NORTH CAROLINA COURT OF APPEALS REPORTS

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196 N.C. APP.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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BARBARA A. JACKSON

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1. Elected and sworn in 21 January 2011.
2. Appointed and sworn in 3 January 2011.

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H. James Hutcheson[2]

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Kimberly Woodell Sieredzki
Allegra Milholland[3]

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1. Retired 31 December 2010.
2. Appointed 1 January 2011.
3. Appointed 1 January 2011.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
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6B	Cy A. Grant, Sr.	Ahoskie
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7BC	Walter H. Godwin, Jr.	Tarboro
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4B	Charles H. Henry	Jacksonville
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11B	Thomas H. Lock	Smithfield
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12B	Gregory A. Weeks	Fayetteville
12C	James F. Ammons, Jr.	Fayetteville
	Mary Ann Tally	Fayetteville
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	James Gregory Bell	Lumberton
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22B	Mark E. Klass	Lexington
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29B	MARK E. POWELL	Hendersonville
30A	JAMES U. DOWNS	Franklin
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JUDICIAL STANDARDS COMMISSION ADVISORY OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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GENERAL STATUTES CITED

GENERAL STATUTES CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFF v. BMJ OF CHARLOTTE, LLC; CONSOLIDATED TEXTILES, INC., LESSEE; AND ANY OTHER PARTIES IN INTEREST, DEFENDANTS

No. COA08-147

(Filed 7 April 2009)

1. Appeal and Error— appealability—condemnation—dismissal of counterclaims—interlocutory order—existence of easement

An interlocutory order dismissing defendants' counterclaims while plaintiff's initial claim for determination of just compensation for the pertinent taking was still pending was immediately appealable because: (1) orders from a condemnation hearing concerning title and area taken are vital primary issues; and (2) the possible existence of an easement is a question affecting title, and defendants' counterclaims raise the question of whether an easement existed.

2. Railroads— right-of-way—city's use for light rail system—standing of landowner and lessor

The owner and lessor of property subject to a railroad right-of-way had standing to contest plaintiff city's acquisition and use of the right-of-way for a light rail system for public transportation on the ground that the city's actions violated the charter authorizing the railroad.

3. Railroads— right-of-way—city's use for light rail system—purpose of railroad—no reversion to fee owner

A city's use of a railroad right-of-way for a light rail system to transport members of the public was within the scope of the "purposes of the railroad" set forth in the amended railroad charter and did not cause the right-of-way to revert to the owner of the underlying fee.

4. Railroads— right-of-way—conveyance to city for light rail system—not abandonment—no reversion to fee owner

The conveyance of a portion of a railroad right-of-way to plaintiff city to be used for a light rail system was not an abandonment of the right-of-way which would result in its reversion by operation of law to the owner of the underlying fee.

5. Railroads— right-of-way—voluntary alienation by quitclaim deed

An amended railroad charter provision for reversion of the right-of-way "if the said road or any part thereof should be sold at execution sale for the debts of said company or otherwise" did not forbid alienation of the right-of-way by any means other than an execution sale and permitted voluntary alienation by a quitclaim deed.

6. Railroads— right-of-way—city's use for light rail system—not overburden of easement—not compensable taking

An increase in rail traffic on a railroad right-of-way by a city's acquisition and use of the right-of-way for a light rail system was not an overburden of the railroad easement that entitles the underlying fee owner and his lessee to compensation for a taking of the easement.

Appeal by defendants from order entered 5 November 2007 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2008.

Horack Talley Pharr & Lowndes, P.A., by Robert B. McNeill and Phillip E. Lewis, for plaintiff-appellee.

Katten Muchin Rosenman LLP, by Richard L. Farley and Jeffrey C. Grady, for defendant-appellant.

STROUD, Judge.

This appeal addresses a counterclaim for inverse condemnation[1] filed in response to a condemnation action by the City of Charlotte. The gravamen of the counterclaim is that plaintiff's use of a railroad right of way that runs over defendants' land is in derogation of defendants' rights as the holder of the underlying fee. Defendants offer two different legal theories as to why they are entitled to compensation for use of the railroad right of way. Defendants' first theory is that any rights which might have previously existed to use the railroad right of way have reverted to the holder of the underlying fee estate. Defendants' alternative theory is that even if any rights to use the railroad right of way still exist, the manner in which it is currently being used is beyond the scope of the right of way, thus creating a compensable overburden on the servient estate. For the reasons which follow, we affirm the trial court.

I. Background

On 2 January 1847 the North Carolina General Assembly chartered ("the original charter") "a company to construct a rail road from some point on the South Carolina Rail Road to the town of Charlotte, in Mecklenburg [C]ounty, to be called 'the Charlotte and South Carolina Rail Road Company ["C&SC"].' " The original charter was amended by the General Assembly on 29 January 1849 ("the amended charter") in order to "produce conformity" with the railroad charter granted by the state of South Carolina. The amended charter is the same as the original charter in all material respects relevant to this appeal.

Among the powers granted, section 20 of the amended charter gave C&SC the power to take land by statutory presumption[2] railroad right of way:

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1. Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 108, 338 S.E.2d 794, 798 (1986) (citation and quotation marks omitted).

2. The amended charter also granted C&SC the authority to acquire necessary land by purchase (section 17) and by eminent domain proceedings (section 19). The parties stipulated that the right of way *sub judice* was acquired by statutory presumption. For a general discussion of the public policy undergirding the grant of power to take land by statutory presumption, see *Earnhardt v. Southern Ry. Co.*, 157 N.C. 358, 362-63, 72 S.E. 1062, 1064 (1911).

> That in the absence of any contract or contracts with the said company, in relation to lands through which the said road or its branches may pass, signed by the owner thereof . . . it shall be presumed that the land upon which the said road or any of its branches may be constructed, together with a space of sixty-five feet on each side of the centre of the said road, has been granted to the company, by the owner or owners thereof; and the said company shall have good right and for a title thereto, and shall have, hold and enjoy the same as long as the same be used only for the purposes of said railroad . . . and no longer, [unless the owner applies for compensation] within two years next after that part of said road was finished[.]

The right of statutory presumption was eventually used by C&SC to acquire a railroad right of way ("the right of way" or "the easement")[3] across property located at what is now 707 East Hebron Street in Charlotte, Mecklenburg County.

In 1969, Robert J. Kunik acquired the property located at 707 East Hebron Street. The property was acquired subject to the right of way, which was held at the time by Southern Railway, successor- in-interest to C&SC.

In 2003, the property was conveyed, subject to the right of way, by Robert J. Kunik's successors-in-interest to defendant BMJ of

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3. We use the terms "right of way" and "easement" interchangeably throughout this opinion. In fact, the trial court *sub judice* concluded that "[p]laintiff did not acquire title in fee simple absolute to the Western NS Right of Way, but instead acquired only those rights held by Norfolk Southern in the property, to wit: an easement[,]" a conclusion which is not under review in this appeal because neither party assigned it as error.

We are aware that a railroad right of way is not always an easement; it can be a fee estate or another type of interest, depending upon the manner of its creation. *See, e.g.*, *McCotter v. Barnes*, 247 N.C. 480, 485, 101 S.E.2d 330, 334-35 (1958) ("It is a matter of common knowledge that the strip of land over which railroad tracks run is often referred to as the 'right of way,' with the term being employed as merely descriptive of the purpose for which the property is used, without reference to the quality of the estate or interest the railroad company may have in the strip of land."); *King Associates, LLP v. Bechtler Development Corp.*, 179 N.C. App. 88, 94-95, 632 S.E.2d 243, 247-48 (2006) (the deed granting a railroad right of way created a "fee simple determinable" not an easement). However, "[i]t is well settled in this State that the company acquires, by the statutory method, either of condemnation or by presumption, no title to the land, but an easement to subject it to the uses prescribed." *Seaboard Air Line R. Co. v. Olive*, 142 N.C. 257, 265, 55 S.E. 263, 266 (1906); *Raleigh & Augusta Air Line R.R. v. Sturgeon*, 120 N.C. 225, 230, 26 S.E. 779, 781 (1897) ("Our opinion, therefore, is that in the case before us the plaintiff [who acquired a railroad right of way by statutory presumption] has only an easement in the land in dispute.").

Charlotte, LLC ("BMJ"), a corporation owned by members of the Kunik family. Defendant Consolidated Textiles, Inc. ("Consolidated") is the lessee of the property and operates a warehouse located thereon. On 2 August 1988, Southern Railway executed a license agreement with Consolidated which allowed Consolidated to use the right of way to access the warehouse for truck unloading. On 11 December 2003, Norfolk Southern Railway Company ("NS" or "Norfolk Southern"), the successor-in-interest to Southern Railway, conveyed an interest in the western half of the right of way by quitclaim deed to the City of Charlotte ("the city" or "plaintiff"). Norfolk Southern retained all of its interest in the eastern portion of the railroad right of way.

The city constructed and began operating a light rail system for transporting the public by rail ("Light Rail") in the western half of the right of way.[4] Light Rail runs from downtown Charlotte to a location just north of Interstate 485, still in North Carolina; it does not connect with any railroad in South Carolina. Light Rail is separate and independent from the rail line currently operated and maintained by Norfolk Southern on the eastern portion of the Norfolk Southern right of way, which will continue to operate.

Light Rail has substantially increased rail traffic upon the right of way. With the addition of Light Rail's two line sections, one running northbound and the other southbound; there are two separate railroad lines, Light Rail and Norfolk Southern, operating at least 3 separate railroad tracks within the western 65 feet of the right of way. The tracks currently in the Norfolk Southern right of way and used by Norfolk Southern are part of its R-Line, which serves approximately 10 trains per day. Norfolk Southern has no current plans to increase the number of times a train will pass through the right of way, but does expect that its business will grow.

When Light Rail began operation in November 2007, both the northbound and southbound lines began passing through the Norfolk Southern right of way every seven minutes during peak times and every fifteen minutes during non-peak times.[5] As a result, a Light Rail train passes through the Norfolk Southern right of way twice every

4. The trial court's findings of fact in the order entered 5 November 2007 were based on the parties' stipulations of fact filed 16 April 2007. The parties stipulated that Light Rail would become operational as of November 2007, so we assume for purposes of this opinion that Light Rail is now actually operating as stipulated.

5. ("Peak times" are 6:00 am to 9:00 am and 3:00 or 4:00 pm to 6:30 or 7:00 pm).

seven minutes during peak times and twice every fifteen minutes during non-peak times. Each time a Light Rail train passes through the Norfolk Southern right of way, the signal gates at the grade crossing of East Hebron Street and South Boulevard come down and stop traffic on East Hebron Street. The gates stay down for about 45 seconds each time.

Light Rail occupies a portion of the Norfolk Southern right of way previously used by Consolidated in connection with its loading docks pursuant to a license agreement with Norfolk Southern. There is a fence between the Light Rail tracks and the Norfolk Southern rail line, which prevents access from South Boulevard to the BMJ property without first going to the street intersection of South Boulevard and East Hebron Street. As a result of the construction and operation of Light Rail, neither Consolidated nor a subsequent tenant can use any portion of the western Norfolk Southern right of way to access the loading docks.

On 22 March 2005, pursuant to N.C. Gen. Stat. § 136-103[6] *et seq.*, plaintiff filed a complaint for condemnation and appropriation of a ten feet wide temporary construction easement adjacent to the railroad right of way and a 2 feet wide by 22 feet long permanent utility easement within the temporary construction easement. Plaintiff deposited the sum of $7,125.00 as its estimate of just compensation for the taking.

Defendants BMJ and Consolidated (collectively "defendants") filed an answer on 5 May 2006. The answer asserted inverse condemnation and overburdening of the easement as counterclaims. The first counterclaim alleged that defendants were entitled to compensation because the city had no interest in the right of way, which defendant asserted no longer exists, having reverted to the holder of the underlying fee. Alternatively, a second counterclaim alleged that even if the easement still exists and the city had an interest in it, the city's use of the easement for Light Rail is beyond the scope of use permitted by the easement.

