

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FELISA R. BACCUS, EMPLOYEE, PLAINTIFF v. N.C. DEPARTMENT OF CRIME CONTROL
& PUBLIC SAFETY, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT
SERVICES, SERVICING AGENT), DEFENDANTS

No. COA08-204

(Filed 20 January 2009)

**Workers' Compensation— National Guard member—injured
during training—not a state employee**

The Industrial Commission did not have jurisdiction in a workers' compensation case, and should not have awarded benefits to a member of the North Carolina National Guard injured during military training in California. Plaintiff was not an employee within the meaning of N.C.G.S. § 97-2(2), which includes those instances where a North Carolina National Guard member is called into service of the State of North Carolina; operates under the command and control of the Governor pursuant to state law; and is paid by the State with state funds. Plaintiff was injured while training pursuant to Title 32 of the U.S. Code and was paid with federal and not state funds.

Appeal by defendants from an opinion and award entered 27 November 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 September 2008.

Lewis & Daggett, Attorneys at Law, P.A., by Griffis C. Shuler and Christopher M. Wilkie, for plaintiff-appellee.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Sharon Patrick-Wilson, for defendant-appellants.

BACCUS v. N.C. DEP'T OF CRIME CONTROL & PUB. SAFETY

[195 N.C. App. 1 (2009)]

HUNTER, Robert C., Judge.

Defendant North Carolina Department of Crime Control and Public Safety (“defendant”) appeals from an opinion and award of the North Carolina Industrial Commission (“the Commission”) awarding Felisa R. Baccus (“plaintiff”), a former member of the North Carolina National Guard, workers’ compensation benefits due to injuries she sustained while participating in military training at Fort Hunter-Liggett in California. The sole issue on appeal is whether plaintiff was an “employee” as defined in N.C. Gen. Stat. § 97-2(2) (2007), and consequently, whether the Commission possessed subject matter jurisdiction. Deputy Commissioner Crystal Redding Stanback concluded plaintiff was an employee as defined in section 97-2(2) and awarded her compensation. The Commission affirmed with some modifications. After careful review, we vacate the opinion and award.

I. Background

In 2003, plaintiff was a member of the North Carolina Army National Guard and assigned to a unit and company based out of Winston-Salem, North Carolina. Plaintiff was also employed in a civilian capacity as a personal nursing assistant.

On or about 25 March 2003, plaintiff was “ordered to active duty for training (ADT)” from 11 May 2003 until 25 May 2003 and instructed to report to Eastover, South Carolina, to attend a motor transport operator course. The order listed its authority as 32 U.S.C. § 502(f) and stated that it was “contingent upon Congress enacting appropriations[.]” The order contained the following heading “State of North Carolina, Office of the Adjutant General” and was signed “for the Adjutant General” by “Charles E. Jackson, Col, MP, NCARNG G3[.]” On or about 14 April 2003, plaintiff received an amended order which changed the dates and location for the training; pursuant to the amended order, plaintiff was required to report from 2 May 2003 until 17 May 2003 at Fort Hunter-Liggett in California.

On 8 May 2003, while plaintiff was training at Fort Hunter-Liggett in California pursuant to the amended order, she sustained injuries while participating in a training exercise. In an effort to avoid a truck that was backing up towards her, plaintiff jumped onto a chain link fence and tried to climb it; her legs became entangled in the fence, causing injuries to her hip, back, and legs.

Plaintiff was incapacitated and unable to perform her military or civilian employment from 8 May 2003 until 5 November 2003. As a

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result of her injuries, she received \$2,676.80 per month in gross incapacitation pay from the federal government from 8 May 2003 until 5 November 2003. In addition, upon filing for severance pay with the Veterans' Administration of the federal government, plaintiff was found eligible for benefits based upon a total disability rating of thirty percent (30%). She was awarded \$330.00 per month in severance pay for approximately one year, after which her benefits increased to \$439.00 per month and continue for the rest of her life. At the time defendant filed this appeal, this was the only compensation plaintiff had received as a result of her injuries. In addition to the federal compensation, defendant paid plaintiff approximately \$273.00 per month for participating in her monthly/weekend drill for the North Carolina National Guard from the time she sustained her injuries (8 May 2003) until approximately June 2004.

Due to her injuries and physical limitations, plaintiff was discharged from the Army Reserve effective 13 August 2004; however, she was not simultaneously discharged from the North Carolina National Guard. She was later determined to be physically unfit to continue with the North Carolina National Guard. Since sustaining her injuries, plaintiff has not been able to return to her civilian employment as a nursing assistant. With the exception of a brief period of employment with Church's Chicken, a job which plaintiff had to leave due to her physical limitations, she has not returned to civilian employment in any capacity since 3 February 2004.

In September 2004, plaintiff filed for state workers' compensation benefits for the injuries she sustained on 8 May 2003. Defendant denied liability asserting that plaintiff "was not on State active duty under orders of the Governor at the time of the alleged injury; therefore, she would not be considered an 'employee' under the [North Carolina] Workers' Compensation Act[,]" and the Commission did not possess subject matter jurisdiction. Plaintiff argued that while at Fort Hunter-Liggett, she was on "State active duty under orders of the Governor" and that the Commission did have subject matter jurisdiction. The Commission found and concluded that plaintiff was an employee as defined by section 97-2(2), specifically that she was on "active duty training with the North Carolina National Guard under orders of the Governor." Defendant appeals.

II. Analysis

In order to determine whether the Commission had subject matter jurisdiction, we must: (1) interpret what "State active duty under

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orders of the Governor” means, an issue of first impression for this Court; and (2) decide whether the training plaintiff was participating in on 8 May 2003, i.e., active duty for training pursuant to 32 U.S.C. § 502(f), fits within that definition.

It is well settled that to be entitled to maintain a proceeding for compensation under the Work[ers'] Compensation Act the claimant must have been an employee of the alleged employer at the time of his injury Thus, the existence of the employer-employee relationship at the time of the accident is a jurisdictional fact. . . . [T]he finding of a jurisdictional fact by the Industrial Commission is not conclusive on appeal even though there be evidence in the record to support such finding. The 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. The claimant has the burden of proof that the employer-employee relation existed at the time the injury by accident occurred.

Lucas v. Stores, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976) (internal citations omitted). “When interpreting a statute, we ascertain the intent of the legislature, first by applying the statute’s language and, if necessary, considering its legislative history and the circumstances of its enactment.” *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 460, 665 S.E.2d 449, 451 (2008) (citations omitted). Further,

“[T]he Workers’ Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. . . . [S]uch liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of ‘judicial legislation.’ [Finally], it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid ‘ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.’ ”

Id. at 463, 665 S.E.2d at 453 (citation omitted; final alteration in original).

N.C. Gen. Stat. § 97-2(2) provides in pertinent part: “The term ‘employee’ shall include members of the North Carolina national

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guard while on State active duty under orders of the Governor and members of the North Carolina State Defense Militia while on State active duty under orders of the Governor.”¹ In its opinion and award, the Commission did not actually interpret the meaning of section 97-2(2). Rather, it simply noted that the statute had been amended in 1999 and that it believed defendant’s interpretation was too narrow. Specifically, the Commission concluded:

5. The amendment to the statute clarified the language to specify that it covered more than injuries at drill, in camp, and while on *special* duty under orders of the Governor. The amendment clarifies that members of both the North Carolina National Guard and the North Carolina State Guard are considered employees under the North Carolina Workers’ Compensation Act while on State active (not just special) duty under orders of the Governor. It appears that the amendment clarified the intent of the legislature to make the statute more inclusive, rather than exclusive. Defendant’s interpretation would preclude State workers’ compensation coverage for members of the North Carolina National Guard while at camp or participating in drills even in North Carolina unless the Governor issued a special order. . . . [T]he Full Commission is not persuaded that the statutory intent is as narrow as Defendant argues.

On appeal, defendant argues, as it did below, that “State active duty under orders of the Governor” only includes those instances where North Carolina National Guard members are called into service of the State by the Governor in the event of a state emergency,

1. The North Carolina National Guard and the North Carolina State Defense Militia are distinctly different components of our organized State militia. The North Carolina National Guard consists of “regularly commissioned, warrant and enlisted personnel between such ages as may be established by regulations promulgated by the secretary of the appropriate service[.]” N.C. Gen. Stat. § 127A-3 (2007). The State Defense Militia “consist[s] of commissioned, warrant and enlisted personnel called, ordered, appointed or enlisted therein by the Governor under the provisions of Article 5 of . . . Chapter [127A.]” N.C. Gen. Stat. § 127A-5 (2007). National Guard members “receive federal recognition by the United States government [and] hold a dual status both as State troops and as a reserve component of the armed forces of the United States.” N.C. Gen. Stat. § 127A-29 (2007). In contrast, State Defense Militia members cannot be members of a reserve component of the armed forces. N.C. Gen. Stat. § 127A-80(b). Finally, unlike with the National Guard which can be called into federal military service, the State Defense Militia “shall not be called, ordered, or in any manner drafted, as such, into the military service of the United States[.]” N.C. Gen. Stat. § 127A-80(d) (2007).

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such as a natural disaster, and that it does not include training.² In all other circumstances, defendant claims North Carolina National Guard members are federal employees, paid with federal funds, who exclusively receive federal benefits. Finally, defendant argues the current statute is clear and unambiguous and must be implemented according to the plain meaning of its terms.

Plaintiff does not make any effort to define “State active duty.” Rather, plaintiff advances the reasoning contained in the Commission’s conclusion of law number five cited *supra*, i.e., that defendant’s interpretation is too narrow, especially because North Carolina National Guard members who are injured while training in North Carolina would not be covered under the Act. Plaintiff further asserts that when a North Carolina National Guard member receives orders pursuant to 32 U.S.C. § 502(f): (1) he or she is under the command and control of the Governor and (2) the Governor effects said command and control through orders issued by the State Adjutant General. Consequently, she asserts that orders issued by the Adjutant General pursuant to 32 U.S.C. § 502(f) are “orders of the Governor.”

The Workers’ Compensation Act does not define “State active duty” or “under orders of the Governor.” Consequently, we review the statute’s legislative history. Section 97-2(2) was amended in 1999; prior to the amendment, the statute provided:

The term “employee” shall include members of the North Carolina national guard, except when called into the service of the United States, and members of the North Carolina State guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor.

N.C. Gen. Stat. § 97-2(2) (1991).

Plaintiff asserts the 1999 amendment was intended to make workers’ compensation coverage broader and more inclusive for North Carolina National Guard members. She further contends that this Court’s decisions in *Britt v. N.C. Dept. of Crime Control and Public Safety*, 108 N.C. App. 777, 425 S.E.2d 11, *disc. review denied*, 333

2. The Governor’s power to order National Guard members to respond to state emergencies is set out in N.C. Gen. Stat. § 127A-16(a) (2007). Also, N.C. Gen. Stat. § 127A-16(b) provides that the Governor, as commander in chief, can order North Carolina National Guard members to a “State Active Duty status” to assist with certain formal government activities. We discuss these provisions *infra*.

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N.C. 536, 429 S.E.2d 554 (1993), and *Duncan v. N.C. Dept. of Crime Control and Public Safety*, 113 N.C. App. 184, 437 S.E.2d 654 (1993), demonstrate that she is an employee under the current, more inclusive statutory definition. In those cases, we respectively held that: (1) a North Carolina National Guard member, who was injured while completing basic Army training camp (“ ‘initial active duty training’ ”) in Alabama pursuant to 10 U.S.C. § 511(d)³ (*Britt*, 108 N.C. App. at 779-80, 425 S.E.2d at 13); and (2) a North Carolina National Guard member who was injured in a jeep accident while returning to his local unit following the completion of a routine weekend drill at Fort Bragg (*Duncan*, 113 N.C. App. at 184-86, 437 S.E.2d at 654-55), were employees within the ambit of section 97-2(2).

Defendant argues the 1999 amendment was intended to narrow the provision of benefits. Specifically, defendant asserts it was intended to limit workers’ compensation benefits to North Carolina National Guard members who are injured while responding to a state emergency, such as a natural disaster or civil unrest, pursuant to a specific call to “State active duty” by the Governor. Defendant also asserts that *Britt* and *Duncan* are inapplicable because: (1) they were decided pursuant to the more inclusive, pre-amendment definition; (2) under current federal law, National Guard members are members of the Army at all times; and (3) the 1999 amendment deleted the language stating that National Guard members are employees while performing their duties at camp or drill.

The legislative record surrounding the 1999 amendment is scant. After examining what information is available, it is difficult to definitively conclude whether the amendment was intended to narrow or broaden the statutory definition. Session Law 1999-418 was entitled: “An Act to Clarify When Members of The North Carolina National Guard and North Carolina State Guard Are Employees Subject to the Workers’ Compensation Act.”⁴ By stating that its intent was to clarify

3. Section 511(d) has since been redesignated as 10 U.S.C. § 12103(d).

4. Session Law 1999-418 originated as Senate Bill 877 and was first assigned to the Senate Judiciary II Committee. At a 20 April 1999 meeting of this committee, the bill “was explained by [its sponsor] Senator Kerr” and by “Jon Williams, with the NC Department of Crime Control and Public Safety[.]” *Minutes of Senate Judiciary II Committee*, April 20, 1999, 1999 General Assembly, First Regular Session (Senate Bill 877). Unfortunately, these explanations are not available for our review. A bill analysis prepared by legislative staff counsel for the meeting states that the law “amends the definition of ‘employee’ under the North Carolina Worker[s]’ Compensation Act to include members of the North Carolina national guard and members of the North Carolina state guard *while on State active duty under orders of the Governor.*” *Id.* (bill analysis by Committee Co-Counsel Brenda J. Carter).

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rather than to codify, we believe the legislature intended to correct some aspect of this Court's interpretations in *Britt* and *Duncan* and that these cases informed "the circumstances of [the amendment's] enactment." *Shaw*, 362 N.C. at 460, 665 S.E.2d at 451. Consequently, we examine the analysis and reasoning presented in those cases.

In *Britt*, 108 N.C. App. at 779, 425 S.E.2d at 13, this Court based its conclusion that a North Carolina National Guard member injured while participating in Initial Active Duty for Training pursuant to 10 U.S.C. § 511(d) was an employee within the ambit of the Workers' Compensation Act in part on our Supreme Court's decision in *Baker v. State*, 200 N.C. 232, 234, 156 S.E. 917, 918 (1931). In *Baker*, our Supreme Court stated that "the National Guard is an organization of the State militia, which does not become a part of the United States Army until the Congress declares an emergency to exist which calls for its services in behalf of the nation." *Id.* Because an emergency situation did not exist when the plaintiff in *Britt* was ordered to perform his mandatory training, the Court essentially concluded that he was not " 'called into the service of the United States[.]' " *Britt*, 108 N.C. App. at 778, 425 S.E.2d at 12 (citation omitted). The Court also reasoned that the plaintiff was covered under the Act given the explicit language stating that National Guard members were covered for, *inter alia*, injuries " 'arising out of and in the course of the performance of their duties' " at drill and in camp. *Id.* (citation omitted).

In *Duncan*, this Court followed the reasoning advanced in *Britt* in concluding that a North Carolina National Guard member injured while returning to his local unit following a routine weekend drill was an employee as defined by section 97-2(2). There, the North Carolina Department of Crime Control and Public Safety raised similar arguments to those it advances in the instant case, specifically that the plaintiff: Was not an employee as defined in the Workers' Compensation Act because he had been called into service of the United States for a weekend drill,⁵ was an employee of the federal government at the time of his injury, and had received federal compensation

5. The opinion does not specify the statutory authority pursuant to which the plaintiff was called to weekend training. However, it would appear to be 32 U.S.C. § 502(a) (2000), which provides: "Under regulations to be prescribed by the Secretary of the Army . . . each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall . . . assemble for drill and instruction . . . at least 48 times each year[.]" See also Steven B Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* 1994 Army Law. 35, 40, n.51 [hereinafter Rich, *The National Guard*] (National Guard weekend drills are performed under the authority of 32 U.S.C. § 502(a)).

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benefits from the federal government. The Court rejected the defendant's contentions, and because the Commission had allowed the defendant a "credit" for the incapacitation pay he had received from the federal government, the Court concluded it was not permitting "double recovery" by affirming the award of compensation. *Duncan*, 113 N.C. App. at 186, 437 S.E.2d at 655.

In the instant case, neither defendant nor plaintiff support their arguments as to what "while on State active duty under orders of the Governor" means, or perhaps stated more accurately what the parties contend it does not mean, with any real discussion of or citation to legal authority. Rather, both support the bulk of their respective arguments with citation to general web sites containing generic, unauthoritative information. In considering the statutory language, the legislative record, and the circumstances of the 1999 amendment's enactment, including this Court's decisions in *Britt and Duncan*, it seems evident that the phrase "while on State active duty under orders of the Governor" differentiates between active service to the State of North Carolina and service to the federal government and includes those instances when a National Guard member is operating under the Governor's command and control pursuant to a specific call to state service. Also, the redaction of the drill and camp language would appear to indicate that the 1999 amendment was enacted with the intent of eliminating workers' compensation coverage for training, i.e., that it was restrictive in intent.

Keeping in mind the aforementioned rules of statutory construction, we do not believe the term "State active duty" is unambiguous and note that the interpretations respectively advanced by defendant and plaintiff both require us to read words into the statute that are not there.⁶ Given that (1) section 97-2(2) appears to distinguish between state and federal service, (2) both parties' arguments implicate the state and federal functions of the National Guard, and (3) the National Guard involves a unique, dual state-federal structure, we next consider the broader universe of North Carolina law as well as federal law in an effort to construe the meaning of "State active duty" in section 97-2(2).⁷

6. Thus, we suggest the legislature may want to amend section 97-2(2) to include a definition of "State active duty."

7. We focus our discussion on chapter 127A of the North Carolina General Statutes, which is entitled "Militia," and Titles 10 and 32 of the United States Code, which are respectively entitled "Armed Forces" and "National Guard."

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“State active duty” is not defined in any provision of the North Carolina General Statutes, the North Carolina Administrative Code, nor the United States Code. Nevertheless, as discussed *infra*, upon reviewing chapter 127A of the North Carolina General Statutes and Titles 10 and 32 of the United States Code, we ultimately conclude that plaintiff was not “on State active duty under orders of the Governor” when she sustained her injuries.

A. Additional North Carolina Law (Chapter 127A)

Chapter 127A specifically deals with the organization and administration of the State militia, of which the North Carolina National Guard is a part. N.C. Gen. Stat. § 127A-3. N.C. Gen. Stat. § 127A-16 is the only statutory provision which both encompasses the power of the Governor to call up the North Carolina National Guard and also uses the “State Active Duty” terminology. It provides:

(a) The Governor shall be commander in chief of the militia and shall have power to call out the militia to execute the laws, secure the safety of persons and property, suppress riots or insurrections, repel invasions and provide disaster relief.

(b) The Governor shall have the additional power, subject to the availability of funding, to place individuals, units, or parts of units of the North Carolina National Guard in a *State Active Duty status* to assist with the planning, support, and execution of activities connected with the swearing in and installation of the Governor and other members of the Council of State.

Id. (emphasis added). Thus, pursuant to section 127A-16, at the very least, “State active duty” does appear to entail a call to state service by the Governor to respond to an emergency or to assist with certain formal state government activities. Noticeably absent from this section and the entirety of chapter 127A is any mention of a call to “State active duty” for the purposes of training. We believe this absence, combined with the 1999 amendment’s redaction of the “camp” and “drill” language contained in the prior version of the statute, provides support for defendant’s argument that “State active duty” does not include training ordered pursuant to 32 U.S.C. § 502(f).

However, chapter 127A does present some ambiguity as to whether “State active duty” possesses a specific meaning in and of itself or if it is simply synonymous with state service in a general sense. For example, N.C. Gen. Stat. § 127A-98 (2007) describes the calling up of the State militia “to execute the law, secure the safety of

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persons and property, suppress riots or insurrections, repel invasions or provide disaster relief” as a call to “active State service[,]” thus supporting the argument that “State active duty” is synonymous with state, as opposed to federal, service in a general sense. However, the different awards established for North Carolina National Guard members and units in chapter 127A support the argument that “State active duty” is a particular form of the broader category of State service.⁸ Regardless of this ambiguity, however, chapter 127A, article 8, which is entitled “Pay of Militia,” clearly indicates that when a North Carolina National Guard member is called or ordered into state service, he or she is: (1) under the authority of the Governor; (2) performing service to the State of North Carolina; and (3) paid by the State with state funds. *See, e.g.*, N.C. Gen. Stat. §§ 127A-105-108 (2007).

B. Dual State-Federal Structure of the National Guard

Because of the unique, dual state-federal structure of the National Guard, we next examine this relationship in an effort to obtain greater clarity as to the distinction between state and federal service.

The National Guard is the only reserve component of the United States’ military to also have a non-federal mission. Serving as the state militia, the National Guard’s unique dual military role has been explained as follows:

Perhaps the most unique aspect of the National Guard is that it exists as both a federal and state force. As a federal force, the Guard provides ready, trained units as an integral part of America’s field forces. In its state role, the National Guard protects life and property and preserves peace, order, and public safety under the direction of state and federal authorities. No other reserve military force in the world has such an arrangement, and the National Guard’s dual allegiance to state and nation has often been the subject of much contro-

8. N.C. Gen. Stat. §§ 127A-45, -45.1 (2007) respectively establish the “North Carolina National Guard State Active Duty Award” for “members of the North Carolina National Guard who, by order of the Governor, satisfactorily serve a tour of State active duty” and the “North Carolina National Guard Governor’s Unit Citation” for “any unit of [the] North Carolina national guard distinguishing itself by extraordinary heroism or meritorious service while in a State active duty status.” In contrast, N.C. Gen. Stat. §§ 127A-45.2, -45.2A (2007) establish awards for North Carolina national guard units who distinguish themselves “through heroism or meritorious service to the State of North Carolina.”

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versy and misunderstanding National Guard troops serve at the direction of the state governors until the president [sic] of the United States orders them to active duty for either domestic emergencies or overseas service.

Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia*, 2007 Army Law. 30, 32 (2007) [hereinafter, Martin, *Military Justice*] (footnote omitted; alteration in original). Since 1933, all persons who have enlisted in their State national guard, i.e., “the National Guard of the various States” have also been required to enlist in the federal component of the Guard, i.e., “the National Guard of the United States.” *Perpich v. Department of Defense*, 496 U.S. 334, 345, 110 L. Ed. 2d 312, 325 (1990). “In the latter capacity they [are] part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retain[] their status as members of a separate State Guard unit.” *Id.* at 345, 110 L. Ed. 2d at 325. “[A] member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service.” *Id.* at 346, 110 L. Ed. 2d at 325. However, when “ “relieved from active duty in the military service of the United States all individuals and units . . . revert to their [state] National Guard status.” ’ ” *Id.* (citations omitted). In sum, as stated by the United States Supreme Court, “all [National Guard members] . . . must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time.” *Id.* at 348, 110 L. Ed. 2d at 327. In other words, except for those instances where individual members of a state National Guard are on federal active duty, members retain their state affiliation, status, and duties. *See id.* at 345-46, 348, 110 L. Ed. 2d at 325-27. As such, in the instant case, unless plaintiff’s order to active duty for training pursuant to 32 U.S.C. § 502(f) qualifies as federal active duty, she was functioning in a state capacity and subject to the command and control of the governor.

C. Statuses of National Guard Members
(Title 10 and Title 32)

As discussed *infra*, title 10 and title 32 of the United States Code indicate that plaintiff’s status in the case *sub judice* was not federal active duty and consequently, that she was functioning in a state capacity when she sustained her injuries. Federal “active duty” is defined as “full-time duty in the active military service of the United States” but “does not include full-time National Guard duty.” 10 U.S.C.

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§ 101(d)(1) (2000); 32 U.S.C. § 101(12) (2000) (same). “Full-time National Guard duty” is defined as

training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States . . . in the member’s status as a member of the National Guard of a State or territory . . . under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

10 U.S.C. § 101(d)(5) (2000); 32 U.S.C. § 101(19) (2000) (same). In other words, a National Guard member is only on federal “active duty” as a member of the United States Army when called to federal service pursuant to Title 10. *See Perpich*, 496 U.S. at 346, 350 n.21, 110 L. Ed. 2d at 325, 328, n.21; *see also* Martin, *Military Justice*, 2007 Army Law. at 31 (footnote omitted) (“[w]hile the National Guard is a component of the U.S. Armed Forces, it is also the militia of the individual state when not serving in a federal status. More simply put, unless called into federal service under Title 10, the National Guard remains primarily under the control of the states and their governors”).

In contrast to a call to federal service pursuant to Title 10, when participating in training under the authority of Title 32, a National Guard member is generally acting in his or her state capacity.

Federally funded [Army National Guard] training duty, referred to as “Title 32 duty,” is ordered by the state governor and paid for with federal funds. This form of duty is used for weekend drills, annual training, and most schools and assignments within the United States. Most National Guard duty falls into this category. Conversely, “Title 10 duty” is duty ordered by the President or the Secretary of the [Army] under the authority of federal law and paid for with federal funds. This form of duty is used for basic (initial) military training, overseas training missions, and occasions when the Guard is called or ordered to active duty (mobilized) by the U.S. Government.

Grant Blowers and David P.S. Charitat, *Disciplining The Force—Jurisdictional Issues In The Joint And Total Force*, 42 A.F. L. Rev. 1, 8 (1997). “In 1956, Congress revised, codified, and enacted into law, Title 32 of the U.S. Code, entitled ‘National Guard.’ . . . Title 32 generally serves as a compilation of most federal statutes affecting the National Guard while serving under state control, yet funded through

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[Department of Defense] appropriations.” Christopher R. Brown, *Been There, Doing That in a Title 32 Status: The National Guard Now Authorized to Perform its 400-Year Old Domestic Mission in Title 32 Status*, 2008 Army Law. 23, 29 [hereinafter, Brown, *Title 32 Status*]. Title 32 training includes: “Inactive Duty for Training (IDT, that is, weekend drills) and annual training (AT)[, which] are performed under the authority of 32 U.S.C. § 502(a) . . . [as well as t]raining . . . performed under [32 U.S.C.] § 502(f).” Rich, *The National Guard*, 1994 Army Law. at 40, n.51 (emphasis added).

In sum, as the federal scheme indicates, when plaintiff was training under the authority of 32 U.S.C. § 502(f), she was: (1) wearing her state militia hat; (2) under the command and control of the Governor; and (3) not on federal “active duty.” Nevertheless, this does not compel the conclusion that our legislature intended “State active duty” to include training pursuant to Title 32, and we reiterate that such an interpretation requires us to read words into section 97-2(2) which simply are not there.

D. “State Active Duty” in the Federal Context

32 C.F.R. § 536.97 (2008), which governs the “Scope for claims under [the] National Guard Claims Act [32 U.S.C. § 715]” provides:⁹

(a) Soldiers of the Army National Guard (ARNG) can perform military duty in an active duty status under the authority of Title 10 of the United States Code, in a full-time National Guard duty or inactive-duty training status under the authority of Title 32 of the United States Code, or in a state active duty status under the authority of a state code.

(1) When ARNG soldiers perform active duty, they are under federal command and control and are paid from federal funds. For claims purposes, th[e]se soldiers are treated as active duty soldiers. . . .

(2) When ARNG soldiers perform full-time National Guard duty or inactive-duty training, they are under state command and control and are paid from federal funds. . . .

9. “The National Guard Claims Act authorizes the settlement of claims for damages caused by National Guard Soldiers in certain limited circumstances. The Act only applies when National Guard personnel are under state control, [and are] being paid with federal funds, such as when they are performing full-time National Guard duties or are on inactive duty training.” R. Peter Masterton, “*Managing a Claims Office*,” 2005 Army Law. 46, 61 (footnotes omitted).

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(3) *When ARNG soldiers perform state active duty, they are under state command and control and are paid from state funds. . . .*

(Emphasis added.)¹⁰ While the situations this regulation addresses are not exactly on point, the explicit distinction it makes between federal active duty (Title 10 duty), Title 32 duty, and state active duty and its “definition” of state active duty, i.e., a call to state service performed under the authority of state law and under the command and control of the Governor which is paid by the State with state funds, are consistent with the general definition of “state active duty” as articulated in numerous military law review articles.

National Guard forces perform their historical, militia-based domestic operational missions when their governors mobilize them in state controlled and funded SAD [state active duty] status. State laws dictate when state authorities may call upon their National Guard to perform SAD, generally providing broad authority for the use of militias to quell domestic disturbances or assist in disaster relief when local and state government civil resources have been exhausted. The states typically pay their National Guard personnel serving in a SAD status at the same rate of pay that the Soldiers . . . receive while serving in a federal status. During a SAD response, the states may use federal equipment provided to the states’ National Guard units for training purposes; however, the states must reimburse the Federal Government for the use of certain resources, such as fuel.

Brown, *Title 32 Status*, 2008 Army Law. at 29 (footnotes omitted). “[S]tate active duty . . . is performed under [the] authority of state law and paid for with state funds[.]” Rich, *The National Guard*, 1994 Army Law. at 40 (footnote omitted). “State active duty (SAD) is specifically defined by state law. In general, it refers to the National Guard under the control of the governor, performing a state mission, paid for by state funds.” Kevin Cieply, *Charting A New Role For Title 10 Reserve Forces: A Total Force Response To Natural Disasters*, 196 Mil. L. Rev. 1, 4, n.10 (2008). In sum, these articles further support the argument that at least in the federal context, “State active duty” is generally defined as: A call to state service pursuant to state law

10. This section did not contain the “state active duty” language at the time our legislature amended section 97-2(2) as it was not adopted until 2006 and not in effect until 2007. See 71 Fed. Reg. 69,360, 69,390 (Nov. 30, 2006) (codified at 32 C.F.R. § 536.97).

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where National Guard members serve under the command and control of the Governor and are paid by the State with state funds.

E. N.C. Gen. Stat. § 97-2(2) and “State Active Duty”

While the above general definition is not controlling as to what our legislature intended “State active duty” to mean within the context of section 97-2(2), this definition does square with the concept of “state service” set out in chapter 127A of the North Carolina General Statutes and discussed *supra*, i.e., those instances when National Guard members are called to perform state service by the Governor under the authority of state law and are paid by the State with state funds. Furthermore, we believe the explicit differentiation between federal “active duty”; Title 32 duty, (including, *inter alia*, full-time national guard duty); and “state active duty” contained in the federal scheme provides insight as to why our legislature deemed it necessary to amend section 97-2(2) to clarify when National Guard members are state employees for purposes of the Workers’ Compensation Act, particularly given this Court’s decisions in *Britt* and *Duncan*, which respectively awarded benefits to a Guard member injured while training pursuant to Title 10 and to a Guard member injured presumably while training pursuant to Title 32. Therefore, we conclude that pursuant to N.C. Gen. Stat. § 97-2(2), “State active duty” includes those instances where a North Carolina National Guard member is: Called into service of the State of North Carolina; operating under the command and control of the Governor pursuant to state law; and paid by the State with state funds.¹¹ Consequently, we further conclude it does not encompass Title 32 training.

Our conclusion is consistent with the vast majority of other states that have considered the compensability of a National Guard member’s injuries incurred while training pursuant to Title 32. *See, e.g., Sullivan v. Industrial Claim Appeals Office*, 22 P.3d 535, 539 (Colo. Ct. App. 2000) (holding that injuries sustained during weekend training activities undertaken pursuant to 32 U.S.C. § 502 are not com-

11. We note that our conclusion is also supported by the sample “State active duty” order which is present in the record but which the Deputy Commissioner and the Commission did not consider because this evidence was excluded on various grounds. This order: (1) specifically states that the National Guard Member is “ordered to State Active Duty (SAD)” in response to Hurricane Isabel; (2) lists its authorization as “[c]onfirm[ing] verbal orders of the Adjutant General”; (3) states that the call to duty is “By Order of the Governor”; (4) states that “State pay and allowances” are authorized and that “[p]ersons in a federal pay status . . . must be in an official leave status when placed on State Duty Orders”; and (5) provides that “[p]ersonnel listed on this order are authorized [to receive] the NCNG State Active Duty Award.”

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pensable because to be on “active service” and thus to qualify for workers’ compensation benefits, national guard members “must be ordered by the governor to provide full-time service . . . in response to an emergency confronting the state”); *Kentucky Nat’l Guard v. Bayles*, 535 S.W.2d 234, 237-38 (Ky. 1976) (holding that national guard members who are injured while training pursuant to 32 U.S.C. § 502 are not entitled to state workers’ compensation benefits because in that status they are entitled to receive federal pay); *Lucas v. Military Dep’t*, 498 So. 2d 161, 166 (La. Ct. App. 1986) (holding that national guard members who sustain injuries during annual training pursuant to 32 U.S.C. § 502 are not entitled to state workers’ compensation benefits because they already receive federal payment and benefits); *Cochran v. Missouri Nat’l Guard*, 893 S.W.2d 814, 816-17 (Mo. 1995) (holding that injuries sustained by national guard members while on active duty training pursuant to 32 U.S.C. § 502 are not compensable under the state workers’ compensation system because in this status members are not “ordered to active state duty by the governor”); *Banker v. Oklahoma Army Nat’l Guard*, 7 P.3d 509, 510 (Okla. Civ. App. 2000) (holding that national guard members injured while participating in a summer training camp pursuant to 32 U.S.C. § 503 are not entitled to state workers’ compensation benefits because they are not on “state duty”). In addition, we note that because plaintiff was performing full-time national guard duty she was entitled to receive and did receive some federal benefits for her injuries in accordance with federal law. *See, e.g.*, 10 U.S.C. § 1074(a) (2000) (medical and dental care); 37 U.S.C. §§ 204(g), (h) (2000) (incapacitation pay); 38 U.S.C. § 1131 (2000) (veteran disability pay). In contrast, National Guard members “performing state active duty are not covered by federal medical or disability benefits. [When] performing state missions[, they] are only protected under state worker’s compensation laws.” Martin, *Military Justice*, 2007 Army Law. at 34 (footnote omitted).

In the instant case, it is undisputed that plaintiff was injured while training pursuant to Title 32 and that she was paid with federal and not state funds. As a result, plaintiff was not on “State active duty” pursuant to section 97-2(2) when she sustained her injuries. Because plaintiff was not an employee as defined by N.C. Gen. Stat. § 97-2(2), the Commission lacked subject matter jurisdiction.

III. Conclusion

In sum, for the reasons stated herein, we conclude that plaintiff was not an employee within the meaning of N.C. Gen. Stat. § 97-2(2) when she sustained her injuries. As such, the Commission did not

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have subject matter jurisdiction. Accordingly, we vacate the Commission's opinion and award.

Vacated.

Judges ELMORE and GEER concur.

MITCHELL TEAGUE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT v. BAYER AG; BAYER POLYMERS, LLC, N/K/A BAYER MATERIALSCIENCE, LLC; BAYER CORPORATION; CROMPTON CORPORATION; UNIROYAL CHEMICAL COMPANY, INC., N/K/A CROMPTON MANUFACTURING COMPANY, INC.; THE DOW CHEMICAL COMPANY; E.I. DUPONT DE NEMOURS & COMPANY; DUPONT DOW ELASTOMERS, L.L.C.; DSM COPOLYMER, INC.; DSM ELASTOMERS EUROPE, B.V.; EXXON MOBIL CHEMICAL, A DIVISION OR SUBSIDIARY OF EXXON MOBIL CORP., DEFENDANTS-APPELLEES

No. COA07-1108

(Filed 20 January 2009)

1. Appeal and Error— motion to dismiss with prejudice granted—settlement

Plaintiff's motion to dismiss his claims with prejudice against defendant Exxon Mobil Chemical, a division or subsidiary of Exxon Mobil Corp., was granted.

2. Unfair Trade Practices— standing—indirect purchaser—antitrust and consumer fraud—Chapter 75 violations

The trial court erred in an antitrust and consumer fraud action by dismissing plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim for relief based on lack of standing because: (1) the factors in *Associated General Contractors*, 459 U.S. 519 (1983), are not applicable to determine which indirect purchasers have standing to sue under the North Carolina antitrust statutes; (2) a trial court will be better suited to assess whether plaintiff will be able to prove causation based on the alleged antitrust violation at the class certification and summary judgment stages; (3) plaintiff alleged sufficient facts in his complaint to show a right of recovery; (4) the fact that EPDM is a component part and not an end product is not a complete bar to recovery, and fear of complexity for apportioning damages is not a sufficient reason to disallow a suit of an indirect purchaser

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given the intent of the General Assembly to establish an effective private cause of action for aggrieved consumers in North Carolina; and (5) allowing indirect purchasers to sue for Chapter 75 violations will best advance the legislative intent that such violations be deterred and that aggrieved consumers have a private cause of action to redress Chapter 75 violations.

3. Class Actions— full faith and credit to foreign order— additional publication not required

The decretal portion of the trial court's order requiring additional publication in North Carolina newspapers of the pertinent class settlement is reversed because the trial court failed to give full faith and credit to the order of the Tennessee court finding that the notice of settlement complied fully with the laws of the State of Tennessee, due process, and any other applicable rules of that court.

Appeal by Plaintiff from order entered 11 May 2007 by Judge Ben F. Tennille in Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 26 August 2008.

Wimer & Jobe, by Michael G. Wimer; and Forman Rossabi Black, P.A., by Amiel J. Rossabi, for Plaintiff-Appellant.

Mayer Brown LLP, by Mary K. Mandeville, Gary A. Winters, and Michael S. Passaportis, for Defendant-Appellee DSM Copolymer, Inc.; Pinto Coates Kyre & Brown PLLC, by Richard L. Pinto, for Defendant-Appellee Exxon Mobile Chemical, a division or subsidiary of Exxon Mobil Corp.

McGEE, Judge.

Plaintiff filed suit under N.C. Gen. Stat. §§ 75-1 and 75-1.1 on 2 April 2004 alleging Defendants engaged in price fixing of ethylene propylene diene monomer elastomers (EPDM). Plaintiff filed his complaint as a putative class action on behalf of similarly situated North Carolina consumers. Plaintiff filed an amended complaint on 23 December 2004 that removed Defendants DSM N.V., DSM Elastomers Holding Company, Inc., and DSM Elastomers, Inc. from the complaint and added claims that Defendants concealed the alleged conspiracy and illegal conduct from consumers. The case was designated as a complex business case on 15 March 2005 and Special Superior Court Judge Ben F. Tennille was assigned to preside over the case.

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Pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), Defendants Bayer Corporation, Bayer MaterialScience LLC (f/k/a Bayer Polymers LLC), Crompton Corporation, Crompton Manufacturing Company, Inc., The Dow Chemical Company, E.I. du Pont de Nemours and Company, DuPont Dow Elastomers L.L.C., and DSM Copolymer, Inc. filed a motion on 24 January 2005 to dismiss Plaintiff's first amended complaint for failure to state a claim for relief. Defendants Dow Chemical Company, E.I. DuPont de Nemours & Company, and DuPont Dow Elastomers, L.L.C. (collectively, DDE Defendants) entered into a multistate settlement of the indirect purchaser claims filed against them by consumers in the District of Columbia and twenty-eight states, including North Carolina. Circuit Court Judge John McAfee in Claiborne County, Tennessee approved this settlement on 21 June 2005. Plaintiff filed a motion to dismiss the claims against the DDE Defendants on 26 September 2005.

The trial court heard the remaining Defendants' motion to dismiss Plaintiff's first amended complaint on 21 November 2005 and entered an order allowing Plaintiff to again amend his complaint. Plaintiff filed a second amended complaint on 12 December 2005.

In his second amended complaint, Plaintiff alleged he purchased EPDM roofing materials and a pond liner, as well as at least one vehicle with EPDM components, between 1994 and 2002. Plaintiff's second amended complaint also stated that EPDM was not a consumer product but a component found in many consumer products and that the amount of EPDM in a given product will vary depending on the nature of that product. For example, Plaintiff alleged "[t]he EPDM roofing [material] purchased by Plaintiff and other Class Members is believed to contain at least 90% EPDM" and "[t]he tires, window molding, hoses, and other rubber products purchased by Plaintiff and the other Class Members [are] believed to include 1% or more EPDM."

Plaintiff alleged that between 1994 and 2002, Defendants manufactured, marketed, sold, and/or distributed throughout the United States virtually all EPDM produced in the United States during that time. Plaintiff further alleged in his second amended complaint that Defendants engaged in price fixing of EPDM by agreeing to restrict output and raise prices for the sale of EPDM sold in the United States and elsewhere. Plaintiff claimed that this agreement forced Plaintiff and other consumers to pay higher prices for EPDM while Defendants earned profits exceeding a normal rate of return.

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Plaintiff alleged that he and other North Carolina class members absorbed all of the portion of the price affected by the price fixing agreement because middlemen passed on 100% or more of the overcharge from Defendants.

Defendants Bayer Corporation, Bayer MaterialScience LLC, and Bayer AG (collectively Bayer Defendants) agreed to a multistate settlement of indirect purchaser claims on or about 27 October 2005, including the claims of indirect purchasers in North Carolina. Plaintiff filed a motion on 5 April 2006 for leave to dismiss with prejudice the claims against the Bayer Defendants.

Defendants DSM Copolymer, Inc., Chemtura (f/k/a Crompton) Corporation, Uniroyal Chemical Company, Inc., and Exxon Mobile Chemical renewed their motion to dismiss Plaintiff's second amended complaint on 9 January 2006.

In an order entered 11 May 2007, the trial court granted Plaintiff's motion to dismiss claims against the DDE Defendants and the Bayer Defendants, and ordered that notice of the settlement with the DDE Defendants and the Bayer Defendants be published in the *Asheville Citizen-Times* and the *Raleigh News & Observer*. The trial court also granted the moving Defendants' Rule 12(b)(6) motion to dismiss for lack of standing. Plaintiff appeals from the 11 May 2007 order of the trial court.

[1] Following Plaintiff's appeal to our Court, Plaintiff filed a motion with our Court on 18 November 2008 to dismiss his claims with prejudice against Defendant Exxon Mobil Chemical after settlement with this Defendant. We grant Plaintiff's motion to dismiss the claims with prejudice against Defendant Exxon Mobil Chemical, a division or subsidiary of Exxon Mobil Corp.

On appeal, Plaintiff argues that the trial court erred by dismissing Plaintiff's claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) when Plaintiff had standing to sue under N.C. Gen. Stat. §§ 75-1 and 75-1.1, and also erred in requiring publication of additional class notice.

I.

[2] In his first assignment of error, Plaintiff argues the trial court erred in dismissing his complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim for relief because Plaintiff lacked standing.

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The “purpose of a motion [to dismiss] pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) is ‘to test the legal sufficiency of the pleading against which [the motion] is directed.’” *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 647, 599 S.E.2d 410, 415 (2004) (internal citations omitted). “Rule 12(b)(6) ‘generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.’” *Meadows v. Iredell Cty.*, 187 N.C. App. 785, 787, 653 S.E.2d 925, 927 (2007) (internal citations omitted). “One such bar to recovery is a lack of standing, which may be challenged by a motion to dismiss for failure to state a claim upon which relief may be granted.” *Id.* at 787, 653 S.E.2d at 927 (citing *Krauss v. Wayne County DSS*, 347 N.C. 371, 373, 493 S.E.2d 428, 430 (1997) (“The 12(b)(6) motion was made on the basis that [the] plaintiff did not have standing[.]”).

As our Supreme Court recently stated, “[a]s a general matter, the North Carolina Constitution confers standing on those who suffer harm: ‘All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . .’” *Mangum v. Raleigh Bd. of Adjust.*, 196 N.C. —, —, — S.E.2d —, — (2008) (quoting N.C. Const. art. I, § 18).

“Although North Carolina courts are not bound by the ‘case or controversy’ requirement of the United States Constitution with respect to the jurisdiction of federal courts, similar ‘standing’ requirements apply ‘to refer generally to a party’s right to have a court decide the merits of a dispute.’” *Meadows*, 187 N.C. App. at 787, 653 S.E.2d at 927-28 (quoting *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003)).

In *Neuse River*, this Court defined “[t]he ‘irreducible constitutional minimum’ of standing” as: (1) “injury in fact”—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Meadows, 187 N.C. App. at 787, 653 S.E.2d at 928 (quoting *Neuse River*, 155 N.C. App. at 114, 574 S.E.2d at 52). “Parties without standing to bring a claim, cannot invoke the subject matter jurisdiction of the North Carolina courts to hear their claims.” *Id.* at 787, 653 S.E.2d at 928.

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In the case before us, the trial court quoted *Slaughter v. Swicegood*, 162 N.C. App. 457, 464, 591 S.E.2d 577, 582 (2004) in its order, stating that “[a] motion to dismiss a party’s claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6).” The Courts in our state use the term “standing” to “refer generally to a party’s right to have a court decide the merits of a dispute.” *Neuse River*, 155 N.C. App. at 114, 574 S.E.2d at 52. A court may not properly exercise subject matter jurisdiction over the parties to an action unless the standing requirements are satisfied. *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). The trial court in the present case correctly noted that standing is often an issue in an indirect purchaser case, such as the case before us, where there are contentions that injury is conjectural and damage awards are speculative. An indirect purchaser is one who purchases a product from some intermediary party rather than directly from the manufacturer. See *Hyde v. Abbott Laboratories*, 123 N.C. App. 572, 574, 473 S.E.2d 680, 681-82 (1996).

The United States Supreme Court addressed the issue of standing for indirect purchasers under federal antitrust law in *Hanover Shoe Co. v. United Shoe Mach. Corp.*, 392 U.S. 481, 20 L. Ed. 2d 1231 (1968), and in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707 (1977). In *Hanover Shoe*, the plaintiff shoe manufacturer sued the defendant, a manufacturer of shoe machinery, for treble damages alleging the defendant created a monopoly over its more complicated and important shoe machinery by leasing, but refusing to sell, the machinery. *Hanover Shoe*, 392 U.S. at 483, 20 L. Ed. 2d at 1236. The defendant argued that the plaintiff shoe manufacturer suffered no injury because it simply passed the illegal overcharges on to its customers. *Id.* at 487-88, 20 L. Ed. 2d at 1238. The Supreme Court rejected the so-called “passing-on” defense and held that a direct purchaser was entitled to damages even if it did pass on the higher prices to its customers. *Id.* at 488-89, 20 L. Ed. 2d at 1238-39.

In *Illinois Brick*, the State of Illinois brought suit as an indirect purchaser against manufacturers and distributors of concrete block. *Illinois Brick*, 431 U.S. at 726-27, 52 L. Ed. 2d at 713. At issue was whether an indirect purchaser plaintiff could use the “passing on” theory offensively to show injury inflicted by the defendant’s violations of federal antitrust laws. *Id.* The Supreme Court held that indirect purchasers did not have standing to sue under the federal antitrust laws. *Id.*

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Although indirect purchaser suits were barred in federal anti-trust cases by *Illinois Brick*, the U.S. Supreme Court later held that states could permit indirect purchaser suits under state antitrust laws in *Associated Gen. Contractors v. Carpenters*, 459 U.S. 519, 74 L. Ed. 2d 723 (1983) (*AGC*). See also *California v. ARC America Corp.*, 490 U.S. 93, 104 L. Ed. 2d 86 (1989) (A state may allow an indirect purchaser to sue under the state's own antitrust law.). In *AGC*, the plaintiff labor union sued the contractor's association under § 4 of the Clayton Act alleging the contractor's association had conspired with nonunion contractors and subcontractors to adversely affect the trade of the unionized firms and the unions themselves. *Id.*; 15 U.S.C. § 15 (2004). In holding that the union was not a proper plaintiff under § 4 of the Clayton Act, the Supreme Court identified several factors to be considered in determining standing under federal antitrust law. *Id.* These factors include: (1) whether the plaintiff is a consumer or a competitor in the market in which trade was restrained; (2) whether the injury alleged is a direct or indirect impact of the restraint alleged; (3) whether there exists an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (4) whether the damages claim is highly speculative; and (5) whether the plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages. *AGC*, 459 U.S. at 539-44, 74 L. Ed. 2d at 738-42.

The issue of whether suit by an indirect purchaser is allowed in North Carolina was decided by our Court in *Hyde v. Abbott Laboratories* when we held that indirect purchasers have standing under N.C. Gen. Stat. § 75-16 to sue under the antitrust laws of North Carolina. *Hyde*, 123 N.C. App. at 584, 473 S.E.2d at 688. In *Hyde*, the plaintiffs were consumers of infant formula manufactured by the defendants. *Id.* at 573-74, 473 S.E.2d at 681-82. In the plaintiffs' class action suit, they alleged that the defendants violated several of North Carolina's antitrust laws by " 'engaging in a continuing conspiracy to fix the wholesale price of infant formula sold within the United States, including North Carolina.' " *Id.* at 573, 473 S.E.2d at 681. The plaintiffs also alleged that this "illegal conspiracy caused an increase in wholesale prices paid by the parties who purchased the infant formula directly from the manufacturer ([direct purchasers]) above that which the direct purchasers would have paid absent any conspiracy." *Id.* Our Court stated that the plaintiffs in *Hyde* were "indirect purchasers from the defendant manufacturers because they purchased infant formula through parties other than the [defendant] manufacturer." *Id.* at 574, 473 S.E.2d at 681-82. In *Hyde*, the trial

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court granted the defendants' motion to dismiss for lack of standing, but on appeal our Court reversed, holding indirect purchasers have standing to sue under the antitrust laws of North Carolina. *Id.* at 584, 473 S.E.2d at 688.

In the present case, Plaintiff argues that *Hyde* established standing for all indirect purchasers, and that the trial court ignored this Court's holding in *Hyde* by imposing limits on the rights of indirect purchasers to sue under the North Carolina antitrust statutes. In contrast, Defendants contend that while *Hyde* established that indirect purchasers have standing, *Hyde* did not delineate the scope or limits of that standing and the well-established doctrine of proximate cause requires that there be limits to this standing. They argue that to adopt Plaintiff's interpretation of *Hyde* would mean that every indirect purchaser claiming to be injured under the antitrust statutes would have a cause of action no matter how attenuated the causal connection between the antitrust violation and the alleged injury. Defendants contend this outcome would be inconsistent with the principles of proximate cause and could result in an unmanageable surge in antitrust litigation.

Defendants point out that in a prior order entered by Judge Tennille in *Crouch v. Crompton Corp.*, 2004 NCBC 7 ¶ 47, 2004 WL 2414027 (N.C. Super. Ct. Oct. 26, 2004), Judge Tennille had stated that *Hyde* did not set forth the scope and breadth of standing under the North Carolina antitrust statutes. In *Crouch*, the trial court stated there was a need for certain boundaries for indirect purchaser standing and it applied a slightly modified five factor *AGC* test. *Crouch*, 2004 NCBC 7 ¶¶ 66-74. In the case before us, the trial court applied these same five factors to determine whether Plaintiff had standing.

Plaintiff argues that the *AGC* factors are not applicable to the issue of standing for indirect purchasers in antitrust cases and that *AGC* is distinguishable from the present case. Plaintiff correctly distinguishes *AGC* from the case before us in several relevant ways, including that the plaintiff in *AGC* was not an indirect purchaser. The U.S. Supreme Court held in *AGC* that the plaintiff union was not a person injured by reason of an antitrust violation. *AGC* involved competitors rather than consumers. Also, the plaintiffs in *AGC* alleged breach of a collective-bargaining agreement and not antitrust violations. *See AGC*, 459 U.S. 519, 74 L. Ed. 2d 723.

Defendants contend the modified *AGC* five factor test applied by the trial court in this case is a logical and appropriate standard by

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which to distinguish actual injuries resulting from violations of North Carolina antitrust statutes from those complaints that are too remote and attenuated. Defendants argue that trial courts in several other states have considered this issue and have applied the *AGC* factors in determining which indirect purchasers have standing to sue under their state antitrust laws. Defendants cite the following cases where trial courts in other states applied the *AGC* factors to dismiss indirect purchaser claims brought by retail customers against Visa and MasterCard. The retail customers alleged that the credit card companies' tying arrangements with retail stores caused prices to increase. See *Fucile v. Visa U.S.A., Inc.*, No. S1560-03 CNC, 2004 WL 3030037 (Vt. Super. Ct. Dec. 27, 2004); *Southard v. Visa U.S.A., Inc.*, No. LACV 031729, 2004 WL 3030028 (Iowa Dist. Ct. Nov. 17, 2004), *aff'd*, 734 N.W.2d 192 (Iowa 2007); *Knowles v. Visa U.S.A., Inc.*, No. CV-03-707, 2004 WL 2475284 (Me. Super. Ct. Oct. 20, 2004); *Tackitt v. Visa U.S.A., Inc.*, No. CI03-740, 2004 WL 2475281 (Neb. Dist. Ct. Oct. 19, 2004). However, in these actions, damages alleged by the plaintiffs were through an alleged inflated cost of goods sold by merchants who were injured by Visa's and MasterCard's inflated cost of financial services. The plaintiffs were not consumers or competitors in the allegedly restrained market, nor were the plaintiffs indirect purchasers in that the plaintiffs did not end up with a product supplied by the defendants. Antitrust laws were intended to protect competition and, thus, standing is generally limited to consumers or competitors. There was no connection between the plaintiffs' purchases of consumer goods and the defendants' alleged unlawful tying of debit services in the Visa and MasterCard suits. Therefore, the courts denied indirect purchaser standing to the plaintiffs in several of these actions. See *Anderson Contracting, Inc. v. Bayer AG*, CL 95959, 18 (Iowa Dist. Ct. 31 May 2005) ("Neither *Associated General Contractors* nor *Southard* involved a product, and thus price-fixing was not at issue, as it is in the present case.").

Plaintiff cites a recent Iowa District Court decision in which the court rejected the *AGC* factors in determining an indirect purchaser's standing, because *AGC* did not involve price fixing and because the plaintiffs in *AGC* were competitors rather than purchasers. *Id.* As stated above, *AGC* is distinguishable from the present case and we hold the *AGC* factors do not apply in determining which indirect purchasers have standing to sue under the North Carolina antitrust statutes.

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Plaintiff has alleged in his complaint that he is a consumer who purchased EPDM roofing material and a pond liner manufactured, marketed, distributed, or sold by one or more of Defendants, as well as at least one vehicle with EPDM components. Plaintiff's allegations of standing show he is a consumer and a purchaser of EPDM. According to the complaint, Plaintiff alleges EPDM comprises 80 to 85 percent of ethylene-propylene elastomers. Plaintiff therefore has alleged that EPDM is a significant component of at least one of the products that he purchased. Plaintiff contends there exists a causal connection between the Defendants' alleged price fixing and the Plaintiff's injury. Plaintiff has alleged in his complaint, that because EPDM is a significant component part of the products at issue in this case, an increase in the price of EPDM could have a ripple effect, thereby increasing the price of the product for Plaintiff, the ultimate consumer.

Defendants contend there are multiple inputs at multiple steps in the EPDM distribution chain, and the allegedly price-fixed product is transformed into a new product in at least one such step. These multiple variables, Defendants argue, render injury and damages impossibly speculative, and therefore the causal chain cannot be established. Defendants cite *Crouch v. Crompton Corp.*, 2004 NCBC 7 ¶ 30, 2004 WL 2414027, *18-25 (N.C. Super. Ct. Oct. 26, 2004), a case in which the trial court expressed strong concerns about stretching antitrust law to cover damages in cases like these. In *Crouch*, the trial court analyzed the complexity and costliness of adjudicating an antitrust case based on rubber compounds and chemicals that form a component of tire products at issue. The trial court in *Crouch* was concerned in part about the lack of express statutory language granting indirect purchaser standing or any definitive ruling by our Supreme Court on indirect purchaser standing. However, our Court and the courts in our state are clearly bound by the prior opinion of our Court in *Hyde* dealing with indirect purchaser cases, unless and until it is overturned by our Supreme Court or by enactments of the General Assembly, which has not occurred in the more than twelve years since *Hyde* was decided by our Court. See *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

The issue now before our Court is a Rule 12(b)(6) motion analysis. A motion to dismiss under Rule 12(b)(6) requires us to determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be

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granted[.]” *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted). The complaint is to be liberally construed in ruling upon a Rule 12(b)(6) motion, and it should not be dismissed unless it appears to a certainty that the plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim. *Jenkins v. Wheeler*, 69 N.C. App. 140, 142, 316 S.E.2d 354, 356, *disc. review denied*, 311 N.C. 758, 321 S.E.2d 136 (1984). In a Rule 12(b)(6) determination we must decide whether Plaintiff, as an indirect purchaser of products containing EPDM, has antitrust standing to recover damages under Chapter 75. What is at issue is Plaintiff’s right of access to the courts, not the merits of his allegations. A trial court will be better suited to assess whether Plaintiff will be able to prove causation based on the alleged antitrust violation at the class certification and summary judgment stages. See *Investors Corp. v. Bayer AG*, S1011-04 CaC. (Vt. Super. Ct. 1 June 2005). At a Rule 12(b)(6) stage in this action, Plaintiff has alleged sufficient facts in his complaint to show a right of recovery. See *Davis v. Messer*, 119 N.C. App. 44, 51, 457 S.E.2d 902, 906 (1995).

The injury that Plaintiff alleges appears to be within the type of injury that the General Assembly intended to address through our state’s antitrust and consumer fraud law. If Plaintiff can demonstrate that the increased EPDM prices affected the price of the goods he purchased, then he will have established the type of injury to indirect purchasers that the General Assembly intended to remedy by allowing indirect purchaser suits.

Defendants challenge the speculative nature of Plaintiff’s damages claim. See *AGC*, 459 U.S. at 542, 74 L. Ed. 2d at 741. Plaintiff argues he “will prove his damages through expert testimony using accepted economic analysis[.]” Defendants contend this simple statement of what Plaintiff states he will do at trial is not convincing enough to refute the specific and well-supported concerns of the trial court as to the speculative nature of Plaintiff’s damages.

We agree with the trial court’s statement that calculation of Plaintiff’s damages would be a “daunting task.” In *Hanover Shoe*, the Supreme Court observed how tracing a cost increase through several levels of a chain of distribution “would often require additional long and complicated proceedings involving massive evidence and complicated theories.” *Hanover Shoe*, 392 U.S. at 493, 20 L. Ed. 2d at 1241. It is correct that the fact that EPDM is a component part and not an end product is not a complete bar to recovery; however, this consid-

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eration does make calculating Plaintiff's damages more difficult. *See Illinois Brick*, 431 U.S. at 759, 52 L. Ed. 2d at 733.

Defendants contend that courts would have to isolate the effect of the alleged conspiracy on the price of EPDM and rule out the numerous other factors that could cause a price increase in these products such as inflation, prices of other inputs, transport costs, product demand, and market conditions. Thus, a rigorous economic analysis would be required to determine whether increased prices were the result of the alleged price fixing or the result of some other factor.

The U.S. Court of Appeals for the Ninth Circuit has recognized, "Complex antitrust cases . . . invariably involve complicated questions of causation and damages." *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997). Even if the present case proves to be no exception, that is not sufficient reason to dismiss for lack of standing. As the trial court found, considering several products containing EPDM adds to the complexity of apportioning damages in this case. The analysis described above would have to be conducted for every product at issue in order to accurately calculate Plaintiff's damages. Our Court recognized in *Hyde* that a suit by indirect purchasers under our antitrust laws would be complex. However, "fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser, given the intent of the General Assembly to 'establish an effective private cause of action for aggrieved consumers in this State.'" *Hyde*, 123 N.C. App. at 584, 473 S.E.2d at 687-88 (quoting *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400).

As our Court concluded in *Hyde*, "allowing indirect purchasers to sue for Chapter 75 violations will best advance the legislative intent that such violations be deterred, and that aggrieved consumers have a private cause of action to redress Chapter 75 violations." *Id.* at 584, 473 S.E.2d at 688. We therefore hold that Plaintiff has standing to bring this antitrust and consumer fraud action. We reverse the order of the trial court dismissing Plaintiff's claims.

II.

[3] In his second assignment of error, Plaintiff argues the trial court erred in requiring publication of additional class notice of the settlement with the DDE Defendants and the Bayer Defendants in the Asheville *Citizen-Times* and the *The News & Observer* of Raleigh. Plaintiff specifically contends the trial court failed to give

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full faith and credit to the order of Judge John McAfee of the Circuit Court of Tennessee, finding the notice of settlement given to the Bayer settlement class members “complied fully with the laws of the State of Tennessee, due process, and any other applicable rules of the Court.”

Plaintiff cites *Freeman v. Pacific Life Ins. Co.*, 156 N.C. App. 583, 577 S.E.2d 184 (2003), in support of his argument. In *Freeman*, the plaintiffs argued that notice given to them pursuant to a final settlement order of a class action lawsuit pending in Kentucky was inadequate and that the notice did not meet due process standards. *Freeman*, 156 N.C. App. at 585, 577 S.E.2d at 186. The plaintiffs argued that the Kentucky settlement was not entitled to full faith and credit in North Carolina. This Court’s review was limited to whether the Kentucky court had already litigated the due process and jurisdictional issues. We determined that the Kentucky judgment was entitled to full faith and credit. *Id.* at 586-90, 577 S.E.2d at 186-89. Therefore, the notice given pursuant to the Kentucky order was adequate and binding on the North Carolina Courts. *Id.*

Judge McAfee in the case before us determined that “[n]otice given to the Bayer Settlement Class members was reasonably calculated under the circumstances to inform the Bayer Settlement Class” and that such notice “complied fully with the laws of the State of Tennessee [and] due process[.]” The record in this case thus shows that the Tennessee court addressed the notice and due process issues in its order. The United States Constitution directs that “[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.” U.S. Const. art. IV, § 1. The United States Supreme Court has also held that “a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of [28 U.S.C. § 1738].” *Matsushita Elec. Indus. v. Epstein*, 516 U.S. 367, 374, 134 L. Ed. 2d 6, 17 (1996). 28 U.S.C. § 1738 (2007) provides that “[t]he records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . from which they are taken.”

We hold the trial court erred in failing to give full faith and credit to the order of the Tennessee court. The decretal section of the trial court’s order requiring additional publication in North Carolina newspapers of the class settlement is reversed. Reversed and remanded.

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[195 N.C. App. 31 (2009)]

Judges McCULLOUGH and STROUD concur.

Judge McCullough concurred in this opinion prior to 31 December 2008.

RONALD REAVES, DECEASED, EMPLOYEE, PLAINTIFF v. INDUSTRIAL PUMP SERVICE,
EMPLOYER, AMERICAN INTERSTATE INSURANCE COMPANY, CARRIER,
DEFENDANTS

No. COA07-1244

(Filed 20 January 2009)

1. Workers' Compensation— *Pickrell* presumption—circumstances sufficient to raise issue

An Industrial Commission denial of workers' compensation death benefits was remanded for findings and conclusions about the *Pickrell* presumption that the death was work-related and compensable. The circumstances are sufficient to raise an issue concerning the *Pickrell* presumption; the fact that another employee testified about what he observed does not necessarily render *Pickrell* immaterial.

2. Workers' Compensation— standard—working conditions versus general public—not versus prior job assignments

The Industrial Commission in a workers' compensation case should have focused on the decedent's working conditions versus the general public, rather than on whether this assignment involved a greater risk than that to which decedent was normally exposed.

3. Workers' Compensation— inadequate training—issue raised in claim—not directly addressed

An Industrial Commission workers' compensation decision was remanded for further findings on whether inadequate training was a significant contributing factor in decedent's death where plaintiff had asserted the issue as part of the claim. While defendant argued that the Commission had addressed the issue, that finding and conclusion addressed whether defendant complied with statutory requirements, not the inadequate training issue.

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Appeal by plaintiff from opinion and award entered 22 June 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 April 2008.

Shipman & Wright, LLP, by Gary K. Shipman and William G. Wright, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Nicole D. Viele and Meredith Taylor Berard, for defendants-appellees.

GEER, Judge.

Plaintiff, the representative of deceased employee Ronald Reaves, appeals from the Industrial Commission's decision denying plaintiff's claim for workers' compensation benefits as a result of the death of Mr. Reaves. Because the Commission failed to address all the issues before it, and, on the issues reached, applied an incorrect legal standard, we must vacate the decision and remand for further findings of fact and conclusions of law. On remand, the Commission must (1) address the applicability of the *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 370, 368 S.E.2d 582, 586 (1988), presumption; (2) apply the proper legal standard for determining whether Mr. Reaves' death was caused by extreme work conditions; and (3) address plaintiff's argument that inadequate safety measures of defendant employer Industrial Pump Service ("IPS") were a significant contributing factor in Mr. Reaves' death.

Facts

On 1 April 2004, Mr. Reaves, who was 54 years old, was working as a welder for IPS. Mr. Reaves underwent a medical examination on 16 January 2004, and the results indicated that (1) his blood pressure was 120/80, (2) his resting heart rate was 76 beats per minute, and (3) he had no prior history of cardiovascular disease.

Mr. Reaves and his work partner, Robert Templeman, a machinist, were scheduled to repair a pump at the International Paper plant in Franklin, Virginia on 1 April 2004. The repair job was supposed to be completed in one day with both Mr. Reaves and Mr. Templeman working a standard 12-hour shift. The pair traveled up to Franklin on 31 March 2004, stayed in a hotel, and went to work the next day.

On 1 April 2004, Mr. Reaves and Mr. Templeman arrived at the International Paper plant at about 7:00 a.m., but did not begin working until approximately 10:00 a.m. They were required to work in a pump room in the basement of the plant that had 15- to 18-foot ceil-

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ings and was roughly 30 feet wide and 40 feet long. The temperature inside the room was in the mid-80s, and it was hotter and more humid inside the room than outside. The entrance to the room was approximately 30 to 35 feet away from the pump they were repairing. That doorway was 10 feet by 12 feet and led to a well-ventilated hallway that was about five to 10 degrees cooler than the pump room. The pump room itself had an upright fan placed 20 to 25 feet away from where Mr. Reaves and Mr. Templeman were working.

Once the pump was disassembled by International Paper employees, Mr. Reaves and Mr. Templeman began their work, first lifting and setting a lathe against the broken pump shaft. This task took about 10 minutes. The pair then set up lighting and arranged their tools around the pump. At that point, Mr. Templeman did his work on the pump for approximately three hours, during which time Mr. Reaves was not required to perform any physical labor, but rather had “down time” and went in and out of the room. After Mr. Templeman finished, Mr. Reaves worked for approximately 45 minutes, using a welding torch to heat up a metal sleeve to 300 degrees so that it would expand to fit over the broken shaft and then tack-welding the sleeve in place over the shaft.

After Mr. Reaves finished, he and Mr. Templeman went to lunch to let the unit cool down so they could finish their work. They returned to working on the pump sometime between 4:00 p.m. and 5:00 p.m. Mr. Templeman machined the sleeve and shaft to the pump over about roughly four hours, during which time Mr. Reaves was not working. Mr. Reaves, however, generally stayed in the room with Mr. Templeman, as it was IPS policy that employees not operate machinery alone. Occasionally, Mr. Reaves would, however, leave the room.

The Commission found that at about 7:00 p.m., Mr. Reaves “complained of not feeling well and being hot,” and he told Mr. Templeman he was going to sit down in the hallway outside the pump room. The Commission further found that later, “[a]t approximately 10:30 p.m., [Mr. Reaves] again complained that he was ‘hot and fatigued’ and Mr. Templeman suggested that he go outside and take a break.” Mr. Templeman believed this was the first time that Mr. Reaves had ever had to walk out of a job site because he was not feeling well and was hot.

Mr. Templeman walked with Mr. Reaves to their work truck. Mr. Reaves got into the truck, and Mr. Templeman told Mr. Reaves that he

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would be back in about 45 minutes when he needed help reloading the truck. There were no witnesses to what occurred during the 45 minutes Mr. Reaves was alone in the truck.

When Mr. Templeman returned to the truck, he found Mr. Reaves slumped over in the passenger seat. After he received no response from Mr. Reaves when he tapped on the window, Mr. Templeman went to the plant's EMT station to get help. The medical staff found Mr. Reaves dead in the truck. An autopsy was performed on 2 April 2004, and the medical examiner noted: "At autopsy the decedent had evidence of severe atherosclerotic cardiovascular disease. . . . Cause of death: Coronary artery disease."

Plaintiff filed a claim for death benefits on 22 September 2004, and on 22 September 2006, the deputy commissioner entered an opinion and award denying the claim. Plaintiff appealed to the Full Commission, and in an opinion and award entered 22 June 2007, the Commission affirmed the deputy commissioner's decision with minor modifications. Plaintiff timely appealed to this Court.

Discussion

Appellate review of an Industrial Commission decision is limited "to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's findings of fact are conclusive on appeal if supported by competent evidence "notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). The Commission's conclusions of law, however, are reviewed de novo. *Id.*

I

[1] Plaintiff first argues that the work-relatedness of Mr. Reaves' death is unknown, and thus the Commission should have applied the presumption of compensability articulated in *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 370, 368 S.E.2d 582, 586 (1988). Plaintiff argued *Pickrell* below, but the Commission failed to make any findings of fact or conclusions of law regarding that issue.

In *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586, our Supreme Court held that "[i]n cases . . . where the circumstances bearing on work-relatedness are unknown and the death occurs within the course of

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employment, claimants should be able to rely on a presumption that death was work-related, and therefore compensable, whether the medical reason for death is known or unknown.” This Court reiterated that holding in *Wooten v. Newcon Transp., Inc.*, 178 N.C. App. 698, 700, 632 S.E.2d 525, 527 (2006) (internal quotation marks omitted), *disc. review denied*, 361 N.C. 704, 655 S.E.2d 405 (2007): “Where the circumstances concerning the causal connection between decedent’s work and his death are unknown, there is a presumption that death was work-related, and therefore compensable, whether the medical reason for death is known or unknown”

In this case, both plaintiff’s and defendant’s expert witnesses agreed that Mr. Reaves suffered a cardiac arrhythmia although they disagreed whether that resulted in an actual heart attack. Both also agreed that exposure to heat can precipitate a cardiac arrhythmia, but disagreed whether it did so in this case. At the time that Mr. Reaves died, he had been alone for a substantial period of time. As the Commission found, however, he had twice complained of being hot and not feeling well. These circumstances are sufficient to at least raise the issue of the applicability of the *Pickrell* presumption.

“It is the duty and responsibility of the full Commission to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it.” *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). The Commission must “decide all of the matters in controversy between the parties.” *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992).

Defendants argue that the Commission did not need to address the *Pickrell* presumption because the circumstances surrounding Mr. Reaves’ death are known as a result of Mr. Templeman’s testimony. The Supreme Court’s reasoning in *Pickrell* suggests, however, that the mere fact that another employee can provide testimony regarding some of the circumstances should not, standing alone, be sufficient to negate the possible applicability of *Pickrell*. The Court explained the purpose of the presumption:

Applying such a presumption of compensability is fair because the Workers’ Compensation Act should be liberally construed in order to accomplish its purpose. Employers may be in a better position than the family of the decedent to offer evidence on the circumstances of the death. *Their employees ordinarily are the last to see the decedent alive, and the first to discover the*

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body. They know the decedent's duties and work assignments. Additionally, if employers deem it necessary to determine the medical reason for death, they may notify the medical examiner of the county where the body is found, N.C.G.S. § 130A-383 (1986), and utilize the certificate of death which the medical examiner thereafter prepares. N.C.G.S. § 130A-385(a)(b) (1986). Such reports may be received as evidence, and certified copies thereof have the same evidentiary value as the originals. N.C.G.S. § 130A-392 (1986).

322 N.C. at 370, 368 S.E.2d at 586 (emphasis added). Thus, the fact that IPS' employee presented testimony regarding what he observed does not necessarily render *Pickrell* immaterial given that plaintiff's decedent is not here to testify as to what he actually experienced. The Commission must, therefore, address the applicability of the presumption.

Defendants further argue that the Commission did not err in failing to address the *Pickrell* presumption because the cause of Mr. Reaves' death is known and not work-related: coronary artery disease. The *Pickrell* Court explained, however, "[i]t is these circumstances [bearing on work-relatedness], not the medical reasons for death, which are critical in determining whether a claimant is entitled to workers' compensation benefits. A blow to the head, gunshot wound *or heart attack* may, or may not, be compensable, depending on the manner in which the event occurred. It is this aspect of causation which the presumption of compensability, properly understood, addresses." *Id.* (emphasis added).

Significantly, defendant's own expert witness, Dr. Arthur Davis, acknowledged that the pre-existing coronary artery disease would not, by itself, have caused Mr. Reaves' death: "Now, the coronary sclerosis by itself, de novo, cannot cause sudden death. You have to have a malignant dysrhythmia." He also agreed that there were numerous known causes of dysrhythmia. Dr. Davis' testimony places this case within the potential scope of *Pickrell* and *Wooten* because it raises, but does not answer, the question: what was the precipitating cause of the dysrhythmia? *See Wooten*, 178 N.C. App. at 703, 632 S.E.2d at 528 (affirming Commission's application of *Pickrell* presumption when Commission concluded " '[t]he evidence fails to show whether decedent had a heart attack that caused the motor vehicle accident or whether the circumstances of the accident caused decedent's heart arrhythmia' "). Contrary to defendants' contention, Mr. Reaves did

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not specifically die of a pre-existing condition; there was some precipitating cause for the dysrhythmia that resulted in his death.

This fact distinguishes this case from *Gilbert v. Entenmann's, Inc.*, 113 N.C. App. 619, 440 S.E.2d 115 (1994), on which defendants rely. In *Gilbert*, the employee died of a subarachnoid hemorrhage, a non-compensable cause that is deadly in and of itself without a precipitating event. *Id.* at 623, 440 S.E.2d at 118. *See also Wooten*, 178 N.C. App. at 702, 632 S.E.2d at 528 (“However, in *Gilbert*, the Court concluded that plaintiff was not entitled to the *Pickrell* presumption because decedent died from a subarachnoid hemorrhage, which is not a compensable cause. In contrast, an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to unusual or extraordinary exertion or extreme conditions.” (emphasis omitted) (internal quotation marks omitted)).

Defendants finally argue that if the *Pickrell* presumption does apply in this case, they “clearly presented evidence which rebutted any presumption.” Defendants’ contention, however, overlooks the fact that the Commission did not address *Pickrell* at all. This Court may not decide for the first time on appeal whether defendants rebutted the presumption. We, therefore, remand so that the Commission may make findings of fact and conclusions of law regarding the applicability of the *Pickrell* presumption. As the Commission may conclude on remand that the *Pickrell* presumption does not apply in this case or that defendants presented sufficient evidence to rebut it, we address plaintiff’s other assignments of error.

II

[2] Plaintiff acknowledges that in the absence of the *Pickrell* presumption, plaintiff bears the burden of proving that Mr. Reaves’ death arose out of his employment. The Commission’s pertinent conclusion of law states:

The greater weight of the evidence showed that decedent’s job duties at the [International Paper] mill in Franklin, from a physical standpoint, were easier than most of the jobs he performed and that decedent worked in the same temperatures as those to which he was normally exposed. Therefore, the employment did not subject decedent to a greater risk or hazard than that to which he was normally exposed. . . . Decedent’s working conditions did not involve unusual or extraordinary exertion or exces-

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sive exposure to heat. The greater weight of the evidence also failed to show that the conditions of decedent's employment placed him at a greater risk of overheating than members of the general public not so employed. . . . Therefore, decedent's death, which occurred on April 1, 2004, was not the result of an injury by accident arising out of decedent's employment with defendant-employer.

The finding of fact supporting this conclusion stated that "decedent's death was not caused by extraordinary exertion or by exposure to a greater hazard or risk than that to which decedent was otherwise exposed and therefore did not arise out of his employment with defendant-employer."

As a general principle, "[w]hen an employee is conducting his work in the usual way and suffers a heart attack, the injury does not arise by accident and is not compensable." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 71, 399 S.E.2d 104, 106 (1991). Nonetheless, "an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to unusual or extraordinary exertion or extreme conditions." *Id.* (emphasis omitted) (internal citations omitted). Plaintiff contends on appeal that the Commission applied the wrong test for determining whether Mr. Reaves' heart attack was due to extreme conditions.

In *Dillingham v. Yeargin Constr. Co.*, 320 N.C. 499, 358 S.E.2d 380 (1987), the Supreme Court held:

"[W]here the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. . . . The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed."

Id. at 503, 358 S.E.2d at 382 (emphasis added) (quoting *Fields v. Tompkins-Johnston Plumbing Co.*, 224 N.C. 841, 842-43, 32 S.E.2d 623, 624 (1945)). The test in *Dillingham* focuses on whether the hazardous conditions to which the employee was exposed are greater than those conditions encountered by the general public. *See id.* at 504, 358 S.E.2d at 382 ("It is clear that the type of heavy clothing required by his employment exposed plaintiff to a greater danger of overheating than that to which he otherwise would have been sub-

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jected. *Members of the public not so employed* would not ordinarily wear heavy layers of clothing such as coveralls, boots, gloves, and a hood in an enclosed space with temperatures reaching 85 degrees.” (emphasis added); *Madison v. Int’l Paper Co.*, 165 N.C. App. 144, 154, 598 S.E.2d 196, 202 (2004) (concluding plaintiff’s heart attack was compensable where plaintiff was exposed to greater temperatures than “members of the general public”). See also 1 Arthur Larson & Lex K. Larson, *Larson’s Workers’ Compensation Law* § 5.04[1] (2006) (“Sunstroke, heat prostration, freezing, pneumonia, and other effects of exposure to heat and cold arise out of the employment . . . if the exposure is accentuated by the nature and conditions of the employment, or, to use a familiar formula, if the exposure is greater than that to which the general public is subject.”).

The Commission’s finding of fact on this issue focused on whether Mr. Reaves was exposed “to a greater hazard or risk than that to which decedent was otherwise exposed.” As the Commission’s conclusion of law confirms, the Commission found dispositive the fact that this particular work assignment involved the “same temperatures as those to which [Mr. Reaves] was normally exposed.” This reasoning is inconsistent with *Dillingham* since it does not focus on the correct comparison: Mr. Reaves’ working conditions versus conditions to which the general public is exposed. As the leading workers’ compensation commentator has noted, “[t]he proper application of the increased-risk test is exemplified by the following beautifully blunt statement in a Texas sunstroke case: ‘In the case before us the very work which the deceased was doing for his employer exposed him to a greater hazard from heat stroke than the general public was exposed to for the simple reason that the general public were not pushing wheelbarrow loads of sand in the hot sun on that day.’” 1 Arthur Larson & Lex K. Larson, *Larson’s Workers’ Compensation Law* § 5.04[2] (2006) (quoting *American Gen. Ins. Co. v. Webster*, 118 S.W.2d 1082, 1085-86 (Tex. Civ. App. 1938)).

Citing *Cody*, 328 N.C. at 71, 399 S.E.2d at 106, and *Dye v. Shippers Freight Lines*, 118 N.C. App. 280, 282, 454 S.E.2d 845, 847 (1995), defendants contend that the Commission nonetheless was required to consider whether Mr. Reaves’ working conditions on the day he died were different than his regular work conditions. Defendants misread *Cody*. In *Cody*, 328 N.C. at 71, 399 S.E.2d at 106 (emphasis original) (internal citation omitted), the Supreme Court observed that a heart attack may be compensable if “due to *unusual or extraordinary exertion* or extreme conditions.” “[U]nusual” and “extraordinary”

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modify “exertion” and not “extreme conditions.” *Cody* cannot reasonably be read to require a finding of unusually extreme conditions. Indeed, the Supreme Court, in reciting this test, referred back to its decision in *Dillingham*, which sets out the increased-risk test that the Commission should have applied. *Cody*, 328 N.C. at 71, 399 S.E.2d at 106.

Factually, neither *Cody* nor *Dye* is material to this case since each involved analysis of the “unusual exertion” prong of the test and not extreme conditions. *See Cody*, 328 N.C. at 71, 399 S.E.2d at 107 (concluding heart attack not compensable where plaintiff’s “physical exertion” was not “precipitating cause of [his] heart attack”); *Dye*, 118 N.C. App. at 283, 454 S.E.2d at 848 (upholding denial of benefits based on lack of “credible evidence that plaintiff experienced any unusual or abnormal stresses in his work that contributed to his” heart attack). Nothing in *Cody* or *Dye* can be read as providing that an employee is not entitled to compensation if a heart attack resulted from extreme conditions that were a routine aspect of the employee’s job. That outcome would, however, be the necessary result of defendants’ argument.

We hold that the controlling test is the one set out in *Dillingham*. We note that the Commission did, in its conclusion of law, also state that “[t]he greater weight of the evidence . . . failed to show that the conditions of decedent’s employment placed him at a greater risk of overheating than members of the general public not so employed.” The Commission, however, made no findings of fact supporting this conclusion. Instead, the only findings arguably related to the extreme conditions issue were that although only a two-man crew was not normal operating procedure, it was adequate for that job; the men were used to the work hours and that type of work; the job was performed in temperatures cooler than temperatures under which Mr. Reaves normally worked; Mr. Reaves had not previously left a job site because of being hot; and “[t]he job performed at the [International Paper] mill that day was easier than most of the work decedent normally performed and the [International Paper] job was no hotter or more fatiguing than any of their other 12-hour jobs.”

Thus, all of the Commission’s findings on the issue of extreme conditions relate only to its conclusion that “[t]he greater weight of the evidence showed that decedent’s job duties at the [International Paper] mill in Franklin, from a physical standpoint, were easier than most of the jobs he performed and that decedent worked in the same

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temperatures as those to which he was normally exposed.” We note that the Commission did report that plaintiff’s expert witness as to industrial safety “was of the opinion that on April 1, 2004, decedent was subjected to a work hazard, namely, a hot and humid workspace, with poor ventilation.” The Commission also reported the conflicting opinions of the medical experts as to whether the working conditions were excessively hot or humid. The Commission did not make findings resolving the issues suggested by this testimony except as to find generally “that decedent’s death was not caused by extraordinary exertion or by exposure to a greater hazard or risk than that to which decedent was otherwise exposed.”

In sum, the Commission’s findings of fact and conclusions of law address whether Mr. Reaves was exposed to greater heat on the day of his death than he usually encountered during a normal day on the job, an issue immaterial to the test articulated in *Dillingham*. Where, as here, “the findings of the Commission are based on a misapprehension of the law, the case should be remanded so ‘that the evidence [may] be considered in its true legal light.’” *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) (quoting *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939)).

III

[3] Plaintiff additionally argues that the Commission erred in failing to make any determination regarding whether inadequate training was a significant contributing factor in Mr. Reaves’ death. Plaintiff points to the testimony of Debra S. Meurs, the industrial safety expert, and plaintiff’s expert witness, Dr. William Holt, as indicating that Mr. Templeman’s lack of proper training in recognizing and reacting to work hazards resulted in an inadequate response to Mr. Reaves’ complaints that ultimately contributed to his death.

The Commission made the following findings summarizing Ms. Meurs’ expert opinion:

26. Ms. Meurs was of the opinion that on April 1, 2004, decedent was subjected to a work hazard, namely, a hot and humid workspace, with poor ventilation. According to Ms. Meurs, OSHA regulations required [IPS] to properly train decedent and Mr. Templeman in the recognition and response to the presence of work hazards, and no documentation exists that either decedent or Mr. Templeman had received such training.

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27. Ms. Meurs believed that Mr. Templeman's response to decedent's complaint was inadequate, and that decedent should have been taken to a medical facility. Mr. Templeman's response, according to Ms. Meurs, is attributable to his lack of training, and his actions on April 1, 2004, contributed to decedent's death.

Although we note that Ms. Meurs was not competent to testify regarding medical causation,¹ she was competent to testify regarding industrial safety issues.

In addition to Ms. Meurs, Dr. Holt testified that in his medical opinion, the decision to take "Mr. Reaves to his work truck versus to an on-site medical facility" was a contributing factor in Mr. Reaves' death. The Commission made a finding reflecting part of Dr. Holt's medical opinion on this issue: "Dr. Holt believed that had decedent been taken to an EMT or other medical professional when he complained of feeling ill, decedent would have been properly examined and assessed and appropriate treatment provided, including using a defibrillator if decedent had suffered an arrhythmia."

Despite the findings acknowledging evidence regarding inadequate training and its role in Mr. Reaves' death, the Commission failed to make any ultimate findings as to whether IPS properly trained Mr. Templeman about how to identify and respond to work hazards or whether any lack of training led to an inadequate response that was a significant contributing factor in Mr. Reaves' death. " 'While the [Full] [C]ommission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends.' " *Perry v. CKE Rests., Inc.*, 187 N.C. App. 759, 763, 654 S.E.2d 33, 35-36 (2007) (quoting *Gaines v. L.D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977)). "If the Full Commission's findings of fact are insufficient to allow this Court to determine the parties' rights upon the matters in controversy, the proceeding must be remanded to the Full Commission for proper findings of fact." *Id.* at 654 S.E.2d at 36.

Defendants contend that the Commission did, in fact, address the issue, pointing to the Commission's finding of fact and conclusion of

1. See *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) ("[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.").

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law that Mr. Reaves' death was not "caused by the willful failure of defendant-employer to comply with any statutory requirement." It is, however, apparent from review of the opinion and award that this finding and conclusion was not intended to address the inadequate training issue, but rather related to plaintiff's claim pursuant to N.C. Gen. Stat. § 97-12 (2007), which provides: "When the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten percent (10%)."

Because plaintiff asserted as part of her claim for compensation that the lack of training was a significant contributing factor in Mr. Reaves' death, the Commission was required to make findings of fact and conclusions of law resolving the issue presented. *See Vieregge*, 105 N.C. App. at 638, 414 S.E.2d at 774. On remand, therefore, the Commission must also make findings of fact and conclusions of law on this aspect of plaintiff's claim. Because we are remanding for further findings of fact and conclusions of law, we need not address plaintiff's remaining arguments.

Reversed and remanded.

Judges WYNN and CALABRIA concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. GLENN JUNIOR MARTIN, DEFENDANT

No. COA08-687

(Filed 20 January 2009)

1. Constitutional Law— effective assistance of counsel—failure to move to dismiss at trial—pretrial delay—no delay by State

Defendant did not have ineffective assistance of counsel in a prosecution for indecent liberties and using a minor for obscenity where his trial attorney did not move to dismiss for pretrial delay and the issue was not preserved for appeal. By defendant's own recitation of facts, law enforcement was not informed of certain photographs until 2007 and defendant was indicted in 2007. Defendant must show that the delay was intentional by the State; neither the child's adoptive mother nor DSS are law enforcement

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agencies, neither do they prosecute criminal cases, and they are not the State for purposes of delayed prosecution.

2. Indecent Liberties— photograph and touching—evidence sufficient

There was sufficient evidence to submit to the jury charges of indecent liberties and using a minor for obscenity based on a photograph and an incident in a shower.

3. Constitutional Law— effective assistance of counsel—failure to object at trial—double jeopardy—indecent liberties and using minor for obscenity—differing elements

Defendant did not receive ineffective assistance of counsel where he did not object at trial on double jeopardy grounds to convictions for indecent liberties and using a minor for obscenity based on the same photograph. Other than the involvement of a minor, the elements of the two crimes are not the same and there was no double jeopardy violation.

Appeal by defendant from judgments entered on or about 28 February 2008 by Judge Benjamin G. Alford in Superior Court, Wayne County. Heard in the Court of Appeals 20 November 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sonya M. Calloway-Durham, for the State.

Daniel F. Read, for defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction of two counts of indecent liberties with a child and using a minor in obscenity. For the following reasons, we find no error.

I. Background

The State's evidence tended to show the following: In September of 2000, Jane,¹ about seven years old, went to live with Lisa Marie Mathias ("Ms. Mathias"). Defendant is Jane's father and Ms. Mathias' uncle. Defendant went to prison on a conviction unrelated to the charges which are the subject of this appeal. While defendant was in prison, his residence was repossessed and cleaned out for remodeling. Ms. Mathias' father found photographs taped to the bottom of a drawer and in a box when he was cleaning out defendant's residence.

1. A pseudonym will be used to protect the identity of the minor child.

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Ms. Mathias later viewed the photographs and deemed some of them to be inappropriate. Ms. Mathias made copies of some of the photographs and gave the originals to Ms. Allen, a social worker.

In 2002, the parental rights of defendant and Jane's mother were terminated. In 2005, Ms. Mathias and her husband adopted Jane. In 2007, Ms. Mathias and her husband angrily contacted the Wayne County Sheriff's Office ("sheriff's office") regarding the photographs to find out why no charges had been brought against defendant; however, Tammy Odom, with the sheriff's office, informed them that the sheriff's office "had never received a report from the Department of Social Services or anybody else concerning this matter."

On or about 1 October 2007, defendant was indicted for three counts of indecent liberties with a child, three counts of committing a lewd and lascivious act with a child, and three counts of using a minor in obscenity. At trial, Jane testified regarding an incident when she was about six years old and her father told her to touch his penis in the shower. A jury found defendant guilty of two counts of indecent liberties with a child and one count of using a minor in obscenity. Defendant appeals, arguing the trial court erred in (1) failing to dismiss the charges due to a long pre-indictment delay which resulted in a denial of due process, (2) denying defendant's motion to dismiss as there was insufficient evidence, and (3) failing to dismiss one of two charges which were based on the same photograph and violated defendant's right to be free from double jeopardy. As to his first and third arguments defendant also claims ineffective assistance of counsel for his attorney's failure to raise these issues at trial. For the following reasons, we find no error.

II. Pre-indictment Delay

A. Failure to Preserve for Appeal

Defendant first contends that "the trial court should have dismissed the charges, as the long pre-indictment delay resulted in a denial of due process to defendant and prejudiced him in the defense of the case, and it was ineffective assistance of counsel to fail to move to dismiss on this ground." Defendant has failed to properly preserve this issue for appeal as he made no such "request, objection or motion" before the trial court. N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if

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the specific grounds were not apparent from the context.); *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002) (citations omitted) (“It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court’s attention is waived and will not be considered on appeal.”), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Furthermore, though defendant alludes to a review under plain error, it is not applicable to this issue. *Wiley* at 615, 565 S.E.2d at 39-40 (citations omitted) (“[P]lain error analysis applies only to jury instructions and evidentiary matters[.]”)

B. Ineffective Assistance of Counsel

[1] Defendant also alleges ineffective assistance of counsel as his trial attorney did not make a motion to dismiss the case based on the alleged pre-indictment delay.

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel’s performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Blakeney, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000) (citations omitted), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). Thus, in order to consider whether defendant’s “counsel’s performance fell below an objective standard of reasonableness[.]” or whether “a reasonable probability exists that the trial result would have been different absent the error[.]” *see id.*, we must consider the merits of defendant’s issue.

Defendant’s brief reads,

It was uncontradicted that the photographs were in the possession of DSS in 2001 and that they were used as part of the termination of parental rights process. It was uncontradicted that although DSS had them and were expected to turn a report in to law enforcement, nothing happened other than a few phone calls from Lisa Matthias [sic] to DSS (claimed by her to be numerous) until 2007, when . . . [defendant] was about to get out of prison. Only then did Lisa Matthias [sic] angrily contact the Sheriff to have something done because she did not like [Jane’s] father contacting her. Only then, for the very first time, did any mention of actual inappropriate touching come up.

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This prosecution was patently motivated not by the desire to obtain speedy justice but to keep . . . [defendant] in prison so he could not have contact with his daughter. The charges should have been dismissed, and at a very minimum challenged on this ground.

“[F]or defendant to carry the burden on his [F] motion to dismiss for pre[-]indictment delay violating his due process rights pursuant to the Fifth and Fourteenth Amendments, he must show both actual and substantial prejudice from the pre[-]indictment delay and that the delay was *intentional on the part of the [S]tate in order to impair defendant’s ability to defend himself or to gain tactical advantage over the defendant.*” *State v. Davis*, 46 N.C. App. 778, 782, 266 S.E.2d 20, 23 (emphasis added), 301 N.C. 97 (1980). Thus, “[i]n order to obtain a ruling that pre-indictment delay violated his due process rights, defendant must show actual prejudice in the conduct of his defense and that the delay was unreasonable, unjustified, and engaged in for the impermissible purpose of gaining a tactical advantage over the defendant.” *State v. Stanford*, 169 N.C. App. 214, 216, 609 S.E.2d 468, 469 (citation and quotation marks omitted), *appeal dismissed and disc. rev. denied*, 359 N.C. 642, 617 S.E.2d 657 (2005). Pursuant to defendant’s own recitation of the facts, law enforcement was not informed about the photographs until 2007 and defendant was indicted in 2007. Defendant has not identified any actions by the sheriff’s office or district attorney’s office which would indicate a delay between learning of the photographs and the indictment, which was a time period of less than a year. Thus, defendant’s only argument for delay must logically be based on the actions of the Department of Social Services (“DSS”) or Ms. Mathias, who were aware of the photographs, according to defendant, since 2001.

1. DSS

Defendant likens his case to *State v. Johnson*, where the North Carolina Supreme Court reversed a decision of the Court of Appeals and remanded the case to Superior Court for dismissal because “[a] delay of four years in securing an indictment is, nothing else appearing, an unusual and an undue delay. The four-year delay in this case was the purposeful choice of the prosecution, and it created the reasonable possibility that prejudice resulted to defendant.” 275 N.C. 264, 277, 167 S.E.2d 274, 283 (1969) (citation omitted). However, in *Johnson*, defendant had been charged with a felony in a warrant four years before he was indicted. *See id.* at 272, 167 S.E.2d at 280. Thus,

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in *Johnson*, it was clear that law enforcement was aware of the crime at least four years before the indictment was issued. *See id.*

N.C. Gen. Stat. § 7B-300 entitled “Protective services” notes, “The director of the department of social services in each county of the State shall establish protective services for juveniles alleged to be abused, neglected, or dependent.” N.C. Gen. Stat. § 7B-300 (2007). Section 7B-300 is located within Article 3, “Screening of Abuse and Neglect Complaints” within Chapter 7B, the “Juvenile Code.” N.C. Gen. Stat. § 7A-61 notes the duties of a district attorney within Article 9, “District Attorneys and Judicial Districts,” of Chapter 7A entitled “Judicial Department.” Thus, from the very structure and titles of the statutes it is clear that DSS is set up primarily as a protective agency for juveniles whereas district attorneys serve primarily to prosecute criminal cases. *See* N.C. Gen. Stat. §§ 7A-61, 7B-300.

In *In Re Weaver*, this Court concluded that a social worker need not warn an individual of the right against self-incrimination because a social worker “is not a law enforcement officer.” 43 N.C. App. 222, 223, 258 S.E.2d 492, 493 (1979); *see also State v. Nations*, 319 N.C. 318, 326, 354 S.E.2d 510, 514 (1987) (where a social worker is determined to be “not an agent of the police”). Also, in *State v. Morrell*, this Court noted that a social worker “went beyond merely fulfilling her role” when she began working with the sheriff’s department. 108 N.C. App. 465, 474, 424 S.E.2d 147, 153, *appeal dismissed, cert. denied, and disc. review denied*, 333 N.C. 465, 427 S.E.2d 626 (1993).

Although defendant is correct that DSS is required to report evidence of abuse to the district attorney, *see* N.C. Gen. Stat. § 7B-307(a) (2007), both our general statutes and case law make it clear that DSS is not a law enforcement agency nor does it prosecute criminal cases. *See* N.C. Gen. Stat. § 7B-300; *Nations* at 326, 354 S.E.2d at 514; *Morrell* at 474, 424 S.E.2d at 153; *In Re Weaver* at 223, 258 S.E.2d at 493. Therefore, any purported delay on the part of DSS cannot carry defendant’s burden of showing any “intentional [act] on the part of the state in order to impair defendant’s ability to defend himself or to gain tactical advantage over the defendant.” *Davis* at 782, 266 S.E.2d at 23.

2. Ms. Mathias

Defendant’s argument of an improper motivation for the delay relates primarily to Ms. Mathias. Defendant contends that the delay was “patently motivated not by the desire to obtain speedy justice but to keep . . . [defendant] in prison so he could not have contact with

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his daughter.” Only Ms. Mathias could have had the motivation to prevent defendant from having contact with his daughter as defendant claims, particularly since, as far as DSS or the State was concerned, defendant’s parental rights had already been terminated long before his release from prison. It is also clear that Ms. Mathias cannot qualify as the prosecution or State for purposes of delay, and the North Carolina Supreme Court and this Court have previously determined that there is no violation of defendant’s rights when the State is unaware of the crime. *See State v. Gallagher*, 313 N.C. 132, 136, 326 S.E.2d 873, 877 (1985) (“[T]he record indicates that Samuel Lancaster, the primary witness against the defendant and the person who actually killed the deceased, made no statement to the police until October 1983. His statement provided evidence required for the indictments against him and the defendant, and she was indicted less than a month after it was received. Therefore, the defendant would have been entitled to no relief on due process grounds under this assignment of error, even had she sought such relief.”); *Stanford* at 215, 609 S.E.2d at 469 (“The offenses defendant was convicted for occurred in the months of March, May, July, and September of 1987. The victim of defendant’s abuse is his niece, who at the time of trial was thirty-two years old; at the time of the incidents she was thirteen and fourteen years old. Despite her telling a few family members and close friends about defendant’s interactions with her previously, she did not file a report against defendant until approximately 5 September 2002, some 15 years after the incidents took place. On 14 October 2002, within just over one month of receiving the complaint from the victim, defendant was indicted for the alleged sex crimes against his niece. Defendant contends that the extensive delay between the incidents of the sex crimes and his indictment for those offenses violated his due process rights. We disagree.”)

3. Conclusion

In conclusion, defendant was not denied due process by a long pre-indictment delay; accordingly, we also conclude defendant’s trial counsel did not provide ineffective assistance by his failure to make a motion to dismiss based upon these grounds. *Blakeney* at 307-08, 531 S.E.2d at 814-15. This argument is overruled.

III. Sufficiency of the Evidence

[2] Defendant next contends that there was insufficient evidence to submit two of the indecent liberties charges and one of the obscenity charges to the jury.

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The proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is substantial evidence of each element of the charged offense, the motion should be denied.

State v. Key, 182 N.C. App. 624, 628-29, 643 S.E.2d 444, 448 (citations and quotation marks omitted), *disc. rev. denied*, 361 N.C. 433, 649 S.E.2d 398 (2007).

A. Indecent Liberties

N.C. Gen. Stat. § 14-202.1(a)(1) reads,

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

- (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]

N.C. Gen. Stat. § 14-202.1(a)(1) (2007). The elements of indecent liberties with a child are:

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

State v. Thaggard, 168 N.C. App. 263, 282, 608 S.E.2d 774, 786-87 (2005) (citations omitted).

1. Photograph

Defendant was convicted of one count of indecent liberties based upon State's exhibit 1, a nude photograph of defendant holding Jane on his lap with his bare penis in close proximity to her bare vagina. The State presented numerous nude photographs of defendant and Jane at trial, in addition to State's exhibit 1. Based upon his acquittal of other charges, but conviction based upon State's exhibit 1, defend-

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ant contends that “[h]ere the jury apparently did not believe that exposure of the child’s genitals was *per se* criminal. It was only in the context of sitting on her father’s lap with his penis exposed that the conviction was returned.” Defendant does not contest his or Jane’s ages at the time of the photograph, but rather that “he willfully took or attempted to take an indecent liberty with the victim” and that “the action by the defendant was for the purpose of arousing or gratifying sexual desire.” *Thaggard* at 282, 608 S.E.2d at 786-87.

“‘Indecent liberties’ are defined as such liberties as the common sense of society would regard as indecent and improper.” *State v. Hammett*, 182 N.C. App. 316, 322, 642 S.E.2d 454, 458 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 361 N.C. 572, 651 S.E.2d 227 (2007). “[I]t is not necessary that defendant touch his victim to commit an immoral, improper, or indecent liberty within the meaning of the statute. Thus, it has been held that the photographing of a naked child in a sexually suggestive pose is an activity contemplated by the statute[.]” *State v. Etheridge*, 319 N.C. 34, 49, 352 S.E.2d 673, 682 (1987) (citations omitted). Furthermore, “a variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor.” *See id.*

We conclude that there was “substantial evidence,” *Key* at 628-29, 643 S.E.2d at 448, that defendant committed an indecent liberty with a child “for the purpose of arousing or gratifying sexual desire[.]” *Thaggard* at 282, 608 S.E.2d at 786-87, in that the photograph, State’s exhibit 1, does depict defendant and the naked child in a sexually suggestive pose. *See Etheridge* at 49, 352 S.E.2d at 682; *Hammett* at 322, 642 S.E.2d at 458.

2. Shower Incident

Defendant was also convicted of indecent liberties based upon an incident when he asked Jane to touch his penis in the shower. Defendant argues the only evidence as to this crime was the testimony of Jane herself, which is insufficient. We again disagree.

This Court has previously determined that “[t]he uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 if the testimony establishes all of the elements of the offense.” *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993) (citation omitted). Jane testified in pertinent part,

Q. I’m going to ask you some questions about when you were growing up in the home of Glenn and Linda Martin. I believe that

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you have been interviewed by Ms. Tammy Odom. Do you remember that?

A. Mm-hmm.

Q. Do you remember telling her about something that happened between you and your father Glenn Martin when you were growing up?

A. Yes.

Q. Can you tell us and tell the jury what it was that happened that you told Tammy about?

A. Mm-hmm.

Q. Okay. Go ahead and tell me what happened.

A. Well, my mother was in the kitchen cooking dinner; my father and I were taking a shower, and while we were in the shower he told me that I should touch his penis.

Q. And what happened after that?

A. I—well, I did what he told me, because he was my father.

Q. Okay. And did you touch it and move your hand away? Did you touch it and leave your hand there? Can you describe the touch a little bit for me?

A. I just put my hand on and moved it.

Q. Moved it? Okay. Did he show you how to do that?

A. He grabbed my hand, yes.

Q. He grabbed your hand?

A. Mm-hmm.

Q. Was he moving his hand with your hand?

A. Mm-hmm.

Q. Okay. Can you tell us about how old you were at this time?

A. About 6 or 7.

As Jane's testimony "establishes all of the elements of the offense[,]" *Quarg* at 100, 431 S.E.2d at 5, *see Thaggard* at 282, 608 S.E.2d at 786-87, we conclude there was substantial evidence of this charge of indecent liberties. *Key* at 628-29, 643 S.E.2d at 448.

B. Obscenity

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Defendant was also convicted of using a minor in obscenity pursuant to N.C. Gen. Stat. § 14-190.6 based upon the same photograph upon which he was convicted of indecent liberties.

Every person 18 years of age or older who intentionally, in any manner, hires, employs, uses or permits any minor under the age of 16 years to do or assist in doing any act or thing constituting an offense under this Article and involving any material, act or thing he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, shall be guilty of a Class I felony.

N.C. Gen. Stat. § 14-190.6 (2007).

N.C. Gen. Stat. § 14-190.1 reads in pertinent part,

(b) For purposes of this Article any material is obscene if:

- (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
- (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
- (3) The material lacks serious literary, artistic, political, or scientific value; and
- (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) As used in this Article, “sexual conduct” means:

- (2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals[.]

N.C. Gen. Stat. § 14-190.1(b), (c)(2) (2007). Based on State’s exhibit 1, we again conclude there was sufficient evidence to deny defendant’s motion to dismiss. *See id.*; *Key* at 628-29, 643 S.E.2d at 448.

C. Conclusion

We conclude there was sufficient evidence to deny the defendant’s motion to dismiss as to all three of the contested charges. This argument is overruled.

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III. Double Jeopardy

[3] Defendant lastly contends that because one of the convictions for indecent liberties with a child and one of the convictions for using a minor in obscenity were based upon the same photograph he has been placed in double jeopardy. Here again defendant failed to object and thus properly preserve this argument for appeal. See N.C.R. App. P. 10(b)(1); *Wiley* at 615, 565 S.E.2d at 39. However, once again defendant has also argued ineffective assistance of counsel which requires us to consider his argument's merits. See *Blakeney* at 307-08, 531 S.E.2d at 814-15.

Both the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution prohibit multiple punishments for the same offense absent clear legislative intent to the contrary.

Where, as here, a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not. By definition, all the essential elements of a lesser included offense are also elements of the greater offense. Invariably then, a lesser included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes. If neither crime constitutes a lesser included offense of the other, the convictions will fail to support a plea of double jeopardy.

Etheridge at 50, 352 S.E.2d at 683 (citations omitted). Furthermore, "double jeopardy is not violated merely because the same evidence is relevant to show both crimes." *State v. Cumber*, 32 N.C. App. 329, 337, 232 S.E.2d 291, 297 (citations omitted), *disc. review denied*, 292 N.C. 642, 235 S.E.2d 63 (1977).

Once again, the elements of indecent liberties with a child are:

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

Thaggard at 282, 608 S.E.2d at 786-87.

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The required showing for using a minor in obscenity is

[(1) someone who is] 18 years of age or older, [(2)] who intentionally, in any manner, hires, employs, uses or permits [(3)] any minor under the age of 16 years [(4)] to do or assist in doing any act or thing constituting an offense under this Article and [(5)] involving any material, act or thing he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1[.]

N.C. Gen. Stat. § 14-190.6; *see also* N.C. Gen. Stat. § 14-190.1.

Except for the involvement of a minor, none of the elements for indecent liberties with a child and using a minor in obscenity are the same; *see* N.C. Gen. Stat. § 14-190.6; *Thaggard* at 282, 608 S.E.2d at 786-87, therefore defendant's right to be free from double jeopardy has not been violated. *See Etheridge* at 50, 352 S.E.2d at 683. Thus, once again defendant did not receive ineffective assistance of counsel for failure to raise this losing argument. *See Blakeney* at 307-08, 531 S.E.2d at 814-15. This argument is overruled.

IV. Conclusion

We conclude that defendant received effective counsel as to the issues presented before us and that the trial court did not err in denying defendant's motion to dismiss.

NO ERROR.

Judges CALABRIA and STEELMAN concur.

PERSIS NOVA CONSTRUCTION, INC., D/B/A PERSIS-NOVA CONSTRUCTION COMPANY A/K/A P&N HOMES, PLAINTIFF V. BRUCE K. EDWARDS AND KATHLYN E. EDWARDS, DEFENDANTS

No. COA07-1501

(Filed 20 January 2009)

1. Pleadings— Rule 11 sanctions—reasonable inquiry

The trial court did not err in a breach of contract and unjust enrichment case by denying defendants' motion for N.C.G.S. § 1A-1, Rule 11 sanctions because: (1) the evidence supported the trial court's findings that plaintiff undertook a reasonable inquiry

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into the facts and that plaintiff reasonably believed that the complaint was well-grounded in fact; (2) defendants presented no authority for their suggestion that plaintiff's complaint was factually insufficient per se since none of the parties to the contract were licensed contractors; and (3) the filing of a complaint for the purpose of collecting a contract balance is proper.

2. Costs— attorney fees—prevailing party

The trial court erred in a breach of contract and unjust enrichment case by denying defendants' motion for attorney fees under N.C.G.S. § 6-21.5 based on the erroneous conclusion that there was no prevailing party in this action, and the case is remanded to the trial court to make further findings and conclusions, because: (1) a prevailing party under N.C.G.S. § 6-21.5 is a party who prevails on a claim or issue in an action, and not a party who prevails in the action; (2) attorney fees are available under N.C.G.S. § 6-21.5 against any party who raises an issue in which there is a complete absence of a justiciable issue of either law or fact; (3) the legislative purpose of N.C.G.S. § 6-21.5 is to discourage frivolous action, and this purpose would be circumvented by limiting the statute's application to the party who prevails in an action; and (4) although the trial court properly found that plaintiff did not prevail on the claims set forth in its complaint and that defendants did not prevail on the counterclaim set forth in their answer, defendants prevailed on plaintiff's claims and plaintiff prevailed on defendants' counterclaim.

Appeal by Defendants from order entered 9 April 2007 by Judge Jesse B. Caldwell, III, in Catawba County Superior Court. Heard in the Court of Appeals 21 August 2008.

Smith Currie & Hancock, LLP, by Robert J. Greene, Jr., for Plaintiff-Appellee.

Crowe & Davis, P.A., by H. Kent Crowe, for Defendants-Appellants.

STEPHENS, Judge.

Defendants appeal an order denying their motion for sanctions and attorney's fees brought pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 11, and 6-21.5, respectively. We agree with the trial court that the filing of this lawsuit did not violate Rule 11; therefore, we affirm the trial court's decision to deny Rule 11 sanctions. We disagree, how-

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ever, with the trial court's conclusion that there was no prevailing party in this action. Accordingly, we reverse that portion of the trial court's order and remand the matter for additional findings and conclusions.

Facts

In January 2003, Defendant Bruce Edwards executed a "Purchase Agreement" whereby "Bruce & Kathlyn Edwards, as Buyer[s,]" agreed to purchase certain "real estate and [i]mprovements" located in Catawba County from "P & N Homes, Inc.[,]" for the purchase price of \$356,975.00. Defendant Kathlyn Edwards did not sign the agreement. Frank Arooji signed the agreement on behalf of the seller. The seller's logo was printed at the top of the agreement's first page and identified the seller as both "p&n homes" and "Persis-Nova Construction Co."

Later that month, Bruce Edwards and Frank Arooji executed an "Addendum to Purchase Agreement[.]" The addendum stated that it was between "Bruce & Kathlyn Edwards" and "P&N Homes" and detailed the purchase agreement's purchase price as follows:

- (1) [T]he purchase price is \$238,975.00[;]
- (2) Included in contract is \$96,000.00 for lot payoff[;]
- (3) Included in contract is \$22,000.00 allowance for future upgrades . . . [;]

Therefore, the contract price is \$356,975.00[.]

Kathlyn Edwards did not sign the addendum.

On 5 March 2004, Bruce and Kathlyn Edwards and Frank Arooji executed a letter, written on letterhead containing the same logo as described above, which stated as follows:

This is to certify that Mr. and Mrs. Bruce Edwards and Persis-Nova Builders have reached an agreement that reads as follows:

The final contract price of the construction cost of Mr. and Mrs. Edwards has been finalized at \$274,500 This total includes all the change orders and upgrades that have occurred, generated, and put in place during the construction of their home located in Somerset Subdivision at Lot 6. The original contract price was based on \$238,975.00 This agreement has been reached as a result of the meeting that took place between Bruce

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and Kathy Edwards and Frank Arooji of Persis-Nova Construction on Thursday, March 4, 2004 at Persis Nova's main office It is also verified that Persis Nova Builders has received a total of \$232,048.25

The balance owed is \$42,451.25

Subsequently, attorney Lisa Jarvis closed Defendants' construction loan and forwarded funds from the closing to Plaintiff in satisfaction of the purchase agreement.

On 27 October 2004, Plaintiff "Persis-Nova Construction, Inc. d/b/a Persis-Nova Construction Company a/k/a P&N Homes" filed a verified complaint commencing this action. The complaint was prepared by the law firm of Horack, Talley, Pharr & Lowndes, P.A. ("Horack Talley"), listed David L. Edwards and D. Christopher Osborn as Plaintiff's attorneys, and was signed by David L. Edwards. Frank Arooji verified the complaint. Plaintiff alleged that it was a North Carolina corporation with its principal place of business in Mecklenburg County and that Defendants had not paid \$15,000.00 of the \$42,451.25 due under the terms of the 5 March 2004 letter. On claims of breach of contract and unjust enrichment, Plaintiff sought \$15,000.00 in compensatory damages.

Defendants filed an answer and counterclaim on 13 January 2005. In the answer, Defendants admitted that Plaintiff was a North Carolina corporation with its principal place of business in Mecklenburg County. In the counterclaim, Defendants alleged that Plaintiff did not construct the house in either a workmanlike or a timely manner. On a claim of breach of contract, Defendants sought damages in excess of \$10,000.00. Plaintiff answered the counterclaim on 18 February 2005.

Almost nineteen months later, on or about 1 September 2006, Defendants filed a motion for summary judgment. In support of the motion, Defendants filed the affidavit of attorney Curtis R. Sharpe, Jr., who averred as follows:

4. I have made a diligent search [of the] Catawba County Register of Deeds office. I find no registered certificate of assumed name with respect to P&N Homes nor P&N Homes, Inc. I have found no registered certificate of assumed name with respect to Persis-Nova Construction Co. nor Persis-Nova Construction Company. I have found no registered certificate of assumed name with respect to Persis-Nova Builders.

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5. I have also searched the Mecklenburg County Register of Deeds and find no registration of an assumed name with respect to P&N Homes, P&N Homes, Inc., Persis-Nova Construction Co., nor Persis-Nova Builders. I did find a registered certificate of assumed name for Persis-Nova Construction Company . . . which indicates that the business is a sole proprietorship and the owner of said business is Ebrahim S. Mowlavi
6. I have searched the roster for the North Carolina Licensing Board for General Contractors. There is no currently licensed contractor in North Carolina with the name Frank Arooji, P&N Homes; P&N Homes, Inc[.]; Persis-Nova Construction Co.; Persis-Nova Construction, Inc.; nor Persis-Nova Builders. There is a licensed contractor known as Ebrahim Safaie Mowlavi, T/A Persis-Nova Construction Company, whose sole qualifier is Ebrahim S. Mowlavi. There is a record of a previous contractor license issued in the name of Farzad Steve Arooji, which was most recently renewed on July 22, 2002, and which is now expired and invalid.
7. I have searched the Secretary of State's website and there is no corporation authorized to do business in the State of North Carolina with the name P&N Homes, Inc.; Persis-Nova Construction Company; or Persis-Nova Construction Co.

In an order filed 28 September 2006, the trial court made the following findings of fact:

1. Plaintiff, Persis-Nova Construction, Inc. is a corporation licensed in the State of North Carolina. Persis-Nova Construction, Inc., however, is an unlicensed general contractor within the meaning of Chapter 87 of the North Carolina General Statutes. Moreover, Persis-Nova Construction, Inc., has no certificate of assumed name registered with the Mecklenburg County Register of Deeds office nor the Catawba County Register of Deeds office.
2. Persis-Nova Construction Company is not a corporation. Persis-Nova Construction Company is an assumed name of Ebrahim Mowlavi. Ebrahim Mowlavi is not a party to this action.
3. P&N Homes is not a corporation nor is it an assumed name for any lawfully recognized entity. P&N Homes is a nullity.

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4. The Defendants signed a document on March 5, 2004. The Court notes that this is the only document signed by Defendant Kathlyn E. Edwards. The March 5, 2004 document is between the Defendants and Frank Arooji of Persis-Nova Construction. The first paragraph of the March 5, 2004 document identifies at least two entities, Persis-Nova Construction and Persis-Nova Builders. Neither Persis-Nova Construction, nor Persis-Nova Builders are corporations. There are no certificates of assumed name registered with respect [to] Persis-Nova Construction nor Persis-Nova Builders. Persis-Nova Construction and Persis-Nova Builders are nullities. Frank Arooji is an unlicensed general contractor within the meaning of Chapter 87 of the North Carolina General Statutes.
5. The January 4, 2003 document captioned “Purchase Agreement” is between P&N Homes, Inc., and is signed only by Defendant Bruce K. Edwards. P&N Homes, Inc. is not a duly licensed corporation and is a nullity.
6. P&N Homes, Inc. possesses no general contractors license within the meaning of Chapter 87 of the North Carolina General Statutes.
7. The addendum to the document captioned “Purchase Agreement” dated January 4, 2003 is between the Defendant, Bruce Edwards, and P&N Homes. P&N Homes is not an assumed name for any legal entity. P&N Homes is an unlicensed general contractor within the meaning of Chapter 87 of the North Carolina General Statutes.

After making these findings,¹ the trial court ordered as follows:

1. The Defendants’ Motion for Summary Judgment is allowed and Plaintiff’s Complaint is dismissed with prejudice.
2. The Court also grants Summary Judgment in favor of the Plaintiffs and dismisses [without] prejudice Defendants’ Counterclaim; the dismissal of Defendants’ counterclaim,

1. “While it is true that a trial court may not, on summary judgment, make findings of fact resolving disputed issues of fact, when—as here—the material facts are undisputed, an order may include a recitation of those undisputed facts.” *In re Estate of Pope*, 192 N.C. App. 321, 329, 666 S.E.2d 140, 147 (2008) (citations omitted). When the recitation of undisputed facts appears “helpful or necessary, the court should let the judgment show that the facts set out therein are the undisputed facts.” *Capps v. City of Raleigh*, 35 N.C. App. 290, 292, 241 S.E.2d 527, 529 (1978).

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however, is without prejudice pending further filings as may be proper and legally cognizable.

On 28 September 2006, Defendants filed a “Motion for Sanctions and Motion for Attorneys Fees” pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 11, and 6-21.5, respectively. At a hearing on the motion conducted 16-17 January 2007, the trial court heard the testimony of Mr. Osborn, Ebrahim Mowlavi, Frank Arooji, and Ms. Jarvis. In an order entered 9 April 2007, the trial court denied Defendants’ motion. Defendants appeal.

Rule 11

[1] Defendants first argue that the trial court erred in denying their motion for Rule 11 sanctions. “The trial court’s decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue.” *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Under this standard, this Court “will determine (1) whether the trial court’s conclusions of law support its judgment or determination, (2) whether the trial court’s conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence.” *Id.* If we make these three determinations in the affirmative, we must uphold the trial court’s decision to impose or deny the imposition of mandatory sanctions under Rule 11. *Id.*

“There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. A violation of any one of these requirements mandates the imposition of sanctions under Rule 11.” *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 (internal citations omitted), *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994). We need not address the legal sufficiency of Plaintiff’s complaint because Defendants do not argue to this Court that Plaintiff’s complaint was legally insufficient. N.C. R. App. P. 28(a). Instead, Defendants argue that Plaintiff’s complaint was factually insufficient and was filed for an improper purpose.

1. Factual Sufficiency

Analysis of the factual sufficiency of a complaint requires the court to determine “(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.” *Page v. Roscoe, LLC*, 128 N.C. App. 678, 681-82, 497 S.E.2d 422, 425 (1998). An inquiry is

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reasonable if “given the knowledge and information which can be imputed to a party, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law[.]” *Bryson v. Sullivan*, 330 N.C. 644, 661-62, 412 S.E.2d 327, 336 (1992).

Static Control Components, Inc. v. Vogler, 152 N.C. App. 599, 603-04, 568 S.E.2d 305, 308 (2002). In the case at bar, the trial court found that Plaintiff undertook a reasonable inquiry into the facts and that Plaintiff reasonably believed that the complaint was well grounded in fact. Defendants contend that these findings are not supported by sufficient evidence. We disagree.

Ms. Jarvis, the closing attorney, testified that she had closed “hundreds” of loans for “Persis Nova” over approximately ten years. She also testified that she explained her understanding of the parties’ dispute to attorneys at Horack Talley. Ms. Jarvis testified that she understood that Defendants owed Plaintiff money as a result of the closing. Finally, Ms. Jarvis testified that she sent Horack Talley a copy of the articles of organization of Persis-Nova Construction, Inc. Mr. Osborn, one of the attorneys who filed the complaint, testified that he filed the complaint “based on the information that was provided to [Horack Talley] by Miss Jarvis[.]” Mr. Osborn further testified that he reviewed the 5 March 2004 letter and that he verified that Persis-Nova Construction, Inc. had filed articles of organization with the Secretary of State. Mr. Osborn also testified that he alleged Persis-Nova Construction, Inc. was doing business as Persis-Nova Construction Company “because that comported with the information that [he] obtained from [the] client[.]” Finally, Mr. Osborn testified that he did not know exactly what steps he took to verify that Persis-Nova Construction, Inc. was doing business as Persis-Nova Construction Company, but that he did not “regularly go and check assumed names [databases] unless [he had] some cause or reason to.” This evidence supports the trial court’s findings that Plaintiff undertook a reasonable inquiry into the facts and that Plaintiff reasonably believed that the complaint was well grounded in fact.

Defendants present no authority for their suggestion that Plaintiff’s complaint was factually insufficient *per se* because neither Persis-Nova Construction, Inc. nor any of the parties to the contract were contractors licensed under N.C. Gen. Stat. ch. 87. Regardless, we do not find Defendants’ suggestion persuasive. The

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test to be applied in analyzing the factual sufficiency of a complaint is one of reasonableness under the circumstances. Defendants' argument is overruled.

2. Improper Purpose

"An improper purpose is 'any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.'" *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (quoting Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 13(C) (Supp. 1992)).

For example, an improper purpose may be inferred from "the service or filing of excessive, successive, or repetitive [papers] . . .," from "filing successive lawsuits despite the res judicata bar of earlier judgments," from "failing to serve the adversary with contested motions," from filing numerous dispositive motions when trial is imminent, from "the filing of meritless papers by counsel who have extensive experience in the pertinent area of law," from "filing suit with no factual basis for the purpose of 'fishing' for some evidence of liability," from "continuing to press an obviously meritless claim after being specifically advised of its meritlessness by a judge or magistrate," or from "filing papers containing 'scandalous, libellous, and impertinent matters' for the purpose of harassing a party or counsel."

Id. Under Rule 11, an objective standard is used to determine whether a paper was filed for an improper purpose, and the movant has the burden of proving an improper purpose. *Bryson*, 330 N.C. at 656, 412 S.E.2d at 333. In the present case, Defendants argue that Plaintiff filed the complaint for the improper purpose of collecting "money from the Defendants that is uncollectible by virtue of Chapter 87 of the North Carolina General Statutes." Again, we disagree.

In its second finding of fact, the trial court found that Plaintiff filed its complaint for the purpose of putting its claims of rights under the contract to a proper test:

The evidence adduced at the hearing by Plaintiffs [sic] with regard to Defendants' Rule 11 motion indicated, by a preponderance, that the attorney signing the original complaint which was filed in this action believed that the action was merely a collection of a contract balance for the purchase of improvements to real property owned by the Defendants.

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Defendants did not assign error to this finding, and, thus, this finding is binding on this Court. N.C. R. App. P. 10(a). *See also Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991). The filing of a complaint for the purpose of collecting a contract balance is proper. The trial court's finding supports its conclusion that the complaint was not filed for an improper purpose. Defendants' argument is overruled.

Section 6-21.5

[2] Defendants next argue that the trial court erred in denying their motion for attorney's fees brought pursuant to N.C. Gen. Stat. § 6-21.5. In denying Defendants' motion, the trial court found that

[b]y [the 28 September 2006 summary judgment order], the claims of the Plaintiffs [sic] and Defendants were each and all dismissed.

Thus, the trial court concluded,

[t]here was no "prevailing party" as required by N.C.G.S. § 6-21.5 and the Defendants have failed to meet the primary threshold for an award of attorneys' fees under the referenced statute.

Based solely upon this conclusion, the trial court denied Defendants' motion for fees. Defendants contend that the trial court erred in concluding that there was no prevailing party in this action. After careful consideration, we agree.

Section 6-21.5 provides as follows:

In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required

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under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

N.C. Gen. Stat. § 6-21.5 (2007). This statute, enacted in 1984 and amended in 2006, has been interpreted by the Supreme Court and this Court numerous times. *E.g.*, *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991). Prior decisions have focused on the sufficiency of a pleading to raise a justiciable issue of law or fact, *see, e.g.*, *Sprouse v. N. River Ins. Co.*, 81 N.C. App. 311, 325, 344 S.E.2d 555, 565, ("The sufficiency of a pleading is after all a question of law for the court.") (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)), *disc. review denied*, 318 N.C. 284, 348 S.E.2d 344 (1986), but also have discussed a trial court's discretionary authority to award attorney's fees. *See Willow Bend Homeowners Ass'n v. Robinson*, 192 N.C. App. 405, 417, 665 S.E.2d 570, 577 (2008) ("Where attorney's fees are available under N.C.G.S. § 6-21.5, we review the trial court's denial of attorney's fees for abuse of discretion.") (citation omitted). To date, however, neither Court has addressed the question of who is a "prevailing party" under this statute. *But see House v. Hillhaven, Inc.*, 105 N.C. App. 191, 195-96, 412 S.E.2d 893, 896 (adopting the "merits test" to determine who was a "prevailing party" under N.C. Gen. Stat. § 6-19.1), *disc. review denied*, 331 N.C. 284, 417 S.E.2d 251 (1992); *H.B.S. Contr'rs, Inc. v. Cumberland Cty. Bd. of Educ.*, 122 N.C. App. 49, 57, 468 S.E.2d 517, 522-23 (adopting the "merits test" to determine who was a "prevailing party" under N.C. Gen. Stat. § 143-318.16B), *disc. review improvidently allowed*, 345 N.C. 178, 477 S.E.2d 926 (1996) (per curiam).

Because Section 6-21.5 provides for an award of attorney's fees in derogation of the common law, this statute must be strictly construed. *Sunamerica*, 328 N.C. at 257, 400 S.E.2d at 437. *See also Bailey v. State*, 348 N.C. 130, 159, 500 S.E.2d 54, 71 (1998) ("[T]he general rule in this country [is] that every litigant is responsible for his or her own attorney's fees.") (citations omitted). In construing a statute, "our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citing *State ex rel. Hunt v. North Carolina Reinsurance Facil.*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981)). "The first consideration in determining legislative intent is the words chosen by the legislature." *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 267-68, 624 S.E.2d 345, 348 (2006) (citing *Brown v. Flowe*, 349 N.C. 520, 522,

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507 S.E.2d 894, 895-96 (1998)). When the words are unambiguous, “they are to be given their plain and ordinary meanings.” *Id.* at 268, 624 S.E.2d at 348.

Section 6-21.5 is unambiguous in providing that attorney’s fees may be awarded against the “losing party *in any pleading.*” N.C. Gen. Stat. § 6-21.5 (emphasis added). Thus, by the plain language of the statute, attorney’s fees may be awarded against more than one party in an action. In other words, a “prevailing party,” as used in Section 6-21.5, is a party who prevails on a claim or issue in an action, not a party who prevails *in the action.*

This reading of the statute is bolstered by *dicta* in *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 413 S.E.2d 268 (1992). In that case, plaintiff Investors Title brought multiple claims against multiple defendants, including defendant Southeastern Shelter Corporation. Investors prevailed on some, but not all, of its claims against Southeastern at trial, and Southeastern prevailed on a crossclaim against a co-defendant. The trial court awarded attorney’s fees to Investors under N.C. Gen. Stat. § 75-1.1. On appeal, the Supreme Court reversed the award of attorney’s fees on the ground that Section 75-1.1 did not apply to Investors. The Supreme Court then stated:

Attorney’s fees are also not allowable in this case under N.C.G.S. § 6-21.5. . . . Since both parties were able to sustain and prevail on several different issues through the various stages of this case, one cannot reasonably say that there was a complete lack of a justiciable issue as to either party.

Id. at 695, 413 S.E.2d at 275. This language clearly implies that attorney’s fees are available under Section 6-21.5 against any party who raises an issue in which there is a complete absence of a justiciable issue of either law or fact.

We also note that this Court has previously stated that “[t]he legislative purpose of [Section 6-21.5] is to discourage frivolous legal action[.]” *Short v. Bryant*, 97 N.C. App. 327, 329, 388 S.E.2d 205, 206 (1990). *See also Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 603, 344 S.E.2d 847, 849 (1986) (stating that Section 6-21.5 “appears to be based on deterring frivolous and bad faith lawsuits by the use of attorney’s fees”), *affirmed in part and reversed in part on other grounds*, 320 N.C. 669, 360 S.E.2d 772 (1987). This purpose would be circumvented by limiting the statute’s application to the party who prevails *in an action.* *Short*, 97 N.C. App. at 329,

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388 S.E.2d at 206 (“Frivolous action in a lawsuit can occur at any stage of the proceeding and whenever it occurs is subject to the legislative ban.”).

In this case, the trial court properly found that Plaintiff did not prevail on the claims set forth in its complaint and that Defendants did not prevail on the counterclaim set forth in their answer. As a corollary, however, Defendants prevailed on Plaintiff’s claims, and Plaintiff prevailed on Defendants’ counterclaim. Accordingly, the trial court erroneously concluded that Defendants were not prevailing parties in this action.

The decision to award or deny attorney’s fees under Section 6-21.5 is a matter left to the sound discretion of the trial court. Accordingly, we must remand this case to the trial court to make further findings and conclusions resolving Defendants’ motion for attorney’s fees. Upon remand, the trial court should consider all of the criteria for an award of attorney’s fees under N.C. Gen. Stat. § 6-21.5 before making its decision to award or deny fees.

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. BERNARDO MURCIA HUETO

No. COA08-503

(Filed 20 January 2009)

1. Appeal and Error— preservation of issues—objection on hearsay grounds—appeal on relevancy—assignment of error dismissed

An assignment of error to certain evidence in a statutory rape case was dismissed where defendant argued that the evidence was irrelevant, but the objection at trial appeared to be on hearsay grounds.

2. Rape— time and number of incidents—variance between indictment and evidence—not material

The trial court did not err in a first-degree rape and statutory rape prosecution by denying defendant’s motion to dismiss one of the charges where the indictment alleged two counts in August

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and the victim was uncertain as to the number of rapes in August. The date given in the indictment is not an essential element of the crime charged, and there was substantial evidence that defendant had sex with the victim at least six times between June and 12 August, including at least four times in July.

3. Sentencing—punishment for pleading not guilty—pretrial remarks—reasonable inference

Consecutive sentences for multiple counts of first-degree rape and statutory rape were remanded where it could be reasonably inferred from the court’s pretrial remarks that defendant’s exercise of his right to a jury trial was considered in issuing consecutive sentences, even though the sentences were within the trial court’s discretion and the court attempted to avoid inhibiting defendant’s right to plead not guilty.

Appeal by Defendant from judgments entered 12 October 2007 by Judge John O. Craig, III, in Randolph County Superior Court. Heard in the Court of Appeals 1 December 2008.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Jarvis John Edgerton, IV, for Defendant.

STEPHENS, Judge.

Defendant appeals from eight judgments entered following jury verdicts finding him guilty of two counts of first-degree rape and six counts of statutory rape. We conclude that Defendant received a fair trial, free of error, but we remand this case for re-sentencing.

Background

The evidence at trial tended to show that in the spring of 2004, Defendant and his brother moved into Defendant’s girlfriend’s home where she lived with her three daughters, “Avery,” “Bernice,” and “Chloe.”¹ Defendant began having sex with Chloe in June 2004 and had sex with her between one and three times a week until August 2004. At that time, Chloe was fourteen years old, and Defendant was twenty-five years old. Defendant stopped having sex with Chloe around 12 August 2004, the day Chloe discovered she was pregnant.²

1. We use pseudonyms to protect the girls’ privacy and for ease of reading.

2. Chloe gave birth to a child on 12 March 2005. Defendant’s brother was the child’s father.

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Defendant began having sex with Chloe again in September 2004 and had sex with her once or twice a week for a few months thereafter.

On 21 February 2005, Defendant had sex with Bernice, who, at that time, was twelve years old. That day, Defendant penetrated Bernice and had sex with her for a few minutes before becoming “frustrated[.]” Defendant stopped having sex with her, discarded his condom in the fireplace, put on another condom, and began having sex with Bernice again. Defendant stopped having sex with Bernice after a few more minutes when Bernice’s mom and sister came home.

Later that day, Bernice told her mom that Defendant had sex with her, and Bernice and Chloe went with their grandmother to Chloe’s scheduled prenatal checkup. Bernice’s grandmother asked Chloe’s doctor to examine Bernice “to see if [she] was okay.” When Chloe’s doctor refused to examine Bernice, the grandmother drove the girls to the “family doctor[.]” Dr. Slatosky. Dr. Slatosky refused to examine Bernice, advised the grandmother to take Bernice to the emergency room, and contacted law enforcement. The grandmother did not take Bernice to the emergency room.

Randolph County’s Sheriff’s Office and Department of Social Services began investigations, and Defendant was arrested on 23 February 2005. Defendant was indicted on two counts of first-degree rape for having sex with Bernice, and on six counts of statutory rape for having sex with Chloe: two counts each for June, August, and September 2004. Defendant did not present any evidence at trial, and the jury convicted Defendant of all charges. The trial court sentenced Defendant to eight consecutive sentences totaling 1384-1736 months in prison. Defendant appeals.

Analysis

At the outset, we note that assignments of error set out in the record on appeal but not brought forward in Defendant’s brief are deemed abandoned. N.C. R. App. P. 28(b)(6).

I. Bernice

[1] By his fourth assignment of error, Defendant argues that he is entitled to a new trial on the two charges of raping Bernice because the trial court erroneously admitted the following testimony of Dr. Slatosky into evidence:

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Q. . . . I want to ask you if you recall the events of February [2005] involving a family which would have included [Bernice] that may have come to your office?

A. A vague recollection.

Q. Okay. Did you actually talk to them or no?

A. The initial contact, no, sir. Lynette Hamilton, my medical assistant—

Q. Okay.

A. —had spoken to—

Q. Okay.

A. —one of the family members and then relayed a message to me—

Q. Okay. All right.

A. —about—

Q. Based on what [Lynette] told you, and I don't want you to tell me what she said, but based on what she told you, what did you do?

A. I asked her to go ask the family member who had approached her about the situation to take her to the emergency room so that they could do some evidence collection, since we are not prepared to do evidence collection in our clinical setting. And then I went to my office and called law enforcement and alerted them.

Q. Now Doctor, why did you call law enforcement?

A. Well, the—Lynette said that there was a situation with [Bernice] where there was an adult male that had had intercourse with her.

[DEFENSE COUNSEL]: Your Honor, please, I'm going to object as to what Lynette said.

[PROSECUTOR]: Offered for a non-hearsay purpose of why he called the police.

THE COURT: All right. I'll allow that one question for the limited purpose of the non-hearsay basis.

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- Q. . . . I'm sorry. Go ahead, Doctor.
- A. So in my mind that constituted a crime, so I called the police.
- Q. Well, you can [answer] the question. The Judge said you can answer the question. So tell us what Lynette told you.
- A. Lynette told me that [Bernice's] grandmother had come in and talked to her and said that [Bernice] had been sexually assaulted by a male that was in their household. I didn't get a name.
- Q. Okay.
- A. Don't know—Didn't know anything else about it, so I instructed her to take her to the emergency there and then immediately, and then I alerted the authorities.
- Q. Now why did you take it upon yourself to alert the authorities[?]
- A. Because it sounded like that it was a criminal matter.

Defendant argues that evidence of what the medical assistant told Dr. Slatosky was irrelevant and inadmissible under N.C. Gen. Stat. § 8C-1, Rules 401 and 402. Alternatively, Defendant argues that this evidence was unduly prejudicial and inadmissible under N.C. Gen. Stat. § 8C-1, Rule 403.

Initially, we agree with the State that Defendant did not preserve this argument for appeal. Defendant never stated to the trial court that he objected to Dr. Slatosky's testimony on relevancy grounds, and the specific grounds of Defendant's objection were not apparent from the context. N.C. R. App. P. 10(b)(1). In fact, it appears from the context that Defendant objected to Dr. Slatosky's testimony "as to what Lynette said[]" on hearsay grounds. The State, apparently understanding Defendant's objection as such, responded that it was offering the evidence for a non-hearsay purpose, and the trial court admitted the testimony for "the limited purpose of the non-hearsay basis." Defendant did not argue to the trial court that this evidence was irrelevant or unduly prejudicial. Accordingly, this assignment of error is dismissed. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008).

Even assuming *arguendo* that the trial court erred in admitting Dr. Slatosky's testimony, any error was harmless beyond a reasonable doubt. "The erroneous admission of evidence requires a new trial

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only when the error is prejudicial.” *State v. Chavis*, 141 N.C. App. 553, 566, 540 S.E.2d 404, 414 (2000) (citing *State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999)). “To show prejudicial error, a defendant has the burden of showing that ‘there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred.’ ” *Id.* (quoting *Locklear*, 349 N.C. at 149, 505 S.E.2d at 295). The evidence against Defendant was substantial. Bernice testified that Defendant twice had sex with her, and her testimony was corroborated by other testimony and physical evidence. The physical evidence consisted of a used condom given to an investigator on 24 February 2005 by Bernice’s mom. The condom contained DNA which matched the DNA of both Defendant and Bernice. In light of this evidence, we perceive no reasonable possibility that the jury would have reached a different result if Dr. Slatosky’s testimony had not been admitted. Accordingly, even if the trial court did err in admitting Dr. Slatosky’s testimony, Defendant is not entitled to a new trial on the charges that he raped Bernice. Defendant’s assignment of error is overruled.

IV. Chloe

[2] By his first assignment of error, Defendant argues that the trial court erred in denying Defendant’s motion to dismiss one of the charges that he raped Chloe because the State presented insufficient evidence that Defendant had sex with Chloe twice in August 2004. Defendant was indicted on six counts of statutory rape for having sex with Chloe: two counts each for June, August, and September 2004. At trial, Chloe testified as follows:

Q. . . . Can you tell us what happened between you and [Defendant] in August?

A. In August is when I found out that I was pregnant, and after I found out I was pregnant he stopped.

Q. Okay. Explain that to me.

. . . .

A. When I found out I was pregnant he didn’t have sex with me anymore.

Q. How many times—When did you find out in August that you were pregnant?

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- A. I think it was around the 12th. It was sometime just like a week or two weeks before school started back.
- Q. And during those two weeks of August, and I know you don't know exactly, could you estimate how many times you had sex with him in August?
- A. I don't know. It's hard to say.
- Q. Did you have sex with him at all in August?
- A. I—At the very first of August I did. I can't remember exactly how much though because I can't remember exactly what date we found out.
- Q. Okay. And none in July?
- A. Yes, in July.
- Q. You did have sex with him in July?
- A. He had sex with me between June and the beginning of August when I found out.
- Q. So June, July, and the beginning of August?
- A. Yes, sir.
-
- Q. Okay. Estimate for me, if you would, and I know you don't know exactly, estimate for me how many times when you were fourteen years old that you had sex with [Defendant].
-
- A. It's—Between June and the first of August it happened maybe once to maybe three times a week. And then between the [sic] September, around September and October, around that time span it was maybe once a week, twice a week.

Defendant argues that this testimony, while sufficient to show that he raped Chloe once in August, is insufficient to show that he raped Chloe twice in August. Defendant's argument is meritless.

A motion to dismiss on the ground of sufficiency of the evidence raises for the trial court the issue whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. The existence of substantial evidence is a question of law for the trial

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court, which must determine whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence. The evidence may be direct, circumstantial, or both.

State v. Barden, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002) (quotation marks and citations omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). A defendant is guilty of statutory rape “if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.” N.C. Gen. Stat. § 14-27.7A(a) (2007). “[T]he date given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal.” *State v. Norris*, 101 N.C. App. 144, 151, 398 S.E.2d 652, 656 (1990) (citing *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961)), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991). “[A] judgment should not be reversed when the indictment lists an incorrect date or time if time was not of the essence of the offense, and the error or omission did not mislead the defendant to his prejudice.” *State v. Stewart*, 353 N.C. 516, 517, 546 S.E.2d 568, 569 (2001) (quotation marks and citation omitted).

Assuming *arguendo* that Chloe’s testimony was insufficient to establish that Defendant had sex with her twice in August, we nevertheless conclude that the State presented substantial evidence that Defendant had sex with Chloe at least six times between June 2004 and 12 August 2004, including at least four times in July. The variance between the period of time in the indictment within which the offenses occurred and the State’s evidence at trial was not material and did not deprive Defendant of the opportunity to adequately present his defense. *Stewart*, 353 N.C. at 517, 546 S.E.2d at 569. This assignment of error is overruled.

V. Sentencing

[3] By his second assignment of error, Defendant argues that he is entitled to a new sentencing hearing because the trial court punished Defendant for exercising his right to a jury trial. Before trial began on 9 October 2007, the trial court addressed Defendant as follows:

THE COURT: Senor Hueto, this is the first time you have seen me, and this may be the only opportunity that I will have to

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speak with you before the trial begins. You are probably not familiar with our system of jury trials in America, and I want to explain a little bit to you about how the jury trial works and my role in the case. I suppose the best way to describe my role is to look upon me as the referee in a football match. Do you like football? Soccer, we call it?

. . . .

THE COURT: During the trial I'm like the referee in a football match. I decide whether someone is offside or I might even issue a yellow card in the case. But the case is tried by the attorneys and then there is a jury of twelve people who listen to everything and they are the ones that make the decision at the end of the case about whether you are convicted of any charges or whether you are found not guilty. My real role, and from your perspective the important part of my role, comes into play if the jury convicts you of any charges, because it is up to me to decide what your sentence will be. And I have looked at the file and I have talked with [your attorney] and with . . . the prosecutor, and in all seriousness I am very concerned about the evidence against you and about your chances of winning this trial and being found not guilty of all charges. This is the point in the trial where you still possibly have some control over the outcome of the trial or control over your fate, because the attorneys have indicated to me that they are willing to trust me to sentence you at this point fairly if you were to decide to plead guilty to some or all of the charges. And I would see to it that I gave you a fair sentence but one that would most likely be a lesser amount of time than if you are convicted. And I'll give you an example. If you are convicted of one of the felonies, which is a B-1 felony, I would have to sentence you to that—to that amount, and it would probably be in the range of fourteen and a half . . . years or maybe a little bit more, not much more. And of course you would also get credit for the two and a half . . . years that you have spent in jail awaiting the trial. But if you are convicted of a B-1 felony against both of the young girls I would most likely be compelled to give you sentences for two . . . B-1 felonies. So all of a sudden, if you decide to go to a jury trial and the jury convicts you of charges against both of these girls, your amount of time is going to be much greater in terms of what your sentence would be, because I would feel that if the jury decided you were guilty as to both of these girls I would have to give you more than one B-1 felony sentence,

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I would have to give you at least two. Which all of a sudden means that you would be looking at about thirty . . . years in prison. Now the District Attorney has indicated to me that he would be willing to let me, if you are willing to plead guilty to one . . . B-1 felony, that he would be willing to put the sentencing [in] my hands and trust me to reach a fair sentence that everyone would be satisfied with. And I'm willing to do that for you. But if you say no, I want to have my jury trial, and let me emphasize that you have every right to a jury trial and to let twelve people decide your case, but if you say you want to do that, then I will not be able to give you the help that I can probably give you at this point. And you are putting your faith in the hands of twelve strangers who do not know you, who do not know your situation, and if they find you guilty of the charges against both of these young girls, it will compel me to give you more than a single B-1 sentence, and I would have to give you at least two . . . and maybe more.

. . . .

THE COURT: All right. You are twenty-eight years old. If I had to sentence you to around thirty years, you can do the math, you would know that you would be fifty-eight years old or almost sixty years old when you got out of prison. If you decide to choose to plead guilty to at least just one of these felonies you are going to get out in a lot less time. You will still be a relatively young man when you get out of prison. But the worst risk of all is that after hearing the evidence the jury convicts you of multiple B-1 felonies then it might compel me to give you even more time than that, and you have the possibility of spending your entire life in prison. Now I want you to make the right choice, and I'm not trying to pressure you in any way into giving up your right to a jury trial if you insist upon it. . . .

After the jury returned its verdict, the trial court briefly recessed before conducting the sentencing hearing. Before recessing, the trial court asked the Prosecutor if the State waived its intent to seek aggravating factors and its intent to have Defendant adjudicated a sexually violent predator, "in light of my intention to give [Defendant] what would amount to more than a life sentence[.]" During the sentencing hearing, the trial court stated as follows:

To you, Senior Hueto, I regret that you do [sic] not choose to take the offer that had been made to you at the beginning of

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the trial to plead guilty for a lesser sentence. And I had told you that I did not know what I would . . . give in terms of a sentence but that I would await the jury's verdict. I believe the jury has spoken very clearly on how convinced they are of your guilt as to all of these charges. And based upon the jury verdicts as to each of these felonies, I intend to give you consecutive sentences for each of them.

The trial court imposed eight consecutive sentences totaling 1384-1736 months in prison. Defendant contends it can reasonably be inferred from the trial court's pre-trial comments that the sentence was imposed at least in part because Defendant insisted on a trial by jury, and Defendant asks this Court to remand this case for another sentencing hearing.

A sentence within statutory limits is "presumed to be regular." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). Where the record, however, reveals the trial court considered an improper matter in determining the severity of the sentence, the presumption of regularity is overcome. *Id.* It is improper for the trial court, in sentencing a defendant, to consider the defendant's decision to insist on a jury trial. *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). 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. *Id.*

State v. Peterson, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002).

We conclude that it can be reasonably inferred from the trial court's pre-trial remarks that, in sentencing Defendant, the court improperly considered Defendant's exercise of his constitutional right to demand a trial by jury. The trial court advised Defendant as follows:

Now the District Attorney has indicated to me that he would be willing to let me, if you are willing to plead guilty to one . . . B-1 felony, that he would be willing to put the sentencing [in] my hands and trust me to reach a fair sentence that everyone would be satisfied with. And I'm willing to do that for you. But if you say no, I want to have my jury trial, and let me emphasize that you have every right to a jury trial, and to let twelve people decide your case, but if you say you want to do that, *then I will not be able to give you the help that I can probably give you at this*

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point. And you are putting your faith in the hands of twelve strangers who do not know you, who do not know your situation, and if they find you guilty of the charges against both of these young girls, it will compel me to give you more than a single B-1 sentence, and I would have to give you at least two . . . and maybe more.

(Emphasis added.) The emphasized portions of the court's comments were inaccurate statements of the law. N.C. Gen. Stat. § 15A-1340.15(b) (2007) ("If an offender is convicted of more than one offense at the same time, the court *may* consolidate the offenses for judgment and impose a single judgment for the consolidated offenses.") (emphasis added). We are of the opinion that the trial court's decision to impose eight consecutive sentences was partially based on Defendant's decision to plead not guilty. Accordingly, this case must be remanded for re-sentencing. *State v. Boone*, 293 N.C. 702, 711-13, 239 S.E.2d 459, 465 (1977).

In reaching this result, we are cognizant that the trial court acted within its discretion in imposing consecutive sentences. *See* N.C. Gen. Stat. § 15A-1340.15(a) (2007) ("This Article does not prohibit the imposition of consecutive sentences."). Moreover, it is evident that the trial court carefully attempted not to inhibit Defendant's right to plead not guilty. Indeed, "[t]he trial judge may have sentenced defendant quite fairly in the case at bar[.]" *Boone*, 293 N.C. at 712, 239 S.E.2d at 465 (quotation marks omitted). Nonetheless, we also conclude "there is a clear inference that a greater sentence was imposed because defendant did not accept a lesser plea proffered by the State." *Id.*

NO ERROR IN TRIAL.

REMANDED FOR RE-SENTENCING.

Chief Judge MARTIN and Judge WYNN concur.

IN RE S.R.G.

[195 N.C. App. 79 (2009)]

IN THE MATTER OF: S.R.G.

No. COA08-954

(Filed 20 January 2009)

1. Termination of Parental Rights— failure to make reasonable progress—failure to allege ground in petition

The trial court erred by terminating respondent's parental rights based on failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2) because this ground was not alleged in the termination petition filed by DSS.

2. Termination of Parental Rights— willful abandonment— sufficiency of findings

The trial court erred by terminating respondent mother's parental rights based on willful abandonment for the six-month period prior to filing the termination petition under N.C.G.S. § 7B-1111(a)(7) because: (1) the evidence showed that respondent visited the minor child eleven times during the relevant time period, she brought appropriate toys and clothes to those visits, and respondent participated in one of the trial proceedings during the relevant time period; (2) many of the findings of fact are not of great relevance for a determination of willful abandonment, including evidence that respondent failed to adequately comply with her case plan and evidence of respondent's continuing substance abuse during the relevant period; (3) the General Assembly did not intend the same factors relevant to termination under N.C.G.S. § 7B-1111(a)(2) over a twelve-month period to be used as substantive evidence in finding willful abandonment under N.C.G.S. § 7B-1111(a)(7); and (4) the findings must show the parent's actions are wholly inconsistent with a desire to maintain custody of the child rather than a failure of the parent to live up to her obligations as a parent in an appropriate fashion, and respondent's actions during the relevant six-month period did not demonstrate a purposeful, deliberative, and manifest willful determination to forego all parental duties and relinquish all parental rights to the minor child.

Appeal by Respondent from order entered 28 May 2008 by Judge Thomas G. Taylor in District Court, Gaston County. Heard in the Court of Appeals 23 December 2008.

IN RE S.R.G.

[195 N.C. App. 79 (2009)]

Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for Petitioner-Appellee Gaston County Department of Social Services.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Tobias S. Hampson, for Respondent-Appellant.

Heather Adams for Guardian ad Litem.

McGEE, Judge.

Respondent mother J.L.G. appeals from an order terminating her parental rights as to the minor child S.R.G.

When S.R.G. was born in March 2006, she tested positive for cocaine and benzodiazepines. Respondent also tested positive for these drugs, and she admitted she had used cocaine and Ativan during her pregnancy. Gaston County Department of Social Services (DSS) worked with Respondent regarding her substance abuse issues, while allowing S.R.G. to remain with Respondent, who was living with her mother. Respondent tested positive for cocaine multiple times between 19 May 2006 and 16 January 2007. DSS allowed Respondent to place S.R.G. in a kinship placement with Respondent's brother on 31 January 2007, while Respondent attempted to continue addressing her substance abuse issues. Respondent's brother had three children of his own, and he decided after several weeks that he could no longer care for S.R.G. Respondent's drug screen taken on 15 February 2007 again was positive for cocaine. DSS filed a juvenile petition alleging neglect and dependency on 16 March 2007. DSS was granted non-secure custody the same day, and S.R.G. was placed in foster care. Non-secure custody was continued by orders entered on 25 April, 13 July, and 30 July 2007.

The trial court adjudicated S.R.G. neglected and dependant on 24 July 2007 with Respondent admitting the underlying facts regarding her substance abuse. In its order filed 15 August 2007, the trial court ordered a permanent plan of reunification, and it adopted the recommendations in the predisposition report submitted by DSS. Those recommendations were for Respondent to (1) refrain from all use of illegal drugs as evidenced by clean random drug screens; (2) obtain and maintain appropriate independent housing; (3) refrain from violating any laws or committing any crimes; (4) complete parenting classes and demonstrate appropriate parenting skills when visiting with S.R.G.; (5) maintain financial stability by paying all bills on time; (6) maintain regular visitation with S.R.G. during the reunification

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period; (7) obtain a substance abuse assessment and follow through with all recommendations; (8) complete anger management and mental health assessments; and (9) complete a psychiatric evaluation. The trial court authorized Respondent to have supervised visits with S.R.G. once a week.

DSS filed a review and permanency planning report on 9 October 2007, which detailed Respondent's progress on her case plan. According to the report, Respondent had (1) obtained a substance abuse and mental health assessment; (2) begun treatment recommendations and had partially attended substance abuse classes, but was dismissed from the program for intermittent attendance and showing up under the influence; (3) submitted to random drug screens; (4) demonstrated appropriate parenting skills with S.R.G.; (5) signed necessary releases required by DSS; (6) attended some medical appointments for S.R.G.; (7) had housing with her mother but had not obtained independent housing; and (8) had participated in a family treatment court program. DSS noted that Respondent had not complied with every aspect of her plan, in that (1) she did not maintain employment, although her focus was on substance abuse treatment; (2) she did not follow through with substance abuse treatment recommendations; (3) she was not compliant with family treatment court program; (4) she did not attend visitation on a regular basis; (5) she did not provide DSS with any information on the paternity of S.R.G., as requested; (6) she did not maintain sobriety from illegal drugs; and (7) she lost transportation services from DSS as a result of not being compliant. Respondent continued to use cocaine between 5 June 2007 and 4 October 2007. The findings of this report were considered and adopted by the trial court at the review hearing held on 23 October 2007. The trial court ordered a concurrent plan of adoption and reunification in its order entered on 11 December 2007.

DSS filed a petition for termination of parental rights on 24 October 2007, alleging the following grounds: (1) Respondent neglected S.R.G. N.C. Gen. Stat. § 7B-1111(a)(1). (2) Willful failure to pay a reasonable portion of the cost of care for S.R.G. for the six-month period preceding the filing of the petition despite being physically and financially able to do so. N.C. Gen. Stat. § 7B-1111(a)(3). (3) Willful abandonment of S.R.G. for at least six months immediately prior to the filing of the petition. N.C. Gen. Stat. § 7B-1111(a)(7). Respondent filed an answer denying the material allegations of the petition and seeking to have the petition dismissed. The motion to dismiss was denied by order entered 28 May 2008.

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Another review hearing was held on 15 January 2008. DSS submitted a report stating that Respondent was not compliant in meeting her case plan goals in that she continued to use illegal drugs and test positive in her drug screens, she continued illegal activities, she attended substance abuse treatment intermittently, and she was not compliant with transportation services and lost those services on two occasions. The trial court continued the concurrent plan of adoption and reunification in its order entered on 6 February 2008. After a review hearing held on 8 April 2008, the trial court changed the permanent plan to adoption.

A termination of parental rights hearing was held on 21 May 2008. Respondent testified extensively regarding her struggle to overcome her substance abuse issues, and she admitted to using cocaine throughout 2007, as evidenced by numerous positive drug screens. She stated she knew she needed to stop using illegal drugs in order to get S.R.G. back, and that she had a limited time to prove herself to DSS and the court. She stated she had attended 11 of 25 scheduled visitations with S.R.G. between March and October 2007.

DSS social worker Mandy Schmitt (Ms. Schmitt) testified that she became involved in the case in March 2007 when S.R.G. came into DSS custody. Ms. Schmitt and Respondent entered into a case plan on 11 May 2007. Respondent exercised her visitation rights and attended review meetings only sporadically in the Spring of 2007. Respondent had continuous problems securing transportation to the meetings and visitations. Ms. Schmitt testified that the majority of Respondent's missed visits with S.R.G. occurred toward the beginning of the case from March 2007 onward, and that as of December 2007, Respondent began visiting more regularly. Although Ms. Schmitt repeatedly informed Respondent about how to get back into her substance abuse treatment, Respondent did not resume treatment until August 2007. Even then, she continued to test positive for cocaine.

After all the evidence, the trial court found as its sole basis for termination of Respondent's parental rights that Respondent willfully abandoned S.R.G. in the six months preceding the filing of the termination petition. The trial court then considered various factors regarding the best interests of S.R.G., determined that termination was in the best interests of S.R.G., and ordered that Respondent's parental rights be terminated. The trial court entered its findings and conclusions in an order filed on 28 May 2008. From the order entered, Respondent appeals.

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Proceedings to terminate parental rights are conducted in two parts: (1) the adjudication phase, governed by N.C. Gen. Stat. § 7B-1109 and (2) the disposition phase, governed by N.C. Gen. Stat. § 7B-1110. *In re Baker*, 158 N.C. App. 491, 581 S.E.2d 144 (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)). Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). Once a trial court has determined that at least one ground exists for termination, the trial court then decides whether termination of parental rights is in the best interest of the child. N.C. Gen. Stat. § 7B-1110; *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 407 (2003).

[1] Respondent first argues the trial court erred because the language in the termination order finding a ground for terminating her parental rights shows that the trial court improperly found she failed to make reasonable progress pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), a ground which was not alleged in the termination petition filed by DSS. Respondent contends that since she did not have notice of this ground, the trial court erred in using N.C. Gen. Stat. § 7B-1111(a)(2) as a basis to terminate her parental rights. As Respondent correctly points out, N.C. Gen. Stat. § 7B-1111(a)(2) may not be used as a ground for terminating her parental rights in this case, as this ground was not alleged in the termination petition. *In re C.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007) (“Because it is undisputed that DSS did not allege abandonment as a ground for termination of parental rights, [the] respondent had no notice that abandonment would be at issue during the termination hearing. Accordingly, the trial court erred by terminating [the] respondent’s parental rights based on this ground.”).

[2] In the alternative, Respondent argues that the trial court erred in terminating her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), or willful abandonment of S.R.G. for the six-month period prior to filing the termination petition.

The trial court’s conclusion from the adjudicatory portion of its order states that Respondent

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has willfully abandoned the Juvenile, [S.R.G.], for at least six consecutive months immediately filing the Petition herein, in that the Juvenile has been in the custody of the Petitioner since January 17, 2007, and has at no time since that date been reunited with the Respondent Mother, and that during that time Respondent has willfully and unreasonably failed to meaningfully cooperate with efforts of reunification by failing to demonstrate, for any significant period, that she is willing to follow the treatment protocols and recommendations of her Case Plans and stop using illegal drugs.

This language appropriately tracks the statutory language in N.C. Gen. Stat. § 7B-1111(a)(7) regarding willful abandonment as a ground for termination of parental rights, a ground which was alleged in the petition filed by DSS. Thus, even though neither the termination petition nor the termination order specifically cites to subsection (a)(7), the trial court correctly used a ground alleged in the petition as its basis for terminating Respondent's parental rights. We note that the language used by the trial court also tracks in some relevant part the language of N.C. Gen. Stat. § 7B-1111(a)(2) (2008), which states:

The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

To show willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), DSS must present evidence that Respondent willfully abandoned S.R.G. for at least six consecutive months prior to the filing of the termination petition. Since the termination petition was filed on 24 October 2007, the determinative period in this case is 24 May 2007 to 24 October 2007. "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child" *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citation omitted). Willfulness is "more than an intention to do a thing; there must also be purpose and deliberation." *Id.* "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *Id.* at 276, 346 S.E.2d at 514.

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In the case before us, the trial court made the following relevant findings of fact: (1) Respondent failed to attend the permanency mediation session on 19 June 2007, the hearing regarding need for continued non-secure custody on 26 June 2007, and the permanency planning hearing on 23 October 2007. (2) Respondent did attend the 24 July 2007 adjudicatory hearing on the neglect/dependency petition. (3) Respondent failed to reasonably and substantially comply with requirements of her case plan between 24 July and 23 October 2007. At no time was Respondent's compliance sufficient to allow her to exercise unsupervised custodial care of S.R.G. Respondent was only allowed supervised visitation at DSS. (4) Respondent failed to comply with substance abuse treatment between 24 July and 23 October 2007, and she "disappeared" without notice for periods of time. (5) Respondent failed to demonstrate consistent reasonable progress in dealing with her substance abuse problem. (6) Respondent attended 11 of 26 scheduled visits with S.R.G. between 24 July and 23 October 2007. (7) Respondent "did provide appropriate clothes, presents, toys, and holiday clothes" for S.R.G. during visitations. (8) The trial court found Respondent's testimony regarding her desire to be with S.R.G., and the causes and frequency of her drug use "wholly without credibility". [R.pp. 143-44]

In deciding whether the trial court erred in terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), we find it helpful, after a thorough review of termination opinions based upon this statute, to compare two opinions most closely tracking the facts in the case before us. In *In re K.B.*, 2006 N.C. App. LEXIS 1173 (June 6, 2006), unpublished opinion reported at 177 N.C. App. 810; 630 S.E.2d 256 (2006), our Court affirmed the trial court's conclusion that the respondent had willfully abandoned her child pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), even though the respondent had visited K.B. once during the relevant six month period. The *K.B.* Court listed other opinions in which this Court has found termination proper despite some minimal contact between the respondents and their children during the relevant six month period, and it compared these cases with one in which the respondent's contact with his child was more substantial:

Compare Searle, 82 N.C. App. at 276-77, 346 S.E.2d at 514 (1986) (finding that the respondent's single \$500.00 support payment during the relevant six-month period did not preclude a finding of willful abandonment) and *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982) ("except for an abandoned attempt to

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negotiate visitation and support, respondent ‘made no other significant attempts to establish a relationship with [the child] or obtain rights of visitation with [the child]’”) *with* [*Bost v. Van Nortwick*, 117 N.C. App. 1, 19, 449 S.E.2d 911, 921 (1994)] (finding no willful abandonment where respondent, during relevant six-month period, visited children at Christmas, attended three soccer games and told mother he wanted to arrange support payments).

K.B., 2006 N.C. App. LEXIS 1173 at 12-13; *see also In re A.A.H.*, 2006 N.C. App. LEXIS 1908, 31-32 (Sept. 5, 2006), *unpublished opinion reported at* 179 N.C. App. 434, 634 S.E.2d 274 (2006).

We find the *Bost* opinion, cited in the above quote, is particularly helpful in our decision. In *Bost*, the respondent’s only acts evincing lack of abandonment were four visits with his children, and a statement to the children’s mother that he wished to provide monetary support for his children. Our Court held as follows in *Bost*: “We do not find that [the] respondent’s actions evince a settled purpose to forego all parental duties and relinquish all parental claims to the children.” *Bost*, 117 N.C. App. at 19, 449 S.E.2d at 921.

In the case before us, Respondent visited S.R.G. eleven times during the relevant time period. She also brought appropriate toys and clothes for S.R.G. to those visits. Respondent’s contacts with S.R.G. during the relevant six month period are more substantial than those in the *Bost* opinion. Further, the trial court also found as fact that Respondent did participate in one of the trial proceedings during the relevant time period.

In addition, many of the findings of fact made by the trial court for the relevant period are not of great relevance for a determination of willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). For example, evidence that Respondent failed to adequately comply with her case plan and evidence of Respondent’s continuing substance abuse during the relevant period are more appropriately considered as a grounds for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). These are failings that do not inherently suggest a willful intent to abandon, as they are subject to other explanations—uncontrolled addiction, for example. *See Pratt v. Bishop*, 257 N.C. 486, 501-02, 126 S.E.2d 597, 608 (1962); *see also In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002) (“Evidence showing [] parents’ ability, or capacity to acquire the ability, to overcome factors

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which resulted in their children being placed in foster care must be apparent for willfulness to attach.”); *Bost*, 117 N.C. App. at 18, 449 S.E.2d at 921 (“Our review of [the] respondent’s inability to pay child support due to his dependency on alcohol and related financial problems does not support a finding of willful abandonment.”); *K.B.*, 2006 N.C. App. LEXIS 1173, 13-14 (“[A]t the time of the hearing, [the respondent] had successfully obtained treatment for substance abuse, maintained stable housing for four years, and ‘provided clean and appropriate housing and care’ for her infant son. [These facts] have little bearing upon the issue of her abandonment of K.B.”).

We are hesitant to introduce N.C. Gen. Stat. § 7B-1111(a)(2) factors into consideration for terminating parental rights in this case due to the relatively short six month period required under N.C. Gen. Stat. § 7B-1111(a)(7). A parent’s failure to address the necessary requirements laid out in her case plan to regain custody of her child becomes more relevant to any finding of willful abandonment the longer the parent fails to act. The General Assembly has determined a parent willfully leaving her child in the custody of DSS for a twelve month period is a reasonable and sufficient ground for termination where the parent has failed to show “to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.” N.C. Gen. Stat. § 7B-1111(a)(2). We do not believe the General Assembly intended the same factors relevant to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), which requires a twelve month period before filing a termination petition on that ground, to be used as substantive evidence in finding willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). A judicial determination that a parent willfully abandoned her child, particularly when we are considering a relatively short six month period, needs to show more than a failure of the parent to live up to her obligations as a parent in an appropriate fashion; the findings must clearly show that the parent’s actions are wholly inconsistent with a desire to maintain custody of the child. *See Bost*, 117 N.C. App. at 19, 449 S.E.2d at 921.

Respondent’s conduct of continuing substance abuse and her failure to follow through with her case plan represents poor parenting, at the least, and may be grounds for termination of her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). However, her actions during the relevant six month period do not demonstrate a purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to S.R.G. pursuant to N.C.

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Gen. Stat. § 7B-1111(a)(7). Therefore, we hold the trial court erred in the adjudication portion of the termination proceeding by finding grounds to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). We thus reverse and remand to the trial court for further action consistent with this opinion.

Reversed and remanded.

Judges ELMORE and STROUD concur.

JOHNNY V. BENTON, JR. AND VERONICA TYNDALL, PLAINTIFFS v. TIMOTHY S.
HANFORD AND PROGRESSIVE SOUTHEASTERN INSURANCE COMPANY,
DEFENDANTS

No. COA08-44

(Filed 20 January 2009)

1. Insurance— automobile—UIM coverage—stacking of policies—Financial Responsibility Act

The trial court did not err by concluding that a tortfeasor's underinsured motorist (UIM) insurance policy which covers a person occupying the tortfeasor's vehicle may be stacked with the injured party's separate UIM policy in order to determine the total UIM coverage available to the injured party because: (1) the purpose of the Financial Responsibility Act is best served when every provision of the Act is interpreted to provide the innocent victim with the fullest possible protection; (2) the 2004 amendment was not applicable since there was only one claimant; and (3) the general definition of "underinsured highway vehicle" found in the Act provided that the amount of the stacked UIM coverage (\$50,000 from the tortfeasor's Nationwide UIM policy + \$100,000 from the injured party's Progressive policy = \$150,000) was the applicable limit of underinsured motorist coverage for the vehicle involved in the accident, and the tortfeasor's vehicle was an underinsured highway vehicle since the \$150,000 amount was greater than the \$50,000 liability limits under the Nationwide policy.

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2. Insurance— automobile—UIM coverage—primary and excess carriers—credit for liability payment

The underinsured motorist (UIM) coverage in a policy on the tortfeasor's vehicle in which a passenger was injured was primary and the UIM coverage in a policy insuring the injured passenger as a resident of the named insured's household was excess coverage, and the tortfeasor's primary UIM insurer was entitled to the credit for the liability insurance payment made to the passenger, where both policies contained "other insurance" clauses stating that any insurance provided with respect to a vehicle not owned by the insured shall be excess over any other collectible insurance.

Appeal by defendant from order entered 28 September 2007 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 26 August 2008.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, and Henson & Fuerst, P.A., by William S. Hoyle, for plaintiff-appellees.

Young Moore and Henderson P.A., by Glenn C. Raynor, for defendant-appellant.

Maynard & Harris, PLLC, by C. Douglas Maynard, Jr., for amicus curiae North Carolina Academy of Trial Lawyers.

STROUD, Judge.

This case presents two issues to this Court: (1) whether a tortfeasor's underinsured motorist ("UIM") insurance policy which covers a person occupying the tortfeasor's vehicle may be stacked with the injured party's separate UIM policy in order to determine the total UIM coverage available to the injured party, and (2) how the credit for the applicable liability coverage should be divided between the tortfeasor's insurer and the injured party's insurer. For the reasons which follow, we affirm the trial court.

I. Background

On 27 October 2005 plaintiff Benton was a passenger in a 2001 Toyota operated by defendant Hanford. The Toyota collided with a tree causing bodily injury to Benton.

At the time of the accident, defendant Hanford was insured as a named driver in Nationwide Policy No. 6132S626920 ("the Nationwide

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policy”). The Nationwide policy provided \$50,000.00 per person in liability coverage and \$50,000.00 per person in UIM coverage for, *inter alia*, a person occupying the covered vehicle. Plaintiff Benton was insured as a “household resident” on Progressive Southeastern Policy No. 11951100-1 (“the Progressive policy”) owned by his mother, plaintiff Tyndall. The Progressive policy provided for \$100,000.00 per person in UIM coverage. After the accident, Nationwide paid plaintiffs \$50,000.00 in liability insurance benefits under its policy.

On 30 January 2007 plaintiffs filed a complaint in Superior Court, Nash County, seeking *inter alia*, “a judicial determination as to whether Progressive is responsible for paying up to a total of \$100,000.00 in underinsured motorist coverage for this claim.” Defendant Progressive filed an answer on 19 April 2007, asserting that its \$100,000.00 UIM policy limit should be reduced by a credit for Nationwide’s liability payment of \$50,000.00, thereby limiting Progressive’s UIM coverage to only \$50,000.00. On 1 June 2007 defendant Progressive moved for summary judgment, requesting the trial court to declare that Progressive’s coverage was limited to \$50,000.00.

On 28 September 2007, the trial court entered summary judgment in favor of plaintiffs, declaring:

6. The Nationwide policy provided UIM coverage in the sum of \$50,000.00 for the damages sustained by plaintiffs in the October 27, 2005 accident.

....

8. The Nationwide policy provides primary UIM coverage for purposes of the damages sustained by the plaintiffs in the October 27, 2005 accident, and the Progressive Southeastern policy provides excess UIM insurance benefits.

9. Nationwide is entitled to a credit of \$50,000.00 to its \$50,000.00 UIM limit, for the amount of the liability insurance paid under Nationwide’s policy to the plaintiffs.

10. The Progressive Southeastern policy is entitled to no credit for the liability proceeds paid under the Nationwide policy to the plaintiffs.

11. The Progressive Southeastern policy provides available UIM coverage in the amount of \$100,000.00 for the damages sustained by the plaintiffs in the October 27, 2005 accident.

Defendant Progressive appeals.

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II. Underinsured Highway Vehicle

[1] Defendant first argues that the Nationwide policy does not provide UIM coverage to plaintiff Benton as a passenger in the Toyota because the Toyota was not an “underinsured vehicle” for purposes of the Nationwide policy. Defendant argues that the definition of “underinsured motor vehicle” found in the Nationwide policy is dispositive, particularly the provision which expressly excludes from the definition “any vehicle . . . [w]hich is insured under Liability Coverage of this policy if such policy’s limit of liability for Combined Uninsured/Underinsured Motorists Coverage is equal to or less than its limit of liability for Liability Coverage.” Defendant reasons that because the liability limits and the UIM limits in the Nationwide policy are equal, the Toyota does not meet the definition of an “underinsured motor vehicle” under the terms of the policy. Therefore, defendant concludes, the Nationwide policy does not provide UIM coverage to plaintiff Benton. We disagree.

“[W]hether the tortfeasor’s vehicle is an ‘underinsured highway vehicle’ as the term is used in N.C.G.S. § 20-279.21(b)(4)” is the “threshold question” in determining if UIM coverage applies. *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 187, 420 S.E.2d 124, 126 (1992); *Ray v. Atlantic Casualty Ins. Co.*, 112 N.C. App. 259, 261, 435 S.E.2d 80, 81 (“UIM coverage . . . necessarily depends on whether the tortfeasor’s vehicle is an underinsured highway vehicle.”), *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993); *see also State Farm Mut. Auto. Ins. Co. v. Young*, 122 N.C. App. 505, 506, 470 S.E.2d 361, 361 (1996) (“[A]n underinsured highway vehicle as defined in G.S. § 20-279.21(b)(4) can include a motor vehicle owned by the named insured, and the provisions in the policies issued by plaintiff attempting to exclude such coverage are invalid and unenforceable.” (Citation and quotation marks omitted.)), *disc. review denied*, 345 N.C. 353, 483 S.E.2d 191 (1997).

Notwithstanding the express language in the Nationwide policy quoted by defendant, the “provisions of the Financial Responsibility Act [], N.C. Gen. Stat. Chapter 20, Article 9A [], are written into every insurance policy as a matter of law. Where the language of an insurance policy conflicts with the provisions of the Act, the provisions of the Act prevail.” *Austin v. Midgett*, 159 N.C. App. 416, 420, 583 S.E.2d 405, 408 (2003) (citations omitted), *modified on rehearing on other grounds*, 166 N.C. App. 740, 603 S.E.2d 855 (2004). Because the Financial Responsibility Act (“the Act”) specifically defines “underinsured highway vehicle[,]” N.C. Gen. Stat. § 20-279.21(b)(4) (2005), we

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turn to the Act and the cases interpreting it without regard to the definition of the term in the Nationwide policy.

Defendant contends that even if we reject the language of the policy and rely on the language of the Act, we should reach the same result, i.e., that the Toyota involved in the accident is not an “underinsured highway vehicle” under the terms of the statute. Again, we disagree.

The Act defines “underinsured highway vehicle” generally as:

a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner’s policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (2005). Statutory interpretation begins with “[t]he cardinal principle of statutory construction . . . that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish.” *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983) (citations omitted). Specific to the Act, the North Carolina Supreme Court has stated:

The avowed purpose of the Financial Responsibility Act is to compensate the innocent victims of financially irresponsible motorists. The Act is remedial in nature and is to be *liberally construed* so that the beneficial purpose intended by its enactment may be accomplished. The purpose of the Act, we have said, is best served when every provision of the Act is interpreted to *provide the innocent victim with the fullest possible protection*.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573-74, 573 S.E.2d 118, 120 (2002) (citations, quotation marks, ellipses and brackets omitted; emphasis added).

In keeping with the purpose of the Act, applicable UIM coverage may be stacked interpolicy to calculate the “applicable limits of underinsured motorist coverage for the vehicle involved in the accident” for the purpose of determining if the tortfeasor’s vehicle is an “underinsured highway vehicle.” *N. C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 50-51, 483 S.E.2d 452, 458 (the legislature’s use

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of the plural “limits” in the statutory definition of “underinsured highway vehicle” means that an insured may stack all applicable UIM policies to determine if the definition is met), *disc. review denied*, 347 N.C. 138, 492 S.E.2d 25 (1997).

Despite *Bost* and other cases which have recognized interpolicy stacking of UIM coverages, *see, e.g., Harrington v. Stevens*, 334 N.C. 586, 434 S.E.2d 212 (1993), defendant contends that the multiple claimant exception added to the definition of “underinsured highway vehicle” in 2004 controls, disallowing stacking in this case. The multiple claimant exception (or “2004 amendment”) reads, with the portion relied on by defendant underlined:

For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle *will also be* an “underinsured highway vehicle” if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner’s policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an “underinsured motor vehicle” for purposes of an underinsured motorist claim under an owner’s policy insuring that vehicle if the owner’s policy insuring that vehicle provides underinsured motorist coverage with limits that are less than or equal to that policy’s bodily injury liability limits.

N.C. Gen. Stat. § 20-279.21(b)(4) (2005) (emphasis added).

Defendant contends, pursuant to the above-underlined portion of the 2004 amendment, that because the Nationwide policy insuring the Toyota provided UIM coverage with a limit of \$50,000.00 per person, an amount equal to the policy’s bodily injury liability coverage limits, the Toyota is not an “underinsured highway vehicle” within the meaning of the Act. Defendant recognizes that both sentences were added together in the 2004 amendment but contend, “there is nothing within the language of the amendment limiting the application of the second sentence of the amendment to the multiple claimant scenario addressed by the first sentence.”

We disagree and hold that the exception in the 2004 amendment does not apply *sub judice*. Keeping in mind that we must interpret the provisions of the Act liberally, in order to “provide the innocent vic-

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tim with the fullest possible protection[.]" *Liberty Mut. Ins. Co.*, 356 N.C. at 574, 573 S.E.2d at 120, we conclude that by including the phrase "[n]otwithstanding the immediately preceding sentence," the General Assembly literally meant to limit the above-underlined provision to the "preceding sentence," which refers to the multiple claimant exception added in the 2004 amendment. Accordingly, we conclude that this sentence applies only to accidents with multiple claimants. Because there is only one claimant *sub judice*, the 2004 amendment, including the language highlighted by defendant, does not apply here and we must use the general definition of "underinsured highway vehicle" found in the Act. *Bost*, 126 N.C. App. at 51-52, 483 S.E.2d at 458.

Using the general definition of "underinsured highway vehicle," it follows that the Nationwide UIM policy limit (\$50,000.00) may be stacked with the Progressive policy limit (\$100,000.00) to determine whether the Toyota is an underinsured motor vehicle. *Id.* The amount of the stacked UIM coverages (\$50,000.00 + \$100,000.00 = \$150,000.00) is the "applicable limits of underinsured motorist coverage for the vehicle involved in the accident[.]" Because this amount (\$150,000.00) is greater than the liability limits (\$50,000.00) under the Nationwide policy, we conclude that the Toyota is an "underinsured highway vehicle" within the meaning of the Act.

III. Allocation of the Credit

[2] After calculating the amount of stacked UIM coverage at \$150,000.00, the trial court credited Nationwide's UIM coverage (\$50,000.00) with the entire amount of Nationwide's liability payment (\$50,000.00) after concluding that "[t]he Nationwide policy provides primary UIM coverage for purposes of the damages sustained by the plaintiffs in the October 27, 2005 accident, and the Progressive Southeastern policy provides excess UIM insurance benefits." Defendant argues that this conclusion is error, and that Progressive is entitled to the entire credit from the Nationwide liability policy. Defendant argues on this issue is essentially a rehash of its first argument, to wit: "[a]s the only provider of UIM coverage to the plaintiffs, Progressive Southeastern is entitled to receive the entire \$50,000.000 [sic] credit from liability insurance paid by Nationwide." Again, we disagree with defendant.

Before making payment to the injured party against the "applicable limits of underinsured motorist coverage for the vehicle involved in the accident," the "UIM carrier[s] are] entitled to a credit for pay-

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ments made by the liability carrier.” *Walker v. Penn Nat’l Sec. Ins. Co.*, 168 N.C. App. 555, 559, 608 S.E.2d 107, 110 (2005). The statutory authority for this rule is N.C. Gen. Stat. § 20-279.21(b)(4) (2005), which states: “In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.” *Id.*; *Iodice v. Jones*, 133 N.C. App. 76, 77, 514 S.E.2d 291, 292 n.2 (1999) (“UIM carriers are entitled to set off the amount received by a claimant from the tortfeasor’s liability carrier against any UIM amounts owed.”).

When there is more than one UIM carrier involved, allocation of the credit for liability payments is necessary. *Onley v. Nationwide Mutual Ins. Co.*, 118 N.C. App. 686, 691, 456 S.E.2d 882, 885, *disc. review denied*, 341 N.C. 651, 462 S.E.2d 514 (1995). If neither policy has an “other insurance” clause, or if each policy has an “other insurance” clause which effectively cancels out the other, the credit is shared pro rata between the two insurance carriers. *Bost*, 126 N.C. App. at 52, 483 S.E.2d at 458-59 (allocating the credit pro rata between two UIM insurers when identical “other insurance” clauses were “deemed mutually repugnant” and therefore nullified each other); *Aetna Casualty and Surety Co. v. Continental Ins. Co.*, 110 N.C. App. 278, 283, 429 S.E.2d 406, 409 (1993) (“When neither of two competing insurance policies has an ‘other insurance’ clause and both cover the loss which has been sustained, liability is allocated pro rata when no contrary policy stipulation is involved.” (Citation and quotation marks omitted.)). However, if one or both policies contain an “other insurance” clause, and the clauses do not effectively cancel each other out, the language of the clause determines which carrier is the “primary” insurer and which is the “excess” insurer. *Iodice*, 133 N.C. App. at 78, 514 S.E.2d at 293 (allocating the liability credit on the basis of the “other insurance” clause in each policy). The “primary” insurer is entitled to the entire credit. *Id.* at 79, 514 S.E.2d at 293.

In the case *sub judice*, both policies contain identical “other insurance” clauses:

In addition, if there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

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The relevant facts and policy language *sub judice* are apposite to the facts and policy language in *Iodice*, 133 N.C. App. 76, 514 S.E.2d 291:

Both the GEICO policy and the Nationwide policy contain the following “other insurance” paragraph:

[I]f there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

Id. at 77, 514 S.E.2d at 292.

Accordingly, the holding of *Iodice* controls this case:

[T]he “excess” clause of the “other insurance” paragraph in each policy provides: “Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.”

. . . .

[T]he “other insurance” clauses in this case, although identically worded, do not have identical meanings and are therefore not mutually repugnant. . . . [T]he Nationwide “excess” clause reads: “Any insurance we provide with respect to a vehicle [the Nationwide policy holder] does not own shall be excess over any other collectible insurance.” It follows that Nationwide’s UIM coverage is *not* “excess” over other collectible insurance (and is, therefore, primary), because the vehicle in which the accident occurred is owned by [the Nationwide policy holder]. The GEICO “excess” clause reads: “Any insurance we provide with respect to a vehicle [the GEICO policy holder] does not own shall be excess over any other collectible insurance.” It follows that GEICO’s UIM coverage is “excess” (and is, therefore, secondary), because the vehicle in which the accident occurred is not owned by [the GEICO policy holder]. Accordingly, Nationwide provides primary UIM coverage in this case. As such, Nationwide is entitled to set off the entire [credit from the liability policy] against any UIM amounts it owes [the injured party], because the primary provider of UIM coverage is entitled to the credit for the liability coverage.

133 N.C. App. at 78-79, 514 S.E.2d at 293 (citation, quotation marks, original brackets and ellipses omitted; original emphasis retained).

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According to the “other insurance” clauses in both policies *sub judice*, as in *Iodice*, the UIM coverage for the vehicle owned by the policy holder is not excess, but is “primary” coverage. 133 N.C. App. at 78-79, 514 S.E.2d at 293-94. In the case *sub judice*, this is the Nationwide policy covering the Toyota involved in the accident. The other policy *sub judice*, the Progressive policy, insured the injured party as a household resident of a named insured, in a vehicle not owned by the named insured. According to *Iodice* and the language of the policy, this is “excess” coverage. *Id.* As the provider of primary coverage, Nationwide is entitled to the entire credit from the liability payment. The trial court did not err in so concluding.

IV. Conclusion

Plaintiffs were entitled to stack both the Nationwide and the Progressive policies in determining whether the Toyota involved in the accident was an “underinsured highway vehicle” for purposes of UIM insurance coverage. Furthermore, Nationwide was entitled to the entire credit for its liability payment as the primary insurer. Accordingly, the order of the trial court granting summary judgment in favor of plaintiffs is affirmed.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

LOLA DAUGHERTY, EMPLOYEE, PLAINTIFF v. CHERRY HOSPITAL/N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT, THIRD-PARTY ADMINISTRATOR), DEFENDANT

No. COA08-211

(Filed 20 January 2009)

1. Workers’ Compensation— applicability of equitable remedies—laches

The full Commission did not err by applying the equitable doctrine of laches to the statutory Workers’ Compensation Act because: (1) our Supreme Court has previously upheld the equitable doctrine of estoppel in workers’ compensation cases; and (2) the equitable law of laches applies in workers’ compensation proceedings as well as in all other cases.

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2. Workers' Compensation— equitable remedy of laches unnecessary—adequate remedy at law

The full Commission erred in its application of the equitable doctrine of laches to the statutory Workers' Compensation Act to determine that plaintiff's claim was time barred, and the case is remanded to the full Commission for further proceedings under Industrial Commission Rule 613, because: (1) Rule 613 provided the proper procedure and remedy at law for determining the issues raised by plaintiff's delay in pursuing her claim; (2) while defendant was not required to file a Rule 613 motion to dismiss to preempt plaintiff's filing of a Form 33, Rule 613 allowed defendant to file a motion to dismiss for failure to prosecute after plaintiff's filing of Form 33; (3) Rule 613 provided defendant with a complete remedy against plaintiff's detrimental delay in prosecuting her claim; and (4) although the findings and conclusions demonstrated that plaintiff acted in a manner which deliberately or unreasonably delayed her case and that defendant was prejudiced by plaintiff's delay, the full Commission did not address whether sanctions short of dismissal would be sufficient in this case.

Appeal by Plaintiff from Opinion and Award entered 21 September 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 August 2008.

The Cole Law Firm, PLLC, by Alden B. Cole, for Plaintiff-Appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

STEPHENS, Judge.

Facts and Procedural History

Plaintiff Lola Daugherty was employed by Defendant Cherry Hospital as a Health Care Technician on 16 November 1992 when she was attacked by a patient while working in the High Risk Unit. Plaintiff sustained physical injuries to her legs and stomach as a result of the attack. Plaintiff immediately sought treatment from Employee Health Services and was cleared to return to work the following day with no restrictions. On 17 November 1992, Defendant filed an Industrial Commission Form 19 Employer's Report of Injury to Employee.

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Plaintiff was treated at Wayne Psychiatric Associates, P.A., by Dr. Louis Gagliano on 22 December 1992. Dr. Gagliano diagnosed Plaintiff with major depression, prescribed medication, and “[g]ave her off work one week[.]” Plaintiff returned to work on 4 January 1993. At an examination by Dr. Gagliano on 5 January 1993, Plaintiff reported that, although she had returned to work, she could not “stay and work again.” Dr. Gagliano ordered that she continue off work for another month.

Plaintiff was seen by Dr. Kurt Luedtke at the Waynesboro Family Clinic, P.A., on 14 January 1993. Dr. Luedtke extended Plaintiff’s medical leave of absence through 19 February 1993, two weeks beyond the leave ordered by Dr. Gagliano. On 5 February 1993, Plaintiff filed a Form 18 Notice of Accident to Employer and Claim of Employee, claiming benefits for physical and psychological injury. Plaintiff’s claim for physical injury was accepted, but her claim for psychological injury was denied. Plaintiff did not return to work on 20 February 1993.

On 22 February 1993, Dr. Luedtke recommended that Plaintiff return to work with several limitations. Ms. Dale Hilburn, Director of Nursing at Cherry Hospital, advised Plaintiff that Defendant could not accommodate those restrictions but would consider other proposals including an extension of Plaintiff’s leave without pay. Ms. Hilburn also requested a statement from Dr. Luedtke regarding the length of time the restrictions would apply. By letter dated 2 March 1993, Dr. Luedtke estimated the duration of Plaintiff’s restrictions to be 120 days.

Plaintiff was assigned to work within the limitations prescribed by Dr. Luedtke as a receptionist from 12 March through 30 June 1993. At the end of this assignment, Plaintiff was expected to return to her routine duties as a Health Care Technician on the Nursing Care Unit.

By letter to the North Carolina Attorney General’s Office also dated 2 March 1993, Dr. Luedtke opined that “it is unequivocally affirmed that each and every psychiatric symptom exhibited by [Plaintiff] subsequent to her attack and harassment at [Cherry Hospital] is a direct result of said attack” and “strongly recommended that [Plaintiff] receive Workman’s [sic] Compensation for work related condition.”

By letter dated 15 March 1993 from the Office of the Attorney General to Plaintiff’s attorney, Cecil P. Merritt, Defendant refused to accept Plaintiff’s claim for benefits for psychological injury based on

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Dr. Luedtke's opinion. Defendant instead advised that it would seek a second opinion on the causal relationship, if any, between the attack on 16 November 1992 and Plaintiff's psychological problems and alleged disability. Bernice George of Cherry Hospital was to contact Mr. Merritt's office to schedule the initial appointment.

Defendant requested that Plaintiff see Dr. Gagliano for a second opinion. By letter dated 5 April 1993, Plaintiff, through her attorney, refused to submit to an examination by Dr. Gagliano. Defendant informed Plaintiff on 15 April 1993 "that pursuant to [N.C. Gen. Stat. §] 97-27(a), [Plaintiff's] right to take or prosecute any proceedings under the Worker's Compensation Act is suspended."

On 1 July 1993, Plaintiff reported to work but refused to resume her position in the Nursing Care Unit. On 7 July 1993, Plaintiff consented to work in the Infirmary Unit. Around August of 1993, Plaintiff's attorney ceased his representation of her before passing away.

By letter dated 3 November 1994, Plaintiff resigned from her position as a Health Care Technician at Cherry Hospital. Plaintiff explained:

I am currently in the LPN Program and need the weekends off to complete my Clinical. The unavailability of any alternatives for a work schedule leave[s] me no choice but to submit my resignation.

My greatest reward has been working with the patients.

If in the future you should need me, please do not hesitate to call.

On 17 January 2006, Plaintiff filed a Form 33 Request that Claim be Assigned for Hearing, seeking retroactive and ongoing medical and indemnity compensation as a result of her injury on 16 November 1992. Defendant's first notice that Plaintiff was seeking further medical treatment was by copy of the Form 33 received in May 2006. Defendant filed a Form 33R Response to Request that Claim be Assigned for Hearing on 8 May 2006, stating that Plaintiff's claim was time barred pursuant to N.C. Gen. Stat. §§ 97-22, 97-24, and 97-25.1. The case was bifurcated so the issue of whether Plaintiff's claim was time barred could first be addressed.

On 24 October 2006, a hearing was held before Deputy Commissioner Ronnie Rowell. By Opinion and Award filed 29 November 2006,

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Deputy Commissioner Rowell concluded that Plaintiff's claim was not time barred. Defendant timely appealed this decision to the Full Commission. The case was heard by the Full Commission on 19 July 2007. By Opinion and Award filed 21 September 2007, then Chairman Buck Lattimore, writing for the Full Commission, filed an Opinion and Award concluding that Plaintiff's claim was barred under the doctrine of laches and dismissing the claim with prejudice. From the Opinion and Award of the Full Commission, Plaintiff appeals.

Discussion

Appellate review of an Opinion and Award of the Full Commission is limited to a determination of whether the Full Commission's findings of fact are supported by any competent evidence, and whether those findings support the Full Commission's legal conclusions. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quotation marks and citation omitted). The Full Commission's conclusions of law are reviewable *de novo*. *Whitfield v. Lab. Corp.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003).

[1] Relying on case law from Oklahoma and Washington, Plaintiff argues that the Full Commission "erred in applying the equitable doctrine of laches to the statutory Workers' Compensation Act and in determining that Plaintiff's claim was time barred under the doctrine of laches." It appears that the North Carolina appellate courts have not previously addressed this issue.

Laches is an equitable remedy that is applied "where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim[.]" *Williams v. Blue Cross Blue Shield*, 357 N.C. 170, 181, 581 S.E.2d 415, 424 (2003) (quotation marks and citation omitted). "[W]hat delay will constitute laches depends upon the facts and circumstances of each case." *Id.* (quotation marks and citation omitted).

Equity supplements the law. Its office is to supply defects in the law where, by reason of its universality, it is deficient, to the

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end that rights may be protected and justice may be done as between litigants.

Its character as the complement merely of legal jurisdiction rests in the fact that it seeks to reach and do complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of the case, are incompetent so to do. It was never intended that it should, and it will never be permitted to, override or set at naught a positive statutory provision. It is an instrument of remedial justice within and not in opposition to the law.

Zebulon v. Dawson, 216 N.C. 520, 522-23, 5 S.E.2d 535, 537 (1939). “Equity will not lend its aid in any case where the party seeking it has a full and complete remedy at law.” *Centre Dev. Co. v. Cty. of Wilson*, 44 N.C. App. 469, 470, 261 S.E.2d 275, 276, *disc. review denied and appeal dismissed*, 299 N.C. 735, 267 S.E.2d 660 (1980).

The North Carolina Supreme Court has upheld the application of the equitable doctrine of estoppel in workers’ compensation cases. In *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E.2d 777 (1953), our Supreme Court expressly held that “[t]he [equitable] law of estoppel applies in [workers’] compensation proceedings as in all other cases.” *Id.* at 665, 75 S.E.2d at 781. The Court determined that the doctrine of equitable estoppel may be invoked to prevent an employer from asserting the time limitation in N.C. Gen. Stat. § 97-24¹ as an affirmative defense, although the Court further concluded that the facts of that case were insufficient to invoke the doctrine.

Following the rule articulated in *Biddix*, our Supreme Court in *Gore v. Myrtle/Mueller*, 362 N.C. 27, 653 S.E.2d 400 (2007), concluded that the employer in that case should be equitably estopped from asserting the two-year time limitation of Section 97-24 as a bar to the employee’s recovery. *Id.* at 40, 653 S.E.2d at 409.

