judge.

This case is heard on remand from the Supreme Court. A more complete recitation of the facts may be found in the original opinion, *Estate of Redden v. Redden*, 179 N.C. App. 113, 632 S.E.2d 794 (2006); however, for the convenience of the reader, a summary of the facts is set forth below.

Barbara Jean Redden ("defendant") was married to Monroe M. Redden, Jr. ("decedent"), who maintained various bank accounts at First Union National Bank, including money market account number 1010044300784 ("Account 784") that was held only in decedent's name. In June 2000, decedent executed a Power of Attorney in favor of defendant. On 16 May 2001, decedent designated defendant as the payable-on-death beneficiary ("POD beneficiary") of Account 784. Decedent never revoked or changed the POD beneficiary designation in favor of defendant on Account 784.

On 21 September 2001, defendant established a bank account in her name only at First Union National Bank, account number 1010052958801 ("Account 801"). That same day, defendant used her Power of Attorney to transfer $237,778.71 from Account 784 to Account 801.

After decedent's death, E.K. Morley ("the Administrator") was named as the administrator of the Estate of Monroe M. Redden, Jr. ("plaintiff"). On 12 February 2004, plaintiff filed a complaint alleging that defendant had committed conversion, constructive fraud, and breach of fiduciary duty in connection with certain banking transactions related to Accounts 784 and 801.

As to the issue for our consideration, defendant argued that the Dead Man's Statute was inapplicable because defendant's deposition was offered *by* the Estate, not *against* the Estate. Defendant also argued that the Statute was waived by a failure to object to the deposition testimony either at the time of deposition or at the partial summary judgment hearing. This Court held that defendant had not established the admissibility of defendant's testimony regarding decedent's oral directions pursuant to Rule 601(c), thus she could not defeat plaintiff's motion for partial summary judgment. *Redden*, 179 N.C. App. at 118, 632 S.E.2d at 799.

Upon consideration, we hold that decedent's oral communications with defendant were offered *by defendant* in her deposition, not by the Estate, and that the Estate timely objected to these communications and moved to strike the incompetent portions, thus preserving the protections of the Dead Man's Statute.

Witness testimony is incompetent pursuant to Rule 601(c) if the witness is a party or is interested in the event; her testimony relates to an oral communication with the decedent; the testimony is against a personal representative of the decedent; or the witness is testifying in his own behalf. *See* N.C. Gen. Stat. § 8C-1, Rule 601(c); *In re Will*

of Hester, 84 N.C. App. 585, 595, 353 S.E.2d 643, 650-51, *rev'd on other grounds*, 320 N.C. 738, 360 S.E.2d 801 (1987) (citing *Godwin v. Trust Co.*, 259 N.C. 520, 528, 131 S.E.2d 456, 462 (1963)). The purpose of this rule is to exclude evidence of statements made by deceased persons, "since those persons are not available to respond." *Hester*, 84 N.C. App. at 595, 353 S.E.2d at 651 (citing *Culler v. Watts*, 67 N.C. App. 735, 737, 313 S.E.2d 917, 919 (1984)).

In *Wilkie v. Wilkie*, 58 N.C. App. 624, 294 S.E.2d 230, *disc. rev. denied*, 306 N.C. 752, 295 S.E.2d 764 (1982), this Court held that when a party elicits incompetent evidence under the Dead Man's Statute, the party then waives any protection afforded by the Statute. *Id.* at 627, 294 S.E.2d at 231 (holding that party waived protection of the Dead Man's Statute by eliciting incompetent evidence through interrogatories). In that case, the plaintiff answered interrogatories implicating the Dead Man's Statute. There were no objections made by either party to the interrogatories themselves or the answers given. *Id.* at 626, 294 S.E.2d at 231. That is not the situation we confront in the instant case.

Here, the Estate deposed defendant and offered the deposition testimony into evidence at the partial summary judgment hearing; however, at the time defendant was deposed, the Estate asked no questions soliciting evidence of oral communications between the decedent and defendant. In addition, answers by defendant relating to such oral communications were promptly objected to by the Estate, with appropriate motions to strike.

> Q. You opened, if we could refer to this as account 8801, you opened that personally?
>
> A. Yes.
>
> Q. Okay. Monroe did not open the account?
>
> A. No, he wasn't there.
>
> Q. He was in the hospital or in the nursing home?
>
> MR. ANDERSON: Objection to form.
>
> THE WITNESS: He just instructed me to do it.
>
> MR. MORLEY: Objection and a motion to strike as to an oral communication.
>
> BY MR. MORLEY:

Q. My question was, did Monroe participate to any extent in the opening of account 8801?

MR. ANDERSON: Other than oral communications?

BY MR. MORLEY:

Q. Other than oral communications.

. . . .

Q. Now, with regard to that account, the assets in that account, 8801, Monroe never had any interest in that account, did he?

MR. ANDERSON: Objection to form.

THE WITNESS: As far as I was concerned, yes, he did.

BY MR. MORLEY:

Q. To what extent?

A. That he told me everything to do.

MR. MORLEY: Objection. Motion to strike.

The incompetent testimony was not elicited *by the Estate* for its own benefit, but offered by defendant, of her own volition, *against the Estate*. These are precisely the types of statements the Dead Man's Statute seeks to disqualify as incompetent.

Defendant points to an exchange within this line of questioning in which defendant testified that while Account 801 was set up in her name alone, she never considered herself owner of the account until decedent's death.

Q. Who did you consider to be the owner?

A. Monroe.

Q. Monroe exclusively?

A. With me as power of attorney doing what he directed.

The attorney for the Estate did not object or move to strike this last statement. It is not clear that "doing what he directed" refers to decedent's oral communications. "What he directed" could mean the directives included in the terms of the written Power of Attorney. Absent clear evidence of an oral communication, there is no need to object to this statement.

This Power of Attorney is not included in the Record on Appeal for our consideration. Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to what appears in the record on appeal. N.C. R. App. P. 9(a) (2007) ("review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9, and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d)). It is appellant's duty to ensure that the record is complete. *Collins v. Talley*, 146 N.C. App. 600, 603, 553 S.E.2d 101, 102 (2001) (citing *Tucker v. Telephone Co.*, 50 N.C. App. 112, 272 S.E.2d 911 (1980)). This Court will not consider matters discussed in a brief but not appearing in the record. *In re Sale of Land of Warrick*, 1 N.C. App. 387, 390, 161 S.E.2d 630, 632 (1968).

Defendant also argues that the deposition was offered in its entirety into evidence at the partial summary judgment hearing, without objection or motion to strike incompetent portions. Defendant notes that counsel for the Estate quoted sections of this line of questioning in its argument on the motion. Defendant does not state specifically what was quoted from the deposition. No transcript of the hearing appears in the Record on Appeal. In fact, the parties stipulated to the fact that the hearing was neither transcribed nor recorded. We therefore have no way of knowing whether the Estate offered the transcript "in its entirety" or precisely what sections of the deposition were quoted.

As this Court previously has held, "[i]n a nonjury trial, in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision." *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-15 (1971) (citations omitted). Because the deposition transcript showed the Estate's objections to the incompetent portions of defendant's deposition testimony, we presume the trial judge relied only on the competent portions of the deposition to render her decision.

Having considered the issue remanded by the Supreme Court, except as herein supplemented, the opinion filed by this Court on 1 August 2006 remains in full force and effect.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges TYSON and GEER concur.

Judge TYSON concurred in this opinion prior to 31 December 2008.

KIMBERLY SISK, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF SLADE AXEL SISK, A MINOR, PLAINTIFF v. TRANSYLVANIA COMMUNITY HOSPITAL, INC.; ABBOTT LABORATORIES; AND ABBOTT LABORATORIES, INC., DEFENDANTS

No. COA08-471

(Filed 6 January 2009)

1. Appeal and Error— appealability—revocation of attorneys' pro hac vice status

Although plaintiff's appeal from the revocation of her attorneys' *pro hac vice* status was an appeal from an interlocutory order, the order was immediately appealable because once an attorney is admitted under N.C.G.S. § 84-4.1, a plaintiff acquires a substantial right to the continuation of representation by that attorney.

2. Attorneys— *pro hac vice*—North Carolina Rules of Professional Conduct—conduct occurring in another state

The trial court abused its discretion by revoking the *pro hac vice* status of plaintiff's attorneys based on its conclusion that the conduct of plaintiff's attorneys violated the North Carolina Rules of Professional Conduct because: (1) the conduct occurred in Kentucky and did not violate the Kentucky Rules of Professional Conduct; and (2) North Carolina Revised Rules of Professional Conduct, Rule 8.5 prohibits the attorneys' actions from now being determined to be subject to disciplinary action under the North Carolina Rules of Professional Conduct since a Kentucky court already determined their actions in a prior Kentucky case did not violate its ethical rules.

Appeal by plaintiff from order entered 4 December 2007 by Judge Richard L. Doughton in Transylvania County Superior Court. Heard in the Court of Appeals 21 October 2008.

Law Office of Michael W. Patrick, by Michael W. Patrick, for plaintiff-appellant.

Roberts & Stevens, P.A., by James W. Williams and Ann-Patton Nelson, for defendant-appellees Abbott Laboratories and Abbott Laboratories, Inc.

Van Winkle Law Firm, by Michelle Rippon and Rachel Fuerst, for defendant-appellee Transylvania Community Hospital, Inc.

BRYANT, Judge.

Kimberly Sisk, individually and as Guardian *ad litem* of Slade Axel Sisk (plaintiff) appeals from an order entered 4 December 2007 disqualifying plaintiff's counsel, Nicholas F. Stein and Stephen H. Meyer. We reverse.

On 15 February 2007, Ms. Sisk filed a complaint against Abbott Industries (Abbott) alleging product liability claims on behalf of Slade, her son, who ingested powdered infant formula and contracted a rare bacteria known as *Enterobacter sakazakii* (E. Sak). The complaint alleged that Slade, a newborn, was fed tainted infant formula manufactured by Abbott shortly after his birth at Transylvania Community Hospital (the Hospital). Subsequently, Slade was diagnosed with E. Sak meningitis and sustained brain damage as a result.

On 9 May 2007, plaintiff's counsel Stephen H. Meyer (Mr. Meyer) and Nicholas F. Stein (Mr. Stein) were admitted *pro hac vice* for the limited purpose of representing plaintiff in her action against Abbott and the Hospital. Abbott moved to disqualify Mr. Meyer and Mr. Stein pursuant to a motion dated 17 October 2007. Abbott alleged Mr. Meyer and Mr. Stein should have been disqualified for their improper contact with one of Abbott's consulting experts. On 4 December 2007, the trial court granted Abbott's motion and disqualified Mr. Meyer and Mr. Stein. Plaintiff's appeals.

On appeal, plaintiff argues: (I) the trial court erred by concluding that Mr. Meyer's and Mr. Stein's conduct violated the North Carolina Rules of Professional Conduct; and (II) the trial court's findings of fact and conclusions of law were not supported by competent evidence in the record.

I

[1] Plaintiff argues the trial court erred by revoking Mr. Meyer's and Mr. Stein's *pro hac vice* status because their conduct occurred in Kentucky and did not violate the Kentucky Rules of Professional Conduct and thus should not be violative of the North Carolina

Rules of Professional Conduct. Defendants argue the analysis should begin with the standard of review, abuse of discretion, and that the trial court "summarily revoked" Mr. Meyer's and Mr. Stein's *pro hac vice* admissions.

At the outset, we note plaintiff's appeal, although interlocutory, is properly before this Court. An out-of-state attorney may be admitted *pro hac vice* pursuant to N.C. Gen. Stat. § 84-4.1. Once an attorney is admitted under N.C.G.S. § 84-4.1, a plaintiff acquires a substantial right to the continuation of representation by that attorney. *Smith v. Beaufort County Hosp. Ass'n*, 141 N.C. App. 203, 207, 540 S.E.2d 775, 778 (2000) (quoting *Goldston v. American Motors Corp.*, 326 N.C. 723, 727, 392 S.E.2d 735, 737 (1990)). Thus "an order removing said counsel affects a substantial right of the plaintiff and is immediately appealable." *Id.*

[2] A trial court may summarily revoke an appointment of counsel *pro hac vice* and is not required to make findings of fact to support its order. *Smith*, 141 N.C. App. at 210, 540 S.E.2d at 780. The decision to revoke an attorney's admission *pro hac vice* is reviewed under an abuse of discretion standard, *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 663, 554 S.E.2d 356, 361 (2001), and may be reversed "only upon a showing that [the court's] actions are manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). The trial court's ruling "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." *Smith*, 141 N.C. App. at 210, 540 S.E.2d at 780.

In *Smith*, the trial court revoked the *pro hac vice* status of plaintiff's counsel. Although findings of fact were not required in revoking the counsel's *pro hac vice* status, the trial court made several findings. This Court reviewed the trial court's findings to determine whether the findings were supported by competent evidence and whether its conclusions were supported by the findings. *Id.* This Court determined that although some of the trial court's findings were based on a misapprehension of the law, or unsupported by the evidence, the findings were not material and prejudicial and did not change the outcome and affirmed the trial court's decision. *Id.* at 215, 540 S.E.2d at 783.

In the present case, defendants correctly argue the standard of review is an abuse of discretion. However, as in *Smith*, the trial court in the present case did not summarily revoke Mr. Meyer's and Mr.

Stein's *pro hac vice* status, but made findings of fact and conclusions of law supporting its order. As in *Smith*, we must review the trial court's findings of fact and conclusions of law. As discussed below in section *II*, a review of the trial court's findings in the present case indicates the findings were based on misapprehensions of the law and such findings were material and prejudicial and changed the outcome.

II

Plaintiff argues the trial court's findings and conclusions of law were not supported by the evidence. Specifically, plaintiff argues the trial court erred by determining Mr. Meyer's and Mr. Stein's prior conduct violated the North Carolina Rules of Professional Conduct because the conduct occurred in Kentucky and was thus subject to the Kentucky Rules of Professional Conduct. We agree.

"[A]ppellate review of findings of fact and conclusions of law made by a trial judge . . . is limited to a determination of whether there is competent evidence to support his findings of fact and whether, in light of such findings, [the judge's] conclusions of law were proper." *Starco, Inc. v. AMG Bonding & Ins. Servs.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996). "[I]f the evidence tends to support the trial court's findings, these findings are binding on appeal, even though there may be some evidence to support findings to the contrary." *Id.* Moreover, "to obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *Id.*

North Carolina Revised Rules of Professional Conduct, Rule 8.5 provides in pertinent part:

> (a) *Disciplinary Authority*. . . . A lawyer not admitted in North Carolina is also subject to the disciplinary authority of North Carolina if the lawyer renders or offers to render any legal services in North Carolina. . . .
>
> (b) *Choice of Law*. In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct to be applied shall be as follows:
>
> . . .
>
> (2) for any other conduct [not connected to a matter pending before a tribunal], the rules of the jurisdiction in which the lawyer's

> conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. *A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.*

N.C. Rev. R. Prof. Conduct 8.5 (a)-(b) (2007) (emphasis supplied). Based on a plain reading of Rule 8.5, Mr. Meyer's and Mr. Stein's conduct in Kentucky was subject to Kentucky's Rules of Professional Conduct. Therefore, whether their actions were a violation of the rules of professional conduct must be determined under Kentucky law. If their conduct is determined not to be violative of the Kentucky rules, our Rule 8.5 does not allow the conduct to be subject to discipline under our rules.

In the present case, the trial court concluded Mr. Meyer's and Mr. Stein's conduct was "inappropriate and constitutes the appearance of an impropriety" and was "inconsistent with fair dealings as reflected in Rule 4.3 of the North Carolina Revised Rules of Professional Conduct." Assuming arguendo that the conduct of Mr. Meyer and Mr. Stein was inappropriate and constituted the appearance of impropriety thereby violating Rule 4.3 of the North Carolina Rules of Professional Conduct, because the conduct occurred in Kentucky and did not violate the Kentucky Rules of Professional conduct, the trial court erred by revoking Mr. Meyer's and Mr. Stein's *pro hac vice* status on that basis.

Because a Kentucky court had already determined that Mr. Meyer's and Mr. Stein's actions in a prior Kentucky case did not violate its ethical rules, Rule 8.5 prohibits their actions from now being determined to be subject to disciplinary action pursuant to the North Carolina Rules of Professional Conduct. The trial court's conclusions were based upon a misapprehension of law and such misapprehension was material and changed the outcome. *See Smith*, 141 N.C. App. at 214, 540 S.E.2d at 782. Therefore, the trial court's subsequent disqualification of counsel was manifestly unsupported by reason and constituted an abuse of discretion. The trial court's order is reversed.

REVERSED.

Judge ARROWOOD concurs.

Judge WYNN concurs in the result only.

Judge ARROWOOD concurred in this opinion prior to 31 December 2008.

JAMES A. WILFONG, AND WIFE, MARIA HERRERA, PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA08-400

(Filed 6 January 2009)

Appeal and Error— appealability—inverse condemnation hearing—interlocutory order—failure to demonstrate substantial right

Defendant DOT's appeal from an order finding it liable to plaintiffs for damages arising from defendant's inverse condemnation of plaintiffs' property is dismissed because: (1) defendant appealed from an interlocutory order entered following a hearing under N.C.G.S. § 136-108 since these hearings do not finally resolve all issues; and (2) defendant failed to identify what right was at issue or why any substantial right would be jeopardized without immediate review of the trial court's order. The appeal was not dismissed as a sanction for a technical violation of N.C. R. App. P. 28, but instead based on a substantive failure to demonstrate any right to an immediate appeal.

Appeal by Defendant from order entered 31 December 2007 by Judge J.B. Allen, Jr., in Durham County Superior Court. Heard in the Court of Appeals 21 October 2008.

Cranfill Sumner & Hartzog, LLP, by George B. Autry, Jr., Brady W. Wells, and Stephanie H. Autry, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General W. Richard Moore, Special Deputy Attorney General E. Burke Haywood, and Assistant Attorney General Thomas B. Wood, for Defendant.

ARROWOOD, Judge.

Defendant, the North Carolina Department of Transportation (DOT), appeals from an order finding it liable to James Wilfong

and Maria Herrera (Plaintiffs) for damages arising from Defendant's inverse condemnation of Plaintiffs' property. We dismiss as interlocutory.

This appeal arises from a road improvement project by Defendant that included widening of Cheek Road in Durham County, North Carolina. Plaintiffs own property on Cheek Road in the area scheduled for widening. In March 1998 Plaintiffs conveyed part of their property to Defendant and granted Defendant a construction easement that allowed Defendant reconnect Plaintiffs' driveway to the highway after the project was finished.

On 8 February 2005, plaintiffs filed an inverse condemnation action under N.C. Gen. Stat. § 136-111 (2007). Plaintiffs alleged that the highway had been raised higher than planned, making the grade of Plaintiffs' driveway so steep that they were "deprived of reasonable access to and from" their property. In an answer filed in July 2007, Defendant denied the allegations of Plaintiffs' complaint and moved for dismissal under N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), and (6).

In October 2007, Plaintiffs filed a motion under N.C. Gen. Stat. §§ 136-108 and 136-111 (2007), seeking a hearing to determine "all issues raised by the pleadings other than the issue of damages." A hearing was conducted in November 2007, addressing the project's history, the parties' interactions, and the change in the slope of Plaintiffs' driveway. In an order entered 31 December 2007, the trial court ruled that the change in road grade was a taking for which Plaintiffs were entitled to compensation. From this order Defendant timely appealed.

We conclude that Defendant's appeal is not properly before this Court. An order is either "interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2007). "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. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Defendant appeals from an interlocutory order entered following a hearing under N.C. Gen. Stat. § 136-108 (2007). "Because G.S. 136-108 hearings do not finally resolve all issues, an appeal from a trial court's order rendered in such hearings is interlocutory." *Department of Transp. v. Byerly*, 154 N.C. App. 454, 456, 573 S.E.2d 522, 523 (2002).

With two exceptions, "there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Appeal may be taken from an order that is "a final judgment as to one or more but fewer than all of the claims or parties" and if the trial court certifies that "there is no just reason for delay" of the appeal. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2007). "Absent a Rule 54(b) certification, an interlocutory order may be reviewed if it will injuriously affect a substantial right unless corrected before entry of a final judgment." *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 634, 652 S.E.2d 231, 233 (2007) (citations omitted).

"It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citation omitted). This requirement was codified in N.C. R. App. P. 28(b)(4), which states in pertinent part that an appellant's brief must include:

> A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

In the instant case, Defendant simply states that because a "threshold issue at the preliminary hearing was whether there had been a taking by NCDOT" the trial court's "ruling clearly affected a substantial right." However, Defendant fails to identify what right is at issue or why any substantial right would be jeopardized without immediate review of the trial court's order. "It is well established in this jurisdiction that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980) (citations omitted).

We conclude that Defendant has attempted to appeal from an interlocutory order without identifying any substantial right requiring immediate appeal. Accordingly, Defendant's appeal is premature and

should be dismissed. We note that this Court is not dismissing Defendant's appeal as a sanction for a technical violation of Rule 28 of the North Carolina Rules of Appellate Procedure, but for its substantive failure to demonstrate any right to interlocutory appeal.

Appeal Dismissed.

Judge WYNN concurs in the result only.

Judge BRYANT concurs.

Concurred in prior to 31 December 2008.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 JANUARY 2009)

ALALA v. HARDIE No. 08-77	Durham (06CVS6360)	Motion allowed, appeal dismissed
DAWES v. AUTUMN CARE OF MARSHVILLE No. 08-190	Ind. Comm. (I.C. No. 473729)	Affirmed in part, reversed and remanded in part
DIXON v. HILL No. 08-124	Robeson (99CVS1058)	Affirmed
ELKINS v. ELECTRONIC MTGE. SYS. No. 08-376	Forsyth (04CVS6138)	Affirmed
IN RE B.G.R. No. 08-938	Catawba (07JT100)	Affirmed
IN RE E.L.W. & E.M.W. No. 08-941	Guilford (02JA467) (06JA863)	Dismissed
IN RE J.D.B. No. 08-593	Wake (07JB449) (07JB79)	Affirmed
IN RE J.O. No. 08-424	Guilford (06JB762)	Reversed and remanded
IN RE N.F. No. 08-906	Buncombe (07JA434)	Affirmed
IN RE N.R. No. 08-930	Wake (98JA253)	Dismissed
IN RE S.R.M., C.P.S.H., S.A.M. No. 08-571	Cabarrus (05J274-76)	Affirmed in part and reversed in part
IN RE SWAIN No. 08-365	Mecklenburg (07SPC3464)	Reversed
IN RE T.D.K., D.D.H., J.A.K. No. 08-807	Guilford (07JT89-91)	Reversed in part, affirmed in part
IN RE THOMAS No. 08-287	Union (06SP551)	Affirmed
NUTTALL v. HORNWOOD, INC. No. 08-395	Ind. Comm. (I.C. No. 531947)	Affirmed
STANFIELD v. METAL BEVERAGE CONTAINER/BALL CORP. No. 08-513	Ind. Comm. (I.C. No. 600557)	Reversed

STATE v. DESPERADO'S, INC. No. 05-1397-2	Beaufort (03CRS4693) (03CRS54596) (04CRS44) (04CRS657-60) (04CRS663-66) (03CRS3929) (03CRS4452) (04CRS651-53)	No error
STATE v. DOLES No. 08-308	McDowell (06CRS50920-22)	No error
STATE v. DUARTE No. 04-1455-2	Henderson (03CRS52615)	Affirmed
STATE v. HARRIS No. 08-641	Graham (07CRS50088)	No error
STATE v. HARRIS No. 08-409	Lee (06CRS53669) (06CRS53685)	Affirmed
STATE v. HILTON No. 08-321	Cleveland (05CRS54637)	No prejudicial error
STATE v. MILLER No. 08-770	Wilkes (05CRS50106)	No error
STATE v. VALDOVINOS No. 06-1485-2	Alamance (04CRS56876-77)	Affirmed

APPENDIXES

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

ORDER ADOPTING AMENDMENTS TO THE RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

ORDER ADOPTING AMENDMENTS TO THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL ETHICS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ATTORNEY CLIENT ASSISTANCE PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PROCEDURES FOR FEE DISPUTE RESOLUTION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

Order Adopting Amendments To The Rules Implementing Statewide Mediated Settlement Conferences And Other Settlement Procedures In Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in superior court judicial districts in order to facilitate the resolution of civil actions within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of March, 2010.