On 4 April 2007, plaintiff filed a Motion to Determine Issues Other than Damages, pursuant to N.C. Gen. Stat. § 136-108. The

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6. Ordinarily a city in North Carolina would exercise its power of eminent domain pursuant to Chapter 40A of the North Carolina General Statutes. However, the City of Charlotte was authorized to exercise the power of eminent domain for its public transportation system pursuant to Chapter 136 of the North Carolina General Statutes. N.C. Sess. Law 2001-304.

trial court held a hearing on the motion during the week of 16 April 2007 and entered its order dismissing defendants' counterclaims on 5 November 2007. Defendants appeal from the order dismissing their counterclaims.

II. Procedural Issues

A. Interlocutory Order

[1] Because plaintiff's initial claim for determination of just compensation for the taking set forth therein is still pending, the order dismissing defendants' counterclaims did not resolve all of the claims in this action. Hence, the order is interlocutory. *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007). Generally, an appeal from an interlocutory order will not be reviewed until all claims in the case are resolved by the trial court. *Id.* However, an interlocutory order is immediately reviewable in two circumstances:

> First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.

Dep't of Transp. v. Rowe, 351 N.C. 172, 174-75, 521 S.E.2d 707, 709 (1999) (citations and quotation marks omitted).

The North Carolina Supreme Court has determined that "orders from a condemnation hearing concerning title and area taken are vital preliminary issues[,]" and has allowed immediate appeal therefrom. *Id.* at 176, 521 S.E.2d at 709 (citation and quotation marks omitted). Even where an order does not address title *per se*, the North Carolina Supreme Court has held that

> "A title is not a piece of paper. It is an abstract concept which represents the legal system's conclusions as to how the interests in a parcel of realty are arranged and who owns them." . . . The possible existence of an easement . . . is a question affecting title; therefore, the trial court's order is subject to immediate review.

N. C. Dep't of Transp. v. Stagecoach Village, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (quoting William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 10.12 (3d ed. 2000)). Because

defendants' counterclaims *sub judice* raise the question of whether or not an easement exists, the order is immediately reviewable.

B. Standing

[2] Before we address the issues raised by defendants, we must address plaintiff's sole cross-assignment of error as to defendants' standing. Plaintiff argues that defendants have no standing to contest plaintiff's acquisition and use of the western right of way on the grounds that plaintiff's actions are in violation of the amended charter because only the State of North Carolina has standing to object on these grounds. Plaintiff relies on the following language from *Mallett v. Simpson*, "[n]o one but the State could take advantage of the defect that the purchase was *ultra vires*[,]" 94 N.C. 37, 41 (1886), to argue that "[b]ecause railroad companies established by charter are quasi-public corporations created by state legislative enactment . . . acts of a railroad company alleged to exceed its legislative charter may only be challenged by the [S]tate."

Mallett is unavailing because the language relied on by plaintiff is dicta. Even though the State was not a party to the action, *Mallett* reviewed the railroad's charter and concluded that the railroad's purchase of the land in question was within the rights granted by the charter. *Id.* at 40-41. Furthermore, even if the language relied on by plaintiff had been dispositive, we conclude that it was not addressing the issue of standing. *Mallett* further stated:

> [I]f the corporation acquired the land for any of the purposes authorized by the charter, its purchase and sale was valid; and if on the other hand, it transcends the authority conferred by the charter, its purchase and sale would still be valid against every body except the State, and its title could not be collaterally assailed[.]

Id. at 42. We read this language, consistent with the holding, to mean that a party other than the State could have brought an action regarding the railroad's title to the land, but on the merits of the action, only the State could have prevailed. Accordingly, plaintiff's cross-assignment of error as to defendants' standing is overruled and we will review on the merits.

III. Standard of Review

Issues which fall under the purview of N.C. Gen. Stat. § 136-108 are decided, as here, by a judge sitting without a jury. N.C. Gen. Stat.

§ 136-108 (2007); *Dept. of Transportation v. Wolfe*, 116 N.C. App. 655, 657, 449 S.E.2d 11, 12-13 (1994). "It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005) (citations and quotation marks omitted), *disc. review denied*, 360 N.C. 491, 631 S.E.2d 520 (2006). The propriety of the trial court's conclusions of law is subject to *de novo* review. *Id.*

Defendants assigned error to five of the trial court's conclusions; the "finding" to which defendants excepted is actually a conclusion of law related to construction of the amended charter. Therefore, our entire review is *de novo*. *See Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) (a legal conclusion mislabeled as a finding of fact is reviewed according to its substance not its label).

IV. Reversion

Defendants contend that the city must compensate them for the use of the land over which the Light Rail runs because all rights in the right of way have reverted to defendants as owner/lessor of the underlying fee. Defendants first argue that the right of way was defeasible at creation and reverted to the owner of the underlying fee because Light Rail is a use not contemplated by the amended charter. Alternatively, defendants argue that reversion resulted by operation of law from the railroad's abandonment of the easement. We disagree as to both.

A. Defeasible at Creation

[3] Section 20 of the amended charter reads in pertinent part:

> [T]he said company shall have good right and title [to any right of way acquired by statutory presumption] and shall have, hold and enjoy the same *as long as the same be used only for the purposes of said railroad . . . and no longer* . . . . [I]f the said road or any part thereof should be sold at execution sale for the debts of said company or otherwise, then and in that case all the rights and title to the land which may have been condemned by virtue of this act, shall immediately revert to the original owners, unless the purchaser or purchasers at such sale shall keep up the road for

> the use of the public in the same manner and under the same restrictions as by this act it is contemplated that the Charlotte and South Carolina Railroad Company should do.

Defendants contend that the preamble to the original charter defines the "purposes of said railroad" very narrowly: "to construct a rail road from some point on the South Carolina Rail Road to the town of Charlotte[.]" Defendants reason therefrom that use of the right of way for Light Rail and use of the right of way by a carrier that does not connect to the South Carolina Railroad is outside the purpose of the charter, therefore triggering the reversion clause. In essence, defendants argue that any rights of way taken by statutory presumption should be interpreted as use it all or lose it all. We disagree.

The purpose of the railroad is set forth in detail in sections 9 and 10 of the amended charter. Section 9 begins: "That the company shall have power and may proceed to construct as speedily as possible a rail road, with one or more tracks, to be used with steam, animal, or other power[.]" Light Rail runs on two tracks with electric power, a use clearly contemplated by section 9. Furthermore, section 9 recognized piecemeal use of the right of way: "said company *may use any section* of the railroad constructed by them, before the whole said road shall be completed." (Emphasis added.) Light Rail runs on a section of the track rather than the whole. Section 10 adds that the tracks built in the right of way are to be used for "conveyance, or transportation of persons, goods, merchandise and produce, over the said railroad . . . ." Light Rail is used for the purpose of transporting persons, a use contemplated by the amended charter.

We conclude therefore that use of the right of way for Light Rail is within the meaning of the "purposes of said railroad." Accordingly, this assignment of error is overruled.

B. Abandonment

[4] Alternatively, defendants argue that alienation of a portion of the right of way to another entity constituted abandonment which resulted in reversion to the holder of the underlying fee by operation of law. Defendants rely on two nineteenth century cases from other jurisdictions, *Blakely v. Chicago, K. & N.R. Co.*, 51 N.W. 767 (Neb. 1892), and *Platt v. Pennsylvania Co.*, 1 N.E. 420 (Ohio 1885), to argue that the law of railroad easement abandonment in North Carolina should be expanded to include conveyance of part or all of the ease-

ment to another party, even another railroad operator, *see* N.C. Gen. Stat. § 1-44.1 (2007) (the passage of seven years after removal of tracks is presumed to be abandonment); *Raleigh, C. & S. Ry. Co. v. McGuire*, 171 N.C. 277, 281-82, 88 S.E. 337, 339 (1916) ("It is well settled that a railroad company does not abandon the land on which it has constructed its tracks so as to entitle the owner to revoke its license by ceasing to operate freight or passenger trains over it, where it continues to use it for purposes incident to and connected with its business in operating the road."); *Skvarla v. Park*, 62 N.C. App. 482, 487, 303 S.E.2d 354, 357 (1983) ("The essential acts of abandonment are the intent to abandon and the unequivocal external act by the owner of the dominant tenement by which the intention is carried to effect.").

We conclude first that *Blakely* is wholly inapposite to the facts *sub judice*. *Blakely* strictly construed a deed expressly granting a right of way to only one railroad, holding that the grantee railroad was thereby prohibited by the deed from conveying part of the right of way, even to another railroad. 51 N.W. at 767. There is no grant of an easement by deed *sub judice*; therefore we conclude *Blakely* has no application.

Platt is closer on its facts but does not persuade us. First, the underlying grant of authority in *Platt* is different from that *sub judice*; *Platt* strictly construed a statute allowing a railroad to acquire rights of way by eminent domain proceedings. 1 N.E. at 421. The language of the statute under review in *Platt* allowed a railroad to " 'appropriate as much [land] as may be deemed necessary for its railroad[.]' " *Id.* (quoting the relevant statute). In comparison, the taking by statutory presumption provision of the amended charter *sub judice* is broader in scope, giving C&SC the right to take land by statutory presumption to be "used only for the purposes of said railroad." Two specific words in the *Platt* statute, "its" and "necessary," which were important to the holding of *Platt*, *id.* at 426, do not appear in the relevant portion of the amended charter *sub judice*.

Second, the basis of the holding of *Platt* is not clear. *See id.* at 433 (McIlvaine, J., dissenting). *Platt* offered two reasons for finding abandonment; it is not clear which one, if either, was dispositive. *Id.* at 427. Besides language suggesting that the easement was abandoned by conveyance to another railroad, *Platt* further noted disuse of the right of way for twenty-one years was also grounds to find abandonment. *Id.* Moreover, the *holding* of *Platt* treats the conveyance of the

easement to another railroad not as an abandonment leading to reversion, but as a compensable overburdening of the easement, *id.*, which is an issue in this case discussed more fully *infra* Part V.

Third, *Platt* does not appear to be the majority rule; at least some jurisdictions which have considered the issue have held otherwise. J. A. Connelly, Annotation, *What Constitutes Abandonment of a Railroad Right of Way*, 95 A.L.R.2d 468, 498 (1964) ("[A] sale or conveyance of a right of way for continued use as a right of way does not generally amount to an abandonment." (Citing for example, *Crolley v. Minneapolis & St. L. Ry. Co.*, 16 N.W. 422, 424 (Minn. 1883) ("A sale of a right of way [taken by condemnation to another railroad operator] is not equivalent to an abandonment."))). A holding from a jurisdiction which does not represent the majority rule is less persuasive on this Court. *See State v. Bindyke*, 288 N.C. 608, 627, 220 S.E.2d 521, 533 (1975) ("After considering the decisions expounding both the majority and minority views we are constrained to adopt the majority rule . . . .").

Fourth, *Platt* would likely not avail for defendants even in Ohio. *Platt* was criticized and limited to its facts by the Supreme Court of Ohio over one hundred years ago. *Garlick v. Pittsburgh & W. Ry. Co.*, 65 N.E. 896, 899-900 (Ohio 1902) ("Instead of intending to abandon the premises in the legal sense, the grantors, for a consideration, sold and conveyed them to be used for the same purposes, which negatives the idea of abandonment. . . . It is urged with much force that this court has decided otherwise in *Platt* . . . . [However, t]he facts in [that] case[] are materially different[] and the questions arose in a different manner, and hence we are not called upon to overrule them in order to decide this case. We are entirely clear, however, that the doctrine of [that] case[] should not be extended beyond the particular facts upon which [it] stand[s].").