Based on the above-cited law regarding the application of equitable remedies, and the precedent set by the North Carolina Supreme Court, we hold that the equitable law of laches applies in workers’ compensation proceedings as in all other cases. Laches may “supplement[] the law[,]” *Zebulon*, 216 N.C. at 522, 5 S.E.2d at 537, and “what delay will constitute laches depends upon the facts and circumstances of each case.” *Williams*, 357 N.C. at 181, 581 S.E.2d at 424.

1. N.C. Gen. Stat. § 97-24 contains a two-year statute of limitations for the pursuit of certain workers’ compensation benefits. *See also* N.C. Gen. Stat. § 97-58.

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[2] We turn now to a consideration of whether the doctrine of laches was correctly applied by the Full Commission in this case.

“Equity will not lend its aid in any case where the party seeking it has a full and complete remedy at law.” *Jefferson Standard Life Ins. Co. v. Guilford Cty.*, 225 N.C. 293, 300, 34 S.E.2d 430, 434 (1945). Accordingly, we must determine whether the Workers’ Compensation Act provides Defendant a full and complete remedy against prejudicial delay caused by Plaintiff’s 13-year failure to pursue her claim after Defendant’s notice of suspension of her benefits pursuant to N.C. Gen. Stat. § 97-27 for her refusal to submit to an examination by an expert of Defendant’s choice.²

N.C. Gen. Stat. § 97-80(a) grants the Industrial Commission the power to make rules consistent with the Workers’ Compensation Act in order to carry out the Act’s provisions. Under the authority of this statute, the Commission adopted Rule 613 which provides in part:

Upon proper notice and an opportunity to be heard, any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion or by motion of any party for failure to prosecute or to comply with these Rules or any Order of the Commission.

4 N.C.A.C. 10A.0613(a)(3) (2006). A workers’ compensation case may be involuntarily dismissed with prejudice for failure to prosecute pursuant to Rule 613 if the Industrial Commission finds: (1) plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) defendant was prejudiced by plaintiff’s delay; and (3) sanctions short of dismissal would not suffice. *See Lee v. Roses*, 162 N.C. App. 129, 133, 590 S.E.2d 404, 407 (2004) (stating that the Industrial Commission must address these three factors in its order dismissing a claim with prejudice for failure to prosecute pursuant to Rule 613). Plaintiff argues that Rule 613 provides the “proper procedure” and “proper remedy at law” for determination of the issues raised by Plaintiff’s delay in pursuing her claim. We agree.

In this case, by letter dated 15 April 1993, Defendant informed Plaintiff’s attorney “that pursuant to [N.C. Gen. Stat. §] 97-27(a),

2. This statute provides in part: “After an injury, and so long as he claims compensation, the employee, if so requested by his employer . . . shall . . . submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. . . . If the employee refuses . . . his right to compensation and his right to take or prosecute any proceedings under this Article shall be suspended until such refusal or objection ceases” N.C. Gen. Stat. § 97-27(a) (1993).

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Plaintiff's] right to take or prosecute any proceedings under the Worker's Compensation Act is suspended." Plaintiff took no further action to pursue her claim until 17 January 2006, when she filed a Form 33 hearing request. While Defendant was not required to file a Rule 613 motion to dismiss to preempt Plaintiff's filing of the Form 33, upon Plaintiff's filing the Form 33, Rule 613 allowed Defendant to file a motion to dismiss for failure to prosecute. Defendant did not do so. However, Rule 613 also allows the Commission on its own motion and in its discretion to dismiss claims that are not timely prosecuted.

Unlike in *Biddix* and *Gore* where neither the General Statutes nor the Workers' Compensation Rules provide a remedy for an employee whose claim is barred because he or she failed, as a result of the employer's conduct, to file a claim within the period set out in N.C. Gen. Stat. § 97-24, Rule 613 provides Defendant with a complete remedy against Plaintiff's detrimental delay in prosecuting her claim. Accordingly, we hold the Industrial Commission erred in applying the doctrine of laches to bar Plaintiff's claim.

In its Opinion and Award, the Full Commission made the following findings of fact which are determinative of two of the factors necessary to support an involuntary dismissal of Plaintiff's claim with prejudice pursuant to Rule 613 for failure to prosecute:

16. On January 1, 2006, almost 13 years after plaintiff's psychological benefits were denied, plaintiff filed a Form 33 seeking medical and indemnity compensation as a result of the November 16, 1992 injury and retroactive to 1993. This was defendant's first notice that plaintiff was seeking further benefits since her claim for psychological treatment was denied in 1993. The undersigned find that plaintiff's 13-year delay in prosecuting her claim is unreasonable, and that based upon plaintiff's testimony, plaintiff was aware of her condition requiring psychological treatment during this 13-year time period.

....

20. The undersigned find that plaintiff's unreasonable delay has hindered defendant's ability to investigate her claim and prevented defendant from providing treatment to lessen plaintiff's period of disability.

The Full Commission thus concluded:³

3. These conclusions are actually mixed findings of fact and conclusions of law.

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6. . . . Although plaintiff knew of the existence of the grounds for a potential claim against defendant for her November 16, 1992 injury, plaintiff did not pursue her claim . . . until 2006. Plaintiff even continued to work for defendant until she voluntarily resigned in November of 1994. Given the fact that plaintiff was aware that she had a denied workers' compensation claim, continued to receive treatment at her own expense, and waited thirteen years to seek compensation, plaintiff's delay in time in prosecuting her claim was unreasonable and caused a change in the relationship with the parties.

7. Plaintiff's unreasonable delay in the prosecution of her workers' compensation claim has disadvantaged and prejudiced defendant. Defendant has been denied the opportunity to further investigate plaintiff's claim, direct medical treatment, and to provide medical treatment necessary to effect a cure, provide relief or lessen plaintiff's period of disability. A thirteen-year delay such as plaintiff's makes it difficult for defendant to obtain plaintiff's medical history dating back thirteen years, particularly when plaintiff has not treated with some of her doctors for over seven years. Further, defendant[] [was] denied the opportunity to mitigate any exacerbations of plaintiff's condition potentially related to plaintiff's workers' compensation claim. . . .

Plaintiff argues that “[f]indings of fact sixteen and twenty are unsupported by the evidence of record[.]” We disagree. The record establishes that Defendant denied Plaintiff's claim for psychological benefits on 15 April 1993. Plaintiff filed a Form 33 seeking medical and indemnity compensation in January 2006,⁴ almost 13 years later. During this time, Plaintiff was treated by several different doctors for her alleged psychological injuries, although she could not remember when she saw these doctors and she did not know who paid for the visits. She said she had been prescribed “[m]edication for anxiety, depression and stuff like that[,]” but claimed not to know “what all the medicine is.” She said she could not remember if she had worked anywhere since resigning her position with Defendant. Plaintiff testified that she had made attempts to contact Defendant during the 13-year delay, but she could not recall specific information regarding these attempts. The Full Commission found that “[P]laintiff's testi-

4. Although the Full Commission found that Plaintiff had filed her Form 33 on 1 January 2006, the record reveals the Form 33 was filed on 17 January 2006. Thus, Plaintiff's delay in filing the form was slightly longer than calculated by the Full Commission.

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mony is not credible” and gave “greater weight to the testimony of Lisa Justice[.]”

Lisa Justice, a claims administrator for Key Risk Management, testified that she became involved in the case on 10 May 2006 when she received the Form 33. Key Risk Management had no record of the claim and Ms. Justice had never spoken to Plaintiff prior to receiving the Form 33. When Ms. Justice called Cherry Hospital to inquire about the claim, “they had to research to try to find the paperwork” and “eventually found” a record of the 1992 claim. Ms. Justice testified that she had never received any requests from Plaintiff for medical treatment before receiving the Form 33.

We conclude that findings of fact sixteen and twenty are supported by competent record evidence, and that the findings of fact support the conclusions of law. Furthermore, although Plaintiff assigns as error conclusions of law numbers six and seven, on the grounds that they are not supported by record evidence and are contrary to law, Plaintiff fails to argue these assignments of error in her brief and they are deemed abandoned. N.C. R. App. P. 28(b)(6).

The above-stated findings and conclusions determine that Plaintiff acted in a manner which deliberately or unreasonably delayed her case and that Defendant was prejudiced by Plaintiff’s delay. *Lee*, 162 N.C. App. at 133, 590 S.E.2d at 407. The Full Commission did not address, however, whether sanctions short of dismissal would be sufficient in this case, thus requiring a remand of this matter for further determination by the Full Commission.

Accordingly, that part of the Full Commission’s Opinion and Award which dismissed Plaintiff’s claim with prejudice based on laches is reversed. This matter is remanded to the Full Commission for further proceedings under Rule 613 consistent with this Opinion. In light of this holding, we need not address Plaintiff’s additional assignments of error.

REVERSED in part and REMANDED for further proceedings.

Judges STEELMAN and GEER concur.

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STATE OF NORTH CAROLINA v. MONICA BENITA YOUNG, DEFENDANT

No. COA08-161

(Filed 20 January 2009)

1. Evidence— impermissible opinion—withdrawal of evidence and curative instruction—failure to demonstrate prejudice

The trial court did not violate defendant's right to a fair trial in a misdemeanor breaking and entering case by posing two questions to witness Medlin that allegedly express the trial court's opinion that defendant obtained a claim of right to the pertinent trailer under false pretenses because: (1) when defendant objected to the trial court's questioning of this witness, defendant received precisely the relief she sought since her motion to strike was granted and the trial court issued an immediate curative instruction that defendant agreed was satisfactory; (2) defendant failed to preserve this issue for appellate review, and withdrawal of evidence and a curative instruction are generally enough to avert any prejudice; and (3) even assuming arguendo that the trial court erred, defendant failed to demonstrate prejudice given the overwhelming evidence against defendant, including a summary ejectment judgment's statement that defendant had no legal claim of right to remain in the pertinent residence and the undisputed fact that Chambers, and not Medlin, owned the trailer.

2. Burglary and Unlawful Breaking or Entering— misdemeanor breaking and entering—motion to dismiss—sufficiency of evidence—claim of right

The trial court did not err by denying defendant's motion to dismiss the charge of misdemeanor breaking and entering because: (1) it was undisputed that defendant broke or entered into a trailer without the consent of the owner or the tenants; and (2) although defendant points to her lease agreement with the lot owner to establish a claim of right, defendant had no claim of right to enter the trailer when a summary ejectment judgment specifically found that defendant had no legal claim to remain in the residence.

Appeal by defendant from judgment entered 13 September 2007 by Judge Paul G. Gessner in Halifax County Superior Court. Heard in the Court of Appeals 11 June 2008.

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Attorney General Roy Cooper, by Assistant Attorney General Scott T. Slusser, for the State.

Betsy J. Wolfenden for defendant-appellant.

GEER, Judge.

Defendant Monica Benita Young appeals from her conviction of misdemeanor breaking and entering. On appeal, defendant primarily argues that the trial court's questioning of a witness constituted an impermissible expression of judicial opinion and warrants a new trial. Although we hold that defendant failed to preserve this issue for appellate review, we also conclude that defendant's assertion that the questioning undermined her "claim of right" defense is unpersuasive given the evidence of the summary ejection judgment specifically finding defendant had no claim of right to the premises.

Facts

At trial, the State's evidence tended to show the following facts. On 4 December 2006, Jacqueline Chambers owned a mobile home ("the trailer"). The trailer sat on lot 30 at 111 Happy Drive, Roanoke Rapids, North Carolina. Chambers had rented the lot from Linda Medlin for \$85.00 per month for about nine years. In February 2006, Chambers moved out of the trailer to let her daughter T'Yara Thomas and her daughter's friend Arquize Artis live there, with the understanding that Thomas would make the monthly \$85.00 lot rental payment to Medlin. Thomas, however, failed to pay the lot rent from February 2006 until March 2007.

In June or July 2006, defendant moved into Chambers' trailer with Thomas. In August 2006, Chambers asked defendant to leave the trailer, but defendant refused. Thomas and Artis brought an eviction action, and on 27 October 2006, a judgment for summary ejection was entered against defendant by the Halifax County District Court. On 29 October 2006, defendant was escorted from the trailer by law enforcement pursuant to the eviction order.

On 5 November 2006—one week after defendant's eviction from Chambers' trailer—defendant approached Medlin and entered into a month-to-month lease for the lot on which Chambers' trailer sat. At that time, Chambers' monthly \$85.00 lot rental payment had gone unpaid for approximately nine months. Defendant paid Medlin \$85.00 for the first month's rent, and Medlin gave her a receipt stating that the payment was for the rental of lot 30. Medlin and defendant also

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signed a lease agreement contract with the space specifying the premises being leased left blank. At trial, Medlin offered conflicting testimony as to whether she thought she had authority to let defendant use Chambers' trailer and whether she in fact intended to give defendant permission to use the trailer rather than just the lot.

On 4 December 2006, police officers contacted Chambers to report that they had found defendant at the trailer, accompanied by a locksmith whom defendant had hired to change the locks. Chambers went to the scene and found defendant inside the trailer. At that time, Chambers took out a warrant against defendant for misdemeanor breaking and entering, and defendant was arrested.

On 12 January 2007, defendant was found guilty in Halifax County District Court of misdemeanor breaking and entering and was sentenced to 30 days incarceration with 30 days credit for time served. Defendant gave notice of appeal to superior court. Following trial in superior court, the jury found defendant guilty of misdemeanor breaking and entering. The trial court sentenced her to 40 days incarceration with 40 days credit for time served. Defendant timely appealed to this Court. Defendant appeared *pro se* in both district court and superior court.

Discussion

[1] Defendant contends that the trial court violated her right to a fair trial conducted by an impartial judge when the trial court posed two questions to witness Linda Medlin. These questions, defendant argues, impermissibly expressed the trial court's opinion that defendant obtained a claim of right to Chamber's trailer under false pretenses and indicated to the jury that it should find defendant guilty.

The trial court's questioning of Medlin followed both direct and cross-examination of Medlin by the State and defendant. During the State's direct examination, Medlin testified: "All I remember was telling [defendant]—She said [Chambers] wasn't there. Nobody was staying in the trailer so I thought I had okay for her, you know, to stay." Asked to clarify where, precisely, she thought it was okay for defendant to stay, Medlin replied, "Well, to rent the lot, I guess so." Medlin then testified that although she remembered talking with defendant about the trailer, she could not remember what she said.

On defendant's cross-examination, Medlin testified that she had told defendant she could stay in Chambers' trailer and merely pay lot rent. Then, however, on the State's re-direct examination, Medlin tes-

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tified that she did not remember what, if anything, she said to defendant “about whether or not she could go into the trailer on Lot 30 and stay there.”

At this point, the trial court interrupted to ask Medlin the following questions:

The Court: On the day that you talked—Let me take you back to the day that you talked to Ms. Young about that contract that you all say you entered into and that she paid you \$85. Did she tell you that nine days prior to that a judge had ordered her off that property?

A. No, sir.

The Court: Did she tell you that at some time prior to that, the sheriff had been there and had asked her to leave and she had left off that property?

A. No, sir.

When the trial court convened the next day, defendant moved to strike the trial court’s questions and Medlin’s responses. The trial court granted the motion and agreed to issue a curative instruction to the jury. The trial court asked defendant if that would be satisfactory, and defendant answered “yes.” The trial court also asked defendant whether she wished to make any other motions, and defendant replied, “Not at this time.” When the jury entered the courtroom, the trial court gave the following instruction:

Before we resume with out [sic] testimony, the defense has made a motion to strike a portion of the testimony from yesterday or the evidence from yesterday and I’m granting that motion.

At this time, I’m going to instruct you to disregard and strike from the evidence any questions that I may have asked of a witness and any response that the witness may have given in response to that question and you’re not to consider that in the evidence in this case or during your deliberations.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure states: “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.” Here, when defendant objected to the trial court’s question-

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ing of Medlin, she received precisely the relief that she sought: her motion to strike was granted, and the trial court issued an immediate curative instruction that defendant agreed was satisfactory. Defendant's argument on appeal that this instruction was not sufficient to cure any error was not properly preserved for review. Failure to preserve an issue for appellate review "ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008).

Moreover, withdrawal of evidence and a curative instruction are generally enough to avert any prejudice. *State v. Silva*, 304 N.C. 122, 133, 282 S.E.2d 449, 456 (1981) ("[T]he general rule is that an instruction that evidence is not to be considered accompanied by the withdrawal of that evidence cures any error in its admission."). In the present case, the trial judge issued a curative instruction immediately after granting defendant's motion to strike his questioning of Medlin from the record. Defendant makes no argument, and we can see no reason, why the general rule that withdrawal and a curative instruction are sufficient to avert prejudice should not apply here.

In any event, even if we assume *arguendo* that the trial court erred, defendant has failed to demonstrate prejudice. Not every impermissible opinion expressed by a trial court is grounds for a new trial. "Unless the comment might reasonably have had a prejudicial effect on defendant's trial, the error will be considered harmless." *State v. Gregory*, 340 N.C. 365, 408, 459 S.E.2d 638, 662 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478, 116 S. Ct. 1327 (1996). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." N.C. Gen. Stat. § 15A-1443(a) (2007).

Given the overwhelming evidence against defendant, we conclude that there is no reasonable possibility that, had the court not questioned Medlin, a different result would have been reached at trial. *See State v. Rushdan*, 183 N.C. App. 281, 286, 644 S.E.2d 568, 572 (holding that trial court's witness interrogation did not cause defendant prejudice when there was already "overwhelming evidence" showing defendant's guilt), *disc. review denied*, 361 N.C. 574, 651 S.E.2d 557 (2007). Although defendant argues that the trial court's questions undermined her "claim of right" defense by suggesting to

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the jury that Medlin had been “fooled” by defendant into entering the lease agreement, defendant’s “claim of right” had already been thoroughly countered by Medlin’s testimony that Medlin only owned the lot and not the trailer; the fact that the \$85.00 defendant paid Medlin for a one-month lease agreement correspond to the amount due only for the lot; and, most significantly, the evidence of the summary ejection judgment that had, only seven days prior to defendant’s rental agreement with Medlin, resulted in defendant’s eviction. That judgment contained explicit findings establishing that the trailer was owned by Chambers and that “[t]he Defendant has no legal claim to remain in the residence.” In light of the judgment’s statement that defendant had no legal claim of right to remain in the residence, and the undisputed fact that Chambers and not Medlin owned the trailer, there is no reasonable possibility that the jury would have reached a contrary verdict even if the trial court had not questioned Medlin. Accordingly, any error made by the trial court was harmless.

[2] Defendant next argues on appeal that the trial court erred when it denied her motion to dismiss. 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, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869. Unless favorable to the State, the defendant’s evidence is not to be taken into consideration. *Id.* Contradictions and discrepancies in the evidence do not warrant dismissal, but rather are for the jury to resolve. *Id.*

Defendant was convicted of misdemeanor breaking and entering under N.C. Gen. Stat. § 14-54(b) (2007), which states: “Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor.” Thus, to survive a motion to dismiss, the State must present substantial evidence of (1) a breaking or entry, (2) into a building, (3) that was wrongful at the time. A breaking or entry is wrongful when it is without the consent of the owner or tenant or other claim of right. *See, e.g., State v. Mathis*, 126 N.C. App. 688, 691-93, 486 S.E.2d 475, 477-78 (1997) (reversing breaking and entering conviction on the grounds that jury was not instructed on the “claim of right” bondsmen have to break and enter the house of

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someone who has jumped bail), *aff'd on other grounds*, 349 N.C. 503, 509 S.E.2d 155 (1998); *State v. Wheeler*, 70 N.C. App. 191, 195, 319 S.E.2d 631, 634 (“Our Courts have held that an entry is punishable under this statute only if it is wrongful, i.e., without the owner’s consent.”), *disc. review denied*, 312 N.C. 624, 323 S.E.2d 925 (1984), *cert. denied*, 316 N.C. 201, 341 S.E.2d 583 (1986); *State v. Chambers*, 52 N.C. App. 713, 723, 280 S.E.2d 175, 181 (1981) (upholding trial court’s jury instruction that misdemeanor breaking or entering must be “wrongful—without any claim of right”). *Cf. State v. Clyburn*, 247 N.C. 455, 462, 101 S.E.2d 295, 300 (1958) (“An entry under a *bona fide* claim of right avoids criminal responsibility under [the trespass statute].”).

It is undisputed that defendant broke or entered into Chambers’ trailer without the consent of Chambers or the tenants. Although defendant points to her lease agreement with Medlin as establishing a claim of right, we have previously outlined the substantial evidence that defendant had no claim of right to enter Chambers’ trailer, including the judgment specifically finding that defendant “has no legal claim to remain in the residence.” Viewed in the light most favorable to the State, this evidence is sufficient to allow a reasonable juror to conclude that defendant did not have a claim of right to enter Chambers’ trailer. The trial court, therefore, did not err in denying defendant’s motion to dismiss.

No error.

Judges MCGEE and STEELMAN concur.

IN THE MATTER OF: N.B., I.B., A.F.

No. COA08-1082

(Filed 20 January 2009)

**Termination of Parental Rights— sufficiency of evidence—
report and file—no oral evidence**

A termination of parental rights case was remanded for insufficient evidence where petitioner presented only a report and file as evidence, with no oral testimony, and testimony from the mother refuted petitioner’s allegations. The trial court did not

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make an independent determination of neglect at the time of the termination of parental rights hearing and there was no competent evidence to support a finding of dependency.

Appeal by respondent-mother from order entered 27 June 2008 by Judge Joseph Moody Buckner in District Court, Orange County. Heard in the Court of Appeals 23 December 2008.

Richard Croutharmel, for appellant respondent-mother.

Pamela Newell Williams, for appellee Guardian ad Litem.

STROUD, Judge.

Respondent-mother appeals from order terminating her parental rights to her children, N.B., I.B. and A.F. For the following reasons, we reverse and remand.

I. Background

On 7 May 2007, Orange County Department of Social Services (“DSS”) filed juvenile petitions alleging that N.B., I.B. and A.F. were neglected juveniles. The petitions alleged that “[r]espondent-mother’s drug use and drug dealing . . . resulted in the children being left for long periods of time” with other caretakers, some of whom were irresponsible. The petitions further alleged that respondent-mother was not taking medication for her depression; her whereabouts were unknown; she would be incarcerated for probation violation when found; and respondent-fathers were currently incarcerated. DSS took nonsecure custody of the children and placed them with family members.

By order filed 28 September 2007 the trial court adjudicated the children neglected. The trial court also adjudicated the children dependent although the juvenile petitions did not allege dependency. After conducting a permanency planning hearing on 15 November 2007, the trial court ceased reunification efforts and changed the permanent plan to adoption.

On 14 January 2008, DSS filed a motion to terminate respondent-mother’s parental rights based upon neglect and dependency. By order filed 27 June 2008, the trial court found, in pertinent part,

5. Respondent/mother has a history of drug abuse, selling drugs, and depression.

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6. Movant has a history with Respondent/mother and her children that dates back to 2002. Several referrals have been made to movant, each involving allegations of neglect.
7. Respondent/mother has briefly attempted drug treatment but has not been committed to her recovery. She has not accepted treatment for herself and continues to actively abuse drugs.
8. Respondent/mother has an extensive criminal history which includes drug-related convictions. She is incarcerated as of this Court hearing.
9. Movant has tried to work with Respondent/mother but Respondent/mother has completely failed to work on her treatment plan or to accept the services offered to her. She has made no progress toward accomplishing any of her goals. Respondent/mother agreed to participate in Family Treatment Court, but did not fulfill this commitment.
10. During the time the juveniles were in Respondent/mother's care, she would leave them with various care givers for long periods of time. Often, her whereabouts were unknown.
11. All three children are placed with relatives. While each have developmental and/or psychological impairments, each are making progress. These children have stability and safety for the first time in their lives.
12. Respondent/mother has no home, no employment, nor visible means of support. She has nothing to offer these children.
13. Respondent/mother's drug use and her impairment therefrom render her incapable of parenting.
14. A Court Report was submitted by LeAnn Taylor, Social Worker for the Orange County Department of Social Services (hereinafter "OCDSS"), which the Court reviewed and finds within credible and factually sufficient evidence to support entry of this order. A copy of the Court Report is attached hereto and hereby incorporated by reference.

Based upon these findings the trial court terminated the parental rights of respondent-mother on grounds of neglect and dependency. Respondent-mother appeals.

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II. Standard of Review

“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, 591 S.E.2d 1, 6 (2004) (citation and quotation marks omitted). Findings of fact supported by competent evidence are binding on appeal even if evidence has been presented contradicting those findings. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988) (citation omitted). Once a trial court has determined that at least one ground exists for terminating parental rights, the trial court then decides whether termination is in the best interests of the child. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001) (citations omitted).

III. Analysis

Respondent-mother contends in her first and third briefed arguments that the trial court erred by concluding that sufficient evidence existed to terminate her parental rights based upon findings that the children were (1) neglected and (2) dependent. Respondent-mother specifically notes that the trial court “failed to make an independent determination that neglect existed at the time of the termination of parental rights hearing” and that “competent evidence” was lacking as to a determination of dependency.

The key to a valid termination of parental rights on neglect grounds where a prior adjudication of neglect is considered is that the court must make an independent determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing. The burden is on the petitioner to prove the allegations of the termination petition by clear, cogent, and convincing evidence.

In re A.M., 192 N.C. App. 538, 541-42, 665 S.E.2d 534, 536 (2008) (citations and quotation marks omitted).

In *In re A.M.*, this Court reversed and remanded a trial court order terminating parental rights because

the trial court entered an order based solely on the written reports of DSS and the guardian *ad litem*, prior court orders, and oral arguments by the attorneys involved in the case. *DSS did not present any witnesses for testimony*, and the trial court did not examine any witnesses. We conclude, therefore, that the trial

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court failed to hold a proper, independent termination hearing. Consideration of written reports, prior court orders, and the attorney's oral arguments was proper; however, in addition the trial court needed some oral testimony.

Id. at 542, 665 S.E.2d at 536 (citation omitted) (emphasis added).

Here the transcript reveals that DSS's entire presentation of evidence in its case in chief consisted of presentation of the court report by Ms. Taylor, social worker for DSS, and the following statement by petitioner's counsel:

—termination of parental rights hearing on three children with respect to the mother, and as you recall Mr. Ennis (phonetic) filed a Motion to Continue because he had not been timely served and we consented to that continuance with respect to the father. Um, Judge, I'd like to ask the Court to review the file of this matter to, uh, look at the prior Court's findings of fact, to accept those as findings of fact for purposes of this hearing, to note for the record that the mother is here, that she's been timely served, uh, and is adequately represented. *And, Judge, uh, as the Department's evidence we'd like to hand up, um, what would be our evidence were our social worker to testify.*

(Emphasis added.)

The only difference between the case before us and *In Re A.M.* is that here the trial court did hear testimony from one witness, respondent-mother. *See id.* However, the testimony of respondent-mother was not sufficient in this case to carry “[t]he burden [which] is on the petitioner to prove the allegations of the termination petition by clear, cogent, and convincing evidence.” *Id.* (citation and quotation marks omitted). Respondent-mother's direct testimony refuted petitioner's allegations, and petitioner did not cross-examine her. We conclude this case is controlled by *In Re A.M.* and that the trial court failed to “make an independent determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing[,]” *see id.*, as no oral testimony was provided on behalf of DSS, and the testimony presented by respondent-mother did not provide sufficient evidence to support the termination of parental rights determination.

Furthermore, though *In Re A.M.* solely addresses neglect as the grounds for termination of parental rights, we extend its holding also to termination on the grounds of dependency under N.C. Gen.

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Stat. § 7B-1111(a)(6). The legal analysis in *In Re A.M.* addresses § 7B-1111 as a whole and not as subsections, and we find no just reason for any procedural difference in treatment of these two subsections. *See id.*, 192 N.C. App. 538, 665 S.E.2d 534; *see also* N.C. Gen. Stat. § 7B-1109(e) (“The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent.”) Therefore, we reverse and remand. However, we reiterate our caveat in *In Re A.M.* that “this opinion should not be construed as requiring extensive oral testimony. We note that . . . trial courts may continue to rely upon properly admitted reports or other documentary evidence and prior orders, as long as a witness or witnesses are sworn or affirmed and tendered to give testimony[.]” *id.* at 542, 665 at 536, which supports petitioner’s assertion that parental rights should be terminated.

IV. Conclusion

As petitioner presented no oral testimony to carry its burden of proof as to neglect or dependency, “the order of the trial court must be reversed and the matter remanded for further proceedings consistent with this opinion. As we remand for a new hearing, we need not address respondent[-mother’s] remaining issues on appeal.” *See id.*

REVERSED AND REMANDED.

Judges McGEE and ELMORE concur.

NORMAN BOJE, EMPLOYEE, PLAINTIFF v. D.W.I.T., L.L.C. ET AL., EMPLOYER, NONINSURED, D.J. GRIFFITH D/B/A GRIFFITH CONSTRUCTION COMPANY, GENERAL CONTRACTOR, NONINSURED, BUILDERS MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA07-1294

(Filed 20 January 2009)

Workers’ Compensation— res judicata—law of the case

The Industrial Commission did not err in a workers’ compensation case by determining that defendant carrier effectively cancelled defendant employer’s workers’ compensation insurance

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under N.C.G.S. § 58-36-105 based on the alternative ground that defendant employer was barred from relitigating that issue because: (1) the doctrine of res judicata precludes relitigation of final orders of the full Commission and orders of a deputy commissioner which have not been appealed to the full Commission; (2) the law of the case provides that when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes the "law of the case" and cannot be challenged in subsequent proceedings in the same case; and (3) under either approach, defendant employer's failure to appeal from a deputy commissioner's 2003 opinion and award finding that it did not have workers' compensation insurance coverage on the date of plaintiff's accident barred it from relitigating that issue in subsequent proceedings.

Appeal by defendant D.W.I.T., L.L.C. from opinion and award entered 17 July 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 May 2008.

No brief filed on behalf of plaintiff.

Leicht & Olinger, by Gene Thomas Leicht, for defendant-appellant D.W.I.T., L.L.C.

Lewis & Roberts, P.L.L.C., by Brian D. Lake and Melissa K. Walker, for defendant-appellee Builders Mutual Insurance Company.

GEER, Judge.

Defendant employer D.W.I.T., L.L.C. ("DWIT") appeals from an opinion and award of the Industrial Commission determining that defendant carrier Builders Mutual Insurance Company had properly canceled DWIT's workers' compensation insurance policy for non-payment of premiums. Builders Mutual counters DWIT's arguments by contending that the Commission's decision should be upheld on appeal on the alternative ground that DWIT failed to appeal a deputy commissioner's prior decision determining that DWIT did not have workers' compensation insurance on the date of plaintiff Norman Boje's injury. We agree with Builders Mutual that DWIT was not entitled to relitigate the issue of insurance coverage without having the prior deputy commissioner's decision set aside. Because the Full Commission expressly found no basis for setting aside that decision, and DWIT has not appealed that ruling, we affirm.

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Facts

DWIT originally purchased workers' compensation insurance from Builders Mutual for the period of 10 May 2001 through 10 May 2002. DWIT elected to pay its monthly premiums by self-reporting its payroll, with payments due by the 20th of each month. DWIT failed to submit the self-reporting information and premium payment for April 2002 by the due date, and Builders Mutual sent out a late-payment notification. On 6 June 2002, when DWIT still had not provided payment or the self-reporting information, Builders Mutual sent DWIT a "Policy Termination/Cancellation/Reinstatement Notice," notifying DWIT that its insurance policy would be cancelled effective 23 June 2002 if DWIT did not provide the necessary self-reporting information and premium payments to bring the account current.

DWIT sent Builders Mutual a check on 27 June 2002 as payment of the April and May 2002 premiums. Builders Mutual sent a letter to DWIT acknowledging the payment, but refused to reinstate DWIT's policy unless DWIT submitted by 9 July 2002 a \$260.00 policy renewal premium and a statement of no losses. DWIT, however, took no further action to renew its workers' compensation insurance policy, and Builders Mutual ultimately cancelled DWIT's policy effective 23 June 2002.

On 13 September 2002, defendant Griffith Construction Company subcontracted with DWIT to frame a house. On 19 September 2002, while working for DWIT on that house, plaintiff fell and shattered his left heel. Plaintiff filed a claim for disability benefits. In an opinion and award filed 26 June 2003, Deputy Commissioner Douglas E. Berger determined that plaintiff had sustained a compensable injury on 19 September 2002. He further found that, "[o]n September 19, 2002, defendant-employer D.W.I.T., LLC did not have workers' compensation coverage for its employees." Deputy Commissioner Berger, therefore, ordered DWIT to pay plaintiff temporary total disability benefits and to pay plaintiff's medical expenses. Neither party appealed that opinion and award.

On 20 October 2003, DWIT filed a motion to join Builders Mutual as a party, arguing that Builders Mutual's attempt to cancel DWIT's insurance policy was ineffective. This motion was allowed on 24 October 2003. On 21 May 2004, plaintiff filed a motion to show cause, asking that corporate officers of DWIT be held in contempt for non-payment of plaintiff's weekly compensation. In addition, on 23 June 2004, Builders Mutual filed a motion to dismiss; an amended motion to dismiss was filed 2 July 2004.

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On 9 July 2004, the Chief Deputy Commissioner entered an order assigning Deputy Commissioner George Glenn to “hear all issues raised upon the pleadings” and to “hear and decide all pending issues that may be present in this matter” In an opinion and award entered 19 April 2005, Deputy Commissioner Glenn determined, among other issues, that Builders Mutual had not effectively cancelled DWIT’s workers’ compensation insurance under the controlling statutory guidelines, and, consequently, that DWIT’s insurance was still in effect on 19 September 2002, the date of plaintiff’s injury.

Builders Mutual appealed to the Full Commission, and, in an opinion and award entered 17 July 2007, the Commission reversed Deputy Commissioner Glenn’s decision. Based on its determination that Builders Mutual had properly cancelled DWIT’s workers’ compensation policy on 23 June 2002 and that DWIT had failed to renew its policy for the period May 2002 through May 2003, the Commission concluded that “DWIT did not possess workers’ compensation insurance for its employees on September 19, 2002, the date of plaintiff’s injury.” Plaintiff and DWIT both filed notices of appeal to this Court, but only DWIT has pursued the appeal.

Discussion

DWIT argues that the Commission erroneously determined that Builders Mutual effectively canceled DWIT’s workers’ compensation insurance under the governing statutory provision, N.C. Gen. Stat. § 58-36-105 (2007). Builders Mutual has, however, cross-assigned error to the Commission’s failure to conclude that DWIT was barred by Deputy Commissioner Berger’s opinion and award from asserting that it had workers’ compensation insurance coverage under the Builders Mutual policy. Builders Mutual contends that Deputy Commissioner Berger’s opinion and award constitutes an alternative basis in law for supporting the Commission’s opinion and award. *See* N.C.R. App. P. 10(d) (“Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.”).

Deputy Commissioner Berger made the following finding of fact in his 26 June 2003 opinion and award: “On September 19, 2002, defendant-employer D.W.I.T., LLC did not have workers’ compensation coverage for its employees.” This opinion and award was not an interlocutory decision, but rather was a final determination of the

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merits of plaintiff's claim against DWIT for temporary total disability benefits. DWIT was entitled to appeal this opinion and award to the Full Commission pursuant to N.C. Gen. Stat. § 97-85 (2007), but did not do so.

It is well established that “[t]he doctrine of *res judicata* precludes relitigation of final orders of the Full Commission and orders of a deputy commissioner which have not been appealed to the Full Commission.” *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 138, 502 S.E.2d 58, 61, *disc. review denied*, 349 N.C. 228, 515 S.E.2d 700 (1998). In *Bryant*, this Court held that when the parties had failed to appeal from a deputy commissioner's opinion and award on the merits of the plaintiff's claim against Weyerhaeuser, the issue whether the plaintiff was required to comply with reasonable vocational rehabilitation—as ordered in that opinion and award—could not be relitigated “even before the Full Commission.” *Id.*

The “law of the case,” a related doctrine, provides that when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes “the law of the case” and cannot be challenged in subsequent proceedings in the same case. *See Williams v. Asheville Contr. Co.*, 257 N.C. 769, 771, 127 S.E.2d 554, 555 (1962) (per curiam) (“[W]hen the appeal was abandoned or not perfected within the time allowed, the order of the court below sustaining the demurrer and dismissing the action became the law of the case and the plaintiff was thereby precluded from amending his complaint which ordinarily may be done when a demurrer is sustained without dismissing the action.”); *Alphin v. Tart L.P. Gas Co.*, 192 N.C. App. 576, 588 n.3, 666 S.E.2d 160, 168 n.3 (2008) (“We agree that since plaintiff did not appeal the finding that he is capable of sedentary work, that ruling is now the law of the case.”).

Here, under either approach, since DWIT did not appeal Deputy Commissioner Berger's 2003 opinion and award finding that it did not have workers' compensation insurance coverage on the date of plaintiff's accident, it was barred from relitigating that issue in subsequent proceedings. DWIT could have moved to have that opinion and award set aside or modified. *See Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985) (holding that Commission has inherent power to set aside its prior decisions); *Bryant*, 130 N.C. App. at 138 n.1, 502 S.E.2d at 61 n.1 (“The Full Commission has the inherent power, analogous to that conferred on courts by Rule 60(b)(6), to set aside or modify its own orders, including final orders of the deputy

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commissioners” (internal quotation marks omitted)). DWIT did not, however, formally make such a motion.

In any event, the Full Commission, in its opinion and award, specifically found: “DWIT did not appeal from Deputy Commissioner Berger’s finding of fact and conclusion of law that it did not have workers’ compensation insurance at the time of plaintiff’s injury. The Full Commission finds no valid grounds to set aside this finding of fact and conclusion of law.” DWIT does not challenge on appeal this determination that no grounds exist to set aside Deputy Commissioner Berger’s finding of fact and conclusion of law. Accordingly, we affirm the Commission’s opinion and award determining that DWIT did not have workers’ compensation insurance coverage on the date of plaintiff’s compensable injury on the alternative ground that DWIT was barred from relitigating that issue by Deputy Commissioner Berger’s opinion and award.

Affirmed.

Judge CALABRIA concurs.

Judge WYNN concurs in the result only.

JOHN C. LANGLEY, PLAINTIFF v. KEVIN BAUGHMAN, DEFENDANT

No. COA08-378

(Filed 20 January 2009)

Process and Service— erroneous name—actual notice

An order denying a motion to amend a summons and complaint to correct defendant’s name was reversed where defendant received notice of the original claim despite the error. The summons listed the correct address and was delivered to defendant, he appeared at the arbitration hearing, and the same error appears on the original contract.

Appeal by plaintiff from judgment entered 4 January 2008 by Judge Rebecca W. Blackmore in New Hanover County District Court. Heard in the Court of Appeals 8 October 2008.

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Sue Genrich Berry for defendant.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Andrew J. Hanley, for plaintiff.

ELMORE, Judge.

John C. Langley (plaintiff) appeals an order denying his motion to amend a summons and complaint. For the reasons stated below, we reverse the order of the trial court.

On 24 May 2002, Kevin Baughman (defendant) signed a contract that read, in its entirety, as follows:

May 24, 2002

Kevin Bachman

B&B Tree Service

This contract will make Mr. Kevin Bachman the responsible Party for Rent/Lease Payment on 1985 Chevy Dump Truck. This payment is due weekly at Two Hundred Dollars (\$ 200.00) per week. As of this date, May 24th, balance on this Contract is Four Thousand Six Hundred Dollars (\$ 4,600.00).

Owner:

John C. Langley

Lessee [*sic*]: Kevin Baughman (signed)

Lessor: John C. Langley (signed)

After defendant took possession of the dump truck, it caught fire and the cab sustained significant damage. Plaintiff filed a complaint on 31 March 2003 for breach of contract and negligence. He alleged that defendant still owed him \$5,200.00 under the lease agreement and had negligently caused \$4,000.00 in damages to the truck. The complaint named “Kevin Bachman” as the defendant, as did the civil summons. The case was selected for arbitration. The notices of case selection for arbitration also named “Kevin Bachman” as the defendant. These were issued 5 May 2004, 21 June 2004, and 20 July 2004. The arbitration hearing occurred on 12 August 2004 and the arbitrator awarded plaintiff \$5,200.00. Defendant personally attended the arbitration hearing.

The arbitration award and judgment, filed 12 August 2004, states “Kevin Bachman” in typeface under “Defendant,” but includes a handwritten notation of “AKA Baughman” after “Bachman.” Under

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“Name(s) of Party(ies) From Whom Award Recoverable” is handwritten “Kevin Bachman aka Baughman.”

On 12 September 2005, defendant submitted a handwritten request for an exemption hearing and an attorney to represent him at the hearing. His request stated, “I had someone else write this letter, because I am unable to read, write or spell.”

On 22 September 2005, defendant filed a motion to quash execution and/or relief from judgment or order because he had “never been properly sued, nor properly served in this case,” rendering the arbitration judgment void. On 25 October 2005, the trial court entered an order granting defendant’s motion. The order stated that “Kevin Baughman was never served with a suit naming him as the Defendant, nor was Plaintiff’s suit ever amended to properly name Mr. Baughman as Defendant. Further, there was no service of summons naming Kevin Baughman as the Defendant in this suit.” Accordingly, the trial court set aside the arbitration award and judgment and quashed any writ of execution on that order, declaring that order null and void.

On 12 October 2006, plaintiff filed a motion pursuant to Rules 4(i) and 15 “to allow the amendment of the Summons and Complaint filed in this case to correctly spell the Defendant’s name as Kevin Baughman and to allow the amendment to relate back to the date of initial filing.” By 4 January 2008 order, the trial court denied plaintiff’s motion. Plaintiff appeals.

Plaintiff argues that he “merely sought to correct the name of a party already before the Court” and that defendant would have suffered no material prejudice. We agree.

“ ‘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)). Rule 15 provides, in relevant part, that a “claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” N.C. Gen. Stat. § 1A-1, Rule 15(c) (2007).

Our Supreme Court interpreted Rule 15(c) in *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 [(1995),] and stated:

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When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. We hold that this rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party.

Id. at 187, 459 S.E.2d at 717.

We have construed the *Crossman* decision to mean that Rule 15(c) is not authority for the relation back of claims against a new party, but *may* allow for the relation back of an amendment to correct a mere misnomer. . . . [T]he notice requirement of Rule 15(c) cannot be met where an amendment has the effect of adding a new party to the action, *as opposed to correcting a misnomer*.

Liss v. Seamark Foods, 147 N.C. App. 281, 283-84, 555 S.E.2d 365, 367 (2001) (additional quotations and citations omitted). In *Seamark Foods*, the plaintiff named “Seamark Foods” as the defendant in the complaint and summons, although the defendant’s legal name was “Seamark Enterprises, Inc.” *Id.* at 285, 555 S.E.2d at 368. The plaintiff moved to amend his complaint and summons to reflect the correct name and for those amendments to relate back to the filing of the original complaint. *Id.* at 282, 555 S.E.2d at 366-67. The trial court denied the plaintiff’s motion, but we reversed because the complaint and summons named the correct address and both Seamark and its attorneys received actual notice of the claim. *Id.* at 285-86, 555 S.E.2d at 368. We held that the plaintiff’s motion to amend would not have had the effect of adding a new party to the action but instead merely would have corrected a misnomer. *Id.* at 286, 555 S.E.2d at 369.

Here, as in *Seamark Foods*, defendant received notice of the original claim despite the error in his name. The summons listed his correct address and was delivered to him. He appeared at the arbitration hearing despite the error, demonstrating that he had actual notice and was not prejudiced by the error. The same error appears on the original contract between the parties, which defendant signed. That defendant is illiterate may have contributed to this oversight, but we do not speculate on its role.

IN RE S.L.T. & A.A.T.

[195 N.C. App. 127 (2009)]

Accordingly, the decision of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed.

Judges HUNTER, Robert C., and GEER concur.

IN THE MATTER OF: S.L.T. & A.A.T.

No. COA08-1223

(Filed 20 January 2009)

**Termination of Parental Rights— subject matter jurisdiction—
summons not issued to juveniles as respondents—service
accepted by guardian ad litem**

The trial court acquired subject matter jurisdiction to hear a petition to terminate parental rights where no summonses were issued to the juveniles as respondents, but the captions of the summonses stated the names of the juveniles, and the guardian ad litem for the juveniles certified that she accepted service of the petitions on the juveniles' behalf.

Judge STROUD dissenting.

Appeal by Respondent from orders entered 27 June 2008 by Judge Dale Graham in District Court, Davidson County. Heard in the Court of Appeals 30 December 2008.

Charles E. Frye, III for Petitioner-Appellee Davidson County Department of Social Services.

David A. Perez for Respondent-Appellant.

Pamela Newell Williams for Guardian ad Litem.

McGEE, Judge.

Respondent appeals from orders terminating her parental rights to A.A.T. and S.L.T. The Davidson County Department of Social Services (DSS) filed petitions alleging that A.A.T. and S.L.T. were

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neglected and dependent juveniles on 12 January 2005. [R. pp. 89-97] The trial court adjudicated A.A.T. and S.L.T. neglected and dependent juveniles by order filed 10 August 2005, based on stipulations entered into between the parties. [R. pp. 111-14] DSS filed a petition to terminate Respondent's parental rights as to S.L.T. on 27 October 2006. [R. pp. 2-8]

DSS filed a second petition on 14 December 2006, alleging that A.A.T. was a neglected and dependent juvenile. [R. pp. 366-69] The trial court adjudicated A.A.T. a neglected and dependent juvenile by order filed 12 February 2007, based on stipulations entered into between the parties. [R. pp. 399-401] DSS filed a petition to terminate Respondent's parental rights as to A.A.T. on 17 April 2007. [R. pp. 40-45] The trial court terminated Respondent's parental rights as to both juveniles by order filed 27 June 2008. [R. pp. 506-35] Respondent appeals.

Respondent's sole argument on appeal is that the trial court lacked subject matter jurisdiction over this matter because no summonses were issued to the juveniles as respondents. We disagree.

Upon the filing of a petition to terminate a parent's rights to the custody of that parent's child, the trial court must issue a summons to the juvenile, naming that juvenile as a respondent. N.C. Gen. Stat. § 7B-1106 (2008). Our Court held in *In re C.T. & R.S.*, 182 N.C. App. 472, 474-75, 643 S.E.2d 23, 25 (2007), that the failure to issue a summons referencing the juvenile R.S. deprived the trial court of subject matter jurisdiction over R.S. Based on our Court's holding in *In re C.T. & R.S.*, this Court has subsequently held that issuance of a 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, 739-40 (2008); *In re I.D.G.*, 188 N.C. App. 629, —, 655 S.E.2d 858, 859 (2008); *In re K.A.D.*, 187 N.C. App. 502, —, 653 S.E.2d 427, 428-29 (2007). However, in *In re S.D.J.* our Court determined that

if a summons is not properly issued naming the juvenile as a respondent in a proceeding to terminate parental rights to the juvenile, the trial court will retain subject matter jurisdiction over the termination proceeding where the caption of an issued summons refers to the juvenile by name and a designated representative of the juvenile certifies the juvenile was served with the petition.

IN RE S.L.T. & A.A.T.

[195 N.C. App. 127 (2009)]

In re S.D.J., 192 N.C. App. 478, —, 665 S.E.2d 818, 820 (2008) (citing *In re J.A.P., I.M.P.*, 189 N.C. App. 683, —, 659 S.E.2d 14, 17 (2008)). Service accepted by a juvenile's guardian *ad litem* constitutes service to the juvenile. *Id.*; see also *In re N.C.H., G.D.H., D.G.H.*, 192 N.C. App. 445, —, 665 S.E.2d 812, 813 (2008) (Stroud, J., dissenting).

In the case before us, it appears no summonses were issued to the juveniles as respondents. Nevertheless, the captions of the summonses state the names of the juveniles, and the guardian *ad litem* for the juveniles certified that she accepted service of the petitions on the juveniles' behalf. [R. pp. 17, 22, 32, 73] Therefore, in accordance with our Court's holdings in *J.A.P.*, *N.C.H.* and *S.D.J.*, we conclude the trial court acquired subject matter jurisdiction to hear the petition to terminate Respondent's parental rights. Respondent's argument is without merit.

Affirmed.

Judge ELMORE concurs.

Judge STROUD dissents with a separate opinion.

STROUD, Judge, dissenting.

I respectfully dissent for the same reasons as discussed in my dissent in *In re N.C.H., G.D.H., D.G.H.*, 192 N.C. App. 445, —, 665 S.E.2d 812, 813-18 (2008) (Stroud, J., dissenting).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 JANUARY 2009

BRASWELL v. ST. PAUL MERCURY INS. CO. No. 08-710	Wayne (04CVS1363)	Affirmed
CURRAN v. N.C. DEPT OF CRIME CONTROL & PUB. SAFETY No. 08-305	Ind. Comm. (TA-18182)	Affirmed
IN RE E.R.A. No. 08-1072	Wake (05JT224)	Affirmed
IN RE J.L.W. No. 08-1011	Harnett (06J59)	Affirmed
IN RE J.M.P. No. 08-1187	Greene (03JT43)	Affirmed
IN RE J.S. No. 08-1030	Lee (06J71)	Vacated
IN RE K.H.U.E. & N.I.E. No. 08-950	Mecklenburg (04JA1049-50)	Affirmed
IN RE L.E.L. & P.P.L., II No. 08-1055	Jackson (07JT57,58)	Affirmed
IN RE L.M.S.L. No. 08-1056	Yadkin (07J18)	Affirmed
IN RE M.B. No. 08-932	Cumberland (06JT441)	Affirmed
IN RE R.A.E. No. 08-1024	Wilkes (02JT218)	Vacated
PUGH v. WILLIAMS No. 08-322	Randolph (06CVS1574)	Affirmed
SANTONI v. SUNDOWN COVE, LLC No. 08-715	Iredell (06CVS3118)	Affirmed
STATE v. CARR No. 08-791	Pitt (06CRS60811-12)	No Error
STATE v. COOPER No. 08-527	Wake (06CRS81156)	Remanded for resentencing
STATE v. DESMORE No. 08-762	Mecklenburg (04CRS243197)	No Error

STATE v. DOSTER No. 08-925	Forsyth (07CRS52229)	Affirmed
STATE v. JACKSON No. 07-1351	Buncombe (06CRS50988-90) (06CRS231)	No Error
STATE v. LUNDY No. 08-799	Forsyth (07CRS56399)	Remanded for resentencing
STATE v. MATTHEWS No. 08-475	Mecklenburg (05CRS71658-67) (05CRS241867-68)	No Error
STATE v. McLEAN No. 08-479	Wake (07CRS31811)	No trial error; remand for resentencing
STATE v. PERRY No. 08-676	Franklin (05CRS50157)	No Error
STATE v. VARAS No. 08-725	Transylvania (06CRS52203)	No prejudicial error
STATE v. WHITE No. 08-837	Burke (06CRS3274-75)	Dismissed

JUDICIAL STANDARDS COMMISSION
ADVISORY OPINION

FORMAL ADVISORY OPINION: 2010-02

QUESTION:

May a judge purchase an advertisement in the program for a NAACP Freedom Fund Banquet, where the advertisement consists of an enlarged copy of the judge's business card and a congratulatory remark?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined the judge may purchase the advertisement, as described, in the program for an organization's fund-raising banquet.

DISCUSSION:

Canon 5B of the Code of Judicial Conduct allows judges to participate in civic and charitable activities so long as such does ". . . not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties." Subparagraph (2) also allows a judge to be listed as a contributor on a fund raising invitation, however a judge may not actively assist in raising funds.

The purchase of such an advertisement does not constitute active assistance in raising funds. The program is distributed at the dinner and the inclusion of the judge's advertisement, as described, could not reasonably be deemed as a means to encourage or put pressure on others to contribute to the organization.

The content of the advertisement does not reflect adversely upon the judge's impartiality, interfere with the performance of the judge's judicial duties, nor lend the prestige of the judge's office to advance the private interests of the organization.

Reference:

North Carolina Code of Judicial Conduct
Canon 2B
Canon 5B(2)

SWINK v. WEINTRAUB

[195 N.C. App. 133 (2009)]

PAUL SWINK, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARGARET SWINK, PLAINTIFF v. RICHARD A. WEINTRAUB, M.D. AND THE SOUTHEASTERN HEART AND VASCULAR CENTER, P.A., DEFENDANTS

No. COA07-960

No. COA07-1088

(Filed 3 February 2009)

1. Medical Malpractice— expert testimony—knowledge of community standard of care—not applicable to reasonable care and best judgment requirements

The community standard of care does not apply to the second and third prongs of the common law duties set out in *Hunt v. Bradshaw*, 242 N.C. 517, reasonable care and diligence, and use of best judgment in treating the patient. The trial court in this wrongful death action arising from the replacement of a pacemaker did not err by failing to require testimony from plaintiff's experts about their knowledge of the community standard of care when giving their opinion of the doctor's exercise of reasonable care and diligence and the doctor's use of his best judgment. The argument that N.C.G.S. § 90-21.12 effectively supplanted the common law was addressed in *Wall v. Stout*, 310 N.C. 184.

2. Discovery— deposition and trial testimony—no substantial variation—inability to prepare for trial—not shown

The trial court did not abuse its discretion in a wrongful death case arising from a pacemaker replacement by failing to exclude portions of the testimony of plaintiff's experts where the experts did not use the terms "best judgment" and "reasonable care and diligence" during discovery. The deposition and trial testimony did not vary substantially, and defendants did not explain why their knowledge of the witnesses' criticisms of defendants was inadequate for them to prepare for trial.

3. Discovery— allegedly new opinions at trial—similar deposition testimony—new medical theories not presented

The trial court did not abuse its discretion in a wrongful death action arising from a pacemaker replacement by allowing plaintiff's experts to testify about previously undisclosed opinions regarding causation and other subjects. Plaintiff accurately pointed to portions of the witnesses' depositions in which similar testimony appeared or identified parallel testimony from other

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witnesses. Defendants did not point to any entirely new medical theory presented at trial or specifically explain how they could not prepare for the testimony presented at trial.

4. Medical Malpractice— expert witness—personal opinion and practice

The trial court did not err in a wrongful death proceeding arising from the replacement of a pacemaker by admitting testimony from one of plaintiff's medical experts about his personal preferences and practices in conducting informed consent discussions. Although defendants argue that this was not evidence of the standard of care and should have been excluded as irrelevant, such evidence may be relevant for other purposes.

5. Medical Malpractice— expert's personal preferences—requested limiting instruction—not given

There was no error in not giving the requested limiting instruction on testimony regarding a medical expert's personal preferences and practices in a wrongful death case arising from a pacemaker replacement. The language in the requested instruction does not precisely state the applicable law, and defendant did not explain a way in which the jury was misled by the omission of the instruction.

6. Medical Malpractice— concerns from prior surgery—admissible

The trial court did not err in a wrongful death action arising from a pacemaker replacement by admitting testimony from the decedent's husband about his wife's statements about complications after a prior surgery. Defendants did not show how they were prejudiced by testimony about a procedure that was not the basis for this lawsuit; moreover, the testimony simply explained the concern the decedent and her husband had about this procedure and duplicated other testimony that was not challenged.

7. Evidence— hearsay—doctor's statement repeated—admission of party opponent

The trial court did not err in a wrongful death action arising from a pacemaker replacement by admitting testimony from the decedent's spouse that a doctor said in a deposition that he had called for a surgeon to come to the cath lab and that there had been a delay. The doctor was an employee of defendant hospital at the time of the deposition and his statements constituted admissions of a party-opponent.

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8. Appeal and Error— preservation of issues—objection overruled, then sustained

There was no issue for appellate review in a wrongful death action arising from a pacemaker replacement where the trial court overruled an objection to testimony from the decedent's spouse about what a doctor said concerning an autopsy, but sustained a renewed objection.

9. Evidence— hearsay—statements in medical procedure room—basis for witness's action

The trial court did not err in a wrongful death action arising from a pacemaker replacement by admitting a videotaped deposition of a lab technician who was present during the procedure where the witness reported what another lab technician said or observed during the procedure. The statements were admissible to show why the witness acted as she did.

10. Evidence— speculation—admission harmless—other admissible testimony

The admission of testimony from a lab technician in a wrongful death action arising from a pacemaker replacement about when the doctor realized that the decedent's heart had stopped was harmless because it was essentially identical to the testimony of two doctors, including the doctor who was the subject of the witness's testimony.

11. Witnesses— expert—no objection to qualifications when tendered

There was no error in a wrongful death action arising from the replacement of a pacemaker in admitting expert testimony from plaintiff's economist about damages. Defendants did not object to the witness's qualifications when he was tendered as a witness, and did not explain any way in which he was not qualified to testify about the value of lost income or services.

12. Wrongful Death— special instruction—informed consent—absence of written request

The trial court did not abuse its discretion in a wrongful death action arising from a pacemaker replacement by not giving a special jury instruction on informed consent where defendants did not submit a written proposed instruction, and the evidence was at best equivocal as to whether the decedent had signed a consent form that covered the procedure in question.

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13. Medical Malpractice— instructions—plaintiff's contentions

The trial court did not err in its jury instructions in a wrongful death case arising from the replacement of a pacemaker by repeating plaintiff's contentions of negligence following its instruction on each of the three theories for proving medical malpractice. Viewed in their entirety, the instructions were not overly favorable to plaintiff and the pattern instructions were not inherently inculpatory.

14. Medical Malpractice— jury request—re-instruction—plaintiff's contentions

The trial court did not abuse its discretion in a wrongful death action arising from a pacemaker replacement by re-instructing the jury on negligence when requested by the jury, reiterating the three methods of proving negligence and plaintiff's seven contentions. Defendants did not suggest that the trial court omit the factual contentions and did not adequately preserve the issue of re-instruction for appeal.

15. Costs— jurisdiction—order following notice of appeal

The trial court erred by taxing costs against defendants in a wrongful death action where the order on costs was entered after notice of appeal was filed. A reservation of the issue is not sufficient, and the order taxing costs was vacated as a matter of jurisdiction even though the underlying judgment was upheld. The better practice is for the trial court to defer entry of judgment until after ruling on attorney's fees and costs, so that there will be one appeal from one judgment.

Appeal by defendants from judgment entered 1 March 2007 and order entered 1 May 2007 by Judge Gary E. Trawick in Guilford County Superior Court. Heard in the Court of Appeals 3 March 2008.

Comerford & Britt, LLP, by Kevin J. Williams, for plaintiff-appellee.

Wilson & Coffey, L.L.P., by G. Gray Wilson and J. Chad Bomar, for defendants-appellants.

GEER, Judge.

This opinion addresses two appeals arising from the same wrongful death action brought by plaintiff Paul Swink individually and as administrator of the estate of his wife, Margaret Swink. Defendants

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Dr. Richard A. Weintraub and the Southeastern Heart and Vascular Center, P.A. (“Southeastern”) appeal from (1) the trial court’s judgment based on the jury’s verdict finding them negligent in the death of Mrs. Swink (COA07-1088), and (2) the trial court’s order taxing costs against defendants (COA07-960). The two appeals were previously consolidated for hearing and now are consolidated for decision.

Defendants’ principal contention as to the trial is that the trial court erred in admitting opinion testimony from plaintiff’s medical experts as to whether defendants exercised reasonable care and diligence and used their best judgment without requiring the experts to testify, as to those opinions, regarding the “same or similar community” standard of care set out in N.C. Gen. Stat. § 90-21.12 (2007). The Supreme Court has already determined in *Wall v. Stout*, 310 N.C. 184, 311 S.E.2d 571 (1984), that § 90-21.12 does not apply to the duty of reasonable care and diligence and the duty of best judgment. Only the Supreme Court may revisit *Wall*. Since we are unpersuaded by defendants’ remaining arguments as to the trial, we hold that defendants received a trial free of prejudicial error.

With respect to the order taxing costs, however, we hold that the trial court lacked subject matter jurisdiction to enter the order as defendants had already appealed from the underlying judgment. We must, therefore, vacate that order and remand for entry of a new order.

Facts

On 9 June 2003, Mrs. Swink and her husband went to Dr. Weintraub, who was employed by Southeastern, to discuss replacement of her pacemaker that was approaching the end of its life span. During the visit, Dr. Weintraub informed the Swinks that one of the pacemaker’s electrical leads was defective and also needed to be replaced.

Mrs. Swink had previously undergone surgery in 1994 for maintenance of her pacemaker. Dr. Weintraub performed the 1994 surgery, doing a procedure known as “lead extraction.” During the surgery, Mrs. Swink suffered complications that required giving her cardiopulmonary resuscitation. As a result of the 1994 surgery, Mrs. Swink was scared about undergoing another lead extraction surgery in 2003.

In the 9 June 2003 consultation, Mr. Swink reminded Dr. Weintraub of the complications during the 1994 surgery and asked

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that the non-functioning lead be left in place if possible. Dr. Weintraub's notes of the office visit stated that his plan was to extract the lead "if this can be done easily." Mr. Swink testified that, based on the office visit, he understood that there was no alternative to lead extraction, even though, in actuality, nonfunctioning leads can be left in place. Mr. Swink also testified that Dr. Weintraub did not discuss with them the risks of lead extraction. Mrs. Swink ultimately executed a form consenting to a procedure to receive a "permanent transvenous pacemaker," but did not sign any form expressly consenting to a lead extraction procedure.

The pacemaker replacement surgery was originally scheduled for 16 June 2003. On 11 June 2003, however, Mrs. Swink arrived at the hospital with total lead electrode failure and was taken to the cath lab for the permanent transvenous pacemaker procedure. While attempting to perform the lead extraction, Dr. Weintraub encountered considerable scar tissue surrounding the non-functioning ventricular lead. At approximately the same time that Dr. Weintraub discovered the scar tissue, Mrs. Swink's heart stopped beating, and she ceased breathing. Dr. Weintraub called a "code."

Mrs. Swink was suffering from pericardial bleeding, which is treated by inserting a syringe into the chest to withdraw the accumulating blood, a procedure known as "pericardioscentesis." An expert witness testified that pericardioscentesis needs to be performed quickly because brain death begins to occur in as little as four to six minutes. According to the operating room's event log, Dr. Weintraub did not perform the pericardioscentesis until 17:24—approximately 19 minutes after the code was announced at 17:05. Mr. Swink presented evidence at trial that, prior to the code, a pericardioscentesis kit was not in the room.

Several calls were made to obtain a surgeon, but a surgeon (Dr. Gerhardt) did not arrive until 18:03, almost an hour after the code. Mr. Swink presented evidence that Dr. Gerhardt and his partners were, however, "right down the hall." Although the surgeon was able to stabilize Mrs. Swink, she was already brain dead. She died on 13 June 2003 after her family decided to remove her from life support.

On 8 June 2005, Mr. Swink filed a wrongful death action against Dr. Weintraub, Southeastern, Moses H. Cone Memorial Hospital, Moses H. Cone Memorial Hospital Operating Corporation, and Moses Cone Medical Services, Inc., asserting claims of medical malpractice. Following a trial on the claims against Dr. Weintraub and South-

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eastern,¹ the jury returned a verdict in Mr. Swink's favor, finding defendants Dr. Weintraub and Southeastern negligent and awarding damages in the amount of \$1,047,732.20. The trial court entered judgment in accordance with the verdict on 1 March 2007. Defendants filed notice of appeal from that judgment on 20 March 2007.

On 22 March 2007, plaintiff moved to tax certain costs against defendants, requesting a total of \$119,075.33. In an order entered 1 May 2007, the trial court granted plaintiff's motion, taxing defendants \$72,709.97 in costs. Defendants appealed from that order on 29 May 2007.

I

[1] Defendants first argue that the trial court erred in admitting certain opinion testimony from Mr. Swink's expert witnesses without requiring them to testify, as to those opinions, regarding the "same or similar community" standard of care. We first observe that defendants have not, in their brief, specifically cited or quoted the testimony that they claim was erroneously admitted. Moreover, defendants have not attached the pertinent testimony in an appendix to the brief. The only place where defendants have identified which testimony is at issue is in the assignments of error contained in the record on appeal. This approach is not adequate under the Rules of Appellate Procedure and renders more difficult the Court's review of the issue raised by defendants.

Rule 28(d)(1) specifies that "the appellant *must* reproduce as appendices to its brief . . . those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief" (Emphasis added.) On the other hand, an appellant "is not required to reproduce an appendix to its brief with respect to an assignment of error . . . whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief" N.C.R. App. P. 28(d)(2).

This Court cannot review defendants' argument regarding the admissibility of certain portions of the expert testimony without specifically reviewing those portions of the transcript. Defendants were, therefore, required to either quote the testimony in the body of their brief or attach the pertinent testimony in an appendix to the

1. The Moses Cone defendants did not participate in that trial and are not parties to this appeal.

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brief. Not only have defendants neglected to comply with Rule 28(d), they have also failed to address in this section of their brief any specifically identified testimony at all.

In any event, defendants do not dispute that Mr. Swink's expert witnesses were competent to testify as to the standards of care that existed in Greensboro, North Carolina, in June 2003 with respect to lead extraction procedures. Defendants instead complain that questions regarding whether Dr. Weintraub "used his best judgment or exercised reasonable care and diligence . . . were asked outside the context of a community standard and were opinions based on speculation as to the state of mind of Doctor Weintraub."

Defendants' argument hinges on their contention that *Hunt v. Bradshaw*, 242 N.C. 517, 522, 88 S.E.2d 762, 765 (1955), was superseded or altered by N.C. Gen. Stat. § 90-21.12. In *Hunt*, the Supreme Court set out the scope of a doctor's duty to his or her patient, stating:

A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable.

242 N.C. at 521-22, 88 S.E.2d at 765 (internal citations omitted).

In 1976, the General Assembly enacted N.C. Gen. Stat. § 90-21.12, which provides:

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience

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situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

Defendants assert that “this statute effectively supplanted the common law because it stated that all actions alleging medical malpractice in this state are governed by the statutory community standard of care codified in G.S. 90-21.12.” This contention is, however, contrary to controlling Supreme Court authority.

In *Wall v. Stout*, 310 N.C. 184, 311 S.E.2d 571 (1984), the Supreme Court addressed a similar argument that N.C. Gen. Stat. § 90-21.12 supplanted the common law standards of care set out in *Hunt*. Like defendants in this case, the plaintiffs in *Wall* argued that “the common law standards of care enunciated in [the Supreme Court’s] prior cases are no longer relevant in a medical malpractice action” and “that all other standards and requirements defining a physician’s duty to a patient . . . are subsumed” within § 90-21.12. *Wall*, 310 N.C. at 191, 311 S.E.2d at 576. The Supreme Court, however, held “that the adoption of the statute was not intended to accomplish the radical result contended by plaintiff[s].” *Id.* at 192, 311 S.E.2d at 576. The Court explained that it “simply [could not] conceive that by passing this legislation, the General Assembly intended to eliminate the previously existing common law obligations of a physician to his patient.” *Id.* The Court, therefore, “conclude[d] that the intended purpose of G.S. 90-21.12 was merely to conform the statute more closely to the existing case law applying a ‘same or similar community’ standard of care.” *Wall*, 310 N.C. at 191, 311 S.E.2d at 576.

Describing this purpose as a “limited” one, the Court then stressed that it “further disagree[d] with plaintiffs that it would be sufficient to instruct the jury that the sole issue relating to a physician’s alleged negligence is whether he complied with this statutory standard of care. Our case law makes clear that this is not the extent of the physician’s duty to his patient.” *Id.* The Court then quoted the three duties set out in *Hunt*, *id.* at 192-93, 311 S.E.2d at 576-77, specifically noting that the first duty—that a doctor “‘must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess,’” *id.* at 192, 311 S.E.2d at 577 (quoting *Hunt*, 242 N.C. at 521, 88 S.E.2d at 765)—had been “further refined by language in our later cases defining the ‘same or similar communities’ standard and by G.S. 90-21.12.” *Wall*, 310 N.C. at 192 n.1, 311 S.E.2d at 577 n.1. The Court concluded by holding: “The applicable standard, then, is completely unitary in nature, combining in

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one test the exercise of ‘best judgment,’ ‘reasonable care and diligence’ *and* compliance with the ‘standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities.’” *Id.* at 193, 311 S.E.2d at 577 (emphasis original). The Court summarized its holding as “[h]aving determined that G.S. 90-21.12 did not abrogate the common law standards of care required of a physician and that an instruction combining elements of both the statute and phraseology from our earlier cases is necessary to fully explain the doctor’s duty” *Wall*, 310 N.C. at 193, 311 S.E.2d at 577.

The Court then proceeded to analyze the jury instructions given in that case. The Court specifically approved the trial court’s decision to instruct the jury first that the defendant physician was required to render health care in “‘accordance with the standards of practice exercised by like specialists with similar training and experience who are situated in the same or similar communities at the time the health care service was rendered’” followed by the additional instruction that it was “the duty of the defendant, [physician], to exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to the plaintiff’s condition and to exert his best judgment in the treatment and care of the plaintiff.” *Id.* at 194, 311 S.E.2d at 577-78 (holding that “[t]his was a complete and accurate summation of the defendant physician’s responsibilities to plaintiff”).

If, at that point in the opinion, any question remained whether N.C. Gen. Stat. § 90-21.12 related to the duty to exercise reasonable care and diligence and the duty to use best judgment, the Court definitively answered that question in addressing the portion of the jury instructions discussing the community standard of care:

We wish to emphasize again, however, that compliance with the “same or similar community” standard of care does not necessarily exonerate defendant from liability for medical negligence. The doctor must also use his “best judgment” and must exercise “reasonable care and diligence” in the treatment of his patient. *Hunt v. Bradshaw*, 242 N.C. 517, 521-22, 88 S.E. 2d [sic] 762, 765 (1955).

If, however, the plaintiff proves a violation of the statutory standard of care which proximately caused her injury, this is sufficient to establish liability on the part of the attending health care professional for medical negligence. It would similarly be

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sufficient to establish liability if the plaintiff were able to show that the defendant did not exercise his “best judgment” in the treatment of the patient *or* if the defendant failed to use “reasonable care and diligence” in his efforts to render medical assistance. These three elements here described relate to the doctor’s *duty* to his patient, which is not necessarily synonymous with the plaintiff’s *burden of proof* in a medical malpractice case. “If [the defendant] fails in any *one* particular [to fulfill his duty to the patient], and such failure is the proximate cause of injury or damage, he is liable.” *Id.* at 522, 88 S.E. 2d [sic] at 765. (Emphasis added.)

Id. at 199 n.2, 311 S.E.2d at 580 n.2.

In short, our Supreme Court in *Wall* specifically rejected the argument made by defendants in this case. The three duties set out in *Hunt* survived the enactment of N.C. Gen. Stat. § 90-21.12, with only the first duty implicating that statute. Neither the duty to exercise reasonable care and diligence nor the duty to use the doctor’s best judgment are restricted by the “similar community” standard of care. This holding of *Wall* has since been reiterated by the Supreme Court and this Court. *See Jackson v. Bumgardner* 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986) ((holding that “[t]he scope of a physician’s duty to his patient” is set forth in *Hunt*, and only “[t]he first requirement is further refined by the ‘same or similar communities’ standard and N.C.G.S. § 90-21.12”); *O’Mara v. Wake Forest Univ. Health Scis.*, 184 N.C. App. 428, 435, 646 S.E.2d 400, 404 (“[*Hunt*’s] first requirement is defined in N.C. Gen. Stat. § 90-21.12 (2005)[.]”), *disc. review granted in part, disc. review denied in part*, 362 N.C. 85, 659 S.E.2d 1 (2007) and 362 N.C. 468, — S.E.2d —, 2008 N.C. LEXIS 641 (2008).

Defendants, however, cite *Bailey v. Jones*, 112 N.C. App. 380, 435 S.E.2d 787 (1993), in support of their contention. *Bailey* could not, however, overrule *Wall*. Nor is it apparent, when the entire opinion is considered, that this Court’s holding in *Bailey* provides support for defendants’ position. After pointing out that N.C. Gen. Stat. § 90-21.12 did not abrogate the common law duties set out in *Hunt*, but rather “provided a basis by which compliance with these duties could be determined,” *Bailey*, 112 N.C. App. at 386, 435 S.E.2d at 791, this Court used the language relied upon by defendants in this case:

Thus, the physician is required to (1) possess the degree of professional learning, skill, and ability possessed by others with similar training and experience situated in the same or similar

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communities at the time of the alleged negligent act; (2) *exercise reasonable care and diligence, in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged negligent act, in the application of his knowledge and skill to the patient's case*; and (3) use his best judgment in the treatment and care of his patient. Failure to comply with any one of these duties is negligence.

Id., 435 S.E.2d at 791-92 (emphasis added). Defendants contend that this recitation of a physician's duties indicates that testimony regarding the exercise of reasonable care and diligence must be in accordance with N.C. Gen. Stat. § 90-21.12. Of course, this language does not support defendants' assertion that opinions regarding "best judgment" are limited by the standard of care set out in § 90-21.12.

Even, however, as to the "reasonable care and diligence" prong of *Hunt*, *Bailey* ultimately follows *Wall*. After determining that the plaintiff had presented expert testimony that the defendant doctor violated that duty, the Court held that the trial court erred in not instructing on that duty:

The instructions given in this case are insufficient. Our Supreme Court in specifically addressing this issue held that it was insufficient for the trial court to instruct the jury "that the sole issue relating to a physician's alleged negligence is whether he complied with [N.C.G.S. § 90-21.12]." *Wall*, 310 N.C. at 192, 311 S.E.2d at 576. In this instance the jury was instructed that Dr. Jones would be negligent if he "did not act in accordance with" "the standards of practice . . . among family practice physicians with similar training and experience, and who were situated in the same or similar communities at the time Dr. Jones examined the plaintiff in 1988." The use of only the precise language of N.C. Gen. Stat. § 90-21.12 was expressly prohibited by *Wall*, and therefore, the instruction was error requiring a new trial.

112 N.C. App. at 388, 435 S.E.2d at 792-93. Thus, this Court ultimately held in *Bailey* that compliance with the duty of reasonable care and diligence was separate from the standard of care set out in § 90-21.12.

Accordingly, we are bound by *Wall* and must hold that the community standard of care does not apply to the second and third prongs of *Hunt*. Defendants' concerns regarding the consequences of

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such a holding are immaterial here since only the Supreme Court may revisit its holding in *Wall*.²

II

[2] Defendants next argue that the trial court erred by failing to exclude portions of the testimony of two of Mr. Swink's expert witnesses, Dr. Ferdinand Venditti and Dr. Richard Friedman, as a sanction under Rule 26(e) and (f1) of the Rules of Civil Procedure, because those portions of the experts' opinions were not, defendants argue, disclosed during discovery. We review a trial court's decision regarding whether to impose discovery sanctions for abuse of discretion. *Willoughby v. Wilkins*, 65 N.C. App. 626, 642, 310 S.E.2d 90, 100 (1983), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 697-98 (1984).³ In order to warrant a new trial, defendants must, however, demonstrate that they were prejudiced by the admission of the testimony. *Coffman v. Roberson*, 153 N.C. App. 618, 626, 571 S.E.2d 255, 260 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003).

Defendants primarily object to the fact that although Dr. Friedman and Dr. Venditti discussed in their depositions various criticisms of Dr. Weintraub and breaches of the standard of care, they did not testify specifically in terms of a failure to use best judgment or exercise reasonable care and diligence as they did at trial. A comparison of the deposition and trial testimony reveals that the expert witnesses' critique of defendants' care did not substantially vary from the deposition to the trial. The deposition testimony—even without the phrasing “best judgment” and “reasonable care and diligence”—provided defendants sufficient notice of the witnesses' criticisms of defendants to prepare for trial.⁴ In addition, Mr. Swink's written discovery responses gave defendants notice that Mr. Swink was contending that these criticisms violated all three *Hunt* duties.

2. Defendants also argue that the challenged expert testimony regarding Dr. Weintraub's use of reasonable care and diligence and the exercise of his best judgment amounted to speculation regarding Dr. Weintraub's state of mind and invaded the province of the jury. Since defendants (1) failed to object on any of these bases at trial, N.C.R. App. P. 10(b)(1); (2) failed to cite in their brief any authority in support of this contention, N.C.R. App. P. 28(b)(6); and (3) did not include this contention in their assignments of error, N.C.R. App. P. 10(a), this particular issue is not properly before the Court.

3. We note that some of the testimony discussed in defendants' brief was not referenced in defendants' assignments of error and, therefore, is not properly before the Court. *See* N.C.R. App. P. 10(a).

4. We note, however, that Dr. Friedman did specifically refer to a “mistake in judgment” and “bad judgment.”

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In any event, defendants have not explained why their knowledge of the expert witnesses' criticisms of defendants and the contentions regarding breaches of the standard of care was inadequate for them to effectively prepare for trial in the absence of explicit disclosure from the witnesses that they would testify that these failures also constituted a failure to use best judgment or exercise reasonable diligence and care. We do not believe that the witnesses' failure to couch their criticisms in terms of "best judgment" and "reasonable care and diligence" renders the trial court's decision not to exclude the testimony manifestly unreasonable. *See State v. Thibodeaux*, 352 N.C. 570, 579, 532 S.E.2d 797, 804 (2000) ("Abuse of the trial court's discretion will be found only where the ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." (internal quotation marks omitted)), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976, 121 S. Ct. 1106 (2001).

[3] Defendants also argue that Dr. Friedman and Dr. Venditti testified at trial to previously undisclosed opinions regarding causation and other subjects. Mr. Swink has, however, accurately pointed to the portions of their depositions in which similar testimony appeared or identified testimony from other witnesses, including Mr. Swink's third expert witness, that paralleled the challenged testimony. Defendants have not, in light of the deposition testimony and the trial testimony of other witnesses, demonstrated in what way the trial court abused its discretion or specifically how they were prejudiced at trial by the admission of the testimony. *See Suarez v. Wotring*, 155 N.C. App. 20, 31, 573 S.E.2d 746, 753 (2002) (holding that any error in trial court's admission of expert opinion not disclosed in discovery was harmless when opinion was substantially similar to testimony given by another expert, and appellant did not show how introduction of challenged opinion influenced jury's verdict), *disc. review denied and cert. denied*, 357 N.C. 66, 579 S.E.2d 107 (2003).

Although defendants analogize this case to *Green v. Maness*, 69 N.C. App. 292, 300, 316 S.E.2d 917, 922, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 922 (1984), the defendant in *Green* had notified the plaintiffs just nine days prior to trial that the defendant intended to call a new expert witness who would testify regarding an entirely new medical theory of causation for the minor plaintiff's injury. This case does not, however, involve the presentation of new witnesses or new medical theories. Notably, even in *Green*, this Court concluded that no sanctions were warranted. *Id.* at 299, 316 S.E.2d at 922. Instead,

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the Court ordered a new trial based on the denial of plaintiffs' motion for a continuance. *Id.*, 316 S.E.2d at 921.

In contrast to the plaintiffs in *Green*, defendants have provided only a boilerplate statement that they were prejudiced "because they had no opportunity to prepare for cross-examination or rebuttal of testimony regarding the new opinions." Given the fact that defendants have not pointed to any entirely new medical theory presented at trial or specifically explained how they could not prepare for the testimony ultimately presented at trial, we cannot conclude that the trial court abused its discretion in declining to exclude the testimony.

III

[4] Defendants contend that the trial court also erred in admitting Dr. Venditti's testimony regarding his personal preferences and practices in conducting informed consent discussions with his patients. Specifically, defendants point to the following testimony:

Q. Would you discuss the types of things you would discuss in an informed consent discussion[?]

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. Again, the first thing I would do is explain to the patient what the problem is. Something like your pacemaker is not functioning properly, its battery is running down. I then explain to them the procedure to deal with that. So we need to explant the old pacemaker generator, put a new one in. It's an incision under your collar bone to get into the pocket.

I then would talk about the risks and benefits of that. The risks being bleeding, infection, those sorts of things. If we don't do it, the battery is going to run down completely and it's going to stop pacing your heart and you're going to have problems from that perspective.

I would then talk about alternatives. Again, if we do nothing then we would have difficulty with the pacing system becoming non-functional. And then I would say do you have any questions, do you want to ask me anything about this, what I'm proposing that we do.

Defendants assert that the testimony should have been excluded as irrelevant under Rules 401 and 402 of the Rules of Evidence.

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We first note that defendants did not object when Dr. Venditti was asked about “your practice regarding the performance of lead extractions.” Dr. Venditti then proceeded to testify at length, without objection, as to his personal practice when performing a lead extraction. It is questionable, therefore, whether defendants preserved this issue for appellate review. *See State v. Tarlton*, 146 N.C. App. 417, 421, 553 S.E.2d 50, 53 (2001) (“It is well settled that a defendant waives objection to the admission of testimony when testimony of the same import is admitted without objection.”).

In any event, the test for relevancy of evidence is whether it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C.R. Evid. 401. Although a trial court’s rulings on relevancy “are given great deference on appeal,” such rulings are “technically . . . not discretionary and therefore are not reviewed under the abuse of discretion standard” *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241, 113 S. Ct. 321 (1992).

Defendants, in support of this assignment of error, rely exclusively upon *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985). *Rorrer* did not, however, address the admissibility of evidence of an expert witness’ personal practices under Rules 401 and 402, but rather held that the personal opinion of an expert witness as to what a professional should have done is not sufficient to establish a breach of the standard of care: “The mere fact that one [expert witness] testifies that he would have acted contrarily to or differently from the action taken by defendant is not sufficient to establish a prima facie case of defendant’s negligence.” *Id.* at 357, 329 S.E.2d at 367. The Supreme Court in *Rorrer* upheld the trial court’s granting of summary judgment because the expert witness’ affidavit “fail[ed] to state what the standard of care to which [the defendant] was subject required him to do” and “nowhere state[d] that [the defendant’s] inaction violated a standard of care required of similarly situated attorneys.” *Id.* at 356-57, 329 S.E.2d at 367. Although the Supreme Court thus held that the expert affidavit was insufficient to prove a *prima facie* case of professional negligence, it never held that the testimony in the affidavit was inadmissible.

Defendants, however, argue that “[b]ecause personal preferences and remarks concerning how experts might have treated the decedent are not evidence of the standard of care, this evidence should

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have been excluded pursuant to Rules 401 and 402 of the North Carolina Rules of Evidence.” This assertion overlooks the fact that such testimony may be relevant for purposes other than defining the standard of care. *See Wallbank v. Rothenberg*, 74 P.3d 413, 416 (Colo. Ct. App. 2003) (“While [prior cases] make it clear that a standard of care may not be established by the testimony of the personal practices of expert witnesses, those cases do not address whether this testimony may be relevant when other evidence is presented concerning the applicable standard of care.”), *cert. allowed*, 2003 Colo. LEXIS 579 (Colo. 2003), *cert. denied*, 2004 Colo. LEXIS 213 (Colo. 2004). For example, our Supreme Court has found relevant testimony of personal practices when used to explain the standard of care. *See Rouse v. Pitt County Mem’l Hosp., Inc.*, 343 N.C. 186, 195-96, 470 S.E.2d 44, 49-50 (1996) (in reversing grant of summary judgment, relying upon testimony of doctor as to “what he normally does as an on-call attending physician” as explaining the standard of care); *see also Wallbank*, 74 P.3d at 417 (“[B]ecause each expert addressed the applicable standard of care, testimony regarding their personal practices was proper direct and cross-examination. Thus, the jury could give whatever weight it determined was appropriate to the testimony of those experts, including ignoring it completely.”). Other jurisdictions have held that “testimony regarding an expert’s personal practices may either bolster or impeach the credibility of that expert’s testimony concerning the standard of care.” *Id.*; *see also Bergman v. Kelsey*, 375 Ill. App. 3d 612, 634, 873 N.E.2d 486, 507 (“Our supreme court has determined that the personal practices used by a testifying expert are not relevant and are insufficient to establish the applicable medical standard of care. However, a medical expert’s personal practices may well be relevant to that expert’s credibility, particularly when those practices do not entirely conform to the expert’s opinion as to the standard of care.” (internal citations omitted)), *appeal denied*, 226 Ill. 2d 579, 879 N.E.2d 929 (2007).

Defendants’ contention in this case that evidence of an expert witness’ personal practices is never admissible is not supportable. We need not, however, resolve the question whether in North Carolina such evidence is always admissible. In this case, our review of Dr. Venditti’s testimony indicates that it was comparable to the testimony relied upon in *Rouse* and, therefore, the trial court did not err in admitting the testimony.

[5] Defendants further argue, however, that even if the evidence was admissible, the trial court erred by refusing to give their requested

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limiting instruction regarding Dr. Venditti's personal preferences and practices. "A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134, 118 S. Ct. 196 (1997).

Defendants' proposed instruction reads:

[Special limiting instruction] Members of the jury, you may have heard some testimony regarding a particular expert witness' personal preference in the practice of medicine or how that particular expert would have performed in a given situation. *Such testimony is not offered to prove or disprove the standard of care applicable to defendants in this case.* Rather, such testimony may be considered by you only in the context of that expert's entire testimony and the weight you choose to give it.

(Emphasis added.) The emphasized language does not, however, precisely state the applicable law. While *Rorrer* establishes that testimony of personal practices, standing alone, cannot prove the standard of care, the proposed limiting instruction does not parallel the holding in *Rorrer*, but rather incorrectly suggests that such testimony is completely irrelevant to the standard of care even when other evidence of the standard exists.

Moreover, even if we assume, *arguendo*, that the trial court erred in not giving the instruction, defendants were required to demonstrate prejudice. *See Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) ("Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission."). For an appellant to be prejudiced, the failure to give the instruction must have "likely misled the jury." *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002).

Defendants have made no attempt to explain in what way the jury was misled by the omission of the limiting instruction. While defendants argue generally that "[t]estimony regarding personal preferences . . . creates a bogus standard of care by which defendants should be judged," defendants have not pointed to any aspect of Dr. Venditti's description of what he would do in an informed consent discussion that varied from the applicable standard of care.⁵ Ac-

5. Defendants do not address at all the lead extraction personal practices testimony.

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cordingly, defendants have failed to demonstrate that they are entitled to a new trial as a result of the failure to give the requested limiting instruction.

IV

[6] Defendants also contend that the trial court erroneously admitted hearsay testimony, including (1) testimony by Mr. Swink regarding statements of his wife, a cardiologist, and the surgeon who ultimately operated on Mrs. Swink and (2) deposition testimony of a lab technician, Hollie Boswell, regarding statements by another lab technician. Defendants further contend that the trial court should not have admitted testimony of Ms. Boswell regarding when Dr. Weintraub realized that Mrs. Swink's heart had ceased to beat. We address each piece of testimony in order.

First, defendants point to Mr. Swink's testimony regarding the complications surrounding his wife's 1994 pacemaker surgery:

Q. Now, after the procedure was over, describe what, if anything, you learned about complications associated with the procedure[?]

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. After talking with Peggy, it was my understanding that she experienced pulling in her chest. She felt like that her heart was moving in her chest when the leads were being pulled on to be removed. She felt as she was—as if she was being lifted off the table. She also recalled being resuscitated.

Mr. Swink contends that the statement falls within the present sense impression exception to the hearsay rule set out in Rule 803(1) of the Rules of Evidence.

Rule 803(1) renders admissible “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” While Mr. Swink's testimony could be read as indicating that the statements were made just after the 1994 procedure and, therefore, would fall within the exception, we need not resolve that question since defendants have made no showing as to how they were prejudiced by testimony regarding a procedure that was not the basis for the lawsuit. *See Scott v. Scott*, 157 N.C. App. 382, 389, 579 S.E.2d 431, 436 (2003)

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(holding that appellant must show that incompetent evidence caused some prejudice). This testimony simply explained why the Swinks were concerned about another lead extraction and duplicated other testimony not challenged on appeal.

[7] Defendants next challenge Mr. Swink's testimony reporting what he remembered Dr. Alfred B. Little saying in his deposition:

I recall that Doctor Little stated that he asked for a surgeon to be called. None came. He asked again for a surgeon to be called and after some time none had arrived. He said he personally went to a phone and called Doctor Gerhardt's service and got in touch with him and had him come to the cath lab.

Dr. Little was an employee of defendant Southeastern at the time of his deposition. Because his statements in the deposition related to matters within the scope of his employment, those statements constituted admissions of a party-opponent under Rule 801(d) of the Rules of Evidence and were admissible.

[8] The last of Mr. Swink's testimony challenged as inadmissible hearsay relates to whether Dr. Gerhardt had asked him if he had considered having an autopsy performed:

Q. Did you have a conversation with somebody about an autopsy?

A. Yes, I did. I had a conversation with Doctor Gerhardt.

Q. What was discussed?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. As I was leaving Peggy the last time, walking out of the room, Doctor Gerhardt was outside the door at a standing desk doing paperwork. And he stopped me and asked me if I had considered an autopsy and I told him that I had not. And he—

[DEFENSE COUNSEL]: Object to the hearsay, Your Honor.

THE COURT: Sustained.

Q. After you had this conversation, what did you decide to do with respect to getting an autopsy?

A. I decided to have an autopsy performed.

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While defendants' initial objection was overruled, the trial court sustained defendants' renewed objection regarding the precise testimony at issue, and, thus, there is no issue to be reviewed on appeal.

[9] Defendants next turn to the testimony of Hollie Boswell, a lab technician present during Mrs. Swink's surgery whose deposition was videotaped and played for the jury at trial. Defendants argue that Ms. Boswell's reports of what another lab technician said or observed during the procedure constituted hearsay. The trial court, however, correctly concluded that those statements were admissible to show why Ms. Boswell undertook the actions that she did. As our Supreme Court has explained, "[o]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (internal citation omitted), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165, 123 S. Ct. 182 (2002).

[10] Finally, defendants contend that the trial court erred under Rule 701 of the Rules of Evidence in admitting the following testimony:

Q. . . . When did Doctor Weintraub instruct you all to wake Peggy up in relation to his request that the code be called?

A. My recollection, Marcus [Brown] was inquiring about the [oxygen] sat[uration]. I went to check on the sat. At that point, while I'm checking the sat probe, he begins to say, wake her up. I then tried to arouse her and he realized, I assumed at that point, that her heart had ceased to beat. So that point was when he asked for us to call a code.

Defendants argue that Ms. Boswell's assumption that Dr. Weintraub had realized that Mrs. Swink's heart had ceased to beat prior to calling the code was not the proper subject of lay testimony and constituted speculation.

Even assuming, without deciding, that this testimony does not fall within the scope of Rule 701 (governing testimony of lay witnesses "in the form of opinions or inferences"), this testimony was essentially identical to testimony of both Dr. Weintraub himself and Dr. Jeffrey Goodman that Dr. Weintraub had observed that the heart was not beating, that the technicians said Mrs. Swink was not responding, and that Dr. Weintraub then called the code. The admission of Ms. Boswell's testimony was thus harmless.

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V

[11] Defendants next challenge the testimony of Mr. Swink's economist Dr. Gary Albrecht regarding damages. Rule 702(a) provides that "[i]f 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.R. Evid. 702(a). Defendants contend that Mr. Swink "failed to show that Dr. Albrecht had sufficient skill, knowledge, or experience in or related to subject matter [sic] to qualify as an expert and given [sic] testimony on damages."

Mr. Swink tendered Dr. Albrecht as an expert in economics and valuation of lost income without objection from defendants. At trial, prior to being tendered as an expert, Dr. Albrecht testified at length regarding his qualifications to testify, such as his education; his employment history, including the fact that he taught econometrics, economic forecasting, advanced microeconomics, and introductory economics at Wake Forest University; his publications and presentations in the area of forensic economics and involving questions of valuation; and the fact he had previously testified as an expert regarding present value of lost income and services. Because defendants did not object to Dr. Albrecht's qualifications at the time he was tendered as an expert witness, defendants failed to preserve the issue for review on appeal. *State v. White*, 340 N.C. 264, 294, 457 S.E.2d 841, 858, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436, 116 S. Ct. 530 (1995).

To the extent that defendants are contending that Dr. Albrecht was not qualified to render the opinions contained in his testimony and report, that issue "is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court." *State v. Goodwin*, 320 N.C. 147, 150-51, 357 S.E.2d 639, 641 (1987). Thus, "[w]hen reviewing whether the trial court erred in permitting a witness to qualify as an expert, the appellate court looks for an abuse of discretion." *State v. Steelmon*, 177 N.C. App. 127, 130, 627 S.E.2d 492, 494 (2006). Although defendants assert in conclusory fashion that the trial court abused its discretion in admitting Dr. Albrecht's damages opinions and report, they have not explained in what way Dr. Albrecht—based on his knowledge, skill, experience, training, or education—was not qualified to testify regarding the valuation of lost income or services. This assignment of error is, therefore, overruled.

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VI

[12] Defendants next argue that the trial court erred by refusing to give the jury their proposed instruction on informed consent. Defendants requested that the trial court use the informed consent instruction set out in N.C.P.I.-Civil 809.45, which the trial court agreed to do. The following colloquy occurred between the trial court and defense counsel during the charge conference regarding defendants' request for an additional special instruction regarding informed consent based on N.C. Gen. Stat. § 90-21.13 (2007):

THE COURT: Anything further now from the defendant?

...

[DEFENSE COUNSEL]: Well, just that I did state for the record the request for the instruction that obtaining an executed written consent form for a procedure created a presumption under the law that informed consent had been properly obtained.

THE COURT: Is there—I [have] never seen an instruction like that.

[DEFENSE COUNSEL]: We didn't either, Your Honor. It's in the statute. And that's really the basis for the request.

THE COURT: Have you got a copy of the statute there?

[DEFENSE COUNSEL]: No, sir.

We have been unable to find any indication in the record or transcript—and defendants' brief and assignments of error contain no such citation—that defendants submitted this requested special instruction to the trial court in writing.

N.C. Gen. Stat. § 1-181 (2007) and Rule 51(b) of the Rules of Civil Procedure require that requests for special instructions—*i.e.*, non-pattern jury instructions—must be submitted to the trial court in writing prior to the charge conference. *See* N.C. Gen. Stat. § 1-181 (providing that special instructions must be in writing, labeled as special instructions, signed by counsel, and submitted to the trial court prior to the charge conference); N.C.R. Civ. P. 51(b) (same). Requests for special instructions not made in compliance with N.C. Gen. Stat. § 1-181 and Rule 51(b) may be denied at the trial court's discretion. *See Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 98, 618 S.E.2d 739, 746 (2005) (“Because defendant did not comply with the requirements of Rule 51(b), the trial court acted properly within its discre-

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tion in denying the request.”), *appeal dismissed and disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006); *Byrd’s Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 379, 542 S.E.2d 689, 694 (2001) (“Because defendant did not comply with the requirements of Rule 51(b), the trial court acted properly within its discretion in denying the request.”). We see no basis for concluding that the trial court abused its discretion here when defendants did not submit a written proposed instruction, and the evidence was, at best, equivocal whether Mrs. Swink had signed a written consent form that in fact covered the lead extraction.

VII

[13] Defendants next argue that the trial court erred in its jury instructions by repeating Mr. Swink’s seven contentions of negligence following its instruction on each of the three theories of proving medical malpractice. We disagree.

When instructing the jury, the trial court first generally explained a doctor’s three duties to his or her patient:

Every health care provider is under a duty to use his best judgment in the treatment and care of his patient. To use reasonable care and diligence in the application of his knowledge and skill to his patients care. To provide health care in accordance with the standard of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care is rendered.

The trial court then instructed the jury regarding Mr. Swink’s contentions as to each of the duties:

The first contention is that the defendant failed to use his best judgment in the treatment and care of his patient in that the defendant negligently failed to obtain informed consent, negligently failed to stop the lead extraction after encountering excessive scar tissue, negligently failed to consult with a surgeon prior to the lead extraction, negligently failed to prepare Margaret Swink for a pericardiocentesis [sic], negligently failed to use an arterial line, negligently failed to use echocardiographic equipment and negligently failed to treat pericardial tamponade in a timely fashion.

The second contention is that the defendant failed to use reasonable care and diligence in the application of his knowledge

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and skill to his patient's care in that the defendant negligently failed to obtain informed consent, negligently failed to stop a lead extraction after encountering excessive scar tissue, negligently failed to consult with a surgeon prior to the lead extraction, negligently failed to prepare Margaret Swink for pericardiocentesis [sic], negligently failed to use an arterial line, negligently failed to use electrocardiographic material and negligently failed to treat pericardial tamponade in a timely fashion.

The third contention is that the defendant failed to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care was rendered in that the defendant negligently failed to obtain informed consent, negligently failed to stop the lead extraction after encountering excessive scar tissue, negligently failed to consult with a surgeon prior to lead extraction, negligently failed to prepare Margaret Swink for pericardiocentesis [sic], negligently failed to use an arterial line, negligently failed to use echocardiographic material and negligently failed to treat pericardial tamponade in a timely fashion.

These jury instructions track the template for medical malpractice instructions set out in N.C.P.I.—Civil 809.00. “This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions.” *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994), *disc. review denied*, 339 N.C. 610, 454 S.E.2d 247 (1995). Defendants do not challenge the instruction as a misstatement of the law or as unsupported by the evidence, but rather argue that “the trial judge’s overt repetition of the categories of negligence and plaintiff’s specific contentions of negligence was extremely prejudicial to defendants,” citing *Stern Fish Co. v. Snowden*, 233 N.C. 269, 63 S.E.2d 557 (1951). *Stern Fish* did not, however, involve repetition, but rather an instruction that was deemed “misleading, if not confusing.” *Id.* at 271, 63 S.E.2d at 558-59.

Our Supreme Court has, nonetheless, stressed that “jury instructions should be as clear as practicable, without needless repetition.” *State v. Trull*, 349 N.C. 428, 455-56, 509 S.E.2d 178, 196 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80, 120 S. Ct. 95 (1999). On the other hand, the mere fact that a trial court repeats “an otherwise proper instruction does not constitute error.” *State v. McDougald*, 336 N.C. 451, 461, 444 S.E.2d 211, 217 (1994) (holding that trial court’s rep-

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etition of an instruction on flight after each of the three charged offenses did not constitute improper expression of court's opinion).

The Supreme Court has awarded a new trial based on correct instructions only when "the instructions in their totality were so emphatically favorable to [the appellee] that [the appellants] are entitled to a new trial." *Wall*, 310 N.C. at 190, 311 S.E.2d at 575. In *Wall*, as in this case, the trial court had instructed the jury in conformity with the pattern jury instructions, but our Supreme Court determined that a new trial was warranted because of "the exculpatory nature of the pattern jury instructions themselves and to their selections and use by the trial judge." *Id.* at 190-91, 311 S.E.2d at 576.

The instructions in this case do not rise to the level present in *Wall*. Defendants identify nothing inherently wrong with the trial court's reciting plaintiff's contentions regarding how defendants had breached each of the *Hunt* duties. It happened that those contentions were the same for each duty. We do not believe that the trial court's approach in this case can be meaningfully distinguished from the repetition of the flight instruction after each offense in *McDougald*. When the charge is viewed in its totality, we do not believe that the instructions were overly favorable to plaintiff or that the pattern instructions can be viewed as inherently inculpatory, as required by *Wall*.

[14] Defendants also argue that "[f]ollowing a jury question, the court, on its own initiative and without giving counsel an opportunity to object or to be heard, elected to instruct the jury again on the issue of negligence, this time reiterating the three methods of proving negligence and plaintiff's seven contentions." The transcript indicates, however, that when the jury asked to have a copy of the jury instructions, the trial court refused, stating that it preferred to re-read the instructions to the jury. When asked to comment on the trial court's decision to re-instruct the jury, defense counsel responded: "The defendants are content with the Court's position." Defendants did not suggest to the trial court that it omit the factual contentions. The trial court then read the instructions to the jury a second time, although it only listed once the seven contentions as to how defendants breached the three duties. After the instructions were given, defendants then renewed their objection to the trial court's reciting the seven factual contentions.

We do not believe that defendants have adequately preserved for appellate review the issue of re-instruction. In any event, whether to

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repeat instructions in response to an inquiry by the jury falls within the discretion of the trial court. *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992). Given the jury's inquiry, we cannot find the re-instruction to be the "needless repetition" against which the Supreme Court has warned. *Id.* ("We do not find this instruction to be erroneous nor do we find its repetition to be needless, in light of the fact that it was specifically requested by the jury."). We believe the charge, "when considered contextually as a whole, is fair, correct, and adequate, and is free from prejudicial error." *Jones v. City of Greensboro*, 51 N.C. App. 571, 591, 277 S.E.2d 562, 575 (1981), *overruled on other grounds by Fowler v. Valencourt*, 334 N.C. 345, 435 S.E.2d 530 (1993).

VIII

[15] In the second appeal, defendants contend that the trial court erred by taxing certain costs against them that are not expressly authorized by statute. We must, however, first determine whether the trial court possessed subject matter jurisdiction to enter its award of costs. "The issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, including on appeal. This Court is required to dismiss an appeal *ex mero motu* when it determines the lower court was without jurisdiction to decide the issues." *McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) (internal citations omitted).

In *McClure*, this Court held that a trial court lacked subject matter jurisdiction under N.C. Gen. Stat. § 1-294 (2007) to enter an order awarding attorneys' fees and costs after notice of appeal had been filed as to the underlying judgment. *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 552. As *McClure* acknowledged, and prior decisions of this Court had held, if an award of attorneys' fees is the result of a party's prevailing as to the underlying judgment, then the issue of attorneys' fees cannot be deemed a "matter included in the action and not affected by the judgment appealed from," N.C. Gen. Stat. § 1-294, and, therefore, the trial court lacks jurisdiction to enter an order awarding attorneys' fees following appeal of the judgment. *See McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551 ("When, as in the instant case, the award of attorney's fees was based upon the plaintiff being the 'prevailing party' in the proceedings, the exception set forth in N.C. Gen. Stat. § 1-294 is not applicable."); *Gibbons v. Cole*, 132 N.C. App. 777, 782, 513 S.E.2d 834, 837 (1999) ("Here, the trial court's decision to award attorneys fees was clearly affected by the outcome of the judgment from which plaintiffs appealed."); *Brooks v. Giesey*,

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106 N.C. App. 586, 590-91, 418 S.E.2d 236, 238 (holding that when “a statute such as section 6-21.5, which contains a ‘prevailing party’ requirement,” is the basis for award of attorneys’ fees, trial court “is divested of jurisdiction” over request for attorneys’ fees by appeal of judgment), *disc. review allowed, disc. review on additional issues denied*, 332 N.C. 664, 424 S.E.2d 904 (1992), *aff’d*, 334 N.C. 303, 432 S.E.2d 339 (1993).

The basis for the award of costs in this case was N.C. Gen. Stat. § 6-1 (2007), which provides: “To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter.” Thus, an award of costs is directly dependent upon whether the judgment is sustained on appeal. Accordingly, under the controlling reasoning of *McClure*, *Gibson*, and *Brooks*, a trial court lacks jurisdiction to enter an award of costs under N.C. Gen. Stat. § 6-1 once notice of appeal has been filed as to the judgment.

Here, the judgment was entered on 1 March 2007. Defendants filed notice of appeal from that judgment on 20 March 2007. The trial court entered its order on costs on 1 May 2007. Since defendants had already appealed from the judgment, the trial court lacked jurisdiction under N.C. Gen. Stat. § 1-294 to enter the order taxing costs. We note that the judgment stated that “[c]ourt costs will be taxed pursuant to a separate order of this Court.” This Court in *McClure*, however, held that such a “reservation” of an issue was not sufficient to permit the trial court to subsequently enter an order on the issue, because “[i]t is fundamental that a court cannot create jurisdiction where none exists.” 185 N.C. App. at 471, 648 S.E.2d at 551.

Thus, even though we have, in this opinion, upheld the judgment, we must, because it is a matter of jurisdiction, vacate the order taxing costs and remand for entry of a new order. As this Court suggested in *McClure*, “the better practice is for the trial court to defer entry of the written judgment until after a ruling is made on the issue of attorney’s fees [and costs], and incorporate all of its rulings into a single, written judgment. This will result in only one appeal, from one judgment, incorporating all issues in the case.” *Id.*, 648 S.E.2d at 551-52.

No error in part and vacated and remanded in part.

Chief Judge MARTIN and Judge STROUD concur.

JOHNSON v. SCHULTZ

[195 N.C. App. 161 (2009)]

WILLIAM WOOD JOHNSON AND WIFE, SUZANNE WAYNE JOHNSON, PLAINTIFFS v.
TIMOTHY P. SCHULTZ AND WIFE, SHELLEY D. SCHULTZ, DONALD A. PARKER,
JERRY HALBROOK, TRUSTEE, AND STATE FARM BANK, F.S.B., DEFENDANTS

No. COA08-133

(Filed 3 February 2009)

1. Appeal and Error— appealability—appellate rules violations

Although defendants contend plaintiffs' appeal should be dismissed based on their failure to comply with N.C. R. App. P. 28(b)(6), the Court of Appeals declined to address this argument because: (1) the record on appeal contained no motion to dismiss filed in accordance with N.C. R. App. P. 25 and 37; and (2) plaintiffs presented sufficient legal argument to comply with N.C. R. App. P. 28(b)(6).

2. Attorneys; Real Property— breach of contract—attorney malpractice—misappropriation of closing funds by attorney—fault—innocent parties—allocation of risk of fault

The trial court erred in a breach of contract case arising out of the misappropriation of closing funds by an attorney in a residential real estate sale by granting summary judgment in favor of defendant buyers, and the case is remanded to the trial court with instructions to consider whether the attorney acted as plaintiffs' attorney as well as the attorney for defendants and whether plaintiffs must share the loss, because: (1) the arrangement did not constitute an escrow and there was no fault, and thus, in accordance with equity the risk of loss should fall on those parties who had an attorney-client relationship with the wrongdoing attorney; (2) even assuming arguendo that the arrangement between the parties was an escrow, where there is no fault and the buyer and seller are essentially innocent parties, the risk of loss should be allocated based on the attorney-client relationship; (3) it cannot be said that but for plaintiff sellers' failure to cash the trust account check until May 2006, the attorney could not have stolen the trust monies since he had already misappropriated them; and (4) defendants admitted that the attorney acted as their attorney, and thus defendants must bear some portion of the loss.

Judge WYNN dissenting.

JOHNSON v. SCHULTZ

[195 N.C. App. 161 (2009)]

Appeal by plaintiffs from judgment entered 18 October 2007 by Judge Jack A. Thompson in Johnston County Superior Court. Heard in the Court of Appeals 18 August 2008.

Woodruff, Reece & Fortner, by Gordon C. Woodruff, for plaintiff-appellants.

Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for defendant-appellees.

Horack Talley Pharr & Lowndes, P.A., by Robert B. McNeill and Phillip E. Lewis, amicus curiae for The North Carolina Land Title Association.

Katherine Jean and David R. Johnson, amicus curiae for The North Carolina State Bar.

HUNTER, Robert C., Judge.

In this case we consider who, between buyer and seller, bears the risk of loss in a residential real estate sale where the attorney who handled the closing misappropriated the remaining sales proceeds owed to the sellers from his trust account.¹ The trial court resolved this issue against plaintiff-sellers, William Wood Johnson and Suzanne Wayne Johnson (“the Johnsons”) on summary judgment. After careful review, we reverse and remand.

I. Background

On 17 November 2005, defendant-buyers Timothy P. and Shelley D. Schultz (“the Schultzes”) entered into a written contract with the Johnsons to purchase their residential property located at 502 West Woodall Street (“West Woodall property”) in Benson, North Carolina, for \$277,500.00. The parties utilized the North Carolina Bar Association’s 2005 standard “Offer to Purchase and Contract” form (“NCBA Contract”). The Schultzes hired defendant-attorney Donald A. Parker (“Mr. Parker”) to represent them in closing the transaction. Mr. Parker conducted the closing and was the only attorney involved in the closing.

1. While plaintiff-sellers also sued defendant-lender State Farm Bank, FSB (“State Farm Bank”) and defendant-trustee Jerry Halbrook (“Mr. Halbrook”), they make no argument as to these parties’ liability on appeal and argue solely that defendant-buyers are liable for the closing attorney’s misappropriation. Similarly, defendant-buyers make no argument as to those defendants’ liability. Accordingly, whether the other original defendants bear or share the risk of loss is not before us.

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The closing occurred at Mr. Parker's office on 3 January 2006. As part of the closing process, Mr. Parker drafted a deed to the West Woodall property for the Johnsons in exchange for a \$125.00 fee. The Schultzes provided \$76,933.56 of their personal funds toward the balance of the purchase price and obtained a loan from defendant State Farm Bank for the remainder (\$200,320.24). These funds were deposited into Mr. Parker's trust account prior to closing.² During the closing, the Johnsons executed a deed to the West Woodall property to the Schultzes. The deed and deed of trust were recorded at 4:46 p.m.; in addition, Mr. Parker tendered a check, drawn from his trust account, to the Johnsons for the net proceeds due (\$262,881.38).

On 3 January 2006, Mr. Parker's trust account contained sufficient funds to cover the check. However, on 4 January 2006, his trust account did not have sufficient funds as he had misappropriated them. The Johnsons did not try to cash the check until May 2006; the check bounced and was returned as "NSF" (non-sufficient funds). At the time they filed this appeal, the Johnsons still had not received the remaining money owed to them for the West Woodall property.

The Johnsons filed suit asserting breach of contract against the Schultzes, Mr. Parker, State Farm Bank, and Mr. Halbrook. The Johnsons sought rescission of the deed and recovery of title to the West Woodall property, or in the alternative, monetary damages. In his answer, Mr. Parker admitted the Johnsons' material allegations. Both the Johnsons and the remaining defendants respectively moved for summary judgment. In its judgment, the trial court allowed defendants' motion, denied the Johnsons' motion, and dismissed the Johnsons' claim with prejudice. The court determined that the Johnsons had to "bear the risk of loss of the sales proceeds . . . resulting from the escrow agent, Defendant Donald A. Parker, having embezzled the [money] . . . [because] Plaintiffs were entitled to receive those sales proceeds at the time of such embezzlement." The court further concluded that "Defendants Schultz were lawfully vested with title to the [real] Property on January 3, 2006, the day before Defendant . . . Parker embezzled the . . . sales proceeds. Therefore, Defendants Schultz were entitled only to the [real] Property, [and] not [to] the embezzled sales proceeds, at the time of . . . embezzlement[.]" The court also quieted title to the West Woodall property in the Schultzes subject only to State Farm Bank's recorded deed of trust. The Johnsons appeal.

2. Mr. Parker's trust account records indicate that the funds from the Schultzes were credited to his account on 4 January 2006, and the funds from State Farm Bank were credited on 3 January 2006.

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II. Analysis

A. Motion to Dismiss and Standard of Review

[1] At the outset, we address the section in the Schultzes' brief which asserts that the Johnsons' appeal should be dismissed due to the Johnsons' failure to comply with N.C.R. App. P. 28(b)(6). Since the record on appeal contains no motion to dismiss filed in accordance with Rules 25 and 37 of the North Carolina Rules of Appellate Procedure, we decline to address this argument as presented in defendant's brief. *E.g., Morris v. Morris*, 92 N.C. App. 359, 361, 374 S.E.2d 441, 442 (1988) (declining to address a motion to dismiss raised in the defendant's brief where the record contained no motion to dismiss filed in accordance with Rule 37); *see also State v. Easter*, 101 N.C. App. 36, 41, 398 S.E.2d 619, 622 (1990) (declining to address a motion to dismiss raised in the State's brief where the record contained no motion to dismiss filed in accordance with Rules 25 and 37). We also believe the Johnsons have presented sufficient legal argument to comply with N.C.R. App. P. 28(b)(6); accordingly, we address the merits of this appeal.

When ruling on a motion for summary judgment, the evidence must be considered in the light most favorable to the nonmoving party. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). Summary judgment should only be granted if the moving party demonstrates there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *Id.* at 62, 414 S.E.2d at 341. Our review is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

B. "Typical" North Carolina Residential
Real Estate Transaction

[2] Here, the residential real estate transaction between the Johnsons and the Schultzes reflects the manner in which the vast majority of residential real estate sales are conducted in this state, particularly the contract, closing method, and form of payment they used.

In a typical North Carolina residential real estate transaction, the buyer and seller execute the standard, pre-printed NCBA contract, which generally is provided to them by a real estate agent who is involved in the transaction. Edmund T. Urban and A. Grant Whitney, Jr., *North Carolina Real Estate*, § 26-1, at 653 (1996). "[I]t is common

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for only one attorney to supervise and handle the entire closing process.” Patrick K. Hetrick, Larry A. Outlaw, and Patricia A. Moylan, *North Carolina Real Estate Manual*, at 508 (North Carolina Real Estate Commission 2008-2009 ed. 2008). Although the attorney may be chosen by buyer, lender, or seller, “[t]he most common practice is for the closing attorney to represent the [buyer] and lender while performing limited functions for the seller (such as preparation of the deed).” *Id.*

[While a]ll parties to the real estate transaction have the right to select their respective attorneys independently and the seller in a residential closing also may choose to have an attorney, . . . this is rare. By comparison, complex real estate transactions, including most commercial and industrial property closings, will involve individual attorneys for the seller and buyer.

Id.

In North Carolina, two basic methods are used for completing real estate transactions: The settlement closing and the escrow closing. *Id.* at 505. In an escrow closing:

After the seller and [buyer] have entered into a sales contract, they also enter into an escrow agreement containing instructions to the escrow agent from both seller and purchaser. This agreement may bear any of a number of titles including but not limited to “Escrow Agreement,” “Escrow Instructions,” or “Deed and Money Escrow.” The escrow agent . . . then performs the specified closing functions in accordance with the escrow agreement independently of any further control by either the seller or the [buyer]. The escrow agent of necessity must be a disinterested party. In areas where this type of closing is popular, title insurance companies and escrow divisions of lending institutions frequently serve as escrow agents. In North Carolina, law firms occasionally act as escrow agents.

The seller and [buyer] must each furnish the escrow agent with all documents and other items necessary to complete the real estate transaction. For the seller, this [typically] means the deed The [buyer’s] chief obligations are to deliver an acceptable check for the balance of the purchase price and to execute all documents necessary for financing the purchase. When both parties have complied with the escrow agreement [terms] . . . the escrow agent will complete the transaction after first verifying by

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an updated title search that the seller's title conforms to the contract terms and that the [buyer's] check is valid.

Id. at 506.

However, as with the parties here, the vast majority of real estate closings in North Carolina are conducted via the settlement closing method. *Id.* at 507. Typically, in a settlement closing, the "closing attorney . . . conduct[s] the closing in accordance with the provisions of the sales contract and the detailed instructions provided by the buyer's lender." *Id.* at 509. In the instant case, the record contains no closing instructions from the lender. Nevertheless, the NCBA standard 2005 "Offer to Purchase and Contract" form, which the Johnsons and Schultzes utilized, obligates the seller to deliver fee simple, marketable, and insurable title to the buyer via general warranty deed at closing. It obligates the buyer to provide the "Balance of the purchase price in cash at Closing." However, in spite of the "cash" requirement, the attorney handling the closing typically deposits all funds paid by the buyer and the lender into his trust account and makes payments to the seller and others from the trust account, which is exactly what occurred here. *Id.* at 524. "Closing" is "defined as the date and time of recording of the deed."

"*The most common practice in North Carolina is*" for the buyer's attorney to handle the closing, including the preparation of the closing statement(s) and the disbursement of the funds. *Id.* at 509. In this regard, generally,

[t]he closing attorney will collect from the buyer a certified check (or comparable check guaranteeing payment) for the amount due from the buyer. The buyer's lender will have provided the closing attorney with a certified check for the amount of the buyer's loan (if any) or may have wired the funds to the attorney's trust account. *There will be no disbursement of funds at the closing meeting.* The closing attorney will place all funds in his trust or escrow account and will not disburse any of the funds until he can perform a final title search.

Id. Finally, in "real estate transactions involving a one- to four-family residential dwelling or a lot restricted to residential use[.]" such as the transaction here, before disbursing the remaining sales proceeds owed to the seller, the "settlement agent," who is often the closing attorney, must verify that the funds the buyer and lender deposited into his trust or escrow account are sufficiently reliable and must

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make sure that the executed deed to the property, and if applicable, the deed of trust are recorded. N.C. Gen. Stat. §§ 45A-2, -4 (2007).

C. Entitlement Theory

Here, the trial court resolved this case based on the entitlement rule. The “entitlement rule” has been “adopted in all jurisdictions that have considered” how “to allocate losses of money deposited in escrow.” Robert L. Flores, *A Comparison of the Rules and Rationales for Allocating Risks Arising in Realty Sales Using Executory Sale Contracts and Escrows*, 59 Mo. L. Rev. 307, 309 (1994) (hereinafter, “Flores, *Escrows*”) (footnotes omitted). The entitlement rule generally places the risk of loss as to escrow monies on the depositor-buyer under the theory that the escrow holder is the buyer’s agent “even if the escrow holder was the seller’s . . . attorney[.]” *Id.* (footnote omitted). However, “fault overrides” the general rule of allocating the risk of loss to buyers. *Id.* at 327 (footnote omitted).

For escrow loss, the cases in which fault has been given a determinative role . . . may be viewed in three categories. First, there are cases in which one party has caused a delay in closing of escrow, thus extending the risk period. Second, there are cases in which one party has committed some act, other than mere delay, that enabled the holder to lose or embezzle the money. Third, there are cases in which one party has had a closer relationship with the wrongdoing holder, and might be blamed for putting the holder in a position to cause the loss.

Id. at 331-32.

In the absence of fault, the entitlement rule shifts the risk of loss solely to the party holding “title” to the funds at the time the misappropriation occurred, a determination based on whether the escrow conditions have been fully performed at the time of embezzlement. *Id.* at 344-45, 352. If all escrow conditions have not been performed, the risk of loss remains solely with the buyer. *Id.* at 352. If all conditions have been performed, the risk of loss shifts solely to the seller. *Id.* In other words, the risk falls squarely on either the buyer or seller.

The trial court’s judgment indicates that the court believed an escrow arrangement was utilized here. In addition, the trial court appeared to shift the risk of loss to the Johnsons as sellers not based on fault but because the Johnsons were “entitled to receive th[e] sales proceeds at the time of . . . embezzlement.” In other words, in

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accordance with the entitlement rule applicable to “innocent” parties, the court appeared to conclude that the Johnsons had title to the money because all of the conditions of the parties’ escrow agreement had been performed at the time of Mr. Parker’s defalcation.

Both the Johnsons and the North Carolina State Bar (“the State Bar”) argue that the transaction here is not an escrow. Consequently, they contend the entitlement rule does not apply and that the Schultzes as principals should bear the risk of loss due to the defalcation of their attorney or agent Mr. Parker. The Johnsons further argue that even if the arrangement here is an escrow, this Court’s decision in *GE Capital Mortgage Services v. Avent*, 114 N.C. App. 430, 442 S.E.2d 98 (1994), which is the only North Carolina appellate case to apply the entitlement theory, establishes that in the absence of fault, the risk of loss is then allocated based on the attorney-client relationship. The Johnsons assert this conclusion is strongly supported by the following equitable principle emphasized by this Court in *Avent*:

Our holding is consistent with the equitable principle that “ ‘where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss.’ ”

Id. at 435, 442 S.E.2d at 101 (quoting *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 30, 209 S.E.2d 795, 799 (1974)).

The Schultzes and the North Carolina Land Title Association (“NCLTA”) argue that the arrangement here is an escrow, that *Avent* and the entitlement rule do apply, and that their application compels the grant of summary judgment in the Schultzes’ favor.

As discussed *infra*, we essentially agree with the Johnsons that the arrangement here does not constitute an “escrow,” and consequently, in accordance with equity, the risk of loss here should fall on those parties who had an attorney-client relationship with Mr. Parker.

Binding clients to the acts of their lawyers can be unfair in some circumstances[, such as where a] client might have authorized a lawyer’s conduct only in general terms, without contemplating the particular acts that lead to liability. However, it has been regarded as more appropriate for costs flowing from a lawyer’s misconduct generally to be borne by the client rather

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than by an innocent third person. Where the lawyer rather than the client is directly to blame, the client may be able to recover any losses by suing the lawyer, a right not generally accorded to nonclients[.]

Restatement (Third) of The Law Governing Lawyers § 26, cmt. b (2000). However, even assuming, *arguendo*, that the arrangement between the Johnsons and the Schultzes is an “escrow,” we agree with the Johnsons that *Avent* establishes that where there is no fault and the buyer and seller are essentially “innocent” parties, the risk of loss should be allocated based on the attorney-client relationship.

D. Escrow

At the outset, we note that our research has failed to yield a single North Carolina case which defines an escrow. A leading encyclopedia on escrow provides:

An “escrow,” as a general rule, is created when the grantor parts with all dominion and control of a instrument or money by delivering it to a third person or a depository with instructions to deliver it to the named grantee upon the happening of certain conditions. It is an instrument which by its terms imports a legal obligation, and which is deposited by the grantor, promisor or obligor, or his agent with a stranger or a third party, the depository, to be kept by him or her until the performance of the condition or the happening of [a] certain event and then to be delivered over to the grantee, promisee, or obligee. “Escrow” by definition means “neutral,” independent from the parties to the transaction Thus, when, pursuant to an agreement, money is left in [the] hands of the attorney or agent of one of the parties, an escrow is not created; however, in some jurisdictions, one may be the escrow agent of both parties to an escrow if there is nothing inconsistent or antagonistic between his acts for the one and the other.

28 Am. Jur. 2d *Escrow* § 1 (2000) (footnotes omitted). Furthermore, “there are two somewhat different types of escrow arrangements frequently associated with realty sales[,]” the “‘deed and money’ escrow” and the “‘set-aside’ escrow, or ‘cure’ or ‘repair’ escrow.” Flores, *Escrows*, 59 Mo. L. Rev. at 320-22 (footnotes omitted).

[A] “set-aside” escrow . . . typically [is] used to salvage the closing of a sale which otherwise would be canceled due to the discovery of a minor physical defect of the realty, or the failure . . .

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to have cleared all liens or other encumbrances on the title to the realty. The sale goes forward and the deed is delivered to the buyer and [typically] the bulk of the purchase price is delivered to the seller. A portion of the price is placed in escrow, to be released to the seller after the seller, for example, . . . clears the title by paying the overdue tax assessment or mortgage lien.

Id. at 322 (footnote omitted). In other words, in a “set-aside” escrow, but for one of the parties’ failure to perform, there is no need for an escrow, and as such, it entails a degree of fault.

In contrast, in a typical “deed and money” escrow,

[s]oon after entering into a contract for the sale of the realty, or perhaps simultaneously, the buyer and seller agree upon a person to serve as escrow holder. The parties agree that the buyer will deposit with the escrow holder some portion of the purchase price, and the seller will deposit an executed deed and related documents. Jointly or separately the parties set forth instructions for the escrow holder. Ordinarily the buyer instructs the holder to release the purchase price to the seller when a valid deed has been recorded and a title insurance policy has been issued, after a title search has shown that the seller has marketable title. The seller instructs the holder to record and deliver the deed to the buyer when the purchase price has been deposited.

Id. at 321 (footnotes omitted). In other words, in contrast to a “set-aside” escrow, the creation of a “deed and money” escrow does not arise out of a failure to perform and does not involve fault. Nevertheless, both types of escrows create risks that the “deeds or . . . documents deposited by a seller will be misappropriated by the escrow holder, . . . [or] that the [escrow] holder will lose, mismanage, or simply embezzle the money on deposit[.]” *Id.* at 322-23 (footnotes omitted).

In the instant case, the record is completely devoid of any evidence tending to establish the creation of an escrow between the parties, including any escrow instructions to Mr. Parker from the buyers (the Schultzes), the sellers (the Johnsons), or the lender (State Farm Bank). Furthermore, here, the only “conditions” that appear in the record are those provided in the parties’ “Offer to Purchase and Contract[.]” In contrast, in *Avent*, the Court explicitly mentioned that there was an “escrow agreement,” requiring the “escrow agent,” who was the buyer’s closing attorney, to deliver the remaining sales pro-

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ceeds to the seller once the seller cancelled the prior lender's deed of trust. *Avent*, 114 N.C. App. at 431-32, 442 S.E.2d at 99. Hence, based on the above definitions and law, the arrangement in the instant case does not appear to be a formal escrow.

Nevertheless, regardless of whether the arrangement here is classified as an escrow, we are aware that the same "escrow" risk of attorney defalcation is present. However, even assuming, *arguendo*, that the arrangement here is an escrow, we believe that in the context of North Carolina residential real estate transactions, this Court's decision in *Avent* establishes that courts should first allocate the risk of loss based on fault, and in the absence of fault, allocate it based on the attorney-client relationship. Furthermore, we believe that as between essentially "innocent" parties, the imposition of the risk of loss on the parties who were actually represented by the wrongdoing attorney is not only more consistent with how residential real estate transactions are generally closed in this state, but also produces a more equitable result.

E. *Avent's* "Entitlement" Rule

Assuming, *arguendo*, the arrangement here is an escrow or sufficiently equivalent to an escrow so as to trigger the application of entitlement rule analysis, we believe this Court's "entitlement" analysis in *Avent* establishes that in the absence of entitlement based on fault, the risk of loss should be allocated based on the attorney-client or agency relationship in accordance with equity. In this regard, we believe it is significant that in *Avent*: (1) the "escrow" at issue was a "set-aside" escrow which was only created due to the seller's failure to perform at closing, as opposed to the instant case, which would be classified as a "deed and money" escrow; (2) the Court explicitly noted that the parties in that case agreed that entitlement theory applied; and (3) the Court explicitly squared its holding with the equitable principle cited *supra*.

Avent is the only North Carolina appellate decision to utilize the entitlement rule, and it shares numerous factual similarities with the instant case: (1) it was a residential real estate transaction; (2) the buyers had obtained financing from a lender; (3) there appeared to be only one closing attorney, who was chosen by the buyers; (4) the attorney embezzled the sales proceeds still owed to the seller from his trust account; and (5) the seller executed the deed to the buyers at closing. *Avent*, 114 N.C. App. at 431-32, 434, 442 S.E.2d at 99, 101. However, it is very significant that, unlike here, where both the

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Schultzes and the Johnsons were prepared to meet their contractual obligations at closing, the seller in *Avent* was not. *Id.* at 431-32, 442 S.E.2d at 99. In other words, in *Avent*, but for the seller's failure to perform, the escrow never would have been created.³

The dissent argues the Court's analysis in *Avent* merely involves a straightforward application of the general entitlement rule and that the decision clearly establishes that the risk of loss should be allocated based on who held title to the funds at the time of defalcation. We disagree. First, we think it is debatable as to how completely the Court in *Avent* embraced the general entitlement theory. In this regard, we think it is significant that before beginning its analysis, the Court in *Avent* specifically noted, "the parties agree that generally when property in the custody of an escrow holder is lost or embezzled by the holder, as between the buyer and the seller, the loss falls on the party who was entitled to the property at the time of the loss or embezzlement." *Avent*, 114 N.C. App. at 432, 442 S.E.2d at 100. In other words, the parties agreed to resolve the issue based on the entitlement rule, and the Court analyzed it as such.

Next, in spite of the fact that: (1) the buyer had chosen *Avent* as the attorney; (2) the lender had consented to the arrangement; and (3) the escrow conditions had not been performed at the time of embezzlement, factors which, under the general entitlement rule, would result in placing the risk of loss solely on the buyer, the Court concluded that the risk of loss fell on the seller because the funds were in escrow solely due to the seller's failure to perform at closing. *Id.* at 434-35, 442 S.E.2d at 101. Hence, while the Court held that the seller "was entitled to the funds held in escrow at the time of the embezzlement and that [the seller] . . . therefore [had to] bear the loss[.]" we believe the Court based this conclusion on the seller's fault (failure to perform) because but for the seller's fault, the escrow would never have been created. *Id.* at 435, 442 S.E.2d at 101. In fact, the Court explicitly stated:

While it is true that *Avent* was retained by the [buyers], and consented to by [the lender], it was [the seller] who gave him the opportunity to abscond with the escrow funds by failing to meet

3. As a result, the buyer and seller agreed that *Avent*, (who had served as the buyer's closing attorney), would hold the net proceeds of the sale (\$136,723.74) in his trust account until the seller could produce the cancelled deed of trust. Approximately six weeks later, the seller notified *Avent* that the deed of trust had been cancelled and requested that *Avent* deliver the escrow funds in accordance with the agreement; however, *Avent* did not comply as he had misappropriated the funds.

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its contractual obligations, thereby necessitating the escrow agreement as a means of closing the transaction as scheduled.

Id. Finally, we think it is particularly significant that the Court was careful to square its analysis and holding with a long-standing principle of equity: “Our holding is consistent with the equitable principle that ‘where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss.’” *Id.* (quoting *Zimmerman*, 286 N.C. at 30, 209 S.E.2d at 799).

Furthermore, we believe that this Court’s decision in *Avent* and the equitable principle highlighted within it establish that in the absence of fault, our courts should consider the attorney-client relationship and impose the loss on those parties whom the attorney represented. In other words, as between essentially “innocent” parties, if the attorney solely represented the buyer or the seller, then the loss should fall solely on that party alone. However, if the attorney represents both buyer and seller, the buyer and seller should share the loss. Finally, we believe this approach is much more consistent with the equitable principle highlighted in *Avent*, as well as the manner in which the majority of North Carolina residential real estate transactions are closed, than the general entitlement rule which, in the absence of fault: (1) imposes the risk of loss solely on buyers even where a seller’s attorney misappropriates the funds; and (2) shifts the loss solely to sellers based on an artificial determination that the buyer’s attorney becomes the seller’s “agent” once the “escrow” conditions have been performed. *See Flores, Escrows*, 59 Mo. L. Rev. at 361.

F. Fault

Clearly, Mr. Parker bears the ultimate responsibility for his malfeasance. In addition, while the Johnsons did not present the trust account check to a financial institution for payment until May 2006: (1) the Schultzes concede that Mr. Parker misappropriated the funds on 4 January 2006; (2) the real estate transaction was closed late in the afternoon on 3 January 2006; (3) pursuant to N.C. Gen. Stat. § 45A-4, Mr. Parker was not permitted to disburse the sales proceeds to the Johnsons until the deed and deed of trust were recorded, which occurred at 4:46 p.m.; and (4) Mr. Johnson testified that he was unable to leave Mr. Parker’s office until after 5:00 p.m., at which time the banks were closed. As such, unlike with the “set-

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aside” escrow in *Avent*, it cannot be said that “but for” the Johnsons’ failure to cash the trust account check until May 2006, Mr. Parker could not have stolen the trust account monies because he had already misappropriated them.

While not explicitly labeled as fault, the dissent argues that the risk of loss should be shifted to the Johnsons as sellers because they “chose to accept” a check drawn on Mr. Parker’s trust account instead of demanding cash as provided in the standard 2005 NCBA contract form or “some other surer method of payment.” As discussed *infra*, because such a rule would significantly disrupt the way residential real estate transactions are traditionally closed in North Carolina and because such a rule would conflict with the equitable principle highlighted in *Avent*, we disagree.

At the outset, we note our disagreement with the dissent’s explanation of the Johnsons’ and a typical seller’s decision to accept a check drawn on an attorney’s trust account purely as a product of the seller’s free choice. While it is true that the standard 2005 NCBA contract form provides the seller with the right to receive the balance of the purchase price in cash, as discussed *supra*, a seller who demands cash would be highly atypical. Furthermore, in residential real estate transactions such as in the case *sub judice*, the closing attorney typically does not represent the seller, and by law, the attorney is not permitted to distribute funds to the seller until the deed is recorded. As such, the typical seller would likely be unaware as to what form of payment the buyer will provide until the actual closing or possibly until the deed has already been executed and recorded.⁴ Though the seller could still refuse the payment, this would almost certainly delay the completion of the closing. As such, while the dissent frames a seller’s “choice” to receive an attorney’s trust account check purely as a product of the seller’s own convenience or as a product of def-

4. Here, as noted *supra*, while the funds State Farm Bank provided on behalf of the Schultzes (\$200,320.24) were present in Mr. Parker’s account on 3 January, the Schultzes did not provide their check for the remaining balance (\$76,933.56) to Mr. Parker until 3 January and these funds were not credited to Mr. Parker’s account until 4 January. In addition, while the dissent argues that the Johnsons as sellers should have required a “surer method of payment,” we note that this Court has held that given the North Carolina State Bar’s regulations and enforcement mechanisms that apply to attorney trust accounts: Checks written on these accounts have “an added layer of security that personal checks do not have; b]ecause of this security, [trust account] checks . . . have more in common with certified checks than personal checks[;] and certified checks are frequently equated by state statute with cash money.” *In re Will of Turner*, 184 N.C. App. 168, 176, 645 S.E.2d 849, 850-51, *disc. review denied*, 361 N.C. 568; 651 S.E.2d 565 (2007).

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erence to the typical practice, we believe this ignores the fact that the seller's decision to accept a trust account check, i.e., to not delay the closing, can also be viewed as an accommodation to the buyer.⁵ As such, we do not think that by accepting a check drawn from Mr. Parker's trust account, the Johnsons exhibited any fault.

Most significantly, we believe that shifting the risk of loss based merely on the form of payment the seller accepts would significantly disrupt the way residential real estate closings are handled under our current system, especially in terms of creating delay, and would shift the risk of loss to the seller in almost every case unless the seller demands payment in cash. Such a rule squarely conflicts with the equitable principle emphasized by this Court in *Avent* and does not take into account the unique way residential real estate transactions are typically closed in North Carolina, i.e., by a single attorney chosen by the buyer. Furthermore, while certainly neither a buyer nor a seller would expect an attorney to misappropriate the closing funds, as we emphasized *supra*:

[I]t has been regarded as more appropriate for the costs flowing from a lawyer's misconduct generally to be borne by the client rather than by an innocent third person. Where the lawyer rather than the client is directly to blame, the client may be able to recover any losses by suing the lawyer, a right not generally accorded to nonclients[.]

Restatement (Third) of the Law Governing Lawyers § 26, cmt. b (2000).

Hence, given the lack of fault here, in accordance with equity and the "entitlement" rule as articulated in *Avent*, the risk of loss here should have been allocated based on which parties reposed confidence in Mr. Parker, i.e., which parties had an attorney-client relationship with him.

G. Attorney-Client Relationship

"[T]he relation of attorney and client may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract." *N. C. State Bar v. Sheffield*, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325 (citation omitted), *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, 474 U.S.

5. For example, given that the interest rate a buyer receives from a lender is typically conditioned upon the closing occurring within a particular time frame, a decision to delay the closing may result in the buyer losing its preferred interest rate.

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981, 88 L. Ed. 2d 338 (1985). Here, in allocating the risk of loss between two essentially “innocent” parties, the trial court erred by not allocating the risk to those parties who had an attorney-client relationship with Mr. Parker. We note that the Schultzes admitted below and continue to admit that Mr. Parker was their attorney. Consequently, we conclude that the trial court erred by granting summary judgment in the Schultzes’ favor, and because Mr. Parker acted as their attorney, we further conclude the Schultzes must bear the loss.

In contrast to the Schultzes, the Johnsons asserted below that they did not have an attorney-client relationship with Mr. Parker. However, the Schultzes disputed this assertion, contending that in addition to representing them, Mr. Parker also served as the Johnsons’ attorney or agent at closing. Because the trial court failed to consider this disputed issue of material fact between the parties, we remand this case to the trial court with instructions to consider whether Mr. Parker also acted as the Johnsons’ attorney, and consequently, whether the Johnsons’ must share the loss.

H. Title Insurance and Closing Protection Letter

Here, neither the Johnsons nor the Schultzes argue that they intended to shift the risk of loss in this transaction based on title insurance or the closing protection letter. In addition, they do not argue that the Schultzes’ title insurance policy or the closing protection letter cover this loss. As such, these issues are not properly before this Court.

I. Enhanced Consumer Protection

While chapter 45A of the North Carolina General Statutes seeks to protect buyers, lenders, and sellers from each other’s unscrupulous actions, neither it, nor any other statutory law protects these parties from the crippling economic loss that an attorney’s malfeasance can potentially impose on them if the attorney absconds and is essentially judgment proof. N.C. Gen. Stat. §§ 45A-1-45A-7 (2007). Our law imposes no bonding or malpractice insurance requirements on attorneys in general, let alone in the context of residential real estate closings where an attorney might handle hundreds of thousands of dollars in trust monies. Either requirement would shift some of the economic risk via insurance from typically innocent and unsophisticated buyers and sellers to the wrongdoing attorney. While the Client Security Fund provides a possible source of some relief, it is clearly

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a fund of last resort. *See* 27 NCAC 1D, Rule .1401(b)(7),(8). In addition, whether a loss is reimbursable is in the sole discretion of the board who administers the Fund, and even if the loss is deemed reimbursable, reimbursement is capped at \$100,000.00. *Id.* Rules .1417(b), .1418(g). As such, our legislature may wish to consider creating safeguards to protect “innocent” consumers in residential real estate sales such as those that exist in Virginia.⁶

III. Conclusion

In sum, we conclude that where, as here: (1) one attorney is used to handle a residential real estate closing, (2) the attorney misappropriates the remaining balance of the purchase price owed to the seller, and (3) the risk of loss must be allocated to one or more parties, courts should first consider the existence of fault. However, if fault does not exist and the risk must be allocated between essentially “innocent” parties, courts should then consider which parties had an attorney-client relationship with the wrongdoing attorney and impose the risk of loss on those parties. Where multiple parties to the transaction have an attorney-client relationship with the offending attorney, the risk of loss should be shared among them.

Because the trial court resolved this case under a misapprehension of law, we reverse the grant of summary judgment in the Schultzes’ favor. Furthermore, because the Schultzes admit that Mr. Parker was their attorney, we conclude that the Schultzes’ must bear the loss. Finally, because the trial court did not consider whether Mr. Parker also acted as the Johnsons’ attorney, a material issue of fact which the Johnsons and the Schultzes disputed below, we remand and instruct the trial court to consider this issue to determine if the Johnsons must share the loss.

Reversed and remanded.

Chief Judge MARTIN concurs.

Judge WYNN dissents in a separate opinion.

6. For example, Virginia law requires, *inter alia*: (1) an “errors and omissions or malpractice insurance policy providing a minimum of \$ 250,000 in coverage”; (2) “[a] blanket fidelity bond or employee dishonesty insurance policy covering persons employed by the settlement agent providing a minimum of \$ 100,000 in coverage”; and (3) “[a] surety bond of not less than \$ 200,000[.]” for “transactions involving . . . not more than four residential dwelling units.” Va. Code Ann. §§ 6.1-2.21(D), 6.1-2.19(C) (2007).

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WYNN, Judge, dissenting.

This matter arises from the misappropriation of real estate sales proceeds by the closing attorney after the closing of the real estate transaction. The issue on appeal is whether the residential buyers should be held accountable for the residential sellers' decision to accept their sales proceeds in the form of a check rather than in cash, as provided for in the sales contract, or some other surer method of payment. Because the sellers chose to accept a check rather than cash, I hold that the buyers are not accountable for the actions of the closing attorney that later rendered that check worthless. Additionally, my holding is supported on the grounds that, after the closing, the buyers had neither a claim to the trust account funds, nor control over how the sellers chose to accept payment of those funds.⁷

In *GE Capital Mortgage Services v. Avent*, 114 N.C. App. 430, 432, 442 S.E.2d 98, 100 (1994), this Court held: “[G]enerally when property in the custody of an escrow holder is lost or embezzled by the holder, as between the buyer and the seller, the loss falls on the party who was entitled to the property at the time of the loss or embezzlement.” Further, this Court explained:

Ordinarily, the determination as to which party is entitled to the escrow property depends upon whether the conditions of the escrow were satisfied prior to the loss or embezzlement. For example, if the escrow agent embezzles the purchase price prior to the seller's performance of the escrow condition, the buyer has retained title to the money and must therefore bear the loss. Conversely, if the embezzlement occurs after the seller has performed the escrow condition, then the seller must bear the loss because he was entitled to it at the time of the embezzlement.

Id. at 432-33, 442 S.E.2d at 100 (internal citations omitted).

7. The majority emphasizes “common practices” in the “typical” residential real estate closing in North Carolina to defeat the contractual requirement to provide the “balance of the purchase price in cash at Closing.” Surely, this issue would not be before us if the sellers had insisted that the contract requirements be carried out, thus the wisdom of the language in the contract between the seller and the buyer. The “common practice” of accepting an attorney's trust account check is a practice undertaken by the seller, not the buyer. Indeed, the consideration at closing given to the buyer follows the contractual requirement of delivering a “fee simple, marketable, and insurable title to the buyer via general warrantee deed.” This case illustrates that when a seller chooses, as a matter of common practice, to substitute the contractual requirement of cash for the convenience of an attorney's trust account check, then the allocation of the risk falls upon the seller, not the buyer.

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The majority interprets the decision in *Avent*, the only North Carolina case to apply the entitlement theory, to stand for the proposition that, in the absence of fault, the courts should impose the loss on the party represented by the wrongdoing attorney. However, I do not agree that the existence of an attorney-client relationship determines the outcome of this case because the conduct of the attorney in this case exceeded the scope of any agency relationship created with either the buyers or the sellers. The attorney was tasked with performing legal services for the closing of the real estate transaction. Indeed, the attorney's conduct, of criminally misappropriating the real estate sales proceeds from his trust account after the closing, was outside the scope of the attorney-client relationship created to close this transaction. Neither the buyers nor the sellers should be held accountable for the intentional and criminal conduct of the attorney which went beyond the scope of an attorney-client relationship.

I also see no need to remand this matter to the trial court to consider whether the closing attorney acted as the sellers' attorney. As the majority notes, this real estate closing was conducted via the settlement closing method and all of the conditions for closing this real estate matter were satisfied, including the making of payments to the seller and others from the trust account, which according to the majority, "is exactly what occurred here."

Rather than holding the buyers liable for the criminal actions of the attorney, which were well beyond the scope of the attorney-client relationship, we should follow the teachings of *Avent*. Thus, in this case, as was done in *Avent*, we should ultimately allocate the risk of loss to the party that held title to the funds in escrow at the time of the embezzlement. We should also follow the conclusion of *Avent* and hold that "[h]aving obtained title to the property [at closing], the [buyers] no longer held title to the funds in escrow. Thus . . . [the sellers] must bear the loss resulting from [the attorney's] embezzlement of the escrow funds." *Avent*, 114 N.C. App. at 434-35, 442 S.E.2d at 101.

The logic of this outcome is confirmed by the conduct of the sellers in the exercise of their choice to receive the sales proceeds in the form of a check which allowed the recalcitrant attorney to misappropriate the funds after the closing date.⁸ Here, at the time of the clos-

8. Analyzing this case under contract law rather than the "common practices" in "typical" real estate closings does not, as the majority states, "disrupt the way residential real estate transactions are traditionally closed in North Carolina." Indeed, any

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ing, the sales proceeds for the real estate transaction were in the trust account of the closing attorney. In exchange for conveying title to the buyers, the sellers chose to accept those proceeds in the form of a check, drawn upon the attorney's trust account. Once the buyers obtained title to the property, they no longer had any claim to the funds in the closing attorney's trust account, nor did they have control over how the seller would choose to accept those funds. The monies in the trust account at that time belonged to the sellers who, under the sales contract, could have required payment in the form of cash. Instead, the sellers chose to accept a check and now desire to place the risk of doing so on the buyers. In my view, the relationship between the buyers and sellers consummated when, in exchange for conveying title to the buyers, the sellers accepted the trust account sales proceeds in the form of a check rather than cash, as provided for in the sales contract.

Indeed, notwithstanding the sales contract requirement that the sales proceeds be paid in cash, the sellers were free to accept any other means of payment—perhaps for their own convenience or out of deference to the “typical” practice of accepting a trust account check. In any event, that was a decision made by the sellers, not the buyers. It is undisputed that the sales proceeds were in the trust account on the date of closing and could have been converted to cash, issued as a certified check or money order, wired to the sellers' account, or transferred by some other commercial transaction method that would have been surer than a check. Common sense dictates that the risks of accepting a check are far greater than those associated with accepting cash or some other surer method of payment.⁹

It follows that the buyers should not be held accountable for the sellers' decision to accept their payment in the form of a check rather than cash or some other surer method of payment. Ultimately, the risk of accepting sales proceeds from a real estate transaction in pay-

disruption in that tradition arises from the malfeasance of the attorney in this matter, which exposed the risk of accepting an attorney's trust account check—i.e., the attorney could steal the money from the account. When the law explicitly answers an issue, we need not rely upon equitable principles to prop up common practices that create risks.

9. The majority relies upon *In re Will of Turner* to analogize an attorney's trust account check to a certified check. The differences between the two types of checks are far greater than the similarities—e.g., a certified check is based on the integrity of a bank or financial institution whereas an attorney's trust account check is based on the integrity of the attorney. This case illustrates the greater risk of accepting an attorney's trust account check rather than a check certified by a financial institution.

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ment forms other than cash, as provided for by the sales contract, is on the sellers, not the buyers.¹⁰

STATE OF NORTH CAROLINA v. FRANKLIN HERRERA

No. COA08-491

(Filed 3 February 2009)

1. Confessions and Incriminating Statements— invocation of right to counsel—phone call to grandmother from police station—failure to show grandmother acting as agent of police—subsequent written confession

Officers did not continue to interrogate defendant after he invoked his right to counsel when they placed a telephone call to defendant's grandmother in Honduras to inform her that defendant was in custody and allowed defendant to speak with his grandmother by speaker phone, and defendant's subsequent written confession resulting from his conversation with his grandmother was not obtained in violation of his Fifth Amendment right to counsel, because: (1) the record was devoid of any evidence tending to show the phone call to defendant's grandmother was made for the purpose of eliciting incriminating statements from defendant or that she was acting as an agent of the police; (2) a suspect in defendant's position would not have felt coerced to incriminate himself by being permitted to speak with his grandmother via speaker phone in the presence of a detective and an interpreter; (3) State questioning or interrogation ceased once defendant invoked his right to counsel; and (4) even if defendant felt pressured into waiving his right to counsel and confessing to police as a result of his conversation with his grandmother, the Fifth Amendment is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion.

10. The majority points out that following the law under the residential contract "would almost certainly delay the completion of the closing" and that such a delay "may result in the buyer losing its preferred interest rate." However, this case illustrates how the substitution of "common practices" for the letter of the law arising under the residential contract can delay the closing for years. The closing in this matter occurred on 3 January 2006 and remains unsettled as a result of the seller's choice to accept an attorney's trust account check rather than a surer method of payment, as provided for under the residential sales contract.

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2. Confessions and Incriminating Statements— motion to suppress written statements—Vienna Convention on Consular Relations

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress both his 13 September and 15 September written statements based on an alleged violation of his rights to the Vienna Convention on Consular Relations when defendant was a Honduran citizen and was not advised of his right to contact the Honduran consulate under Article 36 of the Vienna Convention because: (1) the applicability of the Vienna Convention to state court proceedings is often limited since even though states may have an obligation to comply with the provisions of the Vienna Convention, the Supremacy Clause of the United States Constitution does not convert violations of treaty provisions into violations of constitutional rights; (2) treaties are contracts between or among independent nations, and thus generally do not create rights that are enforceable in the courts, but instead are rights of the sovereign and not the individual; and (3) the purpose of the Vienna Convention is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States, and courts have refused to hold suppression of evidence as a remedy for an Article 36 violation.

3. Discovery— statements disclosed on morning of trial—failure to show abuse of discretion

The trial court did not abuse its discretion in a first-degree murder case by allowing defendant's roommate and an interpreter to testify at trial as to certain inculpatory statements allegedly made to them by defendant when the State disclosed the testimony on the morning of trial because: (1) the court's findings indicated that it did not believe the State violated the discovery statutes by not providing these statements to defense until the morning of trial since the State obtained one statement on the prior evening and the other statement that morning; and (2) even assuming *arguendo* that the State did violate the discovery statute provisions, there was no abuse of discretion when defendant did not request a recess or continuance to address this newly disclosed evidence.

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4. Jury— *Allen* instruction—absence of any indication of deadlock or coercion

The trial court did not coerce a verdict by giving an *Allen* instruction pursuant to N.C.G.S. § 15A-1235(c) at the beginning of the jury's second day of deliberations after the jury had deliberated only three hours on the first day before taking an end-of-day recess where there was no indication that the jury was deadlocked or in any other way open to pressure by the trial court to force a verdict.

Appeal by defendant from judgment entered 19 October 2007 by Judge J. B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 22 October 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

HUNTER, Robert C., Judge.

Franklin Herrera (“defendant”) appeals from judgments entered 19 October 2007 pursuant to a jury verdict finding him guilty of first degree murder. Defendant was sentenced to life imprisonment without parole. After careful review, we find no error.

I. Background

The State presented evidence tending to show that on 29 August 2004, Durham police officers were dispatched to the Palm Park Apartments in Durham, North Carolina, where they discovered the body of Chanda Mwicigi (“the victim”) on the sidewalk. The victim was wearing no shoes, her pants were around her ankles, and her panties and shirt were covered with blood. She had lacerations covering her entire body, and an impression resembling a shoe that had stepped in blood was imprinted on her face.

Officers observed a trail of blood leading to a stairwell of an apartment building and into apartment E43. The apartment appeared to be vacant. Officers observed blood in the apartment's kitchen, on the refrigerator, and on the west wall.

On 2 September 2004, Durham Police Sergeant Brett Hallan (“Sergeant Hallan”) and Detective Deloris West (“Detective West”)

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responded to a call from Jonnie Howard who stated that she had found the victim's purse in a trash can outside a residence which shared a common boundary with another residence located at 401 Moline Street.

Police went to 401 Moline Street and learned that the residents, all of whom were non-English speaking Honduran nationals, had recently moved there from apartment E43. Officers located all of the residents of 401 Moline Street with the exception of defendant who worked in Virginia during the week and returned to Durham on the weekends. The occupants consented to a search of the residence, and police found what appeared to be blood on the couch and Nike tennis shoes with soles similar to prints found at the crime scene. A search of a car located at the residence revealed bloodstains on the driver's side interior door handle, the steering wheel, the driver's seat and backrest, and the emergency brake handle. Swabs of blood taken from the kitchen area of apartment E43 and from the bottom of defendant's shoes matched the DNA profile of the victim. Swabs taken from the kitchen doorknob in apartment E43 matched the DNA profiles of defendant and the victim, and swabs taken from the car's driver's-side door matched the DNA profile of defendant. Latent fingerprints taken from: (1) the interior storm door glass of apartment E43; (2) a beer bottle found in the kitchen in E43; and (3) the car's rearview mirror matched defendant.

In August and September 2004, officers interviewed the residents of 401 Moline Street with the assistance of Spanish-English interpreters, including Manuel Nestor Gonzalez ("Mr. Gonzalez"). Subsequent to this, police obtained a warrant for defendant's arrest and notified Virginia authorities to pick him up. Before the Virginia authorities located defendant, Mr. Gonzalez called defendant's grandmother in Honduras to see if defendant had returned there and to ascertain his whereabouts. He informed her that the police were looking for defendant and asked her to call him if she heard from defendant. Defendant's grandmother expressed concern and asked Mr. Gonzalez to notify her if police found him. On 13 September 2004, Detective West and Mr. Gonzalez traveled to Virginia Beach, Virginia, where defendant had been arrested and was in custody. Gonzalez interpreted for defendant and read him his *Miranda* rights in Spanish. Defendant signed the *Miranda* waiver form and prepared a written statement, which Mr. Gonzalez translated. In this statement, defendant admitted to having sex with the victim on the night in question, and after giving several versions of what happened, he eventu-

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ally admitted to stabbing the victim. However, he claimed it was in self-defense, stating that she had attacked him with a knife because he was in a gang known as “MS.”

On 15 September 2004, defendant was transported back to the Durham Police Department. There, Detective West interviewed him a second time in Sergeant Hallan’s office with Mr. Gonzalez again serving as the interpreter. Before any questions were asked, Gonzalez advised defendant of his *Miranda* rights in Spanish. Defendant requested an attorney, and the questioning stopped. Detective West then prepared defendant’s booking report in order to bring him before the magistrate and incarcerate him. Mr. Gonzalez told Detective West that when he had spoken to defendant’s grandmother in Honduras earlier in September, she had asked him to let her know if defendant was in custody. Prior to leaving for the magistrate’s office, Detective West allowed Mr. Gonzalez to place a call on speaker phone to defendant’s grandmother to inform her that defendant was in custody and going to jail and offered to let defendant speak with his grandmother. Defendant indicated that he wanted to speak to his grandmother. He and his grandmother conversed in Spanish over speaker phone in Detective West’s and Mr. Gonzalez’s presence, with Gonzalez translating the conversation for Detective West. During the telephone call, defendant’s grandmother asked him “‘Son, did you do this?’” and he replied affirmatively. Defendant’s grandmother told him to tell the truth to the police, and defendant indicated that he would.

Thereafter, defendant informed Gonzalez that he wanted to tell the truth to the police. Gonzalez re-Mirandized defendant in Spanish; defendant waived his rights and gave a written statement, in which he detailed the events of the murder and confessed to stabbing and killing the victim.

At trial, defendant testified on his own behalf. He claimed that on the night of the murder, he was at a convenience store purchasing beer, when two “MS” gang members approached him as he returned to the car he was driving. He stated that the two men noticed his “MS” tattoos, asked if he was a member, and when he replied that he was, the men asked for a ride to the Palm Park Apartments. Defendant further testified that he agreed out of fear, and the two men got in the backseat. Upon arriving at the apartment complex, the two men noticed the victim, called out to her, and she got in the backseat. Defendant testified that he parked near his old apartment E43 and that one of the men told defendant he should have sex with the vic-

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tim first. He testified that he was afraid to refuse and that he brought the victim into E43 because he still had a key. He further testified that after he and the victim had sex, one of the other men attacked her as she was leaving the apartment. Defendant claimed the other two men kicked the victim in the face and continuously stabbed her; he admitted stabbing the victim but said that he did so out of fear of the other two men and that she was already dead when he stabbed her.

Defendant brought a pre-trial motion to suppress his 13 September and 15 September written statements. Defendant argued these statements were obtained in violation of his Fifth Amendment right to counsel and in violation of his rights pursuant to Article 36 of the Vienna Convention on Consular Relations. Following a hearing on 8 October 2008, the trial court denied defendant's motion. Following trial by jury, defendant was convicted of first degree murder and sentenced to life in prison without parole.

Other facts necessary to the understanding of this case are set out in the opinion below.

On appeal, defendant argues the trial court erred by: (1) denying his motion to suppress his 15 September written statement because it was obtained in violation of his Fifth Amendment right to counsel; (2) denying his motion to suppress his 13 September and 15 September written statements because he had not been advised of his rights under Article 36 of the Vienna Convention; (3) declining to exclude certain testimony containing inculpatory statements allegedly made by defendant to (a) one of his roommates, Pedro De Valladares ("Mr. Valladares") and (b) to Mr. Gonzalez, because the State had violated the discovery statutes by not disclosing this testimony until the morning of trial; and (4) coercing a verdict from the jury by giving a premature *Allen* instruction. We find these arguments to be without merit and address each in turn.

II. Motion to Suppress

A. Right to Counsel: 15 September Statement

[1] First, defendant argues that the trial court erred by denying his motion to suppress his 15 September 2004 written statement because Detective West and Mr. Gonzalez continued to interrogate him after he had invoked his right to counsel in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981). Specifically, defendant argues that by permitting him to speak with his grandmother after he

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had invoked his right to counsel, Detective West and Mr. Gonzalez interrogated him in violation of *Miranda* as the phone call was reasonably likely to result in him saying something incriminatory. Defendant also claims that Mr. Gonzalez and Detective West utilized his grandmother to try to get him to confess to killing the victim. *See State v. May*, 334 N.C. 609, 611-13, 434 S.E.2d 180, 181-82 (1993) (excluding the defendant's incriminatory statement made to his girlfriend over the telephone because the girlfriend was a state agent who called and questioned the defendant at the behest of the police). He argues this unconstitutional interrogation negated his subsequent written waiver of rights and confession. Because we conclude defendant was not interrogated subsequent to invoking his right to counsel, we find defendant's argument is without merit.

The standard of review for "a trial court's determination 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.'" *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (citation omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). "Furthermore, the trial court's conclusions of law 'must be legally correct, reflecting a correct application of applicable legal principles to the facts found.'" *State v. Barnhill*, 166 N.C. App. 228, 230-31, 601 S.E.2d 215, 217 (citations omitted), *appeal dismissed and disc. review denied*, 359 N.C. 191, 607 S.E.2d 646 (2004). "However, because '[t]he determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law,' this question is fully reviewable on appeal." *State v. Fisher*, 158 N.C. App. 133, 142, 580 S.E.2d 405, 413 (2003) (alteration in original; citation omitted), *affirmed per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004).

"Once an accused invokes his right to counsel during a custodial interrogation, the 'interrogation must cease and cannot be resumed without an attorney being present "unless the accused himself initiates further communication, exchanges, or conversations with the police."' " *Id.* (citations omitted). "[H]owever, [not] all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation." *Rhode Island v. Innis*, 446 U.S. 291, 299, 64 L. Ed. 2d 297, 307 (1980). " 'Interrogation['] . . . must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300, 64 L. Ed. 2d at 307 (footnote omitted). It is defined as either "express questioning by law enforcement officers," *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000),

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cert. denied, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), or police conduct that constitutes the “functional equivalent” of express questioning, which includes “words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308 (footnotes omitted).

“The focus of the definition is on the suspect’s perceptions, rather than on the intent of the [police], because *Miranda* protects suspects from police coercion regardless of the intent of [the] police officers.” *Golphin*, 352 N.C. at 406, 533 S.E.2d at 199 (citing *Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308). However, “since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that *they should have known were reasonably likely to elicit an incriminating response.*” *Innis*, 446 U.S. at 301-02, 64 L. Ed. 2d at 308 (footnote omitted; emphasis added and emphasis in original).

Factors that are relevant to the determination of whether police “should have known” their conduct was likely to elicit an incriminating response include: (1) “the intent of the police”; (2) whether the “practice is designed to elicit an incriminating response from the accused”; and (3) “[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion”

Fisher, 158 N.C. App. at 142-43, 580 S.E.2d at 413 (quoting *Innis*, 446 U.S. at 302, n.7, 8, 64 L. Ed. 2d at 308, n.7, 8) (alteration in original).

In its order denying defendant’s motion to suppress, the trial court made the following findings¹ as to the circumstances surrounding defendant’s 15 September written statement:

5a) That the Defendant was transported to Durham, North Carolina on September 15, 2004, and was interviewed . . . by Detective West . . . using the certified interpreter Gonzalez.

. . .

5d) [T]hat during the interview, the Defendant told Investigator West that he “wanted an attorney”.

1. Some of these “findings of fact” include conclusions of law, which we review *de novo*.

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5e) [N]o further questions were asked of the Defendant at that time after he had requested an attorney.

5f) . . . Mr. Gonzalez, the interpreter, had previously spoken with the Defendant's grandmother in Honduras. That the Defendant was to be carried to the Magistrate and locked up. That the Defendant was given an opportunity to speak to his grandmother. The Court specifically finds that the Defendant wanted to speak to his grandmother in Honduras.

5g) [T]hat the grandmother asked the Defendant, "Son, did you do this?" And the Defendant replied, "Yes, I did it." And the grandmother told the Defendant to tell everything.

5h) [T]hat the Defendant voluntarily and knowingly elected to continue with the interview, that is the interview with Detective West and the interpreter, Mr. Gonzalez.

5i) [T]hat before any further questions were asked of the Defendant, that the Defendant was once again advised of his rights to remain silent. He was advised a second time . . . of his Miranda rights, including the right to have a lawyer. The Court finds that the Defendant waived these rights and freely, voluntarily, [and] knowingly gave another statement.

. . .

5k) [T]he Defendant freely, voluntarily, and knowingly made this statement admitting to stabbing and killing the victim in this case.

. . .

7a) [W]hen the Defendant requested an attorney on September 15, 2004, that no further questions were asked until the Defendant indicated that he wanted to continue with the interview and proceed without a lawyer. And that the Defendant was advised . . . of his constitutional rights to remain silent and to have a lawyer, and he waived those rights[.]

7b) In summation, based on all the evidence before the Court at this hearing, the Court finds that the statements made by the Defendant on September 13, 2004 and September 15, 2004 were freely, knowingly, and voluntarily given after being advised of his rights. That there were no promises or threats, and that the statement given to the law enforcement officer should not be suppressed.

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The State cites the United States Supreme Court's decision in *Arizona v. Mauro*, 481 U.S. 520, 95 L. Ed. 2d 458 (1987), to argue that defendant's grandmother was not acting as a state agent and that the police did not utilize words or actions that were reasonably likely to elicit an incriminating response. In *Mauro*, the United States Supreme Court considered whether certain tape recorded statements the defendant made to his wife were the product of unconstitutional interrogation. In that case, after the defendant invoked his right to counsel, he never waived it. *Id.* at 527, 95 L. Ed. 2d at 466-67. The defendant's wife, (who police were also questioning), repeatedly requested to speak with the defendant, which police permitted so long as an officer was present and the conversation was tape recorded. *Id.* at 522, 95 L. Ed. 2d at 463. Also, the officers explicitly testified that they knew it was possible the defendant might make an incriminating statement and that the tape recorder was present to record any incriminating statements. *Id.* at 525, 95 L. Ed. 2d at 465.

The Court concluded that the defendant was not subjected to interrogation and that the recording of his conversation with his wife was admissible. *Id.* at 529-30, 95 L. Ed. 2d at 468. In reaching this conclusion, the Court specifically noted the absence of any evidence indicating that the defendant's wife acted as a state agent or that the defendant was subjected to psychological ploys by the police. *Id.* at 527, 95 L. Ed. 2d at 467. Furthermore, viewing the circumstances from the defendant's perspective, the Court stated: "We doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way." *Id.* at 528, 95 L. Ed. 2d at 467. Finally, the Court reasoned that even though the officers may have hoped that the defendant might incriminate himself, "[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself." *Id.* at 529, 95 L. Ed. 2d at 468.

In the instant case, as in *Mauro*, the record is completely devoid of any evidence tending to show that the phone call to defendant's grandmother was made for the purpose of eliciting incriminating statements from defendant or that she was acting as an agent of the police. Furthermore, as in *Mauro*, we do not believe that a suspect in defendant's position would have felt coerced to incriminate himself by being permitted to speak with his grandmother via speaker phone in Detective West's and Mr. Gonzalez's presence.

Here, Mr. Gonzalez testified that prior to defendant's detention in Virginia, he called defendant's grandmother to try and ascertain his whereabouts, told her the police were looking for defendant, and

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asked her to call the police if she heard from him. In addition, he testified that defendant's grandmother expressed concern for defendant's safety and asked Mr. Gonzalez to contact her "to let her know anything that had happened[.]" Mr. Gonzalez also testified that the purpose of the 15 September phone call was to let defendant's grandmother know that he was in police custody and was okay.

Detective West testified that: (1) immediately after defendant invoked his right to counsel, all questioning ceased and she completed a booking report for defendant; (2) subsequent to this and prior to leaving for the magistrate's office, Mr. Gonzalez informed her that defendant's grandmother had asked to be notified when they had defendant in custody; and (3) after being notified of this, she told Mr. Gonzalez he could use the speaker phone to contact defendant's grandmother in Honduras and let her know he was going to jail. She further testified that: (1) the sole purpose of the call was to inform defendant's grandmother that he was in custody and going to jail; (2) in the past, she had allowed "several people that [she had] arrest[ed] . . . to call and let their relatives know they[] [were] going to jail"; and (3) defendant indicated that he wanted to speak with his grandmother.

Mr. Gonzalez testified that when he placed the 15 September call to defendant's grandmother via speaker phone: (1) he merely told her that defendant had been arrested; (2) the grandmother then asked if defendant was okay; and (3) defendant responded " '[y]es, I'm fine Mom, I'm fine.' " Mr. Gonzalez further testified that subsequent to this, he heard the following exchange:

[T]he grandmother asked, she seemed very upset, I guess crying, and she says, "Son, did you did [sic] this?" And he says, "Yes, Mom, I did." And then the [grandmother] said, "Will you tell this man the truth? You tell him everything you did." And he says, "Yes, mom, I did."

By then [defendant] was tears in his eyes, and, clearly, he wanted to talk. He told Grandmom, or Mom, that he had not been mistreated, and he says, "I'm going to tell them everything." And, again, she thanked us for taking care of him. And he gave us a statement.

This evidence supports the trial court's findings that State questioning or interrogation ceased once defendant had invoked his right to counsel. Furthermore, the record contains no evidence indicating

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that police utilized defendant's grandmother as an agent to question him or that by permitting defendant to speak with her, the police were engaging in a psychological ploy to obtain a confession. In addition, the evidence supports the finding that defendant chose to speak to his grandmother, and we note that defendant could have elected not to respond to his grandmother's apparent query as to whether or not he committed the crime, especially when he knew that he was on speaker phone and that Mr. Gonzalez was interpreting the conversation for Detective West. Finally, even if defendant felt pressured into waiving his right to counsel and confessing to police as a result of his conversation with his grandmother, this is of no import as the Fifth Amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion." *Oregon v. Elstad*, 470 U.S. 298, 304-05, 84 L. Ed. 2d 222, 229 (1985) (citations omitted).

In sum, after careful review, we hold the police did not interrogate defendant by placing the phone call to his grandmother to inform her that he was going to jail or by allowing defendant to converse with her on speaker phone. Accordingly, the trial court did not err by denying defendant's motion to suppress on this ground.

B. Vienna Convention: 13 September
and 15 September Statements

[2] Defendant also argues that the trial court erred by denying his motion to suppress both his 13 September and 15 September written statements because these statements were obtained in violation of his rights pursuant to the Vienna Convention on Consular Relations ("the Vienna Convention"). Specifically, defendant argues that his conviction must be vacated and that he must be given a new trial since he is a Honduran citizen and was not advised of his right to contact the Honduran consulate pursuant to Article 36 of the Vienna Convention. *See* Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-01, 1969 U.S.T. LEXIS 284, 28-29. We disagree.

Article 36 of the [Vienna] Convention concerns consular officers' access to their nationals detained by authorities in a foreign country. The article provides that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner."

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Sanchez-Llamas v. Oregon, 548 U.S. 331, 338, 165 L. Ed. 2d 557, 571 (2006) (citation and footnote omitted).

In other words, when a national of one country is detained by authorities in another, the authorities must notify the consular officers of the detainee's home country if the detainee so requests. Article 36(1)(b) further states that "[t]he said authorities shall inform the person concerned [*i.e.*, the detainee] without delay of his rights[.]"

Id. at 338-39, 165 L. Ed. 2d 571-72 (alteration in original; citation omitted).

This Court has not previously addressed this issue. However, in *State v. Nguyen*, we noted that "the applicability of the Vienna Convention to state court proceedings is often limited because while 'states may have an obligation . . . to comply with the provisions of the Vienna Convention, the *Supremacy Clause* [of the United States Constitution] does not convert violations of treaty provisions . . . into violations of *constitutional rights*.'" *Nguyen*, 178 N.C. App. 447, 459, 632 S.E.2d 197, 205 (quoting *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (emphasis added and emphasis in original; alterations in original)), *appeal dismissed and disc. review denied*, 360 N.C. 653, 637 S.E.2d 189 (2006), *cert. denied*, — U.S. —, 167 L. Ed. 2d 339 (2007). Furthermore, this Court has noted that because "treaties are contracts between or among independent nations, they generally do not 'create rights that are enforceable in the courts,' but instead are rights of the sovereign and not the individual." *State v. Aquino*, 149 N.C. App. 172, 177, 560 S.E.2d 552, 556 (2002) (quoting *United States v. Jimenez-Nava*, 243 F.3d 192, 195-96 (5th Cir.), *cert. denied*, 533 U.S. 962, 150 L. Ed. 2d 773 (2001)). Finally, this Court has noted that "the purpose of the Vienna Convention 'is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States'" and that "courts . . . have refused to hold 'suppression of evidence is . . . a remedy for an Article 36 violation.'" *Id.* at 178, 560 S.E.2d at 556 (citations omitted).

While the United States Supreme Court has not explicitly addressed the issue of whether Article 36 of the Vienna Convention implicates individual rights, that Court has concluded that suppression of evidence is not an appropriate remedy. *See Sanchez-Llamas*, 548 U.S. at 337, 165 L. Ed. 2d at 571. Further, we note that defendant fails to cite a single case from a United States jurisdiction which holds that a violation of Article 36 of the Vienna Convention requires

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the suppression of evidence. Hence, without deciding whether Article 36 of the Vienna Convention provides a defendant with an individual right, we hold that the trial court did not err by denying defendant's motion to suppress his 13 September and 15 September written statements solely due to the State's failure to inform him of his right to contact the Honduran Consulate.

III. Discovery Statute: Failure to Exclude Testimony

[3] Defendant next assigns error to the trial court's decision to respectively allow Mr. Valladares and Mr. Gonzalez to testify at trial as to certain inculpatory statements allegedly made to them by defendant. Specifically, defendant challenges the trial court allowing Mr. Valladares to testify that defendant admitted to him that he killed the victim and permitting Mr. Gonzalez to testify that defendant requested a gruesome photo of the victim from the crime scene and that defendant told him he cut her thigh to see if she was black on the inside like she was on the outside. Defendant argues that by not disclosing these statements to defendant prior to the morning of trial, the State violated North Carolina's statutory discovery provisions and that the trial court abused its discretion by declining to exclude this evidence pursuant to N.C. Gen. Stat. § 15A-910 (2007). Defendant contends that due to the State's late disclosure he did not have reasonable time to make effective use of these statements at trial, particularly to challenge these two witnesses' respective character for truthfulness. As a result, he contends he is entitled to a new trial. We disagree.

It is undisputed that on the morning of 8 October 2007, the same day as defendant's motion to suppress hearing as well as the beginning of trial, the State provided defendant with the aforementioned statements of Mr. Valladares and Mr. Gonzalez for the first time. During the pretrial motion to suppress hearing regarding defendant's two written statements, defendant asserted that this late disclosure violated North Carolina's discovery statute provisions and expressed his desire that the evidence be suppressed. *See* N.C. Gen. Stat. §§ 15A-902, -903, -907 (2007). The trial judge deferred considering this issue until trial.

A couple of days after trial had begun, when Mr. Valladares and Mr. Gonzalez were called to testify, the trial court excused the jury and conducted a *voir dire* examination regarding this testimonial evidence. Defendant asserted the aforementioned testimonial evidence was inadmissible on a variety of grounds including, *inter alia*, be-

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cause the State had violated the statutory discovery provisions. He noted that this evidence was disclosed almost three years after he had filed a motion for discovery and almost a year and a half since he had filed for discovery of all witness statements.

With regard to Mr. Valladares's statement, the State claimed that they lost track of Mr. Valladares following his initial interview on 2 September 2004 and that they were not able to locate him until 7 October 2007. The State told the court that during the 2 September 2004 interview, Mr. Valladares denied knowing anything regarding the crime. The State also told the court that they did not learn that defendant had purportedly told Mr. Valladares that he killed the victim until the evening of 7 October 2007, and that they disclosed this evidence as soon as possible. Mr. Valladares testified that when he was interviewed by police in September 2004, he did tell them that defendant admitted he had killed the victim.

The court found: (1) that when Mr. Valladares was interviewed on 2 September 2004, he denied knowing anything about the matter; (2) that he was unavailable to the State until 7 October 2007; (3) "that the prosecutor, as an Officer of the Court" stated that the State was unable to obtain this information until 7 October and that the statements were provided to defendant at the earliest possible date, which was 8 October.

With regard to Mr. Gonzalez's testimony, defendant argued that given that Mr. Gonzalez worked for the police department as an interpreter/translator when the crime occurred and that Mr. Gonzalez testified that he believed he had told the investigating officers about defendant's alleged statements at a prior time, disclosure of this information on the morning of trial was a clear discovery violation. The State told the court that they did not provide this information to defendant until the morning of trial because they did not learn of it until that time. The court explicitly asked the prosecutor: "[A]s an officer of the Court, are you saying that you did not know anything about these statements . . . until Monday morning, October the 8th?" He responded, "[c]orrect, Your Honor, and upon learning [of] it, I went and typed it up and then I saw [Detective] West and inquired of her about that. It was my impression that was the first [time] that [she] was aware of it as well."

The trial court found that: (1) defendant strenuously argued that the State clearly violated the discovery statutes and that if not, the evidence should still be disallowed under Rule 403; and (2) the pros-

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ecutor stated as an officer of the court that he did not know of these statements until the morning of 8 October. The Court further noted that discovery was provided to defense counsel prior to trial and that while there was a motion to have this testimony suppressed, defendant did not bring a motion to continue the trial.

The Court allowed both Mr. Valladares and Mr. Gonzalez to testify to these statements over defense counsel's objection, and the court granted defendant standing objections as to this testimony.

A. Preservation

At the outset, we note that the State asserts that defendant has failed to preserve this argument for appellate review. Specifically, the State contends that even though defendant objected to the testimony during the *voir dire* examination of each witness, he waived this issue because he did not renew his objections when the testimony was offered before the jury. In support, the State cites *State v. Grooms*, where the Supreme Court of North Carolina held "that a pre-trial motion to suppress, a type of motion *in limine*, is not sufficient to preserve for appeal the issue of admissibility of evidence[,] and that a "defendant waive[s] appellate review of this issue by failing to object during trial to the admission" of the challenged evidence. *Grooms*, 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

First, we note that even assuming, *arguendo*, that to preserve this issue for appellate review, defendant was required to re-object to Mr. Valladares's and Mr. Gonzalez's testimony in the presence of the jury, defense counsel did so object to Mr. Gonzalez's testimony. While defendant did not object to Mr. Valladares's testimony in front of the jury, as discussed below, we do not believe that under the circumstances here, N.C.R. App. P. 10(b)(1) or North Carolina case law mandate that defendant had to re-object to this testimony in the jury's presence to preserve this issue when the court had already considered and overruled defendant's discovery violation objection during *voir dire*.

Our law is clear that "a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial[.]" *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007), and that "[e]ven if [a] trial court allows [a] party a standing objection, [that] party is not relieved of his obligation to make a contemporaneous objection [at trial]." *State v. Mays*, 158 N.C. App. 563, 578, 582 S.E.2d

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360, 370 (2003) (citation omitted). Here, however, at the 8 October suppression hearing, defendant merely noted his objection to the admission of this testimony on discovery violation grounds, and the trial judge did not consider the issue until trial. In other words, defendant's objection was argued at trial, (albeit outside of the presence of the jury), and not pretrial. Because defendant raised his objections as to the purported discovery statute violation at trial and obtained a ruling and standing objection on this issue, we believe he sufficiently preserved this issue for appellate review.

In reaching this conclusion we note that defendant's discovery violation argument does not implicate the North Carolina Rules of Evidence; rather, his argument appears to assert that the trial court should have found and concluded that a discovery violation occurred and that due to the violation, the trial court should have excluded this testimony pursuant to section 15A-910. Furthermore, we do not believe our conclusion violates N.C.R. App. P. 10(b)(1) which provides:

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.

Nor do we think our conclusion violates the purposes of Appellate Rule 10(b) as stated by the Supreme Court of North Carolina. "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.'" *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195, 675 S.E.2d 361, 363 (2008) (alteration in original; citation omitted). " 'Rule 10 functions as an important vehicle to insure that errors are not "built into" the record, thereby causing unnecessary appellate review[.]'" *Id.* (citation omitted). Here, the trial court did consider and rule on the alleged discovery violation at trial. Consequently, we hold defendant did not have to re-object on that ground in the presence of the jury to preserve this issue for review.

B. Discovery and Testimony

Here, the State clearly had a duty to disclose this testimony pursuant to sections 15A-902, -903, and -907, which it did on the morning

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of trial. The purpose of discovery procedures is to protect defendants from unfair surprise. *State v. Alston*, 307 N.C. 321, 331, 298 S.E.2d 631, 639 (1983) (citation omitted). Further, as this Court has stated “[l]ast minute or ‘day of trial’ production to the defendant of discoverable materials the State intends to use at trial is an unfair surprise and may raise . . . statutory violations. We do not condone either non-production or a ‘sandbag’ delivery of relevant discoverable materials and documents by the State.” *State v. Castrejon*, 179 N.C. App. 685, 695, 635 S.E.2d 520, 526 (2006) (citation omitted), *appeal dismissed and disc. review denied*, 361 N.C. 222, 642 S.E.2d 709 (2007).

A trial judge’s decision to admit evidence in spite of a discovery objection is reviewed for an abuse of discretion, *see State v. Blankenship*, 178 N.C. App. 351, 355-56, 631 S.E.2d 208, 211-12 (2006), and a trial court’s ruling will only be reversed “upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Carson*, 320 N.C. 328, 336, 357 S.E.2d 662, 667 (1987). In the event the trial court determines a discovery violation has been committed, section 15A-910 provides:

(a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt power may

- (1) Order the party to permit the discovery or inspection, or
- (2) Grant a continuance or recess, or
- (3) Prohibit the party from introducing evidence not disclosed, or
- (3a) Declare a mistrial, or
- (3b) Dismiss the charge, with or without prejudice, or
- (4) Enter other appropriate orders.

(b) Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article.

Nevertheless, trial judges have “broad and flexible powers to rectify the events if a party fails to comply with discovery orders . . . [and] exclusion of evidence as a remedy is strictly within the discretion of the trial judge.” *State v. Locklear*, 41 N.C. App. 292, 295, 254 S.E.2d

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653, 656, *review denied*, 298 N.C. 571, 261 S.E.2d 129 (1979). As such, “exclusion of evidence for . . . reason[s] that [a] party offering it has failed to comply with discovery statutes . . . rests in the discretion of the trial court[, and] exercise of that discretion, absent abuse, is not reviewable on appeal.” *State v. Hill*, 294 N.C. 320, 331, 240 S.E.2d 794, 801-02 (1978) (citations omitted).

Here, the court’s aforementioned findings appear to indicate that it did not believe that the State had violated the discovery statutes by not providing these statements to the defense until the morning of trial as the State had only obtained Mr. Valladares’s statement on the evening of 7 October and Mr. Gonzalez’s statement on the morning of 8 October. However, even assuming, *arguendo*, that the State did violate the discovery statute provisions, upon careful review of the record, we conclude the trial court did not abuse its discretion in allowing this testimony especially when defendant did not request a recess or continuance to address this newly disclosed evidence.

IV. *Allen* Instruction

[4] Finally, defendant argues the trial court coerced a verdict of first degree murder from the jury by giving an *Allen* instruction. *Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528 (1896); N.C. Gen. Stat. § 15A-1235 (2007). This argument is without merit.

A trial court’s decision to give an *Allen* instruction is reviewed for abuse of discretion. *State v. Adams*, 85 N.C. App. 200, 210, 354 S.E.2d 338, 344 (1987) (citing *State v. Williams*, 315 N.C. 310, 326-37, 338 S.E.2d 75, 85 (1986)). We determine whether a trial court abused its discretion by looking at the “totality of the circumstances.” *State v. Dexter*, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496, *affirmed per curiam*, 356 N.C. 604, 572 S.E.2d 782 (2002).

[A] defendant is entitled to a new trial if the circumstances surrounding the jury deliberations “might reasonably be construed by [a] member of the jury unwilling to find the defendant guilty as charged as coercive, suggesting to him that he should surrender his well-founded convictions conscientiously held of his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict.”

Id. (citation omitted; second alteration in original).

In *Adams*, this Court held that the defendant failed to show the trial court had abused its discretion by giving an *Allen* instruction

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even though the jury had deliberated for less than two hours. *Adams*, 85 N.C. App. at 210, 354 S.E.2d at 344. The Court noted that our Supreme Court had held that “where the record provide[s] no indication that the jury [i]s deadlocked in its deliberations or in any other way open to pressure by the trial judge to force a verdict, even a charge that is in part impermissible under G.S. 15A-1235 is not prejudicial error requiring a new trial.” *Id.* (citing *State v. Easterling*, 300 N.C. 594, 608-09, 268 S.E.2d 800, 809 (1980)). After noting that the contents of the trial judge’s charge were in accordance with section 15A-1235, the Court in *Adams* held that “any error in the court’s decision to instruct the jury pursuant to G.S. [15A-]1235(c) in the absence of any indication of deadlock was not prejudicial to [the] defendant.” *Id.*

In the instant case, the jury had deliberated for approximately three hours before breaking for an end-of-day recess. The following morning, right before the jury was to resume deliberations, the trial judge gave the following instruction over defense counsel’s objection:

Ladies and gentlemen, as I have already instructed you, in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty. It is the law, and I instruct you, that jurors have a duty to consult with one another and to deliberate with a view of reaching an agreement, if it can be done without violence to individual judgment. Each juror must decide the case for himself or herself, but only after impartial consideration of the evidence with his or her fellow jurors.

In the course of deliberation, a juror should not hesitate to re-examine his or her own views, and change his or her opinion if convinced it is erroneous. And no juror should surrender his or her honest conviction as to the weight or the effect of the evidence solely because of the opinion of his or her fellow jurors, or for the mere purpose of returning a verdict.

Here, the jury had deliberated for a longer period of time than in *Adams*. Furthermore, as in *Adams*, the content of the court’s instruction was proper under section 15A-1235. In addition, as in *Adams*, the record here provides “no indication that the jury was deadlocked in its deliberations or in any other way open to pressure by the trial judge to force a verdict[.]” *Id.* Accordingly, even assuming, *arguendo*, that the trial court erred in deciding to instruct the jury pursuant to section 15A-1235, given the absence of any indication of deadlock or coercion, we hold any error was not prejudicial to defendant.

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V. Conclusion

In sum, after careful review of defendant's arguments, we find no error.

No error.

Judges ELMORE and GEER concur.

DOUGLAS DALE JOHNS, PLAINTIFF v. JANICE MARIE JOHNS, DEFENDANT

JESSICA JOHNS, PLAINTIFF v. DOUGLAS DALE JOHNS, DEFENDANT

No. COA07-1259

(Filed 3 February 2009)

1. Pleadings— Rule 11 sanctions—necessity of evidentiary hearing

There was no abuse of discretion in a trial court's refusal to defer hearing a Rule 11 motion to allow the presentation of oral testimony or additional exhibits. An evidentiary hearing with live testimony is not required in all Rule 11 proceedings, and the law firm subject to sanctions in this case did not indicate at trial or on appeal the new evidence it needed to present to fully address the Rule 11 issues.

2. Pleadings— Rule 11 sanctions—legal sufficiency of pleadings—attorney's subjective belief—not sufficient

A law firm subjected to Rule 11 sanctions did not demonstrate that the trial court erred by concluding that an Amended Objection to a Guardian Ad Litem failed the legal sufficiency prong of Rule 11. The law firm subjected to sanctions (Rice Law) asserted that it had made a reasonable inquiry into the legal sufficiency of its motion, but cited no authority suggesting that its client had standing to object to the Guardian Ad Litem or that Rice Law could have reasonably believed that such a contention was warranted by existing law or a good faith argument from existing law. Whether the attorney who signed the motion "gleaned a belief" that the paper was legally sufficient goes to her subjective belief and does not address whether that belief was objectively reasonable.

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3. Pleadings— Rule 11 sanctions—supporting documents—disparaging and irrelevant comments

A law firm subject to Rule 11 sanctions (Rice Law) did not show that the trial court erred in finding that its memorandum of law filed in support of an Amended Objection to a Guardian Ad Litem in a domestic action was filled with unverified, disparaging and irrelevant comments. The mere existence of facts derogatory to the opposing party does not warrant their submission to the trial court without a showing that the facts are relevant to the issues before the court, and it is apparent from the face of the documents and supporting memorandum that the client did not have personal knowledge of much of the information that he was purporting to verify.

4. Pleadings— Rule 11 sanctions—improper purpose—disparaging comments—lack of standing—advantage in other aspects of dispute

The trial court's findings in a Rule 11 sanctions proceeding against a law firm (Rice Law) supported its conclusion of an improper purpose in filing an Amended Objection to a Guardian Ad Litem. Given findings that disparaging allegations were unverified and irrelevant, together with the unchallenged determination that the Rice Law's client lacked standing, the trial court could reasonably conclude that Rice Law's purpose was to gain an advantage in other aspects of the dispute and not to vindicate any rights of the client in connection with the GAL appointment.

5. Pleadings— Rule 11 sanctions—improper purpose—delay

The trial court properly concluded that filing a motion to remove counsel and an Amended Objection to a Guardian Ad Litem was intended to cause unnecessary delay and violated the improper purpose prong of Rule 11.

6. Pleadings— Rule 11 sanctions—dismissal of motions—standing

A law firm subjected to Rule 11 sanctions lacked standing in its appeal from those sanctions to challenge the dismissal of motions it had filed for the client. Neither a law firm nor an individual attorney is a party to an action brought on behalf of a client.

Judge WYNN concurring.

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Appeal by Rice Law, PLLC from order entered 20 April 2007 by Judge Phyllis M. Gorham in New Hanover County District Court. Heard in the Court of Appeals 13 May 2008.

Lisa Skinner Lefler for Rice Law, PLLC, appellant.

No brief filed on behalf of Douglas Dale Johns.

No brief filed on behalf of Janice Marie Johns, appellee.

No brief filed on behalf of Jessica Johns, appellee.

GEER, Judge.

Rice Law, PLLC appeals from the trial court's order imposing sanctions on the law firm under Rule 11 of the Rules of Civil Procedure. Although Rice Law contends that the trial court erred in entering a Rule 11 order without conducting an evidentiary hearing, the record reveals that the trial court considered documentary evidence. Whether to allow oral testimony or the presentation of further documentary evidence was a question that lay within the discretion of the trial court. Since Rice Law has failed to demonstrate that the trial court abused its discretion in this case and has failed to demonstrate that the trial court erred in concluding that Rice Law violated Rule 11, we affirm the trial court's order.

Facts

Rice Law represented Douglas Dale Johns in connection with proceedings arising out of his divorce from Janice Marie Johns. Mr. Johns and Ms. Johns were married on 12 June 1999, separated on 5 November 2005, and ultimately divorced in February 2007. They have one child, but Ms. Johns also has another daughter, Jessica Johns, from a prior marriage. During their separation, Ms. Johns filed a complaint and a motion for a domestic violence protective order ("DVPO") against Mr. Johns on 8 February 2006. Two days later, on 10 February 2006, Mr. Johns filed an action seeking custody of their child. On 17 March 2006, Mr. and Ms. Johns filed a stipulated dismissal of the DVPO action with prejudice and a consent order providing for temporary custody of their child and restraining Mr. Johns from approaching Ms. Johns or Jessica Johns.

On 30 March 2006, Ms. Johns filed an answer to Mr. Johns' complaint for custody and asserted counterclaims seeking permanent custody of their child, child support, post-separation support, alimony, equitable distribution, and attorney's fees. Mr. Johns filed a reply on 6 June 2006.

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On 6 October 2006, Jessica Johns filed a complaint and motion for a DVPO against Mr. Johns, alleging that he had violated the agreed-upon restraining order. Because Jessica Johns was 17 at the time, her mother, Ms. Johns, was appointed as her guardian ad litem (“GAL”) by the clerk of court. On 12 October 2006, Mr. Johns filed a motion to dismiss Jessica Johns’ action pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, an answer, a document entitled “Objection to Appointment of Guardian Ad Litem Janice Marie Johns and Motion to Dismiss Plaintiff’s Complaint and Motion for Domestic Violence Protective Order” (hereafter “Objection to GAL”), and a motion for Rule 11 sanctions.

The trial court conducted a hearing on 13 October 2006 on Mr. Johns’ motion to dismiss. The court orally allowed Jessica Johns’ oral motion to amend her complaint and denied Mr. Johns’ motion. The written order reflecting those rulings was entered on 19 October 2006. On 16 October 2006, before entry of the order and prior to Jessica Johns’ filing her amended complaint, Mr. Johns filed a motion to strike any amended or supplemental complaint as being “untimely” filed. The next day, 17 October 2006, Jessica Johns filed her amended complaint, as well as a motion for Rule 11 sanctions against Mr. Johns and Rice Law.

On 2 November 2006, Mr. Johns filed an “Amended Objection to Appointment of Guardian Ad Litem Janice Marie Johns and Motion to Dismiss Plaintiff’s Complaint and Motion for Domestic Violence Protective Order” (hereafter “Amended Objection to GAL”). Accompanying the Amended Objection to GAL was a “Memorandum of Law in Support of Defendant’s Objection to Appointment of Guardian Ad Litem Janice Marie Johns” (hereafter “Memorandum of Law”).

On 8 November 2006, Mr. Johns moved to amend the trial court’s 19 October 2006 order, again arguing that the amended complaint was untimely filed. On 18 December 2006, Mr. Johns also filed an answer to the amended complaint. The trial court entered an amended order consolidating Mr. Johns’ and Jessica Johns’ actions on 8 February 2007.

On 16 March 2007, Mr. Johns filed a “Motion to Consider Potential Conflicts of Interest Arising from Dual Representation of Plaintiff and GAL and If Found, to Remove Counsel of Record,” requesting that the trial court remove Linda B. Sayed as counsel for both Ms. Johns and Jessica Johns. In this motion, Mr. Johns repeated various allegations contained in the Objection to GAL and Amended Objection to GAL,

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added new allegations, and contended that if the GAL appointment was found improper, Linda B. Sayed, who had been both Ms. Johns' counsel and counsel in Jessica Johns' action, should be removed as counsel for both Jessica Johns and Ms. Johns "in all pending matters before the New Hanover County District Court." On 23 March 2007, Jessica Johns filed a motion to strike, dismiss, or deny the motion to remove Ms. Sayed and a motion for Rule 11 sanctions on the ground that Mr. Johns' motion was filed for an improper purpose.

On 26 March 2007, during a pre-trial conference, the parties agreed to convert the terms of the temporary custody order into a permanent custody order in exchange for Jessica Johns' dismissing her action for a DVPO against Mr. Johns. Rice Law contends that it was directed by the trial court to release the witnesses that were subpoenaed to testify at the hearing on Jessica Johns' action for a DVPO.

Despite the agreement to dismiss the DVPO action, Jessica Johns, through Ms. Johns as her GAL, refused to withdraw her motion for sanctions against Mr. Johns, and Mr. Johns refused to withdraw his pending motions and objections to Ms. Johns' serving as Jessica Johns' GAL. The trial court held a hearing the next day to rule on all outstanding issues, including: (1) Mr. Johns' motion to modify child and spousal support, (2) his motion to strike Jessica Johns' DVPO amended complaint, (3) his motion to amend the 19 October 2006 order, (4) his Amended Objection to GAL, (5) his motion to consider potential conflicts of interest, (6) his motion for Rule 11 sanctions, and (7) Jessica Johns' motion for Rule 11 sanctions.