Adopted by the Court in conference the 17th day of February, 2010. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Timmons-Goodson, J.
For the Court

REVISED RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

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RULE 1. INITIATING SETTLEMENT EVENTS

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a superior Court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) **Order by Senior Resident Superior Court Judge.** The Senior Resident Superior Court Judge of any judicial district shall, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.C.6 only for good cause shown.

(2) **Motion to authorize the use of other settlement procedures.** The parties may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in G.S. 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on an AOC form, and shall include:

(a) the type of other settlement procedure requested;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected;

(e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the Senior Resident Superior Court Judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the Court. Otherwise, the Court may order the use of any agreed upon settlement procedures authorized by Rules 10-12 herein or by local rules of the Superior Court in the county or district where the action is pending.

(3) **Timing of the order.** The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.C.(4) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(4) **Content of order.** The Court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the Court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the Court. The order shall be on an AOC form.

(5) **Motion for Court ordered mediated settlement conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(6) **Motion to dispense with mediated settlement conference.** A party may move the Senior Resident Superior Court Judge to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

(1) **Order by local rule.** In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts shall, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.D.6. only for good cause shown.

(2) **Scheduling orders or notices.** In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the Court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the Court.

(3) **Scheduling conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the Court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the Court.

(4) **Application of Rule 1.C.** The provisions of Rule 1.C.(2), (5) and (6) shall apply to Rule 1.D. except for the time limitations set out therein.

(5) **Deadline for completion.** The provisions of Rule 3.B. determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) **Selection of mediator.** The parties may select and nominate, or the Senior Resident Superior Court Judge may

appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.

(7) Use of other settlement procedures. The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time limits and method of moving the Court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

RULE 2. ~~SELECTION~~ DESIGNATION OF MEDIATOR

A. ~~SELECTION~~ DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may ~~select~~ designate a mediator certified pursuant to these Rules by agreement within 21 days of the Court's order. The plaintiff's attorney shall file with the Court a ~~Notice of Selection~~ Designation of Mediator by Agreement within 21 days of the Court's order, however, any party may file the ~~notice~~ Designation. The party filing the Designation shall serve a copy on all parties and the mediator designated to conduct the settlement conference. Such ~~notice~~ Designation shall state the name, address and telephone number of the mediator ~~selected~~ designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the ~~selection~~ designation and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an AOC form.

B. APPROVAL OF PARTY NOMINEE ELIMINATED. As of January 1, 2006, the former Rule 2.B.rule allowing the approval of a non-certified mediator is rescinded. Beginning on that date, the Senior Resident Superior Court Judge shall appoint mediators certified by the Dispute Resolution Commission, pursuant to Rule 2.C. which follows.

C. APPOINTMENT OF MEDIATOR BY THE COURT. If the parties cannot agree upon the ~~selection~~ designation of a mediator, the plaintiff or plaintiff's attorney shall so notify the Court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the Court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the ~~selection~~ designation of a mediator and have

been unable to agree ~~upon a mediator~~. The motion shall be on a form approved by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a ~~Notice of Selection~~ Designation of Mediator with the Court within 21 days of the Court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the Judge's district.

In making such appointments, the Senior Resident Superior Court Judge shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned. The Senior Resident Superior Court Judge shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

The Dispute Resolution Commission shall furnish to the Senior Resident Superior Court Judge of each judicial district a list of those certified ~~s~~Superior Court mediators requesting appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided both in writing and electronically through the Commission's website. The Commission shall promptly notify the Senior Resident Superior Judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

D. MEDIATOR INFORMATION DIRECTORY. To assist the parties in ~~selecting~~ designating a mediator, the Dispute Resolution Commission shall assemble, maintain and post on its web site at a list of certified Superior Court mediators. The list shall supply contact information for mediators and identify Court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information including information about an individual mediator's education, professional experience and mediation training and experience.

E. DISQUALIFICATION OF MEDIATOR. Any party may move the Senior Resident Superior Court Judge of the district where

the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be ~~selected~~ designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the Courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The Court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the Court's order. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the Court.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) **Parties.**

(i) All individual parties;

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action or who has been authorized to negotiate on behalf of such party and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, if a specific procedure is required by law (*e.g.*, a statutory preaudit certificate) or the party's governing documents (*e.g.*, articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to nego-

tiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance company representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) **Scheduling.** Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another Court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District

Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically recorded. If an agreement is upon all issues, a consent judgment or one or more voluntary dismissals shall be filed with the Court by such persons as the parties shall designate.

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the Court shall also sign the mediator's report to the Court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the Court within thirty (30) days or within ninety days (90) days if the State or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the Court thirty (30) days or within ninety (90) days if the State or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four

business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when*.

D. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

E. RELATED CASES. Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the Court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the Court.

DRC Comment to Rule 4.E.

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is

common for there to be claims asserted against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES~~S~~ OR PAY MEDIATOR'S FEE. ~~If a party or other person required to attend a mediated settlement conference fails to attend without good cause, a resident or presiding Superior Court Judge, may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.~~ Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with G.S. 7A-38.1 and the rules promulgated by the Supreme Court to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact ~~supported by substantial evidence~~ and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. (See also Rule 7.G. and the Comment to Rule 7.G.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private consultation.** The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) **Scheduling the conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting results of conference.**

(a) The mediator shall report to the Court on an AOC form within 10 days of the conference whether or not an agreement was reached by the parties. The mediator's report shall include the names of those persons attending the mediated settlement conference. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the Court.

(b) If an agreement upon all issues is reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the Court, and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the Court as required by Rule 4.C.(1). If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the Court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the Court and sanctions.

(5) **Scheduling and holding the conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to sched-

ule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(6) **Distribution of mediator evaluation form.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of ~~$125~~ $150 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of ~~$125~~ $150 that is due upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A., the parties may select a certified mediator to conduct their mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the Court has appointed a mediator, shall obtain Court approval for the substitution. The Court may approve the substitution only upon proof of payment to the Court's original appointee the ~~$125~~ $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B. and any postponement fee due and owing pursuant to Rule 7.E.

D. INDIGENT CASES. No party found to be indigent by the Court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the Court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The Court shall enter an order granting or denying the party's request.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in Court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least fourteen (14) calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of ~~$125~~ $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven (7) calendar days of the scheduled date for mediation, the fee shall be ~~$250~~ $300. The postponement fee shall be paid by the party

requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the named parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of Court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a Court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one time, per case administrative fee when two or more cases are mediated together and set his/her fee according to the amount of time s/he spent in an effort to schedule the matter for mediation. The mediator may charge a flat fee of ~~$125.00~~ $150 if scheduling was relatively easy or multiples of that amount if more effort was required.

DRC Comment to Rule 7.E.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program

designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.G.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and Court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the Court express authority to enforce payment of fees owed both Court-appointed and party-selected mediators. In instances where the mediator is party-selected, the Court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Superior Court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial Court mediation training program certified by the Dispute Resolution Commission, or have completed a 16 hour supplemental trial Court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) a member similarly in good standing of the Bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina Court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience after date of licensure as a judge, practicing attorney, law professor and/or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B.(1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina Court organization, legal terminology, civil Court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators

certified prior to January 1, 2005 and have four years of professional, management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of professional, management or administrative experience in a professional, business, or governmental entity and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator;

(1) at least one of which must be Court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein in cases pending in the North Carolina Court of Appeals, North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, the North Carolina Superior Court or the United States District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the

application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanctions(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within thirty (30) days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license(s), other disciplinary complaint(s) filed with, or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission;

H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the Court pursuant to Rule 7; and,

I. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.)

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking only certification as Superior Court mediators shall consist of a minimum

of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial Court mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

(5) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(6) Demonstrations of mediated settlement conferences;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A. and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Senior Resident Superior Court Judge may order the use of the procedure requested under these rules or under local rules unless the Court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES. In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation (Rule 11).** Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party,

(2) **Arbitration (Rule 12).** Non-Binding Arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and Binding Arbitration, in which a neutral renders a binding decision following presentations by the parties.

(3) **Summary Trials (Jury or Non-Jury) (Rule 13).** Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When proceeding is conducted.** Other settlement procedures ordered by the Court pursuant to these rules shall be conducted no later than the date of completion set out in the Court's original mediated settlement conference order unless extended by the Senior Resident Superior Court Judge.

(2) Authority and duties of neutrals.

(a) Authority of neutrals.

(i) Control of proceeding. The neutral evaluator, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the proceeding. The neutral evaluator, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s). In the absence of agreement, such neutral shall select the date for the proceeding.

(b) Duties of neutrals.

(i) The neutral evaluator, arbitrator, or presiding officer shall define and describe the following at the beginning of the proceeding.

(a) he process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G. S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral(s) and the participants.

(ii) Disclosure. Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(iii) Reporting results of the proceeding. The neutral evaluator, arbitrator, or presiding officer shall report the result of the proceeding to the Court on an AOC form. The Administrative Office of the Courts may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) Scheduling and holding the proceeding. It is the duty of the neutral evaluator, arbitrator, or

presiding officer to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator, or presiding officer unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(3) **Extensions of time.** A party or a neutral may request the Senior Resident Superior Court Judge to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the Court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) **Where procedure is conducted.** The neutral evaluator, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) **No delay of other proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

(6) **Inadmissibility of settlement proceedings.** Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(7) **No record made.** There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) **Ex parte communication prohibited.** Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) Duties of the parties.

(a) Attendance. All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is nonbinding in nature, authorized by these rules, and ordered by the Court except those persons to whom the parties agree and the Senior Resident Superior Court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the Court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference. The notice shall be on an AOC form.

(b) Finalizing agreement.

(i) If an agreement is reached on all issues at the neutral evaluation, arbitration, or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the Court by such persons as the parties shall designate within fourteen (14) days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the Court shall also sign the report to the Court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the neutral evaluator, arbitrator, or presiding officer and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration, or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all

issues with the Court within fourteen (14) days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when*.

(c) Payment of neutral's fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12).

(10) Selection of neutrals in other settlement procedures. The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference.

The notice shall be on an AOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) Disqualification. Any party may move a Resident or Presiding Superior Court Judge of the district in which an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of the neutral. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the Court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented

by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) Sanctions for failure to attend other settlement procedures or pay neutral's fee. ~~If a~~Any person required to attend a settlement procedure or to pay a neutral's fee in compliance with G.S. 7A-38.1 and the rules promulgated by the Supreme Court to implement that section, who fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a Resident or Presiding Superior Court Judge. ~~may impose upon the person any appropriate monetary sanction including but not limited to, the payment of fines, reimbursement of a party's attorney fees, expenses, and share of the neutral's fee and loss of earnings incurred by persons attending the conference.~~ Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses and loss of earnings incurred by persons attending the procedure. A party seeking sanctions against a person, or a Resident or Presiding Judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than five (5) pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three (3) pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) **Evaluator's opening statement.** At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the Parties.

(2) Oral report to parties by evaluator. In addition to the written report to the Court required under these rules at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Court thereof.

(3) Report of evaluator to Court. Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form. The evaluator's report shall inform the Court when and where the evaluation was held, the names of those who attended, and the names of any party, attorney, or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the Court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the Court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the Court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the Senior Resident Superior Court Judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

(1) Arbitrator's Canon of Ethics. Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by

the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

(1) **Pre-hearing exchange of information.** At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:

(a) Lists of witnesses they expect to testify.

(b) Copies of documents or exhibits they expect to offer into evidence.

(c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the Court or included in the case file.

(2) **Exchanged documents considered authenticated.** Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) **Copies of exhibits admissible.** Copies of exchanged documents or exhibits are admissible in arbitration hearings, in lieu of the originals.

C. ARBITRATION HEARINGS.

(1) **Witnesses.** Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) **Subpoenas.** Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(3) **Motions.** Designation of an action for arbitration does not affect a party's right to file any motion with the Court.

(a) The Court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B.(1).

(b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the Court so orders.

(4) **Law of evidence used as guide.** The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) **Authority of arbitrator to govern hearings.** Arbitrators shall have the authority of a trial Judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the Senior Resident Superior Court Judge.

(6) **Conduct of hearing.** The arbitrator and the parties shall review the list of witnesses, exhibits and written statements concerning issues previously exchanged by the parties pursuant to Rule 12.B.(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.

(7) **No Record of hearing made.** No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(8) **Parties must be present at hearings; Representation.** Subject to the provisions of Rule 10.C.(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties

may be represented by counsel. Parties may appear *pro se* as permitted by law.

(9) **Hearing concluded.** The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

(1) **Filing the award.** The arbitrator shall file a written award signed by the arbitrator and filed with the Clerk of Superior Court in the County where the action is pending, with a copy to the Senior Resident Superior Court Judge within twenty (20) days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the Court of the absence of any party, attorney, or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be an AOC form, shall be used by the arbitrator as the report to the Court and may be used to record its award. The report shall also inform the Court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the Court. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the Court.

(2) **Findings; Conclusions; Opinions.** No findings of fact and conclusions of law or opinions supporting an award are required.

(3) **Scope of award.** The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(4) **Costs.** The arbitrator may include in an award Court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) **Copies of award to parties.** The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

(1) Trial d*e novo* as of right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the Court, and service of the demand on all parties, on an AOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.

(2) No reference to arbitration in presence of jury. A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the Court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

(1) Termination of action before judgment. Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(2) Judgment entered on award. If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial *de novo* within 30 days after the award is served, the Senior Resident Superior Court Judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

(1) Written agreement. The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel, and shall be filed with the Clerk of Superior Court and the Senior Resident Superior Court Judge prior to the filing of the arbitrator's decision.

(2) Entry of judgment on a binding decision. The arbitrator shall file the decision with the Clerk of Superior Court

and it shall become a judgment in the same manner as set out in G.S. 1-567.1 ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for Court ordered arbitration.

RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provide for summary jury trials. While parties may request of the Court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

(1) Confirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (e.g. deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to be held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UN-ABLE TO AGREE. If the parties are unable to agree upon the dates and procedures set out in Section A. of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. STIPULATION TO A BINDING SUMMARY TRIAL. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. EVIDENTIARY MOTIONS. Counsel shall exchange and file motion in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. JURY SELECTION. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties.

Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL. Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. JURY CHARGE. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. DELIBERATION AND VERDICT. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly, and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs whichever is longer.

I. JURY QUESTIONNING. In a summary jury trial the presiding officer may allow a brief conference with the jurors in open Court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. SETTLEMENT DISCUSSIONS. Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. MODIFICATION OF PROCEDURE. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. REPORT OF PRESIDING OFFICER. The presiding officer shall file a written report no later than ten (10) days after the verdict. The report shall be signed by the presiding officer and filed with the Clerk of the Superior Court in the County where the action is pending, with a copy to the Senior Resident Court Judge. The presiding officer's report shall inform the Court of the absence of any party, attorney, or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. The report shall also inform the Court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the Court. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

RULE 14. LOCAL RULE MAKING.

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. DEFINITIONS.

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 16. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

Order Adopting Amendments to the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission to provide for the certification and qualification of mediators, other neutrals, and mediation and other neutral training programs, the regulation of mediators, other neutrals, and trainers and managers affiliated with certified or qualified programs, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to implement section 7A-38.2 by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Supreme Court's Rules for the Dispute Resolution Commission are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of March, 2010.

Adopted by the Court in conference the 17th day of February, 2010. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Supreme Court's Rules for the Dispute Resolution Commission amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Timmons-Goodson, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

I. OFFICERS OF THE COMMISSION.

A. Officers. The Commission shall establish the offices of Chair~~,~~ and Vice-Chair~~, and Secretary/Treasurer~~.

B. Appointment; Elections.

1. The Chair shall be appointed for a two year term and shall serve at the pleasure of the Chief Justice of the North Carolina Supreme Court.

2. The Vice-Chair ~~and Secretary/Treasurer~~ shall be elected by vote of the full Commission for a two year term ~~and shall serve two year terms~~ and shall serve in the absence of the Chair.

C. Committees.

1. The Chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.

2. The Chair may, with approval of the full Commission, appoint ex-officio members to serve on either standing or *ad hoc* committees. Ex-officio members may vote upon issues before committees but not upon issues before the Commission.

II. COMMISSION OFFICE; STAFF.

A. Office. The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to establish and maintain an office for the conduct of Commission business.

B. Staff. The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to appoint an Executive Secretary and to: (1) fix his or her terms of employment, salary, and benefits; (2) determine the scope of his or her authority and duties and (3) delegate to the Executive Secretary the authority to employ necessary secretarial and staff assistants, with the approval of the Director of the Administrative Office of the Courts.

III. COMMISSION MEMBERSHIP.

A. Vacancies. Upon the death, resignation or permanent incapacitation of a member of the Commission, the Chair shall

notify the appointing authority and request that the vacancy created by the death, resignation or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.

B. Disqualifications. If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.

C. Conflicts of Interest and Recusals. All members and ex-officio members of the Commission must:

1. Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member or ex-officio member is entitled to vote.

2. Recuse himself or herself from voting on any such matter if his or her impartiality might reasonably be questioned; and

3. Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.

D. Compensation. Pursuant to N. C. Gen. Stat. § 138-5, ex-officio members of the Commission shall receive no compensation for their services but may be reimbursed for their out-of-pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

IV. MEETINGS OF THE COMMISSION.

A. Meeting Schedule. The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the Chair or other officer acting for the Chair.

B. Quorum. A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to dismiss complaints or impose sanctions pursuant to Rule VIII of these Rules or to deny certification or certification renewal

or to revoke certification pursuant to Rule IX of these Rules shall require an affirmative vote consistent with those Rules.

C. Public Meetings. All meetings of the Commission for the general conduct of business and minutes of such meetings shall be open and available to the public except that meetings, portions of meetings or hearings conducted pursuant to Rules VIII and IX of these Rules may be closed to the public in accordance with those Rules.

D. Matters Requiring Immediate Action. If, in the opinion of the Chair, any matter requires a decision or other action before the next regular meeting of the Commission and does not warrant the call of a special meeting, it may be considered and a vote or other action taken by correspondence, telephone, facsimile, or other practicable method; provided, all formal Commission decisions taken are reported to the Executive Secretary and included in the minutes of Commission proceedings.

V. COMMISSION'S BUDGET.

The Commission, in consultation with the Director of the Administrative Office of the Courts, shall prepare an annual budget. The budget and supporting financial information shall be public records.

VI. POWERS AND DUTIES OF THE COMMISSION.

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in this State and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

A. Review and approve or disapprove applications of (1) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non-attorneys seeking certification as qualified to conduct mediated settlement conferences and mediations; and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

B. Review applications as against criteria for certification set forth in ~~the *Rules Implementing Mediated Settlement Conferences (Rules)*~~ rules adopted by the Supreme Court for mediated settlement conference/mediation programs oper-

ating under the Commission's jurisdiction and as against such other requirements of ~~the North Carolina Supreme Court Dispute Resolution Commission or~~ the Commission which amplify and clarify those ~~*Rules*~~ rules. The Commission may adopt application forms and require their completion for approval.

C. Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses, and telephone numbers and make those lists available on-line or upon request.

D. Institute periodic review of training programs and trainer qualifications and re-certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs that are not re-certified, shall be removed from the lists of certified trainers and certified training programs.

E. Compile, ~~and~~ keep current, and make available on-line ~~a~~ lists of certified mediators, which specify~~ies~~ the judicial districts in which each mediator wishes to practice. ~~Periodically disseminate copies of that list to each judicial district with a mediated settlement conferences program, and make the list available upon request to any attorney, organization, or member of the public seeking it.~~

F. Prepare, ~~and~~ keep current and make available on-line biographical information ~~on certified mediators~~ submitted to the Commission by certified mediators in order to make such information accessible to court staff, lawyers, and the wider public. ~~who wish to appear in the Mediator Information Directory contemplated in the *Rules*. Periodically disseminate updated biographical information to Senior Resident Superior Court Judges, in districts in which mediators wish to serve, and~~

G. Make reasonable efforts on a continuing basis to ensure that the judiciary~~;~~; clerks of court~~,~~; court administration personnel; attorneys; and to the extent feasible, parties to mediation~~,~~; are aware of the Commission and its office and the Commission's duty to receive and hear complaints against mediators and mediation trainers and training programs.

VII. MEDIATOR CONDUCT.

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of

Professional Conduct for Mediators adopted by the Supreme Court and enforceable by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Standards. A certified mediator shall inform the Commission of any criminal convictions, disbarments or other revocations or suspensions of a professional license, ~~any~~ complaints filed against the mediator or disciplinary actions imposed upon the mediator by any ~~other~~ professional organization, ~~or any~~ judicial sanctions~~.~~, civil judgments, tax liens or filings for bankruptcy. Failure to do so is a violation of these Rules. Violations of the Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission.

VIII. INVESTIGATION AND REVIEW OF MATTERS OF ETHICAL CONDUCT, CHARACTER, AND FITNESS TO PRACTICE; CONDUCT OF HEARINGS; SANCTIONS

~~**A. Establishment of the Standing Committee on Standards, Discipline, and Advisory Opinions.**~~

~~**1. Establishment of Committee.** The Chair of the Commission shall appoint a standing Committee on Standards, Discipline, and Advisory Opinions (Committee) to review the matters set forth in Section 2 below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.~~

~~**2. Matters to Be Considered by Committee.** The Committee shall review and consider the following matters:~~

~~**a.** appeals of staff decisions to deny an application filed by a person seeking certification as a mediator or filed by a person seeking recertification as a mediator based upon the person's conduct, character, or fitness to practice;~~

~~**b.** appeals of staff decisions to deny an application filed by a person or entity seeking certification or recertification as a mediator training program based upon the person's conduct, character, or fitness to practice or that of a trainer or program manager of the mediator training program;~~

c. complaints which are filed by a member of the Commission, its staff, or any member of the public about a mediator, an applicant for mediator certification or renewal of certification, a mediation trainer, or a mediator training program manager (affected person) based upon the affected person's conduct, character, or fitness to practice; and

d. the drafting of advisory opinions pursuant to the Commission's Advisory Opinion Policy.

3. The Investigation of Violations of the Standards of Conduct.

a. Information obtained during the process of certification or renewal. Commission staff shall review all pending grievances, disciplinary matters, judicial sanctions, and convictions reported by certified mediators, by applicants for mediator certification or certification renewal and by trainers or managers affiliated with mediator training programs applying for certification or certification renewal. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant, mediator, or training program's eligibility for certification or certification renewal. Staff shall forward all such matters of eligibility to the Committee for review except those matters expressly exempted from review by the *Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken and Convictions* (Guidelines) adopted by the Committee and approved by the Commission.

b. Complaints of mediator misconduct filed with the Commission. The staff of the Commission shall forward written complaints about the conduct of an applicant, mediator, trainer, or training program manager filed by any member of the general public, the Commission, or its staff to the committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit, the

~~Executive Director shall refer the matter to the committee's chair rather than to the committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have thirty (30) days from the date of notification to appeal the chair's determination to the full Committee on Standards, Discipline, and Advisory Opinions.~~

~~e. Investigation by the Standing Committee.~~ ~~The Committee shall investigate all matters brought before it by staff pursuant to the provisions of subsection a. or b. and may contact the following persons and entities for information concerning such application or complaint: the affected person or applicant, State Bar officials, officials of other professional licensing bodies to whom the affected person is subject, parties or other individuals who brought complaints against the mediator or applicant, court officials, and any other person or entity who may have additional information about the matters reported or facts alleged. The Chair or his/her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation.~~

~~All information in Commission files pertaining to the initial certification of a mediator or mediation training program or renewals of such certifications, to requests for informal or formal guidance from the Commission pursuant to the Advisory Opinion Policy, and to pending complaints shall be confidential.~~

~~d. Probable Cause Determination.~~ ~~The Committee on Standards, Discipline, and Advisory Opinions shall deliberate to determine whether probable cause exists to believe that the conduct of the affected person or applicant:~~

- **~~i)~~** ~~is inconsistent with good moral character (MSC Rule 8.E., FFS Rule 8.F. and Rule VII above);~~
- **~~ii)~~** ~~is a violation of the Supreme Court's Standards of Professional Conduct for Mediators or any~~

other standards of professional conduct that are not in conflict with nor inconsistent with the Supreme Court's Standards and to which the mediator, applicant, trainer, or manager is subject (Rule VII above);

iii) is a violation of the rules for the Mediated Settlement Conference, Family Financial Settlement, or Pre-litigation Farm Nuisance Mediation Programs;

iv) is a violation of MSC Rule 9 or FFS Rule 9 or guidelines and other policies adopted by the Commission that amplify those rules;

v) reflects a lack of fitness to conduct mediations or to serve as a trainer or training program manager (Rule VII above); or

vi) discredits the Commission, the courts, or the mediation process (Rule VII above).