We are further disinclined to be persuaded by *Platt* because North Carolina courts that have addressed conveyances of rights in a railroad right of way by a railroad have not construed the rules governing rights of way as strictly as *Platt*. *See generally* Jeffrey Alan Bandini, Comment, *The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis*, 75 N.C. L. Rev. 1989, 2022 (1997) ("Courts generally have refused to find an abandonment when a railroad leased or sold a right of way for uses not inconsistent with railroad purposes."). One of the leading North Carolina cases on the

issue is *Atlantic Coast Line R.R. v. Bunting*, which stated the rule that "[a] railroad company would not be permitted to sell or farm out any portion of its right of way to an individual for any purposes extraneous to its chartered rights and duties." 168 N.C. 579, 581, 84 S.E. 1009, 1010 (1915). In applying this rule, *Atlantic Coast Line* discussed *Coit v. Owenby*, 166 N.C. 136, 81 S.E.1067 (1914), noting that the "railroad [in *Coit*] had [no] right to rent out the right of way to an individual for strictly personal or private business purposes. [However, the railroad was allowed to lease the right of way] to a patron of the road as a terminal facility for receipt and shipment of freight, . . . *to the extent that it did not interfere with the facilities for serving the public*." 168 N.C. at 581, 84 S.E. at 1010 (emphasis added). *Coit v. Owenby* was further discussed in *Sparrow v. Dixie Leaf Tobacco Co.*, which found that the defendant tobacco company "receive[d] its merchandise for processing and storage purposes and . . . ha[d] to truck its merchandise from the warehouses to the railroad loading platform[, therefore] the warehouses [were] not intended primarily for the storage of tobacco for reshipment or to furnish the tobacco company with facilities for the shipment thereof." 232 N.C. 589, 594-95, 61 S.E.2d 700, 704 (1950). Accordingly, *Sparrow* held that the tobacco company's use of the railroad right of way was not permitted because "the railroad company possesse[d] no right or authority to use or to let the property for *private or nonrailroad* purposes." 232 N.C. at 593, 61 S.E.2d at 703 (emphasis added).

In contrast to *Sparrow*, the city *sub judice* is a municipal corporation which uses the right of way for Light Rail. Light Rail is for public use, not private use, and it is certainly a railroad purpose as it transports persons by means of a rail line. In sum, we are not persuaded that conveying a railroad right of way to another entity to be used for rail transportation is an abandonment of the right of way which results in reversion to the owner of the underlying fee.[7] Accordingly, this assignment of error is without merit.

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7. Even if the right of way were to be considered abandoned according to the law of this State, current federal law mandates that "[a]n abandonment [of a railroad line that is part of an interstate rail network] may be carried out only as authorized under" Chapter 109 of the United States Code. 49 U.S.C. § 10903 (2000); *Preseault v. I.C.C.*, 494 U.S. 1, 8, 108 L. Ed. 2d 1, 11 (1990) ("State law generally governs the disposition of reversionary interests, subject of course to the [federal government's] 'exclusive and plenary' jurisdiction to regulate abandonments and to impose conditions affecting postabandonment use of the property." (Citations omitted)). There is no evidence in the record that an abandonment pursuant to Chapter 109 has been authorized by the federal government.

V. Use/Overuse

Defendants argue that even if the easement still exists and has not reverted to the holder of the underlying fee, the city's use of the easement is unauthorized, for which it must compensate defendants as holder of the servient estate. Defendants first argue that the city's purported acquisition of a portion of the right of way by quitclaim deed gave it no interest in the land, because the amended charter forbids alienation of the right of way. Alternatively, defendants argue that even if the right of way were alienable, the city's use of the right of way for Light Rail overburdens the servient estate, for which defendants, as owner and lessor of the servient estate, are entitled to compensation.

A. Voluntary Alienation

[5] Defendants argue that the amended charter forbids alienation of the right of way by any means other than an execution sale. It is undisputed that the quitclaim deed conveying rights in the easement to the city was not pursuant to an execution sale.

Defendants quote from section 20 of the amended charter: "if the said road or any part thereof should be sold at execution sale for the debts of said company or otherwise, then [the land acquired by statutory presumption] shall immediately revert. . . . Based on this language, defendants argue that "[a]pplying the canon of construction *expressio unis* [sic] *est exclusio alterius*,[8] the Charter must be interpreted to allow a sale only by execution." (Underlining in original; footnote added.) Defendants rely on the reasoning in the "uncontested section" of Justice Bynum's dissent in *State of N.C. v. Richmond & Danville Railroad Co.*,which stated "the act cited authorizes a sale for debt only, and therefore when there is no debt there is no power of sale." 72 N.C. 634, 651 (1875) (Bynum, J., dissenting).

Even if we were to accept that a section of Justice Bynum's dissent was "uncontested" simply because the Court's holding did not address it, Justice Bynum's reasoning is wholly inapposite *sub judice*. The "act" to which Justice Bynum referred, Chapter 138, section 5 of the Public Laws of North Carolina, 1871-72 ("the Free Railroad Act"), reads in pertinent part:

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8. "*Expressio unius est exclusio alterius*" means "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." *Black's Law Dictionary* 620 (8th ed. 2004).

> [W]henever the purchaser or purchasers of the real estate, track and fixtures of any railroad corporation which has heretofore been sold or may be hereafter sold by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court shall acquire title to the same in the manner prescribed by law, such purchaser or purchasers may associate with him and them any number of persons, and make and acknowledge and file articles of association as prescribed in this act; such purchaser or purchasers and their associates shall thereupon be a corporation with all the powers, privileges and franchises, and be subject to all the provisions of said act.

1871-72 N.C. Pub. L. ch. 138 § 5, at 188.

However, section 20 of the amended charter *sub judice* adds a key word not found in the above-quoted section of the Free Railroad Act, invoking the revision clause for nonuse as a railroad "if the said road or any part thereof should be sold at execution sale for the debts of said company *or otherwise*[.]" (Emphasis added). The amended charter therefore recognizes the possibility of alienation at *either* an execution sale *or* another type of sale. This reading of the amended charter is further supported by the language in section 27 of the original charter, which is the same as the amended charter, except that it has a comma before "or otherwise": "if the said road, or any part thereof, should be sold at execution sale for the debts of said company, or otherwise, [then the condemned land] shall immediately revert. . . ." (Emphasis added.) We doubt that the drafters of the amended charter intended to limit the alienability of a railroad right of way to an execution sale by simply omitting a comma.

Defendants' argument offers no explanation for the meaning of the word "otherwise," and appears to imply that there is some sort of execution sale other than one for payment of debts. However, the meaning of "execution sale," then and now, is a forced sale pursuant to a writ of execution for the payment of debts. *Compare* N.C. Gen. Stat. § 1-302 (2007) ("Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this Article."), *and* N.C. Gen. Stat. § 1-303 (2007) ("There are three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court[.]"), *with*

Sheppard v. Bland, 87 N.C. 163, 167 (1882) ("[E]very execution presupposes a judgment of some sort, and the right given to issue the one implies the existence of the other."), *and Rencher v. Wynne*, 86 N.C. 268, 271 (1882) ("The debts reduced to judgment, and on which issued the execution by virtue of which the goods were taken and sold[.]"), *and Broyles v. Young*, 81 N.C. 315, 319 (1879) ("[D]ocketing a transcript [has no] other effect than to constitute a lien of record on all the real estate of the debtor, and the right to have it sold by execution."); *see also Black's Law Dictionary* 1364 (8th ed. 2004) (defining execution sale as "[a] forced sale of a debtor's property by a government official carrying out a writ of execution.").

Even if we accepted an interpretation of section 20 of the amended charter which rendered the word "otherwise" as meaningless surplusage, restraints on alienation are disfavored as a general proposition, *Wachovia Bank & Trust Co. v. John Thomasson Construction Co.*, 3 N.C. App. 157, 162, 164 S.E.2d 519, 522 (1968), *modified on other grounds and aff'd*, 275 N.C. 399, 168 S.E.2d 358 (1969), as are easements in gross, *Gibbs v. Wright*, 17 N.C. App. 495, 498, 195 S.E.2d 40, 42-43 (1973). Consistent with those two principles, North Carolina law recognizes the alienability of railroad rights of way. This was clearly stated in *McLaurin v. Winston-Salem Southbound Railway Co.*:

> The plaintiffs contend that N.C.G.S. § 62-220 lists the powers of railroads and nowhere in those powers is the right to sell real property. They contend a railroad does not have the power to sell for a nonrailroad purpose property it acquired for a railroad purpose. The plaintiffs have not cited any authority for this proposition. More than 140 years ago it was held in an opinion written by Chief Justice Ruffin, *State v. Rives*, 27 N.C. (5 Ired.) 297 (1844), that land used by a railroad for a railroad purpose may be sold by the railroad. Assuming that the plaintiff has standing to raise this issue, we hold we are bound by *Rives* to hold a railroad has the power to sell property which has been acquired for railroad purposes.

323 N.C. 609, 613, 374 S.E.2d 265, 268 (1988). The North Carolina General Statutes also recognize the alienability of railroad rights of way: "In exercising its power to preserve railroad corridors, the Department of Transportation . . . may *acquire property that is or has been part of a railroad corridor* by purchase, gift, condemnation, or other method, provided that the Department may not condemn part of an existing, active railroad line." N.C. Gen. Stat.

§ 136-44.36B. (emphasis added). In addition, the alienability of railroad rights of way is tacitly supported by cases wherein railroad rights of way have been conveyed. *See, e.g.*, *Dowling v. Southern Ry. Co.*, 194 N.C. 488, 490, 140 S.E. 213, 214 (1927) (stating as fact that "[t]he defendant, Southern Railway Company, is the successor in title to all the right, title, and interest formerly owned by the A[tlantic], T[ennessee] & O[hio] R[ailroad] Company in and to said line of railroad and its appurtenances, and is now engaged in operating the same."); *Raleigh Storage Co. v. Bunn*, 192 N.C. 328, 135 S.E. 31 (1926) (recognizing the validity of the transfer of railroad lines and rights of way from the Raleigh, Charlotte & Southern Railway Company to the Norfolk Southern Railroad Company).

Accordingly, we conclude that C&SC had the right to sell or transfer its right of way, even without an execution sale, as did all of its successors in title, including Norfolk Southern. This assignment of error is without merit.

B. Overburdening

[6] Defendants contend that even if the railroad could have alienated the easement, the city acquired the right to no greater use than the original grantee and therefore use of the easement for Light Rail is a compensable overburden on the easement. Again, we disagree.

The following rules apply when overburdening or misuse of an easement is at issue:

> First, the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue. Second, if the conveyance speaks to the scope of the easement in less than precise terms (i.e., it is ambiguous), the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant. Third, if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in this latter situation, a reasonable use is implied.

Swaim v. Simpson, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786-87 (1995) (quoting [1] Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 15-21 (4th ed. 1994)), *aff'd*, 343 N.C. 298, 469 S.E.2d 553 (1996). Because the terms of the conveyance *sub judice* are precise, the terms of the conveyance are dispositive.

Defendants rely entirely upon *Grimes v. Virginia Elec. & Power Co.*, 245 N.C. 583, 96 S.E.2d 713 (1957). In *Grimes*, the plaintiff granted an express easement by contract to the defendant for power lines. *Id.* at 583, 96 S.E.2d at 713-14. The defendant later granted a license to the City of Washington to add additional lines on the same poles. *Id.* at 584, 96 S.E.2d at 714. The plaintiff sued for compensation for the additional servitude on his land, while the defendant contended that "the plaintiff's grant was to the Virginia Electric & Power Company [("VEPC")] and to its successors and *assigns*, and permitted it to make the assignment to the City of Washington." *Id.* (emphasis in original).