The trial court first heard the motion to modify child and spousal support and related motions to hold Mr. Johns in contempt. During that hearing, both Mr. Johns and Ms. Johns called witnesses to testify in support of their positions. The trial court granted Mr. Johns' motion to reduce child support, found that Mr. Johns was in willful contempt for failure to pay post-separation support and attorneys' fees, and denied Mr. Johns' motion to reduce post-separation support.

After the trial court ruled on the motions related to support, the court indicated that it would consider the remaining motions. Counsel from Rice Law stated that he objected to the trial court's hearing any of those motions that day since Mr. Johns' witnesses had been released, and the motions required the presentation of evidence. The trial court overruled the objection and subsequently dismissed or denied all of Mr. Johns' motions and objections. With respect to Jessica Johns' motion for Rule 11 sanctions, the trial court heard oral

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argument, orally granted that motion, and imposed Rule 11 sanctions against Rice Law.

The trial court entered an order on 20 April 2007 setting out its rulings on Mr. Johns' motions and Jessica Johns' motion for Rule 11 sanctions. With respect to the Rule 11 motion, the trial court concluded that "[t]he Amended Objection to GAL is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Further, according to the order, "[t]he Amended Objection to GAL and supporting Memorandum of Law were filed for an improper purpose, that is, to harass and humiliate Janice Marie Johns, to cause unnecessary delay in this matter, and to needlessly increase the cost of litigation." The trial court found that Jessica Johns and her mother, as GAL, had jointly incurred \$4,000.00 to \$5,000.00 in attorneys' fees. The court then imposed a sanction of \$1,000.00 on Rice Law. Rice Law timely appealed the imposition of sanctions to this Court.¹

Discussion

[1] "[U]nder Rule 11, the signer certifies that three distinct things are true: the pleading is (1) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); (2) well grounded in fact; and (3) not interposed for any improper purpose." *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 322, 438 S.E.2d 471, 476 (1994). A violation of any one of these requirements "mandates the imposition of sanctions under Rule 11." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994).

In this case, the trial court imposed sanctions based on its determination that Rice Law's Amended Objection to GAL and accompanying Memorandum of Law were not well-grounded in law and were filed for an improper purpose. When reviewing the decision of a trial court to impose sanctions under Rule 11, an appellate court must determine whether the findings of fact of the trial court are supported by sufficient evidence, whether the conclusions of law are supported by the findings of fact, and whether the conclusions of law support the judgment. *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). The appropriateness of the sanction imposed is reviewed under an abuse of discretion stand-

1. Although the notice of appeal filed in this case was on behalf of both Rice Law and Mr. Johns, Mr. Johns has proceeded with a separate appeal (COA07-1411) and, therefore, this opinion addresses only the issues relating to Rice Law's appeal.

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ard. *Ward v. Jett Properties, LLC*, 191 N.C. App. 605, 607, 663 S.E.2d 862, 864 (2008).

As an initial matter, Rice Law contends that prior to imposing Rule 11 sanctions, the trial court was required to conduct an evidentiary hearing. It is well established that due process requires that a party subject to sanctions under Rule 11 must be given timely notice of the bases for the sanctions and an opportunity to be heard prior to the imposition of sanctions. *See Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 438 (1998) (“ ‘Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution.’ ” (quoting *McDonald’s Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994))). The question remains whether “the opportunity to be heard” necessarily requires an evidentiary hearing.

Rice Law cites *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 568 S.E.2d 305 (2002), in support of the law firm’s contention that “the trial court must take evidence during the hearing on sanctions for the order to be upheld.” Because the trial court in *Static Control* conducted an evidentiary hearing, nothing in this Court’s opinion discusses whether such a hearing is always required. In reciting the standard of review, this Court noted, as we have above, that the standard of review requires this Court to determine whether the trial court’s findings of fact are supported by evidence, *id.* at 603, 568 S.E.2d at 308, but that requirement does not necessarily mean that a trial court must conduct a hearing involving live testimony. *See* N.C.R. Civ. P. 43(e) (“When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.”); *cf. Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (“If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits.”), *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). *Static Control* cannot be read, therefore, as requiring an evidentiary hearing with live testimony in all Rule 11 proceedings.

This Court specifically addressed the issue in *Taylor v. Taylor Prods., Inc.*, 105 N.C. App. 620, 414 S.E.2d 568 (1992), *overruled on other grounds by Brooks v. Giesey*, 334 N.C. 303, 432 S.E.2d 339

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(1993). The Court noted that, in some cases, circumstances would require an evidentiary hearing and cited *In re Kunstler*, 914 F.2d 505, 521 (4th Cir. 1990), *cert. denied sub nom. Kunstler v. Britt*, 499 U.S. 969, 113 L. Ed. 2d 669, 111 S. Ct. 1607 (1991), as holding that an “evidentiary hearing [is] required when necessary to resolve issues of fact or issues of credibility prior to determining whether sanctions should be imposed[.]” *Taylor*, 105 N.C. App. at 629, 414 S.E.2d at 575. The Court then acknowledged that such a hearing could, as provided by N.C.R. Civ. P. 43(e), be conducted based on affidavits. *Id.* According to *Taylor*, a trial court is “required” to give the non-moving party “an opportunity to present evidence,” *id.* at 630, 414 S.E.2d at 575, but whether that evidence includes oral testimony or depositions is “in the discretion of the court.” *Id.* at 629, 414 S.E.2d at 575.

In this case, the trial court did not base its Rule 11 decision only on the arguments of counsel, but rather, as its order states, “considered the verified Amended Objection to GAL, the Memorandum of Law (both of which are signed by Raven Rassette on behalf of Rice Law, PLLC), the documents in the court files, and arguments of counsel.” The order was “[b]ased on the evidence and legal argument . . .” (Emphasis added.) The precise issue before this Court is not, therefore, whether the trial court should have conducted an evidentiary hearing, but rather whether the trial court abused its discretion in not allowing Mr. Johns and Rice Law to present oral testimony and additional exhibits.

Rice Law did not, however, indicate at trial and has not addressed on appeal what evidence—apart from the documentation already filed—it needed to present in order to fully address the Rule 11 issues. Indeed, although Rice Law has pointed to the unidentified witnesses that it released from subpoena the day before the hearing, the only information provided by Rice Law regarding the nature of the witnesses’ testimony is that they were intended to testify in connection with the DVPO action. Presumably, therefore, the witnesses would have testified about facts relevant to whether Mr. Johns violated the consent DVPO.

While perhaps those witnesses might have been relevant to whether the filings had a factual basis, the trial court did not conclude that the filings violated Rule 11’s factual sufficiency prong. Without any showing at trial or on appeal as to how those released witnesses would be relevant to the legal sufficiency and improper purpose prongs or what additional witnesses and exhibits were necessary, we cannot conclude that the trial court abused its discretion

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in deciding not to defer hearing the Rule 11 motion in order to allow the presentation of oral testimony or other evidence.

[2] Rice Law next challenges the trial court's conclusion that the Amended Objection to GAL "is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." This conclusion was based on the trial court's determination that "[Mr. Johns] has no standing to contest the appointment of Janice Marie Johns as the Guardian ad Litem for her 17 year-old daughter, Jessica Johns, particularly in light of the fact that Jessica and Janice Marie Johns moved out of Mr. Johns['] residence in November 2005, and he and Janice Marie Johns are divorced. Mr. Johns does not stand *in loco parentis* for the minor child."

"[A] two-step analysis is required when examining the legal sufficiency of a claim subject to Rule 11 inquiry." *Ward*, 191 N.C. App. at 607-08, 663 S.E.2d at 864. The first step is "determin[ing] the facial plausibility of the paper. 'If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper.'" *Id.* at 608, 663 S.E.2d at 864 (quoting *Mack v. Moore*, 107 N.C. App. 87, 91, 418 S.E.2d 685, 688 (1992)). If, however, the paper is not facially plausible, "the second issue is whether, based on a reasonable inquiry into the law, the alleged offender 'formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed.'" *Id.* (quoting *Mack*, 107 N.C. App. at 91, 418 S.E.2d at 688). In other words, "Rule 11 sanctions are appropriate where the offending party either failed to conduct reasonable inquiry into the law or did not reasonably believe that the paper was warranted by existing law." *Id.*

Rice Law's entire argument regarding the legal sufficiency of its Amended Objection to GAL consists of one paragraph in which it states:

The trial court's imposition of sanctions must fail on this prong of the test as well. Rice Law undertook to explain the motions filed, not only in the body of the motions, but by submitting research memoranda as well. From this research, Rice Law gleaned a belief that any reasonable inquirer would believe that the motions and pleadings filed were based on existing law or the modification of the law as it existed at the time the pleadings were filed.

In this brief argument, Rice Law asserts that it made a "reasonable inquiry," but it has, nonetheless, cited no authority at all on appeal

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suggesting that Mr. Johns had standing or that Rice Law could have reasonably believed that such a contention was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Whether the attorney who signed the Amended Objection to GAL on behalf of Rice Law “gleaned a belief” that the paper was legally sufficient goes to her subjective belief and does not address whether that belief was objectively reasonable. *See id.* at 608, 663 S.E.2d at 865 (“[A]ssuming a reasonable inquiry, the dispositive question is whether a reasonable person in plaintiff’s position . . . after having read and studied the applicable law, would have concluded the [paper] was warranted by existing law.”). Rice Law has, therefore, failed to demonstrate that the trial court erred in concluding that its Amended Objection to GAL failed the legal sufficiency prong of Rule 11.

[3] Turning to the improper purpose prong, the trial court found with respect to the Amended Objection to GAL that there is a presumption that acts done by the clerk of court—which would include appointment of a GAL—“are proper acts taken within the bounds of the law” and that Mr. Johns “failed to present any evidence to rebut this presumption.” The trial court specifically found that the Memorandum of Law filed in support of the Amended Objection to GAL “is filled with unverified, irrelevant and disparaging comments about the personal history and character of Janice Marie Johns and [Jessica Johns].” After determining in addition that Mr. Johns lacked standing to contest the appointment of Ms. Johns as GAL and that the Amended Objection to GAL failed the legal sufficiency prong of Rule 11, the trial court then concluded that “[t]he Amended Objection to GAL and supporting Memorandum of Law were filed for an improper purpose, that is, to harass and humiliate Janice Marie Johns, to cause unnecessary delay in this matter, and to needlessly increase the cost of litigation.”

Rice Law does not specifically address the bases for the trial court’s finding of improper purpose, but rather argues that it “had the obligation to their client to use the facts and their research to advocate his position. Some of the allegations made are unsavory, but a lawyer must take the facts as he finds them.” According to the trial transcript and the brief on appeal, Rice Law believes that their filings cannot be for an improper purpose if they were “for the purpose of litigating Douglas’s claims in high-conflict litigation.”

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It is well established that “[a]n improper purpose is ‘any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.’” *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) (quoting *Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689). This test does not mean, however, that any action to gain an advantage for one’s client in a litigation has a permissible purpose. As the First Circuit stressed in *Jensen v. Phillips Screw Co.*, 546 F.3d 59, 61 (1st Cir. 2008), “[t]here is a line between zealous representation and abuse of the processes of litigation. Lawyers who overstep it do so at their peril.”

The mere existence of facts derogatory to the opposing party does not warrant their submission to the trial court without a showing that the facts are relevant to the issues before the court. Yet, Rice Law has not specifically addressed how the derogatory comments about Ms. Johns and Jessica Johns, including an extensive discussion of Ms. Johns’ prior marital history and issues with prior husbands, were relevant in light of the controlling law regarding the appointment of guardians ad litem. In fact, Rice Law never mentions the relevant law regarding guardians ad litem at any place in its brief. We cannot, therefore, conclude that the trial court erred in determining that Rice Law included information in its filings that was irrelevant to the pending objection.²

With respect to the trial court’s determination that Mr. Johns, when pursuing his Amended Objection to GAL, failed to present evidence to rebut the presumption that the clerk of court acted within the bounds of law when appointing the GAL, the record indicates that Rice Law did not attach any affidavits or other written evidence to support the disparaging allegations in the objections. The only evidence presented by Mr. Johns in support of his Amended Objection to GAL was his verifications of the initial Objection to GAL and the Amended Objection. It is, however, apparent from the face of those documents and the supporting Memorandum of Law that Mr. Johns did not have personal knowledge of much of the information that he was purporting to verify. See *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (“A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively

2. Nothing in this opinion is intended to hold that the type of information presented by Mr. Johns, if in admissible form, would never be relevant with respect to the appointment of a GAL. We simply hold that Rice Law has failed to demonstrate, for this case, the relevance of the information.

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that the affiant is competent to testify to the matters stated therein.”); N.C.R. Civ. P. 11(b) (providing that a verification “shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true”); N.C.R. Civ. P. 56(e) (providing that affidavits filed in connection with motion for summary judgment “shall be made on personal knowledge”). Moreover, the Memorandum of Law contains additional unsubstantiated statements not also included in the objections. Accordingly, Rice Law has not shown that the trial court erred in finding that the Memorandum of Law was filled with unverified and irrelevant disparaging comments.

[4] Thus, we conclude that the trial court’s findings related to the improper purpose are supported by the record. The question remains whether those findings in turn support the trial court’s conclusion that Rice Law violated Rule 11’s improper purpose prong.

“Under Rule 11, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose.” *Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689. Because an objective standard is employed, “ ‘an improper purpose may be inferred from the alleged offender’s objective behavior.’ ” *Ward*, 191 N.C. App. at 609, 663 S.E.2d at 865 (quoting *Kohler Co. v. McIvor*, 177 N.C. App. 396, 404, 628 S.E.2d 817, 824 (2006)). In assessing that behavior, we look at “the totality of the circumstances.” *Mack*, 107 N.C. App. at 94, 418 S.E.2d at 689.

Here, given the findings of fact that the disparaging allegations were unverified and irrelevant, together with the unchallenged determination by the trial court that Mr. Johns had no standing to file his objections, the trial court could reasonably conclude that Rice Law’s purpose was to gain an advantage in other aspects of the dispute between Mr. Johns and Ms. Johns and not to vindicate any rights of Mr. Johns in connection with Ms. Johns’ GAL appointment. Indeed, the trial court found and Rice Law does not dispute that Mr. Johns had no rights with regard to the appointment of Jessica Johns’ GAL. These circumstances—Rice Law’s objective behavior—warrant a determination that the Amended Objection to GAL and supporting Memorandum of Law were filed for the improper purpose of harassing and humiliating Ms. Johns. See *Polygenex Int’l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 253, 515 S.E.2d 457, 463 (1999) (“Since the complaint was facially implausible, not well-grounded in fact and not

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warranted by existing law, we conclude that the trial court properly inferred here that the complaint was interposed for the improper purpose of harassing defendants.”); *Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689 (holding that improper purpose could be inferred from attorney’s filing of lien with no legal basis after attorney had withdrawn from client’s representation out of anger with client).

[5] With respect to the trial court’s further determination that the filings were intended “to cause unnecessary delay in this matter, and to needlessly increase the cost of litigation,” we note that Rice Law also filed, as the trial court found, a “Motion to Consider Potential Conflicts of Interest Arising from Dual Representation of Plaintiff and GAL And If Found, to Remove Counsel of Record”—a motion directly arising out of the Amended Objection to GAL. The granting of this motion—seeking removal of Ms. Johns’ attorney from all proceedings and not just with respect to the action involving the GAL—would unquestionably have delayed the proceedings and increased the cost of litigation by requiring Ms. Johns and her daughter to obtain new counsel. This additional filing supports the trial court’s finding that the purpose of the Amended Objection to GAL was to delay the proceedings and increase the cost of litigation.

Rice Law, however, further argues that the sanctions award was in error because Mr. Johns himself should have been awarded sanctions based on Ms. Johns’ proceeding improperly in pursuing the DVPO on behalf of Jessica Johns. That argument is, however, beside the point since it does not address the issue whether Rice Law had an improper purpose in filing the Amended Objection to GAL and the supporting Memorandum of Law. The time-honored phrase that “two wrongs don’t make a right” illustrates the fallacy of Rice Law’s logic.

Therefore, we hold that the trial court properly concluded, based upon an objective test, that the filing of the Amended Objection to GAL and supporting Memorandum of Law violated the improper purpose prong of Rule 11. Accordingly, the trial court did not err in concluding that Rice Law was subject to Rule 11 sanctions.

The final step in reviewing the imposition of Rule 11 sanctions requires this Court to consider, under an abuse of discretion standard, the appropriateness of the sanction actually imposed. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714. Since Rice Law has not argued that the trial court abused its discretion when it sanctioned Rice Law in the amount of \$1,000.00, we need not specifically address that issue,

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and we affirm the trial court's order requiring Rice Law to pay \$1,000.00 in attorneys' fees as a Rule 11 sanction.

[6] In its final argument on appeal, Rice Law contends that the trial court erred in dismissing several motions it filed on behalf of Mr. Johns. In its 20 April 2007 order, the trial court "summarily dismissed" Mr. Johns' (1) Motion for Sanctions; (2) Motion to Strike Amended Complaint; (3) Motion to Consider Conflicts of Interest; and (4) Amended Objection to GAL. Rice Law contends that the trial court should have held a hearing to consider evidence regarding these motions prior to dismissing them.

"Clearly, North Carolina law does not permit the taking of an appeal by one who is not a party to the action." *Seeley v. Seeley*, 102 N.C. App. 572, 573, 402 S.E.2d 870, 871 (1991) (addressing appeal by attorney of order reducing amount of attorneys' fees awarded). Neither a law firm nor an individual attorney is a party to an action brought on behalf of a client. *Id.* at 572, 402 S.E.2d at 871. Thus, Rice Law lacks standing to challenge the dismissal of Mr. Johns' motions in its appeal from the Rule 11 sanctions.

Affirmed.

Judge CALABRIA concurs.

Judge WYNN concurs with a separate opinion.

WYNN, Judge, concurring.

I agree that the trial court properly determined that Mr. John's Amended Objection to GAL was not warranted by existing law or good faith argument for the extension, modification, or reversal of existing law. Since only one ground is needed to support a Rule 11 sanction, we need not further determine if the Amended Objection to GAL was filed for an improper purpose. *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 (1994).

I further emphasize that in determining whether the trial court abused its discretion by refusing to hear testimony from Mr. Johns' witnesses, it is significant that Mr. Johns and Rice Law did not proffer their evidence to either the trial court or this court. Without a proffer of the evidence that would have been presented, nothing in the record shows that the trial court abused its discretion in this

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matter. See *Miller v. Forsyth Mem. Hosp., Inc.*, 174 N.C. App. 619, 621, 625 S.E.2d, 115, 166 (2005) (“Our Supreme Court has stated that for a party to preserve the issue of the exclusion of evidence or testimony for appellate review, its importance must be made to appear in the record and a specific offer of proof is required, unless the significance of the evidence is discernable from the record.”)

STATE OF NORTH CAROLINA v. ADRIAN DOMINIC WATKINS, DEFENDANT

No. COA07-1213

(Filed 3 February 2009)

1. Evidence— prior trial attorney’s testimony—alleged privileged communications—communication made for purpose of being conveyed by attorney to others

The trial court did not err in a second-degree murder and first-degree burglary case by admitting the testimony of defendant’s prior trial counsel at the hearing on defendant’s motion to withdraw his guilty plea even though defendant contends it violated his attorney-client privilege because: (1) our Supreme Court has noted that if it appears that a communication was not regarded as confidential or that the communication was made for the purpose of being conveyed by the attorney to others, the communication is not privileged; (2) defendant provided the 15 November 2004 information to the attorney precisely for the purpose of conveying it to the prosecutor, and thus that conversation was not a confidential communication to which the attorney-client privilege attached; and (3) in regard to the 30 January 2004 conversation, even assuming without deciding that the conversation was privileged and that defendant did not waive the privilege, defendant failed to demonstrate that he was prejudiced by the disclosure.

2. Criminal Law— refusal to allow withdrawal of guilty plea—delay in time—prejudice to State

The trial court did not err in a second-degree murder and first-degree burglary case by refusing to allow defendant to withdraw his guilty plea because: (1) in regard to whether defendant maintained his innocence, defendant’s statement that “I ain’t completely innocent, but I ain’t completely guilty” was equivocal;

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(2) although defendant contends he never gave his prior attorney the information contained in the 24 November 2004 proffer of testimony, defendant's argument relying on his own testimony is foreclosed by the trial court's unchallenged finding that defendant provided the attorney with the answers to the prosecutor's questions on 15 November 2004; (3) the State's forecast of evidence included defendant's proposed testimony submitted to the prosecutor, evidence of consistent statements and proposed testimony of his codefendants, and evidence of a detective's investigation that implicated defendant; (4) defendant's delay in requesting the withdrawal of his plea far exceeded the lapse in time in other cases in which our appellate courts have upheld denials of motions to withdraw; (5) despite defendant's claims to the contrary, the trial court found there was absolutely no indication that defendant did not fully understand the consequences of his plea; (6) the multiple discussions and review of the plea bargain over several months indicated the absence of haste or coercion in defendant's original decision to plead guilty; and (7) the State demonstrated that its case would be prejudiced if defendant were allowed to withdraw his guilty plea as all the codefendants had already been sentenced and thus could not be relied upon to testify against defendant at trial.

3. Constitutional Law; Sentencing— ex post facto law— change in classification of prior conviction—prior record level

The trial court did not err in a second-degree murder and first-degree burglary case by calculating defendant's prior record level by treating a prior conviction for a sale of cocaine as a Class H felony as it was classified at the time of sentencing rather than as a Class G Felony as it was classified at the time of the offense, resulting in defendant's being a Level IV rather than a Level III offender, because: (1) contrary to defendant's argument, there was no ambiguity in the statute which provides that the classification of an offense at the time of sentencing should be used in calculating the prior record level, N.C.G.S. § 15A-1340.14(c); and (2) the constitutional prohibition on ex post facto laws was not implicated by application of N.C.G.S. § 15A-1340.14(c) when defendant's increased sentence due to the change in the classification of his prior conviction served only to enhance his punishment for the present offenses and not to punish defendant for his prior conviction.

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Appeal by defendant from order and judgments entered 2 April 2007 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 15 April 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

William D. Auman for defendant-appellant.

GEER, Judge.

Defendant Adrian Dominic Watkins appeals from the trial court's order denying his motion to withdraw his guilty plea and from judgments entered pursuant to that plea for second degree murder and first degree burglary. The central issue in this appeal is whether the trial court should have excluded, based on the attorney-client privilege, portions of defendant's former attorney's testimony at the hearing on his motion to withdraw his plea. Based upon our review of the record, we have concluded that certain portions of the challenged testimony related to unprivileged communications, while, with respect to the remaining testimony, defendant has failed to demonstrate prejudice even if the disclosed communications were privileged. Moreover, we hold that the trial court, based on the evidence before it, did not err in denying defendant's motion to withdraw his plea. Accordingly, we affirm.

Facts

In its order denying defendant's motion to withdraw his guilty plea, the trial court found the following facts.¹ On 15 March 2004, defendant was indicted for first degree murder and first degree burglary stemming from a home invasion on 15 December 2003 by four men that resulted in the death of Anthony Graham. Mark Hayes, an attorney certified to represent defendants in potential capital cases, was appointed as defendant's primary counsel.

After the prosecutor provided discovery to defendant, Hayes and defendant reviewed the discovery and discussed possible plea bargains. The discovery received from the prosecutor included confessions and proffers of testimony from defendant's co-defendants. Having confirmed with the prosecutor that co-defendants Robert Blair and Darius Rutledge had already confessed, Hayes told defendant that he believed that they were pursuing plea bargains and would

1. Defendant has not assigned error to these findings, and they are, therefore, binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

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testify that defendant was the “ringleader” if defendant insisted on going to trial. Hayes then discussed with defendant whether Hayes should attempt to negotiate a plea bargain with the prosecutor.

The prosecutor subsequently submitted a set of 12 questions for defendant to answer as a proffer of expected testimony should defendant testify against his co-defendants. In a letter dated 24 November 2004, Hayes provided the prosecutor with defendant’s proffer of proposed testimony.

All four defendants involved in the home invasion had been charged with first degree murder. While the other co-defendants had also been charged with either armed robbery or attempted armed robbery, defendant was charged with first degree burglary. By 28 March 2005, all of the co-defendants had pled guilty and agreed to testify. Concerned that the co-defendants would turn on defendant, Hayes went to the jail and discussed with defendant the plea agreement offered by the prosecutor. Under the terms of the offer, defendant would serve 220 to 273 months on a reduced charge of second degree murder followed by 94 to 122 months for first degree burglary. Defendant would have to testify truthfully regarding the offenses, and the State would dismiss two unrelated charges of possession with intent to sell cocaine. Defendant agreed to accept the plea offer.

On 29 March 2005, defendant and Hayes appeared in Guilford County Superior Court for entry of his guilty plea. After the trial judge reviewed with defendant the terms of the plea agreement, and the prosecutor summarized the factual basis for the plea, defendant announced that he no longer wanted to accept the plea arrangement. During defendant’s exchange with the trial judge, defendant stated: “I ain’t completely innocent, but I ain’t completely guilty.”

After defendant rejected the plea, Hayes researched all of the possible outcomes that could result if defendant continued to refuse the offer and the case went to trial. On 30 March 2005, Hayes discussed with defendant the possible charges and sentences to which defendant would be exposed. At the end of the hour-long meeting, defendant told Hayes that he wanted to accept the prosecutor’s offer.

On 31 March 2005, defendant returned to court with Hayes, and the trial judge entered defendant’s guilty plea. The trial judge found that there was a factual basis for the plea; that defendant was satisfied with his legal counsel; that defendant was competent to stand trial; and that the plea was defendant’s informed choice and entered

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into freely, voluntarily, and understandingly. The trial judge accepted defendant's plea and continued judgment.

Beginning on 21 June 2005, defendant expressed doubts about his plea agreement. Over several months defendant told Hayes that he no longer wanted to accept the deal as he considered a 26-year sentence "just too much time." In response, Hayes reviewed with defendant the favorable and unfavorable consequences of going through with the deal or withdrawing his plea.

Co-defendant Fanton Cummings had originally pled guilty pursuant to a plea agreement, but subsequently withdrew his plea and was tried. During Cummings' trial, in April 2006, the question arose as to whether defendant was willing to testify as required by his plea agreement. When asked in open court whether he wished to testify, defendant stated that he would testify. Neither the State nor Cummings, however, called defendant to testify. Co-defendants Blair and Rutledge testified, and Cummings was convicted of Graham's murder.

The State prayed for judgment in connection with defendant's guilty plea on 30 May 2006. At that time, Hayes reported to the trial court that defendant wanted to withdraw his plea. Hayes also sought to withdraw as defendant's counsel and moved to have substitute counsel appointed to file the motion to withdraw defendant's plea. The trial court granted Hayes' motion to withdraw as counsel and appointed attorney Craig Blitzer to represent defendant.

Defendant's motion to withdraw his plea was heard on 27 March 2007. In support of his motion, defendant testified that on 30 May 2005, the day after he first rejected the plea, Hayes visited him in jail and told him that if he did not accept the offer, he would be subject to being indicted on armed robbery and violent habitual felon charges, which could result in more active time than the proposed plea. Based on that discussion, defendant chose to enter his plea on 31 March 2005. Defendant testified that, at some point later, he called Hayes and told him that he wanted to withdraw his guilty plea. He produced a letter at the hearing dated 10 May 2005 and addressed to Hayes that expressed his desire to withdraw his plea. Defendant stated that Hayes told him that "if you don't want to go through with the plea all you've got to do when [Cummings'] trial come[s] up [is] refuse to testify." Defendant testified that he later wrote Hayes and asked him to file paperwork to withdraw his appeal and get a trial date.

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On cross-examination, defendant stated that he did not know where Hayes had obtained the information contained in the 24 November 2004 proffer of expected testimony. When the prosecutor attempted to ask defendant what information he provided Hayes, defense counsel objected on the grounds of attorney-client privilege, asserting that since defendant did not testify regarding the letter during direct-examination, defendant could not be questioned about it on cross-examination. The trial court overruled the objection, reasoning that defendant had waived the privilege. The trial court stated: "If [defendant]'s going to testify about things his lawyer told him, he's going to have to answer questions about their discussions and meetings."

When the State called Hayes to testify, defense counsel renewed his objection based on attorney-client privilege. The trial court, however, ruled that "[Hayes] may answer questions about his relationship with the defendant and his conversations with the defendant." The State offered into evidence the proffer of defendant's proposed testimony, and Hayes testified that defendant had given him the information contained in the letter. Hayes explained that he visited defendant in jail with the prosecutor's 12 questions, defendant gave him the answers to the questions, Hayes typed up the answers in the form of a letter, he reviewed the letter with defendant, and he then mailed the letter to the prosecutor.

The State also asked Hayes about what defendant had told him during a conversation on 30 January 2004 about defendant's involvement in the crimes. Over defendant's objection, Hayes described in detail defendant's account of what occurred during the home invasion, including defendant's specific role.

Hayes also testified that his notes indicated that defendant did not express reluctance about whether to go through with the plea agreement until 21 June 2005. Hayes reported that defendant would waver back and forth, but that he never actually instructed Hayes to move to withdraw his guilty plea. Hayes explained that defendant repeatedly expressed concern about the length of his sentences under the plea deal, but that after discussing the consequences of withdrawing the plea, defendant would acknowledge that it was the best deal he could get under the circumstances. Hayes testified that during these discussions with defendant, he would ask defendant about filing a motion to withdraw, but that each time, defendant would tell him not to file the motion. Hayes also stated

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that he had never seen the 10 May 2005 letter that defendant testified he mailed to Hayes.

The only other witness to testify at the hearing was Detective Michael Conwell. Detective Conwell testified that the initial investigation indicated that four individuals were involved in a home invasion that resulted in Graham's being shot in the back of the head with a .12 gauge shotgun. When the crime scene was searched, a cell phone was found underneath a window, and "the window had the appearance of someone having made a very hasty exit through it" Detective Conwell called the last number dialed and asked the woman who answered if she knew whose number it was. The woman said that the cell phone belonged to someone named Dominic Watkins. When the police first interviewed Natasha Mack, who had participated in the planning of the robbery, she stated that several men had come to her house on the day of the home invasion, and one of them had red dreadlocks. When Detective Conwell went to the jail to question defendant, who had been arrested on an unrelated matter, defendant had red dreadlocks. Detective Conwell also testified that co-defendants Blair and Rutledge gave statements after being arrested in which they asserted that defendant was involved in the home invasion, that defendant had rented the U-Haul truck used in the robbery, and that defendant was carrying a .40 caliber handgun during the crime.

The trial court entered its order denying defendant's motion to withdraw his guilty plea on 2 April 2007. In the order, the trial court made findings on each of the factors set out in *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990), for determining whether a motion to withdraw a plea should be allowed. Specifically, the court found, based on defendant's statements in court and his proffer of proposed testimony, that defendant had not continuously maintained his innocence throughout the proceedings. Based on the detective's testimony and the statements of co-defendants Blair and Rutledge, which dovetailed with defendant's proffered testimony, the court found that the State's proffer of evidence against defendant was "far stronger than normally heard in similar cases." The court further found that defendant had "waffled" for almost two years, "[a] lengthy amount of time" between entry of his plea and his motion to withdraw it. Finally, the court found that "defendant had extremely competent and capable counsel in Hayes . . . and later Blitzer"; that "[t]here [wa]s absolutely no indication that defendant did not fully understand the consequences

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of his plea”; and that there was no evidence of haste, coercion, or confusion.

Based on these findings, the trial court concluded that defendant had not demonstrated a “fair and just reason to allow the defendant to withdraw his guilty plea.” In addition, the trial court found that even if defendant had met his burden, the State had shown concrete prejudice to its case if defendant were allowed to withdraw his plea in that all co-defendants had been sentenced and thus could not be compelled to testify against defendant at trial. The trial court, therefore, denied defendant’s motion.

Consistent with the plea agreement, the trial court sentenced defendant to a presumptive-range sentence of 220 to 273 months imprisonment for the second degree murder charge, followed by a presumptive-range sentence of 94 to 122 months imprisonment for the first degree burglary charge. Defendant timely appealed to this Court.

I

[1] Defendant first challenges the admission of Hayes’ testimony at the hearing on his motion to withdraw his plea. Defendant maintains that the testimony violated his attorney-client privilege. The attorney-client privilege applies to a particular communication if:

- (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). The person asserting the privilege bears the burden of establishing each of the five elements. *In re Investigation of Death of Eric Miller*, 357 N.C. 316, 336, 584 S.E.2d 772, 787 (2003). “If any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged.” *Id.* at 335, 584 S.E.2d at 786.

Defendant objected at the hearing to Hayes testifying at all on the basis that his testimony would concern matters communicated during the course of that representation. On appeal, defendant limits his argument to those portions of Hayes’ testimony regarding the “intri-

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cate details of the crime itself that were allegedly relayed to him by the defendant,” including: (1) a 15 November 2004 meeting during which defendant allegedly provided Hayes with his proposed testimony to be relayed to the prosecutor; and (2) a 30 January 2004 conversation Hayes had with defendant in which defendant discussed his participation in the crimes.

With respect to the 15 November 2004 discussion between defendant and Hayes, the trial court found:

Hayes discussed with defendant seeking a plea offer for defendant from the prosecutor. The prosecutor had submitted twelve questions to Hayes. On November 15, 2004 at the jail Hayes obtained from defendant answers to these questions. Hayes then put these answers into the form of a letter to the prosecutor and returned to the jail to review the draft with the defendant. Defendant ratified the letter as accurate. Hayes then sent the letter dated November 24, 2004 to assistant district attorney Kelly Thompson. This letter was a written proffer of potential testimony that defendant could offer at a trial of any co-defendant(s) if a satisfactory plea arrangement were agreed upon.

As defendant failed to assign error to this finding, it is binding on appeal. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523, 126 S. Ct. 1773 (2006).

The trial court’s finding establishes that defendant disclosed the information to Hayes on 15 November 2004 so that Hayes could then provide it to the prosecutor in an attempt to negotiate a plea arrangement. As our Supreme Court pointed out in *Miller*, 357 N.C. at 335, 584 S.E.2d at 786, “if it appears that a communication was not regarded as confidential or that the communication was made for the purpose of being conveyed by the attorney to others, the communication is not privileged.” Thus, because defendant provided the 15 November 2004 information to Hayes precisely for the purpose of conveying it to the prosecutor, that conversation was not a “confidential” communication to which the attorney-client privilege attached. *See State v. McIntosh*, 336 N.C. 517, 524, 444 S.E.2d 438, 442 (1994) (holding that attorney-client privilege did not apply to attorney’s statements to police as defendant had “necessarily authorized” counsel to “inform” police that defendant wanted to surrender).

Turning to the admission of Hayes’ testimony about his 30 January 2004 conversation with defendant, even assuming—without deciding—that the conversation was privileged and that defendant

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did not waive the privilege, defendant has failed to demonstrate that he was prejudiced by the disclosure. N.C. Gen. Stat. § 15A-1443(a) (2007) provides that “[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.” In this appeal, therefore, defendant must demonstrate that if Hayes’ testimony regarding the 30 January 2004 conversation had not been admitted, there is a reasonable possibility that the trial court would have granted defendant’s motion to withdraw his guilty plea. We hold that defendant cannot make the necessary showing.

The testimony regarding the 30 January 2004 conversation related to the strength of the State’s proffer of evidence regarding defendant’s guilt. Apart from that conversation, the trial court had before it the 24 November 2004 letter detailing defendant’s proposed testimony, which establishes defendant’s guilt of murder and burglary,² testimony regarding the confessions of co-defendants substantially implicating defendant, and evidence of defendant’s cell phone being present at the crime scene under a broken window. In light of this evidence, we conclude that there is no reasonable possibility that the trial court would have granted defendant’s motion in the absence of the testimony of the 30 January 2004 attorney-client conference.

II

[2] Defendant next claims that the trial court erred in refusing to allow him to withdraw his guilty plea. Much of defendant’s argument on appeal hinges on his contentions regarding the underlying facts. Since, however, defendant has not assigned error to the trial court’s findings of fact, they are binding on appeal notwithstanding the presence of contrary evidence in the record. *Campbell*, 359 N.C. at 662, 617 S.E.2d at 13. The trial court’s findings must nevertheless support its conclusions of law. *Id.*

Where, as here, “the defendant seeks to withdraw his guilty plea before sentenc[ing], he is generally accorded that right if he can show any fair and just reason.” *Handy*, 326 N.C. at 536, 391 S.E.2d at 161 (quoting *State v. Olish*, 164 W. Va. 712, 715, 266 S.E.2d

2. Defendant does not argue on appeal that evidence of his proposed testimony was inadmissible under N.C.R. Evid. 410 as discussions in connection with plea negotiations. Nothing in this opinion, therefore, should be read as addressing that issue.

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134, 136 (1980)). The defendant bears the burden of proving that the motion to withdraw the guilty plea is “supported by some ‘fair and just reason.’” *State v. Robinson*, 177 N.C. App. 225, 229, 628 S.E.2d 252, 255 (2006) (quoting *State v. Meyer*, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992)). In evaluating whether the defendant has demonstrated a fair and just reason for withdrawing his or her plea, courts must consider the following factors:

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

Id. (quoting *Handy*, 326 N.C. at 539, 391 S.E.2d at 163).

If the defendant establishes a fair and just reason for withdrawal of his plea, “[t]he State may refute the [defendant]’s showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea.” *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. This Court “review[s] the record independent of the trial court’s action [to] determine, ‘considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow the motion to withdraw.’” *State v. Graham*, 122 N.C. App. 635, 637, 471 S.E.2d 100, 101 (1996) (quoting *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993)).

As to whether defendant maintained his innocence, defendant points to a 1 April 2007 letter defendant sent to the trial court, in which he states: “First and foremost I would like to proclaim my innocence and wishes to have a(n) trial.” On the other hand, the trial court found in its order that defendant had admitted on the record two years earlier, during the 29 March 2005 hearing: “I ain’t completely innocent, but I ain’t completely guilty.”

We have previously held that statements less equivocal than defendant’s were insufficient assertions of innocence under *Handy*. In *Graham*, 122 N.C. App. at 637, 471 S.E.2d at 102, the defendant stated that “he ‘always felt that he was not guilty. . . .’” In concluding that the defendant in *Graham* had failed to show a fair and just reason for withdrawing his guilty plea, we held that the defendant’s statement was not a “concrete assertion of innocence” under *Handy*. *Id.* Similarly, in *State v. Davis*, 150 N.C. App. 205, 207, 562 S.E.2d 590, 592

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(2002), we held that the defendant had not made a definitive assertion of innocence when he answered “No, sir” to defense counsel’s question: “Do you feel like you’re guilty of second degree murder?” In this case, defendant’s statement “I ain’t completely innocent, but I ain’t completely guilty” is even more equivocal regarding defendant’s innocence than the statements made in *Graham* and *Davis*.

In support of his position that he has always maintained his innocence, defendant denies that he ever gave Hayes the information contained in the 24 November 2004 proffer of testimony. Defendant’s argument relying on his own testimony is foreclosed by the trial court’s unchallenged finding that defendant provided Hayes with the answers to the prosecutor’s questions on 15 November 2004.

As for the strength of the State’s proffer of evidence in support of the plea, defendant maintains that the State relied primarily on Hayes’ testimony divulging confidential communications protected by the attorney-client privilege. Defendant argues that when Hayes’ testimony is excluded, the State’s evidence against him is weak. To the contrary, the State’s forecast included defendant’s proposed testimony submitted to the prosecutor, evidence of consistent statements and proposed testimony of his co-defendants, and evidence of Detective Conwell’s investigation that implicated defendant.

With respect to the length of time between the entry of the plea and defendant’s expression of a desire to withdraw the plea, defendant asserts that he began asking Hayes to move to withdraw his plea within six weeks of entering his plea on 31 March 2005, as evidenced by his 10 May 2005 letter to Hayes. The trial court, however, found in a finding not assigned as error:

Not until June 21, 2005 did defendant express any second thoughts about his guilty plea. For several months thereafter the defendant waffled about his guilty plea. Not until April, 2006, did he tell Hayes that he definitely wanted to withdraw his plea. Even after having new counsel appointed to pursue a motion, however, he did not file such a motion until March 27, 2007, preserving his option to waffle again and rely on his plea arrangement. A lengthy amount of time passed before defendant stated a definite desire to withdraw his guilty plea.

Defendant’s delay in this case far exceeds the lapse in time in other cases in which our appellate courts have upheld denials of motions to withdraw. *See, e.g., Meyer*, 330 N.C. at 744, 412 S.E.2d at 343 (concluding three and a half month period weighed against allowing with-

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drawal); *Robinson*, 177 N.C. App. at 230, 628 S.E.2d at 255 (same); *Graham*, 122 N.C. App. at 637, 471 S.E.2d at 101-02 (denying defendant's motion to withdraw filed five weeks after entry of plea).

Defendant also argues that the evidence relating to whether Hayes provided competent representation weighs in favor of allowing him to withdraw his plea. The trial court, however, found that

[t]here is no doubt that defendant had extremely competent and capable counsel in Hayes and Driver³ and later Blitzer. Hayes fully explained and discussed all pertinent matters with defendant for defendant to be able to make an informed decision about his plea arrangement both before it was reached and subsequent thereto as defendant waffled in his view of whether the length of sentence was too long or the best he could do under the circumstance.

Despite the fact that defendant points to his own testimony in which he stated that Hayes provided him with incorrect information about whether he qualified as a violent habitual felon and whether his refusal to testify against his co-defendants would automatically void his plea agreement, the trial court made uncontested findings of fact contrary to this testimony. Moreover, although defendant claims that he misunderstood the consequences of his guilty plea as he was misinformed by Hayes, the trial court found that “[t]here is absolutely no indication that defendant did not fully understand the consequences of his plea. He knew what he was pleading guilty to, what his sentences would be, and what charges would be dismissed.”

Defendant points to his “swift change of heart” in his 10 May 2005 letter to Hayes as indicative of haste and confusion. The trial court specifically found, however, that Hayes never received that letter. The court's findings further establish that “[t]his is not a situation in which a plea offer was made, discussed and accepted at the last minute.” The court noted that Hayes had discussed the terms of the plea agreement on multiple occasions beginning in November 2004 and continuing through 30 March 2005, the day before the entry of defendant's guilty plea. The multiple discussions and review of the plea bargain over several months indicate the absence of haste or coercion in defendant's original decision to plead guilty.

3. Although this case was originally designated a capital case requiring the appointment of two attorneys to represent defendant, when the plea arrangement was accepted, the case became non-capital, and Mr. Driver was relieved of his responsibilities.

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We agree with the trial court that given the factors set out in *Handy*, defendant did not present a fair and just reason to allow him to withdraw his guilty plea. We also agree that the State sufficiently demonstrated that its case would be prejudiced if defendant were allowed to withdraw his guilty plea as all the co-defendants had already been sentenced and thus could not be relied upon to testify against defendant at trial. Defendant, however, contends that there is no “colorable claim of prejudice” since “the state could simply recall attorney Hayes to testify again in front of a jury.” While Hayes’ testimony may have been admissible in connection with defendant’s motion to withdraw his guilty plea, that does not mean it necessarily would be admissible in a trial on the merits of the burglary and murder charges against defendant, especially given Fifth Amendment concerns. Accordingly, we conclude that the court did not err in denying defendant’s motion to withdraw his guilty plea.

III

[3] Defendant’s final argument is that the trial court erred in calculating his prior record level. Defendant was convicted of the sale of cocaine on 24 July 1997. At the time of that conviction, the offense was a Class H felony. When, however, defendant was sentenced for the current offenses, the sale of cocaine had become a Class G felony. See N.C. Gen. Stat. § 90-95(b)(1) (2007) (providing that sale of a Schedule I substance, such as cocaine, constitutes a Class G felony). For purposes of calculating defendant’s prior record level, the trial court treated the sale of cocaine conviction as a Class G felony, resulting in defendant’s being a Level IV offender rather than a Level III offender.

In his brief, defendant acknowledges that N.C. Gen. Stat. § 15A-1340.14(c) (2007) states that when “determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed.” Defendant contends, however, that in order to prevent unconstitutional *ex post facto* application of the statute, it must be construed liberally in his favor such that he is entitled to be re-sentenced as a Level III offender.

Defendant is correct that “[c]riminal statutes are to be strictly construed against the State.” *State v. Hearst*, 356 N.C. 132, 136, 567 S.E.2d 124, 128 (2002) (quoting *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 489 (1987)). Nevertheless, “[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in

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favor of giving the words their plain and definite meaning.” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005). Judicial construction is appropriate only when the statute is ambiguous. *Id.* Defendant points to no ambiguity in N.C. Gen. Stat. § 15A-1340.14(c), and we find none. Thus, the plain language of the statute controls, and there is nothing to construe.

As for defendant’s *ex post facto* argument, “an impermissible *ex post facto* law is one which, among other things, aggravates a crime or makes it a greater crime than when committed, or changes the punishment of a crime to make the punishment greater than the law permitted when the crime was committed.” *State v. Mason*, 126 N.C. App. 318, 324, 484 S.E.2d 818, 821 (1997), *cert. denied*, 354 N.C. 72, 553 S.E.2d 208 (2001). Because defendant’s increased sentence due to the change in the classification of his prior conviction serves only to enhance his punishment for the present offenses—the 15 December 2003 burglary and murder—and not to punish defendant for his prior conviction, the constitutional prohibition on *ex post facto* laws is not implicated by application of N.C. Gen. Stat. § 15A-1340.14(c). *See State v. Wolfe*, 157 N.C. App. 22, 37, 577 S.E.2d 655, 665 (concluding use of prior conviction, originally a class F felony but currently a class D felony, to establish violent habitual felon status did not violate *ex post facto* clause as punishment for prior conviction was not increased), *appeal dismissed and disc. review denied*, 357 N.C. 255, 583 S.E.2d 289 (2003); *Mason*, 126 N.C. App. at 323-24, 484 S.E.2d at 821 (holding *ex post facto* prohibition not violated when “the crimes of assault with a deadly weapon inflicting serious injury and voluntary manslaughter were Class H and F felonies respectively at the time of commission, [but were] treat[ed] . . . as Class E felonies for establishing violent habitual offender status” under N.C. Gen. Stat. § 14-7.7 (2007)). Accordingly, we find no error in defendant’s sentence.

Affirmed.

Judges WYNN and CALABRIA concur.

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STATE OF NORTH CAROLINA v. RICHARD DANIEL COOK, DEFENDANT

No. COA07-1262

(Filed 3 February 2009)

1. Rape— statutory—cross-examination of victim—limited—comparable testimony from other witnesses

The trial court did not err in a prosecution for statutory rape and other sexual offenses by not permitting defense counsel to cross-examine the victim more extensively about possible motives for fabricating her accusations. Counsel was able to cross-examine the victim about these matters, and, to the extent cross-examination was limited, was able to elicit comparable testimony from other witnesses.

2. Evidence— statutory rape victim—sexual activity excluded

The trial court did not err in a prosecution for statutory rape and other sexual offenses by excluding evidence of the victim's sexual activity. Although defendant indicated during cross-examination that a boy was available to testify that he had had sex with the victim during the same week that she accused defendant, defense counsel did not call the boy to testify at the in camera hearing required by the rape shield statute, and did not attempt to call him during the defense's case. Moreover, defendant failed to establish the relevance of the proposed testimony because the alleged sexual activity with the boy would not have produced the scarring found in a medical examination. Medical testimony to the contrary was speculative.

3. Rape— statutory—subsequent false accusation—no offer of proof—unduly prejudicial

The trial court did not err in a prosecution for statutory rape and other sexual offenses by excluding evidence of a subsequent false accusation where defendant did not make an offer of proof. The exclusion of other testimony about the victim's statements as confusing and unduly prejudicial was within the judge's discretion.

4. Evidence— course of conduct—statutory rape and other offenses—additional incident

The trial court did not err in a prosecution for statutory rape and other sexual offenses by admitting testimony from a detective about an incident not mentioned during the victim's

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testimony. The victim's testimony established a course of conduct, of which the challenged incident was a part. The challenged testimony did not contradict the victim's testimony and sufficiently strengthened her testimony to be admitted as corroborative evidence.

Appeal by defendant from judgments entered 7 June 2006 by Judge Narley L. Cashwell in Alamance County Superior Court. Heard in the Court of Appeals 15 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Brian Michael Aus for defendant-appellant.

GEER, Judge.

Defendant Richard Daniel Cook appeals from his convictions of one count each of statutory rape, first degree sexual offense, and vaginal intercourse in a parental role, two counts of sexual offense in a parental role, and three counts of taking indecent liberties with a child. Defendant contends that the trial court erred in preventing defense counsel from asking the prosecuting witness certain questions pertinent to whether she had a motive to fabricate the charges against defendant. Because defendant was permitted to develop extensive comparable evidence on the issue, defendant has failed to show prejudice resulting from the exclusion of those specific questions. Additionally, defendant argues that the trial court erred in excluding evidence of prior sexually-related conduct by the prosecuting witness. Defendant, however, failed to make a sufficient offer of proof at trial to comply with N.C.R. Evid. 412. Accordingly, we hold defendant received a trial free of prejudicial error.

Facts

The State presented evidence at trial tending to prove the following facts. Defendant is the stepfather of "Helen,"¹ who, at the time of trial, was 16 and in the 10th grade. Helen's mother married defendant when Helen was 11. In the summer of 2002, when Helen was 12, defendant began touching her breasts, grabbing her buttocks, and rubbing his hands along her legs. On several occasions, defendant offered Helen money if she would cooperate and, if she refused, he

1. The pseudonym "Helen" is used throughout the opinion to protect the minor's privacy and for ease of reading.

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raised the amount. When Helen wanted to go out with friends, defendant told her she would have to “give him something.” Helen did not tell anyone about these incidents because she was scared of defendant and thought that her mother would not believe her.

Sometime in December 2003, defendant asked Helen to accompany him to a plumbing job in Burlington, North Carolina. When they arrived at the house, defendant went inside to work while Helen stayed in the truck. After about an hour, defendant returned to the truck. Defendant opened the passenger door as if to retrieve some tools from the backseat, but instead grabbed Helen by the back of her neck and pushed her head down into the driver’s seat. Defendant pulled down her stretch pants and underwear, unzipped his pants, and inserted his penis into her vagina. Defendant did not wear a condom. As Helen was screaming for him to get off of her, defendant told her to be quiet and that he would kill her if she told anyone. Although Helen did not immediately tell anyone what happened, around New Year’s Eve 2003, she reported to a friend that defendant had raped her.

On 9 July 2004, defendant and Helen’s mother were leaving for a weekend beach trip. Although they had planned for the children to stay with their aunt, Helen asked to sleep over at her friend Tabatha’s house instead. That afternoon, Helen was alone in the living room. Defendant came home early from work while Helen’s mother was running errands in town. Defendant grabbed Helen and pushed her down onto the couch, repeatedly telling her to be quiet. Defendant pulled her shorts to the side and put two of his fingers in her vagina, moving them in and out. Helen hit defendant, trying to get away. As he was touching Helen, defendant told her that she could spend the night at Tabatha’s house. Defendant eventually stopped, and Helen’s mother returned soon afterward.

Later that afternoon, Helen went to Tabatha’s house to spend the night. When defendant called the next morning asking Helen to come home, Helen refused and said that she wanted to stay at Tabatha’s house all weekend. Helen became upset as defendant and her mother called repeatedly, telling her to come home. Helen then told Tabatha that defendant had raped and sexually abused her and described what happened. Tabatha told her mother, who called the police.

Detective Michael Enoch responded to the call. When he arrived, he found Helen very upset and crying. She told him that defendant had been sexually abusing her and that the last time had been the

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previous evening. Helen was taken to the police station where she was interviewed further by Detective Enoch and Janet Hadler, a forensic interviewer with DSS. During the interview, Helen described what had happened the night before, as well as the incident in Burlington in December 2003.

Helen was then taken to be examined by Dr. Joseph Pringle. Helen told the doctor that defendant had fondled her breasts and buttocks and, more recently, had raped her and put his fingers in her vagina. Dr. Pringle's examination revealed no fresh bleeding or bruises in Helen's vaginal area, but he did find two scars on her hymen that appeared to be healed lacerations. Dr. Pringle believed that the scars indicated a penetrating-type injury to Helen's vaginal opening. According to Dr. Pringle, Helen's injuries were consistent with the medical history she had provided him and suggested that it was very likely there had been some sexual contact.

Later, on 19 July 2004, Hadler interviewed Helen again. Hadler believed, based on Helen's conduct during the interview and Hadler's discussions with other people who had interacted with Helen, that Helen's behavior was consistent with what is often seen in girls in her age group who have experienced the kind of traumatic events that Helen reported.

On 3 January 2006, defendant was indicted for two counts of statutory rape/sexual offense with a 14 year old (offense dates of 9 July 2004 and between 1 December 2003 and 31 December 2003), two counts of sexual offense by a person in a parental role (the same two offense dates), and three counts of indecent liberties with a child (the same two offense dates plus an offense date of between 1 June 2002 and 15 August 2002). At trial, defendant testified and denied ever touching Helen's breasts or buttocks. He remembered taking Helen to a house in Burlington, but denied raping her.

According to defendant, his relationship with Helen was good before he married Helen's mother, but after the marriage, Helen's attitude changed. She wanted her mother to get back together with her biological father, and she argued with defendant, calling him a son-of-a-bitch. Defendant recalled one occasion when, after he took away Helen's phone privileges, she ran out of the family's trailer yelling: "I hate you, I hate you!" Defendant testified that Helen complained about living in the trailer, about the cars the family had, and her desire to wear tight-fitting clothes. According to defendant, when Helen did not get what she wanted, she yelled that she hated

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her family, slammed doors, kicked walls, kicked the dog, and hit her younger sister in the face.

Helen's mother similarly testified that Helen did not like the fact that she married defendant. She also described an incident when she let Helen spend the night at her friend Tabatha's house. Helen had had a bad attitude about having to leave her friend's house and come home.

Carrie Trent, one of Helen's friends, testified that she never saw defendant engage in any inappropriate sexual conduct with Helen. Trent reported that Helen told her that she considered defendant to be her real father and that she wanted defendant "to walk her down the aisle at her wedding because she felt that he was more of a Dad to her than her biological father."

On 6 April 2006, the jury convicted defendant of all the charges. The trial court consolidated into one judgment defendant's convictions for one count of statutory rape, one count of sexual offense in a parental role, and one count of indecent liberties and sentenced defendant to a presumptive-range term of 376 to 461 months. The trial court consolidated defendant's remaining convictions into a second judgment and sentenced defendant to a consecutive presumptive-range term of 376 to 461 months. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred by not permitting defense counsel to cross-examine Helen more extensively regarding her possible motives for fabricating her accusations against defendant. Defendant claims that the trial court prevented defendant from demonstrating that Helen was motivated to make false accusations because she was frustrated with her living conditions.

Under Rule 611(b) of the Rules of Evidence, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Our Supreme Court has held that "[t]he range of relevant cross-examination is very broad, but it is subject to the discretionary powers of the trial judge to keep it within reasonable bounds." *State v. Newman*, 308 N.C. 231, 254, 302 S.E.2d 174, 187 (1983). The trial court's rulings as to cross-examination "will not be held in error absent a showing that the verdict was improperly influenced thereby." *State v. Sams*, 317 N.C. 230, 240, 345 S.E.2d 179, 185 (1986). See also *State v. Hatcher*, 136 N.C. App. 524, 526, 524 S.E.2d

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815, 816 (2000) (“The trial judge’s rulings in controlling cross examination will not be disturbed unless it is shown that the verdict was improperly influenced.”).

Defendant challenges the trial court’s decision to sustain the State’s objections to four lines of questions. First, on cross-examination, Helen agreed that she had described to Detective Enoch and social workers fights that she had with her mother. Defense counsel then asked Helen: “What kind of fights did you have with your mother?” The trial court sustained the prosecutor’s objection. Next, the trial court precluded defense counsel from asking Helen: “Do you recall crying a lot about having to do house work or you doing the work?” The trial court also sustained an objection to defense counsel’s question: “[H]ow did you express your frustrations [over your living conditions]?” The final question that defense counsel was prevented from asking was: “Isn’t it a fact that you didn’t want your mother to marry [defendant]?”

Even assuming, *arguendo*, that the trial court should have allowed these questions, defendant has failed to establish a reasonable possibility that the verdict was improperly influenced by these rulings. *See* N.C. Gen. Stat. § 15A-1443(a) (2007) (“A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.”). Defendant was able to develop evidence both on cross-examination of Helen and with other witnesses regarding Helen’s potential motive to manufacture sexual allegations. Helen admitted during cross-examination that she fought with her mother and that she was frustrated with her living conditions. Helen acknowledged during cross-examination that she was ashamed of living in a trailer, that she did not want her friends to see where she lived, that she did not like the clothes she had, and that she often swapped clothes with friends at school. She also admitted telling people that her mother had said she hated Helen and wished that Helen were dead.

In addition to Helen’s cross-examination testimony, Hadler, the DSS forensic examiner, testified that Helen told her that her mother gave her sisters preferential treatment and that Helen claimed that her mother had told Helen she wished Helen were dead. Helen’s friend Carrie Trent confirmed that Helen was embarrassed about living in a trailer when her friends lived in houses and had nice clothes. Trent also stated that Helen told her that she wanted to go live with

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Tabatha—the friend with whom Helen spent the night just prior to making the accusations against defendant. Both Helen’s mother and defendant testified that Helen’s attitude changed after they got married. They reported that Helen told them angrily on several occasions that she wished they were not married, and Helen wanted her mother to get back together with Helen’s biological father.

In short, defense counsel was permitted to question Helen about her relationship with her mother, her belief that her mother preferred her sisters over Helen, and her frustration with her living conditions. To the extent that counsel was limited in some respects when cross-examining Helen, counsel was able to elicit comparable testimony from Hadler, Trent, defendant, and Helen’s mother. We cannot conceive of how, in light of this extensive evidence, admission of testimony about the “kinds” of fights Helen had with her mother, her “crying” about having to do housework, “how” she expressed her frustration, and her desire that defendant and her mother not marry could reasonably have affected the verdict. These assignments of error are overruled.

II

[2] Defendant next contends that the trial court erred by excluding evidence of Helen’s sexual activity under Rule 412. Defendant argues that trial counsel should have been permitted to (1) present the testimony of a boy (“C.T.”) indicating that he had sex with Helen during the week that Helen accused defendant and (2) question Helen about sexual activity with her boyfriend.

Rule 412, known as the rape shield law, prohibits the introduction of evidence concerning the sexual activity of a complainant in a sexual offense case unless one of four exceptions applies:

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

- (1) Was between the complainant and the defendant; or
- (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
- (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant’s version of the alleged encounter with the complainant as to tend to

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prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

- (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C.R. Evid. 412(b). Defendant asserts that the proposed testimony falls within the second exception as tending to show that the acts charged were not committed by defendant.

When a defendant wishes to present evidence falling within the scope of Rule 412, he must “first apply to the court for a determination of the relevance of the sexual behavior to which it relates.” N.C.R. Evid. 412(d). “The trial court is then required to ‘conduct an *in camera* hearing . . . to consider the proponent’s *offer of proof* and the argument of counsel . . .’” *State v. Black*, 111 N.C. App. 284, 289, 432 S.E.2d 710, 714 (1993) (quoting N.C.R. Evid. 412(d)). The defendant bears the burden of “establish[ing] the basis of admissibility of such evidence.” N.C.R. Evid. 412(d).

This Court addressed, in *Black*, the showing required in an *in camera* hearing. In that case, only the prosecuting witness testified during the *in camera* hearing, and she denied having been raped by two other men apart from the defendant. *Black*, 111 N.C. App. at 289, 432 S.E.2d at 714. Although defense counsel represented to the trial court that one of the men could testify at the *in camera* hearing, the man was not called as a witness, and defense counsel offered no actual proof of the sexual activity. *Id.* In holding that the trial court had not erred by precluding the defendant from cross-examining the prosecuting witness about the sexual activity, this Court explained:

Under these circumstances, the trial court properly refused to allow defendant to question [the prosecuting witness] before the jury regarding her sexual relations with these men. Rule 412(d) contemplates that the party desiring to introduce evidence of a rape complainant’s past sexual activity must *offer some proof* as to both the existence of such activities and the relevancy thereof. Since [the prosecuting witness’] *denial* constituted the only “evidence” on this point, there was *no evidence of sexual activity* the relevance of which the trial court was obligated to determine.

Id. at 289-90, 432 S.E.2d at 714.

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With respect to the claimed sexual activity with C.T., this case is indistinguishable from *Black*. The primary *in camera* hearing in this case occurred during Helen's cross-examination and related to whether defense counsel would be allowed to ask Helen certain questions. At that time, defense counsel asked Helen whether she had sex with C.T., and she responded: "No." Later during the hearing, defense counsel represented to the trial court that C.T. was available to testify that he had sex with Helen earlier during the same week that she accused defendant. Defense counsel, however, failed to call C.T. to testify at the *in camera* hearing during the State's case and did not attempt to call him as a witness during the defense's case, at which point defendant could have renewed his contention regarding the relevance of C.T.'s testimony.

Thus, as in *Black*, the only evidence presented regarding the alleged sexual activity with C.T. was Helen's denial. Under *Black*, therefore, the trial court properly excluded C.T.'s testimony at trial. See also *State v. Hammett*, 182 N.C. App. 316, 319, 642 S.E.2d 454, 457 (holding *Black* controlled as complainant's denial was only evidence offered at *in camera* Rule 412 hearing), *appeal dismissed and disc. review denied*, 361 N.C. 572, 651 S.E.2d 227 (2007).

Moreover, even if defense counsel's representation regarding the proposed testimony was sufficient to comply with Rule 412(d), defendant failed to establish the relevance of C.T.'s testimony. Defense counsel claimed that C.T. would testify that he had sex with Helen on either 7 or 8 July 2004, just a day or two before Helen accused defendant of sexual abuse. Dr. Pringle, however, testified that he examined Helen within a week of the allegations, on 14 July 2004, and that the scarring he found in her vaginal area had occurred "at least a month or more" prior to the examination. Thus, the undisputed medical evidence indicated that Helen's having sex with C.T. could not have resulted in the vaginal scarring, and therefore C.T.'s testimony would not tend to show that defendant did not commit the charged offenses. See *State v. Holden*, 106 N.C. App. 244, 247, 416 S.E.2d 415, 417 (holding that there must be "a temporal connection between the dates of the alleged offense and the evidence pointing to another perpetrator"), *appeal dismissed and disc. review denied*, 332 N.C. 669, 424 S.E.2d 413 (1992).

With respect to Helen's sexual activity with her boyfriend, defendant points to Helen's admission during the *in camera* hearing that her boyfriend had inserted his finger in her vagina while she

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was partially nude in a closet with him. Defendant, however, failed to present evidence during the *in camera* hearing that the boyfriend's digital penetration could have caused the internal scarring attributed to the charged offenses. *See State v. Harris*, 360 N.C. 145, 153, 622 S.E.2d 615, 620 (2005) ("No evidence proffered at the *in camera* hearing supports an inference that the victim's prior sexual activity was forced or caused any injuries.").

At the close of that *in camera* hearing, defense counsel asked if the trial court would revisit the issue during Dr. Pringle's testimony. The trial court noted: "[S]ince I have not heard the testimony of that physician nor has he been called, I don't know, I can't give you a prediction at this particular time as to what I would or would not do in that regard. You certainly may make your request again when and if the doctor testifies."

Defendant acknowledges Dr. Pringle's testimony at trial that Helen's vaginal scarring was consistent with penetration by a penis, but points to Dr. Pringle's added testimony that he "supposed" the scarring could have been caused by digital penetration if "enough force was applied and it was done long enough." Defendant did not, however, renew his request to ask about the boyfriend after Dr. Pringle's testimony.

Even assuming, however, that Dr. Pringle's trial testimony could support reversal of the ruling following the *in camera* hearing during Helen's cross-examination, because defendant presented no evidence regarding the force used by Helen's boyfriend or the length of time of the penetration, any contention based on Dr. Pringle's conditional supposition would amount to speculation. The trial court, therefore, did not err in excluding evidence of Helen's sexual activity with her boyfriend. *See id.* ("[B]ased on the evidence presented during the *in camera* hearing and before the jury, this analysis would have required the jury to engage in pure speculation and conjecture.").

III

[3] In his third argument on appeal, defendant contends that the trial court erroneously excluded evidence that Helen made false accusations that "A.F." raped her. Defendant argues that he should have been allowed to call as a witness not only A.F., but also Christen Rhoten who would have testified that Helen admitted falsely accusing A.F. of rape. In the course of the *in camera* hearing during Helen's cross-examination, Helen denied having made

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any rape allegation against A.F. and denied having had the conversation with Rhoten.

Defendant asserts that “[t]he trial court excluded any testimony of [A.F.] under Rule 412.” At the close of the *in camera* hearing during Helen’s cross-examination, however, the trial court specifically ruled that it would not be excluding A.F.’s testimony at that juncture under either Rule 412 or Rule 403 of the Rules of Evidence. Yet, defendant never sought to call A.F. as a witness or made any specific offer of proof as to his testimony. The admissibility of his testimony is, therefore, not preserved for appellate review. N.C.R. App. P. 10(b)(1); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp., Inc.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008).

Subsequently, the trial court conducted an additional *voir dire* hearing at which Rhoten testified that Helen and A.F. were boyfriend and girlfriend a year after Helen made the accusations against defendant, that Helen initially said that A.F. had raped her, and that she later admitted that they had consensual sex. The trial court concluded that Rhoten’s testimony was not barred by Rule 412, but that it should be excluded under Rule 403, stating:

I’m going to find and conclude that the evidence proffered by Ms. Rhoten is not evidence . . . that would be barred by Rule 412, the rape shield statute. However, having reviewed this evidence, the Court is of the opinion that taking into consideration all of the circumstances testified to and the time or temporal nature of the evidence offered by Ms. Rhoten, that while the Court concludes that it may be relevant to some degree, this evidence should be excluded because its probative value is substantially outweighed by the dangers of unfair prejudice, and also by the danger of confusion of the issues and mislead[ing] the jury.

We review decisions under Rule 403 for abuse of discretion. *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992) (holding that Rule 403 determination may be reversed for abuse of discretion only upon showing that trial court’s ruling was manifestly unsupported by reason or could not have been result of reasoned decision).

Defendant contends that “[i]t is error for a trial court to exclude evidence that a prosecutrix has made allegations of sexual misconduct and later withdrawn them.” As support for this contention, defendant cites *State v. Ginyard*, 122 N.C. App. 25, 468 S.E.2d 525 (1996). In *Ginyard*, however, this Court did not hold that a trial court

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must admit evidence of false accusations of rape or that exclusion of the evidence under Rule 403 is necessarily an abuse of discretion. Instead, the Court ordered a new trial because, rather than exercising its discretion, the trial court excluded the evidence of false accusations as a matter of law based on an erroneous belief that the evidence was irrelevant and, therefore, had no probative value at all under Rule 403.

In contrast, in this case, the trial court did recognize that Rhoten's testimony was relevant "to some degree." It concluded that the relevance was, however, substantially outweighed by the risk of unfair prejudice and the danger of confusing the issues and misleading the jury. We do not believe that the trial court's conclusion was manifestly unreasonable.

Rhoten's testimony would have indicated that Helen had admitted to sexual intercourse with her boyfriend, but falsely claimed it was nonconsensual. Defendant, however, claimed that Helen made up claims that they had had sexual intercourse in order to retaliate against him. Thus, in one instance, Helen was covering up consensual intercourse with her boyfriend, while, in the other, she was alleged to have been lying about intercourse with her stepfather. Because of the different circumstances, the trial court could reasonably determine that Rhoten's testimony was not highly probative when compared to the potential for unfair prejudice if the jury perceived Helen as promiscuous. *See State v. Harris*, 189 N.C. App. 49, 64, 657 S.E.2d 701, 711 (2008) (holding that trial court did not abuse discretion in excluding under Rule 403 evidence of prior motel stays by prosecuting witness and defendant in case in which defendant denied that sexual encounter giving rise to charges occurred because of "the questionable relevance of this evidence and its likely prejudicial effect on the remainder of [the prosecuting witness'] testimony"), *disc. review denied*, 362 N.C. 366, 664 S.E.2d 315 (2008).

Moreover, the temporal sequence created a risk of jury confusion. Dr. Pringle had indicated that Helen's internal scarring likely resulted from penetration by a penis. Although defendant did not contend, and the evidence did not support, that Helen's intercourse with A.F. could have caused the scarring, a jury could have been confused and mistakenly believed that the evidence was offered as an alternative explanation for the scarring.

Accordingly, we hold the trial court did not abuse its discretion in excluding the evidence under Rule 403. *See Harris*, 360 N.C. at 154,

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622 S.E.2d at 620 (“Moreover, even assuming that the excluded evidence [of prior sexual activity] was probative, we conclude that the probative value, if any, to defendant was substantially outweighed by the danger of unfair prejudice to the State and the prosecuting witness.”); *State v. McCarroll*, 336 N.C. 559, 564, 445 S.E.2d 18, 21 (1994) (stating that evidence that prosecuting witness had a sexual experience with someone other than defendants “might run afoul of N.C.G.S. § 8C-1, Rule 403”).

IV

[4] Defendant’s final argument on appeal is that the trial court should not have permitted Detective Enoch to testify about an incident of digital penetration that was not also mentioned during Helen’s testimony. At trial, the prosecutor asked Detective Enoch a general question regarding whether he remembered Helen telling him of any other incidents of inappropriate sexual contact by defendant. When defense counsel objected, the trial court excused the jury, heard Enoch’s *voir dire* testimony, and considered arguments regarding its admissibility as corroborative evidence.

After ruling that Enoch’s testimony was admissible, the trial court brought in the jury and gave it a limiting instruction on corroborative evidence—at defendant’s request—before permitting Enoch to testify. Enoch then testified:

[Helen] stated that there was one night that she was sitting out on a hill with a blanket out to sit in her yard and look at stars after dark. She stated that [defendant] came out and there was no one else outside or around. He came out, sat down on her legs. I do not recall whether she said he pulled her shorts down or to the side, but he then attempted to insert a finger into her vagina while sitting there.

Defendant contends that this evidence should have been excluded because it did not, in fact, corroborate Helen’s testimony since she never mentioned such an incident.

In *State v. McGraw*, 137 N.C. App. 726, 529 S.E.2d 493, *disc. review denied*, 352 N.C. 360, 544 S.E.2d 554 (2000), this Court set out the general principles governing corroborative evidence:

It is well-settled that a witness’ prior consistent statements are admissible to corroborate the witness’ sworn trial testimony. Corroborative evidence by definition tends to strengthen, con-

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firm, or make more certain the testimony of another witness. Corroborative evidence need not mirror the testimony it seeks to corroborate, and may include new or additional information as long as the new information tends to strengthen or add credibility to the testimony it corroborates. Prior statements by a witness which contradict trial testimony, however, may not be introduced under the auspices of corroborative evidence.

Id. at 730, 529 S.E.2d at 497 (internal citations and quotation marks omitted). A trial court's determination that evidence is admissible as corroborative evidence is reviewed for abuse of discretion. *State v. Covington*, 290 N.C. 313, 337, 226 S.E.2d 629, 645-46 (1976).

Defendant's argument that Enoch's testimony contradicted Helen's testimony because it introduced information about an "additional" incident of digital penetration about which Helen did not testify was rejected by the Supreme Court in *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986). In *Ramey*, the victim testified that the defendant had begun touching his penis when he was five years old and then described one incident of "this" touching although the victim also indicated that the conduct had occurred more than five times. *Id.* at 470, 349 S.E.2d at 574. The investigating detective then testified about another specific incident when "this" happened, although the victim had not described that particular incident. *Id.* at 469-70, 349 S.E.2d at 574. In holding that the detective's testimony was admissible as corroborative evidence, the Court stated: "[The victim's] testimony clearly indicated a course of continuing sexual abuse by the defendant. The victim's prior oral and written statements to [the detective], although including additional facts not referred to in his testimony, tended to strengthen and add credibility to his trial testimony. They were, therefore, admissible as corroborative evidence." *Id.* at 470, 349 S.E.2d at 574.

Similarly, Helen testified that the first time she remembered defendant touching her was in the "summer time of 2002" when she was 12 and that he touched her other times including the incidents in December 2003 and 9 July 2004. Under *Ramey*, Helen's testimony established a course of sexual misconduct by defendant. *See id.* at 470, 349 S.E.2d at 574. Because Enoch testified to an incident of digital penetration within defendant's course of conduct and did not directly contradict Helen's testimony, his testimony sufficiently strengthened Helen's testimony to warrant its admission as corroborative evidence. *See id.* We accordingly find no error.

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No Error.

Judges WYNN and CALABRIA concur.

TONY RAY SMITH, PLAINTIFF v. STACI DAY BARBOUR AND BILAL KANAWATI,
DEFENDANTS v. COLLENE BARBOUR AND STACY BARBOUR, INTERVENORS

No. COA07-1083

(Filed 3 February 2009)

1. Child Support, Custody, and Visitation— custody—standard to be applied—prior order—visitation undecided—best interests

The trial court did not err in a contentious child custody proceeding by applying the “best interests” standard when deciding a motion to change custody. Although plaintiff argued that a prior custody order was permanent as to custody and temporary as to visitation so that the “substantial change of circumstances” standard” should apply, opinions have consistently treated custody orders as a whole.

2. Child Support, Custody, and Visitation— grandparents—intervention—visitation undecided and custody in issue

Grandparents had standing to seek intervention in a child custody proceeding where a prior order had left visitation undetermined. Visitation is part of custody between the parents, and a trial court may order visitation by grandparents in its discretion when custody is an ongoing issue.

3. Child Support, Custody, and Visitation— child evaluation—apportionment of costs

The trial court did not abuse its discretion by reapportioning the costs associated with child centered evaluation in a contentious custody action. The court had found that plaintiff delayed the evaluation and it cannot be said that the apportionment of the bill was manifestly unreasonable.

4. Child Support, Custody, and Visitation— grandparents—attorney fees

The trial court did not err in a contentious child custody action by ordering plaintiff to pay a portion of the grandparents’

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attorney fees. The amount did not exceed the amount in the supporting affidavits and plaintiff did not object to the affidavits or to the grandparents' testimony about their attorney fees; plaintiff had adequate notice to contest the motion; the findings were sufficient and were supported by the evidence; and the findings were sufficient to establish plaintiff's ability to pay the fees.

Appeal by plaintiff from orders entered 2 May 2006 and 18 December 2006 by Judge Donna Stroud in Wake County District Court. Heard in the Court of Appeals 3 March 2008.

Hatch, Little & Bunn, LLP, by Elizabeth T. Martin; and Wake Family Law Group, by Helen M. Oliver, for plaintiff-appellant.

Staci D. Barbour pro se defendant-appellee.

No brief filed on behalf of defendant-appellee Kanawati.

Sandlin & Davidian, PA, by Deborah Sandlin and Debra A. Griffiths, for intervenors-appellees.

GEER, Judge.

Plaintiff Tony Ray Smith appeals from orders modifying custody of his daughter ("the minor child"), granting the maternal grandparents' motion to intervene, reallocating the sharing of the costs of a court-ordered evaluation of the child, and requiring the father to pay a portion of the grandparents' attorneys' fees. Mr. Smith primarily contends that the trial court erred in concluding that an earlier custody order was temporary in nature and applying a best interests standard when revisiting the court's prior award to the father of primary legal and physical custody of the minor child. Because, however, the prior custody order left open the issue of visitation for determination in a hearing three months later, we agree with the trial court that that order was temporary. Accordingly, the trial court properly applied a best interests standard in rendering its 18 December 2006 order. We are unpersuaded by Mr. Smith's remaining arguments regarding the intervention order, the evaluation costs, and the attorneys' fees and, therefore, affirm each of the trial court's orders.

Facts

The minor child, who is Mr. Smith's biological daughter, was born while Ms. Barbour was married to, but separated from, Bilal

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Kanawati.¹ Ms. Barbour and Mr. Kanawati themselves have a daughter who was born in 1993. In June 1999, while Ms. Barbour was pregnant with the minor child, she took her other daughter and fled to Nebraska, not telling Mr. Kanawati, Mr. Smith, or anyone else where she had gone. She used multiple assumed names to avoid apprehension by law enforcement. She was eventually located in October 1999, and Mr. Kanawati obtained legal and physical custody of their daughter.

After Ms. Barbour was discovered in Nebraska, she contacted Mr. Smith and asked for support during her pregnancy. Mr. Smith traveled to Nebraska several times and was present at the child's birth. Ms. Barbour named Mr. Smith as the minor child's father on her birth certificate and allowed him to choose her middle name.

After the child's birth, Ms. Barbour moved back to North Carolina, living first with Mr. Smith for several days and then moving in with her parents. Ms. Barbour allowed Mr. Smith limited visitation from the child's birth in November 1999 until May 2001. In December 2000, Mr. Smith asked for increased visitation. On 3 January 2001, Ms. Barbour filed a motion for a domestic violence protective order against Mr. Smith, although that action was subsequently dismissed.

On 23 February 2001, Mr. Smith filed this action for custody. On the same date, he filed a petition to legitimate the minor child in Wake County Superior Court. Although Ms. Barbour disputed that Mr. Smith was the minor child's father, the superior court, on 6 June 2002, entered an order adjudicating Mr. Smith to be the father and legitimated the minor child. This Court ultimately affirmed that order in *Smith v. Barbour*, 167 N.C. App. 371, 605 S.E.2d 267, 2004 N.C. App. LEXIS 2116, 2004 WL 2792518 (Dec. 7, 2004) (unpublished), *disc. review denied*, 359 N.C. 322, 611 S.E.2d 418 (2005).

From August 2001 through August 2004, numerous other proceedings took place in district court—and, in one instance, superior court—that are not directly pertinent to the issues on appeal. We note that the trial court in this proceeding found:

The continuing litigation between the parties, which now also includes the Intervenor has clearly has [sic] been very harmful for the minor child. Defendant's attempts of bringing pro se cases

1. Mr. Kanawati is a defendant in this matter solely because he was married to Ms. Barbour at the time the minor child was born and is not affected by the orders on appeal.

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of various types against the Plaintiff which began upon his informing her that he wanted to have regular unsupervised visitation with [the minor child], in December of 2000, have caused Plaintiff to have to spend an incredible amount of time and money simply in order to establish himself as [the minor child's] father and to see [the minor child]. Several of the cases Defendant has brought against the Plaintiff—the federal lawsuit being the best example—were clearly groundless and are intended only to harass the Plaintiff and increase his litigation costs, as noted in the 2005 orders.

Over the period 24 through 30 August 2004, the trial court conducted a hearing on Mr. Smith's motions for permanent custody, attorneys' fees, and sanctions. Based on that hearing, the trial court entered a 44-page order on 20 April 2005, determining that Mr. Smith "is a fit and proper parent to be awarded primary physical and legal custody of the minor child" and that Ms. Barbour "is not a fit and proper parent to be awarded physical and legal custody of the minor child at this time." Based on its findings, the trial court awarded permanent physical and legal custody to Mr. Smith.

The trial court also ordered Ms. Barbour to submit to a complete psychological evaluation if she wanted to be considered for visitation and ordered a child-centered evaluation that would, among other things, "address the issue of the feasibility and frequency of visitation that would be in the best interests of the minor child to have with the Defendant and her parents." The court indicated in its order that once it had received copies of the evaluations, it would notify the parties and, upon motion, would "set the issue of visitation for hearing." The trial court further specified that "[f]or the purposes of this Order this Court retains jurisdiction to determine the frequency and conditions under which the Defendant and her parents may visit with the minor child, and said visitation shall be Ordered based upon this evaluation and other competent evidence in a hearing solely on this issue of visitation to be scheduled not later than July 15, 2005." The trial court provided that pending the court's decision regarding visitation, Mr. Smith had authority to arrange supervised visitation with Ms. Barbour or her family if he determined that it would benefit the child.

Ms. Barbour filed a notice of appeal from the 20 April 2005 order. Mr. Smith, however, successfully moved to dismiss the appeal on the grounds that the order did not constitute a final judgment.

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On 13 July 2005, the grandparents filed a motion to intervene. The trial court granted that motion in an order entered 2 May 2006. On 25 August 2006, the grandparents moved for emergency temporary custody of the minor child, alleging that Mr. Smith had refused to take her to the doctor when she injured her arm while on vacation. The trial court entered an order that day allowing the motion and granting temporary physical and legal custody of the minor child to the grandparents.

On the same date, Ms. Barbour moved to modify the custody order. She further moved for the trial court to shorten the notice period for her motion to modify so that it could be heard at a previously scheduled hearing on 28 August 2006. At the hearing beginning on 28 August 2006, the trial court granted Ms. Barbour's motion to shorten the notice period and heard evidence regarding modification of the custody award.

The trial court entered its 51-page custody order on 18 December 2006. After determining that the 20 April 2005 order was a temporary order, it concluded that custody would be reconsidered based on the "best interests of the child" standard. The trial court, however, also noted that even if it had determined that the 20 April 2005 order was a permanent order, "the end result would be the same" after application of the "substantial change in circumstances" standard. The trial court concluded that both parents were fit and proper persons to have custody of the minor child and that it was in the best interests of the child for (1) the parents to have joint legal and physical custody (with the specifics set out in the order) and (2) the grandparents to have specified visitation privileges.

In a separate order also entered on 18 December 2006, the trial court ordered Mr. Smith to pay 40% of the cost of the child-centered evaluation, while Ms. Barbour and the grandparents were each required to pay 30% of the cost. In addition, the trial court ordered Mr. Smith to pay \$40,000.00 of the grandparents' attorneys' fees. Mr. Smith has timely appealed to this Court from (1) the 2 May 2006 order granting intervention, (2) the 18 December 2006 custody order, and (3) the 18 December 2006 attorneys' fees and expert costs order.

Custody Order

[1] In arguing for reversal of the 18 December 2006 custody order, Mr. Smith first contends that the trial court erred in determining that the 20 April 2005 custody order was a temporary order. According to defendant, since it was a permanent order, the trial court was re-

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quired to apply the “substantial change in circumstances” standard in determining whether to modify custody.

Although the 20 April 2005 order was entitled “Permanent Custody” order, the trial court’s designation of an order as “temporary” or “permanent” is not binding on an appellate court. *Lamond v. Mahoney*, 159 N.C. App. 400, 403, 583 S.E.2d 656, 658-59 (2003). Instead, whether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo. *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000).

As this Court has previously held, “an order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues.” *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). In this case, the 20 April 2005 order meets both the second and third prongs of the test.

There is no dispute that the trial court did not determine all of the issues before it since it did not decide Ms. Barbour’s right to visitation. The order expressly stated that “the issue of visitation” would be set for hearing only after the ordered psychological evaluations had been completed and specified that the trial court “retain[ed] jurisdiction to determine the frequency and conditions under which the Defendant and her parents may visit with the minor child” The order provided for a hearing on “this issue of visitation to be scheduled not later than July 15, 2005.” This date qualifies as a clear and specific reconvening time after a time interval that was reasonably brief.

Mr. Smith argues, however, citing *Lamond*, that the order should be viewed as being permanent as to custody, but temporary as to visitation. According to Mr. Smith, the fact that the order is, in that circumstance, still an interlocutory order for purposes of appeal is immaterial to the determination whether the order is permanent as to a particular issue. *Lamond* does not, however, support Mr. Smith’s position that an order may be partially permanent and partially temporary.

Lamond specifically pointed out:

This Court has addressed the question whether a custody order is temporary or permanent when determining if an appeal from the order is interlocutory. Generally, a party is not entitled

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to appeal from a temporary custody order. In that context, this Court has held that a temporary or interlocutory custody order “is one that does not determine the issues, but directs some further proceeding preliminary to a final decree.”

159 N.C. App. at 403, 583 S.E.2d at 659 (quoting *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986)). The Court then applied the test used in determining whether a custody order is interlocutory in order to decide whether the order was permanent or temporary for purposes of determining which standard—“best interests” or “substantial change in circumstances”—should apply. *Id.* at 403-04, 583 S.E.2d at 659. After determining that the order left open issues—visitation—and provided a further review hearing would be held in a period of time reasonably brief under the circumstances, this Court concluded that the trial court properly applied the best interests standard. *Id.* at 404, 583 S.E.2d at 659.

Our appellate decisions have consistently considered whether a custody “order” as a whole was temporary or final rather than breaking down the parts of that order. *See Simmons v. Arriola*, 160 N.C. App. 671, 675, 586 S.E.2d 809, 811 (2003) (“The initial order in the present case does not specify visitation periods and, therefore, is incomplete and cannot be considered final. The language providing for regular review coupled with the court’s failure to completely determine the issue of visitation periods for defendant persuades us that the 17 July 1998 order was a temporary order.”).² Significantly, adoption of Mr. Smith’s position that an order may be permanent as to some issues and temporary as to others would render meaningless the *Senner* holding that an order should be deemed temporary if “the order does not determine all the issues.” 161 N.C. App. at 81, 587 S.E.2d at 677.

Moreover, applying the test for whether an order is interlocutory for appeal purposes—as *Lamond* does—is logical. It ensures that a party has had an opportunity to obtain review of the trial court’s decision on an issue before the more stringent “substantial change in circumstances” standard becomes applicable. *Cf. Cox v. Cox*, 133 N.C. App. 221, 233, 515 S.E.2d 61, 69 (1999) (“The trial court’s refusal to

2. Because the Court in *Lamond* was only addressing a motion to change visitation—with legal and physical custody not being at issue—the opinion’s conclusion “that the 25 July 2001 order was not a permanent order with respect to visitation,” 159 N.C. App. at 404, 583 S.E.2d at 659, does not require the conclusion that the order was permanent as to one issue and temporary as to another issue.

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enter a permanent order has deprived defendant of appellate review and the refusal was error.”).

Accordingly, we hold that the 20 April 2005 custody order was a temporary order. The trial court, therefore, did not err in applying the “best interests” standard when deciding Ms. Barbour’s motion to change custody. Since Mr. Smith’s remaining arguments regarding the 18 December 2006 custody order all presume that the “substantial change in circumstances” standard applies, we need not address them. We, therefore, affirm the 18 December 2006 order.

Order Allowing Intervention

[2] In its order allowing intervention, the trial court concluded that the grandparents were *de facto* parties and should, therefore, be joined as provided in *Sloan v. Sloan*, 164 N.C. App. 190, 595 S.E.2d 228 (2004). Alternatively, the trial court found that “because there is a pending issue before this court regarding future visitation with the requesting Intervenor, there is a pending matter before this court that would also allow the requesting Intervenor to become parties to this action.” We uphold the order granting intervention on the latter ground.

Our Supreme Court in *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995), explained that “the legislature intended to grant grandparents a right to visitation only in those situations specified in these three statutes,” citing N.C. Gen. Stat. §§ 50-13.2(b1), 50-13.5(j), and 50-13.2A. The pertinent statute in this case is N.C. Gen. Stat. § 50-13.2(b1), which provides: “An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate.” As this Court explained in *Fisher v. Gaydon*, 124 N.C. App. 442, 446, 477 S.E.2d 251, 253 (1996), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997), N.C. Gen. Stat. § 50-13.2(b1) applies only when custody of the minor children is an ongoing issue. That requirement is met “only when the custody of a child is ‘in issue’ or ‘being litigated.’” *Fisher*, 124 N.C. App. at 446, 477 S.E.2d at 253.

In this case, it is undisputed that the 20 April 2005 custody order did not address visitation by Ms. Barbour, but left that issue to be resolved at a later date following further psychological evaluations. It is well-established that, at least as between parents, “visitation” is part of custody. *See* N.C. Gen. Stat. § 50-13.1(a) (“Unless a contrary intent is clear, the word ‘custody’ shall be deemed to include custody or visitation or both.”); *Clark v. Clark*, 294 N.C. 554, 575-76, 243

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S.E.2d 129, 142 (1978) (“Visitation privileges are but a lesser degree of custody.”); *Charett v. Charett*, 42 N.C. App. 189, 193, 256 S.E.2d 238, 241 (“Custody and visitation are two facets of the same issue.”), *disc. review denied*, 298 N.C. 294, 259 S.E.2d 299 (1979).³ Thus, because the issue of Ms. Barbour’s visitation was still pending, the custody of the child was still “in issue” and was “being litigated” by the parents, as required by *Fisher*, 124 N.C. App. at 446, 477 S.E.2d at 253.

The grandparents, therefore, had standing to seek intervention under N.C. Gen. Stat. § 50-13.2(b1). Because of this conclusion, we need not address Mr. Smith’s arguments relating to whether the grandparents were *de facto* parties. Mr. Smith makes no other argument warranting reversal of the order allowing intervention. That order is, therefore, affirmed.

Apportionment of Evaluation Costs

[3] Mr. Smith next challenges the trial court’s reapportionment of the costs associated with the court-ordered child-centered evaluation in its 18 December 2006 order. In the 20 April 2005 order, the trial court directed Mr. Smith to arrange for a psychological evaluation of the minor child and appointed Dr. Ginger Calloway to conduct the evaluation pursuant to Rule 706 of the Rules of Evidence. In the 18 December 2006 order, the trial court found:

Additionally, Plaintiff delayed the child centered evaluation by failing to show up for scheduled appointments and by coming to appointments without being prepared and he refused to provide many documents to Dr. Calloway in a timely manner. Intervenors had to subpoena many of the documents requested. Intervenors paid \$15,394.64 of Dr. Calloway’s bill. The total bill was \$26,543.86. It is unfair that Intervenors, who are the grandparents of this child, bear more than one-half the cost of Dr. Calloway’s evaluation. Plaintiff paid \$6583.57 and Defendant paid \$4,565.65. Dr. Calloway’s bill should be reapportioned such that Intervenors pay 30%, Plaintiff pays 40%, and Defendant pays 30%.

Because Mr. Smith did not assign error to this finding of fact, it is binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

3. Mr. Smith asserts that “this was not an on-going custody case” because “the custody of the child [was] determined, and the jurisdiction of the trial court retained for the sole issue of visitation.” This contention, however, disregards the fact that our legislature has defined custody as including visitation when the custody dispute is between parents.

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We first observe that Mr. Smith has cited no legal authority to support his position that the trial court erred in making the reapportionment even though he claims, citing a gift tax case, that the issue presents a question of law requiring de novo review. Under Rule 28(b)(6) of the Rules of Appellate Procedure, “[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned.”

In any event, trial courts have the authority to appoint expert witnesses pursuant to Rule 706(a) of the Rules of Evidence. *See Sharp v. Sharp*, 116 N.C. App. 513, 532, 449 S.E.2d 39, 49, *disc. review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994). Rule 706(b) provides for the compensation of court-appointed experts: “Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. . . . [T]he compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.” N.C.R. Evid. 706(b) (emphasis added).

The trial court’s award of reasonable compensation and its apportionment among the parties is reviewed for abuse of discretion. *Sharp*, 116 N.C. App. at 533, 449 S.E.2d at 50. Based on the trial court’s findings in this case that Mr. Smith delayed the evaluation by failing to attend appointments, coming unprepared to appointments, and refusing to provide documents in a timely manner, we cannot conclude that the trial court was manifestly unreasonable in making Mr. Smith responsible for 40% of the bill rather than 33 1/3%, as would be the case if the bill were equally divided among the parties. *See id.* at 533, 449 S.E.2d at 50 (upholding order in which trial court reallocated “the bulk” of an expert’s fee to plaintiff because “plaintiff was slow in getting information to [the expert’s] firm and that after receiving some information, the firm would often have to ask plaintiff to supply additional information, which plaintiff provided, ‘but not in the most expeditious manner’ ”).

It appears that Mr. Smith is contending that he should not be responsible for 40% because the evaluation exceeded the scope of the 20 April 2005 order. He cites to nothing in the record that supports this contention and, in any event, we have already concluded that the 20 April 2005 order did not preclude further consideration of custody issues.

Additionally, Mr. Smith claims that his portion of the total fees wrongly “included Defendant-Barbour’s evaluation by the child’s psy-

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chological evaluator” because Ms. Barbour’s initial evaluation was not adequate for the trial court’s purposes. In support of that contention, Mr. Smith cites only to a 10 October 2005 order requiring the additional evaluation. That order, however, provides: “Defendant Barbour shall undergo further psychological evaluation by Dr. Ginger Calloway as soon as such can be scheduled by Dr. Calloway *and she shall pay the costs of such evaluation.*” (Emphasis added.)

We see no basis for concluding that the trial court abused its discretion in its allocation of the costs of Dr. Calloway’s evaluation. We, therefore, affirm that portion of the 18 December 2006 order.

Attorneys’ Fees

[4] Mr. Smith’s final argument on appeal is that the trial court erred in ordering him to pay a portion of the grandparents’ attorneys’ fees. On 18 August 2005, the grandparents filed a motion requesting that both Mr. Smith and Ms. Barbour be ordered to pay the grandparents’ “increased attorneys fees.” Of the \$97,109.50 in attorneys’ fees the grandparents had incurred, the trial court ordered Mr. Smith to pay \$40,000.00.

Mr. Smith first argues that the trial court’s order exceeded the fees requested by the grandparents because the motion sought only the fees increased by virtue of his failure to cooperate with Dr. Calloway’s evaluation. The attorneys’ fees affidavits submitted in support of the motion, however, were not so limited, but rather detailed the hours spent and costs incurred in attempting to gain visitation with the minor child. Mr. Smith did not object to these affidavits or to testimony by the grandparents regarding their attorneys’ fees that went beyond those fees connected with Dr. Calloway’s evaluation.

It is also apparent from the record that Mr. Smith understood that fees were sought because of his failure to cooperate with the grandparents regarding visitation. His written “closing argument” stated: “Mr. Smith should not be required to pay any portion of the Barbours [sic] attorney’s fees, as he was following a number of overlapping and complicated orders of this Court and *was not denying them visitation or contact with [the minor child]*, he does not have the means to pay the cost of this and the many other court actions that he has had to participate in relative to this case. *Further, the motion to intervene was filed a mere two weeks after the June 30, 2005 letter that requested every other weekend visitation.*” (Emphasis added.) Accordingly, we conclude that Mr. Smith had adequate notice to contest the grandparents’ motion for attorneys’ fees.

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Mr. Smith next argues that the trial court failed to make sufficient findings of fact to support the award of attorneys' fees. In custody proceedings, attorneys' fees may be awarded pursuant to N.C. Gen. Stat. § 50-13.6 (2007), which provides in pertinent part:

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

North Carolina appellate courts have "interpreted this provision as requiring that before attorney's fees can be taxed in an action for custody . . . , the facts required by the statute—that the party seeking the award is (1) an interested party acting in good faith, and (2) has insufficient means to defray the expense of the suit—must be both alleged and proved." *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996). In addition to these findings mandated by N.C. Gen. Stat. § 50-13.6, "the record must contain additional findings of fact upon which a determination of the requisite reasonableness [of the attorneys' fees] can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers." *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986). If these requirements have been satisfied, "[t]he amount of the award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion." *Id.* at 596, 339 S.E.2d at 828.

Based upon our review of the order, we hold that it includes sufficient findings of each of the above elements. Although Mr. Smith argues that the trial court's findings of fact simply repeated the statutory requirements and thus were conclusory, almost identical findings of fact were held sufficient in *Cunningham v. Cunningham*, 171 N.C. App. 550, 566-67, 615 S.E.2d 675, 686-87 (2005). Further, these findings of fact are adequately supported by the evidence submitted at trial and by the affidavit filed by the grandparents' attorney. While Mr. Smith points to evidence that would support his contention that the grandparents were not entitled to fees, only the trial court may determine the credibility and weight of the evidence and what inferences to draw from the evidence.

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Finally, Mr. Smith argues that the trial court failed to make a finding of fact regarding his ability to pay the fees awarded in the order. In finding of fact 26, however, which was not assigned as error, the trial court found:

Plaintiff is self employed and earns a substantial income. As of the hearing, his financial affidavit shows that he is expending approximately \$6,000 per month for his individual expenses. Additionally, there was no evidence of any debt in Plaintiff's name other than his mortgage. Plaintiff pays cash for many things, including his recent vacation to a dude ranch that involved a two week trip, including airfare and hotels in the western part of this country. Plaintiff's financial affidavit and testimony leaves the court with little choice but to infer that he [is] earning substantially more than reported on his financial affidavit and substantially more than he is expending monthly.

The court then found further "[t]hat the parties are able to comply with the provisions of this order." These findings are sufficient to establish Mr. Smith's ability to pay the attorneys' fees.

Based upon our review of the record and the trial court's order, we find Mr. Smith's final contention that the attorneys' fee award was an improper attempt to punish him to be unpersuasive. Accordingly, we hold that the trial court did not abuse its discretion in requiring Mr. Smith to pay \$40,000.00 of the grandparents' attorneys' fees. The attorneys' fee award is, therefore, affirmed.

Conclusion

For the foregoing reasons, we affirm the trial court's 2 May 2006 and 18 December 2006 orders. Going forward, we urge the parties to be mindful of the trial court's finding that "[t]he continuing litigation between the parties, which now also includes the Intervenors . . . clearly has been very harmful for the minor child."

Affirmed.

Chief Judge MARTIN and Judge ROBERT C. HUNTER concur.

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RICHARD SCHLIEPER AND WAYNE PYRTLE, PLAINTIFFS v. HORACE M. "JAY"
JOHNSON, JR., AND AXIOM INTERMEDIARIES, LLC, DEFENDANTS

No. COA07-1476

(Filed 3 February 2009)

1. Fraud— negligent misrepresentation—sales price—motion to dismiss—sufficiency of evidence

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff employees' claims for fraud and negligent misrepresentation regarding the sales price in the Agreements to Terminate because: (1) plaintiffs did not allege that defendants either prepared or had access to the pertinent Brown document at any time; (2) the reductions in the "sales price" which plaintiffs contend amounted to a discrepancy between the Phantom Sales Calculation and the Brown Acquisition Summary Form were set forth with specificity and clarity in the Phantom Sales Calculation and were the basis of each of the Termination Agreements; and (3) these reductions were affirmatively disclosed and agreed to by each plaintiff.

2. Contracts— breach of contract—motion to dismiss—profit distributions—bonus—sufficiency of evidence

Although the trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff employees' claims for breach of contract for 2005 profit distributions and plaintiff Pyrtle's claim based upon the 2005 bonus, it erred regarding plaintiff Schlieper's claim based upon the 2005 bonus because: (1) Paragraph 34 of the Schlieper's complaint alleged that a 2005 bonus was due him under the terms of his employment, and these allegations are not inexorably tied to the Letter of Understanding and thus are not necessarily barred by Schlieper's Agreement to Terminate; and (2) the trial court looked beyond the allegations of the complaint and its appended documents to conclude that Schlieper was not entitled to a bonus based on his management position.

3. Unfair Trade Practices— motion to dismiss—inapplicable to general employment relationships

The trial court did not err by dismissing plaintiffs' claims for unfair and deceptive trade practices under N.C.G.S. § 75-1.1 because: (1) the statute does not apply to general employment

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relationships; (2) the pleadings disclose that plaintiffs were employees who were compensated through a combination of salary and incentives which were tied to the company's profits, and the 2002 Letters of Understanding granted no equity interest to plaintiffs; and (3) there were no allegations of any conduct that would constitute activity affecting commerce.

Appeal by plaintiffs from judgment entered 6 September 2007 by Judge Ben F. Tennille in the North Carolina Business Court. Heard in the Court of Appeals 21 August 2008.

Forman Rossabi Black, P.A., by Amiel J. Rossabi and S. Brian Walker, for plaintiffs-appellants.

Ragsdale Liggett PLLC, by Mary Hulett, Jon David Hensarling and Amie C. Sivon, for defendants-appellees.

STEELMAN, Judge.

Where the calculations of the amounts to be paid to plaintiffs under an Agreement to Terminate were set forth with clarity and specificity, the trial court did not err in dismissing plaintiffs' claims for fraud and negligent misrepresentation. Plaintiffs' claims for 2005 profit distributions were barred by the Agreements to Terminate. Where the pleadings clearly reveal that plaintiffs were employees and not partners in a business, the complaint fails to state a claim for unfair and deceptive trade practices under Chapter 75. As to plaintiff Schlieper's claims for a 2005 bonus, the complaint contains allegations sufficient to support the claim, and the trial court erred in dismissing this claim.

I. Factual Background

The facts alleged in plaintiffs' complaint, and documents appended thereto, reveal that: Plaintiffs Richard Schlieper (Schlieper) and Wayne Pyrtle (Pyrtle) and defendant Horace Johnson, Jr. (Johnson) were long-term business associates. In 2000, Schlieper accepted employment with defendant Axiom Intermediaries, LLC ("Axiom"), where Johnson was Chairman and Chief Executive Officer. Two years later, Schlieper signed a Letter of Understanding, granting him a "phantom interest" in Axiom and a 5% share of Axiom's net profits. Pyrtle also signed a Letter of Understanding, granting him a "phantom interest" in Axiom and a 2.5% share of Axiom's net profits. Neither Schlieper nor Pyrtle was

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granted an equity interest in Axiom, nor did either assume any risk of loss. Each Letter of Understanding expressly provided that each plaintiff had a 0% equity stake and 0% share of any losses in Axiom.

Both Schlieper's and Pyrtle's Letters of Understanding ("the 2002 Letters of Understanding") included the following provision:

Parachute:

If the majority ownership of the Company elects to sell the Company to a 3rd Party while the Employee is an active employee of the Company, the Company will pay the Employee his share times the "sale price" less his share times \$7,000,000 plus an interest component. The interest component shall be 6.0% of the Employee's share times \$7,000,000 compounded annually.

The "sale price" as used in this section refers only [to] the portion of the total selling price that is related to the Goodwill of the Company. All other assets are to be excluded.

(emphasis in original).

In 2005, Johnson advised plaintiffs that he was considering a sale of Axiom to Brown & Brown, Inc. ("Brown") and that the projected sales price was "about thirty-seven million dollars." On 12 December 2005, each plaintiff received letters from Johnson on Axiom letterhead regarding the prospects of the merger with Brown in which Axiom's sales price was represented to be \$35.6 million. Pyrtle's letter promised a \$75,000 bonus for the 2005 year; Schlieper's made no mention of a 2005 bonus.

Each letter included two attachments. Neither the letters nor the attachments mentioned 2005 profit distributions. The first attachment, unique to each employee, was labeled:

Axiom Intermediaries, LLC

Acquisition by Brown and Brown, Inc.

This attachment stated the requirements and consideration for continued employment with Brown. Both plaintiffs were subject to the same two requirements:

Requirements:

1. Dissolution of Phantom Stock Agreement
2. Execution of Brown & Brown Employment Agreement

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The second attachment, labeled “WP Phantom Calculation[,]” calculated a “Net Payout” to plaintiffs based upon the provisions of the Parachute provision, *supra*, in the 2002 Letters of Understanding.

On 29 December 2005, pursuant to the requirements stated in the 12 December 2005 letters and attachments, *supra*, each plaintiff separately signed an Agreement to Terminate his 2002 Letter of Understanding. Article I of Schlieper’s 2005 Agreement to Terminate read:

Section 1.1—*Termination of LOU*. In consideration of the cash payment set forth in Section 1.2 of this Article I, the LOU previously entered into by and between the Company and Schlieper is hereby terminated and of no further legal effect as of the date of this Agreement.

Section 1.2—*Consideration*. The cash payment to be made to Schlieper for agreeing to terminate the LOU is . . . (\$1,318,317.00).

Section 1.3—*Timing of Payment*. The Company shall pay the consideration to Schlieper within forty-five (45) days of the execution of this Agreement.

There was no mention of a 2005 profit distribution.

In consideration for signing the Agreements, Schlieper received \$1,318,317, and Pyrtle received \$659,408. Pyrtle was further entitled to a \$75,000 2005 bonus under the terms of his 12 December 2005 letter and attachments.

II. Procedural History

On 28 December 2006, plaintiffs filed suit against Johnson and Axiom (together, “defendants”) in the Superior Court of Guilford County. The complaint sought monetary damages based upon claims for fraud, unfair and deceptive trade practices, negligent misrepresentation, and breach of contract. The case was designated a complex business case in February 2007 pursuant to N.C. Gen. Stat. § 7A-45.4(a). On 2 March 2007, defendants filed answers denying the material allegations of the complaint and asserting a number of affirmative defenses.

On 2 April 2007, defendants filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 6 September 2007, the trial court entered an order which granted in part and denied in part defendants’ motion to dismiss. The trial court dismissed plaintiffs’ claims for fraud, unfair

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and deceptive trade practices, and negligent misrepresentation. The trial court also dismissed three of plaintiffs' claims for breach of contract, leaving only Pyrtle's claim for breach of contract regarding his 2005 bonus. On 28 September 2007, Pyrtle took a voluntary dismissal of this claim.

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, 124 (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 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 Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). "A complaint should not be dismissed under Rule 12(b)(6) ' . . . unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim.' " *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979)). We review the trial court's decision *de novo*, treating plaintiff's factual allegations as true. *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 760, 529 S.E.2d 693, 694 (2000); *Wood* at 166, 558 S.E.2d at 494. When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment. *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007).

III. Analysis

A. Claims Based upon Fraud and Negligent Misrepresentation

[1] In their first two arguments, plaintiffs contend that the trial court erred in dismissing their claims for fraud and negligent misrepresentation pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. We disagree.

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Plaintiffs allege that defendants engaged in fraud and negligent misrepresentation in procuring plaintiffs' consent to the two Agreements to Terminate that were a condition to the asset sale to Brown. The basis of this assertion is a document, attached as Exhibit I to plaintiffs' complaint, styled as "Brown Brown, Inc. Acquisition Summary Form." This is an internal Brown document, not an Axiom document, which shows a total purchase price of Axiom as \$60,244,702.57. The document shows the purchase price to be composed of a number of different components:

Expirations	\$17,404,688.14
Goodwill	42,129,138.88
Non-Compete Agreement	31,000.00
Tangible Property	435,273.00
Other	<u>244,702.59¹</u>
Total Purchase Price	\$60,244,702.59

Plaintiffs allege that defendants fraudulently and negligently misrepresented the sales price in the Agreements to Terminate as being only \$35,672.00, and based the "phantom calculation" upon this number, rather than the "true" sales price, which was much higher. Plaintiffs did not allege that defendants either prepared or had access to the Brown document at any time.

"The essential elements of actionable fraud or deceit are the representation, its falsity, *scienter*, deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss."

Lillian Knitting Mills Co. v. Earle, 237 N.C. 97, 105, 74 S.E.2d 351, 356 (1953) (citing *Leggett Elec. Co. v. Morrison*, 194 N.C. 316, 139 S.E. 455 (1927); *Berwer v. Union Cent. Life Ins. Co.*, 214 N.C. 554, 200 S.E. 1(1938); *Hill v. Snider*, 217 N.C. 437, 8 S.E.2d 202 (1940); 37 C.J.S. Fraud, § 3 (2008)).

The tort of negligent misrepresentation occurs when in the course of a business or other transaction in which an individual has a pecuniary interest, he or she supplies false information for the guidance of others in a business transaction, without exercis-

1. This figure is further broken down to consist of brokerage receivables of \$171,812.48 and prepaids and deposits of \$72,890.11.

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ing reasonable care in obtaining or communicating the information. *See Howell v. Fisher*, 49 N.C. App. 488, 272 S.E.2d 19 (1980), *disc. rev. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981).

Fulton v. Vickery, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358 (1985), *review denied*, 313 N.C. 599, 332 S.E.2d 178 (1985).

As was clearly noted by the trial judge in his order, plaintiffs' complaint uses the term "sales price" as found in the Letters of Understanding, the 12 December 2005 phantom calculation, the 29 December 2005 Agreement to Terminate, and the Brown Acquisition Summary, interchangeably. Even a cursory reading of these documents reveals that they are not interchangeable. When reviewing pleadings with documentary attachments on a Rule 12(b)(6) motion, the actual content of the documents controls, not the allegations contained in the pleadings. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) (contrary terms of loan agreement attached to the complaint controlling over allegations).

It is undisputed from plaintiffs' complaint that the parties utilized the computation contained in the parachute provision of the 2002 Letters of Understanding to determine the amount due under the Termination Agreements. As noted above, this required multiplying the shares of Schlieper's (5%) and Pyrtle's (2.5%) times the phantom sales price, less his share times \$7,000,000.00 plus an interest component. Specifically, the 2002 Letters of Understanding provided, in italics, that: "The 'sale price' as used in this section refers only [to] the portion of the total selling price that is related to the Goodwill of the Company. All other assets are to be excluded." Thus, on its face, the formula under the "Parachute Provision" does not encompass the entire "sales price" of the company, but only that portion related to Goodwill.

In the Phantom Calculation contained in the 12 December 2005 letters to the plaintiffs, the phantom sales price was specifically computed as follows:

Projected NI for Sales Calculation	\$ 7,500,000
Less Reduction in HMJ Salary	(615,000)
Less Service Brokerage (85% of 2006)	(676,000)
Less Johnson Mgmt Bonus Pool	(1,250,000)
Less Reduction in Airplane Costs	(500,000)
Adjusted NI for Phantom Sales Calculation	4,459,000
Multiple	8.00

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Adjusted Phantom Sales Price	35,672,000
Less approx Fixed Assets	(458,323)
NET Adjusted Phantom Sales Price	35,213,677

The calculation then multiplied the Net Adjusted Phantom Sales Price (\$35,213,677) times the individual plaintiff's share, which was then reduced by his respective percentage of \$7,000,000 plus the interest component. These calculations resulted in a total payout for Schlieper of \$1,318,317, and for Pyrtle of \$659,408.

As noted above, the Brown Acquisition Summary Form shows a purchase price at closing of \$60,244,702.57. This sum consists of \$60,000,000 plus the sum of \$244,702.59 for receivables and prepaids and deposits. We note that the total sales price of \$60,000,000 is the identical amount which would appear in the Phantom Calculation (\$7,500,000 x 8.0) if there were not reductions made to that figure, which resulted in a Phantom Sales Price of \$35,672,000.²

The reductions in the "sales price" which plaintiffs contend amounted to a discrepancy between the Phantom Sales Calculation and the Brown Acquisition Summary Form were set forth with specificity and clarity in the Phantom Sales Calculation and were the basis of each of the Termination Agreements. Where these reductions were affirmatively disclosed and agreed to by each of the plaintiffs, we fail to discern how plaintiffs' complaint states a claim for either fraud or negligent misrepresentation. *Earle*, 237 N.C. at 105, 74 S.E.2d at 357; *Vickery*, 73 N.C. App. at 388, 326 S.E.2d at 359. The ruling of the trial court dismissing these claims is affirmed.

B. Breach of Contract Claims

[2] In their next two arguments, plaintiffs contend that the trial court erred in dismissing their claims for breach of contract pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. We agree in part and disagree in part.

Plaintiffs' complaint set forth four claims for breach of contract. As to each plaintiff, the complaint alleged that defendants breached agreements to pay a 2005 profit distribution and a bonus for the year 2005. The trial court dismissed three of these claims, leaving only Pyrtle's claim as to the 2005 bonus.

2. Since the Phantom Sales Price was based exclusively upon Goodwill, and there was no adjustment to the Phantom Sales Price for the \$244,702.59, this figure does not impact our analysis.

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“The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.” *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). A contract, express or implied, requires assent, mutuality, and definite terms. *Horton v. Humble Oil & Refining Co.*, 255 N.C. 675, 679, 122 S.E.2d 716, 719 (1961). The trial court may reject allegations that are contradicted by documents attached to the complaint. *Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847.

1. Profit Distributions

The plaintiffs’ claims for 2005 profit distributions are based upon an alleged breach of the 2002 Letters of Understanding. The 2005 Agreements to Terminate specifically stated that “the LOU previously entered into by and between the Company and [Schlieper or Pyrtle] is hereby terminated and of no further legal effect as of the date of this Agreement.”

Further, the 12 December 2005 letters which contained the computations for the amounts to be paid for the termination of the Letters of Understanding stated that the payments represented “the dissolution of the Phantom Stock Plan and your contributions to Axiom for the past, present and envisioned in the future.” Judge Tennille correctly concluded that “any obligation to pay Plaintiffs’ profit distributions was dissolved by the December 29 agreements. . . .”

The trial court’s dismissal of the breach of contract claims for 2005 profit distributions is affirmed.

2. Schlieper Bonus

We note that, with respect to the claims for breach of contract for the 2005 bonus, there are significant differences between Schlieper and Pyrtle. In a letter dated 1 September 2000, which is attached to the complaint as Exhibit B, Schlieper was offered an annual salary of \$125,000, “plus a bonus to be determined.” In the 12 December 2005 letter to Pyrtle, it was stated that “[f]or the 2005 year you will receive a bonus of \$75,000 in appreciation and recognition of your contribution to the success of the Company.” In the 12 December 2005 letter to Schlieper, there is no reference to a bonus being paid to Schlieper.

Based upon this distinction, Judge Tennille denied the motion to dismiss as to Pyrtle’s 2005 bonus. However, the motion to dismiss was granted as to Schlieper’s claim for a 2005 bonus, based upon two fac-

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tors: first, that the language in the 1 September 2000 letter made the bonus discretionary to Axiom; and second, that since Schlieper was in a management position, he would not have been entitled to a production/performance bonus.

The allegations in the complaint relevant to this claim are as follows:

21. Schlieper . . . received yearly production/performance bonus payments from Axiom as part of [his] total compensation package.

. . .

34. Schlieper never received the production/performance bonus for the 2005 year which was due him under the terms of his employment. . . .

. . .

64. Johnson has breached his contract with Schlieper by failing to pay Schlieper any of the performance/production bonus promised to Schlieper.

65. As a result of Johnson's breach of contract, Schlieper [is] entitled to recover from Johnson an amount in excess of \$10,000.00.

Upon consideration of a 12(b)(6) motion, and consistent with notice pleading, we are required to treat plaintiff's allegations as true. *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006). Applying this standard, we hold that Schlieper has made sufficient allegations to withstand a Rule 12(b)(6) motion on his claim for a 2005 bonus. Paragraph 34 of the complaint asserts that a 2005 bonus was due him under the terms of his employment. Unlike the profit distribution claims, these allegations are not inexorably tied to the Letter of Understanding and thus are not necessarily barred by Schlieper's Agreement to Terminate. Further, we believe that the trial court looked beyond the allegations of the complaint and its appended documents to conclude that Schlieper was not entitled to a bonus because of his management position. Ultimately, Schlieper must present evidence of a specific agreement that entitles him to a bonus for the year 2005.

As to Schlieper's claim for breach of contract based upon the 2005 bonus, the ruling of the trial court is reversed.

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C. Chapter 75 Claims

[3] In their next argument, plaintiffs contend that the trial court erred in dismissing their claims under N.C. Gen. Stat. § 75-1.1. We disagree.

Plaintiffs contend that the allegations in their complaint demonstrate that they were business partners, rather than mere employees, and that, under the rationale of *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), the dispute falls within the parameters of N.C. Gen. Stat. § 75-1.1. They further contend that the dispute clearly affected commerce because their “opportunity to halt the sale of Axiom assets” could have a multi-million dollar impact on the reinsurance industry.

To state a claim for relief for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, plaintiff must show (1) an unfair or deceptive act or practice by defendant, (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff. *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994).

N.C. Gen. Stat. § 75-1.1(b) defines “commerce” to include “all business activities, however denominated” Our Supreme Court has held that “[b]usiness activities’ is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or *whatever other activities the business regularly engages in and for which it is organized.*” *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991) (emphasis added).

Wilson v. Blue Ridge Elec. Mbrshp. Corp., 157 N.C. App. 355, 357, 578 S.E.2d 692, 694 (2003); *see also Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980), *overruled on other grounds*, (“Before a practice can be declared unfair or deceptive, it must first be determined that the practice or conduct which is complained of takes place within the context of the statute’s language pertaining to trade or commerce.”). The statute does not apply to general employment relationships. *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 710 (2001) (“[T]he Act does not normally extend to run-of-the-mill employment disputes[.]”); *Blue Ridge, supra*; *Buie v. Daniel Int’l Corp.*, 56 N.C. App. 445, 448, 289 S.E.2d 118, 119-20 (1982), *review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982).

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After a thorough review of plaintiffs' complaint and the documents appended thereto, we hold that *Buie* controls this issue. The pleadings disclose that plaintiffs were employees who were compensated through a combination of salary and incentives which were tied to the company's profits. The 2002 Letters of Understanding granted no equity interest to the plaintiffs. Therefore, plaintiffs had no partnership or equity interest in Axiom.

The *Sara Lee* case upon which plaintiffs rely is not applicable to the facts of this case. In that case, Sara Lee Corporation sued a former employee who was its Information Center Service Administrator. Unknown to Sara Lee, defendant set up four separate computer businesses which sold computer parts and services to Sara Lee at excessive prices. Defendant never disclosed these relationships to Sara Lee. The Supreme Court held that *Buie* was not applicable since the conduct of defendant involved the sale of goods and services which affected commerce. *Sara Lee*, 351 N.C. at 33-34, 519 S.E.2d at 312. In the instant case there are no allegations of any conduct that would constitute activity affecting commerce. The instant case is simply an employment dispute and is controlled by *Buie*.

This argument is without merit.

V. Conclusion

Because the Complaint did not state a claim upon which relief could be granted, the trial court did not err in dismissing plaintiffs' claims for fraud, unfair and deceptive trade practices, and negligent misrepresentation pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. As to the breach of contract claims, the trial court did not err in dismissing the claims related to profit distribution for 2005. However, the allegations contained in plaintiffs' complaint as to Schlieper's claim for a 2005 bonus were sufficient to withstand defendants' Rule 12(b)(6) motion to dismiss, and the dismissal of Schlieper's 2005 bonus claim is reversed.

In light of our holdings, we need not reach plaintiffs' remaining arguments. The order of the trial court is

AFFIRMED IN PART, REVERSED IN PART.

Judges GEER and STEPHENS concur.

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STATE OF NORTH CAROLINA v. YAW OSEI ADU

No. COA08-582

(Filed 3 February 2009)

1. Rape— statutory—physical findings—evidence of other abuse—insufficient for alternate explanation of physical findings—excluded

The trial court did not err in a prosecution of the victim's stepfather for statutory rape and indecent liberties by excluding under the rape shield statute evidence of prior sexual abuse of the victim by her grandfather where the excluded evidence was insufficient to establish an alternate explanation for physical findings. N.C.G.S. 8C-1, Rule 412.

2. Constitutional Law— right to remain silent—questions concerning failure to make statement—closing argument—harmless error

There was harmless error in a prosecution for statutory rape and indecent liberties where the State was allowed to question defendant about his failure to make a statement to law enforcement and the State was allowed to reference defendant's silence in its closing argument. There was substantial other evidence of guilt.

Appeal by Defendant from judgment entered 23 October 2007 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Court of Appeals 19 November 2008.

Attorney General Roy Cooper, by Assistant Attorney General Jane Rankin Thompson, for the State.

Robert W. Ewing for Defendant.

McGEE, Judge.

A jury found Yaw Osei Adu (Defendant) guilty on 6 August 2004 of first-degree statutory rape and indecent liberties with a child. The State's evidence at trial tended to show that Defendant was married to Nellie Adu (Ms. Adu) in 1996. Defendant lived with Ms. Adu and her daughter, S.A., after the marriage. S.A. testified at trial that in April 2002 she asked Defendant to buy her some clothes and a new bra because all of her bras were torn. Defendant told S.A. that he needed

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to see her breasts to see what size they were. S.A. lifted her shirt and took off her bra to show Defendant her bra size. S.A. testified that Defendant started sucking her breasts.

S.A. testified that Defendant picked her up and carried her over Defendant's shoulder into her bedroom. Defendant placed S.A. on her bed, climbed on top of her and started sucking her breasts again. Defendant kissed S.A. on her mouth and started "rocking back and forth" on top of her. After a few minutes, Defendant unzipped his pants, pulled down S.A.'s pants, and tried to insert his penis into S.A.'s vagina. S.A. told Defendant that this hurt her. Defendant waited a few moments before again trying to insert his penis into S.A.'s vagina. S.A. told Defendant that "it still hurts," and S.A. pulled her pants up. S.A. testified that Defendant turned S.A. over onto her stomach and started "rocking back and forth on [S.A.'s] rear end." S.A. told Defendant she needed to go to the bathroom. In the bathroom, S.A. "prayed . . . [Defendant would] stop." S.A. returned to the bedroom and Defendant again "rock[ed] back and forth" on top of her. S.A. asked Defendant to stop, and he stopped. S.A. testified that she made Defendant place his hand on the Bible and swear he would never touch her again. Defendant made S.A. swear to never tell anyone because if she did, Defendant and Ms. Adu "would have to get a divorce." S.A. testified that she felt "too dirty" to tell Ms. Adu what had happened when Ms. Adu returned home from work that day.

S.A. testified that on a later occasion, Defendant hugged S.A. and began kissing her while Ms. Adu was out of the house at work. Defendant laid S.A. down and began rocking back and forth on top of her as he had done before. S.A. testified she could feel Defendant's penis through his blue jeans. S.A. said she again felt too dirty to tell Ms. Adu what happened that day.

About a week later, S.A. told Ms. Adu that Defendant had rocked back and forth on top of her, and that he had kissed her on the mouth and breasts. The next day, Ms. Adu asked S.A. to tell her what happened in the presence of Defendant. S.A. told Ms. Adu and Defendant that Defendant had rocked back and forth on top of her and sucked her breasts. Defendant said that he and S.A. were just wrestling. S.A. testified that it was not wrestling.

S.A. further testified that she accompanied Defendant and Ms. Adu to speak with their pastor, Pastor Longobardo. Pastor Longobardo testified that he spoke with Defendant on 12 July 2002, and that Defendant had told him he had had "some bodily con-

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tact” with S.A. Defendant told Pastor Longobardo that although he used his hands while touching S.A., no penetration had occurred. Pastor Longobardo also testified that Defendant said that none of the contact he had with S.A. would be viewed as inappropriate in his home country.

Sheronda Harris (Harris), an investigator with the child protective services division of the Guilford County Department of Social Services (DSS), testified for the State. Harris testified that on 18 July 2002, Ms. Adu reported inappropriate sexual conduct had occurred between S.A. and Defendant. Harris interviewed Defendant at his home and Defendant told Harris he used to wrestle with S.A. “like she was a boy.” Defendant told Harris he had held S.A.’s breasts while wrestling and that he had ended up on top of her at one point. He admitted his conduct was inappropriate.

Harris testified that after speaking with Defendant, she spoke with S.A. that same day. S.A. told Harris that she “had had sex with [Defendant]” based on overhearing girls at school say sex was how babies were made. Harris allowed Defendant to remain in the home at that point, but he was not permitted to have any unsupervised contact with S.A. The following day, 19 July 2002, Harris asked Defendant to move out of the family home. Harris referred S.A. to Family Services of the Piedmont and also to Dr. Angela Stanley (Dr. Stanley) at the Child Evaluation Clinic of the Moses Cone Health System, for a medical exam. After DSS received the results from Dr. Stanley’s examination, DSS substantiated its report of sexual abuse by Defendant.

Dr. Stanley testified that a genital examination of S.A. revealed a notch or healed tear at her hymen’s 9:00 o’clock position, which was consistent with genital penetration. Based on her physical examination of S.A., Dr. Stanley found a possible certainty of sexual maltreatment.

Ms. Adu testified on *voir dire* that her father, S.A.’s grandfather, had lived in their family home until 1998. Ms. Adu testified that they lived in a two-bedroom home, and that her father chose to move out after the birth of Ms. Adu’s other daughter because there was so little room. During the summer of 1999, after Ms. Adu’s father had moved out of the home, Ms. Adu took S.A. and a friend to visit her father. About a month after this visit, S.A. told Ms. Adu that she did not want to visit her grandfather again because he had kissed her and “ ‘stuck his tongue in [S.A.’s] mouth.’ ” Ms. Adu testified that she had found a

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stain on S.A.'s grandfather's underwear and blood on S.A.'s underwear. Ms. Adu stated the spot on S.A.'s grandfather's underwear was the result of a boil on his buttocks, and that the blood on S.A.'s underwear was from S.A.'s beginning her period.

Defendant filed a motion pursuant to N.C. Gen. Stat. § 8C-1, Rule 412 requesting that the trial court allow him to present evidence of prior sexual abuse of S.A. by her grandfather as an alternative explanation for the trauma to her vaginal area. At the Rule 412 hearing, Defendant testified that S.A.'s grandfather had lived in their home until Ms. Adu found blood on S.A.'s panties and on S.A.'s grandfather's underwear. Defendant testified that Ms. Adu confronted S.A.'s grandfather and kicked him out of the residence because "he had raped [S.A.]" Defendant also presented as evidence S.A.'s taped interview in which S.A. stated that "[w]hat happened to me [with Defendant] is something similar to what happened . . . with my grandfather."

During the Rule 412 hearing and at trial, Defendant argued that the fondling by S.A.'s grandfather caused the trauma to S.A.'s vagina. Upon a finding that there was no credible evidence of penetration by S.A.'s grandfather that could serve as an alternate explanation to the vaginal trauma, the trial court denied Defendant's Rule 412 motion. Thus, the trial court ruled that Defendant could not present any evidence concerning S.A.'s grandfather's prior sexual abuse of S.A. and redacted any mention of the prior sexual abuse stated in S.A.'s videotaped statement and in Dr. Stanley's medical report.

Defendant testified in his own defense and denied the allegations. Defendant also testified that he was a third-degree black belt in Tae Kwon Do and that he did touch S.A. when giving her Tae Kwon Do lessons. However, Defendant stated that he did not touch S.A. in an inappropriate way.

During the State's recross-examination of Defendant, the following exchange occurred:

THE STATE: [Defendant], you testified that you were never given an opportunity to provide a written statement to anybody; isn't that right?

DEFENDANT: Yes.

THE STATE: And isn't it true, [Defendant], that when you took [S.A.] to Family Services of the Piedmont that you had a conversation with Detective Hines [of the Greensboro Police Department] in the parking lot?

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DEFENDANT: Yes. I didn't know she was [a] detective at the time.

....

THE STATE: And she said that if you came [to] meet her, you'd have a chance to tell your side of the story, didn't she?

....

DEFENDANT: She didn't explain it. She told me to come to her office.

THE STATE: And did you ever go into her office and tell her your side of the story?

....

DEFENDANT: Yeah. When I was going, my wife came to me and told me that we need to get an attorney.

THE STATE: Did you ever go in and meet with Detective Hines and tell her your side of the story?

DEFENDANT: No.

During the State's closing argument, the State referenced Defendant's failure to speak with Detective Hines. The State asked: "Why didn't [Defendant] go and talk to Detective Hines when she offered him the opportunity to tell his side of the story?" Defendant objected to this statement but his objection was overruled.

The jury found Defendant guilty of first-degree statutory rape and indecent liberties with a child. Sentencing of Defendant was delayed because Defendant's whereabouts were unknown after 5 August 2004. Defendant was sentenced on 16 October 2007 to four consecutive active sentences with a combined total term of imprisonment of not less than 227 months and not more than 284 months with the North Carolina Department of Correction. Defendant appeals.

I.

[1] Defendant first argues that the trial court erred by excluding evidence of S.A.'s grandfather's sexual abuse of S.A. pursuant to Rule 412. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 412(b)(2) (2007) provides that:

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

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(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant[.]

Defendant argues that evidence of S.A.'s sexual abuse by S.A.'s grandfather was relevant pursuant to N.C.G.S. § 8C-1, Rule 412(b)(2) as an alternative explanation for the notching in S.A.'s vaginal area. In *State v. Ollis*, 318 N.C. 370, 376, 348 S.E.2d 777, 781, (1986), a child testified she had been raped by two men on the same day, and our Supreme Court held that it was error to exclude evidence of the second rape in the defendant's trial. Additionally, our Court held in *State v. Wright*, 98 N.C. App. 658, 662, 392 S.E.2d 125, 128 (1990), that it was error for the trial court to exclude evidence that the child victim masturbated with a washcloth and her fingers, when this would have been an alternative explanation for the child's red and irritated genitalia.

Unlike in *Ollis* and *Wright*, the excluded evidence in the case before us is insufficient to establish an alternative explanation for the physical findings in S.A.'s vaginal area. The evidence of sexual abuse of S.A. by her grandfather tended to show that S.A.'s grandfather had kissed S.A., but there was no evidence of abuse to S.A.'s vaginal area by her grandfather. The only evidence of S.A.'s grandfather's abuse that could have provided an alternative explanation for the notching on S.A.'s vaginal area was the evidence that Ms. Adu found blood on S.A.'s panties and on S.A.'s grandfather's underwear. However, Ms. Adu testified that the blood stain on S.A.'s panties was from S.A.'s period and the stain on S.A.'s grandfather's underwear was from a boil on his buttocks. Defendant presented no other evidence to refute Ms. Adu's testimony as to the stains. Accordingly, the evidence of the stains on S.A.'s panties and S.A.'s grandfather's underwear do not provide any evidence that the abuse by S.A.'s grandfather involved penetration. Thus, S.A.'s abuse by her grandfather would not have provided an alternative explanation for the notching on S.A.'s vaginal area and was properly excluded pursuant to Rule 412. Defendant's first assignment of error is overruled.

II.

[2] Defendant also argues that the trial court erred in allowing the State to question Defendant about his failure to make a statement to law enforcement and in allowing the State to reference Defendant's silence in the State's closing argument. We agree. However, we hold that this error was harmless beyond a reasonable doubt.

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In *State v. Boston*, 191 N.C. App. 637, 651-52, 663 S.E.2d 886, 896 (2008), our Court held that a defendant's silence could not be used as substantive evidence of the defendant's guilt. In *Boston and Satterwhite*, the defendants were convicted of first-degree arson after the defendants and an accomplice set fire to a house. *Id.* at 640-41, 663 S.E.2d at 889-90. The trial court overruled defendant Boston's objection to the State's questioning of the accomplice about Boston's failure to submit to police questioning prior to Boston's arrest. *Id.* at 646-47, 663 S.E.2d at 893. We held that although the trial court erred in allowing the use of Boston's silence as substantive evidence of her guilt, the error was harmless beyond a reasonable doubt. *Id.* at 653-54, 663 S.E.2d at 897.

In the present case, the State argues that the references the State made at trial about Defendant's silence were used solely for impeachment purposes and not as substantive evidence of Defendant's guilt. However, the State also asked:

If [Defendant] didn't do anything, why didn't he tell [Ms. Adu] that when she first told him? Remember, she said he didn't deny it? He didn't really fully admit it, but he didn't deny it. And when he went to Pastor Longobardo, he didn't say, "I absolutely did not do this." When he saw Sheronda Harris, he didn't say, "I did not do this." Why didn't he go and talk to Detective Hines when she offered him the opportunity to tell his side of the story?

Similar references by the State to a defendant's silence during closing arguments have been held to violate a defendant's Fifth Amendment right against self-incrimination. *See* U.S. Const. Amend. V. In *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001), the State referenced the defendant's post-arrest silence after the defendant was convicted of felony murder during sentencing arguments to the jury. The State used the defendant's silence in an attempt to prove the defendant had the mental capacity to appreciate the criminality of his actions. *Id.* The State argued the following to the jury:

He started out that he was with his wife and child or wife and children or something that morning. We know he could talk, but he decided just to sit quietly. He didn't want to say anything that would "incriminate himself." So he appreciated the criminality of his conduct all right.

Ward, 354 N.C. at 266, 555 S.E.2d at 273. Our Supreme Court held that the above comments on the defendant's silence violated the defendant's rights under both the N.C. and U.S. Constitutions. *Id.*

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In *State v. Hoyle*, 325 N.C. 232, 382 S.E.2d 752 (1989), the defendant was on trial for first-degree murder and argued that he had acted in self-defense. The State made the following statement in its closing argument:

Who said anything, until yesterday, about [the victim] having grabbed his gun? Who? When was there an opportunity to say that? For months and that night. You think what you would do. If somebody had severely beaten you, if somebody had caused you to think that you had to defend yourself, if somebody had struggled with you over a gun and had accidentally shot themselves, don't you think, when the police were there and polite and nice and trying to get to the truth . . . don't you think you would tell him then?

Id. at 236, 382 S.E.2d at 754. Our Supreme Court held that the State's use of the defendant's silence violated the defendant's constitutional right to remain silent. *Id.* at 236-37, 382 S.E.2d at 754.

In *State v. Shores*, 155 N.C. App. 342, 573 S.E.2d 237, (2002), our Court granted the defendant a new trial and held that the State impermissibly questioned why the defendant, charged with second-degree murder and claiming self-defense, had failed to tell anyone prior to testifying at trial that the victim had threatened his life. *Id.* at 351-52, 573 S.E.2d at 242-43. The State in *Shores* made the following statement during its closing argument:

Ladies and gentleman of the jury, what would be wrong when you're represented by a lawyer [with] calling up the police or having the lawyer call them up and say "let me tell you some more, let me tell you the rest of this?" He didn't do that. He didn't call the DA's office. He didn't call any police officer. He didn't call the investigating officer. He didn't do any of that. Right on that stand he said "I have told this story for the first time today other than [to] my lawyers."

Ladies and gentlemen of the jury, ask yourself now "why on earth would I wait until now to try to tell that story if I had that kind of story? Why would I do that?"

Shores, 155 N.C. App. at 348, 573 S.E.2d at 240.

As in *Hoyle*, *Ward*, and *Shores*, the State in this case referenced Defendant's silence to insinuate that an innocent man would have freely spoken with Detective Hines, and that Defendant's failure to do

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so permitted an inference of guilt. We hold the State's comments during its closing argument violated Defendant's Fifth Amendment right against self-incrimination.

The State argues that even if it was error to allow the State to question Defendant about his lack of statements to law enforcement, and to mention this failure during closing arguments, it was harmless beyond a reasonable doubt. "A violation of the [d]efendant'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). In *Boston and Satterwhite*, our Court set forth several factors to be considered in determining whether the constitutional error of using a defendant's silence as substantive evidence of guilt was harmless beyond a reasonable doubt. *See Boston*, 191 N.C. App. at 651-52, 663 S.E.2d at 896. These factors included

whether the State's other evidence of guilt was substantial; whether the State emphasized the fact of [the defendant's] silence throughout the trial; whether the State attempted to capitalize on [the defendant's] silence; whether the State commented on [the defendant's] silence during closing argument; whether the reference to [the defendant's] silence was merely benign or *de minimis*; and whether the State solicited the testimony at issue.

Id. at 652-53, 663 S.E.2d at 896-97.

In applying these factors to the present case, we hold that the trial court's error was harmless beyond a reasonable doubt. In addition to Defendant's silence, the State presented substantial evidence of Defendant's guilt based on S.A.'s account of the events, as well as the results of Dr. Stanley's physical examination which she found to reveal a possible certainty of sexual maltreatment. Additionally, the State presented the testimony of Harris who testified that Defendant admitted to holding S.A.'s breasts while wrestling and that Defendant had ended up on top of S.A. at one point. The State also presented the testimony of Pastor Longobardo who testified that Defendant told him he had had bodily contact with S.A.

Other *Boston and Satterwhite* factors support the conclusion that the trial court's error was harmless beyond a reasonable doubt in this case. The State made mention of Defendant's silence to law enforcement briefly on two occasions during the trial but these ref-

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erences were *de minimis*. *See id.* Also, it does not appear from the record or the transcript that the State attempted to capitalize on Defendant's silence. *See id.*

Only two of the *Boston and Satterwhite* factors support a conclusion that the trial court's error was prejudicial: (1) the State referenced Defendant's silence to law enforcement during its closing argument, and (2) the State solicited Defendant's testimony regarding his silence. *See id.* However, having considered all of these factors, the State presented substantial evidence of Defendant's guilt other than Defendant's silence to law enforcement, and the error of referencing Defendant's silence was not prejudicial. Thus, we conclude "beyond a reasonable doubt that the jury would have reached the same verdict even had the trial court disallowed the contested testimony." *Id.* at 653-54, 663 S.E.2d at 897.

No prejudicial error.

Judges BRYANT and GEER concur.

IN RE: MICHAEL G. PAPATHANASSIOU

No. COA08-95

(Filed 3 February 2009)

Paternity—legitimation proceeding—summary judgment

The trial court did not err in a legitimation proceeding by granting summary judgment in favor of petitioner because: (1) our General Assembly has not required a best interest of the child inquiry in the context of a legitimation proceeding; (2) DNA tests indicated a 99.99 percent probability that petitioner is the biological father of the child; (3) respondent, the former husband of the mother of the child, offered no evidence to the contrary, and admitted that he is not the biological father of the child; (4) although the husband of the mother of a child born during the parties' marriage is presumed to be the father of that child, a determination that a petitioner in a legitimation action, and not the husband, is the biological father of the child terminates the husband's rights to the child; and (5) the only issue to be decided in a legitimation proceeding under N.C.G.S. §§ 49-10 and 49-12.1

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is whether the putative father who has filed a petition to legitimate is the biological father of the child.

Appeal by Respondent Andrew Papathanassiou from orders entered 18 August 2005 by the Honorable Martha H. Curran, Clerk of Mecklenburg County Superior Court, and 14 February 2007 by the Honorable Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 September 2008.

James, McElroy & Diehl, P.A., by Jonathan D. Feit and Sarah M. Brady, for Petitioner-Appellee.

Todd Cline, P.A., by Todd W. Cline, for Respondent-Appellee.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, and Sandlin & Davidian, PA, by Deborah Sandlin, for Respondent-Appellant.

No brief filed for Guardian ad Litem for the minor child.

STEPHENS, Judge.

The paramount question presented by this appeal is whether the sole factual issue before the court in a legitimation proceeding pursuant to N.C. Gen. Stat. §§ 49-10 and 49-12.1 is the determination of whether the petitioner is the biological father of the minor child. We hold that it is.

Background and Procedure

On 25 June 1995, Andrew Papathanassiou (“Respondent”) and Altona Dee Jetton Papathanassiou (“Ms. Jetton”) were married. On 23 December 1997, Ms. Jetton gave birth to Michael Gray Papathanassiou (“the child”). Respondent and Ms. Jetton were listed as the child’s father and mother on the child’s birth certificate. At the time the child was conceived and born, Respondent was unaware that he was not the biological father of the child. In the spring of 1998, Respondent obtained a DNA test which indicated that he was not the child’s biological father. Nevertheless, Respondent continued to regard and conduct himself as the child’s father in every other way. On 12 January 2000, Ms. Jetton gave birth to William Garret Papathanassiou, who is Respondent’s biological child.

On or about 1 February 2002, Respondent and Ms. Jetton separated. On 4 June 2003, Ms. Jetton filed a complaint against Respondent in Mecklenburg County District Court seeking, *inter alia*,

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custody and child support for the two minor children “born during the parties’ marriage[.]” On 30 July 2002, Ms. Jetton filed an amended complaint, alleging that only “[o]ne child was born of the marital relationship,” namely William.

On 1 August 2003, a consent order was entered, finding as fact that Ms. Jetton and Respondent were “the biological parents of one child,” William, and resolving the issues of child custody and child support with respect to William only. On 6 October 2003, Respondent and Ms. Jetton were divorced.

On 11 May 2005, Gordon B. Grigg (“Petitioner”) filed a Petition to Legitimate in a special proceeding before the Mecklenburg County Clerk of Superior Court. The petition sought to legitimate the child pursuant to N.C. Gen. Stat. § 49-10. On 9 June 2005, Respondent, although not yet a party to the proceeding, filed a motion to dismiss, alleging that the petition was fatally defective for failing to name him as a necessary party, for insufficiency of service of process, and for failing to request or obtain appointment of a guardian *ad litem* for the child, as required by N.C. Gen. Stat. § 49-12.1(a).

Respondent’s motion was heard on 14 June 2005 by the Honorable Martha H. Curran, Mecklenburg County Clerk of Superior Court. The Clerk granted a continuance to allow for personal service on Respondent and appointed a guardian *ad litem* for the child.

On 2 August 2005, the Clerk convened a hearing on the Petition to Legitimate. On 18 August 2005, the Clerk entered an Order to Legitimate decreeing that “[t]he minor child, Michael Gray Papathanassiou, is declared legitimate, Petitioner is declared the biological father[.]” and “[t]he minor child’s name is changed to Michael Gray Grigg[.]”

From this order, Respondent appealed to the Superior Court of Mecklenburg County for a hearing *de novo* pursuant to N.C. Gen. Stat. § 1-301.2(e). On 20 February 2006, Petitioner filed a Motion *in Limine* and Citation of Authority, requesting that the trial court dismiss Respondent’s appeal on grounds that Respondent was not a necessary party to the action and requesting that Respondent be precluded from using any pleading, testimony, remarks, questions, or argument regarding the best interest of the child. On 26 October 2006, Petitioner filed a Motion for Summary Judgment. On 31 October 2006, Petitioner filed an Amended Motion for Summary Judgment.

On 2 November 2006, Petitioner filed another Motion *in Limine*, requesting that the trial court exclude any evidence regarding the

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child's best interest or public policy concerns of legitimating the child, and seeking to limit the evidence solely to the issue of biological paternity. On 6 February 2007, Petitioner filed a Second Amended Motion for Summary Judgment.

On 13 February 2007, Respondent filed responses to Petitioner's motions *in limine*. A hearing on Petitioner's motion for summary judgment and motions *in limine* was held on 14 February 2007 before the Honorable Timothy S. Kincaid. On that day, the trial court entered an Order Granting Summary Judgment, declaring the child to be legitimate, declaring Petitioner to be the child's biological father, and allowing the child's last name to remain Grigg.

From the Order to Legitimate and the Order Granting Summary Judgment, Respondent appeals.

Discussion

Respondent argues that the trial court improperly granted summary judgment in favor of Petitioner. Specifically, Respondent asserts the trial court erroneously considered DNA evidence of Petitioner's biological parentage of the child as conclusive evidence that the child should be legitimated as the child of Petitioner, without consideration of the child's best interest. Petitioner further argues that summary judgment was inappropriate as there is a genuine issue of material fact regarding the child's best interest.

"North Carolina courts have long recognized that children born during a marriage . . . are presumed to be the product of the marriage." *Jones v. Patience*, 121 N.C. App. 434, 439, 466 S.E.2d 720, 723, *appeal dismissed and disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996). "The presumption is universally recognized and considered one of the strongest known to the law." *In re Legitimation of Locklear*, 314 N.C. 412, 419, 334 S.E.2d 46, 51 (1985). However, "[t]he presumption of legitimacy can be overcome by clear and convincing evidence." N.C. Gen. Stat. § 49-12.1(b) (2005).

Pursuant to N.C. Gen. Stat. § 49-12.1, "[t]he putative father of a child born to a mother who is married to another man may file a special proceeding to legitimate the child." N.C. Gen. Stat. § 49-12.1(a) (2005). The putative father

may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate.

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N.C. Gen. Stat. § 49-10 (2005). The mother, if living, the child, and the spouse of the mother of the child shall be necessary parties to the proceeding. N.C. Gen. Stat. § 49-10; N.C. Gen. Stat. § 49-12.1(a). “A guardian ad litem shall be appointed to represent the child if the child is a minor.” N.C. Gen. Stat. § 49-12.1(a).

If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child.

N.C. Gen. Stat. § 49-10.

“[O]ur General Assembly has continually enacted and modified legislation to establish legal ties binding illegitimate children to their biological fathers and to acknowledge the rights and privileges inherent in the relationship between father and child.” *Rosero v. Blake*, 357 N.C. 193, 201, 581 S.E.2d 41, 46 (2003), *cert. denied*, 540 U.S. 1177, 158 L. Ed. 2d 78 (2004). Legitimation of a child under Chapter 49

impose[s] upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock, and to entitle such child by succession, inheritance or distribution, to take real and personal property by, through, and from his or her father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock.

N.C. Gen. Stat. § 49-11 (2005). By specifying the manner in which an illegitimate child’s paternity may be established, the legislature has attempted to grant to illegitimate children rights of inheritance on par with those enjoyed by legitimate children. *Mitchell v. Freuler*, 297 N.C. 206, 216, 254 S.E.2d 762, 768 (1979). Accordingly, the inquiry in Sections 49-10 and 49-12.1 is whether the petitioner is the biological father of the minor child such that the rights and responsibilities inherent in the relationship between father and child may be acknowledged.

Citing N.C. Gen. Stat. §§ 50-13.2, 7B-1110, and 48-1-101, Respondent asserts that “[i]t is implicit in all of North Carolina’s statutes regarding minor children that the court should consider the best

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interest of the child before making any decision regarding the child[,]” and argues that the permissive language in N.C. Gen. Stat. §§ 49-10 and 49-12.1 implies that the court must consider the best interest of the child before entering an order of legitimation.

N.C. Gen. Stat. § 50-13.2 provides that “[a]n order for [child] custody must include findings of fact which support the determination of what is in the best interest of the child.” N.C. Gen. Stat. § 50-13.2(a) (2005). N.C. Gen. Stat. § 7B-1110 provides that “[a]fter 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.” N.C. Gen. Stat. § 7B-1110(a) (2005). N.C. Gen. Stat. § 48-1-101 is a list of definitions applicable to Chapter 48 of the General Statutes which governs adoptions. Although the definitions section does not mention the best interest of the child, specific provisions in Chapter 48 do require that the court consider a child’s best interest when considering adoptive placement for the child. *See, e.g.*, N.C. Gen. Stat. § 48-2-501(a) (2005) (“Whenever a petition for adoption of a minor is filed, the court shall order a report to the court made to assist the court to determine if the proposed adoption of the minor by the petitioner is in the minor’s best interest.”); N.C. Gen. Stat. § 48-2-603(a) (2005) (“At the hearing on, or disposition of, a petition to adopt a minor, the court shall grant the petition upon finding by a preponderance of the evidence that the adoption will serve the best interest of the adoptee”); N.C. Gen. Stat. § 48-2-606(a)(7) (2005) (“A decree of adoption must state . . . [t]hat the adoption is in the best interest of the adoptee.”). Contrary to Respondent’s assertion, the above-referenced statutes explicitly, not implicitly, require the court to consider the best interest of the child.

In *In re Change of Name of Crawford to Crawford Trull*, 134 N.C. App. 137, 517 S.E.2d 161 (1999), petitioner alleged that the court committed reversible error in failing to consider the minor child’s best interest in determining whether to allow the child’s mother to change the child’s surname over the biological father’s objections. This Court rejected petitioner’s argument, explaining:

Our General Assembly . . . has not required a “best interest[] of the child” inquiry in the context of naming a child under G.S. § 130A-101(f)(4), nor in the changing of a child’s name under G.S. § 101-2. While the General Assembly has specifically required such an inquiry in contexts such as termination of parental rights, child custody and placement, parental visitation

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rights, and even in the context of a change in surname on a birth certificate following legitimation, *see* N.C. Gen. Stat. § 130A-118, its failure to require a best interest[] inquiry in connection with G.S. § 101-2 and G.S. § 130A-101(f)(4) is clear evidence of its intent that no such inquiry is required in this context.

Id. at 142-43, 517 S.E.2d at 164.

Similar to the statutes at issue in *Crawford*, our General Assembly has not required a “best interest of the child” inquiry in the context of a legitimation proceeding. While the General Assembly has specifically required such an inquiry under N.C. Gen. Stat. §§ 50-13.2 and 7B-1110, and Chapter 48, its failure to mandate a best interest inquiry in connection with N.C. Gen. Stat. §§ 49-10 and 49-12.1 is clear evidence of its intent that no such inquiry is required in this context. *See Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (“Legislative purpose is first ascertained from the plain words of the statute.”).

Respondent additionally argues that requiring the husband of the mother of the child be made a party to the legitimation proceeding implies that the court must consider the best interest of the child. Respondent contends that if “the biological parentage of the child [i]s the only issue to be determined in a legitimation proceeding, and upon proof of biological parentage, [Petitioner] [i]s entitled to summary judgment as a matter of law[,]” then there is no purpose for the joinder of the mother’s husband as a necessary party. We disagree.

Pursuant to Rule 19 of the North Carolina Rules of Civil Procedure, all those with an interest in an action or proceeding must be joined as necessary parties to the action. A necessary party is one “who ha[s] a claim or material interest in the subject matter of the controversy, [whose] interest will be directly affected by the outcome of the litigation.” *Lombroia v. Peek*, 107 N.C. App. 745, 750, 421 S.E.2d 784, 787 (1992); N.C. Gen. Stat. § 1A-1, Rule 19(b) (2005).

The husband of the mother of a child born during the parties’ marriage is presumed to be the father of that child and, thus, enjoys all the parental rights and privileges, as well as obligations, to that child. A determination that a petitioner in a legitimation action, and not the husband, is the biological father of the child terminates the husband’s rights to the child, conferring them onto petitioner. N.C. Gen. Stat. § 49-11. Thus, unless the husband has previously been determined not to be the child’s father, he is a necessary party to the

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proceeding. *Lombroia*, 107 N.C. App. at 751, 421 S.E.2d at 787. As “a potentially adverse party in this special proceeding,” *Locklear*, 314 N.C. at 422, 334 S.E.2d at 52, the husband is permitted to file pleadings and motions, *see* N.C. Gen. Stat. 1A-1, Rule 7 (2005), obtain discovery, *see* N.C. Gen. Stat. § 1A-1, Rule 26 (2005), and present evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 101 *et seq.* (2005). Accordingly, Respondent could have introduced evidence of his paternity and/or rebutted or discredited evidence of paternity presented by Petitioner. Although Respondent in this case could accomplish neither, his presence was not “obviously, utterly immaterial,” as it afforded him an opportunity to defend the presumption that he was the child’s father and discredit Petitioner’s evidence to the contrary.

Respondent further argues that the requirement that the court appoint a guardian *ad litem* for the minor child during a legitimation proceeding implies that, similar to a termination of parental rights proceeding, the court must employ a two-step process before entering an order of legitimation: first, the court must determine whether grounds exist that would allow for legitimation, and then the court must determine whether legitimation is in the best interest of the child.

Section 49-10 specifies the procedures to be followed in a proceeding pursuant to Section 49-12.1, and provides that the child is a necessary party to the legitimation proceeding. Section 49-12.1 states specifically that if the child is a minor, a guardian *ad litem* must be appointed to represent the child. N.C. Gen. Stat. § 49-12.1(a). However, regardless of whether Section 49-12.1 required this, appointment of a guardian *ad litem* for the minor child is mandated by Rule 17 of the North Carolina Rules of Civil Procedure.¹

Guardians *ad litem* are appointed to stand in place of minor children in all civil actions and proceedings as minors are presumed by law not to have the requisite capacity to handle their own affairs. *See In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981). The role of the guardian *ad litem* is to defend on behalf of the minor child, N.C. Gen. Stat. § 1A-1, Rule 17(b)(2) (2005), and to “protect the interest of the [minor] defendant at every stage of the proceeding.” *Clark*, 303 N.C. at 598, 281 S.E.2d at 52 (quotation marks and citation omitted). Thus, contrary to Respondent’s assertion, the appointment of a guardian

1. “The Rules of Civil Procedure and the provisions of this Chapter on civil procedure are applicable to special proceedings, except as otherwise provided.” N.C. Gen. Stat. § 1-393 (2005).

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ad litem does not dictate the form and inquiry of the proceeding; rather, the duties of the guardian *ad litem* are dictated by the action or proceeding in which the guardian *ad litem* has been appointed. In the context of a legitimation proceeding, where the inquiry of the court is whether the petitioner is the biological father of the minor child, the guardian *ad litem* must defend on behalf of the child in a manner that assures that the child's interest in the determination of his or her biological father is protected.

Respondent finally asserts that requiring the trial court to consider the best interest of the child is consistent with other statutes regarding the well-being of the child, such as N.C. Gen. Stat. §§ 48-3-603 and 48-3-601(2)(b). Respondent correctly states that pursuant to N.C. Gen. Stat. § 48-3-603, prior to legitimating the child, Petitioner's consent would not have been required for the child to have been placed for adoption. Additionally, Respondent correctly states that pursuant to N.C. Gen. Stat. § 48-3-601(2)(b), prior to Petitioner's legitimating the child, Respondent's consent would have been required for the child to have been placed for adoption. However, pursuant to N.C. Gen. Stat. § 48-3-603, Respondent's consent would *not* be required after Petitioner's petition to legitimate the child was granted. N.C. Gen. Stat. § 48-3-603(a)(2) (2005).

Having carefully considered Respondent's arguments, and not being unsympathetic to his position, we are constrained to hold that the only issue to be decided in a legitimation proceeding pursuant to N.C. Gen. Stat. §§ 49-10 and 49-12.1 is whether the putative father who has filed a petition to legitimate is the biological father of the child. Respondent contends that this "oversimplified interpretation of N.C. Gen. Stat. §§ 49-10 and 49-12.1 [could lead to] many absurd results[.]"² However, the legitimation of a child is a separate and distinct issue from who shall have custody and control of the child. The concerns raised by Respondent can be, and properly are, addressed in other proceedings, such as custody, adoption, or termination of parental rights, where the best interest of the child is paramount.

2. For example, Respondent poses a hypothetical scenario where a petitioner is a convicted murderer who has never contributed any support to the minor child but who presents genetic testing results that show a 99.99 percent probability that he is the child's biological father, and all of the parties to the proceeding acknowledge that he is the biological father of the child. Respondent argues that if the convicted murderer were entitled to summary judgment granting his petition to legitimate, "[s]urely, that result is not what our legislature intended[.]"

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Normally, the factual issue of paternity, when premised on a presumption of legitimacy, should be presented to and resolved by a jury. *Locklear*, 314 N.C. at 421, 334 S.E.2d at 52. However, summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). “A ‘genuine issue’ is one that can be maintained by substantial evidence.” *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). On appeal of a trial court’s grant of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.* Evidence presented by the parties is viewed in the light most favorable to the non-movant. *Id.*

In this case, DNA tests indicated a 99.99 percent probability that Petitioner is the biological father of the child. Furthermore, Respondent offered no evidence to the contrary, and admitted that he is not the biological father of the child. Petitioner, having provided conclusive evidence that he is the child’s biological father, established that there was no remaining issue of fact to be determined in the legitimation proceeding. Therefore, the trial court did not err in entering summary judgment in Petitioner’s favor.³

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

3. Although Respondent additionally argues that the Clerk erred in ordering legitimation upon Petitioner’s Petition to Legitimate, for the reasons stated above, we conclude that the Clerk did not err in entering the 18 August 2005 Order to Legitimate.

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DAILY EXPRESS, INC., PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, DIVISION OF STATE HIGHWAY PATROL, DEFENDANT

No. COA08-562

(Filed 3 February 2009)

Motor Vehicles— trucking company—overweight permit—in-sufficient number of escorts—fine—additional overweight penalty improper

A trucking company which violated a special single trip overweight permit by failing to have the required number of escorts was properly fined \$500.00 for an operational violation of the permit pursuant to N.C.G.S. § 20-119(d)(1) but could not be penalized an additional \$24,492.03 under N.C.G.S. §§ 20-119(d) and 20-118(e) for a weight violation as if no special permit existed where weight of the truck was not in excess of the weight allowed by the special permit.

Appeal by defendant from an order entered 31 January 2008 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 19 November 2008.

Parker Poe Adams & Bernstein LLP, by Kevin L. Chignell and Susan L. Dunathan, for plaintiff-appellee.

Attorney General Roy A. Cooper, III, by Assistant Attorneys General John W. Congleton and Tamara S. Zmuda, for defendant-appellant.

HUNTER, Robert C., Judge.

This case arises out of a violation of N.C. Gen. Stat. § 20-119 (2007), whereby plaintiff trucking company was fined \$500.00 for an operational violation of a special permit and \$24,492.03 for a weight violation based on the statutory weight parameters of N.C. Gen. Stat. § 20-118 (2007). Pursuant to litigation, the trial court interpreted these two statutes, held that the \$24,492.03 fine was unlawful, granted summary judgment for plaintiff, and ordered defendant North Carolina Department of Crime Control and Public Safety to reimburse plaintiff the \$24,492.03. Defendant appeals this grant of summary judgment for plaintiff. After careful review, we affirm.

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Background

On 6 June 2006, Daily Express, Inc. (“Daily Express” or “plaintiff”), obtained a special “single trip permit” (“the permit”) from the North Carolina Department of Transportation, Division of Highways, to transport a truck and trailer with a gross weight of no more than 196,000 pounds through the state. Without this permit, the truck and trailer could not legally exceed 80,000 pounds. N.C. Gen. Stat. § 20-118(b)(3).

On 8 June 2006, Paul Crownover (“Mr. Crownover”), an independent contractor hired by plaintiff, stopped at a weigh station in Hendersonville, North Carolina. Upon examination, an officer for the North Carolina Department of Crime Control and Public Safety (“defendant” or “NCDCCPS”) noted that plaintiff’s special permit required a rear escort and an additional front escort if the gross weight exceeded 149,999 pounds. The gross weight of the truck and trailer at the time was 181,180 pounds, thus requiring a rear and front escort. It is undisputed that only one escort accompanied the truck.

Because of this permit violation, plaintiff was fined \$500.00 pursuant to N.C. Gen. Stat. § 20-119(d)(1). In addition, plaintiff was penalized \$24,492.03 as a weight violation based on the failure to travel with an escort pursuant to section 20-119(d) and sections 20-118(e)(1) and (3). This weight violation was calculated based on the difference between 80,000 pounds (the statutory pound limit for a truck without a special permit) and the 181,180 pounds it actually weighed. Plaintiff’s truck was not in excess of the 196,000 pounds listed on the special permit. After receiving the citations, Mr. Crownover obtained a second escort and was allowed to resume his trip with the original permit.

On 1 August 2006, Robert Wertz, President of Daily Express, filed a letter with NCDCCPS protesting the overweight vehicle penalty. On 1 September 2006, NCDCCPS informed Mr. Wertz that its administrative review revealed that the officer followed state law and patrol policy in issuing the citation and penalty.

Plaintiff filed a complaint in Wake County Superior Court on 1 November 2006 seeking a refund of the \$24,492.03 penalty. Plaintiff filed a motion for summary judgment on 10 December 2007 alleging, *inter alia*, defendant had no authority to impose the weight citation under the statutory scheme set out in section 20-119(d) and section 20-118(e). Defendant filed a motion for summary judgment.

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ment on 20 December 2007 claiming that the citations issued were authorized by law.

On 24 January 2008, the trial judge granted summary judgment in favor of plaintiff, finding that: (1) defendant has no authority to invalidate special permits issued by the Department of Transportation; (2) violation of an operational aspect of a special permit does not invalidate the weight allowance stated on the special permit; and (3) the NCDCCPS, Division of State Highway Patrol, cannot assess overweight penalties on a valid permit. Having found that defendant improperly invalidated plaintiff's permit and unlawfully cited plaintiff for the weight violation, the court ordered defendant to refund plaintiff the amount of \$24,492.03, plus interest.

Standard of Review

"On appeal from summary judgment, the applicable standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Taylor v. Coats*, 180 N.C. App. 210, 212, 636 S.E.2d 581, 583 (2006) (citation omitted). Review by this Court is *de novo* with the evidence viewed in the "light most favorable to the non-moving party[.]" *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007) (citation omitted).

The trial court was correct in finding that no issue of material fact existed for jury determination. The only determination to be made was one of law—statutory interpretation. Furthermore, we find the trial court properly applied the statutes and found plaintiff was entitled to a judgment as a matter of law.

Analysis

I. Statutory Interpretation

Defendant first argues that it acted within its statutory authority to assess an overweight penalty against plaintiff.

There are two statutes that principally govern this case. First, N.C. Gen. Stat. § 20-119(d) states:

(d) For each violation of any of the terms or conditions of a special permit issued or where a permit is required but not obtained under this section the Department of Crime Control and Public Safety may assess a civil penalty for each violation against the registered owner of the vehicle as follows:

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- (1) **A fine of five hundred dollars (\$500.00) for any of the following:** operating without the issuance of a permit, moving a load off the route specified in the permit, falsifying information to obtain a permit, failing to comply with dimension restrictions of a permit, or **failing to comply with the number of properly certified escort vehicles required.**
- (2) A fine of two hundred fifty dollars (\$250.00) for moving loads beyond the distance allowances of an annual permit covering the movement of house trailers from the retailer's premises or for operating in violation of time of travel restrictions.
- (3) A fine of one hundred dollars (\$100.00) for any other violation of the permit conditions or requirements imposed by applicable regulations.

The Department of Transportation may refuse to issue additional permits or suspend existing permits if there are repeated violations of subdivision (1) or (2) of this subsection. **In addition to the penalties provided by this subsection, a civil penalty in accordance with G.S. 20-118(e)(1) and (3) may be assessed if** a vehicle is operating without the issuance of a required permit, operating off permitted route of travel, **operating without the proper number of certified escorts** as determined by the actual loaded weight of the vehicle combination, fails to comply with travel restrictions of the permit, or operating with improper license. **Fees assessed for permit violations under this subsection shall not exceed a maximum of twenty-five thousand dollars (\$25,000).**

Id. (emphasis added).

Second, N.C. Gen. Stat. § 20-118(e)(1) and (3) state:

(e) Penalties.—

- (1) Except as provided in subdivision (2) of this subsection, for each violation of the single-axle or tandem-axle weight limits set in subdivision (b)(1), (b)(2), or (b)(4) of this section **or axle weights authorized by special permit according to G.S. 20-119(a)**, the Department of Crime Control and Public Safety **shall** assess a civil penalty against the owner or registrant of the vehicle in

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accordance with the following schedule: for the first 1,000 pounds or any part thereof, four cents (4¢) per pound; for the next 1,000 pounds or any part thereof, six cents (6¢) per pound; and for each additional pound, ten cents (10¢) per pound. These penalties apply separately to each weight limit violated. In all cases of violation of the weight limitation, the penalty shall be computed and assessed on each pound of weight in excess of the maximum permitted.

...

- (3) If an axle-group weight of a vehicle exceeds the weight limit set in subdivision (b)(3) of this section plus any tolerance allowed in subsection (h) of this section or axle-group weights **or gross weights authorized by special permit under G.S. 20-119(a)**, the Department of Crime Control and Public Safety **shall** assess a civil penalty against the owner or registrant of the motor vehicle. **The penalty shall be assessed on the number of pounds by which the axle-group weight exceeds the limit set in subdivision (b)(3)**, as follows: for the first 2,000 pounds or any part thereof, two cents (2¢) per pound; for the next 3,000 pounds or any part thereof, four cents (4¢) per pound; for each pound in excess of 5,000 pounds, ten cents (10¢) per pound. Tolerance pounds in excess of the limit set in subdivision (b)(3) are subject to the penalty if the vehicle exceeds the tolerance allowed in subsection (h) of this section. These penalties apply separately to each axle-group weight limit violated.

Id. (emphasis added).

It is uncontroverted that plaintiff did not have the required number of escorts, thereby violating an operational aspect of its permit and invoking section 20-119(d)(1). There is no dispute that section 20-119(d)(1) authorizes a \$500.00 fine for the lack of a required escort. The primary issue before the trial court, and on appeal *de novo*, is whether section 20-119(d) and section 20-118(e) authorize NCDC-CPS to issue an additional overweight penalty based on the difference between the actual weight of the truck (181,180 pounds) and the statutory weight listed in section 20-118(b) (80,000 pounds), despite the fact that the actual weight does not violate the weight limit set out in the special permit.

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Both sides claim that section 20-119 and section 20-118 are clear and unambiguous on their face. When a statute is unambiguous, the plain meaning of the statute must prevail. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999). “When a statute is ambiguous, ‘the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish,’ in order to assure that the intent of the legislature is accomplished.” *N.C. Comm’r of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 23, 609 S.E.2d 407, 412 (2005) (internal citation omitted).

This Court has held, “[s]tatutes imposing penalties are . . . strictly construed in favor of the one against whom the penalty is imposed and are never to be extended by construction.” *Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 205, 282 S.E.2d 509, 511 (1981). N.C. Gen. Stat. § 20-118 and § 20-119 impose penalties against violators and therefore, unless the statutes are unambiguous, we must strictly construe them in favor of plaintiff. In reading the statutes *in pari materia*, we find the meaning to be ambiguous.

It is not clear from the statutes, read *in pari materia*, if an additional weight based penalty is to be calculated where the truck is in violation of a condition of its special permit, but not as to the weight authorized by said permit. The key language of section 20-119(d) states:

In addition to the penalties provided by this subsection, a civil penalty **in accordance with G.S. 20-118(e)(1) and (3)** may be assessed if a vehicle is . . . operating without the proper number of certified escorts as determined by the actual loaded weight of the vehicle combination Fees assessed for permit violations under this subsection shall not exceed a maximum of twenty-five thousand dollars (\$25,000).

Id. (emphasis added). Clearly, section 20-118 is applicable, and it says that if the gross weight authorized by special permit is exceeded, a penalty “shall be . . . assessed” It is unambiguous that under section 20-118, a weight based penalty shall be issued if a truck is over the statutory weight requirement without a special permit, *or* if the truck is over the weight listed in the special permit. The ambiguity arises with section 20-119(d) in that it is not clear what it means to issue an additional penalty in accord with sections 20-118(e)(1) and (3).

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Defendant argues that its additional penalty was in accord with sections 20-118(e)(1) and (3) because the truck was not in compliance with safety conditions set forth in its special permit; therefore, the vehicle was not authorized to exceed the standard statutory weight limitations set out in section 20-118(b)(3). In other words, defendant contends that where a truck is not in compliance with one or more of the conditions mandated by the special permit, the weight limit authorized by the permit does not apply and the driver is penalized for weight as if he did not have a permit at all. Defendant argues that due to the escort violation, plaintiff's truck could not exceed 80,000 pounds, therefore plaintiff must be penalized according to the truck's weight in excess of 80,000 pounds.

Plaintiff argues that for section 20-119(d) to be in accord with sections 20-118(e)(1) and (3), an additional penalty can only be imposed if the truck exceeds the weight listed in the special permit. Plaintiff asserts that sections 20-118(e)(1) and (3) only deal with penalties given due to weight violations and makes a distinction between those with permits and those without. Since plaintiff's truck did not exceed the weight authorized by the special permit, plaintiff argues that only the \$500.00 penalty was lawful.

There is little evidence of legislative intent in this case. Both section 20-118 and section 20-119 were amended in 2005 pursuant to House Bill 669. Section 20-118(e) was amended to include weight penalties for vehicles with special permits. Prior to this amendment, the statute did not authorize the NCDCCPS to issue weight penalties for trucks that exceeded the weight authorized by their special permits. Section 20-119(d) was amended to include the language that permits additional civil penalties in accordance with sections 20-118(e)(1) and (3), subject to a \$25,000.00 cap. These amendments made it clear that the NCDCCPS has the authority to issue overweight penalties if a truck weighs in excess of the limit set in the special permit. However, it is not clear if there was further intent to penalize a truck driver for a weight violation as if that driver had no special permit at all.

It is also unclear why the legislature chose to list certain operational violations in section 20-119(d) as triggering the additional civil penalty. Perhaps it was to emphasize that if these violations occurred, NCDCCPS could, in its discretion, issue a violation for a weight penalty as well. However, sections 20-118(e)(1) and (e)(3) state that NCDCCPS "shall" issue a penalty for weight violations.

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Section 20-119(d) says that an additional penalty “may” be assessed for those operating without a special permit at all. There is ambiguity presented by the “may” and “shall” language. Under section 20-118, someone without a permit would certainly be fined based on the truck’s weight that exceeds the statutory limit and unlike under section 20-119(d), the penalty imposed under sections 20-118(e)(1) and (e)(3) would not be subject to a \$25,000.00 cap. Hence, if section 20-119 is supposed to be in accord with section 20-118, there seems to be no need for the cap contained in section 20-119 where the truck driver is operating without a special permit. Plaintiff does not address the effect of the cap. Defendant claims the cap supports its position in that the legislature realized a cap was needed because the additional civil penalty would be substantial where a truck is significantly overweight according to the statutory limit, but not overweight according to the special permit.

Defendant asserts that since section 20-118 already mandates the assessment of a penalty when a truck is overweight, the legislature must have intended the additional civil penalty mentioned in section 20-119(d) to authorize the assessment of a different weight penalty when a truck is operating in violation of the specified restrictions listed in the special permit, but is not overweight according to the special permit. Otherwise, both sections would regulate the same issue, rendering section 20-119(d) redundant. This argument has merit, but it remains unclear whether the legislature intended to fine truck operators based on weight as if no special permit existed to carry that amount of weight. A special permit did exist in this case, and the only violation of that permit was the lack of an escort, which prompted the \$500.00 fine. While some additional civil penalty may be appropriate under section 20-119(d), in accord with sections 20-118(e)(1) and (e)(3), the parameters of that penalty are unclear.

In sum, regardless of the manner in which we interpret the statutes, some language is rendered meaningless. As defendant argues, section 20-118 allows a weight penalty if a truck exceeds the weight listed in the special permit, or if the truck operator has no permit at all. Hence, section 20-119 is not necessary to effectuate that purpose. However, if we follow defendant’s reasoning, a truck operating without a special permit at all still falls within section 20-119 and is subject to the \$25,000.00 cap, which is unnecessary since that individual would already be subject to an uncapped fine under section 20-118.

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If the legislature intended to impose an additional weight penalty against a special permit holder as if that permit holder had no permit at all, then the language of section 20-119 must be clarified to relate that intent. Without such unambiguous language, we must construe the statute in favor of plaintiff, the party being penalized. Thus, summary judgment for plaintiff is affirmed.¹

Affirmed.

Judges ELMORE and JACKSON concur.

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PLAINTIFFS v. TINDALL CORPORATION, FORMERLY TINDALL CONCRETE PRODUCTS,
INC., DEFENDANT

No. COA08-600

(Filed 3 February 2009)

1. Civil Procedure— motion to dismiss not converted into motion for summary judgment—no consideration of matters beyond pleadings

The trial court did not improperly convert defendant's motion to dismiss for failure to state a claim into a motion for summary judgment because: (1) the trial court's order indicated that it dismissed the complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) and did not mention any of the evidentiary matters appropriately considered on a motion for summary judgment; and (2) nothing in the record established that the trial court considered matters beyond the pleadings.

2. Statutes of Limitation and Repose— Tolling Agreement— Interim Funding Agreement

The trial court did not err in an indemnification case arising out of the negligent construction of a walkway by concluding the statutes of limitation and repose did not bar plaintiff's claims, and alternatively, that defendant was equitably estopped from asserting those defenses based on its agreement to waive them in the

1. In light of our decision with regard to summary judgment, we need not address defendant's argument that the trial court incorrectly found that defendant unlawfully invalidated plaintiff's permit when defendant issued the citations.

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Tolling Agreement and Interim Funding Agreement because: (1) the Tolling Agreement expressly remained effective through and including 1 January 2006, and the statute of limitations did not bar the action when plaintiff filed suit less than two years after the tolling agreement expired; (2) the statute of repose did not bar the action since the Interim Funding Agreement operated to toll the statute of repose through the filing of plaintiff's complaint; and (3) assuming argument that plaintiff breached the Agreement by filing this action before the South Carolina litigation concluded, even a material breach by plaintiff would not have caused it to lose the benefit of the tolling provisions in the Interim Funding Agreement.

3. Indemnity— express contract—implied-in-law theory unavailable

The trial court did not err in an indemnification case arising out of the negligent construction of a walkway by concluding that plaintiff was not entitled to implied-in-law indemnity from defendant because: (1) an implied-in-law theory of indemnification is generally not available where there is an express contract; (2) the parties executed an express indemnification provision covering only injuries occurring during the performance of defendant's work on the walkway; and (3) plaintiff cannot be entitled to indemnity from defendant's active negligence when it was adjudicated as having no passive tortious liability for defendant's negligent act.

Appeal by Plaintiffs from order entered 13 December 2007 by Judge W. Erwin Spainhour in Superior Court, Mecklenburg County. Heard in the Court of Appeals 17 November 2008.

Parker Poe Adams & Bernstein LLP, by David N. Allen, Lori R. Keeton, and Jason R. Benton, for plaintiffs.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr. and Reid L. Phillips, for defendant.

WYNN, Judge.

“There can be no implied contract where there is an express contract between the parties in reference to the same subject matter.”¹ Plaintiffs Charlotte Motor Speedway, Inc. and Charlotte Motor

1. *Greene v. Charlotte Chem. Labs., Inc.*, 254 N.C. 680, 691, 120 S.E.2d 82, 89 (1961) (citations omitted).

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Speedway, LLC (“Speedway”) argue that they are entitled to implied-in-law indemnification from Defendant Tindall Corporation (“Tindall”) because their liability is derivative to Tindall’s negligence. Because Speedway and Tindall executed an express indemnification provision that, by its terms, does not cover the losses for which Speedway seeks indemnification, we affirm the trial court’s order of dismissal.

In May 1995, Speedway contracted with Tindall to construct a pedestrian walkway from the Charlotte Motor Speedway to the parking area. The construction contract included an indemnification clause, stating:

[Tindall] shall indemnify and save harmless [Speedway], but only for claims for damages to property and personal injuries, including death, during the performance of the work herein and on the premises of [Speedway] and resulting directly and solely from negligence of [Tindall’s] employees while engaged in such work.

At some point after execution, the words “but only” were stricken from the clause.

Construction of the walkway was completed in October 1995. However, the walkway collapsed in May 2000 during the Winston Cup NASCAR race. Thereafter, 103 of the pedestrians on the walkway brought actions against Speedway and Tindall in various state and federal courts. All North Carolina state court actions were consolidated on 20 September 2001.

On 28 September 2001, Speedway and Tindall executed a Tolling Agreement, which remained effective through 1 January 2006. Under that agreement, Speedway and Tindall agreed “to toll and suspend any applicable statute of limitations, repose or time, whether created by statute, contract, laches or otherwise, within which any cause, claim, action, cause of action, or suit must be made, or commenced by the parties against any one of them concerning the [pedestrian] claims, including any and all claims for indemnification and contribution.”

In August 2002, Speedway and Tindall executed an Interim Funding Agreement agreeing to establish a trust fund with Anti-Hydro—the manufacturer of a product Tindall used to construct the walkway—for the payment of settlements. Under that agreement, Speedway and Tindall again agreed not to sue each other until the

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pedestrian litigation was resolved, and that all claims existing between them would be preserved.

On 28 August 2002, the trial court in one of the pedestrian lawsuits ruled that Speedway was liable to the pedestrians “for the acts and omissions of the defendant Tindall Corporation” on a theory of nondelegable duty. That ruling was later adopted and applied to all pending pedestrian lawsuits. A jury verdict in *Cindy A. Taylor, et al. v. Charlotte Motor Speedway*, 01-CVS-12107, determined liability between Speedway and Tindall as follows: 1) Speedway was not negligent; 2) Tindall’s negligence injured the plaintiffs; and 3) Speedway breached its Encroachment Agreement (to construct the walkway in accordance with state standards) with the N.C. Department of Transportation; plaintiffs were third party beneficiaries of the Encroachment Agreement and were injured by Speedway’s breach.

The last of the pedestrian lawsuits pending in North Carolina courts concluded on 27 June 2007 with our Supreme Court’s denial of a petition for discretionary review. However, two pedestrian cases, neither of which named Speedway as a defendant, remained pending in South Carolina.

On 17 July 2007, Speedway brought the instant action seeking indemnification from Tindall on theories of implied and express indemnification. In turn, Tindall moved to dismiss Speedway’s complaint under N.C. R. Civ. P. 12(b)(6). From the trial court’s order granting Tindall’s motion to dismiss, Speedway appeals arguing that the trial court erred: (I) by considering matters beyond the allegations of its complaint, thereby converting Tindall’s motion to dismiss into a motion for summary judgment; (II) because neither the statute of limitations nor the statute of repose bars Speedway’s claims; and (III) because, as a matter of law, Speedway is entitled to implied-in-law indemnity.

I.

[1] First, Speedway argues that the trial court impermissibly considered matters beyond its pleadings, in effect ruling on the merits of the claims and converting Tindall’s motion to dismiss into a motion for summary judgment. Tindall answers that the plain language in the trial court’s order indicates that it considered nothing beyond the pleadings, and that Speedway urged the trial court to go beyond the pleadings.

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“A motion to dismiss for failure to state a claim is ‘converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court.’” *King v. Cape Fear Mem’l Hosp., Inc.*, 96 N.C. App. 338, 342, 385 S.E.2d 812, 815 (1989) (quoting *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979)). Requests, explanations, and arguments of counsel relating to a motion to dismiss are not considered matters outside the pleadings. *Id.* Reviewing courts have looked to cues in the trial court’s order to determine whether it considered matters outside the pleadings. *See Lowder v. Lowder*, 68 N.C. App. 505, 506, 315 S.E.2d 520, 521 (1984) (“It is apparent from the wording of the order of dismissal that the trial court considered the record of proceedings in *Lowder, et al. v. All Star Mills, Inc., et al.*, No. 79CVS015, *supra.*”). Moreover, where non-movants fully participated in the hearing on a motion to dismiss, observed that matters beyond the pleadings were being considered, and failed to request additional time to produce evidence, reviewing courts have not been persuaded that dismissal was inappropriate. *See Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004) (citing *Knotts v. City of Sanford*, 142 N.C. App. 91, 97-98, 541 S.E.2d 517, 521 (2001)).

At the hearing on Tindall’s motion to dismiss, the trial court heard arguments regarding factual evidence, rulings, and jury instructions in at least one of the underlying pedestrian suits. The parties also made arguments regarding the Interim Funding Agreement. The trial court’s order, however, includes only the following relevant language:

IT APPEARING to the Court, having reviewed the pleadings and the briefs submitted by the parties, and having heard the oral argument by counsel for the parties at the December 5, 2007 hearing, that the Complaint fails to state a claim upon which relief can be granted and that the Motion to Dismiss therefore should be allowed pursuant to Rule 12(b)(6)

Thus, the trial court’s order indicates that it dismissed the complaint under N.C. R. Civ. P. 12(b)(6), and notably, does not mention any of the evidentiary matter appropriately considered on a motion for summary judgment. Moreover, nothing in the record establishes that the trial court considered matters beyond the pleadings. Because the record does not indicate that the trial court converted the motion to dismiss into a summary judgment motion, we reject this assignment of error.

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II.

[2] Speedway next argues that the statutes of limitation and repose do not bar its claims, and alternatively, that Tindall should be equitably estopped from asserting those defenses because it agreed to waive them in the Tolling Agreement and Interim Funding Agreement (collectively “Agreements”). In response, Tindall argues that Speedway’s action is time-barred, and that Speedway lost the benefit of the Agreements when it breached them by filing this suit before all underlying pedestrian suits concluded.

The statute of limitations period for an indemnity contract is three years. N.C. Gen. Stat. § 1-52(1) (2008). The applicable statute of repose provides that “[n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.” N.C. Gen. Stat. § 1-50(a)(5)a (2008).

In this case, Tindall alleges that the statute of limitations bars Speedway’s claim for indemnification of any monies paid prior to three years before it filed its complaint. Speedway filed the complaint in this case on 17 July 2007. However, Tindall’s argument ignores the operation of the Tolling Agreement, which expressly remained effective “through and including January 1, 2006.” Because Speedway filed suit less than two years after the Tolling Agreement expired, we hold that the statute of limitations does not bar this action, and Tindall’s argument must fail.

Likewise, the statute of repose does not bar this action. The Walkway was substantially completed on 9 October 1995; the parties executed the “Tolling Agreement” on 28 September 2001, within six years from substantial completion of the walkway. Although the Tolling Agreement expired on 1 January 2006 (and this action was not filed until more than one year later), the parties executed the Interim Funding Agreement on 8 August 2002, in which they agreed that they would not sue each other until all pedestrian claims were resolved.² The pedestrian lawsuits were still pending when Speedway

2. Tindall argues, on appeal, that this Court should not consider the Interim Funding Agreement because it does not appear on the face of the pleadings. In its Memorandum of Law Supporting its Motion Dismiss before the trial court, however, Tindall quoted extensively from the Interim Funding Agreement, and argued that Speedway was not entitled to its benefit because of a breach. Therefore, Tindall may

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filed the complaint in this case on 17 July 2007; thus the Interim Funding Agreement operated to toll the statute of repose through the filing of Speedway's complaint.

Tindall argues that Speedway lost the benefit of the Interim Funding Agreement's tolling provisions because Speedway breached the Agreement by filing this action before the South Carolina litigation concluded.³ The question of whether a breach of contract is material is ordinarily a question for a jury. *See Combined Ins. Co. of Am. v. McDonald*, 36 N.C. App. 179, 184, 243 S.E.2d 817, 820 (1978). But assuming, *arguendo*, that the breach was material, at most Tindall would have been allowed to sue Speedway prior to the end of the pedestrian litigation. Tindall cites cases stating that a material breach relieves the non-breaching party of the obligation to perform. *See, e.g., McClure Lumber Co. v. Helmsman Constr. Co.*, 160 N.C. App. 190, 198, 585 S.E.2d 234, 239 (2003); *F. Indus., Inc. v. Cox*, 45 N.C. App. 595, 602, 263 S.E.2d 791, 795 (1980). However, Tindall's relevant performance obligation under the Interim Funding Agreement was to refrain from suing Speedway until the underlying pedestrian litigation was resolved. Thus, even a material breach by Speedway would not have caused it to lose the benefit of the tolling provisions in the Interim Funding Agreement. Together, the Agreements operate to toll the statute of repose through the filing of Speedway's complaint.

III.

[3] In its next assignment of error, Speedway argues that its liability is merely derivative to Tindall's negligent construction of the walkway, and thus it is entitled to implied-in-law indemnity from Tindall. In response, Tindall argues that the express indemnification provision in the parties' construction agreement precludes Speedway's implied-in-law indemnity theory.

An implied-in-law contract for indemnification is generally based upon the doctrine of primary-secondary liability. *Greene v. Charlotte Chem. Labs., Inc.*, 254 N.C. 680, 691, 120 S.E.2d 82, 89 (1961) (citing *Hunsucker v. High Point Binding & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953)). Where "a passively negligent tortfeasor has dis-

not argue for the exclusion of the Interim Funding Agreement in this appeal because "arguments of counsel relating to a motion to dismiss are not considered matters outside the pleadings." *King*, 96 N.C. App. at 342, 385 S.E.2d at 815.

3. Tindall concedes that Speedway was not a named party to any outstanding cases when it filed this action.

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charged an obligation for which the actively negligent tortfeasor was primarily liable,” as a matter of fairness, the actively negligent tortfeasor may be found to have made an implied promise to indemnify the passively negligent tortfeasor. *Id.* However, an implied-in-law theory of indemnification is generally not available where there is an express contract. *Id.* (“If there is an express contract of indemnity, the indemnitee is relegated to his contract, a matter not germane to plaintiff’s tort action.”)

Here, Speedway and Tindall executed an express indemnification provision which, by its terms, covered only injuries “occurring during the performance of [Tindall’s] work” on the walkway. Moreover, Speedway was found not to be a tortfeasor in the trial court. Speedway’s liability was adjudicated as purely contractual—it breached a nondelegable duty and the Encroachment Agreement with the NCDOT, of which the injured pedestrians were third-party beneficiaries.

Nonetheless, Speedway attempts to overcome the express indemnification provision and its pure contractual liability by citing *Northeast Solite Corp. v. Unicon Concrete, LLC*, 102 F. Supp. 2d 637, 640 (M.D.N.C. 1999) for the proposition that implied-in-law indemnity may be found based on pure contractual liability. However, *Northeast Solite* is distinguishable from the instant case on at least two material points. First, the District Court in *Northeast Solite* was careful to note that the party seeking indemnification had not “asserted the existence of an express indemnification agreement” *Id.* at 641. Moreover, the party seeking indemnification in *Northeast Solite* claimed a misrepresentation of authority to modify a noncompete agreement as the basis for its claim for implied-in-law indemnification. *Id.* Therefore, no tort was at issue in *Northeast Solite*.

In this case, on the other hand, an express indemnification provision exists which does not cover injuries occurring after the walkway was completed. Furthermore, Speedway seeks indemnity for Tindall’s tortious construction of the walkway, but Speedway was not adjudicated a tortfeasor. Therefore, Speedway cannot be entitled to indemnity for Tindall’s active negligence when it was adjudicated as having no passive tortious liability for Tindall’s negligent act.

In sum, we affirm the dismissal of Speedway’s complaint.

Affirmed.

Judges STEPHENS and JOHNSON concur.

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NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY AND FARM BUREAU INSURANCE OF N.C., INC., PLAINTIFFS v. LINDA F. SEMATOSKI, DEFENDANT

No. COA08-553

(Filed 3 February 2009)

1. Arbitration and Mediation— agreement—covered by N.C. Act

An arbitration agreement was covered by the North Carolina Uniform Arbitration Act where automobile policies were entered into in 2001 and the arbitration agreement does not fall under either exception listed under N.C.G.S. § 1-567.2(b); both plaintiffs are North Carolina corporations with a principal place of business in North Carolina; plaintiffs each issued an insurance policy with defendant as a named beneficiary; both policies were applied for and entered into in North Carolina and covered vehicles registered and garaged in North Carolina; and there is no evidence that the collection of premiums or payment of benefits involved or affected commerce outside of North Carolina.

2. Arbitration and Mediation— lawsuit filed in Florida—NC arbitration not waived

Defendant did not waive her contractual right to arbitration in North Carolina of insurance claims arising from an auto accident in Florida by filing an action in Florida. It has been held that the mere filing of pleadings does not manifest waiver of the right to arbitrate, and the expenses cited by plaintiffs in the defense of the Florida action are not the type contemplated by prejudice from the expense of a lengthy trial.

3. Arbitration and Mediation— summary judgment motion— issues beyond arbitrability—to be considered by arbitrator

The trial court erred when considering a summary judgment motion arising from an auto accident by ruling on issues that should be determined by an arbitrator. The arguments raised by the summary judgment motion were not arguments contesting the scope of or defense to arbitrability and the issues should therefore have been considered by an arbitrator.

Appeal by defendant from order entered 13 December 2008 by Judge Edgar B. Gregory in Wilkes County Superior Court. Heard in the Court of Appeals 19 November 2008.

N.C. FARM BUREAU MUT. INS. CO. v. SEMATOSKI

[195 N.C. App. 304 (2009)]

Willardson Lipscomb & Miller, L.L.P., by William F. Lipscomb, for plaintiff-appellees.

Doran, Shelby, Pethel and Hudson, P.A., by Michael Doran, for defendant-appellant.

BRYANT, Judge.

Defendant appeals from the trial court's order entered 13 December 2008 which allowed plaintiffs' motion for summary judgment and denied defendant's motion to compel arbitration and stay proceedings. For the reasons stated below, we reverse and remand.

According to the record before us, on 7 April 2002, defendant was driving in Sarasota County Florida when she was rear-ended by a vehicle operated by tortfeasor Thomas Ferguson. Defendant was injured. Ferguson's vehicle was covered by an insurance policy issued by Progressive Insurance Company (Progressive) with a liability coverage limit of \$10,000. The vehicle defendant was driving was insured by Hartford Insurance Co. of the Midwest (Hartford), which provided for uninsured and/or underinsured motorist (UM / UIM) coverage in the amount of \$10,000 per person. The vehicle was registered and garaged in North Carolina. Defendant was also a named beneficiary on two insurance policies: (1) a personal auto policy issued by Plaintiff North Carolina Farm Bureau Mutual Insurance Company, which provided UM / UIM coverage up to \$50,000 per person, and (2) a personal auto policy issued by Plaintiff Farm Bureau Insurance of N.C., Inc., which provided UM / UIM coverage in the amount of \$100,000 per person. Both of plaintiffs' policies were applied for and issued in North Carolina.

In May 2006, Progressive, Ferguson's insurance policy provider, paid defendant its \$10,000 policy limit. And, on 24 May 2006, defendant voluntarily dismissed her lawsuit against Ferguson with prejudice. In November 2006, Hartford paid defendant its UM / UIM \$10,000 policy limit.

On 27 March 2007, in Wilkes County Superior Court, plaintiffs filed a complaint for declaratory judgment seeking to determine if defendant was entitled to recover UM / UIM coverage from the insurance policies they issued. On 9 November 2007, plaintiffs filed a motion for summary judgment. On 16 November 2007, defendant filed a motion to compel arbitration and stay the proceedings based on provisions in each of plaintiffs' policies that allow for arbitration of bodily injury claims involving an underinsured motorist.

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On 13 December 2007, after reviewing the record and considering the arguments of counsel for the parties, the trial court allowed plaintiffs' motion for summary judgment and denied defendant's motion to compel arbitration and stay proceedings. Defendant appeals.

On appeal, defendant raises two issues: whether the trial court erred by (I) not staying the proceedings and refusing to compel arbitration and (II) granting summary judgment to plaintiffs.

I and II

Defendant first argues that the trial court erred by not staying the proceedings and not compelling arbitration. Defendant argues that the insurance policies in question involve interstate commerce and as such are governed by the Federal Arbitration Act (FAA). Following that, defendant argues that plaintiffs challenged the arbitrability of this matter on grounds an arbitrator is to decide, such as, whether defendant "is legally entitled to recover compensatory damages." We agree in part.

[1] We first consider whether this matter is governed by the FAA or, alternatively, the North Carolina Uniform Arbitration Act (UAA). "[T]he FAA preempts conflicting state law, including state law addressing the role of courts in reviewing arbitration awards." *WMS, Inc. v. Weaver*, 166 N.C. App. 352, 357-58, 602 S.E.2d 706, 710 (2004) (citation omitted).

Under the FAA, codified under Title 9 of the United States Code Service, sections 1 *et seq.*, the validity, irrevocability, and enforcement of agreements to arbitrate extend to the following:

"A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C.S. § 2 (2002) (emphasis added).

In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 130 L. Ed. 2d 753 (1995), the United States Supreme Court addressed the issue of how to interpret the language "a contract evidencing a transaction involving commerce[.]" *Id.* at 268, 130 L. Ed. 2d at 760 (additional emphasis added). The Court reasoned that the language

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extended the applicability of the FAA to the limits of Congress' Commerce Power. *Id.*

In application to the facts before it, the Court noted that the defendants, Allied-Bruce Terminix and Terminix International, were multi-state firms which utilized treatment and repair materials from outside of the plaintiff's state to satisfy their contractual obligations. *Id.* at 282, 130 L. Ed. 2d at 769. As such, "the transaction . . ., in fact, involved interstate commerce." *Id.*

The North Carolina Uniform Arbitration Act (UAA) is applicable to agreements to arbitrate made on or after 1 August 1973 and prior to 1 January 2004. *See* N.C. Gen. Stat. §§ 1-567.19 (2001) and 1-569.3 (2007). And, the UAA makes only two exclusions. It does not apply to the following:

- (1) Any agreement or provision to arbitrate in which it is stipulated that this Article shall not apply or to any arbitration or award thereunder;
- (2) Arbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that this Article shall apply.