If there is a finding of probable cause, that the affected person or applicant shall be sanctioned pursuant to these rules.

4. Authority of Committee to Dismiss Complaints or Propose Sanctions.

a. If a majority of Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person or applicant without conditions or, if the investigation were initiated by the filing of a written complaint, shall dismiss the complaint and notify the complaining party and the affected person by certified U.S. mail, return receipt requested, that no further action will be taken and that the matter is dismissed. There shall be no right of appeal from the Committee's decision to dismiss a complaint or certify an affected person or applicant.

b. If a majority of Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Committee shall propose sanctions on the affected person or applicant as set forth in Section B.10. of these rules, except that if the Committee determines that the violation of the Standards or rules is technical or minor in nature, that the com-

plaining party was not significantly harmed and that the Commission, courts or programs were not discredited, the Committee may elect to caution the affected person or applicant rather than imposing sanctions. The Committee's findings, conclusions, and proposed sanctions or any letter of caution shall be in writing and forwarded to the affected person or applicant by U.S. mail, return receipt requested.

c. If sanctions are proposed, the affected person or applicant may appeal the findings and/or proposed sanctions to the Commission within thirty (30) days from the date of the letter transmitting the Committee's findings and its proposed sanctions. Notification of appeal must be in writing. If no appeal is filed within thirty (30) days, the affected person or applicant shall be deemed to have accepted the Committee's findings and proposed sanctions and said sanctions shall commence.

5. Disputes Between Mediators and Complainants. Commission staff may attempt to resolve any disputes between a complaining party and an affected person in which the conduct of the affected person does not constitute a violation of the grounds set out in Section A.3.d. above.

B. Appeal to the Commission.

1. The Commission Shall Meet to Consider Appeals. An appeal of the Committee's determination pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination that is on appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

2. Conduct of the Hearing.

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all parties, special counsel to the Commission, and

~~members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.~~

~~**b.** Hearings conducted by the Commission pursuant to this rule shall be a *de novo* review of the Committee's decision.~~

~~**c.** Complainants, applicants, and affected persons may appear at the hearing with or without counsel.~~

~~**d.** All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or affected person.~~

~~**e.** In the event that the complainant, affected person, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.~~

~~**f.** Proceedings before the Commission shall be conducted informally but with decorum.~~

~~**g.** The Commission, through its counsel, and the applicant or affected person may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or affected person may cross-examine any witness called to testify by the other. Commission members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.~~

~~**h.** The Commission's chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for~~

the attendance of witnesses and the production of books, papers, or other documentary evidence.

3. Date of Hearing. An appeal of any sanction proposed by the Committee shall be heard by the Commission within ninety (90) days of the date the sanction is imposed.

4. Notice of Hearing. The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. *Ex Parte* Communications. No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

6. Attendance. All parties, including complaining parties, applicants and parties against whom sanctions are proposed, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. Witnesses. The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least ten (10) days prior to the hearing the names of all witnesses who will be called to testify.

8. Transcript. The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter

retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. Commission Decision. After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the imposition of sanctions and, therefore, dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program, or (ii) find that there is clear and convincing evidence that grounds exist to impose sanctions and impose sanctions. The Commission shall set forth its findings, conclusions, and sanctions, or other action, in writing and serve its decision on the parties within sixty (60) days of the date of the hearing.

10. Sanctions. The sanctions that may be proposed by the Committee or imposed by the Commission include, but are not limited to, the following:

a. Private, written admonishment;

b. Public, written admonishment;

c. Completion of additional training;

d. Restriction on types of cases to be mediated in the future;

e. Reimbursement of fees paid to the mediator or training program;

f. Suspension for a specified term;

g. Probation for a specified term;

h. Certification or renewal of certification upon conditions;

i. Denial of certification or certification renewal;

j. Decertification; and/or

k. Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time.

11. Publication of Committee/Commission Decisions.

a. Names of mediators who are reprimanded privately or applicants who have never been certified and

~~have been denied certification shall not be published in the Commission's newsletter and on its web site.~~

~~b. Names of mediators who are sanctioned under any other provision of Section B.10. above and who have been denied reinstatement under Section B.13. below shall be published in the Commission's newsletter and on its web site along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.~~

~~c. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Subsection a. above.~~

~~d. If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response, counter response, and Commission/Committee decision.~~

~~**12. Appeal.** The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification. An order imposing sanctions or denying applications for mediator or mediator training program certification shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.~~

~~**13. Reinstatement.** A mediator, trainer, or manager who has been sanctioned under this rule may be reinstated as a certified mediator or as an active trainer or manager pursuant to Section B.13.g. below. Except as otherwise provided by the Standing Committee or~~

~~Commission, no application for reinstatement may be tendered within two years of the date of the sanction or denial.~~

~~**a.** A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.~~

~~**b.** The petition for reinstatement shall contain:~~

~~**i)** the name and address of the petitioner;~~

~~**ii)** the offense or misconduct upon which the suspension or decertification or the bar to training or program management was based; and~~

~~**iii)** a concise statement of facts claimed to justify reinstatement as a certified mediator or a trainer or program manager.~~

~~**c.** The petition for reinstatement may also contain a request for a hearing on the matter to consider any additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency, or fitness to practice as a mediator, trainer, or manager.~~

~~**d.** The Commission's staff shall refer the petition to the Commission for review.~~

~~**e.** If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:~~

~~**i)** appear personally and be heard;~~

~~**ii)** be represented by counsel;~~

~~**iii)** call and examine witnesses;~~

~~**iv)** offer exhibits; and~~

~~**v)** cross-examine witnesses.~~

~~**f.** At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.~~

~~**g.** The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:~~

~~**i)** that the petitioner has rehabilitated his/her character, addressed and resolved any conditions which led to his/her suspension or decertification, completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer, or manager, and/or taken steps to address and resolve any other matter(s) which led to the petitioner's suspension, decertification, or prohibition from serving as a trainer or manager; and~~

~~**ii)** the petitioner's certification will not be detrimental to the Mediated Settlement Conference and/or Family Financial Settlement Programs, the Commission, the courts, or the public interest; and~~

~~**iii)** that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.~~

~~**h.** If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer, or manager, the Commission shall reinstate the petitioner as a certified mediator or as an active trainer or manager. However, if the suspension or decertification or the bar to training or management has continued for more than two years, the reinstatement may be conditioned upon the completion of additional training and observations as needed to refresh skills and awareness of program rules and requirements.~~

~~**i.** The Commission shall set forth its decision to reinstate a petitioner or to deny reinstatement in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within thirty (30) days of the date of the hearing.~~

~~j. If a petition for reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.~~

~~k. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.~~

VIII. INVESTIGATION AND REVIEW OF MATTERS OF ETHICAL CONDUCT, CHARACTER, AND FITNESS TO PRACTICE; CONDUCT OF HEARINGS; SANCTIONS

A. Establishment of the Committee on Standards, Discipline, and Advisory Opinions.

The Chair of the Commission shall appoint a standing Committee on Standards, Discipline, and Advisory Opinions (Committee) to review the matters set forth in Section B. below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest. The Commission's Executive Secretary shall serve as staff to the Committee.

B. Matters to Be Considered by Committee. The Committee shall review and consider the following matters:

1. Matters relating to the moral character of an applicant for mediator certification or certification renewal or of a certified mediator and appeals of staff decisions to deny an application for mediator certification or certification renewal on the basis of the applicant's character;

2. Matters relating to the moral character of any trainer or manager affiliated with a certified mediator trainining program or one that is an applicant for certification or certification renewal and appeals of staff decisions to deny an application for mediator training program certification or certification renewal on the basis of the character of any trainer or manager affiliated with the program;

3. Complaints by a member of the Commission, its staff, a judge, court staff or any member of the public regarding the charac-

ter, conduct or fitness to practice of a mediator or a trainer or manager affiliated with a certified mediator training program or that allege a violation of the program rules or the Standards of Professional Conduct of Mediators; and

4. The drafting of advisory opinions pursuant to the Commission's Advisory Opinion Policy.

C. Initial Staff Review and Determination.

1. **Review and Referral Of Matters Relating to Moral Character.** The Executive Secretary shall review information relating to the moral character of applicants for mediator or mediator training program certification or certification renewal, mediators, and mediator training program managers and administrators (applicants) including matters which applicants are required to report under program rules.

   The Executive Secretary may contact applicants to discuss matters reported and conduct background checks on applicants. Any third party with knowledge of the above matters or any other information relating to the moral character of an applicant may notify the Commission. Commission staff shall seek to verify any such third party reports and may disregard those that cannot be verified. Commission staff may contact any agency where complaints about an applicant have been filed or any agency or judge that has imposed discipline.

   All such reported matters or any other information gathed by Commission staff and bearing on moral character shall be forwarded directly to the Committee for its review, except those matters expressly exempted from review by the *Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken and Convictions* (*Guidelines*). Matters that are exempted by the *Guidelines* may be processed by Commission staff and will not act as a bar to certification or certification renewal.

   The Executive Secretary or the Committee may elect to take any matter relating to an applicant's moral character, including matters reported by third parties or revealed by background check, and process it as a complaint pursuant to Rule VIII.C.3.below. The Executive Secretary may consult with the Chair prior to making such election.

2. **Director Review of Oral or Written Complaints.** The Executive Secretary shall review oral and written complaints made to the Commission regarding the conduct, character or

fitness to practice of a mediator or a trainer or manager affiliated with a certified mediator training program (respondent), except that the Executive Secretary shall not act on anonymous complaints unless staff can independently verify the allegations made.

a. Oral complaints. If after reviewing an oral complaint, the Executive Secretary determines it is necessary to contact third party witnesses about the matter or to refer it to the Committee, the Executive Secretary shall first make a summary of the complaint and forward it to the complaining party who shall be asked to sign the summary along with a release and to return it to the Commission's office, except that complaints initiated by a member of the Commission, Committee or Commission staff or by judges, other court officials, or court staff need not be in writing and, upon request, the identity of the complaining party may be withheld from the respondent. The Executive Secretary shall not contact any third parties in the course of investigating a matter until such time as the signed summary and release have been returned to the Commission.

b. Written complaints: Commission staff shall acknowledge all written complaints within twenty (20) days of receipt. Written complaints may be made by letter or email or filed on the Commission's approved complaint form. If a complaint is not made on the approved form, Commission staff shall require the complaining party to sign a release before contacting any third parties in the course of an investigation.

c. If a complaining party refuses to sign a complaint summary prepared by the Executive Secretary or to sign a release or otherwise seeks to withdraw a complaint after filing it with the Commission, the Executive Secretary or a Committee member may pursue the complaint. In determining whether to pursue a complaint independently, the Executive Secretary or a Committee member shall consider why the complaining party is unwilling to pursue the matter further, whether the complaining party is willing to testify if a hearing is necessary, whether the complaining party has specifically asked to withdraw the complaint, the seriousness of the allegations made in the complaint, whether the circumstances complained of may be independently verified without the complaining party's partici-

pation and whether there have been previous complaints filed regarding the respondent's conduct.

d. There shall be no statute of limitations on the filing of complaints.

3. Initial Determination on Oral and Written Complaints.

After reviewing a Rule VIII.B.3. complaint and any additional information gathered, including information supplied by the respondent and any witnesses contacted, the Executive Secretary shall determine whether to:

a. Recommend Dismissal. The Executive Secretary shall make a recommendation to dismiss a complaint if s/he concludes that the complaint does not warrant further action. Such recommendation shall be made to the Chair of the Committee. If after giving the complaint due consideration, the Chair agrees with the Executive Secretary, the complaint shall be dismissed with notification to the complaining party, the respondent, and any witnesses contacted. The Executive Secretary shall note for the file why a determination was made to dismiss the complaint. Dismissed complaints shall remain on file with the Commission for at least five years and the Comittee may take such complaints into consideration if additional complaints are later made against the same respondent.

The complaining party shall have thirty (30) days from the date of notification to appeal the Chair's determination to the full Committee on Standards, Discipline, and Advisory Opinions. If after giving the complaint due consideration, the Chair disagrees with the Executive Secretary's recommendation to dismiss, s/he may direct staff to refer the matter for conciliation or to the full Committee for review.

b. Refer to Conciliation. If the Executive Secretary determines that the complaint appears to be largely the result of a misunderstanding between the respondent and complainant or raises a best practices concern(s) or technical or relatively minor rule violation(s) resulting in minimal harm to the complainant, the matter may be referred for conciliation after speaking with the parties and concluding that they are willing to discuss the matter and explore the complainant's concerns. Once a matter is referred for conciliation, the Executive Secretary may serve as a resource to the parties, but shall not act as their mediator.

Prior to or at the time a matter is referred for conciliation, Commission staff shall provide written information to the complainant explaining the conciliation process and advising him/her that the complaint will be deemed to be resolved and the file closed if the complainant does not notify the Commission within ninety (90) days of the referral that conciliation either failed to occur or did not resolve the matter. If either the complaining party or the respondent refuses conciliation or the complaining party notifies Commission staff that conciliation failed, the Executive Secretary may refer the matter to the Committee for review or to the Chair with a recommendation for dismissal.

c. **Refer to Committee.** Following initial investigation, including contacting the respondent and any witnesses, if necessary, the Executive Secretary shall refer all Rule VIII.B.3. matters to the full Committee when such matters raise concerns about possible significant program rule or Standards violations or raise a significant question about a respondent's character, conduct, or fitness to practice. No matter shall be referred to the Committee until the respondent has been forwarded a copy of the complaint and a copy of these Rules and allowed a thirty (30) day period in which to respond. Upon request, the respondent may be afforded ten (10) additional days to respond.

The response shall not be forwarded to the complainant, except as provided for in G.S. 7A-38.2(h) and there shall be no opportunity for rebuttal. The response, shall be included in the materials forwarded to the Committee. In addition, if any witnesses were contacted, any written responses or any notes from conversations with those witnesses shall also be included in the materials forwarded to the Committee.

4. **Confidentiality.** Commission staff will create and maintain files for all matters considered pursuant to Rule VIII.B. Those files shall contain information submitted by or about applicants and respondents including any notes taken by the Executive Secretary or Commission staff relative to reports regarding moral character of applicants or complaints about mediators, trainers or managers. All information in those files shall remain confidential until such time as the Committee completes its preliminary investigation and finds probable cause following deliberation pursuant to Rule VIII.D.2.

The Executive Secretary shall reveal the names of respondents to the Committee and the Committee shall keep the names of respondents and other identifying information confidential except as provided for in G.S. 7A-38.2(h).

D. Committee Review and Determination on Matters Referred by Staff.

1. Committee Review of Applicant Moral Character Issues and Complaints.

The Committee shall review all matters brought before it by the Executive Secretary pursuant to the provisions of Rule VIII.B. above and may contact any other persons or entities for additional information. The Chair or his/her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to the Committee's investigation and review of the matter.

2. Committee Deliberation.

The Committee shall deliberate to determine whether probable cause exists to believe that an applicant or respondent's conduct:

a. is a violation of the Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not in conflict with nor inconsistent with the Supreme Court's Standards and to which the mediator, trainer, or manager is subject;

b. is a violation of Supreme Court program rules for mediated settlement conference/mediation programs;

c. is inconsistent with good moral character (Mediated Settlement Conference Program Rule 8.E., Family Financial Settlement Conference Rule 8.F. and District Criminal Court Rule 7. E.);

d. reflects a lack of fitness to conduct mediated settlement conferences/mediations or to serve as a trainer or training program manager (Rule VII above); and/or

e. discredits the Commission, the courts, or the mediation process (Rule VII above).

3. Committee Determination.

Following deliberation, the Committee shall determine to dismiss a matter, or to make a referral, or to impose sanctions.

a. To Dismiss. If a majority of Committee members reviewing an issue of moral character or a complaint finds no probable cause, the Committee shall dismiss the matter and instruct the Executive Secretary:

(i) to certify or recertify the applicant, if an application is pending, or to notify the mediator, trainer or manager by certified U.S. mail, return receipt requested that no further action will be taken in the matter; or

(ii) to notify the complaining party and the respondent by certified U.S. mail, return receipt requested, that no further action will be taken and that the matter is dismissed. The complaining party shall have no right of appeal from the Committee's decision to dismiss the complaint.

b. To Refer. If a majority of Committee members determines that:

(i) any violation of the program rules or Standards that occurred was technical or relatively minor in nature, caused minimal harm to a complainant, and did not discredit the program, courts, or Commission, the Committee may:

1) dismiss the complaint with a letter to the respondent citing the violation and advising him or her to avoid such conduct in the future, or

2) refer the respondent to one or more members of the Committee to discuss the matter and explore ways that the respondent may avoid similar complaints in the future.

(ii) the applicant or respondent's conduct has raised best practices or professionalism concerns, the Committee may:

1) direct staff to dismiss the complaint with a letter to the respondent advising him/her of the Committee's concerns and providing guidance, or

2) direct the respondent to meet with one or more members of the Committee who will informally discuss the Committee's concerns and provide counsel, or

3) refer the respondent to the Chief Justice's Commission on Professionalism for counseling and guidance; or

(iii) the applicant or respondent's conduct raises significant concerns about his/her mental stability, mental health, lack of mental acuity, or possible dementia, or concerns about possible alcohol or substance abuse, the Committee may, in lieu of or in addition to imposing sanctions refer the applicant or respondent to the North Carolina State Bar's Lawyer Assistance Program (LAP) for evaluation or, if the applicant or respondent is not a lawyer, to a physician or other licensed mental health professional or to a substance abuse counselor or organization.

Neither letters nor referrals are viewed as sanctions under Rule VIII, E.10. below. Rather, both are intended as opportunities to address concerns and to help applicants or respondents perform more effectively as mediators. There may, however, be instances that are more serious in nature where the Committee may both make a referral and impose sanctions under Rule VIII. E.10.

In the event that an applicant or respondent is referred to one or more members of the Committee for counsel, to LAP or some other professional or entity and fails to cooperate regarding the referral; refuses to sign releases or to provide any resulting evaluations to the Committee; or any resulting discussions or evaluation(s) suggest that the applicant or respondent is not currently capable of serving as a mediator, trainer or manager, the Committee reserves the right to make further determinations in the matter, including decertification. During a referral under (iii) above, the Committee may require the applicant or respondent to cease practicing as a mediator, trainer or manager during the referral period and until such time as the Committee has authorized his/her return to active practice. The Committee may condition a certification or renewal of recertification on the applicant's successful completion of the referral process.

Any costs associated with a referral, *e.g.*, costs of evaluation or treatment, shall be borne entirely by the applicant or respondent.

c. To Propose Sanctions. If a majority of Committee members find probable cause pursuant to Rule VIII.D.2. above, the Committee shall propose sanctions on the applicant or respondent, except as provided for in Rule VIII.D.3.(b)(i).

Within the 30 day period set forth in Rule VIII.D.3.(d) below, an applicant or respondent may contact the Committee and object to any referral made or sanction imposed on the applicant or respondent, including objecting to any public posting of a sanction, and seek to negotiate some other outcome with the Committee. The Committee shall have the authority to engage in such negotiations with the applicant or respondent. During the negotiation period, the respondent may request an extension of the time in which to request an appeal under Rule VIII.E. below. The Executive Secretary, in consultation with the Committee Chair, may extend the appeal period an additional thirty days in order to allow more time to complete negotiations.

4. Right of Appeal. If a referral is made or sanctions are imposed, the applicant or respondent shall have thirty (30) days from the date of the letter transmitting the Committee's findings and action to appeal. Notification of appeal must be made to the Commission's office in writing. If no appeal is received within thirty (30) days, the complainant, applicant or respondent shall be deemed to have accepted the Committee's findings and proposed sanctions.

E. Appeal to the Commission.

1. The Commission Shall Meet to Consider Appeals. An appeal of the Committee's determination pursuant to Rule VIII.E. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination on appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's Chair.

2. Conduct of the Hearing.

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all

parties, special counsel to the Commission, and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

b. Hearings conducted by the Commission pursuant to this rule shall be *de novo*.

c. Applicants, complainants, respondents and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

d. All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or respondent.

e. In the event that the applicant, complainant, or respondent fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

f. Proceedings before the Commission shall be conducted informally but with decorum.

g. The Commission, through its counsel, and the applicant or respondent may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or respondent may cross-examine any witness called to testify by the other. Commission members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

h. The Commission's Chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of

witnesses and the production of books, papers, or other documentary evidence.

3. **Date of Hearing.** An appeal of any sanction proposed by the Committee shall be heard by the Commission within ninety (90) days of the date the sanction is proposed.

4. **Notice of Hearing.** The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. ***Ex Parte* Communications.** No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

6. **Attendance.** All parties, including applicants, complainants and responents, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. **Witnesses.** The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office and to all other parties at least ten (10) days prior to the hearing, the names of all witnesses who will be called to testify.

8. **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. Commission Decision. After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the imposition of sanctions and, therefore, dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program, or (ii) find that there is clear and convincing evidence that grounds exist to impose sanctions and impose sanctions. The Commission may impose the same or different sanctions than imposed by the Committee. The Commission shall set forth its findings, conclusions, and sanctions, or other action, in writing and serve its decision on the parties within sixty (60) days of the date of the hearing.

10. Sanctions. The sanctions that may be proposed by the Committee or imposed by the Commission include, but are not limited to, the following:

a. Private, written admonishment;

b. Public, written admonishment;

c. Completion of additional training;

d. Restriction on types of cases to be mediated in the future;

e. Reimbursement of fees paid to the mediator or training program;

f. Suspension for a specified term;

g. Probation for a specified term;

h. Certification or renewal of certification upon conditions;

i. Denial of certification or certification renewal;

j. Decertification;

k. Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time, and

l. Any other sanction deemed appropriate by the Commission.

11. Publication of Committee/Commission Decisions.

a. Names of respondents who have been reprimanded privately or applicants who have never been certified and have been denied certification shall not be published in the Commission's newsletter and on its web site.

b. Names of respondents or applicants who are sanctioned under any other provision of Section B.10. above and who have been denied reinstatement under Section B.13. below shall be published in the Commission's newsletter and on its web site along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.

c. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which a mediator serves, the NC State Bar and any other professional licensing/certification bodies to which a mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Subsection a. above.

d. If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response, counter response, and Commission/Committee decision.