The Supreme Court rejected the defendant's argument stating:

> The answer to the defendant's contention is that the Virginia Electric & Power Company has not assigned anything. It still retains its right to maintain its full complement of wires and other facilities and to transmit electricity within the full limits of its grant. The contract between the defendants permits the power company to retain all its facilities and, in addition, permits the City of Washington to transmit its own current by means of its own wires attached to the power company's poles. The plaintiff was not a party to the contract between the defendants. The additional lines of the city, with the right to enter upon the lands for maintenance purposes, place an additional burden on plaintiff's land without his consent. Two power companies enjoy an easement over his land. He granted only one.

Id.

Defendants herein contend that NS's transfer of a portion of the easement is analogous to VEPC's grant of rights to the City of Washington and that the following uses overburden the easement:

> [T]he Light Rail has already tripled the number of tracks over the NS Right-of-Way. In addition, the number of trains that will now pass through the NS Right-of-Way increased from approximately ten (10) per day to as many as seventeen (17) per hour during peak travel times. Each time the Light Rail passes through the Western NS Right-of-Way the signal gates at the grade crossing of E. Hebron Street and South Boulevard come down and stop traffic on E. Hebron. The signal gates come down for approximately 45 seconds and block traffic on and onto E. Hebron Street. There is now a fence between the Light Rail tracks and the rail line upon which Norfolk Southern currently operates. The fence prevents

> access from South Boulevard to the BMJ Property without first going to the street intersection of South Boulevard and E. Hebron Street. Finally, the city has the right, separate and independent from the Railroad, to enter the Western NS Right-of-Way for maintenance purposes in connection with Light Rail[.]

(Emphasis added by defendants, citations to the record in original omitted.)

Although *Grimes* may seem similar to the case *sub judice*, the cases differ in three significant ways: (1) the easement at issue in *Grimes* was an express grant by contract from the owner of the servient estate, *id.* at 583, 96 S.E.2d at 713-14, not a taking by statutory presumption; (2) the grantor of the *Grimes* easement did not relinquish any of its rights in the easement, *id.* at 584, 96 S.E.2d at 714, whereas NS did; and (3) the nature of a railroad right of way is very different from that of a utility right of way for power lines.

The plaintiff in *Grimes* granted a very specific express easement to the defendant by contract. *Id.* at 583, 96 S.E.2d at 713-14. To the contrary, the easement *sub judice* was taken by statutory presumption. The power to take easements by statutory presumption included, in section 11 of the amended charter, permission to "farm out," or to lease, the rights to provide rail transportation in this particular right of way. With this authority to "farm out," NS could have leased the western half of the right of way to plaintiff and plaintiff as lessee would have been able to use its portion of the right of way for Light Rail in the same manner as it has actually done. The burden upon the servient estate by another entity's use of the right of way for rail transport was therefore authorized by the amended charter.

While the defendant in *Grimes* did not relinquish any of its rights in the easement when it licensed use of the easement to another entity, *id.* at 584, 96 S.E.2d at 714, Norfolk Southern, the city's grantor, relinquished "all right, title and interest" except for an agreement that the city would not provide freight services, reservation of the right of access to operate and maintain Norfolk Southern equipment, and reservation of the right to temporarily place materials on the easement that would not interfere with the city's use of the easement.

Furthermore, the nature of a railroad right of way is different from many other types of easements, in that the owner of the fee underlying the railroad right of way retains only a "bare fee [which] has no practical value." *City of Statesville v. Bowles*, 6 N.C. App. 124,

129, 169 S.E.2d 467, 470 (1969) (finding no error when the jury was instructed not to consider the fact that the taking of land for a sewer system was merely an easement and not a fee simple interest when determining just compensation). While the owner of the fee underlying a power line easement typically retains substantial ability to use and to travel freely across the area where power lines cross the property, *see, e.g.*, *Hanner v. Duke Power Co.*, 34 N.C. App. 737, 738, 239 S.E.2d 594, 595 (1977) ("[T]he grantor(s) may use said strip of land for growing such crops and maintaining such fences as may not interfere with the use of said right of way by the Power Company for the purposes hereinabove mentioned."), a railroad right of way easement gives the railroad "the complete and perpetual right to occupy and use the land to the total exclusion of the owner of the fee." *Statesville*, 6 N.C. App. at 129, 169 S.E.2d at 470.

Defendants cite no cases, and we find none, wherein a mere increase in traffic volume over an easement results in misuse or overburdening. The North Carolina Supreme Court has specifically held that a railroad may add a second track to an existing track over a right of way taken by statutory presumption. *Earnhardt v. Southern Ry. Co.*, 157 N.C. 358, 366, 72 S.E. 1062, 1065 (1911). In fact, our research showed just two scenarios recognized in North Carolina as misuse or overburdening of easements: (1) using the easement to access other properties not included in the easement, *see, e.g.*, *Hales v. Atlantic Coast Line R. Co.*, 172 N.C. 104, 90 S.E. 11 (1916) (railroad may not unilaterally extend a side track to serve other businesses not included in an easement granted to serve only one parcel of land); *Z.A. Sneeden's Sons v. ZP No. 116*; —— N.C. App. ——, ——, 660 S.E.2d 204, 211-12 (2008) (reversing summary judgment when the intent of the parties as to the scope of the easement was not clear); and (2) using the easement for a kind of use not contemplated in the easement, *see, e.g.*, *Moore v. Leveris*, 128 N.C. App. 276, 281, 495 S.E.2d 153, 156 (1998) (easement to use neighborhood road would not allow defendant to place sewer line under road); *Swaim*, 120 N.C. App. at 864-65, 463 S.E.2d 787 (easement for ingress and egress does not permit installation of domestic utilities); *Leonard v. Pugh*, 86 N.C. App. 207, 209, 356 S.E.2d 812, 814 (1987) (converting a residential easement to commercial use overburdens the easement); *accord Baldwin v. Boston & M. R. R.*, 63 N.E. 428, 430 (Mass. 1902) (holding that a footpath originally used by one household was not overburdened when it was used by five households and noting that "[n]o case has been shown to us, nor are we aware of any, where the change in the

use of the land has been only in degree, and not in kind, in which it has been held that the way could not be used to the land in the changed condition, especially if there was no increased burden upon the servient estate.") (cited in 1 Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 15-22, at 738 n.199 (5th ed. 1999)).

We conclude therefore that the increase in rail traffic on the right of way does not create a compensable taking. It follows that if the frequency of rail traffic brought by the Light Rail affords no relief for defendants, then the fact that the signal gates block traffic, a direct consequence of the amount of rail traffic, is of no moment either.

As to the fence which prevents Consolidated from crossing the right of way to reach its warehouse, Consolidated's license agreement with Southern Railway, Norfolk Southern's predecessor in interest, included provisions regarding the parties' understanding that Norfolk Southern maintained control over the right of way and that Consolidated could continue to occupy the right of way only upon permission of Norfolk Southern. Norfolk Southern retained its rights to enter onto the railroad right of way at all times to operate, maintain, reconstruct, or relocate its track.

In sum, none of the uses put forward by defendants amounts to a misuse or overburdening of the easement. The result might be different if the owner of the railroad right of way sought to change the use of the right of way entirely or to add a different non-railroad type of use to the right of way easement. *See*, *e.g.*, *Teeter v. Postal Telegraph Co.*, 172 N.C. 784, 785, 90 S.E. 941, 941 (1916) ("It is not denied by defendant that the telegraph line superimposed upon a railroad right of way is an additional burden which entitled the owner to compensation."); *Hodges v. Western Union Tel. Co.*, 133 N.C. 225, 234-35, 45 S.E. 572, 575 (1903) (installation of telegraph or telephone lines on a railroad right of way overburdens the easement if they are not for railroad purposes). However, that is not the case before us. Accordingly, this assignment of error is overruled.

VI. Conclusion

We conclude that rights to the easement did not revert to the holder of the underlying fee. The city's use of the easement was not unauthorized and did not overburden the servient estate. Accordingly, we affirm the order dismissing defendants' counterclaims for inverse condemnation and remand to the trial court for fur-

ther proceedings for determination of just compensation based upon the city's original claim.

Affirmed.

Judges STEELMAN and JACKSON concur.

STATE OF NORTH CAROLINA, PLAINTIFF, v. JAMES THOMAS LONG, DEFENDANT

No. COA08-846

(Filed 7 April 2009)

Criminal Law— denial of jury request to review testimony— trial court's failure to exercise discretionary power

The trial court erred in a first-degree rape and first-degree sexual offense case by failing to comply with the mandatory requirements of N.C.G.S. § 15A-1233(a) for responding to the jury's request to review evidence during deliberations, and defendant is entitled to a new trial because: (1) although the trial court instructed the jurors to rely upon their recollections, it did not exercise its discretion since the trial court considered providing a transcript to the jury to be an impossibility; (2) there was no indication the trial court considered the possibility of having the court reporter read the testimony to the jury, which was actually what the jury requested; and (3) the trial court's failure to exercise its discretion resulted in prejudice to defendant since the requested evidence placed this case more in line with those cases where material evidence was requested rather than cases where the evidence requested was not determinative of guilt or innocence.

Appeal by defendant from judgments entered on or about 14 February 2008 by Judge W. Allen Cobb, Jr. in Superior Court, Craven County. Heard in the Court of Appeals 11 December 2008.

Attorney General Roy A. Cooper, III by Assistant Attorney General Lisa Y. Harper and Special Deputy Attorney General Thomas J. Pitman, for the State.

Haral E. Carlin, for defendant-appellant.

STROUD, Judge.

Defendant was found guilty of two counts of first degree sexual offense and one count of first degree rape. Defendant has argued several issues on appeal, one of which we deem dispositive. The dispositive issue is whether it was prejudicial error for the trial court to fail "to comply with the mandatory requirements of N.C.G.S. § 15A-1233(a) for responding to [the] jury['s] request to review evidence during deliberations[.]" For the following reasons, defendant must be granted a new trial.

I. Background

The State's evidence tended to show: In July of 2006, when Claire[1] was eleven years old, she told two others, Samantha and Brooke, that her father, defendant, had raped her. Brooke informed Claire's mother. On 18 July 2006, Sergeant John Whitfield ("Sergeant Whitfield") of the Craven County Sheriff's Office began an investigation of defendant by interviewing Claire and her mother. Claire informed Sergeant Whitfield of two or three incidents of oral sex and an unspecified number of incidents of rape in which defendant's penis penetrated her vagina. Sergeant Whitfield determined that Claire was between the ages of five and seven when the sexual incidents occurred. On 20 July 2006, Sergeant Whitfield obtained a warrant against defendant for rape of a child, and on 21 July 2006 he went to interview defendant. Defendant voluntarily went with Sergeant Whitfield back to the sheriff's office to discuss the accusations. Once at the sheriff's office, defendant was read his Miranda rights. Defendant then signed each page of the following statement:

> My name is James Long, Junior. I am 36 years old. I graduated from New Bern High School. I read well. I can't spell very well. I asked Investigator Whitfield to write this statement for me.
>
> I continued my education at Pitt Community College and Fayetteville Tech. I took my EMT class, took Firefighter I, II, and III, and BLET and then Corrections Classes, because I worked for the Department of Corrections for about a year.
>
> Investigator Whitfield came to my house tonight and told me that my daughter, [Claire], said I had sex with her. He asked me to ride with him to the Sheriff's Office in New Bern to talk, and I did that.

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

I understand that I am not under arrest, and I was read my Miranda Rights, and I understand these rights. And with those rights in mind I give this statement of my own free will.

No one has promised me anything. I understand, and Investigator Whitfield told me, that he could not make any promises to me. I want to do this to keep [Claire] from going through the court process.

I lived at 103 Country Springs Road in Craven County from January 2000 through July 2002. I left July 11, 2002. [Claire] is my daughter. This all started one night while watching television. [Claire] and I were on the couch and she was laying her head in my lap. This caused me to get a hard on, and I couldn't understand why.

[Claire] asked me what I was doing, and I asked her what she meant. She said she hadn't seen my penis big; she said she wanted to see it. She went inside the covers and looked at my penis, and then began to play with it.