N.C. Gen. Stat. § 1-567.2(b) (2001).

Here, both of plaintiffs' policies were entered into in 2001 and the arbitration agreement does not fall under either exception listed under N.C.G.S. § 1-567.2(b) (2001). Both plaintiffs are North Carolina corporations with a principal place of business in North Carolina. Plaintiffs each issued an insurance policy with defendant as a named beneficiary. Both policies were applied for and entered into in North Carolina and covered vehicles registered and garaged in North Carolina. Also, there is no evidence in the record that the collection of insurance premiums or payment of insurance benefits involved or affected commerce outside of North Carolina. Therefore, we hold that on the record before us the arbitration agreement is governed by the UAA.

[2] We next consider whether the trial court, in granting plaintiffs' motion for summary judgment, ruled on issues reserved for an arbitrator.

Under North Carolina General Statute 1-567.2,

- (a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the

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agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

N.C. Gen. Stat. § 1-567.2(a) (2001).

Under North Carolina General Statute 1-567.3,

(a) On application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court *shall* order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

...

(e) An order for arbitration shall not be refused or a stay of arbitration granted on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

N.C. Gen. Stat. § 1-567.3(a) & (e) (2001) (emphasis added).

North Carolina has a strong public policy favoring arbitration. *See Cyclone Roofing Co. v. David M. La Fave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). However, our Supreme Court has held that a party may expressly or impliedly waive its contractual right to arbitration. *Id.* "Waiver of a contractual right to arbitration is a question of fact. [However] [b]ecause of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right." *Id.*

In the instant case, plaintiffs assert that defendant waived her contractual right to arbitration when she filed a lawsuit against plaintiffs in a Florida state court. We disagree.

In *Cyclone Roofing Co.*, our Supreme Court reasoned that "[t]he mere filing of . . . pleadings did not manifest waiver . . . of [the] right to arbitrate under the contract. To hold otherwise . . . would make parts of [the UAA] nonsensical." *Id.* at 230, 321 S.E.2d at 877. Plaintiff

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also asserts prejudice based on the expenditure of \$3,402.24 in legal fees and expenses in defense of the Florida lawsuit. However, such expenses are not the type contemplated by our Supreme Court when it said one may be prejudiced if “forced to bear the expense of a lengthy trial[.]” *Id.* at 229, 321 S.E.2d at 876. Therefore, we hold defendant did not waive her contractual right to arbitration.

[3] Defendant argues that the trial court erred by ruling on issues that should be determined by an arbitrator. In *N.C. Farm Bureau Mut. Ins. Co. v. Edwards*, 154 N.C. App. 616, 572 S.E.2d 805 (2002), the defendants’ UIM carrier sought to determine the rights of the parties after the defendants issued a release for a tortfeasor prior to asserting a derivative claim for UIM benefits. *Id.* at 617-18, 572 S.E.2d at 806. The defendants demanded the matter go to arbitration, and the UIM carrier argued that the release operated as a bar to defendant’s recovery. *Id.* at 619, 572 S.E.2d at 806-07.

On appeal, we considered the issue and held “[the] defendants’ claim[] against their UIM carrier . . . [was] not barred by the execution of their limited release,” and we affirmed the order of the trial court to send the matter to arbitration. *Id.* at 623, 572 S.E.2d at 809. In dicta, we reasoned that “[g]iven that UIM coverage is the derivative of a tortfeasor’s liability, it could be argued that the logical extension of [our prior precedent] is to bar recovery of UIM benefits where a release simply states that the named tortfeasor is released from all liability.” *Id.* at 622, 572 S.E.2d at 808.

Despite our consideration of the issues in *Edwards*, in which we affirmed the trial court’s order compelling arbitration, we have been unable to find a case in which this Court has upheld the denial of a motion to compel arbitration on grounds other than the scope of or defense to arbitrability. See *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992) (stating courts resolve doubts concerning the scope of arbitrable issues whether the issue is the contract language or an allegation of waiver, delay, or a like defense to arbitrability).

Here, in plaintiffs’ motion for summary judgment, plaintiffs argued that defendant was not entitled to recover derivative UM / UIM coverage from plaintiffs because (1) defendant was not entitled to recover from Ferguson after defendant released Ferguson and (2) the Florida statute of limitations for defendant to bring a suit against Ferguson has expired again precluding defendant from ascertaining primarily liability.

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We hold these are not arguments contesting the scope of or defense to arbitrability. Therefore, the issues should be considered by an arbitrator. *Compare Register v. White*, 358 N.C. 691, 693, 599 S.E.2d 549, 552 (2004) (determining whether the plaintiff's contractual right to demand arbitration was time-barred by a statute of limitations).

For the aforementioned reasons we reverse the trial court's grant of summary judgment and denial of defendant's motion to compel arbitration and stay proceedings.

Reversed and remanded.

Judges McGEE and GEER concur.

STATE OF NORTH CAROLINA v. CAMERON LAWRENCE KUEGEL

No. COA08-587

(Filed 3 February 2009)

1. Search and Seizure— consent—totality of circumstances

The trial court did not err by finding that defendant's consent to a search of his apartment during which controlled substances were found was voluntarily given based on the totality of the circumstances even though the officer had falsely told defendant that he had followed and stopped people leaving defendant's apartment who had marijuana or cocaine in their possession.

2. Appeal and Error— preservation of issues—failure to argue—failure to raise at trial court

Although defendant contends the trial court erred in a drug case by failing to conclude the discovery of drugs in defendant's home was the fruit of an unreasonable seizure and that discovery of cocaine on his person while at the jail was likewise fruit of his illegal detention, these arguments are dismissed under N.C. R. App. P. 10(b)(1) because neither of these issues was raised or argued before the trial court.

Appeal by defendant from judgment entered 7 January 2008 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 19 November 2008.

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[195 N.C. App. 310 (2009)]

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

Jeffery S. Miller for defendant-appellant.

BRYANT, Judge.

Defendant appeals from a judgment entered 7 January 2008 pursuant to a guilty plea in which defendant pled guilty to trafficking in cocaine, possession with intent to manufacture, sell, or distribute methylenedioxy-n-methylamphetamine (MDMA), and possession of a controlled substance on the premises of a prison or a jail. Prior to entry of his plea, defendant made known his intent to appeal from the denial of his motion to suppress. For the reasons stated below, we affirm.

At a suppression hearing held on 7 March 2007, Sergeant Joseph LeBlanc, of the New Hanover County Sheriff's Department, testified that on or about 11 December 2004, he received a phone call from a known informant. The informant, who had previously proven to be reliable in the past, provided unsolicited information that a white male, named Cameron, was selling marijuana and cocaine from a residence off Wallace Road in New Hanover County. Ten days later, on 21 December 2004, Sgt. LeBlanc also received a call from an anonymous tipster who provided the following information:

[A] white male named Cameron occupied the bottom floor garage apartment at 5017 Pine Needles Drive, . . . he was selling powder cocaine and marijuana, . . . the house was on the north side of the road, it was a two story, . . . his window had an AC unit, . . . the front door was to the left, . . . [the tipster] had been in the apartment when purchases of marijuana and cocaine had been conducted, . . . Carmeron was a white male in his mid-20s with a shaved head and was approximately 5'10" tall.

Sgt. LeBlanc testified that Pine Needles Drive, where the suspect resided, was off of Wallace Road.

On this information, Sgt. LeBlanc decided to "drive out to the residence and see what was going on." Following Sgt. LeBlanc in a separate vehicle were Detectives Wyatt and Whitlock. The house at the address matched the description provided by the tipster, and after observing the house for a short period, Sgt. LeBlanc informed the detectives that he was going to conduct a "knock and talk."

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Sgt. LeBlanc approached the house wearing plain clothes. Detectives Wyatt and Whitlock were approximately three houses away. Sgt. LeBlanc knocked and waited until a white male approximately 5'10" with a shaved head answered the door. Sgt. LeBlanc informed the man that he was "a detective with the Sheriff's Office." The male did not consent to allow Sgt. LeBlanc inside the house but did step outside to talk. At that time, Sgt. LeBlanc took his badge out and informed the male that he was with the Vice and Narcotics Unit. At the suppression hearing Sgt. LeBlanc gave the following testimony regarding what transpired:

LeBlanc: I explained to him—I used a common street term, I told him that he had been narced on, which, basically means that somebody told on him. And I told him that I knew that he had both marijuana and cocaine in the residence and I wanted consent to search his apartment without a warrant.

...

I told him that someone in his neighborhood had complained that during the night, people would drive up to his residence, stay for a short period of time and leave. I told him that I had conducted surveillance of his apartment and observe[d] [a] lot of people coming and going after staying a short period of time. I told him that I followed—I had follow[ed] people that left his apartment and stopped their cars after they were out of the neighborhood. Each time I made a stop, I had either recovered marijuana or cocaine.

...

Counsel: Had you, in fact, done that?

LeBlanc: No, sir.

Counsel: When—after you told him all of these things, did he say anything further to you

LeBlanc: After he looked down at the ground and shook his head back and forth, he looked up at me and he said, "What if I give you what I got?"

...

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LeBlanc: I explained to him that I could not leave his residence until I was sure that all the dope, money and paraphernalia that he had, I was going to leave with.

...

I told him that if he did not feel conformable [sic] giving me consent to search, that I would leave two detectives at the residence and apply for a search warrant

Counsel: When you told him that, did he say anything to you in response to your statements?

LeBlanc: [T]he Defendant asked me, "If I cooperate, what will you do for me?"

...

I replied to him that I could not make him any promises, but if he did not have, and I'm quoting myself, "If he didn't have a half a kilo or a dead body in his apartment, I might be able to keep him out of jail for the holiday." So that he could handle his charges after Christmas.

Counsel: When you told him that, what did he do, if anything, in response to your statements?

LeBlanc: He walked around, he got the dog from the house and placed him inside a fence in the backyard. Then he walked back over in front of me and he said, "Come on, you guys can come in and look around. I'll show you where everything is."

...

He seemed, somewhat, reluctant. So I stopped him and I took my left hand and I touched his left shoulder and I stopped him before he entered the apartment and told him if he did not feel comfortable letting us look in the apartment, he could say no. And I told him that I wouldn't take his refusal personally or be mad at him if he did not want to give consent. I told him that if he wanted to, and I'm quoting myself, "explore another the [sic] legal option," that he could do that.

I explained that if he wanted, I could leave Detectives Wyatt and Whitlock at his apartment and apply

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for a search warrant. And the Defendant told me, "That's not necessary. Come in." I asked him again if he was sure. He said, "Yeah." That's when Detectives Wyatt and Whitlock and I followed the Defendant inside the apartment.

With defendant's assistance, Sgt. LeBlanc, along with Detectives Wyatt and Whitlock, conducted a search of the apartment. They recovered a large bag of cocaine along with several small bags of cocaine amounting to 30.9 grams, a large vacuum sealed bag of marijuana amounting to 286 grams, a box of sandwich bags, a Radio Shack police-type scanner, a plastic bag containing three-and-a-half pills of MDMA or Ecstasy, a pack of rolling papers, some suspected cocaine residue, a plastic digital scale and \$540 in cash. Defendant was not arrested but allowed to turn himself in to police after the holidays.

On 5 January 2005, defendant reported to the New Hanover County Jail where he was searched incident to arrest. Found in defendant's possession was 1.2 grams of cocaine.

On 27 September 2007, the trial court entered an order denying defendant's motion to suppress, concluding that defendant's consent to search his residence was freely and voluntarily given. On 7 January 2008, defendant pled guilty to trafficking in cocaine; possession with intent to manufacture, sell, or deliver MDA / MDMA; and possession of a controlled substance on the premises of a prison or jail, with notice that he would appeal the trial court's denial of his motion to suppress. The trial court entered judgment in accordance with said plea. Defendant appeals.

On appeal, defendant raises two primary arguments: (I) that the State failed to carry its burden of proving defendant's consent was freely and voluntarily given and (II) that the discovery of drugs in defendant's home and on defendant's person at the jail was the direct result of an unreasonable seizure by police.

I

[1] Defendant first argues that the State failed to carry its burden of proving defendant's consent was freely and voluntarily given and not coerced. Defendant argues that his consent to search was not voluntary as it was the product of deceptive practices by the investigating officer. We disagree.

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“On a motion to suppress evidence, the trial court’s findings of fact are conclusive on appeal if supported by competent evidence.” *State v. Campbell*, 359 N.C. 644, 661, 617 S.E.2d 1, 12 (2005) (citation omitted). Where error is not assigned to any specific finding of fact, “the findings of fact are not reviewable, and the only issue before us is whether the conclusions of law are supported by the findings, a question of law fully reviewable on appeal.” *Id.* at 662, 617 S.E.2d at 13 (citations omitted).

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Consent, however, has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given. For the warrantless, consensual search to pass muster under the Fourth Amendment, consent must be given and the consent must be voluntary.

State v. Smith, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (internal citations and quotations omitted).

“[T]he question whether a consent to a search [is] 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.” *Schneekloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973). “Voluntariness is a question of fact to be determined from all the circumstances, and while the subject’s knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.” *Id.* at 248-49, 36 L. Ed. 2d at 875. “In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.” *Id.* at 227, 36 L. Ed. 2d at 863. *See, e.g., State v. Sokolowski*, 344 N.C. 428, 474 S.E.2d 333 (1996) (holding no coercion where eight officers disarmed the defendant prior to sitting him down on a couch and asking for consent to search his house); *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983) (holding no coercion where officers told the defendant that only he could consent to the search but if he did not consent the officers would get a search warrant and search anyway); *see also State v. Barnes*, 154 N.C. App. 111, 572 S.E.2d 165 (2002) (holding an officer’s deception, telling a pedophile that his victim was pregnant, in an effort to elicit a confes-

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sion, was not sufficient to overcome the defendant's will and render his confession inadmissible).

Here, after the suppression hearing, the trial court made the following findings:

6. The defendant spoke to Detective LeBlanc outside the apartment at his own request . . . , and Detective LeBlanc told him he had received complaints of drug activity and requested consent to search the defendant's residence without a warrant, and Detective LeBlanc further told defendant that he had been watching defendant's apartment and followed people leaving there who had drugs such as marijuana or cocaine in their possession upon leaving defendant's apartment, despite the fact that Detective LeBlanc had not made any such stops of defendant's house visitors;
7. After speaking for a short time outside his residence, defendant asked Detective LeBlanc what would happen if he gave him what he had, and the detective said he would have to confirm that there was no other contraband present and he could go to get a search warrant if defendant did not want to grant consent to search, and if defendant cooperated and there was not a large amount of drugs or a "dead body" in the residence, he would try to keep defendant out of jail for the holidays;
8. At that point, defendant . . . told the officers to come inside and he would show them where everything was

Defendant does not contest the trial court's findings.

Based on the totality of the circumstances as set forth in these uncontested findings, we hold defendant's consent to the search of his residence was voluntary, "the product of an essentially free and unconstrained choice" and not the product of unlawful coercion. *See Schneekloth*, 412 U.S. at 225-26, 36 L. Ed. 2d at 862. Accordingly, defendant's assignment of error is overruled.

II

[2] Defendant next argues that the discovery of the drugs in his home was the "fruit of an unreasonable seizure" and that discovery of cocaine on his person while at the jail was likewise "fruit of his illegal detention." However, these issues were neither raised nor argued before the trial court. Accordingly, we dismiss defendant's contentions. *See* N.C. R. App. P. 10(b)(1) (2008) ("In order to preserve a

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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.”).

Affirmed.

Judges McGEE and GEER concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD BREWINGTON, JR.

No. COA08-501

(Filed 3 February 2009)

Homicide— first-degree murder—felony murder—malice, premeditation, and deliberation—alternate basis

Although defendant contends the trial court erred in a first-degree murder case by denying defendant’s request for a jury instruction on continuous transaction with regard to the underlying felony of arson, the merits of this argument are not reached because: (1) defendant was found guilty under the felony murder rule as well as on the basis of malice, premeditation, and deliberation; and (2) even if the Court of Appeals found reversible error as to issues related to the felony murder rule, the conviction would still stand on the basis of malice, premeditation, and deliberation since defendant made no argument on this basis.

Appeal by defendant from judgment entered 9 November 2007 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 19 November 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Daniel P. O’Brien, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

PER CURIAM.

On 9 November 2007 James Edward Brewington, Jr. (“defendant”) was convicted of one count of first degree murder under the

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first degree felony murder rule (with arson being the underlying felony) and on the basis of malice, premeditation, and deliberation. Judge Kenneth Titus sentenced defendant to life imprisonment without parole. Defendant appeals.

At trial, the evidence tended to show that defendant resided with the victim, James Baggett (“Baggett”), at Baggett’s Holly Springs home in early 2007. There was differing testimony as to why defendant moved out of Baggett’s home and what transpired the evening Baggett was killed.

Defendant testified that he moved out of the residence on or about 4 February 2007 and that he and Baggett were on amicable terms at that time. Another witness, Helen McDonald (“Ms. McDonald”), testified that defendant stole money from Baggett, which led to a conflict between the two and was the reason for defendant’s subsequent move. Defendant testified that Ms. McDonald was the one who stole the money from Baggett.

Defendant testified that on the night of the murder, 10 February 2007,¹ defendant went to the home of John Morris (“Mr. Morris”) where he smoked crack cocaine with several other people. Defendant stated that Ms. McDonald was also present at Mr. Morris’s house and that she sought to instigate an argument between defendant and Baggett, who was not present, by saying she heard defendant was thrown out of Baggett’s house over the “money situation” and Baggett caused defendant to lose his job.

Defendant testified that when the group ran out of beer and cigarettes, he and Ms. McDonald went to buy some more and while they were walking to the store, they saw Baggett drive up to his home. Defendant suggested they go to Baggett’s house because he wanted to make sure there was no animosity between him and Baggett. According to defendant, he and Ms. McDonald entered Baggett’s home and found him sitting on the sofa drinking beer. Baggett offered defendant a beer, which he accepted. During the course of the conversation between Baggett and defendant, an argument ensued in which Baggett called defendant a “crack whore.” Defendant said that during the conversation, Baggett was repeatedly opening and closing a pocket knife. At some point, Baggett got up from the couch, approached defendant, and attempted to strike him. Having missed on his first attempt, Baggett swung again, hitting defendant on the chin. Defendant stated that as he was backing up he saw a piece of

1. Baggett was murdered after midnight on 11 February 2007.

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wood, which was likely intended to fuel the wood heater. He picked up the wood, hit Baggett in the chest, and then again in the face.

According to defendant, Ms. McDonald was in the back room during the altercation and did not witness the event. After Baggett fell, Ms. McDonald ran into the room saying she heard the two men arguing. Ms. McDonald saw Baggett on the floor and ran out of the house. Defendant followed her, saying that she “egged it on.” The two proceeded to buy beer and cigarettes at the nearby Harris Teeter. On the way back to Mr. Morris’s house, defendant and Ms. McDonald encountered the individual who sold defendant the crack cocaine he had smoked earlier in the evening. Defendant purchased more cocaine and he and Ms. McDonald returned to Mr. Morris’s house where they consumed the drugs. Defendant stated that he and Ms. McDonald were at Mr. Morris’s house for an unspecified amount of time when he determined that they should return to Baggett’s house to check on him. Defendant testified that when they got to Baggett’s house, Ms. McDonald waited in the carport while he went inside. Defendant stated that he believed Baggett to be dead since he was in the same position as when defendant left after striking him. Defendant stated that he panicked and poured what he believed to be fluid used to ignite a wood stove onto a “throw,” lit it, and threw it on the floor. He then left and went back to Mr. Morris’s where he continued to smoke and drink. Defendant then went back to his hotel room. He was later arrested and confessed to police that he killed Baggett and burned the residence.

Ms. McDonald testified that on the night of the murder defendant told her that he was going to “f— [Baggett] up” because he was “put out” of Baggett’s house and defendant blamed him for the fact defendant was fired from his job. Defendant said that if Baggett wanted to play with fire, he was going to get burned. Defendant made these statements when she saw him outside of a local gas station earlier in the evening on the night Baggett was killed.

Ms. McDonald testified that defendant made similar statements later in the night at Mr. Morris’s house, where she was smoking crack cocaine and drinking beer. She claimed that she told defendant on multiple occasions to “squash it and leave it alone.” Defendant then left, saying he was “going to f— this guy up[.]” Ms. McDonald testified that defendant was gone for an hour and a half to two hours. She claimed that she did not go with defendant to Baggett’s house; she remained at Mr. Morris’s. When defendant returned, he told the group that he hit Baggett in the head with a crowbar and that they should

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hear sirens soon. Ms. McDonald heard sirens approximately twenty-five minutes later. She became upset and a man named “Kevin” asked defendant to leave. Defendant left and Ms. McDonald did not see him again that night.

The evidence showed that there was a crowbar in the room near Baggett’s charred body. Baggett’s cause of death was blunt force trauma to the skull, which, according to the medical examiner, could have been caused by either a crowbar or a piece of wood. The medical examiner testified that Baggett did not have soot in his lungs, which likely meant that he was dead before the fire was set. The medical examiner further testified that without treatment, Baggett would have died within ten minutes of the skull fracture.

We first point out that defendant did not bring forth in his brief certain assignments of error listed in the record on appeal. “Assignments of error listed in the record but not argued in defendant’s brief are deemed abandoned.” *Wirth v. Wirth*, 193 N.C. App. 657, 670, 668 S.E.2d 603, — (2008) (citing N.C.R. App. P. 28(b)(6)).

Defendant argues on appeal that the trial court erred in denying his request for a jury instruction on continuous transaction with regard to felony murder. Defendant further argues that the trial court erred in denying defendant’s motion to dismiss the charge of felony murder due to insufficiency of the evidence. Specifically, defendant contends that the evidence was insufficient to show that he committed the underlying felony of arson while Baggett was alive.

We have carefully reviewed defendant’s claims, and though we do not find that the trial court erred, we need not reach the merits of defendant’s appeal. Defendant was found guilty of first degree murder under the first degree felony murder rule as well as on the basis of malice, premeditation, and deliberation. Both of defendant’s arguments concern the charge of felony murder and do not assign error to any aspect of the trial with regard to first degree murder on the basis of malice, premeditation, and deliberation.

Even if this Court found reversible error as to issues related to the felony murder rule, the conviction would still stand because the jury also found that defendant murdered Baggett with malice, premeditation, and deliberation. In *State v. McLemore*, 343 N.C. 240, 470 S.E.2d 2 (1996), our Supreme Court found that the defendant should not have been convicted of felony murder, but held that the verdict of first degree murder could not be disturbed because the evidence supported a conviction based on premeditation and deliberation. *Id.* at

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249, 470 S.E.2d at 7 (citing *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989) (finding, “[p]remeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes”)).

Unlike in *McLemore*, we need not determine any issue regarding the first degree murder conviction based on malice, premeditation, and deliberation since defendant makes no argument as to this conviction. Thus, the conviction for first degree murder based on malice, premeditation, and deliberation stands, and defendant’s remaining arguments with regard to the first degree murder conviction based on felony murder are moot.

Dismissed.

Panel Consisting of Judges HUNTER, ROBERT C., ELMORE and JACKSON.

STATE OF NORTH CAROLINA v. ROBIN DALE FORD

No. COA08-936

(Filed 3 February 2009)

1. Sentencing— attempted felonious larceny—prior record level—elements included in prior offense—assignment of one point

In sentencing defendant as an habitual offender upon his conviction for attempted felonious larceny, the trial court did not err in determining defendant’s prior record level by assigning a point under N.C.G.S. § 15A-1340.14(b)(6) on the basis that all elements of the present offense of attempted felonious larceny were included in a prior offense of felonious larceny for which defendant had been convicted.

2. Sentencing— habitual offender—guilty plea

Defendant’s conviction for being an habitual felon was not reversed where defendant challenged an underlying conviction on appeal but pled guilty to being an habitual felon at trial. An

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accused who pleads guilty waives all defenses other than insufficiency of the indictment, which defendant did not challenge. The argument that an earlier judgment is a nullity is properly brought by a motion for appropriate relief.

Appeal by Defendant from judgment entered 25 May 2001 by Judge Evelyn W. Hill in Durham County Superior Court. Heard in the Court of Appeals 15 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for Defendant.

STEPHENS, Judge.

A lengthy recitation of the facts in this case is not necessary for a complete understanding of the issues argued on appeal. On 24 May 2001, a jury convicted Defendant of attempted felonious larceny. Defendant subsequently pled guilty to having attained the status of an habitual felon. The trial court determined that Defendant had 19 prior conviction points and was prior record level VI for sentencing. The trial court sentenced Defendant to 135-171 months in prison. Defendant timely appealed.¹

[1] Defendant first argues that this Court must remand the case for resentencing because the trial court erred in determining that he was prior record level VI for sentencing. Specifically, Defendant argues that the trial court impermissibly assigned one prior conviction point on the basis that all of the elements of attempted felonious larceny were included in a prior offense for which Defendant was convicted. N.C. Gen. Stat. § 15A-1340.14(b)(6) (2007). Defendant contends that (1) pursuant to N.C. Gen. Stat. § 14-7.6, convictions used to establish a defendant's status as an habitual felon may not be used to calculate a defendant's prior record level, (2) the offense of attempted felonious larceny is not a lesser-included offense of felonious larceny, and (3) neither of Defendant's prior felonious larceny convictions included, as "elements" of the crimes, that Defendant took property valued over \$1,000. *See* N.C. Gen. Stat. § 14-72(a) (2007) ("Larceny of goods of the value of more than one thousand dollars (\$1,000) is a

1. Defendant filed the record on appeal on 5 August 2008. By order entered 20 August 2008, this Court deemed the record timely filed.

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Class H felony.”). Each of these contentions has been addressed and rejected by prior decisions of our courts.

First, in *State v. Bethea*, 122 N.C. App. 623, 471 S.E.2d 430 (1996), this Court held that the assignment of a prior conviction point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6) is not contrary to the provisions of N.C. Gen. Stat. § 14-7.6. Second, it is settled that attempted felony larceny is a lesser-included offense of felony larceny. *See State v. Broome*, 136 N.C. App. 82, 87-88, 523 S.E.2d 448, 453 (1999) (“An attempted crime is generally considered a lesser offense of that crime.”), *appeal dismissed and disc. review denied*, 351 N.C. 362, 543 S.E.2d 136 (2000). Finally,

[i]n North Carolina, larceny remains a common law crime and is defined as “the felonious 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. Revelle*, 301 N.C. 153, 163, 270 S.E.2d 476, 482 (1980), quoting from *State v. McCrary*, 263 N.C. 490, 492, 139 S.E.2d 739, 740 (1965). Our Supreme Court has held that “G.S. 14-72 relates solely to punishment for the separate crime of larceny,” *State v. Brown*, 266 N.C. 55, 63, 145 S.E.2d 297, 303 (1965), and this Court has concluded that “[t]he statutory provision upgrading misdemeanor larceny to felony larceny does not change the nature of the crime; the elements of proof remain the same.” *State v. Smith*, 66 N.C. App. 570, 576, 312 S.E.2d 222, 226, *disc. rev. denied*, 310 N.C. 747, 315 S.E.2d 708 (1984).

State v. Boykin, 78 N.C. App. 572, 576, 337 S.E.2d 678, 681 (1985). Thus, for purposes of N.C. Gen. Stat. § 15A-1340.14(b)(6), it matters not under what provision of N.C. Gen. Stat. § 14-72 Defendant’s prior felony larceny convictions were established. Defendant’s first argument is meritless. The trial court properly determined Defendant’s prior record level.

[2] Next, Defendant argues that his conviction for having attained the status of an habitual felon, entered upon Defendant’s guilty plea, must be reversed and that this case must be remanded for resentencing on the underlying attempted felony larceny conviction only. The habitual felon indictment alleged that Defendant previously had been convicted of the following felonies: felonious larceny in 1986, possession of a firearm by a felon in 1988, and felonious larceny in 1995. Defendant specifically argues that the trial court was without

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subject matter jurisdiction to enter judgment in the 1988 case and that, thus, the judgment entered in that case is a “nullity.” As a result, Defendant argues, his conviction for having attained the status of an habitual felon, “which depends on that prior conviction, cannot stand and must be vacated.”

The critical fact in resolving Defendant’s argument is that Defendant pled guilty to having attained the status of an habitual felon. Defendant does not acknowledge in his brief the well-established principle that “[b]y knowingly and voluntarily pleading guilty, an accused waives all defenses other than the sufficiency of the indictment.” *State v. McGee*, 175 N.C. App. 586, 587, 623 S.E.2d 782, 784 (2006) (citing *State v. Hughes*, 136 N.C. App. 92, 97, 524 S.E.2d 63, 66 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000), *superseded on other grounds by* N.C. Gen. Stat. § 15A-1340.34 (2007)). *See also State v. Caldwell*, 269 N.C. 521, 525-27, 153 S.E.2d 34, 37-38 (1967). Defendant does not challenge the sufficiency of the habitual felon indictment. Rather, Defendant attacks the validity of one of his underlying convictions. This, Defendant may not do. *McGee*, 175 N.C. App. at 587, 623 S.E.2d at 784. Defendant’s argument that the 1988 judgment is a nullity is properly brought by a motion for appropriate relief in that cause. *State v. Dammons*, 128 N.C. App. 16, 26, 493 S.E.2d 480, 486-87 (1997); N.C. Gen. Stat. §§ 15A-1411 to -1422 (2007).

Assignments of error set out in the record on appeal but not brought forward in Defendant’s brief are deemed abandoned. N.C. R. App. P. 28(b)(6).

NO ERROR.

Judges STEELMAN and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 FEBRUARY 2009)

ASPEN INV. CO. v. RIVER GATE, LLC No. 08-271	Catawba (07CVS775)	Affirmed
BRINEGAR v. CITY OF WINSTON-SALEM No. 08-157	Forsyth (06CVS7373)	Affirmed
EARTHMOVERS EQUIP. CO. v. N.C. DEP'T. OF CRIME CONTROL & PUB. SAFETY No. 08-693	Wake (07CVS5022)	Affirmed
GARNER v. GARNER No. 08-670	Pitt (01CVD1750)	Affirmed
IN RE APPEAL OF SULLIVAN No. 08-635	Prop. Tax Comm. (07PTC280)	Affirmed
IN RE J.M. No. 08-1184	Harnett (06J178)	Reversed and remanded
IN RE T.L. No. 08-993	Robeson (99JA330)	Affirmed in part, vacated in part, and remanded for further findings
IN RE U.V.M. No. 08-586	Guilford (92J560)	Vacated
JOHNS v. JOHNS No. 07-1411	New Hanover (06CVD597) (06CVD4299)	Dismissed in part and affirmed in part
KEEN TRANSP., INC. v. N.C. DEP'T OF CRIME CONTROL & PUB. SAFETY No. 08-910	Wake (07CVS12922)	Affirmed
PAWLUS v. WISE-PAWLUS No. 07-1539	Hoke (06CVD285)	Affirmed in part; vacated and re- manded in part
RUTHERFORD v. GENERAL INS. CO. OF AM. No. 08-422	Mecklenburg (07CVS10323)	Reversed and remanded
STATE v. BRYSON No. 08-625	Buncombe (06CRS57919-21) (06CRS11312)	No prejudicial error
STATE v. FLEMING No. 08-433	Mecklenburg (06CRS233328-29)	No error

STATE v. RATLIFF No. 08-235	Anson (02CRS51221-22)	No error
STATE v. STACEY No. 08-883	Forsyth (06CRS39324) (06CRS62468)	No error
STATE v. WINCHESTER No. 08-595	Rockingham (05CRS7121)	No error
TONY STERWERF TRUCKING, LLC v. BEATTY No. 08-698	Wake (07CVS14007)	Affirmed
VALLEY TRANSP., INC. v. N.C. DEP'T OF CRIME CONTROL & PUB. SAFETY No. 08-909	Wake (07CVS12921)	Affirmed
VESTAL v. CAPITAL MARBLE CREATIONS, INC. No. 08-739	Wake (06CVD14269)	Affirmed
WEST SIDE HEAVY HAULING, INC. v. N.C. DEP'T OF CRIME CONTROL & PUB. SAFETY No. 08-908	Wake (07CVS12920)	Affirmed

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STATE OF NORTH CAROLINA v. MALCOLM FITZGERALD TYSON, SR.

No. COA07-1376

(Filed 17 February 2009)

1. Rape— statutory rape—consciousness of defendant—sufficiency of evidence

The evidence was sufficient to support a finding by the jury that defendant was conscious when he twice had sexual intercourse with the alleged minor victim and she became pregnant so as to support his conviction on two counts of statutory rape, even though defendant claimed and the minor victim testified that she had drugged defendant and he had passed out when she had sex with him on two occasions, where (1) the State had the burden of proving beyond a reasonable doubt that defendant was indeed conscious when he committed the alleged acts since evidence of his unconsciousness arose out of the State's own evidence; (2) the minor victim changed her story after previously stating that she had impregnated herself by drugging defendant, collecting his sperm, and placing it within herself with a syringe; (3) defendant had written sexually suggestive letters to the minor victim; and (4) defendant told an officer that he would need to think of something else to say when the officer did not believe his story about how the minor victim had become pregnant.

2. Rape— statutory rape—instruction—voluntary act—omitting not guilty by reason of unconsciousness—plain error

The trial court committed plain error by failing to incorporate the element of a voluntary act into the statutory rape instruction and by omitting "not guilty by reason of unconsciousness" in its final mandate to the jury, and defendant is entitled to a new trial, because: (1) given the jury's seemingly inconsistent verdicts finding defendant not guilty of indecent liberties (which has a statutory element of willfulness) but guilty of statutory rape, there was a reasonable likelihood that the jury applied the instructions on unconsciousness in a manner that impermissibly lessened the State's burden of proof to show defendant's consciousness; and (2) even assuming arguendo that the trial court's failure to properly instruct the jury on the State's burden to prove defendant's consciousness beyond a reasonable doubt did not rise to the level of plain error, the trial court committed plain error by failing to include in the final mandate the possible verdict of "not guilty by

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reason of unconsciousness” since the jury could have assumed that a verdict of not guilty of statutory rape by reason of unconsciousness was not a permissible verdict.

Judge HUNTER, Robert C. concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 25 May 2007 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 16 April 2008.

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

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for Defendant.

STEPHENS, Judge.

On 16 October 2006, the Grand Jury of Pitt County returned bills of indictment charging Defendant Malcolm Tyson, Sr. with two counts of taking indecent liberties with a child and two counts of statutory rape. The case came on for trial at the 23 May 2007 Criminal Session of Pitt County Superior Court. Defendant offered no evidence and moved to dismiss the charges for insufficient evidence. The trial court denied his motion. On 25 May 2007, the jury acquitted Defendant of the indecent liberties charges and returned guilty verdicts on the statutory rape charges. On that date, the trial court sentenced Defendant to two consecutive prison terms of 307 to 378 months. From these judgments and commitments, Defendant appeals.

I. Facts

Beginning in July 2004, Defendant Malcolm Tyson, Sr. lived in Greenville, North Carolina, with his wife and their children, and his girlfriend, Alicia Kornegay, and her children, N.B. and N.B.’s sister and half-brother. N.B., the alleged victim in this case, was born in December 1989. N.B. gave birth to children on 29 April 2005 and 25 June 2006. Pitt County Sheriff’s Investigator Paula Dance was notified of the birth of the second child and commenced an investigation. On 27 June 2006, DNA samples were consensually obtained from N.B., her children, and Defendant.

Dance executed a search warrant of Defendant’s residence on 28 June 2006 where she seized letters written by Defendant to N.B. Also

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on that date, Dance interviewed N.B. N.B. denied having had sex with Defendant and denied that he had fathered either of her children. N.B. said that she thought Defendant's son, Malcolm Tyson, Jr. could have fathered one of her children and that one of several boys in Ayden might have fathered the other. Dance asked N.B. about the recurring phrase in Defendant's letters to her, "[c]an I get in them drawers[.]" N.B. explained that the phrase was a song lyric and that Defendant said that to everyone.

Dance questioned Ms. Kornegay on 29 June 2006. Dance showed her the letters and asked Ms. Kornegay if she was concerned about the phrase, "[c]an I get in them drawers[.]" Ms. Kornegay said she knew people would take that the wrong way, but it was only a song and Defendant said that to everyone. Ms. Kornegay told Dance that N.B. was infatuated with Defendant. She said that she and Defendant had told N.B. that she could not be in love with him in that way, but that afterwards, N.B. told her mother that she had given Defendant a pill when he had come home drunk and had been "with him." N.B. said that she had had sex with Defendant and that he did not remember it. Ms. Kornegay said that N.B. had always been a problem child, had trouble in school, and that she and her friends gave pills to boys and had sex with them. Ms. Kornegay told Dance that she felt the situation was all N.B.'s fault.

Detective Dance spoke with N.B. again on 10 July 2006. This time, N.B. told Dance that she had given Defendant pills to knock him out and then had collected Defendant's semen in a shot cup and put the semen inside herself with a syringe.

On 16 August 2006, Defendant was arrested on statutory rape warrants and taken to Pitt County Detention Center, where he remained until his case came on for trial.

II. Motion to Dismiss

[1] Defendant argues that the trial court erred in denying his motion to dismiss the statutory rape charges as there was insufficient evidence to show that Defendant was conscious during the alleged sexual acts and, therefore, that he committed voluntary acts.

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

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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 citation 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. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). “Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.” *Id.* If the evidence, when considered in light of the foregoing principles, is sufficient only to raise a suspicion, even though the suspicion may be strong, as to either the commission of the crime or that the defendant on trial committed it, the motion to dismiss must be allowed. *Scott*, 356 N.C. 591, 573 S.E.2d 866. A trial court’s denial of a motion to dismiss for insufficient evidence is a question of law, reviewed *de novo* upon appeal. *State v. Bagley*, 183 N.C. App. 514, 644 S.E.2d 615 (2007).

A defendant is guilty of statutory rape if “the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.” N.C. Gen. Stat. § 14-27.7A(a) (2007). Although “[c]riminal *mens rea* is not an element of statutory rape[.]” *State v. Ainsworth*, 109 N.C. App. 136, 145, 426 S.E.2d 410, 416 (1993), “where a person commits an act without being conscious thereof, the act is not a criminal act even though it would be a crime if it had been committed by a person who was conscious.” *State v. Jerrett*, 309 N.C. 239, 264, 307 S.E.2d 339, 353 (1983) (citing *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982), *overruled on other grounds by State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677 (1998); *State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975); *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969), *overruled on other grounds by Caddell*, 287 N.C. 266, 215 S.E.2d 348). Thus, “under the law of this State, unconsciousness . . . is a complete defense to a criminal charge,” *Caddell*, 287 N.C. at 290, 215 S.E.2d at 363, because unconsciousness “not only excludes the existence of any specific mental state, but also excludes the *possibility of a voluntary act* without which there can be no criminal liability.” *Id.* at 295, 215 S.E.2d at 366.

The ultimate burden rests on the State to prove every element essential to the crime charged beyond a reasonable doubt. “[N]ormally the presumption of mental capacity is sufficient to prove that [a defendant] acted consciously and voluntarily and the prosecu-

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tion need go no further.” *Id.* at 298-99, 215 S.E.2d at 368. However, this presumption may be rebutted by sufficient evidence to the contrary. If the defendant wishes to overcome the presumption of consciousness, the burden rests upon the defendant to establish this defense by a preponderance of the evidence. *Jerrett*, 309 N.C. 239, 307 S.E.2d 339; *Caddell*, 287 N.C. 266, 215 S.E.2d 348. If, however, the evidence of unconsciousness “arises out of the State’s own evidence,” the burden rests on the State to prove the defendant’s consciousness beyond a reasonable doubt. *Caddell*, 287 N.C. at 290, 215 S.E.2d at 363.

In most North Carolina cases dealing with the defense of unconsciousness, the defendant has been the party offering evidence of his or her unconsciousness, and the issue before the appellate court has been whether the defendant submitted sufficient evidence to warrant a jury instruction on unconsciousness. Here, however, Defendant presented no evidence and the evidence of Defendant’s unconsciousness arose out of the State’s own evidence. Thus, the State had the burden of proving beyond a reasonable doubt that Defendant was indeed conscious when he committed the alleged acts.¹ The State may meet its burden of proof by either direct or circumstantial evidence. *State v. Salters*, 137 N.C. App. 553, 528 S.E.2d 386 (2000). Accordingly, the question before us is whether there is sufficient evidence from which the jury could find beyond a reasonable doubt that Defendant was conscious, and therefore committed voluntary acts, when he had sexual intercourse with N.B. We conclude there is.

The State’s evidence tends to show the following: on direct examination by the State, N.B. testified that she had given Defendant pills and then waited until it looked like he was passed out. She then “unzipped his pants[,] pulled his privacy [sic] out and started jacking him off.” She acknowledged that his penis became erect while she was doing this, and that “after that a little cum came out. . . . I got on top of him.” N.B. further testified on direct examination that during intercourse, Defendant did not respond to her, did not say anything to her, did not move, and did not open his eyes.

N.B. then admitted that the first time she was interviewed by Detective Dance, she told Dance that she had not had sex with Defendant. She also admitted that the second time she spoke with

1. In its closing argument, the State argued that the four elements of statutory rape listed in the North Carolina General Statutes “are the four things and only four things the State has to prove to you beyond a reasonable doubt.” This is a misleading misstatement of the law.

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Dance, she told her “part true and part story” in that she said she had given Defendant a pill, but that, instead of saying she had gotten on top of Defendant, she told Dance she had collected Defendant’s semen in a shot cup and then put the semen inside herself with a syringe. N.B. testified, “I just lied because I didn’t want to be in trouble” and said that she told a different story on the stand because “I don’t want to go to jail for telling a lie.”

Alicia Kornegay testified that N.B. told her “she took and gave [Defendant] a pill, and he was out and she took and said she unzipped his pants and she played with him and she got a little cup and she had a syringe and she placed it in herself. That’s what she told me.” Ms. Kornegay testified that the only thing she knew about N.B. having intercourse with Defendant was what N.B. told her and that when she asked Defendant about it, he said that he had no idea about any of it.

Detective Dance testified that she first interviewed N.B. on or about 28 June 2006. During that interview, N.B. denied ever having sex with Defendant. Detective Dance interviewed N.B. again on 10 July 2006. Detective Dance testified that during that interview, N.B. stated that she got pills that could “lay a person out.” N.B. stated that she put two pills in Defendant’s drink after he had “come home tired from drinking and smoking drugs.” She said that “when she gave it to him[,] he couldn’t move or anything.” N.B. stated to her that he was “dead-weight” and that she couldn’t lift him to get his pants off so she unzipped his pants and pulled his “private” out. She told Dance that she started “messing” with him and then used a shot cup and a syringe to collect his semen and put it into herself. She told Dance that “the next day he acted like he didn’t remember anything” and that he “only said that his head was hurting.” She told Dance that she had done this two different times.

Dance further testified that on 29 June 2006, she interviewed Ms. Kornegay. She testified that Ms. Kornegay told her N.B. had told Ms. Kornegay that she had given Defendant a pill and that after giving him the pill, N.B. had sex with Defendant. Ms. Kornegay said N.B. told her she was the one that did it to him and that he did not remember doing things with her.

Neil Elks, a captain of the patrol division of the Pitt County Sheriff’s Department, testified to a conversation he had with Defendant at the Detention Center on or about 16 August 2006. Elks testified that Defendant told him “his wife’s daughter had got him

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drunk, he had passed out, and then she got him off and she used a turkey baster to put his stuff inside of her and she got pregnant.” Elks further testified that he told Defendant he was going to have to come up with a better story than that, and that Defendant had responded, “[y]ou don’t think anyone will believe that?” Defendant then said, “[o]kay. I need to think of something else to say.”

Shawn Weiss, an expert in the field of DNA analysis, testified that, based on DNA tests done on N.B., her two children, and Defendant, the probability that Defendant was the father of N.B.’s two children was 99.99 percent.

After being arrested on the current charges and while in jail awaiting trial, Defendant sent N.B. two drawings, one depicting a male, a female, and a baby and another depicting a male, a female, a baby standing, and a baby being held. Defendant had also written letters to N.B. Excerpts from these letters stated:

“So what’s the deal, Baby? Can I get in them drawers.”

. . . .

“Quit smiling saying to yourself right now. Yes, you can.”

“P.S. What’s the deal, Shorty, can I get in them drawers?”

“P.S. Quit smiling.”

. . . .

“Big Daddy 4-life.”

. . . .

“The only way to ensure that this cycle be broken is to live for the Lord, but I can’t even do that because of things I don’t regret but maybe should have done differently. . . .”

. . . .

“I hate you have to go back through that kind of pain, but this time I’ll be at the hospital with you. Okay.”

. . . .

“Good night my darling one. I love you more than you can ever know.”

. . . .

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“Age Ain’t Nothing But a Number[.]”

Another letter from Defendant to N.B. stated, in pertinent part:

“You always act like you’re so into me, can’t live without me. As soon as you’re out of my sight you don’t give a damn about me. I don’t even matter then.”

. . . .

“You only, you’re only crazy about me when you’re around me, but the minute you’re gone, who the hell is Malcolm? Some part of [N.B.] will never change, and you and I both know what parts they are, don’t we?”

We conclude that Defendant’s statements in his letters to N.B. and Defendant’s statement to Elks that he would “need to think of something else to say” when Elks did not believe Defendant’s story about how N.B. became pregnant, taken together with the manifest inconsistencies in N.B.’s testimony, provide adequate circumstantial evidence from which a jury could find beyond a reasonable doubt that Defendant was conscious during the two acts of sexual intercourse with N.B. that resulted in the birth of their two children. Defendant’s argument is thus overruled.

III. Jury Instructions

[2] Defendant also contends the trial court committed plain error by failing to incorporate the element of a voluntary act into the instruction on statutory rape and by omitting “not guilty by reason of unconsciousness” in its final mandate to the jury. Defendant argues that the trial court’s charge lessened the State’s burden of proof to show Defendant’s consciousness beyond a reasonable doubt.

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a “*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,” or “where [the error] is grave error which amounts to a denial of a fundamental right of the accused,” or the error has “‘resulted in a miscarriage of justice or in the denial to appellant of a fair trial’ ” or where the error is such as to “seriously affect the fairness, integrity or public reputation of judicial proceedings” or where it can be fairly said “the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.”

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State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378-79 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)). “In deciding whether a defect in the jury instruction constitutes ‘plain error,’ the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury’s finding of guilt.” *Id.* at 661, 300 S.E.2d at 378.

A trial court’s jury instruction “is for the guidance of the jury,” *Sugg v. Baker*, 258 N.C. 333, 335, 128 S.E.2d 595, 597 (1962), and its purpose “is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.” *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971). It is recognized by this Court that “the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions.” *In re Will of Leonard*, 71 N.C. App. 714, 717, 323 S.E.2d 377, 379 (1984).

“In a criminal trial the judge has the duty to instruct the jury on the law arising from all the evidence presented.” *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985). This places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. *See State v. Redman*, 217 N.C. 483, 8 S.E.2d 623 (1940) (holding that the failure to properly instruct the jury on the burden of proof required a new trial). “The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should, therefore, be jealously guarded and rigidly enforced by the courts.” *State v. Falkner*, 182 N.C. 793, 798, 108 S.E. 756, 758 (1921) (quotation marks and citations omitted).

Pursuant to N.C. Gen. Stat. § 14-27.7A(a), a defendant is guilty of statutory rape “if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.” N.C. Gen. Stat. § 14-27.7A(a). However, “under the law of this State, unconsciousness . . . is a complete defense to a criminal charge, . . . it is an affirmative defense; and [] the burden rests upon the defendant to establish this defense, unless it arises out of the State’s own evidence[.]” *Caddell*, 287 N.C. at 290, 215 S.E.2d at 363.

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The trial court gave the following instruction regarding statutory rape:

For you to find defendant guilty of statutory rape of a victim who was 14 and 15 years old, the State must prove four things beyond a reasonable doubt:

First, that the defendant engaged in vaginal intercourse with the victim. Vaginal intercourse is penetration, however slight, . . . of the female sex organ by the male sex organ. The actual emission of semen is not necessary.

Second, that at the time of the act the victim was in this case in one count alleged to be 14, and in the other count alleged to be 15. Years old [sic].

Third, that at the time of the act the defendant was at least six years older than the victim.

And fourth, that at the time of the act the defendant was not lawfully married to the victim.

This instruction adequately encompasses the law of statutory rape and tracks the language of the pattern jury instruction set forth in N.C.P.I.—Crim. 207.15.2 (March 2002).

Prior to this instruction, the trial court instructed the jury on unconsciousness as follows:

[Y]ou may find there's evidence which tends to show that the defendant was physically unable to control his physical actions because of unconsciousness. That is a state of mind in which a person, though capable of action, is not conscious of what he is doing at the time the crime was alleged to have been committed.

In this case one element is that the act charged be done voluntarily. Therefore, unless you find from the evidence beyond a reasonable doubt that at the time the defendant was able to exercise conscious control of his physical actions he would not be guilty of a crime.

If the defendant was unable to act voluntarily, he would not be guilty of any offense. *The burden of persuasion rests on the defendant to establish this defense to the satisfaction of the jury, unless it arises out of the State's own evidence, in which case the burden is on the State to prove beyond a reasonable*

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doubt that the defendant was able to exercise conscious control of his physical action.

(Emphasis added.)

Although this jury instruction adequately encompasses the law of unconsciousness and tracks the language of the pattern jury instruction set forth in N.C.P.I.—Crim. 302.10 (May 2003), the emphasized portion fails to clearly charge the jury as to who had the burden of proof, and what that burden was, to show Defendant's consciousness in this case. The instruction, as given, only explained where the burden of proof *could* lie, depending on the nature of the evidence, and did not explain that *in this case*, since the evidence of Defendant's unconsciousness arose out of the State's own evidence, the State had the burden of proving Defendant's consciousness beyond a reasonable doubt. Moreover, since Defendant offered no evidence, it was unnecessary to charge the jury that "[t]he burden of persuasion rests on the defendant to establish [unconsciousness] to the satisfaction of the jury[.]" We are of the opinion that including this statement in the charge compounded the confusion of the charge, particularly given the trial court's failure to clearly charge that, under the circumstances of this case, the State had the burden of proof beyond a reasonable doubt, and not simply to the jury's satisfaction, to establish Defendant's consciousness.

Given the jury's seemingly inconsistent verdicts, finding Defendant not guilty of indecent liberties, which has a statutory element of willfulness, but guilty of statutory rape, there is a reasonable likelihood that the jury applied the instructions on unconsciousness in a manner that impermissibly lessened the State's burden of proof to show Defendant's consciousness. The trial court's failure to properly instruct the jury on the burden of proof constitutes plain error in this case and warrants a new trial.

Even assuming *arguendo* that the trial court's failure to properly instruct the jury on the State's burden to prove Defendant's consciousness beyond a reasonable doubt did not rise to the level of plain error, we conclude that the trial court committed plain error by failing to include in the final mandate the possible verdict of "not guilty by reason of unconsciousness."

Every criminal jury must be "instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty." *State v. Howell*, 218 N.C. 280, 282, 10 S.E.2d 815, 817 (1940). "Such instruction is generally given during the final mandate after the

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trial court has instructed the jury as to elements it must find to reach a guilty verdict.” *State v. Chapman*, 359 N.C. 328, 380, 611 S.E.2d 794, 831 (2005) (citing *State v. Ward*, 300 N.C. 150, 156-57, 266 S.E.2d 581, 585-86 (1980)).

In *State v. Dooley*, 285 N.C. 158, 203 S.E.2d 815 (1974), the trial court did not include “not guilty by reason of self-defense” as a possible verdict in its final mandate to the jury on the charge of manslaughter. In holding that the trial court’s failure to include such an instruction in its final mandate constituted prejudicial error, entitling defendant to a new trial, the North Carolina Supreme Court reasoned,

[t]he failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case.

Id. at 165-66, 203 S.E.2d at 820. Accord *State v. Withers*, 179 N.C. App. 249, 633 S.E.2d 863 (2006); *State v. Ledford*, 171 N.C. App. 144, 613 S.E.2d 726 (2005); *State v. Williams*, 154 N.C. App. 496, 571 S.E.2d 886 (2002); *State v. Kelly*, 56 N.C. App. 442, 289 S.E.2d 120 (1982).

In this case, in its final mandate on the charge of statutory rape, the trial court instructed:

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in vaginal intercourse with the victim, when the victim was . . . alleged to be 14 in one case, alleged to be 15 years old in the other case, and that the defendant was at least six years older than the victim, and was not lawfully married to the victim, it would be your duty to return a verdict of guilty of statutory rape.

If you do not so find or have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of not guilty.

While the trial court correctly instructed that the jury should find Defendant “not guilty” if it had a reasonable doubt as to any of the elements of statutory rape, the trial court failed to include in its final mandate that the jury should find Defendant “not guilty” if it had a reasonable doubt as to Defendant’s consciousness. As in *Dooley*

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where, even if the State proved all the statutory elements of murder, the defendant would be not guilty if his actions were justified by self-defense, in this case, even if the State proved all the statutory elements of statutory rape, Defendant would be not guilty if his actions were blameless due to his unconsciousness. Thus, as in *Dooley*, the omission of “not guilty by reason of unconsciousness” was not cured by the discussion of the law of unconsciousness in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty of statutory rape by reason of unconsciousness was not a permissible verdict in the case. The trial court’s failure to include “not guilty by reason of unconsciousness” in the final mandate to the jury constitutes plain error in this case and warrants a new trial.

Based on our holding, we need not address Defendant’s remaining argument. This case is remanded to the Superior Court of Pitt County for a new trial in accordance with the principles stated herein.

NEW TRIAL.

Judge STEELMAN concurs.

Judge HUNTER, Robert C. concurs in part and dissents in part in a separate opinion.

HUNTER, Robert C., Judge, concurring in part, dissenting in part.

I concur in Part III of the majority opinion holding that the trial court committed plain error in instructing the jury, warranting a new trial. However, because I conclude that the trial court erred in denying defendant’s motion to dismiss the statutory rape charges for insufficient evidence of defendant’s consciousness, I respectfully dissent in Part II of the majority opinion.

My concern with the majority’s holding in Part II is that it sets a precedent which allows a defendant to be convicted of a crime even though the State’s own evidence exculpates the defendant of that crime, and the State attempts to prove its case solely by requiring the jury to disbelieve the State’s evidence without offering any affirmative evidence to support all the elements of the charge. The prosecution’s own evidence in this case directly contradicted its theory that defendant was conscious during the acts charged. N.B., the State’s

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main witness and the purported victim, testified that defendant was unconscious when the sexual acts occurred, and her testimony was corroborated by her mother and the officer who took her statement during the investigation. The prosecution essentially asked the jury to disregard the evidence it presented and to find that defendant was in fact conscious, despite the fact that no evidence was presented to support that theory. The prosecution presented some evidence, such as defendant's letters to N.B., which amounted to circumstantial evidence that there was an inappropriate relationship, or that defendant sought an inappropriate relationship, but there was no evidence whatsoever that defendant was conscious when the alleged statutory rapes occurred. A criminal defendant cannot be convicted on what the jury, or this Court, might suspect happened. There must be actual evidence to support the prosecution's case.

In sum, the prosecution presented *circumstantial evidence* that defendant had an inappropriate relationship with N.B. That is irrelevant. The prosecution raised, at best, a *circumstantial suspicion* that defendant was conscious when the sexual acts occurred. Circumstantial suspicion is not enough to overcome a motion to dismiss.

Analysis

The standard of review on appeal of a trial court's denial of a criminal defendant's motion to dismiss for insufficient evidence is whether the State offered substantial evidence to show the defendant committed each element required to be convicted of the crime charged. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620 (2002). "Substantial evidence is evidence 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) (citation 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. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citation omitted). "If the evidence, when considered in the light of the foregoing principles, is sufficient only to raise a suspicion, even though the suspicion may be strong, as to either the commission of the crime or that the defendant on trial committed it, the motion for dismissal must be allowed." *State v. Davis*, 74 N.C. App. 208, 212-13, 328 S.E.2d 11, 14-15 (1985). A trial court's denial of a motion to dismiss for insufficient evidence is a question of law, reviewed *de novo* upon appeal. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

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A defendant may be guilty of statutory rape if “the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.” N.C. Gen. Stat. § 14-27.7A(a) (2007). However, “where a person commits an act without being conscious thereof, the act is not a criminal act even though it would be a crime if it had been committed by a person who was conscious.” *State v. Jerrett*, 309 N.C. 239, 264, 307 S.E.2d 339, 353 (1983). “[U]nder the law of this State, unconsciousness . . . is a complete defense to a criminal charge,” *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975), because unconsciousness “excludes the *possibility of a voluntary act* without which there can be no criminal liability.” *Id.* at 295, 215 S.E.2d at 366.

The ultimate burden rests on the State to prove beyond a reasonable doubt every element necessary to convict a defendant. “[N]ormally the presumption of mental capacity is sufficient to prove that [a defendant] acted consciously and voluntarily and the prosecution need go no further.” *Id.* at 298-99, 215 S.E.2d at 368. However, this presumption may be overcome by sufficient evidence to the contrary. If sufficient evidence of the defendant’s unconsciousness “arises out of the State’s own evidence,” the burden rests on the State to prove the defendant’s consciousness beyond a reasonable doubt. *Id.* at 290, 215 S.E.2d at 363. Accordingly, the State had to prove beyond a reasonable doubt the elements of statutory rape in N.C. Gen. Stat. § 14-27.7A(a), and, as the evidence of defendant’s unconsciousness arose out of the State’s evidence, the State had to prove beyond a reasonable doubt that defendant was conscious when he committed the acts charged. *Id.*

Thus, the question before this Court is whether there is some evidence from which the jury could find beyond a reasonable doubt that defendant was conscious, and therefore committed voluntary acts, when he had sexual intercourse with N.B. I conclude there is not.

The State’s evidence tends to show the following: On direct examination by the State, N.B. testified that she had given defendant pills and then waited until it looked like he was passed out. She then “unzipped his pants[,] pulled his privacy [sic] out and started jacking him off.” She acknowledged that his penis became erect while she was doing this, and that “after [] a little bit of cum came out . . . I got on top of him.” N.B. further testified on direct examination that during intercourse, defendant did not respond to her, did not say anything to her, did not move, and did not open his eyes.

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N.B. admitted that the first time she was interviewed by Detective Dance, she told Dance that she had not had sex with defendant. She also admitted that the second time she spoke with Dance, she told her “part true and part story” in that she said she had given defendant a pill, but that, instead of saying she had gotten on top of defendant, she told Dance she had collected defendant’s semen in a shot glass and then put the semen inside of herself with a turkey baster. N.B. testified, “I just lied because I didn’t want to be in trouble” and said that she told a different story on the stand because “I don’t want to go to jail for telling a lie.”

The majority cites “the manifest inconsistencies in N.B.’s testimony” as to how she became pregnant as circumstantial evidence of defendant’s consciousness. The consistent part of both stories was, however, that defendant was unconscious while N.B. performed sexual acts on him. The State offered no evidence to contradict this.

Alicia Kornegay testified that N.B. told her “she took and gave [defendant] a pill, and he was out and she took and said she unzipped his pants and she played with him and she got a little cup and she had a [turkey baster] and she placed it in herself. That’s what she told me.” Ms. Kornegay testified that the only thing she knew about N.B. having intercourse with defendant was what N.B. told her and that when she asked defendant about it, he said that he had no idea about any of it.

This testimony corroborates N.B.’s testimony that defendant was unconscious during intercourse, and none of Ms. Kornegay’s testimony allows an inference that defendant was indeed conscious during intercourse with N.B.

Detective Dance testified that she first interviewed N.B. on or about 28 June 2006. During that interview, N.B. denied ever having sex with defendant. Detective Dance interviewed N.B. again on 10 July 2006. Detective Dance testified that during that interview, N.B. stated that she got pills that could “lay a person out.” N.B. stated that she put two pills in defendant’s drink after he had “come home tired from drinking and smoking drugs.” She said that “when she gave it to him[,] he couldn’t move or anything.” N.B. stated to her that he was “dead-weight” and that she couldn’t lift him to get his pants off so she unzipped his pants and pulled out his genitals. She then told Dance that she started “messing” with him and then used a shot cup and a turkey baster to collect his semen and put it into herself. She told Dance that “the next day he acted like he didn’t remember anything”

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and that he “only said that his head was hurting.” She told Dance that she had done this two different times.

Dance further testified that on 29 June 2006, she interviewed Ms. Kornegay. Dance testified that Ms. Kornegay told her N.B. had told Ms. Kornegay that she had given defendant a pill and that after giving him the pill, N.B. had sex with defendant. Ms. Kornegay said N.B. told her she was the one that did it to him and that he did not remember doing things with her. Detective Dance never interviewed defendant or asked him to give a statement.

Like N.B.’s and Ms. Kornegay’s testimony, Detective Dance’s testimony provides no evidence that defendant was conscious during intercourse with N.B. and, in fact, corroborates prior testimony that defendant was unconscious.

Neil Elks, a captain of the patrol division of the Pitt County Sheriff’s Department, testified to an alleged conversation he had with defendant at the Detention Center on or about 16 August 2006. Elks testified that defendant told him “they had him for something he didn’t do.” Elks testified that defendant said “his wife’s daughter had got him drunk, he had passed out, and then she got him off and she used a turkey baster to put his stuff inside of her and she got pregnant.” Elks further testified that he told defendant he was going to have to come up with a better story than that, and that defendant had responded, “‘[y]ou don’t think anyone will believe that?’” According to Elks, defendant then said, “‘[o]kay. I need to think of something else to say.’”

While the majority concludes that “[d]efendant’s statement to Elks that he would ‘need to think of something else to say’” is circumstantial evidence that defendant was conscious during the two acts of sexual intercourse with N.B., nothing in this statement provides any evidence of defendant’s consciousness. At most, this statement suggests that defendant considered changing some part of his story that “his wife’s daughter had got him drunk, he had passed out, and then she got him off and she used a turkey baster to put his stuff inside of her and she got pregnant” because people might not believe it. Defendant did not state that the story recounted to Elks was untruthful; no witness testified to defendant giving a contradictory version of the story that he had recounted to Elks and defendant did not take the stand and testify to a contradictory version of events.

Shawn Weiss, an expert in the field of DNA analysis, testified that, based on DNA tests done on N.B., her two children, and defend-

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ant, the probability that defendant was the father of N.B.'s two children was 99.99 percent. Although this may provide substantial evidence that defendant and N.B. had sexual intercourse, that is not the issue on appeal. The issue to be determined is whether the State offered sufficient evidence that defendant was conscious during the intercourse. The DNA evidence has no relevance to the determination of this essential issue.

Other evidence introduced by the State included two drawings sent to N.B. by defendant while he was in jail awaiting trial on the current charges. One depicted a male, a female, and a baby, and the other depicted a male, a female, a baby standing, and a baby being held. Although N.B. acknowledged that the children in the second drawing represented her children, she stated that the male figure depicted in each drawing represented her boyfriend, Dominic. While it could be surmised that the drawing depicted N.B., defendant, and their children, this is not evidence that defendant was conscious during the intercourse that resulted in the children's births.

The State also offered into evidence several letters defendant had written to N.B. Excerpts from some of these letters are as follows:

"So what's the deal, Baby? Can I get in them drawers. . . ."

"Quit smiling saying to yourself right now. Yes, you can."

. . .

"P.S. What's the deal, Shorty, can I get in them drawers?"

"P.S. Quit smiling."

. . .

"Big Daddy 4-life."

. . .

The only way to ensure that this cycle be broken is to live for the Lord, but I can't even do that because of things I don't regret, but maybe should have done differently. . . .

. . .

I hate you have to go back through that kind of pain, but this time I'll be at the hospital with you. Okay.

. . .

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Good night my darling one. I love you more than you can ever know.

...

“Age Ain’t Nothing But a Number[.]”

Both N.B. and Ms. Kornegay testified that the phrase, “ ‘[s]o what’s the deal, Baby? Can I get in them drawers. . . .’ ” “ ‘Quit smiling saying to yourself right now. Yes, you can[.]’ ” came from a song and was said often around their house.

The State offered no evidence to contradict N.B. or Ms. Kornegay’s explanation of the meaning of the song lyrics. Even if the lyrics were taken literally as defendant asking N.B. if he could “get in [her pants],” this could only provide circumstantial evidence of defendant’s improper motives towards N.B. and does not provide any evidence of defendant’s consciousness during the sexual acts testified to by N.B. In fact, N.B. testified that defendant was unconscious, and her testimony was corroborated by other witnesses. N.B. was never inconsistent in her assertion that defendant was unconscious and no one testified to the contrary. Whether or not defendant wanted to pursue a sexual relationship with N.B. is not relevant evidence pertaining to defendant’s consciousness in this case.

Another letter from defendant to N.B. stated, in pertinent part:

You always act like you’re so into me, can’t live without me. As soon as you’re out of my sight you don’t give a damn about me. I don’t even matter then.

...

You only, you’re only crazy about me when you’re around me, but the minute you’re gone, who the hell is Malcolm? Some part of [N.B.] will never change, and you and I both know what parts they are, don’t we?

Again, while this may be evidence of defendant’s improper motives towards N.B., the letter does not provide any evidence of defendant’s consciousness during intercourse with N.B.

Defendant offered no evidence. The State offered no evidence to refute N.B.’s testimony at trial or statements to other witnesses that defendant was unconscious during intercourse with her. While the evidence was sufficient to establish each of the four elements of statutory rape listed in N.C. Gen. Stat. § 14-27.7A, the State offered no evidence to show that defendant acted consciously and voluntarily.

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The State attempted to carry its burden of proof to show defendant was conscious and acted voluntarily by putting N.B. and Ms. Kornegay on the stand to give what the State then argued to be false testimony. As defendant pointed out, it was not up to defendant to impeach the exculpatory testimony given by the State's own witnesses. In its closing argument, the State argued that N.B.'s testimony was "just unbelievable" and that "[i]t just doesn't work that way. A man's knocked out. Unconscious, he's not going to be erect. He's not going to be ejaculating." However, "final arguments 'are not evidence[,]'" *State v. Cummings*, 361 N.C. 438, 468, 648 S.E.2d 788, 806 (2007), and the State offered no evidence, medical or otherwise, that defendant would not have been able to maintain an erection under the influence of incapacitating drugs. Furthermore, the State offered no contradictory statements made by any witnesses or by defendant himself that he was conscious during the intercourse or that he remembered the intercourse.

The State cannot prove beyond a reasonable doubt any element of a crime charged by offering evidence which the State subsequently argues to be false, and then requiring the jury to conclude that, because the evidence was false, the State's theory must be true. In the absence of credible evidence to the contrary, the State must offer some affirmative evidence for a jury to believe. There is no doctrine of *res ipsa loquitur* in the criminal law.

The trial court stated that the statute "[d]oesn't say who brought [the intercourse] on; who—who did anything. Just says man can't penetrate a child, whether she consents, jumps on him or whatever." Defendant argued, "[h]owever, the actions have to be voluntary on the part of the defendant." The trial court responded, "[t]hat's a jury question." However, the issue of defendant's consciousness may only be submitted to the jury if the trial court determines that there was sufficient evidence from which the jury could find beyond a reasonable doubt that defendant was conscious. In this case, based on the evidence presented by the State, there was at most circumstantial evidence that defendant and N.B. had an inappropriate relationship, or that defendant sought an inappropriate relationship. There was not sufficient evidence to prove that defendant consciously committed the crime charged such that the case should have been presented to the jury.

Just as the State has the burden of proving that a defendant is not entitled to the complete defense of self-defense on a charge of

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assault, *see State v. Poland*, 148 N.C. App. 588, 597, 560 S.E.2d 186, 192 (2002) (“[t]he State has the burden of proving that a defendant is not entitled to the defense [of self-defense]”), or homicide, *see State v. Watson*, 338 N.C. 168, 180, 449 S.E.2d 694, 701-02 (1994) (“[w]henver there is evidence that a defendant charged with a homicide killed in self-defense, the State has the burden of proving beyond a reasonable doubt that he did not”), and the sufficiency of the State’s evidence is the proper subject of a motion to dismiss even though self-defense is not a statutory element of those crimes, *see, e.g. Poland*, 148 N.C. App. at 597, 560 S.E.2d at 191 (considering whether the trial court erred in denying defendant’s motion to dismiss the charge of assault for insufficient evidence that defendant did not act in self-defense); *Watson*, 338 N.C. at 179-81, 449 S.E.2d at 701-02 (considering whether the trial court erred in denying defendant’s motion to dismiss the charge of homicide on the ground that the State failed to prove defendant did not act in self-defense), here the sufficiency of the State’s evidence of defendant’s consciousness, and thus his commission of a voluntary act, was a proper subject of defendant’s motion to dismiss. Based on the substantial evidence presented by the State that defendant was unconscious when the alleged sexual acts occurred, and the dearth of evidence to support the State’s intended theory that defendant was in fact conscious during the acts, the motion to dismiss should have been granted.

I conclude that the State offered no evidence from which a jury could find beyond a reasonable doubt that defendant was conscious and, therefore, committed voluntary acts, when his penis penetrated N.B.’s vagina. Moreover, assuming *arguendo* the evidence cited by the majority provides circumstantial evidence of defendant’s consciousness, such evidence merely creates a suspicion that defendant was conscious during the acts charged, and thus, would not support a finding beyond a reasonable doubt that defendant was conscious.

Again, I am concerned about the precedent set by the majority in this opinion. What the jury or I may suspect happened is not grounds for a conviction. There must be substantial evidence that a crime occurred and that defendant voluntarily committed it. Such evidence was not presented in this case.

As the State failed to meet its burden of proof, the trial court erred in denying defendant’s motion to dismiss. I would thus vacate the trial court’s judgment.

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No. COA08-516

(Filed 17 February 2009)

1. Schools and Education— charter school funding—jurisdiction over disputes

The superior courts maintain jurisdiction to hear monetary disputes between charter schools and their local boards of education concerning locally derived school funds despite defendants’ argument that sole jurisdiction to resolve the issues resides with the North Carolina Board of Education. Reading the statutes and the North Carolina Constitution together, the powers of the State Board of Education have been limited to control, administration, and disbursement of state and federal moneys.

2. Schools and Education— charter school funding—implied cause of action

The General Assembly intended charter school children to have access to the same level of funding as children attending regular schools, and N.C.G.S. § 115C-238.29H(b) creates an implied cause of action in favor of plaintiff charter schools when they allege violation of the statutory provisions. These issues were properly before the court.

3. Schools and Education— charter school funding—shared funds from board of education—textbook revenue entry

The trial court erred when calculating the funds that a local board of education must share with charter schools by including a revenue item for textbooks supplied by the State in the local current expense fund, the source of the shared funds. The local board of education is merely the custodian of the textbooks and does not have the authority or means to convert that accounting entry to their own purposes.

4. Schools and Education— charter school funding—local expense fund—moneys included

The trial court did not err when calculating the funds that a local board of education must share with charter schools by in-

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cluding in the current expense fund, from which the shared funds were drawn, moneys from a variety of sources (such as sales tax reimbursements or donations) that were held in the current expense fund rather than in separate accounts.

5. Appeal and Error— briefs—argument—no citation of authority

An argument of four sentences without citation to authority was deemed abandoned.

6. Appeal and Error— briefs—argument—violation of appellate rules—argument deemed abandoned

An argument in a charter school funding case concerning the court's refusal to consider an affidavit was deemed abandoned for violation of Appellate Rule 28(b)(6). Moreover, no prejudice was shown from the alleged error.

Appeal by Defendants from judgment entered 15 January 2008 by Judge David S. Cayer in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 November 2008.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Scott W. Gaylord, for Plaintiffs-Appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jill R. Wilson, Robert J. King III, and Elizabeth V. LaFollette, for Defendants-Appellants.

Tharrington Smith, L.L.P., by Ann Majestic and Lisa Lukasik; and North Carolina School Boards Association, by General Counsel Allison B. Schafer, for North Carolina School Boards Association, amicus curiae.

McGEE, Judge.

Plaintiffs filed this action for declaratory judgment on 17 April 2007, alleging that the Charlotte-Mecklenburg Board of Education and Peter Gorman, in his official capacity as Superintendent of the Charlotte-Mecklenburg Schools (Defendants), were violating N.C. Gen. Stat. § 115C-238.29H(b) in that Defendants were not distributing to Plaintiffs the appropriate per pupil *pro rata* share of moneys included in Defendants' local current expense fund. For more detailed facts and law concerning the general funding dispute at issue, see *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of*

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Educ., 188 N.C. App. 454, 655 S.E.2d 850 (2008), *disc. review denied*, 362 N.C. 481, 667 S.E.2d 460 (2008) (*Sugar Creek I*). Plaintiffs moved for summary judgment on 1 November 2007, and the trial court granted Plaintiffs' motion for summary judgment on 15 January 2008. The trial court ordered Defendants to pay Plaintiffs \$1,295,857.00 for moneys not distributed to Plaintiffs for the fiscal years 2003-04 through 2006-07, and further ordered Defendants to distribute in the future all moneys contained in Defendants' local current expense fund pursuant to the mandate of N.C. Gen. Stat. § 115C-238.29H(b). Further relevant facts will be discussed in the body of our opinion. Defendants appeal.

I.

[1] In Defendants' first and second arguments, they contend that the trial court lacked subject matter jurisdiction to consider the issues now on appeal, and that this Court's standard of review for issues of subject matter jurisdiction is *de novo*. We agree in part.

"[Q]uestions of subject matter jurisdiction may properly be raised at any point[,]" even for the first time on appeal. *Forsyth County Bd. of Social Services v. Division of Social Services*, 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986). Our standard of review for questions of subject matter jurisdiction is *de novo*. *Ales v. T. A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004).

Defendants argue that sole jurisdiction to resolve the issues presented resides with the North Carolina Board of Education (BOE). The powers of the BOE are defined in the Constitution of the State of North Carolina, and the North Carolina General Statutes. "It is well settled that statutes dealing with the same subject matter must be construed *in pari materia*, 'as together constituting one law.'" *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (citation omitted).

Statutory interpretation presents a question of law. The cardinal principle in the process is to ensure accomplishment of legislative intent. To achieve this end, the court should consider "the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws.

Id. (citations omitted).

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Section 5 of Article IX of the North Carolina Constitution states:

Powers and duties of Board. The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5. Therefore, this constitutional grant of powers to the BOE may be limited and defined by “laws enacted by the General Assembly.” *Id.* Article 2 of the North Carolina General Statutes, “State Board of Education[,]” covers the constitution, organization, powers and duties of the BOE. Article 2 of the North Carolina General Statutes, Section 115C-12, is titled: “Powers and duties of the Board generally.”

The general supervision and administration of the free public school system shall be vested in the State Board of Education. The State Board of Education shall establish policy for the system of free public schools, subject to laws enacted by the General Assembly. The powers and duties of the State Board of Education are defined as follows:

(1) Financial Powers.—*The financial powers of the Board are set forth in Article 30 of this Chapter.*

. . . .

(5) Apportionment of Funds.—The Board shall have authority to apportion and equalize over the State all *State school funds and all federal funds granted to the State for assistance to educational programs administered within or sponsored by the public school system of the State.*

N.C. Gen. Stat. § 115C-12 (2007) (emphasis added). Article 2 has been amended many times, and as recently as 2007. A thorough reading of Section 115C-12 uncovers no additional grants of power to the BOE relevant to the case before us. Therefore, pursuant to Article 2, the BOE has the power to apportion *state and federal funds* for public school use, and the additional financial powers of the BOE are defined in Article 30.

Article 30 is entitled “Financial Powers of the State Board of Education.” The only section of this article relevant to this case is Section 115C-408, “Funds under control of the State Board of Education[,]” which states in part:

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(a) . . . The Board shall have general supervision and administration of the educational funds provided by the *State and federal governments* . . . *excepting* such *local funds* as may be provided by a county, city, or district.

(b) To insure a quality education for every child in North Carolina, and to assure that the necessary resources are provided, it is the policy of the State of North Carolina to provide from State revenue sources the instructional expenses for current operations of the public school system as defined in the standard course of study.

It is the policy of the State of North Carolina that *the facilities requirements for a public education system will be met by county governments.*

It is the *intent of the 1983 General Assembly to further clarify and delineate the specific financial responsibilities for the public schools to be borne by State and local governments.*

N.C. Gen. Stat. § 115C-408(a)(b) (2007) (emphasis added). The language of Section 115C-408(a) tracks the language of Section 5, Article IX of the North Carolina Constitution and removes local funding from the general supervision and administration of the Board.

Defendants argue that Article 31 of the North Carolina General Statutes should control the jurisdictional issue in this case. Article 31 is entitled “The School Budget and Fiscal Control Act.” Pursuant to Section 115C-12(a) of Article 2, Article 31 does not involve the financial powers of the Board. As noted above, Article 2, though amended numerous times, does not include Article 31 as including the financial powers of the Board. Section 115C-424 of Article 31, entitled “Uniform system; conflicting laws and local acts superseded[.]” states:

It is the intent of the General Assembly by enactment of this Article to prescribe for the public schools a uniform system of budgeting and fiscal control. To this end, all provisions of general laws and local acts in effect as of July 1, 1976, and in conflict with the provisions of this Article are repealed except local acts providing for the levy or for the levy and collection of school supplemental taxes. No *local act* enacted or taking effect after July 1, 1976, may be construed to modify, amend, or repeal any portion of this Article unless it expressly so provides by specific reference to the appropriate section.

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N.C. Gen. Stat. § 115C-424 (2007) (emphasis added). Despite the absence of Article 31 in the allocation of financial powers in Article 2, Article 31 includes:

§ 115C-451. Reports to State Board of Education; failure to comply with School Budget Act.

(a) The State Board of Education shall have authority to require local school administrative units to make such reports as it may deem advisable with respect to the financial operation of the public schools.

(b) The State Board of Education *shall be responsible for assuring that local boards of education comply with State laws and regulations regarding the budgeting, management, and expenditure of funds*. When a local board of education willfully or negligently fails or refuses to comply with these laws and regulations, the State Board of Education shall issue a warning to the local board of education and direct it to take remedial action. In addition, the State Board *may* suspend the flexibility given to the local board under G.S. 115C-105.21A [repealed in 1991] and *may* require the local board to use funds during the term of suspension only for the purposes for which they were allotted or for other purposes with the specific approval from the State Board.

(c) If the local board of education, after warning, persists in willfully or negligently failing or refusing to comply with these laws and regulations, the State Board of Education shall by resolution assume control of the financial affairs of the local board of education and shall appoint an administrator to exercise the powers assumed. The adoption of a resolution shall have the effect of divesting the local board of education of its powers as to the adoption of budgets, expenditure of money, and all other financial powers conferred upon the local board of education by law.

N.C. Gen. Stat. § 115C-451 (2007) (emphasis added). We first note that Section 115C-12(1) of Article 2 was in existence before the enactment of Article 31, and therefore through the express language of Article 31, Article 2 was superseded on the date Article 31 went into effect to the extent that Article 2 excluded Article 31 from expanding the financial powers of the BOE. However, Article 2 has been amended since the effective date of Article 31, but Section 115C-12(1) of Article 2 has not been amended to include Article 31, and Section 115C-12(5) of Article 2 has not been amended to grant the BOE

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authority to regulate apportionment of local funds. As noted, Article 31, Section 115C-424 includes the following language: “No local act enacted or taking effect after July 1, 1976, may be construed to modify, amend, or repeal any portion of this Article unless it expressly so provides by specific reference to the appropriate section.” N.C. Gen. Stat. § 115C-424.

The language of Article 31, Section 115C-424 may have served to resolve the conflict between Article 2 as it existed 1 July 1976, though in light of the later amendments of Article 2, the continued exclusion of Article 31 from the provisions of Article 2 casts some doubt upon the current effect of Article 31. We note that the language in the above quoted section of Article 31, Section 115C-424 pertaining to acts enacted after 1 July 1976 are limited to *local acts*, not those of the General Assembly.

Assuming *arguendo* that Article 31 currently represents a legitimate grant of authority by the General Assembly, when our Court construes the provisions of Articles 2, 30, 31 and the provisions of N.C. Constitution art. IX § 5 *in pari materia*, we still find Defendants’ argument unpersuasive. Article 31, Section 115C-451(b) states: “The State Board of Education shall be responsible for assuring that local boards of education *comply with State laws and regulations regarding the budgeting, management, and expenditure of funds.*” N.C. Gen. Stat. § 115C-151(b) (2007). The State laws regarding the financial powers and duties of the BOE are defined in Articles 2 and 30. Neither of these Articles grants the BOE supervisory authority over local funds, nor the power to determine disputes or provide redress for alleged misuse of local funds. Nothing in Article 31 extends the authority of the BOE beyond administration of state and federal funds.

Further, in *Appeal of Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974):

Chief Justice Stacy stated the rule: “Where the meaning of a statute is doubtful, its title may be called in aid of construction . . . ; but the caption will not be permitted to control when the meaning of the text is clear. . . . Especially is this true where the headings of sections have been prepared by compilers and not by the Legislature itself.”

See also *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763-64 (1992). To the extent that the text of Section 115C-451 of

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Article 31 is unclear, we may look to its title for guidance on the legislative intent in enacting it. In 1991, Section 115C-451 of Article 31 was amended by the General Assembly to include sections (b) and (c), involving enforcement powers of the BOE. The title of Section 115C-451 was also amended by Chapter 529, section 5 of the North Carolina Session Laws of 1991, as proposed by House Bill 493, (codified as amended at N.C. Gen. Stat. § 115C-451), from “Reports to State Board of Education[.]” to “Reports to State Board of Education; *failure to comply with School Budget Act.*” (Emphasis added). This title suggests the authority granted in this section is limited to violations of the School Budget Act. Article 31 *is* the School Budget Act, and the title of Article 31 § 115C-451 indicates that the supervisory and remedial powers and duties granted therein are limited to violations of Article 31 alone, and do not abrogate powers and duties contained in other Articles of the North Carolina General Statutes.

The General Assembly has enacted laws specifically governing Charter Schools in North Carolina. Section 115C-238.29G of Article 16, entitled “Causes for nonrenewal or termination; disputes” states: “(b) The State Board of Education shall develop and implement a process to address contractual and other grievances between a charter school and its chartering entity or the local board of education during the time of its charter.” N.C. Gen. Stat. § 115C-238.29G(b) (2007). This is the sole section in Article 16 concerning resolution of disputes between charter schools and their local boards of education. Section 115C-238.29G of Article 16 also states: “(c) The State Board and the charter school are encouraged to make a good-faith attempt to resolve the differences that may arise between them. They may agree to jointly select a mediator.” N.C. Gen. Stat. § 115C-238.29G(c) (2007). Though Article 16 provides for the BOE to establish a process by which disputes between a charter school and a local board of education might be addressed, there is no express language limiting the resolution of such disputes to this process. In fact, this section expressly encourages resolution by a means other than this process, namely mediation. We do not interpret this section as limiting resolution of disputes between charter schools and local boards of education to the process included in Article 16, Section 115C-238.29G.

In light of our interpretation of Articles 2, 30 and 31 above, we find no grant of authority for the BOE to determine monetary disputes between charter schools and local boards of education for locally derived school funds. The powers of the BOE have been explicitly limited to control, administration, and disbursement of

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state and federal moneys, and superior courts maintain jurisdiction to hear disputes between charter schools and their local boards of education such as those in the case before us. This holding is in keeping with prior opinions of this Court, though the specific issue of subject matter jurisdiction argued by Defendants was not raised in those opinions. *Sugar Creek I*, 188 N.C. App. 454, 655 S.E.2d 850; *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 563 S.E.2d 92 (2002). This argument is without merit.

II.

[2] In their third argument, Defendants contend that the trial court erred in ordering Defendants to share certain of its “other local revenues” with Plaintiffs. We disagree.

Defendants argue that Article 16, specifically Section 115C-238.29H and Article 30, Section 155C-426, provides Plaintiffs no private cause of action against Defendants. Neither of these statutes explicitly provides Plaintiffs with a private cause of action against Defendants, and Defendants state in their brief that “a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute.” *Lea v. Grier*, 156 N.C. App. 503, 508, 577 S.E.2d 411, 415 (2003) (citation omitted).

Defendants include only a partial quote from our opinion in *Lea*. The full quote in *Lea* reads: “[o]ur case law *generally* holds that a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute.” *Id.* (emphasis added). The *Lea* Court then went on to reaffirm established precedent that an implicit right of a cause of action exists when a statute requires action from a party, and that party has failed to comply with the statutory mandate. *Id.* at 508-09, 577 S.E.2d at 415-16 (citation omitted); *see also Williams*, 128 N.C. App. at 604, 495 S.E.2d at 409 (holding that because the language of the statutes in issue were “unambiguous, direct, imperative and mandatory” in requiring certain protections for teachers, the violation of these statutes created an implied cause of action despite the absence of express language granting any cause of action).

N.C. Gen. Stat. § 115C-238.29H(b) (2007) (emphasis added) states in relevant part:

If a student attends a charter school, the local school administrative unit in which the child resides *shall* transfer to the charter

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school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year.

It is clear to this Court that the General Assembly intended that charter school children have access to the same level of funding as children attending the regular public schools of this State. The language of § 115C-238.29H(b) is “unambiguous, direct, imperative and mandatory.” See *Williams*, 128 N.C. App. at 604, 495 S.E.2d at 409. We hold that § 115C-238.29H(b) creates an implied cause of action in favor of Plaintiffs when they allege violation of the mandatory provisions of this statute. When construed *in pari materia* with N.C. Gen. Stat. § 115C-408, which explicitly divests jurisdiction of the BOE concerning issues of local school funding, we hold that the issues on appeal are properly before this Court. This argument is without merit.

III.

In its fourth argument, Defendants contend that the trial court erred in calculating the amount of “local funds” that must be shared with Plaintiffs. We agree in part.

A.

Defendants are required by law to maintain at least three separate funds: (1) the State Public School Fund, (2) the local current expense fund, and (3) the capital outlay fund. N.C. Gen. Stat. § 115C-426(c) (2007); *Sugar Creek I*, 188 N.C. App. at 458, 655 S.E.2d at 853. “In addition, other funds may be required to account for trust funds, federal grants restricted as to use, and special programs. Each local school administrative unit shall maintain those funds shown in the uniform budget format that are applicable to its operations.” *Id.*

Accordingly, money made available to CMS by the Board for current operating expenses shall be deposited into the local current expense fund; money made available to CMS by the Board for capital outlay shall be deposited into the capital outlay fund; and money made available to CMS by the Board for special programs shall be deposited into funds specifically established for those special programs.

Id. at 458, 655 S.E.2d at 854. The local current expense fund of local boards of education includes:

“moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by

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or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.”

Francine Delany, 150 N.C. App. at 339, 563 S.E.2d at 93 (quoting N.C. Gen. Stat. § 115C-426(e); see N.C. Const. art. IX, § 7).

“If a student attends a charter school, the local school administrative unit in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year.” N.C. Gen. Stat. § 115C-238.29H(b) (2001). In [*Francine Delany*], this Court held that the phrase “local current expense appropriation” in the Charter School Funding Statute, N.C. Gen. Stat. § 115C-238.29H(b), is synonymous with the phrase “local current expense fund” in the School Budget and Fiscal Control Act, N.C. Gen. Stat. § 115C-426(e). *Thus, the Charter Schools are entitled to an amount equal to the per pupil amount of all money contained in the local current expense fund.*

Sugar Creek I, 188 N.C. App. at 459-60, 655 S.E.2d at 854 (emphasis added).

B.

We note that Defendants include no authority in their brief in support of several of the following arguments, which constitutes a violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and subjects these arguments to dismissal. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008). Applying the *Dogwood Dev.* guidelines, we choose to address most of Defendants’ arguments on the merits despite this violation of our appellate rules, pursuant to the authority granted us by Rule 2 of the North Carolina Rules of Appellate Procedure.

(1) *Revenue Line for State Textbooks*

[3] Defendants argue that the revenue line for state textbooks should not be included as part of its local current expense fund, which includes “State money disbursed directly to the local school administrative unit.” N.C. Gen. Stat. § 115C-96 states under “Powers and duties of the State Board of Education in regard to textbooks”:

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The children of the public elementary and secondary schools of the State shall be provided with free basic textbooks within the appropriation of the General Assembly for that purpose. To implement this directive, the State Board of Education shall evaluate annually the amount of money necessary to provide textbooks based on the actual cost and availability of textbooks and shall request sufficient appropriations from the General Assembly.

The State Board of Education shall administer a fund and establish rules and regulations necessary to:

(1) Acquire by contract such basic textbooks as are or may be on the adopted list of the State of North Carolina which the Board finds necessary to meet the needs of the State public school system and to carry out the provisions of this Part.

(2) Provide a system of distribution of these textbooks and distribute the books that are provided without using any depository or warehouse facilities other than those operated by the State Board of Education.

(3) Provide for the free use, with proper care and return, of elementary and secondary basic textbooks. The title of said books shall be vested in the State.

N.C. Gen. Stat. § 115C-96 (2007). This statute provides that the BOE make a determination of the appropriate textbooks for the public schools of North Carolina, purchase these textbooks, and distribute them to the public schools. The State retains title to these textbooks. Local boards of education receive neither money to purchase these textbooks, nor any authority to obtain moneys from these textbooks “loaned” by the State. *Id.*; N.C. Gen. Stat. § 115C-100 (2007). The local boards of education are merely the custodians of the textbooks until they are returned to the State. N.C. Gen. Stat. § 115C-99 (2007). The BOE must be reimbursed annually any moneys collected by the local boards of education for damage to the textbooks. N.C.G.S. § 115C-100.

Though, for accounting purposes, the *value* of these textbooks is shown in Defendants’ annual local current expense fund, Defendants do not have any authority or means to convert this “value” to their own purposes, and we hold that it does not constitute moneys contained in Defendants’ local current expense fund that must be shared with Plaintiffs. The trial court erred by including the revenue line for

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state textbooks in its order as moneys within Defendants' local current expense fund that must be shared with Plaintiffs.

(2) *Fund Balance*

[4] Defendants argue that the fund balance constitutes moneys Defendants received in a previous fiscal year but which were not used in that fiscal year, but instead were transferred to the current year's local current expense fund, and therefore Defendants should not have to share the fund balance with Plaintiffs. Defendants object to the proposition that requiring them to share moneys with Plaintiffs that carried over from the previous year would allow Plaintiffs to "double dip," as they presumably received a per pupil share of this money in the prior fiscal year. However, Defendants' argument is double-edged. If Defendants do not share the fund balance with Plaintiffs, then Defendants' students will receive more per pupil funds in the current fiscal year than Plaintiffs' students. As Defendants point out, N.C. Gen. Stat. § 115C-238.29H(b) mandates that Defendants transfer to Plaintiffs "an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year." As the fund balance is carried over from the previous fiscal year to the current fiscal year, it constitutes moneys in Defendants' local current expense fund. By the mandate of N.C. Gen. Stat. § 115C-238.29H(b), it must be shared with Plaintiffs. *See also Sugar Creek I*, 188 N.C. App. at 458, 655 S.E.2d at 854. Otherwise Defendants' students would be receiving a higher per pupil share of the local current expense fund for the current fiscal year than Plaintiffs' students. We hold the trial court did not err in including the fund balance in its calculation of its award.

(3) *Hurricane Katrina Relief Funds*

Defendants argue that they should not have to share moneys granted by the federal government to cover the cost of educating students displaced by Hurricane Katrina who entered the Charlotte-Mecklenburg School System. In their brief, Defendants contend the funds were to "help reimburse [Defendants] for [their] costs in schooling these children." However, in their brief, Defendants do not direct this Court to any evidence indicating how these funds were spent. Defendants do not state in their brief whether the Katrina funds were simply added, without restriction, to the local current expense fund and distributed equally among all students, including those displaced by Hurricane Katrina, or whether these funds were restricted for the sole benefit of Hurricane Katrina students.

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If the former, then we find no inequity in treating these funds like any other funds used to support the general public school student population. If the latter, then a potential equitable argument arises concerning the sharing of these funds with Plaintiffs. However, Defendants provide no guidance on this matter, and we treat the Hurricane Katrina funds as any other funding. Furthermore, because these funds were deposited in the local current expense fund, the trial court did not err in ordering them shared with Plaintiffs. *Sugar Creek I*, 188 N.C. App. at 458, 655 S.E.2d at 854. We further note that “other funds may be required to account for trust funds, *federal grants restricted as to use*, and special programs. Each local school administrative unit shall maintain those funds shown in the uniform budget format that are applicable to its operations.” *Id.* at 458, 655 S.E.2d at 853 (emphasis added). If the federal Hurricane Katrina funds were restricted, then they should have been placed in a separate fund, not the current local expense fund.

(4) *Sales Tax Reimbursement*

Defendants pay sales tax on certain transactions, and they may apply for reimbursement of certain taxes paid. N.C. Gen. Stat. § 105-164.14 (2007). Defendants argue that they should not have to share these tax reimbursements with Plaintiffs. However, these tax reimbursements are deposited in Defendants’ local current expense fund, and Defendants make no argument that these tax reimbursements are used any differently than other moneys in that fund. We hold the trial court did not err by including these moneys in its calculation. *Sugar Creek I*, 188 N.C. App. at 458, 655 S.E.2d at 854.

(5) *Preschool Programs and Facilities*

Defendants argue that moneys in their local current expense fund used for preschool students should not be shared with Plaintiffs because Plaintiffs do not have preschool programs. Defendants’ argument was previously decided against them in our *Sugar Creek I* opinion. *Sugar Creek I*, 188 N.C. App. at 458-59, 655 S.E.2d at 854-55.

(6) *Donations for other Specific Programs*

Defendants argue that donations from individuals and organizations for “specific special programs and schools” should not be shared with Plaintiffs. Again, this issue was addressed in *Sugar Creek I*. If donations or other moneys are intended for special programs, they should be held in a special fund. Because Defendants have held

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these moneys in their local current expense fund, they are required to share these moneys with Plaintiffs. *Id.* at 459, 655 S.E.2d at 855.

(7) *Reimbursements from Capital Funds*

[5] We decline to address this argument because not only do Defendants fail to cite any authority in support of their argument, Defendants' argument consists of four sentences which offer this Court no guidance on the substance of the argument or any significant basis therefore. This argument is deemed abandoned. N.C.R. App. P. 28(b)(6); *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 367.

IV.

[6] In Defendants' fifth argument, they contend that the trial court erred in refusing to consider an affidavit of Dennis Covington (Covington). In their argument, Defendants fail to inform this Court as to the identity of Covington. From Plaintiffs' brief, we learn that Covington is Defendants' Chief Financial Officer. The entirety of Defendants' argument concerning this issue, excluding its recitation of the standard of review, is as follows:

As prior counsel for [Defendants] explained to the trial court throughout the summary judgment process, [Plaintiffs'] proposed damages were incorrect and included categories of money that [Defendants] should not be required to share with [Plaintiffs]. [Defendants] offered the Affidavit of Dennis Covington to more fully elaborate upon [sic.] nature of these objections, but the [c]ourt refused to consider the affidavit. The [c]ourt's decision was arbitrary and the affidavit should have been considered.

This argument has been abandoned for violation of Rule 28(b)(6) of our Appellate Rules. Assuming *arguendo* Defendants have not abandoned this argument, we hold they fail in their burden to show that the trial court's "decision was manifestly unsupported by reason, or "that it was so arbitrary that it could not have been the result of a reasoned decision." " *HIS N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc.*, 169 N.C. App. 767, 774, 611 S.E.2d 224, 228 (2005) (citations omitted). This argument is without merit.

We reverse the trial court's award insofar as it requires Defendants to share moneys with Plaintiffs related to the textbooks Defendants receive from the BOE and remand for further action consistent with this holding. We affirm the judgment of the trial court in every other respect.

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Affirmed in part, reversed and remanded in part.

Judges BRYANT and GEER concur.

GLORIA COOPER, EMPLOYEE, PLAINTIFF v. BHT ENTERPRISES, EMPLOYER, SELF-INSURED, AND KEY RISK MANAGEMENT SERVICES, SERVICING AGENT, DEFENDANTS

No. COA08-711

(Filed 17 February 2009)

1. Workers' Compensation— appeal from deputy commissioner—Form 44 not filed—discretion to waive

The Industrial Commission in a workers' compensation case did not err by hearing an appeal from a deputy commissioner where defendants did not file a Form 44. Both a Court of Appeals opinion and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the required Form 44 filing where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Commission.

2. Workers' Compensation— back injury—subsequent neck condition—timing of complaints to medical providers—finding

There was competent evidence in a workers' compensation case to support the Industrial Commission's finding that plaintiff did not begin to make regular complaints of neck pain to her medical providers until more than six months after the injury, and that there was insufficient evidence to support a finding that a report of isolated neck pain was proximately related to her later treatment for a cervical disc herniation.

3. Workers' Compensation— back injury—subsequent cervical condition—causation—medical testimony—post hoc, ergo propter hoc

There was competent evidence in a workers' compensation case arising from a back injury and a later cervical condition to support the Industrial Commission's determination that the testimony of two doctors could not support a finding that the neck condition was causally related to the work-related fall. Where the

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question is the cause of a controversial medical condition, the confusion of sequence with consequence (post hoc, ergo propter hoc) is not competent evidence of causation.

4. Workers' Compensation— disability—only through date of release

The Industrial Commission did not err by concluding that a workers' compensation plaintiff was entitled to disability compensation only through the date she was released to return to full duty work. There was no presumption of disability in this case, the doctor who issued medical excuse notes could not cite any objective medical reason to keep plaintiff from returning to work with respect to her compensable back injury, and plaintiff offered only the absence of light duty work with her employer in the month after the injury to prove that she had made a "reasonable" effort to obtain work.

Appeal by plaintiff from Opinion and Award entered 13 February 2007 and order entered 25 March 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 December 2008.

Morrison Law Firm, P.L.L.C., by B. Perry Morrison, Jr., Thomas & Farris, P.A., by Albert S. Thomas, Jr., and Rose, Rand Attorneys, by Paul N. Blake, III, for plaintiff-appellant.

Cranfill, Sumner & Hartzog LLP, by J. Gregory Newton, and Meredith Taylor Berard, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff Gloria Cooper appeals from an Opinion and Award by the North Carolina Industrial Commission ("Commission"), which limited the benefits awarded to her by the deputy commissioner's Opinion and Award, and from an order denying her motions to amend and reconsider the Full Commission's Opinion and Award. We affirm.

The parties stipulated that an employment relationship existed between plaintiff and defendant-employer BHT Enterprises at the time of the 7 March 2003 accident, and that plaintiff "suffered a compensable injury by accident involving her lower back arising out of and in the course of her employment" with defendant-employer. The Full Commission's unchallenged and, therefore, binding findings of fact, *see Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d

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110, 118 (concluding that, where a party failed to assign error to the Industrial Commission's findings of fact, those findings are "presumed to be supported by competent evidence" and are, thus, "conclusively established on appeal"), *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003), are as follows:

1. At the time of the hearing before the Deputy Commissioner, plaintiff was a 47 year-old female with a high school education.
 2. At the time of her admittedly compensable low back injury on March 7, 2003, plaintiff had worked for defendant for approximately 14 years as a meat cook in a McDonald's restaurant.
 3. Prior to March 7, 2003, plaintiff did not have any health problems that prevented her from working.
 4. While at work on March 7, 2003, plaintiff entered a walk-in freezer to shelve some bagels. While exiting the freezer, plaintiff slipped on some ice and fell to the floor.
 5. Plaintiff continued to work immediately following the accident, but presented to Nash Urgent Care with complaints of lower back pain later the same day. Plaintiff did not complain of or report any cervical or neck symptoms. X-rays of plaintiff's lumbar and thoracic spine were negative. Plaintiff was released to return to light-duty work; however, defendant informed plaintiff that no light-duty work was available.
-
7. On April 14, 2003, plaintiff presented to Dr. Grieg McAvoy for an orthopaedic evaluation. Dr. McAvoy interpreted x-rays of plaintiff's thoracic and lumbar spine to be within normal limits. Dr. McAvoy diagnosed plaintiff with low back pain with no signs of nerve deficits or nerve irritation, recommended a home exercise program, and released plaintiff to return to regular duty work without restrictions.
 8. Plaintiff delivered a full duty release note to defendant, however she did not return to work due to her belief that she was unable to work. Larry Thomas Winbourne, director of operations for defendant, testified that he was aware of plaintiff's April 14, 2003 full-duty release by Dr. McAvoy. He testified that plaintiff's position was held open for her, and that defendant was "hoping she's come back to work." Mr.

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Winbourne further testified that plaintiff was considered to be on “medical leave” and was “never terminated.”

9. On June 16, 2003, plaintiff returned to Dr. McAvoy for re-evaluation. At this visit, she complained of both lower back and neck pain[, the description of which was recorded in Dr. McAvoy’s medical notes as “a catch in her neck”]. Dr. McAvoy ordered another lumbar MRI but did not order a cervical MRI. The lumbar MRI was performed on July 3, 2003 and revealed slight osteoarthritic changes but no disc extrusion or stenosis. On the basis of this MRI, Dr. McAvoy, on July 3, 2003, deemed plaintiff to have reached maximum medical improvement, assigned a permanent partial disability rating of 0% to plaintiff’s back, and advised plaintiff to “continue with normal activities without restrictions.”
10. Plaintiff began overlapping treatment with her primary care physician, Dr. Samuel Wesonga, at the Boice-Willis Clinic on April 24, 2003. Plaintiff initially reported only lower back pain to Dr. Wesonga, and made no mention of cervical or neck pain. It was not until September 24, 2003, over six months after the March 7, 2003 injury by accident that plaintiff reported both lower back/extremity pain and neck/shoulder pain to Dr. Wesonga.
11. Dr. Wesonga ordered a cervical MRI for the first time since plaintiff’s accident at work. The MRI revealed disc herniations superimposed on severe circumferential spinal stenosis at C5-C6 and C6-C7. As a result, Dr. Wesonga referred plaintiff for neurosurgical evaluation.
12. On December 16, 2003, plaintiff presented to Dr. Lucas J. Martinez, a neurosurgeon at Rocky Mount Neurosurgical and Spine Consultants. Dr. Martinez diagnosed plaintiff with herniated disks in the neck at C6-C7 on the left and C5-C6 on the right.
13. On February 5, 2004, Dr. Martinez performed cervical surgery that consisted of an anterior cervical microdiscectomy and anterior interbody fusion at C6-C7.
14. Following her surgery, plaintiff continued to treat with Dr. Martinez, including a regimen of physical therapy from which she was discharged on August 12, 2004. Plaintiff last saw Dr. Martinez on August 25, 2004, but continued to treat with Dr.

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Wesonga for chronic pain as of the date of hearing before the Deputy Commissioner.

The Commission also found that plaintiff “failed to show disability beyond her release to return to work on April 14, 2003.” Plaintiff did not challenge this finding.

After receiving evidence, the deputy commissioner filed an Opinion and Award on 9 May 2006, which concluded that plaintiff was entitled to (1) “total disability compensation at the [stipulated] rate of \$111.96 per week *from March 8, 2003 and continuing until plaintiff returns to work or until further order of the Commission,*” and (2) “payment of medical expenses incurred or to be incurred as a result of her *compensable upper and lower back conditions* as may reasonably be required to effect a cure, provide relief, or lessen the period of disability.” (Emphasis added.) Defendant-employer and its third-party administrator Key Risk Management Services (collectively “defendants”) appealed to the Full Commission on 11 May 2006. On 13 February 2007, the Full Commission entered an Opinion and Award affirming in part, and reversing in part, the deputy commissioner’s decision. The Full Commission concluded that plaintiff was entitled to (1) “total disability compensation at the [stipulated] rate of \$111.96 per week *from March 8, 2003, through April 14, 2003, the date she was released to return to full-duty work,*” and (2) “payment of medical expenses incurred or to be incurred [*only*] as a result of her *low back condition* as may reasonably be required to effect a cure, provide relief, or lessen the period of disability.” (Emphasis added.) Plaintiff filed a Motion to Amend the Opinion and Award pursuant to Rule 59 of the North Carolina Rules of Civil Procedure, and a Motion to Reconsider the Opinion and Award pursuant to Workers’ Compensation Rule 701, both dated 22 February 2007, on the grounds that “the evidence before the Commission [wa]s insufficient to justify its decision.” On 9 March 2007, defendants filed Responses to Plaintiff’s Motion to Amend and Motion to Reconsider. On 25 March 2008, the Full Commission denied plaintiff’s motions, finding that “plaintiff has not shown good grounds for the Full Commission to amend, reconsider, or make additional findings in this matter.” Plaintiff appealed to this Court from the Commission’s 13 February 2007 Opinion and Award and its 25 March 2008 order denying her motions.

[1] We first address plaintiff’s contention that the Commission erred by hearing defendants’ appeal from the deputy commissioner’s

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Opinion and Award. Plaintiff asserts that defendants failed to file a Form 44 pursuant to Workers' Compensation Rule 701(2), which defendants do not dispute. Although defendants properly filed a brief with the Commission after giving notice of their appeal, as also required by Rule 701(2), plaintiff argues that defendants' mere failure to file a Form 44 constitutes an abandonment of defendants' grounds for appeal to the Full Commission. We disagree.

Workers' Compensation Rule 701(2) of the North Carolina Industrial Commission provides that, after giving sufficient notice of appeal to the Full Commission, an appellant must complete a Form 44 Application for Review, which is supplied by the Commission, stating the grounds for its appeal "with particularity." Workers' Comp. R. of N.C. Indus. Comm'n 701(2), 2009 Ann. R. (N.C.) 1006. The appellant must then file and serve the completed Form 44 and an accompanying brief within the specified time limitations "unless the Industrial Commission, in its discretion, waives the use of the Form 44." *See id.*

Like defendants in the present case, in *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 619 S.E.2d 907 (2005), the plaintiff did not file a Form 44 after giving notice of her appeal to the Full Commission. *See id.* at 742, 619 S.E.2d at 909. However, unlike defendants in the present case, the *Roberts* plaintiff also failed to file a brief or "any other document with the Full Commission setting forth grounds for appeal with particularity." *See id.* at 744, 619 S.E.2d at 910. While we recognized then, as we do now, that the Commission may waive the use of Form 44, we also recognized that Rule 701(2) "specifically requires that grounds for appeal be set forth with particularity." *See id.* (internal quotation marks omitted). Accordingly, in *Roberts*, we concluded that "the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission . . . [because, w]ithout notice of the grounds for appeal, an appellee has no notice of what will be addressed by the Full Commission." *Id.* Thus, because the *Roberts* plaintiff failed to state her appeal *with particularity*, we held that the Commission committed reversible error by issuing an Opinion and Award based "solely on the record." *See id.*

However, unlike the appealing plaintiff in *Roberts*, defendants in the present case complied with Rule 701(2)'s requirement to state the grounds for appeal with particularity by timely filing their brief after giving notice of their appeal to the Full Commission. Additionally, plaintiff does not argue that she did not have adequate notice of

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defendants' grounds for appeal. Plaintiff asserts only that defendants' failure to file a Form 44 should have been deemed an abandonment of defendants' appeal. Since both this Court and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the filing requirement of an appellant's Form 44 where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission, we overrule these assignments of error.

"The Industrial Commission and the appellate courts have distinct responsibilities when reviewing workers' compensation claims." *Billings v. General Parts, Inc.*, 187 N.C. App. 580, 584, 654 S.E.2d 254, 257 (2007) (citing *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 114, 530 S.E.2d 549, 552 (2000)), *disc. review denied*, 362 N.C. 175, 659 S.E.2d 435 (2008). The Industrial Commission is "the fact finding body," *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999), and is "the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Id.* (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "This being true, [the Commission] may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same." *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951).

This Court, on the other hand, "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274); *see also Rewis v. New York Life Ins. Co.*, 226 N.C. 325, 330, 38 S.E.2d 97, 100 (1946) ("The courts are not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached.").

Instead, "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) (alteration and omission in original) (quoting *Deese*, 352 N.C. at 116, 530 S.E.2d at 553). If the findings of fact are supported by competent evidence, those findings are conclusive on appeal "even though there be evidence that would support findings to the con-

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trary.’ ” See *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). While we recognize that “[t]he 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.* (citing *Doggett v. South Atl. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937)), this Court’s “ ‘duty goes no further than to determine whether the record contains any evidence tending to support the finding[s] made by the Industrial Commission.’ ” *Id.* (quoting *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274).

I.

Plaintiff first contends there was no competent evidence to support the Commission’s Findings of Fact 6, 15, 16, or 17, and contends these findings do not support its conclusion that plaintiff “failed to show that her cervical back condition[—i.e., her neck problem—] was proximately caused by the March 7, 2003 injury by accident.” Plaintiff argues that the Commission erroneously “disregarded” the stipulated medical records, plaintiff’s own testimony, and the expert medical testimony. We disagree.

A.

[2] In its Finding of Fact 6, the Commission found that “[p]laintiff continued to treat with Nash Urgent Care for lower back pain on March 12, 17 and 27, 2003[, but] . . . did not complain of or report any cervical or neck symptoms during these visits.” It also found that, at her 2 April 2003 appointment, plaintiff “reported lower back pain, with pain radiating into her upper back and neck, and was referred for an orthopaedic evaluation.” “This visit was the first that plaintiff reported any neck pain, and plaintiff did not report any neck pain to any of her medical providers until September 24, 2003, over six months after the March 7, 2003 injury by accident.”

Plaintiff asserts that the Commission erred in making this finding since the reason her low back pain was her “chief complaint” was not because she had no neck pain during those six months, but simply because she chose to “consistently focus[only] on what hurt the most” at each of her medical visits. Plaintiff also testified that, when she complained of “back pain,” she meant that her entire back was hurting, including her neck. However, since “[t]he Commission is not required to accept the testimony of a witness, even if the testimony is

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uncontradicted,” see *Hassell v. Onslow County Bd. of Educ.*, 362 N.C. 299, 307, 661 S.E.2d 709, 715 (2008), and is “the sole judge of the credibility of the witnesses and the weight to be given their testimony,” see *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274), we cannot conclude that the Commission erred when it did not find plaintiff’s testimony as fact.

Plaintiff next asserts that the Commission erred in making this finding because plaintiff claims that she *did* complain of neck pain at medical visits prior to her 24 September 2003 visit with Dr. Wesonga. In support of this assertion, plaintiff directs this Court’s attention to the stipulated medical records from 16 June 2003, where she states that she complained to Dr. McAvoy of her ongoing neck pain. However, the chart notation from 16 June reflects only that plaintiff complained of symptoms that the treating physician recorded as, simply, “a catch in her neck.” As further support that she regularly complained of neck pain prior to 24 September, plaintiff attempts to rely on a 9 May 2003 chart notation, which indicated that “[s]he does have some mild increased pain with full forward flexion and hyperextension.” However, a careful reading of the 9 May chart note in its entirety shows that plaintiff presented at this visit only “for evaluation of her low back and left lower extremity pain,” and that the excerpted phrase was made in relation to both plaintiff’s neck *and* back.

After a thorough review of the stipulated medical records, the only evidence that plaintiff complained of neck pain prior to 24 September 2003—other than the 2 April 2003 visit, recognized but dismissed by the Commission as an “isolated instance of neck pain” in this challenged finding of fact—is the 16 June reference to her complaint of “a catch in her neck.” Instead, our review found that the references to plaintiff’s neck in the medical records prior to 24 September—for example, on 30 April 2003, 3 May 2003, 5 May 2003, and 1 July 2003—did not show any complaints from plaintiff regarding ongoing pain, but rather only reflected post-examination assessments by plaintiff’s health care providers, who determined that her neck had “[n]o muscle stiffness,” and was “non-tender” with painless range of movement, “supple,” and “[s]oft, supple” with “[n]o lymphadenopathy.”

Therefore, we conclude that there was competent evidence to support the Commission’s finding that plaintiff did not begin to make regular complaints of neck pain to her medical providers until 24

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September 2003, “over six months after the March 7, 2003 injury by accident,” and that there was “insufficient evidence” to support a finding that plaintiff’s report of an “isolated instance of neck pain” on 2 April 2003 “was proximately related to her later treatment for cervical disc herniation by Dr. Martinez.”

B.

[3] “In evaluating the causation issue, this Court can do no more than examine the record to determine whether any competent evidence exists to support the Commission’s findings as to causation” *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 598, 532 S.E.2d 207, 210 (2000) (omission in original) (internal quotation marks omitted). “[W]hen conflicting evidence is presented, the Commission’s finding of causal connection between the accident and the disability is conclusive [and binding on the reviewing court].” *Id.* (first alteration in original) (internal quotation marks omitted).

However, “[i]n a case where the threshold question is the cause of a controversial medical condition, the maxim of ‘*post hoc, ergo propter hoc*,’ is not competent evidence of causation.” *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 232, 538 S.E.2d 912, 916 (2000). “The maxim ‘*post hoc, ergo propter hoc*,’ denotes ‘the fallacy of . . . confusing sequence with consequence,’ and assumes a false connection between causation and temporal sequence.” *Id.* (omission in original) (quoting *Black’s Law Dictionary* 1186 (7th ed. 1999)). “As such, this Court has treated the maxim as inconclusive as to proximate cause.” *Id.*

In its Findings of Fact 15, 16, and 17, the Commission found that Drs. Wesonga and Martinez believed there was a causal link between plaintiff’s cervical condition and her 7 March 2003 work-related fall. However, it further found that Dr. Wesonga “expressly conceded that the sole basis for his causation opinion with respect to plaintiff’s neck condition was the mere temporal proximity of her symptoms to the fall,” and that Dr. Martinez “also based his causation opinion on the temporal proximity of plaintiff’s symptoms to the fall.” As a result, it found that, “[b]ased upon the greater weight of the competent medical evidence of record, . . . plaintiff failed to show that her cervical back condition [wa]s causally related to her accident at work on March 7, 2003.”

Our review of the record reveals that Dr. Wesonga initially testified that it was his opinion within a reasonable degree of medical cer-

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tainty that plaintiff's neck problem was related to her fall on 7 March 2003. He testified, "It's not unusual for folks to be involved in an injury and not have any symptoms in one part of the body, and then later on develop symptoms down the road," and that "you could make a very reasonable assumption that, you know, if somebody's injured they may be focused in on one part of their body and not pay attention to the rest of their body." However, Dr. Wesonga also testified that, if plaintiff had not developed any cervical symptoms until six months after her fall, he could not say to any reasonable degree of medical certainty that plaintiff's fall "more than likely caused her cervical problem." He further testified:

- Q. And you can't say with any degree of medical certainty that her fall at work on March 7th, 2003 calls for [sic] a cervical condition?
- A. Yes, you can. Yes, you can. I mean, she again from the fact that she never had a problem before and now she has a problem cause and effect look as though it's an issue of a time—time frame, you know.
- Q. Okay. So your opinion is based simply on the fact that she didn't have these problems before and that sometime afterward, even if it's six months afterwards she developed these problems. That's the basis for your opinion?
- A. Exactly.

Similarly, Dr. Martinez initially testified that it was his opinion within a reasonable degree of medical certainty that plaintiff's neck problem was caused by her work-related fall. However, he later testified that, "[i]f it is true" that plaintiff did not have any cervical symptoms until six months after her fall, it "would be correct" that he could not state that her condition was related to that fall within a reasonable degree of medical certainty.

Since we have already concluded that there was competent evidence to support the Commission's finding that plaintiff did not report having ongoing neck pain during the six months following her work-related fall, we must also conclude that there was competent evidence to support the Commission's determination that the testimony of Drs. Wesonga and Martinez could not support a finding, within a reasonable degree of medical certainty, that plaintiff's cervical back condition was causally related to her work-related fall. Therefore, we hold that the Commission correctly determined that

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plaintiff “failed to show” that her cervical back condition was proximately caused by her work-related fall. Accordingly, these assignments of error are overruled.

II.

Plaintiff next contends the Commission erred by concluding as a matter of law that she “failed to show” that she was entitled to compensation for medical expenses incurred as a result of her cervical back condition.

“For an injury to be compensable under the terms of the Workmen’s Compensation Act, it must be proximately caused by an accident arising out of and suffered in the course of employment.” *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Therefore, our decision to affirm the Commission’s conclusion that plaintiff failed to show that her cervical back condition was proximately caused by her 7 March 2003 work-related fall renders it unnecessary to address this assignment of error.

III.

[4] Finally, plaintiff contends the Commission erred when it concluded that she was entitled to disability compensation only through 14 April 2003, which was the date she was “released to return to full-duty work.” Plaintiff argues that she presented sufficient evidence to satisfy her burden of proving her continuing disability under *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), and claims that she is entitled to continuing temporary total disability compensation.

“ ‘Disability,’ within the North Carolina Workers’ Compensation Act, 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.” *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005) (internal quotation marks omitted); see also *Cross v. Falk Integrated Tech., Inc.*, 190 N.C. App. 274, 278-79, 661 S.E.2d 249, 255 (2008) (“ ‘Disability’ is defined by a diminished capacity to earn wages, not by physical impairment.”). “In order to obtain compensation under the Workers’ Compensation Act, the claimant has the burden of proving the existence of h[er] disability and its extent.” *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). To prove her disability, the claimant has the burden of proving that, after her work-related injury, she was incapable of earning the same wages she had earned before her injury in either

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the same or any other employment, and that her incapacity to earn was caused by her compensable injury. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Unless the claimant is entitled to a presumption of disability in her favor based on one of three limited circumstances, *see Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004), the claimant may meet the burden of proving her disability in one of four ways:

- (1) the production of medical evidence that [s]he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment,
- (2) the production of evidence that [s]he is capable of some work, but that [s]he has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment,
- (3) the production of evidence that [s]he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment, or
- (4) the production of evidence that [s]he has obtained other employment at a wage less than that earned prior to the injury.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (citations omitted). It is only after the claimant has met this initial burden of proving her disability that the burden will then shift to a defendant who claims that the claimant-employee is capable of earning wages. *See Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 32-33, 398 S.E.2d 677, 682 (1990). If a defendant makes such a claim, then that defendant “must come forward with evidence to show not only that suitable jobs are available, but also that the [claimant-employee] is capable of getting one, taking into account both physical and vocational limitations.” *See id.* at 33, 398 S.E.2d 682.

In the present case, “[s]ince there was neither a previous award of continuing disability nor a Form 21 or Form 26 agreement, plaintiff could not rely upon a presumption of disability and was required to meet [her] burden of proof under *Russell*.” *See Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 42, 630 S.E.2d 681, 692, *disc. review denied*, 361 N.C. 168, 639 S.E.2d 652 (2006). Plaintiff appears to contend that she has satisfied her burden to establish her disability under either of *Russell’s* first or second methods of proof. We disagree.

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In support of her contention that she was still “incapable of work in any employment” after 14 April 2003, *see Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457, plaintiff directs this Court’s attention to two medical excuse notes signed by Dr. Wesonga and one note signed by Dr. Wesonga’s physician’s assistant, which state that plaintiff was unable to work on 30 April, 1 May, 2 May, 5 May, and 1 July 2003 due to her “current medical problems” and “low back pain injury.” Plaintiff also refers to Dr. Wesonga’s testimony in which he stated that, as of the date of his deposition on 12 May 2005, he had still not returned plaintiff to work.

However, a further review of Dr. Wesonga’s testimony shows that, aside from plaintiff’s complaints of some pain, Dr. Wesonga could not cite any objective medical reason to keep plaintiff from returning to work with respect to her compensable back injury:

- Q. And would it be fair to say that when you were examining [plaintiff] from the April 24, 2003—December 24, 2003—that was respect [sic] to her back, her physical examinations were objectively normal?
- A. Yes.
- Q. So basically the only thing you had to go on were [plaintiff’s] subjective complaints with respect to her back?
- A. Yes.
- Q. You couldn’t—you couldn’t corroborate or verify her subjective complaints with any objective findings?
- A. Correct.
- Q. So when you were—when you did take [plaintiff] out of work during that period of time that was based completely on her subjective complaints?
- A. Yes.
- Q. There were no objective findings to keep her out of work; is that correct?
- A. Correct.

This testimony is consistent with the Commission’s unchallenged finding that, at her 14 April 2003 visit with Dr. McAvoy at the Rocky Mount Orthopaedics & Sports Medicine Center, “Dr. McAvoy diagnosed plaintiff with low back pain with no signs of nerve deficits or

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nerve irritation, recommended a home exercise program, and released plaintiff to return to regular duty work without restrictions.” As plaintiff offered no other medical evidence in support of her assertion that she was “incapable of work in any employment” after 14 April 2003 as a result of her work-related injury, we conclude that plaintiff failed to meet her burden of proving her disability under the first method in *Russell*.

Plaintiff seems to alternatively argue that she has proven her continuing disability under the *Russell* second method of proof, see *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457, offering testimony that she was capable of some work but that, in the month that followed her injury, on the several occasions she sought light duty work with her employer, she was told there was none available. However, plaintiff offered no other evidence to prove that she made a “reasonable” effort to obtain employment. As the record contains no indication that plaintiff made any other attempts to obtain employment, we cannot conclude that she proved her disability under the second prong of *Russell*. Cf. *Perkins v. U.S. Airways*, 177 N.C. App. 205, 214, 628 S.E.2d 402, 408 (2006) (“Ms. Perkins alternatively argues that because she contacted U.S. Airways about a light duty position and they did not offer her one, the Commission erred by not concluding she was disabled under the second option [of *Russell*] . . . Ms. Perkins cites to no authority—and we know of none—that would have required U.S. Airways to offer Ms. Perkins such a position. The record contains no indication that Ms. Perkins made any other attempts to obtain employment. The Commission was free to decide, as it did, that Ms. Perkins’ single contact with U.S. Airways was insufficient to establish she had made a reasonable effort to obtain employment under the second *Russell* option.”), *disc. review denied*, 361 N.C. 356, 644 S.E.2d 231 (2007).

Therefore, we conclude that plaintiff has failed to prove that she was disabled after Dr. McAvoy released her to full-duty work on 14 April 2003. Accordingly, we hold that the Commission correctly concluded that plaintiff was entitled to disability compensation only until 14 April 2003, and affirm the Commission’s Opinion and Award and its order denying plaintiff’s motions to amend and reconsider its Opinion and Award.

Affirmed.

Judges WYNN and STEPHENS concur.

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No. COA07-1479

(Filed 17 February 2009)

Hospitals and Other Medical Facilities— certificate of need— facility completed during appeal—appeal moot

An appeal of a certificate of need for a kidney disease treatment center was moot where the facility was completed and became fully operational while the appeal was pending. North Carolina's Certificate of Need law does not authorize withdrawal of a certificate of need once the project or facility is complete or becomes operational.

Appeal by Petitioner from Final Agency Decision entered 17 August 2007 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 30 April 2008.

Poyner & Spruill LLP, by William R. Shenton, Thomas R. West, Pamela A. Scott, and Wilson Hayman for Petitioner-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for Respondent-Appellee.

Thomas & Brooks, PLLC, by Joy Heath Thomas, for Respondents-Intervenors-Appellees.

STEPHENS, Judge.

Pursuant to the powers conferred upon it by the North Carolina Constitution, the General Assembly has enacted legislation which requires a person or entity seeking to "offer or develop a new institutional health service" to first apply for and obtain a Certificate of Need ("CON") from the Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section ("DHHS"). N.C. Gen. Stat. §§ 131E-175 to -192 (2005) (hereinafter, "CON Law"). The CON Law does not authorize DHHS to withdraw a CON after the project or facility for which a CON was issued is complete or becomes operational. N.C. Gen. Stat. § 131E-189. In this case,

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DHHS issued a CON to Respondents-Intervenors-Appellees Bio-Medical Applications of North Carolina, Inc., d/b/a Fresenius Medical Care of North Carolina (“BMA”), and Nephro Rentals, LLC to develop a kidney disease treatment center. Petitioner-Appellant Total Renal Care of North Carolina LLC (“TRC”) appealed DHHS’s decision to this Court. While the appeal was pending, BMA completed and began operating the kidney disease treatment center. Accordingly, this appeal is now moot. *See Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep’t of Health & Human Services*, 360 N.C. 156, 622 S.E.2d 621 (2005) (per curiam), *vacating* 169 N.C. App. 641, 611 S.E.2d 431 (2005).

NORTH CAROLINA’S CERTIFICATE OF NEED LAW

This Court has previously and ably reviewed the history and purpose of the CON Law and the procedure involved in obtaining a CON in North Carolina. *See, e.g., Living Centers-Southeast, Inc. v. N.C. Dep’t of Health & Human Services*, 138 N.C. App. 572, 532 S.E.2d 192 (2000). However, we find it useful to once again set forth the CON Law’s somewhat complicated regime before addressing the merits of this appeal.

The General Assembly enacted the CON Law in 1977 after the United States Congress passed the National Health Planning and Resource Development Act of 1974 requiring states to establish certificate of need programs as a prerequisite to obtaining federal health program financial grants. *Hosp. Grp. of W. N.C., Inc. v. N.C. Dep’t of Human Res.*, 76 N.C. App. 265, 267, 332 S.E.2d 748, 750 (1985). Congress repealed the Health Planning Act effective 1 January 1987, Pub. L. No. 99-660, title VII, § 701(a), 100 Stat. 3799 (1986), but the General Assembly did not repeal the CON Law. The fundamental purpose of the CON Law is to limit the construction of health care facilities in North Carolina to those that are needed by the public and that can be operated efficiently and economically for the public’s benefit. *In re Humana Hosp. Corp. v. N.C. Dep’t of Human Res.*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986). *See* N.C. Gen. Stat. § 131E-175.

Under the CON Law, “[n]o person shall offer or develop a new institutional health service without first obtaining a [CON] from [DHHS][.]” N.C. Gen. Stat. § 131E-178(a). A CON is defined as a “written order which affords the person so designated as the legal proponent of the proposed project the opportunity to proceed with the development of such project.” N.C. Gen. Stat. § 131E-176(3). Health

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care facilities to which the CON Law applies include: hospitals; long-term care hospitals; psychiatric facilities; rehabilitation facilities; nursing home facilities; adult care homes; kidney disease treatment centers, including freestanding hemodialysis units; intermediate care facilities for the mentally retarded; home health agency offices; chemical dependency treatment facilities; diagnostic centers; hospice offices, hospice inpatient facilities, hospice residential care facilities; and ambulatory surgical facilities. N.C. Gen. Stat. § 131E-176(9b).

DHHS normally has 90 days to review an application for a CON before it must “issue a decision to ‘approve,’ ‘approve with conditions,’ or ‘deny,’ ” the application. N.C. Gen. Stat. § 131E-186(a). DHHS bases its initial decision upon its determination of whether the applicant has complied with the statutory criteria contained in N.C. Gen. Stat. § 131E-183(a). The statutory criteria include, among other things, documentation of the needs of the subject population, the applicant’s financial and operational projections, and a demonstration that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities. N.C. Gen. Stat. §§ 131E-183(a)(3), (5), and (6).

After DHHS issues its initial decision to approve, approve with conditions, or deny a CON application, “any affected person[]” may file a petition under the Administrative Procedure Act with the Office of Administrative Hearings (“OAH”) for a contested case hearing before an Administrative Law Judge (“ALJ”). N.C. Gen. Stat. § 131E-188(a). If no person files a petition for a contested case hearing, DHHS must issue the CON within 35 days of its initial decision if “all applicable conditions of approval that can be satisfied before issuance of the [CON] have been met.” N.C. Gen. Stat. § 131E-187(a).

If an affected person files a petition for a contested case hearing, DHHS may not issue the CON until the petition is withdrawn or until DHHS issues a final agency decision following a hearing before an ALJ. N.C. Gen. Stat. § 131E-187(b). OAH must assign an ALJ to the case within 15 days after the filing of a petition, and the parties must complete discovery within 90 days after the assignment of the ALJ. N.C. Gen. Stat. §§ 131E-188(a)(1) and (2). Within 45 days from the conclusion of the discovery period, a “hearing at which sworn testimony is taken and evidence is presented shall be held[.]” N.C. Gen. Stat. § 131E-188(a)(3). The ALJ must make a non-binding recommended decision within 75 days after the hearing. N.C. Gen. Stat. § 131E-188(a)(4). After issuing the recommended decision, OAH compiles an official record in the case, which contains:

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- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose; and
-
- (6) The [ALJ's] decision, or order.

N.C. Gen. Stat. § 150B-37(a) (2005). OAH then forwards the record to DHHS for a final agency decision.

DHHS must issue a final agency decision within 30 days of receiving the official record from OAH. N.C. Gen. Stat. § 131E-188(a)(5). DHHS must issue a CON within five days after making the final agency decision when “all applicable conditions of approval that can be satisfied before issuance of the [CON] have been met.” N.C. Gen. Stat. § 131E-187(b). Once DHHS issues the CON, the holder must make the service or equipment available or complete the project in compliance with a timetable set forth in the CON. N.C. Gen. Stat. § 131E-189(a).

DHHS may only withdraw an issued CON in three instances. First, DHHS may withdraw a CON if the holder does not submit periodic progress reports or if DHHS determines that the holder is not making a good faith effort to comply with the timetable. N.C. Gen. Stat. § 131E-189(a). Second, DHHS may withdraw a CON if the holder fails to develop the service in a manner consistent with representations made in the CON application or with any conditions DHHS placed on the CON. N.C. Gen. Stat. § 131E-189(b). Third, DHHS may withdraw a CON “if the holder of the [CON], before completion of the project or operation of the facility, transfers ownership or control of the facility, the project, or the [CON].” N.C. Gen. Stat. § 131E-189(c).

The CON Law does not authorize DHHS to withdraw a CON once the project or facility for which the CON was issued is complete or becomes operational. N.C. Gen. Stat. § 131E-189. “A project authorized by a [CON] is complete when the health service or the health service facility for which the [CON] was issued is licensed and certified and is in material compliance with the representations made in the [CON] application.” N.C. Gen. Stat. § 131E-181(d). Kidney disease

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treatment centers, the subject of the CON in this case, are not “licensed” by the State, but rather are “certified” by the federal government. *See* N.C. Gen. Stat. § 131E-176(14e) (defining a “[k]idney disease treatment center” as “a facility that is certified as an end-stage renal disease facility by the Centers for Medicare and Medicaid Services, Department of Health and Human Services, pursuant to 42 C.F.R. § 405.”).

Any affected person who was a party in a contested case hearing is entitled to judicial review of all or any portion of any final decision by filing a notice of appeal within 30 days after receipt of written notice of the final agency decision. N.C. Gen. Stat. § 131E-188(b). The appeal is to this Court, and the procedure for the appeal is governed by the Rules of Appellate Procedure. N.C. Gen. Stat. § 131E-188(b). The CON Law does not provide that a person aggrieved by a final agency decision may apply to this Court for a stay of the decision, nor does the CON Law provide for an automatic stay, pending the outcome of judicial review.

FACTS

TRC and BMA provide end-stage renal disease services at dialysis facilities across North Carolina. On 17 March 2003, TRC applied to DHHS for a CON to develop a new dialysis facility in the Town of St. Pauls, Robeson County. TRC proposed to transfer ten dialysis stations from one of its existing facilities located in contiguous Hoke County to St. Pauls. At that time, BMA operated all three of Robeson County’s dialysis facilities. On 12 August 2003, DHHS “approved with conditions” TRC’s application. On 9 September 2003, BMA filed a petition for a contested case hearing with OAH. In a recommended decision issued after the hearing, an ALJ concluded that DHHS erred in approving TRC’s application. In a final agency decision issued on or about 20 August 2004, DHHS rejected the ALJ’s recommended decision and upheld the decision to issue the CON. On 4 October 2005, this Court affirmed the final agency decision. *Bio-Medical Applications of N.C., Inc. v. N.C. Dep’t of Health & Human Services*, 173 N.C. App. 641, 619 S.E.2d 593 (2005) (unpublished).

On 17 April 2006, BMA applied to DHHS for a CON to establish its own dialysis facility in St. Pauls, to be located approximately one mile from TRC’s approved facility. BMA proposed to transfer ten dialysis stations from two of its existing Robeson County facilities to St. Pauls. On 22 August 2006, DHHS “approved with conditions” BMA’s application. On 21 September 2006, TRC filed a petition for a con-

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tested case hearing with OAH. In a recommended decision issued 14 June 2007, an ALJ concluded that DHHS did not err in approving BMA's application. In a final agency decision issued on 17 August 2007, DHHS adopted the ALJ's recommended decision in its entirety and upheld the decision to issue the CON.

DHHS issued the CON on 20 August 2007. The timetable set forth in the CON called for construction of BMA's facility to be complete by 8 March 2008 and for the facility to be certified by the Centers for Medicare and Medicaid Services by 31 March 2008.

On 5 September 2007, Nephro Rentals purchased the property on which it planned to construct BMA's St. Pauls facility and subsequently began constructing the facility.¹ On 19 September 2007, TRC filed a notice of appeal from the final agency decision.

On 14 December 2007, TRC filed a Petition for Writ of Supersedeas in this Court to stay the certification and operation of BMA's St. Pauls facility pending resolution of the appeal. Citing *Mooreville*, 360 N.C. 156, 622 S.E.2d 621, TRC argued, *inter alia*, that its appeal "might be held moot if no [writ of *supersedeas*] is issued." In its response to the petition, BMA asserted that construction of its St. Pauls facility was "approaching fifty percent . . . complete with in excess of \$200,000 having been spent to date." This Court denied TRC's petition by order entered 7 January 2008. TRC subsequently filed a Petition for Writ of Supersedeas with the North Carolina Supreme Court. By order entered 29 February 2008, the Supreme Court denied TRC's petition. This Court heard arguments in this case on 30 April 2008.

On 18 August 2008, and citing *Mooreville*, BMA filed a motion to dismiss this appeal as moot. In support of the motion, BMA asserted that (1) the construction of its St. Pauls facility was completed in June 2008; (2) the Centers for Medicare and Medicaid Services certified the facility effective 18 August 2008; and (3) DHHS determined that the facility was "complete" as of 18 August 2008. All of BMA's assertions were supported by documents attached to its motion.

TRC responded to BMA's motion on 10 September 2008, arguing as follows: (1) the appeal is not moot because BMA is judicially estopped from arguing mootness based on BMA's prior representa-

1. Nephro Rentals applied with BMA for the St. Pauls CON. According to the CON application, Nephro Rentals was to acquire the property for and construct BMA's St. Pauls facility. Nephro Rentals was then to lease the building to BMA. In this opinion, we generally refer to both parties as "BMA."

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tions to this Court in this case; (2) the Supreme Court's decision in *Mooreville* is without precedential value because that decision was issued *per curiam*; (3) the facts of *Mooreville* distinguish that case from the case at bar; (4) even if this appeal is moot, this Court should review the case under the "capable of repetition, yet evading review" and "public interest" exceptions to the mootness doctrine; and (5) BMA's motion to dismiss should be denied as untimely under Rule 37(a) of the Rules of Appellate Procedure.

ANALYSIS

In *Mooreville*, 169 N.C. App. 641, 611 S.E.2d 431, Presbyterian Hospital ("Presbyterian") applied to DHHS in 1999 for a CON to construct a hospital 11 miles from Lake Norman Regional Medical Center ("Lake Norman").² DHHS issued a final agency decision denying the application, and Presbyterian appealed to this Court. While that appeal was pending, Presbyterian filed another CON application for the hospital in 2001. DHHS issued an initial decision denying the application, and Presbyterian petitioned OAH for a contested case hearing. While the appeals to both this Court and OAH were pending, Presbyterian and DHHS entered into settlement agreements resolving all disputes. As part of the settlement, Presbyterian was required to dismiss the appeal pending before this Court, dismiss the contested case pending before OAH, and withdraw the 2001 application. DHHS was required to immediately issue a CON based on updates and amendments to the 1999 application. Following a contested case hearing and a final agency decision upholding the settlement, Lake Norman appealed to this Court.

While Lake Norman's appeal was pending in this Court, and after the case was called for oral argument, Presbyterian filed a motion to dismiss the appeal as moot. In the motion, Presbyterian argued that the CON Law primarily regulates the *development* of new health services or facilities and that once a project for which a CON was issued is complete and becomes operational, the CON is no longer needed. In support of this argument, Presbyterian pointed to, *inter alia*, the inability of DHHS to withdraw a CON once a project becomes operational and a holder's duty to submit periodic progress reports during, but not after, a project's or facility's development. N.C. Gen. Stat. § 131E-189. Since construction of the hospital was completed and the hospital was operational, Presbyterian argued, the appeal was moot. This Court denied the motion on 4 January 2005.

2. Lake Norman Regional Medical Center was an assumed name of Mooreville Hospital Management Associates, Inc. 169 N.C. App. at 643, 611 S.E.2d at 433.

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In an opinion issued 19 April 2005, a majority held that DHHS procedurally and statutorily erred in issuing the CON.³ The majority remanded the case to DHHS to consider the settlement anew, but recognized and ordered as follows:

As a final matter, we note Presbyterian Hospital North became fully operational during the pendency of this appeal. We are faced, therefore, with balancing a strict application of the provisions of the CON Act against maintaining health care services currently provided by the operating hospital. It would be imprudent to close the hospital due to procedural irregularities in light of the hardship to the community. . . . Presbyterian Hospital North may continue to operate (1) until the hospital settlement has upon remand been considered anew by DHHS following the procedures outlined above and (2) in the event a contested case hearing should occur following DHHS' initial decision, until DHHS enters a final agency decision.

169 N.C. App. at 655, 611 S.E.2d at 441. Judge Steelman dissented, concluding that DHHS did not err in issuing the CON and disagreeing with the majority's directive authorizing the hospital to continue operating without a CON, stating, "The majority cites no authority for this directive, and I know of none." *Id.* at 656-57, 611 S.E.2d at 441-42.

Presbyterian subsequently filed a petition for writ of *certiorari* in the Supreme Court seeking review of this Court's denial of Presbyterian's motion to dismiss. The Supreme Court allowed the petition for *certiorari*, 359 N.C. 634, 616 S.E.2d 540, and granted discretionary review on additional issues. 359 N.C. 634, 616 S.E.2d 541. In a *per curiam* opinion issued 16 December 2005, the Supreme Court held as follows:

While the appeal was pending [in the Court of Appeals], [Presbyterian] obtained an operating license from DHHS. On 19 November 2004, before the Court of Appeals issued its decision, [Presbyterian] filed in that court a motion to dismiss [Lake Norman's] appeal as moot because *construction of Presbyterian Hospital had been completed and the hospital was fully opera-*

3. Although this Court did not address the motion to dismiss in the opinion, we take judicial notice of the records filed in this Court in that case. *Mason v. Town of Fletcher*, 149 N.C. App. 636, 640, 561 S.E.2d 524, 527 ("[T]here [] seems little reason why a court should not notice its own records in any prior or contemporary case when the matter noticed has relevance[.]' ") (quoting Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 26 (5th ed. 1998)), *disc. review denied*, 355 N.C. 492, 563 S.E.2d 570 (2002).

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tional. The Court of Appeals denied the motion in an order dated 4 January 2005.

. . . .

We conclude that the Court of Appeals erred in denying [Presbyterian's] motion to dismiss as moot. The opinion of the Court of Appeals is vacated. The appeal before this Court is dismissed as moot.

360 N.C. at 157-58, 622 S.E.2d at 622 (emphasis added).

Initially, we reject TRC's argument that *Mooreville*, as a *per curiam* decision, has "little or no precedential value." "*Per curiam* decisions stand upon the same footing as those in which fuller citations of authorities are made and more extended opinions are written." *Bigham v. Foor*, 201 N.C. 14, 15, 158 S.E. 548, 549 (1931) (citations omitted).

Moreover, we discern no relevant distinctions between the facts of *Mooreville* and the facts of the case at bar. In both cases, DHHS issued a CON, and the project for which the CON was issued was completed and became operational while an appeal was pending. That the facility at issue in *Mooreville* was a hospital—the development of which, TRC argues, is "exponentially" more complex than the development of a dialysis facility—is of no moment. As stated above, the CON Law applies in equal measure to both hospitals and dialysis facilities without regard to the complexity of their development.

Regardless, we need not determine whether the facts of *Mooreville* are distinguishable, for it is not *Mooreville* but rather the CON Law itself that controls the resolution of this case. *Mooreville* merely instructs that our conclusion is correct. DHHS issued the CON to BMA; BMA completed construction of its St. Pauls dialysis facility; DHHS determined that development of the facility was complete; and the facility became fully operational. As previously stated, the CON Law does not authorize DHHS to withdraw a CON once the project or facility for which the CON was issued is complete or becomes operational. Thus, even were we to determine that DHHS erred in issuing the CON, DHHS is without authority to correct the error. Accordingly, we conclude that this appeal is moot. *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

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We are not persuaded by TRC's argument that BMA's motion to dismiss "must be denied as untimely under N.C. R. App. P. 37(a)." Rule 37(a) provides that "[u]nless another time is expressly provided by these rules, [an application to a court of the appellate division for an order or for other relief available under these rules] may be filed and served at any time before the case is called for oral argument." N.C. R. App. P. 37(a). Citing only *State v. Brigman*, 178 N.C. App. 78, 632 S.E.2d 498, *appeal dismissed and disc. review denied*, 360 N.C. 650, 636 S.E.2d 813 (2006), TRC asserts that the motion was untimely because BMA filed the motion after this case was called for oral argument. Anticipating TRC's argument, BMA states in a footnote to its motion to dismiss that this Court should invoke Rule 2 of the Rules of Appellate Procedure to "suspend the time limit provided in Rule 37(a)[.]" See N.C. R. App. P. 2 ("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.").

Brigman is easily distinguishable, and TRC's reliance on that decision is unfounded. Before that case was called for oral argument, the defendant filed in this Court a motion for appropriate relief seeking a new trial on the ground that a State's witness had recanted her trial testimony. After the case was called for oral argument, the defendant filed an amended motion for appropriate relief on the ground of ineffective assistance of counsel. This Court stated that

[s]ince [the amended] motion did not amend the previous motion, nor was it timely filed [pursuant to Rule 37(a)], "we dismiss that portion of defendant's motion for appropriate relief concerning [ineffective assistance of counsel], without prejudice to defendant to file a new motion for appropriate relief in the superior court." [*State v. Verrier*, 173 N.C. App. [123,] 132, 617 S.E.2d [675,] 681 [(2005)].

Id. at 95, 632 S.E.2d at 509. In so stating, this Court did not proclaim, as a general rule, that this Court must deny every motion filed after a case is called for oral argument as untimely. Accordingly, *Brigman* is not controlling.

Although we acknowledge that Rule 37(a) arguably provides that every motion filed after a case is called for oral argument is untimely,

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to our knowledge neither the Supreme Court nor this Court has ever held that a motion to dismiss a case as moot must be filed before a case is called for oral argument. In fact, it is well-known that both Courts, *as a matter of routine*, rule on such motions even if the motions are filed after cases have been called for argument. *E.g., Mooresville*, 360 N.C. 156, 622 S.E.2d 621. The exclusion of moot questions from determination represents a form of judicial restraint. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). As the Supreme Court has held:

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.

Id. (emphasis added). “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.” *Id.* at 148, 250 S.E.2d at 912 (emphasis added). We reject TRC’s argument that BMA’s motion to dismiss must be denied because the motion was not timely filed.

We also reject TRC’s argument that BMA is judicially estopped from arguing mootness based upon representations BMA made to both this Court and the Supreme Court in its responses to TRC’s petitions for writs of *supersedeas*. Initially, we note that TRC has not cited any authority for the proposition that a party may be judicially estopped from arguing mootness. A case either is or is not moot, and when it is, a court will normally dismiss the action. However, even assuming that a party may be so estopped, we would not apply the doctrine in this case. BMA did not urge either this Court or the Supreme Court to deny TRC’s petitions for writs of *supersedeas* on the ground that it would not argue mootness in the event that its St. Pauls facility become operational during the pendency of the appeal. *Whitacre P’ship v. Biosignia, Inc.*, 358 N.C. 1, 29, 591 S.E.2d 870, 888 (2004) (stating that one apparently essential factor which typically informs the decision to apply the doctrine of judicial estoppel is whether a party’s subsequent position is “ ‘clearly inconsistent with its earlier position’ ”) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750, 149 L. Ed. 2d 968, 978 (2001)) (quotation marks omitted). Moreover, we discern no “ ‘threat to judicial integrity’ ” by concluding

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that this appeal is moot. *Id.* at 29, 591 S.E.2d at 889 (stating a second factor which informs the decision) (quoting *New Hampshire*, 532 U.S. at 751, 149 L. Ed. 2d at 978).

Finally, we reject TRC's argument that the issues raised by this appeal fall within the "capable of repetition yet evading review" and "public interest" exceptions to the mootness doctrine. *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (discussing the former), *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989); *Granville Cty. Bd. of Comm'rs v. N.C. Hazardous Waste Mgmt. Comm'n*, 329 N.C. 615, 623, 407 S.E.2d 785, 789-90 (1991) (discussing the latter). TRC asserts that the issues can evade review due to the relatively brief amount of time required to construct a dialysis facility as compared to the average duration of an appeal to this Court. Undoubtedly, TRC and other end-stage renal disease service providers may face *similar* actions in *similar* situations throughout the state. However, there is no "reasonable expectation that [TRC] would be subjected to the *same action* again." *Crumpler*, 92 N.C. App. at 723, 375 S.E.2d at 711 (emphasis added) (quotation marks and citation omitted). Furthermore, we simply disagree with TRC's assertion that the issues raised by this appeal are of such "general importance" as to justify the application of the public interest exception. *Granville Cty. Bd.*, 329 N.C. at 623, 407 S.E.2d at 789-90 (quotation marks and citations omitted).

CONCLUSION

The CON Law "reveals the legislature's intent that an applicant's fundamental right to engage in its otherwise lawful business be regulated but not be encumbered with unnecessary bureaucratic delay." *HCA Crossroads Residential Centers v. N.C. Dep't of Human Res.*, 327 N.C. 573, 579, 398 S.E.2d 466, 470 (1990). Both parties recognized during the pendency of this appeal that, as in *Mooreville*, the appeal could become moot upon the completion of BMA's facility. We must presume that the General Assembly recognized such a possibility in enacting the CON Law. Even if the General Assembly failed to recognize this possibility prior to the Supreme Court's decision in *Mooreville*, in the more than three years since that case was decided, the General Assembly has not revised the CON Law to provide for a stay of either the construction or operation of a facility for which a CON has been issued pending an appeal from a final agency decision.

While the appeal in this case was pending, BMA completed construction of its St. Pauls facility, and the facility became fully opera-

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tional. Accordingly, this appeal is moot. *Mooreville*, 360 N.C. 156, 622 S.E.2d 621.

DISMISSED.

Judges HUNTER, Robert C. and STEELMAN concur.

STATE OF NORTH CAROLINA v. DAVID EDWARD HODGES

No. COA08-474

(Filed 17 February 2009)

1. Search and Seizure— traffic stop—cocaine—probable cause—extended detention

The trial court did not err in an attempted trafficking by possessing and transporting cocaine and conspiracy to traffic cocaine case by concluding an officer did not conduct an unreasonable search of the car defendant was driving and seizure of cocaine therefrom because: (1) competent evidence existed to support the trial court's findings of fact; (2) defendant's argument concerning the constitutionality of the initial stop was abandoned under N.C. R. App. P. 28(b)(6) based on defendant's failure to make this argument in his brief; (3) even if defendant had not abandoned this issue, the officer possessed probable cause to stop defendant for speeding and possessed the necessary reasonable suspicion to briefly detain defendant to investigate whether he and the passenger of the car possessed drugs or other contraband, including evidence of defendant's misidentification of the passenger, defendant's exhibited nervousness, and a detective warning the officer to be careful in conducting the traffic stop since a narcotics surveillance was conducted on the vehicle with observance of the passenger appearing to place something under his seat believed to be drugs or a weapon; and (4) defendant's detention for fifteen minutes, from the time the officer activated his blue lights until he found the cocaine, was not excessive.

2. Evidence— hearsay—consent to search vehicle—not offered for truth of matter asserted—waiver of standing—motion to suppress

The trial court did not err in an attempted trafficking by possessing and transporting cocaine and conspiracy to traffic co-

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caine case by denying defendant's motion to suppress evidence of the passenger's consent to search the vehicle because: (1) defendant waived any standing he may have had to challenge the passenger's consent to search the rental vehicle by informing the officer that he had to ask the passenger who rented the vehicle for permission to search the car; and (2) even if defendant had standing to contest the passenger's consent and did not waive it, the evidence was not hearsay when it was not used to prove the truth of the matter asserted and instead the evidence was used to explain why the officer believed he could conduct the search of the vehicle and proceeded to search the vehicle.

Appeal by defendant from judgments entered 31 October 2007 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 22 October 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General William N. Farrell, Jr. and Assistant Attorney General John P. Scherer II, for the State.

Mary March Exum for defendant-appellant.

HUNTER, Robert C., Judge.

David Edward Hodges ("defendant") appeals from the trial court's denial of his motion to suppress evidence. Following the denial of his motion to suppress, on 31 October 2007, defendant pled guilty to: (1) attempted trafficking by possessing more than 200 grams of cocaine, (2) attempted trafficking by transporting more than 200 grams of cocaine, and (3) conspiracy to traffic more than 200 grams of cocaine, reserving the right to appeal the denial of his motion to suppress. Defendant was sentenced to seventy to eighty-four months imprisonment for the conspiracy conviction and twelve to fifteen months for the attempt convictions; however, the latter sentence was suspended. After careful review, we affirm the trial court's denial of the motion to suppress and therefore affirm the judgments.

I. Background

The State's evidence tended to show that on 22 November 2006, Detective James Armstrong ("Detective Armstrong"), the head of the Greensboro Police Department's narcotics division ("Greensboro vice") and other Greensboro vice officers were conducting surveil-

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lance at a residence located at 3127 Shallowford Drive as well as on a man named Valderramas, a suspected high-level narcotics distributor. Burlington police detectives had contacted Greensboro vice and informed them that a confidential informant told them that Valderramas had large amounts of cash and was possibly delivering cash or drugs to various locations on 22 November 2006. Previously, in December 2005 and early November 2006, Greensboro vice had also received direct tips from two confidential informants that a resident of 3127 Shallowford Drive, a man named Lopez, acted as a middleman between a high-level narcotics distributor and buyers and conducted narcotics sales at said residence. The informants also provided details as to how the sales were conducted, stating that when buyers arrived at the residence, Lopez would take them to a detached garage behind the residence where the money and drugs were exchanged.

On 3 November 2006, Greensboro vice had conducted an undercover purchase of a half kilogram of cocaine at the 3127 Shallowford residence; the sale followed the pattern described by the informants. During the 3 November sale, Greensboro vice observed Valderramas standing in the yard and leave in his truck shortly after the completion of the sale. Based on the 3 November undercover sale, Greensboro vice began to conduct surveillance on Valderramas. On numerous occasions, from 3 November until 22 November 2006, officers observed Valderramas proceed to a house in Gibsonville, open the hood of his truck, put a package under the hood, and leave for various suspected narcotics locations in the Burlington and High Point area.

On 22 November, officers observed Valderramas's truck, Lopez's vehicle, and a white Ford Focus at the Shallowford Road residence. Detective Brian Williamson ("Detective Williamson") conducted the surveillance and radioed his observations to Detective Armstrong and other officers. Detective Williamson observed Valderramas walk from the back of the house to his truck, open the hood, "mess[] there" for a short period of time, close the hood, and return to the backyard. However, because his view was obstructed, Detective Williamson could not see if Valderramas was carrying anything nor could he see what was transpiring in the backyard. Approximately five minutes later, he observed Valderramas return to the front of the house with Lopez and another man, later identified as Lancelot Muir ("Muir"). Valderramas got into his truck, Lopez went inside the house, and Muir got into the passenger side of the white Ford Focus. At no point did

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Detective Williamson actually observe any exchange of narcotics or see any packages that possibly contained narcotics.

Based on their experience and training, the surveillance of the Shallowford Road residence and Valderramas, and the 3 November 2006 undercover buy, Detectives Williamson and Armstrong believed that the white Ford Focus contained a buyer of narcotics. Consequently, they followed the Focus as it left the residence and headed toward Winston-Salem.¹

As he followed the Focus on Interstate 40, Detective Armstrong radioed Greensboro Police Department Officer Lester Prescott (“Officer Prescott”), who was on routine highway patrol on Interstate 40, and informed him that Greensboro vice was conducting narcotics surveillance on the vehicle and that he noticed the Focus may have been speeding. Detective Armstrong asked Officer Prescott if he could make his own observation as to the vehicle’s speed or another traffic violation, and if so, to conduct a traffic stop. He further informed Officer Prescott that he and other officers would set up a perimeter should he need it.

Officer Prescott followed the Focus and observed it speeding and constantly changing lanes. When Officer Prescott initiated his lights to stop the vehicle, Detective Armstrong noticed the passenger look back toward Officer Prescott’s vehicle and appear to conceal something underneath the passenger’s seat. He then radioed Officer Prescott and told him that he believed the passenger was hiding either narcotics or a weapon under the seat and warned him to be careful.

After stopping the Focus, Officer Prescott approached the vehicle and requested defendant’s license and registration. Defendant handed Officer Prescott his driver’s license and a car rental contract and stated that the car had been rented in the passenger’s name. The passenger, Muir, also gave Officer Prescott his driver’s license.

Officer Prescott then asked defendant to step out of the car, took defendant to the back of the car, and told him he had stopped him for speeding. Officer Prescott also asked defendant who his passenger was. Defendant responded that the passenger was his neighbor, that his name was “Bobby,” and that he did not know his last name.

1. According to Detective Armstrong, the Burlington DEA and the IRS followed Valderramas back to his residence.

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Greensboro Police Department Officer E.C. Martin (“Officer Martin”) arrived to assist, and Officer Prescott returned to his vehicle to run license and warrant checks on defendant and Muir. Before running the checks, Officer Prescott told defendant to remain standing between his police vehicle and the Focus; Officer Martin remained there with defendant for the duration of the investigation.

Officer Prescott determined that the licenses were valid and that there were no outstanding warrants on defendant or Muir. After this, he walked back to defendant, returned his license and the rental contract, and issued a verbal warning for speeding. Officer Prescott again asked defendant who his passenger was. Once again, defendant identified Muir as “Bobby,” which was not consistent with Muir’s driver’s license, and stated that he did not know Muir’s last name. Officer Prescott left defendant behind the car, had a brief conversation with Muir, and then returned to defendant.

Upon returning to defendant, Officer Prescott asked defendant if there was anything illegal in the car, and defendant said, “[n]ot that I know of.” He then asked defendant for permission to search the car, and defendant told him that he would have to ask Muir. Officer Prescott returned to Muir and asked Muir for consent to search the car. Muir consented and Officer Prescott had Muir step out of the car. Prior to searching the car, Officer Prescott asked Muir if he had any large amount of cash, and Muir produced \$4,000.00, which was wrapped in masking tape, from his jacket. Officer Prescott testified that Muir then consented to being searched, and during this search, Officer Prescott found an additional \$3,000.00 in his pocket. Officer Prescott then proceeded to search the car and found a package, wrapped in clear plastic wrap containing what appeared to be cocaine, under the passenger seat. Consequently, he arrested defendant and Muir.

On 26 April 2006, defendant filed a motion to suppress the cocaine, asserting that the stop and search violated his state and federal constitutional rights. Prior to the hearing on defendant’s motion to suppress, Muir died, the apparent victim of a homicide. On 21 August 2007, defendant filed an “Additional Basis” for its motion to suppress, claiming that the State could not introduce Muir’s consent to justify the search because it constituted hearsay and violated *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). On 23 August 2007, the trial court denied defendant’s motion. On 1 November 2007, defendant filed notice of appeal.

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II. Analysis

“ ‘An appellate court accords great deference to the trial court’s ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence.’ ” *State v. Hernandez*, 170 N.C. App. 299, 303-04, 612 S.E.2d 420, 423 (2005) (citations omitted). This Court’s review of the denial of a motion to suppress evidence is limited in scope to whether the “underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The trial judge’s conclusions of law are reviewed *de novo*. *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

A. Search and Seizure

[1] First, defendant argues that Officer Prescott conducted an unreasonable search and seizure in violation of our state and federal constitutions. Specifically, he argues that: (1) Officer Prescott lacked reasonable suspicion to detain him once he returned his driver’s license and the rental contract and issued him a verbal warning for speeding; and (2) the trial court made certain erroneous findings of fact in contravention of the evidence before it. As discussed *infra*, these arguments are without merit. Briefly, we first address the contested findings of fact.

Defendant argues that the trial judge erred with regard to two findings of fact. First, defendant asserts that the trial court erroneously found that when defendant told Officer Prescott that he would have to ask Muir for consent to search the vehicle, defendant “looked down to the ground and seemed to fumble with his hands.” We believe the record contains competent evidence to support the court’s finding. Specifically, Officer Prescott testified that during the investigation, defendant was “quietly respectful, and he just answered what he was asked, and just kept hanging his head low. He kept . . . playing with his hands, pretty much.” Officer Prescott also stated, “[defendant’s] head went down, looked to the ground, and he kept his hands down in front of him.” While defendant appears to argue that this testimony should have resulted merely in a finding that defendant was quiet and cooperative, we note that:

Where the evidence is conflicting . . . , the judge must resolve the conflict. He sees the witnesses . . . as they testify and by reason of his more favorable position, he is given the responsibility of

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discovering the truth. The appellate court is much less favored because it sees only a cold, written record.

State v. Smith, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971).

Defendant also argues that the trial court erred by failing to find as fact that subsequent to Officer Prescott handing back his license, issuing him a verbal warning for speeding, and indicating to him that he had to remain at the scene while he continued the investigation, Officer Prescott “then went and talked with Mr. Muir further.” Defendant contends that such a finding would have constituted additional evidence that Officer Prescott was “ ‘further detaining’ [defendant and Muir] after the traffic stop had ended.” Given that the record is clear and the trial court specifically found that Officer Prescott proceeded to detain defendant and Muir and to investigate them subsequent to issuing the verbal warning and returning the documents, we fail to discern why defendant believes this finding is erroneous. Furthermore, we believe that competent evidence exists to support the trial court’s finding that Officer Prescott “gave the Defendant a warning for the speeding and proceeded to continue with his investigation.” Officer Prescott specifically testified that he told defendant that he was going to give him a verbal warning for speeding and admitted that he continued to investigate defendant and Muir after returning the license and registration.

In sum, because competent evidence exists to support these findings of fact, we overrule this assignment of error.

Next, defendant argues that Officer Prescott violated his state and federal constitutional rights against being subjected to unreasonable searches and seizures. In his brief, defendant makes no argument as to the constitutionality of the initial stop; accordingly, this argument is abandoned pursuant to N.C.R. App. P. 28(b)(6). Even if defendant had not abandoned this issue, the record is clear that Officer Prescott possessed probable cause to stop defendant for speeding. Here defendant specifically contends that his detention subsequent to the point at which Officer Prescott returned his license and the rental contract and issued him a verbal warning for speeding went beyond the scope of the stop and was unreasonable. As discussed *infra*, because we conclude that Officer Prescott possessed a reasonable, articulable suspicion that additional criminal activity was afoot, specifically that defendant and Muir had drugs or contraband inside the automobile, we disagree.

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“In order to further detain a person after lawfully stopping him, an officer must have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot.” *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) (citation omitted). To ascertain whether an officer has a reasonable suspicion, we examine the totality of the circumstances. *Id.* Furthermore, reasonable suspicion

“ ‘must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an “unparticularized suspicion or hunch.” ’ ”

State v. Campbell, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (citations omitted). “After a lawful stop, an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer’s suspicions.” *McClendon*, 350 N.C. at 636-37, 517 S.E.2d at 132-33 (citations omitted). “In order for [an officer] to lawfully detain [a] defendant, [his] suspicion must be based solely on information obtained during the lawful detention of [the defendant] up to the point that the purpose of the stop has been fulfilled.” *State v. Myles*, 188 N.C. App. 42, 51, 654 S.E.2d 752, 758, *affirmed per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008).

In support of his argument that his detention was unconstitutionally prolonged, defendant relies primarily on *State v. Myles* and *State v. Falana*, two cases in which this Court respectively determined that the police lacked reasonable suspicion to further detain the defendants after the purposes of the respective traffic stops had been fulfilled and thus unconstitutionally prolonged their respective detention. *Id.*; *Falana*, 129 N.C. App. 813, 501 S.E.2d 358 (1998). As discussed *infra*, we find those cases to be distinguishable from the instant case and conclude that Officer Prescott did possess the necessary reasonable suspicion to briefly detain defendant and investigate whether defendant and Muir possessed drugs or other contraband.

In *Myles*, the defendant-passenger and his driver were stopped for weaving and because the officer suspected the driver might be intoxicated. *Myles*, 188 N.C. App. at 45-46, 654 S.E.2d at 755. During the stop, the officer did not detect any evidence that the driver or the

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defendant were impaired, the license check came back clear, and he did not observe any indication that contraband or weapons were present. In addition, the only factor that arguably provided support for reasonable suspicion to extend the stop which ultimately led to a dog sniff and a discovery of marijuana in the vehicle, was the driver's nervousness, which the Court concluded was not sufficient to constitute reasonable suspicion. *Id.* at 51, 654 S.E.2d at 757-58. Furthermore, the Court noted that while the officer testified that the defendant exhibited nervousness as well, the defendant did not exhibit any nervousness until after the purpose of the traffic stop had already been completed; consequently, the Court concluded that the trial court could not consider this fact to support the officer's reasonable suspicion. *Id.* at 51, 654 S.E.2d at 758.

In *Falana*, the officer stopped the car the defendant was driving because he observed the vehicle weaving within its own lane and touching the plane of the divider line to the adjoining lane; he testified that he intended to determine whether the defendant was impaired or tired. *Falana*, 129 N.C. App. at 814, 501 S.E.2d at 358-59. There, the Court stated that the only facts the officer provided to support his reasonable suspicion and to justify the subsequent dog sniff of the exterior of the car which revealed cocaine were the defendant's nervousness and the passenger's uncertainty as to the day their trip had begun; the Court concluded that these facts did not provide "reasonable and articulable suspicion that criminal activity was afoot[.]" *Id.* at 817, 501 S.E.2d at 360.

Here, defendant incorrectly argues that Officer Prescott's search could only have been justified by defendant's incorrect identification of Muir, which he contends occurred only after the stop for speeding had already been fulfilled. First, we note that Officer Prescott's police report and his testimony state that he asked defendant who his passenger was before conducting the license check and repeated this line of questioning after he handed back the documentation and issued the warning for speeding. Furthermore, as the State correctly points out, there is considerably more evidence here to support Officer Prescott's reasonable suspicion to further detain defendant and Muir than was present in either *Myles* or *Falana*. Here, in addition to defendant's "misidentification" of Muir, defendant exhibited nervousness and Detective Armstrong informed Officer Prescott that: Greensboro vice had been conducting narcotics surveillance on the vehicle; that he had observed the passenger appear to place something under his seat which he believed to be drugs or a weapon; and

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warned Officer Prescott to be careful in conducting the traffic stop. This is consistent with the trial court's finding of fact that

the officer knew that the narcotics officers were interested in this car by being told to stop it in the event that they [sic] saw anything illegal. And upon stopping it, the driver appeared to be somewhat nervous by his actions, that the officer had been told that something had been put under that front seat which might be a gun or narcotics.

The trial court's findings of fact support its conclusion of law that "the officer in this case, guided by his experience and training and through his eyes of being reasonable and cautious, had a reasonable, articulable suspicion that there might be drugs in the vehicle, or some other contraband." In sum, examining the totality of the circumstances through the eyes of a reasonable and cautious officer, we conclude that Officer Prescott possessed reasonable suspicion to prolong defendant's detention.

"Having determined that [Officer Prescott] did have the requisite reasonable suspicion needed to detain defendant further, we turn to examine whether the duration of [the] detention was reasonable." *McClendon*, 350 N.C. at 639, 517 S.E.2d at 134. Here, the trial court specifically found that fifteen minutes had passed from the time Officer Prescott activated his blue lights until he found the cocaine. Furthermore, Officer Prescott specifically testified that less than five minutes passed between when he returned the documentation to defendant and when he located the cocaine. In *McClendon*, the Supreme Court of North Carolina held that a fifteen to twenty minute detention from the issuance of a warning ticket to the arrival of a drug sniffing canine was not an excessive prolongation of the traffic stop. *Id.* at 639, 517 S.E.2d at 134. Accordingly, we conclude that defendant's detention here, which was much shorter than the detention in *McClendon*, was not excessive and it was reasonable for Officer Prescott to continue his investigation for this minimal amount of time.

B. Hearsay

[2] Next, defendant argues that the evidence of Muir's consent to search the vehicle should have been suppressed because it constitutes inadmissible hearsay testimony in violation of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). This argument is without merit.

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First, we agree with the trial court that by informing Officer Prescott that he had to ask Muir for permission to search the car, defendant waived any standing he may have had to challenge Muir's consent to search the vehicle.

In *Rakas v. Illinois*, the United States Supreme Court held that the defendant-automobile passengers' constitutional rights were not violated where they did not assert a possessory interest in the automobile nor in the property seized from it. *Rakas*, 439 U.S. 128, 148, 58 L. Ed. 2d 387, 404 (1978) ("petitioners' claim must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. . . . [P]etitioners' claim is one which would fail even in an analogous situation in a dwelling place, since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers"); see also *State v. Little*, 27 N.C. App. 54, 56, 218 S.E.2d 184, 186 (holding that where a defendant possesses no interest in the property searched, "he lacks standing to contest [the owner's] consent to a search producing evidence that implicate[s] him") (citations omitted), *cert. denied*, 288 N.C. 512, 219 S.E.2d 347 (1975). Though defendant here was the driver rather than the passenger, we do not believe this distinction is controlling under the facts of this case as defendant claimed no ownership interest in the vehicle nor in the items within it. To the contrary, he handed Officer Prescott a rental contract in Muir's name and told Officer Prescott he would have to ask Muir for permission to search the vehicle. In other words, defendant appeared to indicate that he was not able to provide Officer Prescott with consent to search the rental vehicle and that only Muir could give consent.

In the alternative, even if defendant had standing to contest Muir's consent and did not waive it, we believe that the evidence here is not hearsay because it was not used to prove the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801(c) (2007) (" '[h]earsay' 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"). "For example, a statement made by one person to another is not hearsay if introduced for the purpose of explaining the subsequent conduct of the person to whom the statement was made." *State v. Morston* 336 N.C. 381, 399, 445 S.E.2d 1, 11 (1994). Here, this evidence was used to explain why Officer Prescott believed he could conduct the search of the vehicle and proceeded to search the vehicle. Furthermore, in *State v. Bates*, this Court held that a police offi-

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cer's testimony that the owner of a trailer consented to the search of the home was not admitted to show the truth of the matter asserted, "but to show simply that such statement was made[.]" *Bates*, 37 N.C. App. 276, 280, 245 S.E.2d 827, 829, *review denied*, 295 N.C. 735, 248 S.E.2d 864 (1978). Accordingly, the Court concluded "the officer's testimony was not hearsay and that it was competent to show authorization to enter the trailer." *Id.* The Court further stated, "even if we found the evidence to be hearsay, *and we do not*, any error would be harmless since [the homeowner] herself testified under oath concerning the statements she made to the [officer]." *Id.* (emphasis added). Here, Muir could not testify because he was deceased. Thus, we conclude Officer's Prescott's testimony as to Muir's consent was not hearsay as it was admitted to explain his subsequent conduct and to show that Muir made this statement to him. Accordingly, we overrule this assignment of error.

III. Conclusion

In sum, we hold that defendant's extended detention was constitutionally permissible as it was supported by a reasonable suspicion that criminal activity was afoot; thus, defendant was not subjected to an unreasonable search and seizure in violation of the state and federal constitutions. In addition, assuming *arguendo* that defendant did have standing to challenge Muir's consent to the subsequent search of the vehicle, we conclude he waived his standing by informing Officer Prescott that Muir rented the vehicle and that he would have to obtain consent from Muir to search the vehicle. In the alternative, we conclude Officer Prescott's testimony as to Muir's consent was not hearsay as it was not offered to prove the truth of the matter asserted.

Affirmed.

Judges ELMORE and GEER concur.

FULFORD v. JENKINS

[195 N.C. App. 402 (2009)]

JAMES E. FULFORD JR., EXECUTOR FOR THE ESTATE OF MARY FULFORD, PLAINTIFF-APPELLEE v. ANTONIO JAVON JENKINS; COUNTY OF DUPLIN; DUPLIN COUNTY DEPARTMENT OF SOCIAL SERVICES; MILLIE I. BROWN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS DIRECTOR OF DUPLIN COUNTY DEPARTMENT OF SOCIAL SERVICES; DE WANA KENAN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A SOCIAL WORKER WITH THE DUPLIN COUNTY DEPARTMENT OF SOCIAL SERVICES; SHERITA WRIGHT, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A SOCIAL WORKER WITH THE DUPLIN COUNTY DEPARTMENT OF SOCIAL SERVICES; NANETTE SMITH, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A SOCIAL WORKER WITH THE DUPLIN COUNTY DEPARTMENT OF SOCIAL SERVICES; AND ELVA QUINN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A SOCIAL WORKER WITH THE DUPLIN COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS-APPELLANTS

No. COA08-675

(Filed 17 February 2009)

Immunity— sovereign immunity—professional liability coverage—negligent supervision

The doctrine of sovereign immunity did not bar an estate's action against a county, the county DSS, and DSS employees in their official capacities for negligent supervision of a juvenile who was placed with his elderly grandmother and stabbed his grandmother's neighbor to death because: (1) the county purchased professional liability coverage in addition to its general liability coverage, thus supplementing and increasing the county's coverage; (2) the acts and omissions alleged in plaintiff's complaint were not excluded from coverage by the public officials coverage portion of the professional liability coverage section of the policy since plaintiff's action constituted a negligence claim against defendants for failure to fulfill their duties to supervise a juvenile in a reasonable fashion rather than a claim for bodily injury as excluded by the public officials coverage section; and (3) if the policy exempted the county from coverage for all of its governmental functions, it would be uncertain what acts by the county would be covered by the policy.

Appeal by Defendants from order entered 20 March 2008 by Judge Gary E. Trawick in Superior Court, Duplin County. Heard in the Court of Appeals 3 December 2008.

Valentine & McFayden, P.C., by Stephen M. Valentine, for Plaintiff-Appellee.

Womble Carlyle Sandridge & Rice, PLLC, by James R. Morgan, Jr. and Christopher J. Geis, for Defendants-Appellants.

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McGEE, Judge.

Plaintiff filed his complaint on 28 October 2005, alleging that Duplin County; Duplin County Department of Social Services (DSS); Millie I. Brown, Director of DSS; and DSS social workers De Wana Kenan, Sherita Wright, Nanette Smith and Elva Quin (collectively Defendants) were negligent in their supervision of a thirteen-year-old boy (the Juvenile) over whom they exercised control. Plaintiff alleged in his complaint that Defendants arranged placement of the Juvenile with his grandmother on 17 September 2003, and that on 30 October 2003 the Juvenile repeatedly stabbed his grandmother's next door neighbor, Mary Fulford, resulting in her death. Plaintiff's complaint also included a claim against the Juvenile, which is not the subject of this appeal.

Defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on 9 January 2008, arguing that Defendants were protected by the doctrine of governmental, or sovereign, immunity from Plaintiff's suit. N.C. Gen. Stat. § 1A-1, Rule 56. Defendants further argued that Plaintiff's complaint failed to state valid claims against individual Defendants in their individual capacities.

By orders entered 20 March 2008, the trial court granted summary judgment in favor of the individual defendants in their individual capacities, but denied summary judgment for Duplin County, DSS and the individual defendants in their official capacities. Defendants appeal.

In Defendants' appeal, they argue the trial court erred in partially denying their motion for summary judgment because they are immune from suit in this case based upon the doctrine of governmental immunity. We disagree.

"Summary judgment is properly granted only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" "On appeal, our standard of review is (1) whether there is a genuine issue of material fact and (2) whether the movant is entitled to judgment as a matter of law." "The evidence presented is viewed in the light most favorable to the non-movant."

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“Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.” When a county purchases liability insurance, however, it waives governmental immunity to the extent it is covered by that insurance. N.C. Gen. Stat. § 153A-435(a) (2004).

McCoy v. Coker, 174 N.C. App. 311, 313, 620 S.E.2d 691, 693 (2005) (citations omitted).

In the case before us, Duplin County purchased an insurance policy (the policy) through its participation in the North Carolina Counties Liability and Property Insurance Pool Fund. The dispositive issue in this case is whether the policy covers the acts alleged in Plaintiff’s complaint, thus constituting a waiver of governmental immunity by Duplin County. “It is defendants’ burden to show that no genuine issue of material fact exists that the policy does *not* cover [their] actions in the instant case.” *Id.* at 313-14, 620 S.E.2d at 693, citing *Marlowe v. Piner*, 119 N.C. App. 125, 127-28, 458 S.E.2d 220, 222 (1995). This Court’s review of contract provisions is *de novo*. *Sutton v. Messer*, 173 N.C. App. 521, 525, 620 S.E.2d 19, 22 (2005).

It is well established that contracts for insurance are to be interpreted under the same rules of law as are applicable to other written contracts. One of the most fundamental principles of contract interpretation is that ambiguities are to be construed against the party who prepared the writing. Therefore, in an insurance contract all ambiguous terms and provisions are construed against the insurer.

Chavis v. Southern Life Ins. Co., 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986) (citations omitted).

Duplin County purchased General Liability Coverage in the amount of \$2,000,000.00 per occurrence, without any deductible. [R.p. 83] The “General Liability Contract Declarations” section of the policy contains the following relevant provisions:

A. Coverage Agreement

The Fund agrees, subject to the limitations, terms, and conditions hereunder mentioned:

1. to pay on behalf of the Participant all sums which the Participant shall be obligated to pay by reason of the liability imposed upon the Participant by law or assumed by the

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Participant under contract or agreement for damages on account of Personal Injury, Bodily Injury . . . including death at any time resulting therefrom, suffered or alleged to have been suffered by any persons . . . arising out of any Occurrence from any cause other than as covered by . . . Section V (Professional Liability) of the Contract[.]

. . . .

K. Definitions

. . . .

10. "Occurrence" means [a] . . . happening or event or a continuous or repeated exposure to conditions which result in Personal Injury [or] Bodily Injury . . . during the Contract Period. All Personal Injury or Bodily Injury to one or more persons . . . arising out of . . . a happening or event or continuous or repeated exposure to conditions shall be deemed an Occurrence.

. . . .

E. Exclusions Applicable to General Liability

This coverage does not apply to any of the following:

. . . .

13. Public Officials Liability

to any liability for any actual or alleged error, . . . act, or omission, or neglect or breach of duty by the Participant, or by any other persons for whose acts the Participant is legally responsible arising out of the discharge of duties as a political subdivision or a duly elected or appointed member or official thereof.

Defendants argue that the Public Officials exclusion to the General Liability section of the policy serves to exclude them from liability coverage for Plaintiff's claims, thus rendering them immune from suit due to governmental immunity. Defendants cite two opinions from our Court which held that exclusionary provisions in the relevant insurance policies, identical in language to the Public Officials exclusion contained in the General Liability Coverage section of the policy in this case, served to exclude the policyholders (New Hanover and Orange Counties) from coverage for the claims against them. *See Satorre v. New Hanover County Bd. of Comm'rs*,

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165 N.C. App. 173, 598 S.E.2d 142 (2004); *Doe v. Jenkins*, 144 N.C. App. 131, 547 S.E.2d 124 (2001). In *Satorre* and *Doe*, our Court held that because the counties were excluded from coverage for the claims brought against them due to the relevant, identical provisions in their policies, they were protected by governmental immunity and thus immune from suit.

Assuming *arguendo* that Defendants' interpretation of the General Liability portion of the policy is correct, our analysis does not end there. The *Satorre* and *Doe* opinions do not discuss any additional coverage the defendants in those cases might have purchased. Duplin County purchased Professional Liability Coverage in addition to its General Liability Coverage, including coverage for Public Officials Liability in the amount of \$2,000,000.00 per occurrence, which included a \$5,000.00 deductible for each wrongful act of Duplin County. [R.p. 133] The relevant sections of this "Professional Liability: Law Enforcement and Public Officials Contract Declarations" coverage are as follows:

A. Coverage Agreements.

....

2. Public Officials Coverage

The Fund will pay on behalf of the Participant or a Covered Person, or both, all sums which the Participant or Covered Person shall become legally obligated to pay as money damages because of any civil claim or claims brought against the Participant or a Covered Person arising out of any Wrongful Act of any Covered Person acting in his capacity as a Covered Person(s) of the Participant and caused by the Covered Person while acting in his regular course of duty.

....

G. Exclusions Applicable to Public Officials Coverage.

This coverage does not apply to any claim as follows:

....

4. for Bodily Injury[.]

....

K. Definitions.

....

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2. “Bodily Injury” means bodily injury . . . sustained by a person including death as a result of an injury . . . at any time.

....

12. “Wrongful Act” means any actual or alleged error or . . . act or omission or neglect or breach of duty including misfeasance, malfeasance, nonfeasance and “Employment Practices Violation(s)” by a Covered Person while acting within the scope of his professional duties or Fund approved activities.

The Professional Liability Coverage includes a section for Public Officials Coverage. If this Public Officials Coverage is in conflict with the Public Officials Liability exemption in the General Liability section of the policy, the Public Officials Coverage must control. The Professional Liability Coverage section of the policy is a contract in itself, as it was bargained for, and separate consideration was provided by both parties for this contract. Therefore, though all of the provisions of the policy must be interpreted *in pari materia*, *Sutton*, 173 N.C. App. at 525, 620 S.E.2d at 22, because the Professional Liability Coverage section was purchased *in addition to* the General Liability Coverage section, the provisions in the Professional Liability Coverage section supplement and increase Duplin County’s coverage. *See McCoy*, 174 N.C. App. at 314, 620 S.E.2d at 693. Otherwise, the relevant provisions of this additional coverage would have no effect, which would violate the rules of contract interpretation. *See Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000) (citations omitted).

The explicit language of the Public Officials Coverage portion of the Professional Liability Coverage section, along with the definition of “Wrongful Act” given in that section (act or omission or neglect or breach of duty including misfeasance, malfeasance, nonfeasance), clearly grant coverage to Duplin County for the acts and omissions alleged by Plaintiff, unless there is a specific exemption granted in this section. Defendants argue that the exclusions portion of the Professional Liability Coverage section provide exemption for the acts or omissions alleged in Plaintiff’s complaint. Specifically, this section excludes coverage for claims “for bodily injury,” which is defined in the section as including death.

In this case, Plaintiff’s second cause of action is a negligence claim against Defendants. Plaintiff alleges that Defendants were negligent in placing the Juvenile, known to Defendants to be dangerous,

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with his elderly grandmother who was in poor health and thus unable to appropriately supervise the Juvenile. Further, the Juvenile had been involuntarily committed to psychiatric hospitals on three separate occasions presenting with homicidal ideations and other severe psychiatric issues. Plaintiff alleged the Juvenile ceased taking his antipsychotic and mood stabilizing medications, causing an increase in his unstable behaviors. Plaintiff further alleged that once the Juvenile ceased taking his medications, the Juvenile's grandmother contacted DSS on a number of occasions requesting help in managing the Juvenile. According to Plaintiff's complaint, DSS did not respond to these requests from the Juvenile's grandmother, and the Juvenile later killed Mary Fulford.

Although Plaintiff alleged Defendants' negligence caused the bodily injury and ultimate death of Mary Fulford, we do not view this as a claim "for bodily injury" as excluded by the Public Officials Coverage section. Plaintiff's action constitutes a negligence claim against Defendants for failure to fulfil their duties to supervise the Juvenile in a reasonable fashion. *See Herndon v. Barrett*, 101 N.C. App. 636, 641-42, 400 S.E.2d 767, 770-71 (1991). Therefore, the acts and omissions alleged in Plaintiff's complaint are not excluded from coverage by the Public Officials Coverage portion of the Professional Liability Coverage section of the policy. As we hold that Duplin County purchased liability insurance covering the alleged acts and omissions of Defendants, the doctrine of governmental immunity does not serve to bar Plaintiff's suit.

In addition, a contract must be interpreted as a whole, and individual provisions within a contract must be interpreted within the context of the entire contract. *Sutton*, 173 N.C. App. at 525, 620 S.E.2d at 22.

[A] contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language.

Grant v. Emmco Ins. Co., 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978) (citation omitted).

"The heart of a contract is the intention of the parties which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the

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parties at the time.” Therefore, in the interpretation of language contained in an insurance policy, the court may take into consideration the character of the business of the insured and the usual hazards involved therein in ascertaining the intent of the parties.

McDowell Motor Co. v. New York Underwriters Ins. Co., 233 N.C. 251, 254, 63 S.E.2d 538, 540-41 (1951) (citations omitted).

These rules of contract interpretation provide additional support for holding against Defendants. Were we to adopt Defendants’ interpretation of the policy, we would have to assume that Duplin County intended to purchase an insurance policy that provided it almost no coverage. *See id.* Because Duplin County is a governmental entity and political subdivision of the State, *Doe*, 144 N.C. App. at 134, 547 S.E.2d at 127, if the policy exempts Duplin County from coverage for all of its governmental functions, it is uncertain what acts by Duplin County *would* be covered by the policy. The vast majority of actions for which Duplin County could face liability are those performed in its official capacity as a political subdivision of this State. It is thus “unclear how the contracting parties could have had any meaningful meeting of the minds as to what services were and were not excluded” if the policy as written was not intended to cover the official acts of Duplin County. *Cowell v. Gaston Cty.*, 190 N.C. App. 743, 748-49, 660 S.E.2d 915, 919-20 (2008). Defendants’ argument is without merit.

We hold that the trial court did not err in denying Defendants’ motion for summary judgment.

Affirmed.

Judges BRYANT and GEER concur.

FIVE C'S, INC. v. COUNTY OF PASQUOTANK

[195 N.C. App. 410 (2009)]

FIVE C'S, INC., PLAINTIFF v. COUNTY OF PASQUOTANK, DEFENDANT

No. COA08-771

(Filed 17 February 2009)

Zoning— manufactured homes—age—absence of—appearance and dimensional criteria

A county ordinance requiring manufactured homes to be no more than 10 years old in order for the owner to obtain a building permit for permanent set up exceeded the county's statutory authority because it does not employ appearance and dimensional criteria as intended by the General Assembly in N.C.G.S. §§ 153A-341.1 and 160A-383.1.

Appeal by plaintiff from judgment entered 10 April 2008 by Judge J. Richard Parker in Pasquotank County Superior Court. Heard in the Court of Appeals 28 January 2009.

Hornthal, Riley, Ellis & Maland, L.L.P., by Benjamin M. Gallop and John D. Leidy, for plaintiff-appellant.

The Twiford Law Firm, P.C., by John S. Morrison and T. Taylor Manning, for defendant-appellee.

HUNTER, JR., Robert N., Judge.

Five C's, Inc. ("plaintiff") appeals from judgment entered, which granted the County of Pasquotank's ("the County") motion for summary judgment. We reverse.

I. Background

On 17 August 1992, the County adopted an Ordinance To Provide for Allowable Manufactured/Mobile Home Units ("the Ordinance") "under the authority of Chapter 153A-121 of the General Statutes of North Carolina." The Ordinance's purpose was "to regulate allowable manufactured homes or mobile homes within the jurisdiction of [the County] in order to promote the public health, safety and general welfare of the citizens of [the County]." Article II of the Ordinance contained the following definitions:

1. **Mobile Home:** Mobile home shall mean a transportable structure designed to be used as a year-round residential dwelling and built prior to the enactment of the National Manufactured Housing Construction and Safety Standards Act of 1974 which became effective June 15, 1976.

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[195 N.C. App. 410 (2009)]

2. **Manufactured Home:** Manufactured home shall mean a single family dwelling fabricated in an off site manufacturing facility for installing or assembling on the building site bearing a seal certifying that it was built in compliance with the National Manufactured Housing and Construction and Safety Standards Act of 1974 which became effective June 15, 1976.

Article III of the ordinance stated “[m]anufactured homes must have an attached HUD label to be brought into [the County] for the purpose of permanent set-up.”

On 21 May 2001, the County’s Board of Commissioners considered “proposed changes to the Ordinance to Limit Manufactured Homes that Are Brought into [the County] to Not More than Ten Years Old.” The meeting’s minutes state:

County Attorney Brenda White provided her opinion regarding the proposed amendments. She explained that a county is allowed under its police power to protect the health, safety, welfare, and environment within the county. She summarized case law that placed within the authority of the governing board to regulate those things under its police power. She said the county’s proposal to limit the age of mobile homes that are brought into the county was based upon the evaluation of the county’s tax base and the services that the county is required to provide for all residents of the county in contrast to the revenues generated to pay for those services. She noted that according to manufactured home values provided by the Tax Administrator there is a substantial decrease in the value of a manufactured home during the first 10 years, and that a 10-year old manufactured home has about the same value as a used vehicle. Ms. White stated that she believes it is within the county’s authority to enact the proposed regulations.

The proposed change to the Ordinance passed by a four-to-two vote. Article III was amended to state “[m]anufactured homes must have an attached HUD label and shall not be more than ten (10) years old on the date of application for a building permit for the purpose of permanent set-up.”

Plaintiff acquires mobile and manufactured homes for sale, transportation, and set up within the County. Plaintiff filed a complaint on 7 September 2001 seeking a declaratory judgment that the amendment exceeded the County’s statutory authority and violated plaintiff’s substantive due process, procedural due process, and equal

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protection rights. Plaintiff also sought both a preliminary and permanent injunction restraining the County from enforcing the Ordinance as amended.

Plaintiff alleged: (1) it had an inventory of ten manufactured homes more than ten years old on 21 May 2001; (2) it entered into a contract sometime between 21 May 2001 and 5 June 2001 to sell and set up a twenty-three-year-old manufactured home; (3) it applied for a building permit for the permanent setup of this manufactured home on 5 June 2001; (4) the County “denied [its] application for a building permit because the manufactured home was more than ten years in age on the date of [its] application and because the manufactured home was not listed in the Pasquotank County Tax Assessor’s office as of the date the ordinance was ratified[.]” (4) it applied for a building permit for the permanent setup of a mobile home on 17 August 2001; and (5) the County denied its application for the same reasons the County denied its 5 June 2001 application.

On 26 November 2001, the County answered plaintiff’s complaint and moved to dismiss. Plaintiff filed a motion for summary judgment on 5 January 2006 and the case was scheduled for a non-jury trial. Plaintiff and the County subsequently advised the trial court that the case “was in the proper posture for summary judgment[.]” The trial court entered summary judgment in favor of the County on 10 April 2008. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred when it entered summary judgment in favor of the County because the County: (1) exceeded its statutory authority; (2) violated plaintiff’s due process rights; and (3) violated plaintiff’s equal protection rights.

III. Standard of Review

This Court reviews a trial court’s order for summary judgment *de novo* to determine “whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.” *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003); *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007).

IV. Statutory Authority

Plaintiff argues the County “exceeded its statutory authority by restricting the location of manufactured homes within [the County] based solely on age.” We agree.

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“Counties are creatures of the General Assembly and have no inherent legislative powers. They are instrumentalities of state government and possess only those powers the General Assembly has conferred upon them.” *Craig v. County of Chatham*, 356 N.C. 40, 44, 565 S.E.2d 172, 175 (2002) (citations omitted).

In 1874, our Supreme Court adopted what has become known as Dillon’s Rule:

a municipal corporation possesses and can exercise the following powers and no others: First, those granted in *express words*; second, those *necessarily or fairly implied in or incident to* the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation.

Smith v. Newbern, 70 N.C. 14, 18 (1874), *modified*, 73 N.C. 303 (1875) (citations omitted). Recently, however, Dillon’s Rule has come under attack.

In 1973, the General Assembly enacted Section 153A-4 of the North Carolina General Statutes. N.C. Gen. Stat. § 153A-4 (2001) states:

It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.

In *Homebuilders Assn. of Charlotte v. City of Charlotte*, our Supreme Court analyzed the interplay of Dillon’s Rule with N.C. Gen. Stat. § 160A-4 (1987), a statute similar to that of N.C. Gen. Stat. § 153A-4. 336 N.C. 37, 43-44, 442 S.E.2d 45, 49-50 (1994); *see also* N.C. Gen. Stat. § 160A-4 (2001). Our Supreme Court held “that the proper rule of construction is the one set forth in [N.C. Gen. Stat. § 160A-4].” *Homebuilders Assn. of Charlotte*, 336 N.C. at 44, 442 S.E.2d at 50.

This Court has since interpreted *Homebuilders Assn. of Charlotte* to state that Dillon’s Rule was overruled by N.C. Gen. Stat. § 160A-4. *See BellSouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 81, 606 S.E.2d 721, 725 (“In its reading of N.C. Gen. Stat. § 160A-4, the [Supreme] Court found that the narrow rule of construction established over some 100 years prior by common law,

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known as 'Dillon's Rule,' had been replaced by the legislature's 1971 enactment." (citing *Homebuilders Assn. of Charlotte*, 336 N.C. at 43-44, 442 S.E.2d at 49-50 and *Smith*, 70 N.C. at 14)), *disc. review denied*, 615 S.E.2d 660 (2005). This Court has also stated since *Homebuilders Assn. of Charlotte* that:

[N.C. Gen. Stat. §] 153A-4 does state that any legislative act affecting counties should be "broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power." And the clear legislative policy and purpose in the broad construction is so "that the counties of this State . . . [can] have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law." But, in conjunction with our general rules of statutory construction, only if there is an ambiguity in a statute found in chapter 153A should section 153A-4 be part of the courts' interpretative process. If, however, the statute is clear on its face, the plain language of the statute controls and section 153A-4 remains idle.

Durham Land Owners Ass'n v. County of Durham, 177 N.C. App. 629, 633-34, 630 S.E.2d 200, 203 (citations omitted), *disc. review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006).