12. Appeal. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification. An order imposing sanctions or denying applications for mediator or mediator training program certification shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

13. Reinstatement. An applicant, mediator, trainer, or manager who has been sanctioned under this rule may be reinstated as a certified mediator or as an active trainer or manager pursuant to Section B.13.g. below. Except as otherwise provided by the Standing Committee or Commission, no application for reinstatement may be tendered within two years of the date of the sanction or denial.

a. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

b. The petition for reinstatement shall contain:

(i) the name and address of the petitioner;

(ii) the offense or misconduct upon which the suspension or decertification or the bar to training or program management was based; and

(iii) a concise statement of facts claimed to justify reinstatement as a certified mediator or a trainer or program manager.

c. The petition for reinstatement may also contain a request for a hearing on the matter to consider any additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency, or fitness to practice as a mediator, trainer, or manager.

d. The Commission's staff shall refer the petition to the Commission for review.

e. If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:

(i) appear personally and be heard;

(ii) be represented by counsel;

(iii) call and examine witnesses;

(iv) offer exhibits; and

(v) cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

(i) the petitioner has rehabilitated his/her character, addressed and resolved any conditions which led to his/her suspension or decertification, completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer, or manager, and/or taken steps to address and resolve any other matter(s) which led to the peti-

tioner's suspension, decertification, or prohibition from serving as a trainer or manager; and

(ii) the petitioner's certification will not be detrimental to the Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation or District Criminal Court Mediation Programs, the Commission, the courts, or the public interest;

(iii) and that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer, or manager, the Commission shall reinstate the petitioner as a certified mediator or as an active trainer or manager. However, if the suspension or decertification or the bar to training or management has continued for more than two years, the reinstatement may be conditioned upon the completion of additional training and observations as needed to refresh skills and awareness of program rules and requirements.

i. The Commission shall set forth its decision to reinstate a petitioner or to deny reinstatement in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within thirty (30) days of the date of the hearing.

j. If a petition for reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.

k. The General Court of Justice, Superior Court Division in Wake County, shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

IX. INVESTIGATION AND REVIEW OF APPLICATIONS FOR CERTIFICATION DENIED OR REVOKED FOR REASONS OTHER THAN THOSE PERTAINING TO ETHICS AND CONDUCT.

A. Establishment of the Standing Committee on Certification of Mediators and Mediator Training Programs.

1. **Establishment of Committee.** The Chair of the Commission shall appoint a standing Committee on Certification of Mediators and Mediator Training Programs (Committee) to review the matters set forth in Section 2 below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

2. **Matters to Be Considered by Committee.** The Committee shall review and consider the following matters:

   a. Appeals of staff decisions to deny an application filed by a person seeking mediator certification or recertification or by a mediator training program seeking certification or recertification, because of deficiencies that do not relate to conduct or ethics. The latter deficiencies shall be considered pursuant to Rule ~~8.~~ VIII.

   b. Complaints which are filed by a member of the Commission, its staff, or any member of the public about a certified mediator or certified mediator training program or an applicant for certification or certification renewal; except that, complaints relating to applicant, mediator, trainer or manager conduct or ethics shall be considered only pursuant to Rule ~~8.~~ VIII.

3. **The Investigation of Qualifications.**

   a. Information obtained during the process of certification or renewal. Commission staff shall review all pending applications for certification and recertification to determine whether the applicant meets the non-ethics related qualifications set out in ~~the MSC Rules 8 and 9 and FFS Rules 8 and 9~~ program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission and any guidelines or other policies adopted by the Commission amplifying those rules. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant's eligibility for certification or certification renewal.

   b. Complaints about mediator or mediator training program qualifications filed with the Commission. The staff of the Commission shall forward written complaints about the qualifications of a certified mediator or certified mediator training program or any trainer or manager affil-

iated with such program (affected person/program) that do not pertain to ethics or conduct filed by any member of the general public, the Commission, or its staff to the Committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit, the Executive ~~Director~~ Secretary shall refer the matter to the Committee's chair rather than to the Committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have thirty (30) days from the date of notification to appeal the chair's determination to the full Committee on Certification of Mediators and Mediator Training Programs. The appeal shall be in writing and directed to the Commission's office.

c. Investigation by the Standing Committee. The Committee shall investigate all matters brought before it by staff pursuant to the provisions of Sections a. or b. The Chair or designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, or other documentary evidence deemed necessary or material to any such investigation. The Chair or designee may contact the following persons and entities for information concerning such application or complaint:

i) all references, employers, colleges, and other individuals and entities cited in applications for mediator certification, including any and all other professional licensing or certification bodies to which the applicant is subject.

ii) all proposed trainers cited in training program applications and in the case of applications for certification renewal, participants who have completed the training program.

iii) all parties bringing complaints about a mediator or a mediator training program's qualifications for certification or certification renewal and any other person or entity with information about the subject of the complaint.

All information in Commission files pertaining to the initial certification of a mediator or mediation training program or to renewals of such certifications shall be confidential.

d. Probable Cause Determination. The Committee on Certification of Mediators and Mediator Training Programs shall deliberate to determine whether probable cause exists to believe that the affected person/program or the applicant:

i) does not meet the qualifications for mediator certification set out in ~~MSC Rule 8 and/or FFS Rule 8~~ program adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission that amplify those rules; or

ii) does not meet the qualifications for mediator training program certification as set out in ~~MSC rule 9 and/or FFS Rule 9~~ program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission that amplify those rules.

If probable cause is found, that the application for certification or re-certification should be denied or the affected person/program's certification should be revoked.

4. Authority of Committee to Deny Certification or Certification Renewal or to Revoke Certification.

a. If a majority of Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person/program or applicant. If the investigation were initiated by the filing of a written complaint, the Committee shall dismiss the complaint and notify the complaining party and the affected person/program or applicant in writing by certified U.S. mail, return receipt requested, that the complaint has been dismissed and that the affected person/program or applicant will be certified or re-certified. There shall be no right of appeal from the Committee's decision to dismiss a complaint or to certify or re-certify an affected person/program or applicant.

b. If a majority of Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Committee shall deny certification or re-certification or revoke certification. The Committee's findings, conclusions, and denial shall be in writing and forwarded to the affected person/program or applicant by U.S. mail, return receipt requested.

c. If the Committee denies certification or re-certification or revokes certification, the affected person/program or applicant may appeal the denial or revocation to the Commission within thirty (30) days from the date of the letter transmitting the Committee's findings, conclusions, and denial. Notification of appeal must be in writing and directed to the Commission's office. If no appeal is filed within thirty (30) days, the affected person/program or applicant shall be deemed to have accepted the committee's findings and denial or revocation.

B. Appeal of the Denial to the Commission.

1. The Commission Shall Meet. An appeal of a denial or revocation by the Committee pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Committee who participated in issuing the determination that is on appeal shall recuse themselves from participating. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

2. Conduct of the Hearing.

a. At least thirty (30) days prior to the hearing before the Commission, Commission staff shall forward to all parties; special counsel to the Commission, if appointed; and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

b. Hearings conducted by the Commission will be a *de novo* review of the Committee's decision.

c. The Commission's chair or his/her designee shall serve as the presiding officer. The presiding officer shall have such

jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

d. Special counsel supplied either by the Attorney General at the request of the Commission or employed by the Commission may present the evidence in support of the denial or revocation of certification. Commission members may question any witnesses called to testify at the hearing.

e. The Commission, through its counsel, and the applicant or affected person/program may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or affected person/program, may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

f. All hearings shall be conducted in private, unless the applicant or affected person/program requests a public hearing.

g. In the event that the complainant, affected person/program, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

h. Proceedings before the Commission shall be conducted informally but with decorum.

3. **Date of Hearing.** An appeal of any denial by the Committee shall be heard by the Commission within ninety (90) days of the date of the letter transmitting the Committee's findings, conclusions, and denial or revocation.

4. **Notice of Hearing.** The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty (60) days prior to the hearing.

5. ***Ex Parte* Communications.** No person shall have any *ex parte* communication with members of the Commission con-

cerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

6. **Attendance.** All parties, including complaining parties and applicants, or their representatives in the case of a training program, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least twenty (20) days prior to the proceeding. At least five (5) days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

7. **Witnesses.** The presiding officer shall exercise his/her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least ten (10) days prior to the hearing the names of all witness who will testify for them.

8. **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

9. **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the denial or revocation and, therefore dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program; or (ii) find that there is clear and convincing evidence to affirm the committee's findings and denial or revocation. The Commission shall set forth its findings, conclusions, and denial in writing and serve it on the parties within sixty (60) days of the date of the hearing.

10. Publication of Committee/Commission Decisions.

a. Names of applicants for mediator certification or names of mediator training programs that are denied certification or recertification or who have had their certification revoked pursuant to this rule shall not be published in the Commission's newsletter or on its web site and the fact of that denial or revocation shall not be generally publicized.

b. Chief District Court Judges and/or Senior Resident Superior Court Judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any denial or revocation of certification.

11. Appeals. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions denying an application or revoking a certification. An order denying or revoking certification pursuant to this rule shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within thirty (30) days of the date of the Commission's decision.

12. Reinstatement of Certification. A mediator or training program whose certification renewal has been denied or whose certification has been revoked under this rule may be re-certified or reinstated as a certified mediator or mediation training program pursuant to Section B.12.g. below. An application for reinstatement may be tendered at any time the applicant believes that he/she/it is qualified to be reinstated.

a. A petition for reinstatement shall be made in writing, verified by the petitioner, and filed with the Commission's office.

b. The petition for reinstatement shall contain:

i) the name and address of the petitioner;

ii) the qualification upon which the denial or revocation was based; and

iii) a concise statement of facts claimed to justify certification or recertification as a certified mediator or mediator training program.

c. The petition for reinstatement or certification may also contain a request for a hearing on the matter to consider any additional evidence that the petitioner wishes to put forth.

d. The Commission's staff shall refer the petition to the Commission for review.

e. If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within sixty (60) days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ninety (90) days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:

i) appear personally and be heard;

ii) be represented by counsel;

iii) call and examine witnesses;

iv) offer exhibits; and

v) cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the petitioner and witnesses.

g. The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

i) that the petitioner has satisfied the qualifications that led to the denial or revocation; and

ii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

h. If the petitioner is found to have met the qualifications and is entitled to be certified as a mediator or mediator training program, the Commission shall so certify.

i. If a petition for reinstatement is denied, the petitioner may apply again pursuant to this section at any time after the qualifications are met.

j. The Commission shall set forth its decision to certify a mediator or mediator training program or to deny certification in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. mail, return receipt requested, within ~~thirty (30)~~ sixty (60) days of the date of the hearing.

k. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of review shall be filed with the Superior Court in Wake County within thirty (30) days of the date of the Commission's decision.

X. INTERNAL OPERATING PROCEDURES.

A. The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

B. The Commission's procedures and policies may be changed as needed on the basis of experience.

Order Adopting Amendments to the Standards of Professional Conduct for Mediators

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the proceedings conducted pursuant to N.C.G.S. § 7A-38.1, 7A-38.3, 7A-38.4A, 7A-38.3B, and 7A-38.3C.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Standards of Professional Conduct for Mediators are hereby amended to read as in the following pages. These amended Standards shall be effective on the 1st of March, 2010.

Adopted by the Court in conference the 17th day of February, 2010. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Standards of Professional Conduct for Mediators amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Timmons-Goodson, J.
For the Court

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

PREAMBLE

These standards shall apply ~~are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct~~ to all mediators who are certified by the North Carolina Dispute Resolution Commission or who are not certified, but are conducting court-ordered mediations in the context of a program or process that is governed by statutes, as amended from time-to-time, which provide for the Commission to regulate the conduct of mediators participating in the program or process. Provided, however, that if there is a specific statutory provision that conflicts with these standards, then the statute shall control. ~~As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators participating in mediated settlement conferences in the State of North Carolina pursuant to NCGS 7A-38.1, NCGS 7A-38.3, NCGS 7A-38.4A, NCGS 7A-38.3B, NCGS 7A-38.3C or who are certified by the NC Dispute Resolution Commission. These Standards shall not apply in instances where a mediator is participating in a mediation program or process which is governed by other statutes, program rules, and/or Standards of Conduct and there is a conflict between these Standards and the statutes, rules, or Standards governing the other program. In such instance, the mediator's conduct shall be governed by the conflicting statutory provision, rule, or Standard applicable to the program or process in which the mediator is participating.~~

These standards are intended to instill and promote public confidence in the mediation process and to provide minimum standards for mediator conduct. As with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible to the parties, the public and the courts to conduct themselves in a manner that will merit that confidence. (See Rule VII of the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission.)

~~Mediation is a process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.~~

~~The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in~~

~~deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.~~

It is the mediator's role to facilitate communication and understanding among the parties and to assist them in reaching an agreement. The mediator should aid the parties in identifying and discussing issues and in exploring options for settlement. The mediator should not, however, render a decision on the issues in dispute. In mediation, the ultimate decision whether and on what terms to resolve the dispute belongs to the parties and the parties alone.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his/her serving on grounds of lack of impartiality, and after discussion, the party continues to object; or

(2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

A. A mediator shall not disclose, directly or indirectly, to any nonparticipant, any information communicated to the mediator by a participant within the mediation process. A mediator's tendering a copy of an agreement reached in mediation pursuant to a statute that mandates such a tender shall not be considered to be a violation of this paragraph.

B. A mediator shall not disclose, directly or indirectly, to any ~~non~~participant, information communicated to the mediator in confidence by any other participant in the mediation process, unless that participant gives permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator has discretion to report otherwise confidential conduct or statements made in preparation for, during, or as a follow-up to mediation to a participant, non-participant, law enforcement personnel, or other officials or to give an affidavit, or to testify about such conduct or statements in the following circumstances:

(1) A statute requires or permits a mediator to testify, or to give an affidavit, or to tender a copy of any agreement reached in mediation to the official designated by the statute.

(2) Where public safety is an issue:

(i) a party to the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(ii) a party to the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(iii) a party's conduct during the mediation results in direct bodily injury or death to a person.

D. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

E. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during, or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. ~~A mediator shall also inform the parties of the following:~~

~~(1) that mediation is private;~~

~~(2) that mediation is informal;~~

~~(3) that mediation is confidential to the extent provided by law;~~

~~(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;~~

~~(5) the mediator's role; and~~

~~(6) what fees, if any, will be charged by the mediator for his/her services.~~

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nev-

ertheless, a mediator ~~may and~~ shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

~~C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.~~

C. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination. If the mediator then determines that the party cannot meaningfully participate in the mediation, the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstance of the mediation, including subject matter of the dispute, availability of support persons for the party and whether the party is represented by counsel.

~~D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.~~

~~E.~~D In appropriate circumstances, a mediator shall ~~encourage~~ inform the parties ~~to seek~~ of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process. ~~A mediator shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.~~

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for those of the parties concerning any aspect of the mediation.

B. A mediator may raise questions for the participants to consider regarding their perceptions of the dispute as well as the accept-

ability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest for consideration options for settlement in addition to those conceived of by the parties themselves.

C. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

   This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

D. Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, inequality of bargaining power or ability, unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties of the mediator's concern. Consistent with the confidentiality required in Standard III, the mediator may discuss with the parties the source of the concern. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may~~,~~ provide information that the mediator ~~in areas where he/she~~ is qualified by training ~~and~~ or experience to provide, ~~raise questions regarding the~~ only if the mediator can do so consistent with these Standards. ~~information presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice.~~ Mediators may respond to a

party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C. above.

OFFICIAL COMMENT

Although mediators shall not provide legal or other professional advice, mediators may respond to a party's request for an opinion on the merits of the case or the suitability of settlement proposals only in accordance with Section V.C. above, and mediators may provide information that they are qualified by training or experience to provide only if it can be done consistent with these Standards.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer, therapist or other professional and the mediator's professional partners or co-shareholders shall not advise, counsel or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an out growth of the dispute when the mediator or his/her staff has engaged in substantive conversations with any party to the dispute. Substantive conversations are those that go beyond discussion of the general issues in dispute, the identity of parties or participants and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential pursuant to Standard III is a substantive conversation.

A mediator who is a lawyer, therapist or other professional may not mediate the dispute when the mediator or the mediator's professional partners or co-shareholders has advised, counseled or represented any of the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute or an out growth of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained or relationships formed during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral or expectation of referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. ~~When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V. D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality~~. If a mediator believes that the actions of a participant, including those of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

Order Adopting Amendments to the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

WHEREAS, section 7A-38.4A of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in district court judicial districts in order to facilitate the resolution of equitable distribution and other family financial matters within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.4A(o) provides for this Court to implement section 7A-38.4A by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), Rules Implementing Settlement Procedures in Equitable Distribution and other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of March, 2010.

Adopted by the Court in conference the 17th day of February, 2010. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Timmons-Goodson, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

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RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district Court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or

claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) Equitable Distribution Scheduling Conference. At the scheduling conference mandated by G.S. 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2). The Court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case.

Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that all parties consent to the motion.

(4) Content of Order. The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the

reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as nonbinding arbitration or early neutral evaluation prior to the Court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. ~~SELECTION~~ DESIGNATION OF MEDIATOR

A. ~~SELECTION~~ DESIGNATION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may ~~select~~ designate a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such ~~d~~Designation shall: state the name, address and telephone number of the mediator ~~selected~~ designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the ~~selection~~ designation and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to ~~select~~ designate a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified

Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the ~~selection~~ nomination and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the ~~selection~~ designation of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the ~~selection~~ designation of a mediator and have been unable to agree on a mediator. The motion shall be on a form approved by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a ~~Notice of Selection~~ Designation of Mediator with the Court, the Court shall appoint a family financial mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the Court's district.

In making such appointments, the Court shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned. The District Court Judges shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

The Dispute Resolution Commission shall furnish to the District Court Judges of each judicial district a list of those certified family financial mediators requesting appointments in that district. That list shall contain the mediators' names, addresses and telephone numbers and shall be provided both in writing and electronically through the Commission's website. The Commission shall promptly notify the District Court Judges of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

C. **MEDIATOR INFORMATION.** To assist the parties in ~~select-ing~~ designating a mediator, the Dispute Resolution Commission shall assemble, maintain and post on its web site at www.ncdrc.org a list of certified family financial mediators. The list shall supply contact information for mediators and identify Court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information including information about an individual mediator's education, professional experience and mediation training and experience.

D. **DISQUALIFICATION OF MEDIATOR.** Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **WHERE CONFERENCE IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion of the conference which shall be

not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any,

declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another Court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, the parties shall reduce to writing the essential terms of the agreement.

a. If the parties conclude the conference with a written document containing all the terms of their agreement, signed by all parties and formally acknowledged as required by NCGS 50-20(d) for property distribution, the mediator shall report to the Court that the matter has been settled and include in the report the name and signature of the person responsible for filing closing documents with the Court.

b. If the parties are able to reach an agreement at the conference, but are unable to have it written or have it signed and acknowledged as required by NCGS 50-20(d) for property distribution agreements, then the parties shall summarize their understanding in written form and shall use it as a memorandum and

guide to writing such agreements and orders as may be required to give legal effect to its terms. In that event, the mediator shall facilitate the writing of the summary memorandum and shall either:

(i) report to the Court that the matter has been settled and include in the report the name and signature of the person responsible for filing closing documents with the Court; or, in the mediator's discretion,

(ii) declare a recess of the conference. If a recess is declared, the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) If the agreement is reached at the conference, the person(s) responsible for filing closing documents with the Court shall sign the mediator's report to the Court. The parties shall file their consent judgment or voluntary dismissal with the Court within thirty (30) days or before expiration of the mediation deadline, whichever is longer.

(3) If an agreement is reached prior to the conference or finalized while the conference is in recess, the parties shall notify the mediator and file the consent judgment or voluntary dismissal(s) with the Court within thirty (30) days or before the expiration of the mediation deadline, whichever is longer. The mediator shall report to the Court that the matter has been settled and who reported the settlement.

(4) No settlement agreement resolving issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required by NCGS 50-20(d).

C. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

DRC Comments to Rule 4.

DRC Comment to Rule 4.B.

N.C.G.S. § 7A-38.4A(j) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the

parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement on all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the Court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the Court.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES~~S~~ OR PAY MEDIATOR'S FEE

~~If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.~~

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with G.S. 7A-38.4A and the rules promulgated by the Supreme Court to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the Court and monetary sanctions imposed by a judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

~~A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rule 7.F.)~~

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief

sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making finding of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. (See also Rule 7.F. and the Comment to Rule 7.F.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.4A(j);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of Conference.

(a) The mediator shall report to the Court on an A.O.C. form within 10 days of the conference whether or not an agreement was reached by the parties.

The mediator's report shall include the names of those persons attending the mediated settlement conference. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the Court.

(b) If an agreement upon all issues was reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the Court, and the name, address and telephone number of the per-

son(s) designated by the parties to file such consent judgment or dismissal(s) with the Court as required by Rule 4.B.2. If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the Court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the Court and sanctions.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) Informational Brochure. Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.

(7) Evaluation Forms. At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purpose of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of ~~$125~~ $150 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of ~~$125~~ $150, which accrues upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A., the parties may select a certified mediator or nominate a non-certified mediator to conduct their mediated settlement conference. Parties who fail to select a mediator and then desire a substitution after the Court has appointed a mediator, shall obtain Court approval for the substitution. The Court may approve the substitution only upon proof of payment to the Court's original appointee the ~~$125~~ $150 one time, per case administrative fee, and any other amount due and owing for mediation services pursuant to Rule 7.B. and any postponement fee due and owing pursuant to Rule 7.E.

D. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fees shall be paid in equal shares by the named parties. Payment shall be due and payable upon completion of the conference.

E. INABILITY TO PAY. No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B. and C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

F. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all par-

ties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in Court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least fourteen (14) calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of ~~$125~~ $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven (7) calendar days of the scheduled date for mediation, the fee shall be ~~$250~~ $300. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status or the inability to pay his or her full share of the fee to promptly move the Court for a determina-

tion of indigency or the inability to pay a full share, shall constitute contempt of Court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by the Court.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a Court-ordered mediation.

DRC Comment to Rule 7.D.

If a party is found by the Court to have failed to attend a family financial settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.F.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.G.

If the Family Financial Settlement Program is to be successful, it is essential that mediators, both party-selected and Court-appointed, be compensated for their services. FFS Rule 7.G. is intended to give the Court express authority to enforce payment of fees owned both Court-appointed and party-selected mediators. In instances where the mediator is party-selected, the Court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.F (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience. Each applicant for certification under this provision shall have completed the North Carolina Bar Association's two-day basic family law CLE course or equivalent course work in North Carolina law relating to separation and divorce, alimony and post separation support, equitable distribution, child custody and support and domestic violence and in addition, shall:

(1) Be an Advanced Practitioner member of the Association for Conflict Resolution and have earned an undergraduate degree from an accredited four-year college or university, or

(2) Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9, or, if already a certified Superior Court mediator, have completed the 16 hour family mediation supplemental course pursuant to Rule 9, and have additional experience as follows:

(a) as a Licensed Attorney and/or Judge of the General Court of Justice of the State of North Carolina or other state for at least five years; or

(b) as a Licensed Physician certified in psychiatry pursuant to NCGS 90-9 et seq., for at least five years; or

(c) as a person licensed to practice psychology in North Carolina pursuant to NCGS 90-270.1 et seq., for at least five years; or

(d) as a Licensed Marriage and Family Therapist pursuant to NCGS 90-270.45 et seq., for at least five years; or

(e) as a Licensed Clinical Social Worker pursuant to NCGS 90B-7 et seq., for at least five years; or

(f) as a Licensed Professional Counselor pursuant to NCGS 90-329 et seq., for at least five years; or

(g) as a Certified Public Accountant certified in North Carolina for at least five years.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, Court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission. Attorneys licensed to practice law in states other than North

Carolina shall complete this requirement through a course of self-study as directed by the Commission's Executive Secretary.

C. Be a member in good standing of the State Bar of one of the United States. or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience as required by Rule 8.A.

D. Have observed as a neutral observer with the permission of the parties two mediations involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, or who is an Advanced Practitioner Member of the Association for Conflict Resolution or who is an A.O.C. mediator, and, if the applicant is not an attorney licensed to practice law in one of the United States, have observed three additional Court ordered mediations in cases that are pending in State or Federal Courts in North Carolina having rules for mandatory mediation similar to these.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanction(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within thirty (30) days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license, other disciplinary complaints filed with, or actions taken by, a professional licensing or regulatory body; any judi-

cial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Courts ~~in consultation with~~ upon the recommendation of the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. No application for recertification shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under Rules which were promulgated after the date of his/her original certification.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to Rule 8.A.2.(c) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Communication and information gathering skills.