This happened a couple of times; and once, she came into the bedroom and saw my wife, Jennifer, giving me head.

She asked me later what her mother was doing, and asked me if she could do it too. She would give me oral sex, and I would give her oral sex, sometimes at the same time. I came in her mouth once, but she didn't like it and spit it out.

I don't actually remember putting my dick in her vagina, but she would get on top of me and ride the pony, as she called it, but it may have slipped in then.

Her mother would be at work when this happened, and she worked night shift.

It happened on the couch, in the bathroom, and in my bedroom. I never got on top of her, because she was a very small child. I would kill her if I got on top of her.

I think all this happened five to 10 times; I'm not sure. I never felt that it was right to come inside of her vagina. I did stick my dick in her ass one time; I used K-Y Jelly as a lubricant. And I stuck it in, and I was about to come anyway. By the time she said, Daddy, it hurts, I told her it was okay, I was coming then anyway.

I told her what we were doing was wrong and if she ever told anyone that Daddy would go to jail for a long time.

Defendant was arrested and tried. The jury found defendant guilty of two counts of first degree sexual offense and one count of first degree rape. The jury also found aggravating factors as to all three charges.

II. Jury's Request

Defendant argues that the trial court failed to exercise its discretion in denying the jury's request to review the transcripts of defendant and Claire, and thus defendant is entitled to a new trial. Though defendant failed to object regarding N.C. Gen. Stat. § 15A-1233(a) at trial, his argument is nonetheless preserved for appeal. *See State v. Ashe*, 314 N.C. 28, 40, 331 S.E.2d 652, 659 (1985). The State's response to defendant's argument as to the trial court's failure to exercise its discretion in denying the jury's request consists primarily of a quotation from the applicable statute and statement of the standard of review, but it has failed to address any of the cases, and there are many, regarding this substantive issue. We admonish the State to fully brief the issues and applicable case law, particularly when dealing with such important interests as defendant's liberty and the sexual abuse of a minor child. For the following reasons, we order defendant be given a new trial.

During the jury deliberations of defendant's trial the following dialogue took place outside of the presence of the jury:

> The Court: Let the record reflect that they [, the jury,] have sent what appears to be a note with these words on it. Mister Long transcript from the trial, [Claire] transcript, both read back to us.
>
> Ms. Hobbs [prosecutor]: Judge, I've never heard of that happening?
>
> The Court: Any comments?
>
> Mr. Wolfe [defendant's attorney]: Can we comply in any way, sir?
>
> The Court: No, because we don't have real-time transcripts. I'm assuming that's correct, isn't it, Madam Court Reporter?
>
> Court Reporter: That's correct.

The Court: So my inclination is to call them back in and tell them that we do not have such a thing, we don't have the technology to provide that, and tell them that they need to rely on their recollection in their deliberations as they work towards their verdict.

Mr. Wolfe: Well how long would it take to prepare that?

The Court: We don't do that in North Carolina. We do not do that.

. . . .

(All 12 jurors are present in the courtroom.)

The Court: Mister Taylor [, jury foreperson], when you first knocked on the door to the jury room the bailiff indicated to me that you had reached a verdict. If you would stand, please, sir. And then when I asked you if you had reached a unanimous verdict you said you had not; is that correct?

Mr. Taylor: Yes, sir, that's correct.

The Court: Have you reached a unanimous verdict on any of the charges that you are considering?

Mr. Taylor: No, sir, we have not.

The Court: Then you went back into the jury room, and I told you to write down any question that you may have, and you sent back a paper writing, and it says: Mister Long's transcripts from the trial, [Claire]'s transcripts, both read back to us. Is that your question for the Court at this point?

Mr. Taylor: Yes, sir. That's what I need.

The Court: I need to inform you that in the State of North Carolina, with our court reporting equipment, we don't have the technology to give you transcripts from the trial. We are not prepared to do that.

So what I am going to say to you is that in this situation you are to rely upon your recollection of what the evidence is in trying to resolve this question that you have. That is what you are charged with doing. That's why in my instructions to you I said, you are to rely on your recollection of the evidence in reaching a verdict in this case.

> If your recollection of the evidence differs from that of the attorneys, you are in remembering and recalling the evidence to be guided exclusively by what your recollection of the evidence is, and not that of the attorney or anybody else. It is your job to do that.
>
> Now, if you are going to ask me something off of this paper I need you to go back in there and write it back down again.

A. Standard of Review

The standard of review for this case is well-established:

> [t]he issue is whether the trial court exercised its discretion as required by N.C.G.S. § 15A-1233(a). The statute's requirement that the trial court exercise its discretion is a codification of the long-standing common law rule that the decision whether to grant or refuse a request by the jury for a restatement of the evidence lies within the discretion of the trial court. It is within the court's discretion to determine whether, under the facts of a particular case, the transcript should be available for reexamination and rehearing by the jury.

State v. Barrow, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999) (citations omitted). "A trial court's ruling in response to a request by the jury to review testimony or other evidence is a discretionary decision, ordinarily reviewable only for an abuse thereof." *State v. Perez*, 135 N.C. App. 543, 554, 522 S.E.2d 102, 110 (1999) (citations omitted), *appeal dismissed and disc. review denied*, 351 N.C. 366, 543 S.E.2d 140 (2000).

> When a motion addressed to the discretion of the trial court is denied upon the ground that the trial court has no power to grant the motion in its discretion, the ruling is reviewable. In addition, there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter.

Barrow at 646, 517 S.E.2d at 378 (citations and quotation marks omitted). "It is only prejudicial error to deny the jury an opportunity to ask to review certain testimony or evidence where the defendant can show that (1) such testimony or evidence involved issues of some confusion and contradiction, and (2) it is likely that a jury would want

to review such testimony." *State v. Johnson*, 164 N.C. App. 1, 20, 595 S.E.2d 176, 187 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 359 N.C. 194, 607 S.E.2d 658-59 (2004), *cert. dismissed*, 651 S.E.2d 369 (N.C. 2007). Thus, in summary, we must consider if the trial court failed to exercise its discretion. *See Barrow* at 646, 517 S.E.2d at 378. If the trial court did indeed fail to exercise its discretion, this would constitute error, and we must then consider whether this error was prejudicial. *See id.*

B. Controlling Statute

N.C. Gen. Stat. § 15A-1233(a) reads,

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2005).

C. Discretion Exercised

The North Carolina Supreme Court and this Court have in several cases concluded that the trial court properly exercised its discretion in denying the jury's request for a transcript or for testimony to be read back to them even though the trial court did not explicitly use the specific language of "in my discretion" or the like. *See infra* at II, C. Furthermore, "[o]ur Supreme Court has held that in instructing the jury to rely upon their individual recollections to arrive at a verdict, the trial court exercised its discretion and complied with the requirements of N.C.G.S. § 15A-1233(a)." *State v. McVay*, 174 N.C. App. 335, 341, 620 S.E.2d 883, 888 (2005) (quotations and brackets omitted) (citing *State v. Corbett*, 339 N.C. 313, 338, 451 S.E.2d 252, 265 (1994); *State v. Harden*, 344 N.C. 542, 563, 476 S.E.2d 658, 669 (1996)) (quotations and brackets omitted). However, because the cases addressing the issue of the trial court's exercise of its discretion to permit the jury to review testimony normally turn upon content and context of the jury's request and the specific language used by the trial court, we must examine the jury's request and the statements of the trial court in prior cases below in detail.

In *State v. Lawrence*,

> the jury sent a note to the trial judge requesting the transcript of prosecution witness Gwen Morrison's testimony. The trial court instructed the jury that its duty was to recall the evidence as it was presented and thereby denied the request.
>
> . . . .
>
> Here, the trial court instructed the jury, without objection from the parties, as follows:
>
> ['] As to the second question, members of the jury, it is your duty to recall the evidence as the evidence was presented. So you may retire and resume your deliberation.[']
>
> From these instructions, we are convinced that the trial judge did not impermissibly deny the request based solely on the unavailability of the transcript. Instead, the trial judge plainly exercised his discretion in denying the jury's request.

352 N.C. 1, 26-28, 530 S.E.2d 807, 823-24 (2000) (citations omitted).

In *State v. Guevara*,

> [a]t trial, while the jury was deliberating, the trial court received a paper writing from the jury inquiring about three items: two exhibits . . . and a reference to 'Medlin's testimony.' The parties and the trial court discussed the meaning of the jury's request, and the trial court then decided that as to 'Medlin's testimony,' the jury was referring to a transcript of Lieutenant Medlin's testimony. The trial court stated in this regard, 'Well, you know, frequently that's done. All of us know that.' . . . The jurors were then returned to the courtroom, where . . . [t]he trial court then stated, 'We do not have prepared transcripts of the testimony of each witness. It is the duty of the jury to recall the testimony of the witness as it was presented during the trial of the case.' . . .
>
> . . . .
>
> In the case *sub judice*, the fact that the trial court considered the jury's request and acknowledged that it had the authority to provide the jury with Lieutenant Medlin's testimony is indicated by the trial court's comment that 'frequently that's done.' The trial court did not say or indicate that it could not make the transcript or review of the testimony available to the jury. The record

therefore reflects that the trial court considered, but in its discretion denied, the jury's request in compliance with the statute.

349 N.C. 243, 251-53, 506 S.E.2d 711, 717-18 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999).

In *State v. Harden*,

> the trial court was aware that it had discretion to produce the transcript, and the record shows that the trial court exercised its discretion when deciding not to honor the jury's request. The trial court was also aware that both doctors and defendant had testified at great length; the doctors' testimony covered over 180 pages of transcript and defendant's another 155 pages. In light of this evidence, it is clear that the trial court had decided that justice would be better served if the jury deliberations were not delayed to produce the requested transcripts. Moreover, the trial court's instruction that the jurors rely upon their individual and collective memory of the testimony is indicative of further exercise of its discretion.

344 N.C. 542, 563, 476 S.E.2d 658, 669 (1996) (citation omitted), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997).

In *State v. Corbett*,

> [d]uring deliberations, the jury indicated it had a question and was returned to the courtroom. The following occurred:
>
> ['']JURY FOREMAN: We, the jury, would like to know if we could look over some of the evidence so we can clarify our decision.
>
> THE COURT: What evidence is it you want to see?
>
> JURY FOREMAN: It's several things, it's not all been in one particular thing.
>
> THE COURT: I can't help you until you tell me what it is.
>
> JURY FOREMAN: It's not necessarily the pictures. I guess one at a time we can say. Each person is disagreeing on some things. Can we see a transcript?
>
> THE COURT: I see what you're saying. All right, have a seat. It is the request for a transcript of the testimony of the witnesses I would deny that to you. The reason being is unless we had a

transcript of the witnesses for you to read, it wouldn't be fair to, say, take part of the state's witnesses and part of the defense witnesses and not give it all to you, and all of you, all 12 of you together, have heard all of the evidence in this case. As I stated to you, your job is to weed through this evidence, assign weight to it and also to determine from your joint and collective recollections of the evidence, determine what the facts are. You deliberate with a view to reaching a verdict if it can be done without the surrender of an honest conviction, and that's what we're asking you to do, as best you can, to remember all the evidence and from that evidence determine what the facts are and render a verdict based upon your deliberations and the law as I have given it to you. I will not give you a transcript of any one witness, and I don't have the wherewithal or the facilities to give you a transcript of this entire trial. Now, do you have a question?[']

The jury's request was, at best, ambiguous. At no point did the jury foreman specify what clarifications they desired, what questions they had, or which pieces of evidence they wished to review. When the foreman finally asked to review the transcript in general, the court explained it would not be fair to give the jury only portions of the testimony taken out of context of the whole trial. In instructing the jury to rely upon their individual recollections to arrive at a verdict, the trial court exercised its discretion and complied with the requirements of N.C.G.S. § 15A-1233(a).