Plaintiff argues the County's general power to enact ordinances under Section 153A-121 of the North Carolina General Statutes was preempted with regard to the zoning of manufactured housing when the General Assembly adopted N.C. Gen. Stat. §§ 153A-341.1 and 160A-383.1 in 1987. *See* N.C. Gen. Stat. § 153A-121(a) (2001) ("A county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances."). To determine whether the General Assembly intended to preempt its broad grant of authority under N.C. Gen. Stat. § 153A-121, with its subsequent adoption of N.C. Gen. Stat. §§ 153A-341.1 and 160A-383.1, we must decide if it has shown an intent to limit a county's power with regard to zoning regulations for manufactured homes. "In so doing, the context of the Act and the spirit and reason of the law must be considered, for it is the intention of the Legislature, as expressed in the statute, which controls." *Mullen v. Louisburg*, 225 N.C. 53, 58, 33 S.E.2d 484, 487 (1945); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) ("The foremost task in statutory interpretation is 'to determine legislative intent while giving the language

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of the statute its natural and ordinary meaning unless the context requires otherwise.” ’ ’ (citations omitted)).

N.C. Gen. Stat. § 153A-341.1 (2001) states “[t]he provisions of [N.C. Gen. Stat. §] 160A-383.1 shall apply to counties.” N.C. Gen. Stat. § 160A-383.1 (2001) states:

(a) The General Assembly finds and declares that manufactured housing offers affordable housing opportunities for low and moderate income residents of this State who could not otherwise afford to own their own home. The General Assembly further finds that some local governments have adopted zoning regulations which severely restrict the placement of manufactured homes. It is the intent of the General Assembly in enacting this section that cities reexamine their land use practices to assure compliance with applicable statutes and case law, and consider allocating more residential land area for manufactured homes based upon local housing needs.

....

(d) A city may adopt and enforce appearance and dimensional criteria for manufactured homes. Such criteria shall be designed to protect property values, to preserve the character and integrity of the community or individual neighborhoods within the community, and to promote the health, safety and welfare of area residents. The criteria shall be adopted by ordinance.

The General Assembly made “the context of [N.C. Gen. Stat. §§ 153A-341.1 and 160A-383.1] and the spirit and reason of the law” clear in subsection (a) of N.C. Gen. Stat. § 160A-383.1. *Mullen*, 225 N.C. at 58, 33 S.E.2d at 487. The plain language of N.C. Gen. Stat. §§ 153A-341.1 and 160A-383.1 therefore controls and N.C. Gen. Stat. § 153A-4 remains idle. *Durham Land Owners Ass’n*, 177 N.C. App. at 634, 630 S.E.2d at 203. N.C. Gen. Stat. § 160A-383.1, as made applicable to counties by N.C. Gen. Stat. § 153A-341.1, limits a county’s power to enact zoning regulations for manufactured homes. If this Court interprets N.C. Gen. Stat. §§ 153A-341.1 and 160A-383.1 any other way, N.C. Gen. Stat. § 160A-383.1(d) becomes meaningless. A county may not therefore use its broad police powers as a guise to enact zoning regulations for manufactured homes inconsistent with N.C. Gen. Stat. § 160A-383.1.

In *White v. Union County*, this Court, interpreting N.C. Gen. Stat. §§ 153A-340, -341.1, and 160A-383.1, held that the trial court erred

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when it allowed Union County's motion to dismiss for failure to state a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). 93 N.C. App. 148, 152, 377 S.E.2d 93, 95 (1989). In *White*, the plaintiffs contended that Union County's land use ordinance requiring

a resident prove his/her mobile home to be worth at least \$5,000.00 in order for that resident to reside in such a mobile home within Union County, is not a legal regulation of land use, and is therefore an *ultra vires* ordinance, in violation of N.C.G.S. § 153A-340.

Id. at 150, 377 S.E.2d at 94. This Court stated:

The nub of [the] plaintiffs' argument [was] that the legislature ha[d] granted the county authority to draft ordinances limiting structures, and mobile homes specifically, only in qualitative terms and not by way of an arbitrary money value. Given the requirements of Dillon's Rule, [the] plaintiffs . . . stated a direct attack on the ordinance so long as they [could] show that the attack [was] timely under N.C.G.S. § 153A-348.

Id. at 152, 377 S.E.2d at 95.

Here, the Ordinance, as amended, states "[m]anufactured homes must have an attached HUD label and shall not be more than ten (10) years old on the date of application for a building permit for the purpose of permanent set-up." At the time of the adoption of the amendment to the Ordinance, the rational basis proffered by the proponents of the Ordinance was to increase the tax base. At oral argument, counsel for the County contended that increasing the tax base by requiring manufactured homes to have a certain value was a legitimate governmental interest. This contention was advanced by the record evidence of Chairman Wood who stated:

[T]here is a significant tax problem in this situation because rental mobile homes are taxed as personal property and the values decrease substantially over a ten year period. [Chairman Wood] said the county provides services for these property owners, but has no vehicle for collecting sufficient revenues to pay for these services.

The intent of the Ordinance is to increase the tax base by elimination of housing which rapidly depreciates in value. This wealth based criterion is neither an appearance nor dimensional criteria. The nexus between the County's intention and its statutory authority "to protect property values, to preserve the character and integrity of

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the community or individual neighborhoods within the community, and to promote the health, safety and welfare of area residents[]” is too tenuous. N.C. Gen. Stat. § 160A-383.1(d). The County cannot accomplish by indirect legislation what it cannot achieve by direct legislation. The County therefore exceeded the power the General Assembly has conferred upon it with regard to zoning regulations for manufactured homes. The trial court erred when it denied plaintiff’s motion for summary judgment and entered summary judgment in favor of the County.

In light of our holding, it is unnecessary to review plaintiff’s remaining assignments of error.

V. Conclusion

The Ordinance, as amended, does not employ appearance and dimensional criteria as intended by the General Assembly in N.C. Gen. Stat. §§ 153A-341.1 and 160A-383.1. The County exceeded its statutory authority. The trial court erred when it denied plaintiff’s motion for summary judgment and entered summary judgment in favor of the County. The trial court’s judgment is reversed.

Reversed.

Judges McGEE and JACKSON concur.

ALLEN CHARLES DeHART AND LUEARTTIE DeHART, PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA08-216

(Filed 17 February 2009)

1. Appeal and Error; Eminent Domain— inverse condemnation—dismissal order—voluntary dismissal of remaining claim—timeliness of notice of appeal

Plaintiff landowners who brought breach of contract and inverse condemnation claims against the DOT were not required to immediately appeal the trial court’s dismissal of their inverse condemnation claim but could wait until they thereafter voluntarily dismissed their breach of contract claim, at which time the order dismissing their inverse condemnation claim became

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a final order. Therefore, plaintiffs' notice of appeal filed within 30 days after the trial court's dismissal order became final was timely.

2. Eminent Domain— inverse condemnation—slope of private driveway—failure to show deprivation of use of property

The trial court did not err by dismissing plaintiffs' claim for inverse condemnation arising out of the failure of defendant DOT to grade their driveway at the slope of no more than ten percent as required by a compromise settlement of a condemnation action because there was no taking where plaintiffs only alleged that DOT's actions have not improved the value of their land to the degree they expected under the agreement; and plaintiffs have not established that the increased slope of the new driveway substantially deprived them of the use of their property.

Appeal by plaintiffs from order entered 7 September 2006 by Judge Dennis J. Winner in Graham County Superior Court. Heard in the Court of Appeals 28 August 2008.

Moody & Brigham, PLLC, by Fred H. Moody, Jr. and Justin B. Greene, for plaintiffs-appellants.

Attorney General Roy Cooper, by Assistant Attorney General David P. Brenskelle, for defendant-appellee.

GEER, Judge.

Plaintiffs Allen Charles DeHart and Luearttie DeHart appeal from the trial court's dismissal of their claim for inverse condemnation arising out of the failure of the North Carolina Department of Transportation ("DOT") to grade their driveway at a slope of no more than 10 percent after widening a highway running past plaintiffs' property. Because plaintiffs have not established that they were substantially deprived of the use of their property by DOT's actions, we affirm the trial court's order.

Facts

Plaintiffs own a tract of land in Graham County, North Carolina. In 1998, DOT condemned a portion of plaintiffs' property in order to widen North Carolina Highway 28. The parties reached a compromise settlement with regard to DOT's taking that provided not only for the payment of \$14,050.00 to plaintiffs, but also included an agreement by DOT to build a private drive across DOT's right of way that

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would connect with plaintiffs' driveway. The agreement specified that the driveway would be a "16 ft. roadbed with a maximum grade of 10%." When DOT built the driveway, the grade ranged from 13 percent to 17 percent.

Plaintiffs brought suit in Graham County Superior Court, alleging breach of contract and inverse condemnation based on DOT's failure to grade the driveway at 10 percent. On 31 January 2003, DOT moved to dismiss plaintiffs' claim for inverse condemnation. Judge Ronald K. Payne denied this motion on 13 May 2003. DOT then moved for a hearing pursuant to N.C. Gen. Stat. § 136-108 (2007) to determine "whether the Plaintiffs have had any interest or area of their property taken by the Defendant and/or whether the Plaintiffs have an inverse condemnation claim against the Defendant." On 7 September 2006, Judge Dennis J. Winner ruled that the failure of DOT to comply with its agreement to build the driveway at a grade of 10 percent or less was not a taking and dismissed plaintiffs' claim for inverse condemnation.

Plaintiffs filed a Notice of Voluntary Dismissal of their breach of contract claim on 6 September 2007 and filed a notice of appeal from Judge Winner's order on 26 September 2007. DOT has filed a motion to dismiss the appeal as untimely.

Discussion

[1] We first address DOT's motion to dismiss. Rule 3(c)(1) of the North Carolina Rules of Appellate Procedure requires that a party file his or her notice of appeal within 30 days after entry of judgment. The trial court filed its order dismissing plaintiffs' inverse condemnation claim on 7 September 2006. The order was interlocutory because plaintiffs' contract claim remained pending. Once plaintiffs voluntarily dismissed the breach of contract claim on 6 September 2007, the trial court's order dismissing their inverse condemnation claim became a final order. *See Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367-68, 555 S.E.2d 634, 638-39 (2001) (holding that plaintiff's voluntary dismissal of its only remaining claim after the trial court granted summary judgment to defendant on plaintiff's other claims had the effect of making the court's partial summary judgment order an appealable final order). Plaintiffs filed their notice of appeal on 26 September 2007, within 30 days after the date the trial court's dismissal order became final.

DOT argues, however, that the holding in *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967), required plain-

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tiffs to file their notice of appeal within 30 days of the trial court's ruling on 7 September 2006. In *Nuckles*, 271 N.C. at 14, 155 S.E.2d at 783, the Supreme Court held that a trial court's ruling on the issue of what land was taken during a condemnation proceeding is immediately appealable because it affects a landowner's substantial rights. The Court in that case then dismissed an appeal as untimely because the appellant waited to file notice of appeal until the trial court rendered a final judgment. *Id.* at 15, 155 S.E.2d at 784.

The Supreme Court, however, narrowed *Nuckles* in *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175-76, 521 S.E.2d 707, 709-10 (1999). The Court specifically held: "[W]e now limit [the holding in *Nuckles*] to questions of title and area taken." *Id.* at 176, 521 S.E.2d at 709. The Court observed that "[a]lthough the parties to a condemnation hearing must resolve all issues other than damages at the N.C.G.S. § 136-108 hearing, that statute does not require the parties to appeal those issues before proceeding to the damages trial." *Id.*, 521 S.E.2d at 710. The landowners in *Rowe* were "the undisputed owners of the land DOT [was] seeking to condemn," and the case presented no issue regarding "what parcel of land [was] being taken or to whom that land belong[ed]." *Id.*, 521 S.E.2d at 709. Consequently, the landowners were not required to immediately appeal the trial court's ruling after the § 136-108 hearing, but rather could wait until a final judgment was entered. *Id.* at 177, 521 S.E.2d at 710. *See also N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) ("The Court of Appeals correctly read our decisions in *N.C. State Highway Comm'n v. Nuckles* and *Rowe* as holding interlocutory orders concerning title or area taken must be immediately appealed as 'vital preliminary issues' involving substantial rights adversely affected." (quoting *Rowe*, 351 N.C. at 176, 521 S.E.2d at 710)).

In this case, the order following the N.C. Gen. Stat. § 136-108 hearing did not address a question of title or area taken. Plaintiffs are the undisputed owners of the property, and the parties agree regarding what area is in dispute. The sole question was whether there was any taking at all. Based on *Rowe*, plaintiffs were not required to immediately appeal the trial court's ruling that DOT's failure to build a driveway at a 10 percent grade was not a taking. We, therefore, deny DOT's motion to dismiss plaintiffs' appeal.

[2] Turning to the merits of plaintiffs' appeal, *Rowe* pointed out that "[p]arties to a condemnation proceeding must resolve all issues other than damages at a hearing pursuant to N.C.G.S. § 136-108." 351 N.C. at 175, 521 S.E.2d at 709. N.C. Gen. Stat. § 136-108 provides:

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After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine *any and all issues raised by the pleadings other than the issue of damages*, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

(Emphasis added.) Following the hearing in this case, Judge Winner concluded that “[t]he failure of the Defendant to comply with its agreement to build the driveway at 10 percent or less is not a taking of property within the laws of the State of North Carolina” and that “[t]he Plaintiffs are not entitled therefore to proceed with respect to the remedy of an inverse condemnation.”

In *Ledford v. N.C. State Highway Comm'n*, 279 N.C. 188, 190-91, 181 S.E.2d 466, 468 (1971) (quoting 26 Am. Jur. 2d *Eminent Domain* § 157 (1966)), the Supreme Court held:

“ ‘Taking’ under the power of eminent domain may be defined generally as entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.”

This Court applied this principle in *Dep't of Transp. v. Higdon*, 82 N.C. App. 752, 347 S.E.2d 868 (1986), *appeal dismissed and disc. review denied*, 318 N.C. 692, 351 S.E.2d 742 (1987).

In *Higdon*, DOT had condemned a portion of the defendants' property in order to widen a street. As part of the widening construction, DOT, without the defendants' permission, resloped and repaved a parking lot at the front of the defendants' property, making the area steeper, rendering the front parking lot useless, and requiring the defendants to build a retaining wall and add steps to the front of their building. *Id.* at 753, 347 S.E.2d at 869. The defendants argued that this regrading of the front parking lot constituted an additional taking. This Court rejected the defendants' contention, explaining, based on the definition in *Ledford*, that “[i]n no way was this additional area devoted to a public use and defendants were neither substantially ousted nor deprived of all beneficial enjoyment of the area in question by the mere regrading of the property.” *Id.* at 754, 347 S.E.2d at 869.

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We believe *Higdon* is materially indistinguishable from this case. As the trial court found, DOT built a driveway across its right of way that attached to plaintiffs' private driveway, but was steeper than the parties had agreed upon. As in *Higdon*, the area at issue—the driveway—was not devoted to public use, and plaintiffs in this case do not contend that they were ousted or deprived of beneficial enjoyment of their property.

Plaintiffs argue nonetheless that a taking occurred under the reasoning of *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 621, 304 S.E.2d 164, 176 (1983), because the value of their property decreased as a result of the steeper slope to their driveway. In *Lea*, the Court addressed “whether an easement for flooding was taken from the plaintiff by the defendant, a State agency.” *Id.* at 607, 304 S.E.2d at 169. The State and the plaintiff in that case had entered into an agreement regarding the condemnation of a portion of the plaintiff's property in connection with highway improvements. Certain structures built for those improvements subsequently caused flooding of the plaintiff's property and were likely to lead to periodic future flooding.

The Supreme Court held that “[i]n order to recover for a taking in the present case, the plaintiff must additionally show that the defendant's structures caused an actual permanent invasion of the plaintiff's land or a right appurtenant thereto.” *Id.* at 618, 304 S.E.2d at 175. In concluding that the plaintiff had met its burden, the Court stated:

In the present case the evidence tended to show that the structures built and maintained by the defendant caused increased flooding and substantial injury to the plaintiff's relatively high density apartments in an urban area. The highway structures built and maintained by the defendant which were found to have directly caused the increased flooding were permanent in nature. In light of this evidence, the trial court did not err in concluding that the increased flooding directly resulting from the defendant's structures was a permanent invasion of the plaintiff's property and a taking by the State.

Id. at 620-21, 304 S.E.2d at 176 (internal citation omitted).

The Supreme Court's decision in *Lea* does not support plaintiffs' contention that a taking has occurred because the steeper grade of the drive “resulted in Plaintiffs' remaining land being less valuable than it would have been had the reconstructed drive and its recon-

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nection to Defendant's land been completed as agreed." While, in *Lea*, DOT's actions substantially impaired the value of the owner's land because they caused it to be flooded every time the area experienced a hard rain, plaintiffs in this case have only alleged that DOT's actions have not improved the value of their land to the degree they expected under the agreement.

Accordingly, we hold *Higdon* controls the disposition of this appeal. Because plaintiffs failed to prove at trial and failed to argue on appeal that the increased slope of the new driveway substantially deprived them of the use of their land, as required in *Higdon* and *Ledford*, the trial court did not err in concluding that there was no taking. The trial court's dismissal of plaintiffs' claim for inverse condemnation is, therefore, affirmed.

Affirmed.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. RICHARD MASSEY

No. COA08-831

(Filed 17 February 2009)

1. Criminal Law— instruction—entrapment

The trial court did not err in a possession with intent to sell or deliver a controlled substance and sale of a controlled substance case by refusing to instruct the jury on the affirmative defense of entrapment because: (1) viewed in the light most favorable to defendant, the evidence failed to show acts by the undercover officer to persuade, trick or fraudulently induce defendant to sell him drugs; (2) there is no entrapment when an officer merely affords a defendant the opportunity to commit the crime; and (3) the fact that the undercover officer drove by defendant waving money out of the window, with defendant subsequently selling cocaine to the undercover officer, was insufficient evidence to show inducement on the part of the undercover officer.

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2. Sentencing— habitual felon—indictments for three felonies

The trial court did not err in a drug case by admitting into evidence the indictments for the three felonies supporting defendant's habitual felon status during the habitual felon portion of defendant's trial because: (1) the prohibition in N.C.G.S. § 15A-1221(b) does not prohibit publication during the sentencing proceeding of indictments from cases not currently before the jury; and (2) the indictments were from cases not currently before the jury.

3. Sentencing— habitual felon—prior record level

The trial court did not err in a drug case by sentencing defendant at a record level VI on the grounds that there were alleged errors in the sentencing worksheet and in the calculation of his prior criminal record because: (1) defendant stipulated that this record level was correct and further stipulated that the worksheet used by the State to determine his prior record level was correct; (2) while defendant is correct that an habitual felon conviction cannot be counted in the calculation of a prior record level, contrary to defendant's argument it is unclear whether the trial court treated the 1998 conviction as a Class C felony in its calculation of sentencing points; (3) even without the habitual felon conviction included in the calculation of defendant's prior record points, defendant would still have at least nineteen prior record points and would have properly been assigned a prior record level of VI; (4) although defendant challenged the evidentiary basis of three of the prior convictions on the grounds that no file numbers are listed for those convictions on the worksheet, the lack of a file number is not determinative; (5) although defendant contends the record contained insufficient evidence of his 1976 conviction for attempted robbery with a dangerous weapon, his stipulation to the accuracy of the prior conviction worksheet was sufficient to satisfy the State's evidentiary burden of proof of this conviction; and (6) the certified copy of defendant's criminal record that was requested in June 2008, six months after defendant was convicted and sentenced, was not before the trial court and will not be considered on appeal.

Appeal by defendant from judgment entered 10 January 2008 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 December 2008.

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Attorney General Roy A. Cooper, III, by Assistant Attorney General David P. Brenskelle, for the State.

L. Jayne Stowers, for defendant-appellant.

STEELMAN, Judge.

Where the evidence did not support a jury instruction on the affirmative defense of entrapment, the trial court did not err in refusing to instruct the jury on that defense. It was not error for the trial court to admit into evidence the indictments from prior convictions during defendant's habitual felon trial. Where any alleged errors by the trial court in the calculation of defendant's prior record level were harmless, a new sentencing hearing is not required.

I. Factual and Procedural Background

On 1 December 2006, officers of the Charlotte-Mecklenburg Police Department were engaged in an undercover attempt to purchase cocaine from drug dealers in the Hill Valley Community. At approximately 9:00 p.m., the officers were in a conversion van driving along Reagan Avenue. The undercover officer driving the van waved some money out of the window of the van, and he was subsequently flagged down by Richard Massey ("defendant"). Defendant inquired as to what the undercover officer wanted, and was informed that he wanted a "twenty." Defendant instructed the undercover officer to pull the van into a hotel parking lot. The parking lot was blocked by a gate, and the undercover officer pulled the van to the side of the road. Defendant approached the van and handed the undercover officer an object which was later determined to be a rock of cocaine. The undercover officer gave defendant a twenty dollar bill. The officers in the back of the van then placed defendant under arrest.

On 11 December 2006, defendant was indicted for possession with intent to sell or deliver a controlled substance, sale of a controlled substance, and attaining the status of being an habitual felon. The case went to trial on 7 January 2008. The jury found defendant guilty of both drug charges. During the second phase of the trial, defendant was found guilty of attaining the status of being an habitual felon. The trial court found defendant to be a prior record level VI for felony sentencing purposes. The trial court imposed a sentence of 101 to 131 months imprisonment from the bottom of the mitigated range. Defendant appeals.

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II. Entrapment

[1] In his first argument, defendant contends that the trial court erred by failing to instruct the jury on the defense of entrapment. We disagree.

“A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence.” *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001) (citation omitted). The burden of proving the affirmative defense of entrapment lies with the defendant. *State v. Hageman*, 307 N.C. 1, 28, 296 S.E.2d 433, 448 (1982). In determining whether there is sufficient evidence to require a jury instruction on the entrapment defense, the court must view the evidence in the light most favorable to defendant. *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983) (citations omitted). To be entitled to an instruction on entrapment, a defendant must present evidence of (1) “acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime” and (2) “the origin of the criminal intent [lying] with the law enforcement agencies.” *Hageman* at 28, 296 S.E.2d at 449 (citations omitted). “However there is no entrapment when the officer merely affords the defendant the opportunity to commit the crime.” *State v. Booker*, 33 N.C. App. 223, 224-25, 234 S.E.2d 417, 418 (1977) (citations omitted).

In the instant case, defendant did not offer any evidence, and we look solely to the evidence offered by the State. The State’s evidence, viewed in the light most favorable to defendant, fails to show acts by the undercover officer to persuade, trick, or fraudulently induce defendant to sell him drugs. The fact that the undercover officer drove by defendant waving money out of the window, and that defendant subsequently sold cocaine to the undercover officer, is insufficient evidence to show inducement on the part of the undercover officer. At most, the evidence shows that the officer afforded defendant the opportunity to commit the offense.

Defendant has failed to offer sufficient evidence of entrapment, and we hold that the trial court did not err in refusing to instruct the jury on that defense.

This argument is without merit.

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II. Admission of Indictments from Underlying Felonies in the Habitual Felon Stage of Trial

[2] In his second argument, defendant contends that the trial court erred by admitting into evidence State's exhibits 11, 13, and 15, the indictments for the three felonies supporting defendant's habitual felon status, in the habitual felon portion of his trial. We disagree.

"[W]hen a defendant has previously been convicted of or plead guilty to three non-overlapping felonies, he may be indicted by the State in a separate bill of indictment for having attained the status of being an habitual felon." *State v. Murphy*, 193 N.C. App. 236, 237, 666 S.E.2d 880, 882 (2008) (citing N.C. Gen. Stat. § 14-7.1, 14-7.3 (2007)). N.C. Gen. Stat. § 14-7.5 requires that a separate trial be conducted subsequent to the principal felony trial in order for the jury to determine whether a defendant is an habitual felon. *Id.* (2007). The habitual felon portion of the trial is to be conducted "as if the issue of habitual felon were a principal charge." *Id.* N.C. Gen. Stat. § 15A-1221(b) provides that "[a]t no time . . . during trial may any person read the indictment to the . . . jury." *Id.* (2007). The North Carolina Supreme Court has held that the prohibition contained in N.C. Gen. Stat. § 15A-1221(b) "does not prohibit publication during the sentencing proceeding of indictments from cases not currently before the jury." *State v. Flowers*, 347 N.C. 1, 36, 489 S.E.2d 391, 411 (1997). The Court in *Flowers* further noted that it is not error to read a prior indictment to the jury "for the purpose of proving the existence of a prior felony." *Id.*

In the habitual felon portion of defendant's trial, the prosecutor submitted into evidence the indictments from the three prior felonies that the State contended made defendant an habitual felon as State's exhibits 11, 13, and 15. The State also offered, and the court received into evidence, the judgments from the three prior felony convictions.

It was not error for the trial court to admit into evidence indictments from cases not currently before the jury. *See Flowers* at 36, 489 S.E.2d at 411.

This argument is without merit.

III. Sentencing

[3] In his third argument, defendant contends that the trial court erred in sentencing him at a record level VI on the grounds that there were errors in the sentencing worksheet and in the calculation of his prior criminal record. We disagree.

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The trial court determined defendant's prior record level to be a VI for felony sentencing purposes based upon a finding of thirty-two prior sentencing points. Defendant stipulated that this record level was correct, and further stipulated that the worksheet used by the State to determine defendant's prior record level was correct.

N.C. Gen. Stat. § 15A-1340.14(a) (2007) provides that a felony offender's prior record level is to be determined "by calculating the sum of the points assigned to each of the offender's prior convictions . . ." *Id.* Subsection (b) assigns points to prior felony convictions as follows:

- (1) For each prior felony Class A conviction, 10 points.
- (1a) For each prior felony Class B1 conviction, 9 points.
- (2) For each prior felony Class B2, C, or D conviction, 6 points.
- (3) For each prior felony Class E, F, or G conviction, 4 points.
- (4) For each prior felony Class H or I conviction, 2 points.

N.C. Gen. Stat. § 15A-1340.14(b) (2007).

"Upon a conviction as an habitual felon, the court must sentence the defendant for the underlying felony as a Class C felon." *State v. Penland*, 89 N.C. App. 350, 351, 365 S.E.2d 721, 722 (1988) (citations omitted). Being an habitual felon is a status, not a crime, and a conviction for habitual felon should not be used to calculate prior record level points. *State v. Vaughn*, 130 N.C. App. 456, 460, 503 S.E.2d 110, 112 (1998).

On 26 June 1998, defendant was convicted of two Class I felonies of breaking or entering a motor vehicle and of being an habitual felon. Defendant argues that the trial court erred by including the 1998 conviction as a Class C felony in its calculation of his prior record level, rather than assigning points for only one of the underlying Class I felonies. While defendant is correct that an habitual felon conviction cannot be counted in the calculation of a prior record level, it is unclear in the instant case whether the trial court treated this conviction as a Class C felony in its calculation of sentencing points. Moreover, a review of the prior record level worksheet reveals that any alleged error was harmless. *See State v. Allah*, 168 N.C. App. 190, 195-96, 607 S.E.2d 311, 315 (2005). Even without the habitual felon conviction included in the calculation of defendant's prior record points, defendant would still have at least nineteen prior record

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points and would have properly been assigned a prior record level of VI. *See* N.C. Gen. Stat. § 15A-1340.14(c)(6).

Defendant also challenges the evidentiary basis of three of the prior convictions on the grounds that no file numbers are listed for those convictions on the worksheet. We hold that the lack of a file number is not determinative. Defendant also argues that the record contains insufficient evidence of his 1975 conviction for attempted robbery with a dangerous weapon. However, we note that defendant stipulated to the accuracy of the prior conviction worksheet. Although this stipulation does not preclude our *de novo* appellate review of the trial court's calculation of defendant's prior record level, it is sufficient to satisfy the State's evidentiary burden of proof of this conviction. *See* N.C. Gen. Stat. § 15A-1340.14(f)(1).

Further, defendant bases his argument on appeal upon a certified copy of his criminal record that was requested in June of 2008, six months after defendant was convicted and sentenced. This document could not possibly have been before the trial court at defendant's sentencing. This criminal record check was on its face limited to criminal convictions occurring from 1984 to 2008 and would not have included a 1975 conviction. The Court of Appeals is not the proper place for the introduction of evidence. This Court is not a fact-finding court, and will not consider evidence, documentary or otherwise, that was not before the trial court. To allow such evidence would lead to interminable appeals and defeat the fundamental roles of our trial and appellate courts. *See State v. Kirby*, 187 N.C. App. 367, 376, 653 S.E.2d 174, 180 (2007).

In light of defendant's stipulation to each of these convictions, all from North Carolina, we hold that the State established defendant's prior convictions in accordance with the provisions of N.C. Gen. Stat. § 15A-1340.14(f).

This argument is without merit.

Defendant's remaining assignment of error listed in the record but not argued in his brief is deemed abandoned. N.C. R. App. P. 28(b)(6) (2008).

NO ERROR.

Judges CALABRIA and STROUD concur.

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STATE OF NORTH CAROLINA v. DARREN L. HUDGINS

No. COA08-441

(Filed 17 February 2009)

1. Search and Seizure— motion to suppress—caller's tip— reasonable suspicion—sufficient evidence of reliability coupled with attendant circumstances

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress the stop of defendant's vehicle and evidence procured as a result of the stop because: (1) there was sufficient indicia of reliability from the tip of another driver, including that the caller telephoned police and remained on the telephone for approximately eight minutes, the caller provided specific information about the vehicle that was following him and their location, the caller carefully followed the instructions of the dispatcher which allowed an officer to intercept the vehicles, defendant followed the caller over a peculiar and circuitous route that doubled back on itself going in and out of residential areas between 2 and 3 a.m., the caller remained on the scene long enough to identify defendant to the officer, and the caller placed his anonymity at risk by calling on a cell phone and remaining at the scene; and (2) there were attendant circumstances perceivable to the officer supporting reasonable suspicion, including that the final route leading to the interception of the two vehicles was dictated by the officer, and the vehicles were as described when the officer arrived with defendant's vehicle behind that of the caller.

2. Appeal and Error— appellate rules violations—single-spaced—no page numbers

The Court of Appeals chose not to impose sanctions under N.C. R. App. P. 34 even though defendant's argument section of his brief was single-spaced in violation of N.C. R. App. P. 28(j) and contained no page numbers as required by Appendix B to the Rules of Appellate Procedure.

Appeal by defendant from judgment entered 16 July 2007 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 24 September 2008.

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Attorney General Roy Cooper, by Associate Attorney General Jess D. Mekeel, for the State.

Knight & Free, L.L.C., by Kenneth A. Free, Jr., for the defendant-appellant.

STEELMAN, Judge.

The arresting Officer had reasonable suspicion to investigate the defendant's activity, and thus the trial court properly denied defendant's motion to suppress the stop of defendant's vehicle and evidence procured as a result of that stop.

I. Factual and Procedural Background

On 10 September 2006, at approximately 2:55 a.m., Officer Palmenteri received a call from dispatch informing him that a man (hereinafter referred to as "caller") was driving his car and being followed. The caller did not identify himself to the dispatcher but stated that he was being followed by a man armed with a gun in the vicinity of Westover Terrace and Green Valley Drive in Greensboro. The caller remained on the line with dispatch and described the vehicle by make, model and color and provided various updates on his location. This information was relayed to Officer Palmenteri who advised the dispatcher to direct the caller to drive to Market Street so he could intercept them. Officer Palmenteri proceeded to Market Street where he observed vehicles that matched the description given by the caller stopped at a red light. Officer Palmenteri activated his lights and siren and approached the following vehicle. At this time, caller did not identify himself but exited his vehicle and identified the driver of the second vehicle as the man who had been following him. Officer Palmenteri directed the driver of the second vehicle to show his hands and removed Darren Lynn Hudgins (defendant) from his car. During this time, caller re-entered his vehicle and drove away. After a protective frisk of defendant, Officer Palmenteri determined there was probable cause to arrest defendant for driving while impaired. There was no weapon found in a search of the car incident to the arrest.

On 10 May 2007, defendant filed a motion to suppress all evidence obtained as a result of the stop of his vehicle. On 30 May 2007, Judge Balog denied defendant's motion, finding that there was reasonable suspicion to stop the defendant's vehicle. On 16 July 2007, defendant pled guilty to driving while impaired, reserving his right to appeal the denial of his motion to suppress. Defendant now appeals that denial.

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II. Standard of Review

Our standard of review of an order granting or denying a motion to suppress “is strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). “ ‘[A] trial court’s conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*.’ ” *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002), *review denied*, 356 N.C. 693, 579 S.E.2d 98 (2003), *cert. denied*, 540 U.S. 843, 157 L. Ed. 2d 78 (2003) (internal quotation marks and citations omitted). “ ‘[T]he trial court’s conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.’ ” *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (internal quotation marks and citations omitted).

III. Motion to Suppress**A. Findings of Fact**

We note at the outset that defendant does not assign error to any of the trial court’s findings of fact. “Where . . . the trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.” *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36, (2004), *cert. denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). We thus review the trial court’s order only to determine whether the findings of fact support the legal conclusion that the circumstances provided Officer Palmenteri reasonable suspicion for the stop of defendant.

B. Reasonable Suspicion for the Stop

[1] In his sole argument on appeal, defendant contends that the trial court committed reversible error by denying his motion to suppress on the grounds that there was no reasonable suspicion to justify the stop of his vehicle. We disagree.

Defendant contends that there were no indicia of reliability as to caller which would support the stop of his vehicle. He further questions whether there was any illegal activity which would support the stop. The entire argument is based upon the decision of the North Carolina Court of Appeals in *State v. Maready*, 188 N.C. App. 169, 654 S.E.2d 769 (2008), *rev’d*, 362 N.C. 614, 669 S.E.2d 564 (2008), which

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held, under facts very similar to the instant case, that there were not sufficient indicia of reliability in an anonymous tip to support a reasonable suspicion of criminal activity necessary to support the stop. In *State v. Maready*, 362 N.C. 614, 669 S.E.2d 564 (2008), our Supreme Court reversed this court's decision in *Maready* holding that there were sufficient indicia of reliability and other attendant circumstances to support a reasonable suspicion required to support the investigative stop.

"[T]he police can stop and briefly detain a person for investigative purposes if they have a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if they lack probable cause. . . ." *United States v. Sokolow*, 490 U.S. 1, 2, 104 L. Ed. 2d 1, 6 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)). In order to conduct an investigatory warrantless stop and detention of an individual, a police officer must have reasonable suspicion, grounded in articulable and objective facts, that the individual is engaged in criminal activity. *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979), *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). "The reasonable suspicion must arise from the officer's knowledge prior to the time of the stop." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). Reasonable suspicion has been applied to investigatory stops because a police officer is not required "to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145, 32 L. Ed. 2d 612, 616 (1972). Instead, "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 146, 32 L. Ed. 2d at 617. Nonetheless, such an investigative stop does create the basis for a Fourth Amendment seizure. *United States v. Gooding*, 695 F.2d 78, 82 (4th Cir. 1982).

Further, "the very point of *Terry* was to permit officers to take preventative action and conduct investigative stops *before* crimes are committed, based on what they view as suspicious—albeit even legal—activity." *United States v. Perkins*, 363 F.3d 317, 326 (4th Cir. 2004) (internal citations omitted) (emphasis in original), *cert. denied*, 543 U.S. 1056, 160 L. Ed. 2d 781 (2005). *Perkins* went on to hold that "[w]e cannot afford to read the Fourth Amendment to require officers to wait until criminal activity occurs, and perhaps until innocent bystanders are physically harmed, before taking reasonable, preventative measures." *Id.* at 328.

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An informant's tip may provide the reasonable suspicion necessary for an investigative stop. *State v. Sanchez*, 147 N.C. App. 619, 623, 556 S.E.2d 602, 606 (2001), *review denied*, 355 N.C. 220, 560 S.E.2d 358 (2002). However, in cases where an informant's tip supplies part of the basis for reasonable suspicion, we must ensure that the tip possesses sufficient indicia of reliability. *See Florida v. J. L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000); *Alabama v. White*, 496 U.S. 325, 328, 110 L. Ed. 2d 301, 307 (1990); *Adams v. Williams*, 407 U.S. 143, 147, 32 L. Ed. 2d 612, 617 (1972). In weighing the reliability of an informant's tip, the informant's veracity, reliability, and basis of knowledge must be considered. *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983).

Where the informant is known or where the informant relays information to an officer face-to-face, an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion. *See Adams*, 407 U.S. at 146-47, 32 L. Ed. 2d at 617 (tip from known source); *United States v. Christmas*, 222 F.3d 141, 144 (4th Cir. 2000) (face-to-face tip from unknown source), *cert. denied*, 531 U.S. 1098, 148 L. Ed. 2d 712 (2001). Where a tip is anonymous, it must be accompanied by some corroborative elements that establish the tip's reliability. *See J. L.*, 529 U.S. at 270, 146 L. Ed. 2d at 260; *White*, 496 U.S. at 329-31, 110 L. Ed. 2d at 308-09. In determining whether the informant was anonymous or confidential and reliable the Court has adopted a "totality of the circumstances" test. *Gates*, 462 U.S. at 233, 76 L. Ed. 2d at 545.

In *Maready*, the Supreme Court emphasized that the "overarching inquiry" in assessing reasonable suspicion is "the *totality* of the circumstances." *Maready*, 362 N.C. at 619, 669 S.E.2d at 567 (emphasis in original). It also reiterated that:

Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." Only " 'some minimal level of objective justification' " is required. This Court has determined that the reasonable suspicion standard requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." Moreover, "[a] court must consider 'the totality of the circumstances-the whole picture' in determining whether a reasonable suspicion" exists.

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Id. (quoting *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (citations omitted), *cert. denied*, — U.S. —, 172 L. Ed. 2d 198 (2008)).

In *Maready*, an apparently distraught driver of a minivan advised deputies that they needed to check on the driver of a silver Honda Civic (Honda), which had been driving behind the minivan, because the Honda had been operated in an erratic manner. Deputies made an investigatory stop and discovered defendant to be impaired. In affirming the trial court's holding that reasonable suspicion existed to make the stop, the Supreme Court held that the following were indicia of reliability of the tip from the minivan driver: (1) the driver was operating the minivan immediately in front of the Honda and was able to provide a firsthand, eyewitness report; (2) the cautious driving and apparent distress of the driver of the minivan; (3) the driver of the minivan approached the deputies at a time and place near the scene of the alleged violations, giving little time to fabricate the allegations; (4) the minivan driver was not entirely unknown to the officers and placed her anonymity at risk because the officers could have written down the tag number of the minivan or detained the driver. *Maready*, 362 N.C. at 619, 669 S.E.2d at 567.

The Supreme Court also held that there were other attendant circumstances supporting a reasonable suspicion that support the " 'minimal intrusion' of a simple investigatory stop." *Id.* at 620, 669 S.E.2d at 568 (citing *Illinois v. Wardlow*, 528 U.S. 119, 126, 145 L. Ed. 2d 570, 577 (2000)).

In the instant case, there were indicia of reliability similar to those that existed in *Maready*: (1) the caller telephoned police and remained on the telephone for approximately eight minutes; (2) the caller provided specific information about the vehicle that was following him and their location; (3) the caller carefully followed the instructions of the dispatcher, which allowed Officer Palmenteri to intercept the vehicles; (4) defendant followed caller over a peculiar and circuitous route that doubled back on itself, going in and out of residential areas between 2 and 3 a.m.; (5) the caller remained on the scene long enough to identify defendant to Officer Palmenteri; (6) by calling on a cell phone and remaining at the scene, caller placed his anonymity at risk.

There were also attendant circumstances, perceivable to Officer Palmenteri, that support a reasonable suspicion. The final route leading to the interception of the two vehicles was dictated by Officer

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Palmeri, and when he arrived on Market Street, the vehicles were as described with defendant's vehicle behind that of caller.

Under the rationale of *Maready*, we hold there were sufficient indicia of reliability, coupled with attendant circumstances to satisfy the reasonable suspicion standard. We affirm the ruling of the trial court denying defendant's motion to suppress.

[2] We further note that the argument section of appellant's brief is single spaced in violation of Rule 28(j) of the Rules of Appellate Procedure. Further, appellant's brief contains no page numbers as required by Appendix B to the Rules of Appellate Procedure. In our discretion, we do not impose sanctions upon counsel pursuant to Rule 34. However, counsel is admonished that compliance with the Rules of Appellate Procedure is mandatory.

AFFIRMED.

Judges HUNTER, ROBERT C. and STROUD concur.

DAWNE HENDRIX AND CHRISTOPHER HENDRIX, PLAINTIFFS v. ADVANCED METAL CORPORATION, DEFENDANT

No. COA08-736

(Filed 17 February 2009)

1. Appeal and Error— appealability—denial of motion to dismiss—prior action pending

The denial of a motion to dismiss under N.C.G.S. § 1A-1, Rule 13(a) on the ground of a prior action pending was interlocutory but appealable.

2. Pleadings— compulsory counterclaims—dispute over installation of roof

Plaintiff's claims for fraud arising from the installation of a metal roof should have been dismissed as compulsory counterclaims in another action, and were remanded with leave to file as such, where defendant filed an action for breach of contract for failure to fully pay for the installation of a metal roof on a residence, and the plaintiffs subsequently filed this action for fraud and other related claims. The claims arose from a single transac-

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tion; plaintiffs cannot avoid Rule 13(a) by casting their claims in tort rather than contract.

Appeal by Advanced Metal from judgment entered 11 March 2008 by Judge Milton F. Fitch, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 20 November 2008.

Wood Law Firm, PLLC, by W. Swain Wood, for plaintiffs-appellees.

Block, Crouch, Keeter, Behm & Sayed, LLP, by Christopher K. Behm, for defendant-appellant.

STEELMAN, Judge.

Where plaintiffs' claims were compulsory counterclaims in Advanced Metal's previously filed action, the trial court erred in failing to dismiss plaintiffs' action.

I. Factual and Procedural Background

Defendant Advanced Metal Corporation ("Advanced Metal") is a North Carolina corporation with its principal place of business in New Hanover County. On or about 29 April 2007, Dawne and Christopher Hendrix ("plaintiffs") entered into a contract with Advanced Metal for the purpose of furnishing the materials and providing the labor to install a metal roof on plaintiffs' home in Pitt County. The contract called for three installment payments, a third of which was to be paid upon the completion of the work. Plaintiffs made the first two payments as the work was being done on their home.

On 31 July 2007, Advanced Metal filed a breach of contract action against plaintiffs in the District Court of New Hanover County, alleging that plaintiffs breached the contract by failing to pay the full amount due under the contract, and seeking \$7,810.66 in damages. On 2 August 2007, Advanced Metal filed a claim of lien on plaintiffs' real estate in Pitt County, and a notice of *lis pendens* in Pitt County. Plaintiffs filed an answer on 14 September 2007, seeking dismissal of Advanced Metal's complaint and change of venue to Pitt County. Plaintiffs asserted the following affirmative defenses: (1) that Advanced Metal's claims were barred by waiver, estoppel, fraud, and unclean hands; (2) that Advanced Metal's claims failed due to its failure to perform the contract; (3) that Advanced Metal's claims failed due to a subsequent agreement between the parties; (4) that

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Advanced Metal's claims failed on the basis that the damages caused by Advanced Metal exceeded any amounts that might be owing on the contract; and (5) that Advanced Metal's claims were barred due to its own breach of the contract.

On 15 October 2007, plaintiffs filed a complaint in Pitt County, asserting claims of fraud, unfair and deceptive trade practices, breach of contract, and negligence. Plaintiffs sought damages for the diminished value of their home, the cost of having to remove and replace the roof, the physical and structural damage to their home, and restitution of the amounts of the first and second installment payments paid to Advanced Metal under the contract. Plaintiffs also sought exemplary and punitive damages, attorney's fees and costs, and treble damages pursuant to N.C. Gen. Stat. § 75-16. Plaintiffs amended their complaint on 22 October 2007. On 13 December 2007, Advanced Metal filed motions to dismiss plaintiffs' Pitt County claims pursuant to Rules 13(a) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Advanced Metal also filed an answer to plaintiffs' amended complaint, and a motion to change venue. On 22 January 2008, the trial court denied Advanced Metal's motion to dismiss. Advanced Metal appeals.

II. Interlocutory Appeal

[1] We first address the issue of whether the denial of Advanced Metal's motion to dismiss pursuant to Rule 13(a) is appealable.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). The denial of a motion to dismiss is an interlocutory order and is generally not appealable. *See Duke University v. Stainback*, 84 N.C. App. 75, 77, 351 S.E.2d 806, 807 (1987). However, our Supreme Court has allowed immediate review of the denial of a motion to dismiss on the ground of a prior action pending. *Atkins v. Nash*, 61 N.C. App. 488, 489, 300 S.E.2d 880, 881 (1983) (citing *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978)). Thus, although this appeal is interlocutory, we hold that immediate review is proper.

III. Denial of Motion to Dismiss

[2] In its sole argument on appeal, Advanced Metal contends that the trial court erred in denying its motion to dismiss plaintiffs' Pitt

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County claims pursuant to Rule 13(a) of the North Carolina Rules of Civil Procedure on the grounds that plaintiffs' claims were compulsory counterclaims in the prior pending New Hanover County action. We agree.

Rule 13(a) of the North Carolina Rules of Civil Procedure defines a compulsory counterclaim as:

[A]ny claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

N.C. Gen. Stat. § 1A-1, Rule 13(a) (2007). The North Carolina Supreme Court has held that "[t]he purpose of Rule 13(a), making certain counterclaims compulsory, is to enable one court to resolve 'all related claims in one action, thereby avoiding a wasteful multiplicity of litigation . . .'" *Gardner* at 176-77, 240 S.E.2d at 403 (quotation and citations omitted). Thus, once a claim has been deemed compulsory, it must "be either (1) dismissed with leave to file it in former case, or (2) stayed until the former case has been finally determined." *Id.* at 177, 240 S.E.2d at 403. In *Curlings v. Macemore*, 57 N.C. App. 200, 290 S.E.2d 725 (1982), this Court adopted a three-part test to be used to determine whether a claim is a compulsory counterclaim. Under this analysis, a court is to consider "[(1)] whether the issues of fact and law raised by the claim and counterclaim are largely the same[; (2)] whether substantially the same evidence bears on both claims[;] and [(3)] whether any logical relationship exists between the two claims." *Id.* at 202, 290 S.E.2d at 726 (quotation omitted). Although each party may "rely on different explanations and theories of recovery," a claim is compulsory if the legal effect of a given transaction "necessarily will resolve the conflicting assertion as to the law by the other party." *Brooks v. Rogers*, 82 N.C. App. 502, 509, 346 S.E.2d 677, 682 (1986).

All three of the *Curlings* factors dictate that plaintiffs' claims should have been brought as compulsory counterclaims in Advanced Metal's New Hanover County action. First, the factual and legal issues of the two cases arose "out of the common factual background of the construction contract and the construction project." See *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 600, 614 S.E.2d 268, 273 (2005). Second, the evidence

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required to support the parties' claims was the same, particularly in light of the fact that plaintiffs' claims for relief in their Pitt County action, including fraud, negligent construction, and breach of contract, are premised on identical legal bases as the affirmative defenses of fraud, failure to perform, and breach of contract they asserted in Advanced Metal's New Hanover County action. Thus, plaintiffs would be presenting identical evidence in both actions. Further, the resolution of the New Hanover County action, encompassing Advanced Metal's breach of contract claim and the affirmative defense raised by plaintiffs would necessarily resolve and be *res judicata* as to plaintiffs' claims in the Pitt County action. *See Brooks* at 509, 346 S.E.2d at 682. Third, there is clearly a logical relationship between the two actions.

We hold that this case is controlled by the rationale of the North Carolina Supreme Court case of *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 600, 614 S.E.2d 268, 273 (2005). Like the instant case, *Jonesboro* involved a dispute over the performance (or nonperformance) of a construction contract. The Supreme Court held:

In conclusion, the construction contract and the parties' performance under that contract constitute a single "transaction or occurrence" that formed the factual basis for the parties' respective claims for relief in both the Forsyth County and Lee County actions. Although Batten's claims in the Forsyth County litigation and JUMC's claims in the Lee County litigation are not identical, "[t]he issues of law and fact are . . . largely the same in both actions, . . . require substantially the same evidence for their determination, and . . . are logically related." *Cloer*, 132 N.C. App. at 574, 512 S.E.2d at 782. Accordingly, JUMC's claims against Batten were compulsory counterclaims in the Forsyth County action . . .

Jonesboro at 601-02, 614 S.E.2d 273-74.

Thus, although plaintiffs raised claims of negligence and unfair and deceptive trade practices in the Pitt County action that were not specifically raised in the New Hanover County action, we hold that, as in *Jonesboro*, the claims in both cases arise out of a single transaction, forming the factual basis for the parties' respective claims. *See id.* The claims asserted by plaintiffs in the Pitt County action were compulsory counterclaims in the New Hanover County action.

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Plaintiffs argue that they have raised tort claims in the Pitt County case while the New Hanover County case is one in contract. We note that a contractual relationship and a breach of contract do not ordinarily give rise to claims in tort. *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978), closely prescribes the four situations where such claims are permitted. Plaintiffs cannot avoid the provisions of Rule 13(a) by casting their claims to sound in tort rather than contract.

Finally, plaintiffs assert that cases in the field of landlord-tenant and summary ejectment law support the decision of the trial court, citing to *Twin City Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 263 S.E.2d 323 (1980), and *Murillo v. Daly*, 169 N.C. App. 223, 609 S.E.2d 478 (2005). These cases hinged upon the peculiarities of the law of summary ejectment, which have no application to the construction case presently before this Court. This case is controlled by the rationale of *Jonesboro*.

We hold that the trial court erred in denying Advanced Metal's motion to dismiss. We remand the case for the trial court to grant leave to file plaintiffs' claims as counterclaims in Advanced Metal's New Hanover County action. *See Gardner* at 181, 240 S.E.2d at 406; *Brooks* at 507, 346 S.E.2d at 681.

In light of our holding, we find it unnecessary to address Advanced Metal's remaining argument.

REVERSED and REMANDED.

Judges CALABRIA and STROUD concur.

GAINES v. CUMBERLAND CTY. HOSP. SYS., INC.

[195 N.C. App. 442 (2009)]

AJAMU GAINES, JR., A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, SCOTT HANCOX; AND AJAMU GAINES, SR., PLAINTIFFS v. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC., A/K/A CAPE FEAR VALLEY HEALTH SYSTEM AND/OR CAPE FEAR VALLEY MEDICAL CENTER; CAPE FEAR ORTHOPAEDIC CLINIC, P.A.; KAREN JONES, M.D.; THOMAS R. TETZLAFF, M.D.; AND JOHNNY KEGLER, A/K/A JASON WILLIS, CAROLINA REGIONAL RADIOLOGY, P.A.; AND BEVERLY A. DAVIS, M.D., DEFENDANTS

No. COA07-1419

(Filed 17 February 2009)

Medical Malpractice— failure to detect child abuse—proximate cause of injuries—burden of proof not met

The trial court did not err by granting summary judgment for the health care provider defendants on a medical malpractice claim for not detecting child abuse where X-rays intended to rule out aspiration pneumonia following surgery showed an old rib injury. Plaintiff's burden of showing proximate cause was not satisfied by speculative testimony from a pediatrician that rested on a series of inferences about the possibility that subsequent injuries could have been prevented had defendants acted differently.

Appeal by plaintiffs from judgment entered 17 April 2007 by Judge Ola M. Lewis in Cumberland County Superior Court. Heard in the Court of Appeals 14 May 2008.

Faison & Gillespie, by Reginald B. Gillespie, Jr., and Conley Griggs LLP, by Cale H. Conley, Richard A. Griggs, and William S. Britt, for plaintiffs-appellants.

Cranfill, Sumner & Hartzog, LLP, by Norwood P. Blanchard, III, John D. Martin, and Katherine C. Wagner, for defendant-appellee Thomas R. Tetzlaff, M.D.

Helms Mulliss Wicker, PLLC, by Mark E. Anderson and Andrew H. Nelson, for defendant-appellee Cumberland County Hospital System, Inc., a/k/a Cape Fear Valley Health System and/or Cape Fear Valley Medical Center.

Manning, Fulton & Skinner, PA, by Robert S. Shields, Jr., and Katherine M. Bulfer, for defendants-appellees Beverly A. Davis, M.D. and Carolina Regional Radiology, P.A.

Ellis & Winters LLP, by Alex J. Hagan, for defendants-appellees Cape Fear Orthopaedic Clinic, P.A. and Karen V. Jones, M.D.

GAINES v. CUMBERLAND CTY. HOSP. SYS., INC.

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STEELMAN, Judge.

Where plaintiffs failed to establish causation, the trial court did not err in granting summary judgment in favor of the healthcare-provider defendants.

I. Factual and Procedural Background

On the evening of 15 April 2003, the minor plaintiff, Ajamu Gaines, Jr., was brought to the Emergency Department at Cape Fear Valley Medical Center (“the Hospital”) by his mother, Wyenda Phelps, with a wrist fracture reportedly sustained from falling or jumping off a porch. An x-ray of Ajamu’s wrist was taken and reviewed by Dr. Beverly A. Davis. It was determined that orthopedic assistance would be required to treat Ajamu’s wrist, and the Hospital called Dr. Karen V. Jones, an orthopedic surgeon, to treat the wrist. Dr. Jones determined that surgery would be required to treat the break, and Ajamu was transferred to the operating room. During the surgery, Ajamu vomited, which caused the anesthesiologist, Dr. Elisabeth Schaidler, to order a chest x-ray to rule out possible aspiration pneumonia. Dr. Jones also ordered a chest x-ray for the same reason. Dr. Schaidler reviewed the chest x-ray and reported in the medical record that the films were clear. Dr. Davis also read the x-ray and reported that the lung fields were clear. Additionally, Dr. Davis noted in her radiology report that “[t]here is an old-appearing fracture deformity left 9th rib posterolateral.” Dr. Jones relied on Dr. Schaidler’s review of the x-ray.

Because Ajamu vomited during surgery, Dr. Thomas R. Tetzlaff, a pediatrician, was consulted to confirm that Ajamu was not at risk of developing aspiration pneumonia. Dr. Tetzlaff ordered another chest x-ray to verify that Ajamu had not developed aspiration pneumonia. The x-ray was clear and showed no signs of aspiration. Ajamu was discharged on 16 April 2003.

On 3 July 2003, Ajamu returned to the Hospital with a severe head injury. It was reported that earlier that day he was eating ice cream and began shaking on the floor. It was also reported that he had hit his head falling or jumping off a counter a week earlier.

On the night of 10 July 2003, Dr. Sharon Cooper examined Ajamu and reviewed his records. Dr. Cooper suspected child abuse and reported Ajamu’s case to the Department of Social Services (“DSS”). DSS began an investigation, and on 17 July 2003, a multidisciplinary team at the Hospital concluded that Ajamu’s injuries were suffered as a result of child abuse by defendant Kegler, Wyenda Phelps’ live-in

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boyfriend. As a result of the injuries inflicted by Kegler, Ajamu is a quadriplegic.

On 1 September 2005, plaintiffs filed a complaint against defendants Cumberland County Hospital System, Inc., a/k/a Cape Fear Valley Health System and/or Cape Fear Valley Medical Center; Cape Fear Orthopaedic Clinic, P.A.; Karen Jones, M.D.; Thomas R. Tetzlaff, M.D.; and Johnny Kegler, a/k/a Jason Willis. On 12 April 2006 plaintiffs filed an amended complaint, adding claims against Carolina Regional Radiology, P.A. and Beverly A. Davis, M.D. Plaintiffs alleged that defendants were negligent in that they “failed to discover or diagnose . . . prior abuse and/or neglect of Ajamu Gaines, Jr., despite the availability of existing evidence that would give rise to a suspicion of such abuse and neglect[.]” Plaintiffs further asserted that there was a causal link between defendants’ alleged negligence and Ajamu’s injuries. On 30-31 January 2007, all defendants except Johnny Kegler filed motions for summary judgment, which were presented as “one joint motion from all defendants.” An order granting the motion for summary judgment was entered 17 April 2007, concluding that “there is no genuine issue as to any material fact . . . and that the moving defendants are entitled to judgment as a matter of law.” Plaintiffs appeal.

II. Proximate Cause

In their first argument, plaintiffs contend that the trial court erred in granting summary judgment on the grounds that there were genuine issues of material fact as to whether Ajamu’s injuries were proximately caused by any negligence of defendants. We disagree.

Our standard of review of a trial court’s ruling on a motion for summary judgment is *de novo*, and “this Court’s task is to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.” *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citation omitted). “There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim . . .” *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675 (2006) (citation omitted). In a negligence action, plaintiff must “offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper.” *Young v. Fun Services-*

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Carolina, Inc., 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996) (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992)). The burden is on the moving party to establish the lack of a triable issue. *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008). “All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” *Collingwood v. G.E. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted).

In an action alleging medical malpractice, in order to survive summary judgment, a plaintiff must “demonstrate . . . that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the community and that defendant’s treatment proximately caused the injury.” *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978) (citation omitted).

North Carolina appellate courts define proximate cause as “a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff’s injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.”

Williamson v. Liptzin, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (quoting *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)). “To hold a defendant responsible for a plaintiff’s injuries, defendant’s negligence must have been a substantial factor . . . of the *particular* injuries for which plaintiff seeks recovery.” *Brown v. Neal*, 283 N.C. 604, 611, 197 S.E.2d 505, 509 (1973) (citation omitted).

In support of their argument on proximate cause, plaintiffs rely almost entirely on the deposition testimony of Dr. Cooper, a pediatrician, who testified, in part:

My opinion is that the team based at the hospital responsible for the care and well-being of Ajamu [] did not act accordingly on the 15th and 14th [sic] of April, 2003, thereby clearly contributing as [] a proximate cause to the ultimate outcome of this catastrophic head trauma injury. . . .

[I]f any one of all of these people who were involved in the care of this little boy had taken the time to simply pick up the phone

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and report to an agency for which their only job is to investigate possible suspicions of child abuse, I sincerely believe that Ajamu Gaines would not be an almost 11-year-old boy functioning at the 9-month level with severe mental retardation, cerebral palsy and no potential for normal development in life. . . .

I do believe that DSS would have more likely accepted this referral—this report and would have investigated and at the very minute—minimum put into place a Protection Plan for this child. . . .

I believe that had a Protection Plan been put into place, the likelihood would be very great that Ajamu Gaines would have been protected because I believe that Mr. Kegler, the caregiver, would no longer have remained in that home.

While Dr. Cooper did testify regarding what she believed was more likely than not the proximate cause of Ajamu's injuries, her testimony was based on speculation and was not grounded in fact. Dr. Cooper expressed her opinion regarding a series of inferences that: (1) had the healthcare-provider defendants pursued an investigation of potential abuse of Ajamu in April 2003, they would have reported the situation to DSS; (2) DSS would have accepted the report for investigation and would have subsequently substantiated it; (3) as a result of the substantiated report, either Ajamu or defendant Kegler would have been removed from the home; and (4) if either Ajamu or Kegler had been removed from the home, the child abuse occurring in July 2003 would not have taken place.

Dr. Cooper did not testify that the healthcare-provider defendants violated the applicable medical standard of care in their treatment of Ajamu's injuries in April 2003, but instead that, had defendants acted differently, there was a possibility that the injuries to Ajamu would have been prevented. As such, this evidence was insufficient to satisfy plaintiffs' burden of showing proximate cause. *Lane v. Bryan*, 246 N.C. 108, 112, 97 S.E.2d 411, 413 (1957) (if plaintiff relies on circumstantial evidence to establish negligence, every piece of circumstantial evidence must be a reasonable inference directly connected to an established fact); *see also Hopkins v. Comer*, 240 N.C. 143, 151, 81 S.E.2d 368, 374 (1954) ("Cases cannot be submitted to a jury on speculations, guesses or conjectures."); *Beerman* at 295, 664 S.E.2d at 335 ("Even where a plaintiff has introduced some evidence of a causal connection between the defendant's failure to diagnose or intervene sooner and the plaintiff's poor ultimate medical

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outcome, our Court has held that such evidence is insufficient if it merely speculates that a causal connection is possible.”).

Plaintiffs failed to establish an essential element of their negligence claim, and we hold that the trial court did not err in granting summary judgment in favor of the healthcare-provider defendants. *See Fun Services-Carolina, Inc.* at 162, 468 S.E.2d at 263.

AFFIRMED.

Judges ROBERT C. HUNTER and STEPHENS concur.

DEBRA DIANE BURRESS, PLAINTIFF v. GARY DANIEL BURRESS, DEFENDANT

No. COA08-660

(Filed 17 February 2009)

Domestic Violence— protective order—insufficient evidence

The trial court erred by issuing a Domestic Violence Protective Order (DVPO) where there was no competent evidence that defendant caused or attempted to cause bodily injury or committed any sex offense against a minor child in plaintiff’s custody, or placed a member of plaintiff’s family in fear of imminent serious bodily injury or continued harassment that rose to the level of substantial emotional distress. The fact of a DSS investigation of abuse was not relevant to whether defendant actually committed acts of domestic violence, a statement by plaintiff’s son was admitted for the limited purpose of explaining plaintiff’s actions and was not competent to support a finding of domestic violence, and plaintiff’s testimony was not sufficient to support the court’s finding of previous violence. Moreover, a DVPO is authorized only upon a showing of acts which the court may bring about a halt.

Appeal by defendant from order entered 20 February 2008 by Judge J. Gary Dellinger in Caldwell County District Court. Heard in the Court of Appeals 15 January 2009.

No brief filed by plaintiff.

Wilson, Lackey & Rohr, P.C., by Timothy J. Rohr, for defendant-appellant.

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[195 N.C. App. 447 (2009)]

STEELMAN, Judge.

Where there was no competent evidence to support the trial court's findings of domestic violence by defendant against the minor children, and where the trial court's conclusion of law regarding domestic violence by defendant against plaintiff did not support the issuance of a domestic violence protective order, the order is reversed.

I. Factual and Procedural Background

On 13 February 2008, Debra Diane Burress ("plaintiff") filed a complaint seeking a domestic violence protective order ("DVPO") against Gary Daniel Burress ("defendant"). Defendant moved to dismiss the case both at the close of plaintiff's evidence and at the close of all the evidence, and both motions were denied by the trial court. On 20 February 2008, the trial court entered a Domestic Violence Order of Protection and Temporary Child Custody Addendum against defendant. The trial court marked the following findings on the Administrative Office of the Courts ("AOC") Form AOC-CV-306:

3. On FEB. 13, 08, the defendant

...

- b. placed in fear of imminent serious bodily injury a member of the plaintiff's family/a member of the plaintiff's household
- c. placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress a member of plaintiff's family/a member of plaintiff's household

The trial court then marked the following conclusions of law on the AOC Form:

- 1. The defendant has committed acts of domestic violence against the plaintiff.
- 2. The defendant has committed acts of domestic violence against the minor child(ren) residing with or in the custody of the plaintiff.
- 3. There is danger of serious and immediate injury to the minor child(ren).

Defendant appeals.

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II. Mootness

We preliminarily note that, although the DVPO issued in this case expired on 20 May 2008, defendant's appeal is not moot. *See Smith v. Smith*, 145 N.C. App. 434, 436-37, 549 S.E.2d 912, 914 (2001).

III. Findings of Fact and Conclusions of Law

In his sole argument on appeal, defendant contends that the trial court erred in entering a Domestic Violence Order of Protection and Temporary Child Custody Addendum on the grounds that there was no competent evidence to support the trial court's findings of fact and the findings of fact did not support the trial court's conclusions of law. We agree.

Domestic Violence Protective Order

N.C. Gen. Stat. § 50B-3 provides that a trial court shall "grant a protective order restraining the defendant from further acts of domestic violence" if the court "finds that an act of domestic violence has occurred[.]" N.C. Gen. Stat. § 50B-3(a) (2007). Domestic violence is defined as

[T]he commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

- (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
- (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3, that rises to such a level as to inflict substantial emotional distress; or
- (3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

N.C. Gen. Stat. § 50B-1(a) (2007).

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). Where there is competent evidence to support the trial court's findings of fact, those findings

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are binding on appeal. *Harris v. Harris*, 51 N.C. App. 103, 105, 275 S.E.2d 273, 275 (1981).

A review of the evidence reveals that plaintiff testified that, at the time of the hearing, the Department of Social Services (“DSS”) was investigating allegations of sexual abuse against the plaintiff’s minor children by defendant. There was no evidence presented regarding what any alleged investigation revealed. While the results of a DSS investigation may be relevant to the issue of domestic violence, the fact that there is an investigation is not. The director of DSS is required to investigate any report of abuse, neglect, or dependency. N.C. Gen. Stat. § 7B-302(a) (2007). This evidence was therefore not relevant to whether defendant actually committed acts of domestic violence against the minor children. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (2007) (“ ‘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.”).

Plaintiff also testified at trial that her son told her that “his dad put his private parts on his body.” Defendant objected to this statement on the grounds that it was hearsay. The trial court admitted the statement for the limited purpose of explaining why plaintiff left the residence she previously shared with defendant. Thus, the statement was not admitted to prove that defendant committed the act at issue, and was not competent to support a finding of domestic violence by defendant against a member of plaintiff’s family. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c) (2007).

Finally, regarding any alleged domestic violence between defendant and plaintiff, the trial court made an additional handwritten finding that defendant “committed allegations in paragraph 4 of the Complaint, which are hereby incorporated by reference.” Paragraph 4 of plaintiff’s complaint alleged “open DSS investigation as of 2-13-08 on Jacob Ware and Daniel Burress. There has been previous domestic violence between Gary and Debra where Gary was the perpetrator.”

At trial, the following exchange took place between the court and plaintiff:

Q: All right. Have you ever had to take out any domestic violence orders against your husband before?

A. No.

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Q. Well, your statement says there has been previous domestic violence between Gary and Debra.

A. That was when we were first together, but I never filed anything.

Q. You never filed the papers.

A. (No audible response.)

We hold that plaintiff's testimony was insufficient to support the trial court's finding of "previous domestic violence between Gary and Debra where Gary was the perpetrator." Plaintiff did not testify that defendant was the perpetrator of any previous domestic violence, nor did she provide a description of the circumstances of any previous domestic violence to support the court's finding. Further, even assuming *arguendo* that plaintiff's testimony was competent to support the court's finding of fact, and this finding supported the court's conclusion that "[d]efendant has committed acts of domestic violence against the plaintiff," this conclusion of law does not support the issuance of a DVPO. *See Brandon v. Brandon*, 132 N.C. App. 646, 655, 513 S.E.2d 589, 595 (1999) (N.C. Gen. Stat. § 50B-3(a) authorizes a trial court to issue a DVPO only upon a showing of acts of domestic violence of which the court may "bring about a cessation.").

There was no competent evidence presented that defendant caused or attempted to cause bodily injury or committed any sex offense against a minor child in plaintiff's custody, or that defendant placed a member of plaintiff's family in fear of (1) imminent serious bodily injury or (2) continued harassment that rose to such a level as to inflict substantial emotional distress. Therefore, the trial court's conclusions of law that defendant committed acts of domestic violence against plaintiff's minor children were not supported by sufficient findings of fact, and the trial court erred in issuing the DVPO. *See id.*

We reverse and vacate the Domestic Violence Order of Protection.

In light of our holding, we need not address defendant's remaining arguments.

REVERSED AND VACATED.

Judges GEER and STEPHENS concur.

TIMBER RIDGE v. CALDWELL

[195 N.C. App. 452 (2009)]

TIMBER RIDGE, PLAINTIFF v. YUMEKA CALDWELL, DEFENDANT

No. COA08-689

(Filed 17 February 2009)

Landlord and Tenant— summary ejectment—federally subsidized lease—proper notice not given

The trial court erred by granting a summary ejectment where plaintiff checked a box on the complaint indicating that defendant's lease was federally subsidized, and there was no evidence in the record that plaintiff complied with federal regulations by providing a proper Notice of Termination.

Appeal by defendant from judgment entered 18 February 2008 by Judge Thomas F. Moore, Jr. in Mecklenburg County District Court. Heard in the Court of Appeals 3 December 2008.

Caudle & Spears, P.A., by Natalie D. Potter and Christopher J. Loeb sack, for plaintiff-appellee.

Legal Aid of North Carolina, Inc., by Chad Crockford, Theodore O. Fillette, and Linda S. Johnson, for defendant-appellant.

BRYANT, Judge.

Yumeka Caldwell (defendant) appeals from an order entered 18 February 2008 removing defendant and placing Timber Ridge Apartments (plaintiff) in possession of an apartment located at 7203B Barrington Drive, Charlotte, North Carolina. We reverse.

Facts

Defendant and her two children began residing in an apartment owned by plaintiff on 17 April 2007. On 30 August 2007, Officer Fishbeck was dispatched to defendant's apartment because of drug complaints by the apartment manager. Upon arrival, Officer Fishbeck knocked on the door and when defendant answered the door, advised defendant of the reason he was there and requested defendant's consent to search the apartment. Defendant consented.

Plaintiff filed a Complaint in Summary Ejectment on 21 November 2007 and a judgment was announced in favor of plaintiff on that date. Defendant filed a written notice of appeal to district court on 17 December 2007.

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At the district court hearing on 18 December 2007, Officer Fishbeck testified multiple clear plastic baggies that had the corners torn off of them were located in defendant's apartment on 30 August 2007. Also located in the apartment was a torn plastic baggie containing traces of marijuana. Officer Fishbeck stated he issued defendant a citation for possession of drug paraphernalia and notified the management of Timber Ridge Apartments of the citation. However, at the time of the hearing, defendant had not been convicted of possession of drug paraphernalia.

Defendant offered testimony in opposition to plaintiff's evidence and stated the plastic baggie the officer showed her after searching the apartment on 30 August 2007 did not contain any traces of marijuana. Defendant also denied having multiple plastic baggies in her apartment, and stated that she had not been convicted of possession of drug paraphernalia.

On 18 February 2008, the district court entered judgment requiring defendant be removed from and plaintiff put into possession of the premises described in the complaint. Defendant appeals.

On appeal, defendant argues the trial court erred by: (I) failing to require plaintiff to prove defendant was provided adequate termination notice in compliance with applicable federal law; (II) failing to require that plaintiff prove defendant breached the lease agreement or was holding over beyond the end of the lease agreement; and (III) denying defendant's motion to dismiss at the close of plaintiff's evidence.

I

Defendant argues the trial court erred by failing to require plaintiff to prove defendant was provided adequate termination notice as required by 24 C.F.R. § 247.4. We agree.

Pursuant to 24 C.F.R. § 247.4 (a) (2008), prior to terminating the lease agreement of a tenant in a federally subsidized housing project, a landlord must provide notice to the tenant in the following manner:

- (a) Requisites of Termination Notice. The landlord's determination to terminate the tenancy shall be in writing and shall: (1) State that the tenancy is terminated on a date specified therein; (2) state the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense; (3) advise

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the tenant that if he or she remains in the leased unit on the date specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense; and (4) be served on the tenant in the manner prescribed by paragraph (b) of this section.

Id.

“[A] tenant in a federally subsidized low-income housing project enjoys substantial procedural due process rights under the Fifth and Fourteenth Amendments.” *Goler Metropolitan Apartments, Inc. v. Williams*, 43 N.C. App. 648, 650, 260 S.E.2d 146, 148 (1979). The tenant has an entitlement to continued occupancy and cannot be evicted until certain procedural protections, such as notice, have been given to the tenant. *Id.* “Our courts do not look with favor on lease forfeitures.” *Stanley v. Harvey*, 90 N.C. App. 535, 539, 369 S.E.2d 382, 385 (1988). “When termination of a lease depends upon notice, the notice must be given in strict compliance with the contract as to both time and contents.” *Lincoln Terrace Assocs., Ltd. v. Kelly*, 179 N.C. App. 621, 623, 635 S.E.2d 434, 436 (2006) (quotations omitted).

Here, no copy of the lease agreement was submitted into evidence. Plaintiff contends no evidence was submitted by either party that defendant’s lease was federally subsidized and therefore entitled to the protections afforded tenants of federally subsidized housing. However, a review of plaintiff’s Complaint in Summary Ejectment reveals plaintiff indicated by checking a box on the pre-printed form that defendant’s lease was subsidized by the Section 8 housing program.¹ Thus we conclude defendant’s lease was entitled to the protections afforded tenants of federally subsidized housing. As such, plaintiff was required to comply with 24 C.F.R. § 247.4.

In *Lincoln Terrace*, the plaintiff failed to submit a copy of the Notice of Termination. 179 N.C. App. at 624, 635 S.E.2d at 436. The only evidence presented that a Notice of Termination had been issued to the defendant was testimony presented on behalf of the plaintiff by the apartment manager. *Id.* Although the trial court had granted summary ejectment on the plaintiff’s behalf, this Court reversed the judgment of the trial court because there was no evidence in the record to support a finding that a Notice of Termination had been properly issued. *Id.* at 628, 635 S.E.2d at 438.

1. Section 8 of the United States Housing Act of 1937, as amended in 1974, establishes the federally subsidized housing assistance payments program commonly referred to as the Section 8 program. *See* 42 U.S.C.A. § 1437f (2008).

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[195 N.C. App. 455 (2009)]

In the present case, defendant argued during the hearing that plaintiff failed to provide a notice of lease termination in compliance with the requirements of 24 C.F.R. § 247.4. Specifically, defendant argued the notice of lease termination did not provide defendant with sufficient detail to enable defendant to prepare a defense. A review of the transcript indicates no notice of termination was entered into the record. Also, no copy of plaintiff and defendant's lease agreement was entered into the record. The only indication that a termination notice had been issued was the testimony of Ms. English, the property manager, that a termination notice was issued to defendant.

As in *Lincoln Terrace*, there is no evidence in the record in the present case that plaintiff complied with the requirements of 24 C.F.R. § 247.4 by providing a proper Notice of Termination. Therefore, the trial court's grant of summary ejectment was in error and must be reversed. Because of our holding, we need not address defendant's remaining assignments of error. See *Lincoln Terrace*, 179 N.C. App. at 628, 635 S.E.2d at 438 (declining to reach appellant's remaining arguments when grant of summary ejectment held in error and reversed because evidence was insufficient to establish a proper Notice of Termination had been issued).

Reversed.

Judges McGEE and GEER concur.

THE MOSES H. CONE MEMORIAL HOSPITAL OPERATING CORPORATION,
PLAINTIFF v. AUDREY HAWLEY AND SPOUSE, SAMUEL B. HAWLEY, DEFENDANTS

No. COA08-712

(Filed 17 February 2009)

Husband and Wife— doctrine of necessities—medical bills

The trial court did not err by granting summary judgment for a hospital attempting to collect a deceased husband's unpaid medical bills from the wife. The application of the Doctrine of Necessaries in North Carolina has been upheld by the North Carolina Supreme Court.

MOSES H. CONE MEM'L HOSP. OPERATING CORP. v. HAWLEY

[195 N.C. App. 455 (2009)]

Appeal by defendant from judgment entered 1 February 2008 by Judge H. Thomas Jarrell, Jr. in District Court, Guilford County. Heard in the Court of Appeals 1 December 2008.

Ott Cone & Redpath, P.A., by Thomas E. Cone, for plaintiff-appellee.

Robertson, Medlin & Blocker, PLLC, by W. Eric Medlin, Adrienne S. Blocker, and John F. Bloss, for defendant-appellant.

WYNN, Judge.

Under common law established by the Supreme Court of North Carolina, “a wife is liable for the necessary medical expenses provided for her husband.”¹ In this matter, Audrey Hawley argues that the modern application of the “Doctrine of Necessaries” is fundamentally flawed because it is based on the antiquated law that a married woman is legally disabled to handle her own financial affairs. Because this Court does not possess the authority to abolish the established common law of our Supreme Court, we must uphold the trial court’s grant of summary judgment, requiring Ms. Hawley to pay her deceased husband’s unpaid medical bills.

Viewing the facts in the light most favorable to Ms. Hawley, as we must when reviewing a summary judgment, the record shows that Audrey and Sam Hawley married in 1996—a second marriage for both. In her brief, Ms. Hawley states that “Sam retained some residual debt and a poor credit rating from his prior marriage.” On the other hand, she took “considerable care in managing her finances, [and] had little debt and a good credit rating.”

In September 2004, Mr. Hawley was diagnosed with chronic lymphocytic leukemia and was treated by Moses Cone Hospital. Ms. Hawley states:

Most of the medical bills were paid by Sam’s health insurance carrier; however, not all the medical bills were paid and Sam quickly went into debt. In October 2005[,] Sam filed for chapter 7 bankruptcy protection from his creditors. At that time, more than half of his unsecured debt was for medical bills resulting from his treatment and most of that was debt owed to Moses Cone. Sam’s debts were discharged in February 2006.

1. *N.C. Baptist Hospitals v. Harris*, 319 N.C. 347, 353, 354 S.E.2d 471, 474 (1987).

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Following Mr. Hawley's death in June 2007, Moses Cone Hospital brought an action to recover Mr. Hawley's unpaid medical expenses from Ms. Hawley. Relying upon the "Doctrine of Necessaries," the trial court granted summary judgment in favor of Moses Cone Hospital.

On appeal, Ms. Hawley argues that the "Doctrine of Necessaries" is (1) inconsistent with article X, section 4 of the N.C. Constitution, (2) contrary to the State's public policy favoring marriage, and (3) a violation of the State's contractual privity laws.

The "Doctrine of Necessaries" establishes that a spouse is liable for the necessary expenses incurred by the other spouse, including those expenses incurred by medical necessity. *Alamance County Hospital v. Neighbors*, 315 N.C. 362, 338 S.E.2d 87 (1986) (holding that medical treatment is included in the traditional definition of "necessaries"). Stemming from the common law allocation of rights and duties between spouses, the doctrine "is a recognition of a personal duty of each spouse to support the other, a duty arising from the marital relationship itself and carrying with it the corollary right to support from the other spouse." *Baptist Hospitals*, 319 N.C. at 353, 354 S.E.2d at 474; *see also Forsyth Memorial Hospital v. Chisholm*, 342 N.C. 616, 621, 467 S.E.2d 88, 90-91 (1996) (recognizing the modernization of the "Doctrine of Necessaries" "to impose liability on a gender-neutral basis").

To establish a *prima facie* case "for the recovery of expenses incurred in providing necessary medical services to the other spouse," the party seeking to apply the doctrine must show:

- (1) medical services were provided to the spouse;
- (2) the medical services were necessary for the health and well-being of the receiving spouse;
- (3) the person against whom the action is brought was married to the person to whom the medical services were provided at the time such services were provided; and
- (4) the payment for the necessities has not been made.

Baptist Hospitals, 319 N.C. at 353-54, 354 S.E.2d at 474-75 (holding a wife liable for necessary medical expenses incurred by her husband under the doctrine even though the wife did not sign as a guarantor, and did not request that her husband be admitted nor anticipate that her husband would be admitted).

MOSES H. CONE MEM'L HOSP. OPERATING CORP. v. HAWLEY

[195 N.C. App. 455 (2009)]

In *Baptist Hospitals* and *Forsyth Memorial*, our Supreme Court upheld the continued application of the “Doctrine of Necessaries” in North Carolina. In *Baptist Hospitals*, our Supreme Court held a wife liable for the cost of the medical services provided to her husband where the trial court found that the parties were married at the time the services were rendered, the services were provided to the spouse, the services were necessary for the spouse’s health and well-being, and no payments were made to the hospital. *Baptist Hospitals*, 319 N.C. at 354, 354 S.E.2d at 475. Further, in *Forsyth Memorial*, our Supreme Court concluded that “unless defendant [wife] can establish some exception to the necessities doctrine, she must be held liable to the hospital for the necessary services it provided her husband.” *Forsyth Memorial*, 342 N.C. at 619, 467 S.E.2d at 90.²

The holdings of *Baptist Hospitals* and *Forsyth Memorial* bind this Court to uphold the application of the “Doctrine of Necessaries.” *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (iterating that this Court does not have the authority to overrule decisions of the Supreme Court of North Carolina). Accordingly, we affirm the trial court’s grant of summary judgment.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

2. Ms. Hawley does not claim an exception to the application of the doctrine in this matter. We note in passing that prior to *Forsyth Memorial*, the only recognized exception to the “Doctrine of Necessaries,” known as the “separation exception,” required that the provider of the services or necessities carry the burden of showing that the husband and wife were living apart when the services were provided and that the spousal separation was due to the fault or misconduct of the husband. *Cole v. Adams*, 56 N.C. App. 714, 716, 289 S.E.2d 918, 920 (1982) (“Where the husband and wife are living apart, there is no presumption . . . that she has any authority to pledge his credit even for necessities. The presumption is that she has *in fact* no authority.”); see also *Pool v. Everton*, 50 N.C. 241, 242 (1858) (explaining that a husband is not responsible for his wife’s necessities where “a wife leaves the ‘bed and board’ of the husband *without good cause*”). In *Forsyth Memorial*, our Supreme Court revised the exception in light of the modern view of marriage as a “partnership of equality,” and concluded that “[t]he spouse seeking to benefit from the separation exception . . . must show that the provider of necessary services had *actual notice* of the separation at the time the services were rendered.” *Forsyth Memorial*, 342 N.C. at 622, 467 S.E.2d at 91 (holding that because the hospital had no actual or constructive notice that the parties were separated at the time services were rendered, the separation exception did not apply).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 FEBRUARY 2009)

ALLEN v. CARE FOCUS No. 07-852	Ind. Comm. (I.C. 162649) (I.C. 355745)	Affirmed
BATTS v. BATTS No. 08-522	Wilson (01CVS1375)	Reversed
BROYHILL v. BROYHILL No. 08-512	Wilkes (06CVD711)	Vacated
COLLINS v. CITATION FOUNDRY No. 08-786	Ind. Comm. (I.C. NO. 545137)	Affirmed
D.E.F. OF HICKORY, LLC v. HONEYCUTT No. 07-1493	Catawba (06CVS2612)	Affirmed
DISCOVER BANK v. ALTMAN No. 08-749	Mecklenburg (07CVD13885)	Dismissed
DISCOVER BANK v. SIMS No. 08-751	Mecklenburg (07CVD13646)	Dismissed
DUNSTONE FIN., L.L.C. v. SIMMONS No. 08-748	Mecklenburg (07CVD13568)	Dismissed
FAULKENBURY v. FAULKENBURY No. 08-682	New Hanover (02CVD301)	Affirmed
IN RE A.N., A.W. & I.N. No. 08-901	Wake (06JT92-94)	Affirmed
IN RE A.R.S. & C.T.S. No. 08-1324	Rutherford (06J9-10)	Affirmed
IN RE A.S., J.B., B.L.S. No. 08-1225	Brunswick (07J127A-128A (08J70A)	Affirmed in part; reversed and) remanded in part
IN RE B.A.N.T. No. 08-1167	Durham (06J58)	Affirmed
IN RE C.G. No. 08-552	Mecklenburg (01J430)	Affirmed
IN RE C.T. No. 08-1025	Craven (06JT154)	Affirmed
IN RE D.N. No. 08-1013	Pitt (03JA209)	Dismissed
IN RE H.M. & N.M. No. 08-1073	Pasquotank (08JT1-2)	Affirmed

IN RE N.L.O. No. 08-1014	Guilford (06JT794)	Affirmed
IN RE R.M.H. & C.N.P. No. 08-1089	New Hanover (06JT27-28)	Affirmed
JOHNSON v. THOMASVILLE FURN. CO. No. 08-610	Ind. Comm. (I.C. NO. 455846)	Affirmed
JONES v. McLEOD No. 08-702	Johnston (07CVS1816)	Affirmed
LANE v. AMERICAN NAT'L CAN CO. No. 08-835	Ind. Comm. (I.C. NO. 963599)	Affirmed
LVNV FUNDING, LLC v. AIKENS No. 08-750	Mecklenburg (07CVD13571)	Dismissed
NATIONAL R.R. MUSEUM & HALL OF FAME, INC. v. CITY OF HAMLET No. 08-356	Richmond (06CVS749)	Affirmed
STANTON BARRETT MOTOR- SPORTS, LLC v. INNOVATIVE TECHS. CORP. OF AM. No. 08-983	Cabarrus (07CVS284)	Affirmed
STATE v. BAKER No. 08-743	Wayne (06CRS51809) (06CRS8433)	No prejudicial error
STATE v. BELL No. 08-281	Brunswick (03CRS2212-13) (03CRS2215-16)	Affirmed
STATE v. BRADY No. 08-333	Robeson (04CRS5629) (04CRS6107)	No error
STATE v. BROWN No. 08-916	Mecklenburg (05CRS227671-75)	No error
STATE v. BUTLER No. 08-428	Forsyth (06CRS59304-06) (07CRS3061-63)	No error
STATE v. CASEY No. 08-183	Randolph (06CRS50128) (06CRS50667-68)	No error
STATE v. CHITWOOD No. 08-759	Gaston (03CRS25296)	Affirmed
STATE v. CLARK No. 08-752	Cumberland (07CRS5856)	Affirmed

STATE v. CORBETT No. 08-410	Alamance (06CRS52324-25)	No error
STATE v. CROSS No. 08-379	Iredell (05CRS53581-82)	No error in part; judgment arrested as to 05CRS53582
STATE v. CUMMINGS No. 08-163	Robeson (05CRS56491) (05CRS56494-95)	No error
STATE v. DURHAM No. 08-464	Wake (07CRS27554)	No error in part, reversed and remanded in part
STATE v. FRANKLIN No. 08-467	Forsyth (07CRS26644-45)	Affirmed
STATE v. FREEMAN No. 08-445	Columbus (04CRS53256)	Affirmed
STATE v. GARY No. 08-361	Polk (07CRS50217)	No error
STATE v. GRAHAM No. 08-462	Scotland (05CRS50577-78)	Affirmed
STATE v. HARRIS No. 08-200	Wake (06CRS25593)	New Trial
STATE v. HILLIKER No. 08-348	Pitt (07CRS50246)	No error
STATE v. JUSTICE No. 08-328	Wake (06CRS46671-72) (06CRS48045)	No error
STATE v. LYNCH No. 08-6	Wake (04CRS74473)	Affirmed
STATE v. MOORE No. 08-800	Wake (07CRS75867)	Dismissed
STATE v. ORR No. 08-653	Mecklenburg (06CRS222928-30) (06CRS222932) (06CRS222934)	No error in part, reversed in part and remanded for resentencing
STATE v. PRUITT No. 08-412	Rutherford (07CRS3312)	Affirmed
STATE v. RANKINS No. 08-841	Guilford (07CRS106698)	No error
STATE v. REID No. 08-575	Forsyth (06CRS55442) (06CRS20432)	No error in part; harmless error in part; and dismissed in part

STATE v. ROBINSON No. 07-1316	Mecklenburg (06CRS30577) (06CRS30579)	No error in part and remanded in part
STATE v. ROWLAND No. 08-753	Harnett (06CRS57619) (07CRS6932)	No error in part; vacated in part
STATE v. SMITH No. 08-559	Wake (05CRS62018)	No error
STATE v. SPENCER No. 08-817	Cleveland (06CRS53923-24) (06CRS4758)	Reversed and remanded
STATE v. WEAVER No. 08-354	Gaston (04CRS69848)	Affirm in part; no error in part
STATE v. WESLEY No. 08-695	Rutherford (06CRS55240)	No error
STATE ex rel. COOPER v. STATE PROPS., LLC No. 08-779	Wake (07CVS20574)	Reversed
TRITON INDUS., INC. v. RIVERWALK IN HIGHLANDS, LLC No. 08-583	Macon (08CVS21)	Affirmed in part, reversed in part
WHD, L.P. v. MAYFLOWER CAPITAL, LLC No. 08-541	Wake (03CVS4991)	Affirmed

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[195 N.C. App. 463 (2009)]

SCOTT CHAISSON, EMPLOYEE, PLAINTIFF v. RED SIMPSON, EMPLOYER, LIBERTY
MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA08-704

(Filed 3 March 2009)

1. Workers' Compensation— settlement amount—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation case by its finding of fact stating the parties negotiated a settlement agreement in the amount of \$97,500 and that the settlement amount reflected the parties' meeting of the minds because: (1) the Commission concluded the testimony of a former adjuster of the insurance company that she knew for sure she did not settle the claim with plaintiff for \$97,500 was not credible, and the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony; (2) defendants did not challenge the Commission's findings that neither the former adjuster nor defendant carrier produced any documentation to support the former adjuster's position that the settlement figure actually negotiated was in the range of \$25,000 or that the \$97,500 figure was a mistake; (3) defendants did not challenge the Commission's finding that after settlement negotiations between the parties that included demands as high as \$145,000, the end result was the settlement figure of \$97,500; and (4) defendant carrier's settlement attorney testified that the former adjuster communicated to her that the settlement amount was \$97,500.

2. Workers' Compensation— clincher agreement—signature withheld by carrier and employer—enforceability

An agreement between plaintiff employee and defendant employer's workers' compensation insurance carrier to settle a claim for \$97,500 was enforceable even though defendant carrier and defendant employer did not sign the settlement agreement where: (1) the carrier's adjuster contacted an attorney representing the employer and the carrier and requested that the attorney prepare a clincher agreement reflecting that the parties settled plaintiff's claim for \$97,500; (2) the attorney sent a letter to plaintiff stating that she understood that a settlement had been reached in the amount of \$97,500 and that she would prepare a clincher agreement embodying the parties' agreement to settle the claim for that amount once she received plaintiff's medical

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records; (3) after the attorney received the medical records she forwarded to plaintiff, with a cover letter signed by her, a clincher agreement stating that the claim had been settled for \$97,500; and (4) plaintiff signed the clincher agreement without modification. The letters signed by the settlement attorney, who was defendants' agent, and the clincher agreement signed by plaintiff together comprise a written memorialization of the fully executed settlement agreement that satisfied the signing requirement of Workers' Compensation Rule 502(3)(b).

3. Workers' Compensation— compromise settlement agreement—filing by employee rather than by employer

A compromise settlement agreement that was drafted by an attorney representing the compensation carrier and the employer and that was signed by the employee but not by the carrier and the employer was not unenforceable because the employee rather than the employer filed it with the Industrial Commission for enforcement. N.C.G.S. § 97-17(a).

4. Workers' Compensation— settlement agreement—fair and just—best interests of parties

The Industrial Commission did not err in a workers' compensation case by deeming that a compromise agreement settling plaintiff's knee injury claim for \$97,500 was fair and just and in the best interest of all parties based on the evidence available to the parties at the time of the settlement negotiations.

5. Workers' Compensation— attorney fees—bad faith

The Industrial Commission did not abuse its discretion in a workers' compensation case by assessing attorney fees in the amount of 25% of the settlement amount of \$97,500 against defendant carrier under N.C.G.S. § 97-88.1 because: (1) the position defendants took in the face of their settlement agreement with plaintiff was in bad faith; and (2) defendants have articulated no reasonable ground in support of their failure to honor the terms of the settlement agreement.

Appeal by defendants from Opinion and Award entered 7 February 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 December 2008.

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The Jernigan Law Firm, by Leonard T. Jernigan, Jr., for plaintiff-appellee.

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

MARTIN, Chief Judge.

Defendant-employer Red Simpson and defendant-carrier Liberty Mutual Insurance Company (collectively “defendants”) appeal from an Opinion and Award of the North Carolina Industrial Commission (“Commission”) approving a compromise settlement agreement and awarding attorney’s fees and costs in favor of plaintiff-employee Scott Chaisson (“plaintiff”). We affirm.

The parties do not dispute that, on 21 February 2003, plaintiff sustained an injury to his right ankle and right knee arising out of and in the course of his employment as a crew foreman and utility lineman with defendant-employer. Defendant-employer is a power line contracting company, which “servic[es] power companies, utility companies around the United States.” In the course of his employment with defendant-employer, plaintiff “would prepare and install underground power and overhead power, high voltage, low voltage and transmission lines all across the mid[-A]tlantic,” which required plaintiff to “engage[] in strenuous activity, including climbing poles, walking lines and making repairs during ice storms.”

At the time of his injury, plaintiff was in Tallmansville, West Virginia, working for defendant-employer to assess and repair power lines that had been damaged as a result of an ice storm in the area. While he was surveying miles of damaged power lines in a mountainous area covered by five to seven feet of snow, plaintiff walked down an embankment and fell into a concealed hole that was about five feet deep. When plaintiff fell into the hole, he “heard a pop noise, and [his] knee completely flipped to right around [his] shoulder area.” Since his cellular telephone did not work due to the elevation in that area, plaintiff made his way out of the hole and “dragg[ed his] leg [behind him] actually to get back to the roadway for someone to pick [him] up,” during which time he felt “a lot of burning in [his] knee.”

Defendant-carrier accepted plaintiff’s claim as a compensable injury. On 15 May 2003, plaintiff underwent arthroscopic surgery on his right knee to repair the right medial meniscal tear that was detected by an MRI on 13 March 2003. Plaintiff’s treating physician

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prescribed “a vigorous physical therapy rehabilitation program” following his surgery and released plaintiff to return to full duty work on 28 October 2003.

However, on 18 August 2004, plaintiff returned to his treating physician complaining that he continued to “hav[e] problems with his knee and . . . described a burning-type discomfort, particularly with activity, and squatting.” After being ordered to start another course of physical therapy, plaintiff returned to his treating physician on 15 February 2005, who noted that plaintiff “had persistent pain in the knee cap (patellofemoral pain) and tendinitis (iliotibial friction band syndrome) on the outside of his knee.” Plaintiff was again sent to participate in a physical therapy rehabilitation program and told to return for a reevaluation in three months. Plaintiff began physical therapy on 7 March 2005 and was to be seen twice a week for four to six weeks, where it was reported that plaintiff “had pain in his knee at rest and with activity, an abnormal gait, and decreased knee strength.”

According to a later follow-up visit, the results of which are reflected in the Full Commission’s unchallenged Finding of Fact 10, plaintiff’s treating physician made the following determinations:

Per the testimony of [plaintiff’s treating physician,] Dr. Caudle, Plaintiff is likely to have persistent symptoms and over time he is likely to have wear-and-tear type arthritis, a wearing away of the cartilage on the bone, on the inside half of the knee, where the torn cartilage was removed. The meniscus cartilage is between the bones, and the articular cartilage is on the bone. The cartilage serves as a cushioning between the bones. As Dr. Caudle testified, Plaintiff is at risk of needing future medical treatment for his knee because he does not have enough normal cushion remaining in his knee. It is more likely than not that Plaintiff will have gradual worsening symptoms in his right knee as he ages.

The Full Commission also made the following unchallenged findings of fact:

5. In January 2004, Liberty Mutual sent Plaintiff a Form 21, which Plaintiff refused to sign. Plaintiff wrote the Industrial Commission saying he did not think the compensation was fair, particularly since he had lost his job because he could no longer perform the physical duties of his job.

....

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11. Candice Buchanan was a Senior Claims Case Manager II for Liberty Mutual in 2005, and was employed by Liberty Mutual from April 1998 until May 13, 2005 in Tampa, Florida. She now works in a similar capacity for another insurance company in Tampa.
12. As a Senior Claims Case Manager II she handled catastrophic claims, complicated litigation and anything that had a high dollar value. She tended to get more complicated claims or older claims. Because Ms. Buchanan had been able to settle a lot of cases quickly, the company started giving her more and more cases that needed to be settled that other people could not get settled, and she was able to do it. She handled and settled a high volume of claims, and because of this ability she was nicknamed "The Liquidator." If no other case manager could liquidate the file, it would be given to her.
13. Several adjusters had handled Plaintiff's file before Ms. Buchanan got it. Future medicals were an issue, no permanent disability benefits had been paid, and Plaintiff had refused to sign a Form 21 submitted to him previously by Liberty Mutual.
14. Ms. Buchanan first picked up the Plaintiff's file on April 6, 2005. Ms. Buchanan talked with Plaintiff on one day, on or about April 14, 2005, and they reached a settlement agreement. Ms. Buchanan could not testify as to the exact settlement amount, but thought it was in the range of \$25,000. Per Plaintiff's testimony, the settlement amount agreed to was \$97,500.
15. Even though his education level is only a G.E.D., Plaintiff presents himself as intelligent and articulate. Plaintiff's wife has a B.S. in nursing, and was able to assist her husband in researching issues of further medical treatment, including a possible knee replacement. During the settlement negotiations with Liberty Mutual, Plaintiff made settlement demands as high as \$145,000. At one time, a figure of \$85,000 was also discussed, although after researching the knee replacement issue, Plaintiff would not accept that amount. *The end result was the settlement figure of \$97,500.*
16. After the settlement figure was reached between Plaintiff and Candice Buchanan, Ms. Buchanan contacted Hedrick Eatman Gardner and Kincheloe, defense counsel for Liberty

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Mutual in North Carolina. The file was assigned to attorney Jennifer Ruiz for preparation of the settlement package, including the compromise settlement agreement. On April 28, 2005, Attorney Ruiz contacted Candice Buchanan by telephone, to determine the settlement amount. *In her handwritten notes of April 28, 2005, Ms. Ruiz recorded that she had spoken with Candice (“Candy”) Buchanan and that the Scott Chaisson case had been settled for \$97,500 and that Ms. Buchanan would email her the medical records.* Ms. Ruiz would draft the settlement agreement, and was not involved in the settlement negotiations.

. . . .

18. Jennifer Ruiz prepared a Compromise Settlement Agreement, per the direction of her client, Liberty Mutual. The Compromise Settlement Agreement was mailed to Plaintiff with a cover letter from Ms. Ruiz dated June 9, 2005. Ms[.] Ruiz requested that Plaintiff review and sign the agreement and return it to her office. After receiving the settlement agreement, which stated that the settlement amount was \$97,500.00, to be paid in one lump sum, Plaintiff signed the agreement and returned it to Ms. Ruiz’s office.
19. By the time the agreement had been signed by Plaintiff and returned to Liberty Mutual, Candice Buchanan had left her employment. Although the agreement had been negotiated by Ms. Buchanan as an agent of Liberty Mutual Insurance Company, Liberty Mutual refused to sign the agreement, and took the position that the settlement amount was a mistake.
20. In her testimony, Candice Buchanan acknowledged that a settlement agreement was reached. However, she denied that the amount was \$97,500 and insisted that it was in the range of \$25,000. *Ms. Buchanan produced no documentation to support her position that the settlement figure actually negotiated was in the range of \$25,000 rather than the \$97,500, which she communicated to Jennifer Ruiz. Liberty Mutual produced no records to substantiate their position that the \$97,500 figure was a “mistake.”*

. . . .

23. After Plaintiff learned that the carrier would not honor the Compromise Settlement Agreement, he sent the agreement to

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the Executive Secretary's office for enforcement. By Order filed August 30, 2005, the Executive Secretary's office denied the motion to enforce, and referred the matter for a hearing before a Deputy Commissioner. Plaintiff hired attorney Leonard Jernigan to represent him at the hearing before the Deputy Commissioner, and Mr. Jernigan filed a Form 33 with cover letter dated September 14, 2005.

(Emphasis added.)

On 19 September 2005, defendants' attorney signed a Form 33R on behalf of defendants alleging that "[d]efendants never signed a settlement agreement and therefore a settlement in any amount cannot be enforced." On 4 April 2006, a deputy commissioner heard plaintiff's motion to "enforce an alleged settlement agreement." On 22 May 2007, the deputy commissioner filed an Opinion and Award, which concluded that the parties did negotiate and enter into a settlement agreement to which defendants were bound "under general principles of contract law," and that defendant-carrier's conduct "ha[d] been in bad faith." As a result, the deputy commissioner approved the compromise settlement agreement in the amount of \$97,500, ordered defendant-carrier to pay attorney's fees, and ordered defendants to pay costs.

On 5 June 2007, defendants appealed to the Full Commission from the deputy commissioner's Opinion and Award. On 7 February 2008, the Full Commission entered its Opinion and Award, which affirmed the deputy commissioner's Opinion and Award with minor modifications. Defendants gave notice of appeal to this Court.

Our Supreme Court has "repeatedly held 'that our Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

"The Industrial Commission and the appellate courts have distinct responsibilities when reviewing workers' compensation claims." *Billings v. Gen. Parts, Inc.*, 187 N.C. App. 580, 584, 654 S.E.2d 254, 257 (2007) (citing *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 114, 530 S.E.2d 549, 552 (2000)), *disc. review and supersedeas denied*,

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362 N.C. 233, 659 S.E.2d 435 (2008). The Industrial Commission is “the fact finding body,” *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)), and is “the sole judge of the credibility of the witnesses and the weight to be given their testimony.” *Id.* (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). As such, “[t]he Commission is not required to accept the testimony of a witness, even if the testimony is uncontradicted.” *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 307, 661 S.E.2d 709, 715 (2008); see also *Anderson v. Nw. Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951) (“[The Commission] may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same.”).

On the other hand, “appellate courts must examine [only] ‘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) (emphasis added) (second alteration and omission in original) (quoting *Deese*, 352 N.C. at 116, 530 S.E.2d at 553). If the findings of fact are supported by competent evidence, those findings are conclusive on appeal “even though there be evidence that would support findings to the contrary.” See *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). Moreover, findings of fact which are left unchallenged by the parties on appeal are “presumed to be supported by competent evidence” and are, thus “conclusively established on appeal.” See *Johnson v. Herbie’s Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (internal quotation marks omitted), *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). Only “[t]he Commission’s conclusions of law are reviewed *de novo*.” *McRae*, 358 N.C. at 496, 597 S.E.2d at 701.

I.

[1] Defendants first contend there is no competent evidence to support the Commission’s Finding of Fact 21, which found that the parties negotiated a settlement agreement in the amount of \$97,500, and that the settlement amount reflected the parties’ “meeting of the minds.” We disagree.

“It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement.” *Northington v. Michelotti*, 121

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N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995) (citing *O'Grady v. Bank*, 296 N.C. 212, 221, 250 S.E.2d 587, 594 (1978)); see also *Charles Holmes Mach. Co. v. Chalkley*, 143 N.C. 181, 183, 55 S.E. 524, 525 (1906) (“The first and most essential element of an agreement is the consent of the parties, an *aggregatio mentium*, or meeting of two minds in one and the same intention, and until the moment arrives when the minds of the parties are thus drawn together, the contract is not complete, so as to be legally enforceable.”). “There must be neither doubt nor difference between the parties[; t]hey must assent to the same thing in the same sense, and their minds must meet as to all the terms.” *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735, 737 (1921). “This mutual assent and the effectuation of the parties’ intent is normally accomplished through the mechanism of offer and acceptance.” *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980). “Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact.” *Id.* at 217, 266 S.E.2d at 602.

The Commission’s Finding of Fact 21 reads as follows:

Considering all of the evidence, the testimony of Candice Buchanan that the settlement amount was less than \$97,500 is not credible. The Plaintiff’s testimony that the parties had negotiated a settlement of \$97,500 is supported by the greater weight of the evidence and is found to be credible. [Defendant-carrier] Liberty Mutual through their agent, Candice Buchanan, who was authorized to act on the [defendant-]carrier’s behalf, negotiated a settlement with Plaintiff in the amount of \$97,500. This meeting of the minds was communicated to their attorney and agent Jennifer Ruiz and was reflected in documents prepared by Ms. Ruiz as the attorney and agent for the Defendants, in her letter of May 25, 2005, her cover letter of June 9, 2005, and the settlement agreement itself.

We first note that we cannot conclude the Commission erred when it found Ms. Buchanan’s testimony that she “kn[e]w for sure” she did not settle the claim with plaintiff for \$97,500 was not credible, since the Commission is “the sole judge of the credibility of the witnesses and the weight to be given their testimony.” See *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274). Secondly, defendants did not challenge the Commission’s findings that neither Ms. Buchanan nor defendant-carrier produced any documentation to support Ms. Buchanan’s posi-

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tion that “the settlement figure actually negotiated was in the range of \$25,000, rather than \$97,500,” or that the \$97,500 figure was a “mistake.” Defendants also did not challenge the Commission’s finding that, after settlement negotiations between plaintiff and defendant-carrier that included “demands as high as \$145,000,” “[t]he end result [of the settlement negotiations] was the settlement figure of \$97,500.” (Emphasis added.)

Additionally, according to Ms. Ruiz’s testimony, Ms. Buchanan communicated to her that the settlement amount was \$97,500. In support of her testimony, Ms. Ruiz produced her own handwritten notes taken during her telephone conversation with Ms. Buchanan in which Ms. Ruiz documented that she had spoken with Candice (“Candy”) Buchanan who told her that plaintiff’s case had been “settled for \$97,500.” The parties also stipulated that a letter was written and signed by Ms. Ruiz, dated 25 May 2005, and sent to plaintiff in which she wrote:

As you know, I represent the [d]efendants in the above-referenced workers’ compensation claim [for I.C. File No. 332868, Carrier File No. WC555-683956, and HEGK File No. 19R-1090]. *I understand that a settlement has been reached in the amount of \$97,500.00.* The settlement proceeds cannot be paid until a fully executed Settlement Agreement has been approved by the North Carolina Industrial Commission. I cannot draft the Settlement Agreement until I have a complete copy of your medical records.

I understand that you will be providing me with a copy of your medical records. . . . If it would be more convenient for you, I could certainly have our office courier pick up the documents.

(Emphasis added.) The parties further stipulated that, along with a signed letter from Ms. Ruiz dated 9 June 2005, plaintiff received an unsigned copy of the Agreement for Final Compromise Settlement and Release prepared by Ms. Ruiz, which included the following paragraph:

Notwithstanding the controversy between the parties, [plaintiff] has agreed to accept, and [d]efendants have agreed to pay, the sum of NINETY-SEVEN THOUSAND FIVE HUNDRED AND 00/100 DOLLARS (\$97,500.00), in one lump sum, without commutation, plus payment of all medical bills and expenses, as per Rule 502(2)(a), incurred for treatment of the injury of February 21,

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2003, up to and including the date of this Agreement, and no further, after said medical bills have been submitted to and approved by the North Carolina Industrial Commission.

Moreover, the letter from Ms. Ruiz to plaintiff accompanying the compromise settlement agreement stated: “Please find enclosed the *Agreement for Compromise Settlement and Release* (‘clincher agreement’) which I have drafted in accordance with the agreement you have reached with Red Simpson, Inc. and Liberty Mutual Insurance Company to settle your workers’ compensation claim.”

Based on the evidence in the record and the unchallenged findings of fact by which we are bound, we conclude that there was competent evidence to support the Commission’s finding that a settlement agreement was reached in the amount of \$97,500. Therefore, we hold that the Commission did not err by determining that there had been a meeting of the minds between plaintiff and defendants, through defendant-carrier’s agent Ms. Buchanan, as to the settlement amount of \$97,500. Accordingly, we overrule this assignment of error.

II.

[2] Defendants next contend the Commission erred by considering the parties’ compromise settlement agreement because the agreement did not strictly comply with the requirements of Workers’ Compensation Rule 502(3)(b). We disagree.

“To make its purpose that the North Carolina Workmen’s Compensation Act shall be administered exclusively by the North Carolina Industrial Commission effective, the General Assembly has empowered the said Industrial Commission to make rules, not inconsistent with this act, for carrying out the provisions of the act” *Winslow v. Carolina Conf. Ass’n*, 211 N.C. 571, 579, 191 S.E. 403, 408 (1937) (internal quotation marks omitted). The North Carolina Industrial Commission also has the power “to construe and apply such rules[, the construction and application of which] . . . ordinarily are final and conclusive and not subject to review by the courts of this State on an appeal from an award made by said Industrial Commission.” *Id.* at 579-80, 191 S.E. at 408.

Furthermore, the Commission has the discretion under Rule 801 of the Workers’ Compensation Rules of the North Carolina Industrial Commission to waive violations of its own rules in the interest of justice, see *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 251, 652

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S.E.2d 713, 717 (2007), but only “where such action does not controvert the provisions of the statute.” See *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 25, 286 S.E.2d 837, 843 (1982).

Workers’ Compensation Rule 801 provides:

In the interest of justice, these rules may be waived by the Industrial Commission. The rights of any unrepresented plaintiff will be given special consideration in this regard, to the end that *a plaintiff without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these rules.*

Workers’ Comp. R. of N.C. Indus. Comm’n 801 2009 Ann. R. (N.C.) 1009 (emphasis added). This Court has stated that “[i]t should be clearly understood that the Commission does have the discretion to apply Rule 801 in cases where a *pro se* litigant fails to *strictly* comply with the rules.” *Wade*, 187 N.C. App. at 251, 652 S.E.2d at 717; *see also id.* (“Had the plaintiff filed a defective Form 44 or other document setting forth the grounds for appeal, even if inexpertly drawn, the Commission could have applied Rule 801 to waive strict compliance.”). Consequently, when the Commission properly exercises its discretion to waive strict compliance with those rules which do not conflict with the Workers’ Compensation Act, such decisions are “not reviewable by the courts, absent a showing of manifest abuse of that discretion.” See *Hyatt*, 56 N.C. App. at 25, 286 S.E.2d at 843-44; *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (stating that a decision subject to an abuse of discretion standard of review must be “accorded great deference” and may be reversed “only upon a showing that its actions are manifestly unsupported by reason . . . [and] only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.”).

“A ‘clincher’ or compromise agreement is a form of voluntary settlement” recognized by the Commission and used to finally resolve contested or disputed workers’ compensation cases. See *Ledford v. Asheville Hous. Auth.*, 125 N.C. App. 597, 599, 482 S.E.2d 544, 546, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 550 (1997). According to Workers’ Compensation Rule 502: “All compromise settlement agreements must be submitted to the Industrial Commission for approval. Only those agreements deemed fair and just and in the best interest of all parties will be approved.” Workers’ Comp. R. of N.C. Indus. Comm’n 502(1) 2009 Ann. R. (N.C.) 996. Additionally, in order for the settlement agreement to be eligible for approval by the Commission, the settlement agreement or “clincher” must contain

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certain specified or “equivalent” language that complies with the requirements identified in subsections (a) through (h) of Rule 502(2). *See* Workers’ Comp. R. of N.C. Indus. Comm’n 502(2) 2009 Ann. R. (N.C.) 996-97. Further, Rule 502(3) provides that “[n]o compromise agreement will be considered [by the Commission] unless” certain specified “additional requirements are met,” which include the provision that “[t]he parties and all attorneys of record must have signed the agreement.” Workers’ Comp. R. of N.C. Indus. Comm’n 502(3)(b) 2009 Ann. R. (N.C.) 997.

It has been long held that “[c]ompromise agreements are governed by the legal principles applicable to contracts generally,” *Penn Dixie Lines, Inc. v. Grannick*, 238 N.C. 552, 556, 78 S.E.2d 410, 414 (1953), which include the central principle that, “[i]n the formation of a contract[,] an offer and an acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms.” *Dodds v. St. Louis Union Tr. Co.*, 205 N.C. 153, 156, 170 S.E. 652, 653 (1933). Moreover, this acceptance, by “promise or act, and communication thereof when necessary, while an offer of a promise is in force, changes the character of the offer. It supplies the elements of agreement and consideration, changing the offer into a binding promise, and the offer cannot afterwards be revoked without the acceptor’s consent.” *Wilkins v. Vass Cotton Mills*, 176 N.C. 72, 81, 97 S.E. 151, 155 (1918) (internal quotation marks omitted).

Furthermore, it has long been recognized that “[a] valid contract . . . may consist of one or many pieces of paper, provided the several pieces are so connected physically or by internal reference that there can be no uncertainty as to the meaning and effect when taken together.” *Simpson v. Beaufort Cty. Lumber Co.*, 193 N.C. 454, 455, 137 S.E. 311, 312 (1927) (internal quotation marks omitted); *see also Rankin v. Mitchem*, 141 N.C. 277, 280, 53 S.E. 854, 855 (1906) (“Letters and telegrams which constitute an offer and acceptance of a proposition, complete in its terms, may constitute a binding contract, although there is an understanding that the agreement must be expressed in a formal writing, and one of the parties afterwards refuses to sign such agreement without material modification.”) (internal quotation marks omitted).

In *Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 577 S.E.2d 712 (2003), this Court determined that a handwritten memorandum, signed by the parties following a Commission-ordered mediated settlement conference was “a valid compromise settlement agreement

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subject to approval by the Industrial Commission pursuant to Rule 502(1),” after one party drafted a clincher agreement according to the terms agreed upon in the settlement conference but the non-drafting party refused to sign the agreement. *See Lemly*, 157 N.C. App. at 101, 104, 577 S.E.2d at 714, 716. The handwritten memorandum at issue in *Lemly* stated that (1) a definite settlement amount was to be payable by defendants to claimant, (2) claimant would “execute [a] clincher setting out above terms and other standard language,” and (3) “[u]pon approval by [the Industrial Commission], settlement will be paid.” *See id.* at 100-01, 577 S.E.2d at 713 (third alteration in original). Although, at the time of the settlement negotiations in the present case, the parties were not participating in a mediated settlement conference, we nevertheless find *Lemly* instructive.

In *Lemly*, the Commission found that the parties had reached an agreement following their mediation settlement conference and signed a settlement memo “pending the execution by plaintiff of a clincher agreement.” *See id.* at 102, 577 S.E.2d at 714 (internal quotation marks omitted). This was also reflected in the mediator’s report from the parties’ settlement conference, which stated that the parties reached “agreement on all issues” and that the issues settled would be “disposed of” by the clincher. *Id.* at 104, 577 S.E.2d at 715. The Court also recognized that, one day after the parties signed the handwritten settlement memo, defendants sent plaintiff a clincher agreement “contain[ing] the standard terms required by Rule 502(2),” but plaintiff did not sign it. *See id.* at 103-04, 577 S.E.2d at 715. The Court further stated: “Defendants argue[d] that the plaintiff ha[d] not alleged that the clincher agreement contained terms different than what was agreed to at the mediation. We agree.” *Id.* at 101, 577 S.E.2d at 714.

In the present case, as in *Lemly*, the Commission found that, on or about 14 April 2005, plaintiff and defendant-carrier’s agent, Ms. Buchanan, “reached a settlement agreement.” Again, this finding was not challenged by defendants and is, therefore, binding on this Court. Additionally, defendants do not dispute that a letter dated 25 May 2005 was signed by their agent, Ms. Ruiz, and sent to plaintiff which stated, “I understand that a settlement has been reached in the amount of \$97,500.00.” Thus, as in *Lemly*, defendants in the present case signed a letter memorializing their offer to settle plaintiff’s workers’ compensation claim for the definite amount of \$97,500, pending the execution of a clincher agreement to be drafted by Ms. Ruiz upon receipt of plaintiff’s medical records.

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The parties in this case further stipulated that a settlement agreement was prepared by Ms. Ruiz and sent to plaintiff, which stated: “Notwithstanding the controversy between the parties, [plaintiff] has agreed to accept, and [d]efendants have agreed to pay, the sum of NINETY-SEVEN THOUSAND FIVE HUNDRED AND 00/100 DOLLARS (\$97,500.00), in one lump sum” In the signed letter, dated 9 June 2005, accompanying the settlement agreement, Ms. Ruiz wrote:

Please find enclosed the *Agreement for Compromise Settlement and Release* (“clincher agreement”) which I have drafted in accordance with the agreement you have reached with Red Simpson, Inc. and Liberty Mutual Insurance Company to settle your workers’ compensation claim.

I would ask that you review this clincher agreement, sign where indicated, have your signature witnessed, and return it to me in the enclosed, self-addressed, stamped envelope. Upon receipt, I will sign the same on behalf of my clients and submit it to the North Carolina Industrial Commission for approval. The North Carolina Industrial Commission will review our agreement at that time to make sure that it is fair to all parties involved. After reviewing the agreement, the Commission will enter an Order, approving our settlement, and payment will be made to you in accordance with the agreement.

. . . .

Following the brief medical summary [included in the first several paragraphs of the clincher agreement], there are several paragraphs which state the positions of both you and, in the alternative, my clients with regard to your claim and any workers’ compensation benefits allegedly owed to you by my clients. Please understand that these “contentions” paragraphs are not facts and should not be considered as such by you in reviewing the agreement. Following these paragraphs, there are several paragraphs which more fully set out in legal terms the settlement and release agreement. *These provide, among other things, the amount of settlement and indicate that this is a final settlement of your workers’ compensation claim.*

. . . .

By copy of this letter to my clients, I am also asking that they review the enclosed clincher agreement and documentation/reports to be sure that they accurately and completely reflect

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the terms of the settlement agreement reached between the parties. . . .

(Second and third emphasis added.) The parties further stipulated that, unlike the plaintiff in *Lemly*, the plaintiff in this case accepted all of the terms of the agreement by affixing his signature and that of his witness to the agreement, and returned the signed agreement to Ms. Ruiz as she requested.

Neither of the parties in the present case allege that the clincher agreement, prepared by defendants' agent and signed by plaintiff without any modifications, failed to comply with any of the requirements of 502(2), which are required for the agreement to be eligible for approval by the Commission. Instead, defendants assert only that this Court should conclude the Commission erred by considering the settlement agreement since, due to defendants' decision to withhold their signatures from the unmodified clincher agreement, which they drafted, the agreement failed to strictly comply with the signature requirement of Rule 502(3)(b).

However, we conclude that the 25 May and 9 June 2005 letters written and *signed by defendants' agent Ms. Ruiz*—which specifically stated that a settlement had been reached in the amount of \$97,500 and that a clincher agreement stating the same followed—and the clincher agreement *signed by plaintiff*—which was prepared by defendants' agent reflecting the same terms—taken *together* comprise a written memorialization of the fully executed settlement agreement between plaintiff and defendants. Accordingly, since settlement agreements are subject to general contracting principles, we find that, in this case, the aforementioned documents taken together satisfied the signing requirement of Rule 502(3)(b), even though only defendants' agent signed the agreement on behalf of all defendants. See, e.g., *Pee Dee Oil Co. v. Quality Oil Co., Inc.*, 80 N.C. App. 219, 223, 341 S.E.2d 113, 115 (“That defendant company did not sign the asset purchase contract, which was prepared at its direction, is not decisive, *for a written contract can consist of several writings.*”) (emphasis added) (citing *Hines v. Tripp*, 263 N.C. 470, 139 S.E.2d 545 (1965)), *disc. review denied*, 317 N.C. 706, 347 S.E.2d 438 (1986). Therefore, we hold that the Commission did not err or abuse its discretion when it waived strict compliance with Rule 502(3)(b) and considered the settlement agreement that it received from plaintiff, who was unrepresented by counsel at the time. Consequently, we overrule this assignment of error.

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III.

[3] Defendants next contend the settlement agreement was not approved by the Commission “in accordance with the statutory requirements” of N.C.G.S. § 97-17(a). In the present case, after plaintiff learned that defendants would “not honor” the compromise settlement agreement that defendants drafted and that he accepted without modifications, this then-*pro se* plaintiff “sent the agreement to the Executive Secretary’s office [at the Commission] for enforcement.” Defendants argue that, because plaintiff’s decision to submit a copy of the settlement agreement directly to the Commission failed to comply with the express language of N.C.G.S. § 97-17(a), which provides that “[a] copy of a settlement agreement *shall be filed by the employer*,” see N.C. Gen. Stat. § 97-17(a) (2007) (emphasis added), the “system envisioned” by the North Carolina General Assembly to “safeguard” the “processing and handling of compromise settlement agreements” was, itself, compromised. For the reasons discussed below, we overrule this assignment of error.

It has long been held that, “[i]f the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey. In other words, the statute must be interpreted literally.” *Sch. Comm’rs of Charlotte v. Bd. of Aldermen of Charlotte*, 158 N.C. 191, 196, 73 S.E. 905, 908 (1912). However, it has also long been the rule that a statute must be “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. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921). “[I]t is further and fully established that 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.” *Id.*

N.C.G.S. § 97-17(a) provides:

This article does not prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article. *A copy of a settlement agreement shall be filed by the employer with and approved by the Commission.* No party to any agreement for compensation approved

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by the Commission shall deny the truth of the matters contained in the settlement agreement, unless the party is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Commission may set aside the agreement. Except as provided in this subsection, the decision of the Commission to approve a settlement agreement is final and is not subject to review or collateral attack.

N.C. Gen. Stat. §97-17(a) (emphasis added). N.C.G.S. § 97-17(b) further provides that “[t]he *Commission shall not approve a settlement agreement* under this section, *unless all of the following conditions are satisfied*,” which include the requirements that: (1) “[t]he settlement agreement is deemed by the Commission to be fair and just, and that the interests of all of the parties and of any person, including a health benefit plan that paid medical expenses of the employee have been considered”; (2) “[t]he settlement agreement contains a list of all of the known medical expenses of the employee related to the injury to the date of the settlement agreement, including medical expenses that the employer or carrier disputes . . . ,” unless “the employer agrees to pay all medical expenses of the employee related to the injury to the date of the settlement agreement”; and (3) “[t]he settlement agreement contains a finding that the positions of all of the parties to the agreement are reasonable as to the payment of medical expenses.” N.C. Gen. Stat. §97-17(b) (emphasis added).

We agree that there seems to be no ambiguity in the sentence of subsection (a) of N.C.G.S. § 97-17, which provides that “[a] copy of a settlement agreement shall be filed by the employer with and approved by the Commission.” N.C. Gen. Stat. §97-17(a). However, subsection (b) of the same statutory provision casts some doubt on how to construe this language, since subsection (b) plainly states that the Commission has the authority to approve a settlement agreement under this section *only* when “*all of the following conditions are satisfied*”—none of which is the condition that the settlement agreement must be submitted for filing to the Commission by the employer, rather than by the claimant. *See* N.C. Gen. Stat. §97-17(b) (emphasis added).

Furthermore, defendants cite no authority to support their assertion that the “public policy” the General Assembly has “set forth in G.S. 97-17 is that [d]efendants are the last to look at compromise settlement agreements . . . [to] ensure they were not altered before

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sending them to the Industrial Commission for consideration and that they comply with the current expectations of the employer/carrier.” Defendants also do not explain why this “policy” would be compromised by allowing this plaintiff, in these circumstances, to file this settlement agreement with the Commission. Instead, defendants only argue that, by the General Assembly requiring “the employer” rather than the claimant to file the settlement agreement with the Commission, it “assures [sic] that [defendants] have the last opportunity to ensure that same [sic] is compliant with their authority and their assessment of the claim” “[s]ince the carrier is making the payment.”

Defendants’ argument is unpersuasive. Defendants presented no evidence to show that they were deprived of the opportunity to thoroughly review the content of *their own* contract, prepared by *their agent*, to verify that the terms were consistent with their assessment of the value of plaintiff’s claim prior to sending it to plaintiff for his acceptance, and presented no evidence that plaintiff altered the settlement agreement in any way prior to filing it with the Commission.

The facts of the present case are as follows: (1) an agreement had been reached between plaintiff and defendants, through its authorized agent, to settle plaintiff’s worker’s compensation claim in its entirety for a definite settlement amount; (2) defendants drafted a settlement agreement according to the terms of this negotiated agreement between plaintiff and defendants’ agent; (3) there was competent evidence that plaintiff and defendants agreed on the terms that were reduced to writing in this settlement agreement; (4) plaintiff timely accepted the terms of the written settlement agreement without any modifications thereto; (5) there was no evidence of any change in circumstances that would tend to negate the negotiated settlement figure of the agreement between the time plaintiff signed the agreement and the time it was returned to defendants for their signatures; (6) there were no unknown facts which came to light that would impact the defendants’ ability to enter into the agreement; and (7) defendants failed to show any justification for their failure to follow through with the settlement agreement negotiated.

As referenced above, our appellate courts “have held in decision after decision that our Workmen’s Compensation Act *should be liberally construed to effectuate its purpose* to provide compensation for injured employees or their dependents, and its *benefits should not be denied by a technical, narrow, and strict construction.*” *Hollman*, 273 N.C. at 252, 159 S.E.2d at 882 (emphasis added). Accordingly,

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since the General Assembly has not expressly provided that a settlement agreement filed by the claimant, rather than by the employer, deprives the Commission of its authority to approve a settlement agreement otherwise properly before it, in light of the facts of the case before us, we hold that the compromise settlement agreement approved by the Commission is not unenforceable solely because it was filed by plaintiff, rather than by defendants. Therefore, we overrule this assignment of error.

IV.

[4] Defendants next contend the Commission erred when it deemed that the settlement agreement was “fair and just and in the best interest of all parties.” We disagree.

“The law permits compromise settlements between employers and employees who are bound by and subject to the Workmen’s Compensation Act, provided they are submitted to and approved by the Industrial Commission.” *Caudill v. Chatham Mfg. Co.*, 258 N.C. 99, 106, 128 S.E.2d 128, 133 (1962). Both Workers’ Compensation Rule 502(1) and N.C.G.S. § 97-17(b)(1) provide that the Commission may only approve those compromise settlement agreements that it deems to be “fair and just” and in the best interests of all of the parties. *See* Workers’ Comp. R. of N.C. Indus. Comm’n 502(1) 2009 Ann. R. (N.C.) 996; N.C. Gen. Stat. § 97-17(b)(1). “The conclusion the agreement is fair and just . . . must come after a full review of the medical records filed with the agreement submitted to the Commission[, and] . . . only if [the agreement] allows the injured employee to receive the most favorable disability benefits to which he is entitled.” *Lewis v. Craven Reg’l Med. Ctr.*, 134 N.C. App. 438, 441, 518 S.E.2d 1, 3 (1999), *aff’d per curiam*, 352 N.C. 668, 535 S.E.2d 33 (2000). “The law thus undertakes to protect the rights of the employee in contracting with respect to his injuries.” *Caudill*, 258 N.C. at 106, 128 S.E.2d at 133 (emphasis added).

Here, although the parties stipulated that the cost of a total knee replacement is approximately \$25,000 to \$30,000, defendants argue that, at the time of the “alleged date of settlement” on 14 April 2005, there was “no indication” in plaintiff’s medical history that he would require a total knee replacement, and so there was “no competent evidence, such as a medical note, to support the \$97,500 settlement figure at the time the settlement was reached on or around April 14, 2005.” However, defendants did not challenge the Commission’s findings that “[f]uture medicals *were an issue*, no

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permanent disability benefits had been paid, and [p]laintiff had refused to sign a Form 21 submitted to him previously by [defendant-carrier].” (Emphasis added.)

Furthermore, defendants did not dispute, and the medical records support, the Commission’s finding that plaintiff suffered from a 10% permanent partial disability rating to his right knee, and that, although plaintiff’s treating physician first determined that he had reached maximum medical improvement in October 2003, his physician withdrew this opinion after he reassessed plaintiff’s condition in October 2004. Additionally, at a 15 February 2005 follow-up visit with plaintiff, plaintiff’s treating physician noted that plaintiff had “[p]ersistent knee pain” dating back to the arthroscopic surgery on plaintiff’s right knee almost two years earlier, and noted that he planned to see plaintiff in three months to “reevaluate” his condition, but would see him “[a]nytime sooner if [plaintiff wa]s having problems.” The medical records also support the Commission’s finding that, during plaintiff’s third prescribed course of physical therapy beginning in March 2005, plaintiff reported continued knee pain “at rest and with activity,” and had an “abnormal gait,” as well as “decreased knee strength.”

Since defendants chose to give plaintiff’s file to Ms. Buchanan one month before plaintiff was due to return to his physician for a reevaluation of his condition in May 2005, and Ms. Buchanan was relied upon to settle a lot of cases *quickly* and could settle “cases that needed to be settled” that other people could not settle, it seems “clear that the parties were contracting [to settle plaintiff’s claim] with reference to future uncertainties and were taking their chances as to future developments, relapses and complications, or lack thereof.” See *Caudill*, 258 N.C. at 106, 128 S.E.2d at 133; see also *id.* (“A compromise is essentially an adjustment and settlement of differences. If there are no differences or uncertainties there is no reason for compromise.”). Therefore, we hold that, based on the evidence available to the parties at the time of the settlement negotiation, the Commission correctly concluded that the parties’ decision to settle plaintiff’s claim for \$97,500 was fair and just and in the best interest of the parties, and overrule this assignment of error.

V.

[5] Finally, defendants contend the Commission abused its discretion when it assessed attorney’s fees in the amount of 25% of the settlement amount of \$97,500 against defendant-carrier pursuant to

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N.C.G.S. § 97-88.1. “[T]he policy behind North Carolina’s Workers’ Compensation Act . . . [is] to provide a swift and certain remedy to an injured worker and to ensure a limited and determinate liability for employers.” *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 16-17, 510 S.E.2d 388, 393, *disc. review denied*, 350 N.C. 834, 538 S.E.2d 197 (1999). In furtherance of this purpose, the General Assembly enacted N.C.G.S. § 97-88.1, which provides:

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

N.C. Gen. Stat. § 97-88.1 (2007). “The purpose of th[is] section is to prevent stubborn, unfounded litigiousness, which is inharmonious with the primary purpose of the Workers’ Compensation Act to provide compensation to injured employees.” *Beam v. Floyd’s Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990) (internal quotation marks omitted).

The determination of “[w]hether the defendant had a reasonable ground to bring a hearing is reviewable by this Court *de novo*.” *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50, 464 S.E.2d 481, 484 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). “The reviewing court must look to the evidence introduced at the hearing in order to determine whether a hearing has been defended without reasonable ground.” *Ruggery v. N.C. Dep’t of Corr.*, 135 N.C. App. 270, 274, 520 S.E.2d 77, 80 (1999). “The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness.” *Sparks v. Mountain Breeze Rest. & Fish House, Inc.*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982). If it is determined that a party lacked reasonable grounds to bring or defend a hearing before the Commission, then the decision of whether to make an award pursuant to N.C.G.S. § 97-88.1, “and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion.” *Troutman*, 121 N.C. App. at 54-55, 464 S.E.2d at 486.

Defendants argue that they had “a reasonable basis to defend th[eir] claim” that the settlement agreement submitted to the Commission by plaintiff was unenforceable, primarily because they denied that the settlement amount agreed to by both parties was

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\$97,500. However, in light of the evidence before the Commission discussed in the sections above, we conclude that the position defendants took in the face of their settlement agreement with plaintiff was in bad faith, as found by the Commission, and conclude that defendants have articulated no reasonable ground in support of their failure to honor the terms of this settlement agreement with plaintiff. Accordingly, we hold that the Commission did not abuse its discretion when it assessed a percentage of the settlement amount of \$97,500 as attorney's fees against defendant-carrier in its 7 February 2008 Opinion and Award.

Affirmed.

Judges WYNN and STEPHENS concur.

GAVIN DEMURRY, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTIONS (SIC), BOYD BENNETT, DARLYN WHITE, DUNCAN DAUGHTERY (SIC), TED HOWELL, DANNY SEIFERT (SIC), WAYNE HARRIS, ANTHONY FLORENCE, EACH DEFENDANT, WHO IS AN INDIVIDUAL, INDIVIDUALLY AND IN HIS/HER OFFICIAL CAPACITY, JOINTLY AND SEVERALLY LIABLE, DEFENDANTS

No. COA08-442

(Filed 3 March 2009)

1. Appeal and Error— appealability—denial of summary judgment—sovereign immunity

Appeals by the Department of Correction and an assistant superintendent of a correctional facility (Florence) in his official capacity from the denial of summary judgment were properly before the Court of Appeals because defendants raised sovereign immunity, public official immunity, and qualified immunity as affirmative defenses. The denial of summary judgment for another defendant who did not raise affirmative defenses was not immediately appealable.

2. Appeal and Error— appealability—denial of summary judgment—officials sued in individual capacity—not subject to two trials

The denial of summary judgment for two state officials on claims in their individual capacity was interlocutory and not ripe

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for appellate review, despite their contention that they were subject to two trials because they were also sued in their official capacities. The State would be the defendant in any suit brought against them in their official capacities.

3. Conversion— claim against official—sovereign immunity

A claim for conversion against the Department of Correction and an assistant superintendent in his official capacity was barred by sovereign immunity. The Department of Correction is a state agency created for the performance of essentially governmental functions and sovereign immunity extends to an assistant superintendent of a county correctional facility in his official capacity when immunity has not been waived.

4. Civil Rights— 1983 claim against official—monetary damages only—summary judgment

The trial court should have granted summary judgment for the Department of Correction and an assistant superintendent in his official capacity on a claim for violation of 42 U.S.C. § 1983 arising from a personnel matter where plaintiff sought only monetary damages. Neither a State nor its officials in their official capacities are “persons” under § 1983 when the remedy sought is monetary damages.

5. Public Officers and Employees— Correction employee— job transfer—Whistleblower claim—no adverse claim

The trial court erred by denying summary judgment for the Department of Correction and an assistant superintendent on a Whistleblower claim arising from a personnel decision. Plaintiff did not forecast evidence that defendant took adverse actions against plaintiff.

Appeal by defendants from order signed 31 December 2007 by Judge Gary Trawick in Onslow County Superior Court. Heard in the Court of Appeals 1 December 2008.

Law Offices of Kenneth N. Glover, PLLC, by Kenneth N. Glover, for plaintiff-appellee.

Roy Cooper, Attorney General, by Thomas H. Moore, Assistant Attorney General, for defendants-appellants N.C. Department of Correction and Anthony Florence.

Roy Cooper, Attorney General, by Neil Dalton, Special Deputy Attorney General, for defendant-appellant Duncan Daughtry.

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MARTIN, Chief Judge.

The North Carolina Department of Correction (“NCDOC”), Anthony Florence, and Duncan Daughtry appeal from an order denying their motions for summary judgment in this action in which plaintiff alleged claims for conversion, violation of North Carolina’s Whistleblower Act pursuant to N.C.G.S. §§ 126-84 through 126-88, and violation of 42 U.S.C. § 1983. We reverse the order of the trial court denying defendant NCDOC’s motion for summary judgment as to all claims alleged against it, and reverse the order denying defendant Florence’s motion for summary judgment as to all claims alleged against him in his official capacity. We dismiss defendant Daughtry’s appeal.

According to the record before us, plaintiff Gavin DeMurry was employed by defendant NCDOC as a correctional officer at Carteret Correctional facility in Newport, North Carolina. He worked for defendant NCDOC from October 2000 until his resignation in February 2006. When plaintiff began working for defendant NCDOC, he worked the second-shift rotation as a correctional officer supervising inmates in the unit at Carteret Correctional. In 2003, plaintiff was reassigned to work with Carteret Correctional’s Community Work Program (“CWP”), which puts inmates to work providing labor in manual labor projects for local governments. According to plaintiff’s deposition, he did not consider this reassignment to the CWP to be a promotion, and did not receive any salary increase as a result thereof. In his new post, plaintiff began supervising the work of inmates on CWP’s “litter squad” and, due to his construction background, plaintiff was later assigned to work in the CWP’s “cement program,” which was said to have worked on such projects as reconstructing shelters and building seawalls. Plaintiff continued in this position until September 2005.

On or about 21 September 2005, as a result of allegations that plaintiff had “created a ‘hostile work’ environment by making repeated threatening remarks” toward two other correctional officers who worked with him on his CWP squad, defendant Anthony Florence, Assistant Superintendent of Carteret Correctional, was assigned to conduct an investigation. Plaintiff denied knowing anything about the charges. However, as a result of his investigation, defendant Florence determined that an incident did occur and subsequently reassigned plaintiff and the two officers to other posts. Plaintiff’s reassignment allowed plaintiff to work the same shift hours and receive the same rate of pay as his post with the CWP.

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Plaintiff was out on leave at the end of September 2005 from a reported off-duty injury when he learned, by a telephone call from a fellow officer on the CWP, of his reassignment. Plaintiff also received a letter dated 30 September 2005 from defendant Florence informing plaintiff that, effective 4 October 2005, he was “permanent[ly]” “reassigned to the Correctional Officer A-1 rotation from the Community Work Crew position” in order “to maintain the orderly operations of [the Carteret Correctional] facility.” Plaintiff did not return to work after September 2005, and submitted his resignation on 6 February 2006.

On 17 October and 24 October 2005, defendant Boyd Bennett, Director of NCDOC’s Division of Prisons, received two letters from plaintiff complaining about his reassignment and seeking to be reassigned to his position with the CWP or to a post with a similar NCDOC inmate work program. Plaintiff further complained that defendant Ted Howell, his immediate supervisor on the CWP, ordered plaintiff to use his personal tools on CWP projects, and that those tools were now missing or damaged due to negligence by other employees. Defendant Bennett assigned defendant Darlyn White, Eastern Region Operations Manager of NCDOC Division of Prisons, to investigate plaintiff’s claims. Defendant White sent plaintiff a letter on or about 5 November 2005 stating that “it was determined by staff that [plaintiff] and [his] co-workers were having conflicts on the job,” and that “[t]he staff at Carteret [Correctional] attempted to resolve [the] conflicts with no avail.” As a result, “[t]he staff as a final measure decided to change all who were involved duty post [sic],” and “made a decision to re-adjust [plaintiff’s] Post Assignment based on the needs of the Department.”

On 6 November 2005, plaintiff sent a response letter to defendant White reiterating his complaints about his post reassignment and about his missing and damaged personal tools. Since defendants Bennett and White determined that this letter “raised no new issues for [defendant White] to investigate” and that defendant White “had properly responded to [these same] concerns” raised by plaintiff in October, plaintiff was not sent a response to his November 2005 letter.

On 9 January 2006, almost three-and-one-half months after plaintiff’s reassignment from the CWP, plaintiff sent a letter to NCDOC Secretary Theodis Beck, in which he made the same complaints as those he had made in his previous letters to defendants Bennett and White. However, in this letter, for the first time, plaintiff also alleged

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that he was asked to “do construction projects that were for private gain,” that he was directed by defendant Howell to use property and resources of the CWP for defendant Howell’s personal benefit, and that, while on duty, plaintiff was required to work for the personal benefit of Superintendent of Carteret Correctional, defendant Duncan Daughtry.

On 1 February 2006, the Eastern Region Director of NCDOC’s Division of Prisons, defendant Danny Safrit, and the Administrative Services Manager for the Eastern Region of NCDOC’s Division of Prisons, defendant Wayne Harris, met with plaintiff at the direction of Secretary Beck to learn more about plaintiff’s allegations of misappropriation of State resources. It was at this meeting that plaintiff indicated he was considering resigning his employment, which he did on 6 February 2006. On 27 April 2006, defendants Harris and White concluded their investigation into plaintiff’s allegations of misappropriation, recommending that the matter merited further investigation by the State Bureau of Investigation, to which it was referred.

On 22 August 2006, plaintiff filed a civil complaint alleging claims of conversion, violation of the North Carolina Whistleblower Act, and violation of 42 U.S.C. § 1983. Plaintiff named the following eight defendants in his complaint: defendant NCDOC; defendant Bennett; defendant White; defendant Howell; defendant Safrit (misspelled in the complaint as “Seifert”); defendant Harris; defendant Daughtry (misspelled as “Daughtery”); and defendant Florence.

On 20 September 2006, defendants Boyd, White, and Daughtry filed motions to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). On 20 September 2006, defendants Safrit, Harris, and Florence filed Answers and Affirmative Defenses, which included motions to dismiss pursuant to Rule 12(b)(6), and the assertion of fifteen affirmative defenses, including sovereign immunity, public official immunity, and qualified immunity. On 1 December 2006, defendant NCDOC filed its Answer and Affirmative Defenses, which included a motion to dismiss pursuant to Rule 12(b)(6), and the assertion of the same fifteen affirmative defenses. On 24 October 2006, defendant Howell filed his motion to dismiss. On or after 27 November 2007, defendants NCDOC, Bennett, Safrit, White, Harris, and Florence filed motions for summary judgment. On 31 December 2007, the trial court signed an order granting summary judgment in favor of defendants Bennett, White, and Harris, and denying summary judgment for defendants NCDOC and Florence, and denying defendant Howell’s motion to dis-

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miss. The trial court's order also denied defendant Daughtry's motion for summary judgment, apparently converting defendant Daughtry's Rule 12(b)(6) motion to a motion for summary judgment, since the record discloses no summary judgment motion filed on behalf of defendant Daughtry. Defendants NCDOC, Florence, and Daughtry gave notice of appeal to this Court and, on 10 June 2008, filed a petition for writ of certiorari.

[1] The first issue before this Court is whether this appeal is properly before us. For the reasons discussed below, we conclude that the appeal of defendant NCDOC, and that of defendant Florence in his official capacity, are properly before this Court. However, the appeal of defendant Daughtry is not properly before us.

“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, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Consequently, “[a]n appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment.” *Steele v. Moore-Flesher Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963) (citing *Veazey*, 231 N.C. 357, 57 S.E.2d 377).

The denial of summary judgment is an interlocutory order not ordinarily subject to appeal. *See Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Nevertheless, since “[i]t has long been established that an action cannot be maintained against the State of North Carolina or an agency thereof unless it consents to be sued or upon its waiver of immunity . . .,” *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983), “when the moving party claims sovereign, absolute or qualified immunity, the denial of a motion for summary judgment is immediately appealable.” *Moore v. Evans*, 124 N.C. App. 35, 39, 476 S.E.2d 415, 420 (1996).

Our appellate courts have determined that sovereign immunity, qualified immunity, governmental immunity, and public official's immunity are affirmative defenses. *See, e.g., Summey v. Barker*, 357 N.C. 492, 494, 586 S.E.2d 247, 248 (2003) (identifying governmental immunity, public official's immunity, and qualified immunity as affirmative defenses); *Herring v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, 188 N.C. App. 441, 445-46, 656 S.E.2d 307, 311 (2008) (identify-

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ing sovereign immunity as an affirmative defense); *Burwell v. Giant Genie Corp.*, 115 N.C. App. 680, 684, 446 S.E.2d 126, 129 (1994) (identifying qualified immunity as an affirmative defense) (citing *Gomez v. Toledo*, 446 U.S. 635, 64 L. Ed. 2d 572 (1980)). “Where a defendant does not raise [such] an affirmative defense in his pleadings or in the trial, he cannot present it on appeal.” See *Delp v. Delp*, 53 N.C. App. 72, 76, 280 S.E.2d 27, 30, *disc. review denied*, 304 N.C. 194, 285 S.E.2d 97 (1981).

As indicated above, in their answers to plaintiff’s complaint, defendants NCDOC and Florence asserted sovereign immunity, public official immunity, and qualified immunity among their affirmative defenses. For this reason, we conclude that the appeals sought by defendant NCDOC and by defendant Florence in his official capacity are properly before this Court. See *Moore*, 124 N.C. App. 39, 476 S.E.2d 420 (“[W]hen the moving party claims sovereign, absolute or qualified immunity, the denial of a motion for summary judgment is immediately appealable.”). However, the record before us contains no pleading filed on behalf of defendant Daughtry other than his Rule 12(b)(6) motion and he has asserted no affirmative defenses to plaintiff’s complaint. Thus, we conclude that the denial of defendant Daughtry’s motion for summary judgment is not immediately appealable on the same grounds as those for defendants NCDOC and Florence.

[2] Defendants Florence and Daughtry further contend the trial court decided in its order that they were sued in their individual capacities and, consequently, seek immediate appellate review of several issues from this status, claiming that, without an immediate appeal, they will be subjected to the possibility of two trials. We agree that “the right to avoid the possibility of two trials *on the same issues* can be . . . a substantial right” and may be grounds for an immediate appeal. See *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (omission in original) (internal quotations marks omitted). However, “[a] suit against defendants in their official capacities, as public officials or . . . public employee[s] . . . is a suit against the State.” *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443, *reh’g denied*, 326 N.C. 488, 392 S.E.2d 90 (1990). Accordingly, a suit against defendants Florence and Daughtry in both their official *and* individual capacities would subject them *each* to *only one* trial individually in their individual capacities, since the State would be the actual defendant in any suit brought against them in their official capacities. See *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 205, 468

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S.E.2d 846, 851 (“State officers sued for damages . . . assume the identity of the government that employs them. By contrast, officers sued in their personal capacity *come to court as individuals.*”) (omission in original) (internal quotation marks omitted), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Thus, the order denying the motions sought by defendants Florence and Daughtry for summary judgment as to claims brought against them in their individual capacities is interlocutory, affects no substantial right, and is not ripe for appellate review. Their appeals of this order are dismissed, and, for the same reasons, we also deny defendants’ petition for writ of certiorari.

“In order to prevail on their summary judgment motion, defendants must carry the burden of establishing the lack of a genuine issue as to any material fact and their entitlement to judgment as a matter of law.” *Bernick v. Jurden*, 306 N.C. 435, 440, 293 S.E.2d 405, 409 (1982). Defendants may meet their burden 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.” *Id.* at 440-41, 293 S.E.2d at 409. “If the moving party meets this burden, the nonmoving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not so doing.” *Id.* at 441, 293 S.E.2d at 409 (internal quotation marks omitted). “In reviewing a superior court order denying a motion for summary judgment, the standard of review is *de novo*.” *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005).

I.

[3] Defendant NCDOC and defendant Florence in his official capacity (collectively “defendants”) first contend plaintiff’s claim for conversion against defendants is barred by sovereign immunity. We agree.

“North Carolina has a well-established common law doctrine of sovereign immunity which prevents a claim for relief against the State except where the State has consented or waived its immunity.” *Harwood*, 326 N.C. at 238, 388 S.E.2d at 443 (citing *Gen. Elec. Co. v. Turner*, 275 N.C. 493, 168 S.E.2d 385 (1969)). “It is also well-settled that when an action is brought against individual officers in their official capacities the action is one against the [S]tate for the purposes of

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applying the doctrine of sovereign immunity.” *Whitaker v. Clark*, 109 N.C. App. 379, 381-82, 427 S.E.2d 142, 143-44, *disc. review and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993).

“The State has absolute immunity in tort actions without regard to whether it is performing a governmental or proprietary function except insofar as it has consented to be sued or otherwise expressly waived its immunity.” *Guthrie*, 307 N.C. at 534, 299 S.E.2d at 625. In other words, “[c]laims for tort liability are allowed only by virtue of the express waiver of the State’s immunity.” *Id.* at 534-35, 299 S.E.2d at 625 (citing *Turner v. Bd. of Educ.*, 250 N.C. 456, 109 S.E.2d 211 (1959)). Under current North Carolina law, “[t]he State has not waived sovereign immunity for intentional torts[—including the intentional tort of conversion—]by action of the Tort Claims Act or other statute.” *Kawai Am. Corp. v. Univ. of N.C. at Chapel Hill*, 152 N.C. App. 163, 167, 567 S.E.2d 215, 218 (2002).

“The Department of Correction is a state agency created for the performance of essentially governmental functions, and a suit against this department is a suit against the State.” *Harwood*, 326 N.C. at 238, 388 S.E.2d at 443 (citing *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960)). Additionally, “the actions of a county and its officials in maintaining confinement facilities within the context of law enforcement services are likewise encompassed within the rubric of governmental functions,” *see Kephart v. Pendergraph*, 131 N.C. App. 559, 563, 507 S.E.2d 915, 918 (1998), and sovereign immunity extends to an assistant superintendent of a county correctional facility in his official capacity when immunity has not been waived. *See Price v. Davis*, 132 N.C. App. 556, 559-60, 512 S.E.2d 783, 786 (1999). Therefore, we conclude that sovereign immunity bars plaintiff’s claim for conversion against defendant NCDOC and defendant Florence, in his official capacity as Assistant Superintendent of Carteret County Correctional, and hold that the trial court erred by not granting summary judgment for these defendants with respect to this claim.

II.

[4] Defendants NCDOC and Florence next contend the trial court erred by denying their motions for summary judgment with respect to plaintiff’s claim of a violation of 42 U.S.C. § 1983 for which he seeks to recover monetary damages. We agree.

The United States Supreme Court has held that, “when an action is brought under section 1983 in state court against the State, its

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agencies, and/or its officials acting in their official capacities, neither a State nor its officials acting in their official capacity are ‘persons’ under section 1983 when the remedy sought is monetary damages.” *Corum v. Univ. of N.C.*, 330 N.C. 761, 771, 413 S.E.2d 276, 282-83, *reh’g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

In his complaint, plaintiff alleges that, as a result of defendants’ “actions or lack thereof” in violation of 42 U.S.C. § 1983, he “has been damaged in excess of ten thousand dollars,” and seeks only to be “awarded cost, interest, and actual attorney fees” pursuant to this claim. Accordingly, we conclude that plaintiff was prohibited from seeking monetary damages from defendants NCDOC and Florence in his official capacity, and hold that the trial court erred by not granting summary judgment for these defendants with respect to this claim.

III.

[5] Finally, defendants NCDOC and Florence contend the trial court erred by denying their motions for summary judgment with respect to plaintiff’s claim that defendants violated the Whistleblower Act. We agree.

North Carolina’s Whistleblower Act, codified in Article 14 of Chapter 126 of the General Statutes, provides:

It is the policy of this State that State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:

- (1) A violation of State or federal law, rule or regulation;
- (2) Fraud;
- (3) Misappropriation of State resources;
- (4) Substantial and specific danger to the public health and safety; or
- (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

N.C. Gen. Stat. § 126-84(a) (2007). The Act also provides:

- (a) No head of any State department, agency or institution or other State employee exercising supervisory authority

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shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84

- (a1) No State employee shall retaliate against another State employee because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84.

N.C. Gen. Stat. § 126-85(a), (a1) (2007). The Act further provides:

Any State employee injured by a violation of G.S. 126-85 may maintain an action in superior court for damages, an injunction, or other remedies provided in this Article against the person or agency who committed the violation within one year after the occurrence of the alleged violation of this Article; provided, however, any claim arising under Article 21 of Chapter 95 of the General Statutes may be maintained pursuant to the provisions of that Article only and may be redressed only by the remedies and relief available under that Article.

N.C. Gen. Stat. § 126-86 (2007). In addition, this Court has determined that “[t]he Whistleblower Act, in providing for specific remedies, represents a clear statutory waiver of sovereign immunity to redress violations of the nature proscribed in G.S. § 126-85.” *Minneman v. Martin*, 114 N.C. App. 616, 619, 442 S.E.2d 564, 566 (1994).

In *Newberne v. Department of Crime Control and Public Safety*, 359 N.C. 782, 794, 618 S.E.2d 201, 209-10 (2005), our Supreme Court established procedures to guide our courts in adjudicating North Carolina Whistleblower Act violation claims. The first step of this procedure requires that “the plaintiff must endeavor to establish a prima facie case of retaliation under the statute[, including] . . . any available ‘direct evidence’ that the adverse employment action was retaliatory along with circumstantial evidence to that effect.” *Newberne*, 359 N.C. at 794, 618 S.E.2d at 209 (citation omitted). To establish a prima facie case, a plaintiff must prove, by a preponderance of the evidence, the following “three essential 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,

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and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.” *Id.* at 788, 618 S.E.2d at 206. In the present case, the parties do not dispute that plaintiff established the first element of this claim. Therefore, we must first determine whether defendants “took *adverse action* against the plaintiff in his . . . employment.” *See id.* (emphasis added).

On 6 February 2006, plaintiff resigned from his employment with defendant NCDOC due to “actions taken” regarding his “employment status, and the inaction taken by the supervising staff to correct and remedy such action.” In his deposition, plaintiff stated the following when questioned about the circumstances surrounding his decision to resign from his employment with defendant NCDOC:

Q. I want you to correct me if I’m wrong, is that you went in and told these—Mr. Harris and Mr. Seifert [sic] that you were, you know, thinking about, if not intending, to resign your employment. I mean what could they have done that would have dissuaded you from that?

A. Well, I mean they tried—they—you know, they tried to talk to me. And I told them—I said—like I said, there was nothing—there was nothing they could do to promise my safety or the fact that I would be, for lack of a better term, blackballed at another unit. So—

. . . .

Q. Are you telling me then that there’s nothing they could have said to have changed your mind about resigning?

A. At that point, probably not.

Q. Well, I mean other than Mr. Seifert [sic] and Mr. Harris, who had you told, you know, at the Department of Correction that you were contemplating resigning your employment before you did so?

A. I think that was it. I mean, you know, my wife and I discussed it.

Plaintiff also stated that he did not speak with any of the other named defendants in the present case about his decision to resign from his employment prior to the time when he submitted his resignation on 6 February. Thus, since, by his own testimony, the only persons affiliated with defendant NCDOC whom plaintiff told about his intent to

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resign tried to discourage him from doing so, we do not consider plaintiff's resignation to be an "employment action" relevant to this claim. Therefore, we review only whether defendants took "*adverse action*" against plaintiff in his employment when plaintiff was reassigned by defendant Florence from his post on the CWP to a post on the same shift in the correctional officer unit rotation at the same correctional facility.

In his complaint, plaintiff claimed that he was "demoted, transferred from his position, . . . and *adverse action* was taken against him as related to the terms, conditions, privileges, and benefits of employment." (Emphasis added.) We agree that "demotions" are undoubtedly "adverse employment actions" subject to review under a Whistleblower Act violation claim, since such actions would reflect "[a]n employer's decision that substantially and negatively affects an employee's job, such as a termination, *demotion*, or pay cut." See *Black's Law Dictionary* 59 (8th ed. 2004) (emphasis added) (defining "adverse employment action"). This is also consistent with the policies identified in defendant NCDOC's Personnel Manual, which allow all decisions to demote an NCDOC employee to be appealed to the State Personnel Commission according to the process described in its Grievance Policy and Procedures pursuant to Chapter 126 of the General Statutes. However, NCDOC's internal Administrative Grievance process—developed "to resolve non-disciplinary, nondiscriminatory problems arising from employment at the lowest possible level," which are not appealable to the State Personnel Commission—*specifically excludes* "Shift, Post, or Job Assignments" and "Reassignments of duty station" from its internal grievance review. In other words, a reassignment of an NCDOC employee's post or duties is an employment action which is neither appealable to the State Personnel Commission nor appealable under NCDOC's internal Administrative Grievance process.

In the present case, following an investigation regarding plaintiff's October 2005 grievance about his reassignment from the CWP, plaintiff received a letter in November 2005 from defendant White concluding that, since "Shift, Post and Duty station are excluded from the Administrative Grievance Process," the decision to reassign plaintiff to the correctional officer unit rotation from the CWP was "appropriate at this time." Thus, following an internal departmental investigation, plaintiff's reassignment was determined to be an action which was specifically excluded from further review as a non-appealable, non-disciplinary action.

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Additionally, in his 20 November 2007 deposition, when plaintiff was asked whether he had ever had “any promotions” or “any demotions” during the course of his employment for defendant NCDOC at Carteret Correctional, he answered, “No.” He also stated that the only salary increases he had received from the time he began working for defendant NCDOC in 2000, until his resignation in February 2006, were those increases provided by the General Assembly. When asked whether he considered his first reassignment—from his post on the correctional officer unit rotation, to his post on the CWP’s litter squad—as “a promotion in any way,” plaintiff said, “No, I—no.” Further, when specifically asked whether plaintiff, “in any way consider[ed] this reassignment [from his post on the CWP to his post in the correctional officer unit rotation] a demotion,” plaintiff answered, “No.” Plaintiff then stated:

Q. And your earlier testimony was that that [reassignment at the end of September 2005] was not a demotion. Do you stand by that?

A. It wasn’t a demotion as in pay.

Q. I mean what other kind of demotion is there—

A. (interposing) It’s—

Q. —in the Department of Correction?

A. Because—it was a demotion because I was taken away from my squad. *And it wasn’t the fact that I was being taken away from my squad. It was the reason—the reasoning behind.*

Plaintiff also admitted that he suffered “no pay loss” as a result of his reassignment from the CWP, where he was also assigned to work the same shift, but did not further describe why he considered this reassignment to be “adverse.” Rather, the only evidence supporting plaintiff’s allegation that his reassignment from the CWP to the unit rotation was “adverse” is the following statement taken from his 17 October 2005 letter to defendant Bennett: “I would like to say that I like my job and have received many satisfied moments of accomplishment from the work that we do. . . . The communities that we serve are appreciative and the inmates are given a chance to give something back to the society they have wronged.”

This Court has previously determined that an employee placed in a “position of higher respect” and “given supervisory authority” over one’s peers, “without regard to the presence or absence of any con-

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comitant salary increase,” has been “promoted.” *Edwards v. Univ. of N.C. at Chapel Hill*, 107 N.C. App. 606, 610, 421 S.E.2d 383, 385-86, *disc. review and supersedeas denied*, 333 N.C. 167, 424 S.E.2d 909 (1992). However, in the present case, plaintiff was reassigned from a position supervising inmates working in the CWP to supervising inmates in the correctional facility unit. Although the absence of a change in salary may not be determinative when considering whether an employee has been “promoted” or, likely, “demoted,” based on a thorough review of plaintiff’s deposition and the evidence in the record, we find that plaintiff’s only support for his complaint that the reassignment from the CWP was “adverse” was that, by not working with the CWP, he might be deprived of the opportunity to have another “satisf[y]ing moment[.]” at work. On these facts, we cannot conclude that the important protections afforded to State employees from retaliatory employment decisions under the Whistleblower Act extend to the employment action taken in this case, where the only articulable adverse effect on this employee was that he might not have as many “moments” of personal satisfaction in the post to which he was reassigned.

Therefore, we conclude that plaintiff has not forecast evidence that defendants “took *adverse action* against the plaintiff in his . . . employment,” *see Newberne*, 359 N.C. at 788, 618 S.E.2d at 206 (emphasis added), and that defendants have shown that plaintiff “cannot produce evidence to support an essential element” of his claim. *See Bernick*, 306 N.C. at 440-41, 293 S.E.2d at 409. Since plaintiff’s own deposition and other evidence in the record before us have not shown that a genuine issue of material fact exists for trial on this issue, *see id.* at 441, 293 S.E.2d 409, we must hold that the trial court erred by denying defendants’ motions for summary judgment as to this claim. Accordingly, we do not need to consider whether plaintiff established the third element of his *prima facie* claim of a violation pursuant to the Whistleblower Act.

Reversed and Remanded for further proceedings consistent with this opinion.

Judges WYNN and STEPHENS concur.

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REBECCA P. JONES, PLAINTIFF v. SUSAN L. SKELLEY, DEFENDANT

No. COA08-387

(Filed 3 March 2009)

1. Alienation of Affections— subject matter jurisdiction— activity in North and South Carolina

The trial court erred by granting summary judgment for defendant on an alienation of affections claim based on lack of subject matter jurisdiction where plaintiff lived in South Carolina, which does not recognize alienation of affections, defendant lived in North and South Carolina, and some of the acts occurred in South Carolina and some in North Carolina. When the evidence is viewed in the light most favorable to plaintiff, a material issue of fact exists as to whether the alleged alienation of affections occurred in North or South Carolina, especially given the clandestine phone calls made by defendant to plaintiff's husband, the sexual acts that admittedly and allegedly occurred at defendant's North Carolina condominium, and a trip to North Carolina during which defendant and plaintiff's husband admittedly had sexual intercourse.

2. Criminal Conversation— subject matter jurisdiction— South Carolina residents—lex loci delicti

The trial court erred by granting summary judgment for defendant on a criminal conversation claim based on lack of subject matter jurisdiction, and should have granted summary judgment for plaintiff. There was no material question of fact that defendant engaged in sexual intercourse with plaintiff's husband in North Carolina while plaintiff and her husband were still married and prior to the execution of a separation agreement. Although defendant argued that North Carolina has no interest in the sexual relationship of South Carolina residents, the law of the place where the tort was committed controls.

Appeal by plaintiff from an order entered 27 November 2007 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 22 October 2008.

Gailor, Wallis & Hunt, P.L.L.C., by Kimberly A. Wallis and Jaime H. Davis, for plaintiff-appellant.

Jess, Isenberg & Thompson, by Laura E. Thompson, for defendant-appellee.

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HUNTER, Robert C., Judge.

Rebecca P. Jones (“plaintiff”) appeals from an order granting summary judgment in favor of defendant Susan L. Skelley (“defendant”) and dismissing plaintiff’s claims for alienation of affections and criminal conversation based on lack of subject matter jurisdiction. After careful review, we reverse and remand.

I.

Background

On 16 March 2006, plaintiff filed a complaint against defendant in Brunswick County Superior Court asserting claims for alienation of affections and criminal conversation. On 1 November 2007, plaintiff filed a motion for summary judgment as to her criminal conversation claim. On 13 November 2007, defendant filed a motion for summary judgment seeking dismissal of plaintiff’s claims for lack of subject matter jurisdiction, or in the alternative, for an order granting defendant’s motion for the application of South Carolina law. At the motions hearing, defendant conceded that she had stipulated to personal jurisdiction.¹ However, defendant argued, *inter alia*, that because the majority of her alleged acts which purportedly alienated the affections of plaintiff’s spouse, Phil V. Jones (“Mr. Jones”), occurred in South Carolina, and because plaintiff lived in South Carolina at all times, any tortious injury had to occur in South Carolina. Because South Carolina does not recognize the tort of alienation of affections, defendant asserted that the trial court lacked subject matter jurisdiction and was required to dismiss the alienation of affections claim. As to the criminal conversation claim, defendant contended that even though she had engaged in sexual intercourse with Mr. Jones in North Carolina in June 2004 while the Joneses were still married, the court lacked subject matter jurisdiction because South Carolina abolished the tort of criminal conversation and any injury or damage would have occurred in South Carolina given that the Joneses were residents of South Carolina.

Plaintiff argued that North Carolina law is clear that for alienation of affections, the tortious injury or harm occurs where a defendant’s alienating acts occur and that for criminal conversation, said injury occurs where the sexual intercourse occurs, not where a plaintiff resides. She asserted that because defendant’s alienating acts occurred in both North Carolina and South Carolina, there was a

1. Defendant also admits to stipulating to personal jurisdiction in this matter on appeal.

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material question of fact as to where the tortious injury occurred and consequently, whether North Carolina or South Carolina law applied. As to the criminal conversation claim, plaintiff contended that North Carolina law is clear that a defendant can be liable for a single act of post-separation sexual intercourse with another's spouse in North Carolina, and given that defendant admitted to engaging in sexual intercourse with her husband in North Carolina while they were still married, she, not defendant, was entitled to summary judgment.

The trial court granted summary judgment based on lack of subject matter jurisdiction and dismissed both claims. Plaintiff appeals.

Standard of Review

Under Rule 56, summary judgment shall be entered "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."

Mortgage Co. v. Real Estate, Inc., 39 N.C. App. 1, 3, 249 S.E.2d 727, 729 (1978) (citations omitted), *affirmed per curiam*, 297 N.C. 696, 256 S.E.2d 688 (1979).

The burden of establishing the lack of any triable issue of fact is on the party moving for summary judgment, and the movant's papers are carefully scrutinized while those of the opposing party are regarded with indulgence. The movant can satisfy this burden either by proving that an essential element of the opposing party's claim is nonexistent or by showing, through discovery, that the opposing party cannot produce evidence to support an essential element of its claim.

Id. at 4, 249 S.E.2d at 729 (citations omitted). While courts must determine if a genuine issue of material fact exists, they are not authorized to decide an issue of material fact. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979). Further, "if there is any question as to the credibility of affiants in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 655, 268 S.E.2d 190, 193-94 (1980) (citations omitted). In ruling on a motion for summary judgment, " 'the evidence is viewed in the light most favorable to the non-moving party,' and all inferences of fact must be drawn against the movant and in favor of the nonmovant.' " *Koenig v. Town*

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of *Kure Beach*, 178 N.C. App. 500, 503, 631 S.E.2d 884, 887 (2006) (citations omitted). The standard of review is *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

Viewed in the light most favorable to plaintiff, the evidence tends to show that plaintiff and Mr. Jones married in 1974, moved to South Carolina from North Carolina in 1979, and had eleven children during their marriage. They separated on 29 January 2004 but did not enter a formal separation agreement until 21 January 2005. On 31 January 2005, plaintiff filed for divorce in South Carolina, and on 4 March 2005, she and Mr. Jones divorced. Defendant admitted that she lived in North Carolina until mid-August 2003 and between March and May of 2004. At the time plaintiff filed her complaint, defendant lived in South Carolina. Plaintiff has resided in South Carolina since 1979. Mr. Jones has lived in South Carolina since 1979 as well, with the exception of spending the majority of the 2003 summer living in a friend's trailer in North Carolina.

Beginning in January 2003, defendant and Mr. Jones began conversing with some regularity via cell phone. Both testified that their relationship began to deepen in the spring of 2003. Defendant testified that she and Mr. Jones began to talk frequently via cell phone in the spring of 2003 and that they would also occasionally meet in parking lots. Defendant and Mr. Jones both admitted that they concealed their phone conversations, these meetings, and their relationship from their respective spouses. Mr. Jones testified that he hid this information from his wife because his relationship with defendant "was too close." Defendant admitted to having secret, lengthy, phone conversations with Mr. Jones and that she remembered being "very close to" Mr. Jones before May 2003. She further testified that in February or March 2003, during a rendezvous in a South Carolina parking lot, Mr. Jones gave her a letter stating that "he had fallen in love with [her]."

On or about 12 May 2003, plaintiff was diagnosed with genital herpes. After her diagnosis, Mr. Jones left the marital household for the majority of the 2003 summer, and the Joneses began marriage counseling. Mr. Jones testified that he had never been diagnosed with genital herpes. He did testify that he had a "rash" on his penis and that he believed he had told defendant about this fact; however, Mr. Jones could not explain why he would have told defendant about the rash given that he denied having any sexual contact with her prior to this time. On 15 May 2003, defendant was prescribed Valtrex, a drug used

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to treat the herpes virus; however, she testified that she had never been diagnosed with herpes and that the drug was prescribed to treat fever blisters.

For two to three months during the 2003 summer, Mr. Jones lived in North Carolina in a friend's trailer. In May 2003, defendant left her marital home in North Carolina and moved into a condominium in North Carolina. Mr. Jones testified that during the 2003 summer, he and defendant became "affectionate" but that they only engaged in hugging at her North Carolina condominium. Despite testifying several times that only hugging occurred at her North Carolina apartment, defendant ultimately admitted that she and Mr. Jones engaged in hugging and kissing throughout the 2003 summer. Plaintiff testified that in August 2003, Mr. Jones admitted to her that he had engaged in sexual intercourse with defendant at her North Carolina condominium during the 2003 summer and that he had engaged in "sexual touching" with defendant prior to May 2003. In addition, on 6 June 2003, plaintiff went to a home where Mr. Jones was performing construction and found defendant hiding in a closet, albeit fully clothed. When asked at her deposition why she was hiding in the closet, defendant testified that she did not want to confront plaintiff. Plaintiff claims this home was located in Cherry Grove, North Carolina and defendant asserts it was located in Cherry Grove, South Carolina.

On or about 21 August 2003, plaintiff allowed Mr. Jones to return to the marital residence because he promised her that he had ended his relationship with defendant and because plaintiff wanted to work on their marriage. Toward the end of August, defendant attended a treatment facility in Arizona known as "the Meadows." Defendant admitted that while there, she wrote a letter to Mr. Jones almost every day and sent them to a secret, prearranged post office box in Surfside, South Carolina. She further admitted that in these letters, she and Mr. Jones expressed their love for each other. Mr. Jones testified that defendant sent him the letters at this post office box "so she could—just so she could mail me something. So no one would know about it obviously." He further testified that he and defendant were going to great lengths to hide their relationship "[b]ecause it was an inappropriate emotional relationship" in that it was "too close" for two people who were married to other individuals.

On 7 October 2003, Mr. Jones left the marital residence for a second time because plaintiff believed that he and defendant were continuing to see each other and converse on the telephone. On or

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about 2 November 2003, the Joneses resumed living together. Plaintiff testified that Mr. Jones left the marital residence for a third time on 29 January 2004, but that they resumed marriage counseling with the goal of Mr. Jones returning to the marital home by June 2004.

In May 2004, plaintiff discovered Mr. Jones and defendant in bed together in the middle of the night at a residence in South Carolina. Defendant and Mr. Jones both admitted that they engaged in sexual intercourse on that day, but claimed that it was the first time that they had done so. Both defendant and Mr. Jones admitted that approximately one month later, in June 2004, they went on a weekend trip to Wilmington and New Bern, North Carolina where they engaged in sexual intercourse. Defendant admitted to paying for the majority of expenses for this trip. Though Mr. Jones initially testified that he and defendant only had sex on these two occasions, he ultimately admitted that he and defendant began having sex on a regular basis beginning in May 2004 and that he was currently in a committed relationship with defendant.

On 21 January 2005, plaintiff and Mr. Jones signed a formal separation agreement, and on 4 March 2005, they divorced. Mr. Jones testified that his relationship with defendant contributed to the downfall of his marriage.

II. Analysis

A. Alienation of Affections

[1] On appeal, both parties largely reiterate the arguments raised below. Plaintiff contends a material issue of fact exists as to the state in which the alleged alienation of affections occurred, North Carolina, which recognizes the tort, or South Carolina, which has abolished the tort, particularly given this Court's decision in *Darnell v. Rupplin*, 91 N.C. App. 349, 371 S.E.2d 743 (1988).

Defendant asserts that no material question of fact exists as to the state in which the alleged alienation occurred because virtually all of the activity which purportedly alienated Mr. Jones's affections occurred in South Carolina and the "minimal acts that took place in North Carolina could not have and did not cause any alienation of affection between the Plaintiff and [Mr.] Jones." Specifically, plaintiff argues: (1) the 2003 cell phone calls she made to Mr. Jones while she resided in North Carolina were not "wrongful and malicious conduct"; (2) any alleged alienating acts that occurred in North Carolina prior to Mr. Jones moving back into the marital household in August

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and November 2003 could not have alienated Mr. Jones's affections because the fact that Mr. Jones returned to the marital residence shows he and plaintiff reconciled; (3) the June 2004 trip to North Carolina could not have alienated Mr. Jones's affections because "Plaintiff was already divorced [from Mr. Jones] when she learned of said trip" and because defendant and Mr. Jones embarked on said trip after plaintiff had told defendant " 'I don't want him; you can have him' " subsequent to finding Mr. Jones and defendant in bed together in May 2004; and (4) if any alienation did occur, it occurred in South Carolina either during a November 2004 conversation between defendant and plaintiff or during a January 2005 incident in which plaintiff discovered Mr. Jones spending the night at defendant's residence in South Carolina because plaintiff testified that after these incidents she realized she was probably going to have to file for divorce.

Viewing the evidence in its proper light, we agree with plaintiff that the evidence here is sufficient to survive defendant's motion for summary judgment.

"A claim for alienation of affections is a transitory tort because it is based on transactions that can take place anywhere and that harm the marital relationship." *Darnell*, 91 N.C. App. at 351, 371 S.E.2d at 745 (citations omitted). "The substantive law applicable to a transitory tort is the law of the state where the tortious injury occurred, and not the substantive law of the forum state." *Id.* (citations omitted). The issue of where the tortious injury occurs, and accordingly which state's law applies, is based on where the alleged alienating conduct occurred, not the locus of the plaintiff's residence or marriage. *Id.*; see also Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts* § 11.25, at 109, n.47 (2d ed. 1999) [hereinafter, Daye, *Torts*] (stating that the "law applicable to determine whether alienation of affections occurred is that of the state in which the conduct occurred"); 1 Robert E. Lee, *North Carolina Family Law* § 5.50, at 421 (5th ed. 1993) [hereinafter Lee, *Family Law*] (stating that "the Court of Appeals [has] found [in *Darnell*] that the place where the conduct occurred should govern [which state's law applies] in an action for alienation of affections") (footnote omitted). Accordingly, where the "defendant's involvement with [the] plaintiff's [spouse]" spans multiple states, for "North Carolina substantive law . . . [to] appl[y]," a plaintiff must show that "the tortious injury . . . occurred in North Carolina." *Darnell*, 91 N.C. App. at 351, 371 S.E.2d at 745. Thus, if the tortious injury occurs in a state that does not recognize

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alienation of affections, the case “cannot be tried in a North Carolina court.” *Id.* (citations omitted).

To establish a claim for alienation of affections, plaintiff’s evidence must prove: “(1) plaintiff and [her husband] were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the wrongful and malicious acts of defendant produced the alienation of affections.”

Id. at 350-51, 371 S.E.2d at 745 (citations omitted; alteration in original).

A claim for “alienation of affections is comprised of wrongful acts which deprive a married person of the affections of his or her spouse—love, society, companionship and comfort of the other spouse. . . . The gist of the tort is an interference with one spouse’s mental attitude toward the other, and the conjugal kindness of the marital relation. . . . [Evidence of alienation] is sufficient if there is no more than a partial loss of [a spouse’s] affections.”

Id. at 350, 371 S.E.2d at 744 (citations omitted; alterations in original). “[A]n alienation of affections claim” does not have “to be based on pre-separation conduct alone.” *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006). Furthermore:

Destruction of the marriage . . . is not a necessary element of the action. Rather, the action lies for the diminution of affection within the marital relationship. Thus, while damages will obviously be affected, the action lies for the diminished affection, and a partial loss of affection is sufficient to support the action.

Daye, *Torts* § 11.22.2, at 107 (footnotes omitted). Finally, as this Court stated in *Darnell*, even if it is difficult to discern where the tortious injury occurred, the issue is generally one for the jury:

We recognize that the injury attributable to the alienation of another’s affections is a nebulous concept, which, unlike a broken bone, is not a readily identifiable event. The establishment of this tortious injury is further complicated because it may be sustained through one act or through successive acts of a defendant.

However, even with this knowledge, as long as this cause of action exists in North Carolina, we conclude that the issue of

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where the tort took place may not be kept from a jury simply because it is difficult to discern.

Darnell, 91 N.C. App. at 354, 371 S.E.2d at 747.

Here, when the evidence is viewed in the light most favorable to plaintiff, we believe a material question of fact exists as to whether the alleged alienation of Mr. Jones's affections occurred in North Carolina or South Carolina, especially given the clandestine phone calls defendant made to Mr. Jones in the spring and summer of 2003, the sexual acts that admittedly and allegedly occurred during the 2003 summer at defendant's North Carolina condominium, and the 2004 trip to North Carolina during which defendant and Mr. Jones admitted to engaging in sexual intercourse.

While defendant cites this Court's decision in *Coachman v. Gould*, 122 N.C. App. 443, 470 S.E.2d 560 (1996), for the proposition that summary judgment is proper here and that the telephone calls she made from North Carolina to South Carolina, were not "wrongful and malicious conduct," we disagree. "A malicious act, in the context of an alienation of affection claim, has been loosely defined to include any intentional conduct that 'would probably affect the marital relationship.'" *Pharr v. Beck*, 147 N.C. App. 268, 272, 554 S.E.2d 851, 854 (2001) (citations and footnote omitted), *overruled in part on other grounds by, McCutchen*, 360 N.C. at 285, 624 S.E.2d at 624-25. "[M]alicious acts . . . are acts constituting 'unjustifiable conduct causing the injury complained of.'" *Coachman*, 122 N.C. App. at 448, 470 S.E.2d at 564 (citations omitted). In granting summary judgment in the defendant's favor on the alienation of affections claim in *Coachman*, this Court specifically noted that "the only possible wrongful and malicious instances of conduct by [the defendant we]re the phone calls [the defendant] made to the marital home[.]" *Id.* The Court concluded that the lengthy phone conversations between the defendant, who resided in Florida, and the plaintiff's spouse, who resided in North Carolina, were not "sufficient evidence of malicious and wrongful conduct" because the plaintiff admitted that the defendant and his wife had an ongoing business relationship, which provided "a valid; inoffensive reason for calling the [marital] home" and because "[t]here [wa]s no indication that the phone conversations were marked by salacious whisperings, plans for clandestine meetings, or any other intonation of improper conduct by defendant." *Id.* In contrast, in the instant case, not only is there more evidence to support plaintiff's alienation of affections claim than existed in

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Coachman, defendant and Mr. Jones intentionally concealed: These phone conversations; their in-person meetings with each other, which they arranged via these phone conversations; and their relationship from their respective spouses.

Next, defendant argues that these phone calls, the clandestine in-person meetings, and the sexual activity that occurred at her North Carolina condominium during the summer of 2003 did not alienate the affections of Mr. Jones because subsequent to these events, Mr. Jones returned to the marital home and agreed to work on his marriage. We disagree.

First, we note that defendant's argument appears to assume that simply because a plaintiff and her spouse agree to resume living together in the marital home and work on their marriage following a defendant's alleged interference in their marriage, no alienation of affections has occurred. Defendant's argument is contrary to North Carolina law and ignores the fact that "diminution or destruction [of love and affection] often does not happen all at once. "[Rather] [t]he mischief is a continuing one[.]'" *McCutchen*, 360 N.C. at 284, 624 S.E.2d at 623-24 (citations omitted). Furthermore, the mere fact that plaintiff and Mr. Jones attempted to reconcile, does not conclusively negate the fact that "a partial loss of [Mr. Jones's] affections" could have occurred. *Darnell*, 91 N.C. App. at 350, 371 S.E.2d at 744 (citation omitted). As stated by our Supreme Court, "the fact that spouses continue living together after the alleged alienation does not preclude the possibility that alienation of affections has already occurred." *McCutchen*, 360 N.C. at 284, 624 S.E.2d at 624 (citation omitted). See also, 1 Lloyd T. Kelso, *North Carolina Family Law Practice* § 5:9, at 277 (2008) ("[t]he fact that the [wife] continues to live with the [husband] after knowledge of [his] adultery, but without condoning it, is no defense, and the fact that the plaintiff and her or his spouse continue to live in the same house after the spouse's affections have allegedly been alienated affects only the credibility of the plaintiff's testimony, and is not a defense to a claim of alienation of affections") (footnotes omitted). As such, the alleged alienating acts that occurred in North Carolina prior to Mr. Jones's brief returns to the marital residence in August and November 2003 respectively are relevant and material in determining where the tortious injury occurred.

Next, defendant argues that her June 2004 trip to North Carolina with Mr. Jones, during which they engaged in sexual intercourse, "could not possibly have alienated the affection of [Mr.] Jones from

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Plaintiff because plaintiff was already divorced [from him] when she learned of said trip[,]” and because when she called plaintiff to apologize for hurting her after plaintiff had found defendant and Mr. Jones in bed together in May 2004, plaintiff told her “ ‘I don’t want him; you can have him.’ ” We disagree.

First, defendant does not cite any authority to establish that a plaintiff-spouse must show that she was aware of every alienating act prior to divorce in order to assert said acts alienated her spouse’s affection. And, we fail to discern how a plaintiff’s lack of awareness as to a particular alienating act prior to divorce conclusively negates the fact that said act might have sufficiently diminished her spouse’s affections toward her. In addition, defendant makes no argument and cites no authority as to how plaintiff’s statement that she did not want Mr. Jones and that defendant could have him, which plaintiff testified was made in a state of anger, conclusively negates the fact that the 2004 trip to North Carolina alienated Mr. Jones’s affections. To the extent that defendant’s brief implicates the argument that plaintiff consented to such activity, we decline to address this issue as defendant neither raised nor argued the defense of consent below nor does she argue it or cite any authority in support thereof in her brief.

Finally, defendant appears to argue that if any alienation occurred here, it conclusively did not occur until November 2004 when plaintiff purportedly realized via a discussion with defendant in South Carolina that she was going to have to get a divorce, or until January 2005, when plaintiff discovered defendant and Mr. Jones together at defendant’s South Carolina residence, which purportedly prompted plaintiff to file for divorce. We disagree. As we stated *supra*, “[d]estruction of the marriage . . . is not a necessary element of [alienation of affections]. Rather, the action lies for the diminution of affection within the marital relationship.” Daye, *Torts* § 11.22.2, at 107 (footnote omitted). Hence, while this evidence supports the fact that prior to this point, plaintiff was still trying to salvage her marriage with Mr. Jones and that she believed it was still possible, this does not conclusively negate the fact that defendant might have already sufficiently alienated Mr. Jones’s affections toward plaintiff. Furthermore, we note that when viewed in the light most favorable to plaintiff, the November 2004 conversation actually lends support to plaintiff’s claim that the alienation had already occurred and that defendant was puzzled as to how plaintiff had not already grasped that fact. Specifically, defendant allegedly stated to plaintiff:

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“Don’t you get it? What does it take for you to get it? I wonder just what does it take for you to get it. You catch us here and there and, you know, at The Collins and all these telephone conversations. What does it take for you? I just don’t understand[.]”

In sum, because we conclude that when the evidence here is viewed in the light most favorable to plaintiff, a material issue of fact exists as to whether the alleged alienation of affections occurred in North Carolina or South Carolina, we hold the trial court erred in granting summary judgment based on lack of subject matter jurisdiction.

B. Criminal Conversation

[2] Plaintiff asserts the court erred with respect to her criminal conversation claim because North Carolina law is clear that she, not defendant, was entitled to summary judgment. Although defendant “acknowledges case law to the contrary[,]” she argues that a single occurrence of sexual intercourse between her and Mr. Jones in North Carolina in June 2004, which occurred while plaintiff and her husband were separated and subsequent to plaintiff telling her that she did not want Mr. Jones, “does not constitute an interest of the State to give North Carolina subject matter jurisdiction.” We agree with plaintiff.

“To withstand [a] defendant’s motion for summary judgment on [a] claim of criminal conversation, plaintiff must present evidence demonstrating: ‘(1) marriage between the spouses and (2) sexual intercourse between defendant and plaintiff’s spouse during the marriage.’ ” *Coachman*, 122 N.C. App. at 446, 470 S.E.2d at 563 (citation omitted). In addition, a plaintiff must also show “that the tortious injuries . . . [the] criminal conversation, occurred in North Carolina before North Carolina substantive law can be applied.” *Cooper v. Shealy*, 140 N.C. App. 729, 736, 537 S.E.2d 854, 859 (2000) (citation omitted). Consequently, a plaintiff must show that a defendant engaged in sexual intercourse with her spouse in North Carolina. North Carolina law is clear that a claim for criminal conversation can be based solely on post-separation conduct. *Johnson v. Pearce*, 148 N.C. App. 199, 201, 557 S.E.2d 189, 190-91 (2001). Even where spouses enter into a separation agreement containing provisions which purportedly address and waive their “ ‘right to exclusive sexual intercourse’ with the other,” this Court, reasoning that such “provision[s] relate[] only to the spouse[’s] rights against each other” and not against third parties, has held that “the existence of [such a] separa-

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tion agreement between [a] plaintiff and [her spouse] does not shield [a] defendant from liability for criminal conversation based on [a defendant's] post-separation sexual relationship with [the plaintiff's spouse]." *Nunn v. Allen*, 154 N.C. App. 523, 536, 574 S.E.2d 35, 43-44 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 630 (2003). Finally, a plaintiff may recover for criminal conversation where the evidence merely shows a single encounter of sexual intercourse between a defendant and her spouse. *See, e.g., Warner v. Torrence*, 2 N.C. App. 384, 163 S.E.2d 90 (1968).

Here, there is no material question of fact that defendant engaged in sexual intercourse with Mr. Jones in North Carolina while he and plaintiff were still married and prior to the execution of a separation agreement. While defendant argues that North Carolina does not have subject matter jurisdiction because at the time the June 2004 intercourse occurred, neither the parties nor Mr. Jones were residents of North Carolina and because North Carolina "has no interest in the exclusive right of the sexual relationship" between South Carolina residents, we note that "[i]n actions arising in tort, [North Carolina employs] the doctrine of *lex loci delicti* [which] provides that the law of the state where the tort was allegedly committed controls the substantive issues of the case." *Gbye v. Gbye*, 130 N.C. App. 585, 585, 503 S.E.2d 434, 434 (citation omitted), *disc. review denied*, 349 N.C. 357, 517 S.E.2d 893 (1998). "North Carolina case law reveals a steadfast adherence by our courts to the traditional application of the *lex loci delicti* doctrine." *Id.* at 587, 503 S.E.2d at 435 (citations omitted). Furthermore, as noted by this Court, our Supreme Court has stated that "*lex loci delicti* is a rule not to be abandoned in this State[.]" *Id.* at 588, 503 S.E.2d at 436 (citing *Boudreau v. Baughman*, 322 N.C. 331, 336, 368 S.E.2d 849, 854 (1988)). Accordingly, we hold that the trial court erred in granting summary judgment based on lack of subject matter jurisdiction in defendant's favor and that the trial court should have entered summary judgment in plaintiff's favor as there is no issue of material fact regarding plaintiff's criminal conversation claim arising out of the June 2004 sexual intercourse and plaintiff was entitled to judgment as a matter of law.

We note that while the vast majority of states have abolished the torts of alienation of affections and criminal conversation, our Supreme Court has clearly stated that both torts exist in North Carolina and that only our legislature or our Supreme Court can abolish them. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985). Furthermore, until the legislature or Supreme Court acts to modify

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these torts, we are bound both by the decisions of that Court as well as by prior decisions of this Court. *Johnson*, 148 N.C. App. at 202, 557 S.E.2d at 191 (citations omitted).

III. Conclusion

In sum, we conclude that the trial court erred in granting summary judgment in defendant's favor and dismissing plaintiff's claim for alienation of affections based on lack of subject matter jurisdiction because when the evidence is viewed in the light most favorable to plaintiff, a material question of fact exists as to the state in which defendant's alleged alienation of Mr. Jones's affections occurred. We further conclude that the trial court erred in granting summary judgment in defendant's favor and dismissing plaintiff's criminal conversation claim because it is undisputed that defendant engaged in sexual intercourse with Mr. Jones in North Carolina in June 2004, while he was still married to plaintiff; as such, plaintiff, not defendant, was entitled to summary judgment on the criminal conversation claim. Accordingly, we reverse the trial court's order and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges ELMORE and GEER concur.

JAMES M. ERICKSON, EMPLOYEE, PLAINTIFF v. LEAR SIEGLER, EMPLOYER, AMERICAN
MOTORIST INSURANCE, CARRIER, DEFENDANTS

No. COA07-1420

(Filed 3 March 2009)

1. Workers' Compensation— complaint of lumbar spine pain—jurisdiction over cervical spine injury—Form 63—Form 33 request for hearing

The filing by defendant employer and defendant workers' compensation carrier of a Form 63—Notice of Payment of Compensation Without Prejudice invoked the Industrial Commission's jurisdiction over plaintiff employee's cervical spine condition as well as his lumbar spine condition arising as a result of a workplace accident, although plaintiff initially complained of lumbar

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pain and did not file a separate claim for a cervical injury within two years after the accident, where the Form 63 specifically acknowledged plaintiff's claim for "injury on 06/06/2002" and did not purport to limit the claim to any particular body part or portion of the spine, and one of plaintiff's expert witnesses ultimately determined that a cervical spine injury, as well as a lumbar spine injury, was contributing to the pain experienced by plaintiff following the accident. Even if plaintiff's cervical spine condition required the filing of its own claim, plaintiff invoked the jurisdiction of the Industrial Commission over his cervical spine condition under N.C.G.S. § 97-24(a)(ii) by filing a Form 33 requesting a hearing on his claim of injury to his upper, middle and lower back within two years after defendants paid for treatment that included treatment of plaintiff's cervical spine condition.

2. Workers' Compensation— expert testimony—"likely" cause of injury

The evidence supported the Industrial Commission's finding that plaintiff's cervical spine condition (neck injury) was causally related to his workplace accident, even though plaintiff complained of lower back and leg pain and testified that he felt a pop in his back rather than in his neck, where the neurosurgeon who performed surgery on plaintiff testified that it was "likely" that the accident caused plaintiff's neck injury.

3. Workers' Compensation— average weekly wage—calculation

The Industrial Commission's calculation of plaintiff employee's average weekly as \$662.06 under N.C.G.S. § 97-2(5) in a workers' compensation case is remanded for further findings of fact because it cannot be determined how the Commission reached its conclusion.

Appeal by defendants from opinion and award entered 24 August 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 April 2008.

Brumbaugh, Mu & King, P.A., by Maggie S. Bennington, for plaintiff-appellee.

Wilson & Rattledge, PLLC, by Kristine L. Prati, for defendants-appellants.

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GEER, Judge.

Defendants Lear Siegler and American Motorist Insurance appeal the opinion and award of the Full Commission concluding that plaintiff James M. Erickson's cervical spine condition was a compensable injury. Defendants have not disputed that plaintiff suffered a compensable back injury, but contend that any workers' compensation benefits should be limited to disability and medical expenses arising out of plaintiff's lower back condition rather than his cervical spine condition. We find unpersuasive defendants' contention that the Commission's jurisdiction was timely invoked only as to a lumbar spine condition and not as to a cervical spine condition. Since, in addition, the record contains competent expert testimony supporting the Commission's determination that the compensable workplace accident caused the cervical spine condition, we affirm the Commission's opinion and award as to the cervical spine condition. We must, however, remand for further findings of fact regarding plaintiff's average weekly wage.

Facts

At the time of the hearing before the deputy commissioner, plaintiff was 57 years old. Plaintiff had served in the United States Army for 26 years, retiring in 1993. In November 1999, plaintiff was hired by defendant Lear Siegler as a mechanic. After working with Lear Siegler for two years, plaintiff was assigned to repair military vehicles.

On 6 June 2002, plaintiff was working on a water trailer and needed to change the axle. Plaintiff first removed the 150-pound wheel and hub and then removed the lug nuts and axle. After removing the axle, plaintiff stood up and turned to the right. As he turned, he felt a "pop" in his back and collapsed on the floor. Eventually, plaintiff stood back up, put away his tools, and went home for the day. The next morning, plaintiff could not get out of bed. He called Lear Siegler, told them what had happened the day before, and explained that he could not get out of bed.

Plaintiff experienced pain from his "neck on down," including pain in his arms and legs. Plaintiff made an attempt to go to work the following Monday, 10 June 2002, but his supervisor informed him that he needed a note from a doctor before returning to work. Lear Siegler did not, however, refer plaintiff to any doctor for medical treatment.

Plaintiff sought treatment at the Veterans Administration Hospital ("VA Hospital") on 11 June 2002. He was diagnosed with an

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exacerbation of lumbar disc disease and was referred for an MRI. An MRI was not, however, performed at that time. On 14 June 2002, plaintiff returned to the VA Hospital for re-evaluation of his lower back pain. He was prescribed 500 milligrams of Naproxen, and seven days of bed rest was recommended. Plaintiff returned again to the VA Hospital on 24 June 2002, complaining of lower back pain and pain radiating in his arms and legs. During the course of his treatment at the VA Hospital, the medical providers never gave plaintiff a release to return to work. Plaintiff has not, in fact, worked at Lear Siegler since 6 June 2002.

On 27 June 2002, defendants filed a Form 19 with the Industrial Commission. On 10 July 2002, defendants completed a Form 63—Notice to Employee of Payment of Compensation Without Prejudice—acknowledging (1) plaintiff’s “claim” for “injury on 06/06/2002” and (2) that defendant-employer had “actual notice of employee’s injury” on 7 June 2002. Defendants stated in the Form 63 that plaintiff’s disability began on 7 June 2002 and that the first payment had been made to him on 27 June 2002. After filing the Form 63, defendants did not subsequently deny the claim within the time specified by N.C. Gen. Stat. § 97-18(d) (2007) (providing, upon payment without prejudice, that “[i]f the employer or insurer does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury or death, or within such additional period as may be granted by the Commission, it waives the right to contest the compensability of and its liability for the claim under this Article”).