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A.2.(d) shall consist of a minimum of sixteen hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the

Association for Conflict Resolution (ACR) with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the ACR approved training or in some other acceptable course.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) Judicial Settlement Conference (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) Other Settlement Procedures described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) which shall constitute good cause for the Court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) When Proceeding is Conducted. The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) Extensions of Time. A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) Where Procedure is Conducted. Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) No Delay of Other Proceedings. Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) Inadmissibility of Settlement Proceedings. Evidence of statements made and conduct occurring in a

mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or others neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement.

i. If agreement is reached on all issues at the neutral evaluation, judicial settlement conference, or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within thirty (30) days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

ii. If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference, or other settlement procedure or finalized while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the General Statutes, and shall file a con-

sent judgment or voluntary dismissals(s) disposing of all issues with the Court within thirty (30) days, or before the expiration of the deadline for completion of the proceeding, whichever is longer.

iii. When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when.*

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedures or Pay Neutral's Fee. ~~If a~~Any person required to attend a settlement ~~proceeding~~ procedure or pay a neutral's fee in compliance with G.S. 7A-38.4A and the rules promulgated by the Supreme Court to implement that section who, fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the Court and monetary sanctions imposed by the Court. ~~may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.~~ Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses and loss of earnings incurred by persons attending the procedure. A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the

settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the Court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the Court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The admissibility of conduct and statements as provided by G.S. 7A-38.1 (1) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting Results of the Proceeding. The neutral evaluator, settlement judge, or other neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11 and 12 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) Scheduling and Holding the Proceeding. It is the duty of the neutral to schedule the proceeding and conduct it prior to the com-

pletion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) Report of Evaluator to Court. Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the evaluator to have been absent

from the neutral evaluation without permission. The report shall also inform the Court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the evaluation conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the Court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the Court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. SETTLEMENT JUDGE. A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge. Unless specifically approved by the Chief District Court Judge, the District Court Judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. CONDUCTING THE CONFERENCE. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. CONFIDENTIAL NATURE OF THE CONFERENCE. Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. REPORT OF JUDGE. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the Court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the Court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the Court.

E. REPORT OF JUDGE. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the Court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the Court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the Court.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

A. The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial Court

administrator, case management assistant, judicial assistant, and trial Court coordinator.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

C. The term, Family Financial Case, shall refer to any civil action in district Court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under GS 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

Order Adopting Amendments to the Rules Implementing Mediation in Matters Before the Clerk of Superior Court

WHEREAS, section 7A-38.3B of the North Carolina General Statutes establishes a statewide system of mediations to facilitate the resolution of matters pending before Clerks of Superior Court, and

WHEREAS, N.C.G.S. § 7A-38.3B(b) enables this Court to implement section 7A-38.3B by adopting rules and amendments to rules concerning said mediations.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3B(b), the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st of March, 2010.

Adopted by the Court in conference the 17th day of February, 2010. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Timmons-Goodson, J.
For the Court

RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

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RULE 1. INITIATING MEDIATION IN MATTERS BEFORE THE CLERK.

A. PURPOSE OF MANDATORY MEDIATION.

These Rules are promulgated pursuant to G.S. 7A-38.3B to implement mediation in certain cases within the Clerk's jurisdiction. The procedures set out here are designed to focus the parties' attention on settlement and resolution rather than on preparation for contested hearings and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily either prior to or after the filing of a matter with the Clerk.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent a party to a matter before the Clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall also discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy.

C. INITIATING THE MEDIATION BY ORDER OF THE CLERK.

(1) **Order by The Clerk of Superior Court.** The Clerk of Superior Court of any county may, by written order, require all persons and entities identified in Rule 4 to attend a mediation in any matter in which the Clerk has original or exclusive jurisdiction, except those matters under NCGS Chapters 45 and 48 and those matters in which the jurisdiction of the Clerk is ancillary.

(2) **Content of Order.** The order shall be on an AOC form and shall:

(a) require that a mediation be held in the case;

(b) establish deadlines for the selection of a mediator and completion of the mediation;

(c) state the names of the persons and entities who shall attend the mediation;

(d) state clearly that the persons ordered to attend have the right to select their own mediator as provided by Rule 2;

(e) state the rate of compensation of the Court appointed mediator in the event that those persons do not exercise their right to select a mediator pursuant to Rule 2; and

(f) state that those persons shall be required to pay the mediator's fee in shares determined by the Clerk.

(3) **Motion for Court Ordered Mediation.** In matters not ordered to mediation, any party, interested persons, or fiduciary may file a written motion with the Clerk requesting that mediation be ordered. Such motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the N.C.R.C.P. on non-moving parties, interested persons, and fiduciaries designated by the Clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within 5 days after the date of the service of the motion. Thereafter, the Clerk shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) **Informational Brochure.** The Clerk shall serve a brochure prepared by the Dispute Resolution Commis-

sion explaining the mediation process and the operations of the Commission along with the order required by Rule 1.C.(1) and 1.C.(3).

(5) Motion to Dispense With Mediation. A named party, interested person, or fiduciary may move the Clerk of Superior Court to dispense with a mediation ordered by the Clerk. Such motion shall state the reasons the relief is sought and shall be served on all persons ordered to attend and the mediator. For good cause shown, the Clerk may grant the motion.

(6) Dismissal of Petition For the Adjudication of Incompetence. The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after mediation is ordered.

RULE 2. ~~SELECTION~~ DESIGNATION OF MEDIATOR

A. ~~SELECTION~~ DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may ~~select~~ designate a mediator certified by the Dispute Resolution Commission by agreement within a period of time as set out in the Clerk's order. However, the parties may only ~~select~~ designate mediators certified for estate and guardianship matters pursuant to these Rules for estate or guardianship matters.

The petitioner shall file with the Clerk a ~~Notice of Selection of~~ Designation of Mediator ~~by Agreement~~ within the period set out in the Clerk's order; however, any party may file the ~~notice~~ Designation. The party filing the Designation shall serve a copy on all parties and the mediator designated to conduct the mediation. Such ~~notice~~ Designation shall state the name, address and telephone number of the mediator ~~selected~~ designated; state the rate of compensation of the mediator; state that the mediator and persons ordered to attend have agreed upon the ~~selection~~ designation and rate of compensation; and state under what Rules the mediator is certified. The notice shall be on an AOC form.

B. APPOINTMENT OF MEDIATOR BY THE CLERK. In the event a ~~notice of selection~~ Designation of Mediator is not filed with the Clerk within the time for filing stated in the Clerk's order, the Clerk shall appoint a mediator certified by the Dispute Resolution Commission. The Clerk shall appoint only

those mediators certified pursuant to these Rules for estate and guardianship matters to those matters. The Clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the Clerk.

Except for good cause, mediators shall be appointed by the Clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the Clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether they are an attorney.

C. MEDIATOR INFORMATION DIRECTORY. The Dispute Resolution Commission shall maintain for the consideration of the Clerks of Superior Court and those ~~selecting~~ designating mediators for matters within the Clerk's jurisdiction a directory of certified mediators who request appointments in those matters and a directory of those mediators who are certified pursuant to these Rules. Said directory shall be maintained on the Commission's web site.

D. DISQUALIFICATION OF MEDIATOR. Any person ordered to attend a mediation pursuant to these Rules may move the Clerk of Superior Court of the county in which the matter is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be ~~selected~~ designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. CONDUCTING THE MEDIATION

A. WHERE MEDIATION IS TO BE HELD. The mediation may be held in any location to which all the persons ordered to attend and the mediator agree. In the absence of such an agreement, the mediation shall be held in the Courthouse or other public or community building in the county where the matter is pending. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the time and location of the mediation to all persons ordered to attend.

B. WHEN MEDIATION IS TO BE HELD. The Clerk's order issued pursuant to Rule 1.C.(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation pursuant to Rule 6.B.(5) and shall conduct the mediation before that date unless the date is extended by the Clerk.

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. The mediator or any person ordered to attend the mediation may request the Clerk of Superior Court to extend the deadline for completion of the mediation. Such request shall state the reasons the extension is sought and shall be delivered to all persons ordered to attend and the mediator. The Clerk may grant the request without hearing by setting a new deadline for the completion of the mediation, which date may be set at any time prior to the hearing. Notice of the Clerk's decision shall be delivered to all persons ordered to attend and the mediator by the person who sought the extension and shall be filed with the Court.

D. RECESSES. The mediator may recess the mediation at any time and may set times for reconvening which are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation.

E. THE MEDIATION IS NOT TO DELAY OTHER PROCEEDINGS. The mediation shall not be cause for the delay of other proceedings in the matter, including the completion of discovery, the filing or hearing of motions, or the hearing of the matter, except by order of the Clerk of Superior Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATIONS

A. ATTENDANCE.

(1) Persons ordered by the Clerk to attend a mediation conducted pursuant to these Rules shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.B. or an impasse has been declared. Any such person may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference:

(a) By agreement of all persons ordered to attend and the mediator; or

(b) By order of the Clerk of Superior Court, upon motion of a person ordered to attend and notice of the motion to all other persons ordered to attend and the mediator.

(2) Any person ordered to attend a mediation conducted pursuant to these Rules that is not a natural person or a

governmental entity shall be represented at the mediation by an officer, employee or agent who is not such person's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the matter.

(3) Any person ordered to attend a mediation conducted pursuant to these Rules that is a governmental entity shall be represented at the mediation by an employee or agent who is not such entity's outside counsel and who has authority to decide on behalf of such entity whether and on what terms to settle the matter; provided, however, if under law proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation pursuant to these Rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in the mediation at the discretion of the mediator.

(6) Persons ordered to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for mediation sessions before the completion deadline and shall keep the mediator informed as to such problems as may arise before an anticipated session is scheduled by the mediator.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. The parties shall designate a person who will file a consent judgment or one or more voluntary dismissals with the Clerk and that person shall sign the mediator's report. If agreement is reached in such matters prior to the mediation or during a recess, the parties shall inform the mediator and the Clerk that the matter has been settled and, within 10 calendar days of

the agreement being reached, file a consent judgment or voluntary dismissal(s).

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at mediation, the persons ordered to attend shall reduce its terms to writing and sign it along with their counsel, if any. Such agreements are not binding upon the Clerk but they may be offered into evidence at the hearing of the matter and may be considered by the Clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible pursuant to NCGS 7A-38. 3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent place in the document:

"This agreement is not binding on the Clerk but will be presented to the Clerk as an aid to reaching a just resolution of the matter."

C. PAYMENT OF MEDIATOR'S FEE. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATION OR PAY MEDIATOR'S FEE. ~~If a~~ Any person ordered to attend a mediation pursuant to these Rules who fails without good cause to attend ~~without good cause,~~ or to pay a portion of the mediator's fee in compliance with G.S. 7A-38.3B and the rules promulgated by the Supreme Court to implement that section, shall be subject to contempt powers of the Clerk and the Clerk may impose ~~upon the person any appropriate~~ monetary sanction~~s. including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.~~ Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.

A person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all persons ordered to attend. The Clerk may initiate sanction proceedings upon ~~its~~ his/her own motion by the entry of a show cause order. If the Clerk imposes sanctions, the Clerk shall do so, after notice and a hearing, in a writ-

ten order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38.1(g).

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of the Mediation.** The mediator shall at all times be in control of the mediation and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court that shall contain a provision prohibiting mediators from prolonging a mediation unduly.

(2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The costs of the mediation and the circumstances in which participants will not be taxed with the costs of mediation;

(c) That the mediation is not a trial, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(f) The inadmissibility of conduct and statements as provided by G.S. 7A-38.3B;

(g) The duties and responsibilities of the mediator and the participants; and

(h) That any agreement reached will be reached by mutual consent and reported to the Clerk as provided by rule.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of Mediation.**

(a) The mediator shall report to the Court on an AOC form within 5 days of completion of the mediation whether or not the mediation resulted in a settlement or impasse. If settlement occurred prior to or during a recess of a mediation, the mediator shall file the report of settlement within 5 days of learning of the settlement and, in addition to the other information required, report who informed the mediator of the settlement.

(b) The mediator's report shall identify those persons attending the mediation, the time spent in and fees charged for mediation, and the names and contact information for those persons designated by the parties to file such consent judgment or dismissal(s) with the Clerk as required by Rule 4.B. Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Dispute Resolution Commission or the Administrative Office of the Courts. Mediators shall not be required to send agreements reached in mediation to the Clerk, except in Estate and Guardianship matters and other matters which may be resolved only by order of the Clerk.

(c) Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the Court and sanctions.

(5) **Scheduling and holding the mediation.** It is the duty of the mediator to schedule the mediation and conduct it prior to the mediation completion deadline set out in

the Clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. Deadlines for completion of the mediation shall be strictly observed by the mediator unless said time limit is changed by a written order of the Clerk of Superior Court.

(6) **Distribution of mediator evaluation form.** At the mediation, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per person with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY ORDER OF THE CLERK. When the mediator is appointed by the Clerk, the parties shall compensate the mediator for mediation services at the rate of ~~$125~~ $150 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of ~~$125~~ $150 that is due upon appointment.

C. PAYMENT OF COMPENSATION. In matters within the Clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement**,** the mediator's fee shall be paid in equal shares by the parties unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the Clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares as determined by the Clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or a guardianship or against a fiduciary or interested person upon the entry of a written order making specific written findings of fact justifying the taxing of costs.

D. CHANGE OF APPOINTED MEDIATOR. Parties who fail to select a certified mediator within the time set out in the

Clerk's order and then desire a substitution after the Clerk has appointed a certified mediator, shall obtain the approval of the Clerk for the substitution. The Clerk may approve the substitution only upon proof of payment to the Clerk's original appointee the ~~$125~~ $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B., and any postponement fee due and owing pursuant to Rule 7.F., unless the Clerk determines that payment of the fees would be unnecessary or inequitable.

E. INDIGENT CASES. No person ordered to attend a mediation found to be indigent by the Clerk for the purposes of these rules shall be required to pay a share of the mediator's fee. Any person ordered by the Clerk of Superior Court to attend may move the Clerk for a finding of indigence and to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation or, if the parties do not settle their matter, subsequent to its conclusion. In ruling upon such motions, the Clerk shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the matter and whether a decision was rendered in the movant's favor. The Clerk shall enter an order granting or denying the person's request. Any mediator conducting a mediation pursuant to these rules shall waive the payment of fees from persons found by the Court to be indigent.

F. POSTPONEMENTS.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with mediation once the mediator has scheduled a date for a session of the mediation. After mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation session may be postponed by the mediator for good cause beyond the control of the movant only after notice by the movant to all persons of the reasons for the postponement and a finding of good cause by the mediator. A postponement fee shall not be charged in such circumstance.

(3) Without a finding of good cause, a mediator may also postpone a scheduled mediation session with the consent of all parties. A fee of ~~$125~~ $150 shall be paid to the mediator if the postponement is allowed or if the

request is within two (2) business days of the scheduled date the fee shall be ~~$250~~ $300. The person responsible for it shall pay the postponement fee. If it is not possible to determine who is responsible, the Clerk shall assess responsibility. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B. A mediator shall not charge a postponement fee when the mediator is responsible for the postponement.

(4) If all persons ordered to attend select the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Clerk of Superior Court for a finding of indigency, shall constitute contempt of Court and may result, following notice and a hearing, in the imposition of any and all lawful sanctions by the Superior Court pursuant to G.S. 5A.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Clerk of Court mediators.

A. For appointment by the Clerk as mediator in all cases within the Clerk's jurisdiction except guardianship and estate matters, a person shall be certified by the Dispute Resolution Commission for either the superior or district Court mediation programs;

B. For appointment by the Clerk as mediator in guardianship and estate matters within the Clerk's jurisdiction, a person shall be certified as a mediator by the Dispute Resolution Commission for either the superior or district Court programs and complete a course, at least 10 hours in length, approved by the Dispute Resolution Commission pursuant to Rule 9 concerning estate and guardianship matters within the Clerk's jurisdiction;

C. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

D. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission; and

E. Agree to accept, as payment in full of a party's share of the mediator's fee, the fee ordered by the Clerk pursuant to Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any county in which he or she has served as a mediator or the Standards of Conduct. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking certification pursuant to these Rules for estate and guardianship matters within the jurisdiction of the Clerk of Superior Court shall consist of a minimum of 10 hours instruction. The curriculum of such programs shall include:

(1) Factors distinguishing estate and guardianship mediation from other types of mediations;

(2) The aging process and societal attitudes toward the elderly, mentally ill, and disabled;

(3) Ensuring full participation of Respondents and identifying interested persons and nonparty participants;

(4) Medical concerns of the elderly, mentally ill and disabled;

(5) Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;

(6) Family dynamics relative to the elderly, mentally ill, and disabled and to the families of deceased persons;

(7) Assessing physical and mental capacity;

(8) Availability of community resources for the elderly, mentally ill and disabled;

(9) Principles of guardianship law and procedure;

(10) Principles of estate law and procedure;

(11) Statute, Rules, and forms applicable to mediation conducted under these Rules; and

(12) Ethical and conduct issues in mediations conducted under these Rules.

The Commission may adopt Guidelines for trainers amplifying the above topics and set out minimum time frames and materials that trainers shall allocate to each topic. Any such Guidelines shall be available at the Commission's office and posted on its web site.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.B. Certification need not be given in advance of attendance. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. PROCEDURAL DETAILS. The Clerk of Superior Court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with these Rules.

RULE 11. DEFINITIONS.

A. The term, Clerk of Superior Court, as used throughout these rules, shall refer both to said Clerk or Assistant Clerk.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 12. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Certification of Paralegals, Section .0200 Rules Governing Continuing Paralegal Education

.0202 Accreditation Standards

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(a) . . .

(c) A certified paralegal may receive credit for continuing education activities ~~where~~ in which live instruction ~~is used~~ or ~~mechanically or electronically~~ recorded ~~or reproduced~~ material is used~~,~~ . Recorded material includes ~~including~~ videotaped or satellite transmitted programs, and programs on CD-ROM, DVD, or other similar electronic or digital replay formats. A minimum of three certified paralegals must register to attend the presentation of a replayed prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(d) A certified paralegal may receive credit for participation in a course ~~on CD-ROM or~~ online. ~~A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer.~~ An online course is an educational seminar available on a provider's website reached via the internet. To be accredited, a computer-based ~~CLE~~ CPE course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

(e) . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2009.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Certification of Paralegals, Section .0100 The Plan for Certification of Paralegals

.0105 Appointment of Members; When; Removal

(a) Appointment . . .

(b) Procedure for Nomination of Candidates for Paralegal Members.

(1) Composition of Nominating Committee. At least 60 days prior to a meeting of the Council at which one or more paralegal members of the board are subject to Appointment for a full three year term, the board shall appoint a nominating Committee comprised of certified paralegals as follows:

(i) A representative selected by the North Carolina Paralegal Association;

(ii) A representative selected by the North Carolina Bar Association ~~Legal Assistants~~ Paralegal Division

(iii) A representative selected by the North Carolina ~~Academy of Trial Lawyers~~ Advocates for Justice Legal Assistants Division;

(iv) Three representatives from three local or regional paralegal organizations to be slected by the board; and

(v) An independent paralegal (not employed by a law firm, government entity, or legal department) to be selected by the board.

.0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education. The applicant must have earned one of the following:

(A) an associate's, bachelor's, or master's degree from a qualified paralegal studies program; ~~or~~

(B) an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body reconginized by the United States Department of Education and a certificate from a qualified paralegal studies program; or

(C) a juris doctorate degree from a law school accredited by the American Bar Association

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2009.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State

Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL ETHICS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal ethics, as particularly set forth in 27 N.C.A.C. 1D, Section .0100, be amended by adding the following new rule:

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .0100, Procedures for Ruling on Questions of Legal Ethics

.0105 Procedures for Meetings of the Ethics Committee

(a) Consent Agenda. The agenda for a meeting of the committee shall include a consent agenda consisting of those proposed formal ethics opinions, proposed ethics decisions, and ethics advisories (collectively "proposed opinions") published, circulated, or mailed during the preceding quarter that the chairperson, vice-chair, and staff counsel agree do not warrant discussion by the full committee.

(b) Vote on Consent Agenda. The consent agenda shall be considered at the beginning of the meeting of the committee following the consideration of administrative matters. Any committee member may make a non-debatable motion to remove an item from the consent agenda for separate discussion and vote. The motion must receive an affirmative vote of one-third of all of the duly appointed members of the committee in order for an item to be removed from the consent agenda. The items remaining upon the consent agenda shall be considered together upon a non-debatable motion to approve the remaining items on the consent agenda. The motion must pass by a vote of not less than a majority of the duly appointed members of the committee pursuant to Rule .0104(f) of this subchapter. All items on a consent agenda so approved shall be transmitted to the council with a recommendation to adopt.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments

to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ATTORNEY CLIENT ASSISTANCE PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Attorney Client Assistance Program, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Organization of the North Carolina State Bar

Section .0700, Standing Committees of the Council

.0701 Standing Committees and Boards

(a) Standing Committees.

. . .

(1) Executive Committee.

. . .

(3) Grievance Committee. It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilities set forth in Section .0100 of Subchapter 1B of these rules and to make recommendations to the council for such amendments to that section as the committee deems necessary or appropriate. The Grievance Committee shall sit in ~~panels~~ subcommittees as assigned by the president. Each ~~panel~~ subcommittee shall have at least ten members. Two members of each ~~panel~~ subcommittee shall be nonlawyers, one member may be a lawyer who is not a member of the council, and the remaining members of each ~~panel~~ subcommittee shall be councilors of the North Carolina State Bar. A quorum of a ~~panel~~ subcommittee shall be five members serving at a particular time. One subcommittee shall oversee the Attorney Client Assistance Program. It shall be the duty of the Attorney Client Assistance subcommittee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal

representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as the council or the president may designate. Each ~~panel~~ subcommittee shall exercise the powers and discharge the duties of the Grievance Committee with respect to the grievances, fee disputes, and other matters referred to it by the chairperson of the Grievance Committee. Each ~~panel~~ subcommittee member shall be furnished a brief description of all matters referred to other ~~panels~~ subcommittees (and such other available information as he or she may request) and be given a reasonable opportunity to provide comments to such other ~~panels~~ subcommittees. Each ~~panel's~~ subcommittee's decision respecting the grievances, fee disputes, and other matters assigned to it will be deemed final action of the Grievance Committee, unless the full committee at its next meeting, by a majority vote of those present, elects to review a ~~panel~~ subcommittee decision and upon further consideration decides to reverse or modify that decision. There will be no other right of appeal to the committee as a whole or to another ~~panel~~ subcommittee. The president shall designate a vice-chairperson to preside over, and oversee the functions of each ~~panel~~ subcommittee. The vice-chairpersons shall have such other powers as may be delegated to them by the chairperson of the Grievance Committee. The Grievance Committee shall perform such other duties and consider such other matters as the council or the president may designate.

(4) Authorized Practice Committee.

. . .

~~(7) Attorney Client Assistance Committee. It shall be the duty of the Attorney Client Assistance Committee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as the council or the president may designate.~~

~~(8)~~ (7) Legal Assistance for Military Personnel (LAMP) Committee.

. . .

[Renumber remaining paragraphs]

NORTH CAROLINA
WAKE COUNTY

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Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

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This the 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning membership, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D Rules of the Standing Committees of the North Carolina State Bar, Section .0900 Procedures for Administrative Committee

.0904 Compliance After Suspension for Failure to Fulfill Obligations of Membership

(a) Reinstatement Within 30 Days of Service of Suspension Order. A member who receives an Order of Suspension for failure to comply with an obligation of membership may preclude the order from becoming effective by submitting a written request and satisfactory showing within 30 days after service of the suspension order that the member has complied with or fulfilled the obligations of membership set forth in the order, and has paid the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay ~~a $125~~ the reinstatement fee.

(b) Reinstatement More than 30 Days After Service of Suspension Order.