339 N.C. 313, 337-38, 451 S.E.2d 252, 265 (1994) (citations and ellipses omitted).

In *State v. Lee*,

the record shows that in denying the jury's request, the judge made the following statement:

[']For you to have that and not have a copy of all of the testimony might cause something to be taken out of context or unduly —place undue emphasis on this. It is your duty to use your own recollection and recall the evidence as you heard it from the witness stand.[']

In response to defense counsel's request that the testimony be provided to the jury, the judge continued:

'It is not in a form where it can be readily copied without a great deal of time, and as I said the Court has determined that it might unduly emphasize that testimony to the exclusion of other

testimony and it's the duty of the jury to consider and recall all of the testimony they heard.[']

It is clear from this record that the trial court was aware of its authority to exercise its discretion and allow the jury to review the expert's testimony. It is also clear that the court's decision was made in an effort to conserve time and to ensure that all evidence received equal consideration.

335 N.C. 244, 290, 439 S.E.2d 547, 571 (ellipses and brackets omitted), *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994).

In *McVay*,

the record clearly shows the trial court reasonably exercised its discretion in denying the jury's request. With all of the jurors in the courtroom, the court stated:

[']I am sorry but I am not going to grant your request. The jury has the responsibility of recalling all the evidence. To begin rehearing parts of the evidence by means of providing you with a written transcript would tend to emphasize certain portions of the evidence without giving equal publication to the other evidence in the case.

For that reason, it would be best not to let portions of the evidence be repeated without having it all repeated because all of the evidence is important.[']

The trial court was clearly concerned that by allowing the jury to review the testimony of only one of the many witnesses heard at the trial the jury might overemphasize the testimony of Deputy Watson and not properly consider the totality of the evidence before them. . . . The trial court property [sic] exercised its discretion in denying the jury's request to review Deputy Watson's testimony and the denial was not an abuse of the trial court's discretion.

McVay at 340-41, 620 S.E.2d at 886-87.

In *State v. Hines*,

[a]t the time he requested a jury room view of the exhibits, the jury foreman also requested that the jury be allowed to hear again the testimony of the attorney defendant indicated he had contacted regarding incorporation of the business venture. The court cited problems with extracting portions of evi-

> dence rather than reviewing it in its entirety, and refused the request on the basis that 'it might result in error.' It asked the members of the jury instead 'to rely upon their collective recollection of the evidence.' . . .
>
> [T]he court's statement clearly indicates that it was denying the request in the exercise of its discretion.

54 N.C. App. 529, 537, 284 S.E.2d 164, 169 (1981) (citation and brackets omitted). In each of the above cases, where the trial court admonished the jury to rely upon their own recollections, it was determined that the trial court had exercised its discretion. *See supra* at II, C. The statements by the trial courts above also indicated that although the court had the ability to provide a transcript or to have testimony read to the jury, the trial court decided for various other valid reasons to deny the jury's request, thereby properly exercising its discretion. *See id.*

D. Failure to Exercise Discretion Held Prejudicial

The North Carolina Supreme Court and this Court in several cases have held that even though the trial court "instruct[ed] the jury to rely upon their individual recollections to arrive at a verdict[,]" *McVay* at 341, 620 S.E.2d at 888 (citations omitted), the trial court had failed to exercise its discretion to grant the jury's request, and therefore erred, because of the other language accompanying the instruction "to rely upon their individual recollections[.]" *Id.*, *see infra* at II, D and E. In some of the cases which conclude that the trial court did not exercise its discretion, the error was deemed to be prejudicial, while in others the error was not prejudicial. *See infra* at II, D and E.

Several cases have found prejudicial error from the trial court's failure to exercise its discretion. *See infra* at II, D.

In *State v. Johnson*, this Court held

> that the trial court's response to the jury's request in this case must be interpreted as a statement that the trial court believed it did not have discretion to consider the request. First, the precise words chosen by the trial court strongly indicate that it did not believe it had the discretion to grant the jurors' request. The trial court told the jury, 'I'll need to instruct you that we will not be able to replay or review the testimony for you.' Among other things, a 'need' is defined as 'a requirement, necessary duty, or obligation,' a 'necessity arising from existing circumstances.'

'Able' is defined as 'having the necessary power, skill, resources, or qualifications to do something.' Taken together, the trial court's denial, in these words as defined, can be rephrased as, 'I am required to instruct you that we do not have the power or qualifications to review the testimony for you.' Examined in this light, the trial court's words clearly indicate it did not exercise discretion in denying the request. Second, the context of the trial court's denial indicates it did not believe it had discretion to grant the request. The trial court first tells the jury that it 'will not be able to replay or review the testimony.' The trial court then immediately goes on to tell the jury that it 'can review further instructions.' This juxtaposition of determinations—what it cannot do set off against what it can do—is telling. Combined with the subsequent admonishment that it is the jurors' 'duty to consider the evidence as they recall it,' the trial court's comments are indicative of its understanding that it was not empowered to let the jurors review the testimony at issue.

. . . In the present case, no . . . reason is given for the denial except the erroneous statement that the trial court is not able to let the jury review the testimony.

. . . .

Having determined that the trial court erred in not exercising its discretion in determining whether to permit the jury to review some of the testimony, we now consider whether these errors were so prejudicial as to entitle defendant to a new trial. We conclude they were. The evidence requested for review by the jury in this case was clearly material to the determination of defendant's guilt or innocence. The testimonies of both J, the victim, and her Aunt Barbara were central to this case, and both testimonies involved issues of some confusion and contradiction. The medical evidence was inconclusive as to whether J had been raped, and there was no medical proof linking the defendant to the alleged crimes. Further, there were no eyewitnesses to the alleged crimes and no witnesses who heard or saw anything unusual. Thus, J's testimony was crucial because it was the only evidence directly linking defendant to the alleged crimes. As such, J's credibility was the key to the case. J's testimony was likely difficult for the jury to follow or assess due to its often confusing and self-contradictory nature. Barbara's testimony was also important because she was the first person J told about the

> alleged incident, and she also had information about the incident with J's cousin Jerome, about which J and Tiffany testified. Thus, whether the jury fully understood the witnesses' testimony was material to the determination of defendant's guilt or innocence. Defendant was at least entitled to have the jury's request resolved as a discretionary matter, and it was prejudicial error for the trial judge to refuse to do so.

346 N.C. 119, 124-26, 484 S.E.2d 372, 376 (1997) (citations, quotation marks, brackets, and parenthesis omitted).

In *State v. Lang*, this Court held

> that the trial judge's refusal on the grounds that he did not have the authority, in his discretion, to grant the jury's request was prejudicial error entitling defendant to a new trial.
>
> . . . .
>
> We find that the trial court's response to the jury's request in this case must be interpreted as a statement that the court believed it did not have discretion to consider the request. In answer to the jury's question whether the transcript of Ms. Rena James was available to be read to them, the trial judge replied:
>
> 'No sir, the transcript is not available to the jury. The lady who takes it down, of course, is just another individual like you 12 people. And what she hears may or may not be what you hear, and 12 of you people are expected, through your ability to hear and understand and to recall evidence, to establish what the testimony was. No, I hope you understand. She takes it down and the record, after she submits it to the various individuals, if it needs to be submitted is gone over and then they themselves can object to what she had in the record as not being what the witness says, and so on and so forth. For that reason I do not allow records to even be read back to the jury, because she may not have heard it exactly as the witness said it, and you people might have heard it differently; so for that reason you are required to recall the witness' testimony as you've heard it.'
>
> We hold that Judge Grist's comment to the jury that the transcript was not available to them was an indication that he did not exercise his discretion to decide whether the transcript should have been available under the facts of this case. The denial of the jury's request as a matter of law was error.

We further find the trial court's error prejudicial to defendant in this action. . . . [T]he requested evidence was testimony which, if believed, would have established an alibi for defendant. Ms. James' statements were in direct conflict with the evidence presented by the State. Thus, whether the jury fully understood the alibi witness' testimony was material to the determination of defendant's guilt or innocence. Defendant was at least entitled to have the jury's request resolved as a discretionary matter, and it was prejudicial error for the trial judge to refuse to do so.

301 N.C. 508, 510-11, 272 S.E.2d 123, 125 (1980).

In *State v. Thompkins*, the Court stated that,

In the present case, after the jury had retired for deliberations, they returned to the courtroom, and the foreman requested to rehear the testimony of Karon Maier and the sheriff's deputy. The trial judge responded as follows:

['']All right, sir. Let me advise you that—undoubtedly, this request is based upon your observation of the Court Reporter taking down everything that has been said. A transcript has not been prepared. The Court Reporter is making the recordation for appellate review purposes, and it would take a considerable period of time to type that up. Her notes are in a coded form of shorthand, so it is not possible to arrange that.

In addition to that, the law will not permit me to bring witnesses back to the stand at this stage and have them repeat as closely as they can what has been stated before. So unfortunately, your only recourse is to recall, as best you can, the testimony as it was presented in open court.

I'm sorry that there is no way I can accommodate that request.['']

This response . . . indicates that the trial judge did not exercise his discretion in denying the jury's request to rehear testimony, but denied the request because he felt that he could not grant it. The trial court's failure to exercise its discretion constitutes reversible error. The jury requested a review of the testimony of Karon Maier, the only witness to identify defendant as the perpetrator. Whether the jury fully understood her testimony was material to the determination of defendant's guilt or innocence. Therefore, defendant is entitled to a new trial.

83 N.C. App. 42, 45-46, 348 S.E.2d 605, 607 (1986) (citation omitted). In each of the above cases *see supra* at II, D, the trial court's statements indicated its belief "that it was not empowered to let the jurors review the testimony at issue[,]" and therefore the trial court failed to exercise its discretion. 346 N.C. at 125, 484 S.E.2d at 376.

E. Failure to Exercise Discretion Held Non-prejudicial

In several cases, our Courts have found that the trial court failed to exercise its discretion, but that the error was non-prejudicial. *See infra* at II, E.

In *State v. Ford*, the Court noted that

> [i]t appears from the record that after deliberating for several hours, the jury returned to the courtroom whereupon the following exchange took place:
>
> ['']COURT: All right, ladies and gentlemen, I understand you have a question.
>
> FOREMAN: Your Honor, we would like answered—we can't remember which time did each man, Barbee and Ford, sign his rights and on what date was this, and what time did the detectives go out and pick up each man?
>
> COURT: Members of the jury, I'm sorry but we're not allowed to go back in and review the evidence once the case is completed. It is your duty, of course, as best you can to recall all of the evidence that was presented, and I'm sorry, but we really can't help you with that particular matter.['']
>
> . . . .
>
> In [the] instant case, it appears that the trial judge erroneously believed that he was not permitted to review the evidence after the jury had begun its deliberation. We must, therefore, determine whether defendant has been prejudiced by the trial court's ruling which was apparently based on a misapprehension of the law.
>
> . . . .
>
> . . . The requested evidence was, for the most part, conflicting, inconclusive, or not in the record. We note that the trial judge correctly instructed the jury that it was their duty 'as best you can to recall all of the evidence that was presented.' It would have

been difficult, if not impossible, for the trial judge to review this evidence in a comprehensible manner. Here, any attempt to review such evidence would likely have raised more questions than it would have answered. Thus, defendant has failed to show prejudice resulting from the trial judge's ruling.

297 N.C. 28, 30-31, 252 S.E.2d 717, 718-19 (1979) (ellipses omitted).

In *State v. Johnson*,

the trial court made the following comments to the jury after it was empaneled, but prior to opening arguments:

['']I'm going to impose upon you in just a moment one of the most important things you are going to find when I charge you as to the law in this case. I'm going to tell you that it is your duty to remember the evidence. There is no transcript to bring back there. She might get one typed in a month. You see what I mean, we don't have the fancy equipment that you might see on TV. I don't even think its out there, but if it was, I can assure you the State of North Carolina won't spend the money for it. I don't mind putting that in the record because higher Judges agree with me on that. So, we don't have anything that can bring it back there to you. So, listen carefully, pay close attention. You are the triers of fact and it is up to you collectively, the twelve of you to go back there to remember the evidence and that is why we have twelve. Surely one of you can remember the evidence on everything that come[s] in.['']

. . . .