Defendants began directing plaintiff’s medical treatment by arranging for plaintiff to be seen by Dr. Timothy R. Detamore at Carolina Neurosurgical Services, P.A. on 14 August 2002. Dr. Detamore, however, noted that there were no MRIs or x-rays of plaintiff’s spine and requested that these tests be completed prior to his examination of plaintiff. On 12 September 2002, plaintiff returned to Dr. Detamore’s office for a complete evaluation, complaining primarily of back and leg pain. Following the examination, Dr. Detamore diagnosed plaintiff as having cervical myelopathy, cervical radiculopathy, and lumbar radiculopathy. He ordered a myelogram and took plaintiff out of work until 4 October 2002, the date of plaintiff’s next scheduled visit to Dr. Detamore’s office.

On 16 September 2002, plaintiff underwent pre-myelogram studies. The studies revealed degenerative disc disease at L5-S1, mild degenerative disc disease at C4-5 and C6-7, and a prior fusion at

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C5-6. Plaintiff's myelogram on 23 September 2002 revealed a prior fusion at C5-6 with unremarkable findings; broad disc bulges at C3-4, C4-5, and C6-7; and broad based disc bulges at L3-4, L4-5, and L5-S1. Defendants paid for these tests.

When plaintiff returned to Dr. Detamore's office on 3 October 2002, the doctor recommended that plaintiff undergo an anterior cervical discectomy, spondylectomy, osteophyctectomy, bilateral foraminotomy, and partial corpectomy at the C3-4 and C4-5 levels. Dr. Detamore performed the surgery on 24 October 2002. At the time of plaintiff's surgery, defendants had not denied liability for plaintiff's neck condition. At some point after the surgery, however, defendants refused to cover the cost of the procedure.

Dr. Detamore ultimately expressed the opinion that the workplace incident necessitated the surgery he performed. He explained:

What [plaintiff] came to me for was complaints of pain which he said was in his low back and leg. The complaints of pain in my medical opinion was [sic] a combination of cervical myelopathy, cervical radiculopathy, spinal cord compression, and nerve root irritation which was brought on at the time of the lifting of this heavy weight. That's what caused those symptoms to become present even though he had the pre-existing condition of degenerative osteoarthritis.

He added that when he examined plaintiff, plaintiff "did come to me with this complaint of a lumbar radicular complaint only. And yet on my examination, I found not as much of a problem with a [sic] lumbar radicular symptoms and signs on his examination. I found more of cervical both myelopathy and radiculopathy and that his focus was primarily on a [sic] lumbar radicular symptoms."

Dr. Detamore retired after plaintiff's surgery and transferred plaintiff's care to Dr. Carol Wadon, another doctor from Carolina Neurosurgical Services. When Dr. Wadon initially examined plaintiff on 7 November 2002, plaintiff complained of numbness in his arms and difficulty turning his head. Dr. Wadon recommended a cervical MRI that revealed evidence of post-operative changes at C3-4 and C4-5 with some persistent stenosis. Dr. Wadon recommended that plaintiff undergo further cervical surgery that was performed on 27 November 2002.

On 17 January 2003, Dr. Wadon ordered an MRI that indicated mild multilevel spondylosis and degenerative disc disease most

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prominent at the L4-5 and L5-S1 levels. On 27 February 2003, Dr. Wadon determined that plaintiff had reached maximum medical improvement and assigned a 10% permanent partial impairment rating to his low back. Rather than recommend additional surgery, Dr. Wadon referred plaintiff to pain management. Dr. Wadon concluded that plaintiff's cervical problems were the result of degenerative changes. Defendants did not pay for the 27 November 2002 surgery, but they did pay for treatment provided by Dr. Wadon on 27 February 2003 as well as the 17 January 2003 diagnostic tests.

Dr. Wadon referred plaintiff to Dr. Toni Harris at Eastern Carolina Pain Management for his low back and bilateral extremity pain. Dr. Harris diagnosed plaintiff with low back and bilateral lower extremity pain related to his workplace injury and neck and shoulder pain secondary to his fusion surgery. Dr. Harris treated plaintiff with epidural steroid injections for his back and a referral to physical therapy. Plaintiff was released from Dr. Harris' care on 15 October 2003. Dr. Harris determined that plaintiff had reached maximum medical improvement, and plaintiff was assigned a 5% permanent partial impairment rating to his low back. He recommended that plaintiff undergo a functional capacity evaluation.

On 28 July 2004, plaintiff filed a Form 18, reporting an injury to his back and legs as a result of the incident on 6 June 2002. On 4 October 2004, the functional capacity evaluation recommended by Dr. Harris was performed. The results of that evaluation indicated that plaintiff was capable of performing sedentary work. On 21 October 2004, plaintiff filed a Form 33, Request for Hearing, alleging injury to his upper, middle, and lower back.

Defendants filed a Form 33R and amended Forms 33R in response to plaintiff's request for hearing on 7 January, 11 January, and 9 March 2005 in which they notified the Commission that they refused to pay for plaintiff's neck treatment. In addition, on 9 March 2005, defendants submitted to the Commission a motion to dismiss for lack of jurisdiction, arguing that plaintiff had not timely filed a claim under N.C. Gen. Stat. § 97-24 (2007).

On 21 June 2005, Dr. Jaylan R. Parikh at Orthopedic Solutions & Sports Medicine Center performed an independent medical evaluation of plaintiff. Dr. Parikh concluded that plaintiff's cervical spine condition was not related to his work injury on 6 June 2002. He believed that plaintiff's neck condition was a continuation of neck problems that plaintiff experienced prior to the workplace incident.

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In an opinion and award filed 24 February 2006, the deputy commissioner concluded that plaintiff had timely filed his claim and awarded plaintiff continuing temporary total disability benefits until such time plaintiff returned to work or until further order of the Commission. Additionally, the deputy commissioner ordered defendants to pay all medical expenses for plaintiff's cervical and lumbar spine injuries incurred as a result of the 6 June 2002 incident.

Defendants appealed to the Full Commission, and, in an opinion and award filed 24 August 2007, the Commission affirmed the opinion and award of the deputy commissioner with modifications. Chairman Buck Lattimore dissented. The Full Commission chose to give greater weight to the opinion of Dr. Detamore over the contrary opinions of Dr. Wadon and Dr. Parikh and, therefore, found that "Plaintiff's workplace injury by accident on June 6, 2002 significantly contributed to the cervical spine condition for which Dr. Detamore treated Plaintiff and performed surgery."

The Commission then concluded, "[b]ased on the greater weight of the evidence, Plaintiff suffered a compensable injury to his neck and back on June 6, 2002, as a direct result of a specific traumatic incident of the work assigned to him by Defendant-Employer." The Commission further determined that plaintiff's claim for compensation for his neck injury was not barred by N.C. Gen. Stat. § 97-24. The Commission noted, in any event, that defendants had not disputed plaintiff's entitlement to continuing temporary total disability compensation for his lower back injury. It further concluded that although defendants had terminated vocational rehabilitation assistance to plaintiff on 26 October 2004, plaintiff would benefit from such assistance. The Commission awarded plaintiff continuing temporary total disability benefits from the date of his 6 June 2002 injury continuing until further order of the Commission and ordered defendants to pay "all medical expenses incurred or to be incurred in the future for Plaintiff's cervical and lumbar spine injuries when bills for the same have been submitted and approved according to procedures adopted by the Industrial Commission." Defendants timely appealed to this Court.

I

[1] Defendants first contend the Full Commission erred in concluding that plaintiff's claim was not time barred under N.C. Gen. Stat. § 97-24 because plaintiff failed to file a claim for his neck injury with the Industrial Commission within two years of the accident. N.C. Gen. Stat. 97-24(a) provides:

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The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

Failure to file a claim within the two-year period precludes the Industrial Commission from asserting jurisdiction over an employee's claim. *Crane v. Berry's Clean-Up & Landscaping, Inc.*, 169 N.C. App. 323, 328, 610 S.E.2d 464, 467, *disc. review denied*, 359 N.C. 630, 616 S.E.2d 230 (2005). As this Court noted in *Tilly v. High Point Sprinkler*, 143 N.C. App. 142, 146, 546 S.E.2d 404, 406, *disc. review denied*, 353 N.C. 734, 552 S.E.2d 636 (2001), when, as here, "a party challenges the Commission's jurisdiction to hear a claim, the findings relating to jurisdiction are not conclusive [on appeal,] and the reviewing court may consider all of the evidence in the record and make its own determination on jurisdiction."

Defendants concede that the Commission's jurisdiction was invoked when the Form 63 was filed on 10 July 2002, but argue that the Form 63 only invoked the Commission's jurisdiction over plaintiff's claim for his lumbar spine condition and not over his claim for his cervical spine condition. The Form 63 specifically acknowledged plaintiff's "claim" for "injury on 06/06/2002." Defendants did not purport to limit this claim to any particular body part or portion of the spine. Defendants, however, assert that "the Form 63 only related to the low back claim, as is evidenced by the totality of the record."

Defendants cite no authority to support their attempt to limit the jurisdiction of the Commission, and we have found none. As the Supreme Court recently observed, "[w]e have previously explained the context of the workers' compensation claim: 'The claim is the right of the employee, at his election, to demand compensation for such injuries as result from an accident.'" *Gore v. Myrtle/Mueller*, 362 N.C. 27, 34, 653 S.E.2d 400, 406 (2007) (quoting *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953)). In addition, this Court has previously held that a claim for benefits "is sufficient under N.C. Gen. Stat. § 97-24 if it identifies the accident and injury at issue and expresses an intent to invoke the Commission's jurisdiction with

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respect to that injury.” *Crane*, 169 N.C. App. at 329, 610 S.E.2d at 467. Here, the Commission’s jurisdiction was invoked as to the accident on 6 June 2002, and plaintiff was entitled to seek compensation for such injuries as resulted from that accident.

This case involves a specific traumatic incident resulting in a back injury; the only dispute is over the portions of the back involved. We note that the evidence indicates that the cervical spine injury was not some new injury that arose long after the Form 63 was filed. Instead, this case from the beginning has involved a claim for a back injury, in which one of the expert witnesses ultimately determined that a cervical spine injury, as well as a lumbar spine injury, was contributing to the pain experienced by plaintiff following the accident. Such a determination must be made by a medical expert. *See Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (explaining that “where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury”). In this case, defendants chose to invoke the jurisdiction of the Commission without further investigating the source of plaintiff’s low back pain.

Those circumstances do not warrant limiting the jurisdiction of the Commission invoked by the Form 63. Under defendants’ approach, an employee would be precluded from receiving compensation for not properly diagnosing his own injury and informing the defendant of that diagnosis. Such a result would be inconsistent with the principle recently affirmed by our Supreme Court in *Gore*, 362 N.C. at 36, 653 S.E.2d at 406 (internal quotation marks omitted), “that the Workers’ Compensation Act requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees, and that this overarching purpose is not to be defeated by the overly rigorous technical, narrow and strict interpretation of its provisions.”

In any event, even if plaintiff’s cervical spine condition required the filing of its own claim, that claim falls within N.C. Gen. Stat. § 97-24(a)(ii), providing that a claim is timely when filed “within two years after the last payment of medical compensation when no other compensation has been paid and when the employer’s liability has not otherwise been established” The Commission found, with respect to § 97-24(a)(ii) that “[d]efendants paid for the following treatment by Dr. Detamore: the August 14, 2002 treatment was paid

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on October 29, 2002; the September 12, 2002 treatment was paid on October 28, 2002; the October 3, 2002 treatment was paid on April 1, 2003.” This treatment included treatment for plaintiff’s cervical spine condition. Plaintiff’s 21 October 2004 Form 33, requesting a hearing on plaintiff’s claim of injury to the “Upper/Middle/Lower Back, left & right legs,” falls within two years of the payment of this medical compensation. *See, e.g., McGhee v. Bank of Am. Corp.*, 173 N.C. App. 422, 426, 618 S.E.2d 833, 836 (2005) (holding that although plaintiff did not file her claim within two years of her accident, her claim was timely filed because it was filed within the two-year period following defendants’ last payment of medical compensation to plaintiff).

Defendants, however, contend that the payment of this compensation should not render plaintiff’s claim timely as to the cervical spine aspect of his injury because “Defendants have never paid for any medical compensation related *solely* to Plaintiff’s neck.” (Emphasis added.) There is no dispute that the treatment provided by Dr. Detamore related, in part, to plaintiff’s cervical spine. Defendants have cited no authority to support their proposition that N.C. Gen. Stat. § 97-24(a)(ii)’s previous medical compensation must be confined solely to one particular area of a larger injury. We, therefore, conclude that defendants have failed to demonstrate that plaintiff’s claim is untimely under § 97-24(a)(ii).

Finally, defendants argue that even if they did pay medical compensation to plaintiff, plaintiff nonetheless was still required to file his claim for the neck injury within two years of the date of the accident. Although this argument is contrary to the plain language of the statute, defendants cite *Barham v. Kayser-Roth Hosiery Co.*, 15 N.C. App. 519, 521, 190 S.E.2d 306, 308 (1972), as support for their contention. *Barham*, however, construed a prior statute that did not include the language currently set out in N.C. Gen. Stat. § 97-24(a)(ii). *Barham* was, in fact, superseded by that statute. We, therefore, hold that the Commission was correct in concluding that plaintiff’s claim for compensation was not barred by N.C. Gen. Stat. § 97-24.

II

[2] Defendants next contend the Full Commission erred in finding that plaintiff’s neck condition was causally related to the 6 June 2002 accident. Defendants first argue that plaintiff’s cervical condition did not arise out of his employment at Lear Siegler, and thus he is not entitled to compensation for that injury. As this argument dovetails with their second contention that plaintiff failed

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to prove the causation element of his claim because his expert's testimony was only speculation and conjecture, we address both arguments simultaneously.

Apart from the issue of jurisdiction, appellate review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). The Commission's findings of fact may be set aside only if there is a "complete lack of competent evidence to support them." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). This Court reviews the Commission's conclusions of law de novo. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

The Commission made the following findings with respect to whether plaintiff's cervical spine condition was caused by his workplace accident:

27. Both Dr. Parikh and Dr. Wadon opined that Plaintiff's cervical condition was due to degenerative conditions. Dr. Detamore opined that Plaintiff's complaints of pain resulted from a combination of cervical myelopathy, cervical radiculopathy, spinal cord compression, and nerve root irritation which was brought on by his workplace injury. The Full Commission gives greater weight to the opinions of Dr. Detamore over the contrary opinions of Dr. Wadon and Dr. Parikh and finds that Plaintiff's workplace injury by accident on June 6, 2002 significantly contributed to the cervical spine condition for which Dr. Detamore treated Plaintiff and performed surgery. Plaintiff began treatment with Dr. Detamore approximately six weeks after his workplace accident. Plaintiff did not treat with Dr. Wadon until approximately four and one half months later and Dr. Parikh performed the [independent medical examination] approximately three years later. Dr. Detamore was tendered as an expert in neurosurgery and he performed a complete evaluation of Plaintiff.

28. Based on the greater weight of the evidence, Plaintiff suffered a compensable injury to his neck and back on June 6,

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2002, as a direct result of a specific traumatic incident of the work assigned to him by Defendant-Employer.

The question before this Court is whether these findings of fact are supported by any competent evidence.

In arguing that they are not supported, defendants first point to statements by plaintiff limiting his complaints to the lower back area and his testimony that he felt a pop in his back rather than a pop in his neck. It is, however, well established that questions of causation require expert testimony. *See Click*, 300 N.C. at 167, 265 S.E.2d at 391. Specifically, we believe that what sort of “pop” a particular injury would make or where an injury’s symptoms would manifest themselves are questions that must be answered by an expert. Plaintiff, who is not a medical doctor, was not competent to diagnose himself, and his statements cannot render Dr. Detamore’s testimony incompetent, especially when Dr. Detamore specifically recognized and considered the fact that plaintiff was complaining about only his lower back pain when he was evaluated by Dr. Detamore.

Next, defendants argue that “[t]he overwhelming evidence shows that the plaintiff’s cervical condition was not related to his workers’ compensation injury.” Although defendants acknowledge that the Commission found Dr. Detamore’s testimony entitled to greater weight than the testimony of Dr. Parikh and Dr. Wadon, upon which defendants rely, defendants argue that Dr. Detamore’s testimony was not competent because he could not conclude to a reasonable degree of medical certainty that plaintiff’s neck injury was the result of the workplace accident.

This court has repeatedly held that a doctor is not required to testify to a reasonable degree of medical certainty. *See Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 599, 532 S.E.2d 207, 211 (2000). *See also Davis v. Columbus County Sch.*, 175 N.C. App. 95, 101, 622 S.E.2d 671, 676 (2005) (citing *Peagler* and stating that “[e]xpert testimony need not show that the work incident caused the injury to a reasonable degree of medical certainty”). All that is required is that it is “likely” that the workplace accident caused plaintiff’s injury. *See Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 264, 614 S.E.2d 440, 447 (explaining that “when expert testimony establishes that a work-related injury ‘likely’ caused further injury, competent evidence exists to support a finding of causation”), *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005); *Workman v. Rutherford*

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Elec. Membership Corp., 170 N.C. App. 481, 495, 613 S.E.2d 243, 252 (2005) (holding that expert's testimony that plaintiff's workplace injury "more likely than not" caused plaintiff's injury was sufficient to prove causation).

In this case, Dr. Detamore testified that although he could not say to a reasonable degree of medical certainty whether the workplace accident caused plaintiff's neck injury, he "would have to say it is more likely" that the accident caused plaintiff's neck injury. This testimony met the required standard and, therefore, is sufficient to support the Commission's finding of a causal connection between the workplace accident and plaintiff's cervical spine condition.

Defendants also argue that Dr. Detamore's deposition contained inconsistent testimony and that portions of it could be viewed as supportive of their position. As Judge Hudson stated in a dissenting opinion adopted by the Supreme Court in *Alexander v. Wal-Mart Stores, Inc.*, 359 N.C. 403, 610 S.E.2d 374 (2005) (*per curiam*), it is not "the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence." *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting). We will not second-guess the Commission's credibility and weight determinations and, therefore, we uphold the Commission's finding of causation.

III

[3] Finally, defendants contend the Commission incorrectly calculated plaintiff's average weekly wage. The Commission found that "[p]laintiff's average weekly wage is \$662.06, yielding a compensation rate of \$441.40" pursuant to N.C. Gen. Stat. § 97-2(5) (2007). The Commission did not include in its opinion and award any explanation as to how it calculated plaintiff's average weekly wage.

The average weekly wage consists of "the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury." N.C. Gen. Stat. § 97-2(5). Defendants argue that the Commission should have used the first method set out in N.C. Gen. Stat. § 97-2(5) for calculating the average weekly wage—the method applicable when an employee has worked 52 weeks prior to

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his injury without being absent from work for more than seven consecutive calendar days. Under this method, the average weekly wage is calculated by totaling the employee's earnings for the 52 weeks prior to the injury and dividing that sum by 52. Although the statute provides alternative methods for calculating an employee's average weekly wage, it is well settled that "[w]hen the first method of compensation *can* be used, it *must* be used." *Conyers v. New Hanover Cty. Schools*, 188 N.C. App. 253, 258-59, 654 S.E.2d 745, 750 (2008) (quoting *Hensley v. Caswell Action Comm., Inc.*, 296 N.C. 527, 533, 251 S.E.2d 399, 402 (1979)). Plaintiff has not suggested that any method other than the first method in § 97-2(5) should be used.

Here, the parties stipulated that "[p]laintiff's average weekly wage will be determined by a Form 22." It appears to us that application of the first method in § 97-2(5) to the figures in the Form 22 would result in an average weekly wage of \$538.33. Since we cannot determine how the Commission reached the conclusion that plaintiff's average weekly wage should be \$662.06, we remand for further findings of fact regarding plaintiff's average weekly wage. *See Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 333, 593 S.E.2d 93, 96 (2004) (remanding to Commission where it did not clearly state the method used to calculate plaintiff's average weekly wage); *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 437, 517 S.E.2d 914, 921 (1999) (remanding to the Commission where there were no findings indicating how the average weekly wage was derived).

Affirmed in part, remanded in part.

Judges WYNN and CALABRIA concur.

COUNTY OF DURHAM v. DAYE

[195 N.C. App. 527 (2009)]

THE COUNTY OF DURHAM, AND THE CITY OF DURHAM, PLAINTIFFS v. EDGAR R. DAYE AND WIFE ELLA M. DAYE (NOW BOTH DECEASED), OWNERS; ALL ASSIGNEES, HEIRS AT LAW AND DEVISEES OF EDGAR R. DAYE AND OR ELLA M. DAYE TOGETHER WITH ALL CREDITORS AND LIENHOLDERS REGARDLESS OF HOW OR THROUGH WHOM THEY CLAIM, AND ANY AND ALL PERSONS CLAIMING ANY INTEREST IN THE ESTATES OF EDGAR R. DAYE AND/OR ELLA M. DAYE, DEFENDANTS

No. COA07-1532

(Filed 3 March 2009)

1. Jurisdiction— dismissal of issue by prior judge—new evidence and new issues

Where a prior judge had granted a Rule 12(b)(6) dismissal of the damages issue, the trial court lacked jurisdiction to enter an order requiring a county to pay damages to defendants in an action arising from a judgment for nonpayment of property taxes. Although defendants argued that there was new evidence and new legal issues, defendants could not pursue their claim without taking steps to have the damages claim brought back into the action.

2. Appeal and Error— interlocutory appeals—jurisdiction continuing in trial court

The trial court retained jurisdiction to enter a final order even though the City had appealed the denial of its motions to dismiss and for summary judgment because those were improper interlocutory appeals.

3. Civil Procedure— Rule 60—damages awarded

The trial court did not have authority to award defendants damages or fees on a Rule 60 motion to set aside a default judgment in a tax foreclosure action. Rule 60 does not provide damages as a possible form of relief; once the foreclosure sale was set aside, defendant could have filed an independent action seeking damages.

Appeal by plaintiff City of Durham from orders entered 19 August 2004 and 14 December 2004 by Judge Wade Barber, orders entered 1 August 2006, 2 February 2007, 14 May 2007, and 1 August 2007 by Judge Orlando F. Hudson, Jr., and judgment entered 1 June 2007 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Appeal by plaintiff County of Durham from order entered 1 August 2007 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 August 2008.

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Durham County Attorney, S.C. Kitchen, for plaintiff-appellant County of Durham.

The Banks Law Firm, P.A., by Sherrod Banks; The Roseboro Law Firm, PLLC, by John Roseboro, for plaintiff-appellant City of Durham.

No brief filed on behalf of plaintiff-appellee Chidinma Nweke.

Michaux & Michaux, P.A., by Eric C. Michaux, for defendants-appellees.

GEER, Judge.

Plaintiffs, the City of Durham and the County of Durham, appeal from the trial court's final order requiring the City and County to pay damages and attorneys' fees to the heirs and devisees of Edgar R. Daye and Ella M. Daye, the defendants in this case. Defendants had filed a motion pursuant to Rule 60 of the Rules of Civil Procedure, seeking relief from a judgment by default entered for non-payment of city and county taxes. In that motion, defendants also sought monetary relief for violation of their constitutional rights. With respect to the County, since a superior court judge had already granted the County's motion to dismiss defendants' claim for damages against the County, a second superior court judge could not then enter an order requiring the County to pay damages. The order must also be reversed as to the City because the trial court, in granting a Rule 60 motion, had authority only to grant relief from the default judgment, and, in any event, counterclaims—the essence of defendants' claim for damages—cannot be asserted in tax foreclosure actions. Accordingly, we reverse the trial court's order.

Facts

Edgar and Ella Daye owned property located at 3603 Dearborn Avenue in Durham as tenants by the entirety. Mrs. Daye died in 1997, and Mr. Daye died in 1999, leaving no lineal descendants. W.E. Daye, Mr. Daye's brother, subsequently took possession of the property and rented it to a tenant. On 27 January 2003, the City and County initiated a tax foreclosure action in Durham County District Court to recover unpaid taxes on the property for tax years 1995-1998 and 2000-2002. The defendants were identified as the Dayes (whom the complaint acknowledged were deceased) and all assignees, heirs, devisees, creditors, lienholders, and other persons claiming any interest in the estates of the Dayes. The City and County

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first attempted to serve the deceased Dayes by certified mail addressed to the Dayes at the Dearborn address. When the certified mail was returned unclaimed, the City and County proceeded to serve defendants by publication.

No response to the complaint was ever filed, and, on 7 April 2003, the Clerk of Durham County Superior Court entered default and a default judgment against defendants. The property was then sold to Chidinma Nweke for \$17,261.00 on 20 June 2003. The Commissioners' Deed was delivered on 4 July 2003 with the sale being confirmed on 10 July 2003.

In August 2003, W.E. Daye was notified by his tenant that the property had been sold and the tenant evicted. On 22 April 2004, defendants filed a motion in the cause pursuant to Rule 60, seeking to have the entry of default, default judgment, and confirmation of sale set aside on the ground of inadequate notice. In their Rule 60 motion, defendants also sought (1) a declaration that the heirs of Edgar R. and Ella M. Daye were the owners of the property, (2) lost rents from the property, and (3) costs and attorneys' fees. On 28 July 2004, defendants filed a supplement to their motion adding an allegation that "[u]pon information and belief the County and City of Durham have waived their sovereign immunity through the purchase of liability insurance."

The superior court entered an order removing the case to superior court. The trial court entered a separate order concluding that Chidinma Nweke, the Estate of Edgar R. Daye, and W.E. Daye (as administrator of the Estates of Edgar R. Daye and Ella M. Daye) were all necessary parties and directing that they be joined as parties. Ms. Nweke was joined as a plaintiff, while W.E. Daye and the Estate of Edgar R. Daye were joined as defendants. On 5 August 2004, the County filed a motion to dismiss defendants' claim for damages pursuant to Rule 12(b)(1), 12(b)(2), and 12(b)(6) of the Rules of Civil Procedure.

Judge Wade Barber heard defendants' Rule 60 motion on 4 September 2004 and, on 14 December 2004, entered an order setting aside the foreclosure sale based on his finding that defendants did not "receive any notice of the delinquent taxes, the Summons or Complaint, read or hear[] about the publication in the local newspaper, or receive[] any other notice of this lawsuit or the sale of the property." Judge Barber then concluded: "The City and the County of Durham, having failed to apprise the Defendants of the pending fore-

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closure action, as they were required to do by the statutes of this state, the Constitution of North Carolina and the Constitution of the United States, all orders effecting the sale of the Defendants' property are *void ab initio*." Judge Barber also concluded that at the time of the order of sale and the sale of the property, the court did not have jurisdiction over the owners of the property and, for that reason as well, "the orders [e]ffecting the sale [were] *void ab initio*."

In an order entered 18 March 2005, Judge John W. Smith addressed the County's motion to dismiss. Judge Smith determined that defendants' claim against the County for damages and costs was barred by sovereign immunity. Judge Smith also concluded that defendants had failed to state a claim for relief because the County was not responsible for any error of the tax collector. Judge Smith ruled, however, that "[t]he other grounds argued by Plaintiff Durham County in its motions to dismiss are denied." Defendants appealed Judge Smith's decision to this Court, but that appeal was dismissed as interlocutory. *See County of Durham v. Daye*, 177 N.C. App. 810, 630 S.E.2d 256, 2006 N.C. App. LEXIS 1246, 2006 WL 1529021 (June 6, 2006) (unpublished).

On 23 February 2006, defendants filed a motion seeking an order awarding them ownership and possession of the property or, in the alternative, permission to enter and lease the premises if the trial court did not grant them ownership and possession. On 1 August 2006, Judge Orlando F. Hudson, Jr. entered a supplemental order awarding the property to the heirs of Edgar R. Daye.

On 7 February 2007, the City filed a motion to dismiss defendants' claim for damages and attorneys' fees on the grounds that: (1) the City could not be liable for constitutional claims on the basis of *respondeat superior*; (2) damages are prohibited in tax foreclosure actions; (3) counterclaims are prohibited in tax foreclosure actions; (4) the Estates had no standing since the Dayes died intestate; (5) the City could not be held liable for errors made by the tax collector; and (6) "[a]ssuming that Defendants' Motion in the Cause pleads tort claims, the claims are barred by all applicable immunities, including, but not limited to, sovereign immunity." On 2 April 2007, the City also filed a motion for summary judgment seeking dismissal of the claim for damages and attorneys' fees on the same grounds as the motion to dismiss.

On 14 May 2007, Judge Hudson denied the City's motions to dismiss and for summary judgment. The City filed a notice of appeal

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from this order on 12 June 2007. This Court dismissed that appeal as interlocutory. *See County of Durham v. Daye*, 191 N.C. App. 610, 664 S.E.2d 78 (2008) (unpublished).

On 4 May 2007, defendants filed a “Petition for Fees and Expenses.” In that petition, defendants “request[ed] reimbursement from the City of Durham for attorney fees, loss of income and attorney fees that they have incurred as a result of the action taken against them by the County and the City of Durham.”

Meanwhile, on 23 May 2006, Ms. Nweke filed a petition, seeking compensation for the cost of the permanent improvements she had made to the Dayes’ property at 3603 Dearborn Avenue. Judge Hudson entered judgment on 1 June 2007 ordering that the heirs at law of Edgar R. Daye pay Ms. Nweke \$58,332.29 as compensation for “betterments” she made to the property. The court also imposed a judgment lien for that amount on the property.

In a final order entered 1 August 2007, Judge Hudson addressed “the motion of the Defendants for fees and expenses.” Judge Hudson found that “[p]laintiffs['] action[s] have violated the civil rights of the Defendants in violation of the Constitution of the United States and the Constitution of North Carolina.” Judge Hudson further found that defendants had suffered a loss of rents in the amount of \$9,500.00 and, as a result of the lien on the property from the betterments judgment, defendants had been damaged in the amount of \$58,332.29. Finally, Judge Hudson determined that defendants’ law firm was entitled to an award of \$55,532.69 in attorneys’ fees. Based on these findings, Judge Hudson concluded that defendants were entitled to the damages they sought in their petition, together with interest, based on the violation of their constitutional rights. Judge Hudson then decreed “[t]hat the Defendants are awarded a judgment against the Plaintiffs and that they recover from the Plaintiffs” (1) \$9,500.00 plus interest for lost rent; (2) \$58,332.29 to remove Ms. Nweke’s judgment lien; and (3) \$55,532.69 in attorneys’ fees.

On 8 August 2007, the City and County jointly filed a motion pursuant to Rule 60(a) and (b)(4), arguing that Judge Hudson had mistakenly ordered them to pay defendants’ fees and expenses. Also on 8 August 2007, the City moved to vacate the order, for reconsideration, or to supplement the record on the ground that Judge Hudson did not have the City’s proposed order to consider prior to entering the final order. On 14 August 2007, the trial court continued the hear-

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ing on these motions from the original hearing date of 16 August 2007 to an unspecified date in the future. The County then filed a notice of appeal on 16 August 2007, appealing from the 1 August 2007 final order. The City filed a notice of appeal on 30 August 2007, appealing from (1) the 19 August 2004 order joining necessary parties; (2) the 14 December 2004 order setting aside the foreclosure judgment; (3) the 1 August 2006 supplemental order awarding the property to defendants; (4) the 2 February 2007 order releasing funds to Ms. Nweke; (5) the 1 June 2007 judgment on betterments; (6) the 14 May 2007 order denying the City's motion to dismiss and motion for summary judgment; and (7) the 1 August 2007 final order. In its brief on appeal, however, the City has limited its arguments to the 1 August 2007 final order and the 19 August 2004 order joining necessary parties.

County's Appeal

[1] The County first argues on appeal that because Judge Smith had previously dismissed defendants' claim for damages against the County, Judge Hudson necessarily lacked jurisdiction to enter an order requiring the County to pay damages to defendants. In his final order, Judge Hudson acknowledged Judge Smith's order, finding that "[o]n the 18th day of March 2005, a hearing was had before the Honorable Judge John Smith who issued an order dismissing the issue of damages against the County of Durham." The final order further found that "[t]his matter comes before this Court for an order dismissing the issue of damages against the Co-Plaintiff, the City of Durham." Nevertheless, the final order ultimately directed "[t]hat the Defendants are awarded a judgment against the *Plaintiffs* and that they recover from the *Plaintiffs* the following" (Emphasis added.) Whether or not Judge Hudson intended to enter an award of damages against the County, that is the effect of the final order.

When, as Judge Smith did in this case, a trial court dismisses a claim under Rule 12(b)(6) for failure to state a claim for relief, that dismissal "operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice." *Hill v. West*, 189 N.C. App. 194, 198, 657 S.E.2d 698, 700 (2008) (quoting *Clancy v. Onslow County*, 151 N.C. App. 269, 272, 564 S.E.2d 920, 923 (2002)). The Rule 12(b)(6) dismissal in this case did not specify that it was without prejudice and, therefore, operated as an adjudication on the merits as to the claim for damages against the County. *See id.* at 197, 657 S.E.2d at 701 (holding that dismissal under Rule 12(b)(6) constitutes a "final judgment[] on the merits that preclude[s] 'a second suit

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involving the same claim between the same parties or those in privity with them' ” (quoting *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 261 (2005))). As a basic legal tenet, the trial court could not hold the County liable on a claim for damages that was no longer pending against the County.

Defendants argue that the trial court could properly award damages against the County because “both new evidence *and* new legal issues were before Judge Hudson; the evidence and legal issues were not ones considered by Judge Smith.” This contention overlooks the fact that the claim against the County had been dismissed, it was no longer part of the action before the trial court, and defendants could not continue to pursue their claim without taking action to have the damages claim against the County brought back into the action. Indeed, as the language used in their petition for fees and expenses shows, defendants recognized that there was no longer a claim pending against the County at the time they filed the petition: “NOW COME THE DEFENDANTS in the above styled action and hereby request reimbursement from the *City of Durham* for attorney fees, loss of income and attorney fees that they have incurred as a result of the action taken against them by the County and the City of Durham.” (Emphasis added.) Thus, with no damages claim pending against the County at the time the trial court entered its final order on 1 August 2007, the trial court erred in ordering the County to pay defendants’ damages.

City’s Appeal

[2] The City contends first that the trial court lacked jurisdiction to enter a final order while the City’s appeal from the denial of its motions to dismiss and for summary judgment was pending before this Court. N.C. Gen. Stat. § 1-294 (2007) provides in pertinent part: “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.”

Under this statute, “[t]he general rule [is] that a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court.” *McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) (quoting *Parrish v. Cole*, 38 N.C. App. 691, 693, 248 S.E.2d 878, 879 (1978)). As pointed out by defendants, an exception to the general rule exists “[w]here a party appeals from

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a nonappealable interlocutory order.” *RPR & Assocs. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002), *disc. review denied and cert. dismissed*, 357 N.C. 166, 579 S.E.2d 882 (2003). An improper interlocutory appeal “does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case.” *Id.* See *Veazey v. City of Durham*, 231 N.C. 357, 364, 57 S.E.2d 377, 382-83 (1950) (holding that improper interlocutory appeal does not deprive trial court of jurisdiction over case). In other words, “a litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order of the trial court.” *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001). In this case, since, as this Court previously concluded, the City’s appeal was an improper interlocutory appeal, the trial court retained jurisdiction to enter its final order during the pendency of the City’s prior appeal.

[3] The City next argues that the trial court erred in awarding defendants damages and fees based on their petition for fees and expenses because Rule 60 does not provide for damages as a possible form of relief. Rule 60 states in pertinent part: “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” N.C.R. Civ. P. 60(b). As our Supreme Court has explained, “[t]he rule empowers the court to set aside or modify a final judgment, order or proceeding whenever such action is necessary to do justice under the circumstances.” *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 587-88 (1987).

As this Court has previously noted, a trial court has “no authority to enter” an order granting a Rule 60 motion if that order does not “set aside” the judgment or “relieve[] [the moving party] of it.” *Kimzey Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 79, 404 S.E.2d 176, 177, *disc. review denied*, 329 N.C. 497, 407 S.E.2d 534 (1991). The Eighth Circuit has similarly held with respect to Rule 60 of the Federal Rules of Civil Procedure: “Rule 60(b) is available . . . only to set aside a prior order or judgment. It cannot be used to impose additional affirmative relief.” *Adduono v. World Hockey Ass’n*, 824 F.2d 617, 620 (8th Cir. 1987). See also *United States v. One Douglas A-26B Aircraft*, 662 F.2d 1372, 1377 (11th Cir. 1981) (“[C]laims for affirmative relief beyond the reopening of a judgment cannot be adjudicated on a Rule 60(b) motion but must be asserted in a new and independent suit.”); *Affordable Country Homes, LLC v. Smith*, 194 P.3d 511, 514 (Colo. Ct. App. 2008) (holding that under

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Rule 60, trial court could only set aside judgment and could not award other relief such as reformation or damages).

In this case, defendants could not properly seek damages and fees through a Rule 60 motion, and the trial court had no authority to grant that relief under Rule 60. As the Colorado Court of Appeals noted, “[b]y setting aside an order or judgment, the court sets the stage for further proceedings in the case in which the order or judgment was entered.” *Id.* Thus, when Judge Barber granted defendants’ Rule 60 motion, further proceedings could then occur in the tax foreclosure action.

Although the trial court did not specifically say so, it may have deemed the petition for fees and expenses, filed after the Rule 60 motion was granted, to be in effect a counterclaim for damages for constitutional violations. Our Supreme Court has, however, previously held that counterclaims may not be asserted in tax foreclosure actions because “‘permit[ing] a taxpayer . . . to set up an opposing claim against the State or the city might seriously embarrass the Government in its financial operations by delaying the collection of taxes to pay current expenses.’” *Bd. of Comm’rs of Moore County v. Blue*, 190 N.C. 638, 641, 130 S.E. 743, 745 (1925) (quoting *Wilmington v. Bryan*, 141 N.C. 666, 679, 54 S.E. 543, 547-48 (1906) (Walker, J., dissenting)). See also *Town of Apex v. Templeton*, 223 N.C. 645, 646, 27 S.E.2d 617, 617-18 (1943) (holding counterclaim was “properly stricken” from answer in tax foreclosure action); *Blue*, 190 N.C. at 641, 130 S.E. at 745 (“‘No counterclaim is valid against a demand for taxes.’” (quoting *Wilmington*, 141 N.C. 675, 54 S.E. at 546)).

Although these decisions of the Supreme Court are not recent, this Court in *Onslow County v. Phillips*, 123 N.C. App. 317, 324, 473 S.E.2d 643, 648 (1996), *rev’d in part on other grounds*, 346 N.C. 265, 485 S.E.2d 618 (1997), reiterated the principle set forth in *Blue* and *Templeton*: “[A] counterclaim cannot be filed in a tax foreclosure action” We further note that N.C. Gen. Stat. § 105-374 (2007), which establishes the procedures for conducting a tax foreclosure action, does not provide for counterclaims for damages by taxpayers.

When defendants discovered that the Dearborn property had been sold through a foreclosure sale, they properly filed a Rule 60 motion in the cause to have the foreclosure sale set aside. See *Henderson County v. Osteen*, 292 N.C. 692, 701, 235 S.E.2d 166, 172 (1977) (“‘The Court from which the execution issued may, for sufficient cause shown, recall or set aside an execution or a sale made

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thereunder and prevent further proceedings. This is properly done by a motion in the cause and not by an independent action.’ ” (quoting *Abernethy Land & Fin. Co. v. First Sec. Trust Co.*, 213 N.C. 369, 372, 196 S.E. 340, 342 (1938)); *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 402, 580 S.E.2d 1, 5 (holding that a “motion in the cause” is the proper method for attacking foreclosure sales), *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). Once the foreclosure sale was set aside, defendants could have then filed an independent action seeking damages that, as they alleged in their petition, “result[ed] [from] action taken against them by the County and the City of Durham.”

The trial court did not, however, have authority to award defendants damages or fees in this tax foreclosure action. We, therefore, reverse the trial court’s 1 August 2007 final order. Because of our disposition of this appeal, we need not address the remaining arguments of the City and County.

Reversed.

Judges STEELMAN and STEPHENS concur.

DAVID ESTES, AS TRUSTEE FOR ESTES FAMILY REVOCABLE TRUST, PLAINTIFF v. COMSTOCK HOMEBUILDING COMPANIES, INC.; COMSTOCK HOLDING COMPANY, INC., COMSTOCK HOMES OF NORTH CAROLINA, L.L.C. AND COMSTOCK HOMES OF RALEIGH, L.L.C. AND HEIDI HASKELL, DEFENDANTS

No. COA08-730

(Filed 3 March 2009)

Employer and Employee; Negligence— respondeat superior— course and scope of employment—smoking—summary judgment

The trial court did not err by granting plaintiff’s motion for partial summary judgment and denying defendant company’s motion for summary judgment based on its finding that defendant sales assistant was within the course and scope of her employment when she started a fire to a model house by failing to completely extinguish a cigarette on the deck of the model home when going to answer the phone, and thus by imputing her negligence to defendant company under the theory of respondeat

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superior, because: (1) the sales assistant was required by her employer to remain on the premises of the model home unless she was showing a property to a potential customer, and she did not deviate from that duty; (2) the sales assistant was required to answer the telephone when it rang, and she put out the cigarette perhaps hastily in order to answer the telephone when it rang; (3) the sales assistant was on the premises where she was required to be and the negligence occurred when she went to perform one of those duties; (4) the act of smoking while on duty did not take the sales assistant out of her scope of employment despite the personal nature of the activity when there was a nexus between her attempt to put out the cigarette and the answering of the telephone for her employer; and (5) whether the sales assistant was permitted to smoke on the premises was not relevant since performing a forbidden act does not necessarily remove an employee from the course and scope of employment.

Appeal by defendants from an order entered 4 February 2008 by Judge A. Leon Stanback, Jr. in Wake County Superior Court. Heard in the Court of Appeals 10 December 2008.

Brown, Crump, Vanore & Tierney, L.L.P., by R. Scott Brown and W. John Cathcart, Jr., for plaintiff-appellee.

Heidi Haskell, defendant-appellee, pro se.

Ragsdale Liggett PLLC, by Walter L. Tippett, Jr. and Amie C. Sivon, for defendant-appellants.

HUNTER, Robert C., Judge.

On 19 April 2004, a fire negligently started by defendant Heidi Haskell (“Ms. Haskell”), an employee of defendant Comstock (“Comstock”),¹ caused damage to a house located at 1004 Fairfax Woods Drive in Apex, North Carolina. At the time of the fire, the house was owned by David Estes (“plaintiff”), as Trustee for Estes Family Revocable Trust, but was leased to Comstock as the sales model home for a housing subdivision. Plaintiff brought an action against both Ms. Haskell and Comstock. After the completion of discovery, both parties submitted motions for summary judgment on the issue of respondeat superior. The trial court ruled in favor of plaintiff, finding that Ms. Haskell was within the course and scope of her em-

1. We refer to the Comstock defendants collectively as “Comstock.”

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ployment when the negligent act occurred, and therefore her negligence was imputed to Comstock. Comstock appeals from this order. After careful review, we affirm.

Background

On the day of the fire, Ms. Haskell was the only sales assistant on duty at the model home. According to the deposition of Ms. Haskell's supervisor, it was Comstock's policy for a single sales assistant not to leave the premises of the model home for any reason other than to show a property to a potential customer. There is no dispute that Ms. Haskell followed that directive.

According to the written job criteria list prepared by Comstock, Ms. Haskell was required to perform many tasks associated with sales while on duty, such as assisting any potential customer who entered the model home and answering the telephone. She was also required to perform certain clerical duties and general maintenance of the property, such as changing light bulbs and removing trash or debris around the exterior of the house.

Immediately before the fire started, Ms. Haskell went onto the attached deck of the model home to smoke a cigarette. While doing so, she heard the telephone ring inside the house. She attempted to put out her cigarette, went inside, and answered the telephone. However, Ms. Haskell failed to completely extinguish the cigarette, which resulted in a fire and extensive damage to the model home. The Apex Fire Department and an independent cause and origin expert found that the fire was caused by the cigarette.

On 16 September 2005, plaintiff filed a complaint against Comstock, its holding companies and related entities, and Ms. Haskell.² Plaintiff alleged, *inter alia*, that Ms. Haskell was negligent and as an employee of Comstock, acting within the scope of her employment, Comstock was liable for plaintiff's damages under a theory of respondeat superior and/or agency.

After completion of discovery, Comstock filed a motion for summary judgment on 15 January 2008, claiming that Ms. Haskell's negligence occurred outside the scope of her employment and thus

2. Comstock Homebuilding Companies, Inc.; Comstock Holding Company, Inc.; Comstock Homes of North Carolina, L.L.C.; and Comstock Homes of Raleigh, L.L.C. were named defendants in this action. At the time of appeal, all defendants were dismissed, pursuant to a consent order, with the exception of Ms. Haskell and Comstock Homes of North Carolina, L.L.C.

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Comstock was not liable pursuant to the doctrine of respondeat superior. On 16 January 2005, plaintiff filed a partial motion for summary judgment as to the applicability of the doctrine of respondeat superior, asking the court to find that Ms. Haskell was acting within the scope of her employment as a matter of law. On 4 February 2008, the trial court granted plaintiff's motion for partial summary judgment, finding that Ms. Haskell was acting within the scope of her employment when the negligent act occurred and that as a result, her negligence should be imputed to Comstock under the doctrine of respondeat superior.

On 11 February 2008, the trial court granted summary judgment in favor of both plaintiff and Comstock against Ms. Haskell as to liability, finding Ms. Haskell's negligence was the cause of the fire and plaintiff's resulting damages. A judgment in the amount of \$225,000.00 was entered against Ms. Haskell on plaintiff's claim as well as on Comstock's crossclaim against her. On 9 May 2008, Comstock Homes of North Carolina, L.L.C. entered into a consent judgment in the amount of \$225,000.00, to be paid when all appeals are exhausted. Upon entry of the judgment, plaintiff agreed to dismiss without prejudice all claims against defendants, other than Comstock Homes of North Carolina, L.L.C. and Heidi Haskell.

On appeal, Comstock does not dispute that Ms. Haskell was negligent. The only issue on appeal is whether the 10 February 2008 grant of partial summary judgment for plaintiff on the issue of respondeat superior was proper.³

Analysis

Comstock argues that the trial court erred in granting plaintiff's motion for partial summary judgment and denying Comstock's motion for summary judgment. Comstock contends that summary judgment should have been awarded in its favor because as a matter of law Ms. Haskell was not acting within the course and scope of her employment when she negligently caused the fire, and therefore her liability should not have been imputed to Comstock under the doctrine of respondeat superior.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

3. An appeal from an order denying partial summary judgment for defendant is typically interlocutory, however, a final determination as to liability and damages was reached in this case, therefore this appeal is not interlocutory.

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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 standard of review from a grant or denial of summary judgment is *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

I. The Doctrine of Respondeat Superior

In an action against the employer under a theory of respondeat superior, plaintiff must show:

“1. That the plaintiff was injured by the negligence of the alleged wrongdoer.[”]

“2. That the relation of master and servant, employer and employee, or principal and agent, existed between the one sought to be charged and the alleged *tortfeasor*.[”]

“3. That the neglect or wrong of the servant, employee, or agent was done in the course of his employment or in the scope of his authority.[”]

“4. That the servant, employee, or agent was engaged in the work of the master, employer, or principal, and was about the business of his superior, at the time of the injury.[”]

“It is elementary law that the master is responsible for the negligence of his servant which results in injury to a third person when the servant is acting within the scope of his employment and about the master’s business. It is equally elementary that the master is not responsible if the negligence of the servant which caused the injury occurred while the servant was engaged in some private matter of his own or outside the legitimate scope of his employment.”

Van Landingham v. Sewing Machine Co., 207 N.C. 355, 357, 177 S.E. 126, 127 (1934) (quoting *Martin v. Bus Line*, 197 N.C. 720, 722, 150 S.E. 501, 502 (1929) (citations omitted)). “It is only when the relation of master and servant between the wrongdoer and his employer exists at the time and in respect to the very transaction out of which the injury arose that liability therefor attaches to the employer.” *Tomlinson v. Sharpe*, 226 N.C. 177, 179, 37 S.E.2d 498, 500 (1946).

There is no dispute that Ms. Haskell was an employee of Comstock. The sole question presented to the trial court, and the only

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issue to be decided on appeal, is whether Ms. Haskell was acting within the scope of her employment and about her employer's business, as a matter of law, when the negligent act occurred.

II. Scope of Employment

Comstock argues that the act of smoking was in no way in furtherance of Ms. Haskell's duty to her employer as it was strictly for personal enjoyment. However, not every personal act takes an employee out of the scope of his/her employment. "Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility, but, if there is a *total departure from the course of the master's business*, the master is not answerable for the servant's conduct." *Parrott v. Kantor and Martin v. Kantor*, 216 N.C. 584, 589, 6 S.E.2d 40, 43 (1939) (citation omitted; emphasis added).

We find that Ms. Haskell did not depart from her employer's business when she smoked the cigarette on the deck of the model home and negligently failed to extinguish it when going to answer the telephone. Ms. Haskell was required by her employer to remain on the premises of the model home unless she was showing a property to a potential customer. She did not deviate from that duty. Ms. Haskell was also required to answer the telephone when it rang. She put out the cigarette, perhaps hastily, in order to answer the ringing telephone.

In sum, the two key factors in this case which lead to Comstock's liability are: (1) Ms. Haskell was on the premises of her employer where she was required to be, able and willing to perform her duties; and (2) the negligence occurred when she went to perform one of those duties, answering the telephone.

Comstock relies heavily on *Tomlinson v. Sharpe*, the only North Carolina case that directly deals with an employer's liability when an employee negligently causes a fire while smoking a cigarette. In *Tomlinson*, the defendant's employees were driving a company truck when it broke down, blocking passage on the highway. *Tomlinson*, 226 N.C. at 179, 37 S.E.2d at 500. The plaintiff's truck, operated by its employees, pulled over to assist the defendant's employees. *Id.* Still unable to restart the truck, the defendant's employees got into plaintiff's truck as it was a cold evening. *Id.* The defendant's employees were warned not to light a match because a gas leak had saturated the passenger floor mats. *Id.* at 180, 37 S.E.2d at 500. Nevertheless,

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one of the defendant's employees struck a match to light a cigarette and threw the lit match on the floor of the truck, which caused the truck to ignite. *Id.* The trial court found, and our Supreme Court affirmed, that the defendant's employees were not acting within the scope of their employment when they negligently threw the match on the gasoline soaked floor. *Id.* at 183, 37 S.E.2d at 502. The Court noted the applicable rule of law was aptly stated in section 235 of the Restatement of Agency which provides, "[a]n act of the servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." *Id.* (quoting Restatement (First) of Agency § 235 (1933)).

The primary distinguishing factor between *Tomlinson* and the present case is that the defendant's employees in *Tomlinson* were not on the premises of their employer nor using an instrumentality (the truck) of their employer to perform their duties. The Court noted this fact and further stated that the defendant's employees were in the truck to stay warm and were conversing with the plaintiff's employees for some fifteen minutes before they disregarded the warning and lit the match. *Id.* at 179-80, 37 S.E.2d at 500. In the case *sub judice*, plaintiff was on the premises and was merely taking a short break while still attentive to her duties. She negligently put out the cigarette in order to perform one of her specified obligations to her employer.

Tomlinson distinguishes the case of *Jefferson v. Derbyshire Farms*, (1921) 2 K.B. 281, which plaintiff cites as supporting its position that Ms. Haskell was in the scope of her employment. The *Tomlinson* Court summarized *Jefferson* as follows:

[D]efendants were using a garage for servicing their trucks, and employed a young man named Booth to work in and about the garage. While Booth was emptying a drum of motor spirit, or benzol, into tins, he struck a match to light a cigarette and threw the match on the floor, causing a destructive fire. The court held the defendant's employers liable on the ground that it was within the scope of Booth's employment to empty motor spirit drums in the garage, and that it was his duty to do this work with reasonable care. To smoke and throw a lighted match on the floor while doing this work was thought to be a negligent act in the performance of the work he was employed to do.

Tomlinson, 226 N.C. at 180, 37 S.E.2d at 500-01. Our Supreme Court in *Tomlinson* interpreted this case and found, "[t]he epitome of the

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decision [in *Jefferson*] is that recovery was permitted on the ground that the servant was doing the act he was employed to do, negligently." *Id.* at 180-81, 37 S.E.2d at 501. The *Tomlinson* Court held that the defendant's employees in the case before them were not performing an act "connected with any business for [their] employer" as they were not on the premises of their employer, nor were they using an instrumentality of their employer when the negligent act occurred. *Id.* at 180, 37 S.E.2d at 500.

In the present case, we find that Ms. Haskell remained on duty during the "smoke break." It is uncontroverted that she performed her duties negligently and started the fire. In other words, Ms. Haskell was on duty despite the fact that she was smoking on the deck of the model home, and when the telephone rang, she negligently failed to extinguish the cigarette in order to perform her duty inside. Restatement of Agency, section 236 states that a servant may be within the scope of employment if "the servant, although performing his employer's work, is at the same time accomplishing his own objects or those of a third person which conflict with those of the master." Restatement (Second) of Agency § 236 (1958). This theory comports with the holding of *Tomlinson* and its interpretation of *Jefferson*.

Comstock argues that even though Ms. Haskell was on the premises of her employer when the negligent act occurred, she was nevertheless acting outside the scope of her employment since the act of smoking was purely personal.

Under North Carolina law, as generally, an employee can go "on a frolic of his own" not only by physically leaving his post of duty or "detouring" from an assigned route of travel, but by engaging in conduct which though it occurs while he is on duty and physically on the post or route of duty, is in no way "about," or "in furtherance of," "his master's business."

McNair v. Lend Lease Trucks, Inc., 62 F.3d 651, 657 (4th Cir. 1995), *reversed on other grounds*, 95 F.3d 325 (4th Cir. 1996) (citing *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990) (school principal's sexual assault on student in his office while on duty was outside scope of employment); *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E.2d 804 (1967) (employer not held liable where employee attacked a restaurant patron)). Therefore, an employee can be on the premises of his/her employer and still act outside the scope of employment. Being on the premises does not automatically create liability for the

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employer. However, if an employee is on the premises and the negligent act occurs while the employee is acting in furtherance of his duties, then the employer is liable under the doctrine of respondeat superior.

Comstock is accurate in contending that smoking a cigarette is a purely personal action; however, the essence of Comstock's argument is that any personal act by an employee that does not directly benefit the employer is outside the scope of employment. We do not agree with that assertion. As indicated in *Tomlinson, Jefferson*, and the Restatement of Agency, an employee can simultaneously perform a duty for his/her employer while also undertaking a personal endeavor. If the personal endeavor is performed negligently, then the employee has also performed his/her duty negligently.

Conversely, not every personal act performed while on duty will result in employer liability. There must be a nexus between the negligent act and the performance of the employee's duties. In the case before us, there was a nexus between Ms. Haskell's attempt to put out her cigarette and the answering of the telephone for her employer. The act of smoking while on duty did not take her out of the scope of her employment despite the personal nature of the activity.

III. Authority to Smoke

Based on the depositions in this case, there was a dispute as to whether Ms. Haskell was permitted to smoke on the premises, and whether Comstock ratified her smoking on the deck of the model home. Comstock claims that this dispute created a material issue of fact that should have prevented summary judgment for plaintiff. However, whether Ms. Haskell was permitted to smoke on the deck of the model home is not relevant to the analysis in this case. The issue here is whether Ms. Haskell was in the scope of her employment, and about the business of her employer, when the negligent act occurred. Performing a forbidden act does not necessarily remove an employee from the course and scope of employment.

If an employee is negligent while acting in the course of employment and such negligence is the proximate cause of injury to another, the employer is liable in damages under the doctrine of *respondeat superior*, notwithstanding the fact that the employer, himself, exercised due care in the supervision and direction of the employee, *the employee's violation of instructions being no defense to the employer*.

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Johnson v. Lamb, 273 N.C. 701, 707, 161 S.E.2d 131, 137 (1968) (emphasis in original and emphasis added).

It is well settled in this State that “[i]f the act of the employee was a means or method of doing that which he was employed to do, though the act be unlawful and unauthorized or even forbidden, the employer is liable for the resulting injury, but he is not liable if the employee departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do.”

Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 491-92, 340 S.E.2d 116, 122 (1986) (citation omitted; alteration in original). Therefore, even if it were proven that Ms. Haskell was not authorized to smoke, Comstock would still be liable under the doctrine of respondeat superior if she were in the scope of her employment while performing the act.

We find that no issue of material fact existed because whether or not Comstock authorized or ratified the smoking was irrelevant as Ms. Haskell was acting within the course and scope of her employment.

Conclusion

In this case, Ms. Haskell, an employee of Comstock, was on the premises of her employer, still attentive to her duties, when she committed a negligent act in the same transaction as an obligation to her employer. We hold that Ms. Haskell was in the scope of her employment and about her employer’s business at the time the negligent act occurred and therefore liability was properly imputed to Comstock.

Affirmed.

Judges ELMORE and JACKSON concur.

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STATE OF NORTH CAROLINA v. CARITA JACOBS REVELS, DEFENDANT

No. COA08-346

(Filed 3 March 2009)

Criminal Law— self-defense—denial of instruction

The trial court did not err in a second-degree murder case by denying defendant's request to instruct the jury on perfect and imperfect self-defense because: (1) it cannot be said that the inference that a knife might have been left in the back seat of a car by the victim and might have been picked up and used by the victim rose above mere possibility and conjecture; and (2) even if the victim did introduce the knife into the fight, there was no evidence that defendant, having disarmed the victim, then actually and reasonably believed that she needed to stab the victim multiple times resulting in her death after defendant received only a small cut on her index finger before she took the knife away.

Appeal by defendant from judgment entered 11 May 2007 by Judge D. Jack Hooks, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 11 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State.

Kathryn L. Vandenberg for defendant-appellant.

GEER, Judge.

Defendant Carita Jacobs Revels appeals her conviction of second degree murder, arguing that the trial court erred in denying her request to instruct the jury on perfect and imperfect self-defense. Based upon our review of the record, we conclude that there was insufficient evidence that defendant in fact formed an actual, reasonable belief that it was necessary to kill the victim to protect herself from death or serious bodily injury, and, therefore, the trial court did not err in refusing to submit the issue of self-defense to the jury.

Facts

Defendant separated from her husband Gary Revels in January 2004 when he began a relationship with Tina Strickland, the victim in this case. Mr. Revels often stayed with Ms. Strickland at her apartment, but occasionally they would stay in the trailer in which Mr.

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Revels and defendant used to live. Defendant indicated that she was angry with Ms. Strickland for dating defendant's husband and because she believed that Ms. Strickland was beating defendant's children. On several occasions, defendant stated: "I'm going to kill that bitch."

Sometime in May 2004, defendant went to Ms. Strickland's apartment and began beating on the door and yelling for Ms. Strickland to come outside. When Ms. Strickland came out, defendant kicked her in the stomach twice, punched her, and used a choke hold on her. The fight ended after a few minutes with Ms. Strickland suffering some scratches and bruises. Afterward, the two shook hands, and defendant left.

Roughly two weeks later, on 28 May 2004, another fight occurred involving defendant and Ms. Strickland. Ms. Strickland was out "cruising" with friends from school, Brittany and Brook Bullard, in Brook's Mitsubishi Galant. Ms. Strickland was in the back seat, Brittany was in the passenger seat, and Brook was driving. When Brook saw her cousin waving at them from an Amoco parking lot, she pulled in to talk.

Defendant was also out "cruising" with Brandi Oxendine, the 15-year-old daughter of Toby Oxendine, the man defendant was dating at that time. Defendant had consumed at least one bottle of beer while driving. Brandi asked defendant to turn into the Amoco so she could talk to a friend.

As defendant was pulling into the parking lot, she spotted Ms. Strickland. Defendant got out of her car and walked over to Brook Bullard's car. As defendant approached, Ms. Strickland got out of the back seat and began walking toward defendant. Some witnesses testified that they saw defendant hit Ms. Strickland in the head with a beer bottle, while other witnesses stated that they never saw defendant holding a beer bottle. The witnesses agreed, however, that defendant and Ms. Strickland began fighting, hitting each other with their fists and pulling each other's hair.

By all accounts, defendant was "winning" the fight, but at some point, Ms. Strickland pushed defendant through the open back door of Brook Bullard's car onto the back seat with Ms. Strickland then on top of defendant. Brandi Oxendine tried to grab Ms. Strickland to stop the fight, but Brittany Bullard pulled her away. None of the witnesses testified about what happened further in the back seat until

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Ms. Strickland came stumbling out of the car, falling backward onto Brittany Bullard, and passing out. Defendant followed, swinging a knife with blood on it. Defendant had a cut on her right index finger and blood running down her leg.

Brittany Bullard grabbed defendant and tried to wrestle the knife away from her. While Brittany was holding defendant, defendant kept yelling: “Let me go. Let me go. I’ll finish killing that bitch.” Ms. Strickland’s brother, who was also at the gas station that evening, slapped the knife out of defendant’s hand, and a woman then kicked the knife across the parking lot. Someone had called the police during the fight, and Officer Charles Maynor arrived at that point, took defendant over to his vehicle, and handcuffed her. Defendant told Officer Maynor: “If you’ll take these handcuffs off of me I’ll go over there and I’ll kill her—finish killing her.”

When Ms. Strickland’s shirt was lifted up, she was covered in blood. She was taken to the hospital, and emergency surgery was performed, but she ultimately died. The autopsy showed that Ms. Strickland had lacerations and bruising on the right side of her head, near her ear and neck. She had abrasions on her knuckles and fingers and a cut on her elbow. The medical examiner found a stab wound on her left shoulder that was three-and-a-half inches deep; a stab wound on the right side of her chest that was also about three-and-a-half inches deep that punctured her lung; and, a stab wound on her left side going under her arm into her breast and penetrating approximately five inches. This last wound penetrated Ms. Strickland’s left ventricle, killing her.

Defendant was arrested and indicted for first degree murder. Defendant pled not guilty and was tried before a jury in Robeson County Superior Court. The primary disputes at trial were about the knife and what happened in the back seat of the car. The State presented evidence, through the testimony of defendant’s boyfriend at the time, Toby Oxendine, that defendant routinely carried a knife with her in her right back pocket. He described it as being a military-style knife about six to seven inches long with a black handle. Mr. Oxendine testified that the knife identified at trial as the one recovered from the parking lot was the knife that defendant regularly carried. In his statement to the police, however, Mr. Oxendine had not mentioned defendant’s routinely carrying a knife, but rather had said he saw defendant pick up one of his knives from his dresser before she left the house on 28 May 2004.

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Mr. Oxendine, who was no longer dating defendant, also testified that defendant told him that she saw Ms. Strickland in the parking lot, pulled in, dragged Ms. Strickland from the car, and started beating her up. Defendant told him that she was losing the fight in the back seat of the car, so she pulled out the knife and started stabbing Ms. Strickland. She then cut her own finger to “cover it up to make it look like self-defense” On cross-examination, Mr. Oxendine admitted that he had not given a statement to the police until after he had broken up with defendant.

The State also presented the testimony of Mr. Oxendine’s daughter, Brandi Oxendine. As was established during the trial, on 1 June 2004, Brandi gave a statement to the police that she had seen Ms. Strickland with a knife and that defendant took it away from her. On 21 June 2004, however, Brandi gave another statement to the police asserting that she never saw a knife. Brandi claimed that her first statement was based on what defendant had said in the parking lot on the day of the stabbing. She acknowledged, however, that she gave her second statement after defendant and her father had broken up.

Defendant did not testify at trial, but did present the testimony of Gary Revels, who at the time of the homicide was defendant’s husband, but was seeing Ms. Strickland. Mr. Revels and defendant had, prior to the trial, reconciled. Mr. Revels testified that his father had given him several knives from a set for Christmas 2003. He stated that he kept one of the knives with him at all times in his pocket. He described the knife as having a stainless steel blade and see-through “louvers.” According to Mr. Revels, on 28 May 2004, Ms. Strickland took his knife out of his pocket and left with Brittany and Brook Bullard to drive into town. He then identified the knife introduced at trial as the weapon used by defendant as being his knife, the one Ms. Strickland took from him on 28 May 2004. Mr. Revels’ father also identified the knife introduced at trial as one given by him to his son from a set of 12 identical knives.

At the charge conference, defendant requested that the trial court instruct the jury on perfect self-defense and voluntary manslaughter based on imperfect self-defense. The trial court denied defendant’s request and instructed the jury only on first and second degree murder. The jury convicted defendant of second degree murder, and the trial court sentenced defendant to a presumptive-range term of 180 to 225 months imprisonment. Defendant timely appealed to this Court.

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Discussion

Defendant argues that when the trial court instructed the jury on first and second degree murder as possible verdicts, the court also should have instructed the jury on perfect self-defense and voluntary manslaughter based on imperfect self-defense. "The right to kill in self-defense is based on the necessity, real or reasonably apparent, of killing an unlawful aggressor to save oneself from imminent death or great bodily harm at his hands." *State v. Norman*, 324 N.C. 253, 259, 378 S.E.2d 8, 12 (1989) (emphasis omitted).

When there is evidence that defendant acted in self-defense, the trial court must submit the issue to the jury even though there is contradictory evidence by the State or discrepancies in the defendant's evidence. *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 819 (1974); see *State v. Guss*, 254 N.C. 349, 351, 118 S.E.2d 906, 907 (1961) ("The jury must not only consider the case in accordance with the State's theory but also in accordance with defendant's explanation."). The trial court must consider the evidence in the light most favorable to the defendant in deciding whether the evidence is sufficient to entitle a defendant to jury instructions on self-defense. *State v. Watkins*, 283 N.C. 504, 509, 196 S.E.2d 750, 754 (1973).

There are two types of self-defense: perfect and imperfect. "Perfect self-defense excuses a killing altogether, while imperfect self-defense may reduce a charge of murder to voluntary manslaughter." *State v. Ross*, 338 N.C. 280, 283, 449 S.E.2d 556, 559 (1994). Perfect self-defense is established when the following four elements exist at the time of the homicide:

- "(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
- (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
- (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
- (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm."

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State v. Lyons, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995) (quoting *State v. McAvoy*, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992)). In contrast, imperfect self-defense is established if the first two elements exist at the time of the homicide, “but the defendant, without murderous intent, either was the aggressor in bringing on the affray or used excessive force.” *Id.*

Thus, for a defendant to be entitled to *any* 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). If the evidence requires a negative answer to either question, a self-defense instruction should not be given. *Id.* at 160-61, 297 S.E.2d at 569.

Although defendant did not testify at trial, a defendant is not required to testify or offer evidence in order for the jury to be instructed on the law of self-defense. Instead, “[a] defendant is entitled to an instruction on self-defense if there is *any evidence in the record* from which it can be determined that it was necessary or reasonably appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm.” *Id.* at 160, 297 S.E.2d at 569 (emphasis added); accord *State v. Deck*, 285 N.C. 209, 215, 203 S.E.2d 830, 834 (1974) (holding *State’s evidence* was sufficient to permit jury to reasonably conclude defendant killed in self-defense).

Defendant maintains that if Ms. Strickland was the one who pulled out the knife during the fight, then it is reasonable to infer that defendant actually and reasonably believed it was necessary to use deadly force. Even assuming *arguendo* that we may draw such an inference, there is still insufficient evidence to support the underlying premise: that Ms. Strickland pulled out the knife and threatened defendant with it. Defendant points to the evidence identifying the knife used in the stabbing as one taken by Ms. Strickland from Mr. Revels that day. Defendant then argues that neither woman had a knife before defendant was pushed into the back seat of the car. According to defendant, because Ms. Strickland had been riding in the back seat, it is reasonable to infer that Ms. Strickland had left the knife in the back seat, pushed defendant into the back seat so that Ms. Strickland could get the knife, and then Ms. Strickland used the knife on defendant. Defendant contends that the cut on her finger was a defensive wound.

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The evidence viewed in the light most favorable to defendant would require us to assume that the knife used was the one carried by Ms. Strickland. Nevertheless, while defendant asks this Court to infer that the knife was left in the back seat where Ms. Strickland had been sitting, the record contains no evidence allowing that inference apart from the fact that Ms. Strickland was sitting somewhere in the back of the car sometime prior to the fight. In addition, even if the knife was in some unidentified location in the back seat area of the car prior to defendant's being pushed into the car, no evidence exists from which the inference can be drawn that Ms. Strickland picked up the knife from its location rather than defendant. As the State notes in its brief, "[o]ne could just as easily speculate that [Ms. Strickland] left the knife on the back seat of the car or it had fallen out there and that the defendant found it or that defendant pulled it out of [Ms. Strickland]'s pocket and stabbed [her] with intent to kill her."

It has long been the law that "[e]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." *State v. Clark*, 324 N.C. 146, 162, 377 S.E.2d 54, 64 (1989) (quoting *State v. Vinson*, 63 N.C. 335, 338 (1869)). Here, we cannot say that the inference that the knife might have been left in the back seat and might have been picked up and used by Ms. Strickland rises above mere possibility and conjecture. See *State v. Wolfe*, 157 N.C. App. 22, 28, 577 S.E.2d 655, 660 (holding that mere fact victim had gun residue on his hand and, therefore, he possibly held gun was not sufficient to support self-defense instruction when defendant did not testify he saw gun, and no gun was found near victim), *appeal dismissed and disc. review denied*, 357 N.C. 255, 583 S.E.2d 289 (2003).

Moreover, even if Ms. Strickland did introduce the knife into the fight, the evidence is undisputed that defendant received only a small cut on her index finger before she took the knife away from Ms. Strickland. There is no evidence that defendant, having disarmed Ms. Strickland, then actually and reasonably believed that she needed to stab Ms. Strickland multiple times, resulting in her death. See *State v. Coley*, 193 N.C. App. 458, 467-68, 668 S.E.2d 46, 53 (2008) (holding that trial court did not err in refusing to give self-defense instruction when defendant's evidence revealed that although victim reached for knife, defendant grabbed it first and offered no evidence that, after securing knife, he still reasonably believed he had to kill

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victim), *disc. review denied*, 363 N.C. 132, 673 S.E.2d 664, *aff'd per curiam*, 363 N.C. 622, 683 S.E.2d 208 (2009); *State v. Hayes*, 130 N.C. App. 154, 180, 502 S.E.2d 853, 870 (1998) (“The defendant wrestled the bat from her and only after obtaining sole possession of the bat did he proceed to strike her multiple times about her body with the bat causing her death. There is no evidence in this record that shows that Mrs. Hayes presented any threat to the defendant after he acquired the bat from her.”), *aff'd in part and modified in part, disc. review improvidently allowed in part*, 350 N.C. 79, 511 S.E.2d 302 (1999).

Defendant, however, points to three cases in which the appellate courts held that the trial court was required to instruct on self-defense: *State v. Johnson*, 184 N.C. 637, 113 S.E. 617 (1922), *State v. Hayes*, 88 N.C. App. 749, 364 S.E.2d 712 (1988), and *State v. Hughes*, 82 N.C. App. 724, 348 S.E.2d 147 (1986). None of these cases is apposite here. In *Johnson*, 184 N.C. at 638-40, 113 S.E. at 617-18, unlike in this case, there was substantial, although conflicting, testimony regarding what actually occurred during the fight that resulted in the victim’s death. Similarly, in *Hayes*, 88 N.C. App. at 750, 364 S.E.2d at 712, the defendant presented evidence—conflicting with the State’s—about what happened during the fight in which the victim was fatally stabbed. Finally, in *Hughes*, 82 N.C. App. at 728, 348 S.E.2d at 150, the defendant testified at trial that “[the victim] was in fact armed and a threat to defendant’s life or health.”

Rather than supporting defendant’s argument, *Johnson*, *Hayes*, and *Hughes* highlight the weakness in defendant’s argument: she cannot point to any evidence regarding what happened in the back seat of that car. While the evidence would permit a reasonable juror to find that Ms. Strickland was killed with her own knife, there is no evidence as to where the knife was before it was introduced into the fight, how or by whom it was introduced, how defendant obtained the knife, and why she believed it necessary to stab Ms. Strickland multiple times after disarming her. Under these circumstances, we hold that the trial court did not err in refusing to instruct the jury on perfect or imperfect self-defense.

No Error.

Judges STEELMAN and STEPHENS concur.

STATE v. WILLIAMS

[195 N.C. App. 554 (2009)]

STATE OF NORTH CAROLINA v. DEMETRIUS MIGUEL WILLIAMS, DEFENDANT

No. COA08-314

(Filed 3 March 2009)

1. Search and Seizure— stop and frisk—reasonable articulable suspicion

The trial court properly determined that an officer had reasonable articulable suspicion to stop and frisk defendant (which led to a drugs arrest) where the officer arrived in the vicinity of an armed robbery minutes after the robber had fled in the direction traveled by defendant, defendant matched the corrected description of the robber, he was found within a few blocks of the robbery minutes after it occurred, he was traveling in the same direction as the robber, he froze when confronted, and he initially refused to take his hands out of his pockets when asked by the officer.

2. Search and Seizure— seizure of drugs after stop and frisk—probable cause standard required—remand

A motion to suppress was remanded for determination under the correct standard where the trial court concluded that an officer seized crack cocaine from defendant based on reasonable suspicion after a stop and frisk. The trial court should have determined whether the officer had probable cause to make the seizure under the plain feel doctrine; where the trial court mistakenly applies the incorrect standard in determining a constitutional violation for purposes of a motion to suppress, the appellate court must remand for a determination under the proper standard.

Appeal by defendant from judgment entered 10 September 2007 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 11 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

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GEER, Judge.

Defendant Demetrius Miguel Williams, after having his motion to suppress denied, pled guilty to possession with the intent to sell or deliver cocaine, possession of marijuana, possession of drug paraphernalia, and having attained habitual felon status. Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Although we hold that the arresting officer had reasonable articulable suspicion to stop and frisk defendant under *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), we conclude that the trial court did not apply the correct legal standard in determining whether the officer's seizure of contraband during the frisk was constitutional under the plain feel doctrine. We, therefore, reverse and remand for further proceedings.

Appellate review of the denial of a motion to suppress 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, 123 S. Ct. 2087 (2003). The trial court's conclusions of law are, however, "fully reviewable on appeal." *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523, 126 S. Ct. 1773 (2006).

As a preliminary matter, we note that the trial court announced its decision from the bench, but apparently did not subsequently enter a written order memorializing its ruling on defendant's motion to suppress. N.C. Gen. Stat. § 15A-977(f) (2007) states that "[t]he [trial] judge must set forth in the record his findings of facts and conclusions of law." This statute has been interpreted as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing. *State v. Shelly*, 181 N.C. App. 196, 205, 638 S.E.2d 516, 523, *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007). If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress. *Id.*

In this case, the trial court provided its rationale from the bench, and there were no material conflicts in the evidence. Only Officer Nathan Smith of the Hendersonville Police Department testified;

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defendant presented no evidence. We, therefore, infer that the trial court made the findings necessary to support the denial of the motion to suppress. The issue is, therefore, whether the undisputed evidence supports the denial of the motion to suppress.

Officer Smith's testimony at the suppression hearing tended to establish the following facts. On 17 January 2006, sometime around 1:00 p.m., he was on patrol when he heard over the radio that an armed robbery had just occurred at a local Hispanic store. Due to the language barrier between the victims and the police, there were two conflicting BOLO ("be on the lookout for") descriptions of the perpetrator. The first described the perpetrator as a white male wearing a hood and gloves and carrying a silver firearm. In the second BOLO, the perpetrator was described as an African-American male about six feet tall with a medium build, who was wearing a green hooded jacket with gloves and some type of mask, and who was armed with a silver gun.

Just minutes after the robbery, Officer Smith spotted defendant—who is African-American and approximately six feet tall with a medium build—a block or two from the location of the robbery, walking in the same direction that the suspect was reportedly traveling, although he was also walking down the middle of the street blocking traffic. Defendant was wearing a "blue-green" jacket made of a material that changed colors. He had his hands in his pockets, had his hood up, and was wearing shooting glasses that wrapped around his face.

Officer Smith stopped his patrol car, radioed for backup, and approached defendant, asking him to take his hands out of his pockets. At this point, defendant "locked up," stopped walking, kept his hands in his pockets, and did not say anything. Based on defendant's response, Officer Smith became concerned that defendant was the armed robbery suspect and that he might be concealing a firearm in his pockets. Officer Smith drew his firearm and ordered defendant several more times to take his hands out of his pockets.

After Officer Smith "very strong[ly]" ordered defendant to show his hands, defendant took out his hands but also started to empty out his pockets. According to Officer Smith, as defendant was emptying his pockets, defendant exposed the top of a plastic baggie in one of his front pockets. The officer took hold of defendant's arm, put defendant's hand on top of the vehicle, and holstered his gun. When Officer Smith frisked defendant, he patted defendant's front pocket

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and felt something hard to the touch, round, and possibly a quarter of an inch thick. Based on its feel, Officer Smith believed the object to be a “crack cookie.” Officer Smith then pulled the baggie out of defendant’s pocket—the baggie contained an off-white “big crack cookie” and smaller pieces of what appeared to be crack cocaine.

Officer Smith arrested defendant for possession of cocaine and conducted a search incident to arrest during which he found a small pipe packed with less than half an ounce of marijuana. The “cookie” was sent to the SBI for testing and was identified as 19.5 grams of crack cocaine.

Defendant was indicted for possession of marijuana in an amount up to 1.2 ounces, possession with the intent to sell or deliver cocaine, possession of drug paraphernalia, and having attained habitual felon status. Defendant moved to suppress the drugs and drug paraphernalia on the ground that they had been seized in violation of his Fourth Amendment rights. The trial court denied the motion to suppress, orally concluding that the officer had reasonable articulable suspicion to stop defendant and upholding the seizure of the drugs under the plain feel doctrine. Reserving the right to appeal from the denial of his motion to suppress, defendant pled guilty to each of the charges and having attained habitual felon status. At sentencing, the State stipulated to and the trial court found the mitigating factor that defendant had accepted responsibility for his criminal conduct at an early stage. The court then consolidated the four charges into one judgment and sentenced defendant to a mitigated sentence of 80 to 105 months imprisonment. Defendant timely appealed to this Court.¹

Investigatory Stop

[1] Defendant first argues that Officer Smith did not have reasonable articulable suspicion to justify the investigatory stop, and thus the trial court erred in denying his motion to suppress. “A police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway.” *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007), *aff’d*, 362 N.C. 244, 658 S.E.2d 643, *cert. denied*, — U.S. —, 172 L. Ed. 2d 198, 129 S. Ct. 264 (2008). Reasonable articulable suspi-

1. We note that, pursuant to a motion to amend the record on appeal, defendant’s appellate counsel wrote in by hand amendments to defendant’s assignments of error. Because these handwritten additions can be difficult to read, the better practice would have been to retype and submit corrected assignments of error.

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cion requires that “[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906, 88 S. Ct. at 1880)).

Reasonable articulable suspicion “only require[s] . . . a minimal level of objective justification, something more than an ‘unparticularized suspicion or hunch.’” *Id.* at 442, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, 109 S. Ct. 1581, 1585 (1989)). “A court must consider ‘the totality of the circumstances—the whole picture’ in determining whether a reasonable suspicion to make an investigatory stop exists.” *Id.* at 441, 446 S.E.2d at 70 (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629, 101 S. Ct. 690, 695 (1981)).

Considering the “whole picture,” the evidence presented at the suppression hearing establishes that the officer had reasonable articulable suspicion to conduct an investigatory stop of defendant. Officer Smith reached the vicinity of the armed robbery just minutes after the robber had fled in the direction traveled by defendant. At the time he first saw defendant, Officer Smith had received the second BOLO describing the suspect as an African-American male about six feet tall with a medium build, armed with a silver gun, and wearing a green jacket with a hood, gloves, and some type of mask. Officer Smith described defendant as being roughly six feet tall with a medium build and wearing a “blue-green” hooded jacket that changed colors. Defendant was also wearing large glasses which covered much of his face. With his hands in his pockets, Officer Smith was unable to confirm whether defendant was wearing gloves or carrying a silver gun. When, however, Officer Smith stopped defendant and asked him to show his hands to see if he was in fact wearing gloves, defendant “locked up” and initially refused to take his hands out of his pockets. Viewed as a whole, these facts and the reasonable inferences flowing from them support the trial court’s conclusion that Officer Smith had reasonable articulable suspicion that defendant was the perpetrator of the robbery.

Relying predominately on *State v. Cooper*, 186 N.C. App. 100, 103, 649 S.E.2d 664, 666 (2007), *disc. review denied*, 362 N.C. 476, 666 S.E.2d 761 (2008), and the cases cited in *Cooper*, defendant argues that the officer lacked reasonable articulable suspicion because the officer had received two “drastically” different descriptions of the

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armed robbery suspect, with defendant matching neither description. In *Cooper*, this Court held that the officer lacked reasonable suspicion because, beyond describing the suspect as an African-American male, the BOLO provided “no further description as to age, physical characteristics, or clothing” of the suspect. *Id.* at 107, 649 S.E.2d at 668. The officer in *Cooper* stopped the defendant solely because he was a black male within a quarter of a mile of where a robbery by a black male had occurred. *Id.*

Here, by contrast, the corrected BOLO provided specific details about the robber apart from race that matched defendant: his height and build, his clothing, and the direction in which the robber was traveling. *See State v. Lovin*, 339 N.C. 695, 704, 454 S.E.2d 229, 234 (1995) (stating officer had reasonable articulable suspicion to conduct *Terry* stop in part because defendant’s appearance—a man with long brown hair, wearing a gold watch—substantially matched the description given of a male with a “lot of hair,” wearing a gold watch and large frame glasses). Moreover, there is no requirement that the individual stopped must match precisely the description of the suspect. *See State v. Buie*, 297 N.C. 159, 162, 254 S.E.2d 26, 28 (finding reasonable articulable suspicion when defendant only “roughly matched the description of the suspect”), *cert. denied*, 444 U.S. 971, 62 L. Ed. 2d 386, 100 S. Ct. 464 (1979).

Defendant, however, appears to be arguing that if conflicting BOLOs are issued, an officer relying on the most recent BOLO cannot, given the discrepancy, have reasonable articulable suspicion. Defendant cites no authority for this proposition, and we know of none. Even though an officer’s reliance on a prior, inaccurate BOLO might raise Fourth Amendment concerns, in this case, the officer was relying on the corrected BOLO.

Defendant also argues, however, that, like the defendant in *Cooper*, he was not engaged in any suspicious activity when Officer Smith first saw him and did not act nervously or threateningly during his interaction with Officer Smith, but rather fully cooperated. This argument disregards the requirement that we look at the “whole picture” or the “totality of the circumstances.” Because defendant substantially matched the description in the corrected BOLO, was found a few blocks from the robbery only minutes after it occurred, was traveling in the same direction as the robber, froze when confronted, and refused initially to remove his hands from his pockets, we hold that the trial court properly determined that the officer had reasonable articulable suspicion to stop defendant and frisk him. *See, e.g.*,

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State v. Rinck, 303 N.C. 551, 560, 280 S.E.2d 912, 920 (1981) (upholding trial court's determination that officer had reasonable articulable suspicion to conduct *Terry* stop where officer spotted defendants walking down street within a few hundred feet of where homicide occurred within past half hour); *In re Whitley*, 122 N.C. App. 290, 292, 468 S.E.2d 610, 612 (1996) (concluding officer had reasonable articulable suspicion when officer had to repeatedly ask juvenile to spread his legs to be frisked and juvenile had "nervous body reflexes"), *disc. review denied*, 344 N.C. 437, 476 S.E.2d 132 (1996); *State v. Cornelius*, 104 N.C. App. 583, 588, 410 S.E.2d 504, 508 (1991) (holding that officer had reasonable suspicion to justify investigatory stop of automobile when officer received dispatch that black male in black BMW with temporary license tag was selling controlled substances, and officer observed person in automobile fitting that description less than one minute later), *disc. review denied*, 331 N.C. 119, 414 S.E.2d 762 (1992).

Plain Feel Doctrine

[2] Defendant next contends that even if he was properly stopped, the trial court applied the wrong legal standard under the plain feel doctrine in determining whether the officer was justified in seizing the "crack cookie" from defendant's pocket. Defendant asserts that "an officer must have probable cause sufficient to warrant a belief that the object may be contraband drugs." We agree.

According to the plain feel doctrine, when conducting a *Terry* frisk, "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons . . ." *Minnesota v. Dickerson*, 508 U.S. 366, 375, 124 L. Ed. 2d 334, 346, 113 S. Ct. 2130, 2137 (1993). The Supreme Court has, however, explicitly limited this doctrine to when the officer has probable cause to believe the object is contraband, explaining that "the Fourth Amendment's requirement that the officer have *probable cause* to believe that the item is contraband before seizing it ensures against excessively speculative seizures." *Id.* at 376, 124 L. Ed. 2d at 347, 113 S. Ct. at 2137 (emphasis added). *See also State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 376 ("Evidence of contraband, plainly felt during a pat-down or frisk, may also be admissible, provided the officer had *probable cause* to believe that the item was in fact contraband." (emphasis added)), *appeal dismissed and disc.*

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review denied, 360 N.C. 75, 624 S.E.2d 369 (2005); *State v. Briggs*, 140 N.C. App. 484, 489, 536 S.E.2d 858, 861 (2000) (“[I]f after feeling the object, the officer lacks probable cause to believe that the object is contraband without conducting some further search, the ‘immediately apparent’ requirement has not been met and the plain feel doctrine cannot justify the seizure of that object.”).

Thus, in order for the seizure of the contraband in this case to be constitutional under the plain feel doctrine, the trial court was required to determine that the officer had probable cause—not reasonable suspicion—to believe that the item felt in defendant’s pocket was contraband. When, however, the trial court made its oral denial of the motion to suppress, it stated that “the officer had a *reasonable suspicion* that the defendant might be carrying contraband drugs.” The trial court’s statement suggests that the court improperly applied the reasonable articulable suspicion standard rather than probable cause in determining whether the seizure of the contraband drugs was justified under the Fourth Amendment.

Our Supreme Court has stated that when reviewing a trial court’s ruling on a motion to suppress, “[t]he trial court’s conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.” *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305, 121 S. Ct. 1379-80 (2001)). Where, as here, the trial court mistakenly applies an incorrect legal standard in determining whether a defendant’s constitutional rights have been violated for purposes of a motion to suppress, the appellate court must remand the matter to the trial court for a “redetermination” under the proper standard. *Id.* at 339-40, 543 S.E.2d at 828. Accordingly, we reverse the portion of the trial court’s denial of the motion to suppress concluding that the officer properly seized the crack cocaine cookie and remand for a determination whether the officer had probable cause to make that seizure under the plain feel doctrine.

Reversed and remanded.

Judges STEELMAN and STEPHENS concur.

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[195 N.C. App. 562 (2009)]

DOUGLAS SCOTT FILE, PLAINTIFF v. PATRICIA ANN FILE, DEFENDANT

No. COA08-797

(Filed 3 March 2009)

1. Child Support, Custody, and Visitation— custody—criminal contempt—findings sufficient

Contested findings concerning the issue of criminal contempt in a child custody case were not reviewed where the established findings supported the conclusion that defendant was in contempt in denying plaintiff visitation.

2. Child Support, Custody, and Visitation— custody—order to be reviewed in five months—temporary—interlocutory

A child custody order was temporary, and thus interlocutory, where it scheduled a review in approximately five months. The order thus stated a clear and specific time for reconvening which was reasonably brief.

3. Appeal and Error— appealability—temporary child custody order—parent’s driving—no danger to child

An interlocutory temporary child custody order was not shown to adversely affect a substantial right and was not immediately appealable. Although defendant argued that the child was endangered by plaintiff’s driving, the trial court found that his driving did not endanger the child, based on substantial evidence from plaintiff’s physicians.

Appeal by defendant from order entered 28 December 2007 by Judge R. Marshall Bickett, Jr. in District Court, Rowan County. Heard in the Court of Appeals 4 December 2008.

Milton Bays Shoaf, for plaintiff-appellee.

Sherrill and Cameron, P.L.L.C., by William W. Cameron, III, for defendant-appellant.

STROUD, Judge.

Defendant appeals trial court order (1) finding her to be in willful contempt of the court and (2) granting plaintiff primary custody of plaintiff and defendant’s minor child. For the following reasons, we affirm the order on the issue of defendant’s contempt and dismiss defendant’s appeal as to the issue of custody, as the appeal is interlocutory.

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I. Background

On or about 26 February 2003, the trial court entered a custody order finding defendant to be in “willful contempt” and ordering plaintiff and defendant “to share joint custody of the minor child . . . with the primary residence of the minor child remaining with the defendant.” On 7 June 2007, plaintiff filed a motion in the cause requesting defendant be held in contempt and that primary custody of the minor child be granted to plaintiff (“plaintiff’s motion”). This same date defendant was ordered to show cause why she should not be held in contempt. On 24 July 2007, defendant filed a motion to dismiss plaintiff’s motion or to transfer plaintiff’s motion to Ohio and to strike certain documents. On 28 December 2007, the trial court entered an order regarding plaintiff’s motion. The uncontested findings of fact in the trial court order are as follows in pertinent part:

10. Plaintiff and defendant were lawfully married on February 10, 1998, in Kent, Ohio, and separated on November 7, 1999, and were subsequently divorced.

11. The parties are the parents of one (1) minor child, namely; Katlyn Elizabeth File, born February 16, 1999.

. . . .

24. The February 26, 2003 order retained the joint custody arrangement, with the primary residence being with the defendant. Plaintiff’s time with the minor child was expanded, stating that plaintiff shall have the minor child for summer vacation beginning two days after public school ends until two days before school begins. Further, during the school year while defendant has custody of the minor child, plaintiff is allowed weekend visitation with the minor child in the location where the child is staying on a twenty days written notice, once every thirty days.

25. Plaintiff mailed a certified letter to defendant notifying her that he would be in Ohio for a weekend visit on April 20, 2007. Defendant told plaintiff that she would not allow visitation that weekend because it had not been 30 days since his last visit.

26. Plaintiff mailed another certified letter on April 24, 2007, (Plaintiff’s Ex. 8) stating that he would be coming to Ohio for a weekend visit on May 25, 2007; that he would pick her up from school on Friday and return her on Sunday, May 27, 2007.

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Tracking from the USPS shows that the letter was postmarked on April 25, 2007. Notice was left at the Kent Ohio postal address on April 27, 2007, Defendant did not pick up the letter until May 17, 2007, as shown by the certified receipt. Despite having signed the return receipt, defendant told plaintiff that she had never received the letter and told him that they would not be available for a visit that weekend. She actually had the letter and did not notify plaintiff of the late receipt thereof.

27. Plaintiff traveled to Ohio on Thursday, May 24, 2007 to visit the minor child. The child was not in school on that day. He stayed overnight and the child was not in school on Friday, May 25, 2007. He attempted to call defendant several times to find the child to initiate his weekend visitation. Plaintiff contacted his attorney in Ohio, who called the attorney for defendant. The defendant's mother then called plaintiff and told him he would not get the child that she and the child were in Chicago. The defendant called plaintiff shortly after his conversation with her mother and told him that the child was with her mother in Ohio. Plaintiff was never able to locate defendant or the child.

27. [sic]. Defendant testified that the reason she denied plaintiff his visitation is because she believes that his health makes it dangerous for him to drive with the minor child in the car. Plaintiff received a letter from defendant dated August 29, 2007, stating in part: "I want you to provide me with a current letter from your doctor on your ability to drive. I will want a current letter every time you visit from now on." (P Ex. 1) Plaintiff has sent several statements from his physicians stating that although he has had a brain tumor and has had surgeries for it, he is "clinically and radiologically stable . . . [and is] able to drive." (P Ex. 4) Other letters were introduced making the same general statement that plaintiff is perfectly capable of safely driving an automobile (P Ex. 2, 3 and 5) Defendant further testified that despite these letters, she believes that plaintiff poses a danger to the child, that he has a "terminal condition" and that she is opposed to plaintiff transporting the child at any time.

. . . .

29. On February 22, 2007, defendant filed a petition seeking temporary emergency custody of the minor child in the Court of Common Pleas, Domestic Relations Division, Portage County, Ohio. She alleged that the minor child was at risk when travelling

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[sic] with her father due to his brain tumor. Plaintiff was served by certified mail on February 27, 2007. Plaintiff retained an attorney in Ohio. On April 19, 2007, the Ohio court appointed a guardian *ad litem*. Due to a conflict of interest, the initial guardian withdrew and a subsequent guardian was appointed on June 4, 2007. After the guardian received a letter from Dr. James Vrendengurgh of the Duke University Brain Tumor Center (P Ex. 4), the guardian *ad litem* wrote a letter to both attorneys, which appears of record in the Ohio court, stating that the “strong statement as to Mr. File’s health and ability to safely drive and care for his daughter” resolved the issue. On June 8, 2007, the Ohio court vacated the order of June 4, 2007. No further proceedings are pending in Ohio. As stated above, the undersigned judge has spoken with Judge Jerry L. Hayes by telephone, and he confirmed that the action in Ohio was for emergency relief only and Ohio did not intend to seek jurisdiction.

. . . .

31. Because plaintiff has experienced this serious medical condition, it is important to him to maximize his time with his daughter, and defendant has continuously made it difficult to impossible for him to spend time with his child.

Based on these and other findings the trial court found defendant to be in willful contempt and granted primary custody of the minor child to plaintiff. In the order, the trial court also scheduled the case for review in May of 2008. Defendant appeals contesting several findings of fact, conclusions of law, and the entire substance of the trial court’s decretal provision; however, all of defendant’s contentions center around two decisions of the trial court: (1) concluding defendant was in willful contempt and (2) awarding primary custody of the minor child to plaintiff. For the following reasons, we affirm in part and dismiss in part.

II. Willful Contempt

At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private par-

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ties and to compel obedience to orders and decrees made for the benefit of such parties.

A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. The importance in distinguishing between criminal and civil contempt lies in the difference in procedure, punishment, and right of review.

O'Briant v. O'Briant, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (citations omitted). Criminal contempt includes "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution." N.C. Gen. Stat. § 5A-11(a)(3) (2007). It appears from the record that defendant was determined to be in criminal contempt as the court order reads, "Defendant is in willful contempt of this court for her repeated conduct of refusing to allow plaintiff visitation with the minor child, *in callous disregard for the Court and its orders[.]*" (Emphasis added). See N.C. Gen. Stat. § 5A-11(a)(3); *O'Briant* at 434, 329 S.E.2d at 372.

[1] Defendant assigns error to findings and conclusions which (1) nullify her alleged reasoning for denying plaintiff visitation to the minor child, that she was fearful plaintiff was a danger while he was driving due to a brain tumor, and (2) establish that defendant not only had no justifiable excuse, but purposely ignored the court's previous directives.

A contempt hearing is a non-jury proceeding. The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary. The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*.

State v. Simon, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (citations and quotation marks omitted), *disc. review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007).

Without even considering defendant's contested findings of fact, other uncontested findings establish that defendant acted in willful

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contempt by interfering with a court order and the proper execution thereof. *See* N.C. Gen. Stat. § 5A-11(a)(3); *Pascoe v. Pascoe*, 183 N.C. App. 648, 650, 645 S.E.2d 156, 157 (2007) (citation and quotation marks omitted). (“Findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal.”). These uncontested findings include: (1) defendant claiming to have not received plaintiff’s letter informing her of his visit, though defendant had indeed received the letter; (2) defendant hiding the minor child away when plaintiff actually came to visit; (3) plaintiff’s several statements sent to defendant from doctors stating that he was capable of driving and not a danger due to his brain tumor; and (4) the guardian *ad litem*’s review of plaintiff’s letter from the Duke University Brain Tumor Center establishing that plaintiff was not a danger while driving. These four established findings alone support the conclusion that defendant was in contempt of court by denying plaintiff visitation with the minor child. *See* N.C. Gen. Stat. § 5A-11(a)(3); *Pascoe* at 650, 645 S.E.2d at 157. Accordingly, we need not review the contested findings dealing with the issue of contempt, as the established findings support a conclusion of contempt.

III. Custody

[2] Defendant next assigns error to several findings and conclusions which resulted in the trial court awarding primary custody of the minor child to plaintiff. Though not raised by either party, we conclude that the order is actually an order for temporary custody and is therefore interlocutory.

“An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree.” *Brewer v. Brewer*, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000) (citation and quotation marks omitted). Though the trial court did not specifically designate this order as “temporary” or “permanent,” “the trial court’s designation of an order as ‘temporary’ or ‘permanent’ is not binding on an appellate court. Instead, whether an order is temporary or permanent in nature is a question of law, reviewed on appeal *de novo*.” *Smith v. Barbour*, 195 N.C. App. —, —, — S.E.2d —, — (2009) (3 February 2009) (No. COA07-1083) (citations omitted).

A permanent custody order establishes a party’s present right to custody of a child and that party’s right to retain custody indefinitely. . . .

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In contrast, temporary custody orders establish a party's right to custody of a child pending the resolution of a claim for permanent custody—that is, pending the issuance of a permanent custody order.

Regan v. Smith, 131 N.C. App. 851, 852-53, 509 S.E.2d 452, 454 (1998) (citations omitted).

“[A]n order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues.” *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). As the order was not entered without prejudice to either party, we will analyze this order pursuant to the second test. *See id.* Here, the order does state “a clear and specific reconvening time” of May 2008, approximately five months after entry of the order. *Id.* Thus, the only question is if the time interval between the two hearings would be considered “reasonably brief.” *Id.* “[T]he reasonableness of the time must be addressed on a case-by-case basis[.]” *Id.* (citation and quotation marks omitted). This Court has concluded that over twelve months is not a “reasonably brief” time for reconvening. *Id.*, *see LaValley v. LaValley*, 151 N.C. App. 290, 293, n.6, 564 S.E.2d 913, 915, n.6 (2002); *Brewer* at 228, 533 S.E.2d at 546. However, in *Senner*, this Court concluded that twenty months was a “reasonably brief” time for reconvening. *Senner* at 81, 587 S.E.2d at 677. In *Dunlap v. Dunlap*, this Court determined that a two to three month reconvening time meant that the custody order issued was temporary. *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). We deem approximately five months to be a “reasonably brief” time for a reconvening hearing. *Senner* at 81, 587 S.E.2d at 677. As the trial court order “states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief[.]” *id.*, we conclude the order was temporary and thus interlocutory.

[3] However, even a temporary custody order may be appealed immediately if the order affects a substantial right. *See* N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2007); *Dunlap* at 676, 344 S.E.2d at 807.

The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party. Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed.

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Flitt v. Flitt, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (citations omitted). “A substantial right is one which will clearly be lost or irretrievably adversely affected if the order is not reviewable before final judgment.” *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation and quotation marks omitted).

We note that defendant did not address the issue of whether the order is immediately appealable, nor the issue of a loss of or adverse affect upon a substantial right, in her brief. In *McConnell v. McConnell*, this Court found an interlocutory custody order to be immediately reviewable on the basis of an adverse affect upon a substantial right because the physical well being of the child may have been endangered by a delay of the appeal. 151 N.C. App. 622, 625, 566 S.E.2d 801, 804 (2002). This Court stated that

the order in this case involves the removal of the child from a home where the court specifically concluded that there is a direct threat that the child is subject to sexual molestation if left in the mother’s home. Where as here, the physical well being of the child is at issue, we conclude that a substantial right is affected that would be lost or prejudiced unless immediate appeal is allowed.

See id. However, in the present case, although defendant argued that the child was endangered by plaintiff’s driving, the trial court found that his driving did not endanger the child, based upon substantial evidence from plaintiff’s physicians. We therefore find no indication of impairment of a substantial right by a delay in review.

The general rule which has been stated by this Court is that temporary custody orders are interlocutory “and the temporary custody granted by the order does not affect any substantial right of plaintiff which cannot be protected by timely appeal from the trial court’s ultimate disposition of the entire controversy on the merits.” *Dunlap* at 676, 344 S.E.2d at 807 (citation omitted). As defendant has not demonstrated that the order adversely affected a substantial right which cannot be protected by a timely appeal of the “trial court’s ultimate disposition of the entire controversy on the merits[.]” *id.*, this interlocutory appeal as to custody should be dismissed.

IV. Conclusion

In conclusion, we affirm the portion of the trial court order determining defendant to be in willful contempt of the court and sentenc-

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[195 N.C. App. 570 (2009)]

ing defendant to 30 months of unsupervised probation. We dismiss the portion of plaintiff's appeal as to custody.

AFFIRMED IN PART and DISMISSED IN PART.

Judges CALABRIA and STEELMAN concur.

ESTATE OF SHENNEL MCCRIMON MCKENDALL, LAWRENCE AND JOYCE MCCRIMON, ADMINISTRATORS, AND JANAY WHITE, PLAINTIFFS v. RICHARD WEBSTER, IN HIS OFFICIAL CAPACITY AS SHERIFF OF CHATHAM COUNTY, AND WESTERN SURETY, AS SURETY FOR SHERIFF WEBSTER, DEFENDANTS

No. COA07-1451

(Filed 3 March 2009)

1. Appeal and Error— appealability—denial of motion to dismiss—public duty doctrine

While the denial of a motion to dismiss is interlocutory, an appeal based on the public duty doctrine involves a substantial right warranting immediate appellate review.

2. Police Officers— liability—public duty doctrine—sheriff's promise of protection

In a wrongful death action against a sheriff that followed the shooting of a spouse who had obtained a domestic violence protective order, the non-specific nature of the sheriff's promises of protection and to enforce the protective order, with the attendant circumstances, were not sufficient to state a claim as an exception to the public duty doctrine. The trial court erred by not dismissing the portions of plaintiffs' complaint based on general promises of protection and to enforce the protective order.

3. Police Officers— liability—promise to seize weapons—public duty doctrine

In a wrongful death action against a sheriff that followed the shooting of a spouse who had obtained a domestic violence protective order, the sheriff's promise to procure the surrender of the husband's firearms was sufficient to state an exception to the public duty doctrine, and the ruling of the trial court denying defendants' motion to dismiss in this regard was affirmed.

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[195 N.C. App. 570 (2009)]

Appeal by defendants from order filed 30 August 2007 by Judge Paul Gessner in Chatham County Superior Court. Heard in the Court of Appeals 30 April 2008.

Alan McSurely for plaintiff-appellees.

Frazier, Hill & Fury RLLP, by William L. Hill and Torin L. Fury, for defendant-appellants.

STEELMAN, Judge.

Issues that implicate the public duty doctrine involve a substantial right that is immediately appealable. Under the attendant circumstances, the trial court properly denied defendants' motion to dismiss the complaint as it relates to a promise to seize McKendall's weapons.

I. Factual and Procedural Background

Plaintiffs' complaint alleges that on 15 November 2004, the District Court of Chatham County entered a domestic violence protective order that prohibited Randy McKendall (McKendall) from going near his wife, Shennel McKendall (Shennel), going to the marital home, communicating with Shennel or her family, and requiring him to turn all his firearms over to the defendant Sheriff of Chatham County¹ (CCSD). McKendall was served with this order on 15 November 2004. No firearms were collected at that time. The following day, Shennel reported to CCSD that McKendall had called her, entered their home, and fired a handgun in her daughter's bedroom. Deputies responded to Shennel's home, where they recovered a casing from a 9mm handgun. A report of this incident was filed.

Over the next six days, CCSD deputies made promises to protect Shennel on four separate occasions: 17 November, 20 November, 22 November, and 23 November 2004. The first two promises were made as deputies assisted Shennel in packing personal items to leave the marital residence. On or about 17 November, Shennel obtained a warrant from the Magistrate. On 18 November, McKendall was admitted to Lee County Hospital following an overdose of drugs. CCSD was informed of McKendall's hospitalization but took no action to prevent McKendall's release. Two days later, CCSD deputies made the second promise to protect Shennel, again as they helped her to pack belongings.

1. All actions were not alleged to have been taken by Sheriff Webster personally, but by Sheriff Webster or his deputies, acting as agents of the Sheriff.

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On 22 November 2004, McKendall turned himself into Lee County authorities. CCSD did not comply with a request to transport McKendall back to Chatham County. The District Court of Lee County released McKendall on a \$1,000 bond and further directed that he have no contact with Shennel. Shortly thereafter, Shennel reported to CCSD that McKendall had called and threatened to kill himself. That same night, CCSD deputies met with Shennel and told her that she “must find a new location that night.” Lieutenants Gardner and Stuart promised to protect her, to seize McKendall’s weapons, and to enforce the protective order. The following day, Lt. Stuart conferred with Corporal Brad Johnson, who obtained a warrant for the arrest of McKendall, drove to Lee County, picked up McKendall, and delivered him to the Chatham County jail. Corporal Johnson promised Shennel that CCSD “would do better and she could rely on the Sheriff for protection.”

On 24 November 2004, the court set bail at \$10,000; McKendall made bail within hours and was released. In the early morning hours of 29 November 2004, McKendall shot Shennel five times with a 9mm handgun in the parking lot of her workplace in Orange County. She died shortly thereafter. McKendall then shot himself in the head, resulting in his own death.

On 28 November 2006, plaintiffs filed a complaint seeking damages and other relief in a wrongful death action against defendant Webster and an unnamed surety. On 24 April 2007, the trial court allowed the plaintiffs to substitute the proper name of the surety company in an amended complaint. The amended complaint, naming Western Surety as a defendant and adding a paragraph alleging waiver of sovereign immunity, was served on defendants on 29 May 2007. Defendants moved to dismiss the amended complaint, in part upon the public duty doctrine. The court denied the motion.

Defendants appeal.

II. Standard of Review

[1] Ordinarily, the denial of a motion to dismiss is interlocutory, and there is no immediate right of appeal. *Cockerham-Ellerbee v. Town of Jonesville*, 176 N.C. App. 372, 374, 626 S.E.2d 685, 687 (2006). However, an appeal based on the public duty doctrine “involves a substantial right warranting immediate appellate review.” *Id.* (citing *Smith v. Jackson Cty. Bd. of Educ.*, 168 N.C. App. 452, 458, 608 S.E.2d 399, 405 (2005)). The scope of our review in this case is thus limited to issues that implicate the public duty doctrine. *Id.*

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When ruling upon a 12(b)(6) motion to dismiss, a trial court must determine as a matter of law whether the allegations in the complaint, taken as true, state a claim for relief under some legal theory. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court “conduct[s] 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.” *Id.*

Page v. Lexington Ins. Co., 177 N.C. App. 246, 248, 628 S.E.2d 427, 429 (2006).

III. Analysis

A. Exception to the Public Duty Doctrine

[2] In their first argument, defendants contend that the complaint was grounded in an alleged failure to arrest McKendall and did not plead facts sufficient to establish any exception to the public duty doctrine. We agree in part and disagree in part.

Generally, the public duty doctrine bars negligence claims by individuals against a governmental entity or its agents acting in a law enforcement capacity for failure to provide protection to that person from the criminal acts of a third party. *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). “[S]ince plaintiff’s cause of action is based on defendant’s failure to protect her from the acts of a third party rather than any direct misconduct on their part, the public duty doctrine is applicable.” *Cockerham-Ellerbee*, 176 N.C. App. at 375, 626 S.E.2d at 688 (citation omitted). An exception to the public duty doctrine exists where the governmental entity, through its law enforcement officers “promise[s] protection to an individual, the protection is not forthcoming, and the individual’s reliance on the promise of protection is causally related to the injury suffered.” *Braswell*, 330 N.C. at 371, 410 S.E.2d at 901 (citations omitted).

Plaintiffs’ complaint alleges four separate and distinct promises, as follows:²

18. On 17 November 2004 Shennel and two deputies of Sheriff Webster went to her home to pack some personal items so she

2. Paragraphs 26 and 28 are both related to the third promise, made on 22 November 2004. The final promise, paragraph 31, was made on 23 November 2004.

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could stay elsewhere. For the first time agents of the Sheriff treated her with respect. They promised Shennel they would do everything they could to find Mr. McKendall and protect her.

...

22. On 20 November 2004 agents of the Sheriff again promised Shennel they would protect her from Mr. McKendall when they helped her pack more belongings from her home to stay elsewhere.

...

26. [On 22 November 2004, t]wo agents of Sheriff Webster, Lt. Gardner and Lt. Stuart, met with Shennel and told her she must find a new location that night. Again, for the third time, they promised her they would protect her, seize Mr. McKendall's weapons from him, and enforce the protective order that Mr. McKendall had violated.

...

28. Again, these agents of Sheriff Webster promised Shennel the Sheriff would protect her and that they really meant it this time. Shennel believed them.

...

31. On information and belief, Cpl. Johnson, embarrassed for his Department, promised Shennel the Sheriff would do better and she could rely on the Sheriff for protection.

These alleged promises fall into three categories: (1) general promise to protect (paragraphs 18, 22, 26, 28, and 31); (2) promise to enforce the protective order (paragraph 26); and (3) promise to seize McKendall's weapons (paragraph 26). Whether these promises created a special duty depends not just on the statements made by law enforcement, but also upon all of the attendant circumstances. *Cockerham-Elberbee*, 176 N.C. App. at 377-78, 626 S.E.2d at 689.

1. Promise to Protect Shennel and Enforce Protective Order

Braswell makes it clear that general promises of protection made by law enforcement officers are not sufficient to constitute an exception to the public duty doctrine. Plaintiff in *Braswell* presented evidence that "Sheriff Tyson stated that Billy would not harm Lillie and that his men would be keeping an eye on her, and promised only that

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Lillie would get to and from work safely.” *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. The Supreme Court held that, except for the promise to get Lillie to and from work, the promises were no more than “general words of comfort and assurance, commonly offered by law enforcement officers in situations involving domestic problems.” *Id.* at 371-72, 410 S.E.2d at 902. In the instant case, the general promises of protection alleged in paragraphs 18, 22, 26, 28, and 31 are far less specific than those made either in *Braswell* or in *Cockerham-Ellebee*, where defendants promised “to arrest Ellebee ‘right then’ ” and that the victim and her daughter “would no longer have to worry about their safety.” *Cockerham-Ellebee*, 176 N.C. App. at 378, 626 S.E.2d at 689.

We also note that there are attendant circumstances alleged in the complaint. Shennel moved to another location from the marital residence. The Sheriff’s Department obtained a warrant for McKendall’s arrest, picked him up in Lee County, and placed him in the Chatham County jail. McKendall remained there until the District Court set bail. He was released upon posting bail. The setting of conditions of pretrial release is a judicial function, *see* N.C. Gen. Stat. § 15A-534 (2008), and is not a function of the office of Sheriff. Further, Shennel was killed in Orange County, not Chatham County.

Based upon the non-specific nature of the promises made by the Sheriff to protect Shennel and to enforce the protective order, and the attendant circumstances, all as alleged in plaintiffs’ complaint, we hold that these allegations are insufficient to state a claim as an exception to the public duty doctrine. *Id.* The trial court erred in not dismissing the portions of plaintiffs’ complaint based upon general promises of protection and to enforce the protective order.

2. Promise to Seize Weapons

[3] In paragraph 26 of the complaint, plaintiffs allege that the Sheriff promised to seize McKendall’s weapons. Upon review, we are required to treat this allegation as true. *Page v. Lexington Ins.*, 177 N.C. App. at 248, 628 S.E.2d at 429. This promise is more specific than the general promises of protection and enforcement of the protective order and is more analogous to the promises in *Cockerham-Ellebee* than those in *Braswell*.

The complaint contains allegations of attendant circumstances relevant to this claim. On 15 November 2004, the District Court of Chatham County ordered that McKendall surrender all firearms to the

Sheriff. The order was served on McKendall on 15 November 2004. On 16 November 2004, McKendall entered the marital home and discharged a 9mm handgun twice. Deputies confirmed that this occurred and recovered one of the shell casings. The complaint alleged that the Sheriff took no action to procure the surrender of McKendall's firearms. On 29 November 2004, McKendall shot and killed Shennel with a 9mm handgun in Orange County.

Based upon the specific nature of this promise made by the Sheriff and the attendant circumstances, all as alleged in plaintiffs' complaint, we hold that this allegation is sufficient to state a claim that is an exception to the public duty doctrine. The ruling of the trial court denying defendants' motion to dismiss is affirmed as to the specific promise to seize McKendall's weapons.

B. The 23 November 2004 Arrest

In their final two arguments, defendants assert that, should this Court find that plaintiffs have pled an exception to the public duty doctrine, any such duty was discharged by the 23 November 2004 arrest.

We have previously held that plaintiffs have properly pled exceptions to the public duty doctrine based upon the Sheriff's promises to seize McKendall's weapons. This claim was not implicated by any duty to arrest, and we need not address it.

IV. Conclusion

Because of our previous rulings, we need not address plaintiffs' remaining argument. As to the general promises to protect Shennel and to enforce the protective order, the denial of defendants' motion to dismiss is reversed. As to defendants' specific promise to seize McKendall's weapons, the order of the trial court is affirmed.

We further reiterate that at this stage of the proceedings, we are required to accept plaintiffs' allegations as true, and have not reviewed any issues other than those arising under the public duty doctrine.

AFFIRMED IN PART.

REVERSED IN PART.

Judges HUNTER, ROBERT C. and STEPHENS concur.

SONY ERICSSON MOBILE COMMUNICATIONS USA, INC. v. AGERE SYSTEMS, INC.

[195 N.C. App. 577 (2009)]

SONY ERICSSON MOBILE COMMUNICATIONS USA, INC., PLAINTIFF v.
AGERE SYSTEMS, INC., DEFENDANT

COA08-525

(Filed 3 March 2009)

Venue— New York—forum selection clause

The trial court did not err in an unfair and deceptive trade practices, fraud, and negligent misrepresentation case by dismissing plaintiff's complaint against defendant based on improper venue because: (1) the parties' Master Development License Agreement (MDLA) forum selection clause specified that disputes between the parties would be governed by New York law, and the parties agreed to apply New York law to the question of whether the forum selection clause appeared in an enforceable contract; (2) plaintiff's claim arises in connection with the MDLA, and the forum selection clause is applicable to plaintiff's complaint; (3) the MDLA was an enforceable contract setting out the ground rules for the parties to negotiate possible Statements of Work (SOW) and articulated agreed-upon procedures, practices, and terms applicable to SOW the parties might execute in the future; (4) plaintiff failed to articulate how open terms in a hypothetical future SOW would make the terms of the MDLA itself unenforceable; and (5) both parties are sophisticated multinational corporations, and if either party wanted enforcement of the MDLA or its forum selection clause to depend on execution of SOW, such a term would have been stated in the MDLA.

Appeal by Plaintiff from order entered 27 August 2007 by Judge John R. Jolly, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 January 2009.

Ellis & Winters LLP, by Jonathan D. Sasser, Alex J. Hagan, Thomas H. Segars, and Stephen D. Feldman, for Plaintiff-Appellant.

McGuireWoods LLP, by Christian M. Kennedy, Andrew E. Kristianson and Mark E. Anderson, for Defendant-Appellee.

BEASLEY, Judge.

Plaintiff appeals from an order dismissing its complaint against Defendant for improper venue. We affirm.

SONY ERICSSON MOBILE COMMUNICATIONS USA, INC. v. AGERE SYSTEMS, INC.

[195 N.C. App. 577 (2009)]

The parties are multi-national corporations engaged in the production and distribution of products and components used for wireless digital communication. Plaintiff (Sony Ericsson Mobile Communications USA, or SEMC) is a corporate subsidiary of Sony Ericsson Mobile Communications AB (SEAB). The Defendant named in Plaintiff's complaint, Agere Systems, Inc., formerly existed as an independent provider of products used in digital data storage and communications devices. After Plaintiff filed its complaint, Defendant became a subsidiary of LSI Corporation (LSI), also a multi-national corporation in the digital technology business.

In 2004 Plaintiff planned to improve its wireless devices and needed a supplier of digital components. The parties explored the possibility that Defendant would supply the necessary components, and in June 2005 SEAB and Defendant signed a Master Development and License Agreement (MDLA). The MDLA set out terms and conditions for negotiations and commercial transactions, including the terms governing the parties' possible execution of work orders. The MDLA also contained a mandatory forum selection clause stating in relevant part that:

This [MDLA] and any Statement of Work shall be governed by and construed in accordance with the laws of the State of New York[.] . . . The Parties agree to (i) request that any dispute or claim arising out of or in connection with this Master Agreement, or the performance, breach or termination thereof be subject to the jurisdiction of the state and federal courts located in New York and (ii) to the extent such courts accept jurisdiction, to submit such matters exclusively to such courts. . . .

On 6 December 2006 Plaintiff filed suit against Defendant, alleging that Defendant had misrepresented its product development schedule and that Plaintiff's reliance on these misrepresentations had caused Plaintiff to incur substantial damages. Plaintiff sought damages for unfair and deceptive trade practices, fraud, and negligent misrepresentation. The case was designated a mandatory complex business case, pursuant to N.C. Gen. Stat. § 7A-45.4 (b), and was assigned to Judge John R. Jolly, Jr.

In February 2007 Defendant moved to dismiss Plaintiff's complaint for improper venue, under N.C. Gen. Stat. § 1A-1, Rule 12(b)(3). Defendant argued that the MDLA's forum selection clause required that the case be tried in New York. On 27 August 2007 the trial court

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granted Defendant's motion and dismissed Plaintiff's claim for improper venue. From this order, Plaintiff has appealed.

Standard of Review

Preliminarily, we note that the MDLA's forum selection clause specifies that disputes between the parties will be governed by New York law, and that the parties agreed to apply New York law to the question of "whether the forum selection clause appears in an enforceable contract." Accordingly, we have cited New York case law when appropriate.

This appeal requires our interpretation of the forum selection clause and the MDLA, issues of law that are reviewed *de novo*. See, e.g., *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278 279, 788 N.Y.S.2d 44, 45 (2004) (applying a *de novo* standard of review where trial court "interpreted a contract provision . . . as a matter of law") (citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)) (citation omitted).

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent 'The best evidence of what parties to a written agreement intend is what they say in their writing' Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569, 780 N.E.2d 166, 170 (2002) (quoting *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018, 594 N.E.2d 918 (1992) (internal citations omitted)).

Plaintiff argues that the trial court erred by dismissing its claim for improper venue, on the grounds that the mandatory forum selection clause in the MDLA is unenforceable. We disagree.

The MDLA's forum selection clause states that it applies to "any dispute or claim arising out of or in connection with this Master Agreement, or the performance, breach or termination thereof[.]" Section 1.1 of the MDLA sets out its scope and stated purpose as follows:

- 1.1 This document, herein called the "Master Agreement," comprises the general terms and conditions under which

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1.1.1 [Defendant] may develop and license Technology Solutions to SEAB and its Affiliates (“SEMC”);

1.1.2 [Defendant] may provide services and development tools to SEMC; and

1.1.3 SEAB and its Affiliates and [Defendant] (each individually a “Party”, or collectively, “Parties”) may discuss project roadmaps, strategies, business plans, technological alternatives or other short or long-term issues.

Plaintiff’s complaint asserts that during the parties’ negotiations Defendant misrepresented the status of its progress on certain digital components. These allegations pertain to the terms and conditions for the parties to “discuss project roadmaps, strategies, business plans, technological alternatives or other short or long-term issues.” We conclude that Plaintiff’s claim arises “in connection with” the MDLA, and that the forum selection clause is applicable to Plaintiff’s complaint.

Plaintiff does not dispute the general enforceability of forum selection clauses. “[I]t is now recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract. Such clauses are *prima facie* valid and enforceable unless shown by the resisting party to be unreasonable[.] Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes, particularly those involving international business agreements[.]” *Brooke Group v. JCH Syndicate* 488, 87 N.Y.2d 530, 534, 663 N.E.2d 635, 637-38 (1996) (citations omitted).

Thus, “to set aside such a clause, a party must show either that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in [New York] would be . . . inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court[.]” *Hirschman v. National Textbook Co.*, 184 A.D.2d 494, 584 N.Y.S.2d 199, 200 (1992) (citations omitted). In the present case, Plaintiff does not argue that the forum selection clause is unreasonable, unjust, or was fraudulently procured. Nor does it contend that a trial in New York would be inconvenient. Indeed, after its claim was dismissed in North Carolina, Plaintiff filed essentially the same claim in New York, naming the Defendant’s successor in interest as Defendant in the new complaint.

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Plaintiff's sole basis for invalidating the forum selection clause is its assertion that the MDLA is not an enforceable contract. "[T]he parties would not be bound by choice of law and forum provisions contained in a contract that is otherwise invalid[.]" *Indosuez Int'l Fin. B.V. v. National Reserve Bank*, 279 A.D.2d 408, 408, 720 N.Y.S.2d 102, 103 (2001), *aff'd*, 98 N.Y.2d 238, 774 N.E.2d 696 (2002) (citations omitted).

Plaintiff correctly cites the general rule that "definiteness as to material matters is of the very essence in contract law. Impenetrable vagueness and uncertainty will not do[.] . . . [I]t is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable[.] *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109, 417 N.E.2d 541, 543 (1981) (citation omitted). However, we conclude that the MDLA does not lack material terms essential for its enforcement.

Plaintiff argues that the MDLA is enforceable only in conjunction with a properly executed Statement of Work (SOW), and that, because the MDLA does not include the terms of any specific SOW, it does not constitute a binding agreement. We do not agree. As discussed above, the stated purpose and scope of the MDLA is to set out the "general terms and conditions" governing the parties' negotiations and their possible execution of SOWs. It includes terms addressing invoicing, quality control of products, warranties, intellectual property rights, use of confidential information, termination rights, taxes, etc. The MDLA sets out the ground rules for the parties to negotiate possible SOWs and articulates agreed-upon procedures, practices, and terms applicable to SOWs the parties might execute in the future. As the trial court stated in its order, "the main purpose of the MDLA is to provide 'the general terms and conditions under which' the parties would explore a further relationship . . . the MDLA does not require that a Statement of Work ever be executed."

Plaintiff argues that the MDLA contains numerous material terms that are not resolved, and thus does not represent an enforceable agreement. However, Plaintiff does not cite provisions or terms of the MDLA itself, but only terms of possible SOWs. Plaintiff fails to articulate how open terms in a hypothetical future SOW would make the terms of the MDLA itself unenforceable. We again quote from the trial court's order:

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Though the MDLA may not contain many of the substantive terms of the contemplated ultimate relationship of the parties itself—which appears to be the provision of technological deliverables—none of its own terms remain to be negotiated. . . .

[T]he majority of the MDLA's provisions pertain directly to Statements of Work, should any have been entered. Sony USA argues that this demonstrates that the MDLA's effect depends on a Statement of Work. However, such dormant provisions neither demonstrate a lack of assent to the MDLA's terms nor otherwise provide grounds upon which to negate those provisions of the MDLA that do not pertain directly to Statements of Work, such as the Forum Selection Clause[.]

“To consider the existence of open terms as fatal would be to rule, in effect, that preliminary binding commitments cannot be enforced. That is not the law.” *Teachers Ins. & Annuity Asso. v. Tribune Co.*, 670 F. Supp. 491, 499 (S.D.N.Y. 1987). In the instant case, the MDLA contains numerous indicia of the parties' intent to be bound by its terms, including the following: (1) the MDLA has an “effective date” set out in the MDLA's preamble; (2) the MDLA § 3.5 states that future purchase orders will not alter the parties' “rights and obligations” under the MDLA; (3) the MDLA § 19 allows either party to terminate the MDLA upon the other party's “breach” of the MDLA's terms; and (4) the MDLA is signed by a representative of each party who is “empowered to bind” that party.

We also note that both parties are sophisticated multinational corporations. Presumably, if either party wanted enforcement of the MDLA or its forum selection clause to depend on execution of a SOW, such a term would have been stated in the MDLA. “Where, as here, the agreement was negotiated by sophisticated and well-counseled parties, courts are ‘extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include,’ and ‘courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing’ ” *Worcester Creameries Corp. v. City of New York*, 54 A.D.3d 87, 91, 861 N.Y.S.2d 198, 201 (2008) (quoting *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 807 N.E.2d 876 (2004) (internal quotation marks and citations omitted)).

For the reasons discussed above, we conclude that the trial court did not err by ruling that the MDLA is an enforceable contract,

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or by applying its forum selection clause. We conclude that the trial court's order should be

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

JOSHUA PERDUE, PLAINTIFF v. SHEENA FUQUA, DEFENDANT

No. COA07-1358

(Filed 3 March 2009)

Child Support, Custody, and Visitation— grandmother—motion to intervene—lack of standing

The trial court did not err by dismissing intervenor's motion to intervene in a custody proceeding between her daughter and the father of her granddaughter based on lack of standing because: (1) while intervenor satisfied the definition of "other person" since she was the primary caregiver since birth and she had a close familial relationship with the minor child, the grandmother was still required to allege parental unfitness; (2) despite the broad language of N.C.G.S. § 50-13.1, nonparents do not have standing to seek custody against a parent unless they overcome the presumption that the parents has the superior right to the care, custody, and control of the minor child; (3) although intervenor contends she only needed to set forth a claim to demonstrate a change of circumstances since there was a motion for custody ongoing between the parents, that standard is for a grandparent seeking visitation instead of custody; (4) there has been no substantial change in circumstances since the entry of the 8 February 2006 order, and the trial court reinforced its indication that both parents were fit and proper persons for the care of the minor child; and (5) the assertion that intervenor would be able to afford the minor child a higher standard of living was not relevant to the issue of the parents' constitutionally protected parental interest.

Appeal by intervenor from order entered 16 July 2007 by Judge James A. Grogan in Rockingham County District Court. Heard in the Court of Appeals 13 May 2008.

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Walker & Bullard, P.A., by Daniel S. Bullard, for intervenor-appellant.

No brief filed for plaintiff-appellee.

No brief filed for defendant-appellee.

CALABRIA, Judge.

Sheila Fuqua (“intervenor”) appeals an order denying her Motion to Intervene in a custody proceeding between her daughter, Sheena Fuqua (“defendant”) and the father of her granddaughter, Joshua Perdue (“plaintiff”). We affirm.

Plaintiff and defendant (collectively referred to as “the parties” or “the parents”) are the biological parents of Shelly Marie Fuqua (“the minor child”). The parties were married on 15 November 2003, separated on 20 August 2004, and divorced on 9 January 2006. Prior to the divorce, the minor child was born on 12 May 2005. On 8 February 2006, the trial court ordered, *inter alia*, joint legal and physical custody (“custody order”). The parties alternated weeks with the minor child.

On 16 March 2007 defendant did not return the minor child to the plaintiff as scheduled. On 15 June 2007, plaintiff filed a motion to show cause and a motion for an *ex parte* order alleging defendant violated the custody order by refusing to return the minor child to plaintiff. The trial court granted plaintiff’s motion for an emergency *ex parte* protective order (“ex parte order”), ordered local law enforcement to assist plaintiff in obtaining physical custody of the minor child. The court granted plaintiff legal and physical custody of the minor child, pending further orders of the court and a full hearing on the merits. A hearing was scheduled for 27 June 2007.

On 20 June 2007, intervenor filed a motion to intervene, a motion for custody, and a motion to strike the ex parte order. Intervenor believed the trial court should allow her to intervene since she was the primary caregiver of the minor child since the child was born. Intervenor alleged, *inter alia*, the plaintiff’s seventeen-year-old girlfriend was taking care of the minor child, therefore the court should grant her custody of the minor child.

Plaintiff moved to dismiss intervenor’s motion, in part, on the basis intervenor lacked standing. On 16 July 2007, the Honorable James A. Grogan (“Judge Grogan”) of Rockingham County District

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Court denied intervenor's motions on the basis that her allegations did not rise to the level of a substantial change in circumstances. In addition, Judge Grogan set aside the emergency custody order entered on 15 June 2007. As a result the court reinstated the 8 February 2006 order for child custody and visitation, and preserved the show cause order entered 15 June 2007 as well as the plaintiff's motion for attorney's fees for a later date. From this order, intervenor appeals.

Standing

The trial court denied the motion to intervene and, therefore, never addressed intervenor's motion for custody. As a result, the sole issue before this Court is whether the trial court properly denied intervenor's motion to intervene for lack of standing. Intervenor argues that she has standing and therefore the trial court erred in dismissing her motion. We disagree.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. Standing is a question of law which this court reviews *de novo*." *Cook v. Union Cty. Zoning Bd. of Adjust.*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007) (internal citations and quotations omitted). "Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re S.E.P.*, 184 N.C. App. 481, 487, 646 S.E.2d 617, 621 (2007) (internal quotations omitted). "A court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Id.* at 486, 646 S.E.2d at 621.

Standing in custody disputes is governed by N.C. Gen. Stat. § 50-13.1(a), which "grants grandparents the broad privilege to institute an action for custody or visitation as allowed in G.S. §§ 50-13.2(b1), 50-13.2A, and 50-13.5(j)." *Eakett v. Eakett*, 157 N.C. App. 550, 552, 579 S.E.2d 486, 488 (2003). N.C. Gen. Stat. § 50-13.1(a) (2007) permits "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child [to] institute an action or proceeding for the custody of such child, as hereinafter provided." Intervenor based her right to intervene on N.C. Gen. Stat. § 50-13.5(j) (2007) which permits a grandparent to petition for custody or visitation due to changed circumstances in those actions where custody has previously been determined. Thus, under N.C. Gen. Stat. § 50-13.5(j), the proper procedure for

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the grandmother was to file, as she did, a Motion to Intervene and a Motion for Custody.

Despite the statute's broad language, our Courts have distinguished grandparents' standing to seek visitation from grandparents' standing to seek custody. In order for a grandparent to initiate a proceeding for visitation, there must be an ongoing custody proceeding and the child's family must not be an intact family. *McIntyre v. McIntyre*, 341 N.C. 629, 635, 461 S.E.2d 745, 749 (1995). "The *McIntyre* holding was narrowly limited to suits initiated by grandparents for *visitation* and does not apply to suits for *custody*." *Sharp v. Sharp*, 124 N.C. App. 357, 360, 477 S.E.2d 258, 260 (1996) (emphasis in original). In contrast, a grandparent initiating a proceeding for custody must allege unfitness of a parent due to neglect or abandonment. *Id.*, *Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 489 (grandparents initiating custody lawsuits under N.C. Gen. Stat. § 50-13.1(a) must show parent is unfit or has taken action inconsistent with her parental status to gain custody of the minor child, not necessary to show child is not in an intact family).

While this Court recognizes that intervenor satisfies the definition of "other person" because she was the primary caregiver since birth and she had a close familial relationship with the minor child, the grandmother is still required to allege parental unfitness. Despite the broad language of N.C. Gen. Stat. § 50-13.1, non-parents do not have standing to seek custody against a parent unless they overcome the presumption that the parent has the superior right to the care, custody, and control of the minor child. *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). A parent can lose this superior right status through conduct inconsistent with the presumption that the parent is the best person to have primary custody over the child. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

While the court applies the best interest of the child analysis in a custody action between parents, to do so when the custody dispute is between a parent and a non-parent offends the Due Process Clause if the "parent's conduct has not been inconsistent with his or her constitutionally protected status. . . ." *Id.* If the non-parent can show the parent engaged in conduct inconsistent with his or her right to custody, such as abandonment, then the court can apply the best interest test to determine whether the non-parent should receive custody. *Id.*

Therefore, absent a showing by intervenor that the natural parents are unfit, have neglected the welfare of the child, or have acted

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in a manner inconsistent with the paramount status provided by the Constitution, the intervenor does not have standing. “If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). Without jurisdiction the trial court must dismiss all claims brought by the intervenor.

Intervenor’s Arguments

Intervenor argues that because there was a motion for custody ongoing between the parents she need only set forth a claim that could demonstrate a change in circumstances. Intervenor, however, cites authority that provides standing for grandparents seeking visitation, not custody. Intervenor has failed to recognize that our Courts have made a distinction between grandparents seeking custody and those seeking visitation. Participation in a custody proceeding by itself is not a sufficient reason for parents to lose their constitutionally protected status absent a showing that the parents are unfit, have neglected the welfare of the child, or acted in a manner inconsistent with their protected status. Such a holding would offend the Due Process Clause of the Constitution.

The trial court denied the motion to intervene because there had been no substantial change in circumstances since the entry of the 8 February 2006 custody order. In the 8 February 2006 custody order, both parents were found to be fit and proper persons to have joint legal and physical custody of the minor child. By reinstating the 8 February 2006 custody order, the trial court indicated that both parents were fit and proper persons for the care of the minor child just as the trial court previously found on 8 February 2006.

Conclusion

Intervenor’s motion contains a general statement “[t]hat both the Plaintiff and Defendant have failed to shoulder the parental responsibilities attendant with the enjoyment of the constitutionally preferred status of the parents in a child custody case.” The factual allegations in the motion to intervene do not support this conclusion. Intervenor alleged that the father lost his job, obtained third-shift employment, and had a young girlfriend babysitting the minor child. Intervenor also alleged that the parents allowed the minor child to live exclusively with the intervenor for four months. These allegations are insufficient to indicate the parents “acted in a manner inconsistent with [their] constitutionally-protected paramount interest in the com-

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panionship, custody, care, and control of [their] child.” *Mason v. Dwinnell*, 190 N.C. App. 209, 221, 660 S.E.2d 58, 66 (2008). Intervenor further alleges that she would be a better caregiver for the minor child than the parents. Absent a showing that the parents are unfit, these allegations cannot be considered. The “assertion that [intervenor] would be able to afford the minor child a higher standard of living is not relevant to the issue of [the parents’] constitutionally protected parental interest.” *Penland v. Harris*, 135 N.C. App. 359, 363, 520 S.E.2d 105, 108 (1999).

Intervenor failed to allege conduct sufficient to support a finding that the parents engaged in conduct inconsistent with their parental rights and responsibilities. Therefore intervenor could not overcome the presumption that the parents have the superior right to the care, custody, and control of the child, and lacked standing to intervene. Because we determine that intervenor lacked standing we need not address intervenor’s additional assignment of error. We affirm the trial court’s order, which dismissed intervenor’s motion to intervene.

Affirmed.

Judges WYNN and GEER concur.

GARRY L. DRAKE AND WANDA H. DRAKE, PLAINTIFFS v. W. ERIC HANCE AND DEBRA A. HANCE, DEFENDANTS

No. COA08-849

(Filed 3 March 2009)

1. Deeds— action to reform—parol evidence—ambiguity

The trial court did not err in considering parol evidence in an action to reform a deed where the purchase contracts included the street address and described the property as “#15 Legacy Lake” but included deed references that described both lots 15 and 11.

2. Deeds— action to reform—parol evidence—draftsman’s mistake

The trial court did not err by admitting parol evidence to reform a deed where defendants argued that the deed was an

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integrated document. Parol evidence is competent to show the true intentions of the parties if a party can show a mutual mistake in the execution of a deed, and the evidence here of an error by the draftsman was strong, cogent, and convincing.

Appeal by defendants from an order and judgment entered 7 April 2008, *nunc pro tunc* 9 September 2005, by Judge Russell J. Lanier, Jr. in Union County Superior Court. Heard in the Court of Appeals 14 January 2009.

Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr., Fenton T. Erwin, Jr., and Amy N. Bokor, for plaintiffs-appellees.

Franklin S. Hancock, for defendants-appellants.

CALABRIA, Judge.

W. Eric and Debra A. Hance (“defendants”) appeal an order and judgment that reforms a deed due to a mutual mistake of fact in the legal description of the property. We affirm.

On 15 June 2005, the defendants entered into an Offer to Purchase and Contract (“the contract”) with Garry L. and Wanda H. Drake (“plaintiffs”) for the purchase of plaintiffs’ home (“the home”) at 3301 Chancellor Drive, Union County, Monroe, North Carolina (“the street address”). The property was described in the contract as “#15 Legacy Lake (ALL of the property in Deed Reference: Book 1137, Page 244, Union County).” Although the contract only specifically mentioned the purchase of lot 15, the recorded deed described both lot 15 Legacy Lake and lot 11, Legacy Lake. On 16 June 2005, the parties entered into a new contract for the purchase of the same real property since the parties increased the purchase price and plaintiffs agreed to pay the closing costs. The new contract included the street address and the property was described in the same manner as the first contract.

Lot 15 and lot 11 are not adjacent lots. Lot 15 is the property on which the home is located. Lot 11 is a vacant lot located across the street from lot 15. As a result of the legal description, plaintiffs acquired both lots at the same time, since both lots were included in the legal description of the same deed.

In preparation for closing, the closing attorney prepared the deed, deeds of trust, prorated taxes, certified title, and procured title

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insurance. The legal description on the deed transferring ownership from plaintiffs to defendants was similar to the prior deed. The new deed also described the property as “Lot 11 and 15, Legacy on the Lake.” After the closing, the deed and the deeds of trust were recorded on 9 September 2005 in Union County. Eight months later, when plaintiffs contracted to sell lot 11 to a third party they learned lot 11 had been included in the transaction with defendants. Plaintiffs communicated this mistake to defendants.

After attempts to correct the mistake were unsuccessful, plaintiffs filed a complaint in August 2006 alleging that both lots were mistakenly conveyed to defendants, because they intended only to convey lot 15. Plaintiffs alleged that the conveyance resulted from a mutual mistake of fact and requested the court reform the deed to reflect the intended transaction between the parties. The defendants denied any mistake of fact regarding the deed involved in the transaction.

Prior to trial, defendants filed a motion *in limine* objecting to the trial court’s consideration of extrinsic evidence to reform the deed. The court denied defendants’ motion and admitted extrinsic evidence to ascertain the intentions of the parties. The trial court ordered reformation of the deed conveying lots 11 and 15 by deleting lot 11. Therefore, only lot 15 remained. The defendants appealed.

On appeal, the standard of review is whether competent evidence supports the trial court’s findings of fact and whether the findings of fact support the court’s conclusions of law. The findings of fact are conclusive if supported by competent evidence. The court’s conclusions of law are reviewed *de novo*. *CitiFinancial Mtge. v. Gray*, 187 N.C. App. 82, 88, 652 S.E.2d 321, 324 (2007).

The defendants make two separate but connected arguments. They argue first that the trial court erred by allowing plaintiffs to present evidence which directly contradicted and modified the sales contracts between the parties where all of the documents executed prior to the sale clearly described the property to be conveyed. Second, defendants argue that the trial court erred by considering extrinsic evidence to modify the deed.

I. Parol Evidence

[1] The defendants argue that the trial court erred by allowing plaintiffs to present evidence which directly contradicted and modified the sales contracts previously made between the parties where all of

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the documents executed prior to the sale clearly described the property to be conveyed. We disagree.

The parol evidence rule is not a rule of evidence but of substantive law. . . . It prohibits the consideration of evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement. Generally, the parol evidence rule prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract. Thus, it is assumed the [parties] signed the instrument they intended to sign[,] . . . [and, absent] evidence or proof of mental incapacity, mutual mistake of the parties, undue influence, or fraud[,] . . . the court [does] not err in refusing to allow parol evidence[.]

Thompson v. First Citizens Bank & Tr. Co., 151 N.C. App. 704, 708-09, 567 S.E.2d 184, 188 (2002) (internal citations and quotations omitted).

“If the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent . . . to show and make certain what was the real agreement between the parties; and in such a case what was meant, is for the jury, under proper instructions from the court.” *Cleland v. Children’s Home*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983). “The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict” the terms of an integrated written agreement, *Hall v. Hotel L’Europe, Inc.*, 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984), though “an ambiguous term may be explained or construed with the aid of parol evidence.” *Vestal v. Vestal*, 49 N.C. App. 263, 266-67, 271 S.E.2d 306, 309 (1980).

In the present case, the contracts for the purchase of the home included the street address and described the property as “#15 Legacy Lake” but also included deed references describing both lots 15 and 11: “[a]ll of the property in Deed Reference: Book 1137, Page No. 244, Union County.” Given this ambiguity the trial court did not err in considering parol evidence to explain or construe the legal description.

II. Deed reformation

[2] Defendants argue the trial court erred by ordering reformation of the deed between the parties where the deed was an integrated document. We disagree.

A deed is a written document that on its face conveys title or an interest in real property. *Williams v. Board of Education*, 284 N.C.

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588, 201 S.E.2d 889 (1974). A deed is an integrated document and the parties may not introduce oral or written evidence to contradict its terms. *Guy v. Guy*, 104 N.C. App. 753, 756, 411 S.E.2d 403, 405 (1991).

However, if a party can show a mutual mistake was made in the execution of a deed, in this case due to the error of the draftsman, parol evidence is competent evidence to show the true intentions of the parties. If the evidence is strong, cogent, and convincing that the deed, as recorded, did not reflect the agreement between the parties due to a mutual mistake caused by a drafting error, a deed can be reformed. *Parker v. Pittman*, 18 N.C. App. 500, 505, 197 S.E.2d 570, 573 (1973). *See also Durham v. Creech*, 32 N.C. App. 55, 58-59, 231 S.E.2d 163, 166 (1977).

In the present case, the closing attorney improperly prepared the deed due to an error in his office. The court found that repeated attempts were made to contact the defendants to correct the error but were unsuccessful. More importantly, the defendants, at that time, did not dispute that an error had been made. The trial court found the closing attorney's testimony "exceptionally persuasive," and we agree.

In addition, the owner and holder of each Deed of Trust, along with the Trustee in each Deed of Trust, executed Partial Release Deeds transferring their interests in the vacant lot to defendants. The court found that "if lot 11 had been intended by the lending institution and the parties to serve as security for the obligations of defendant to it, the Partial Release Deed would not have been executed by the owner and holder of each deed of trust." The evidence of an error by the draftsman was strong, cogent, and convincing. The trial court did not err in reforming the deed based on this evidence.

Competent evidence supports the trial court's findings that the parties contracted for the sale of lot 15 only, and that the attorney erred when drafting the deed that included both lots. The trial court did not err in admitting parol evidence to determine the intent of the parties, and did not err in reforming the deed when presented evidence of the attorney's mistake.

Defendants' remaining assignment of error was not argued and is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2007).

Affirmed.

Judges ELMORE and STROUD concur.

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[195 N.C. App. 593 (2009)]

STATE OF NORTH CAROLINA v. MARK STEPHEN THOMAS

No. COA08-599

(Filed 3 March 2009)

Jury— voir dire reopened—use of remaining peremptory challenge

The trial court erred by not permitting defendant to use his remaining peremptory challenge after voir dire was reopened. After the jury is empaneled, further challenge is within the judge's discretion, but once voir dire is reopened, each party has the absolute right to exercise remaining peremptory challenges.

Appeal by Defendant from judgment entered 2 October 2007 by Judge Ronald E. Spivey in Union County Superior Court. Heard in the Court of Appeals 12 January 2009.

Attorney General Roy A. Cooper, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for Defendant.

BEASLEY, Judge.

Mark Stephen Thomas (Defendant) appeals from judgment entered on his conviction of second-degree murder. Because the trial court erroneously deprived Defendant of his right to use his remaining peremptory challenge, we hold Defendant is entitled to a new trial.

The evidence tended to show the following: on 11 October 2006, Defendant shot and killed Christopher Brynarsky (Brynarsky) at Brynarsky's car repair shop. Brynarsky was the owner of Union County Customs (UCC), a car bodywork and paint business. Thirteen months prior to 11 October 2006, Defendant brought his Toyota MR2 to Brynarsky's shop to have work done. Defendant testified that he had paid Brynarsky approximately \$6,500.00 in advance to complete the work and provided all the necessary car parts. He was told that it would take about three to four weeks to complete. After approximately one month, Defendant frequently visited the car shop to check on the status of his car repairs. Brynarsky and Defendant's relationship became strained five months prior to the shooting. After numer-

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ous heated conversations, Brynarsky refused to work on the car any longer and communicated that to Defendant on the morning of 11 October 2008.

Defendant received a call from Brynarsky to pick up his car. Adam Frye, an employee at UCC, aware of the escalating conflict between Defendant and Brynarsky, advised Defendant to retrieve his vehicle and parts at lunchtime, a time when Frye presumed that Brynarsky would be away from the repair shop. Defendant went to Derek Parker's (Parker) house to pick him up to accompany him to the repair shop. Along the route to UCC, Defendant saw two sheriff deputies in separate locations and requested assistance from each in retrieving his car and parts. Each deputy refused to escort him to UCC.

Upon entering UCC, Defendant started collecting his car parts and dragging them to the door. Brynarsky approached Defendant and asked whether or not he had been "talking sh—" about him. Defendant admitted that he had been and Brynarsky then stated, "f— you and f— your little faggott buddy. I'll kill both of you." Brynarsky then walked toward his tool box and brandished a shotgun. Defendant retrieved his gun from his person and fired two shots into the roof and Brynarsky aimed his shotgun at Defendant. Defendant fired a single shot at Brynarsky. Defendant called the police, notified them of the shooting, and asked them to meet him at a nearby restaurant parking lot.

Right to Peremptory Challenge

Defendant argues that the trial court committed reversible error by failing to grant Defendant's request to remove a juror with his remaining peremptory challenge after the trial court reopened jury voir dire. Defendant contends that parties have an absolute right to exercise any remaining peremptory challenges to excuse a juror once the trial court reopens the examination of a juror and requests a new trial. We agree.

After the jury was impaneled and the trial was underway, the trial court learned that one of the seated jurors attempted to contact an employee in the District Attorney's Office prior to impanelment. The juror visited the District Attorney's Office with the intention of greeting a friend, but was unsuccessful in his attempts to speak with her. Voir dire was reopened, the trial court questioned the juror, and allowed the parties to do so as well. After questioning, defense coun-

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sel requested that the juror be removed. The trial court denied this request and found that there would be no prejudice to either party to keep the juror seated. Defendant argues that his counsel informed the trial court that he had a peremptory challenge left and wished to use it to remove the juror.

The following was the exchange between the trial court and defense counsel:

The Court: [Defense Counsel], do you wish to be heard at all?

[Defense Counsel]: Well, obviously a relationship with someone in the D.A.'s office and actually going up there while we're selecting the jury, and I think that I know Your Honor, having been in front of you just a short period of time, know that you had admonished them and told them, and I think even had talked to them even at that point about the problem you had with a juror. Or maybe you told us about somebody talking to somebody. But, you know, he had those admonitions I think when—even though he hadn't been in the box, he was sitting out here with other jurors and expected to listen and follow the Court's orders. You know, obviously if he'd come back and said I did this, then I could have questioned him about it and maybe removed him from the jury. I think I still had one challenge left or could have even challenged him for cause. And now here we sit. So I'm asking that you remove him.

The Court: Well, the Court will find that the admonitions were not to have any contact with any of the attorneys or participants in the case. The Court will find that prior to being called up to the jury box that juror number eight, . . . , while in the jury pool of prospective jurors apparently went by the District Attorney's Office to say hello to a friend of his, did not speak with that person, did not talk about the case, and nothing else took place. The Court will find that even though it makes common sense that you not go visit the District Attorney's Office, the Court would find after a voir dire of the witness that there was nothing spoken of about this case, that he apparently did not realize until later that this was an error, which he does realize now. The Court will find there would be no prejudice to either party and the Court will deny the motion to strike at this point. . . .

“The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to

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the accused. . . .” *State v. Freeman*, 314 N.C. 432, 438, 333 S.E.2d 743, 747 (1985) (internal quotation marks omitted). N.C. Gen. Stat. § 15A-1217(b)(1) (2007) governs the number of peremptory challenges that a defendant in a non-capital case is allotted. Each defendant is allowed six challenges. The record indicates that Defendant only utilized five of the six peremptory challenges, making it clear that he had one remaining.

It is established that after a jury has been impaneled, further challenge of a juror is a matter within the trial court’s discretion. *State v. McLamb*, 313 N.C. 572, 576, 330 S.E.2d 476, 479 (1985). However, “[o]nce the trial court reopens the examination of a juror, each party has the *absolute* right to exercise any remaining peremptory challenges to excuse such a juror.” *State v. Holden*, 346 N.C. 404, 429, 488 S.E.2d 514, 527 (1997) (quoting *State v. Womble*, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996)) (emphasis added). It is undisputed in this case that the trial court, did in fact, reopen voir dire.

Stating Defendant’s concerns about the juror’s conduct, he sufficiently communicated the grounds upon which he was requesting to exercise his remaining peremptory challenge. Defense counsel stated, “I think I still had one challenge left or could have even challenged him for cause. And now here we sit. So I’m asking that you remove him.” Subsequently, Defendant’s motion was improperly denied. As a matter of law, Defendant was entitled to exercise his remaining peremptory challenge.

For the foregoing reasons, we conclude that the trial court committed reversible error by failing to permit Defendant to use his remaining peremptory challenge. Defendant is entitled to a new trial.

New Trial.

Chief Judge MARTIN and Judge BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 MARCH 2009)

CHRISTOPH v. PENNELL No. 08-505	Forsyth (07CVD2290)	Affirmed
ESTATE OF RAY v. FORGY No. 08-721	Burke (04CVS1291)	Dismissed
IN RE A.J. & J.G. No. 08-1218	Jackson (06J89) (07J37)	Affirmed
IN RE A.L.L. & T.A.L. No. 08-1265	Guilford (06JT627-28)	Affirmed
IN RE A.M. No. 08-1236	Harnett (07J137)	Affirmed
IN RE B.R.M. & R.W.M., JR. No. 08-1103	Harnett (08J23-24)	Affirmed
IN RE J.L.P No. 08-1211	Currituck (06J83)	Affirmed
IN RE K.P.W., M.A.W. No. 08-1028	Rutherford (07JT76-77)	Affirmed
IN RE K.W.B. No. 08-1294	Haywood (07JT54)	Affirmed
IN RE M.T. No. 08-1183	Guilford (06JT317)	Remanded
IN RE M.X.R. No. 08-1194	Harnett (06J230)	Affirmed
IN RE N.N. & A.N. No. 08-1229	Onslow (07JA03-04)	Adjudicatory order entered 29 January 2008, reversed in part and affirmed in part; dispositional orders entered 7 April and 5 June 2008, vacated
IN RE R.A.S. No. 08-1345	Alamance (06JA01)	Affirmed
JOHNSON v. NASH CMTY. COLL. No. 08-969	Nash (07CVS2080)	Affirmed
OUTER BANKS WATER & SEWER, L.L.C. v. R.P.C. CONTR'G, INC. No. 08-709	Currituck (06CVS198)	Affirmed

PHOENIX LTD. P'SHIP OF RALEIGH v. SIMPSON No. 07-1333	Wake (05CVS1524)	Reversed and re- manded in part; affirmed in part
RIDGE CARE, INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 08-237	DHHS (07DHR169)	Dismissed
STATE v. CARR No. 08-1337	Cabarrus (04CRS54915)	Vacated
STATE v. HART No. 05-1488-2	Lenoir (03CRS51385) (03CRS3321)	No error
STATE v. HOLMES No. 08-646	Brunswick (05CRS56226-27) (07CRS2061)	No error
STATE v. MABRY No. 08-729	Stanly (05CRS5906-13) (05CRS52890-97) (07CRS563-65) (07CRS50127-29)	No error in part, vacated in part, remanded for resentencing
STATE v. MOORE No. 08-616	Lenoir (06CRS55192)	No error
WILES v. CITY OF CONCORD ZONING BD. OF ADJUST. No. 08-717	Cabarrus (07CVS1969)	Affirmed

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STATE OF NORTH CAROLINA v. KAHLIL JACOBS

No. COA08-564

(Filed 17 March 2009)

1. Homicide— felony murder—armed robbery—evidence sufficient

The trial court did not err by denying defendant's motions to dismiss a charge of first-degree murder that was based on felony murder where the State presented evidence that defendant approached the victim, demanded money from him, and shot him. This was sufficient for first-degree murder based both on premeditation and deliberation and felony murder, with attempted robbery with a firearm as the underlying felony.

2. Evidence— victim's prior criminal record—testimony correctly excluded

The trial court did not err in a first-degree murder prosecution by sustaining objections to defendant's cross-examination of a witness about the victim's criminal record. The record indicates that any information the witness had was second-hand and that he did not know exactly what convictions the victim had. Furthermore, defendant presented no explanation of why he was entitled to ask the witness about a subject on which he had no personal knowledge, and defendant did not make an offer of proof.

3. Evidence— victim's prior convictions—certified copies—offered to bolster defendant's credibility

The trial court did not err by excluding certified copies of a murder victim's armed robbery convictions where the convictions represented specific instances of conduct being offered to prove a character trait of the victim (that he was dangerous) to bolster the credibility of defendant's testimony that he was not attempting to rob the victim when the shooting occurred. Defendant offered no authority suggesting that a desire to bolster his own credibility falls within N.C.G.S. § 8C-1, Rule 405(b).

4. Evidence— victim's character—evidence excluded—other evidence admitted—no prejudice

The trial court did not err in a first-degree murder prosecution by not admitting certain evidence of the victim's character

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where some of the evidence suggested that the shooting happened during a robbery, and defendant testified that he would not have attempted to rob the victim because of his violent past. Defendant made no offer of proof for the excluded evidence and waived his right to challenge the rulings; even so, given the admitted evidence about the victim's gang membership, defendant's knowledge that the victim had shot people, the victim's status as a convicted felon, the victim's possession of a gun and his companion's likely possession of a gun, there was no reasonable possibility of a different verdict if the court had admitted the challenged evidence.

5. Homicide— short-form indictment—jurisdiction obtained

The trial court had subject matter jurisdiction pursuant to a short-form murder indictment that met the requirements of N.C.G.S. § 14-17.

Judge McGee concurring in part and dissenting in part.

Appeal by defendant from judgment entered 15 October 2007 by Judge Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 19 November 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for the State.

Russell J. Hollers, III for defendant-appellant.

BRYANT, Judge.

Defendant Kahlil Jacobs appeals from judgment entered 16 October 2007 in Guilford County Superior Court following a jury verdict finding him guilty of first degree murder based on the felony murder rule. For the reasons stated herein, we find no prejudicial error and affirm the judgment of the trial court.

Facts

On 20 March 2007, defendant was riding in a car with Keschia Blackwell when defendant asked Blackwell to pull over at Great Stops, a gas station and convenience store on East Market Street in Greensboro, North Carolina. Defendant saw two people he recognized—George Nichols (Nichols) and Dana Hampton (Hampton)—and got out to talk to them. Defendant approached Nichols and Hampton who were standing near Hampton's automobile which was

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parked beside a gas pump. According to Blackwell, as defendant approached Nichols, Nichols “said something about man, you got me and [defendant] was like give me everything in your pocket. . . . That’s what he told [Nichols].”

So the guy, he pulled out his pocket and he was like man, I ain’t got nothing but three dollars and stuff. So then after that I heard pow, pow, pow Then the tall guy [Dana Hampton], he picked up [Nichols] and put him in his car and stuff so then they drove off

I seen [defendant] go running . . . and that’s the last time I seen him.

Mildred Haizlip also testified for the State. She was a bystander at Great Stops when she observed three men arguing by the gas pumps. Haizlip testified that she saw “a guy get out of a car, walk up to two guys at [sic] gas pump and start[] shooting.” When asked which guy, Haizlip responded “[t]he one that got out of the car with the girl.”

Hampton testified that he and Nichols were friends and were at the Great Stops convenience store on 20 March 2007 for about an hour talking to people in and around the store. About that time, a burgundy car with tinted windows drove into the store parking lot. Hampton testified that the passenger in the burgundy car rolled his window down and spoke to Nichols. From previous encounters, Hampton recognized the passenger as defendant and testified to the following sequence of events:

Hampton: They had a couple of words. . . . [defendant] jumps out, [and defendant and Nichols] start conversating [sic] at the beginning of the car but it sounds like—it sounds like [sic] altercation fixing to go on.

. . .

Sounds like it was something about money

. . .

Counsel: [W]here was everyone?

Hampton: In the front of the car by the passenger’s side. Like in the front of the hood.

. . .

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As I'm going around the passenger's side [defendant is] walking towards the car, backing—looking back towards us.

...

He had his hand in his pocket the whole time. So he comes out his pocket

Counsel: Did you see him do this?

Hampton: Yes, sir.

Counsel: Okay. Could you tell what [defendant] had?

Hampton: Maybe like a small revolver.

...

Counsel: What did you do?

Hampton: I reached for the gun in the back seat and I start firing back.

...

Counsel: Okay. Did your friend [Nichols] have a handgun or any kind of gun for that matter at any point?

Hampton: No, sir, he didn't have nothing on him.

On cross-examination, defendant asked Hampton the following questions: "Did [Nichols] carry nine millimeters around with him all the time?"; "How many times have you seen [Nichols] carrying a nine millimeter?"; "Are you familiar with [Nichols] reputation in the community?"; "[W]hat do you know [Nichols] was [previously] convicted of?"; "[D]id you hear about [Nichols'] reputation?". The trial court sustained objections to each question. No offers of proof were made for the record. However, Hampton did testify that Nichols was carrying a nine millimeter the day of the shooting and had left the gun in the back seat of his car.

Defendant testified that at least three weeks prior to 20 March 2007, he sold Nichols two puppies. Nichols gave defendant a down payment of \$175 but still owed defendant \$350. Defendant made numerous unsuccessful attempts to collect the money Nichols owed him. Defendant testified that on two occasions prior to 20 March 2007, when he confronted Nichols about the money, Hampton was with Nichols and carrying a handgun. On each of these occasions,

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when defendant discussed with Nichols the money owed him, Hampton placed his hand on his handgun. Defendant testified Hampton appeared menacing and ready to draw his gun if defendant's confrontation with Nichols escalated.

Defendant further testified that on 20 March 2007, he once again saw Nichols with Hampton at the Great Stops convenience store. Defendant again confronted Nichols about the money he was owed. The conversation became heated, and defendant testified Nichols grabbed him and yelled for Hampton to "get him." Defendant said that as Hampton reached for a weapon, defendant reached for his weapon. Defendant testified that only after hearing a gunshot did he fire two shots, then ran.

Defendant testified that he believed he was going to be shot "[b]ecause somebody [was] approaching me pulling a weapon and I'm being held by another person"

Counsel: What was it that you knew about George Nichols that lead you to believe you were about to be shot?

. . .

Defendant: He told me he was a member of the street gang called the Crypts [sic].

Counsel: Did he tell you he had shot people?

Defendant: Yes.

Defendant testified that prior to the day in question "[he had] always seen [Nichols] with guns," and Nichols had previously stated that he had been in prison.

On voir dire, defendant testified that Nichols had a reputation in his community. Defendant testified that Nichols had boasted to him about robberies, shootings, and drug transactions, and told defendant that he had spent time in prison. Defendant also testified that in his prior experiences with Nichols, Hampton was always present and either Nichols or Hampton if not both were always carrying a gun.

Also, out of the presence of the jury, defendant attempted to offer into evidence certified copies of Nichols' convictions for armed robbery. The trial court ruled the evidence inadmissible by stating "any alleged probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or [at the] very minimum needless presentation of cumulative evidence

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based on the testimony.” At the conclusion of the evidence, the trial court denied defendant’s motions to dismiss.

The jury returned a verdict of guilty of first degree murder under the felony murder rule. The trial court entered judgment and commitment on the verdict and sentenced defendant to life imprisonment without parole in the custody of the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant raises four arguments: Defendant argues the trial court erred (I) in denying defendant’s motions to dismiss; (II) in excluding from evidence Nichols’ prior armed robbery convictions; (III) in not allowing defendant to prove Nichols’ character; and (IV) in denying defendant’s motion to dismiss the “short-form” murder indictment.

I

[1] In defendant’s first argument, he contends the trial court erred in denying his motions to dismiss the charges against him at the close of the State’s evidence and at the close of all the evidence. We disagree.

“Upon [a] defendant’s motion for dismissal, the question for the [c]ourt is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of [the] defendant’s guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of [the] defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or

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in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Both competent and incompetent evidence must be considered. In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict may be used to explain or clarify the evidence offered by the State. 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.

Id. at 596-97, 573 S.E.2d at 869 (internal and external citations and quotations omitted).

In this case, the State presented evidence that defendant approached Nichols, demanded money from him, then shot Nichols twice, resulting in Nichols' death. We hold this evidence, viewed in the light most favorable to the State, was sufficient to submit to the jury both charges against defendant: first-degree murder based upon premeditation and deliberation; and first-degree murder based upon the felony murder rule, with attempted robbery with a firearm as the underlying felony. Accordingly, defendant's assignment of error is overruled.

II

In defendant's second argument, he contends the trial court erred in excluding evidence of Nichols' prior armed robbery conviction. Defendant argues that the trial court's failure to admit evidence of Nichols' prior convictions unfairly impeached defendant's credibility. We disagree.

Defendant attempted to elicit evidence of Nichols' prior convictions at two times: (A) during cross-examination of Dana Hampton and (B) when attempting to introduce certified copies of Nichols' two armed robbery convictions.

A

[2] Defendant first tried to elicit evidence of Nichols' prior convictions by asking Hampton whether he knew if Nichols was a convicted felon. Hampton replied, "[h]earsay," but then testified that this information had not come from Nichols. Hampton was then asked, "Well, what do you know he was convicted of?" The trial court sus-

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tained the State's objection although Hampton still responded, "I don't know exactly."

As to Hampton's testimony regarding Nichols' criminal record, the record on appeal contains no offer of proof that would suggest Hampton possessed admissible information regarding the convictions. Based on the transcript, it appears the trial court excluded Hampton's testimony regarding Nichols' convictions because Hampton indicated he did not have personal knowledge of the nature of those convictions. The record indicates, in Hampton's own words, that any information he had regarding Nichols' record was second-hand, and he, in fact, did not know "exactly" what convictions Nichols had.

Further, defendant has presented no argument explaining why he was entitled to ask Hampton about a subject on which he had no personal knowledge, and defendant made no offer of proof at trial that Hampton in fact did know of Nichols' criminal convictions. *See State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310 (1994) ("In order to preserve the exclusion of evidence for appellate review, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record.").

Therefore, the trial court did not err in sustaining objections to defendant's cross-examination of Hampton regarding Nichols' criminal record.

B

[3] With respect to the trial court's exclusion of the certified copy of Nichols' convictions for armed robbery, defendant argues the prior convictions were relevant to corroborate defendant's testimony that he would never have attempted to rob Nichols because he knew that Nichols had a prior history of violence and was likely to be armed. According to defendant, "[t]he fact that Mr[.] Nichols had been twice convicted of armed robbery made it more probable that [defendant] was telling the truth when he testified."

In this argument, defendant asserts that evidence in the form of certified copies of Nichols' prior convictions was relevant under our Rules of Evidence, Rule 401. However, defendant does not address Rule 404, which defines when character evidence or evidence of prior crimes is admissible. Rule 404(a) of our evidence rules provides that except in limited circumstances, character evidence "is not admis-

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sible for the purpose of proving that [a person] acted in conformity therewith on a particular occasion[.]” N.C. R. Evid. 404(a) (2007). However, Rule 404(a)(2) provides an exception to the general rule, allowing an accused to present evidence of a “pertinent trait of character” of the victim to show the victim’s conduct in conformity therewith on the occasion in question. As the leading commentator on the North Carolina Rules of Evidence has explained, this subsection sets out “an exception to the basic Rule barring evidence of character to prove conforming conduct[.]” 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 90 (6th ed. 2004).

Rule 404(b) addresses “[e]vidence of other crimes, wrongs, or acts” and specifies that such evidence “is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” Such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.” N.C. R. Evid. 404(b) (2007).

In *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583, *rev’g* 148 N.C. App. 310, 559 S.E.2d 5 (2002) (*per curiam*), our Supreme Court adopted Judge Wynn’s dissent in the Court of Appeals opinion and established that certified copies of prior convictions were not admissible under Rule 404(b). *Id.* Judge Wynn concluded that “in a criminal prosecution, the State may not introduce prior crimes evidence under rule 404(b) by introducing the bare fact that the defendant was previously convicted of a crime” *State v. Wilkerson*, 148 N.C. App. 310, 327, 559 S.E.2d 5, 16 (2002) (Wynn, J. dissenting). While evidence of “the facts and circumstances underlying the conviction” might be admissible under Rule 404(b), evidence of the bare fact of a conviction is admissible only under Rule 609. *Id.* at 321, 559 S.E.2d at 12.

In light of this, we cannot discern any meaningful basis for distinguishing the admission of prior convictions of a defendant and the admission of prior convictions of a victim. Thus, we hold that the certified copies of Nichols’ prior convictions were inadmissible under Rule 404(b). Rule 609, allowing admission of evidence of prior convictions “[f]or the purpose of attacking the credibility of a witness” does not, of course, apply since Nichols was deceased and not a witness. *See* N.C. R. Evid. 609(a) (2007).

Rule 404(a) permits evidence of “a pertinent trait of character of the victim of the crime[.]” N.C. R. Evid. 404(a) (2007). Rule 405

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addresses the method by which this character trait may be proven. Evidence Rule 405 provides:

(a) Reputation or opinion.—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.

(b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

N.C. R. Evid. 405 (a) and (b) (2007). Nichols' convictions represent specific instances of conduct being offered to prove a trait of character of Nichols—presumably that Nichols was dangerous.

However, defendant has not demonstrated that Nichols' dangerousness was “an essential element of a . . . defense.” N.C.R. Evid. 405(b). Defendant in fact acknowledges that Nichols' prior convictions were not being offered to show Nichols acted violently on 20 March 2007 or that defendant was acting in self-defense as a result of any actions by Nichols. Instead, defendant argues the prior convictions were relevant and admissible to enhance his own credibility, to corroborate his own testimony that he was not attempting a robbery of Nichols due to Nichols' violent past. Defendant has cited no authority suggesting that a simple albeit fervent desire to bolster his own credibility falls within the scope of Rule 405(b), and we have found none.

Therefore, we hold the trial court did not err in excluding the certified copies of Nichols' armed robbery convictions. Accordingly, this assignment of error is overruled.

III

[4] Defendant next argues the trial court erred in not admitting evidence of Nichols' character. We disagree.

On cross-examination of Hampton, defendant asked whether Hampton was “familiar with [Nichols'] reputation in the community” and whether Hampton had “hear[d] about his reputation[.]” Defendant also asked whether Nichols “carr[ied] nine millimeters

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around with him all the time[.]” The trial court sustained the State’s objections to each question.

Defendant made no offer of proof following any of these rulings, and therefore, this Court has no basis upon which to ascertain the admissibility of this evidence. Thus, defendant has waived his right to challenge these rulings on appeal. *State v. Stiller*, 162 N.C. App. 138, 142, 590 S.E.2d 305, 307 (2004) (“To prevail on a contention that evidence was improperly excluded, either a defendant must make an offer of proof as to what the evidence would have shown or the relevance and content of the answer must be obvious from the context of the questioning.”). This Court has explained that “[t]he reason for such a rule is that the essential content or substance of the witness’ testimony must be shown before we can ascertain whether prejudicial error occurred. In the absence of an adequate offer of proof, we can only speculate as to what the witness’ answer would have been.” *State v. Clemmons*, 181 N.C. App. 391, 397, 639 S.E.2d 110, 114, *aff’d*, 361 N.C. 582, 650 S.E.2d 595 (2007) (citations and internal quotations omitted).

However, even assuming *arguendo* we should address defendant’s argument, we do not believe defendant has demonstrated prejudice. Defendant must show that the answers to these questions would have so bolstered the credibility of his claim—that he lacked any motive to try to rob Nichols—that there is a reasonable possibility the jury would have reached a different verdict. *See* N.C. Gen. Stat. § 15A-1443 (a) (2007) (“A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.”).

Defendant was allowed to testify that Nichols stated that “he was a member of the street gang called the Crypts [sic]” and that he had shot people in the past. Defendant further testified that whenever he saw Nichols and Hampton together either Nichols or Hampton or both had a gun. On cross-examination of Hampton, defendant was able to establish that Nichols was carrying a nine millimeter gun on the day of the shooting and had placed the gun in the back of Hampton’s car. The jury also heard testimony from Hampton that both he and Nichols were convicted felons.

In other words, the only information that was excluded was the fact that Nichols had committed an armed robbery, that he had

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kicked in people's doors, and that he had tied them up. In light of the evidence before the jury regarding Nichols' gang membership, defendant's knowledge that Nichols had shot people, Nichols' status as a convicted felon, Nichols' gun possession on the date of the shooting and Hampton's likely gun possession, we cannot conclude that a reasonable possibility exists that the jury would have reached a different verdict if the trial court had not sustained the State's objection and admitted the challenged evidence of Nichols' character.

This assignment of error is dismissed.

IV

[5] Last, defendant argues the trial court lacked subject matter jurisdiction where defendant was indicted pursuant to a short-form murder indictment. We disagree.

In *State v. Allen*, 360 N.C. 297, 626 S.E.2d 271 (2006), our Supreme Court addressed a defendant's contention that his "short-form indictment was insufficient because it failed to allege all the elements of first-degree murder." *Id.* at 316, 626 S.E.2d at 286. Our Supreme Court disagreed and reasoned as follows:

We have consistently ruled short-form indictments for first-degree murder are permissible under N.C.G.S. § 15-144 (2005) and the North Carolina and United States Constitutions. *See State v. Mitchell*, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842, *cert. denied*, 534 U.S. 1000 (2001); *State v. Davis*, 353 N.C. 1, 44-45, 539 S.E.2d 243, 271 (2000), *cert. denied*, 534 U.S. 839 (2001); *State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (2000), *cert. denied*, 531 U.S. 1130, (2001); *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43, *cert. denied*, 531 U.S. 1018 (2000). We see no compelling reason to depart from our prior precedent on this issue. Here the indictment read: "The jurors for the State upon their oath present that on or about the 8th day of July, 1999, and in the county named above the defendant named above unlawfully, willfully and feloniously and of malice aforethought did kill and murder [victim]. Offense in violation of G.S. 14-17." As this indictment meets the requirements of N.C.G.S. § 15-144, we overrule defendant's assignment of error.

Id. at 316-17, 626 S.E.2d at 286.

Here, defendant was indicted for first degree murder in violation of N.C. Gen. Stat. § 14-17. The indictment read: "The jurors for the

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State upon their oath present that on or about [3/20/07] and in the county named above the defendant named above unlawfully, willfully and feloniously did of malice aforethought kill and murder George Nichols, III.”

As in *Allen*, we hold this short-form murder indictment meets the requirements of N.C.G.S. § 15-144. Accordingly this assignment of error is overruled.

No prejudicial error.

Judge GEER concurs.

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

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

I concur with the majority opinion that the trial court did not err in denying Defendant’s motions to dismiss at the close of State’s evidence and at the close of all the evidence. I further concur with the majority opinion that the trial court did not err in denying Defendant’s motion to dismiss the “short form” murder indictment. I must, however, dissent from the majority opinion because I believe the trial court committed prejudicial error in refusing to admit certain evidence at trial.

In this case, the State proceeded on two theories: that Defendant was guilty of first-degree murder pursuant to (1) premeditation and deliberation; and (2) the felony murder rule, with robbery with a firearm as the underlying felony. Defendant presented evidence of self-defense for the charge of first-degree murder based upon premeditation and deliberation. Self-defense is not a defense to charges based upon the felony murder rule.

I find the evidence Defendant sought to admit clearly relevant under the permissive standard of Rule 402 and the definition of relevance articulated in Rule 401 that “any evidence calculated to throw any light upon the crime charged is admissible in criminal cases.” *State v. Huffstetter*, 312 N.C. 92, 104, 322 S.E.2d 110, 118 (1984) (citations omitted).

Nichols’ violent past, if known to Defendant at the time of the shooting, was relevant to Defendant’s state of mind at that time. *See*

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State v. Strickland, 346 N.C. 443, 456, 488 S.E.2d 194, 201 (1997); *State v. Gibson*, 333 N.C. 29, 42, 424 S.E.2d 95, 103 (1992), *overruled on other grounds by* 334 N.C. 402, 432 S.E.2d 349 (1993); *State v. Poole*, 154 N.C. App. 419, 426, 572 S.E.2d 433, 438 (2002). For example: Defendant's fear of Nichols and Hampton based upon Defendant's testimony, before the jury and on *voir dire*, that whenever Defendant saw Nichols and Hampton they were carrying guns; that Defendant had felt threatened by Nichols and Hampton in prior interactions with them; that Defendant feared one or both of them might shoot him if an altercation were to escalate; and that Defendant would be afraid to attempt to take anything from Nichols by force because he knew Nichols and Hampton regularly carried guns and because of their threatening manner toward him.

Therefore, evidence of Nichols' reputation or character, given through opinion testimony, was admissible under Rule 404(a), pursuant to the restrictions of Rule 405(a). Rule 404(a) states: "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, except: . . . (2) . . . Evidence of a pertinent trait of character of the victim of the crime offered by an accused[.]" N.C. Gen. Stat. § 8A-1, Rule 404(a). Rule 405(a) states: "Reputation or opinion.—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." N.C. Gen. Stat. § 8A-1, Rule 405(a) (2007).

Prior specific acts of Nichols were admissible, to the extent Defendant was aware of them, pursuant to Rule 404(b).

Where, as in this case, a defendant seeks under Rule 404(b) to use *evidence of a prior violent act by the victim to prove the defendant's state of mind at the time he killed the victim*, the defendant must show that he was aware of the prior act and that his awareness somehow was related to the killing.

Strickland, 346 N.C. at 456, 488 S.E.2d at 201. (emphasis added) (holding that the exclusion of evidence of the victim's prior bad acts pursuant to 404(b) was not an abuse of discretion because the defendant never argued self-defense, and on the facts of the case the defendant's mental state concerning the victim's dangerousness was not an issue); *see also State v. Smith*, 337 N.C. 658, 666, 447 S.E.2d 376, 380-81 (1994) (stating that had the evidence the defendant sought to admit about the victim's prior threatening acts been closer in time

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to the acts for which the defendant was charged, this evidence might have been admissible pursuant to Rule 404(b)). “Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that [a] *defendant* has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002) (emphasis added). I note that by the language of *Berry*, this sole exclusion is limited to 404(b) evidence sought to be entered into evidence against a defendant, not a victim. I have been unable to locate any appellate opinion of this State applying the same language to evidence sought to be admitted pursuant to 404(b) concerning a victim.

Pursuant to Rule 404(a) through Rule 405(b), evidence of Nichols’ prior acts was admissible to the extent that these prior acts were relevant to Defendant’s state of mind in relation to his claim of self-defense for the premeditated first-degree murder charge, and in relation to the element of intent in the underlying felony of robbery with a firearm for the felony murder charge. *Gibson*, 333 N.C. at 42, 424 S.E.2d at 103 (1992); *Poole*, 154 N.C. App. at 426, 572 S.E.2d at 438. Even had Defendant been unaware of Nichols’ prior convictions, they may have been admissible to bolster Defendant’s self-defense argument at trial that Nichols was the first aggressor. *See State v. Hager*, 320 N.C. 77, 85, 357 S.E.2d 615, 620 (1987); *State v. Everett*, 178 N.C. App. 44, 51, 630 S.E.2d 703, 708 (2006) (quoting *State v. Winfrey*, 298 N.C. 260, 262, 258 S.E.2d 346, 347 (1979)).

The fact that the jury did not convict Defendant of first-degree murder based upon premeditation in no manner affects the analysis concerning whether the trial court erred in excluding evidence admissible in support of Defendant’s self-defense argument *at trial*. This evidence could only be excluded based upon a proper discretionary ruling by the trial court that the evidence ran afoul of the Rule 403 balancing test.

Defendant testified that he had known Nichols for three or four months prior to the shooting. Defendant was asked by his trial counsel if Nichols had a reputation in the community. The State objected, and a lengthy *voir dire* of Defendant ensued. During this *voir dire*, Defendant testified to the following: Prior to the shooting, Nichols told Defendant that he had robbed and shot people; that he had spent time in prison; that he was in the Crips street gang; and that he sold drugs. Because of the context of the conversation, Defendant assumed that Nichols had been in prison for robbing and shooting peo-

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ple. Defendant stated that whenever he saw Nichols, Nichols had a gun, and that

every time I would talk to [Nichols] [Hampton] would be like standing behind [Nichols] with his hand on the gun like he's about to try to shoot me if the situation don't go the way they want it to go, if it get out of hand or something. . . . I was really nervous because [Hampton] might try to shoot me. He got a gun. Every time come around, me and [Nichols] talk, and our voice raise he seem like he's about ready to jump in it.

Concerning the night of the shooting, Defendant testified in *voir dire* that Nichols' reputation made Defendant "cautious" and "kind of nervous" because he knew that Nichols had shot people before, and Defendant worried that he might get shot if a confrontation between him and Nichols over the money Nichols owed got out of hand. Defendant testified that he did not threaten Nichols because he knew "[i]t's two to one. I wouldn't start no trouble with two men that I know carry guns. No, that's crazy." Defendant stated that Nichols raised his voice and threatened Defendant, that Nichols said he didn't have to give Defendant any money, and that he would "beat" or "shoot" Defendant. Defendant further testified that what finally made him fearful for his life that night was when Nichols "grabbed me and said '['[Hampton], get him[']" and Hampton came around the car, "went for his waist and pulled the weapon."

Defendant testified that he tried to run away, but that Nichols was holding him and Hampton was reaching for his gun. Defendant heard a shot, so he shot Nichols in the leg in order to get away. Defendant testified that he shot one more time as he was falling away from Nichols, then put his gun away and ran as Hampton continued to shoot at him. Defendant stated that he ran because he had no intention of being involved in a shoot-out, he just wanted to get away, and that when he did fire the gun, he was in fear of being killed. Following *voir dire*, the trial court ruled that "if [Defendant] lays a proper foundation . . . the proffered testimony for the most part would all be admissible."

Defendant argues that the trial court erred in sustaining the State's objections to certain of Defendant's questions at trial. The State's objections to Defendant's questions were general objections. According to the North Carolina Rules of Appellate Procedure, Rule 10(b)(1): "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or

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motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” The State did not state the specific grounds for its objections to the solicited testimony, and the trial court did not state the basis upon which it sustained those objections. However,

[see] *State v. Morgan*, 315 N.C. 626, 640, 340 S.E.2d 84, 93 (1986) where Justice Meyer, speaking for the Court, said in reference to the offer of evidence under [Rule] 404(b). . . . “[The rule requires] the trial judge, prior to admitting extrinsic conduct evidence, to engage in a balancing, under Rule 403, of the probative value of the evidence against its prejudicial effect. The better practice is for the proponent of the evidence, out of the presence of the jury, to inform the court of the rule under which he is proceeding and to obtain a ruling on its admissibility prior to offering it.”

State v. McKoy, 317 N.C. 519, 524-25, note 1, 347 S.E.2d 374, 378, note 1 (1986). “Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court.” *State v. Cotton*, 318 N.C. 663, 668, 351 S.E.2d 277, 280 (1987). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403.

Defendant objects to the following rulings of the trial court concerning Defendant’s testimony: (1) excluding evidence of any specific instances of violence committed by Nichols, and (2) excluding evidence of whether Defendant had ever had any “problem” with Nichols in the past. Concerning the first issue, Defendant’s counsel first asked Defendant “[w]hat specific instances of violence” Defendant knew Nichols had committed in the past. The State objected and the trial court sustained the objection. Defendant’s counsel attempted to ask this question again in a different way, but the State’s objection was again sustained. Defendant was then allowed to testify that Nichols “told me that he had shot people before. He’s been to prison before. He done armed robbery, told me he had kicked in people door, tied them up.” Following this testimony, the State made a general objection, and the objection was sustained.

The record does not show the basis for the State’s objection nor whether the State was objecting to all or part of this testimony. The

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State did not move to strike the testimony. Defendant was later allowed to testify that Nichols had told him he had shot people in the past, but Defendant did not get the opportunity to testify that Nichols had told him he had been to prison and had committed armed robberies. Nonetheless, when Defendant's counsel later asked Defendant if Nichols had told him Nichols had "robbed and shot people," the State objected on the grounds that the question had been asked and answered, and the trial court sustained the objection.

As to the second issue, Defendant failed to make any offer of proof following the trial court's ruling. However, Defendant's *voir dire* testimony makes clear problems Defendant had with Nichols in the past, including testimony that whenever Defendant saw Nichols, Nichols had a gun, and that

every time I would talk to [Nichols] [Hampton] would be like standing behind [Nichols] with his hand on the gun like he's about to try to shoot me if the situation don't go the way they want it to go, if it get out of hand or something. . . . I was really nervous because [Hampton] might try to shoot me. He got a gun. Every time come around, me and [Nichols] talk, and our voices raise he seem like he's about ready to jump in it.

In a different part of his testimony, Defendant was allowed to testify to Hampton's menacing presence in Defendant's prior dealings with Nichols, and the fact that Defendant always saw Hampton with a gun, but Defendant did not get the opportunity to testify that Nichols was carrying a gun every time Defendant had seen Nichols in the past.

I cannot, upon review of the record, identify any reasoned ground upon which this excluded testimony would lead to confusion of the issues, misleading of the jury, or cause undue delay, waste of time, or needless presentation of cumulative evidence. Further, because this testimony is relevant and probative to issues at trial, namely Defendant's state of mind relating to his fear of Nichols and Defendant's perceived need to defend himself, and his alleged intent to rob Nichols by use of a firearm—and because I find no significant danger of unfair prejudice—I would hold the trial court abused its discretion in excluding this testimony. These rulings of the trial court are also confusing in light of its prior ruling following *voir dire* that "the proffered testimony for the most part would all be admissible."

Further, by preventing this line of questioning at trial, I also find a substantial possibility that Defendant was prevented from testify-

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ing, as he had testified in *voir dire*, that in light of his previous dealings with Nichols, he would be “crazy” to attempt to rob Nichols, having reason to believe both Nichols and Hampton were armed, and that both men were capable, if not likely, of reacting with gunfire to aggression on Defendant’s part.

Defendant also specifically argues that the denial of his motion to introduce into evidence records concerning Nichols’ two convictions for armed robbery constituted error. The trial court ruled:

I don’t think they’re relevant. I don’t think they’re admissible. To the extent they are relevant under Rule 403, the [c]ourt would find that any alleged probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or very minimum needless presentation of cumulative evidence based on the testimony.

The trial court did not offer any further insight into its ruling. There is no further guidance as to why the trial court, after considering the evidence before it, believed the records of Nichols’ prior convictions were not relevant and ran afoul of Rule 403.

I would first hold that Nichols’ prior convictions were relevant. As I indicated above, I believe it was error to exclude Defendant’s testimony that Nichols had told Defendant he had robbed people and spent time in prison. Defendant testified that Nichols told him he had shot people. Defendant’s testimony was the only evidence allowed at trial that Nichols had shot and robbed people and, along with Hampton’s testimony that he had heard Nichols was a convicted felon through “hearsay” and not from Nichols himself, it was the only evidence that Nichols had served time in prison. Evidence of Nichols’ prior criminal history for violent crime was clearly relevant to issues at trial. Such evidence would tend to corroborate Defendant’s testimony that Nichols was the first aggressor and would bolster Defendant’s self-defense claim in that: (1) Defendant testified he knew Nichols had shot people, (2) Defendant’s testimony that he knew Nichols had robbed people and had spent time in prison should have been admitted, and (3) Defendant’s testimony evinced his fear that Nichols was armed and might shoot him on the night in question.

Evidence of Nichols’ prior convictions would further bolster Defendant’s defense that he had no intent to rob Nichols, again because of Defendant’s testimony that he knew Nichols to be a dan-

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gerous man—a man who had informed Defendant that he had shot people in the past.

Therefore, because this evidence was relevant, it was admissible pursuant to either Rule 404(b), or Rule 404(a) through Rule 405(b), unless properly excluded pursuant to Rule 403. I find no reasoned justification for excluding this evidence pursuant to Rule 403 based upon confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. Concerning whether the probative value of this evidence is substantially outweighed by the danger of unfair prejudice, I find little risk of prejudice on these facts as Hampton was allowed to testify that he believed Nichols to be a convicted felon. Further, I would hold that Defendant's testimony that Nichols had informed Defendant that Nichols had shot and robbed people in the past, and had served time in prison, should have been allowed to remain in evidence.

Concerning probative value, because Defendant was the *only* witness who testified that Nichols had told him he had shot and robbed people, and because the jury could easily decide this testimony was self-serving, Nichols' prior record of armed robbery was the *only* potential evidence at trial that could have corroborated Defendant's testimony and served to lend it credibility. This objective evidence of Nichols' violent past could have substantially mitigated the potential that the jury would dismiss Defendant's testimony as self-serving, and thus support Defendant's stated fear of Nichols.

This Court in *Everett*, 178 N.C. App. 44, 630 S.E.2d 703, ordered a new trial based on these same concerns. In *Everett*, the defendant was accused of murdering her husband, but claimed she acted in self-defense. A salesman at an automobile dealership called the defendant before the killing and informed her that her husband had come to the dealership and smashed out the windows of certain cars on the lot. The defendant testified at trial concerning the incident at the dealership. The defendant attempted to call the salesman at trial to testify about the incident as well, but the trial court sustained the State's objection, stating it found no relevance in the proposed testimony. Two of the defendant's family members and one of the defendant's friends were allowed to testify in support of the defendant's self-defense claim concerning violent acts they had witnessed the victim commit. This Court held that not only was the trial court's decision not to allow the salesman to testify error, it was prejudicial error, stating:

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The jury in this case heard testimony from the following defense witnesses: defendant; John Rowland, defendant's father; Adele Rowland, defendant's mother; and Iris Bryant, defendant's friend. All of these witnesses were either parents of or closely associated with defendant. [The salesman] was the only witness defendant tendered at trial not closely associated with defendant.

[The salesman] witnessed the victim's violent acts first hand. [His] testimony would have provided the jury with the only evidence from a neutral source of the victim's violent character, a crucial element of defendant's claim of self-defense. The trial court erred in excluding [the salesman's] testimony regarding the incident at the car dealership to show the victim's propensity for violent behavior. This error was prejudicial in light of defendant's assertion of self-defense, [the salesman] being defendant's only neutral witness, and defendant's testimony regarding the car dealership incident possibly being viewed by the jury as self-serving.

Everett, 178 N.C. App. at 53-54, 630 S.E.2d at 710.

Regarding unfair prejudice under Rule 403, on these facts it is unclear who would be prejudiced by the admission of Nichols' prior convictions. As previously stated, the contention that Nichols was a convicted felon was already presented to the jury in the form of testimony. Any danger that the jury would be prejudiced against Nichols, and determine that Nichols had only "gotten what he deserved" was already present. Admission of the prior criminal record would not have introduced this danger of prejudice, but would have helped to confirm and validate Defendant's testimony, bolster his credibility, and lend weight to his claims of self-defense and lack of intent to rob Nichols.

Further, "when the witness is the accused, the balancing requisite for [Rule 404(b)] reflects the concern that the extrinsic evidence not reflect more upon the defendant's propensity to commit the kind of offense for which he is being tried than upon the particular purpose of the rule invoked." *State v. Carter*, 326 N.C. 243, 250, 388 S.E.2d 111, 116 (1990). This statement reflects the logical conclusion that the predominating concern regarding prejudice when ruling on the admission of Rule 404(b) evidence is prejudice to the accused, that the jury may be more likely to convict on weaker evidence if it knows that the accused has committed similar or violent acts in the past.

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The majority cites Judge Wynn's dissent in *Wilkerson*, adopted by our Supreme Court, in support of its position that the certified copies of Nichols' prior convictions were properly excluded. I do not find *Wilkerson* controlling in the instant case. Judge Wynn's concern in *Wilkerson* was that the admission of the bare fact of a defendant's prior conviction pursuant to Rule 404(b), to show intent, for example, would be inherently prejudicial to that defendant:

An unchallenged basic tenet of criminal law is that the State must prove defendant's guilt beyond a reasonable doubt. Fundamentally, this means that the State may not prove such guilt by showing that because another jury found the defendant guilty of an unrelated crime in the past, he is therefore guilty in the present case. Nor may the State prove guilt by showing that the fact that an earlier jury convicted the defendant is proof of his intent, motive, knowledge, etc. under Rule 404(b)[.]

Wilkerson, 148 N.C. App. at 319, note 1, 559 S.E.2d at 11, note 1. None of Judge Wynn's concerns are implicated in the present case, because the evidence the trial court rejected was not prior convictions of Defendant. Judge Wynn's holding is quite clear and targeted: "I would hold that in a criminal prosecution, the State may not introduce prior crimes evidence under Rule 404(b) by introducing the bare fact that *the defendant* was previously convicted of a crime[.]" *Id.* at 327, 559 S.E.2d at 16 (emphasis added). None of Judge Wynn's concerns apply where the prior conviction evidence concerns the victim. The admission of this evidence would have furthered the goal of putting the State to its burden of proving Defendant's guilt beyond a reasonable doubt, not abrogated it. Further, as Judge Wynn noted, there are exceptions to the general rule articulated in his adopted dissent, *even where prior convictions are admitted against a defendant.* *Id.* at 327-28, 559 S.E.2d at 16. I strongly disagree with the statement of the majority suggesting there is no "meaningful basis for distinguishing the admission of prior convictions of a defendant and the admission of prior convictions of a victim."

Further, *Wilkerson* does not involve Rule 404(a) and Rule 405(b), which, together, allow "evidence of a pertinent trait of character of the victim of the crime offered by an accused[.]" in the form of "[s]pecific instances of conduct . . . [i]n cases in which character or a trait of character of a person is an essential element of a charge . . . or defense[.]" Nichols' violent character was an essential element of both Defendant's self-defense claim, and the element of intent in the robbery with a firearm charge supporting the felony murder con-

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viction, as Defendant testified he was aware of Nichols' violent character before the shooting. *See Everett*, 178 N.C. App. at 51-52, 630 S.E.2d at 708; *see also State v. Brown*, 120 N.C. App. 276, 462 S.E.2d 655 (1995).

In light of these considerations, I would hold that the trial court abused its discretion in excluding the prior record of Nichols. This evidence was relevant and probative to the issue of the reasonableness of Defendant's fear of Nichols, thus bolstering his claim of self-defense—that he was in fear for his life when he shot Nichols—and that Nichols was the first aggressor. The excluded evidence was also relevant and probative for Defendant's argued lack of intent to rob or shoot Nichols. *See Rules 404(a)(2), 404(b) and 405(b)*.

I further believe that Defendant was prejudiced by the exclusion of the above evidence.

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2007). In order to determine whether the trial court's errors were prejudicial, they must be examined within the context of all the evidence presented at trial. The jury decided that Defendant was not guilty of premeditated first-degree murder, but found Defendant guilty of first-degree murder based upon the felony murder rule. The underlying felony supporting this verdict was a determination by the jury that Defendant had committed attempted robbery with a firearm against Nichols, which led to Nichols' shooting death. I find the State's evidence that Defendant committed attempted robbery with a firearm minimal, and open to multiple interpretations.