. . .

(c) Contents of Reinstatement Petition

. . .

(d) Procedure for Review of Reinstatement Petition

. . .

(e) Reinstatement by Secretary of the State Bar. At any time after the effective date of a suspension order and prior to the next meeting of the Administrative Committee, a suspended member may petition for reinstatement pursuant to paragraphs (b) and (c) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the

suspended member has complied with or fulfilled the obligations of membership set forth in the order; there are no issues relating to the suspended member's character or fitness; and the suspended member has paid the costs of the suspension and reinstatement procedure including the costs of service and the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f).

NORTH CAROLINA
WAKE COUNTY

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Hudson, J.
For the Court

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The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning obligations of membership, as particularly set forth in 27 N.C.A.C. 1A, Section .0200, and 27 N.C.A.C. 1D, Section .0900 be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Organization of the North Carolina State Bar

Section .0200 Membership—Annual Membership Fees

~~.0204 Certificate of Insurance Coverage~~

~~(a) Before July 1 of each year, each active member shall submit a certificate to the secretary of the North Carolina State Bar on a form provided by the secretary stating whether the member is engaged in the private practice of law and, if so, whether the member is covered by a policy of professional liability insurance issued by an insurer legally permitted to provide coverage in North Carolina. The certificate may be submitted in electronic form or in an original document. If, after having most recently submitted a certificate of insurance coverage asserting that the member is covered by a policy of professional liability insurance coverage, a member for any reason ceases to be insured, the member shall immediately advise the North Carolina State Bar of the changed circumstances in writing.~~

~~(b) Any active member who fails to submit the certificate of insurance coverage required above in a timely fashion may be suspended from active membership in the North Carolina State Bar in accordance with the procedures set forth in Rule .0903 of subchapter D.~~

~~(c) Any member failing to submit a certificate of insurance coverage in a timely fashion shall pay a late fee of $30 to defray the administrative cost of enforcing compliance with this rule; provided, however, that no late fee associated with such failure shall be charged if the member is also liable for a late fee in regard to failure to pay the annual membership fee or Client Security Fund assessment for the same year in a timely fashion.~~

~~(d) Notwithstanding the foregoing:~~

~~(1) A person licensed to practice law in North Carolina for the first time by examination shall not be required to file a certificate of insurance coverage during the year in which the person is admitted;~~

~~(2) A person licensed to practice law in North Carolina serving in the armed forces, in a legal or nonlegal capacity, shall not be required to file a certificate of insurance coverage for any year in which the member is on active duty in military service;~~

~~(3) A person licensed to practice law in North Carolina who files a petition for inactive status on or before December 31 of a given year shall not be required to file a certificate of insurance coverage for the following year if the petition is granted. A petition shall be deemed timely if it is postmarked on or before December 31.~~

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .0900, Procedures for Administrative Committee

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

. . .

(1) The following are examples of obligations of membership that will be enforced by administrative suspension. This list is illustrative and not exclusive:

(A) . . .

~~(D) Filing of the certificate of insurance coverage as required in Rule .0204 of subchapter 1A of these rules;~~

(D)~~(E)~~ . . .

[Reletter remaining subparagraphs]

(b) . . .

NORTH CAROLINA
WAKE COUNTY

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Sarah Parker, Chief Justice

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Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2900 Certification Standards for the Elder Law Specialty

.2905, Standards for Certification as a Specialist in Elder Law

Each applicant for certification as a specialist in elder law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in elder law:

(a) Licensure and Practice.

. . .

(c) Substantial Involvement Experience Requirements

(1) . . .

(3) Experience Categories:

(A) . . .

(F) Special Needs Counseling, including the planning, drafting, and administration of special/supplemental needs trusts, housing, employment, education, and related issues.

[Reletter subparagraphs (F) to (I)]

~~(J) income, Estate, and Gift Tax Advice, including consequences of plans made and advice offered.~~

~~(K) public Benefits Advice, including planning for and assisting in obtaining Medicare, social security, and food stamps.~~

[Reletter remaining subparagraphs]

NORTH CAROLINA
WAKE COUNTY

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Sarah Parker, Chief Justice

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Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1800, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1800 Hearing and Appeal Rules of the Board of Legal Specialization

.1801 Incomplete Applications; Reconsideration of Applications, ~~Failure of Written Examinations~~ Rejected by Specialty Committee; and ~~Appeals~~ Reconsideration Procedure

(a) ~~Applications Incomplete and/or Applicants Not in Compliance with Standards for Certification~~

~~(1)~~ Incomplete Applications. The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. The applicant will be notified in writing ~~of the incompleteness of his or her application~~ if an application is incomplete. The applicant must submit ~~the~~ the information necessary to ~~completed~~ complete the application within 21 days of the date of ~~mailing of~~ the notice. If the applicant fails to provide the required information ~~for the application~~ during the requisite time period, the executive director will ~~refer the application to the specialty committee for review.~~ return the application to the applicant together with a refund of the application fee less a fifty dollar ($50.00) administrative fee. The decision of the executive director to reject an application as incomplete is final unless the applicant shows good cause for an extension of time to provide the required information.

(b) ~~(2) Applicant Not in Compliance~~ Denial of Application by Specialty Committee. The executive director shall refer all complete applications to the specialty committee for review ~~any application which appears complete on its face, but which does not satisfactorily demonstrate~~ for compliance with the standards for certification in the specialty area for which certification is sought.

~~(3) Specialty Committee Action. The specialty committee shall review the incomplete applications and the applications not in compliance with the standards for certification.~~ After reviewing the applications, the specialty committee shall recommend to the board the acceptance or rejection of the applications. The specialty committee shall notify the board of its recommendations in writing and the reason for any negative recommendation must be specified. ~~The specialty committee must complete the above process within 14 days of receiving the applications.~~

(1~~4~~) Notification to Applicant of the Specialty Committee's Action. The executive director shall promptly notify the applicant in writing of the specialty committee's recommendation of rejection of the application and the board's intention to act in accordance with the committee's recommendation. The notification must specify the reason for the recommendation of rejection of the application~~. In addition, the notification~~ and shall inform the applicant of ~~his or her~~ the right to petition pursuant to paragraph (c) of this rule ~~the board~~ for ~~review of the application or request a hearing before the board.~~ reconsideration of the recommendation of the specialty committee.

(c~~5~~) Petition for ~~Review by the Board~~ Reconsideration. Within ~~21~~ 14 days of the ~~mailing~~ date of the notice from the executive director that an application has been recommended for rejection by ~~the~~ a specialty committee, the applicant may petition the board for ~~review~~ reconsideration. The petition ~~may be informal (e.g., by letter), but~~ shall be in writing and ~~should~~ shall include the following information: ~~date on which notice of the recommendation of rejection was received~~ the applicant's election between a reconsideration hearing on the written record or in-person; and the reasons for which the applicant believes the specialty committee's recommendation ~~of rejection~~ should not be accepted.

(d~~6~~) ~~Review of Petition by the Board~~ Reconsideration Procedure. Upon receipt of a petition filed pursuant to paragraph (c) of this rule, a~~A~~ three-member panel of the board, to be appointed by the chairperson of the board, shall ~~review and~~ reconsider an application pursuant to the following procedures: ~~take action by a majority of the panel upon the petition :and notify the applicant of the board's decision. The notification shall inform the applicant of his or her right to appeal the decision to the North Carolina State Bar Council (the council) if the board's action is unfavorable to the applicant.~~

~~(7) Request for Hearing. In lieu of a petition for review, an applicant may request a hearing before the board. The applicant shall notify the board through its executive director in writing of such request for a~~

~~hearing within 21 days of the mailing of the notice regarding the specialty committee's recommendation of rejection of the application. The applicant shall set forth the grounds for the hearing before the board. In such a request, the applicant shall list the names of prospective witnesses and identify documentation and other evidence to be introduced at the hearing before the board. The applicant shall be notified of the board's decision, and if the board's decision is unfavorable to the applicant, the applicant will be notified of his or her right to appeal the board's decision to the council.~~

~~(8) Hearing Procedures~~

(1) ~~(A)~~ Notice. ~~Time and Place of Hearing~~ The chairperson of the ~~board~~ panel shall ~~fix~~ set the time and place of the hearing to reconsider the applicant's application as soon as practicable after the applicant's request for ~~hearing~~ reconsideration is received. The applicant shall be notified of the ~~hearing~~ date~~. Such notice shall be given to the applicant~~ at least 10 days prior to the time ~~fixed~~ set for the hearing.

~~(B) Quorum — A panel of three members of the board, as appointed by the chairperson, shall be necessary to conduct the hearing with the majority of those in attendance necessary to decide upon the matter.~~

(2) Reconsideration on the Written Record. ~~(C) Representation by Counsel and Witnesses~~ If the ~~The~~ applicant ~~may~~ elects to have the matter decided on the written record, the applicant will not be present at the hearing and no witnesses will appear before the panel except the executive director of the specialization program, or a staff designee, who shall provide administrative support to the panel. At least 10 days prior to the hearing, the applicant shall provide the panel with copies of any documents that the applicant would like to be considered by the panel.

(3) Reconsideration In-Person. If the applicant elects to be present at the hearing, the applicant may be represented by counsel or represent himself or herself at such hearing. The applicant may offer witnesses and documents and may ~~cross-examine~~ question any witness. At least 10 days prior to the hearing, the applicant shall provide the panel with copies of any documents that the applicant wants considered by the panel and, if the reconsideration is in-person, with the names of prospective witnesses. At least ten days prior to the hearing, the applicant shall be provided with copies of any documents that the executive director will submit to the panel, except confidential peer review forms or information, and with the names of prospective wit-

nesses. Additional documents may be considered at the discretion of the panel.

~~(D) Written Briefs — The applicant is urged to submit a written brief (in quadruplicate) 10 days prior to the hearing to the executive director for distribution to the panel in support of his or her position. However, written briefs are not required.~~

~~(E) Depositions — Should the applicant or executive director desire to take a deposition prior to the board hearing of any voluntary witness who cannot attend the board hearing, such intention to take, and request to take, the deposition of a witness may be applied for in writing to the chairperson of the board together with a written consent signed by the potential witness that he or she will give a deposition for one party and a statement to the effect that the witness cannot attend the hearing along with the reason for such unavailability. The party seeking to take the deposition of a witness shall state in detail as to what the witness is expected to testify. If the chairperson is satisfied that such deposition from a possible witness will be relevant to the issue in question before the board, then the chairperson will authorize said taking of the deposition. The chairperson will also designate the executive director or a member of the specialty committee to be present at the deposition. The deposition may be taken orally or by video. Any refusal of the taking of the deposition by the chairperson shall be reviewed by the board at the request of the applicant. The cost connected with taking the deposition shall be borne by the party requesting the deposition.~~

~~(F) Continuances — Motions for continuance of the hearing should be made to the chairperson of the board and such motions will be granted or denied by the chairperson of the board.~~

(4~~G~~) Burden of Proof. ~~— Preponderance of the Evidence —~~ The applicant must make a clear and convincing showing that the application satisfies the standards for certification in the applicable specialty. ~~The panel of the board shall apply the preponderance of the evidence rule in determining whether or not to accept the application for certification The burden of proof is upon the applicant.~~

(5) ~~(H)~~ Conduct of ~~Hearings: Rights of Parties —~~ Reconsideration Hearing.

(A~~i~~) Preservation of Record. ~~Hearings~~ The hearing shall be recorded unless the applicant agrees in writing that the hearing shall not be recorded or, if the applicant wants an official transcript, the applicant ~~reported by a certified court reporter. The applicant shall pay~~ pays the costs associated

with obtaining a court reporter and makes all arrangements for the court reporter's services and for the preparation of the transcript. ~~the court reporter's services for the hearing. The applicant shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The applicant shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the board before whom the hearing is conducted. The board in its discretion may refund to the applicant all or some portion of the necessary costs incurred as a result of the hearing.~~

~~(ii) The applicant may retain counsel at all stages of the investigation and at all meetinghearings. The applicant and his or her counsel shall have the right to attend all hearings.~~

(B~~iii~~) Procedural Rules. ~~Oral evidence at hearings shall be taken only on oath or affirmation. The applicant shall have the right to testify unless he or she specifically waives such right or fails to appear at the hearing. If the applicant does not testify on his or her behalf, the applicant may be called and examined by the panel of the board, the executive director, and any member of the specialty committee. The applicant's failure to appear at the hearing ordered by the board, after receipt of written notice, shall constitute a waiver of the applicant's right to a hearing before the board.~~

~~(iv) At any hearing, the panel of the board, the executive director, any member of the appropriate specialty committee, and the applicant shall have these rights:~~

~~(a) to call and examine witnesses;~~

~~(b) to offer exhibits;~~

~~(c) to cross-examine witnesses on any matter relevant to the issues even thought that matter was not covered in the direct examination; and~~

~~(d) to impeach any witness regardless of who first called such witness to testify and to rebut any evidence.~~

~~(v) Hearings~~ The reconsideration hearing shall ~~need~~ not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted and may be considered by the panel according to its probative value if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of any common

law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(C) Decision of the Panel. ~~(vi) Any hearing may be recessed or adjourned from time to time at the discretion of the panel.~~

The decision of the panel shall be by a majority of the members of the panel and shall be binding upon the board. Written notification of the decision shall be sent to the applicant. If the board's decision is unfavorable, the notification shall set forth the grounds for the decision and shall notify the applicant of the right to appeal the decision to the North Carolina State Bar Council (the council) pursuant to Rule .1804 of this subchapter

(e ~~9~~) Failure of Applicant to Petition the Board for ~~Review or Request a Hearing Before the Board~~ Reconsideration Within the Time Allowed by These Rules. If the applicant does not petition the board for ~~review or request a hearing before the board regarding~~ reconsideration of the specialty committee's recommendation of rejection of the application within the time allowed by these rules, the board shall act on the matter at its next board meeting.

~~(b) Failure of a Written Examination Prepared and Administered by a Certification Committee~~

~~(1) Review of Examination. Within 30 days of the mailing of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant will be given the applicant's scores for each question on the examination. The applicant shall not remove the examination from the board's office.~~

~~(2) Petition for Grade Review. If, after reviewing the examination, the applicant feels an error or errors were made in the grading, the applicant may file with the executive director a petition for grade review. The petition must be filed within 45 days of the mailing of the notice of failure and should set out in detail the examination questions and answers which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim.~~

~~(3) Review Procedure. The applicant's examination and petition shall be submitted to a panel consisting of a minimum of at least three members of the specialty committee (the review committee of the specialty committee). All information will be submitted in blind form, the staff being responsible for deleting any identifying information on the examination or the petition. The review committee of the~~

~~specialty committee shall review the petition of the applicant and determine whether the grade of the examination should remain the same or be changed. The review committee shall make a written report to the board setting forth its recommendation relative to the grade on the applicant's examination and an explanation of its recommendation.~~

~~(4) Decision of the Board. The board shall consider the petition and the report and recommendation of the review committee and shall certify the applicant if it determines that the applicant has satisfied all of the standards for certification.~~

~~(c) Failure of a Written Examination Prepared and Administered by a Testing Organization on Behalf of the Board.~~

~~The applicant shall comply with the review and appeal procedures of any testing organization retained by the board to prepare and administer the certification examination.~~

.1802 Denial, Revocation, or Suspension of Continued Certification as a Specialist

(a) . . .

(c) Notification of Board Action. The executive director shall notify the lawyer of the board's action to grant or deny continued certification as a specialist upon application for continued certification pursuant to Rule .1721(a) of this subchapter, or to revoke or suspend continued certification pursuant to Rule .1723(a) or (b) of this subchapter. If the board's action is unfavorable, the notification shall set forth the grounds for the action and shall notify ~~The~~ the lawyer ~~will also be notified of his or her~~ of the right to a hearing if ~~a hearing is~~ allowed by these rules.

(d) Request for Hearing. Within ~~21~~ 14 days of the ~~mailing~~ date of the ~~of~~ notice from the executive director of the board that the lawyer has been denied continued certification pursuant to Rule .1721(a) of this subchapter or that certification has been revoked or suspended pursuant to Rule .1723(b) of this subchapter, the lawyer must request a hearing before the board in writing. There is no right to a hearing upon automatic revocation pursuant to Rule .1723(a) of this subchapter.

(e) Hearing Procedure. Except as set forth in Rule .1802(f) below, the procedures ~~rules~~ set forth in Rule .1801(~~a~~d)~~(8)~~ of this subchapter shall be followed when a lawyer requests a hearing regarding the denial of continued certification pursuant to Rule .1721(a) of this subchapter or the revocation or suspension of certification under Rule .1723(b) of this subchapter.

(f) Burden of Proof: Preponderance of the Evidence. A three-member panel of the board shall apply the preponderance of the evidence rule in determining whether the lawyer's certification should be continued, revoked, or suspended. ~~In cases of denial of an application for continued certification under Rule .1721(a), the~~ The burden of proof is upon the lawyer. ~~In cases of revocation or suspension under Rule .1723(b), the burden of proof is upon the board.~~

(g) Notification of Board's Decision. After the hearing, the board shall timely notify the lawyer of its decision regarding continued certification as a specialist. If the board's decision is unfavorable, the notification shall set forth the grounds for the decision and the lawyer's appeal rights under Rule .1804 of this subchapter.

.1803 ~~RESERVED~~ Reconsideration of Failed Examination

(a) Review of Examination. Within 30 days of the date of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant will be given the applicant's scores for each question on the examination. The applicant shall not copy, transcribe, or remove the examination from the board's office (or any other location established by the board for the review of the examination) and shall be subject to such other restrictions as the board deems necessary to protect the content of the examination.

(b) Petition for Grade Review. If, after reviewing the examination, the applicant feels an error or errors were made in the grading, the applicant may file with the executive director a petition for grade review. The petition must be filed within 45 days of the date of the notice of failure and should set out in detail the examination questions and answers which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim.

(c) Review Procedure. The applicant's examination and petition shall be submitted to a panel consisting of three members of the specialty committee (the grade review panel). All identifying information shall be redacted from the examination and petition prior to submission to the grade review panel. The grade review panel shall review the petition of the applicant and determine whether the grade of the examination should be changed. The grade review panel shall make a written report to the board setting forth its recommendation relative to the grade on the applicant's examination and an explanation of its recommendation.

(d) Decision of the Board. The board shall consider the petition and the report of the grade review panel and shall certify the applicant if it determines by majority vote that the applicant has satisfied all of the standards for certification.

(e) Failure of Examination Prepared and Administered by a Testing Organization on Behalf of the Board. Notwithstanding paragraphs (a) – (d) of this rule, if the board is utilizing a qualified organization to prepare and administer the certification examination for a specialty pursuant to Rule .1716(10) of this subchapter, an applicant for such specialty shall only be entitled to the review and appeal procedures of the organization.

.1804 Appeal to the Council

(a) Appealable Decisions. An appeal may be taken to the council from a decision of the board which denies an applicant certification (i.e., when an applicant's application has been rejected because ~~it is incomplete and/or~~ it is not in compliance with the standards for certification or when an applicant fails the written specialty examination), denies an applicant continued certification as a specialist, or suspends or revokes a specialist's certification. The rejection of an application because it is incomplete shall not be appealable. (Persons who appeal the board's decision are referred to herein as appellants.)

(b) Filing the Appeal. An appeal from a decision of the board as described in paragraph ~~Rule .1804~~ (a) may be taken by filing with the executive director of the North Carolina State Bar (the State Bar) a written notice of appeal not later than 21 days after the ~~mailing~~ date of the notice of the board's decision to the applicant who is denied certification or continued certification or to a lawyer whose certification is suspended or revoked.

(c) Time and Place of Hearing. The appeal will be scheduled for hearing at a time set by the council. The executive director of the State Bar shall notify the appellant and the board of the time and place of the hearing before the council.

(d) Record on Appeal to the Council.

(1) The record on appeal to the council shall consist of all ~~the evidence~~ documents and oral statements by witnesses offered at ~~the hearing before the board~~ any reconsideration hearing. The executive director of the board shall assemble the record and certify it to the executive director of the State Bar and notify the appellant of such action.

(2) If a court reporter was present at a reconsideration hearing at the election of the appellant, ~~T~~the appellant shall make

prompt arrangement with the court reporter to obtain and have filed with the executive director of the State Bar a complete transcript of the hearing. Failure of the appellant to make such arrangements and pay the costs shall be grounds for dismissal of the appeal.

(e) Parties Appearing Before the Council. The appellant may request to appear, with or without counsel, before the council and make oral argument. The board may appear on its own behalf or by counsel.

(f) Appeal Procedure. The council shall consider the appeal *en banc*. The council shall consider only the record on appeal, briefs, and oral arguments. The decision of the council shall be by a majority of those members voting. All council members present at the ~~meeting~~ hearing may participate in the discussion and deliberation of the appeal. Members of the board who also serve on the council are recused from voting on the appeal.

(g) Scope of Review. Review by the council shall be limited to whether the appellant was provided with procedural rights and whether the board, or the reconsideration panel where applicable, applied the correct procedural standards and State Bar rules in rendering its decision. The appellant shall have the burden of making a clear and convincing showing of arbitrary, capricious, or fraudulent denial of procedural rights or misapplication of the procedural standards or State Bar rules.

(h) Notice of the Council's Decision. The appellant shall receive written notice of the council's decision.

.1806 Additional Rules Pertaining to Hearing and Appeals

(a) Notices. Every notice required by these rules shall be deemed sufficient if ~~mailed~~ sent to the applicant at the address listed on the applicant's last application to the board or the address in the official membership records of the State Bar.

(b) Expenses Related to Hearings and Appeals. In its discretion, the board may direct that the necessary expenses incurred in any investigation, processing, and hearing of any matter to the board or appeal to the council be paid by the board or appeal to the council be paid by the board. However, all expenses related to travel to any hearing or appeal for the applicant, his or her attorney, and witnesses called by the applicant shall be ~~home~~ paid by the applicant ~~and shall not be paid by the board~~.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PROCEDURES FOR FEE DISPUTE RESOLUTION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the procedures for fee dispute resolution, as particularly set forth in 27 N.C.A.C. 1D, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D Rules of the Standing Committees of the North Carolina State Bar, Section .0700 Procedures for Fee Dispute Resolution

.0701 Purpose and Implementation

The purpose of the Fee Dispute Resolution Program ~~shall be to assist lawyers and clients to~~ is to help clients and lawyers settle disputes over fees. In doing so, the Fee Dispute Resolution Program shall assist the lawyers and clients in determining the appropriate fee for legal services rendered. The State Bar shall implement the Fee Dispute Resolution Program under the auspices of ~~the Attorney Client Assistance Committee (the committee)~~ the Grievance Committee (the committee) as part of the Attorney Client Assistance Program (ACAP)~~,~~. It ~~which~~ ~~shall~~ will be offered to clients and their lawyers at no cost. A person other than the client who pays the lawyer's legal fee or expenses may file a fee dispute petition. The person who paid the fees or expenses will not be permitted to participate in the fee dispute resolution process.

.0702 Jurisdiction

~~The committee shall have jurisdiction over all disagreements concerning the fees and expenses charged or incurred for legal services provided by an attorney licensed to practice law in North Carolina arising out of a client-lawyer relationship. Jurisdiction shall also extend to any person, other than the client, who pays the fee of such an attorney.~~

~~The committee shall not have jurisdiction over the following:~~

~~1. disputes concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;~~

~~2. disputes involving services that are the subject of a pending grievance complaint alleging the violation of the Revised Rules of Professional Conduct;~~

~~3. fee disputes that are or were the subject of litigation;~~

~~4. fee disputes between lawyers and service providers, such as court reporters and expert witnesses;~~

~~5. fee disputes between lawyers and individuals with whom the lawyer had no client-lawyer relationship, except in those case where the fee has been paid by a person other than the client; and~~

~~6. disputes concerning fees charged for ancillary services provided by the lawyer not involving the practice of law.~~

~~The committee shall encourage mediated settlement of fee disputes falling within its jurisdiction pursuant to Rule .0706 of this subchapter.~~

(a) The committee has jurisdiction over a disagreement arising out of a client-lawyer relationship concerning the fees and expenses charged or incurred for legal services provided by a lawyer licensed to practice law in North Carolina.