. . . [W]e find a failure to exercise discretion in this case where the trial court stated, 'we don't have anything that can bring it back there to you.'

. . . .

[However,] [d]efendant argues no circumstances indicating there was any testimony or evidence in this case involving issues of some confusion and contradiction that would make it likely that the jury would have wanted to review it. Thus, we find no prejudicial error resulting from the trial court's pretrial comments in this case.

164 N.C. App. at 19-20, 595 S.E.2d at 186-87.

Thus, in each of the above cases, the trial court indicated its belief that it was not possible to permit the jury to review the evi-

dence as it had requested, and thereby failed to exercise its discretion. *See supra* at II, E. However, the errors were not prejudicial because the defendants failed to demonstrate that the evidence requested "involved issues of some confusion and contradiction, and [that] it is likely that a jury would want to review such testimony." *Johnson*, 164 N.C. App. at 20, 595 S.E.2d at 187 (citation and quotation marks omitted).

F. Analysis

In the present case, although the trial court instructed the jury to rely upon their recollections, *see McVay* at 341, 620 S.E.2d at 887, it also plainly stated to them beforehand that "the State of North Carolina, with our court reporting equipment, we don't have the technology to give you transcripts from the trial. We are not prepared to do that." Furthermore, outside of the presence of the jury while discussing the issue with the attorneys, the State's counsel responded to being informed of the jury's request by stating "Judge, I've never heard of that happening."[2] The trial court did not respond directly to the State's statement that "I've never heard of that happening?", but instead asked defense counsel if he had "[a]ny comments?". Defense counsel asked, "Can we comply in any way, sir?" to which the Court responded "No, because we don't have real-time transcripts. I'm assuming that's correct, isn't it, Madam Court Reporter?" The court reporter agreed that it was correct. The trial court then stated, "So my inclination is to call them back in and tell them that we do not have such a thing, we don't have the technology to provide that, and tell them that they need to rely on their recollection in their deliberations as they work towards their verdict." Defense counsel persisted in his request, asking "Well how long would it take to prepare [a transcript]?" to which the Court responded, "We don't do that in North Carolina. We do not do that."

Considering the colloquy of counsel and the trial court regarding the request as well as the trial court's ruling upon the question, it appears that the trial court considered providing a transcript to the jury to be an impossibility, something that is simply not done in North Carolina. While we fully recognize the difficulty in providing a transcript quickly, there is also no indication that the trial court considered the possibility of having the court reporter read the testimony to the jury, which was actually what the jury requested. *See* N.C. Gen. Stat. § 15A-1233(a) ("If the jury after retiring for deliberation requests

2. It would appear to us that in actuality a request by the jury of this nature happens with some frequency, based upon the number of cases addressing this issue.

a review of certain testimony or other evidence, ... [t]he judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury . . . .") Our Supreme Court pointed out in *State v. Ashe* that

> [t]he existence of a transcript is, of course, not a prerequisite to permitting review of testimony. The usual method of reviewing testimony before a transcript has been prepared is to let the court reporter read to the jury his or her notes under the supervision of the trial court and in the presence of all parties.

Ashe at 35, n.6, 331 S.E.2d at 657, n.6.

We therefore conclude that the instruction, read as a whole, is more apposite to cases in which our courts have concluded that although the trial court admonished the jury to rely upon their recollections, the trial court did not exercise its discretion because of accompanying language which indicated the trial court "did not believe it had the discretion to grant the request." *Johnson*, 346 N.C. at 124, 484 S.E.2d at 375-77; *see*, *e.g.*, *Lang* at 510-11, 272 S.E.2d at 125; *Ford* at 30-31, 252 S.E.2d at 718-19; *Johnson*, 164 N.C. App. at 20, 595 S.E.2d at 186-87; *Thompkins* at 44-46, 348 S.E.2d at 607. Having determined that the trial court failed to exercise its discretion in denying the jury's request, we now must determine whether the trial court's failure to exercise its discretion resulted in prejudice to defendant. *See Barrow* at 646, 517 S.E.2d at 378; *Johnson*, 164 N.C. App. at 18-20, 595 S.E.2d at 186-87.

As noted above, "[i]t is only prejudicial error to deny the jury an opportunity to ask to review certain testimony or evidence where the defendant can show that (1) such testimony or evidence involved issues of some confusion and contradiction, and (2) it is likely that a jury would want to review such testimony." *Johnson*, 164 N.C. App. at 20, 595 S.E.2d at 187 (citation and quotation marks omitted). We conclude that the case before us is controlled by those cases which found prejudice, as the jury requested the transcripts of the testimony of the victim and defendant. The requested evidence places this cases more in line with those cases where material evidence was requested, rather than cases where the evidence requested was not determinative of guilt or innocence. *See*, *e.g.*, *Johnson*, 346 N.C. at 124-26, 484 S.E.2d at 377; *Lang* at 510-12, 272 S.E.2d at 125; *Thompkins* at 44-46, 348 S.E.2d at 607, *but see Ford* at 30-31, 252 S.E.2d at 719. Certainly the testimony of the victim and defendant was "contradicti[ng,]" *Johnson*, 164 N.C. App. 18-20, 595 S.E.2d at 187, as Claire testified she

was raped and that defendant committed other sexual offenses against her, while defendant testified he had never touched her inappropriately. Despite the fact that defendant had made a confession, at trial he recanted this confession, testified, and denied that he committed any offense against Claire. Furthermore, such contradictory testimony would likely lead the jury to want to review it. *See id.* It is most unfortunate that Claire must face the painful task of testifying at another trial, but as we have concluded that there was prejudicial error, defendant must be granted a new trial.

III. Conclusion

As the trial court prejudicially erred in not exercising its discretion in denying the jury's request for the victim's and defendant's transcripts, we order defendant be granted a new trial. As we are granting defendant's request for a new trial, and the other issues he has raised may not be repeated in a new trial, we will not address his other assignments of error.

NEW TRIAL.

Judges CALABRIA and STEELMAN concur.

IRENE EGERTON PERRY, RAYMOND CHRISTOPHER PERRY, BESSIE FLETCHER, ANGELA HUNTLEY AND ELIZABETHE PERRY, PLAINTIFFS v. GRP FINANCIAL SERVICES CORPORATION, JWB PROPERTIES, L.L.C., TRIAD RESIDENTIAL, L.L.C., JERRY W. BLACKWELDER, BONNIE BLACKWELDER, ROBERT HEARN, STEPHANIE M. HEARN, ROBERT GILCHRIST AND ROBERT GILCHRIST, JR., DEFENDANTS

No. COA08-80

(Filed 7 April 2009)

1. Arbitration and Mediation— sanctions—failure to attend mediation—sufficiency of findings of good cause

The trial court erred in a conversion and unfair and deceptive trade practices case arising out of defendants' actions in a foreclosure and eviction proceeding by imposing sanctions against three of the plaintiffs for not physically attending the mediation, and the case is remanded for further findings of fact as to the rea-

sonableness of any fees, because: (1) the trial court did not make sufficient findings of fact on the issue of good cause for the absences; and (2) while the lack of an earlier explanation may be relevant to the credibility of the explanation or other aspects of the sanctions determination, it does not, standing alone, support a conclusion that no good cause existed despite the parties' affidavits. On remand, the trial court may address the waiver argument including resolution of any factual disputes related to that issue.

2. Costs— amended version of N.C.G.S. § 7A-305(d)—award following voluntary dismissal without prejudice

The trial court did not err in a conversion and unfair and deceptive trade practices case arising out of defendants' actions in a foreclosure and eviction proceeding by granting the Blackwelder defendants' motion for costs based on the amended version of N.C.G.S. § 7A-305(d) (2007) following plaintiffs' voluntary dismissal without prejudice of this action because: (1) contrary to plaintiffs' contention, the amended version of this statute was applicable since the motion for costs in this case was filed on 3 August 2007; and (2) the trial court only taxed costs permitted by N.C.G.S. § 7A-305(d), and thus inclusion of N.C.G.S. § 6-20 in the order did not prejudice plaintiffs.

Appeal by plaintiffs from orders entered 17 August 2007 by Judge Paul C. Ridgeway and 1 October 2007 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 23 September 2008.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiffs-appellants.

Pharr & Boynton, PLLC, by Steve M. Pharr and Stacey D. Bailey, for defendants-appellees JWB Properties, L.L.C., Jerry W. Blackwelder, and Bonnie Blackwelder.

GEER, Judge.

Plaintiffs Irene Egerton Perry, Raymond Christopher Perry ("Chris Perry"), Elizabethe Perry, Bessie Fletcher, and Angela Huntley appeal from (1) an order entering sanctions against Chris Perry, Bessie Fletcher, and Elizabethe Perry ("the sanctioned plaintiffs") for their absence at a court-ordered mediation and (2) an order taxing costs against all of the plaintiffs following their voluntary dis-

missal without prejudice of their claims pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. With respect to the sanctions order, we hold that the trial court did not make sufficient findings of fact to support the award of sanctions and, therefore, reverse and remand that order for further findings of fact. We affirm the order awarding costs.

Facts

Irene Perry owned a house in Advance, North Carolina. In 2003, GRP Financial Services, who is not a party to this appeal, foreclosed on the house and hired JWB Properties, LLC, owned by Jerry W. and Bonnie Blackwelder (collectively, with JWB Properties, "the Blackwelder defendants"), to provide services relating to the foreclosure and eviction proceedings. Ms. Perry's house contained personal property belonging to Ms. Perry; her two children, Chris Perry and Elizabethe Perry; and her friends, Bessie Fletcher and Angela Huntley. JWB Properties hired Triad Residential, LLC, of which Robert and Stephanie Hearn, Robert Gilchrist, and Robert Gilchrist, Jr. are members (collectively, with Triad Residential, "the Hearn defendants"), to remove from the house plaintiffs' personal property, some of which was taken to landfills in Davie and Davidson Counties.

On 29 June 2006, plaintiffs filed an action in Forsyth County Superior Court against defendants, asserting claims for conversion and unfair and deceptive trade practices arising out of defendants' actions in the foreclosure and eviction proceedings. The complaint also included additional causes of action on behalf of Irene Perry against all defendants for intentional and/or negligent infliction of emotional distress.

The superior court entered an Order for Mediated Settlement Conference requiring that the mediation be completed by 31 May 2007. The order also set a tentative trial date of 11 June 2007. While the parties were attempting to schedule the mediation and depositions, counsel for defendant GRP sent an e-mail to plaintiffs' counsel indicating that his client had asked him to inquire about GRP's participating in the mediation by telephone. Counsel for plaintiffs responded that they had no objection to telephone participation and added: "In fact, Irene Perry will be present at the mediation, but the other plaintiffs will participate by telephone. Irene will be representing all of the plaintiffs at the mediation." In response, counsel for the Blackwelder defendants wrote: "No, we do not consent to allow the plaintiffs or GRP to participate in the mediation by telephone."

The mediation was held on 15 May 2007. Of the plaintiffs, Irene Perry and Angela Huntley were physically present, but Chris Perry, Elizabethe Perry, and Bessie Fletcher did not attend. The mediator, in her report, next to the line asking her to identify the parties "who were absent without permission," wrote: "Bessie Fletcher & Elizabeth [sic] Perry ? Chris Perry called to say he could not get a flight from Ohio that would get him here before 4:30 pm. Mediator told him to stand by cell phone." On the morning of the mediation, Chris Perry, who is a player for the Cincinnati Bengals, called the mediator on his cell phone from the Cincinnati airport to inform her that he would be unable to attend the mediation due to flight delays with his airline. The mediation proceeded as scheduled and lasted eight and a half hours before the mediator declared an impasse. During that time, Bessie Fletcher participated in the opening portion of the mediation by telephone, and Elizabethe Perry and Chris Perry were available by telephone.