The entirety of this evidence is testimony from some witnesses that Defendant fired first, that Nichols owed Defendant money which Nichols had not paid, and the testimony of Blackwell that she heard Defendant tell Nichols "man, you got me and [Defendant] was like give me everything in your pocket." Blackwell further testified that Nichols "pulled out his pocket and he was like man, I ain't got nothing but three dollars. . . ." ¹ Blackwell then testified that she heard

1. This testimony of Nichols' response is corroborated by the three dollars found in Nichols' pocket by Elizabeth Carter, the crime scene investigator.

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gunfire, but she did not see who was shooting. Hampton, who was with Nichols at the time of the shooting, testified that Defendant and Nichols seemed to be in an argument, and he thought he heard the word “money” mentioned.

Blackwell testified that she was watching what transpired in the side-view mirror of her car, which was parked in front of the Great Stops gas station and convenience store. She testified that Defendant, Nichols, and Hampton were all talking together and that Defendant was facing her, and the two other men had their backs to her. This would mean that Defendant was facing Great Stops, and the two other men were between Defendant and Great Stops, with their backs to the store. This testimony conflicts with other witnesses who placed the three men in different locations at the time of the shooting. Blackwell further testified that she heard three initial shots fired, and she believed “about two more shots” followed those initial shots. The evidence at trial tends to show that Defendant only fired twice. Blackwell’s testimony could be interpreted to bolster Defendant’s account, which was that Hampton fired at Defendant once, then Defendant fired towards Nichols twice before Defendant ran away. It also contradicts evidence of the total number of shots fired by Hampton, as other witnesses testified that Hampton fired more than two or three times, and eight spent shell casings were located at the scene. Defendant’s gun was a revolver, which would not have ejected any casings at the scene.

As has been previously stated, the felony underlying Defendant’s conviction for felony murder was attempted robbery with a firearm. One of the essential elements of attempted robbery with a firearm is felonious intent. *Poole*, 154 N.C. App. at 426, 572 S.E.2d at 438.

It is clear from the facts that Defendant did not take any personal property from Nichols. Therefore, Defendant’s conviction rests entirely upon the question of whether the State proved beyond a reasonable doubt that Defendant was attempting to take personal property from Nichols when Defendant pulled and used his handgun.

The State’s evidence could be interpreted in a number of ways. The fact that Blackwell testified that Defendant asked Nichols for everything Nichols had in his pockets could be interpreted as a robbery demand. However, there is no evidence that at the time the demand was made, Defendant had drawn his handgun or had threatened to use it. There is no evidence that Nichols was aware Defend-

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ant was in possession of any firearm at that time. Defendant's demand could quite logically be interpreted as a demand for the money Nichols owed him. Defendant testified he had asked Nichols in person twice before for the money owed, without any intent to resort to violence, and no evidence was presented suggesting Defendant had threatened Nichols at these previous meetings.

According to Blackwell's testimony, Nichols told Defendant he only had three dollars, and turned out his pockets to prove his point. Three dollars was recovered from Nichols' person after his death. It is feasible that Defendant believed Nichols had more money somewhere on his person, or in Hampton's automobile, and drew his gun in an attempt to take that money. It is just as possible that Defendant made a demand for the money Nichols owed him, Nichols said he did not have it, Defendant was angered, the argument escalated, and ended up in gunfire. This interpretation of the events does not lead to a conclusion that Defendant attempted to rob Nichols, whether it was Defendant or Hampton who drew the first firearm or fired the first shot.

Defendant testified to the jury or in *voir dire* that he feared both Nichols and Hampton could be armed, that he knew Nichols had committed violent acts in the past, and that he believed Hampton was very willing to resort to violence to protect Nichols. If the jury found this testimony to be credible, it would have seriously weakened the rationale underpinning the State's case for attempted robbery with a firearm. Why would Defendant attempt to rob Nichols when there was a high likelihood Nichols had very little cash, and that any aggression on Defendant's part was likely to result in two men confronting Defendant with firearms. As Defendant stated in *voir dire*, attempting robbery in those circumstances would have been "crazy."

Further, if one is going to attempt a robbery in a public place, shooting the intended victim before obtaining the victim's money would be an ill-conceived plan. Once shots are fired, the would-be robber has drawn attention to himself of the most unwanted kind. Logic would dictate that the threat of violence, used to direct a victim to produce whatever money he might have, would yield a much higher possibility of success than killing the victim in a public place and having to make a search of the victim and an automobile while law enforcement was en route. Further, once shots were fired, witnesses, who may otherwise not have been paying attention, would have a greater interest and opportunity to identify suspects.

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Even accepting *arguendo* that Defendant fired first, this evidence could be viewed as an attempt to get away from Nichols and Hampton, even if the jury determined Defendant's fear of Nichols and Hampton was not reasonable under the circumstances. This evidence could also be interpreted as an angry reaction to the wrong Defendant perceived Nichols had done to him, the fact that Nichols only had three dollars on his person, and Defendant's belief that Nichols would never pay Defendant the money owed—an act of passion and revenge. Both of these scenarios are inconsistent with an intent to rob Nichols.

Determination of these issues and assessing the credibility of the witnesses is, of course, the province of the jury. However, the strength of the evidence against Defendant, which includes alternate theories of guilt or innocence, must be evaluated in making a determination of prejudice. Based upon the evidence admitted at trial, I cannot say that there was not a "reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at the trial . . ." N.C. Gen. Stat. § 15A-1443(a).

In this case, the State's key evidence supporting robbery with a firearm is testimony that Defendant demanded that Nichols give him everything Nichols had in his pockets because Nichols owed Defendant money, and therefore Defendant's demand could easily be interpreted as a claim of right. *See State v. Spratt*, 265 N.C. 524, 526-27, 144 S.E.2d 569, 571-72 (1965). Though Defendant did not argue claim of right as a defense at trial, consideration of Defendant's claim that he was owed money by Nichols was evidence to be considered by the jury, and weighed in the jury's deliberations concerning the element of intent to rob Nichols. The evidence presented at trial concerning the sequence of events leading up to the shooting of Nichols is at least as suggestive of an act of passion and revenge, or fear—whether reasonable or not—as it is of an intent to rob Nichols.

In light of the equivocal nature of the evidence produced by the State in support of its charge of felony murder based upon attempted robbery with a firearm, the credibility of the witnesses, and that of Defendant in particular, was of great importance. Due to the errors I believe were committed by the trial court, Defendant was only allowed to produce evidence of his state of mind through his own testimony. This testimony is far less persuasive than objective evidence, as the jury is likely to interpret it as self-serving. Defendant's *voir dire* testimony that whenever he saw Nichols, Nichols was carrying a firearm, though also self-serving, was highly relevant to any consid-

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eration of Defendant's state of mind and intent at the time of the shooting. Defendant's *voir dire* testimony that he would be "crazy" to attempt to rob two men he believed to be armed and dangerous, which was likely excluded from evidence due to the trial court's sustaining of the State's objections, would have also provided the jury important evidence to consider concerning Defendant's intent at the time of the shooting. Evidence that Nichols had served prison time for two previous robberies with a firearm would have been the *only* objective evidence presented concerning Nichols' violent past, and would have thus provided objective corroborative evidence of Defendant's testimony concerning his fear of Nichols, and Defendant's testimony that Nichols had personally informed Defendant that he had robbed and shot people, and served time in prison. *See Everett*, 178 N.C. App. at 54, 630 S.E.2d at 709 ("[The witness'] testimony would have provided the jury with the only evidence from a neutral source of the victim's violent character, a crucial element of the defendant's [defense].").

Had this evidence been admitted at trial, on these facts, it could have made the difference in the jury's deliberations concerning Defendant's intent to rob Nichols. I would hold that had this evidence been admitted, there is a reasonable possibility that the outcome of the trial would have been different. I would reverse and remand to the trial court for a new trial.

BOYCE & ISLEY, PLLC, EUGENE BOYCE, R. DANIEL BOYCE, PHILIP R. ISLEY, AND
LAURA B. ISLEY, PLAINTIFFS v. ROY A. COOPER, III, THE COOPER COMMITTEE,
JULIA WHITE, STEPHEN BRYANT, AND KRISTI HYMAN, DEFENDANTS

No. COA08-313

(Filed 17 March 2009)

1. Appeal and Error— cross-assignments of error—cross-appeal—sanctions

Defendants' motion to dismiss appellee's cross-assignments of error and cross appeal, and a motion for sanctions against appellee, are denied because: (1) plaintiff's argument was appropriately classified as a cross-assignment of error and not subject to dismissal; and (2) the Court of Appeals declined to impose sanctions on plaintiff for violations of Appellate Rules 25 and 34, although plaintiff was cautioned to refrain from employ-

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ing an argumentative and speculative presentation of the facts and procedural background of this case in violation of N.C. R. App. P. 34(a)(3).

2. Appeal and Error— appealability—interlocutory order—substantial right—qualified immunity—attorney work product

Defendants' appeal from an interlocutory discovery order regarding whether a defense attorney's notes should be disclosed to plaintiffs since they are allegedly protected under the qualified immunity for attorney work product implicated a substantial right that would be lost if not reviewed before the entry of final judgment.

3. Discovery— pretrial—attorney work product

The trial court abused its discretion in a defamation and unfair and deceptive trade practices case arising out of the alleged publication of a false and fraudulent political television advertisement by concluding that the verbatim text that a defense attorney entered into her computer from plaintiff's files was not attorney opinion work product of defendants' counsel, and thus was discoverable, because: (1) the trial court did not make any findings or conclusions in either its 18 April 2006 order or in its 12 December 2007 order that defendants' counsel committed wrongful or inappropriate actions in copying this text; (2) the act of defendants' counsel of inputting text from plaintiff's files into her laptop was analogous to an attorney highlighting select portions of copied documents considered relevant to defendants' litigation strategy that plaintiff already had in his possession; (3) the disclosure of the notes would direct plaintiffs to the few documents and portions thereof that defendants' counsel focused on and considered significant enough to emphasize from among a vast number of items; and (4) even assuming *arguendo* that the verbatim text qualified merely as ordinary work product as opposed to opinion work product, plaintiffs have neither argued nor shown that there is a substantial need or undue hardship to justify production, particularly given that plaintiff has all of the underlying documents in his possession.

4. Discovery— purported violation of protective order—request to destroy verbatim text

The trial court did not err by failing to base its 12 December 2007 order upon the purported violation of the protective order by defendants' counsel, nor did it abuse its discretion by

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failing to require defendants to destroy the pertinent verbatim text, because the verbatim text did not include confidential, sensitive, or privileged information. Thus, the protective order was not implicated.

Appeal by defendants from orders entered 18 April 2006 and 12 December 2007 by Judge John B. Lewis, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 October 2008.

Boyce & Isley, PLLC, by G. Eugene Boyce, Philip R. Isley, and Laura B. Isley, plaintiff-appellee, pro se.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr. and Charles E. Coble; Smith Moore LLP, by Alan W. Duncan and Allison O. Van Laningham, for defendant-appellants.

HUNTER, Robert C., Judge.

Defendants North Carolina Attorney General Roy A. Cooper, III, his campaign committee for the 2000 election for North Carolina Attorney General (the “Cooper Committee”), and three employees of the Cooper Committee, Julia White, Stephen Bryant, and Kristi Hyman, (hereinafter, collectively referred to as “defendants”), appeal from an interlocutory order entitled “Order, Following *In Camera* Review, On Plaintiffs’ Motion Regarding Defendants’ Compliance with Protective Order” entered by Judge John B. Lewis, Jr. (“Judge Lewis”) on 12 December 2007 and from the “Order on Plaintiffs’ Motion Regarding Defendants’ Compliance with Protective Order” entered by Judge Lewis on 18 April 2006,¹ which was “incorporated . . . by reference” into the 12 December 2007 Order. Plaintiff G. Eugene Boyce (“Mr. Boyce”), appearing *pro se*, cross-assigns error² to Judge Lewis’s 12 December 2007 Order. After careful review, we affirm in part and reverse in part.

1. Defendants purport to appeal from Judge Lewis’s 17 April 2006 Order. In his 12 December 2007 Order, Judge Lewis stated that the 18 April 2006 Order was entered on 17 April 2006. While Judge Lewis signed the Order on 17 April, the file stamp in the record indicates this Order was entered on 18 April 2006. For purposes of this opinion we refer to said Order as the 18 April 2006 Order. Defendants make no argument regarding the 18 April 2006 Order on appeal. Accordingly, any argument pertaining to this Order is abandoned pursuant to N.C.R. App. P. 28.

2. Defendants have filed a Motion to Dismiss which argues, *inter alia*, that Mr. Boyce’s cross-assignment of error is really a cross-appeal which should be dismissed due to several violations of the North Carolina Rules of Appellate Procedure. We discuss this issue *infra*.

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I. Background

The underlying case in this appeal began over eight years ago on 22 November 2000, when the law firm of Boyce & Isley, PLLC, and its members, Mr. Boyce, R. Daniel Boyce (“Dan Boyce”), Phillip R. Isley, and Laura B. Isley (hereinafter, collectively referred to as “plaintiffs”), filed a complaint in Wake County Superior Court alleging that defendants published a false and fraudulent political television advertisement (the “advertisement”) regarding Dan Boyce and Boyce & Isley, PLLC during the 2000 election campaign for the office of North Carolina Attorney General. Dan Boyce and Mr. Cooper were opponents in the November 2000 general election for Attorney General. The audio portion of the advertisement stated:

I’m Roy Cooper, candidate for Attorney general, and I sponsored this ad. Roy Cooper, endorsed by every major police organization for his record of tougher crime laws. Dan Boyce—his law firm sued the State, charging \$ 28,000 an hour in lawyer fees to the taxpayers. The judge said it shocks the conscience. Dan Boyce’s law firm wanted more than a police officer’s salary for each hour’s work. Dan Boyce, wrong for Attorney General.

The lawsuits to which the ad apparently referred were a group of class action lawsuits brought on behalf of thousands of plaintiffs alleging that taxes levied by the State were unconstitutional. Dan Boyce or members of the plaintiff law firm allegedly served as counsel to the plaintiffs in each of those cases, and plaintiffs referred to the cases in various campaign materials and on their law firm’s website.

Boyce & Isley, PLLC v. Cooper, 169 N.C. App. 572, 574, 611 S.E.2d 175, 176 (2005) (hereinafter, “*Boyce II*”). The advertisement specifically referenced *Smith v. State*, 349 N.C. 332, 507 S.E.2d 28 (1998) (hereinafter, “*Smith A*”).

Plaintiffs alleged that the advertisement defamed Dan Boyce, the Republican nominee for the Office of Attorney General, and the member attorneys of Boyce & Isley, PLLC. Specifically, they asserted that defendants’ publication of the advertisement was defamatory *per se* and constituted unfair and deceptive trade practices (“UDTP”). They further asserted that defendants had conspired to violate N.C. Gen. Stat. § 163-274(8), which prohibits “any person [from] publish[ing] . . . derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reck-

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less disregard of its truth or falsity when such report is calculated or intended to affect the chances of such candidate for . . . election[.]”

The instant case is the third time this Court has been asked to address issues pertaining to the underlying case. *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 568 S.E.2d 893 (2002) (hereinafter, “*Boyce I*”), *appeal dismissed and review denied*, 357 N.C. 163, 580 S.E.2d 361 (2003); *see also Boyce II*, 169 N.C. App. at 572, 611 S.E.2d at 175. In *Boyce I*, 153 N.C. App. at 39, 568 S.E.2d at 904, this Court held that plaintiffs had presented sufficient claims upon which relief could be granted for defamation and UDTP,³ and in *Boyce II*, 169 N.C. App. at 578, 611 S.E.2d at 178-9, this Court dismissed as interlocutory defendants’ appeal of the trial court’s denial of defendants’ motion for judgment on the pleadings. A more detailed summation of the facts regarding the underlying case can be found in *Boyce I*.

Here, the instant appeal involves issues which stem from a pre-trial discovery dispute between the parties and specifically center on what should be done with certain verbatim text which one of defendants’ attorneys, Patti Ramseur (“Ms. Ramseur”) copied into her laptop computer from Mr. Boyce’s client files on 12 September 2005. Prior to addressing this issue, we first discuss the procedural background of this case as it relates to discovery.

On 9 May 2003, pursuant to N.C.R. Civ. P. 26, defendants filed a “Motion for Protective Order” to govern the conduct of discovery between the parties. On 1 July 2003, then Chief Justice Lake designated this case as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts and assigned the case to Judge Lewis. On 17 September 2003, Judge Lewis entered a “Protective Order” providing rules and procedures to govern the discovery process between the parties, particularly with regard to the discovery of confidential or privileged information.⁴

On 1 September 2005, defendants’ counsel sent plaintiffs letters via facsimile and United States Mail asking them to, *inter alia*, reply to their prior discovery requests for, *inter alia*: documentation pertaining to the “Smith A, Bailey/Emory/Patton, Smith/Shaver, and Faulkenbury/Woodard/Peele/Hailey Cases”, particularly documents related to attorney time and billing records, correspondence between plaintiffs, documents related to the receipt and distribution of fees,

3. Plaintiffs did not appeal the dismissal of their election law claim. *See Boyce I*, 153 N.C. App. at 28, 568 S.E.2d at 897.

4. The Protective Order is discussed in greater detail *infra*.

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documents sent to prospective clients, and other documents related to attorney work on the tax cases. Defendants contended that these materials were relevant and discoverable in part due to plaintiffs' claim that the advertisement was false because Dan Boyce did not work on *Smith A* or the other tax cases even though Dan Boyce's campaign materials stated that he did work on these cases. On 9 September 2005, defendants filed a "Motion to Compel Responses to Discovery Requests" which sought the production of, *inter alia*, the aforementioned materials.

Mr. Boyce was counsel of record in the aforementioned cases and possessed documents and records pertaining to them at his home office in Raleigh, North Carolina. Though plaintiffs offered to pay the copying costs, Mr. Boyce refused to copy and produce the requested documents, which he asserted were too voluminous. However, he did agree to permit defendants' counsel to inspect files related to the tax cases at his home office.

On 12 September 2005, Ms. Ramseur and a legal assistant traveled to Mr. Boyce's home office to undertake an inspection. There, Mr. Boyce informed Ms. Ramseur that documents from the following cases were available for inspection: "*Smith v. State of North Carolina* (95 CvS 6715), *Shaver et al. v. State of North Carolina* (98 CvS 00625), the consolidated cases of *Smith v. State of North Carolina* and *Shaver et al. v. State of North Carolina* (95 CvS 6715 and 98 CvS 00625), the *Fulton* case, the *Bailey/Emory/Patton* cases, and the disabled retiree cases." Mr. Boyce did not individually mark these documents as confidential or as otherwise protected from discovery.

Ms. Ramseur informed Mr. Boyce that she had brought a laptop computer to take notes, but that she had forgotten to bring a power cord. Mr. Boyce offered one of his power cords and assisted her with plugging in the computer. With the exception of a few brief moments, Mr. Boyce remained in the room during the entire 12 September 2005 document inspection. At no time did Mr. Boyce ask defendants' counsel not to take notes, nor did he take any action to end the inspection process on that date.

At a 15 September 2005 hearing, Mr. Boyce informed Judge Lewis of certain activities that occurred during the 12 September document inspection. Specifically, he told the court that during the 12 September inspection, he believed that Ms. Ramseur was not solely marking the documents she wanted copied or making a list of said

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documents; rather, she appeared to enter into her laptop computer what appeared to be verbatim text from the documents contained in his client files from the tax cases. Plaintiffs argued that this violated the Protective Order, which they asserted merely allowed defendants to inspect, designate, and make a list of which documents they wanted Mr. Boyce to copy, but not to copy any documents or text from said documents without Mr. Boyce's explicit approval. Consequently, plaintiffs contended that defendants were required to return the text to Mr. Boyce so that he could make a determination as to whether the text Ms. Ramseur had copied was "confidential" or "highly confidential."

Defendants argued that Ms. Ramseur's actions did not violate the Protective Order because Mr. Boyce should have specifically delineated each document as confidential or highly confidential prior to making them available to defense counsel for inspection.⁵ Furthermore, defendants contended that they should not be required to turn over the notes Ms. Ramseur took during the 12 September 2005 inspection, including the verbatim text, because these materials were protected as defendants' counsels' work product.

On 18 October 2005, plaintiffs filed a "Motion Regarding Defendants' Failure to Comply with Protective Order". In this motion, plaintiffs reiterated Mr. Boyce's belief that Ms. Ramseur copied verbatim text "from folders of Class Members/Client documents from Plaintiffs' intangibles tax cases files (*Smith A Protestor and Smith/Shaver Non-Protestor* cases)" and that this violated the Protective Order because said Order limited defendants to creating a "list" or "inventory" of the documents they wanted to copy. Specifically, plaintiffs contended that the Protective Order provides that the producing party has the right to protect its documents by placing an appropriate "confidentiality" marking on them and to have unauthorized copies destroyed even if the claim of confidentiality or privilege is made subsequent to production. In support, plaintiffs cited paragraphs five, ten, and eleven of the Protective Order, which provide in relevant part:

5. All information or documents disclosed in this litigation, whether or not containing Confidential Information, shall be used

5. The Protective Order provides in pertinent part: "Any information supplied in documentary or other tangible form may be designated by the producing person or producing party as Confidential Information by placing or affixing on each page of such document, or on the face of such thing, the legend 'Confidential' or 'Highly Confidential,' as appropriate."

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by the receiving party solely for purposes of preparation for trial, pretrial proceedings and trial of this action and not in connection with any other litigation or judicial or regulatory proceeding or for any business, commercial, competitive, political, personal or other purpose. Any summary, compilation, notes or copy containing Confidential Information and any electronic image or database containing Confidential Information shall be subject to the terms of the Protective Order to the same extent as the material or information from which such summary, compilation, notes, copy, electronic image or database is derived.

. . .

10. In the event any document is produced that the producing person later claims is protected by the attorney-client privilege, work product doctrine or other privilege or immunity, the receiving party shall, within five (5) business days of receipt of a written request by the producing person, return the original to the producing person, destroy all copies thereof, as well as, all notes, memoranda or other documents that summarize, discuss or quote the document, and delete any copy of the document, or any portion thereof, from any word processing or data base tape or disk it maintains. Production of privileged, work-product-protected or otherwise immune documents in the course of discovery in this action shall not constitute a waiver of any privilege, work product protection or immunity, either as to the produced document or as to any other documents or communications. . . . Inadvertent failure to designate any information pursuant to this Protective Order shall not constitute a waiver of any otherwise valid claim for protection, so long as such claim is asserted within fifteen (15) days of the discovery of the inadvertent failure. At such time, arrangements shall be made for the return to the designating person of all copies of the inadvertently mis-designated documents and for the substitution, where appropriate, of properly labeled copies.

11. This Order is entered solely for the purpose of facilitating the exchange of information between the parties to this action without involving the Court unnecessarily in this process. Nothing in this Order, nor the production of any documents or disclosure of any information pursuant to this Order, shall be deemed to have the effect of (i) an admission or waiver, including waiver under the rules of evidence, by any party or other sub-

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scriber to this Order; (ii) altering the confidentiality or nonconfidentiality of any such information; or (iii) altering any existing obligation of any party or other subscriber, or the absence of such obligation.

In order to ascertain whether defendants' counsel violated the Protective Order, plaintiffs asked Judge Lewis: to "conduct an *in camera* inspection of the text and data copied from Plaintiffs' client files and downloaded electronically to the computer word processing data base," to "impose appropriate sanctions to assure future compliance by Defendants with the Protective Order," and to impose sanctions if the court determined that "Defendants have not complied with the Protective order, extracted more than an 'inventory' or 'list' of documents, and if Defendants do not timely destroy all attorney/client material other than what appears to be . . . [a] 'list' or 'inventory' of client documents[.]"

Defendants acknowledged before Judge Lewis that Ms. Ramseur's notes were not limited to an inventory or list of the documents and that her notes included short snippets of verbatim text from certain documents contained in the files provided by Mr. Boyce as well as her thoughts regarding them and her theories of the case. Citing N.C.R. Civ. P. 26(b)(3), defendants claimed that the entirety of Ms. Ramseur's notes—both the verbatim text she typed into her computer as well as her notes pertaining to said text—were protected as defendants' counsels' attorney work product because they contained "the mental impressions, conclusions, and opinions of Defendants' counsel[.]" Consequently, once again, defendants objected to having to produce their counsels' notes "for *in camera* inspection or otherwise[.]" Finally, defendants stated that Ms. Ramseur had not copied any confidential information from Mr. Boyce's files and that they would treat the verbatim text as confidential until such time as Mr. Boyce identified which documents contained in his files were indeed confidential.

On 18 April 2006, Judge Lewis entered an order requiring "Defendants . . . [to] provide to the Court for an *in camera* review only, and not for production to Plaintiffs, the portion of attorney notes taken during document inspection at Eugene Boyce's home office on September 12, 2005, which contains verbatim text from documents reviewed" within ten days of the date of the Order.

During a 9 October 2007 hearing, Judge Lewis reviewed the verbatim text that Ms. Ramseur had copied. On 12 December 2007, Judge

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Lewis entered an Order⁶ entitled “Order, Following *In Camera* Review, On Plaintiff’s Motion Regarding Defendants’ Compliance with Protective Order[,]” which incorporated the 18 April 2006 Order by reference and made numerous findings of fact. Judge Lewis concluded “that . . . [t]he portion of attorney notes . . . contain[ing] verbatim text from documents reviewed during the inspection at Gene Boyce’s home office on 12 September 2005:” (1) did “not contain any confidential or sensitive information relating to third parties or any information that is privileged as between Gene Boyce and his former clients” and (2) “[i]ncludes information, which is verbatim text from Plaintiffs’ documents that is relevant and discoverable by [Defendants].” Judge Lewis further concluded that “[b]ecause of the broad scope of discovery, . . . the notes are discoverable . . . [and] are not attorney work product because they are quotes from documents.” Judge Lewis mandated that defendants had to provide plaintiffs “with a copy” of the verbatim text which he had reviewed within ten days from the date of the Order, but did not order the destruction of the notes. In sum, Judge Lewis concluded: (1) the verbatim text defendants’ counsel copied is not confidential or privileged; (2) the documents contained in Mr. Boyce’s files are relevant and discoverable; and (3) defendants had to provide plaintiffs with a copy of the verbatim text because the scope of discovery is broad and because the text does not constitute work product, not because of any purported violation of the Protective Order.

On 18 December 2007, defendants simultaneously filed notice of appeal to this Court as well as a “Notice of Non-Production” and a “Request to Recognize Stay of Order During Appeal” with Judge Lewis. In a 21 December 2007 Order, Judge Lewis decreed, *inter alia*, that a “stay of the [12 December] Order arose automatically upon filing of the Notice of Appeal, and shall remain in place during the pendency of appellate proceedings related to the Order.” This appeal followed.

II. Analysis

A. Motions

[1] Here, defendants have respectively filed with this Court a “Motion to Dismiss Appellee’s Cross-Assignments of Error and Cross-Appeal” and a “Motion for Sanctions Against Appellee[.]” Specifically, defendants argue that this Court should dismiss Mr. Boyce’s cross-

6. In the December Order, Judge Lewis noted that “[r]ecords reflect that defendants’ counsel [had] complied with” his 18 April 2006 Order on 18 April 2006.

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assignments of error for violation of N.C.R. App. P. 10(d) and that we should dismiss Mr. Boyce's cross-appeal for violation of N.C.R. App. P. 13 and N.C.R. App. P. 25. Regarding sanctions, defendants assert that Mr. Boyce should be sanctioned due to violating the aforementioned Appellate Rules and because Mr. Boyce's brief to this Court violates Appellate Rule 34(a)(3), in that it "[is] so grossly lacking in the requirements of propriety, grossly violate[s] appellate court rules, [and] grossly disregard[s] the requirements of a fair presentation of the issues to the appellate court." N.C.R. App. P. 34(a)(3). Consequently, they argue that we should impose sanctions against Mr. Boyce pursuant to N.C.R. App. P. 25(b) and N.C.R. App. P. 34.

Appellate Rule 10(d) provides that "an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." Defendants contend that Mr. Boyce's "purported cross-assignments of error violate Rule 10(d) because they do not argue for 'an alternative basis in law for supporting the . . . order[.]'" Defendants note that Mr. Boyce's brief is entitled "Response Brief of Plaintiff-Appellee and Plaintiff-Cross Appellant[.]" According to defendants, Mr. Boyce has actually cross-appealed from and not cross-assigned error to Judge Lewis's 12 December 2007 Order.

Defendants note that when a party cross-appeals, pursuant to Appellate Rule 13(a)(1), he must file a cross-appellant's brief "[w]ithin 30 days after the clerk of the appellate court has mailed the printed record to the parties[.]" N.C.R. App. P. 13(a)(1). They further note that Appellate Rule 13(c) provides that "[i]f an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed . . . on the court's own initiative." *See also Ferguson v. Croom*, 73 N.C. App. 316, 317-18, 326 S.E.2d 373, 375 (1985) (dismissing appeal pursuant to Appellate Rule 13(c) because even though the party labeled the trial court's purported error as a cross-assignment of error and filed an appellee's brief, the party was actually bringing a cross-appeal and failed to file and serve an appellant's brief within the time allowed). In addition, defendants note that N.C.R. App. P. 25(a) provides that dismissal is a possible sanction for failing to take timely action. Here, defendants contend that Mr. Boyce failed to take timely action because he did not file his "cross-appellant's brief within thirty (30) days of 10 April 2008, the date on which the Clerk mailed the printed Record."

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In accordance with *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199-200, 657 S.E.2d 361, 366-67 (2008), we have considered defendants' and Mr. Boyce's arguments pertaining to the purported violations asserted in defendants' Motion to Dismiss in conjunction with Appellate Rules 25 and 34. While the title of Mr. Boyce's brief and some of the arguments contained therein contain language that lend support to defendants' contentions, Judge Lewis's 12 December 2007 Order is clear that said Order is not based on the Protective Order in this case, and as such, the 12 December Order does deprive Mr. Boyce "of an alternative basis in law for supporting the . . . order . . . from which appeal has been taken." N.C.R. App. P. 10(d). Accordingly, we conclude that Mr. Boyce's argument is appropriately classified as a cross-assignment of error and not subject to dismissal.

In support of their Motion for Sanctions, defendants assert that Mr. Boyce's brief grossly violates the aforementioned Appellate Rules and that it violates Appellate Rule 34(a)(3) because it: (1) contains a highly argumentative statement of relevant facts; (2) presents a false history of this case and defendants' conduct; (3) grossly misstates the trial court's findings and conclusions; and (4) wrongly accuses "Defendants' counsel of engaging in misconduct and unethical conduct, including theft, allegedly in violation of the trial court's orders, the Rules of Civil Procedure, and the Rules of Professional Conduct[.]"

Once again, as directed by our Supreme Court in *Dogwood*, we have carefully considered defendants' and Mr. Boyce's arguments in conjunction with Appellate Rules 25 and 34. In our discretion, we decline to impose sanctions on Mr. Boyce for these purported violations. However, defendants' argument as to Appellate Rule 34(a)(3) does contain merit, and we caution Mr. Boyce to refrain from employing an argumentative and speculative presentation of the facts and procedural background of this case.

B. Interlocutory Appeal

[2] Here, defendants contend that their assertion that Ms. Ramseur's notes should not be disclosed to plaintiffs because they are protected under the qualified immunity for attorney work product (N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2007)) implicates a substantial right. In addition, defendants point out that the disclosure of said notes would moot their appeal on this issue. Hence, defendants assert their interlocutory appeal is reviewable by this Court. We agree.

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A review of discovery orders is generally considered interlocutory and therefore not usually immediately appealable unless they affect a substantial right. “[W]here a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right”

Isom v. Bank of Am., N.A., 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006) (alterations in original) (quoting *Evans v. United Servs. Auto. Ass’n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786, cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001)). In addition, where “[an] appeal affects a substantial right that would be lost if not reviewed before the entry of final judgment, the issue is properly before [this Court].” *Id.*

Accordingly, we conclude defendants’ appeal is properly before us and review the trial court’s discovery order for abuse of discretion. *Id.* (citation omitted).

C. Production of Verbatim Text

[3] The threshold issue in defendants’ appeal is whether Judge Lewis erred in concluding that the verbatim text, which Ms. Ramseur entered into her computer from Mr. Boyce’s files, is not the attorney work product of defendants’ counsel and thus is discoverable by plaintiffs. As discussed *infra*, we conclude that the verbatim text is the work product of defendants’ counsel and consequently that the trial court erred by ordering defendants’ to disclose a copy of the verbatim text to plaintiffs.

In order to successfully assert protection based on the work product doctrine, the party asserting the protection . . . bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant . . . or agent.

Id. at 412-13, 628 S.E.2d at 463 (citations and internal quotation marks omitted; second alteration in original).

Although not a *privilege*, the exception is a “qualified immunity” and extends to all materials prepared “in anticipation of litigation or for trial by or for another party or by or for that other party’s consultant, surety, indemnitor, insurer, or agent.” The protection is allowed not only [for] materials prepared after the other party

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has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Materials prepared in the ordinary course of business are not protected, nor does the protection extend to *facts* known by any party.

Willis v. Power Co., 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976) (citations omitted). “[N]o discovery whatsoever of [work product containing] the ‘mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party’ concerning the litigation at bar . . . is permitted under [N.C.R. Civ. P. 26(b)(3)].” *Id.* at 36, 229 S.E.2d at 201 (citation omitted). However, documents that constitute work product but that do not contain or reflect the aforementioned input of an attorney or other representative may be discoverable “[u]pon a showing of ‘substantial need’ and ‘undue hardship’ involved in obtaining the substantial equivalent[.]” *Id.* “In the interests of justice, the trial judge may require *in camera* inspection and may allow discovery of only parts of some documents.” *Id.*

In the instant case, defendants argue that: (1) they met their burden of showing that the verbatim quotes are their counsels’ work product; (2) the verbatim quotes qualify as opinion work product, i.e., that they reflect defense counsel’s “ ‘mental impressions, conclusions, opinions, or legal theories’ . . . concerning the litigation at bar” and are not discoverable; (3) even if the verbatim text does not qualify as opinion work product, it is nonetheless work product and still not discoverable because plaintiffs did not assert before Judge Lewis, let alone show, that they had a “ ‘substantial need’ ” for the text and that they would incur an “ ‘undue hardship’ . . . in obtaining the substantial equivalent”; and (4) plaintiffs cannot make this showing because the verbatim text was copied from documents which are within Mr. Boyce’s control. *Id.* (citation omitted).

On appeal, Mr. Boyce argues that Ms. Ramseur’s notes are not entitled to work product protection because he asserts the verbatim text was taken from his files in violation of the Protective Order, the North Carolina Rules of Civil Procedure, and the Rules of Professional Conduct and because this text was protected by the attorney-client privilege.

As discussed *infra*, we agree with defendants and conclude the trial court abused its discretion in ordering them to provide plaintiffs with a copy of the verbatim text that defendants’ counsel copied from certain documents contained in Mr. Boyce’s files.

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At the outset, we note that Judge Lewis did not make any findings or conclusions in either his 18 April 2006 Order or in his 12 December 2007 Order that defendants' counsel committed wrongful or inappropriate actions in copying this text. Furthermore, in the 12 December Order, which was entered following the court's *in camera* review of the verbatim text, Judge Lewis explicitly concluded that said text "[d]oes not contain any confidential or sensitive information relating to third parties or any information that is privileged as between Gene Boyce and his former clients[.]" Given that Judge Lewis concluded that the verbatim text did not contain confidential or privileged information, he implicitly concluded that the Protective Order was not implicated here. We have carefully reviewed the verbatim text at issue, which is less than three pages in length, and conclude that Judge Lewis did not abuse his discretion in determining that said text does not contain confidential or privileged information.

Defendants acknowledge that their contention that "when counsel, during discovery, compiles a document containing, among other things, selected excerpts from the opposing party's documents, . . . that compilation [is] attorney work product[.]" is an issue of first impression for this Court. They further acknowledge that they have failed to locate any case law from this or any other jurisdiction which is exactly on point with the facts here. However, defendants argue that their contention that the verbatim text here is opinion work product and barred from plaintiffs' discovery is supported by analogous federal highlighting and selection cases, i.e. cases in which federal courts have respectively determined that an attorney's highlighting of documents and an attorney's selection of a smaller subset of documents from a voluminous set of documents, is work product. Defendants note that this Court has looked to federal decisions for guidance on issues of first impression regarding the North Carolina Rules of Civil Procedure, including in analyzing the scope of the " 'in anticipation of litigation' " work product requirement. *Cook v. Wake County Hospital System*, 125 N.C. App. 618, 623, 482 S.E.2d 546, 550 (1997).

In support of their highlighting argument, defendants cite four published federal district court cases: (1) *Rohm and Haas Co. v. Brotech Corp.*, 815 F. Supp. 793, 795 (D. Del. 1993) (holding that an attorney's "highlighting [of passages of an affidavit] reflects the thought processes of counsel in connection with a matter for which he was providing advice and services to his client and . . . should be protected from disclosure either under the attorney client privilege or

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as work product”), *affirmed*, 19 F.3d 41 (Fed. Cir. 1994); (2) *Federal Deposit Ins. Corp. v. Singh*, 140 F.R.D. 252, 254 (D. Me. 1992) (stating that even though underlying memorandum was discoverable, “[the attorney’s] attached notes and highlighting on the memorandum itself [we]re not subject to discovery”); (3) *In re Search Warrant for Law Offices*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) (stating that where an attorney highlights original corporate documents which are not privileged, “th[e] highlighting will not be sufficient to secure a work product privilege in the [original] document”, but “[w]here highlighting was done on copies [of the original document] . . . it [is] reasonable to restrict production to the original, or to have the highlighted copies of documents sanitized by being recopied without the highlighting”); (4) *Biben v. Card*, 119 F.R.D. 421, 429 n.4 (W.D. Mo. 1987) (stating that while SEC transcripts in defense counsel’s possession were not work product, “[a]ny notations, highlighting, etc., made by counsel for objecting defendants upon copies of the transcripts already in counsel’s possession would be protected from discovery by the attorney work product rule”).

We believe that here, the act of defendants’ counsel of inputting text from Mr. Boyce’s files into her laptop is analogous to an attorney highlighting select portions of copied documents. In addition, defendants’ counsel sought to examine these files because they were relevant to establishing what, if any, work Dan Boyce and the other members of Boyce & Isley, LLP performed on the prior, class action tax cases and consequently were relevant to defendants’ defense in this matter.

Furthermore, the notes that were produced *in camera* clearly show that Ms. Ramseur did not copy entire documents or substantial parts of documents contained in Mr. Boyce’s files. Rather, she inputted very short, select pieces of documents that she considered relevant to defendants’ litigation strategy. In addition, unlike the instant case, where the party seeking production already has the underlying documents in their possession in their entirety, the cases cited by defendants all respectively involve efforts to discover entire documents which the requesting parties did not already possess. We believe this factual distinction creates an even more compelling case for concluding that the verbatim text copied by defendants’ counsel here is protected from discovery as plaintiffs, specifically Mr. Boyce, already have these documents in their possession.

Next, while defendants acknowledge that the underlying documents Ms. Ramseur examined were not protected, they argue her

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selection of “a few items [out of thousands of pages of documents], amounting to less than three pages, that she believed to be important to Defendants’ theories of the case[,]” is attorney work product. Defendants contend that this assertion is supported by a variety of federal cases; however they primarily rely on and discuss the following three cases for this proposition: (1) *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 474 U.S. 903, 88 L. Ed. 2d 230 (1985); (2) *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986); and (3) *In re Allen*, 106 F.3d 582 (4th Cir. 1997), *cert. denied*, 522 U.S. 1047, 139 L. Ed. 2d 635 (1998). As discussed *infra*, based on the facts of the instant case, we agree.

“The concept of protecting as opinion work product a lawyer’s compilation of non-protected . . . documents developed . . . in the early and mid-1980s . . . [and] has become known as the *Sporck* doctrine, because *Sporck v. Peil* was the first decision to articulate the protection.” 2 Thomas E. Spahn, *The Work Product Doctrine: A Practitioner’s Guide* 555 (2007) (footnote omitted).

Perhaps the most confusing and complicated concept in the work product area involves possible opinion work product protection for a lawyer’s . . . selection of facts, documents, or witnesses that are *not* themselves intrinsically protected by . . . the work product doctrine.

At one extreme, the concept makes perfect sense. If a lawyer sorts through 100,000 documents produced by an adversary and selects the ten documents the lawyer considers most important, the adversary should not be able to insist that the lawyer identify those ten documents. Under the basic precept of the work product doctrine, the adversary should sort through its own documents and figure out which ten documents *it* considers the most important.

At the other extreme, the concept does not seem appropriate. If a lawyer reviews 100,000 documents produced by the adversary and designates 99,990 of them for copying and further study, the adversary learns nothing about the reviewing lawyer’s thought process by asking what documents the lawyer selected.

Id. at 554-55. “The *Sporck* doctrine applies only if the adversary has equal access to the pool of documents from which a lawyer selects the documents he or she thinks are the most important.” *Id.* at 559.

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In *Sporck*, in response to the plaintiffs' discovery request, the defendants produced hundreds of thousands of documents from which the plaintiffs' attorney selected more than 100,000 for copying. 759 F.2d at 313. To prepare defendant Sporck for his deposition, defense counsel showed him an unknown quantity of the numerous documents which had been produced for and copied by the plaintiffs, which defense counsel selected and compiled into a folder. *Id.* None of the defendants' individual documents themselves, in their redacted form, were undiscoverable. *Id.* At Sporck's deposition, plaintiffs' counsel asked him to identify all the documents he examined for the deposition, but he declined to answer based on advice of defense counsel. *Id.* at 314. The Third Circuit concluded that "the selection and compilation of documents [made] by [defense] counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product[.]" *id.* at 316 (citation omitted), and that "identification of the documents as a group will reveal defense counsel's selection process, and thus his mental impressions[.]" *Id.* at 315.

In *Shelton*, the plaintiff deposed the defendant's in-house counsel ("Burns"), who "refused to respond to questions concerning her knowledge of the existence or nonexistence of certain documents[.]" on the basis that she acquired such knowledge in her capacity as the defendant's attorney. 805 F.2d at 1325 (footnote omitted). The Eighth Circuit concluded that defense counsel's process of selecting and reviewing her clients' documents was protected as opinion work product, stating:

In cases that involve reams of documents and extensive document discovery, the selection and compilation of documents is often more crucial than legal research. We believe Burns' selective review of [the defendant's] numerous documents was based upon her professional judgment of the issues and defenses involved in this case. This mental selective process reflects Burns' legal theories and thought processes, which are protected as work product.

Id. at 1329 (citations omitted).

In *In re Allen*, 106 F.3d at 608, the Fourth Circuit considered whether a document containing "pages of selected employment records . . . which [the attorney] requested that [her clients] provide to her" was work product. Although the underlying employment

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records were discoverable, the Fourth Circuit held that counsel's "choice and arrangement constitutes opinion work product because [the attorney's] selection and compilation of these particular documents reveals her thought processes and theories regarding this litigation." *Id.* (citations omitted).

In the instant case, defendants note that Mr. Boyce provided defendants' counsel with thousands of pages for inspection, and defendants' counsel copied into her computer only a few, short verbatim excerpts from a few of these documents. Defendants contend that the disclosure of the notes would direct plaintiffs to the few documents and portions thereof that defendants' counsel focused on and considered significant enough to emphasize from among a vast number of items. We agree. Consequently, we conclude that the verbatim text entered in the computer of defendants' counsel qualifies as opinion work product and is not discoverable, especially where plaintiffs, specifically Mr. Boyce, already have the underlying, original documents in their possession. As such, the trial court abused its discretion by concluding otherwise. Furthermore, even assuming, *arguendo*, that the verbatim text here qualifies merely as ordinary work product as opposed to opinion work product, we agree with defendants that plaintiffs have neither argued nor shown that there is a "substantial need" or "undue hardship" to justify production, particularly given that Mr. Boyce has all of the underlying documents in his possession.

D. Mr. Boyce's Cross-Assignment of Error

[4] Mr. Boyce asserts that Judge Lewis erred by failing to base his 12 December 2007 Order upon the purported violation of the Protective Order by defendants' counsel. Because the Protective Order provides the producing party with the right to claim confidentiality or privilege subsequent to production and states that the "receiving party" upon receiving a written request by the producing person "shall . . . return the original to the producing [party], destroy all copies thereof, as well as, all notes, memoranda or other documents that summarize, discuss or quote the document, and delete any copy of the document, or any portion thereof, from any word processing or data base tape or disk" the receiving party possesses, Mr. Boyce contends that Judge Lewis erred by not ordering defendants to destroy "the items or information improperly obtained, copied, and generated by Defendant[s.]"

As discussed *supra*, upon carefully reviewing the verbatim text which defendants produced for *in camera* inspection, we do not

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believe that Judge Lewis erred by concluding that the text at issue does not contain any privileged, sensitive or confidential information. As such, the Protective Order was not implicated here. Accordingly, we conclude that Judge Lewis did not abuse his discretion by not requiring defendants to destroy the verbatim text.

III. Conclusion

In sum, because we conclude the verbatim text at issue is protected as the work product of defendants' counsel, we conclude Judge Lewis erred in ordering defendants to provide plaintiffs with a copy of said text. Hence, we reverse Judge Lewis's Order as to this issue. In addition, because we conclude that the verbatim text did not include confidential, sensitive, or privileged information, we conclude that Judge Lewis did not err by declining to base his 12 December 2007 Order on the Protective Order and by not ordering defendants to destroy their copies of the verbatim text pursuant to the Protective Order. Hence, we affirm Judge Lewis's Order as to this issue. Accordingly, Judge Lewis's 12 December 2007 Order is affirmed in part and reversed in part.

Affirmed in part; reversed in part.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA v. ALEX CORTES-SERRANO

No. COA08-591

(Filed 17 March 2009)

1. Rape— statutory rape—motion to dismiss—sufficiency of evidence—age—testimony

The trial court did not err by denying defendant's motion to dismiss the charges of statutory rape even though defendant contends the State failed to produce substantial evidence of the ages of both the victim and defendant at the time of the alleged crime because: (1) nothing in N.C.G.S. § 14-27.7A(a) or other precedent requires that these elements be proven by the introduction of birth certificates or other certified copies of birth records; and (2) the testimony of the victim and the victim's mother that the

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victim was thirteen years old at the pertinent time, and defendant's testimony that he was twenty-one years old at the pertinent time, was sufficient evidence.

2. Rape— statutory rape—motion to dismiss—sufficiency of evidence—continuous course of conduct not recognized in North Carolina

The trial court did not err by denying defendant's motion to dismiss one of the two statutory rape charges even though defendant contends the two acts were in the nature of a continuous transaction rather than separate and distinct crimes because: (1) defendant's reliance on *Clark*, 161 N.C. App. 316, is misplaced when defendant in that case did not assign error to the number of charges against him and thus that issue was not addressed; and (2) the Court of Appeals has previously held that North Carolina law does not recognize the continuous course of conduct theory.

3. Confessions and Incriminating Statements— recorded interview—voluntariness

The trial court did not err in a double statutory rape case by denying defendant's motion to suppress a recorded interview conducted by a detective that defendant contends improperly induced a confession through promises of a more favorable outcome because: (1) there was ample evidence in the record to support the trial court's findings that no improper promises or threats were made to defendant to induce an involuntary confession; and (2) the trial court's findings support its conclusion that, under the totality of circumstances, defendant's will was not overborne and that his statement was freely and voluntarily given.

4. Evidence— prior crimes or bad acts—cross-examination

The trial court did not abuse its discretion in a double statutory rape case by allowing the district attorney to cross-examine defendant about unrelated charges and criminal activity because: (1) defendant lost the benefit of an objection to this testimony since the State's cross-examination did not go outside the scope of the evidence introduced by defendant, but instead explained and rebutted defendant's testimony; and (2) defendant failed to show a reasonable possibility that a different result would have been reached had this line of questioning been prohibited.

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5. Appeal and Error; Sentencing— preservation of issues— cruel and unusual punishment argument—failure to raise below—rational legislative policy

Defendant's sentence in a double statutory rape case of two consecutive terms of 336-413 months did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 19 and 27 of the North Carolina Constitution because: (1) defendant did not present this argument at trial, and is it well-established that appellate courts ordinarily will not pass upon a constitutional question unless it was raised in the court below; and (2) even assuming *arguendo* that defendant adequately preserved the issue for appeal, the Court of Appeals has previously held that the sentencing scheme under N.C.G.S. § 14-27.7A reflects a rational legislative policy, is not disproportionate to the crime, and is therefore constitutional.

Appeal by defendant from judgment entered 17 September 2007 by Judge Ola Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 12 January 2009.

Roy Cooper, Attorney General, by Alexandra S. Gruber, Assistant Attorney General, for the State.

William D. Spence for defendant-appellant.

MARTIN, Chief Judge.

Alex Cortes-Serrano (“defendant”) appeals from the judgment entered upon his conviction by a jury of two counts of statutory rape. For the reasons stated below, we find no error.

At trial, the State presented evidence which tended to show that on 12 September 2005, defendant was arrested on charges of burglary, kidnapping, and sexual assault in connection with a home invasion that occurred in Brunswick County. Defendant was taken into custody together with his roommate, McCormick Cassiano (“Cassiano”), who was also a suspect in the home invasion. Subsequently, Cassiano provided deputies with information that defendant had been sexually involved with K.N., a juvenile. Defendant was escorted to the children’s interview room at the Brunswick County Sheriff’s Department and interviewed there by Detective Simpson. An audio-video recording was made of the interview and is included in the record on appeal. Prior to questioning,

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Detective Simpson advised defendant of his *Miranda* rights. Defendant indicated that he understood each of his rights and signed a *Miranda* waiver form, writing his birth date as 29 March 1984 beside his signature.

After signing the *Miranda* waiver form, defendant proceeded to describe his relationship with K.N., the daughter of his twin brother's girlfriend. Defendant admitted to having sexual intercourse with K.N. in July and August of 2005, when K.N. was thirteen years old and defendant was twenty-one years old. Defendant also stated that he knew his relationship with K.N. was wrong, and that he could go to jail for it. When defendant expressed concern that he would "go to jail for the rest of [his] life," Detective Simpson responded, "Force is one thing. Consent is another." Detective Simpson told defendant that she "had been doing this for ten years. There's been many a people, even grown men, sitting in that chair, well not that chair . . . that's raped their own children and been getting probation." Detective Simpson also indicated that due to the number of times defendant had admitted having sex with K.N., the State would likely not "stack charges" against defendant. However, Detective Simpson informed defendant that all she could do "is go to the D.A. and tell him what the evidence is," and that the District Attorney's office would then decide the charges. Later she reiterated, "Honestly, I can't say what will happen."

During the interview, which lasted approximately one hour and fifteen minutes, defendant, who was wearing no shirt, wrapped himself in a blanket given to him by deputies. Although his legs were shackled, defendant's hands were free and he frequently gestured with his hands while talking. Later in the interview, defendant allowed the blanket to fall around his waist and legs, and did not appear to be uncomfortable as he answered Detective Simpson's questions. Defendant did not indicate that he desired to speak with an attorney or to cease speaking with Detective Simpson. Following the interview, Detective Simpson stated, "If you want to write a statement, I'll give you a piece of paper." Defendant later wrote a statement in which he admitted to having sex with K.N. "about 10 times in 2 month period [sic]," noting "I din't [sic] forse [sic] her no time."

Based on the evidence gathered by Detective Simpson, defendant was subsequently indicted by the Brunswick County Grand Jury on two counts of statutory rape, in violation of N.C.G.S. § 14-27.7A(a). Prior to trial, defendant made a motion in limine, seeking to preclude evidence at trial of unrelated crimes or acts committed by defendant. The trial court allowed the motion, but warned, "He better not open

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the door.” Also prior to trial, defendant moved to suppress the statement made to Detective Simpson, arguing that the statement was made in violation of his constitutional rights. After a voir dire hearing at which the trial court reviewed the audio-video recording of Detective Simpson’s interview with defendant and heard evidence and arguments, the trial court made the following findings of fact relevant to this appeal:

5. That the defendant was given his *Miranda* warnings and waived same in the Brunswick County Sheriff’s Department, said warnings were recorded on video and introduced as State’s Exhibit Voir Dire #1;

. . . .

8. That the defendant did not complain and appeared to be coherent answering Detective Simpson’s questions and appeared to understand said questioning;

. . . .

10. That defendant did appear to be cold and a blanket was provided for him;

11. When he requested water it was provided for him;

12. That the only Law Enforcement Officer in the room was Detective Simpson;

13. That there was no threat, or suggested violence, or show of violence by Detective Simpson to persuade or induce the defendant to make a statement;

14. That during the interview the defendant freely admitted to crimes Detective Simpson did not know about and to having sexual relations with a 13 year old, said charges presently before this Court;

15. That during the interview Detective Simpson told the defendant that she has seen those who have raped children receive probation and that they are not going to stack charges;

16. That Detective Simpson further said it would be up to the District Attorney’s Office to decide the charges;

17. That after the interview the defendant was asked if he wanted to write a statement;

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18. That defendant was provided pen and paper and wrote a statement, State's Exhibit Voir Dire #3;

19. That under the totality of the circumstances, the defendant's confession was voluntarily and understandingly given;

20. That any false representations by Detective Simpson was [sic] not egregious or overreaching, and did not improperly induce hope or fear and did not promise any relief from any criminal charge;

Based on these and other findings of fact, the trial court concluded as a matter of law that:

1. None of defendant's Constitutional Rights, either Federal or State, were violated by his arrest and interrogation;
2. No promises or inducements for defendant to make a statement were made;
3. No threat or suggested violence or show of violence to persuade defendant to make a statement [was made];
4. The statement made by defendant to Detective Simpson on September 13, 2005 was made freely, voluntarily and understandingly;
5. The defendant fully understood his Constitutional Right to remain silent and his Constitutional Right to counsel and all other rights;
6. The defendant freely, knowingly, intelligently and voluntarily waived each of those rights and thereupon made the statement to the above mentioned officer.

Based upon these conclusions, the trial court denied defendant's motion to suppress the recorded statement.

At trial, K.N.'s mother testified that K.N. was thirteen years old after 1 July 2005. K.N. also testified, describing how she met defendant when he moved into her mother's house in the summer of 2005, after her thirteenth birthday. K.N. testified that she and defendant had vaginal intercourse two or more times and oral sex one time in July and August of 2005, just before she entered the eighth grade.

Defendant also testified at trial, stating that he was born on 29 March 1984 and that he was twenty-one years old at the time he had sexual intercourse with K.N. Defendant testified that he had met K.N.

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after he was released from prison and began living with K.N.'s mother. He described how they became romantically involved and stated, "I do love her, man." Defendant also testified that, on the night of his arrest, he had been doing drugs and that, as a result, when he wrote his statement, he "didn't know what I wrote down." When asked why he would write that he had sex with K.N. ten times, instead of once or twice, defendant responded:

I really, it's just like, first, I was scared, man, because you know if I come to jail, you know, and they trying to tell me that I done raped a Mexican girl, whatever and first what they say they told me that—

After defendant's direct examination, the State, outside the presence of the jury, argued that it should be allowed to cross-examine defendant regarding the unrelated rape charges. The State contended that, although such evidence was initially precluded by defendant's motion in limine, defendant's testimony regarding the rape of "a Mexican girl" had opened the door to this evidence as relevant to defendant's credibility. The trial court informed counsel that it would listen carefully to the State's cross-examination of defendant and exclude anything "beyond what the DA should be addressing," but would otherwise allow the State to cross-examine defendant regarding the unrelated charges. When cross-examination resumed, the following exchange occurred:

Q: And during the time span of that hour they were questioning you about the rape of this Mexican girl, you were talking to them about other crimes, correct?

A: Yes, sir.

Q: All right. And those other crimes that you were talking about were crimes that—

[Defense Counsel]: Objection.

Q: —that you committed, correct?

THE COURT: Note it for the record.

A: Some of it. And like the man that got me here, you know, what you, how would you feel if a man is trying to put you in a spot where you facing, one, two, three life sentences? Would you let a man just thank you for doing that or would you try to get a man down?

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Q: And the man you are talking is his name is [sic] McKermit Cassiano, right?

A: Cassiano, yes.

. . . .

Q: During the time that you were being questioned for this one-hour span, some of those crimes that you were talking about that you told the detective, isn't it true that the detective didn't know about it?

[Defense Counsel]: Objection.

THE COURT: Overruled.

[Defense Counsel]: Well, he can't testify as to what the detective knew or didn't know.

THE COURT: Oh, sustained as to form, sir.

Q: The crimes that you were talking about, what crimes were they?

[Defense Counsel]: Objection. I would instruct him not to answer that question.

THE COURT: Okay.

[Defense Counsel]: Under the Fifth Amendment.

THE COURT: Okay. Ladies and gentlemen, the defendant has the right against self-incrimination and he can take the Fifth Amendment. It's his constitutional right if he chooses to do so.

At the close of all the evidence, defendant made a motion to dismiss the charges for insufficiency of the evidence, arguing that the evidence was insufficient to establish every element of the crimes charged and defendant's identity as the perpetrator. The trial court denied defendant's motion. Subsequently, the jury returned a verdict of guilty of two counts of statutory rape. The trial court sentenced defendant to an active sentence within the presumptive range of 336 months minimum to 413 months maximum.

I.

[1] In support of the assignments of error brought forward in his brief, and thus not deemed abandoned under N.C.R. App. P. 28(b)(6), defendant makes five central arguments. First, defendant argues because the State did not meet its burden of producing evidence of

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every element of the crime of statutory rape, the trial court erred in denying his motion to dismiss for insufficiency of the evidence. As part of this argument, defendant contends the State failed to produce substantial evidence of the ages of both K.N. and defendant at the time they had intercourse. He contends the State cannot meet its burden of production by testimony alone, but must produce the birth certificates of both parties. We disagree.

“When ruling on a motion to dismiss, the trial court must decide ‘whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.’” *State v. King*, 178 N.C. App. 122, 130-31, 630 S.E.2d 719, 724 (2006) (quoting *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000)). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citing *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414-15, 233 S.E.2d 538, 544 (1977)). In reviewing challenges to the sufficiency of evidence, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *See State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citing *State v. Small*, 328 N.C. 175, 180, 400 S.E.2d 413, 417 (1991)). “ ‘Contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve.’ ” *Id.* at 544, 417 S.E.2d at 761 (quoting *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982)).

Here, defendant was charged with two counts of statutory rape of a thirteen-year-old person under N.C.G.S. § 14-27.7A(a), which provides:

A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

N.C. Gen. Stat. § 14-27.7A(a) (2007). Although the ages of the perpetrator and the victim at the time of the alleged act are essential elements of statutory rape, *see State v. Locklear*, 138 N.C. App. 549, 552, 531 S.E.2d 853, 855, *disc. review denied*, 352 N.C. 359, 544 S.E.2d 553 (2000), nothing in N.C.G.S. § 14-27.7A(a) or our precedent requires that these elements be proven by the introduction of birth

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certificates or other certified copies of birth records. To the contrary, our Supreme Court has held that where the victim's testimony was the only evidence of her age at the time of the alleged sexual act, the trial court correctly denied defendant's motion to dismiss for insufficient evidence. *State v. Degree*, 322 N.C. 302, 308, 367 S.E.2d 679, 683 (1988). Similarly, a defendant's own testimony may also be sufficient evidence for the State to meet its burden regarding the age element of a sex offense. *See State v. Rhodes*, 321 N.C. 102, 104, 361 S.E.2d 578, 580 (1987) (upholding defendant's conviction of first degree rape where age of defendant was an essential element and defendant admitted his age during trial testimony). *See also State v. Clark*, 161 N.C. App. 316, 588 S.E.2d 66 (2003) (holding that defendant's in-trial statements regarding his age were properly admitted under admission by a party-opponent exception to the hearsay rule), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 81 (2004).

Defendant cites *State v. Wade*, 224 N.C. 760, 32 S.E.2d 314 (1944) for the premise that the State must offer birth certificates of the defendant and victim to prove the age elements of N.C.G.S. § 14-27.7A(a). However, in *Wade*, after the victim testified to the circumstances of the offense, the State offered the victim's birth certificate as *corroboration* of the victim's testimony regarding her age at the time of the offense. *See id.* at 761, 32 S.E.2d at 314-15. The *Wade* Court did not indicate that the introduction of the victim's birth certificate was required, but instead held that the testimony of the victim and her mother, along with the victim's birth certificate, constituted "abundant evidence" in support of defendant's conviction. *Id.* As such, defendant's reliance on *Wade* is misplaced.

Here, K.N.'s mother and K.N. both testified that K.N. was thirteen years old in August of 2005. K.N. testified that she and defendant had vaginal intercourse at least twice and oral sex once in July and August of 2005. Defendant testified that he was twenty-one years old in July and August of 2005 and that he had sexual intercourse with K.N. twice during that period. When viewed in the light most favorable to the State, the testimony of K.N., K.N.'s mother, and defendant was sufficient to allow the two charges of statutory rape to go to the jury. Thus, the trial court did not err by denying defendant's motion to dismiss.

II.

[2] Next, defendant assigns error to the trial court's denial of defendant's motion to dismiss one of the two statutory rape charges, argu-

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ing that the two acts were in the nature of a “continuous transaction” rather than separate and distinct crimes. As part of this argument, defendant contends that, because his relationship with K.N. was a “consensual,” boyfriend-girlfriend relationship, there was insufficient evidence to show two separate acts of statutory rape. Defendant cites *Clark*, 161 N.C. App. 316, 588 S.E.2d 66 in support of this premise. *Clark* involved a defendant who was convicted and sentenced upon only one count of statutory rape even though his romantic relationship with the victim lasted nearly a year. *Id.* at 317, 588 S.E.2d at 66-67. However, the defendant in *Clark* did not assign error to the number of charges against him and thus we did not address the issue. *Id.* at 318, 588 S.E.2d at 67. Therefore, defendant’s reliance upon *Clark* is misplaced.

Furthermore, we have previously noted that North Carolina law does not recognize the “continuous course of conduct” theory:

In *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 363 (1987), the Supreme Court cited with approval language from *State v. Small*, 31 N.C. App. 556, 230 S.E.2d 425 (1977): “Generally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense.” The General Assembly has criminalized each act of statutory rape, not a course of conduct. Any changes in the manner in which a course of criminal conduct is punished must come from the legislative branch and not from the judicial branch.

State v. Bullock, 178 N.C. App. 460, 473, 631 S.E.2d 868, 877 (2006). As such, defendant’s argument is without merit and this assignment of error is overruled.

III.

[3] Defendant next assigns error to several findings of fact and conclusions of law made by the trial court in denying his motion to suppress the recorded interview conducted by Detective Simpson. For purposes of this appeal, these assignments of error may be condensed into one issue. Defendant contends that Detective Simpson improperly induced his confession through promises of a more favorable outcome and, as such, defendant’s confession was involuntary and thus inadmissible. We disagree.

The standard of review in determining 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 its conclu-

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sions of law are, in turn, supported by those findings of fact. *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003). “The trial court’s findings ‘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) (quoting *State v. Bebington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001)). “The determination of whether a defendant’s statements are voluntary and admissible ‘is a question of law and is fully reviewable on appeal.’” *State v. Maniego*, 163 N.C. App. 676, 682, 594 S.E.2d 242, 246 (quoting *State v. Greene*, 332 N.C. 565, 580, 422 S.E.2d 730, 738 (1992)), *appeal dismissed*, 358 N.C. 737, 602 S.E.2d 369 (2004). We look “at the totality of the circumstances of the case in determining whether the confession was voluntary.” *Id.* at 682, 594 S.E.2d at 246 (quoting *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983)). Factors we consider include:

whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id. at 682, 594 S.E.2d at 246 (quoting *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994)). A confession may be used against a defendant if it is “the product of an essentially free and unconstrained choice by its maker.” *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973)). However, where a defendant’s “will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.” *Id.* Our Supreme Court stated in *State v. Jackson* that:

[W]hile deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession.

308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983) (citations omitted).

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In the present case, the trial court made detailed findings of fact regarding defendant's recorded confession. Our review of the video recording, included in the record on appeal, reveals ample evidence in the record to support the trial court's findings that no improper promises or threats were made to defendant to induce an involuntary confession. Further, we conclude that the trial court's findings support its conclusion that, under the totality of the circumstances, defendant's will was not overborne and that his statement was freely and voluntarily given. Defendant's assignments of error relating to the suppression of his confession are, therefore, overruled.

IV.

[4] Defendant next argues that the trial court erred by allowing the district attorney to cross-examine defendant about unrelated charges and criminal activity, creating unfair prejudice in the minds of the jury. As part of this argument, defendant contends that the State was precluded, by the trial court's ruling on defendant's motion in limine and by the North Carolina Rules of Evidence, from offering evidence concerning forcible rape charges. We disagree.

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion." *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004) (citing *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 350 (1990)). "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. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006). On appeal of an evidentiary ruling, "[t]he burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002), *disc. review denied and cert. denied*, 357 N.C. 66, 579 S.E.2d 107 (2003).

"It is well-established that the benefit of any objection to the introduction of evidence is lost where the evidence is previously admitted without objection, and particularly, where defendant is responsible for first introducing the evidence." *State v. Rhue*, 150 N.C. App. 280, 286, 563 S.E.2d 72, 76 (2002) (citing *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989); *State v. Moses*, 316 N.C. 356, 362, 341 S.E.2d 551, 554-55 (1986)). Furthermore, our Supreme Court has held that, "[w]here one party introduces evidence as to a particu-

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lar fact or transaction, the other party is entitled to introduce evidence in *explanation* or *rebuttal* thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.” *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981) (citing *State v. Patterson*, 284 N.C. 190, 200 S.E.2d 16 (1973); *State v. Black*, 230 N.C. 448, 53 S.E.2d 443 (1949)) (emphasis added). *See also* N.C.G.S. § 15A-1226 (b) (2007) (“The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict.”).

Here, defendant correctly points out that the trial court, in its ruling on defendant’s motion in limine, had precluded the State from raising the unrelated charges of forcible rape. The State did not raise the issue at trial. Instead, defendant broached the subject during his direct examination by testifying, when asked why he would write that he had sex with K.N. ten times instead of once or twice, that he “was scared . . . and they trying to tell me I done raped a Mexican girl.” We note that this testimony immediately followed defendant’s assertion that he had been doing drugs all night and did not mean to write that he had sex with K.N. ten times. Furthermore, defense counsel did not move to strike this testimony.

After hearing arguments on the matter, the trial court ruled that it was proper for the State to ask defendant questions about the forcible rape charges, with the caveat that “anything that [defendant] does not wish to discuss he has the right to take the Fifth Amendment sir, against self incrimination.” Thereafter, the prosecutor’s cross-examination of defendant was limited in scope to questions which sought to explain and rebut defendant’s direct examination testimony. The trial court did not allow defendant to incriminate himself or even address the other charges against him. Instead, defendant was merely allowed to testify that, at the time of his statement, he was “in a spot . . . facing, one, two, three life sentences,” testimony which seemed to explain defendant’s state of mind at the time he wrote the statement and rebut defendant’s prior testimony that he did not mean to write “10 times in a 2 month period.”

Because the State’s cross-examination did not go outside the scope of the evidence introduced by defendant, but instead explained and rebutted defendant’s testimony, defendant lost the benefit of an objection to this testimony. Thus, the trial court did not abuse its discretion by allowing the State to cross-examine defendant regarding the unrelated charges. *See State v. Jennings*, 333 N.C. 579, 604, 430 S.E.2d 188, 200 (defendant cannot claim reversible error occurred

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when he introduces the evidence which he claims is prejudicial or makes no objection when the evidence is brought in), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). We also note that defendant has failed to show a reasonable possibility that a different result would have been reached had this line of questioning been prohibited by the trial court. *See* N.C.G.S. § 15A-1443(c) (2007) (“A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.”).

V.

[5] Finally, defendant assigns error to the sentence imposed by the trial court, arguing that the active sentence of two consecutive terms of 336-413 months constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the U.S. Constitution and article I, sections 19 and 27 of the North Carolina Constitution. As part of this argument, defendant contends that the sentence imposed by the trial court was “clearly excessive and disproportionate” to the crime of which defendant was convicted.

Our review of the record, however, reveals that defendant did not present this argument at trial. In the conference regarding jury instructions, defendant’s counsel did state, “I think that this becomes in many ways an Eighth Amendment constitutional argument which of course is *premature at this time to raise*. But should the jury find him guilty and he is sentenced, I think that becomes an Eighth Amendment argument” (Emphasis added.) However, defendant did not object to the sentence on constitutional grounds, and the trial court thus did not rule on the issue. It is well-established that appellate courts ordinarily will not pass upon a constitutional question unless it was raised and passed upon in the court below. *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982); *State v. Dorsett*, 272 N.C. 227, 229, 158 S.E.2d 15, 17 (1967). Even assuming, *arguendo*, that defendant adequately preserved the issue for appeal, we have previously held that the sentencing scheme under N.C.G.S. § 14-27.7A, “reflects a rational legislative policy and is not disproportionate to the crime” and is therefore constitutional. *Clark*, 161 N.C. App. at 319, 588 S.E.2d at 67 (quoting *State v. Anthony*, 133 N.C. App. 573, 578, 516 S.E.2d 195, 198 (1999), *aff’d*, 351 N.C. 611, 528 S.E.2d 321 (2000)). This assignment of error is overruled.

No error.

Judges BRYANT and BEASLEY concur.

TOWN OF PINEBLUFF v. MARTS

[195 N.C. App. 659 (2009)]

TOWN OF PINEBLUFF, PLAINTIFF v. WILLIAM A. MARTS AND SANDRA MARTS,
DEFENDANTS

No. COA08-434

(Filed 17 March 2009)

1. Zoning—UDO—collateral attack—not allowed

Defendants could not collaterally attack the validity of a Unified Development Ordinance where they waited to object to the ordinance until after the Town sought to enforce it as a result of their undisputed noncompliance.

2. Zoning—enforcement of ordinance—estoppel—not applicable

Estoppel cannot apply when a municipality is enforcing a zoning ordinance because the police power of the state cannot be bartered away by contract or otherwise lost; the trial court did not err here by failing to conclude that the Town was estopped from enforcing the ordinance.

3. Zoning—injunction to enforce ordinance—balancing of equities—not properly raised

The question of whether the trial court was required to balance the equities in issuing an injunction requiring compliance with a zoning ordinance was not before the appellate court where defendants pointed only to inequities from the ordinance, and not inequities resulting from the injunction itself. It is not the role of the courts to decide the wisdom of the ordinance.

4. Zoning—multi-phase development—no implicit approval of subsequent stages—not an impairment of contract

A Town's application of a zoning ordinance to the last two phases of a development did not constitute a retroactive application of the ordinance or an unconstitutional impairment of contract where the ordinance was passed after Phase I was begun, permits were issued for Phases II and III with certain conditions related to the ordinance, and the Town eventually sought an injunction for enforcement of the ordinance when the conditions were not met. Defendants asserted that there was an implicit approval of the later phases in the approval of Phase I, but the Town submitted evidence that the initial approval was for Phase I only and that defendants did not seek approval of Phases II and III until after the ordinance had been adopted. No authority was presented that the Town's knowledge of defendants'

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intent to seek approval of Phases II and III constituted a contractual obligation.

5. Zoning— reservation of open space—violation properly enjoined

A zoning ordinance requiring that a developer reserve open space and install a mini-park fell within the scope of *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, and the trial court did not err by granting summary judgment for plaintiff town and enjoining defendants' violation of the ordinance.

Appeal by defendants from order entered 25 January 2008 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 23 September 2008.

The Brough Law Firm, by William C. Morgan, Jr. and Michael B. Brough, for plaintiff-appellee.

Michael G. Walsh for defendants-appellants.

GEER, Judge.

Defendants William A. and Sandra Marts appeal from the trial court's order granting summary judgment to the Town of Pinebluff and issuing an injunction requiring the Marts to comply with the Town's zoning ordinance and maintain a mini-park and open space in a subdivision they developed. The bulk of the Marts' arguments on appeal constitute a collateral attack on the zoning ordinance and, therefore, were not properly raised as a defense to the Town's action for an injunction enforcing the ordinance. The Marts had the ability and the opportunity to assert their contentions regarding the validity of the ordinance by seeking a variance from the ordinance or obtaining review of decisions by the Town, but chose not to do so. Since we find the remainder of the Marts' contentions also unpersuasive, we affirm the trial court's order.

Facts

In 2001, the Town enacted the "Town of Pinebluff Unified Development Ordinance" ("the UDO"), Article XIII of which requires developers of new residential developments to provide mini-parks and open space for the recreational use of their residents. The Marts are the original developers of the Willow Creek Subdivision located in the Town. Before the UDO was adopted, the Marts obtained the Town's approval and began development of Phase I of Willow Creek

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with the intention of subsequently proceeding with Phases II and III. The Town subsequently notified the Marts that Phases II and III of Willow Creek would have to comply with the requirements of the newly-adopted UDO.

On 18 August 2003, the Marts submitted an application for a conditional use permit for the development of Phases II and III. The application included a memo to the Town from the Marts referring to “Parks and Open Space” and stating that they “agree[d] to install a mini-park before the start of sales of the third phase of the Willow Creek Subdivision.” The application also attached draft restrictive covenants that would establish a homeowners’ association among the development’s residents to provide assessments for the maintenance of common areas, including open space and a mini-park. The Marts, however, never recorded those covenants.

In October 2003, the Town’s Board of Commissioners held a public hearing on the Marts’ conditional use permit application for Phases II and III. Following that hearing, the Board approved the conditional use permit subject to the mini-park’s being developed before the final plat approval for Phase III.

The final plat for Phase II was approved on 1 November 2004. In May 2005, Mr. Marts sought final plat approval for Phase III so that he could sell the lots in Phase III, along with the remaining lots in Phase II, to Ron Jackson. Mr. Marts indicated that the Marts would retain ownership of one lot and would install the mini-park on that lot. In order to ensure that the Marts built the mini-park, the Town accepted from Mr. Marts an irrevocable letter of credit in the amount of \$10,000, although the Town never called the bond, which lapsed after one year.

The Phase III final plat was approved on 19 May 2005 and, subsequently, the Marts sold the remainder of the subdivision to Mr. Jackson. In September 2006, the Marts informed the Town that they did not intend to build the mini-park, and they were thinking about posting a “no trespassing” sign in the area reserved as open space.

On 11 December 2006, the Town brought suit against the Marts in Moore County Superior Court, contending that the Marts were “in continuing violation of the UDO” and seeking an injunction ordering the Marts to comply with the UDO by installing a mini-park and reserving open space in Willow Creek. On 25 January 2008, the Honorable James M. Webb granted the Town’s motion for summary

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judgment, ordering the Marts to install a mini-park and provide open space in the development by 31 May 2008. The Marts timely appealed to this Court.

Discussion

This Court reviews an order granting summary judgment de novo. *Wilkins v. Safran*, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007). “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.” *Id.* at 671-72, 649 S.E.2d at 661 (quoting *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), *aff’d per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004)). “If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.” *Rakestraw v. Town of Knightdale*, 188 N.C. App. 129, 131, 654 S.E.2d 825, 827 (quoting *Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661), *disc. review denied*, 362 N.C. 237, 659 S.E.2d 739 (2008).

I

[1] The Marts first challenge the UDO’s validity, contending that the ordinance is an illegal restraint on alienation, void as against the Rule Against Perpetuities, and invalid due to the Town’s failure to comply with statutory notice requirements. The Marts did not, however, challenge the UDO in a direct action against the Town, but rather assert their arguments only as a defense to the Town’s action for an injunction enforcing the ordinance.

In *City of Elizabeth City v. LFM Enters., Inc.*, 48 N.C. App. 408, 413, 269 S.E.2d 260, 262 (1980), the city filed an action seeking an injunction requiring the defendants to comply with a city ordinance. The defendants had previously filed an application for a variance from the ordinance that was denied, but did not seek judicial review of that decision. When, however, the city sought to enforce the injunction, the defendants challenged the ordinance’s validity. *Id.* at 412, 269 S.E.2d at 262. This Court affirmed the trial court’s grant of summary judgment to the city, holding that the defendants “failed to exercise the remedies available to them under the zoning ordinance and may not as a defense to the plaintiff’s action for injunctive relief collaterally attack the validity of the ordinance.” *Id.* at 413, 269 S.E.2d at 262.

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The principle in *LFM Enters.* is well established. See also *Wil-Hol Corp. v. Marshall*, 71 N.C. App. 611, 614, 322 S.E.2d 655, 657 (1984) (“A zoning ordinance may not be collaterally attacked by a party that failed to avail herself of the judicial review that the ordinance and statutes authorize.”); *City of Hickory v. Catawba Valley Mach. Co.*, 39 N.C. App. 236, 238, 249 S.E.2d 851, 852 (1978) (“Defendant failed to exercise the remedies available to it under the zoning ordinance and may not as a defense to the city’s action for injunctive relief collaterally complain that the city denied it due process of law.”); *Forsyth County v. York*, 19 N.C. App. 361, 364-65, 198 S.E.2d 770, 772 (holding that defendant, who could have challenged constitutionality of zoning ordinance by seeking review of Board of Adjustment decision, “may not now challenge the validity of the zoning ordinance he allegedly violated in an effort to avoid a summary judgment”), *cert. denied*, 284 N.C. 253, 200 S.E.2d 653 (1973).

In this case, the Marts could have raised their arguments regarding the validity of the UDO by seeking relief from the ordinance’s requirement of a mini-park and open space or by seeking review of the Town’s determination that Phases II and III were required to comply with the UDO. Rather than directly challenging the UDO, the Marts waited to object to the ordinance until after the Town sought to enforce it as a result of their undisputed non-compliance. We cannot meaningfully distinguish the above cases and, therefore, hold that the Marts may not in this action collaterally attack the validity of the UDO as an illegal restraint on alienation, as void as against the Rule Against Perpetuities, and as invalid due to the Town’s failure to comply with the statutory notice requirements. Because of our resolution of this issue, we need not address the Town’s argument that the Marts’ contentions are barred by the statute of limitations.

II

[2] The Marts also contend that the Town is equitably estopped from seeking an injunction requiring them to comply with the mini-park and open space requirements of the UDO. The elements of equitable estoppel are “(1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.” *Hawkins v. M&J Fin. Corp.*, 238 N.C. 174, 178, 77 S.E.2d 669, 672 (1953). The Marts base their estoppel defense on their claim that the Town approved the plat for the entire subdivision before adopting the UDO, and the Marts then proceeded with the development of Phases II and III of

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the subdivision without knowledge that the Town intended to enforce the UDO as to those phases despite the initial plat approval.

We need not address the factual or legal bases for this defense since estoppel cannot apply when a municipality is enforcing a zoning ordinance. “In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State.” *City of Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950). Our courts have held that this police power “cannot be bartered away by contract, or lost by any other mode.” *Id.* Therefore, “a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past.” *Id.* See also *Overton v. Camden County*, 155 N.C. App. 391, 398, 574 S.E.2d 157, 162 (2002) (holding that county was not estopped from enforcing uniform development ordinance against plaintiff even though it had not done so at earlier hearing); *City of Winston-Salem v. Hoots Concrete Co.*, 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (“A city cannot be estopped to enforce a zoning ordinance against a violator due to the conduct of a zoning official in encouraging or permitting the violation.”), *disc. review denied*, 301 N.C. 234, 283 S.E.2d 131 (1980). Accordingly, the trial court did not err in failing to conclude that the Town was estopped from enforcing the UDO against the Marts.

III

[3] The Marts next argue that the trial court erred in issuing an injunction ordering them to comply with the UDO without first considering the Marts’ “potential inconvenience, expenses, and exposure to liability.” We disagree.

Each of the cases relied upon by the Marts in support of their contention that the trial court was required to “balance the equities” before issuing an injunction involve a private party seeking an injunction to remedy a private injury. See *Hodge v. N.C. Dep’t of Transp.*, 137 N.C. App. 247, 253, 528 S.E.2d 22, 27 (“In deciding whether to issue an injunction, the judge should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if the injunction is issued.”), *reversed on other grounds*, 352 N.C. 664, 535 S.E.2d 32 (2000); *Clark v. Asheville Contracting Co.*, 72 N.C. App. 143, 149, 323 S.E.2d 765, 769 (1984) (holding that the trial court erred in failing to make findings of fact about the “relative convenience-inconvenience

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and the comparative injuries to the parties” before issuing injunction), *aff’d as modified*, 316 N.C. 475, 342 S.E.2d 832 (1986). We believe that actions by municipalities to enforce ordinances present a distinguishable situation.

The Town was entitled to seek an injunction pursuant to N.C. Gen. Stat. § 160A-375 (2007) and N.C. Gen. Stat. § 160A-389 (2007). N.C. Gen. Stat. § 160A-375(a) (emphasis added) provides that a municipality “may bring an action for injunction of any illegal subdivision, transfer, conveyance, or sale of land, *and the court shall*, upon appropriate findings, issue an injunction and order requiring the offending party to comply with the subdivision ordinance.” N.C. Gen. Stat. § 160A-389 authorizes a municipality to file actions “to restrain, correct or abate the violation” of a municipality’s zoning ordinance. The North Carolina courts have not addressed, however, whether a trial court entering an injunction pursuant to these statutes must still balance the equities of the parties.

We note that other jurisdictions are split regarding whether a trial court is required to “balance the equities” before issuing an injunction to enforce a zoning ordinance. *Compare Pinecrest Lakes, Inc. v. Shidel*, 795 So.2d 191, 207 (Fla. Dist. Ct. App. 2001) (holding that trial court was not required to balance equities before issuing an injunction to enforce a development ordinance because statute authorizing action said nothing about weighing equities), *review denied*, 821 So.2d 300 (2002), *with City of East Providence v. Rhode Island Hosp. Trust Nat’l Bank*, 505 A.2d 1143, 1145-46 (R.I. 1986) (holding that statute granting court authority to order removal of building in violation of zoning ordinance did not abrogate principle that prior to granting injunction to municipality to enforce ordinance, trial court must balance equities). We need not decide the rule for North Carolina, however, because the Marts have failed to make a showing that enforcement of the injunction would be inequitable.

The Marts argue that the court erred because it “never considered the financial obligation that was thus imposed on [the Marts] and completely overlooked the potential liability that [they] would face—forever—in the likely event that children and others at play in these areas might be injured on the playground equipment or elsewhere.” They further argue that “Judge Webb never considered whether the existence of a mini-park or open spaces might serve as a magnet for undesirables in the area to congregate and engage in illegal activities, perhaps involving drug peddling or usage, or both.”

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These “equities,” however, go to *the effect of the ordinance* and not to the effect of the issuance of the injunction. Only the Town’s Board of Commissioners may consider the policy concerns raised by the Marts regarding the effect of the ordinance’s requirement of a mini-park and open space. It is not the role of the courts to decide the wisdom of an ordinance. *See, e.g., Town of Pine Knoll Shores v. Evans*, 104 N.C. App. 79, 83, 407 S.E.2d 895, 897 (1991) (explaining that “it is this Court’s duty to apply the ordinance irrespective of any opinion we may have as to its wisdom, for it is our duty to ‘declare what the law is . . . [not] what the law ought to be’ ” (quoting *Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E.2d 631, 633 (1968), *aff’d*, 275 N.C. 234, 166 S.E.2d 686 (1969))), *aff’d as modified*, 331 N.C. 361, 416 S.E.2d 4 (1992). Because the Marts have not pointed to any inequities resulting from the injunction itself, we need not decide whether the trial court was required to “balance the equities” as contended by the Marts.

IV

[4] The Marts further argue that the Town’s application of the UDO to Phases II and III constitutes a retroactive application of the UDO and an unconstitutional impairment of contract in violation of U.S. Const. art. I, § 10 (“No state shall . . . pass any . . . law impairing the obligation of contracts . . .”). Our Supreme Court has held that in order to determine whether there has been an unconstitutional impairment of contract, courts must apply a three-part test and determine: “(1) whether a contractual obligation is present, (2) whether the state’s actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose.” *Bailey v. State*, 348 N.C. 130, 141, 500 S.E.2d 54, 60 (1998).

The Marts have made no attempt to show that they submitted sufficient evidence regarding each of these elements. Instead, they simply assert that “[a]lthough the Developer was going to develop the property in stages, he made it clear to the Planning Board that there would be three phases in all, and the Town’s initial approval implicitly recognized that.” The Marts then argue that the application of the UDO to Phases II and III “notwithstanding that the Developer had made clear from the outset that this project ultimately involved three phases” was retroactive and unconstitutional.

These assertions are not, however, sufficient to demonstrate either factually or legally that any contractual obligation existed. The Town submitted the affidavit of Stephen Minks, the Town’s Planning

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Director/Zoning Administrator, in which Mr. Minks stated that the initial approval given to the Marts was only for Phase I. According to Mr. Minks, the Marts did not seek approval of Phase II and Phase III until 2002 and 2003 respectively, after the UDO had been adopted. The Marts have cited no evidence to the contrary. In addition, the Marts have pointed to no authority that would suggest that the Town's knowledge, at the time that it approved Phase I, that the Marts intended later to seek approval of Phases II and III constituted the "contractual obligation" required by *Bailey*. The Marts have, therefore, failed to establish any unconstitutional impairment of contract.

V

[5] Finally, the Marts argue that the Town's requiring that they reserve open space and install a mini-park is an unconstitutional taking. In *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 121-22, 388 S.E.2d 538, 550-51 (1990), however, our Supreme Court upheld a similar ordinance against a takings challenge.

In *River Birch Assocs.*, the ordinance required that the developer reserve open space and convey it to the homeowners' association as a common area. *Id.* at 120, 388 S.E.2d at 550. The Court observed first that "[t]he objective of preserving open space is within the scope of a municipality's police power" and that "the General Assembly has recognized the importance of preserving open space and has given broad authority to municipalities to take action to conserve open space." *Id.* at 121, 388 S.E.2d at 550 (citing N.C. Gen. Stat. §§ 160A-402, -372 (1987)). In language equally applicable to this case, the Court then noted that the ordinance was "part of a comprehensive plan of development that applies uniformly to all property owners and from which all property owners, including developers, will benefit." *Id.* The Court then held that "[a] requirement of dedication of park space for subdivision approval does not necessarily constitute a taking. Where the subdivider creates the specific need for the parks, it is not unreasonable to charge the subdivider with the burden of providing them. Here, the increased density of development renders necessary the setting aside of open space." *Id.* at 122, 388 S.E.2d at 551 (internal citations omitted).

We believe that *River Birch Assocs.* controls. The Marts attempt to distinguish *River Birch Assocs.* by suggesting that the developer was allowed to develop its subdivision in a manner more intensively than other subdivisions and, thus, received a benefit that made the requirement of open space not a taking. The Marts have misread the

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opinion: the Supreme Court indicated that the subdivision at issue met all of the city's subdivision requirements and, therefore, the developer did not receive any special benefit. *Id.* at 105, 388 S.E.2d at 541. The Supreme Court simply held that because a subdivision is more intensively developed than other property, subdivision ordinances requiring open space of the type in *River Birch Assocs.* are not a taking. We, therefore, hold that the ordinance in this case falls within the scope of *River Birch Assocs.* The trial court, consequently, did not err in granting summary judgment and enjoining the Marts' violation of the UDO.

Affirmed.

Judges ROBERT C. HUNTER and ELMORE concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. HAYWOOD OIL COMPANY,
DEFENDANT

No. COA08-420

(Filed 17 March 2009)

1. Evidence— partial condemnation—real estate sales price—comparability of properties

The trial court did not abuse its discretion in a partial condemnation case by allowing plaintiff DOT to elicit and put before the jury evidence of real estate sales prices after the properties were allegedly determined to be not sufficiently comparable because: (1) defendant company failed to preserve the issue in regard to the price that the Clark and Leatherman firm paid for property in the industrial park by not objecting to either the question presented regarding the pertinent property or the response as required by N.C. R. App. P. 10(b)(1); and (2) in regard to the testimony regarding the original purchase price of the property sold by Haywood Services Corporation (HSC) to Haywood Electric Membership Corporation in an in-house transaction, it was uncontested that the approximately eleven acres transferred on 23 January 1997 was similar in nature, location, and condition to the Haywood Oil property; and it was also uncontested that HSC's purchase price of the original forty-one acre property was the result of an arms-length transaction.

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2. Appeal and Error— preservation of issues—failure to object

Although defendant company contends the trial court erred in a partial condemnation case by instructing the jury that the measure of damages for compensating defendant was payment for value of land taken, without indicating that the value included damage to the remaining property, this assignment of error is dismissed because: (1) the trial court's introductory remarks were to the entire jury pool prior to the beginning of jury selection; and (2) defendant did not object to the trial court's opening remarks as required by N.C. R. App. P. 10(b)(1).

3. Evidence— denial of cross-examination—no personal knowledge

The trial court did not err in a partial condemnation case by prohibiting defendant from cross-examining plaintiff's expert in real estate appraisals about the comparability of the Haywood Services property because the expert indicated that he did not have personal knowledge of Haywood Services Corporation and Haywood Electric Membership Corporation.

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

Although defendant company contends the trial court unconstitutionally erred in a partial condemnation case by failing to award a judgment which provides that plaintiff DOT was to pay defendant eight percent from the date of the taking until the judgment was fully satisfied, this assignment of error is dismissed because: (1) constitutional issues not raised before the trial court are not properly preserved for appeal; and (2) defendant failed to present the trial court with a request or argument for post-judgment interest prior to this appeal.

Appeal by defendant from judgment entered 4 June 2007 and order entered 17 August 2007 by Judge Dennis J. Winner in Haywood County Superior Court. Heard in the Court of Appeals 19 November 2008.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for plaintiff-appellee.

Van Winkle, Buck, Starnes and Davis, P.A., by Jones P. Byrd and Matthew W. Kitchens, for defendant-appellant.

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BRYANT, Judge.

Defendant Haywood Oil Company appeals from a judgment entered 4 June 2007 after a jury awarded defendant \$57,500.00 “as just compensation for the appropriation of a portion of their property for highway purposes” and from an order entered 17 August 2007 which denied defendant’s motion for a new trial. For the reasons stated herein, we find no error and affirm the judgment of the trial court.

Facts

On 16 April 2001, plaintiff Department of Transportation (DOT) instituted an action for the partial condemnation of 2.98 acres of Haywood Oil’s real property for the widening of US Highway Business 23 in Haywood County. Haywood Oil owned and operated a bulk oil plant on the property just north of the intersection of Highway 23 and Howell Mill Road. Approximately, 0.293 acres was taken for a right-of-way, 0.011 acres for two slope easements, and 0.0088 acres for a permanent drainage easement. The property condemnation allowed for the installation of a median traffic island on Highway 23 and curbing along defendant’s eastern most boundary. On 21 May 2007, a trial before a jury was commenced to determine the value of the taking.

Haywood Oil Company called CEO David Blevins, who testified to the use and development of the property since 1973; Alan Shelton, a commercial petroleum truck driver and petroleum business owner; Tom Steitler, a thirty-year commercial real estate appraiser; Carroll Mease, a land and commercial property appraiser who had worked for various banks and real estate firms; and Bobby Joe McClure, a private businessman who had extensive experience in real estate development in Haywood County. Each witness, with the exception of Blevins and Shelton, testified to his assessment of the pre- and post-taking decline in the Haywood Oil property value—a decline between \$136,912 and \$117,786.

DOT first called James Wynne, a DOT staff appraiser with thirty years of experience. Wynne testified that in appraising the subject property he “looked for land sales that were similar . . . in terms of size, access and frontage, topography, utilities”

Wynne testified that the fair market value of the property pre-taking was \$279,050 and post-taking was \$255,050—a decline of \$24,000. He based this opinion on the sale of four comparable properties:

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three industrial park properties¹ and one property purchased by Haywood Electric Membership Corporation from Haywood Services Corporation.

On voir dire, Wynne testified that the fourth property was a commercial property located approximately one mile south of Haywood Oil and also bordered by Highway 23. The property was sold 23 January 1997 and transferred from Haywood Services Corporation to Haywood Electric Membership Corporation. The sale conveyed 10.89 acres at a unit price of \$36,364 per acre. However, Wynne did not know whether the Haywood Services Corporation and Haywood Electric Membership Corporation were related entities and thus did not know whether the sale price was the result of an arms-length transaction.

At the conclusion of Wynne's voir dire, the trial court ruled that the three industrial park properties were insufficiently comparable to the subject property to submit evidence of their sales prices to the jury. Initially, the trial court reserved ruling on the admissibility of the sales price of the fourth property acknowledging that admissibility would depend upon whether the price was the result of an arms-length transaction. Therefore, later in the hearing, upon evidence the fourth property was sold between related entities and was not the result of an arms-length transaction, the trial court ruled that the sales price of that property was also inadmissible.

DOT next called Marty Reece, a DOT real estate appraiser with eighteen years of experience. Reece testified that the pre-taking fair market value of the Haywood Oil property was \$217,425. The property value post-taking was \$200,325—a difference of \$17,100. Reece testified that to render an opinion he used the sale of three comparable properties—two of which were industrial properties also used by Wynne. Reece did not proffer the sales price of any of these properties.

As a rebuttal witness to Reece, Haywood Oil called Larry Clark. Clark was president of Haywood Services Corporation, which he tes-

1. The first industrial park property was located one-half mile from the Haywood Oil property in Waynesville Industrial Park. Sold on 25 February 1997 by George Escaravage to Clark and Leatherwood, the sale transferred 1.56 acres at a unit price of \$38,462 per acre. The second property, also located in Waynesville Industrial Park, was sold on 5 October 1998 from "Escaravage to Kidd." This sale transferred 4.3 acres at a unit price of \$29,070 per acre. The third property, also located in Waynesville Industrial Park, was sold on 24 August 1999. The sale transferred 3.45 acres at a unit price of \$30,725 from "Marcelle Talbot to Kidd." At the time of the sale, all three properties were vacant and none were directly accessible from a main road.

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tified was a wholly owned subsidiary of Haywood Electric Membership Corporation. Clark also sat on the board of directors for Haywood Electric Membership Corporation. He testified that on 23 January 1997, Haywood Services Corporation sold approximately eleven acres of commercial property approximately one mile south of Haywood Oil along Highway 23 to Haywood Electric Membership Corporation in an “in-house” transaction rather than an arms-length sale.

Clark was also president of Clark and Leatherwood, a local construction management firm, which had purchased property in the industrial park. On cross-examination, DOT asked Clark how much Clark and Leatherwood paid for the industrial park lot on which it later built a structure. Absent objection, Clark responded that the firm paid \$17,000 for the property and an additional \$8,000 to \$10,000 to condition the soil to support the structure. Over objection, DOT further questioned Clark about the property sold between Haywood Services Corporation and Haywood Electric Membership Corporation.

After the close of the evidence, the trial court instructed the jury that “[t]he measure of just compensation where a road right-of-way and a permanent easement are taken is the difference between the fair market value of the property immediately before the taking and the fair market value of the property immediately after the taking” The jury determined that for the taking of its property Haywood Oil was entitled to recover \$57,500.

The trial court entered judgment in accordance with the jury verdict. The judgment ordered that the unpaid portion of the judgment be subject to an interest rate of eight percent (8%) per annum from the date of the taking until the date the judgment was entered. Haywood Oil filed a Rule 59 motion for a new trial on the basis of testimony regarding the property Haywood Services Corporation sold in an in-house transaction to Haywood Electric Membership Corporation and testimony regarding the purchase price of Clark and Leatherwood’s property in the Waynesville Industrial Park. The trial court denied the motion. Haywood Oil appeals from both the trial court’s judgment and the denial of its Rule 59 motion.

On appeal, Haywood Oil raises the following four issues: whether the trial court erred (I) in admitting sales prices of real estate transactions; (II) in failing to instruct the jury that payment for the value

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of land taken in an eminent domain case could include damage to the remaining property; (III) failing to allow Haywood Oil to cross-examine DOT's expert witness Marty Reece concerning the comparability of a real property sale; and (IV) in entering a judgment that provides that interest be paid at 8% per annum from the date of the taking until the date the judgment was entered.

I

[1] Haywood Oil argues that the trial court erred in allowing DOT to elicit and put before the jury evidence of real estate sales prices after the properties were determined not sufficiently comparable. We disagree.

Under the North Carolina General Statutes, section 136-112, our General Assembly has mandated the following:

Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C. Gen. Stat. § 136-112(1) (2007). "Methods of appraisal acceptable in determining fair market value include: (1) comparable sales, (2) capitalization of income, and (3) cost." *DOT v. M.M. Fowler, Inc.*, 361 N.C. 1, 13, 637 S.E.2d 885, 894 n.5 (2006) (citation omitted).

"The decision to admit evidence of comparable sales is within the sound discretion of the trial judge . . ." *Duke Power Co. v. Smith*, 54 N.C. App. 214, 217, 282 S.E.2d 564, 567 (1981) (citations omitted). "A discretionary ruling of a trial court is conclusive on appeal in the absence of abuse or arbitrariness, or some imputed error of law or legal inference." *North Carolina State Highway Com. v. Coggins*, 262 N.C. 25, 28, 136 S.E.2d 265, 267 (1964) (citation omitted).

"[Though] no two parcels of land are exactly alike . . . parcels may be compared where the dissimilarities are reduced to a minimum and allowance is made for such dissimilarities . . ." *North Carolina State Highway Com. v. Pearce*, 261 N.C. 760, 762, 136 S.E.2d 71, 73 (1964). In seeking to proffer evidence of comparable sales, "[t]he price paid at voluntary sales of land if similar in nature, location and condition to the condemnee's land is admissible and of considerable probative

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force in determining the value of land taken.” *Duke Power Co.*, 54 N.C. App. at 215, 282 S.E.2d at 566 (citations omitted). Under our North Carolina Rules of Evidence, Rule 611(b), “[a] witness may be cross-examined on any matter relevant to any issue in the case” N.C. R. Evid. 611(b) (2007).

We first turn our attention to Haywood Oil’s argument that the trial court improperly allowed DOT to question Clark before the jury regarding the price that the Clark and Leatherman firm paid for property in the industrial park after the trial court had ruled that the industrial park properties were not sufficiently comparable to the subject property to admit their sales prices. We note that Haywood Oil failed to object to either the question presented to Clark or Clark’s response. Therefore, Haywood Oil’s argument as to this assignment of error is not 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.”).

We next address whether the trial court abused its discretion by allowing Clark to testify over objection to the original purchase price of the property sold by Haywood Services Corporation to Haywood Electric Membership Corporation in an in-house transaction.

As previously noted, James Wynne testified on voir dire that the Haywood Services Corporation property was zoned commercial and located approximately one mile south of the Haywood Oil property. In its deliberation as to the admissibility of the sales price of the property, the trial court stated that the “[Haywood Services Corporation site is] not that different [from the Haywood Oil property]. . . . [I]t’s a commercial site. It’s on the same road and it’s very close, so whether or not it’s an arms-length transaction might well be determin[ative] to me as to whether this comes in.” The trial court temporarily ruled that Wynne could not testify to the price of the Haywood Services Corporation property until the trial court heard evidence on the nature of the relationship between Haywood Services Corporation and Haywood Electric Membership Corporation.

Clark testified before the jury that Haywood Services Corporation was a wholly owned subsidiary of Haywood Electric Membership Corporation; therefore, the property sold 23 January 1997 from Haywood Services Corporation to Haywood Electric

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Membership Corporation was the subject of an in-house transaction rather than an arms-length sale. However, over objection, Clark was allowed to testify that Haywood Services Corporation originally acquired the property sold 23 January 1997 as part of a forty-one acre acquisition. The purchase price for the original forty-one acres was \$445,000. DOT then questioned Clark as to how it arrived at \$396,000 as the conveyance price between Haywood Electric Services Corporation and Haywood Electric Membership Corporation. Dividing the total acreage transferred to Haywood Electric Membership by the price paid, DOT confirmed through Clark that the price per acreage amounted to \$36,365. When asked if he considered this a reasonable allocation of value for those eleven acres, Clark testified that it was “because it was primarily road frontage property fronted on two roads, [Highway 23] and Radcliffe Cove Road.”

It is uncontested that the approximately eleven acres transferred from Haywood Services Corporation to Haywood Electric Membership Corporation on 23 January 1997 was similar in nature, location, and condition to the Haywood Oil property. It is also uncontested that Haywood Services Corporation’s purchase price of the original forty-one acre property was the result of an arms-length transaction. Therefore, we hold the trial court did not abuse its discretion in allowing testimony of Haywood Services Corporation’s purchase price of the original forty-one acre property and how that purchase price factored into the price used to convey approximately eleven acres in the 23 January 1997 in-house transfer from Haywood Services Corporation to Haywood Electric Membership Corporation. Accordingly, this assignment of error is overruled.

II

[2] Next, Haywood Oil argues that the trial court erred in instructing the jury that the measure of damages for compensating defendant is payment for value of land taken, without indicating that the value includes damage to the remaining property. We dismiss this assignment of error.

Here, the trial court’s introductory remarks were to the entire jury pool, prior to the beginning of jury selection. In these introductory remarks, the trial court introduced itself, gave information about the rotation of [superior] court judges, and indicated the number of cases left on the civil calendar for the week. In addition, the trial court informed the jury of the name of the current case and gave a short overview of the factual, as well as legal, context of the case.

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Court: In April of 2001, the Department of Transportation in order to do road improvements condemned several tracts of land here in Haywood County along old Business 19/23, and one of the tracts of land which they condemned . . . was the tract of land owned by the defendant in this case.

As you probably all remember from high school, our Constitution, both the Federal and the State Constitution, gives the State the right to take people's property for a public purpose They can't just do it arbitrarily, and when they do that, they must pay the landowner the value of what was taken, and sometimes that can be agreed upon and sometimes it can't, and when it can't, it takes a jury to determine from the evidence the value of the property taken.

Now, in this case, only part of the property was taken, part of the property was taken along with for a road right of way along with various easements for drainage and sloping and a temporary easement for a time during the construction purpose. The landowner is entitled to be compensated for all of that, and the jury that is chosen in this case will under the law that I will describe and then at the end of the trial make that determination, that is basically the value of what was taken.

We further note defendant did not object to the trial court's opening remarks. 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). Therefore, the challenged action defendant now asserts as error is not properly preserved for appellate review. Accordingly, this assignment of error is dismissed.

III

[3] Next, defendant argues the trial court erred in failing to allow defendant to cross-examine Marty Reece about the comparability of the Haywood Services property. We disagree.

While a witness may be examined concerning a prior statement made by that witness, *see* N.C. R. Evid. 613 ("examining a witness

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concerning a prior statement made by him”), “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.” N.C. R. Evid. 602 (2007).

Here, DOT called Marty Reece and tendered him as an expert in real estate appraisals. On cross-examination, Reece testified that in valuing the Haywood Oil property by comparable sales he did not use the sale between Haywood Services Corporation and Haywood Electric Membership, a sale which James Wynne utilized. In explanation, Reece testified that he was not familiar with Haywood Services Corporation and had only “heard of” Haywood Electric Membership Corporation. When Haywood Oil asked why he didn’t use the Haywood Services Corporation property sale, Reece responded, “Well, because I felt the three sales that I used were most comparable. That’s not uncommon for appraisers to use different sales.”

During a recess, with the jury excused, the trial court conducted a brief voir dire of Larry Clark. Clark testified that the 23 January 1997 transfer of property from Haywood Services Corporation to Haywood Electric Membership Corporation was not an arms-length transaction. When the jury was recalled and Reece returned to the witness stand to continue his cross-examination, Haywood Oil asked, “Mr. Reece, were you here in the courtroom a minute ago when Mr. Larry Clark was testifying?” When DOT objected, Haywood Oil explained, “I’m just going to ask him if he now knows whether or not one is a wholly-owned subsidiary, the other an arm[s]-length transaction. . . . Your honor, it explains why he didn’t use it perhaps.” The trial court sustained the objection.

We hold that where Reece indicated he did not have personal knowledge of Haywood Services Corporation and Haywood Electric Membership Corporation the trial court did not err in prohibiting Haywood Oil from cross-examining Marty Reece about the nature of the transaction between Haywood Services Corporation and Haywood Electric Membership Corporation. Accordingly, this assignment of error is overruled.

IV

[4] Last, Haywood Oil argues the trial court erred in failing to award a judgment which provides that DOT is to pay Haywood Oil eight percent (8%) from the date of the taking until the judgment is fully satisfied. Haywood Oil argues that pursuant to the 14th Amendment to the United States Constitution as well as the Law of the Land Clause of

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the North Carolina Constitution, the trial court was compelled to order that interest applied to the unpaid portion of the judgment be computed from the date of the taking until the judgment is satisfied. We dismiss this assignment of error.

Constitutional issues not raised before the trial court are not properly preserved for appeal. *See Daniels v. Hetrick*, 164 N.C. App. 197, 200, 595 S.E.2d 700, 702 (2004) (citation omitted).

Here, Haywood Oil failed to present the trial court with a request or argument for post-judgment interest prior to appeal to this Court. Therefore, we hold the issue is not properly before us, and accordingly, this assignment of error is dismissed.

No error.

Judges McGEE and GEER concur.

THRASH LIMITED PARTNERSHIP AND LOTT PARTNERSHIP II, PLAINTIFFS v. THE
COUNTY OF BUNCOMBE, DEFENDANT

No. COA08-327

(Filed 17 March 2009)

1. Zoning— amended ordinance—standing—failure to follow procedures

The trial court did not err by concluding that plaintiff had standing to institute this declaratory judgment action challenging an amended zoning ordinance, even though it had not sought a permit to develop its land and had no active plans to build multi-family units on its land, because plaintiff's challenge to the amended zoning ordinance was based on the alleged failure of the county to follow the proper procedures to enact the zoning ordinance, which was an attack on the validity of the amended zoning ordinance instead of an "as-applied" challenge.

2. Zoning— amended ordinance—failure to follow statutory and ordinance procedures—time of public hearing—map changes

An amended county zoning ordinance extending zoning to the entire county was invalid where (1) the amendment was not

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adopted in accordance with the county's own zoning ordinance procedure governing notice of a public hearing when the hearing was held fourteen days after the initial notice was published and not after the minimum of fifteen days as required by the ordinance; and (2) the county did not follow the procedure set forth in N.C.G.S. § 153A-344 and the county ordinance for implementing zoning maps changes in that requests for changes in zoning classification in the open use district were never considered by the planning board but were handled by the planning board staff, the staff approved 404 changes in zoning, and each approved change was incorporated into the zoning maps.

Appeal by plaintiff from judgment entered 21 December 2007 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 28 August 2008.

The Van Winkle Law Firm, by Albert L. Sneed, Jr., for plaintiff-appellant.

William F. Slawter, PLLC, by William F. Slawter, and Assistant County Attorney Michael C. Frue, for defendant-appellee.

STEELMAN, Judge.

Where a zoning ordinance amendment was not adopted in accordance with Buncombe County's own zoning ordinance procedures, the amendment is invalid.

I. Factual and Procedural Background

Plaintiff Lott Partnership II is a North Carolina Limited Partnership which owns a parcel of land in eastern Buncombe County. Plaintiff Thrash Limited Partnership sold its land during the pendency of this action and the action is moot as to Thrash Limited Partnership.

Defendant Buncombe County ("County") first exercised its zoning authority pursuant to Article 18 of Chapter 153A in the 1970's by enacting a community-based zoning plan that only applied zoning to townships in which the residents requested zoning. As of March of 2007, Limestone and Beaverdam were the only townships to request zoning, and those ordinances are codified, respectively, as Articles III and IV of the Buncombe County Code.

On 8 March 2007, the Buncombe County Commissioners adopted a resolution which referred a draft of "the proposed amendments to

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the zoning ordinance of Buncombe County, North Carolina as well as the amended zoning maps” (the “Amended Zoning Ordinance”) to the Buncombe County Planning Board (“Planning Board”). The Amended Zoning Ordinance was modeled after the Limestone Township Zoning ordinance, and was the first county-wide zoning ordinance, superceding Articles III and IV of the County Code. The Planning Board considered the text of the Amended Zoning Ordinance on 19 and 26 March, and 2 April. On 2 April, the Planning Board adopted a resolution setting forth its recommendations regarding the text of the Amended Zoning Ordinance.

On 10 and 17 April 2007, a notice of a public hearing was published in the Asheville Citizen-Times stating that the “Buncombe County Board of Commissioners will conduct a public hearing on the 24th day of April 2007 . . . to consider the adoption of the Amended County Zoning Ordinance and Zoning Maps.” The notice further provided that “[a] copy of the amended ordinance can be accessed at buncombecounty.org . . .” The public hearing was held on 24 April.

On 1 May 2007, the board of commissioners adopted the Amended Zoning Ordinance enacting county-wide zoning. On 15 June 2007, plaintiff filed an action seeking to have the Amended Zoning Ordinance declared invalid, alleging that the Ordinance was adopted without compliance with the requirements of County’s Zoning Ordinance and state law. Following a summary judgment hearing on 4 December 2007, Judge Downs entered an order on 21 December 2007, ruling that plaintiff had standing to bring the action and granting summary judgment in favor of County. Plaintiff appeals. County cross-assigns as error the trial court’s finding and conclusion that plaintiff had standing.

II. Standing

[1] We first address County’s contention that plaintiff did not have standing to institute this action because it had not sought a permit to develop its land and had no active plans to build multi-family units on its land. 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). As the party invoking jurisdiction, plaintiffs have 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).

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North Carolina's case law makes clear that landowners in the area of a county affected by a zoning ordinance are allowed to challenge the ordinance on the basis of procedural defects in the enactment of such ordinances. *See Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d 421 (1992) (plaintiffs, as landowners in the area of the county affected by the zoning ordinance, were allowed to challenge the ordinance on the basis of inadequate notice); *Lee v. Simpson*, 44 N.C. App. 611, 261 S.E.2d 295 (1980) (plaintiffs, who were owners of property adjacent to property that was rezoned, succeeded in overturning the rezoning ordinance for lack of proper notice); *George v. Town of Edenton*, 294 N.C. 679, 680, 242 S.E.2d 877, 878 (1978) ("Plaintiffs, as residents of Chowan County within the jurisdiction of the zoning powers of defendants, challenge in their complaint the legality of both actions of the Town Council and ask the court to determine their validity."); *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972) ("The plaintiffs, owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain the action.").

County contends that plaintiff does not have standing because it "ha[s] not alleged that the County has sought to apply the Ordinance under challenge to the Plaintiff[] or that the Plaintiff[] ha[s] applied for or been denied anything related to use of their property." County argues that the instant case is controlled by *Andrews v. Alamance County*, 132 N.C. App. 811, 513 S.E.2d 349 (1999). In *Andrews*, the plaintiff alleged an intention to develop her property as a manufactured home community and brought a declaratory judgment action seeking to declare the county ordinance establishing minimum lot requirements as invalid as applied to her. This Court held that the plaintiff lacked standing to sue because she did not allege in her complaint that she had taken any steps to begin developing her property, such as applying for a permit or filing a subdivision plat with the county. *Andrews*, 132 N.C. App. at 815, 513 S.E.2d at 351. In the instant case, County contends that since plaintiff has not sought to use its property for a multi-family dwelling use, it is not an "aggrieved party."

We find *Andrews* to be distinguishable. The plaintiff's challenge to the zoning ordinance in *Andrews* was based on arbitrariness, equal protection, or constitutionality as applied to the plaintiff's land. As the case necessarily involved a specific consideration of plaintiff's land, plaintiff was required to show that she had an immediate risk of sustaining an injury in order to have standing. In contrast, plaintiff's

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challenge in the instant case to the Amended Zoning Ordinance is based on the alleged failure of County to follow the proper procedures to enact the zoning ordinance. Thus, plaintiff's declaratory judgment action is not an "as-applied" challenge, but rather is an attack on the validity of the Amended Zoning Ordinance.

This argument is without merit.

III. Amended Zoning Ordinance

[2] In its sole argument on appeal, plaintiff contends that the trial court erred in granting County's motion for summary judgment on the grounds that County failed to follow the proper procedures to amend its Zoning Ordinance. We agree.

Standard of Review—Summary Judgment

Our standard of review of a trial court's ruling on a motion for summary judgment is *de novo*, and "this Court's task is to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citation omitted).

Amendment of Buncombe County's Zoning Ordinance

This Court has repeatedly held that a County's failure to comply with the provisions of its own ordinance, including procedures to amend a zoning ordinance, renders the ordinance invalid. *See, e.g., Lee* at 612, 261 S.E.2d at 296 ("The procedural rules of an administrative agency 'are binding upon the agency which enacts them as well as upon the public To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights.' " (quotation omitted)); *Frizzelle* at 243, 416 S.E.2d at 426 ("Because the Harnett County Board of Commissioners violated its own ordinance's notice requirements for amending the zoning ordinance, the zoning amendment must be set aside as to the southern section of the county."); *George* at 687, 242 S.E.2d at 882 (where the Town Council acted in violation of required procedures, the purported rezoning was set aside).

Article III, § 78-341 of the Buncombe County Code provides that the Article, including the zoning map, "may be amended by the Board of Commissioners in accordance with the provisions of this division."

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Section 78-345 of Article III provides the procedures County is required to follow prior to amending the Article:

A notice of such public hearing shall be published in a newspaper of general circulation in the county once a week for two successive weeks. The first publication shall not appear less than 15 days or more than 25 days prior to the date fixed for the public hearing. The notice shall include the time, place, and date of the hearing and include a description of the property or the nature of the change or amendment to the article and/or map.

County contends that Article III of the County Code applies only to changes and amendments to re-zone Limestone Township, and does not apply to an initial zoning of the entire county. County argues that it was not required to follow the procedures set forth in Article III governing the amendment of the ordinance. In support of its argument, County cites to the jurisdiction sections of the Limestone and Beaverdam ordinances, which limit the application of those ordinances to their respective townships.

We first note that it is clear from the record that County considered the Amended Zoning Ordinance to be an “amendment” to the zoning provisions contained in its County Code. The 8 March resolution adopted by the Buncombe County Commissioners referred to “the proposed amendments to the zoning ordinance of Buncombe County[.]” The notices published in the Asheville Citizen-Times expressly stated that the purpose of the public hearing was “to consider the adoption of the *Amended County Zoning Ordinance* and Zoning Maps.” (emphasis added). The notice further provided that “[a] copy of the *amended ordinance* can be accessed at buncombe-county.org . . .” (emphasis added). County thus acknowledged that the ordinance was an amendment to its existing ordinances, and County was therefore required to follow the procedures set forth in those ordinances prior to enacting the amendment.

Notice of Public Hearing

Plaintiff first contends that the Amended Zoning Ordinance is invalid on the grounds that County did not comply with its own rules governing notice of a public hearing on an amendment to the zoning ordinance.

On 10 and 17 April 2007, a notice regarding a public hearing on the Amended Zoning Ordinance was published in the Asheville Citizen-Times. The public hearing was held on 24 April, fourteen days

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after the initial notice was published and not the minimum of fifteen days as required by the ordinance.

This case is controlled by our decision in *Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d 421 (1992). In *Frizzelle*, the Harnett County Board of Commissioners adopted a zoning ordinance which applied exclusively to the northern section of Harnett County. The County subsequently enacted a zoning ordinance which extended the zoning ordinance to the southern section of the County. The plaintiff landowners challenged the zoning ordinance on the grounds that the County failed to follow the proper procedures to extend the ordinance to the southern section of the County in violation of the amendment procedures established in the zoning ordinance applicable to the northern section. This Court agreed with plaintiffs, finding that “the county failed to follow its own procedures as delineated in the zoning ordinance that it wrote[.]” *Frizzelle* at 242, 416 S.E.2d at 425. Although the County argued, as Buncombe County argues in the instant case, that the provisions of the zoning ordinance for the northern section were not intended to apply to the initial zoning of the southern section, this Court rejected the argument, stating that since the County “was the drafter of the ordinance in question and in a position to include any restrictions and qualifications it chose,” the notice requirements for amending the zoning ordinance in the northern section were applicable to county-wide zoning. *Id.* at 243, 416 S.E.2d at 426.

Likewise, County’s argument that the provisions of Article III did not apply to its county-wide Amended Zoning Ordinance must fail. The clear and unequivocal language of the zoning ordinance requires at least fifteen days’ notice prior to the public hearing on any amendments to the Ordinance. The record reveals that County only provided fourteen days’ notice.

If a County were allowed to enact a zoning change as part of an adoption of a “new ordinance” rather than as an amendment to an existing ordinance, “[s]uch a distinction would allow easy circumvention of the provision whenever an applicant can attach a proposed zoning amendment to some larger revision of the general ordinance. We therefore decline so to eviscerate a requirement the Council has established to regulate its own procedure.” *George* at 685, 242 S.E.2d at 881 (citations omitted). Because County failed to follow its own procedures in amending its Ordinance, the Amended Zoning Ordinance is invalid. *See id.*; *see also Refining Co. v. Board of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 135-36 (1974) (“The fail-

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ure of the Aldermen to comply with the terms of the ordinance requires that its denial of Humble's application for a special use permit be set aside . . .").

Map Changes to Amended Zoning Ordinance

Plaintiff next contends that the Amended Zoning Ordinance is invalid on the grounds that County did not follow North Carolina statutory procedure for submitting zoning maps to the Planning Board.

N.C. Gen. Stat. § 153A-344 provides, in part, "[s]ubsequent to initial adoption of a zoning ordinance, all proposed amendments to the zoning ordinance or zoning map *shall* be submitted to the planning board for review and comment." N.C. Gen. Stat. § 153A-344(a) (2007) (emphasis added).

At their 20 November 2006 meeting, the Planning Board reviewed the original draft zoning amendments and hand drawn zoning maps. Through several ensuing meetings, the Planning Board reviewed and recommended changes to the text of the amendments. Following the 8 January 2007 meeting, sets of zoning maps were produced and distributed to Planning Board members. These maps showed the proposed classification for each property in Buncombe County. The text of the ordinance amendments did not indicate how a particular piece of property was to be zoned.

At an 11 January 2007 Planning staff meeting, a discussion took place as to how to handle requests to change the proposed zoning by individual property owners. It was decided to make forms requesting a change in the proposed zoning available to the public. Between 23 January 2007 and 5 February 2007, a series of Community Zoning Meetings were held at different locations throughout Buncombe County. Planning staff and Planning Board members were present to hear community concerns and answer questions. Requests for changes in zoning classification were received at this meeting.

At the 26 February 2007 Planning Board meeting, it was decided to postpone the public hearing to 24 April 2007, and to set 15 March 2007 as the deadline for submission of requests to change the zoning classification. The deadline was posted on the website and persons seeking a change in zoning were notified of this deadline by Planning staff. The zoning maps divided Buncombe County into two categories: properties within the MSD Sewer Service District, and the Open Use District. As of 15 March 2007, there were 374 requests for

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changes in zoning classifications for properties in the Open Use District. At its 19 March 2007 meeting, the Planning Board voted unanimously to only consider requested zoning changes within or contiguous to the MSD Sewer Service District. This was done at the 26 March 2007 meeting.

Following the 15 March 2007 deadline for submission of requests for change in zoning classification, requests continued to come into the Planning Department. At its 2 April 2007 meeting, the Planning Board reviewed requests to change zoning classification in the MSD Sewer Service District. At its 16 April 2007 meeting, the Planning Board continued to review requests for change in zoning classification in the MSD Sewer Service District, received through 12 April 2007. At its 19 April 2007 Special Meeting, the Planning Board considered change requests for the MSD Sewer Service District received between 13 April and 19 April. Each approved change in zoning classification necessitated a corresponding change in the zoning maps. No further change requests were processed after 19 April 2007.

At its 23 April 2007 Special Meeting, the Planning Board heard appeals of its previous denials for zoning classification changes. It also approved a resolution recommending the proposed zoning map, with all MSD Sewer Service District changes included, to the Board of Commissioners. These changes were incorporated into maps dated 24 April 2007.

The requests for changes in zoning classification in the Open Use District were never considered by the Planning Board. Instead, they were handled by the Planning staff, which approved 404 changes in zoning in the Open Use District. Each of these changes necessitated a change in the zoning maps. These changes were incorporated into the zoning maps dated 24 April 2007.

N.C. Gen. Stat. § 153A-344 requires that changes in a “zoning map shall be submitted to the planning board for review and comment.” The language of this provision is mandatory, not discretionary. In its headlong rush to adopt the amendments to its ordinance, County violated this statutory provision. In addition, County did not comply with the provisions of its own existing ordinance:

Before taking any action on a proposed amendment to this article, the board of commissioners shall consider the planning board's recommendations on each proposed amendment.

Buncombe County, N.C., Code Article III, § 78-344 (2007).

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Finally, we note that the maps used at the public hearing before the board of commissioners on 24 April 2007 were not in existence at the time the public hearing was called for, and at the time the notices were published in the newspapers. Citizens are most concerned with how their property and their neighbors' property is zoned. In this case, changes were being made to the zoning maps, the only document showing how a particular property was to be zoned, up until the day before the public hearing. We fail to see how the citizens of Buncombe County could make any meaningful comment on the proposed zoning ordinance amendments under these circumstances.

We hold that County's violation of the provisions of N.C. Gen. Stat. § 153A-344 provides an additional basis for declaring the amendments to the zoning ordinance to be invalid.

IV. Conclusion

This matter came before the trial court on cross-motions for summary judgment. Neither party has asserted that there are any material issues of fact present in this case. We hold that the trial court erred in granting County's motion for summary judgment. The order of the trial court is reversed and this matter is remanded to the trial court for entry of judgment in favor of plaintiff in accordance with this opinion. The trial court's conclusion that plaintiff had standing to challenge the ordinance is affirmed.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges GEER and STEPHENS concur.

Laura Robinson, Plaintiff v. Linda Trantham, Administratrix of the Estate of
Horace Gregory Howard, Jr., Defendant

No. COA08-979

(Filed 17 March 2009)

1. Negligence— contributory—riding with intoxicated driver

The trial court did not abuse its discretion by refusing to submit the issue of contributory negligence to the jury in a case involving a one car automobile accident where the evidence was insufficient to support the inference that plaintiff knew or should

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have known that defendant (the driver, with plaintiff as a passenger) was under the influence of an impairing substance.

2. Negligence— automobile accident—drugs found on passenger—correctly excluded

The trial court did not abuse its discretion in a one car accident case in which plaintiff was a passenger by excluding as unduly prejudicial a plastic baggie containing an undertermined white powder found on plaintiff's person after the accident. There was no evidence presented to the jury that the driver had consumed or was under the influence of an illegal drug on this occasion.

3. Trials— motion for new trial—underlying basis rejected on appeal

The trial court did abuse its discretion by denying defendant's motion for a new trial under N.C.G.S. § 1A-1, Rule 59, where that motion was based on the failure to submit contributory negligence to the jury and the exclusion of certain evidence, and those rulings were upheld elsewhere in the opinion.

4. Civil Procedure— Rule 60—newly discovered evidence—discoverable earlier with due diligence

The trial did not err by denying a Rule 60 motion for relief based on newly discovered evidence in a case involving a one car automobile accident where the estate of the deceased driver released a sample of the driver's blood to a private lab for testing. The private lab's findings could have been discovered with the exercise of due diligence in time to present them in the original trial.

5. Negligence— gross—automobile accident—not submitted to jury—no error

The trial court did not err by failing to submit gross negligence to the jury in a case involving a one car accident where the evidence was that the driver was driving normally, then began to brag about his car and accelerated, and plaintiff, who was a passenger in the car, saw that they were approaching a curve and knew that they were traveling "way above the posted speed limit."

Appeal by defendant from judgment entered 9 October 2007 and orders entered 14 January 2008 by Judge Mark E. Powell in Henderson County Superior Court. Plaintiff cross-appeals from

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judgment entered 9 October 2007 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 26 January 2009.

Law Office of Frank B. Jackson, by Frank B. Jackson and Adrienne I. Roberson, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Dale A. Curriden and Jeffrey D. Zentner, for defendant-appellant.

BRYANT, Judge.

Defendant appeals and plaintiff cross-appeals from judgment entered 9 October 2007 concluding that plaintiff was injured by the negligence of Horace Gregory Howard, Jr. (Greg) and awarding plaintiff \$275,000. Defendant also appeals from the trial court's orders entered 14 January 2008 denying defendant's motion for a new trial based on Rule 59 and defendant's motion for relief from judgment based on Rule 60(b)(2). For the reasons stated herein, we affirm.

On 25 February 2006, Laura Robinson, her teenage son Quinton, Greg, and Greg's eight year old son Horace met around 7:00 p.m. to celebrate a friend's birthday, Jeretta Godfrey. After eating at a local restaurant, the group moved to Ms. Godfrey's house. A bit later, Greg left the house with an adult male who was also at the birthday party and did not return for over an hour. During this time, Laura, Quinton, and Horace remained at the Godfrey home.

After Greg returned, Greg, Horace, Laura, and Quinton traveled to Vernon Appley's house. When they arrived, Appley was having a beer. Appley joined the group and brought with him a twelve-pack of beer. About 12:40 a.m., the group ended up at a vacation cabin in Green River in Henderson County. According to Quinton, Greg drove normally—no speeding, no running off the road, or anything of that matter.

At the cabin, Quinton, Appley, and Greg played darts; Horace went to bed; and Laura made a place for Appley to sleep as well as prepared for their next day departure. During the dart game, only Appley was drinking. After the game, Greg and Appley wanted to look for wildlife and check on a camper Appley had on the premises. Quinton was not allowed to go, but Greg and Appley convinced Laura to join them despite being dressed only in her pajamas. In preparation for turning in for the night, Laura had made Greg a vodka and orange

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juice mixed drink; so, she took the drink with her. That was the last time Quinton saw the three that night.

Laura testified that the Appley camper was about a third of a mile from the cabin. They were going to check the camper to be sure the pipes did not freeze, and Greg and Appley were planning to look out over an adjacent cornfield for wild animals. They never saw any wildlife and never made it to Appley's camper. Laura testified that Greg was bragging about his car, a 2006 Chrysler 300, then he simply "pressed the gas and accelerated through [a] little straight-away there He never let off the gas." The speed limit in the area was 55 mph. Laura saw they were approaching a curve and because of the car's acceleration past 55 mph, she knew they were traveling "way above the posted speed limit."

The next morning, Officer Tony Osteen of the State Highway Patrol arrived at the accident site shortly after 9:00 a.m. to find Greg's Chrysler 300 sitting in a cornfield. The first gouge marks in the field were fifty feet from the roadside. After flipping and rolling, the vehicle had come to rest 217 feet from its initial point of impact.

EMT John Constance was also on the scene. He found Laura lying in the vehicle's backseat. Appley was found thirty yards from the car with faint vital signs. Greg was found dead approximately seventy yards from the car. Constance saw no alcoholic beverage containers in the vehicle. Officer Osteen later interviewed Laura while she was in the hospital. He testified absent objection that she related to him that Greg had two drinks prior to eating.

Laura incurred \$31,853.77 in medical bills, and on 16 May 2006, she sued the estate of Greg Howard for negligence. Linda Trantham, administratrix of the estate of Greg Howard, answered Laura's complaint and pled that Laura was contributorily negligent "in that she knowingly entered the vehicle with an intoxicated driver . . . [and] failed to use ordinary care to protect herself Such actions . . . amount to contributory negligence"

At trial, Trantham presented evidence by Dr. Diana Garside that at the time of death Greg had a blood alcohol content of 70 milligrams per deciliter (0.07). However, the trial court determined there was no evidence that Laura was aware of Greg's intoxication and thus did not submit the issue of contributory negligence to the jury.

After the close of the evidence, the jury determined that Laura was injured by the negligence of Greg and awarded her \$275,000.00.

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On 9 October 2007, the trial court entered judgment consistent with the jury verdict. Trantham appeals and Laura cross-appeals.

On appeal, Trantham raises the following four arguments: the trial court erred (I) in failing to instruct the jury on the theory of contributory negligence; (II) in granting Laura's motion in limine to exclude evidence of a "baggie" containing white powder; (III) in denying Trantham's Rule 59 motion; and (IV) in denying Trantham's Rule 60 motion.

On cross-appeal, Laura argues that the trial court erred in failing to submit to the jury the issue of gross negligence.

I

[1] Trantham argues that the trial court erred by failing to instruct the jury on the theory of contributory negligence. We disagree.

"[T]he trial court has wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 645, 643 S.E.2d 28, 34 (2007) (citations and quotations omitted). "Under an abuse of discretion standard, we defer to the trial court's discretion and will reverse its decision only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (2004) (citation and internal quotations omitted).

For a defendant driver accused of negligence to establish the contributory negligence of a plaintiff passenger, three elements must be satisfied.

The defendant must prove that (1) the driver was under the influence of an intoxicating beverage; (2) the passenger knew or should have known that the driver was under the influence of an intoxicating beverage; and (3) the passenger voluntarily rode with the driver even though the passenger knew or should have known that the driver was under the influence of an intoxicating beverage.

Watkins v. Hellings, 321 N.C. 78, 80, 361 S.E.2d 568, 569 (1987) (citations omitted). " 'Under the influence' has been defined as when a person has drunk a sufficient quantity of intoxicating beverage to

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cause him to lose the normal control of his bodily or mental faculties to such an extent that there is an appreciable impairment of either or both of these faculties.” *Jansen v. Collins*, 92 N.C. App. 516, 518, 374 S.E.2d 641, 643 (1988) (citation omitted).

The standard to establish whether a passenger should have known that the driver was under the influence is that of an ordinarily prudent man. If the passenger exercises the degree of care that an ordinarily prudent man under similar circumstances would have used, then his claim will not be barred.

Taylor v. Coats, 180 N.C. App. 210, 213, 636 S.E.2d 581, 583 (2006) (citation omitted).

In *Jansen*, this Court held that a trial court’s refusal to submit the issue of contributory negligence to a jury entitled the defendant to a new trial. *Jansen*, 92 N.C. App. at 519, 374 S.E.2d at 643-44. Both the plaintiff and the defendant testified that they had been drinking beer together and at the time of the accident had a wine cooler in the car. *Id.* at 519, 374 S.E.2d at 643. The defendant testified that he consumed nine beers while he and the plaintiff were together. Though the plaintiff testified that the defendant walked and talked normally, he was driving “a little bit too fast.” The defendant testified that “he was definitely feeling the effects of the alcohol.” On those facts, we held that the question of “whether [the] plaintiff was contributorily negligent in voluntarily riding in a car driven by [the] defendant when [the] plaintiff knew or should have known that [the] defendant was under the influence of intoxicating beverages was a question for the jury.” *Id.* (citations omitted). Compare *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127 (1986) (holding insufficient evidence to instruct the jury on the issue of contributory negligence where the defendant had been drinking liquor between 9:00 a.m. and noon, the plaintiff was aware of this when he accepted a ride, but there was no evidence of improper driving up until the time of the accident at 4:00 p.m.).

Here, Officer Osteen testified, absent objection, that when he interviewed Laura in the hospital she informed him that Greg had two beers prior to eating. Quinton testified that Greg drove normally—no speeding, no running off the road, or anything of that matter—while returning to their cabin from the dinner party. Laura testified that while she, Greg, and Appley were driving to see wildlife Greg didn’t do anything out of the ordinary until he simply “pressed the gas and accelerated through [a] little straight-away He never

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let off the gas.” Otherwise, there was no testimony from any of the witnesses that Greg was observed drinking more than two beers and no testimony that he was observed to be under the influence of an impairing substance.

Unlike in *Jansen*, where there was evidence the plaintiff knew or should have known the defendant was under the influence of an impairing substance, in the instant case the evidence was insufficient to support such an inference. “Evidence which merely raises a conjecture as to plaintiff’s negligence will not support a jury instruction.” *Osetek v. Jeremiah*, 174 N.C. App. 438, 443-44, 621 S.E.2d 202, 206 (2005) (citation omitted). Therefore, the trial court did not abuse its discretion in refusing to submit the issue of contributory negligence to the jury. Accordingly, this assignment of error is overruled.

II

[2] Next, Trantham argues that the trial court erred in granting Laura’s motion in limine to exclude evidence of a plastic “baggie” containing white powder found on Laura’s person after the accident. Such evidence, Trantham argues, was relevant to determining Laura’s credibility as well as supporting Trantham’s claim of contributory negligence. 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 trials. The trial court has wide discretion regarding this advance ruling and will not be reversed absent an abuse of discretion.” *Nunnery v. Baucom*, 135 N.C. App. 556, 566, 521 S.E.2d 479, 486 (1999) (internal citations and quotations omitted).

Under our North Carolina Rules of Evidence, Rule 403, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. R. Evid. 403 (2007).

Here, the trial court excluded evidence of a plastic “baggie” containing an undetermined white powdery substance found on Laura’s person. At trial, during a voir dire of Laura, Trantham made an offer of proof with regard to the plastic “baggie.” Laura testified that just prior to going for a ride with Greg and Appley, Greg handed her a baggy with a white, powdery substance. As she had no pockets, Laura

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dropped the “baggie” in her underwear and later testified that she had no idea what it contained. Laura also testified that on prior occasions she had observed Greg using cocaine and smoking marijuana.

We note there was no evidence presented to the jury that on *this occasion* Greg had consumed or was under the influence of an illegal drug. Therefore, the trial court did not abuse its discretion in ruling that the probative value of the plastic “baggie” which contained an undetermined white powder was substantially outweighed by the danger of unfair prejudice. Accordingly, we overrule this assignment of error.

III

[3] Next, Trantham argues that the trial court erred in denying her Rule 59 motion for a new trial. This contention is based on Trantham’s arguments that the trial court erred by failing to submit the issue of contributory negligence to the jury and excluding from evidence the “baggie” of white powder found on Laura’s person. We disagree.

“An appellate court should not disturb a *discretionary* Rule 59 order unless it is reasonably convinced by the cold record that the trial judge’s ruling probably amounted to a substantial miscarriage of justice.” *Weber, Hodges & Godwin Commer. Real Estate Servs., LLC v. Cook*, 186 N.C. App. 288, 293, 650 S.E.2d 834, 838 (2007) (citation omitted) (original emphasis).

Based on the arguments previously addressed, we hold the trial court did not abuse its discretion in failing to allow Trantham’s Rule 59 motion for a new trial. Accordingly, we overrule this assignment of error.

IV

[4] Next, Trantham argues that the trial court erred in denying her Rule 60 motion for relief from judgment based upon newly discovered evidence. We disagree.

Under our North Carolina Rules of Civil Procedure, Rule 60(b)(2), relief from judgment or order,

(b) 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 . . . :

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(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)

N.C. R. Civ. P. 60(b)(2) (2007).

[However,] [f]or relief to be granted under Rule 60(b)(2) the failure to produce the evidence at the [original proceeding] must not have been caused by the moving party's lack of due diligence. The evidence must be such as was not and could not by the exercise of diligence have been discovered in time to present in the original proceeding.

Harris v. Family Medical Center, 38 N.C. App. 716, 719, 248 S.E.2d 768, 770 (1978) (citation omitted).

In *Harris*, this Court affirmed a trial court's denial of the plaintiff's Rule 60(b)(2) motion on the grounds that the plaintiff could have obtained a copy of a birth certificate prior to the hearing in the original proceeding. *Id.*

Here, Trantham spoke with Dr. Garside on 13 October 2007 after judgment had been entered 9 October 2007 and learned that the Office of the Chief Medical Examiner routinely retains blood samples for two years and furthermore Trantham could consent to the release of Greg's blood for private testing. On 30 October 2007, Trantham sent a letter authorizing the release of Greg's blood sample to NMS Labs in Willow Grove, Pennsylvania. On 15 November 2007, NMS labs released a toxicology report of their findings. According to the report, Greg's blood sample contained 56 mg/dL of ethanol; 140 ng/mL of cocaine; 86 ng/mL of cocaethylene—a cocaine/ethanol by-product; 1900 ng/mL of benzoylecgonine—a cocaine degradation product; and 39 ng/mL of methamphetamine. Trantham argues that this evidence, which she asserts bears upon Greg's state of impairment and Laura's knowledge of that impairment, supports her defense of contributory negligence.

The accident in this case occurred on 26 February 2006, the complaint was filed 16 May 2006, and the trial commenced 25 September 2007. On these facts, we hold the NMS findings could have been discovered with the exercise of due diligence in time to present them in the original trial. Therefore, the trial court did not err in denying Trantham's Rule 60(b) motion. Accordingly, this assignment of error is overruled.

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[5] On cross-appeal, Laura argues the trial court erred in failing to submit to the jury the issue of gross negligence. We disagree.

In determining or defining gross negligence, this Court has often used the terms ‘willful and wanton conduct’ and ‘gross negligence’ interchangeably to describe conduct that falls somewhere between ordinary negligence and intentional conduct. We have defined ‘gross negligence’ as ‘wanton conduct done with conscious or reckless disregard for the rights and safety of others.’

Yancey v. Lea, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001) (citations omitted).

In *Berrier v. Thrift*, 107 N.C. App. 356, 420 S.E.2d 206 (1992), this Court held that the evidence submitted was sufficient for the trial court to instruct the jury on gross negligence. The defendant in *Berrier* offered to drive home a girl and her three companions. In their presence, the driver had consumed two beers. But, on the way home, the defendant failed to negotiate a turn and the vehicle rolled down a steep embankment. The girl died as a result. Evidence submitted at trial showed the defendant had a blood alcohol level of 0.184 two hours after the accident. Unknown to the passengers, the defendant had consumed eight beers within two hours of meeting the girl and her companions. The defendant testified that he knew that alcohol impairs anyone’s ability to drive, that driving while impaired is a crime, that he had alcohol in his system when he drove the car and that there was a risk associated with his driving the car the night of the fatal accident.

This Court reasoned that where the defendant had consumed ten cans of beer within three hours of the accident, had a blood alcohol content of 0.184 two hours after the accident, was aware alcohol impairs a driver’s reaction time, and knew that driving in his condition posed a risk, there was sufficient evidence to submit the issue of gross negligence to the jury. *Id.* See also *Pearce v. Barham*, 271 N.C. 285, 156 S.E.2d 290 (1967) (holding there was sufficient evidence to support a finding of willful and wanton conduct where, in a drizzling rain with slick tires, the defendant driver swerved back and forth across the roadway at 90 mph, failed to stop at a stop sign, lost control of his vehicle and injured the passengers); *Baker v. Mauldin*, 82 N.C. App. 404, 346 S.E.2d 240 (1986) (holding the issue of gross negligence was for the jury where, though there was some evidence the defendant was not driving as though intoxicated, there was evidence the defendant was driving 100 mph immediately prior to the acci-

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dent); *compare Yancey*, 354 N.C. 48, 550 S.E.2d 155 (holding insufficient facts to find gross negligence where a collision occurred after a driver, traveling between 55 and 65 mph in a 55 mph zone, attempted to pass a truck that turned into the driver's path).

Here, the evidence presented to the jury indicates that Greg was driving normally, began to brag about his car, and simply "pressed the gas and accelerated through [a] little straight-away there . . ." The speed limit in the area was 55 mph. Laura saw they were approaching a curve and because of the car's acceleration past 55 mph, she knew they were traveling "way above the posted speed limit."

On these facts, we cannot say the trial court erred in failing to submit the issue of gross negligence to the jury. Accordingly, this assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge BEASLEY concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD LILLY, DEFENDANT

No. COA08-421

(Filed 17 March 2009)

1. Firearms and Other Weapons— injury to real property— indictment—tenant listed as owner—no fatal variance

There was no fatal variance between the indictment and evidence where defendant was convicted of injury to real property, and the indictment incorrectly described the lessee of the real property as its owner. The tenant here was the exclusive possessor of the property, which was sufficient.

2. Firearms and Other Weapons— injury to real property— discharging weapon into occupied property—defendant as perpetrator—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of injury to real property and discharging a weapon into occupied property where defendant contended that there was insufficient evidence

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that defendant was the perpetrator. Defendant's arguments depended upon inferences being drawn in his favor rather than for the State.

Appeal by defendant from judgments entered 22 October 2007 by Judge Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 23 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Anne J. Brown, for the State.

James N. Freeman, Jr. for defendant-appellant.

GEER, Judge.

Defendant James Edward Lilly appeals his convictions of injury to real property and discharging a weapon into occupied property. On appeal, defendant primarily contends that the indictment for the charge of injury to real property, which incorrectly described the lessee of the real property as its owner, fatally varied from the evidence presented at trial. We hold that the indictment was sufficient because it properly identified the lawful possessor of the damaged property, and, therefore, no fatal variance occurred.

Facts

At trial, the State's evidence tended to show the following facts. Defendant and Tomeka Teague, who were involved in a romantic relationship for a little over one year, lived together in Ms. Teague's townhome that she rented from Smith Homes in Greensboro, North Carolina. The couple had a turbulent relationship with several incidents of domestic violence and numerous arguments. In late April or early May 2007, Ms. Teague ended the relationship and asked defendant to move out of her home, which he did. Soon after, defendant began to obsessively call and pursue Ms. Teague, often hiding in the bushes outside her home.

In the early morning hours on 18 May 2007, Ms. Teague received a call from a friend, Chris Kilburn, who was stranded and needed a ride. Ms. Teague picked up Mr. Kilburn and brought him back to her home, where her brother was watching over her daughter while the daughter slept. The three adults were upstairs in Ms. Teague's bedroom talking and watching television when Ms. Teague got a call on her cell phone from defendant. While talking to defendant, Ms. Teague was sitting on her bed next to her window.

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During that phone call, defendant became angry with Ms. Teague and accused her of sleeping with Mr. Kilburn. As Ms. Teague was listening to defendant talk to her on the phone, she could also hear his voice coming from somewhere outside her townhome. Ms. Teague believed defendant was standing on her front porch while talking to her on the phone. Ms. Teague's brother could also hear defendant's voice coming from outside the townhome. During the conversation, defendant accurately described the clothing that Mr. Kilburn was wearing, a fact that also suggested to Ms. Teague and her brother that defendant was somewhere close by.

As Ms. Teague was talking to defendant on the phone, several gunshots were fired nearby. Ms. Teague estimated the shots were fired "maybe two feet" away from her window. One of the bullets entered through Ms. Teague's window, just under the air conditioning unit, and penetrated the wall on the opposite side of the room. Ms. Teague's brother felt the bullet pass by him as it shot through the room.

When the police arrived, they found a fresh bullet hole under the air conditioning unit. The responding officer testified that based on his observations of the damage to the window, he believed that the shots had been fired from a wooded area approximately 20 to 25 feet from the townhome. Ms. Teague claimed the shots had been fired from a point closer to the townhome, such as from the front porch. The officer testified that the only way someone standing on the front porch of Ms. Teague's townhome could have fired the bullet into her air conditioning unit at that angle would have been if he were 15 feet tall. Based on the number of shots the witnesses heard, the officer concluded that the shots had been fired from a semi-automatic weapon. A search of the surrounding area, at night, revealed no shell casings.

On 16 July 2007, defendant was indicted for one count of injury to real property and one count of discharging a weapon into occupied property. A jury found defendant guilty of both charges. The trial court sentenced defendant to a presumptive-range sentence of 34 to 50 months imprisonment for the charge of discharging a weapon into occupied property followed by a consecutive term of 45 days imprisonment for the charge of injury to real property. Defendant timely appealed to this Court.

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[195 N.C. App. 697 (2009)]

I

[1] Defendant first argues that his conviction for injury to real property should be reversed because the evidence presented at trial varied fatally from the indictment. The indictment alleged that defendant damaged a window frame and wall that were the property of Ms. Teague. At trial, however, the evidence showed that Ms. Teague was only renting that property from Smith Homes. Defendant argues that this variance mandates dismissal of the charge against him.

To support a criminal prosecution and conviction, the criminal offense must be “sufficiently charged in a warrant or an indictment.” *State v. Stokes*, 274 N.C. 409, 411, 163 S.E.2d 770, 772 (1968). In order for a variance between the indictment and the evidence presented at trial to warrant reversal of a conviction, that variance must be material. *State v. Skinner*, 162 N.C. App. 434, 445, 590 S.E.2d 876, 885 (2004). “A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged.” *Id.* at 445-46, 590 S.E.2d at 885.

Although the North Carolina courts have not dealt with the specific instance in which an indictment charging a defendant with injury to real property identifies the lawful possessor as the actual owner of the property, they have addressed that issue in the context of a larceny prosecution. This Court has held that when an indictment for larceny incorrectly alleges that the lawful possessor of the stolen property was its owner, there is no fatal variance.

In *State v. Liddell*, 39 N.C. App. 373, 374, 250 S.E.2d 77, 78, *cert. denied*, 297 N.C. 178, 254 S.E.2d 36 (1979), the indictment charged the defendant with stealing the property of Lees-McRae College, but, at trial, the evidence showed that the stolen property actually belonged to a vending company and a food distributor. This Court held:

It is not always necessary that the indictment allege the actual owner. It is generally stated as the rule that no fatal variance exists when the indictment names an owner of the stolen property and the evidence discloses that that person, though not the owner, was in lawful possession of the property at the time of the offense.

Id. at 374-75, 250 S.E.2d at 78. The Court explained further:

We note that the purposes of requiring an indictment to allege the ownership of the stolen property have been served here. The requirements are intended to (1) inform defendant of the ele-

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ments of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial, and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense. We do not see how these purposes could have been better served had the indictments alleged ownership in [the vending company].

Id. at 375, 250 S.E.2d at 79 (internal citations and quotation marks omitted).

Since the Court's decision in *Liddell*, our appellate courts have repeatedly held that an indictment for larceny that mistakenly identifies the lawful possessor as the property owner is not a fatal variance mandating dismissal. *See, e.g., State v. Young*, 60 N.C. App. 705, 709-11, 299 S.E.2d 834, 837-38 (1983) (holding indictment not fatally variant when it charged defendant with larceny of various items alleged to be owned by specified person when evidence showed that stolen property belonged to that person's wife, because husband had a possessory interest in property of his wife); *State v. Holley*, 35 N.C. App. 64, 66-68, 239 S.E.2d 853, 855-56 (1978) (holding indictment not fatally variant when it charged defendant with larceny of gun alleged to be owned by specified woman when gun was personal property of woman's father, but she had lawful custody and possession of gun).

An indictment for injury to personal property, a crime similar to larceny, must also contain an allegation as to the ownership or possession of the property. This Court has previously addressed the requirements for indictments for both charges:

To convict a defendant of injury to personal property or larceny, the State must prove that the personal property was that "of another," i.e., someone other than the person or persons accused. *See* N.C. Gen. Stat. § 14-160 (2004) ("If any person shall wantonly and willfully injure the personal property of another he shall be guilty"); *In re Meaut*, 51 N.C. App. 153, 155, 275 S.E.2d 200, 201 (1981). Moreover, "an indictment for larceny must allege the owner or person in lawful possession of the stolen property." *State v. Downing*, 313 N.C. 164, 166, 326 S.E.2d 256, 258 (1985). *Thus, to be sufficient, an indictment for injury to personal property or larceny must allege the owner or person in lawful possession of the injured or stolen property.*

State v. Cave, 174 N.C. App. 580, 582, 621 S.E.2d 299, 301 (2005) (emphasis added). *See also State v. Price*, 170 N.C. App. 672, 673-74,

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613 S.E.2d 60, 62 (2005) (“Thus, to be sufficient, an indictment for injury to personal property or larceny must allege the owner or person in lawful possession of the injured or stolen property.”). Since this Court has previously held that both larceny and injury to personal property have the same requirement that the indictment allege ownership or lawful possession of the property, we think the Court’s reasoning in *Liddell*, addressing a larceny indictment, applies with equal force in the context of a prosecution for injury to personal property.

In this case, defendant was indicted for injury to *real* property under N.C. Gen. Stat. § 14-127 (2007), which provides that “[i]f any person shall willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a Class 1 misdemeanor.” While the language of this statute does not appear to require that an indictment for injury to real property contain any allegation at all regarding the owner or possessor of the property, our case law seems to indicate that such an allegation is in fact required. In *State v. Cooke*, 246 N.C. 518, 520, 98 S.E.2d 885, 887 (1957), while addressing the sufficiency of an indictment for trespass, our Supreme Court stated:

Where an interference with the possession of property is a crime, it is necessary to allege in the warrant or bill of indictment the rightful owner or possessor of the property, and the proof must correspond with the charge. If the rightful possession is in one other than the person named in the warrant or bill, there is a fatal variance.

This language tends to indicate that an indictment for injury to real property must contain an allegation of ownership as well.

Moreover, in *State v. Hicks*, 233 N.C. 31, 34, 62 S.E.2d 497, 499 (1950), *cert. denied*, 342 U.S. 831, 96 L. Ed. 629, 72 S. Ct. 56 (1951), the Court held that a variance between an indictment charging defendants with conspiracy to damage the real and personal property of the Jefferson Broadcasting Company and the evidence showing the transformer that defendants agreed to damage actually belonged to Duke Power Company was fatal to the State’s prosecution. The Court explained, without distinguishing between injury to real property and injury to personal property, that “[i]n indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal.” *Id.* (quoting *State v. Mason*, 35 N.C. 341, 342 (1852)).

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Therefore, as the Court's language in *Cooke* appears to require an allegation regarding ownership or possession for offenses involving criminal interference with property rights, and the Court in *Hicks* did not distinguish between injury to real property and injury to personal property with respect to the requirements for an indictment, we believe the indictment in this case was required to contain such an allegation. Nonetheless, because (1) this Court has held that the law regarding the sufficiency of indictments for larceny and injury to personal property is the same, and (2) the Supreme Court has not distinguished between indictments for injury to personal property and injury to real property, we conclude that *Liddell* should apply to indictments for injury to real property.

Defendant, however, relies on *Hicks* to support his argument that the indictment's mistaken identification of Ms. Teague as the property's owner is fatal. In *Hicks*, however, the evidence at trial established that the property at issue was enclosed by its own locked fence, and there was no dispute that the broadcasting company identified in the indictment had no right of access to the property. Thus, in *Hicks*, the evidence at trial established that the indictment had not named either the owner or a person in lawful possession of the property as required for a valid indictment for injury to property.

Here, Ms. Teague was the exclusive possessor of the property because she leased it from the property's owner, Smith Homes. Although she was not the owner of the townhome that was damaged, she was a tenant with lawful possession of the property. Under the *Liddell* line of authority, which we have concluded is applicable to an indictment for injury to real property, the indictment, by naming the lawful possessor of the property, was sufficient, and any variance did not warrant dismissal.

Our Court explained in *State v. Poole*, 154 N.C. App. 419, 423, 572 S.E.2d 433, 436 (2002) (internal citations omitted) (quoting *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981)), *cert. denied*, 356 N.C. 689, 578 S.E.2d 589 (2003), that "not every variance is sufficient to require the allowance of a motion to dismiss. It is only 'where the evidence tends to show the commission of an offense not charged in the indictment [that] there is a fatal variance between the allegations and the proof requiring dismissal.'" Here, we do not believe the evidence presented at trial showed the commission of an offense that was not charged in the indictment. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss.

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II

[2] Defendant also argues that the trial court erred in denying his motion to dismiss for insufficient evidence. “In making a determination as to whether a motion to dismiss for insufficiency of the evidence should be granted, the trial court must decide ‘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. Davis*, 130 N.C. App. 675, 678, 505 S.E.2d 138, 141 (1998) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). “If substantial evidence exists supporting defendant’s guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt.” *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 700 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230, 122 S. Ct. 1322 (2002).

Substantial evidence is defined as “evidence from which a rational finder of fact could find the fact to be proved beyond a reasonable doubt.” *Davis*, 130 N.C. App. at 678, 505 S.E.2d at 141. When ruling on a motion to dismiss, the trial court must consider all the evidence in the light most favorable to the State. *Id.* at 679, 505 S.E.2d at 141. “Any contradictions or discrepancies arising from the evidence are properly left 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). On appeal, the trial court’s decision as to whether there is substantial evidence is a “question of law,” *State v. Bumgarner*, 147 N.C. App. 409, 412, 556 S.E.2d 324, 327 (2001), that we review de novo.

Defendant does not challenge the sufficiency of the evidence to prove the elements of the offenses, but rather argues that the State presented insufficient evidence that he was the perpetrator of the crimes. The State, however, presented evidence that while Ms. Teague was having a phone conversation with defendant, immediately before the shooting, both Ms. Teague and her brother could hear defendant outside her house talking on the phone to her. In addition, during that conversation, defendant was able to describe specifically what Mr. Kilburn was wearing at that moment, suggesting that defendant could see the three individuals. This evidence, tending to prove that defendant was outside the townhome immediately before the shots were fired—together with evidence that defendant had previously been standing outside the house a few times a week, was jealous of Ms. Teague, and had engaged in domestic violence—is sufficient to permit a reasonable juror to find that defendant was the one who fired the shots into the house.

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Defendant contends, however, that Ms. Teague's testimony that the shots were fired from near the townhome mandates reversal because it would be "physically impossible" for Ms. Teague to have heard defendant talking to her on the phone outside her window if the shots were fired 20 to 25 feet away from the townhome, as the police officer testified. As the State points out, however, this evidence is not completely inconsistent—defendant could have spoken with Ms. Teague on the phone outside her window and then quickly moved to the wooded area before firing the shots at the townhome. Alternatively, the jury could decide that Ms. Teague did not accurately gauge defendant's location at the time the shots were fired.

Defendant's arguments depend upon drawing inferences from the evidence in his favor rather than, as required, in the State's favor. Further, while defendant presented evidence to contradict Ms. Teague's testimony, that evidence was for the jury to consider in weighing the credibility of Ms. Teague's testimony. We hold, therefore, that the trial court did not err in denying defendant's motion to dismiss.

No error.

Judges ROBERT C. HUNTER and ELMORE concur.

BEVERLY McNEELY, PLAINTIFF v. BOYD R. McNEELY, DEFENDANT

No. COA08-917

(Filed 17 March 2009)

1. Divorce— equitable distribution—value of property— mortgage payment—divisible property

The trial court did not err in finding the net value of a property in dispute in an equitable distribution action where a prior appeal had determined that there was sufficient evidence to support the net value found by the court, and the trial court adhered to the remand instructions when it found the amount paid by the husband from his funds toward the mortgage and classified the payment as divisible property.

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2. Divorce— equitable distribution—mortgage—marital debt

The trial court did not err in an equitable distribution action by concluding that a mortgage was a marital debt where the debt was a joint obligation incurred on entireties property two months before separation.

3. Divorce— equitable distribution—post-separation mortgage payment—divisible property

The trial court did not err in an equitable distribution action by classifying a post-separation mortgage payment as divisible property. N.C.G.S. § 50-20(b)(4)(d) (2007).

4. Divorce— equitable distribution—post-separation payment of debt—separate funds lent to business

The trial court did not abuse its discretion in an equitable distribution action in the way the husband was given credit for a post-separation payment to reduce a marital mortgage debt where the wife had lent her separate funds to the marital business and the parties's assets were not liquid.

Appeal by defendant from judgment entered 28 March 2008 by Judge Robert S. Cilley in Transylvania County District Court. Heard in the Court of Appeals 28 January 2008.

Adams Hendon Carson Crow & Saenger, P.A., by Joy McIver and Matthew S. Roberson, for plaintiff-appellee.

Donald H. Barton, P.C., by Donald H. Barton, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant Boyd R. McNeely appeals a modified judgment of equitable distribution entered 28 March 2008. For reasons discussed herein, we affirm.

I. Background

Plaintiff Beverly McNeely (“wife”) and defendant Boyd R. McNeely (“husband”) were married 20 October 2001, separated 7 June 2003, and have since divorced. This appeal primarily involves characterization of a post-separation mortgage payment made by husband on an 8.627-acre tract of jointly owned land located on Country Club Road in Brevard, North Carolina (“the Country Club property”). Both parties purchased the Country Club property as tenants by

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entireties for \$76,900.00 in April 2003, approximately two months prior to their separation. Simultaneously with the purchase, the parties obtained a mortgage securing the joint obligation on the Country Club property. In August of 2005, more than two years after the parties' separation, husband sold his separately owned trailer park property for \$203,000.00 and used \$75,644.00 of the proceeds to pay off the mortgage on the Country Club property.

A. Initial Hearing

This matter was initially heard in Transylvania County District Court on 27-28 April 2006. The trial court entered its original judgment of equitable distribution ("original judgment") on 25 August 2006. The original judgment found that husband had made a payment on the mortgage after the parties' separation. However, the original judgment did not contain any sufficiently specific findings regarding the amount husband had paid or the mortgage's impact on the date of separation valuation. Despite this marital indebtedness, the trial court found the Country Club property's net value on the date of separation to be \$76,900.00. The trial court found that a distribution in the proportion of 60.43% of the marital estate to wife and 39.57% to husband was equitable, and divided the assets accordingly.

B. First Appeal

Husband's previous appeal contended that the trial court erred in finding that the net value of the Country Club property on the date of separation was \$76,900.00. On this issue, we remanded the matter to the trial court to determine what credit, if any, the husband should receive for reduction of debt on marital property. *McNeely v. McNeely*, 2008 N.C. App. LEXIS 217, 2008 WL 304922 (N.C. App. Feb. 5, 2008) (No. COA07-483) ("*McNeely I*"). We explained that

husband made loan payments on the mortgage after the date of separation, although "how much he paid, and how much was interest, [wa]s not in evidence." . . . "[I]t would appear that [husband] should be credited with at least the amount by which he decreased the principal owed on the marital [Country Club property]."

Id. (citations omitted).

C. Hearing After Remand

On remand, husband proved that, post-separation, he extinguished the \$75,644.00 mortgage on the Country Club property, from

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his separate funds. On 28 March 2008, the trial court entered a modified judgment of equitable distribution (“modified judgment”). Consistent with our mandate, the court properly awarded \$11,084.48 in escrow funds to husband as his separate property. The court also awarded husband credit for the post-separation payment on the Country Club property. The subsequent judgment of the trial court explains its methodology in the following findings:

5. There exists a tract of land on Country Club Road The parties concede it is marital. It had a gross fair market value on the date of separation of \$76,900 which was its purchase price in April, 2003. . . . Husband sold his separate properties on August 2, 2005, and paid off the loan, thus freeing this parcel of encumbrance. *Husband made the loan payments after the date of separation, and the effect of those payments was to eliminate a marital debt to the extent of \$75,644.* The court finds that the net value of the 8.627 acres on the date of separation was \$76,900.

. . . .

14. In addition to having various items of personalty at the time of this marriage, Wife had a quantity of money. Out of that pre-marital money, over the course of the marriage, Wife deposited a total of \$178,710 into the McNeely Landscaping account, such deposits being each duly noted as “Loan from Beverly.” No check is ever shown as explicitly repaying any such loan Because [it] is not possible to point to any specific asset and call it the proceeds of the loans, the court considers the fact of the money deposited as “Loan from Beverly” as a distributional factor.

15. [B]ecause marital estate [is] so heavily concentrated in large, non-liquid assets, and because a distribution in kind is practical, the court’s distribution will not necessarily follow what the parties recommended.

16. Because of the weight that the court has given the distributional factor discussed in finding 14, an equal distribution of the net marital estate is not equitable. . . . [T]he distributional factor discussed in finding 14 persuades the court that Wife’s portion should be about \$178,700 higher than Husband’s. In fact (as an examination of the distribution set forth below will confirm), the difference is not quite that much, because of other distributional factors. . . . [This is] how the court has dealt with Husband’s payment of the deed of trust[:] The court subtracted the debt from

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the marital estate, which has the effect of spreading the debt equally. The court then assigned Husband's payments on that debt (as divisible property) entirely to Husband, at their negative value, thus giving him sole credit for their payment, and in effect debiting Wife's portion by the part of the marital debt that she theoretically should have been responsible for.

(Emphasis added.) Husband appeals the modified judgment.

II. Standard of Review

The trial court has discretion in distributing marital property and "the exercise of that discretion will not be disturbed in the absence of clear abuse." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986). "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).

III. Issues

In this appeal, husband contends that the trial court erred in its modified judgment by failing to properly credit him with the sum of \$75,644.00 after receiving evidence of his post-separation mortgage payment on the Country Club property. Husband argues that the trial court should have either distributed additional marital assets to him valued at \$75,644.00 or returned his separate funds of \$75,644.00.

Husband specifically assigns error to the findings of fact and conclusions of law in the modified judgment which provide that: (1) the net value of the Country Club property on the date of separation was \$76,900.00; (2) the mortgage on the Country Club property was a marital debt; and (3) husband's post-separation payment on the mortgage constituted divisible property with a negative value of \$75,644.00. Husband also asserts that, in light of his post-separation mortgage payment, from his separate funds, the trial court abused its discretion when it awarded wife three of the four marital real properties. We disagree.

IV. Modified Judgment of Equitable Distribution

N.C. Gen. Stat. § 50-20 provides that, in an equitable distribution proceeding, the trial court "shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the par-

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ties[.]” N.C. Gen. Stat. § 50-20(a) (2007). Marital property is restricted to property acquired before the date of separation. N.C. Gen. Stat. § 50-20(b)(1). In an effort to equitably account for post-separation events, N.C. Gen. Stat. § 50-20(b) was amended in 1997 to include the category of “divisible” property. *See* 1997 N.C. Sess. Laws ch. 302, § 1; N.C. Gen. Stat. § 50-20(b). The definition of divisible property, pursuant to N.C. Gen. Stat. § 50-20(b), was amended in 2002 to include increases and decreases in marital debt. *See* 2002 N.C. Sess. Laws ch. 159, § 33.5; N.C. Gen. Stat. § 50-20(b)(4).

A. *Net Value*

[1] Husband assigns error to the trial court’s finding that the net value of the Country Club property on the date of separation was \$76,900.00. He argues that the net value should be zero because the property was encumbered by a mortgage. “Prior to ordering an equitable distribution of marital property, the trial judge is required to calculate the net fair market value of the property.” *Carlson v. Carlson*, 127 N.C. App. 87, 91, 487 S.E.2d 784, 786, *disc. reviews denied*, 347 N.C. 396, 494 S.E.2d 407 (1997). The trial court calculates the net fair market value of a property, by reducing its fair market value by the value of any debts that are attached to the property. *Id.*

“In appellate 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). “This Court is not here to second-guess values of marital and separate 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).

In *McNeely I*, we had already decided that there was sufficient evidence to support the net value of \$76,900.00. 2008 N.C. App. LEXIS 217, 2008 WL 304922. In our determination, we explained that:

Without copies of the mortgage documents in the record on appeal from April 2003 (when the mortgage was taken out by the parties) or August 2005 (when the mortgage was satisfied by husband), this Court cannot contradict the trial court’s finding with respect to the value of the Country Club property, rather than reduce[] in net value to zero on the date of separation, as husband contends. In the absence of clear abuse of discretion, we must find as conclusive the trial court’s findings of fact regarding the

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value of the marital Country Club property, “even if there is also evidence supporting a finding otherwise.”

Id. (citations omitted). After affirming the net value of \$76,900.00, this Court remanded the case so that the trial court could determine the amount to be credited to husband for reducing the debt on the Country Club property. *Id.* On remand, it found that husband paid \$75,644.00 from his separate funds toward the mortgage and classified the payment as divisible property. Given that the trial court adhered to our instructions, this assignment of error is overruled.

B. *Classification of Debt*

[2] Husband also assigns error to the trial court’s conclusion that the mortgage on the Country Club property was a marital debt. “[A] marital debt is defined as a debt incurred during the marriage for the joint benefit of the parties.” *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987). Here, the debt was a joint obligation incurred on entireties’ property, two months prior to the date of separation. We overrule this assignment of error.

C. *Classification as Divisible Property*

[3] Husband also contends that the trial court erred in classifying his post-separation mortgage payment as divisible property. The definition of divisible property, pursuant to N.C. Gen. Stat. § 50-20(b)(4)(d), was amended in 2002, to include “*decreases in marital debt and financing charges and interest related to marital debt.*” See N.C. Sess. Laws ch. 159, § 33.5; N.C. § 50-20(b)(4)(d) (2007) (emphasis added). As a result of this amendment, the trial courts were directed to classify all post-separation payments of a marital debt, made by either spouse after 11 October 2006, as divisible property. See *Warren v. Warren*, 175 N.C. App. 509, 517, 623 S.E.2d 800, 805 (2006).

In the present case, husband decreased the marital debt by \$75,644.00 in August 2005 by paying the mortgage on the Country Club property. The trial court properly classified this payment as divisible property, and therefore, we overrule this assignment of error.

D. *Credit for Post-Separation Payments*

[4] Husband argues that the trial court erred by failing to properly grant him credit for the payment he made to decrease the mortgage debt. He argues that, in light of his post-separation payment, he should have either been credited with \$75,644.00 in additional marital assets, such as the Country Club property, or have been

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returned his \$75,644.00. After careful review, we do not find an abuse of discretion.

The equitable distribution statute provides that the trial court should divide the marital property equally “by using net value of marital property and net value of divisible property[.]” N.C. Gen. Stat. § 50-20(c). However, “[i]f the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably.” *Id.* When making an unequal distribution, the trial court must make findings to indicate that it has considered the distributional factors listed in N.C. Gen. Stat. § 50-20(c), which includes “[a]ny other factor which the court finds to be just and proper.” N.C. Gen. Stat. § 50-20(c)(12); see *Collins v. Collins*, 125 N.C. App. 113, 117, 479 S.E.2d 240, 242, *disc. review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997).

In its original judgment, the parties’ marital estate was valued at approximately \$458,375.00. The trial court awarded wife approximately 60.43% of the estate, valued at \$276,984.00, and husband received the remaining 39.57% of the estate, valued at approximately \$181,391.00.¹ At the time, the trial court did not have evidence of the amount which husband paid toward the Country Club property mortgage and therefore, assigned the Country Club property a net value of \$76,900.00 and awarded it to wife.

In *McNeely I*, we determined that \$11,084.48 of funds previously awarded to wife as marital property was the separate property of husband. 2008 N.C. App. LEXIS 217, 2008 WL 304922. This reduced the value of the marital estate to \$447,291.00 and wife’s award to \$265,900.00.

In its modified judgment, in accordance with our instructions in *McNeely I*, the trial court made a finding of fact that husband had contributed \$75,644.00 of his separate funds to pay off the Country Club mortgage. Furthermore, it explained in detail how it granted husband credit for his payment. Next, the trial court subtracted the amount of \$75,644.00 from the value of the marital estate, so that the mortgage debt could be spread equally between both parties, which resulted in a marital estate having a value of \$371,647.00.

The trial court credited husband for his contribution toward the Country Club property mortgage by subtracting \$75,644.00 from his award in order to give him sole credit for satisfying the marital debt.

1. All figures are rounded.

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As a result, the value of husband's award was reduced to \$105,747.00, which was \$160,153.00 less than wife's award, valued at \$265,900.00.

To support its division, the trial court found that over the course of the marriage, wife had lent \$178,710.00 of her separate funds to the marital business, McNeely Landscaping, and that there was no evidence that she had been repaid. The trial court considered this loan as a distributional factor because it "is not possible to point to any specific asset and call it the proceeds of the loans[.]" Due to the non-liquid nature of the parties' assets and the amount of wife's loan, the trial court determined that wife should be awarded \$178,700.00 more than husband. Therefore, it would not have been equitable for the trial court to award husband any additional assets or funds. Because the trial court made sufficient findings of fact to consider wife's loan as a distributional factor, we find no abuse of discretion. Having concluded that the trial court correctly classified husband's post-separation payment as divisible property, granted husband credit for the payment, and made sufficient findings of fact reflecting its distribution decision, we overrule the assignments of error.

V. Conclusion

There being no abuse of discretion in the division of the parties' marital estate and debt, the modified judgment of equitable distribution is affirmed.

Affirmed.

Judges McGEE and JACKSON concur.

C. WAYNE CRAWFORD AND LYNN P. CRAWFORD, PLAINTIFFS v. COLON S. MINTZ, JR., WILLIAM R. OWENS, AND BFD PROPERTIES, INC. D/B/A RE/MAX PROPERTY ASSOCIATES, DEFENDANTS

No. COA07-141-2

(Filed 17 March 2009)

1. Real Property— erroneous listing—negligence action—instructions on contributory negligence denied

There was no likelihood that a failure to instruct on contributory negligence as requested misled the jury in an action arising from an erroneous real estate listing. The court instructed the

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jury on negligent misrepresentation, so that the jury was required to find that plaintiffs had exercised due care and were not contributorily negligent in order to decide the issue of negligent misrepresentation for plaintiffs.

2. Appeal and Error— preservation of issues—failure to object at trial

Defendants' failure to object at trial precluded them from raising on appeal the question of whether the trial court erred by refusing to re-instruct the jury on the elements of negligent misrepresentation.

3. Appeal and Error— argument on appeal—inadequately presented

An argument on appeal was dismissed where it consisted of one paragraph, about a third of a page, which contained no standard of review and no citations.

4. Costs— attorney fees—erroneous real estate listing—negligence action

The trial court erred by granting defendants' motion for partial summary judgment on attorney fees in a negligent misrepresentation action arising from an erroneous real estate listing. The decision to deny attorney fees was based on a case that involved breach of contract, not negligent misrepresentation, and plaintiffs were not barred as a matter of law from recovering attorney fees pursuant to N.C.G.S. § 6-21.1.

Appeal by Plaintiffs from order entered 25 July 2003 by Judge Alice Stubbs in District Court, Wake County; from order entered 29 December 2004 by Judge Jane Gray in District Court, Wake County; and from order entered 11 May 2006 by Judge James R. Fullwood in District Court, Wake County. Appeal by Defendants from order entered 11 May 2006 *nunc pro tunc* 25 July 2005 by Judge James R. Fullwood in District Court, Wake County; and from judgment entered 11 May 2006 by Judge James R. Fullwood in District Court, Wake County. Heard in the Court of Appeals originally on 12 September 2007, and opinion filed on 4 December 2007. Remanded to the Court of Appeals for consideration of the remaining assignments of error by order of the North Carolina Supreme Court on 12 December 2008.

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Everett, Gaskins, Hancock & Stevens, LLP, by E.D. Gaskins, Jr. and Michael J. Tadych, for Plaintiffs.

McDaniel & Anderson, LLP, by John M. Kirby and William E. Anderson, for Defendants.

McGEE, Judge.

This case arises from a real property transaction between Plaintiffs, as the purchasers, and Thomas and Lois Proctor (the Proctors), as the sellers. The Proctors hired Colon S. Mintz, Jr. (Mintz), a real estate agent with BFD Properties, Inc., d/b/a Re/Max Property Associates (Re/Max), to list their house (the property) for sale. William R. Owens was the supervising broker in charge of the Re/Max office in which Mintz worked.

The Multiple Listing Service (MLS) is a service used by real estate agents and brokers to list and obtain information about houses for sale. Mintz, as part of his duties as the Proctors' agent, entered information into the MLS stating that the property was connected to the city sewer system when, in fact, the property was connected to a septic system. Plaintiffs' real estate agent obtained a copy of the MLS report, which included the incorrect statement that the property was connected to the city sewer system, and shared the report with Plaintiffs. Plaintiffs ultimately purchased the property in March of 1998. In March of 2000, after raw sewage began emerging from the property's lawn, Plaintiffs discovered that the house was serviced by a septic tank, and was not connected to the city sewer system. Plaintiffs paid to have the septic system serviced on two occasions and later paid to have the property connected to the city sewer system.

Plaintiffs filed a claim for negligent misrepresentation against the Proctors. Plaintiffs also filed a claim for negligent misrepresentation against Mintz, Owens, and Re/Max, (Defendants) on 13 November 2001, alleging that Plaintiffs reasonably relied upon the statement in the MLS that the property was connected to the city sewer system. Plaintiffs also filed a claim against Defendants for unfair and deceptive trade practices. Plaintiffs' complaint included a request for attorneys' fees. The trial court granted summary judgment in favor of Defendants on the question of attorneys' fees by order entered 25 July 2003. Plaintiffs dismissed their claim against the Proctors on 29 October 2004. The trial court granted Defendants' summary judgment motion as to Plaintiffs' unfair and deceptive trade practices claim by

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order entered 29 December 2004. Plaintiffs then proceeded to trial on their remaining negligent misrepresentation claim against Defendants on 31 October 2005. At the close of Plaintiffs' evidence, Defendants moved for a directed verdict. The trial court denied Defendants' motion. The jury found Defendants liable to Plaintiffs in the amount of \$7,278.00, a sum roughly equal to Plaintiffs' cost of repairing the septic tank and connecting the property to the city sewer system.

Plaintiffs renewed their motion for attorneys' fees, but the trial court denied Plaintiffs' motion. Plaintiffs appealed the trial court's grant of summary judgment to Defendants on the issue of attorneys' fees, and the trial court's denial of Plaintiffs' renewed motion for attorneys' fees. Defendants appealed the final judgment against them. This Court, by a divided panel, reversed the trial court's denial of Defendants' motion for a directed verdict, holding that Plaintiffs had failed to satisfy a requisite element of the charge of negligent misrepresentation. *Crawford v. Mintz*, 187 N.C. App. 378, 653 S.E.2d 222 (2007) (*Crawford I*). Our Supreme Court reversed our decision in *Crawford I*, adopting Judge Steelman's dissent in that opinion, and remanded to this Court to decide the remaining issues on appeal. *Crawford v. Mintz*, 362 N.C. 666, 669 S.E.2d 738 (2008) (*Crawford II*). Additional facts may be found in the *Crawford I* and *Crawford II* opinions.

Defendants' Appeal

[1] Defendants' first and second arguments on appeal were decided against them in *Crawford II*. In Defendants' third argument, they contend that the trial court erred in refusing to submit the issue of contributory negligence to the jury. We disagree.

To prevail on this issue, the plaintiff must demonstrate that (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury. *Faeber v. E. C. T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972) (upholding instruction on grounds that it "sufficiently covered the meaning of the terms" that defendant requested the trial court to define in its charge to jury).

When a request is made for a specific jury instruction that is correct as a matter of law and is supported by the evidence, the trial

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court is required to give an instruction expressing “at least the substance of the requested instruction.” On appeal, this Court “must consider and review the challenged instructions in their entirety; it cannot dissect and examine them in fragments,” in order to determine if the court’s instruction provided “the substance of the instruction requested[.]”

Liborio v. King, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274-75 (2002) (citations omitted).

Where a “person having the capacity to exercise ordinary care . . . fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under . . . similar circumstances to avoid injury.” In North Carolina, a finding of contributory negligence poses a complete bar to a plaintiff’s negligence claim.

Swain v. Preston Falls East, L.L.C., 156 N.C. App. 357, 361, 576 S.E.2d 699, 702 (2003) (citations omitted).

In the case before us, the trial court instructed the jury that in order to find for Plaintiffs, the jury must determine that Plaintiffs proved they actually relied upon false information supplied by Defendants, and that Plaintiffs’ actual reliance was justifiable. The trial court further instructed that:

Reliance is justifiable if under the same or similar circumstances a reasonable person, in the exercise of ordinary care, would not have discovered that the information was false or would have relied on the false information. In this case, [P]laintiffs’ reliance would be justified only if they could not have discovered the truth about the property’s condition by exercise of reasonable diligence or if they were induced to forgo additional investigation of the property by [Defendants’ actions].

“To establish contributory negligence, a defendant must demonstrate: ‘(1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff’s negligence and the injury.’ ” *Seay v. Snyder*, 181 N.C. App. 248, 251, 638 S.E.2d 584, 587 (2007) (citation omitted). By the trial court’s instruction on negligent misrepresentation, it required the jury to find that Plaintiffs had proved they exercised due care in relying on Defendants’ representation, and that Plaintiffs could not have discovered that the property was not con-

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nected to the city sewer system through the exercise of due care. This instruction therefore required the jury to make a determination that Plaintiffs were not contributorily negligent in order for the jury to decide the issue of negligent misrepresentation in Plaintiffs' favor. Further, unlike an instruction on contributory negligence, where the burden of proof would have been on Defendants, the burden of proof for negligent misrepresentation remained with Plaintiffs.

The trial court explained it was following reasoning in the North Carolina Pattern Jury Instructions stating that giving instructions for both negligent misrepresentation and contributory negligence could result in an inconsistent verdict. A finding by the jury that a defendant had committed negligent misrepresentation would necessarily indicate that the plaintiff had not been contributorily negligent, yet the jury could then make a separate determination that the plaintiff was contributorily negligent. N.C.P.I.-Civil 800.10, note 4 (May 1992). We find the above reasoning in the North Carolina Pattern Jury Instructions persuasive.

In light of the trial court's instruction on negligent misrepresentation, which placed the burden on Plaintiffs to prove they exercised due care in inspecting the property before closing, we hold that the instruction given, considered in its entirety, did not fail to encompass the substance of the law requested, and that there is no likelihood that the failure to instruct on contributory negligence misled the jury. *Liborio*, 150 N.C. App. at 534, 564 S.E.2d at 274-75. In addition, Defendants failed to argue in their brief that the trial court's decision not to instruct the jury on contributory negligence likely misled the jury. Defendants' argument is without merit.

[2] In Defendants' fourth argument, they contend the trial court erred in refusing to re-instruct the jury on the elements of negligent misrepresentation. We disagree.

During its deliberations, the jury sent the trial court a note asking: "Can the jury have a copy of the six elements or the list of jury instructions?" The trial court decided it would not give the jury a copy of the jury instructions, and neither Plaintiffs nor Defendants objected. The trial court then decided it would simply answer the jury's question in the negative. Plaintiffs, Defendants, and the trial court all agreed that if the jury specifically asked to be re-instructed on negligent misrepresentation, the trial court would do so. Defendants never objected to the trial court's decision in response to the jury's question, and the jury never asked to have the instruc-

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tion on negligent misrepresentation read to them again. Because Defendants did not raise this issue at trial, they are precluded from raising it for the first time on appeal, and we dismiss their argument. N.C.R. App. P. 10(b)(1); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 363-64 (2008).

[3] Defendant's fifth argument violates our rules of appellate procedure. It consists of one paragraph, approximately one-third of a page in length, which contains no standard of review, and no citations in support of Defendants' argument; in fact, no citations at all. This argument is dismissed. N.C.R. App. P. 28(b)(6); *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 367.

Plaintiffs' Appeal

[4] In Plaintiffs' first argument, they contend that the trial court erred in granting Defendants' motion for partial summary judgment, which precluded Plaintiffs from recovering attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1. We agree.

In any . . . property damage suit . . . instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars (\$10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C. Gen. Stat. § 6-21.1 (2008).

The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that [it] is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973) (citations omitted).

The order granting Defendants' motion for partial summary judgment was entered by Judge Alice Stubbs on 25 July 2003. Following

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the jury verdict in Plaintiffs' favor on the issue of negligent misrepresentation, Plaintiffs renewed their motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.1 on 18 November 2005. Judge Fullwood, the trial judge, denied Plaintiffs' renewed motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.1 on 11 May 2006, stating that he was "barred or precluded from considering Plaintiffs' Motion for Attorney fees by the Order entered in this action by Judge Stubbs[.]"

Though Judge Stubbs' order does not state the specific basis for her ruling that Plaintiffs' motion for attorneys' fees should be denied as a matter of law, the record indicates that Judge Stubbs found *Hicks v. Clegg's Termite & Pest Control, Inc.*, 132 N.C. App. 383, 512 S.E.2d 85 (1999), dispositive. *Hicks* was a contract case in which our Court held that N.C. Gen. Stat. § 6-21.1 did not apply to contract cases, even when a breach of contract may have led to property damage. *Id.* The case before us is not a contract case, but a negligence case based upon negligent misrepresentation. See *Whitley v. Durham*, 256 N.C. 106, 122 S.E.2d 784 (1961); *Stanford v. Owens*, 46 N.C. App. 388, 395, 265 S.E.2d 617, 622 (1980). We hold that the plain language of the statute allows the trial court, in its discretion, to award attorneys' fees in negligence cases resulting in property damage where the award is \$10,000.00 or less. It was error to grant Defendants' motion for partial summary judgment, as Plaintiffs were not barred as a matter of law from recovering attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.1. We remand to the trial court for consideration of Plaintiffs' renewed motion for attorneys' fees, considering all relevant factors. See *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999).

In light of our holding, we do not address Plaintiffs' second argument on appeal.

Affirmed in part, reversed and remanded in part.

Judges ELMORE and STEELMAN concur.

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NORTH CAROLINA BAPTIST HOSPITAL, PLAINTIFF v. NOVANT HEALTH, INC. AND FORSYTH MEMORIAL HOSPITAL, INC. D/B/A FORSYTH MEDICAL CENTER, DEFENDANTS

No. COA08-747

(Filed 17 March 2009)

Hospitals and Other Medical Facilities— certificate of need— noncompetitive application—violation of Settlement Agreement—injunction

The trial court did not err by granting a preliminary injunction preventing defendant hospital from challenging or opposing plaintiff hospital's application for a certificate of need (CON) to build a medical facility in violation of a Settlement Agreement providing that the two hospitals would not challenge each other's future noncompetitive CON applications where plaintiff's present CON application is noncompetitive because defendant did not file an application for a competing CON in the same review period, and plaintiff showed that it would suffer immediate or irreparable harm if defendant is permitted to challenge its present CON application in that the parties agreed in their Settlement Agreement that a breach thereof would result in irreparable harm requiring injunctive relief.

Appeal by defendants from judgment entered 25 April 2008 by Judge Mark E. Klass in Davie County Superior Court. Heard in the Court of Appeals 20 November 2008.

Kilpatrick Stockton, LLP, by James H. Kelly, Jr., Adam H. Charnes, and Richard D. Dietz, for plaintiff-appellee.

Martin & Van Hoy, LLP, by Henry P. Van Hoy, II, for Amici Curiae Davie County and the Towns of Mocksville, Bermuda Run, and Cooleemee.

Nelson Mullins Riley & Scarborough, LLP, by Noah H. Huffstetter, III, Denise M. Gunter, Wallace C. Hollowell, III, and Elizabeth B. Frock, for defendants-appellants.

STEELMAN, Judge.

Where the trial court correctly concluded that plaintiff had shown a likelihood of success on the merits of its claim that defendants breached the parties' Agreement, and that plaintiff would suffer

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immediate and irreparable injury if a preliminary injunction were not entered, the court did not err in issuing the preliminary injunction.

I. Factual and Procedural Background

Plaintiff-appellee North Carolina Baptist Hospital (“Baptist”) and defendants-appellants Novant Health, Inc. and Forsyth Memorial Hospital, Inc. (collectively referred to as “Novant”) are major medical providers in the Piedmont Triad area of North Carolina.

Under North Carolina state law, a healthcare provider must obtain a Certificate of Need (“CON”) from the State Department of Health and Human Services (“DHHS”) prior to expanding or replacing its existing medical services. *See* N.C. Gen. Stat. §§ 131E-175, *et seq.* (2007). When a provider applies for a CON, competitors are permitted to submit comments opposing the application and seek to intervene in the administrative review process.

Under the CON statute, DHHS is required to establish specific review periods and filing deadlines for CON applications. *See* N.C. Gen. Stat. § 131E-182(a) (2007). DHHS must review competitive applications filed during the same review period at the same time. *See id.* Applications are considered competitive “if they, in whole or in part, are for the same or similar services and the agency determines that the approval of one or more of the applications may result in the denial of another application reviewed in the same review period.” 10A N.C. Admin. Code § 14C.0202(f) (2008). When DHHS determines that two applications are “competitive,” it sends official notice to the respective parties.

Baptist and Novant provide similar medical services to the citizens of Forsyth, Davie, Stokes, Yadkin, Davidson, Iredell, Surry, or Wilkes Counties and the surrounding areas. Effective 3 July 2006, Baptist and Novant entered into a Settlement Agreement (“Agreement”) in order to resolve a number of disputes pending between them involving CON applications and to provide a mechanism for resolution of future disputes “in a way that enables the parties to focus their respective efforts and energies on providing vital health care services to the citizens . . .” Specifically, they agreed “not to challenge or oppose in any way” the following projects: (1) 50 bed satellite hospital in Kernersville (Novant); (2) Breast MRI Scanner (Novant); (3) Addition of 51 general acute care beds (Baptist); (4) Extremity MRI (Baptist); and (5) ED/ICU Tower (Baptist). The Agreement further provided that Baptist and Novant would not challenge each other’s

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future noncompetitive CON applications, but would remain free to challenge each other's competitive applications.

On 17 September 2007, both Baptist and Novant filed CON applications with DHHS. Baptist sought to replace the Davie County Hospital with a new eighty-one-bed hospital to be located in Bermuda Run ("Davie 1"). Novant sought to relocate beds from two of its hospitals in Winston-Salem to establish a new Medical Park Clemmons Hospital in Clemmons ("Clemmons 1"). Although the projects were located in different counties, the proposed locations were only four miles apart. DHHS determined that the applications were competitive, and each party challenged and opposed the other party's 17 September application, as permitted by the Agreement. Both applications were denied by DHHS on 27 February 2008, and both parties appealed the denial of their respective applications.

On 17 March 2008, Baptist filed two new applications, which were reviewed during the 1 April 2008 review period ("Davie 2" and "Davie 3"). The Davie 2 application was for a fifty-bed replacement hospital in Davie County. The Davie 3 application, which included obstetrics services, was withdrawn by Baptist on 24 March 2008. Novant did not file a CON application during this review period. DHHS determined that Baptist's application was noncompetitive. Baptist requested that, pursuant to the terms of the Agreement, Novant submit a no-contest letter to DHHS, stating that it would not challenge the Davie 2 application. Novant refused to submit this letter and instead informed Baptist that it intended to challenge and oppose Baptist's application. Baptist brought an action in Davie County Superior Court against Novant alleging that Novant was in breach of the Agreement. As a portion of the relief sought in this action, Baptist requested a preliminary injunction to enjoin Novant from challenging the Davie 2 application. Following a hearing on 22 April 2008, the trial court granted Baptist a preliminary injunction prohibiting Novant from challenging Davie 2 pending a trial on the merits. Novant appealed and filed a petition for writ of *supersedeas* and motion for temporary stay in the Court of Appeals, seeking to stay the trial court's 25 April order. This Court allowed Novant's petition for writ of *supersedeas* and stayed the trial court's preliminary injunction on 1 May 2008. Baptist appealed this stay by filing a petition for writ of *certiorari* with the North Carolina Supreme Court. This petition was denied on 13 May 2008.

On 28 August 2008, DHHS conditionally approved Davie 2.

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II. Preliminary Injunction

In its sole argument on appeal, Novant contends that the trial court erred by granting a preliminary injunction preventing it from challenging or opposing Baptist's 17 March 2008 CON application. We disagree.

Standard of Review—Preliminary Injunction

A preliminary injunction is an interlocutory injunction which restrains a party pending trial on the merits. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983); N.C. Gen. Stat. § 1A-1, Rule 65 (2007). A preliminary injunction will be granted

(1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

A.E.P. Industries at 401, 302 S.E.2d at 759-60 (quotation and citations omitted, emphasis in original). "[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *Id.* at 402, 302 S.E.2d at 760 (citations omitted).

A. Likelihood of Success on the Merits

Novant first contends that the preliminary injunction was improperly granted on the grounds that Baptist did not show that it was likely to succeed on the merits of its claim that Novant breached the Agreement.

Definition of "Competitive Application"

The central issue in this case is the interpretation of the definition of "competitive applications" in the parties' Agreement, which reads as follows:

"Competitive Applications" shall mean two or more Certificate of Need applications by the parties to this Agreement or their Affiliates, that, in whole or in part, are for the same or similar equipment, facilities or services and with respect to which the North Carolina Department of Health and Human Services determines that the approval of one or more of the applications may result in the denial of the other party's application *received in the same review period*. (emphasis added)

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The definition adopted by DHHS in its agency regulations provides that “[a]pplications are competitive if they, in whole or in part, are for the same or similar services and the agency determines that the approval of one or more of the applications may result in the denial of another application reviewed in the same review period.” 10A N.C. Admin. Code § 14C.0202(f) (2008).

Baptist contends that the definition of competitive application contained in the parties’ Agreement is substantively identical to the definition adopted by DHHS. Baptist further contends that the correct interpretation of these two definitions is that, in order to be considered competitive, two CON applications must be (1) filed in the same review period and (2) determined by DHHS to be competitive. Baptist argues that, since Novant did not file an application during the 1 April 2008 review period, and since DHHS has determined Davie 2 to be noncompetitive with any other application, Davie 2 does not meet the definition of competitive application.

Novant contends that the proper interpretation of the parties’ definition in the Agreement is one by which, if any of the applications filed by the parties at any time have been determined to be competitive, then all of the applications for the “same or similar equipment, facilities or services” are to be competitive. Under this interpretation, Novant asserts that Davie 2 is competitive with its Clemmons 1 application, because the two applications are for the same or similar services. Novant asserts that there is no requirement that the applications for the same or similar services be filed in the same review period.

We hold that the clear and unequivocal language contained in the Agreement provided that, for applications to be competitive, they must be “received in the same review period.” We decline Novant’s request that we disregard this provision in order to construe the Agreement in the manner preferred by Novant. *See McCain v. Ins. Co.*, 190 N.C. 549, 551, 130 S.E. 186, 187 (1925) (“Rules of construction are only aids in interpreting contracts that are either ambiguous or not clearly plain in meaning, either from the terms of the contract itself, or from the facts to which it is to be applied.”). Novant did not file an application in the same review period as Baptist filed Davie 2, and DHHS determined Davie 2 to be a noncompetitive application. Since Davie 2 was not a competitive application, Novant was barred from opposing it. Thus, the trial court correctly concluded that there was a likelihood that Novant breached the Agreement by refusing to submit a no-contest letter to DHHS, in violation of the Agreement.

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People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.

Blaylock Grading Co., LLP v. Smith, 189 N.C. App. 508, 511, 658 S.E.2d 680, 682 (2008) (quoting *Gas House, Inc. v. Southern Bell Telephone & Telegraph Company*, 289 N.C. 175, 182, 221 S.E.2d 499, 504 (1976), *overruled on other grounds by State ex. rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 307 N.C. 541, 299 S.E.2d 763 (1983)).

We further note that the parties to this agreement are not neophytes in the area of healthcare law. Our courts are loath to intervene in contractual relationships based upon public policy considerations when the parties “are sophisticated, professional parties who conducted business at arms’ length, and the ‘result’ of the contract does not elicit a ‘profound sense of injustice.’” *Blaylock* at 511, 658 S.E.2d at 683 (quotation omitted).

B. Irreparable Harm to Baptist

Novant next contends that the preliminary injunction was improperly granted on the grounds that Baptist did not show that it would suffer immediate or irreparable harm if Novant was permitted to challenge its Davie 2 application.