(b) The committee does not have jurisdiction over the following:

(1) a dispute concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;

(2) a dispute involving services that are the subject of a pending grievance complaint alleging violation of the Rules of Professional Conduct;

(3) a dispute over fees or expenses that are or were the subject of litigation unless

(i) a court directs the matter to the State Bar for mediation, or

(ii) both parties to the dispute agree to dismiss the litigation without prejudice and pursue mediation;

(4) a dispute between a lawyer and a service provider, such as a court reporter or an expert witness;

(5) a dispute between a lawyer and a person or entity with whom the lawyer had no client-lawyer relationship, except that the committee has jurisdiction over a dispute between a lawyer and a per-

son other than the lawyer's client who paid fees or expenses to the lawyer for the benefit of the client; and

(6) a dispute concerning a fee charged for services provided by the lawyer that do not constitute the practice of law.

The committee will encourage settlement of fee disputes falling within its jurisdiction pursuant to Rule .0708 of this subchapter.

.0703 Coordinator of Fee Dispute Resolution

The secretary-treasurer of the North Carolina State Bar ~~shall~~ will designate a member of the staff to serve as coordinator of the Fee Dispute Resolution Program. The coordinator ~~shall~~ will develop forms, maintain records, and provide statistics on the Fee Dispute Resolution Program. The coordinator ~~shall~~ will also develop an annual report to the council. The coordinator may also serve as a facilitator.

.0704 ~~Reserved~~ Confidentiality

The existence of and content of any petition for resolution of a disputed fee and of any lawyer's response to a petition for resolution of a disputed fee are confidential.

.0705 Selection of ~~Mediators~~ Facilitators

~~The State Bar will select a pool of qualified mediators. Selected mediators shall be certified by the North Carolina Dispute Resolution Commission or have a minimum of three (3) years experience as a mediator.~~

The secretary-treasurer of the North Carolina State Bar will designate members of the State Bar staff to serve as facilitators.

.0706 ~~Processing Requests for Fee Dispute Resolution~~ Powers and Duties of the Vice-Chairperson

~~(a) Requests for fee dispute resolution shall be timely submitted in writing to the coordinator of fee dispute resolution addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The attorney must allow at least 30 days after the client shall have received written notice of the fee dispute resolution program before filing a lawsuit. An attorney may file a lawsuit prior to expiration of the required 30 day notice period or after the petition is filed by the client if such is necessary to preserve a claim. However, the attorney must not take any further steps to pursue the litigation until he/she complies with the provision of the fee dispute resolution rules. Clients may request fee dispute resolution at any time prior to the filing of a lawsuit. No filing fee shall be required. The request should state with~~

~~clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement, the matter has not been adjudicated, and the matter is not presently the subject of litigation. All requests for resolution of a disputed fee must be filed before the statute of limitation has run or within three years of the ending of the client/attorney relationship, whichever comes last.~~

~~(b) The coordinator of fee dispute resolution or his/her designee shall investigate the request to determine its suitability for fee dispute resolution. If it is determined that the matter is not suitable for fee dispute resolution, the coordinator shall prepare a brief written report setting forth the facts and a recommendation for dismissal. Grounds for dismissal include, but are not limited to, the following:~~

~~(1) the request is frivolous or moot;~~

~~(2) the absence of jurisdiction; or~~

~~(3) the facts as stated support the conclusion that the fee was earned and is not excessive.~~

~~The report shall be forwarded to the chairperson of the committee. If the chairperson of the Attorney Client Assistance Committee of the State Bar concurs with the recommendation, the matter shall be dismissed and the parties notified.~~

~~(c) If the chairperson disagrees with the recommendation for dismissal, an attempt to resolve the dispute will be made pursuant to Rule .0707 below or the chair may recommend review by the full committee.~~

The vice-chairperson of the Grievance Subcommittee overseeing ACAP, or his/her designee, who must be a councilor, will:

(a) approve or disapprove any recommendation that a petition for resolution of a disputed fee be dismissed;

(b) call and preside over meetings of the committee; and

(c) refer to the Grievance Committee all cases in which it appears to the vice chairperson that (i) a lawyer might have charged, contracted to receive or received an illegal or clearly excessive fee or a clearly excessive amount for expenses or (ii) a lawyer might have failed to refund an unearned portion of a fee in violation of Rule 1.5 the Rules of Professional Conduct, or (iii) a lawyer might have violated one or more Rules of Professional Conduct other than or in addition to Rule 1.5.

.0707 ~~Mediation Proceedings~~ Processing Requests for Fee Dispute Resolution

~~(a) The coordinator shall assign the case to a mediator who shall conduct a mediated settlement conference. The mediator shall be responsible for reserving a place and making arrangements for the conference at a time and place convenient to all parties.~~

~~(b) The attorney against whom a request for fee dispute resolution is filed must attend the mediated settlement conference in person and may not send another representative of his or her law firm. If a party fails to attend a mediated settlement conference without good cause, the mediator may either reschedule the conference or recommend dismissal.~~

~~(c) The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator may communicate privately with any participant prior to and during the conference. Any private communication with a participant shall be disclosed to all other participants at the beginning of the conference. The mediator shall define and describe the following at the beginning of the conference:~~

~~(1) the process of mediation;~~

~~(2) the differences between mediation and other forms of conflict resolution;~~

~~(3) that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;~~

~~(4) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;~~

~~(5) Whether and under what conditions communications with the mediator will be held in confidence during the conference;~~

~~(6) The duties and responsibilities of the mediator and the participants; and~~

~~(7) That any agreement reached will be reached by mutual consent, reduced to writing and signed by all parties.~~

~~The mediator has a duty to be impartial and advise all participants of any circumstance bearing on possible bias, prejudice, or partiality. It is the duty of the mediator timely to determine and declare that an impasse exists and that the conference should end.~~

(a) Requests for resolution of a disputed fee must be submitted in writing to the coordinator of the Fee Dispute Resolution Program addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. A lawyer is required by Rule 1.5 of the Rules of Professional Conduct to notify in writing a client with whom the lawyer has a dispute over a fee of the existence of the Fee Dispute Resolution Program and to wait at least 30 days after the client receives such notification before filing a lawsuit to collect a disputed fee. A lawyer may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client only if such filing is necessary to preserve a claim. If a lawyer does file a lawsuit pursuant to the preceding sentence, the lawyer must not take steps to pursue the litigation until the fee dispute resolution process is completed. A client may request fee dispute resolution at any time before either party files a lawsuit. The petition for resolution of a disputed fee must contain:

(1) the names and addresses of the parties to the dispute;

(2) a clear and brief statement of the facts giving rise to the dispute;

(3) a statement that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement;

(4) a statement that the subject matter of the dispute has not been adjudicated and is not presently the subject of litigation.

(b) All petitions for resolution of a disputed fee must be filed (i) before the expiration of the statute of limitation applicable in the General Court of Justice for collection of the funds in issue or (ii) within three years of the termination of the client-lawyer relationship, whichever is later.

(c) The coordinator of the Fee Dispute Resolution Program or a facilitator will investigate the petition to determine its suitability for fee dispute resolution. If it is determined that the dispute is not suitable for fee dispute resolution, the coordinator and/or the facilitator will prepare a dismissal letter setting forth the facts and a recommendation for dismissal. The coordinator and/or the facilitator will forward the dismissal letter to the vice-chairperson. If the vice chairperson agrees with the recommendation, the petition will be dismissed. The coordinator and/or facilitator will notify the parties in writing of the dismissal. Grounds for dismissal include, but are not limited to, the following:

(1) the petition is frivolous or moot;

(2) the committee lacks jurisdiction over one or more of the parties or over the subject matter of the dispute;

(3) the fee has been earned; or

(4) the expenses were properly incurred.

(d) If the vice-chairperson disagrees with the recommendation for dismissal, the coordinator will schedule a settlement conference.

.0708 ~~Finalizing the Agreement~~ Settlement Conference Proceedings

~~If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel, if any, prior to leaving the conference.~~

(a) The coordinator will assign the case to a facilitator.

(b) The facilitator will send a Letter of Notice to the lawyer by certified mail. The Letter of Notice will include a copy of the petition and any documents the petitioner included with the petition.

(c) Within 15 days after the Letter of Notice is served upon the lawyer, the lawyer must provide a written response to the petition. The facilitator is authorized to grant requests for extensions of time to respond. The lawyer's response must be a full and fair disclosure of all the facts and circumstances pertaining to the dispute. The facilitator will provide a copy of the lawyer's response to the client unless the lawyer objects in writing.

(d) The facilitator will conduct an investigation.

(e) The facilitator will conduct a telephone settlement conference between the parties. The facilitator is authorized to carry out the settlement conference by separate telephone calls with each of the parties or by conference calls, depending upon which method the facilitator believes has the greater likelihood of success.

(f) The facilitator will define and describe the following to the parties:

(1) the procedure that will be followed;

(2) the differences between a facilitated settlement conference and other forms of conflict resolution;

(3) that the settlement conference is not a trial;

(4) that the facilitator is not a judge;

(5) that participation in the settlement conference does not deprive the parties of any right they would otherwise have to pursue resolution of the dispute through the court system if they do not reach a settlement;

(6) the circumstances under which the facilitator may communicate privately with any of the parties or with any other person;

(7) whether and under what conditions private communications with the facilitator will be shared with the other party or held in confidence during the conference; and

(8) that any agreement reached will be reached by mutual consent.

(g) The facilitator has a duty to be impartial and to advise all participants of any circumstance that might cause either party to conclude that the facilitator has a possible bias, prejudice, or partiality.

(h) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.

(i) Upon completion of the settlement conference, the facilitator will prepare a disposition letter to be sent to the parties detailing:

(1) that the settlement conference resulted in a settlement and the terms of settlement; or

(2) that the settlement conference resulted in an impasse.

.0709 Record Keeping

The coordinator of fee dispute resolution ~~shall~~ will keep a record of each request for fee dispute resolution. The record must contain the following information:

(1) the client's name;

(2) ~~date of the request;~~ the date the petition was received;

(3) the lawyer's name;

(4) the district in which the lawyer resides or maintains a place of business;

(5) ~~how the dispute was resolved (dismissed for non-merit, mediated agreement, arbitration, etc.);~~ what action was taken on the petition and, if applicable, how the dispute was resolved; and

(6) ~~the time necessary to resolve the dispute.~~ the date the file was closed.

.0710 District Bar Fee Dispute Resolution

~~For the purpose of resolving disputes involving attorneys residing or doing business in the district, any district bar may adopt a fee dispute resolution program, subject to the approval of the council, which shall operate in lieu of the program described herein. Although such programs may be tailored to accommodate local conditions, they must be offered without cost, comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter, and be consistent with the provisions of Rules .0706 and .0707.~~ Subject to the approval of the council, any judicial district bar may adopt a fee dispute resolution program for the purpose of resolving disputes involving lawyers residing or doing business in the district. The State Bar does not offer arbitration as a form of dispute resolution. The judicial district bar may offer arbitration to resolve a disputed fee. A judicial district bar fee dispute resolution program shall have jurisdiction over disputes that would otherwise be addressed by the State Bar's ACAP department. Such programs may be tailored to accommodate local conditions but they must be offered without cost and must comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter.

.0711 District Bar Settlement Conference Proceedings

(a) The chairperson of the judicial district bar fee dispute committee will assign the case to a facilitator who will conduct a settlement conference. The facilitator is responsible for arranging the settlement conference at a time and place convenient to all parties.

(b) The lawyer who is named in the petition must attend the settlement conference in person and may not send a representative in his or her place. If a party fails to attend a settlement conference without good cause, the facilitator may either reschedule the settlement conference or recommend dismissal of the petition.

(c) The facilitator must at all times be in control of the settlement conference and the procedures to be followed. The facilitator may communicate privately with any participant prior to and during the settlement conference. Any private communication with a participant will be disclosed to all other participants at the beginning of the settlement conference or, if the private communication occurs during the settlement conference, immediately after the private communication occurs. The facilitator will explain the following at the beginning of the settlement conference:

(1) the procedure that will be followed;

(2) the differences between a facilitated settlement conference and other forms of conflict resolution;

(3) that the settlement conference is not a trial;

(4) that the facilitator is not a judge;

(5) that participation in the settlement conference does not deprive the parties of any right they would otherwise have to pursue resolution of the dispute through the court system if they do not reach a settlement;

(6) the circumstances under which the facilitator may meet and communicate privately with any of the parties or with any other person;

(7) whether and under what conditions communications with the facilitator will be held in confidence during the settlement conference;

(8) that any agreement reached will be reached by mutual consent; and

(9) that, if the parties reach an agreement, that agreement will be reduced to writing and signed by the parties and their counsel, if any, before the parties leave the settlement conference.

(d) The facilitator has a duty to be impartial and to advise all participants of any circumstance that might cause either party to conclude that the facilitator has a possible bias, prejudice, or partiality.

(e) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council

of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 11th day of March, 2010.

Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1518 Continuing Legal Education Program

(a) Annual Requirement. Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

~~(b)~~ Of the 12 hours:

(1) at least 2 hours shall be devoted to the areas of professional responsibility or professionalism or any combination thereof; and

(2) effective January 1, 2002, at least once every three calendar years, each member shall complete an hour of continuing legal education instruction on substance abuse and debilitating mental conditions as defined in Rule .1602 ~~(c)~~ (a). This hour shall be credited to the annual 12-hour requirement ~~set forth in Rule .1518 (a) above~~ but shall be in addition to the annual professional responsibility/professionalism requirement ~~of Rule .1518 (b)(1) above~~. To satisfy ~~this~~ the requirement, a member must attend an accredited program on substance abuse and debilitating mental conditions that is at least one hour long.

~~(c)~~ (b) Carryover. Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by ~~Rule .1518(b)~~ paragraph (a)(1) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year

any approved CLE hours earned after that member's graduation from law school.

(c) Professionalism Requirement for New Members. Except as provided in paragraph (d)(1), each active member admitted to the North Carolina State Bar after January 1, 2011, must complete the North Carolina State Bar New Admittee Professionalism Program (New Admittee Program) in the year the member is first required to meet the continuing legal education requirements as set forth in Rule .1526(b) and (c) of this subchapter. CLE credit for the New Admittee Program shall be applied to the annual mandatory continuing legal education requirements set forth in paragraph (a) above.

(1) Content and Accreditation. The State Bar New Admittee Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish the required content on or before January 1 of each year. To be approved as a New Admittee Program CLE activity, a sponsor must satisfy the annual content requirements. At least 45 days prior to the presentation of a New Admittee Program, a sponsor must submit a detailed description of the program to the board for approval. Accredited sponsors shall not be exempt from the prior submission requirement and may not advertise a New Admittee Program until approved by the board. New Admittee Programs shall be specially designated by the board and no course that is not so designated shall satisfy the New Admittee Program requirement for new members.

(2) Evaluation. To receive CLE credit for attending a New Admittee Program, the participant must complete a written evaluation of the program which shall contain questions specified by the State Bar. Sponsors shall collate the information on the completed evaluation forms and shall send a report showing the collated information, together with the original forms, to the State Bar when reporting attendance pursuant to Rule .1601(e)(1) of this subchapter.

(3) Format and Partial Credit. The New Admittee Program shall be presented in two six-hour blocks (with appropriate breaks) over two days. The six-hour blocks do not have to be attended on consecutive days or taken from the same provider; however, no partial credit shall be awarded for attending less than an entire six-hour block unless a special circumstances exemption is

granted by the board. No part of the program may be taken online (via the Internet).

(d) Exemptions from Professionalism Requirement for New Members.

(1) Licensed in Another Jurisdiction. A member who is licensed by a United States jurisdiction other than North Carolina for five or more years prior to admission to practice in North Carolina is exempt from the New Admittee Program requirement and must notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter.

(2) Inactive Status. A newly admitted member who is transferred to inactive status in the year of admission to the State Bar is exempt from the New Admittee Program requirement but, upon the entry of an order transferring the member back to active status, must complete the New Admittee Program in the year that the member is subject to the requirements set forth in paragraph (a) above unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

(3) Exemptions Under Rule .1517. A newly admitted active member who qualifies for an exemption under Rule .1517 of this subchapter shall be exempt from the New Admittee Program requirement during the period of the Rule .1517 exemption. The member shall notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter. The member must complete the New Admittee Program in the year the member no longer qualifies for the Rule .1517 exemption or the next calendar year unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

.1519 Accreditation Standards

The board shall approve continuing legal education activities which meet the following standards and provisions.

(a) . . .

(d) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience. Credit shall not be given for any continuing legal education activity taught or presented by a disbarred lawyer except a course on professional responsibility (including a course or program on the effects of substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities) taught by a disbarred lawyer whose disbarment date is at

least five years (60 months) prior to the date of the activity. The advertising for the activity shall disclose the lawyer's disbarment.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2010.

L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11th day of March, 2010.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 11th day of March, 2010.

Hudson, J.
For the Court

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WORD AND PHRASE INDEX

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TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

Amount of bond—underlying matter remanded—appeal moot—An appeal from the amount of a supersedeas bond was dismissed as moot where the underlying matter was remanded for further proceedings. To avoid repetition, the Court of Appeals also decided that the trial court was without jurisdiction to reduce the bond because that amount was the subject of the appeal; furthermore, plaintiff's motion to stay should have been dismissed because the relief sought had already been granted by the Court of Appeals. **Ross v. Ross, 365.**

Appealability—arbitration—substantial right—An order denying arbitration of two issues affected a substantial right and was immediately appealable. **In re W.W. Jarvis & Sons, 799.**

Appealability—dismissal of NCPWDA claims—remaining claims—possibility of inconsistent verdicts—An interlocutory order dismissing plaintiff's claim under the North Carolina Persons With Disabilities Act was immediately appealable where the trial court denied defendants' motion to dismiss plaintiff's remaining claims and there was a risk that two trials and possibly inconsistent verdicts could result. **Taylor v. Hospice of Henderson Cty., Inc., 179.**

Appealability—failure to sign initial notice of appeal—untimely amended notice of appeal—writ of certiorari—The motions filed on 26 June 2008 by juvenile's guardian ad litem for the juvenile and on 14 July 2008 by petitioner seeking to dismiss respondents' appeals for failure to abide by N.C. R. App. P. 3A are denied because: (1) although neither respondent signed the initial notice of appeal and the amended notices of appeal were filed outside the thirty-day deadline imposed by N.C.G.S. § 7B-1001(b), the Court of Appeals exercised its discretion under N.C. R. App. P. 21(a)(1) to allow respondent parents' petitions for writ of certiorari to permit consideration of their appeal on the merits so as to avoid penalizing respondents for their attorneys' errors; and (2) DSS timely filed its notice of appeal on 31 March 2008 prior to the 5 April 2008 deadline imposed by N.C.G.S. § 7B-1001(b), and thus DSS's petition for writ of certiorari was unnecessary and dismissed. **In re I.T.P-L., 453.**

Appealability—failure to timely file notice of appeal—Plaintiffs' appeal from the trial court's order entered 7 September 2007 should have been dismissed for failure to timely file a notice of appeal under N.C. R. App. P. 3(c) because motions entered under Rule 60 do not toll the time for filing a notice of appeal, and plaintiffs appealed from the 7 September 2007 order more than thirty days after the order was filed. **Wallis v. Cambron, 190.**

Appealability—failure to timely file notice of appeal—failure to file petition seeking certiorari—Plaintiffs' appeal from the 22 May 2006 dismissal of their claims against the municipal defendants under 42 U.S.C. § 1983 for violation of their constitutional rights was not properly before the Court of Appeals because plaintiffs failed to timely file notice of appeal and have not filed a petition seeking certiorari. **Strickland v. Hedrick, 1.**

Appealability—grant of summary judgment—interlocutory order—Rule 54 certification—Plaintiffs' appeal from the trial court's grant of summary judgment in favor of defendant ordering plaintiffs' claims to be dismissed but stating it was not a final judgment regarding defendant's counterclaims was an appeal from an interlocutory order entitled to immediate appellate review because: (1) the trial court certified the appeal for immediate review under N.C.G.S. § 1A-1, Rule 54; and (2)

APPEAL AND ERROR—Continued

late Procedure, and costs of this appeal are taxed against plaintiff's attorney in accordance with N.C. R. App. P. 25 and 34, because: (1) the records on appeal filed with the Court of Appeals are at variance with the proposed records on appeal served upon defendants in violation of N.C. R. App. P. 11; (2) assuming arguendo that plaintiff's response to the companion appeal on 25 August 2008 was as to both appeals, it was not timely filed as to this appeal since there was no extension of time granted for this appeal; and (3) even if the final record on appeal presented to the Court of Appeals was consistent with the proposed record on appeal which was presented to opposing counsel, the lack of assignments of error alone would be fatal to plaintiff's appeal under N.C. R. App. P. 10(a). **Hackos v. Smith, 557.**

Gross violations of appellate rules—violations of Revised Rules of Professional Conduct—Although the Court of Appeals denied defendants' motion to dismiss this appeal based upon gross violations of the North Carolina Rules of Appellate Procedure, the Court of Appeals elected to tax double the costs of this appeal against plaintiff's attorney under N.C. R. App. P. 25 and 34, because: (1) even though the omission of assignments of error from the proposed record on appeal was not fatal since the notice of appeal from an order granting summary judgment was sufficient, the record on appeal filed with the Court of Appeals was at variance with what was presented to defendants as the proposed record on appeal; and (2) a record on appeal presented to the Court of Appeals that differed materially from what was proposed to opposing counsel was a false statement of material fact or law in violation of Rules 3.3(a)(1), 3.4(a), and 8.4(c) of the Revised Rules of Professional Conduct. **Hackos v. Smith, 532.**

Motion for access to victim's juvenile records—failure to include in record for appellate review—Although defendant contends the trial court erred in a voluntary manslaughter case by denying his motion and request for access to the victim's juvenile records, this assignment of error is dismissed because defendant failed to include the juvenile records in his record on appeal, making it impossible for the Court of Appeals to examine whether the evidence was favorable or material. **State v. Moore, 754.**

Preservation of issues—crime scene diagram—prior testimony without objection—A defendant in a murder prosecution waived any objection to a crime scene diagram by not objecting to preceding testimony about the essential content of the exhibit. **State v. Mitchell, 705.**

Preservation of issues—failure to appeal from order—failure to allege in complaint—failure to proffer evidence—Plaintiffs' assignments of error that the trial court erred by granting summary judgment for defendant landlord on claims for conversion and unfair trade practices were not before the appellate court where plaintiffs did not appeal from the order dismissing the conversion claim, and plaintiffs neither alleged nor produced evidence of an unfair trade practice. **Strickland v. Hedrick, 1.**

Preservation of issues—failure to argue—Although defendant assigned error to the trial court's denial of his motions to set aside the verdict of guilty on the charge of assault with a deadly weapon with intent to kill inflicting serious injury and for a new trial, this assignment of error is deemed abandoned under N.C. R. App. P. 28(b)(6) because defendant failed to argue this assignment of error in his brief. **State v. Liggons, 734.**

APPEAL AND ERROR—Continued

Preservation of issues—failure to argue—failure to cite legal authority—The assignments of error that respondent father failed to argue or support with legal authority are deemed abandoned under N.C. R. App. P. 28(b)(6). **In re I.T.P-L., 453.**

Preservation of issues—failure to offer proof—irrelevant transcript page numbers—Although defendant contends the trial court erred in a breaking and entering, larceny, and felonious possession of stolen goods case by allowing statements to be made at trial regarding other property found in a camper that was believed to be stolen, defendant abandoned this assignment of error under N.C. R. App. P. 28(b)(6) because: (1) defendant failed to point to any specific trial testimony in his brief; and (2) the transcript page numbers he cited in the assignment of error were not relevant to his argument. **State v. Patterson, 608.**