The Agreement provides that “[e]ach party hereto acknowledges that it has no adequate means to protect its rights under this Settlement Agreement other than by securing an injunction (a court order prohibiting a party from violating this Settlement Agreement).”

This question is controlled by the Supreme Court’s holding in *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983). In *A.E.P. Industries*, the contract at issue contained nearly identical language to the language used in the parties’ Agreement. The Supreme Court held that the contractual statement was “evidence of the inadequacy of money damages” and was thus suffi-

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cient to show “irreparable injury.” *Id.* at 406-07, 302 S.E.2d at 762-63. The Court further held that

where the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff; where no “legal” (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation.

Id. at 410, 302 S.E.2d at 764.

In the instant case, the parties agreed in the Agreement that a breach would result in irreparable harm requiring injunctive relief. Moreover, under North Carolina law, the injury Baptist would suffer if Novant is permitted to oppose the Davie 2 application “is one to which the complainant should not be required to submit or the other party permitted to inflict[.]” *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949).

We hold that the trial court correctly concluded that Baptist would suffer immediate and irreparable injury if Novant were permitted to oppose Baptist’s CON application.

The writ of *supersedeas* is dissolved, and the preliminary injunction is reinstated.

AFFIRMED.

Judges CALABRIA and STROUD concur.

THRASH LIMITED PARTNERSHIP AND LOTT PARTNERSHIP II, PLAINTIFFS v. THE
COUNTY OF BUNCOMBE, DEFENDANT

No. COA08-229

(Filed 17 March 2009)

1. Zoning— amended ordinance—standing—failure to follow procedures

The trial court did not err by concluding that plaintiff had standing to institute this declaratory judgment action challenging an amended zoning ordinance, even though it had not sought a

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permit to develop its land and had no active plans to build multi-family units on its land, because: (1) plaintiff's challenge to the amended zoning ordinance was based on the alleged failure of the county to follow the proper procedures to enact the zoning ordinance, which was an attack on the validity of the amended zoning ordinance instead of an "as-applied" challenge; (2) plaintiff's use of its land was limited by the zoning regulations; and (3) to require a plaintiff to demonstrate a direct injury in order to challenge a zoning regulation would allow counties to make zoning decisions without complying with the statutory requirements of Article 18 of Chapter 153A of the General Statutes.

2. Zoning— Multi-Family Dwelling Ordinance—failure to follow procedures—notice

A Multi-Family Dwelling Ordinance was passed without proper notice and was thus invalid because: (1) although the county claims the Multi-Family Dwelling Ordinance was enacted under N.C.G.S. § 153A-121, a county may not evade the legislative notice requirements imposed by N.C.G.S. § 153A-323 by labeling the zoning act as an exercise of police power; and (2) the ordinance substantially affected plaintiff's use of its property, and the county had to comply with the notice requirements since the ordinance was the type authorized by Article 18.

Appeal by plaintiff from judgment entered 28 December 2007 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 28 August 2008.

The Van Winkle Law Firm, by Albert L. Sneed, Jr., for plaintiff-appellant.

County Attorney Joseph A. Connolly, and Assistant County Attorney Michael C. Frue for defendant-appellee.

STEELMAN, Judge.

Where plaintiff is a landowner within the county affected by the zoning ordinance, plaintiff has standing to contest the procedural enactment of the ordinance. Where the zoning ordinance was not adopted in accordance with statutory requirements, the ordinance is invalid.

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I. Factual and Procedural Background

Plaintiff Lott Partnership II is a North Carolina Limited Partnership which owns a parcel of land in defendant Buncombe County ("County"). Plaintiff Thrash Limited Partnership sold its land during the pendency of this action and the action is moot as to Thrash Limited Partnership.

On 6 December 2006, the Buncombe County Commissioners drafted an ordinance regulating multi-family dwellings. The Multi-Family Dwelling Ordinance applies one set of rules for properties located above 2500 feet above sea level, and another set of rules for properties located 3000 feet above sea level. The Ordinance does not apply any rules to property located below 2500 feet above sea level.

On 8 March 2007, the Commissioners voted to enact the Multi-Family Dwelling Ordinance. On 7 May 2007, plaintiff filed an action for declaratory relief seeking to have the Multi-Family Dwelling Ordinance declared invalid, alleging that the Ordinance was adopted without compliance with the prerequisite statutory requirements of adopting zoning ordinances pursuant to Article 18 of Chapter 153A. On 8 August 2007, County filed a motion to dismiss based on Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, contending that plaintiff lacked standing to bring a declaratory judgment action. Plaintiff filed a motion for judgment on the pleadings based on Rule 12(c).

Following a hearing on 12 December 2007, the trial court found that matters outside the pleadings were presented and treated the motions as summary judgment motions pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. The trial court entered an order on 28 December 2007, finding and concluding that plaintiff had standing to bring the action and granting summary judgment in favor of County. Plaintiff appeals. County cross-assigns as error the trial court's finding and conclusion that plaintiff had standing.

II. Standing

[1] We first address County's contention that plaintiff did not have standing to prosecute this action because it had not sought a permit to develop its land and had no active plans to build multi-family units on its land. 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,

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560 S.E.2d 875, 878 (2002) (citation omitted). As the party invoking jurisdiction, plaintiffs have 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).

North Carolina's case law makes clear that landowners in the area of a county affected by a zoning ordinance are allowed to challenge the ordinance on the basis of procedural defects in the enactment of such ordinances. See *Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d 421 (1992) (plaintiffs, as landowners in the area of the county affected by the zoning ordinance, were allowed to challenge the ordinance on the basis of inadequate notice); *Lee v. Simpson*, 44 N.C. 611, 261 S.E.2d 295 (1980) (plaintiffs, who were owners of property adjacent to property that was rezoned, succeeded in overturning the rezoning ordinance for lack of proper notice); *George v. Town of Edenton*, 294 N.C. 679, 680, 242 S.E.2d 877, 878 (1978) ("Plaintiffs, as residents of Chowan County within the jurisdiction of the zoning powers of defendants, challenge in their complaint the legality of both actions of the Town Council and ask the court to determine their validity."); *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972) ("The plaintiffs, owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain the action.").

County contends that plaintiff does not have standing because it "ha[s] not alleged that the County has sought to apply the Ordinance under challenge to the Plaintiff[] or that the Plaintiff[] ha[s] applied for or been denied anything related to use of their property." County argues that the instant case is controlled by *Andrews v. Alamance County*, 132 N.C. App. 811, 513 S.E.2d 349 (1999). In *Andrews*, the plaintiff alleged an intention to develop her property as a manufactured home community and brought a declaratory judgment action seeking to declare the county ordinance establishing minimum lot requirements as invalid as applied to her. This Court held that the plaintiff lacked standing to sue because she did not allege in her complaint that she had taken any steps to begin developing her property, such as applying for a permit or filing a subdivision plat with the county. *Andrews*, 132 N.C. App. at 815, 513 S.E.2d at 351. In the instant case, County contends that, since plaintiff has not sought to use its property for a multi-family dwelling use, it is not an "aggrieved party."

We find *Andrews* to be distinguishable. The plaintiff's challenge to the zoning ordinance in *Andrews* was based on arbitrariness, equal

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protection, or constitutionality as applied to the plaintiff's land. As the case necessarily involved a specific consideration of plaintiff's land, the plaintiff was required to show that she had an immediate risk of sustaining an injury in order to have standing. In the instant case, plaintiff is challenging the procedural enactment of the Multi-Family Dwelling Ordinance. Thus, plaintiff's declaratory judgment action is not an "as-applied" challenge, but rather is an attack on the validity of the zoning ordinance.

"A party has standing to challenge a zoning ordinance in an action for declaratory judgment only when it 'has a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby.' " *Village Creek Prop. Owners' Ass'n v. Town of Edenton*, 135 N.C. App. 482, 485, 520 S.E.2d 793, 795 (1999) (quotation omitted). The Multi-Family Dwelling Ordinance contains regulations of land which are contingent upon the elevation and use of the land. Plaintiff's land is located at an elevation above 2500 feet above sea level, and is suitable for multi-family dwelling use. Therefore, plaintiff's use of its land was limited by the zoning regulations.

We hold that plaintiff has standing to challenge the validity of the Multi-Family Dwelling Ordinance. We further note that to require a plaintiff to demonstrate a direct injury in order to challenge a zoning regulation would allow counties to make zoning decisions without complying with the statutory requirements of Article 18 of Chapter 153A of the General Statutes.

III. Exercise of Police Power

[2] In its first argument, plaintiff contends that the trial court erred in granting County's motion for summary judgment on the grounds that the Multi-Family Dwelling Ordinance was passed without proper notice. We agree.

Standard of Review—Summary Judgment

Our standard of review of a trial court's ruling on a motion for summary judgment is *de novo*, and "this Court's task is to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citation omitted).

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North Carolina General Statutes/Zoning Laws

Local governments have only powers conferred to them by the Legislature. *Keiger v. Board of Adjustment*, 281 N.C. 715, 720, 190 S.E.2d 175, 179 (1972); *see also Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965) (counties “possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them.”).

A county has the power to adopt a zoning ordinance “[f]or the purpose of promoting health, safety, morals, or the general welfare[.]” N.C. Gen. Stat. § 153A-340(a) (2007). This power is delegated to local governments by the North Carolina legislature and authorizes counties to:

regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.C. Gen. Stat. § 153A-340(a) (2007).

N.C. Gen. Stat. § 153A-342(d) (2007) provides, in part:

A county may determine that the public interest does not require that the entire territorial jurisdiction of the county be zoned and may designate one or more portions of that jurisdiction as a zoning area or areas.

“Within these districts a county may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land.” *Sandy Mush Props., Inc. v. Rutherford Cty.*, 164 N.C. App. 162, 167, 595 S.E.2d 233, 236 (2004) (quoting N.C. Gen. Stat. § 153A-342).

Before adopting any ordinance authorized by Article 18, the Board of Commissioners must first receive “a recommendation regarding the ordinance from the planning board” and shall then hold a public hearing. N.C. Gen. Stat. § 153A-344(a); N.C. Gen. Stat. § 153A-323. Notice of the hearing shall be published “once a week for two successive calendar weeks. The notice shall be published the first time not less than 10 days nor more than 25 days before the date fixed for the hearing.” N.C. Gen. Stat. § 153A-323.

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The determination of whether an ordinance is a zoning ordinance, and must be enacted under the procedures which govern zoning and rezoning, is whether the ordinance “substantially affects land use[.]” *Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779, 782, 407 S.E.2d 283, 286 (1991) (quotation omitted). Zoning ordinances not adopted in accordance with enabling statutes are invalid. *Kass v. Hedgpeth*, 226 N.C. 405, 407, 38 S.E.2d 164, 165 (1946).

In the instant case, County concedes that the public hearing on the consideration of the Multi-Family Dwelling Ordinance was not advertised in accordance with N.C. Gen. Stat. § 153A-323 or 343. However, County argues that the Ordinance was adopted pursuant to N.C. Gen. Stat. § 153A-121, providing for the adoption of ordinances in the exercise of a county’s general police power, and that the requirements of N.C. Gen. Stat. § 153A-323 were inapplicable.

The Multi-Family Dwelling Ordinance limited density and regulated: property used for multi-family dwellings; the height of buildings; the area of land disturbance and development as a portion of any parcel; parking standards for roads built in Group Housing Projects; subdivision of land; and road construction. All of these regulations are governed by Article 18 of Chapter 153A. By approving the ordinance, the Board divided the County into three separate zones. The effect of the Multi-Family Dwelling Ordinance was to make unzoned areas of the county subject to zoning prior to adoption of a zoning ordinance. *See Sandy Mush* at 167, 595 S.E.2d at 236 (citing *Vulcan* at 782, 407 S.E.2d at 286). “An action of this nature is *authorized* under Article 18 even though the Board sought to use Section 153A-121 to justify the County division.” *Id.* (emphasis in original). Although County claims that the Multi-Family Dwelling Ordinance was enacted pursuant to N.C. Gen. Stat. § 153A-121, a county may not evade the legislative notice requirements imposed by Section 153A-323 by labeling the zoning act as an exercise of police power. *See id.*

The Multi-Family Dwelling Ordinance substantially affected plaintiff’s use of its property. Since the ordinance was the type of ordinance authorized by Article 18, County had to comply with the notice requirements of Section 153A-323. *See Sandy Mush* at 168, 595 S.E.2d at 237; *see also Refining Co. v. Board of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 135-36 (1974). The ordinance was not passed in accordance with statutory requirements and we hold that it is invalid.

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IV. Conclusion

This matter was decided upon summary judgment. Neither party has asserted that there are any material issues of fact present in this case. We hold that the trial court erred in granting County's motion for summary judgment. The order of the trial court is reversed and this matter is remanded to the trial court for entry of judgment in favor of plaintiff in accordance with this opinion. The trial court's conclusion that plaintiff had standing to challenge the ordinance is affirmed.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges GEER and STEPHENS concur.

TROPHY TRACKS, INC., PLAINTIFF v. MASSACHUSETTS BAY INSURANCE COMPANY, HANOVER INSURANCE COMPANY, LANCASTER McADEN, WILLIS SMITH COMPANY, THE INSURANCE CENTER AND MIKE McADEN, DEFENDANTS

No. COA08-733

(Filed 17 March 2009)

1. Insurance— fire—related businesses—listed address— other site not covered

The trial court erred by granting plaintiff partial summary judgment on the issue of insurance coverage for a fire in Greenville involving one of two related businesses (similar products as well as shared management, employees, shareholders, and facilities) where a policy provision specifically limited coverage to the listed address of the Apex facility. A reasonable person would not understand the clause “premises described in the Schedule below” to include the address listed on the top of each page.

2. Insurance— fire—related businesses—joint operation—off premises provision—not applicable

The trial court erred by granting plaintiff partial summary judgment on the issue of insurance coverage for a fire in Greenville involving one of two related businesses where plaintiff asserted that the Greenville property was partially insured under an “Off Premises” provision of the policy covering an Apex facil-

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ity. That provision covers property located at premises that plaintiff does not own, lease, or operate. Although plaintiff asserted that the Greenville facility is owned and operated solely by the Apex company, the evidence in the case clearly shows that the two related businesses simultaneously conducted their affairs at the Greenville facility.

Appeal by defendants, Massachusetts Bay Insurance Company and Hanover Insurance Company, from order entered 23 January 2008 by Judge Jerry R. Tillet in Pitt County Superior Court. Heard in the Court of Appeals 28 January 2008.

Hopf & Higley, P.A., by Donald S. Higley, II, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Reid Russell, for Massachusetts Bay Insurance Company and Hanover Insurance Company, defendant-appellants.

Manning, Fulton & Skinner, P.A., by Michael T. Medford and William S. Cherry, III, for Lancaster McAden, Willis Smith Company, The Insurance Center and Mike McAden, defendant-appellees.

HUNTER, JR., Robert N., Judge.

Defendants, Massachusetts Bay Insurance Company and Hanover Insurance Company (collectively “insurance companies”), appeal from partial summary judgment order entered in favor of plaintiff on the issue of insurance coverage. For reasons discussed herein, we reverse.

I. Background

Kenneth Weeks, Michele Weeks, Edward Weeks, and Carolyn Weeks are stockholders of Weeks Seed Company (“Weeks Seed”), which was incorporated in 1990 for the purpose of selling seeds wholesale. In 2003, Kenneth Weeks, Michele Weeks, Kinsey Weeks, and Tori Weeks became shareholders of Trophy Tracks, Inc. (“plaintiff”), which was incorporated for the purpose of selling larger boxes of seed to attract deer for hunting purposes. Both companies shared a facility, owned by Weeks Seed, located at 2103 Chestnut Street in Greenville, NC (“Greenville facility”). The two companies shared management and employees. The employees of Weeks Seed also performed services for plaintiff including sales, seed storage, and ship-

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ping. Shortly after its incorporation, plaintiff leased a second facility located at 2501-C Ten Ten Road in Apex (“Apex facility”) for which it sought insurance. In September 2003, plaintiff purchased a business owners’ insurance policy (“the policy”) through defendant Lancaster McAden, an independent insurance agency. The policy, issued by defendant Massachusetts Bay Insurance Company, was effective from 12 September 2003 through 12 September 2004.

On 24 December 2003, a fire occurred at the Greenville facility and destroyed approximately \$70,000.00 worth of plaintiff’s property. On 30 April 2004, defendant Hanover Insurance Company, an affiliate of defendant Massachusetts Bay Insurance Company, denied coverage for plaintiff’s property, on the grounds that the policy only covered property located at the Apex facility. The policy provides:

A. Coverage

We will pay for direct physical loss of or damage to *Covered Property at the premises described in the Declarations* caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property includes . . .
Business Personal Property[.]

(Emphasis added.)

The first page of the declarations provides:

In consideration of the premium, insurance is provided the Named Insured with respect to those *premises described in the Schedule below* and with respect to those coverages and kinds of property for which a specific Limit of Insurance is shown, subject to all of the terms of this policy including forms and endorsements made a part hereof:

LOCATION SCHEDULE**Described Premises:**

NO. 1 2501-C TEN TEN ROAD, APEX, N.C. 27502

(Emphasis added.)

In August of 2006, plaintiff filed suit against the insurance companies, seeking to recover for its losses under the policy.¹ On 28

1. Plaintiff also filed alternative claims against Lancaster McAden, Willis Smith Company, The Insurance Center, and Mike McAden for failure to procure requested insurance. As a result of the partial summary judgment order, the claims against these

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September 2006, plaintiff filed a motion for partial summary judgment on the issue of whether the policy provides coverage for its personal property destroyed by the fire on 24 December 2003. The matter was heard at the 6 October 2006 term of Pitt County Superior Court. The trial court granted plaintiff's partial summary judgment motion on 23 January 2008.

II. Issues

The insurance companies argue that the trial court erred in granting plaintiff's motion for partial summary judgment and request that this Court remand the matter, pursuant to Rule 56(c), to the trial court to enter summary judgment against plaintiff.

III. Standard of Review

Where a motion for summary judgment has been granted, the two critical questions on appeal are whether (1) there is a genuine issue of material fact, and (2) the moving party is entitled to judgment as a matter of law. *North River Ins. Co. v. Young*, 117 N.C. App. 663, 667, 453 S.E.2d 205, 208 (1995). We review an order granting summary judgment *de novo*. *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 294, 628 S.E.2d 851, 855 (2006), *disc. review denied*, 361 N.C. 426, 648 S.E.2d 209 (2007).

IV. Partial Summary Judgment Order

The insurance companies argue that the trial court erred in granting plaintiff partial summary judgment on the issue of insurance coverage. The insurance companies assert that neither the "Business Personal Property" provision nor the "Personal Property Off Premises" provision of the policy provides coverage for plaintiff's property at the Greenville facility. We agree.

[1] A. "Business Personal Property" Provision

The insurance companies contend that the "Business Personal Property" provision of the policy only provides coverage for plaintiff's property located at the Apex facility. The parties do not dispute that plaintiff's property destroyed in the fire is "Business Personal Property" or that the loss resulted from a "Covered Cause of Loss." The parties disagree whether or not plaintiff's property in Greenville constitutes "Covered Property at the premises described in the Declarations."

defendants became moot. A consent order staying plaintiff's claims against these defendants was filed on 18 December 2006.

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The insurance companies claim that the policy clearly does not insure the Greenville facility because only the Apex facility is listed as a “described premises.” Plaintiff argues that the Greenville facility is a “Covered Property at the premises described in the Declarations” because its name and address appear in the declarations six times. On the top of each page of the declarations, the following is listed:

Named Insured and Address

TROPHY TRACKS, INC.
2103 CHESTNUT STREET
GREENVILLE, NC 27834

We do not agree with plaintiff.

An insurance policy is a contract between two parties. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 345, 152 S.E.2d 436, 440 (1967). “[I]t is the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties.” *Id.* at 346, 152 S.E.2d at 440 (citations omitted).

“[A] contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean[.]” *Cowell v. Gaston Cty.*, 190 N.C. App.743, 746, 660 S.E.2d 915, 918 (2008) (quoting *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978), *disc. review denied*, 363 N.C. 124, — S.E.2d — (2009). “If there is uncertainty or ambiguity in the language of an insurance policy regarding whether certain provisions impose liability, the language should be resolved in the insured’s favor.” *Eatman Leasing, Inc. v. Empire Fire & Marine Ins. Co.*, 145 N.C. App. 278, 281, 550 S.E.2d 271, 273 (2001), *disc. review denied and cert. denied*, 356 N.C. 298, 570 S.E.2d 503 (2002).

We do not find that the provision insures plaintiff’s property in Greenville. The language in this provision specifically limits the insurance coverage to “those premises described in the Schedule below.” Below that paragraph, in bold, is the heading, “LOCATION SCHEDULE.” Directly under that heading, “Described Premises” is listed with the address of the Apex facility. We do not find that a reasonable person would understand the clause “premises described in the Schedule below” to include the address listed on the top of each page. (Emphasis added.) As a matter of law, the “Business Personal Property” provision does not provide coverage for plaintiff’s property destroyed in the fire.

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B. “Off Premises” Provision

[2] In an alternative argument, plaintiff asserts that its property in Greenville is partially insured under the “Off Premises” provision of the policy, which provides:

b. Personal Property Off Premises You may extend the insurance that applies to Business Personal Property . . . *while temporarily at a premises you do not own, lease, or operate.* . . . The most we will pay for loss or damage under this Extension is \$50,000 or the amount shown in the Additional Property Coverage Schedule.

We do not agree.

In their briefs, the parties primarily discuss whether or not plaintiff’s property was “temporarily” located in Greenville. We need not address this matter, as we find that the provision does not apply because plaintiff operates the Greenville facility.

As provided above, the “Off Premises” provision requires the property to be located at a premises that plaintiff does not “own, lease, or operate.” In its brief, plaintiff asserts that the Greenville facility is owned and operated solely by Weeks Seed.

“The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction.” *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95 (2000). In the absence of ambiguity, we construe the policy provisions by the “plain, ordinary and accepted meaning of the language used.” *Integon General Ins. Corp. v. Universal Underwriters Ins. Co.*, 100 N.C. App. 64, 68, 394 S.E.2d 209, 211 (1990). The American Heritage Dictionary of the English Language defines “operate” as “[t]o conduct the affairs of; manage: *operate a business.*” American Heritage Dictionary 871 (2d ed. 1985).

The evidence in the case *sub judice* clearly shows that Weeks Seed and plaintiff simultaneously conducted their affairs at the Greenville facility. Plaintiff has always kept a substantial amount of its inventory and property at the Greenville facility. Plaintiff stored and packaged its products there until the products were shipped upon sale. By plaintiff’s own admission “Trophy Tracks shared the [Greenville] facility with Weeks Seed Company and later leased a second building in Apex, NC.” We hold that there is no genuine question of fact, on the basis of the evidence in the appellate record, that the

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“Off Premises” provision does not insure plaintiff’s property in Greenville. We reverse the partial summary judgment order.

V. Summary Judgment for Defendants

Additionally, the insurance companies contend that the trial court should have entered summary judgment against plaintiff, pursuant to Rule 56(c), because there is no genuine issue of material fact that the policy did not insure plaintiff’s property at the Greenville facility. Rule 56(c) provides that “[s]ummary judgment, when appropriate, may be rendered against the moving party.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). We remand this case to the trial court with instructions to consider whether, based on our decision, summary judgment should be issued in favor of the insurance companies on the issue of insurance coverage.

V. Conclusion

There is no genuine issue of material fact that neither the “Business Personal Property” provision nor the “Business Personal Property Off Premises” provision provides coverage for plaintiff’s property located at its Greenville facility. Accordingly, we reverse the order granting partial summary judgment to plaintiff.

Reversed and Remanded.

Judges JACKSON and ERVIN concur.

STATE OF NORTH CAROLINA v. DUANE E. FIELDS, DEFENDANT

No. COA08-627

(Filed 17 March 2009)

Search and Seizure— traffic stop—motion to suppress evidence—lack of reasonable suspicion

The trial court erred in a trafficking in cocaine by transportation case by denying defendant’s motion to suppress evidence obtained during a traffic stop based on suspicion of driving while impaired due to defendant’s weaving his vehicle because: (1) although the Court of Appeals has previously held that weaving can contribute to a reasonable suspicion of driving while impaired, it

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is usually coupled with additional specific articulable facts to also indicate that defendant was driving while impaired; (2) defendant's weaving within his lane, standing alone, was insufficient to support a reasonable suspicion that defendant was driving under the influence of alcohol; and (3) the totality of circumstances did not give rise to a reasonable articulable suspicion of criminal activity justifying the stop of defendant's vehicle when the detective did not observe defendant violating any laws such as driving above or significantly below the speed limit, defendant was stopped at approximately 4:00 pm which was not an unusual hour, and there was no evidence that defendant was near any places to purchase alcohol.

Appeal by defendant from order entered 14 February 2006 by Judge William C. Gore, Jr., in Columbus County Superior Court. Heard in the Court of Appeals 14 January 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant appellant.

HUNTER, JR., Robert N., Judge.

Duane Edward Fields ("defendant") appeals from an order of the trial court that denied his motion to suppress evidence obtained during a traffic stop. For reasons discussed herein, we reverse.

I. Background

At approximately 4:00 p.m. on 19 May 2005, Detective Heath Little ("Detective Little") of the Columbus County Sheriff's Office Drug Enforcement Unit was patrolling Highway 74 when he observed defendant's car. Detective Little followed defendant's car for approximately one and a half miles. On three separate occasions, Detective Little saw defendant's car swerve to the white line on the right side of the traffic lane.

Due to defendant's weaving, Detective Little stopped the car under suspicion of driving while impaired. When Detective Little approached defendant's car, defendant produced his license and registration. Detective Little asked defendant if he had consumed any alcohol. Defendant responded that he had not and pointed to a bottle of Gatorade he had been drinking. Detective Little did not smell alco-

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hol or observe anything in defendant's car to indicate illegal activity. Detective Little then went back to his vehicle to verify defendant's license and registration through the police radio.

Approximately five minutes later, Detective Little returned defendant's license and registration and observed what appeared to be a pack of rolling papers in the console of the driver's side door. When he asked defendant what the item was, defendant produced a cover to a pack of rolling papers. Detective Little then asked defendant if there was anything illegal in his vehicle and defendant stated there was not. At trial, Detective Little testified that defendant consented to the search of his car, while defendant testified that Detective Little never asked for his consent. The trial court made a factual finding in its 14 February 2006 order that defendant had consented to the search. While searching defendant's car, Detective Little recovered 112 grams of marijuana and 124 grams of cocaine in the glove compartment. Defendant was then under arrest.

Defendant was indicted for trafficking in cocaine by transport in violation of N.C. Gen. Stat. § 90-95(h)(3). On 14 November 2005, defendant filed a motion to suppress arguing that the initial stop of his vehicle was unreasonable and that all evidence obtained as a result of that stop should be suppressed. The trial court denied defendant's motion and concluded that the initial stop of defendant's car was based on reasonable suspicion and that the amount of time defendant was detained was not unreasonable. Defendant pleaded guilty to trafficking in cocaine by transportation, pursuant to *State v. Alford*,¹ and reserved his right to appeal the denial of the motion to suppress. Defendant was sentenced to 12 to 15 months' imprisonment and has remained on bond pending this appeal.

II. Issues

Defendant asserts that the trial court erred by denying his motion to suppress on the grounds that (1) the initial stop of defendant's car was not based on a reasonable and articulable suspicion of criminal activity and (2) the length of defendant's detention was unreasonable.

III. Standard of Review

When reviewing a motion to suppress, the trial court's findings of fact are conclusive and binding on appeal if supported by competent

1. In *State v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), the Court held that a defendant may enter a guilty plea containing a protestation of innocence when the defendant intelligently concludes that a guilty plea is in his best interest and the record contains strong evidence of actual guilt. *Id.* at 37-39, 27 L. Ed. 2d at 171-72.

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evidence. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). We review the trial court's conclusions of law *de novo*. *Id.*

IV. Motion to Suppress Evidence

On appeal, defendant renews his contention that Detective Little did not have a reasonable suspicion of criminal activity to justify stopping his car. Defendant does not assign error to the trial court's findings of fact, and therefore, these findings are binding on this Court. *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36, *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). Defendant challenges the trial court's conclusion of law that a reasonable suspicion existed to stop his vehicle, arguing that the findings of fact do not support this conclusion. We agree with defendant and therefore reverse the trial court's order denying the motion to suppress.

Our federal and state constitutions protect individuals against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Seizures include brief investigatory detentions, such as those involved in the stopping of a vehicle. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994). "Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citation omitted). If the investigatory seizure is invalid, evidence resulting from the warrantless stop is inadmissible under the exclusionary rule in both our federal and state constitutions. *State v. Jones*, 96 N.C. App. 389, 394, 386 S.E.2d 217, 220 (1989), *appeal dismissed, disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990).

Our Supreme Court has held that an investigatory stop must be justified by a " 'reasonable, articulable suspicion that criminal activity is afoot.' " *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)). Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]" *Wardlow*, 528 U.S. at 123, 145 L. Ed. 2d at 576. "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training."

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Watkins, 337 N.C. at 441-42, 446 S.E.2d at 70 (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906). A court must consider the totality of the circumstances in determining whether a reasonable suspicion existed. *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (citations omitted), *cert. denied*, — U.S. —, 172 L. Ed. 2d 198 (2008).

The requisite degree of suspicion must be high enough “to assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.” *State v. Murray*, 192 N.C. App. 684, 687, 666 S.E.2d 205, 208 (2008). A police officer must develop more than an “unparticularized suspicion or hunch” before he or she is justified in conducting an investigatory stop. *See id.* (holding that the police officer lacked reasonable suspicion when he stopped a vehicle to find out why it was traveling in an area with a history of break-ins).

We have previously held that weaving can contribute to a reasonable suspicion of driving while impaired. However, in each instance, the defendant’s weaving was coupled with additional specific articulable facts, which also indicated that the defendant was driving while impaired. *See, e.g., State v. Aubin*, 100 N.C. App. 628, 397 S.E.2d 653 (1990) (weaving within lane, plus driving only forty-five miles per hour on the interstate), *appeal dismissed, disc. review denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 502 U.S. 842, 116 L. Ed. 2d 101 (1991); *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989) (weaving towards both sides of the lane, plus driving twenty miles per hour below the speed limit), *appeal dismissed, disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990); *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988) (weaving within lane five to six times, plus driving off the road); *State v. Thompson*, 154 N.C. App. 194, 571 S.E.2d 673 (2002) (weaving within lane, plus exceeding the speed limit).

When determining if reasonable suspicion exists under the totality of circumstances, a police officer may also evaluate factors such as traveling at an unusual hour or driving in an area with drinking establishments. In *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 441 (2004), the defendant was weaving within his lane and touching the designated lane markers on each side of the road. We concluded that the defendant’s weaving combined with the fact that he was driving at 1:43 a.m. in an area near bars was sufficient to establish a reasonable suspicion of driving while impaired. *Id.* Similarly, we found that the facts in *State v. Watson*, 122 N.C. App. 596, 599-600, 472 S.E.2d 28, 30 (1996), established a reasonable

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suspicion, due to the fact that the defendant was weaving within his lane and driving on the dividing line of the highway at 2:30 a.m. on a road near a nightclub.

In order to preserve an individual's Fourth Amendment rights, it is of the utmost importance that we recognize that the presence of any one of these factors is not, by itself, proof of any illegal conduct and is often quite consistent with innocent travel. *See United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, 11 (1989). It is only when these factors are "taken together [that] they amount to reasonable suspicion." *Id.* In *Terry*, the United States Supreme Court stated:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. . . . Anything less would invite intrusions upon constitutionally guaranteed rights . . . [S]imple "good faith on the part of the arresting officer is not enough." . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Terry, 392 U.S. at 21-22, 20 L. Ed. 2d at 906 (citations omitted).

In *Roberson*, 163 N.C. App. at 135, 592 S.E.2d at 737, we affirmed the trial court's order that granted the defendant's motion to suppress evidence. The defendant in *Roberson* delayed proceeding through a traffic light for approximately eight-to-ten seconds upon the light turning green. Although the incident occurred at 4:30 a.m. in an area of town where several bars were located, we held that those factors viewed collectively did not create a reasonable, articulable suspicion of criminal activity. We adopted the following reasoning of the Idaho Court of Appeals:

In this case, the officer relied upon his prior training which suggested that forty percent of all people who make a delayed response to a traffic signal are driving while under the influence of alcohol. However, such inferences must still be evaluated against the backdrop of everyday driving experience. It is self-evident that motorists often pause at a stop sign or traffic light when their attention is distracted or preoccupied by outside influences.

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Id. at 134; 592 S.E.2d at 736 (quoting *State v. Emory*, 809 P.2d 522, 525 (1991)).

Similarly, we hold that defendant's weaving within his lane, standing alone, is insufficient to support a reasonable suspicion that defendant was driving under the influence of alcohol. To hold otherwise would extend the grounds for reasonable suspicion farther than our Courts ever have. The facts in this case are clearly distinguishable from the circumstances in *Jacobs* and *Watson*. Here, Detective Little did not observe defendant violating any laws such as driving above or significantly below the speed limit. Furthermore, defendant was stopped at approximately 4:00 p.m., which is not an unusual hour, and there was no evidence that defendant was near any places to purchase alcohol. The totality of circumstances do not give rise to a reasonable, articulable suspicion of criminal activity justifying the stop of defendant's vehicle. Thus, we reverse the trial court's order denying defendant's motion to suppress. Accordingly, we need not address whether the length of defendant's detention was unreasonable.

V. Conclusion

Based on the aforementioned reasons, we reverse the order denying defendant's motion to suppress and remand this case to the trial court for further proceedings.

Reversed and remanded.

Judges McGEE and JACKSON concur.

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[195 N.C. App. 747 (2009)]

JOHN MALLOY, D/B/A THE DOGWOOD GUN CLUB, PLAINTIFF v. ROY A. COOPER, III, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA; SAM CURRIN, DISTRICT ATTORNEY FOR THE 9TH PROSECUTORIAL DISTRICT; DAVID S. SMITH, SHERIFF OF GRANVILLE COUNTY; STATE OF NORTH CAROLINA, DEFENDANTS

No. COA08-892

(Filed 17 March 2009)

Injunction—pigeon shoot—enforcement of animal cruelty statute enjoined—subsequent amendment of regulation—motion to intervene denied

The trial court did not abuse its discretion by denying a motion to intervene based on timeliness in a case involving a permanent injunction against enforcement of an animal cruelty statute and a subsequent clarification of the underlying regulation. The length of the delay and the lack of justification for the delay were sufficient grounds to affirm the denial of the motion to intervene; whether the regulation amendment should result in the dissolution of the injunction remains unsettled.

Appeal by Movants (the Humane Society of the United States, Robert Reder, Lauren Bartfield, and Cynthia Bailey) from order denying Movants' motion to intervene entered 21 April 2008 by Judge Kenneth C. Titus in Superior Court, Granville County. Heard in the Court of Appeals 10 December 2008.

Tharrington Smith, L.L.P., by F. Hill Allen, for Plaintiff-Appellee.

Everett, Gaskins, Hancock & Stevens, LLP, by E.D. Gaskins, Jr. and James Hash, for Movants-Appellants.

McGEE, Judge.

Plaintiff is a resident of Granville County, North Carolina, and owns an unincorporated business operating under the name "Dogwood Gun Club." Plaintiff sponsors a biannual pigeon shoot, known as "The Dogwood Invitational," on his private land in Granville County. Plaintiff has sponsored, organized, and operated these pigeon shoots since 1987. Contestants participate by invitation only, and each contestant pays \$275.00 per day to participate. According to Plaintiff's response to interrogatories, the pigeon shoot is conducted as follows: "Each contestant faces a ring. Inside the ring are a num-

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ber of boxes which are opened on cue. An individual feral [sic] pigeon flies from a particular box. The feral pigeon serves as a target at which the contestant shoots.” The last two pigeon shoots Plaintiff conducted before this action was filed utilized approximately 40,000 pigeons each. Pigeons that are killed by the contestants are buried, whereas pigeons that are merely injured are “dispatched promptly” and then buried. Plaintiff alleges he spent \$500,000.00 in capital improvements to his land to further the pigeon shoots and also claims that the pigeon shoots provide approximately fifty percent of his net income. See *Malloy v. Cooper*, 356 N.C. 113, 114, 565 S.E.2d 76, 77 (2002).

Plaintiff filed a declaratory judgment action in 1999, seeking a determination that N.C. Gen. Stat. § 14-360, an animal cruelty statute, was unconstitutional and could not be used to prosecute Plaintiff for operating pigeon shoots. For a complete procedural history of this case, and additional facts, see *Malloy v. Cooper*, 146 N.C. App. 66, 551 S.E.2d 911 (2001) (*Malloy I*), reversed and remanded by our Supreme Court to this Court by *Malloy*, 356 N.C. 113, 565 S.E.2d 76 (*Malloy II*), and ultimately decided by *Malloy v. Cooper*, 162 N.C. App. 504, 592 S.E.2d 17 (2004) (*Malloy III*).

This Court held in *Malloy III* that N.C. Gen. Stat. § 14-360, as it was then written, was unconstitutionally vague as it applied to Plaintiff’s pigeon shoots. Our Court remanded the case to the trial court for entry of a permanent injunction against prosecuting Plaintiff pursuant to the provisions of N.C. Gen. Stat. § 14-360. *Malloy III*, 162 N.C. App. at 510, 592 S.E.2d at 22 (citations omitted). This holding was based upon the definition of “domestic pigeon” as it applied to N.C. Gen. Stat. § 14-360 through N.C. Gen. Stat. § 113-129(15a) and 15A N.C.A.C. 10B.0121. The trial court entered a permanent injunction against prosecution of Plaintiff under N.C. Gen. Stat. § 14-360 on 9 December 2004.

The Humane Society of the United States (HSUS) filed *amicus curiae* briefs in support of Defendants’ position in *Malloy I* and *Malloy II*. HSUS’ *amicus curiae* brief from *Malloy I* was therefore properly before this Court for consideration upon remand in *Malloy III*. None of the Movants, however, have been parties to this action.

In an attempt to correct the constitutional defects of N.C. Gen. Stat. § 14-360 set out in our holding in *Malloy III*, the Wildlife Resource Commission (WRC) amended its definition of “pigeon” in

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its exclusionary provision for wild birds, 15A N.C.A.C. 10B.0121, as defined in N.C. Gen. Stat. § 113-129(15a) (the amendment). The amendment became effective 1 October 2004. Through the amendment, the WRC changed the relevant wording of 15A N.C.A.C. 10B.0121 from “domestic pigeon” to simply “pigeon.” This change was intended to removed the ambiguity inherent in N.C. Gen. Stat. § 14-360 by clearly indicating that *all* pigeons, not just “domestic pigeons” are protected by the provisions of that statute.

Following the amendment, the Granville County District Attorney Sam Currin (Currin), wrote a letter to the North Carolina Attorney General’s Office requesting legal guidance on what impact the amendment had on the injunction in this case. Special Deputy Attorney General John J. Aldridge, III (Aldridge) responded on 3 November 2006 with an advisory letter. Aldridge indicated that in his opinion the amendment had cured the constitutional defect recognized by this Court in *Malloy III*. Aldridge advised that he had been unable to find any case law answering the question of whether the amendment automatically dissolved the injunction against prosecution of Plaintiff pursuant to N.C. Gen. Stat. § 14-360. He further advised that in his opinion the best course of action would be for either the Granville County District Attorney or Sheriff to move for dissolution of the injunction before attempting prosecution of Plaintiff pursuant to N.C. Gen. Stat. § 14-360. HSUS made attempts to persuade Currin to move for the dissolution of the injunction. In a letter to Heidi Prescott of the HSUS dated 6 March 2007, Currin stated: “At the present time, the Attorney General’s Office and any private law firm has the same standing that I do to bring this action. Please, concentrate your efforts with one of them.”

In response to Currin’s letter, counsel for HSUS wrote Aldridge on 19 March 2007 requesting that the Attorney General’s Office move to modify or dissolve the injunction. After several more attempts to persuade any Defendants in this matter to move for dissolution of the injunction, Movants sent a letter dated 24 September 2007 to Plaintiff and Defendants indicating their intention to move for intervention in the matter. Movants filed their motion to intervene with this Court on 10 October 2007. The motion was denied on 4 December 2007, without prejudice to file in superior court. Movants filed a motion to intervene in superior court on 11 March 2008. In an order entered 21 April 2008, the trial court denied Movants’ motion on the basis that the motion was not filed in a timely manner, and that granting the motion “would be unfair and prejudicial to Plaintiff.” Movants appeal.

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In Movants' first and third arguments, they contend the trial court erred in finding there was no justification for Movants' delay in filing their motion to intervene, and that it was therefore not filed in a timely manner. We disagree.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 24[] (2003), anyone can intervene if the individual *timely* files a petition[.]

. . . .

The determination of the timeliness of the motion under this rule is left to the sound discretion of the trial court. Such rulings are given great deference and will only be overturned upon a showing that the ruling “ ‘was so arbitrary that it could not have been the result of a reasoned decision.’ ”

When considering the issue of timeliness, North Carolina Courts consider five factors: “(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) *the reason for the delay in moving for intervention*, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances.”

Home Builders Ass'n of Fayetteville N.C., Inc. v. City of Fayetteville, 170 N.C. App. 625, 630-31, 613 S.E.2d 521, 525 (2005) (emphasis added) (citations omitted).

Movants claim that due to the amendment of 15A N.C.A.C. 10B.0121 by the WRC effective 1 October 2004, the injunction preventing prosecution of Plaintiff pursuant to N.C. Gen. Stat. § 14-360 ordered by this Court in *Malloy III* should be dissolved. However, Movants did not file their motion to intervene with this Court until 10 October 2007, which was denied on 4 December 2007. Movants then filed a motion to intervene in Superior Court, Granville County on 11 March 2008. The trial court denied Movants' motion to intervene on the basis that it was not “timely” as required by N.C. Gen. Stat. § 1A-1, Rule 24.

Movants failed to file their motion in this Court until more than three years after the WRC amended the definition of “pigeon” in 15A N.C.A.C. 10B.0121. Moreover, Movants failed to file their motion to intervene in Superior Court, Granville County until nearly three and a half years after the amendment.

While HSUS was involved in the original appeal of this case through the filing of an *amicus curiae* brief, and though HSUS clearly

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made attempts to persuade Defendants to pursue the matter, we cannot find that the trial court's ruling that Movants' motion to intervene was not timely filed "was so arbitrary that it could not have been the result of a reasoned decision." *Home Builders Ass'n*, 170 N.C. App. at 631, 613 S.E.2d at 525. We reach this holding in light of the more than three year period between the amendment and the filing of Movants' motion to intervene with this Court, and the period of more than three months between this Court's denial of the motion and Movants' filing of a motion to intervene in Superior Court, Granville County. See *State ex rel. Easley v. Philip Morris, Inc.*, 144 N.C. App. 329, 548 S.E.2d 781 (2001); *Loman Garrett, Inc. v. Timco Mechanical, Inc.*, 93 N.C. App. 500, 378 S.E.2d 194 (1989); *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Further, Movants did nothing between the time of the amendment, effective 1 October 2004, and the Fall of 2006, when HSUS began pressuring Defendants to move to dissolve the injunction. Movants argue they were unaware an injunction had been entered on 9 December 2004. We do not find Movants' argument persuasive. Movants were clearly aware that this Court had ordered the trial court to enter the injunction. Movants could have easily determined when the injunction was entered. In light of Movants' professed interest and their attempt to intervene in this matter, we find no sufficient justification for their failure to ascertain when or if this Court's order had been carried out. We hold that the length of the delay, combined with the lack of justification for that delay, are sufficient grounds to affirm the trial court's denial of Movants' motion to intervene. These arguments are without merit.

Because we have determined the trial court did not abuse its discretion in denying Movants' motion to intervene based upon untimeliness, we do not address Movants' additional argument.

This holding may in no manner be construed as a decision on Movants' underlying position that the amendment should result in the dissolution of the injunction prohibiting prosecution of Plaintiff for violations of N.C. Gen. Stat. § 14-360. In *Malloy III*, this Court held that the definition of "domestic pigeon" in 15A N.C.A.C. 10B.0121, as it then existed, rendered N.C. Gen. Stat. § 14-360 unconstitutionally vague as it applied to that case.

The statute and regulation as written fail to give a person a reasonable opportunity to know whether shooting particular pigeons is prohibited, and fails to provide standards for those

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[195 N.C. App. 752 (2009)]

applying the law, as required by the North Carolina Supreme Court and United States Supreme Court. “Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.” Therefore, we hold that G.S. § 14-360, in its entirety, is unconstitutionally void for vagueness, as applied to plaintiff’s contemplated pigeon shoot.

Malloy III, 162 N.C. App. at 510, 592 S.E.2d at 22 (citations omitted). We recognize that as long as the injunction remains in place, Plaintiff is immune from prosecution for acts that could potentially lead to the prosecution of other North Carolina citizens if the same acts were committed by them. However, because the impact of the amendment of 15A N.C.A.C. 10B.0121 on our holding in *Malloy III* has not been addressed by our courts, it remains an unsettled issue.

Affirmed.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. RICHARD ANDERSON SMART, JR.

No. COA08-714

(Filed 17 March 2009)

Evidence— officer’s testimony—horizontal gaze nystagmus test—admissibility

The trial court did not err by admitting an officer’s testimony about the horizontal gaze nystagmus (HGN) test in a prosecution for impaired driving. An amendment to N.C.G.S. § 8C-1, Rule 702(a1) obviates the need for the State to prove that HGN testing is sufficiently reliable. Given that this officer was questioned at length about her skill, experience and training in administering the test, and that defendant’s argument on appeal concentrated on the method of proof rather than the officer’s qualifications, the court did not err in admitting the testimony.

Appeal by defendant from judgment entered 6 December 2007 by Judge W. Osmond Smith, III, in Wake County Superior Court. Heard in the Court of Appeals 3 December 2008.

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[195 N.C. App. 752 (2009)]

Robert W. Ewing for defendant.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

ELMORE, Judge.

Richard Anderson Smart, Jr. (defendant), appeals from a judgment sentencing him to a minimum of twenty-seven months' and a maximum of thirty-two months' imprisonment pursuant to his conviction for one count of habitual impaired driving; one count of resisting, delaying, or obstructing an officer; and one count of reckless driving.

I.

On 14 May 2007, at 1:00 am, Officer Tiffany Silsbee of the Cary Police Department was on patrol in Cary when she saw two vehicles traveling down East Chatham Street. The following information comes from Officer Silsbee's testimony at trial.

Officer Silsbee observed that the second car, which was being driven by defendant, was traveling over the posted speed limit and was very close to the rear bumper of the vehicle in front of it. Defendant's car at times came so close to the vehicle in front of it that the two nearly collided; in addition, Officer Silsbee observed defendant's brake lights come on several times and weave across two traffic lanes behind the other vehicle. Officer Silsbee activated her blue lights and pulled both cars over; all three pulled into the parking lot of a closed gas station.

Officer Silsbee first spoke briefly to the driver of the front vehicle, who told her defendant had been tailgating him. Officer Silsbee then approached defendant, who was still in the driver's seat of his car; she noticed a "very strong" odor of alcohol and defendant's eyes were half open, red, and glassy. She also noted that there was a male passenger in the passenger seat.

Officer Silsbee asked defendant why he had been speeding and tailgating the other vehicle, at which point he "became very upset." After she told him she had observed his driving, he made several excuses for the way he had been driving, said it was not intentional, and said he was "very sorry." Officer Silsbee then asked defendant whether he had been drinking, and he replied first that "he had had a few," but quickly changed his answer to "I've had none tonight."

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When Officer Silsbee asked defendant to exit his vehicle, he had to use his car door to pull himself to a standing position, then stumbled as he emerged from the car. She noted a “very obvious and very strong” odor of alcohol emanating from defendant at that point.

Officer Silsbee then asked defendant for his driver’s license; after some fumbling with his wallet, he produced an ID card. When she began speaking with defendant again about his driving, “he began to get very upset and angry once again”; feeling that it might be dangerous to proceed by herself, she called for back-up.

Officer Silsbee then began conducting field sobriety tests, beginning with the breathalyzer. She twice explained to defendant that, if he had not had anything to drink, the result would be a double zero. By this time, her back-up had arrived. Defendant initially agreed to submit to a breathalyzer test, but once Officer Silsbee retrieved the equipment to administer the test from her patrol car, he refused to take the test.

Officer Silsbee then administered the horizontal gaze nystagmus test (HGN), which involves moving an object—usually a pen or finger—horizontally in front of the subject’s eyes while observing whether the movement of the subject’s pupil is “jerky,” indicating intoxication, or smooth. Defendant had trouble following Officer Silsbee’s finger without moving his head, despite repeated instructions to keep his head still. Eventually Officer Silsbee was able to administer both the HGN and the vertical gaze nystagmus (VGN) test, which is the same as the HGN but with vertical movement of the object. She observed several indicators that defendant was under the influence of “an impairing substance.”

Officer Silsbee next initiated the walk-and-turn sobriety test, which begins with the subject walking a straight line, heel to toe, with the subject’s arms at his sides. Officer Silsbee walked defendant over to a line marking a parking spot where, after several requests to do so, defendant got into an appropriate position to begin the test. When Officer Silsbee then tried to give defendant instructions on how to perform the test, “he told me that he knew, he knew, and he began walking” before she could give any instructions. Defendant held up his arms to balance himself while walking, did not walk heel to toe, did not walk on the line, and took approximately five steps before stopping.

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Defendant then turned and began to walk rapidly toward his car. When Officer Silsbee called him to come back, he stated that he would not take the test and continued walking toward his car. Officer Silsbee and the officer who had arrived as back-up then subdued defendant and placed him under arrest.

On 11 September 2007, defendant was indicted on charges stemming from the incident; on 3 December 2007, defendant was found guilty on three of those charges, including resisting, delaying, or obstructing a public officer; reckless driving; and driving while impaired. Having a prior record level of IV, defendant was sentenced to twenty-seven months' to thirty-two months' imprisonment. Defendant now appeals.

II.

Although defendant initially phrases his sole argument on appeal in terms of Officer Silsbee's qualifications as an expert witness, he in fact specifies that his argument pertains to whether the officer's "method of proof"—that is, the nystagmus testing—is sufficiently reliable as a basis for expert testimony. This argument is without merit.

We note first that, although Officer Silsbee conducted both vertical and horizontal gaze nystagmus testing, only defendant's argument as to the latter is properly before this Court. Defendant failed to properly preserve the issue of vertical gaze nystagmus testing for review; he made only a general objection at trial not sufficient to preserve the error, see *State v. Parker*, 140 N.C. App. 169, 183, 539 S.E.2d 656, 665 (2000), and in his brief to this Court mentions it only in passing. As such, only defendant's arguments as to the HGN are before us.

Rule 702 of the North Carolina Rules of Evidence governs the testimony of expert witnesses; that rule states: "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). Per Rule 702(a1), an expert witness

qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following: (1) The results of a Horizontal

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Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

N.C. Gen. Stat. § 8C-1, Rule 702(a1) (2007).¹

Before an expert witness may offer an opinion under Rule 702(a) of the North Carolina Rules of Evidence, the trial court must first make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid[.]” *State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995).

Before Officer Silsbee testified as to her administration of the HGN test, defense counsel subjected her to extensive voir dire regarding her training and her experience administrating the test. She also testified as to the accuracy rate of the test in assessing intoxication as measured by various studies.

Defendant’s argument virtually ignores the above amendment to Rule 702(a1) specifying both the admissibility of HGN testimony and the admissibility of expert testimony on that test by “a person who has successfully completed training in HGN.” We interpret this amendment to Rule 702(a1) as obviating the need for the State to prove that the HGN testing method is sufficiently reliable. Defendant would have us interpret this subsection to state that a person testifying as to the HGN test must be an expert on it, an interpretation which would make the subsection nothing more than an example of the requirements of subsection (a), which as mentioned above states that “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). Given that (1) Officer Silsbee was questioned at length as to her skill, experience, and training in administering the HGN test and (2) defendant’s argument to this Court concentrates entirely on the method of proof rather than Officer Silsbee’s qualifications, we find that the trial court did not err in admitting her testimony.

No error.

Judges HUNTER, Robert C., and CALABRIA concur.

1. This subsection was added by amendment and applies to all hearings held on or after 21 August 2006; defendant was indicted and tried in late 2007. *See* 2006 N.C. Sess. Laws 253, § 6; 2007 N.C. Sess. Laws 493, § 33.

STATE v. MAYNARD

[195 N.C. App. 757 (2009)]

STATE OF NORTH CAROLINA v. ADELE MAYNARD

No. COA08-847

(Filed 17 March 2009)

**Animals— ordinance limiting number of dogs—not arbitrary—
related to public purpose**

A town ordinance limiting the number of dogs that could be kept on a property was constitutional where the ordinance was enacted to reduce noise and odor problems, which are clearly legitimate public purposes, the limitation is directly connected to those purposes, and a limit based on the size of the lot, the number of dogs, and the age of the dogs is not arbitrary.

Appeal by defendant from judgment entered 17 January 2008 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 15 January 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joan M. Cunningham, for the State.

Daniel F. Read, for defendant-appellant.

STEELMAN, Judge.

Where the city ordinance limiting the number of dogs to be kept on premises within the city limits was rationally related to the accomplishment of a legitimate governmental objective, the trial court did not err in denying defendant's motion to dismiss.

I. Factual and Procedural Background

On 4 March 2003, the Town Council of Nashville, North Carolina, adopted an ordinance which limited the number of dogs, greater than five months of age, that could be kept on property in the town of Nashville to three. The ordinance provided:

Sec. 4.3 Number of dogs to be kept on premises.

- (a) It shall be unlawful for any person to keep or maintain more than two (2) dogs on any lot or parcel of land having less than thirty thousand (30,000) square feet, and an additional seven thousand (7,000) square feet shall be required for an additional dog. A total of no more than three (3) dogs shall be

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allowed on any lot or parcel of land within the town limits regardless of square footage. Provided, however, this limitation shall not apply to dogs which are less than five (5) months of age.

- (b) Dog owners will have ninety (90) days from the effected [sic] date of section 4-3 [previously section 4-91] to bring their property into compliance.

Adele Maynard (“defendant”) was notified by a letter dated 7 April 2003 that she was not in compliance with the ordinance, and was informed that she had 90 days to come into compliance. On 3 January 2007, defendant was cited for keeping more than three dogs at her Nashville residence in violation of the ordinance.

Defendant was found guilty by a jury of violating Section 4.3 of the city ordinance and of keeping noisy animals. The trial court found defendant to be a prior record level 1 for misdemeanor sentencing purposes. The trial court consolidated the offenses and imposed a sentence of ten days, which was suspended, a fine of \$25.00, costs of court, and twelve months unsupervised probation. As a special condition of probation, defendant was directed to comply with the Nashville City Ordinance regarding dogs within thirty days. Defendant appeals.

II. Constitutionality of Ordinance

In her sole argument on appeal, defendant contends that the trial court erred in denying her motion to dismiss on the grounds that the city ordinance limiting the number of dogs that she could keep in her residence was unconstitutional. We disagree.

“It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated.” *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citations omitted).

Local governments have only powers conferred to them by the Legislature. *Keiger v. Board of Adjustment*, 281 N.C. 715, 720, 190 S.E.2d 175, 179 (1972); *see also High Point Surplus v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965) (counties “possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them.”). Pursuant to N.C. Gen. Stat. § 160A-186 (2007), a city may adopt an ordinance to “regulate, restrict, or prohibit the keeping, running, or going at large of any

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domestic animals, including dogs and cats.” This police power may be exercised in order “to protect or promote the health, morals, order, safety and general welfare of society.” *Town of Atlantic Beach v. Young*, 307 N.C. 422, 427, 298 S.E.2d 686, 690 (1983) (quotation and citations omitted); *see also* N.C. Gen. Stat. § 160A-174 (2007).

Defendant’s argument on appeal is that the ordinance in this case is “arbitrary and without any justification” and “fails to stand upon a rational basis.”

“In reviewing an ordinance to determine whether the police power has been exercised within constitutional limitations, this Court does not analyze the wisdom of a legislative enactment.” *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 443, 358 S.E.2d 372, 374 (1987) (citation omitted). “In order to determine whether [an] ordinance is unconstitutionally arbitrary and unreasonable we look to see if the ordinance is reasonably related to the accomplishment of a legitimate state objective.” *Atlantic Beach* at 428, 298 S.E.2d at 690-91 (citations omitted). Unless a statute is clearly prohibited by the Constitution, the appellate courts of North Carolina presume that it is constitutional. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167-68, 594 S.E.2d 1, 7 (2004). Likewise, municipal ordinances are presumed to be valid. *McNeill v. Harnett County*, 327 N.C. 552, 565, 398 S.E.2d 475, 482 (1990). The burden of showing that a municipal ordinance is invalid falls on the party challenging the constitutionality of the ordinance. *Atlantic Beach* at 426, 298 S.E.2d at 690.

Defendant argues that the restrictions of no more than three dogs over five months of age is inherently arbitrary, and that the ordinance should have considered and regulated pets “by weight or other characteristics” rather than just by the number of pets. She cites to the ordinance adopted by the city of Marion, South Dakota, and discussed in the case of *City of Marion v. Schoenwald*, 631 N.W.2d 213 (2001). That ordinance limited households to four dogs and four adult cats, with the additional requirement that only two of the dogs could “weigh more than twenty-five pounds,” and did not apply to kittens and puppies less than eight weeks old. *Schoenwald* at 215, footnote 1.

We note that this ordinance is in some respects more restrictive, and in some respects more lenient, than the Nashville ordinance before this Court. Clearly defendant would like to craft an ordinance based on numbers of pets and their characteristics that would allow

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her to retain all of her pets. So would every other pet owner within the municipal limits of Nashville. For this reason, the decision for the regulation of pets has been vested in the elected representatives of Nashville, so that the interests of the entire community can be considered and balanced in crafting an ordinance.

The Nashville ordinance does not set an arbitrary, immutable limit on the number of pets. Rather, the number of dogs allowed is based on the square footage of the lot. Further, there is no restriction on the number of dogs less than five months old. The fact that Nashville chose to regulate by size of lot, number of dogs, and age of dogs rather than by size or breed of dog does not render the ordinance arbitrary and unconstitutional.

We agree with the following portion of the analysis found in the *Schoenwald* case:

A maximum of four dogs per household is scarcely over restrictive. As we have said, numerous courts have upheld stricter limits. Too many dogs in one place can produce noise, odor, and other adverse conditions. *Downing v. Cook*, 69 Ohio St. 2d 149, 431 N.E.2d 995, 997 (Ohio 1982). . . . From our extensive research on similar decisions throughout the country, we think it significant that with growing urbanization over the past fifty years, courts have become increasingly deferential to local authorities in upholding diverse pet control measures.

Schoenwald at 218.

In the instant case, the record reveals that the town of Nashville enacted the ordinance at issue for the purpose of reducing noise and odor problems within the city limits. These objectives are clearly legitimate public purposes, and a limitation on the number of dogs per lot is directly connected to these objectives. Based on the record in this case, including the evidence presented, defendant has failed to meet her burden of showing that the ordinance is arbitrary, unreasonable, and unrelated to the public health and welfare of the citizens of Nashville, and we hold that the ordinance is constitutional.

Defendant's argument is without merit.

Defendant makes no argument in her brief concerning her conviction for keeping noisy animals and any assignment of error pertaining to that conviction is deemed abandoned. N.C. R. App. P. 28(b)(6) (2008).

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NO ERROR.

Judge GEER concurs.

Judge STEPHENS concurs in result only.

STATE OF NORTH CAROLINA v. ROBERT LEE VINCENT, SR.

No. COA08-1137

(Filed 17 March 2009)

1. Criminal Law— instruction—defense of accident—precluded by unlawful conduct

The trial court did not commit plain error in a second-degree murder case by failing to give an instruction on the defense of accident because the defense of accident is not raised where defendant was engaged in unlawful conduct when the killing occurred, and it cannot be said that defendant was engaged in lawful conduct since: (1) defendant created the volatile situation by following the victim and his family, getting out of his truck, and continuing an altercation with the victim's father that began at a gas station; and (2) the encounter escalated to the point of deadly violence when defendant introduced the gun into the altercation which resulted in the death of the victim.

2. Homicide— instruction—voluntary manslaughter—sufficiency of evidence

The trial court did not commit plain error in a second-degree murder case by failing to give an instruction on voluntary manslaughter because neither the State's evidence nor defendant's evidence supported this instruction when defendant's evidence tended to show that the gun fired when defendant and the victim's father struggled for control of the gun and the shooting was accidental, and the State's evidence tended to show that defendant fired the gun while he was arguing with the victim's father. Neither evidence tended to show that defendant acted in the heat of passion or in the imperfect exercise of self-defense.

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Appeal by defendant from judgment dated 22 April 2008 by Judge Cy A. Grant in Northampton County Superior Court. Heard in the Court of Appeals 25 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant-appellant.

BRYANT, Judge.

Robert Lee Vincent, Sr., (defendant) appeals from a judgment entered upon a jury verdict finding him guilty of second-degree murder. We find no error.

Facts

The State presented evidence tending to show the following: On the evening of 27 July 2006, John McLaurin stopped at the Blue Flame gas station in Gaston, North Carolina with his wife, Yvette, and his stepson, Kenneth. As the McLaurins were leaving the gas station, a gray truck pulled in front of their vehicle and stopped in the middle of the entryway to the gas station. The McLaurins, irritated by the length of time the truck blocked the driveway, pulled up beside the truck. Mr. McLaurin who was driving, told the driver of the truck that it was unlawful not to use a turn signal. The truck driver, later identified as defendant, and Mr. McLaurin exchanged unpleasantries, then Mr. McLaurin pulled onto Highway 46 in the direction of the McLaurin home.

Defendant followed the McLaurins onto Highway 46. Mr. McLaurin's car was having trouble and stalled several times, however, defendant remained behind the vehicle. When Mr. McLaurin turned off Highway 46 onto Family Road, where he lived, he pulled the vehicle to the side of the road and got out. Defendant stopped his truck behind the McLaurin car and also got out. As the two men began to argue, Mrs. McLaurin and Kenneth got out of the car. While continuing to argue, defendant reached into his truck, pulled out an object wrapped in a black cloth, and revealed a pistol. At that point, Mr. McLaurin told his wife and stepson to return to their car. Defendant raised the gun, pointed it towards Mr. McLaurin, and fired a shot. The gunshot struck eleven-year-old Kenneth in the forehead. Kenneth was transported to a hospital where he died later that evening as a result of brain damage caused by the gunshot wound.

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Meanwhile, defendant, after firing the gun, got into his truck and drove to a friend's home in Virginia. Several days later an officer with the Emporia, Virginia police department saw defendant walking down a highway in the middle of the night. When the officer approached defendant, he ran into a nearby soybean field and only surrendered after officers threatened to release dogs into the field.

Defendant testified at trial and stated that on 27 July 2006, while at the Blue Flame gas station, Mr. McLaurin had cursed at him for blocking the driveway. Defendant also testified Mr. McLaurin got out of his car and walked to the back of defendant's truck. Defendant thought he heard Mr. McLaurin kick or hit the truck. Because he thought his truck may have been damaged, defendant followed the McLaurins until they pulled over onto the side of the road. Defendant removed his gun from his truck and held it while telling Mr. McLaurin not to "come up on me." When defendant was distracted by Mrs. McLaurin, Mr. McLaurin grabbed defendant's hand and attempted to snatch the gun from him. During the struggle, the gun fired.

Defendant was found guilty of second-degree murder. Defendant was sentenced to a minimum term of 220 months to a maximum term of 273 months. Defendant appeals.

On appeal, defendant argues: (I) the trial court committed plain error by failing to give an accident instruction; and (II) the trial court committed plain error by failing to give a jury instruction on manslaughter.

Standard of Review

"Plain error is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Holbrook*, 137 N.C. App. 766, 767, 529 S.E.2d 510, 511 (2000) (internal quotations omitted).

The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously

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affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotations omitted) (emphasis omitted). “[D]efendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result.” *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

I

[1] Defendant argues the trial court committed plain error by failing to give an instruction on the defense of accident. We disagree.

Defendant failed to request the instruction at trial and concedes that plain error is the proper standard of review. When a request is made for an instruction which is legally correct and supported by evidence, the court must give the instruction at least in substance. *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956). “The defense of accident is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another.” *State v. Lytton*, 319 N.C. 422, 425, 355 S.E.2d 485, 487 (1987). “A killing will be excused as an accident when it is unintentional and when the perpetrator, in doing the homicidal act, did so without wrongful purpose or criminal negligence while engaged in a lawful enterprise.” *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 732 (1995). However, where the defendant was engaged in unlawful conduct when the killing occurred, the defense of accident is not raised. *Id.*

In the present case we can not say defendant was engaged in lawful conduct. After the initial altercation, defendant followed the McLaurins in his truck until they pulled over onto the side of the road. Defendant then got out of his truck and began to argue with Mr. McLaurin. Defendant then reached into his truck and removed his gun. Like the defendant in *Riddick*, defendant in the present case was engaged in intentional conduct when the killing occurred. Defendant created the volatile situation by following the McLaurins, getting out of his truck, and continuing the altercation that began at the Blue Flame gas station. The encounter escalated to the point of deadly violence when defendant introduced the gun into the altercation which resulted in the death of the McLaurins' son. We hold the trial court did

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not commit plain error by refusing to give an instruction on the defense of accident. Defendant's assignment of error is overruled.

II

[2] Defendant argues the trial court committed plain error by failing to give an instruction on voluntary manslaughter. We disagree.

Defendant failed to object to the instruction at trial and concedes that plain error is the proper standard of review. In order to receive an instruction on voluntary manslaughter, there must be evidence tending to show "[a] killing [was] committed in the heat of passion suddenly aroused by adequate provocation, or in the imperfect exercise of the right of self-defense[.]" *State v. Huggins*, 338 N.C. 494, 497, 450 S.E.2d 479, 481 (1994) (internal quotations omitted).

In *State v. Blake*, 317 N.C. 632, 346 S.E.2d 399 (1986), the State's evidence tended to show the defendant arrived at the victim's auto repair shop agitated, called the victim to his truck, and shot the unarmed victim. *Id.* at 634, 346 S.E.2d at 400. The defendant's evidence tended to show that the victim approached the defendant in a threatening manner, began to choke the defendant, and was accidentally shot when the two men struggled for control of the defendant's gun. *Id.* at 636, 346 S.E.2d at 402. Our Supreme Court, relying on *State v. Wallace*, 309 N.C. 141, 305 S.E.2d 548 (1983), held the defendant was not entitled to an instruction on voluntary manslaughter because neither the State's evidence nor the defendant's evidence supported an instruction on voluntary manslaughter.

Here, as in *Blake*, neither the State's evidence nor defendant's evidence support an instruction on voluntary manslaughter. Defendant's evidence tended to show that the gun fired when defendant and Mr. McLaurin struggled for control of the gun and the shooting was accidental. The State's evidence tended to show that defendant fired the gun while he was arguing with Mr. McLaurin. Neither the State's evidence nor the defendant's evidence tended to show that defendant acted in the heat of passion or in the imperfect exercise of self-defense. We hold the trial court did not commit plain error by failing to give an instruction on voluntary manslaughter. This assignment of error is overruled.

NO ERROR.

Judges ELMORE and STEELMAN concur.

STATE v. FRADY

[195 N.C. App. 766 (2009)]

STATE OF NORTH CAROLINA v. MARY JEAN HANDY FRADY

No. COA08-1215

(Filed 17 March 2009)

Schools and Education— compulsory attendance—warrant for parent’s violation—principal’s discretion not jurisdictional or element of offense

The State was not required to present evidence at trial that the school principal personally made the decision to have a warrant issued against defendant parent charging a violation of the school attendance law, N.C.G.S. § 115C-378, in order to convict defendant of that offense. The exercise of the principal’s discretion was neither a jurisdictional requirement nor an element of the offense.

Appeal by defendant from judgment entered 13 February 2008 by Judge James L. Baker in Buncombe County Superior Court. Heard in the Court of Appeals 25 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General Katherine A. Murphy, for the State.

Carol Ann Bauer for defendant-appellant.

STEELMAN, Judge.

The discretion of a school principal to seek a warrant for a parent’s violation of N.C. Gen. Stat. § 115C-378 is not jurisdictional and is not an element of the offense. The trial court had subject matter jurisdiction over defendant.

I. Factual Summary and Procedural Background

On 23 August 2006, Mary Jean Handy Frady’s (defendant) son, M.P., started the eighth grade at Clyde A. Erwin Middle School. Between that first day of school and 22 February 2007, he missed sixty-three days of school. Of those sixty-three absences, thirty-two were unexcused.

On 20 October 2006, Jill Castelloe, the dropout prevention specialist with the Buncombe County School system, sent defendant a letter notifying her of North Carolina’s Compulsory Attendance Law and informing her that her son had three days of unexcused absences. On 28 November 2006, Castelloe sent defendant a second letter

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reminding her of the Compulsory Attendance Law, informing her that her son had six unexcused absences, and asking her to contact the school to discuss a solution to the problem. Defendant did not respond. On 6 December 2006, Castelloe sent defendant a third letter informing her that she was in violation of the Compulsory Attendance Law, that charges might be brought against her, and to set up a “ten-day conference,” in accordance with N.C. Gen. Stat. § 115C-378. Castelloe spoke with defendant over the phone on 13 December 2006. During this conversation, Castelloe and defendant set the conference for 15 December 2006.

The ten-day conference convened as planned and was attended by the principal of Erwin Middle School, representatives from two alternative schools, and Castelloe. Defendant did not attend the conference. As a result of the conference, a warrant was issued on 22 February 2007 charging defendant with violation of the Compulsory Attendance Law.

On 23 November 2007, defendant was found guilty in the Buncombe County District Court. Upon appeal to the Superior Court, defendant was found guilty by a jury on 13 February 2008. The Superior Court entered judgment and sentenced defendant to forty-five days in the common jail of Buncombe County. This sentence was suspended, and defendant was placed on supervised probation for twelve months. Defendant appeals.

II. Analysis

In her only argument, defendant contends that the trial court lacked subject matter jurisdiction because administrative procedures had not been followed before the warrant was issued charging the defendant with school attendance law violation pursuant to N.C. Gen. Stat. § 115C-378. We disagree.

A review of the trial court’s subject matter jurisdiction presents a question of law. *State v. Satanek*, 190 N.C. App. 653, —, 660 S.E.2d 623, 625 (2008) (citing *State v. Taylor*, 155 N.C. App. 251, 260, 574 S.E.2d 58, 65 (2002), *cert. denied*, 357 N.C. 65, 579 S.E.2d 572-73 (2003)). On appeal concerning the trial court’s subject matter jurisdiction, this Court applies a *de novo* standard of review. *Id.*

Chapter 115C of the North Carolina General Statutes governs elementary and secondary education in this State. Part 1 of Article 26 of Chapter 115C provides for compulsory attendance of school-aged children. N.C. Gen. Stat. § 115C-380 provides that “any parent,

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guardian or other person violating the provisions of this Part shall be guilty of a Class 1 misdemeanor.” N.C. Gen. Stat. § 115C-380 (2007).

Specifically, N.C. Gen. Stat. § 115C-378 provides that “[e]vidence that shows that the parents, guardian, or custodian were notified and that the child has accumulated 10 absences which cannot be justified under the established attendance policies of the local board shall establish a prima facie case that the child’s parent, guardian, or custodian is responsible for the absences.” N.C. Gen. Stat. § 115C-378 (2007).

Defendant’s child accumulated thirty-two unexcused absences in six months. Defendant was notified after her child had accumulated three, six, and more than ten unexcused absences.

N.C. Gen. Stat. § 115C-378 requires a conference after ten unexcused absences, providing that “the principal shall review any report or investigation prepared under G.S. 115C-381 and shall confer with the student and the student’s parent, guardian, or custodian, if possible, to determine whether the parent, guardian, or custodian has received notification pursuant to this section and made a good faith effort to comply with the law.” N.C. Gen. Stat. § 115C-378 (2007).

The trial court charged the jury that in order to find the defendant guilty, the State was required to prove the following six things beyond a reasonable doubt:

First, that the Defendant, Mary [Jean] Handy Frady, was the parent or guardian of a child who was between the age of seven and sixteen years.

Second, that the child was enrolled in a North Carolina public school during the 2006-2007 school year. Clyde A. Erwin Middle School is a public school.

Third, that the principal or principal’s designee notified the Defendant of the child’s absences from school after the child accumulated three unexcused absences in that 2006-2007 school year.

Four, that after not more than six unexcused absences, the defendant was further notified that she may be in violation of the North Carolina compulsory school attendance law.

Five, that after the Defendant was notified, the school attendance counselor worked with or attempted to work with the child and

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the Defendant to analyze causes of absences and determine steps to eliminate the problem.

And sixth, during the 2006-2007 school year the child in question had accumulate [sic] ten unexcused absences, and that the defendant was notified of the ten unexcused absences, and that the ten unexcused absences cannot be justified under the established attendance policies of the local Board of Education.

We note that defendant makes no challenge on appeal to either the sufficiency of the evidence presented by the State as to these elements or to the court's charge to the jury.

Rather, defendant makes the peculiar argument that the State was required to present specific evidence at trial that the principal personally made the decision to proceed with having a warrant issued for violation of N.C. Gen. Stat. § 115C-378. Defendant acknowledges that there do "not appear to be any cases on point with North Carolina General Statute § 115C-378 and establishing subject matter jurisdiction with the courts."

We hold that the procedures set forth in N.C. Gen. Stat. § 115C-378 requiring that the schools take certain steps prior to causing a warrant to be issued are elements of the offense. They were so treated by the trial judge and were found to exist in this case by the jury, beyond a reasonable doubt. These steps included the repeated notification to defendant by the school of cumulative absences over a considerable period of time. Once each of these steps have been complied with, then the principal was vested with the discretion of whether or not to seek a criminal warrant for violation of the State's compulsory attendance law. The exercise of this discretion was not a jurisdictional requirement nor was it an element of the offense.

The jury found that all required procedures were fully complied with. The ten-day conference was conducted, at which the principal was present and defendant was not. Following this conference, a warrant was obtained against defendant for violation of the provisions of N.C. Gen. Stat. § 115C-378.

The trial court had jurisdiction to hear this matter.

NO ERROR.

Judges BRYANT and ELMORE concur.

STATE v. BOGGESS

[195 N.C. App. 770 (2009)]

STATE OF NORTH CAROLINA v. TODD CHARLES BOGGESS

No. COA08-746

(Filed 17 March 2009)

Criminal Law— defenses—automatism—felony murder—underlying kidnapping voluntary

The trial court did not err by failing to give an instruction on the defense of automatism in a prosecution for felony murder based on kidnapping where the defendant's expert evidence was that he was in a dissociative state, precluding a voluntary act, but not until the murder. In felony murder, the underlying offense provides the voluntary act if the elements of both offenses occur in a time frame that can be perceived as a single transaction, as here. Defendant was also not entitled to an instruction that a person found not guilty based on automatism could be involuntarily committed as being mentally ill.

Appeal by defendant from judgment entered 1 June 2007 by Judge Ripley E. Rand in Superior Court, Durham County. Heard in the Court of Appeals 10 February 2009.

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

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

WYNN, Judge.

This is a second appeal for Defendant arising from the facts in this matter, which are set forth in *State v. Boggess*, 358 N.C. 676, 600 S.E.2d 453 (2004) (*Boggess I*).

The first appeal arose from his capital trial in January 1997 wherein a jury found him guilty of first-degree murder on the basis of premeditation and deliberation; felony murder, with kidnapping and robbery with a dangerous weapon serving as underlying felonies; and murder by torture. In conformance with the jury's recommendation, the trial court imposed a sentence of death as to the murder, and sentenced Defendant to a term of 60 to 92 months' imprisonment for the conviction of robbery with a dangerous weapon.

Upon review, our Supreme Court in *Boggess I* awarded Defendant a new trial based upon errors found in the jury selection process and a jury instruction pertaining to the meaning of a life sentence. *Id.*

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This second appeal arises from his retrial wherein he was convicted of first-degree murder, solely on the theory of felony murder with kidnapping as the underlying felony; robbery with a dangerous weapon; and first-degree kidnapping. The trial court sentenced Defendant to a term of life imprisonment without parole. In this appeal, Defendant challenges only his first-degree murder conviction.

As stated in our Supreme Court's opinion in *Bogges I*, the State's evidence tended to show that Defendant and his girlfriend, Melanie Gray, were at Wrightsville Beach when they approached Danny Pence, who was interested in selling his Ford Mustang. The three rode for a test drive that resulted in the couple driving Mr. Pence to Durham.

In Durham, the couple drove Mr. Pence to a wooded area and, with his hands tied, led him to a partially constructed house with the chimney and fireplace exposed. Defendant told Mr. Pence to get into the fireplace, and unsuccessfully attempted to tie him. Thereafter, Defendant hit Mr. Pence on the head several times with a piece of floorboard and a brick, and covered Mr. Pence with pieces of sheet metal. The couple was later observed driving Mr. Pence's Mustang and pawning some items from the car. Mr. Pence's body was found in a wooded area by a group of teenage boys.

At his second trial, Defendant's main theory of defense was that he was in a dissociative state when he committed the killing in Durham. Defendant offered the expert opinion of forensic psychiatrist George Corvin, who testified that Defendant "was in a dissociative trance during the events that occurred in the woods off Terry Road" in Durham. Dr. Corvin equated automatism or unconsciousness with dissociation, describing the latter as follows:

Dissociation as a symptom is basically the separation of normally connected mental processes, such as emotions, cognition, thinking, and also behavioral controls from full conscious awareness. . . .

It is a temporary, can be sudden, alteration in your level of consciousness, if you will. It can last anywhere from moments to minutes to hours and, in rare situations, people can have conditions where they literally lose complete memory of what and where they've been for days even.

During this period of time, during periods of Dissociation, an individual can engage in acts that they don't really have vol-

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untary conscious control over or even full awareness of what they are doing.

Following the evidence, Defendant requested instructions on the defenses of automatism/unconsciousness, but the trial court gave the instructions only as to first-degree murder by premeditation and deliberation and by torture, ruling that the defenses did not apply to felony murder. The trial court also refused to give an instruction, which Defendant requested, stating that a person found not guilty by reason of unconsciousness is subject to involuntary commitment in a mental health facility.

In this appeal, Defendant argues that the trial court erred by refusing to instruct that the unconsciousness defense applied to the felony murder charges, and failing to instruct that he could be involuntarily committed if found not guilty by reason of unconsciousness. We disagree.

A trial court must give an instruction, at least in substance, that is a correct statement of the law and supported by substantial evidence. *State v. Napier*, 149 N.C. App. 462, 463-64, 560 S.E.2d 867, 868-69 (2002) (citation omitted). The automatism defense has been defined as:

the state of a person who, though capable of action, is not conscious of what he is doing. It is to be equated with unconsciousness, involuntary action [and] implies that there must be some attendant disturbance of conscious awareness. Undoubtedly automatic states exist and medically they may be defined as conditions in which the patient may perform simple or complex actions in a more or less skilled or uncoordinated fashion without having full awareness of what he is doing.

State v. Fields, 324 N.C. 204, 208, 376 S.E.2d 740, 742 (1989) (citations omitted). The practical effect of automatism is that the “absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.” *Id.* (citations omitted).

Here, Defendant argues that he was entitled to an instruction that the automatism defense applied to the felony-murder charges because Dr. Corvin’s testimony established that he was in a dissociative state at the time of the killing, thus precluding the necessary “voluntary act.” However, the felony-murder rule holds that a killing committed during the perpetration of a kidnapping is first-degree murder.

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N.C. Gen. Stat. § 14-17 (2007). “All that is required to support convictions for a felony offense and related felony murder ‘is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction.’” *State v. Trull*, 349 N.C. 428, 449, 509 S.E.2d 178, 192 (1998) (citations omitted). Thus, the underlying offense provides the voluntary act under the felony murder rule if “the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction.” *Id.* (citations and quotation marks omitted).

Dr. Corvin expressed the following opinion regarding when, in the entire sequence of events, Defendant became dissociative:

Q: I want to try to clarify one thing. You’re saying while you can’t precisely say when [Defendant] went into a dissociative state, it was somewhere in the woods off Terry Road. Is that fair to say?

A: Yes, sir. Certainly, the way that I’ve come to that opinion is that by the time they came to the foundation or the rock walls, all of the triggers were in place and all of the stresses were at least well developed. Then the statement, of course, that he made early in those sequence of events all suggest that, by that time and during that period, he was dissociative.

Q: But prior to that, he was not in a dissociative state. I mean well prior to it. I’m not trying to trip you up with minutes—

A: I understand. There’s certainly not clear indication that, say, for example, that while they were driving or while they were still at Wrightsville that he was in a dissociative state. It doesn’t rule it out, but I have no reason to conclude that.

Thus, neither Dr. Corvin’s testimony nor any other evidence in the record supports the theory that Defendant was in a dissociative state at Wrightsville Beach or any other point before reaching Durham. In other words, the automatism defense would not have been at play when Defendant committed the kidnapping. Because all events leading to the killing constitute “a single transaction,” no additional voluntary act was required to complete the felony murder. Therefore, the evidence did not support an instruction on the automatism defense as applied to felony murder, and we reject that argument.

Because we hold that Defendant was not entitled to an instruction on the defense of automatism, we summarily reject Defendant’s contention that “the trial court erred by refusing to instruct the jury that a person found not guilty based on automat-

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ism or unconsciousness could be involuntarily committed to a facility for the mentally ill.” The record does not show evidence to support giving such an instruction.

No error.

Judges ROBERT C. HUNTER and ERVIN concur.

STATE OF NORTH CAROLINA v. JEAN RINEHART

No. COA08-1209

(Filed 17 March 2009)

Appeal and Error— appealability—guilty plea—writ of certiorari

Defendant’s appeal from a judgment entered upon his plea of guilty to one count of escape from state prison and attaining the status of an habitual felon is dismissed without prejudice to defendant’s right to file a motion for appropriate relief under N.C.G.S. § 15A-1413 because: (1) a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right unless defendant is appealing sentencing issues or the denial of a motion to suppress, or defendant has made an unsuccessful motion to withdraw the guilty plea; (2) defendant’s assertions on appeal that his freedom from double jeopardy and his right to a speedy trial were violated are not issues from which defendant has an appeal of right as enumerated in N.C.G.S. § 15A-1444; and (3) although defendant filed a writ of certiorari, the Court of Appeals was without authority to issue it since defendant failed to take timely action, was not appealing from an interlocutory order, and was not seeking review under N.C.G.S. § 15A-1422(c)(3).

Appeal by defendant from judgment dated 25 February 2008 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 25 February 2009.

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

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

STATE v. RINEHART

[195 N.C. App. 774 (2009)]

BRYANT, Judge.

Jean Rinehart (defendant) appeals from a judgment entered upon his plea of guilty to one count of escape from state prison and attaining the status of an habitual felon. For the reasons stated herein, we dismiss defendant's appeal.

Facts

On 8 December 2005, defendant escaped from the Forsyth Correctional Center where he was serving a sentence for breaking and entering. He was captured on 10 December 2005 in Georgia and charged with escape from state prison and attaining the status of an habitual felon.

Defendant made pre-trial motions to dismiss based on the double jeopardy clause of the Fifth Amendment to the United States Constitution and the violation of his right to a speedy trial. Defendant contended he was subjected to an administrative punishment by the Department of Correction's imposition of a fine and solitary confinement. Defendant also contended his right to a speedy trial was violated because he had been in the continuous custody of the Forsyth County Sheriff for sixteen months in violation of N.C. Gen. Stat. § 15A-711(a).

At the pre-trial hearing on 25 February 2008, the trial court denied both of defendant's motions. After the denial of his motions, defendant entered an *Alford* guilty plea and reserved the right to appeal the denial of his motions to dismiss. Defendant was sentenced to a minimum of 101 months to a maximum of 131 months imprisonment. Defendant appeals.

We first determine whether defendant has a right to appeal the denial of his motions to dismiss. The State, by way of motion, argues defendant's appeal should be dismissed. We agree.

A defendant's right to appeal in North Carolina is purely a creation of statute. *See State v. Pimental*, 153 N.C. App. 69, 568 S.E.2d 867 (2002). Pursuant to N.C. Gen. Stat. § 15A-1444, a defendant who has plead guilty may appeal the following:

- (1) whether the sentence is supported by the evidence (if the minimum term of imprisonment does not fall within the presumptive range);
- (2) whether the sentence results from an incorrect finding of the defendant's prior record level under N.C. Gen.

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Stat. § 15A-1340.14 or the defendant's prior conviction level under N.C. Gen. Stat. § 15A-1340.21; (3) whether the sentence constitutes a type of sentence not authorized by N.C. Gen. Stat. § 15A-1340.17 or § 15A-1340.23 for the defendant's class of offense and prior record or conviction level; (4) whether the trial court improperly denied the defendant's motion to suppress; and (5) whether the trial court improperly denied the defendant's motion to withdraw his guilty plea.

State v. Jamerson, 161 N.C. App. 527, 528, 588 S.E.2d 545, 546 (2003) (citation omitted); N.C. Gen. Stat. § 15A-1444 (a2) (2007). Accordingly, "a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea." *State v. Corbett*, 191 N.C. App. 1, 3, 661 S.E.2d 759, 761 (2008), *aff'd per curiam*, 362 N.C. 672, 669 S.E.2d 323 (2008) (quoting *Pimental*, 153 N.C. App. at 73, 568 S.E.2d at 870).

Defendant's assertions on appeal that his freedom from double jeopardy and his right to a speedy trial were violated are not issues from which defendant has an appeal of right as enumerated by G.S. § 15A-1444. Therefore, defendant does not have a right of appeal to this Court.¹

Although defendant has filed a petition for writ of certiorari, this Court is without authority to issue a writ of certiorari. *See Corbett*, 191 N.C. App. at 3, 661 S.E.2d at 761; *Jamerson*, 161 N.C. App. at 529, 588 S.E.2d at 547; *State v. Dickson*, 151 N.C. App. 136, 137-38, 564 S.E.2d 640, 640 (2002).

Although N.C. Gen. Stat. § 15A-1444(e) permits a defendant to petition for a writ of certiorari, pursuant to N.C. R. App. P. 21(a)(1), this Court is limited to issuing a writ of certiorari:

in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review

1. We are cognizant of the recent opinion in *State v. Smith*, 193 N.C. App. 739, 668 S.E.2d 612 (2008), where this Court, relying on *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), vacated a judgment entered upon the defendant's guilty plea. However, we find *Wall* distinguishable from the facts of the present case because the State in *Wall* had, and exercised, its right to appeal from the judgment; in the present case, defendant has no right to appeal.

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pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

Id. And, where “the North Carolina General Statutes conflict with Rules of Appellate Procedure, the Rules of Appellate Procedure will prevail.” *Dickson*, 151 N.C. App. at 138, 564 S.E.2d at 640-41 (quoting *Neasham v. Day*, 34 N.C. App. 53, 55-56, 237 S.E.2d 287, 289 (1977)). Because defendant has not failed to take timely action, is not appealing from an interlocutory order, and is not seeking review pursuant to N.C. Gen. Stat. § 15A-1422(c)(3), we are without authority to issue a writ of certiorari.

Therefore, defendant’s appeal must be dismissed. However, dismissal of defendant’s appeal is without prejudice to defendant’s right to file a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1413 (2007). *See Corbett*, 191 N.C. App. at 3, 661 S.E.2d at 762; *Jamerson*, 161 N.C. App. at 530, 588 S.E.2d at 547.

Dismissed.

Judges ELMORE and STEELMAN concur.

ANTWAN BYNUM, BY AND THROUGH HIS GUARDIAN AD LITEM, WAYNE BOYETTE, AND ANITA BYNUM, PLAINTIFFS v. THE NASH-ROCKY MOUNT BOARD OF EDUCATION, DEFENDANT

No. COA08-823

(Filed 17 March 2009)

Schools and Education— student injured on playground—interest on damages against board of education

An elementary school student injured on playground equipment and his mother were entitled to recover interest on damages awarded in their negligence action against the local board of education where: (1) the terms of a trust fund agreement between the board and a risk management program waived the board’s governmental immunity to the extent it provided excess coverage through a commercial insurance carrier meeting the requirements of N.C.G.S. § 115C-42, including interest on a judgment to the extent such interest was authorized by statute; and (2) authority for such interest was provided by N.C.G.S. § 24-5.

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[195 N.C. App. 777 (2009)]

Appeal by plaintiffs from judgment entered 15 April 2008 by Judge Frank R. Brown in Edgecombe County Superior Court. Heard in the Court of Appeals 11 December 2008.

Taylor Law Office, by W. Earl Taylor, Jr., for plaintiff-appellants.

Valentine, Adams, Lamar, Murray, Lewis and Daughtry, LLP, by Lewis W. Lamar, Jr., for defendant-appellee.

STEELMAN, Judge.

Where the clear and unambiguous language of defendant's insurance policy defined "damages" to include interest as authorized by North Carolina statutory law, the trial court erred in concluding that interest on plaintiffs' judgment was prohibited by North Carolina case law.

I. Factual and Procedural Background

On 14 February 2006, Antwan Bynum, the minor plaintiff, was a student in the fifth grade at Benvenue Elementary School. On that date, he was on a swing in the playground of the school when the swing's chain broke, causing Antwan to fall to the ground and sustain injuries. On 19 December 2006, Antwan and his mother, Anita Bynum (hereinafter, plaintiffs) commenced an action against defendant, the Nash-Rocky Mount Board of Education, seeking monetary damages based upon the alleged negligence of defendant. The action was tried before a jury on 24 March 2008. The jury found defendant to have been negligent, awarded the minor plaintiff the sum of \$160,000.00 and awarded his mother the sum of \$6,385.35 for medical bills incurred on behalf of the minor plaintiff. The trial court held that an award of pre and post judgment interest against defendant was prohibited and denied plaintiffs' request to award interest on the judgment. Plaintiffs appeal.

II. Pre-Judgment and Post-Judgment Interest

In plaintiffs' sole argument on appeal, they contend that the trial court erred in refusing to award interest on the judgment against defendant. We agree.

Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions

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absent waiver of immunity. An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State.

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

Defendant is a local board of education as defined in N.C. Gen. Stat. § 115C-5(5) (2007). N.C. Gen. Stat. § 115C-42 (2007) provides that a local board of education may waive governmental immunity from liability for damage caused by the torts of its employees acting within the course of their employment upon the purchase of insurance. However, “such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.” N.C. Gen. Stat. § 115C-42.

In the instant case, defendant participated in a risk management program known as the North Carolina School Boards Trust (“NCSBT”). Defendant and NCSBT entered into a Trust Fund Agreement, that provided coverage for claims filed between 1 July 2006 and 1 July 2007 for incidents occurring after 1 July 1986, and was applicable to the incident that was the subject of this suit. The term damages was defined in the Agreement as “a monetary judgment (including pre-judgment and post-judgment interest awarded on any monetary judgment pursuant to North Carolina statutory law) . . .”

The Trust Fund Agreement constitutes a waiver of defendant’s immunity to the extent it provides excess coverage through a commercial insurance carrier meeting the requirements of N.C. Gen. Stat. § 115C-42. The clear and unequivocal language of the Agreement establishes that this waiver includes interest on a judgment to the extent that such interest is authorized by North Carolina statutory law. The statutory authority for such interest is provided by N.C. Gen. Stat. § 24-5, which states 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.” N.C. Gen. Stat. § 24-5(b) (2007).

We hold that under the terms of the policy, plaintiffs are entitled to recover interest. The procurement of excess insurance coverage constitutes a waiver of any immunity as to the payment of interest on the judgment. In the instant case, the coverage limits provided for in

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the Trust Fund Agreement are sufficient to cover the judgment against defendant, plus any interest applicable under N.C. Gen. Stat. § 24-5(b). We therefore reverse the order of the trial court and remand for the entry of an order requiring the computation of interest on plaintiffs' judgment.

REVERSED.

Judges CALABRIA and STROUD concur.

MARVIN SIMMS, PLAINTIFF v. DEBORAH SIMMS, DEFENDANT

No. COA08-719

(Filed 17 March 2009)

1. Child Support, Custody, and Visitation; Collateral Estoppel and Res Judicata—entitlement to rehearing—collaterally estopped from relitigating domestic violence issue

Plaintiff father is entitled to a child custody rehearing because the trial court was collaterally estopped from relitigating and finding that he had committed acts of domestic violence, a factor which the trial court was required to consider in awarding custody, since the issue was actually litigated and determined in plaintiff's favor during a domestic violence protective order hearing.

2. Evidence—child custody—testimony by guardian ad litem

On rehearing in a child custody case, the trial court should take the testimony of the guardian ad litem so that she may offer her findings before both parties and on the record.

Appeal by plaintiff from orders entered 26 June and 28 December 2007 by Judge Jennifer M. Green in District Court, Wake County. Heard in the Court of Appeals 27 January 2009.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

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[195 N.C. App. 780 (2009)]

WYNN, Judge.

The doctrine of collateral estoppel precludes an issue, determined in a prior judicial action, from being relitigated in a later action.¹ On appeal, Plaintiff-Father Marvin Simms argues that the trial court was collaterally estopped from finding in its custody order that he committed acts of domestic violence. Because the issue of whether Marvin Simms committed acts of domestic violence was determined in his favor in a prior judicial action, we hold that the trial court erred by relitigating that issue, and finding that he committed acts of domestic violence in awarding custody to Defendant-Mother Deborah Simms.

Marvin and Deborah Simms married on 6 June 1987, separated in 2003, and subsequently divorced. The parties have two children, one of which has now reached the age of majority.

Beginning in 2004, the couple filed domestic violence complaints against each other. On 4 February 2004, District Court Judge K. D. Bailey heard their claims and entered a judgment concluding that both have “failed to prove grounds for issuance of a domestic violence protective order.”

On 10 May 2004, District Court Judge Jennifer M. Green issued a temporary consent order giving physical custody of the minor child to Marvin Simms and allowing Deborah Simms scheduled visitations. Subsequently, Deborah Simms moved to New Jersey and filed a motion for modification. In response, the trial court granted Deborah Simms visitation and appointed Patricia K. Gibbons as guardian *ad litem* for the minor child.

On 26 June 2007, the trial court issued an order for child support and alimony, and a separate custody order, awarding the parties joint legal custody and Deborah Simms primary physical custody.

[1] On appeal, Marvin Simms argues that he is entitled to a custody rehearing because the trial court was collaterally estopped from relitigating and finding that he had committed acts of domestic violence, a factor which the trial court was required to consider in awarding custody. We agree.

The doctrine of collateral estoppel precludes a court from relitigating issues “actually litigated and necessary to the outcome of the

1. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citations omitted).

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prior action in a later suit involving a different cause of action between the parties or their privies.” *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986). Collateral estoppel or “estoppel by judgment” is designed to promote judicial economy and prevent a party from carrying the burden and expense of relitigating a previously decided issue. *Id.* at 427, 349 S.E.2d at 556.

However, the doctrine of collateral estoppel only applies when the following circumstances are present:

(1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

King v. Grindstaff, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973) (citations omitted). Where the doctrine is applicable, a court will be precluded from issuing findings of fact and conclusions of law contrary to the previous disposition. *State v. Summers*, 351 N.C. 620, 622, 528 S.E.2d 17, 20 (2000).

The facts here are analogous to those in *Doyle v. Doyle*, 176 N.C. App. 547, 626 S.E.2d 845 (2006), which involved a custody dispute. In *Doyle*, before the custody hearing, the parties requested domestic violence protective orders against each other. At the domestic violence hearing, the trial judge determined that the defendant committed acts of domestic violence against plaintiff, but found that defendant had failed to show that plaintiff had committed any acts of domestic violence. *Id.* Subsequently, at the custody hearing, a different judge revisited the factual determinations made in the domestic violence protective order and issued contrary findings, concluding that plaintiff was the perpetrator of acts of domestic violence against defendant. On review, this Court held that the doctrine of collateral estoppel precluded the trial court from making findings of fact in its custody order contrary to those previously made as part of a domestic violence protective order. *Id.* at 554, 626 S.E.2d at 850 (“Although N.C. Gen. Stat. § 50-13.2 specifically required [the judge issuing the custody order] to consider the events of [the domestic violence protective order], collateral estoppel renders [the previous] findings of fact binding on the subsequent child custody proceeding regarding those events.”).

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As in *Doyle*, each of the collateral estoppel requirements set out in *King* is met here. The issues addressed by Judge Green in the custody determination were the same issues addressed during the domestic violence protective order hearing—whether Marvin Simms committed acts of domestic violence. Judge Green’s order for child support and alimony specifically found:

29. Plaintiff filed a Complaint for Domestic Violence Protective Order against Defendant in 2004, immediately following the separation of the parties, also alleging a history of domestic violence by Defendant against him. Plaintiff filed a Counterclaim in that action also seeking 50B relief and temporary orders were granted to both parties. After hearing, The Honorable Kris Bailey found that there was contradictory evidence of domestic violence by both parties and, as a result, concluded that both parties had failed to establish grounds for issuance of a Domestic Violence Protective Order. Judge Bailey did not find that domestic violence had not occurred.

30. This Court heard the same contradictory evidence of domestic violence. However, this Court finds that the testimony of Defendant is more credible than that of Plaintiff . . .

In her order, Judge Green specifically stated that she found “the testimony of Defendant is more credible than that of Plaintiff” and that “Plaintiff committed acts of domestic violence against the Defendant during the course of the marriage.” Further, the issue was “actually litigated” during the domestic violence protective order hearing, “material and relevant” to that action, and “necessary and essential” to the resulting conclusion that there was insufficient evidence to support the issuance of a domestic violence protective order against Marvin Simms.

Accordingly, the trial court was barred from making findings in its custody order that Marvin Simms committed acts of domestic violence as those findings are contrary to the findings made in the prior action. We, therefore, set aside the trial court’s order of custody and remand for a rehearing since our General Assembly specifically requires that our courts consider domestic violence in making custody determinations. N.C. Gen. Stat. § 50-13.2(a) (2007) (“In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly.”).

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[2] We note that Marvin Simms also argues that the trial court violated N.C. Rule of Evidence 605 by resolving a factual dispute over the guardian *ad litem* Patricia Gibbons' oral report to the court. He contends that, contrary to the trial court's findings of fact, Ms. Gibbons reported that the child expressed a custodial preference in his favor. To resolve this issue on rehearing, the trial court should take the testimony of Ms. Gibbons so that she may offer her findings before both parties and on the record.

Remanded.

Judges ROBERT C. HUNTER and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 MARCH 2009)

ATKINS v. BLACK & DECKER No. 08-912.	Indus. Comm (I.C. NO. 339500)	Affirmed
EASON v. CLEVELAND DRAFT HOUSE, LLC No. 08-684	Johnston (07CVS3002)	Affirmed
FOLLUM v. N.C. STATE UNIV. No. 08-608	Wake (07CVS16476)	Affirmed
IN RE A.G. No. 08-1376	Iredell (05JT01)	Affirmed
IN RE B.W.M. No. 08-1122	Wake (06JT659)	Affirmed
IN RE C.E.J., JR. No. 08-1289	Pitt (03JT132)	Affirmed
IN RE J.C. No. 08-851	Mecklenburg (06J1185)	Vacated and remanded
IN RE M.S. No. 08-774	Mecklenburg (07J123)	Affirmed
IN RE N.W. No. 08-935	Guilford (95JB123)	Remanded for further proceedings con- sistent with this opinion
IN RE T.S. No. 08-1321	Pitt (01JT116)	Affirmed
LIVESAY v. CAROLINA FIRST BANK No. 08-1102	Henderson (05CVS2081)	Affirmed
McKOY v. BEASLEY No. 08-369	Bladen (07CVS259)	Affirmed
SHEW v. WAL-MART STORES E., L.P. No. 08-902	Rowan (07CVS2363)	Affirmed
SMITH v. BECK No. 08-403	Scotland (05CVS509)	Affirmed
STATE v. BATTLE No. 08-580	Edgecombe (07CRS6708-09)	Affirmed
STATE v. BLACKBURN No. 08-914	Forsyth (07CRS54014) (07CRS22502)	No error

STATE v. COOK No. 08-628	Haywood (06CRS589) (06CRS994)	No error
STATE v. HOLLARS No. 08-706	Watauga (03CR52357-59)	Affirmed
STATE v. LAND No. 08-407	Wake (05CRS11316-17)	No error
STATE v. McSWAIN No. 08-507	Cleveland (06CRS54050)	No error
STATE v. PONE No. 08-656	Sampson (07CRS52036)	No error
STATE v. RICHARDSON No. 08-788	Orange (06CRS53465-69)	No error
STATE v. ROWE No. 08-639	Wayne (07CRS51225)	No prejudicial error
STATE v. SADLER No. 08-843	Gaston (06CRS50697-98)	No error
STATE v. WARD No. 08-524	New Hanover (05CRS52472)	No error
WEST DURHAM LUMBER CO. v. SUNTRUST BANK No. 08-1136	Durham (06CVS5872)	Affirmed
WILLIAMS v. BIRD No. 08-594	Rowan (07CVS1364)	Affirmed

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ALIENATION OF AFFECTIONS

Subject matter jurisdiction—activity in North and South Carolina—The trial court erred by granting summary judgment for defendant on an alienation of affections claim based on lack of subject matter jurisdiction where plaintiff lived in South Carolina, which does not recognize alienation of affections, defendant lived in North and South Carolina, and some of the acts occurred in South Carolina and some in North Carolina. A material issue of fact exists as to whether the alleged alienation of affections occurred in North or South Carolina. **Jones v. Skelley, 500.**

ANIMALS

Ordinance limiting number of dogs—not arbitrary—related to public purpose—A town ordinance limiting the number of dogs that could be kept on a property was constitutional where the ordinance was enacted to reduce noise and odor problems, which are clearly legitimate public purposes, the limitation is directly connected to those purposes, and a limit based on the size of the lot, the number of dogs, and the age of the dogs is not arbitrary. **State v. Maynard, 757.**

APPEAL AND ERROR

Appealability—appellate rules violations—Although defendants contend plaintiffs' appeal should be dismissed based on their failure to comply with N.C. R. App. P. 28(b)(6), the Court of Appeals declined to address this argument because: (1) the record on appeal contained no motion to dismiss filed in accordance with N.C. R. App. P. 25 and 37; and (2) plaintiffs presented sufficient legal argument to comply with N.C. R. App. P. 28(b)(6). **Johnson v. Schultz, 161.**

Appealability—denial of motion to dismiss—prior action pending—The denial of a motion to dismiss under N.C.G.S. § 1A-1, Rule 13(a) on the ground of a prior action pending was interlocutory but appealable. **Hendrix v. Advanced Metal Corp., 436.**

Appealability—denial of motion to dismiss—public duty doctrine—While the denial of a motion to dismiss is interlocutory, an appeal based on the public duty doctrine involves a substantial right warranting immediate appellate review. **Estate of McKendall v. Webster, 570.**

Appealability—denial of summary judgment—officials sued in individual capacity—not subject to two trials—The denial of summary judgment for two state officials on claims in their individual capacity was interlocutory and not ripe for appellate review, despite their contention that they were subject to two trials because they were also sued in their official capacities. The State would be the defendant in any suit brought against them in their official capacities. **Demurry v. N.C. Dep't of Corr., 485.**

Appealability—denial of summary judgment—sovereign immunity—Appeals by the Department of Correction and an assistant superintendent of a correctional facility (Florence) in his official capacity from the denial of summary judgment were properly before the Court of Appeals because defendants raised sovereign immunity, public official immunity, and qualified immunity as affirmative defenses. The denial of summary judgment for a another defendant who did not raise affirmative defenses was not immediately appealable. **Demurry v. N.C. Dep't of Corr., 485.**

APPEAL AND ERROR—Continued

Appealability—guilty plea—writ of certiorari—Defendant's appeal from a judgment entered upon his plea of guilty to one count of escape from state prison and attaining the status of an habitual felon is dismissed without prejudice to defendant's right to file a motion for appropriate relief under N.C.G.S. § 15A-1413 because: (1) defendant's assertions on appeal that his freedom from double jeopardy and his right to a speedy trial were violated are not issues from which defendant has an appeal of right as enumerated in N.C.G.S. § 15A-1444; and (2) although defendant filed a writ of certiorari, the Court of Appeals was without authority to issue it since defendant failed to take timely action, was not appealing from an interlocutory order, and was not seeking review under N.C.G.S. § 15A-1422(c)(3). **State v. Rinehart, 774.**

Appealability—interlocutory order—substantial right—qualified immunity—attorney work product—Defendants' appeal from an interlocutory discovery order regarding whether a defense attorney's notes should be disclosed to plaintiffs since they are allegedly protected under the qualified immunity for attorney work product implicated a substantial right that would be lost if not reviewed before the entry of final judgment. **Boyce & Isley, PLLC v. Cooper, 625.**

Appealability—temporary child custody order—parent's driving—no danger to child—An interlocutory temporary child custody order was not shown to adversely affect a substantial right and was dismissed. Although defendant argued that the child was endangered by plaintiff's driving, the trial court found that his driving did not endanger the child, based on substantial evidence from plaintiff's physicians. **File v. File, 562.**

Appellate rules violations—single-spaced—no page numbers—The Court of Appeals chose not to impose sanctions under N.C. R. App. P. 34 even though defendant's argument section of his brief was single-spaced in violation of N.C. R. App. P. 28(j) and contained no page numbers as required by Appendix B to the Rules of Appellate Procedure. **State v. Hudgins, 430.**

Argument on appeal—inadequately presented—An argument on appeal was dismissed where it consisted of one paragraph, about a third of a page, which contained no standard of review and no citations. **Crawford v. Mintz, 713.**

Briefs—argument—no citation of authority—An argument of four sentences without citation to authority was deemed abandoned. **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 348.**

Briefs—argument—violation of appellate rules—argument deemed abandoned—An argument in a charter school funding case concerning the court's refusal to consider an affidavit was deemed abandoned for violation of Appellate Rule 28(b)(6). Moreover, no prejudice was shown from the alleged error. **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 348.**

Cross-assignments of error—cross-appeal—sanctions—Defendants' motion to dismiss appellee's cross-assignments of error and cross appeal, and a motion for sanctions against appellee, are denied because: (1) plaintiff's argument was appropriately classified as a cross-assignment of error and not subject to dismissal; and (2) the Court of Appeals declined to impose sanctions on plaintiff for

APPEAL AND ERROR—Continued

violations of Appellate Rules 25 and 34, although plaintiff was cautioned to refrain from employing an argumentative and speculative presentation of the facts and procedural background of this case in violation of N.C. R. App. P. 34(a)(3). **Boyce & Isley, PLLC v. Cooper, 625.**

Interlocutory appeals—jurisdiction continuing in trial court—The trial court retained jurisdiction to enter a final order even though the City had appealed the denial of its motions to dismiss and for summary judgment because those were improper interlocutory appeals. **County of Durham v. Daye, 527.**

Inverse condemnation—dismissal order—voluntary dismissal of remaining claim—timeliness of notice of appeal—Plaintiff landowners who brought breach of contract and inverse condemnation claims against the DOT were not required to immediately appeal the trial court's dismissal of their inverse condemnation claim but could wait until they thereafter voluntarily dismissed their breach of contract claim, at which time the order dismissing their inverse condemnation claim became a final order. Therefore, plaintiffs' notice of appeal filed within 30 days after the trial court's dismissal order became final was timely. **DeHart v. N.C. Dep't of Transp., 417.**

Motion to dismiss with prejudice granted—settlement—Plaintiff's motion to dismiss his claims with prejudice against defendant Exxon Mobil Chemical, a division or subsidiary of Exxon Mobil Corp., was granted. **Teague v. Bayer AG, 18.**

Preservation of issues—cruel and unusual punishment argument—failure to raise below—rational legislative policy—Defendant's sentence in a double statutory rape case of two consecutive terms of 336-413 months did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 19 and 27 of the North Carolina Constitution. **State v. Cortes-Serrano, 644.**

Preservation of issues—failure to argue—failure to raise at trial court—Although defendant contends the trial court erred in a drug case by failing to conclude the discovery of drugs in defendant's home was the fruit of an unreasonable seizure and that discovery of cocaine on his person while at the jail was likewise fruit of his illegal detention, these arguments are dismissed under N.C. R. App. P. 10(b)(1) because neither of these issues was raised or argued before the trial court. **State v. Kuegel, 310.**

Preservation of issues—failure to object—Although defendant company contends the trial court erred in a partial condemnation case by instructing the jury that the measure of damages for compensating defendant was payment for value of land taken, without indicating that the value included damage to the remaining property, this assignment of error is dismissed because: (1) the trial court's introductory remarks were to the entire jury pool prior to the beginning of jury selection; and (2) defendant did not object to the trial court's opening remarks as required by N.C. R. App. P. 10(b)(1). **Department of Transp. v. Haywood Oil Co., 668.**

Preservation of issue—failure to object at trial—Defendants' failure to object at trial precluded them from raising on appeal the question of whether the trial court erred by refusing to re-instruct the jury on the elements of negligent misrepresentation. **Crawford v. Mintz, 713.**

APPEAL AND ERROR—Continued

Preservation of issues—failure to raise constitutional issue at trial—Although defendant company contends the trial court unconstitutionally erred in a partial condemnation case by failing to award a judgment which provides that plaintiff DOT was to pay defendant eight percent from the date of the taking until the judgment was fully satisfied, this assignment of error is dismissed because constitutional issues not raised before the trial court are not properly preserved for appeal. **Department of Transp. v. Haywood Oil Co., 668.**

Preservation of issues—objection on hearsay grounds—appeal on relevancy—assignment of error dismissed—An assignment of error to certain evidence in a statutory rape case was dismissed where defendant argued that the evidence was irrelevant, but the objection at trial appeared to be on hearsay grounds. **State v. Hueto, 67.**

Preservation of issues—objection overruled, then sustained—There was no issue for appellate review in a wrongful death action arising from a pace-maker replacement where the trial court overruled an objection to testimony from the decedent's spouse about what a doctor said concerning an autopsy, but sustained a renewed objection. **Swink v. Weintraub, 133.**

ARBITRATION AND MEDIATION

Agreement—covered by N.C. Act—An arbitration agreement was covered by the North Carolina Uniform Arbitration Act where automobile policies were entered into in 2001 and the arbitration agreement does not fall under either exception listed under N.C.G.S. § 1-567.2(b); both plaintiffs are North Carolina corporations with a principal place of business in North Carolina; plaintiffs each issued an insurance policy with defendant as a named beneficiary; both policies were applied for and entered into in North Carolina and covered vehicles registered and garaged in North Carolina; and there is no evidence that the collection of premiums or payment of benefits involved or affected commerce outside of North Carolina. **N.C. Farm Bureau Mut. Ins. Co. v. Sematoski, 304.**

Lawsuit filed in Florida—NC arbitration not waived—Defendant did not waive her contractual right to arbitration in North Carolina of insurance claims arising from an auto accident in Florida by filing an action in Florida. It has been held that the mere filing of pleadings does not manifest waiver of the right to arbitrate, and the expenses cited by plaintiffs in the defense of the Florida action are not the type contemplated by prejudice from the expense of a lengthy trial. **N.C. Farm Bureau Mut. Ins. Co. v. Sematoski, 304.**

Summary judgment motion—issues beyond arbitrability—to be considered by arbitrator—The trial court erred when considering a summary judgment motion arising from an auto accident by ruling on issues that should be determined by an arbitrator. The arguments raised by the summary judgment motion were not arguments contesting the scope of or defense to arbitrability and the issues should therefore have been considered by an arbitrator. **N.C. Farm Bureau Mut. Ins. Co. v. Sematoski, 304.**

ATTORNEYS

Breach of contract—attorney malpractice—misappropriation of closing funds by attorney—fault—innocent parties—allocation of risk of fault—

ATTORNEYS—Continued

The trial court erred in a breach of contract case arising out of the misappropriation of closing funds by an attorney in a residential real estate sale by granting summary judgment in favor of defendant buyers, and the case is remanded to the trial court with instructions to consider whether the attorney acted as plaintiffs' attorney as well as the attorney for defendants and whether plaintiffs must share the loss. **Johnson v. Schultz, 161.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Misdemeanor breaking and entering—motion to dismiss—sufficiency of evidence—claim of right—The trial court did not err by denying defendant's motion to dismiss the charge of misdemeanor breaking and entering because: (1) it was undisputed that defendant broke or entered into a trailer without the consent of the owner or the tenants; and (2) although defendant points to her lease agreement with the lot owner to establish a claim of right, defendant had no claim of right to enter the trailer when a summary ejectment judgment specifically found that defendant had no legal claim to remain in the residence. **State v. Young, 107.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Child evaluation—apportionment of costs—The trial court did not abuse its discretion by reapportioning the costs associated with child centered evaluation in a contentious custody action. The court had found that plaintiff delayed the evaluation and it cannot be said that the apportionment of the bill was manifestly unreasonable. **Smith v. Barbour, 244.**

Custody—criminal contempt—findings sufficient—Contested findings concerning the issue of criminal contempt in a child custody case were not reviewed where the established findings supported the conclusion that defendant was in contempt in denying plaintiff visitation. **File v. File, 562.**

Custody—order to be reviewed in five months—temporary—interlocutory—A child custody order was temporary, and thus interlocutory, where it scheduled a review in approximately five months. The order thus stated a clear and specific time for reconvening which was reasonably brief. **File v. File, 562.**

Custody—standard to be applied—prior order—visitation undecided—best interests—The trial court did not err in a contentious child custody proceeding by applying the "best interests" standard when deciding a motion to change custody. Although plaintiff argued that a prior custody order was permanent as to custody and temporary as to visitation so that the "substantial change of circumstances" standard should apply, opinions have consistently treated custody orders as a whole. **Smith v. Barbour, 244.**

Entitlement to rehearing—collaterally estopped from relitigating domestic violence issue—Plaintiff father is entitled to a child custody rehearing because the trial court was collaterally estopped from relitigating and finding that he had committed acts of domestic violence, a factor which the trial court was required to consider in awarding custody, since the issue was actually litigated and determined in plaintiff's favor during a domestic violence protective order hearing. **Simms v. Simms, 780.**

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

Grandmother—motion to intervene—lack of standing—The trial court did not err by dismissing intervenor's motion to intervene in a custody proceeding between her daughter and the father of her granddaughter based on lack of standing because, while intervenor satisfied the definition of "other person" since she was the primary caregiver since birth and she had a close familial relationship with the minor child, the grandmother was still required to allege parental unfitness, and despite the broad language of N.C.G.S. § 50-13.1, nonparents do not have standing to seek custody against a parent unless they overcome the presumption that the parent has the superior right to the care, custody, and control of the minor child. **Perdue v. Fuqua, 583.**

Grandparents—attorney fees—The trial court did not err in a contentious child custody action by ordering plaintiff to pay a portion of the grandparents' attorney fees. **Smith v. Barbour, 244.**

Grandparents—intervention—visitation undecided and custody in issue—Grandparents had standing to seek intervention in a child custody proceeding where a prior order had left visitation undetermined. Visitation is part of custody between the parents, and a trial court may order visitation by grandparents in its discretion when custody is an ongoing issue. **Smith v. Barbour, 244.**

CIVIL PROCEDURE

Motion to dismiss not converted into motion for summary judgment—no consideration of matters beyond pleadings—The trial court did not improperly convert defendant's motion to dismiss for failure to state a claim into a motion for summary judgment because: (1) the trial court's order indicated that it dismissed the complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) and did not mention any of the evidentiary matters appropriately considered on a motion for summary judgment; and (2) nothing in the record established that the trial court considered matters beyond the pleadings. **Charlotte Motor Speedway, Inc. v. Tindall Corp., 296.**

Rule 60—damages awarded—The trial court did not have authority to award defendants damages or fees on a Rule 60 motion to set aside a default judgment in a tax foreclosure action. Rule 60 does not provide damages as a possible form of relief; once the foreclosure sale was set aside, defendant could have filed an independent action seeking damages. **County of Durham v. Daye, 527.**

Rule 60—newly discovered evidence—discoverable earlier with due diligence—The trial did not err by denying a Rule 60 motion for relief based on newly discovered evidence in a case involving a one car automobile accident where the estate of the deceased driver released a sample of the driver's blood to a private lab for testing. The private lab's findings could have been discovered with the exercise of due diligence in time to present them in the original trial. **Robinson v. Trantham, 687.**

CIVIL RIGHTS

1983 claim against official—monetary damages only—summary judgment—The trial should have granted summary judgment for the Department of Correction and an assistant superintendent in his official capacity on a claim for

CIVIL RIGHTS—Continued

violation of 42 U.S.C. § 1983 arising from a personnel matter where plaintiff sought only monetary damages. Neither a State nor its officials in their official capacities are “persons” under § 1983 when the remedy sought is monetary damages. **Demurry v. N.C. Dep’t of Corr., 485.**

CLASS ACTIONS

Full faith and credit to foreign order—additional publication not required—The decretal portion of the trial court’s order requiring additional publication in North Carolina newspapers of the pertinent class settlement is reversed because the trial court failed to give full faith and credit to the order of the Tennessee court finding that the notice of settlement complied fully with the laws of the State of Tennessee, due process, and any other applicable rules of that court. **Teague v. Bayer AG, 18.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Entitlement to rehearing—collaterally estopped from relitigating domestic violence issue—Plaintiff father is entitled to a child custody rehearing because the trial court was collaterally estopped from relitigating and finding that he had committed acts of domestic violence, a factor which the trial court was required to consider in awarding custody, since the issue was actually litigated and determined in plaintiff’s favor during a domestic violence protective order hearing. **Simms v. Simms, 780.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Invocation of right to counsel—phone call to grandmother at police station—failure to show grandmother acting as agent of police—subsequent written confession—Officers did not continue to interrogate defendant after he invoked his right to counsel when they placed a telephone call to defendant’s grandmother in Honduras to inform her that defendant was in custody and allowed defendant to speak with his grandmother by speaker phone, and defendant’s subsequent written confession resulting from his conversation with his grandmother was not obtained in violation of his Fifth Amendment right to counsel, because the record was devoid of any evidence tending to show the phone call to defendant’s grandmother was made for the purpose of eliciting incriminating statements from defendant or that she was acting as an agent of the police. **State v. Herrera, 181.**

Motion to suppress written statements—Vienna Convention on Consular Relations—The trial court did not err in a first-degree murder case by denying defendant’s motion to suppress both his 13 September and 15 September written statements based on an alleged violation of his rights to the Vienna Convention on Consular Relations when defendant was a Honduran citizen and was not advised of his right to contact the Honduran consulate under Article 36 of the Vienna Convention. **State v. Herrera, 181.**

Recorded interview—voluntariness—The trial court did not err in a double statutory rape case by denying defendant’s motion to suppress a recorded interview conducted by a detective that defendant contends improperly induced

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

a confession through promises of a more favorable outcome because there was ample evidence in the record to support the trial court's findings that no improper promises or threats were made to defendant to induce an involuntary confession. **State v. Cortes-Serrano, 644.**

CONSTITUTIONAL LAW

Effective assistance of counsel—failure to move to dismiss at trial—pre-trial delay—no delay by State—Defendant did not have ineffective assistance of counsel in a prosecution for indecent liberties and using a minor for obscenity where his trial attorney did not move to dismiss for pre-trial delay and the issue was not preserved for appeal. **State v. Martin, 43.**

Effective assistance of counsel—failure to object at trial—double jeopardy—indecent liberties and using minor for obscenity—differing elements—Defendant did not receive ineffective assistance of counsel where he did not object at trial on double jeopardy grounds to convictions for indecent liberties and using a minor for obscenity based on the same photograph. Other than the involvement of a minor, the elements of the two crimes are not the same and there was no double jeopardy violation. **State v. Martin, 43.**

Ex post facto law—change in classification of prior conviction—prior record level—The trial court did not err in a second-degree murder and first-degree burglary case by calculating defendant's prior record level by treating a prior conviction for a sale of cocaine as a Class H. felony as it was classified at the time of sentencing rather than as a Class G. Felony as it was classified at the time of the offense, resulting in defendant's being a Level IV rather than a Level III offender, because: (1) there was no ambiguity in the statute which provides that the classification of an offense at the time of sentencing should be used in calculating the prior record level, N.C.G.S. § 15A-1340.14(c); and (2) the constitutional prohibition on ex post facto laws was not implicated by application of N.C.G.S. § 15A-1340.14(c) when defendant's increased sentence due to the change in the classification of his prior conviction served only to enhance his punishment for the present offenses and not to punish defendant for his prior conviction. **State v. Watkins, 215.**

Right to remain silent—questions concerning failure to make statement—closing argument—harmless error—There was harmless error in a prosecution for statutory rape and indecent liberties where the State was allowed to question defendant about his failure to make a statement to law enforcement and the State was allowed to reference defendant's silence in its closing argument. There was substantial other evidence of guilt. **State v. Adu, 269.**

CONTRACTS

Breach of contract—motion to dismiss—profit distributions—bonus—sufficiency of evidence—Although the trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff employees' claims for breach of contract for 2005 profit distributions and plaintiff Pyrtle's claim based upon the 2005 bonus, it erred regarding plaintiff Schlieper's claim based upon the 2005 bonus. **Schlieper v. Johnson, 257.**

CONVERSION

Claim against official—sovereign immunity—A claim for conversion against the Department of Correction and an assistant superintendent in his official capacity was barred by sovereign immunity. The Department of Correction is a state agency created for the performance of essentially governmental functions and sovereign immunity extends to an assistant superintendent of a county correctional facility in his official capacity when immunity has not been waived. **Demurry v. N.C. Dep't of Corr.**, 485.

COSTS

Attorney fees—erroneous real estate listing—negligence action—The trial court erred by granting defendants' motion for partial summary judgment on attorney fees in a negligent misrepresentation action rising from an erroneous real estate listing. The decision to deny attorney fees was based on a case that involved breach of contract, not negligent misrepresentation, and plaintiffs were not barred as a matter of law from recovering attorney fees pursuant to N.C.G.S. § 6-21.1. **Crawford v. Mintz**, 713.

Attorney fees—prevailing party—The trial court erred in a breach of contract and unjust enrichment case by denying defendants' motion for attorney fees under N.C.G.S. § 6-21.5 based on the erroneous conclusion that there was no prevailing party in this action, and the case is remanded to the trial court to make further findings and conclusions, because: (1) a prevailing party under N.C.G.S. § 6-21.5 is a party who prevails on a claim or issue in an action, and not a party who prevails in the action; (2) attorney fees are available under N.C.G.S. § 6-21.5 against any party who raises an issue in which there is a complete absence of a justiciable issue of either law or fact; and (3) although the trial court properly found that plaintiff did not prevail on the claims set forth in its complaint and that defendants did not prevail on the counterclaim set forth in their answer, defendants prevailed on plaintiff's claims and plaintiff prevailed on defendants' counterclaim. **Persis Nova Constr., Inc. v. Edwards**, 55.

Jurisdiction—order following notice of appeal—The trial court erred by taxing costs against defendants in a wrongful death action where the order on costs was entered after notice of appeal was filed. **Swink v. Weintraub**, 133.

CRIMINAL CONVERSATION

Subject matter jurisdiction—South Carolina residents—lex loci delicti—The trial court erred by granting summary judgment for defendant on a criminal conversation claim based on lack of subject matter jurisdiction, and should have granted summary judgment for plaintiff. There was no material question of fact that defendant engaged in sexual intercourse with plaintiff's husband in North Carolina while plaintiff and her husband were still married and prior to the execution of a separation agreement. Although defendant argued that North Carolina has no interest in the sexual relationship of South Carolina residents, the law of the place where the tort was committed controls. **Jones v. Skelley**, 500.

CRIMINAL LAW

Defenses—automatism—felony murder—underlying kidnapping voluntary—The trial court did not err by not giving an instruction on the defense of

CRIMINAL LAW—Continued

automatism in a prosecution for felony murder based on kidnapping where the defendant's expert evidence was that he was in a dissociative state, precluding a voluntary act, but not until the murder. In felony murder, the underlying offense provides the voluntary act if the elements of both offenses occur in a time frame that can be perceived as a single transaction, as here. **State v. Boggess, 770.**

Instruction—defense of accident—precluded by unlawful conduct—The trial court did not commit plain error in a second-degree murder case by failing to give an instruction on the defense of accident because the defense of accident is not raised where defendant was engaged in unlawful conduct when the killing occurred. **State v. Vincent, 761.**

Instruction—entrapment—The trial court did not err in a possession with intent to sell or deliver a controlled substance and sale of a controlled substance case by refusing to instruct the jury on the affirmative defense of entrapment because: (1) viewed in the light most favorable to defendant, the evidence failed to show acts by the undercover officer to persuade, trick or fraudulently induce defendant to sell him drugs; (2) there is no entrapment when an officer merely affords a defendant the opportunity to commit the crime; and (3) the fact that the undercover officer drove by defendant waiving money out of the window, with defendant subsequently selling cocaine to the undercover officer, was insufficient evidence to show inducement on the part of the undercover officer. **State v. Massey, 423.**

Refusal to allow withdrawal of guilty plea—delay in time—prejudice to State—The trial court did not err in a second-degree murder and first-degree burglary case by refusing to allow defendant to withdraw his guilty plea. **State v. Watkins, 215.**

Self-defense—denial of instruction—The trial court did not err in a second-degree murder case by denying defendant's request to instruct the jury on perfect and imperfect self-defense because, even if the victim did introduce a knife into the fight, there was no evidence that defendant, having disarmed the victim, then actually and reasonably believed that she needed to stab the victim multiple times resulting in her death after defendant received only a small cut on her index finger before she took the knife away. **State v. Revels, 546.**

DEEDS

Action to reform—parol evidence—ambiguity—The trial court did not err in considering parol evidence in an action to reform a deed where the purchase contracts included the street address and described the property as “#15 Legacy Lake” but included deed references that described both lots 15 and 11. **Drake v. Hance, 588.**

Action to reform—parol evidence—draftsman's mistake—The trial court did not err by admitting parol evidence to reform a deed where defendants argued that the deed was an integrated document. Parol evidence is competent to show the true intentions of the parties if a party can show a mutual mistake in the execution of a deed, and the evidence here of an error by the draftsman was strong, cogent, and convincing. **Drake v. Hance, 588.**

DISCOVERY

Allegedly new opinions at trial—similar deposition testimony—new medical theories not presented—The trial court did not abuse its discretion in a wrongful death action arising from a pacemaker replacement by allowing plaintiff's experts to testify about previously undisclosed opinions regarding causation and other subjects. Plaintiff accurately pointed to portions of the witnesses' depositions in which similar testimony appeared or identified parallel testimony from other witnesses. Defendants did not point to any entirely new medical theory presented at trial or specifically explain how they could not prepare for the testimony presented at trial. **Swink v. Weintraub, 133.**

Deposition and trial testimony—no substantial variation—inability to prepare for trial—not shown—The trial court did not abuse its discretion in a wrongful death case arising from a pacemaker replacement by not excluding portions of the testimony of plaintiff's experts where the experts did not use the terms "best judgment" and "reasonable care and diligence" during discovery. The deposition and trial testimony did not vary substantially, and defendants did not explain why their knowledge of the witnesses' criticisms of defendants was inadequate for them to prepare for trial. **Swink v. Weintraub, 133.**

Pretrial—attorney work product—The trial court abused its discretion in a defamation and unfair and deceptive trade practices case arising out of the alleged publication of a false and fraudulent political television advertisement by concluding that the verbatim text that a defense attorney entered into her computer from plaintiff's files was not attorney opinion work product of defendants' counsel, and thus was discoverable. **Boyce & Isley, PLLC v. Cooper, 625.**

Purported violation of protective order—request to destroy verbatim text—The trial court did not err by failing to base its 12 December 2007 order upon the purported violation of the protective order by defendants' counsel, nor did it abuse its discretion by failing to require defendants to destroy the pertinent verbatim text, because the verbatim text did not include confidential, sensitive, or privileged information. Thus, the protective order was not implicated. **Boyce & Isley, PLLC v. Cooper, 625.**

Statements disclosed on morning of trial—failure to show abuse of discretion—The trial court did not abuse its discretion in a first-degree murder case by allowing defendant's roommate and an interpreter to testify at trial as to certain inculpatory statements allegedly made to them by defendant when the State disclosed the testimony on the morning of trial because: (1) the court's findings indicated the State did not violate the discovery statutes by not providing these statements to defense until the morning of trial since the State obtained one statement on the prior evening and the other statement that morning; and (2) even assuming arguendo that the State did violate the discovery statute provisions, there was no abuse of discretion when defendant did not request a recess or continuance to address this newly disclosed evidence. **State v. Herrera, 181.**

DIVORCE

Equitable distribution—mortgage—marital debt—The trial court did not err in an equitable distribution action by concluding that a mortgage was a marital debt where the debt was a joint obligation incurred on entireties property two months before separation. **McNeely v. McNeely, 705.**

DIVORCE—Continued

Equitable distribution—post-separation mortgage payment—divisible property—The trial court did not err in an equitable distribution action by classifying a post-separation mortgage payment as divisible property. **McNeely v. McNeely, 705.**

Equitable distribution—post-separation payment of debt—separate funds lent to business—The trial court did not abuse its discretion in an equitable distribution action in the way the husband was given credit for a post-separation payment to reduce a marital mortgage debt where the wife had lent her separate funds to the marital business and the parties's assets were not liquid. **McNeely v. McNeely, 705.**

Equitable distribution—value of property—mortgage payment—divisible property—The trial court did not err in finding the net value of a property in dispute in an equitable distribution action where a prior appeal had determined that there was sufficient evidence to support the net value found by the court, and the trial court adhered to the remand instructions when it found the amount paid by the husband from his funds toward the mortgage and classified the payment as divisible property. **McNeely v. McNeely, 705.**

DOMESTIC VIOLENCE

Protective order—insufficient evidence—The trial court erred by issuing a Domestic Violence Protective Order where there was no competent evidence that defendant caused or attempted to cause bodily injury or committed any sex offense against a minor child in plaintiff's custody, or placed a member of plaintiff's family in fear of imminent serious bodily injury or continued harassment that rose to the level of substantial emotional distress. The fact of a DSS investigation of abuse was not relevant to whether defendant actually committed acts of domestic violence, a statement by plaintiff's son was admitted for the limited purpose of explaining plaintiff's actions and was not competent to support a finding of domestic violence, and plaintiff's testimony was not sufficient to support the court's finding of previous violence. Moreover, a DVPO is authorized only upon a showing of acts which the court may bring about a halt. **Burress v. Burress, 447.**

EMINENT DOMAIN

Inverse condemnation—dismissal order—voluntary dismissal of remaining claim—timeliness of notice of appeal—Plaintiff landowners who brought breach of contract and inverse condemnation claims against the DOT were not required to immediately appeal the trial court's dismissal of their inverse condemnation claim but could wait until they thereafter voluntarily dismissed their breach of contract claim, at which time the order dismissing their inverse condemnation claim become a final order. Therefore, plaintiffs' notice of appeal filed within 30 days after the trial court's dismissal order became final was timely. **DeHart v. N.C. Dep't of Transp., 417.**

Inverse condemnation—slope of private driveway—failure to show deprivation of use of property—The trial court did not err by dismissing plaintiffs' claim for inverse condemnation arising out of the failure of defendant DOT to grade their driveway at the slope of no more than ten percent as required by a

EMINENT DOMAIN—Continued

compromise settlement of a condemnation action because there was no taking where plaintiffs only alleged that DOT's actions have not improved the value of their land to the degree they expected under the agreement; and plaintiffs have not established that the increased slope of the new driveway substantially deprived them of the use of their property. **DeHart v. N.C. Dep't of Transp.**, 417.

EMPLOYER AND EMPLOYEE

Respondeat superior—course and scope of employment—smoking—summary judgment—The trial court did not err by granting plaintiff's motion for partial summary judgment and denying defendant company's motion for summary judgment based on its finding that defendant sales assistant was within the course and scope of her employment when she started a fire to a model home by failing to completely extinguish a cigarette on the deck of the model home when going to answer the phone, and thus by imputing her negligence to defendant company under the theory of respondeat superior. **Estes v. Comstock Homebuilding Cos.**, 536.

EVIDENCE

Child custody—testimony by guardian ad litem—On rehearing in a child custody case, the trial court should take the testimony of the guardian ad litem so that she may offer her findings before both parties and on the record. **Simms v. Simms**, 780.

Course of conduct—statutory rape and other offenses—additional incident—The trial court did not err in a prosecution for statutory rape and other sexual offenses by admitting testimony from a detective about an incident not mentioned during the victim's testimony. The victim's testimony established a course of conduct, of which the challenged incident was a part. The challenged testimony did not contradict the victim's testimony and sufficiently strengthened her testimony to be admitted as corroborative evidence. **State v. Cook**, 230.

Denial of cross-examination—no personal knowledge—The trial court did not err in a partial condemnation case by prohibiting defendant from cross-examining plaintiff's expert in real estate appraisals about the comparability of the Haywood Services property because the expert indicated that he did not have personal knowledge of Haywood Services Corporation and Haywood Electric Membership Corporation. **Department of Transp. v. Haywood Oil Co.**, 668.

Hearsay—consent to search vehicle—not offered for truth of matter asserted—waiver of standing—motion to suppress—The trial court did not err in an attempted trafficking by possessing and transporting cocaine and conspiracy to traffic cocaine case by denying defendant's motion to suppress evidence of the passenger's consent to search the vehicle because: (1) defendant waived any standing he may have had to challenge the passenger's consent to search the rental vehicle by informing the officer that he had to ask the passenger who rented the vehicle for permission to search the car; and (2) even if defendant had standing to contest the passenger's consent and did not waive it, the evidence was not hearsay when it was not used to prove the truth of the matter asserted and instead the evidence was used to explain why the officer

EVIDENCE—Continued

believed he could conduct the search of the vehicle and proceeded to search the vehicle. **State v. Hodges, 390.**

Hearsay—doctor’s statement repeated—admission of party opponent—The trial court did not err in a wrongful death action arising from a pacemaker replacement by admitting testimony from the decedent’s spouse that a doctor said in a deposition that he had called for a surgeon to come to the cath lab and that there had been a delay. The doctor was an employee of defendant hospital at the time of the deposition and his statements constituted admissions of a party-opponent. **Swink v. Weintraub, 133.**

Hearsay—statements in medical procedure room—basis for witness’s action—The trial court did not err in a wrongful death action arising from a pacemaker replacement by admitting a videotaped deposition of a lab technician who was present during the procedure where the witness reported what another lab technician said or observed during the procedure. The statements were admissible to show why the witness acted as she did. **Swink v. Weintraub, 133.**

Impermissible opinion—withdrawal of evidence and curative instruction—failure to demonstrate prejudice—The trial court did not violate defendant’s right to a fair trial in a misdemeanor breaking and entering case by posing two questions to witness Medlin that allegedly express the trial court’s opinion that defendant obtained a claim of right to the pertinent trailer under false pretenses because, when defendant objected to the trial court’s questioning of this witness, defendant received precisely the relief she sought since her motion to strike was granted and the trial court issued an immediate curative instruction that defendant agreed was satisfactory. **State v. Young, 107.**

Officer’s testimony—horizontal gaze nystagmus test—admissibility—The trial court did not err by admitting an officer’s testimony about the horizontal gaze nystagmus (HGN) test in a prosecution for impaired driving. An amendment to N.C.G.S. § 8C-1, Rule 702(a1) obviates the need for the State to prove that HGN testing is sufficiently reliable. **State v. Smart, 752.**

Partial condemnation—real estate sales price—comparability of properties—The trial court did not abuse its discretion in a partial condemnation case by allowing plaintiff DOT to elicit and put before the jury evidence of real estate sales prices after the properties were allegedly determined to be not sufficiently comparable. **Department of Transp. v. Haywood Oil Co., 668.**

Prior crimes or bad acts—cross-examination—The trial court did not abuse its discretion in a double statutory rape case by allowing the district attorney to cross-examine defendant about unrelated charges and criminal activity because: (1) defendant lost the benefit of an objection to this testimony since the State’s cross-examination did not go outside the scope of the evidence introduced by defendant, but instead explained and rebutted defendant’s testimony; and (2) defendant failed to show a reasonable possibility that a different result would have been reached had this line of questioning been prohibited. **State v. Cortes-Serrano, 644.**

Prior trial attorney’s testimony—alleged privileged communications—communication made for purpose of being conveyed by attorney to others—The trial court did not err in a second-degree murder and first-degree

EVIDENCE—Continued

burglary case by admitting the testimony of defendant's prior trial counsel at the hearing on defendant's motion to withdraw his guilty plea even though defendant contends it violated his attorney-client privilege because defendant provided the 15 November 2004 information to the attorney precisely for the purpose of conveying it to the prosecutor, and thus that conversation was not a confidential communication to which the attorney-client privilege attached; and in regard to the 30 January 2004 conversation, even assuming without deciding that the conversation was privileged and that defendant did not waive the privilege, defendant failed to demonstrate that he was prejudiced by the disclosure. **State v. Watkins, 215.**

Speculation—admission harmless—other admissible testimony—The admission of testimony from a lab technician in a wrongful death action arising from a pacemaker replacement about when the doctor realized that the decedent's heart had stopped was harmless because it was essentially identical to the testimony of two doctors, including the doctor who was the subject of the witness's testimony. **Swink v. Weintraub, 133.**

Statutory rape victim—sexual activity excluded—The trial court did not err in a prosecution for statutory rape and other sexual offenses by excluding evidence of the victim's sexual activity. Although defendant indicated during cross-examination that a boy was available to testify that he had had sex with the victim during the same week that she accused defendant, defense counsel did not call the boy to testify at the in camera hearing required by the rape shield statute, and did not attempt to call him during the defense's case. Moreover, defendant failed to establish the relevance of the proposed testimony because the alleged sexual activity with the boy would not have produced the scarring found in a medical examination. **State v. Cook, 230.**

Victim's character—evidence excluded—other evidence admitted—no prejudice—The trial court did not err in a first-degree murder prosecution by not admitting certain evidence of the victim's character where some of the evidence suggested that the shooting happened during a robbery, and defendant testified that he would not have attempted to rob the victim because of his violent past. Defendant made no offer of proof for the excluded evidence and waived his right to challenge the rulings; even so, given the admitted evidence about the victim's gang membership, defendant's knowledge that the victim had shot people, the victim's status as a convicted felon, the victim's possession of a gun and his companion's likely possession of a gun, there was no reasonable possibility of a different verdict if the court had admitted the challenged evidence. **State v. Jacobs, 599.**

Victim's prior convictions—certified copies—offered to bolster defendant's credibility—The trial court did not err by excluding certified copies of a murder victim's armed robbery convictions where the convictions represented specific instances of conduct being offered to prove a character trait of the victim (that he was dangerous) to bolster the credibility of defendant's testimony that he was not attempting to rob the victim when the shooting occurred. Defendant offered no authority suggesting that a desire to bolster his own credibility falls within N.C.G.S. § 8C-1, Rule 405(b). **State v. Jacobs, 599.**

Victim's prior criminal record—testimony correctly excluded—The trial court did not err in a first-degree murder prosecution by sustaining objections to

EVIDENCE—Continued

defendant's cross-examination of a witness about the victim's criminal record. The record indicates that any information the witness had was second-hand and that he did not know exactly what convictions the victim had. Furthermore, defendant presented no explanation of why he was entitled to ask the witness about a subject on which he had no personal knowledge, and defendant did not make an offer of proof. **State v. Jacobs, 599.**

FIREARMS AND OTHER WEAPONS

Injury to real property—discharging weapon into occupied property—defendant as perpetrator—evidence sufficient—The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of injury to real property and discharging a weapon into occupied property where defendant contended that there was insufficient evidence that defendant was the perpetrator. Defendant's arguments depended upon inferences being drawn in his favor rather than for the State. **State v. Lilly, 697.**

Injury to real property—indictment—tenant listed as owner—no fatal variance—There was no fatal variance between the indictment and evidence where defendant was convicted of injury to real property, and the indictment incorrectly described the lessee of the real property as its owner. The tenant here was the exclusive possessor of the property, which was sufficient. **State v. Lilly, 697.**

FRAUD

Negligent misrepresentation—sales price—motion to dismiss—sufficiency of evidence—The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff employees' claims for fraud and negligent misrepresentation regarding the sales price in the Agreements to Terminate. **Schlieper v. Johnson, 257.**

HOMICIDE

Felony murder—armed robbery—evidence sufficient—The trial court did not err by denying defendant's motions to dismiss a charge of first-degree murder that was based on felony murder where the State presented evidence that defendant approached the victim, demanded money from him, and shot him. This was sufficient for first-degree murder based both on premeditation and deliberation and felony murder, with attempted robbery with a firearm as the underlying felony. **State v. Jacobs, 599.**

First-degree murder—felony murder—malice, premeditation, and deliberation—alternate basis—Although defendant contends the trial court erred in a first-degree murder case by denying defendant's request for a jury instruction on continuous transaction with regard to the underlying felony of arson, the merits of this argument are not reached because: (1) defendant was found guilty under the felony murder rule as well as on the basis of malice, premeditation, and deliberation; and (2) even if the Court of Appeals found reversible error as to issues related to the felony murder rule, the conviction would still stand on the basis of malice, premeditation, and deliberation since defendant made no argument on this basis. **State v. Brewington, 317.**

HOMICIDE—Continued

Instruction—voluntary manslaughter—sufficiency of evidence—The trial court did not commit plain error in a second-degree murder case by failing to give an instruction on voluntary manslaughter because neither the State's evidence nor defendant's evidence supported this instruction when defendant's evidence tended to show that the gun fired when defendant and the victim's father struggled for control of the gun and the shooting was accidental, and the State's evidence tended to show that defendant fired the gun while he was arguing with the victim's father. Neither evidence tended to show that defendant acted in the heat of passion or in the imperfect exercise of self-defense. **State v. Vincent, 761.**

Short-form indictment—jurisdiction obtained—The trial court had subject matter jurisdiction pursuant to a short-form murder indictment that met the requirements of N.C.G.S. § 14-17. **State v. Jacobs, 599.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—facility completed during appeal—appeal moot—An appeal of a certificate of need for a kidney disease treatment center was moot where the facility was completed and became fully operational while the appeal was pending. North Carolina's Certificate of Need law does not authorize withdrawal of a certificate of need once the project or facility is complete or becomes operational. **Total Renal Care of N.C. LLC v. N.C. Dep't of Health & Human Servs., 378.**

Certificate of need—noncompetitive application—violation of Settlement Agreement—injunction—The trial court did not err by granting a preliminary injunction preventing defendant hospital from challenging or opposing plaintiff hospital's application for a certificate of need (CON) to build a medical facility in violation of a Settlement Agreement providing that the two hospitals would not challenge each other's future noncompetitive CON applications where plaintiff's present CON application is noncompetitive because defendant did not file on application for a competing CON in the same review period, and plaintiff showed that it would suffer immediate or irreparable harm if defendant is permitted to challenge its present CON application in that the parties agreed in their Settlement Agreement that a breach thereof would result in irreparable harm requiring injunctive relief. **N.C. Baptist Hosp. v. Novant Health, Inc., 721.**

HUSBAND AND WIFE

Doctrine of necessities—medical bills—The trial court did not err by granting summary judgment for a hospital attempting to collect a deceased husband's unpaid medical bills from the wife. The application of the Doctrine of Necessaries in North Carolina has been upheld by the North Carolina Supreme Court. **Moses H. Cone Mem'l Hosp. Operating Corp. v. Hawley, 455.**

IMMUNITY

Sovereign—professional liability coverage—negligent supervision—The doctrine of sovereign immunity did not bar an estate's action against a county, the county DSS, and DSS employees in their official capacities for negligent supervision of a juvenile who was placed with his elderly grandmother and stabbed his grandmother's neighbor to death because the county purchased professional lia-

IMMUNITY—Continued

bility coverage in addition to its general liability coverage, and the acts and omissions alleged in plaintiff's complaint were not excluded from coverage by the public officials coverage portion of the professional liability coverage section of the policy. **Fulford v. Jenkins, 402.**

INDECENT LIBERTIES

Photograph and touching—evidence sufficient—There was sufficient evidence to submit to the jury charges of indecent liberties and using a minor for obscenity based on a photograph and an incident in a shower. **State v. Martin, 43.**

INDEMNITY

Express contract—implied-in-law theory unavailable—The trial court did not err in an indemnification case arising out of the negligent construction of a walkway by concluding that plaintiff was not entitled to implied-in-law indemnity from defendant where the parties executed an express indemnification provision covering only injuries occurring during the performance of defendant's work on the walkway. **Charlotte Motor Speedway, Inc. v. Tindall Corp., 296.**

INJUNCTION

Pigeon shoot—enforcement of animal cruelty statute enjoined—subsequent amendment of regulation—motion to intervene denied—The trial court did not abuse its discretion by denying a motion to intervene based on timeliness in a case involving a permanent injunction against enforcement of an animal cruelty statute and a subsequent clarification of the underlying regulation. The length of the delay and the lack of justification for the delay were sufficient grounds to affirm the denial of the motion to intervene; whether the regulation amendment should result in the dissolution of the injunction remains unsettled. **Malloy v. Cooper, 747.**

INSURANCE

Automobile—UIM coverage—primary and excess carriers—credit for liability payment—The underinsured motorist (UIM) coverage in a policy on the tortfeasor's vehicle in which a passenger was injured was primary and the UIM coverage in a policy insuring the injured passenger as a resident of the named insured's household was excess coverage, and the tortfeasor's primary UIM insurer was entitled to the credit for the liability insurance payment made to the passenger, where both policies contained "other insurance" clauses stating that any insurance provided with respect to a vehicle not owned by the insured shall be excess over any other collectible insurance. **Benton v. Hanford, 88.**

Automobile—UIM coverage—stacking of policies—Financial Responsibility Act—The trial court did not err by concluding that a tortfeasor's underinsured motorist (UIM) insurance policy which covers a person occupying the tortfeasor's vehicle may be stacked with the injured party's separate UIM policy in order to determine the total UIM coverage available to the injured party. **Benton v. Hanford, 88.**

INSURANCE—Continued

Fire—related businesses—joint operation—off premises provision—not applicable—The trial court erred by granting plaintiff partial summary judgment on the issue of insurance coverage for a fire in Greenville involving one of two related businesses where plaintiff asserted that the Greenville property was partially insured under an “Off Premises” provision of the policy covering an Apex facility. That provision covers property located at premises that plaintiff does not own, lease, or operate. Although plaintiff asserted that the Greenville facility is owned and operated solely by the Apex company, the evidence in the case clearly shows that the two related businesses simultaneously conducted their affairs at the Greenville facility. **Trophy Tracks, Inc. v. Massachusetts Bay Ins. Co., 734.**

Fire—related businesses—listed address—other site not covered—The trial court erred by granting plaintiff partial summary judgment on the issue of insurance coverage for a fire in Greenville involving one of two related businesses (similar products as well as shared management, employees, shareholders, and facilities) where a policy provision specifically limited coverage to the listed address of the Apex facility. A reasonable person would not understand the clause “premises described in the Schedule below” to include the address listed on the top of each page. **Trophy Tracks, Inc. v. Massachusetts Bay Ins. Co., 734.**

JURISDICTION

Dismissal of issue by prior judge—new evidence and new issues—Where a prior judge had granted a Rule 12(b)(6) dismissal of the damages issue, the trial court lacked jurisdiction to enter an order requiring a county to pay damages to defendants in an action arising from a judgment for nonpayment of property taxes. Although defendants argued that there was new evidence and new legal issues, defendants could not pursue their claim without taking steps to have the damages claim brought back into the action. **County of Durham v. Daye, 527.**

JURY

Allen instruction—absence of any indication of deadlock or coercion—The trial court did not coerce a verdict by giving an *Allen* instruction pursuant to N.C.G.S. § 15A-1235(c) at the beginning of the jury’s second day of deliberations after the jury had deliberated only three hours on the first day before taking an end-of-day recess where there was no indication that the jury was deadlocked or in any other way open to pressure by the trial court to force a verdict. **State v. Herrera, 181.**

Voir dire reopened—use of remaining peremptory challenge—The trial court erred by not permitting defendant to use his remaining peremptory challenge after voir dire was reopened. **State v. Thomas, 593.**

LANDLORD AND TENANT

Summary ejection—federally subsidized lease—proper notice not given—The trial court erred by granting a summary ejection where plaintiff checked a box on the complaint indicating that defendant’s lease was federally subsidized, and there was no evidence in the record that plaintiff complied with

LANDLORD AND TENANT—Continued

federal regulations by providing a proper Notice of Termination. **Timber Ridge v. Caldwell, 452.**

MEDICAL MALPRACTICE

Concerns from prior surgery—admissible—The trial court did not err in a wrongful death action arising from a pacemaker replacement by admitting testimony from the decedent's husband about his wife's statements about complications after a prior surgery. Defendants did not show how they were prejudiced by testimony about a procedure that was not the basis for this lawsuit; moreover, the testimony simply explained the concern the decedent and her husband had about this procedure and duplicated other testimony that was not challenged. **Swink v. Weintraub, 133.**

Expert testimony—knowledge of community standard of care—not applicable to reasonable care and best judgment requirements—The community standard of care does not apply to the second and third prongs of the common law duties set out in *Hunt v. Bradshaw*, 242 N.C. 517, reasonable care and diligence, and use of best judgment in treating the patient. The trial court in this wrongful death action arising from the replacement of a pacemaker did not err by not requiring testimony from plaintiff's experts about their knowledge of the community standard of care when giving their opinion of the doctor's exercise of reasonable care and diligence and the doctor's use of his best judgment. The argument that N.C.G.S. § 90-21.12 effectively supplanted the common law was addressed in *Wall v. Stout*, 310 N.C. 184. **Swink v. Weintraub, 133.**

Expert witness—personal opinion and practice—The trial court did not err in a wrongful death proceeding arising from the replacement of a pacemaker by admitting testimony from one of plaintiff's medical experts about his personal preferences and practices in conducting informed consent discussions. Although defendants argue that this was not evidence of the standard of care and should have been excluded as irrelevant, such evidence may be relevant for other purposes. **Swink v. Weintraub, 133.**

Expert witness—personal preferences—requested limiting instruction—not given—There was no error in not giving the requested limiting instruction on testimony regarding a medical expert's personal preferences and practices in a wrongful death case arising from a pacemaker replacement. The language in the requested instruction does not precisely state the applicable law, and defendant did not explain a way in which the jury was misled by the omission of the instruction. **Swink v. Weintraub, 133.**

Failure to detect child abuse—proximate cause of injuries—burden of proof not met—The trial court did not err by granting summary judgment for the healthcare provider defendants on a medical malpractice claim for not detecting child abuse where X-rays intended to rule out aspiration pneumonia following surgery showed an old rib injury. **Gaines v. Cumberland Cty. Hosp. Sys., Inc., 442.**

Instructions—plaintiff's contentions—The trial court did not err in its jury instructions in a wrongful death case arising from the replacement of a pacemaker by repeating plaintiff's contentions of negligence following its instruction on each of the three theories for proving medical malpractice. Viewed in their

MEDICAL MALPRACTICE—Continued

entirety, the instructions were not overly favorable to plaintiff and the pattern instructions were not inherently inculpatory. **Swink v. Weintraub, 133.**

Jury request—reinstruction—plaintiff's contentions—The trial court did not abuse its discretion in a wrongful death action arising from a pacemaker replacement by re-instructing the jury on negligence when requested by the jury, reiterating the three methods of proving negligence and plaintiff's seven contentions. Defendants did not suggest that the trial court omit the factual contentions and did not adequately preserve the issue of re-instruction for appeal. **Swink v. Weintraub, 133.**

MOTOR VEHICLES

Trucking company—overweight permit—insufficient number of escorts—fine—additional overweight penalty improper—A trucking company which violated a special single trip overweight permit by failing to have the required number of escorts was properly fined \$500.00 for an operational violation of the permit pursuant to N.C.G.S. § 20-119(d)(1) but could not be penalized an additional \$24,492.03 under N.C.G.S. §§ 20-119(d) and 20-118(e) for a weight violation as if no special permit existed where weight of the truck was not in excess of the weight allowed by the special permit. **Daily Express, Inc. v. N.C. Dep't of Crime Control & Pub. Safety, 288.**

NEGLIGENCE

Automobile accident—drugs found on passenger—correctly excluded—The trial court did not abuse its discretion in a one car accident case in which plaintiff was a passenger by excluding as unduly prejudicial a plastic baggie containing an undetermined white powder found on plaintiff's person after the accident. There was no evidence presented to the jury that the driver had consumed or was under the influence of an illegal drug on this occasion. **Robinson v. Trantham, 687.**

Contributory—riding with intoxicated driver—The trial court did not abuse its discretion by refusing to submit the issue of contributory negligence to the jury in a case involving a one car automobile accident where the evidence was insufficient to support the inference that plaintiff knew or should have known that defendant (the driver, with plaintiff as a passenger) was under the influence of an impairing substance. **Robinson v. Trantham, 687.**

Gross—automobile accident—not submitted to jury—no error—The trial court did not err by not submitting gross negligence to the jury in a case involving a one car accident where the evidence was that the driver was driving normally, then began to brag about his car and accelerated, and plaintiff, who was a passenger in the car, saw that they were approaching a curve and knew that they were traveling "way above the posted speed limit." **Robinson v. Trantham, 687.**

Respondeat superior—course and scope of employment—smoking—summary judgment—The trial court did not err by granting plaintiff's motion for partial summary judgment and denying defendant company's motion for summary judgment based on its finding that defendant sales assistant was within the course and scope of her employment when she started a fire to a model home by failing to completely extinguish a cigarette on the deck of the model home when

NEGLIGENCE—Continued

going to answer the phone, and thus by imputing her negligence to defendant company under the theory of respondeat superior. **Estes v. Comstock Homebuilding Cos.**, 536.

PATERNITY

Legitimation proceeding—summary judgment—The trial court did not err in a legitimation proceeding by granting summary judgment in favor of petitioner because: (1) our General Assembly has not required a best interest of the child inquiry in the context of a legitimation proceeding; (2) DNA tests indicated a 99.99 percent probability that petitioner is the biological father of the child; (3) respondent, the former husband of the mother of the child, offered no evidence to the contrary, and admitted that he is not the biological father of the child; (4) although the husband of the mother of a child born during the parties' marriage is presumed to be the father of that child, a determination that a petitioner in a legitimation action, and not the husband, is the biological father of the child terminates the husband's rights to the child; and (5) the only issue to be decided in a legitimation proceeding under N.C.G.S. §§ 49-10 and 49-12.1 is whether the putative father who has filed a petition to legitimate is the biological father of the child. **In re Papathanassiou**, 278.

PLEADINGS

Compulsory counterclaims—dispute over installation of roof—Plaintiff's claims for fraud arising from the installation of a metal roof should have been dismissed as compulsory counterclaims in another action, and were remanded with leave to file as such, where defendant filed an action for breach of contract for failure to fully pay for the installation of a metal roof on a residence, and the plaintiffs subsequently filed this action for fraud and other related claims. The claims arose from a single transaction; plaintiffs cannot avoid Rule 13(a) by casting their claims in tort rather than contract. **Hendrix v. Advanced Metal Corp.**, 436.

Rule 11 sanctions—dismissal of motions—standing—A law firm subjected to Rule 11 sanctions lacked standing in its appeal from those sanctions to challenge the dismissal of motions it had filed for the client. Neither a law firm nor an individual attorney is a party to an action brought on behalf of a client. **Johns v. Johns**, 201.

Rule 11 sanctions—improper purpose—delay—The trial court properly concluded that filing a motion to remove counsel and an Amended Objection to a Guardian Ad Litem was intended to cause unnecessary delay and violated the improper purpose prong of Rule 11. **Johns v. Johns**, 201.

Rule 11 sanctions—improper purpose—disparaging comments—lack of standing—advantage in other aspects of dispute—The trial court's findings in a Rule 11 sanctions proceeding against a law firm (Rice Law) supported its conclusion of an improper purpose in filing an Amended Objection to a Guardian Ad Litem. Given findings that disparaging allegations were unverified and irrelevant, together with the unchallenged determination that the Rice Law's client lacked standing, the trial court could reasonably conclude that Rice Law's purpose was to gain an advantage in other aspects of the dispute and not to vindi-

PLEADINGS—Continued

cate any rights of the client in connection with the GAL appointment. **Johns v. Johns, 201.**

Rule 11 sanctions—legal sufficiency of pleadings—attorney’s subjective belief—not sufficient—A law firm subjected to Rule 11 sanctions did not demonstrate that the trial court erred by concluding that an Amended Objection to Guardian Ad Litem failed the legal sufficiency prong of Rule 11. The law firm subjected to sanctions (Rice Law) asserted that it had made a reasonable inquiry into the legal sufficiency of its motion, but cited no authority suggesting that its client had standing to object to the Guardian Ad Litem or that Rice Law could have reasonably believed that such a contention was warranted by existing law or a good faith argument from existing law. Whether the attorney who signed the motion “gleaned a belief” that the paper was legally sufficient goes to her subjective belief and does not address whether that belief was objectively reasonable. **Johns v. Johns, 201.**

Rule 11 sanctions—necessity of evidentiary hearing—There was no abuse of discretion in a trial court’s refusal to defer hearing a Rule 11 motion to allow the presentation of oral testimony or additional exhibits. An evidentiary hearing with live testimony is not required in all Rule 11 proceedings, and the law firm subject to sanctions in this case did not indicate at trial or on appeal the new evidence it needed to present to fully address the Rule 11 issues. **Johns v. Johns, 201.**

Rule 11 sanctions—reasonable inquiry—The trial court did not err in a breach of contract and unjust enrichment case by denying defendants’ motion for N.C.G.S. § 1A-1, Rule 11 sanctions because the evidence supported the trial court’s findings that plaintiff undertook a reasonable inquiry into the facts and that plaintiff reasonably believed that the complaint was well-grounded in fact. **Persis Nova Constr., Inc. v. Edwards, 55.**

Rule 11 sanctions—supporting documents—disparaging and irrelevant comments—A law firm subject to Rule 11 sanctions (Rice Law) did not show that the trial court erred in finding that its memorandum of law filed in support of an Amended Objection to a Guardian Ad Litem in a domestic action was filled with unverified, disparaging and irrelevant comments. The mere existence of facts derogatory to the opposing party does not warrant their submission to the trial court without a showing that the facts are relevant to the issues before the court, and it is apparent from the face of the documents and supporting memorandum that the client did not have personal knowledge of much of the information that he was purporting to verify. **Johns v. Johns, 201.**

POLICE OFFICERS

Liability—promise to seize weapons—public duty doctrine—In a wrongful death action against a sheriff that followed the shooting of a spouse who had obtained a domestic violence protective order, the sheriff’s promise to procure the surrender of the husband’s firearms was sufficient to state an exception to the public duty doctrine, and the ruling of the trial court denying defendants’ motion to dismiss in this regard was affirmed. **Estate of McKendall v. Webster, 570.**

Liability—public duty doctrine—sheriff’s promise of protection—In a wrongful death action against a sheriff that followed the shooting of a spouse

POLICE OFFICERS—Continued

who had obtained a domestic violence protective order, the non-specific nature of the sheriff's promises of protection and to enforce the protective order, with the attendant circumstances, were not sufficient to state a claim as an exception to the public duty doctrine. The trial court erred by not dismissing the portions of plaintiffs' complaint based on general promises of protection and to enforce the protective order. **Estate of McKendall v. Webster, 570.**

PROCESS AND SERVICE

Erroneous name—actual notice—An order denying a motion to amend a summons and complaint to correct defendant's name was reversed where defendant received notice of the original claim despite the error. The summons listed the correct address and was delivered to defendant, he appeared at the arbitration hearing, and the same error appears on the original contract. **Langley v. Baughman, 123.**

PUBLIC OFFICERS AND EMPLOYEES

Correction employee—job transfer—Whistleblower claim—no adverse claim—The trial court erred by denying summary judgment for the Department of Correction and an assistant superintendent on a Whistleblower claim arising from a personnel decision. Plaintiff did not forecast evidence that defendant took adverse actions against plaintiff. **Demurry v. N.C. Dep't of Corr., 485.**

RAPE

Statutory rape—consciousness of defendant—sufficiency of evidence—The evidence was sufficient to support a finding by the jury that defendant was conscious when he twice had sexual intercourse with the alleged minor victim and she became pregnant so as to support his conviction on two counts of statutory rape, even though defendant claimed and the minor victim testified that she had drugged defendant and he had passed out when she had sex with him on two occasions. **State v. Tyson, 327.**

Statutory rape—cross-examination of victim—limited—comparable testimony from other witnesses—The trial court did not err in a prosecution for statutory rape and other sexual offenses by not permitting defense counsel to cross-examine the victim more extensively about possible motives for fabricating her accusations. Counsel was able cross-examine the victim about these matters, and, to the extent cross-examination was limited, was able to elicit comparable testimony from other witnesses. **State v. Cook, 230.**

Statutory rape—instruction—voluntary act—omitting not guilty by reason of unconsciousness—plain error—The trial court committed plain error by failing to incorporate the element of a voluntary act into the statutory rape instruction and by omitting "not guilty by reason of unconsciousness" in its final mandate to the jury. **State v. Tyson, 327.**

Statutory rape—motion to dismiss—sufficiency of evidence—age—testimony—The trial court did not err by denying defendant's motion to dismiss the charges of statutory rape even though defendant contends the State failed to produce substantial evidence of the ages of both the victim and defendant at the time

RAPE—Continued

of the alleged crime because: (1) nothing in N.C.G.S. § 14-27.7A(a) or other precedent requires that these elements be proven by the introduction of birth certificates or other certified copies of birth records; and (2) the testimony of the victim and the victim's mother that the victim was thirteen years old at the pertinent time, and defendant's testimony that he was twenty-one years old at the pertinent time, was sufficient evidence. **State v. Cortes-Serrano, 644.**

Statutory rape—motion to dismiss—sufficiency of evidence—continuous course of conduct not recognized in North Carolina—The trial court did not err by denying defendant's motion to dismiss one of the two statutory rape charges even though defendant contends the two acts were in the nature of a continuous transaction rather than separate and distinct crimes because the Court of Appeals has previously held that North Carolina law does not recognize the continuous course of conduct theory. **State v. Cortes-Serrano, 644.**

Statutory rape—physical findings—evidence of other abuse—insufficient for alternate explanation of physical findings—excluded—The trial court did not err in a prosecution of the victim's stepfather for statutory rape and indecent liberties by excluding under the rape shield statute evidence of prior sexual abuse of the victim by her grandfather where the excluded evidence was insufficient to establish an alternate explanation for physical findings. **State v. Adu, 269.**

Statutory rape—subsequent false accusation—no offer of proof—unduly prejudicial—The trial court did not err in a prosecution for statutory rape and other sexual offenses by excluding evidence of a subsequent false accusation where defendant did not make an offer of proof. The exclusion of other testimony about the victim's statements as confusing and unduly prejudicial was within the judge's discretion. **State v. Cook, 230.**

Time and number of incidents—variance between indictment and evidence—not material—The trial court did not err in a first-degree rape and statutory rape prosecution by denying defendant's motion to dismiss one of the charges where the indictment alleged two counts in August and the victim was uncertain as to the number of rapes in August. The date given in the indictment is not an essential element of the crime charged, and there was substantial evidence that defendant had sex with the victim at least six times between June and 12 August, including at least four times in July. **State v. Hueto, 67.**

REAL PROPERTY

Breach of contract—attorney malpractice—misappropriation of closing funds by attorney—fault—innocent parties—allocation of risk of fault—The trial court erred in a breach of contract case arising out of the misappropriation of closing funds by an attorney in a residential real estate sale by granting summary judgment in favor of defendant buyers, and the case is remanded to the trial court with instructions to consider whether the attorney acted as plaintiffs' attorney as well as the attorney for defendants and whether plaintiffs must share the loss. **Johnson v. Schultz, 161.**

Erroneous listing—negligence action—instructions on contributory negligence denied—There was no likelihood that a failure to instruct on contributory negligence as requested misled the jury in an action arising from an er-

REAL PROPERTY—Continued

aneous real estate listing. The court instructed the jury on negligent misrepresentation, so that the jury was required to find that plaintiffs had exercised due care and were not contributorily negligent in order to decide the issue of negligent misrepresentation for plaintiffs. **Crawford v. Mintz, 713.**

SCHOOLS AND EDUCATION

Charter school funding—implied cause of action—The General Assembly intended charter school children to have access to the same level of funding as children attending regular schools, and N.C.G.S. § 115C-238.29H(b) creates an implied cause of action in favor of plaintiff charter schools when they allege violation of the statutory provisions. These issues were properly before the court. **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 348.**

Charter school funding—jurisdiction over disputes—The superior courts maintain jurisdiction to hear monetary disputes between charter schools and their local boards of education concerning locally driven school funds despite defendants' argument that sole jurisdiction to resolve the issues resides with the North Carolina Board of Education. Reading the statutes and the North Carolina Constitution together, the powers of the State Board of Education have been limited to control, administration, and disbursement of state and federal moneys. **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 348.**

Charter school funding—local expense fund—moneys included—The trial court did not err when calculating the funds that a local board of education must share with charter schools by including in the current expense fund, from which the shared funds were drawn, moneys from a variety of sources (such as sales tax reimbursements or donations) that were held in the current expense fund rather than in separate accounts. **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 348.**

Charter school funding—shared funds from board of education—textbook revenue entry—The trial court erred when calculating the funds that a local board of education must share with charter schools by including a revenue item for textbooks supplied by the State in the local current expense fund, the source of the shared funds. The local board of education is merely the custodian of the textbooks and does not have the authority or means to convert that accounting entry to their own purposes. **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 348.**

Compulsory attendance—warrant for parent's violation—principal's discretion not jurisdictional or element of offense—The state was not required to present evidence at trial that the school principal personally made the decision to have a warrant issued against defendant parent charging a violation of the school attendance law, N.C.G.S. § 115C-378, in order to convict defendant of that offense. The exercise of the principal's discretion was neither a jurisdictional requirement nor an element of the offense. **State v. Frady, 766.**

Student injured on playground—interest on damages against board of education—An elementary school student injured on playground equipment and his mother were entitled to recover interest on damages awarded in their negligence action against the local board of education where: (1) the terms of a trust

SCHOOLS AND EDUCATION—Continued

fund agreement between the board and a risk management program waived the board's governmental immunity to the extent it provided excess coverage through a commercial insurance carrier meeting the requirements of N.C.G.S. § 115C-42, including interest on a judgment to the extent such interest was authorized by statute; and (2) authority for such interest was provided by N.C.G.S. § 24-5. **Bynum v. Nash-Rocky Mount Bd. of Educ.**, 777.

SEARCH AND SEIZURE

Consent—totality of circumstances—The trial court did not err by finding that defendant's consent to a search of his apartment during which controlled substances were found was voluntarily given based on the totality of the circumstances even though the officer had falsely told defendant that he had followed and stopped people leaving defendant's apartment who had marijuana or cocaine in their possession. **State v. Kuegel**, 310.

Motion to suppress—caller's tip—reasonable suspicion—sufficient evidence of reliability coupled with attendant circumstances—The trial court did not err in a driving while impaired case by denying defendant's motion to suppress the stop of defendant's vehicle and evidence procured as a result of the stop because there was sufficient indicia of reliability from the tip of another driver, and there were attendant circumstances perceivable to the officer supporting reasonable suspicion. **State v. Hudgins**, 430.

Seizure of drugs after stop and frisk—probable cause standard required—remand—A motion to suppress was remanded for determination under the correct standard where the trial court concluded that an officer seized crack cocaine from defendant based on reasonable suspicion after a stop and frisk. The trial court should have determined whether the officer had probable cause to make the seizure under the plain feel doctrine. **State v. Williams**, 554.

Stop and frisk—reasonable articulable suspicion—The trial court properly determined that an officer had reasonable articulable suspicion to stop and frisk defendant (which led to a drugs arrest) where the officer arrived in the vicinity of an armed robbery minutes after the robber had fled in the direction traveled by defendant, defendant matched the corrected description of the robber, he was found within a few blocks of the robbery minutes after it occurred, he was traveling in the same direction as the robber, he froze when confronted, and he initially refused to take his hands out of his pockets when asked by the officer. **State v. Williams**, 554.

Traffic stop—cocaine—probable cause—extended detention—The trial court did not err in an attempted trafficking by possessing and transporting cocaine and conspiracy to traffic cocaine case by concluding an officer did not conduct an unreasonable search of the car defendant was driving and seizure of cocaine therefrom because the officer possessed probable cause to stop defendant for speeding and possessed the necessary reasonable suspicion to briefly detain defendant to investigate whether he and the passenger of the car possessed drugs or other contraband, and defendant's detention for fifteen minutes, from the time the officer activated his blue lights until he found the cocaine, was not excessive. **State v. Hodges**, 390.

Traffic stop—motion to suppress evidence—lack of reasonable suspicion—The trial court erred in a trafficking in cocaine by transportation case by

SEARCH AND SEIZURE—Continued

denying defendant's motion to suppress evidence obtained during a traffic stop based on suspicion of driving while impaired due to defendant's weaving his vehicle because: (1) defendant's weaving within his lane, standing alone, was insufficient to support a reasonable suspicion that defendant was driving under the influence of alcohol; and (2) the totality of circumstances did not give rise to a reasonable articulable suspicion of criminal activity justifying the stop of defendant's vehicle when the detective did not observe defendant violating any laws such as driving above or significantly below the speed limit, defendant was stopped at approximately 4:00 pm which was not an unusual hour, and there was no evidence that defendant was near any places to purchase alcohol. **State v. Fields, 740.**

SENTENCING

Attempted felonious larceny—prior record level—element included in prior offense—assignment of one point—In sentencing defendant as an habitual offender upon his conviction for attempted felonious larceny, the trial court did not err in determining defendant's prior record level by assigning a point under N.C.G.S. § 15A-1340.14(b)(6) on the basis that all elements of the present offense of attempted felonious larceny were included in a prior offense of felonious larceny for which defendant had been convicted. **State v. Ford, 321.**

Ex post facto law—change in classification of prior conviction—prior record level—The trial court did not err in a second-degree murder and first-degree burglary case by calculating defendant's prior record level by treating a prior conviction for a sale of cocaine as a Class H. felony as it was classified at the time of sentencing rather than as a Class G. Felony as it was classified at the time of the offense, resulting in defendant's being a Level IV rather than a Level III offender, because: (1) there was no ambiguity in the statute which provides that the classification of an offense at the time of sentencing should be used in calculating the prior record level, N.C.G.S. § 15A-1340.14(c); and (2) the constitutional prohibition on ex post facto laws was not implicated by application of N.C.G.S. § 15A-1340.14(c) when defendant's increased sentence due to the change in the classification of his prior conviction served only to enhance his punishment for the present offenses and not to punish defendant for his prior conviction. **State v. Watkins, 215.**

Habitual felon—indictments for three felonies—The trial court did not err in a drug case by admitting into evidence the indictments for the three felonies supporting defendant's habitual felon status during the habitual felon portion of defendant's trial because the prohibition in N.C.G.S. § 15A-1221(b) does not prohibit publication during the sentencing proceeding of indictments from cases not currently before the jury. **State v. Massey, 423.**

Habitual felon—prior record level—The trial court did not err in a drug case by sentencing defendant at a record level VI on the grounds that there were alleged errors in the sentencing worksheet and in the calculation of his prior criminal record because: (1) defendant stipulated that this record level was correct and further stipulated that the worksheet used by the State to determine his prior record level was correct; (2) while defendant is correct that an habitual felon conviction cannot be counted in the calculation of a prior record level, con-

SENTENCING—Continued

trary to defendant's argument it is unclear whether the trial court treated the 1998 conviction as a Class C felony in its calculation of sentencing points; and (3) even without the habitual felon conviction included in the calculation of defendant's prior record points, defendant would still have at least nineteen prior record points and would have properly been assigned a prior record level of VI. **State v. Massey, 423.**

Preservation of issues—cruel and unusual punishment argument—failure to raise below—rational legislative policy—Defendant's sentence in a double statutory rape case of two consecutive terms of 336-413 months did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 19 and 27 of the North Carolina Constitution. **State v. Cortes-Serrano, 644.**

Punishment for pleading not guilty—pre-trial remarks—reasonable inference—Consecutive sentences for multiple counts of first-degree rape and statutory rape were remanded where it could be reasonably inferred from the court's pre-trial remarks that defendant's exercise of his right to a jury trial was considered in issuing consecutive sentences, even though the sentences were within the trial court's discretion and the court attempted to avoid inhibiting defendant's right to plead not guilty. **State v. Hueto, 67.**

STATUTES OF LIMITATION AND REPOSE

Tolling Agreement—Interim Funding Agreement—The trial court did not err in an indemnification case arising out of the negligent construction of a walkway by concluding the statutes of limitation and repose did not bar plaintiff's claims, and alternatively, that defendant was equitably estopped from asserting those defenses based on its agreement to waive them in the Tolling Agreement and Interim Funding Agreement. **Charlotte Motor Speedway, Inc. v. Tindall Corp., 296.**

TERMINATION OF PARENTAL RIGHTS

Failure to make reasonable progress—failure to allege ground in petition—The trial court erred by terminating respondent's parental rights based on failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2) because this ground was not alleged in the termination petition filed by DSS. **In re S.R.G., 79.**

Subject matter jurisdiction—summonses not issued to juveniles as respondents—service accepted by guardian ad litem—The trial court acquired subject matter jurisdiction to hear a petition to terminate parental rights where no summonses were issued to the juveniles as respondents, but the captions of the summonses stated the names of the juveniles, and the guardian ad litem for the juveniles certified that she accepted service of the petitions on the juveniles' behalf. **In re S.L.T. & A.A.T., 127.**

Sufficiency of evidence—report and file—no oral evidence—A termination of parental rights was remanded for insufficient evidence where petitioner presented only a report and file as evidence, with no oral testimony, and testimony from the mother refuted petitioner's allegations. The trial court did not make an independent determination of neglect at the time of the termination of parental

TERMINATION OF PARENTAL RIGHTS—Continued

rights hearing and there was no competent evidence to support a finding of dependency. **In re N.B., I.B., A.F., 113.**

Willful abandonment—sufficiency of findings—The trial court erred by terminating respondent mother's parental rights based on willful abandonment for the six-month period prior to filing the termination petition under N.C.G.S. § 7B-1111(a)(7) because the evidence showed that respondent visited the minor child eleven times during the relevant time period, she brought appropriate toys and clothes to those visits, and respondent participated in one of the trial proceedings during the relevant time period. The findings must show the parent's actions are wholly inconsistent with a desire to maintain custody of the child rather than a failure of the parent to live up to her obligations as a parent in an appropriate fashion, and respondent's actions during the relevant six-month period did not demonstrate a purposeful, deliberative, and manifest willful determination to forego all parental duties and relinquish all parental rights to the minor child. **In re S.R.G., 79.**

TRIALS

Motion for new trial—underlying basis rejected on appeal—The trial court did abuse its discretion by denying defendant's motion for a new trial under N.C.G.S. § 1A-1, Rule 59, where that motion was based on the failure to submit contributory negligence to the jury and the exclusion of certain evidence, and those rulings were upheld elsewhere in the opinion. **Robinson v. Trantham, 687.**

VENUE

New York—forum selection clause—The trial court did not err in an unfair and deceptive trade practices, fraud, and negligent misrepresentation case by dismissing plaintiff's complaint against defendant based on improper venue because the parties' Master Development License Agreement (MDLA) forum selection clause specified that disputes between the parties would be governed by New York law, and the parties agreed to apply New York law to the question of whether the forum selection clause appeared in an enforceable contract. **Sony Ericsson Mobile Communications USA, Inc. v. Agere Systems, Inc., 577.**

UNFAIR TRADE PRACTICES

Motion to dismiss—inapplicable to general employment relationships—The trial court did not err by dismissing plaintiffs' claims for unfair and deceptive trade practices under N.C.G.S. § 75-1.1 because: (1) the statute does not apply to general employment relationships; (2) the pleadings disclose that plaintiffs were employees who were compensated through a combination of salary and incentives which were tied to the company's profits, and the 2002 Letters of Understanding granted no equity interest to plaintiffs; and (3) there were no allegations of any conduct that would constitute activity affecting commerce. **Schlieper v. Johnson, 257.**

Standing—indirect purchaser—antitrust and consumer fraud—Chapter 75 violations—The trial court erred in an antitrust and consumer fraud action by dismissing plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) for fail-

UNFAIR TRADE PRACTICES—Continued

ure to state a claim for relief based on lack of standing because allowing indirect purchasers to sue for Chapter 75 violations will best advance the legislative intent that such violations be deterred and that aggrieved consumers have a private cause of action to redress Chapter 75 violations. **Teague v. Bayer AG, 18.**

WITNESSES

Expert—no objection to qualifications when tendered—There was no error in a wrongful death action arising from the replacement of a pacemaker in admitting expert testimony from plaintiff's economist about damages. Defendants did not object to the witness's qualifications when he was tendered as a witness, and did not explain any way in which he was not qualified to testify about the value of lost income or services. **Swink v. Weintraub, 133.**

WORKERS' COMPENSATION

Appeal from deputy commissioner—Form 44 not filed—discretion to waive—The Industrial Commission in a workers' compensation case did not err by hearing an appeal from a deputy commissioner where defendants did not file a Form 44. Both a Court of Appeals opinion and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the required Form 44 filing where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Commission. **Cooper v. BHT Enters., 363.**

Applicability of equitable remedies—laches—The full Commission did not err by applying the equitable doctrine of laches to the statutory Workers' Compensation Act. **Daugherty v. Cherry Hosp., 97.**

Attorney fees—bad faith—The Industrial Commission did not abuse its discretion in a workers' compensation case by assessing attorney fees in the amount of 25% of the settlement amount of \$97,500 against defendant carrier under N.C.G.S. § 97-88.1 because: (1) the position defendants took in the face of their settlement agreement with plaintiff was in bad faith; and (2) defendants have articulated no reasonable ground in support of their failure to honor the terms of the settlement agreement. **Chaisson v. Simpson, 463.**

Average weekly wage—calculation—The Industrial Commission's calculation of plaintiff employee's average weekly as \$662.06 under N.C.G.S. § 97-2(5) in a workers' compensation case is remanded for further findings of fact because it cannot be determined how the Commission reached its conclusion. **Erickson v. Lear Siegler, 513.**

Back injury—subsequent cervical condition—causation—medical testimony—post hoc, ergo propter hoc—There was competent evidence in a workers' compensation case arising from a back injury and a later cervical condition to support the Industrial Commission's determination that the testimony of two doctors could not support a finding that the neck condition was causally related to the work-related fall. Where the question is the cause of a controversial medical condition, the confusion of sequence with consequence (post hoc, ergo propter hoc) is not competent evidence of causation. **Cooper v. BHT Enters., 363.**

WORKERS' COMPENSATION—Continued

Back injury—subsequent neck condition—timing of complaints to medical providers—finding—There was competent evidence in a workers' compensation case to support the Industrial Commission's finding that plaintiff did not begin to make regular complaints of neck pain to her medical providers until more than six months after the injury, and that there was insufficient evidence to support a finding that a report of isolated neck pain was proximately related to her later treatment for a cervical disc herniation. **Cooper v. BHT Enters., 363.**

Clincher agreement—signature withheld by carrier and employer—enforceability—An agreement between plaintiff employee and defendant employer's workers' compensation insurance carrier to settle a claim for \$97,500 was enforceable even though defendant carrier and defendant employer did not sign the settlement agreement. **Chaisson v. Simpson, 463.**

Complaint of lumbar spine pain—jurisdiction over cervical spine injury—Form 63—Form 33 request for hearing—The filing by defendant employer and defendant workers' compensation carrier of a Form 63—Notice of Payment of Compensation Without Prejudice invoked the Industrial Commission's jurisdiction over plaintiff employee's cervical spine condition as well as his lumbar spine condition arising as a result of a workplace accident, although plaintiff initially complained of lumbar pain and did not file a separate claim for a cervical injury within two years after the accident, where the Form 63 specifically acknowledged plaintiff's claim for "injury on 06/06/2002" and did not purport to limit the claim to any particular body part or portion of the spine, and one of plaintiff's expert witnesses ultimately determined that a cervical spine injury, as well as a lumbar spine injury, was contributing to the pain experienced by plaintiff following the accident. **Erickson v. Lear Siegler, 513.**

Compromise settlement agreement—filing by employee rather than by employer—A compromise settlement agreement that was drafted by an attorney representing the compensation carrier and the employer and that was signed by the employee but not by the carrier and the employer was not unenforceable because the employee rather than the employer filed it with the Industrial Commission for enforcement. N.C.G.S. § 97-17(a). **Chaisson v. Simpson, 463.**

Disability—only through date of release—The Industrial Commission did not err by concluding that a workers' compensation plaintiff was entitled to disability compensation only through the date she was released to return to full duty work. There was no presumption of disability in this case, the doctor who issued medical excuse notes could not cite any objective medical reason to keep plaintiff from returning to work with respect to her compensable back injury, and plaintiff offered only the absence of light duty work with her employer in the month after the injury to prove that she had made a "reasonable" effort to obtain work. **Cooper v. BHT Enters., 363.**

Equitable remedy of laches unnecessary—adequate remedy at law—The full Commission erred in its application of the equitable doctrine of laches to the statutory Workers' Compensation Act to determine that plaintiff's claim was time barred, and the case is remanded to the full Commission for further proceedings under Industrial Commission Rule 613. **Daugherty v. Cherry Hosp., 97.**

Expert testimony—"likely" cause of injury—The evidence supported the Industrial Commission's finding that plaintiff's cervical spine condition (neck

WORKERS' COMPENSATION—Continued

injury) was casually related to his workplace accident, even though plaintiff complained of lower back and leg pain and testified that he felt a pop in his back rather than in his neck, where the neurosurgeon who performed surgery on plaintiff testified that it was “likely” that the accident caused plaintiff’s neck injury. **Erickson v. Lear Siegler, 513.**

Inadequate training—issue raised in claim—not directly addressed—An Industrial Commission workers’ compensation decision was remanded for further findings on whether inadequate training was a significant contributing factor in decedent’s death where plaintiff had asserted the issue as part of the claim. **Reaves v. Industrial Pump Serv., 31.**

National Guard member—injured during training—not a state employee—The Industrial Commission did not have jurisdiction in a workers’ compensation case, and should not have awarded benefits to a member of the North Carolina National Guard injured during federally funded military training in California. Plaintiff was not an employee within the meaning of N.C.G.S. § 97-2(2), which includes those instances where a North Carolina National Guard member is called into service of the State of North Carolina; operates under the command and control of the Governor pursuant to state law; and is paid by the State with state funds. **Baccus v. N.C. Dep’t of Crime Control & Pub. Safety, 1.**

Pickrell presumption—circumstances sufficient to raise issue—An Industrial Commission denial of workers’ compensation death benefits was remanded for findings and conclusions about the *Pickrell* presumption that the death was work-related and compensable. The fact that another employee testified about what he observed does not necessarily render *Pickrell* immaterial. **Reaves v. Industrial Pump Serv., 31.**

Res judicata—law of the case—The Industrial Commission did not err in a workers’ compensation case by determining that defendant carrier effectively cancelled defendant employer’s workers’ compensation insurance under N.C.G.S. § 58-36-105 based on the alternative ground that defendant employer was barred from relitigating that issue because defendant employer’s failure to appeal from a deputy commissioner’s 2003 opinion and award finding that it did not have workers’ compensation insurance coverage on the date of plaintiff’s accident barred it from relitigating that issue in subsequent proceedings under either res judicata or law of the case. **Boje v. D.W.I.T., L.L.C., 118.**

Settlement agreement—fair and just—best interests of parties—The Industrial Commission did not err in a workers’ compensation case by deeming that a compromise agreement settling plaintiff’s knee injury claim for \$97,500 was fair and just and in the best interest of all parties based on the evidence available to the parties at the time of the settlement negotiations. **Chaisson v. Simpson, 463.**

Settlement amount—sufficiency of evidence—The Industrial Commission did not err in a workers’ compensation case by its finding of fact stating the parties negotiated a settlement agreement in the amount of \$97,500 and that the settlement amount reflected the parties’ meeting of the minds because: (1) the Commission concluded the testimony of a former adjuster of the insurance company that she knew for sure she did not settle the claim with plaintiff for \$97,500 was

WORKERS' COMPENSATION—Continued

not credible; (2) defendants did not challenge the Commission's findings that neither the former adjuster nor defendant carrier produced any documentation to support the former adjuster's position that the settlement figure actually negotiated was in the range of \$25,000 or that the \$97,500 figure was a mistake; and (3) defendant carrier's settlement attorney testified that the former adjuster communicated to her that the settlement amount was \$97,500. **Chaisson v. Simpson, 463.**

Standard—working conditions versus general public—not versus prior job assignments—The Industrial Commission in a workers' compensation case should have focused on the decedent's working conditions versus the general public, rather than on whether this assignment involved a greater risk than that to which decedent was normally exposed. **Reaves v. Industrial Pump Serv., 31.**

WRONGFUL DEATH

Special instruction—informed consent—absence of written request—The trial court did not abuse its discretion in a wrongful death action arising from a pacemaker replacement by not giving a special jury instruction on informed consent where defendants did not submit a written proposed instruction, and the evidence was at best equivocal as to whether the decedent had signed a consent form that covered the procedure in question. **Swink v. Weintraub, 133.**

ZONING

Amended ordinance—failure to follow statutory and ordinance procedures—time of public hearing—map changes—An amended county zoning ordinance extending zoning to the entire county was invalid where (1) the amendment was not adopted in accordance with the county's own zoning ordinance procedure governing notice of a public hearing when the hearing was held fourteen days after the initial notice was published and not after the minimum of fifteen days as required by the ordinance; and (2) the county did not follow the procedure set forth in N.C.G.S. § 153A-344 and the county ordinance for implementing zoning maps changes in that requests for changes in zoning classification in the open use district were never considered by the planning board but were handled by the planning board staff, the staff approved 404 changes in zoning, and each approved change was incorporated into the zoning maps. **Thrash Ltd. P'ship v. County of Buncombe, 678.**

Amended ordinance—standing—failure to follow procedures—The trial court did not err by concluding that plaintiff had standing to institute this declaratory judgment action challenging an amended zoning ordinance, even though it had not sought a permit to develop its land and had no active plans to build multi-family units on its land, because plaintiff's challenge to the amended zoning ordinance was based on the alleged failure of the county to follow the proper procedures to enact the zoning ordinance, which was an attack on the validity of the amended zoning ordinance instead of an "as-applied" challenge. **Thrash Ltd. P'ship v. County of Buncombe, 678.**

Amended ordinance—standing—failure to follow procedures—The trial court did not err by concluding that plaintiff had standing to institute this

ZONING—Continued

declaratory judgment action challenging an amended zoning ordinance, even though it had not sought a permit to develop its land and had no active plans to build multi-family units on its land, because: (1) plaintiff's challenge to the amended zoning ordinance was based on the alleged failure of the county to follow the proper procedures to enact the zoning ordinance, which was an attack on the validity of the amended zoning ordinance instead of an "as-applied" challenge; (2) plaintiff's use of its land was limited by the zoning regulations; and (3) to require a plaintiff to demonstrate a direct injury in order to challenge a zoning regulation would allow counties to make zoning decisions without complying with the statutory requirements of Article 18 of Chapter 153A of the General Statutes. **Thrash Ltd. P'ship v. County of Buncombe, 727.**

Enforcement of ordinance—estoppel—not applicable—Estoppel cannot apply when a municipality is enforcing a zoning ordinance because the police power of the state cannot be bartered away by contract or otherwise lost; the trial court did not err here by failing to conclude that the Town was estopped from enforcing the ordinance. **Town of Pinebluff v. Marts, 659.**

Injunction to enforce ordinance—balancing of equities—not properly raised—The question of whether the trial court was required to balance the equities in issuing an injunction requiring compliance with a zoning ordinance was not before the appellate court where defendants pointed only to inequities from the ordinance, and not inequities resulting from the injunction itself. It is not the role of the courts to decide the wisdom of the ordinance. **Town of Pinebluff v. Marts, 659.**

Manufactured homes—age—absence of appearance and dimensional criteria—A county ordinance requiring manufactured homes to be no more than 10 years old in order for the owner to obtain a building permit for permanent set up exceeded the county's statutory authority because it does not employ appearance and dimensional criteria as intended by the General Assembly in N.C.G.S. §§ 153A-341.1 and 160A-383.1. **Five C's, Inc. v. County of Pasquotank, 410.**

Multi-Family Dwelling Ordinance—failure to follow procedures—notice—A Multi-Family Dwelling Ordinance was passed without proper notice and was thus invalid because: (1) although the county claims the Multi-Family Dwelling Ordinance was enacted under N.C.G.S. § 153A-121, a county may not evade the legislative notice requirements imposed by N.C.G.S. § 153A-323 by labeling the zoning act as an exercise of police power; and (2) the ordinance substantially affected plaintiff's use of its property, and the county had to comply with the notice requirements since the ordinance was the type authorized by Article 18. **Thrash Ltd. P'ship v. County of Buncombe, 727.**

Multi-phase development—no implicit approval of subsequent stages—not an impairment of contract—A Town's application of a zoning ordinance to the last two phases of a development did not constitute a retroactive application of the ordinance or an unconstitutional impairment of contract where the ordinance was passed after Phase I was begun, permits were issued for Phases II and III with certain conditions related to the ordinance, and the Town eventually sought an injunction for enforcement of the ordinance when the conditions were not met. Defendants asserted that there was an implicit approval of the later phases in the approval of Phase I, but the Town submitted evidence that the initial approval was for Phase I only and that defendants did not seek approval of

ZONING—Continued—Continued

Phases II and III until after the ordinance had been adopted. No authority was presented that the Town's knowledge of defendants' intent to seek approval of Phases II and III constituted a contractual obligation. **Town of Pinebluff v. Marts, 659.**

Reservation of open space—violation properly enjoined—A zoning ordinance requiring that a developer reserve open space and install a mini-park fell within the scope of *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, and the trial court did not err by granting summary judgment for plaintiff town and enjoining defendants' violation of the ordinance. **Town of Pinebluff v. Marts, 659.**

UDO—collateral attack—not allowed—Defendants could not collaterally attack the validity of a Unified Development Ordinance where they waited to object to the ordinance until after the Town sought to enforce it as a result of their undisputed noncompliance. **Town of Pinebluff v. Marts, 659.**

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