Preservation of issues—failure to raise issue at trial—Although defendant contends it is entitled to a credit for short-term disability benefits paid to plaintiff in the event the Commission's award of temporary total disability benefits is upheld in a workers' compensation case, this argument is dismissed because defendant failed to raise it below as required by N.C. R. App. P. 10(b)(1). **Carey v. Norment Sec. Indus., 97.**

Preservation of issues—failure to rule on motion—Plaintiff did not preserve for appellate review the question of the trial court's duty to rule on his motion to amend his complaint before ruling on defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). Plaintiff argued at trial that his complaint did not need amendment to withstand the motion to dismiss and neither sought a ruling on his motion to amend nor argued that the trial court was required to hear his motion to amend before the motion to dismiss. **Ventriglia v. Deese, 344.**

Preservation of issues—issues first raised on appeal—not addressed—Issues in a workers' compensation case raised for the first time on appeal were not addressed. **Floyd v. Executive Personnel Grp., 322.**

Preservation of issues—no objection at trial—The issue of whether sufficient evidence existed for the trial court to find that plaintiff was the biological father of the minor child was not preserved for appellate review where the trial court was not presented with a timely request, objection, or motion. **Helms v. Landry, 787.**

Preservation of issues—photographs—prior testimony without objection—A murder defendant waived his objection to photographs depicting the scene where the weapon was recovered by not objecting to prior testimony about the circumstances surrounding the recovery of the gun. **State v. Mitchell, 705.**

Preservation of issues—post-judgment interest not ordered—not raised below—The issue of whether there was constitutional error in failing to order DOT to pay post-judgment interest was not preserved for appeal where it was not raised at trial. **Department of Transp. v. Blevins, 637.**

Rules violations—not substantial—citation to record and authority—Appellate Rules violations were not sufficient to warrant dismissal of the appeal or the imposition of sanctions beyond the refusal to review an assignment of error involving prejudgment interest; consideration of that assignment of error was not necessary to prevent manifest injustice to a party. Violations that were not jurisdictional did not warrant sanctions; those violations involved citing to the transcript

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress statements to detective—failure to file a written motion prior to trial—The trial court did not err in a robbery with a dangerous weapon case by denying defendant's motion to suppress his statement to a detective because defendant failed to file a written motion to suppress his statement prior to trial, the State notified defendant more than 20 working days prior to trial of its intention to use evidence of a statement made to the detective, and defendant had a full and reasonable opportunity to make a motion to suppress before trial. **State v. Ford, 468.**

Right to counsel—ambiguous invocation of right—The trial court erred by concluding that defendant's statement "I'm probably gonna have to have a lawyer" constituted an unambiguous invocation of his right to counsel requiring suppression of his recorded statement. **State v. Dix, 151.**

Right to counsel—resolution of ambiguity in favor of defendant not required—The trial court was not required to resolve any ambiguity in defendant's statement about the need for counsel in defendant's favor because: (1) the detective did not dissuade defendant from exercising his right to have an attorney, and the detective's attempt to clarify what defendant wanted to do could not be equated to badgering, intimidating, threatening, or even ignoring defendant; (2) this case involved an ambiguous reference to an attorney that a reasonable officer under the circumstances would have only understood might be an invocation of the right to counsel, and thus, neither the complete cessation of questioning nor the limitation of questioning to clarifying questions was required; and (3) the detective was not required to ask clarifying questions. **State v. Dix, 151.**

CONSPIRACY

Civil conspiracy—motion to dismiss—probable cause—failure to allege agreement—improper legal standard—The trial court did not err by granting the motion by defendant purchaser of plaintiffs' sign business for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of malicious prosecution and civil conspiracy claims. **Strickland v. Hedrick, 1.**

Malicious prosecution—motion for summary judgment—Municipal defendants were entitled to summary judgment on the claim of conspiracy because even if the claim is construed as alleging conspiracy to commit malicious prosecution, it is subject to dismissal since defendants were entitled to summary judgment on the claim of malicious prosecution. **Strickland v. Hedrick, 1.**

Malicious prosecution—motion for summary judgment—sufficiency of evidence—The trial court did not err by granting defendant landlord's summary judgment motion on plaintiffs' claims of conspiracy and malicious prosecution where plaintiffs produced no evidence that the landlord asked the police to arrest plaintiffs, gave a sworn statement in the case, spoke with the district attorney, filed an official complaint, or otherwise acted to initiate charges against plaintiffs. **Strickland v. Hedrick, 1.**

Police officers—motion for summary judgment—good faith—governmental immunity—failure to offer evidence of corruption or malice—vicarious liability—The trial court did not err by granting the motion by defendant police officers, city and police chief for summary judgment on plaintiffs' claims of conspiracy and malicious prosecution because both defendant police officers produced evi-

CONSPIRACY—Continued

dence establishing their good faith and that they are entitled to the affirmative defense of governmental immunity; plaintiffs failed to rebut either the presumption that these law enforcement officers acted in good faith or the evidence that defendants presented; and plaintiffs failed to offer any evidence of corruption or malice by the police chief or the city, and the claims against these defendants are based on vicarious liability for the torts of the other officers. **Strickland v. Hedrick, 1.**

CONSTITUTIONAL LAW

Double jeopardy—possession and receipt of child pornography—Defendant's double jeopardy rights were not violated where the court proceeded on charges of second-degree exploitation of a minor for receiving computer files containing child pornography and third-degree exploitation of a minor for possessing those computer files. **State v. Anderson, 292.**

Effective assistance of counsel—alleged failure to present legally sound argument—violation of *ex post facto* guarantees—Defendant did not receive ineffective assistance of counsel in a taking indecent liberties with a minor case based on his trial counsel's alleged failure to present a legally sound argument that the satellite-based monitoring (SBM) program violated the *ex post facto* guarantees of the United States and North Carolina Constitutions. **State v. Wooten, 524.**

Effective assistance of counsel—claim dismissed without prejudice to seek motion for appropriate relief—Defendant's claim of ineffective assistance of counsel in a breaking and entering, larceny, and felonious possession of stolen goods case based on his trial attorney failing to question a witness regarding evidence acquired during defendant's prior trial for breaking and entering into a different business is dismissed without prejudice to allow defendant to seek a motion for appropriate relief in the superior court. **State v. Patterson, 608.**

Effective assistance of counsel—failure to show prejudice—Defendant was not deprived his right to effective assistance of counsel in a voluntary manslaughter case based on his trial counsel's failure to call a witness to the stand, trial counsel's performance on redirect examination of defendant and another witness, and trial counsel's failure to object and move to strike several statements, because none of these alleged errors were serious enough to have deprived defendant of a fair trial. **State v. Moore, 754.**

Inadequate representation of counsel—per se representation—A defendant convicted of felonious breaking and entering and other offenses could not complain on appeal that his self-representation was inadequate where counsel was appointed four times for defendant, one was required to withdraw for conflict of interest, three were "fired" by defendant, and defendant sought to represent himself over the advice of more than one judge. Defendant made his choice, as was his constitutional right; he is entitled to no special exception for the quality of his particular self-representation or his lack of access to legal materials. **State v. Rogers, 131.**

Objection to real estate option purchase—transaction not misconduct—adequate state remedy—It was not necessary to consider plaintiff's constitutional claims arising from her dismissal as a university vice chancellor after she refused to buy an option on real estate for the university. It was decided elsewhere in the opinion that the option had value and that defendants' pursuit of the option did not constitute misconduct; moreover, the Whistleblower Act creates an ade-

CONSTITUTIONAL LAW—Continued

quate state remedy and precludes plaintiff's claims. **Helm v. Appalachian State Univ., 239.**

CONTRACTS

Breach—third party beneficiary—summary judgment—The trial court did not err by granting summary judgment in favor of defendant on plaintiff's third party beneficiary breach of contract claim arising from defendant's provision of resin to a third party, Moll, to be used in manufacturing IV administration kits. **Hospira Inc. v. AlphaGary Corp., 695.**

Novation—merger clause—The trial court did not err by holding a 2000 Agreement was legally binding on the parties and had not been superseded by a 2001 Agreement because, although plaintiff has not presented any evidence of fraud, bad faith, unconscionability, negligent omission or mistake in fact to rebut the presumption of novation created by a merger clause in the 2001 Agreement, the covenants of both agreements are not wholly inconsistent but can be enforced consistently; and the two agreements were executed for two distinct purposes since the 2000 Agreement was executed to govern the employment relationship of all employees whereas the 2001 Agreement was executed as part of a stock purchase agreement offered to only select employees. **Medical Staffing Network, Inc. v. Ridgway, 649.**

Tobacco settlement—payments to trust—payments for end of price support—offset—The trial court erred by denying summary judgment for Philip Morris and granting summary judgment for Maryland and Pennsylvania in an action arising from the settlement of litigation over the health effects of tobacco. Maryland and Pennsylvania had sought an order requiring that the tobacco companies be required to continue payments to a trust for the benefit of their farmers after the tobacco companies stopped making those payments under an offset provision in the trust when they began payments under a separate program to end the federal system of price supports and quotas for growing tobacco. Maryland and Pennsylvania had not participated in the price support system, and their farmers did not receive payments under the act ending the system. **State v. Philip Morris USA, Inc., 255.**

COSTS

Attorney fees—supporting material—objection at trial on different grounds—The trial court's decision about the amount of attorney fees to award the defendants in voluntarily dismissed condemnation actions was supported by competent evidence where the amounts were supported by affidavits and billing documents. **Town of N. Topsail Beach v. Forster-Pereira, 763.**

Attorney fees and costs for appeal—order allowing petition—not a justiciable controversy—The question of whether the trial court exceeded its jurisdiction by allowing attorney fees and costs for an appeal was not ripe for consideration. The court's order merely permitted defendants to petition the trial court for consideration of the matter, but defendants have not done so. **Town of N. Topsail Beach v. Forster-Pereira, 763.**

Award of deposition costs—failure to show abuse of discretion—The trial court did not err in a wrongful termination case by awarding defendant deposition costs of $1,596.93 because: (1) plaintiff failed to show the trial court abused its discretion; and (2) although the General Assembly addressed inconsistencies within

CRIMINAL LAW—Continued

DISCOVERY—Continued

abused its discretion by failing to impose sanctions for the State not complying with discovery. **State v. Early, 594.**

DIVORCE

Equitable distribution—distributive award—calculation of income—The trial court did not abuse its discretion in an equitable distribution case by utilizing a defense expert's income figure for a similarly situated anesthesiologist to calculate plaintiff husband's income for the distributive award because, even if it would have been better practice to use a more recent version, accepting figures based on the 2003 report of the Medical Group Management Association physician compensation data for anesthesiologists does not rise to an abuse of discretion. **Pellom v. Pellom, 57.**

Equitable distribution—findings of fact—ability to pay distributive award—The trial court did not abuse its discretion in an equitable distribution case by failing to make any findings regarding plaintiff's ability to pay a distributive award because: (1) plaintiff did not allege that he would have to liquidate assets or obtain a loan to pay the award; (2) the court made findings regarding plaintiff's substantial income which was a liquid asset he could use to pay the award; (3) plaintiff maintained half of the parties' joint savings account of $60,604.82; (4) the court did not order plaintiff to liquidate any assets, and plaintiff was given more than ten years to pay the award per his request that it be made payable over time; (5) defendant had additional resources of liquid assets besides his monthly paycheck including savings, stock distributions, and DAA bonuses, and he was allowed to pay the majority of the award over time; and (6) if a party's ability to pay an award with liquid assets can be ascertained from the record, then the distributive award must be affirmed. **Pellom v. Pellom, 57.**

Equitable distribution—future earning capacity—The trial court did not abuse its discretion in an equitable distribution case by accepting a defense expert's assumption that plaintiff will continue to work for Durham Anesthesia Associates (DAA) until he reaches the age of 60 even though plaintiff contends the method of valuing DAA was calculated using post-date of separation (D.O.S.) active efforts because: (1) there was no evidence that the expert used any information concerning plaintiff's post-D.O.S. earnings; (2) the expert was taking into account future earning capacity in order to properly value plaintiff's current interest; and (3) the expert needed a limitation on the future earnings figure, and plaintiff's retirement from DAA served that purpose. **Pellom v. Pellom, 57.**

Equitable distribution—marital property—in-kind distribution—The trial court did not abuse its discretion in an equitable distribution case by not ordering an in-kind distribution of the parties' 25% interest in Fitness Docs and by allocating the stock in Fitness Docs to plaintiff and requiring him to pay a distributive award. **Pellom v. Pellom, 57.**

Equitable distribution—marital property valuation—failure to take into account goodwill or accounts receivable—The trial court did not abuse its discretion in an equitable distribution case by refusing to accept plaintiff's Durham Anesthesia Associates (DAA) valuation of $183,000 based on his expert's failure to account for the goodwill value or accounts receivable of DAA. **Pellom v. Pellom, 57.**

DIVORCE—Continued

Equitable distribution—marital property valuation—tax consequences—The trial court did not abuse its discretion in an equitable distribution case by allegedly failing to consider the tax consequences when accepting a defense expert's valuation regarding the parties' ownership interest of Durham Anesthesia Associates (DAA) because: (1) the trial court complied with N.C.G.S. § 50-20(c)(11) by ordering plaintiff to pay a distributive award rather than liquidate his interest in DAA, which may have had a significant tax consequence; and (2) the defense expert was correct in not taking into account personal taxes that plaintiff had to pay on his income, but did consider DAA's entity taxes by evaluating the capitalization rate of DAA and finding that the company paid little to no taxes since it typically disbursed all of its profits each year. **Pellom v. Pellom, 57.**

Equitable distribution—premarital and third-party contributions—The trial court did not improperly consider premarital and third-party contributions to support its equitable distribution award because, although the trial court made findings that defendant's parents assisted the couple with gas money, furniture, groceries, and the like in the early years of their marriage, there was no indication that the court placed a value on these activities for the purpose of forming the distributive award or in determining that an unequal distribution was justified. **Pellom v. Pellom, 57.**

Equitable distribution—unequal distribution—present day dollar for dollar reimbursement for retirement account—support of family unit instead of out-of-pocket direct contribution to spouse's education—The trial court abused its discretion in an equitable distribution case by giving a present day dollar for dollar reimbursement of $65,125.21 for defendant wife's retirement account which she cashed out approximately twenty years prior to the date of separation and used to support the family while plaintiff husband was in medical school, and the case is remanded since the 54% unequal distribution was based in large part on this reimbursement, because: (1) although the trial court made proper findings under N.C.G.S. § 50-20(c)(7) as to why defendant was entitled to an unequal distribution according to the various statutory factors including defendant's contributions to plaintiff's education, defendant also obtained a substantial benefit; (2) although direct out-of-pocket expenses of a non-student spouse in support of a student spouse's education should be considered by the trial court when dividing marital property and ordering a reimbursement of those expenses, the facts of this case revealed that defendant's retirement earnings were used to support the family unit instead of an out-of-pocket direct contribution to plaintiff's education that would warrant a present day dollar for dollar reimbursement; and (3) defendant reaped the benefits of withdrawing the account both while plaintiff was in school, as she was able to stay home with the parties' daughter, as well as after plaintiff obtained his degree. **Pellom v. Pellom, 57.**

Equitable distribution—valuation—marital property—business ownership interest—date of separation—The trial court did not abuse its discretion in an equitable distribution case by using a defense expert's valuation regarding plaintiff husband's normalized income in calculating the value of his ownership interest in Durham Anesthesia Associates (DAA) because the defense expert properly valued the business at the date of separation with the data he had at the time; the fact that the defense expert's projection did not prove completely accurate between the time of the report and the time of trial was not sufficient reason to find an abuse of discretion by the trial court in accepting the expert's opinion; and the trial court's find-

TERMINATION OF PARENTAL RIGHTS—Continued

after she was in jeopardy of losing them, and her extremely limited progress was not reasonable. **In re S.N., X.Z., 142.**

Grounds—felony assault—The trial court did not err by concluding that grounds existed to terminate respondent mother's parental rights based on a finding that the parent has committed a felony assault that resulted in serious bodily injury to the child, another child of the parent, or other child residing in the home under N.C.G.S. § 7B-1111(a)(8). **In re I.T.P-L., 453.**

Lack of notice—motion in the cause—waiver—The trial court did not lack subject matter jurisdiction even though respondent mother was never served with the notice required by N.C.G.S. § 7B-1106.1 for motions in the cause seeking termination of parental rights because respondent waived any objection to noncompliance with N.C.G.S. § 7B-1106.1 when she filed a verified response, without objecting to the lack of proper notice, and participated in the termination proceeding. **In re C.S.B., 195.**

Lack of subject matter jurisdiction—failure to serve summons on juvenile or guardian ad litem for juvenile—The trial court lacked subject matter jurisdiction to terminate respondent mother's parental rights, and the order adjudicating the juvenile as neglected is vacated as well as the termination order, because: (1) the purported summonses to the parents in the neglect and dependency proceedings were not signed and dated by the clerk of court, or a deputy or assistant clerk of court, and thus they were not legally issued under N.C.G.S. § 7B-406(a); (2) without a legally issued summons, the trial court did not have jurisdiction over the subject matter of the neglect and dependency proceeding; and (3) even if the trial court had subject matter jurisdiction over the neglect and dependency action, the trial court still did not have subject matter jurisdiction over the termination of parental rights action since no summons was issued to the juvenile and no summons was served upon or accepted by the guardian ad litem for the juvenile. **In re K.J.L., 386.**

Placement of minor child—legal and physical custody vested in DSS—The trial court lacked jurisdiction to place the minor child in a termination of parental rights case, and the trial court's order placing her with her maternal grandmother must be vacated, because: (1) the minor child was in the custody of DSS when the trial court terminated respondents' parental rights, and thus legal and physical custody of the minor child vested in DSS upon the termination; and (2) when legal and physical custody of the minor child vested in DSS, DSS was then authorized to proceed in its discretion with placing the minor child. **In re I.T.P-L., 453.**

Subject matter jurisdiction—failure to issue summons naming juvenile as respondent—The trial court had subject matter jurisdiction over a termination of parental rights case even though no summons was issued naming the juvenile as a respondent as required by N.C.G.S. § 7B-1106 where the record showed the caption of the summons had the juvenile's name and also reflected that copies of the summons and petition were served on the juvenile's guardian ad litem. **In re I.T.P-L., 453.**

Subject matter jurisdiction—service on guardian ad litem—The trial court had subject matter jurisdiction in a termination of parental rights proceeding where the children were named in the caption of the summons but the guardian ad litem was named as a respondent and accepted service. Service on the guardian ad litem

WITNESSES—Continued

ness doctor on the basis that he did not meet the requirements of N.C.G.S. § 8C-1, Rule 702(b) because: (1) although the doctor was a licensed physician with the same specialty as defendants, his testimony revealed that he was not devoting a majority of his professional time to clinical surgery or instruction surgery in the year prior to the pertinent occurrence; (2) contrary to plaintiff's assertion, the trial court did consider the doctor's occasional performance of minor surgeries; and (3) even if the doctor could have testified to causation, without an expert to testify to the applicable standard of care, plaintiff did not forecast evidence to defeat the summary judgment motion. **Cornett v. Watauga Surgical Grp., 490.**

WORKERS' COMPENSATION

Ability to find comparable employment—termination—The evidence in a workers' compensation case supported the Industrial Commission's conclusion that plaintiff's inability to find comparable employment is due to her compensable injury where her employment was terminated after her injury. Even if the Commission erred by determining that plaintiff was not terminated for misconduct, she testified that she could not do similar jobs because of medical restrictions, she submitted an exhibit showing her efforts to find employment, and she testified that she was told by one employer that she could not perform the duties of the position because of her physical limitations. **Castaneda v. International Leg Wear Grp., 27.**

Appeal—attorney fees—costs—The Court of Appeals exercised its discretion in a workers' compensation case and declined to award plaintiff employee costs and attorney fees for time spent on this appeal. **Carey v. Norment Sec. Indus., 97.**

Back injury—causation—sufficiency of evidence—The evidence in a workers' compensation case was sufficient to permit the Industrial Commission to find that plaintiff's annular disc tear injury was caused by a work-related accident where it was reasonable to infer from plaintiff's testimony that she suffered a violent motion when she was struck by a box on a conveyor belt and that the motion caused trauma to the spine; plaintiff had a spinal MRI which revealed an annular disc tear; and an orthopedic surgeon testified that it was "quite possible" and "more likely than not" that the tear was caused by plaintiff's work-related accident. **Castaneda v. International Leg Wear Grp., 27.**

Cervical condition—causation—The full Industrial Commission did not err in a workers' compensation case by concluding plaintiff employee's cervical disc herniation was caused by his fall at work on 30 April 2004 because, although there was medical testimony that hypothetically turning one's neck could cause herniation, there was testimony that to a reasonable degree of medical certainty plaintiff's fall caused his herniation. **Carey v. Norment Sec. Indus., 97.**

Change of condition—burden of proof on party claiming change—The full Industrial Commission did not err in a workers' compensation case by concluding in its 13 April 2007 opinion and award that plaintiff employee has not suffered a change of condition because: (1) the depositions of two doctors did not indicate that plaintiff has developed a new condition, but instead seemed to indicate that plaintiff has been permanently and totally disabled since before the 6 February 2002 opinion and award; (2) even when the responses indicated that plaintiff has developed a new condition, the dialogue indicated it was not necessarily causally related to the injury but instead due to plaintiff's retirement and sedentary lifestyle; and (3)

WORKERS' COMPENSATION—Continued

ments since the original filing. The Commission's findings recited or summarized testimony, but did not state the facts the Commission was finding, and general statements that the Commission finds a witness credible do not reveal the part of the testimony the Commission finds as a fact. **Huffman v. Moore Cty., 352.**

Findings—sufficiency—The Industrial Commission made sufficient findings in a workers' compensation case to support its conclusions, even though plaintiff contended that there were matters which were not addressed. The Commission is not required to find facts on all credible evidence. **Floyd v. Executive Personnel Grp., 322.**

Injuries to employees of unlicensed subcontractor—civil penalty on statutory employer—The Industrial Commission did not err by assessing civil penalties under N.C.G.S. § 97-94(d) against the owner of the statutory employer of two carpenters who were injured while working for an uninsured subcontractor because a civil penalty may be assessed against the person who had the ability and authority to bring a statutory employer in compliance with N.C.G.S. § 97-93 but who willfully failed or neglected to do so. **Putman v. Alexander, 578.**

Medications—reasonableness for requirement of treatment—The full Industrial Commission did not err in a workers' compensation case by concluding medications prescribed by the authorized treating physician for plaintiff's fibromyalgia and its sequelae are not reasonably required for the treatment of plaintiff's compensable conditions. **Hunt v. N.C. State Univ., 662.**

Temporary total disability—sufficiency of findings of fact—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff was temporarily totally disabled from any employment and was entitled to payment from 15 February 2005 until 8 July 2005, and the case is reversed and remanded for further findings of fact with regard to sporadic days plaintiff missed due to his medical treatment and status of plaintiff's disability between 23 May 2005 and 8 July 2005 because the record supported a finding of temporary total disability from 22 February through 23 May 2005, but did not support a finding that plaintiff was temporarily totally disabled between 23 May 2005 and 8 July 2005. **Carey v. Norment Sec. Indus., 97.**

Termination after return to work—temporary disability awarded—remand for further findings—A workers' compensation case was remanded where the Industrial Commission did not make the necessary findings or conclusions to explain why it applied *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228 (1996), and awarded plaintiff temporary total disability after he injured his right knee, developed pain in his left knee, had surgery on the right knee, returned to work but continued to have pain in the left knee, and was terminated. **Jones v. Modern Chevrolet, 86.**

Uninsured subcontractor—injuries to employees—general contractor as statutory employer—The evidence before the Industrial Commission in a workers' compensation case was sufficient to establish that defendant construction company was the statutory employer under N.C.G.S. § 97-19 of two carpenters who were injured while working for an uninsured subcontractor on a townhome construction project where it showed that the owner of the construction company entered into an agreement with the developer that the construction company would serve as the general contractor for the project; the site manager for the project who hired the

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