On 31 May 2007, the Blackwelder defendants filed a motion for sanctions supported by the affidavits of Steve M. Pharr and Elizabeth W. Ives. Mr. Pharr, managing partner of the law firm representing the Blackwelder defendants, stated in his affidavit that he had "personally reviewed the expenses" incurred by the Blackwelder defendants' counsel in the lawsuit and had itemized them for the court's review. Ms. Ives, a representative of XL Select Professional, the insurance carrier for the Blackwelder defendants, itemized her expenses in attending the mediation. On 29 June 2007, the Hearn defendants also filed a motion for sanctions supported by the affidavit of Steven D. Smith, counsel for the Hearn defendants. In his affidavit, Mr. Smith explained and totaled his charges for preparing for and attending the mediation.

On 6 June 2007, plaintiffs voluntarily dismissed their claims without prejudice. At the hearing on the sanctions motions on 9 July 2007, because plaintiffs challenged the trial court's jurisdiction to hear the motions, the trial court held the matter open to allow time to research that issue. On 12 July 2007, immediately before the reconvened hearing on the sanctions motions, plaintiffs filed a response to the motions supported by the affidavits of Elizabethe Perry, Irene Perry, and Bessie Fletcher. Chris Perry did not file an affidavit.

Elizabethe Perry, in her affidavit, stated that she had originally planned to travel to Winston-Salem, North Carolina for the mediation in this case scheduled for 15 May 2007, but that on 14 May 2007, she was informed by her employer, T.G.I. Friday's in Brooklyn, New York,

that she would not be given permission to attend the mediation because her employer was short-staffed. The affidavit further stated that her employer had not anticipated the situation and that Elizabethe Perry could not afford to lose her job. Elizabethe Perry added that she had given her mother, Irene Perry, full authority to settle the lawsuit during mediation, that she was available by telephone during the mediation, and that she understood that she would have been bound by a settlement if the case had been settled.

Attached to the affidavit was a letter from Elizabethe Perry's supervisor at T.G.I. Friday's on the company's letterhead, dated 6 July 2007, and addressed to plaintiffs' counsel. The letter reported:

> This is to confirm that Elizabethe I. Perry was unable to come to North Carolina because our company was short staffed on Thursday, May 15, 2007.
>
> Therefore, Elizabethe was not given permission to attend mediation in Winston-Salem, North Carolina. This short staff position was a situation that occurred at the company that we did not anticipate. Elizabethe had previously asked for permission to attend the mediation. When it became apparent that we would be short staffed, we could not allow her the time off she needed.

Irene Perry's affidavit stated that her son, Chris Perry, "had planned to be present at the mediation; that before the mediation began on May 15th, [she] spoke with [her] son by telephone; he informed [her] that the airplane he was taking had been delayed; that he told [her] that the plane was not scheduled to land in Greensboro until around 4:30 p.m." Ms. Perry explained that her son was a professional football player with the Cincinnati Bengals and that he had received permission from the Bengals to attend the mediation despite the fact that he was participating in the Bengals' mini-camp. The affidavit stated that the mediator spoke with Chris Perry and explained what happened and that the mediator told him to be accessible throughout the mediated settlement conference. According to Ms. Perry's affidavit, Chris Perry spoke with plaintiffs' counsel, Ms. Perry, and the mediator several times during the mediation regarding offers and counteroffers. Ms. Perry stated that Chris Perry gave her full settlement authority to settle the case and understood that he would have been bound by any settlement agreement reached.

Bessie Fletcher explained in her affidavit that she "was unable to travel to Winston-Salem, North Carolina for the mediation on May 15,

2007 because [she] did not have the financial means to pay the transportation expenses at that time." Ms. Fletcher stated that she "made arrangements to participate in the mediation by telephone" and "had good cause for not attending the mediation in person because of [her] lack of financial resources."

On 17 August 2007, the trial court entered an order granting the motions for sanctions. The court concluded that plaintiffs' objection and response to the motions for sanctions and the accompanying affidavits "were untimely," but the trial court stated that they "were considered." The trial court further noted that Chris Perry had not filed an affidavit in response to the sanctions motions.

On the merits of the motions, the trial court concluded that all parties were required to physically attend the mediation unless "excused pursuant to the agreement of all parties and persons required to attend and the mediator or by an order of the Senior Resident Superior Court Judge." The court found that plaintiffs' counsel was aware as of 7 March 2007 that one or more of the defendants would not agree to excuse any of the plaintiffs from their obligation to attend the mediated settlement conference in person, but that plaintiffs' counsel had nonetheless "made no effort to secure permission from the Court for Plaintiffs Raymond Christopher Perry, Bessie Fletcher, and Elizabeth [sic] Perry to attend the mediation via telephone conference call, to allow Plaintiff Irene Perry to act as their representative at the mediated settlement conference, or to otherwise excuse [the sanctioned plaintiffs] from their obligation to attend the mediated settlement conference in person."

The trial court found that the sanctioned plaintiffs did not attend the mediation in person although Ms. Fletcher listened to a portion of the opening remarks by telephone. The trial court noted that defendants and the mediator "were told that Raymond Christopher Perry was unable to book a flight from Ohio to Winston Salem [sic] that would enable him to arrive in Winston Salem [sic] before 4:30 p.m. on May 15, 2007[.]" He further found that Chris Perry is a professional football player and "possessed the financial means to make arrangements to attend the mediation[.]" With respect to Bessie Fletcher and Elizabethe Perry, the trial court noted only that "until the affidavits of Irene Egerton Perry, Bessie Fletcher and Elizabeth [sic] I. Perry were filed with the Court on July 12, 2007, no explanation was given for the failure of Bessie Fletcher and Elizabeth [sic] Perry to attend the mediation in person on May 15, 2007[.]"

Based on these findings of fact, the trial court concluded that "no good cause was shown for the failure of Plaintiffs Raymond Christopher Perry, Bessie Fletcher and Elizabeth [sic] Perry to attend the mediation." The trial court, therefore, granted the Blackwelder and Hearn defendants' motions for sanctions. Based on findings of fact regarding the attorneys' fees incurred for attendance at the mediation and prosecution of the motion for sanctions, as well as expenses incurred in connection with the mediation, the trial court entered judgment in favor of the Blackwelder defendants in the amount of $3,903.78 and in favor of the Hearn defendants in the amount of $2,439.37 against the sanctioned plaintiffs, jointly and severally.

On 3 August 2007, the Blackwelder defendants filed a motion for costs. In an order filed 7 September 2007, the trial court concluded "in its sound discretion, and pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 6-20 and § 7A-305(d), as amended by SL 2007-212, § 3, eff. Aug. 1, 2007, that the motion [for costs] should be granted[.]" The trial court accordingly ordered that plaintiffs, jointly and severally, be taxed with costs in the amount of $4,352.20. The order specified that the costs be paid within 30 days of the signing of the order. On 1 October 2007, the trial court entered an amended order omitting the 30-day requirement.

On 28 August 2007, plaintiffs filed notice of appeal from the 17 August 2007 order granting defendants' motions for sanctions. On 30 October 2007, plaintiffs filed notice of appeal from the 1 October 2007 order granting the Blackwelder defendants' motion for costs.

Motion for Sanctions

[1] We first address the sanctioned plaintiffs' appeal of the order imposing sanctions against Chris Perry, Elizabethe Perry, and Bessie Fletcher for not physically attending the mediation. N.C. Gen. Stat. § 7A-38.1(f) (2007) provides regarding attendance at a court-ordered mediated settlement conference:

> The parties to a superior court civil action in which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority, by law or by contract, to settle the parties' claims shall attend the mediated settlement conference unless excused by rules of the Supreme Court or by order of the senior resident superior court judge.

Rule 4A(1) of the Rules for Statewide Mediated Settlement Conferences specifies that "[a]ll individual parties," as well as at least one counsel of record, must attend the mediation.

Rule 4A(2) clarifies that attendance means being physically present at the mediation: "Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared." Rule 4A(2) then sets out the only exceptions to physical attendance:

> Any such party or person [required to attend a mediated settlement conference] may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:
>
> (a) By agreement of all parties and persons required to attend and the mediator; or
>
> (b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

With respect to sanctions for non-attendance, N.C. Gen. § 7A-38.1(g) provides that "[a]ny person required to attend a mediated settlement conference who, *without good cause*, fails to attend in compliance with this section and the rules adopted under this section, shall be subject to any appropriate monetary sanction imposed by a resident or presiding superior court judge, including the payment of attorneys' fees, mediator fees, and expenses incurred in attending the conference." (Emphasis added.) Rule 5 implements this statutory provision and specifies that *if* the party "fails to attend without good cause," then a superior court judge "may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference."

In arguing that the trial court erred in imposing sanctions, the sanctioned plaintiffs first assert that the mediator authorized Chris Perry and Bessie Fletcher to participate in the mediation by telephone, and, therefore, they cannot now be sanctioned for their absence. As an initial matter, we are not persuaded that the record shows that the mediator in fact excused them from being physically present at the mediation. The Mediator's Report specifically identified Bessie Fletcher and Elizabethe Perry as parties absent without

permission. With respect to Chris Perry, the report noted what he had told the mediator, but did not specify that his absence was authorized. Rather than authorizing the parties' absence, the record indicates that the mediator was simply complying with the requirement in Rule 6A(4)(a) of the Rules for Statewide Mediated Settlement Conferences that she note any absent parties in her report.

Even assuming, however, that the Mediator's Report could be read as indicating the mediator's express permission for the absences, the mediator lacked authority to grant such permission. Neither N.C. Gen. Stat. § 7A-38.1(f) nor Rule 4A provides a mediator with authority to excuse a party from physical attendance at a court-ordered mediation. N.C. Gen. Stat. § 7A-38.1(f) states that a party *shall* attend a mediation unless excused by (1) the rules of the Supreme Court regarding mediated settlement conferences or (2) order of the senior resident superior court judge. Similarly, Rule 4A(2) provides only that a party may be excused from a mediation by (1) agreement of all parties required to attend and the mediator or (2) order of the senior resident superior court judge.

The sanctioned plaintiffs, however, argue that Rule 6A(1) and (2) grant the mediator authority to allow parties to be absent from a mediation. Rule 6A(1) states that "[t]he mediator shall at all times be in control of the conference and the procedures to be followed." Rule 6A(2) provides that "[t]he mediator may communicate privately with any participant or counsel prior to or during the conference." Neither provision specifically refers to attendance at a mediation, and we do not believe that they can reasonably be read as overriding the specific language in N.C. Gen. Stat. § 7A-38.1(f) and Rule 4A(2) regarding the manner in which a party may be excused. Indeed, plaintiffs' construction would effectively negate any need for the parties' agreement in Rule 4A(2)(b).

North Carolina's appellate courts have repeatedly recognized that "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985). As this Court has stated, "[w]hen conflicting statutes are construed, the specific controls over the general if the statutes cannot be reconciled." *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 283, 536 S.E.2d 349, 357 (2000). Since Rule 4A(2) and N.C. Gen. Stat. § 7A-38.1(f) specifically address the issue of how a party can be excused from physical par-

ticipation in a mediation, and since Rule 6A does not directly address the issue but rather only addresses generally a mediator's authority, Rule 4A(2) and N.C. Gen. Stat. § 7A-38.1(f) control. The mediator, therefore, did not have authority to unilaterally authorize the sanctioned plaintiffs to be physically absent from the mediation.

It is undisputed in this case that no superior court order was issued to excuse the sanctioned plaintiffs from attending the mediation. The record also indicates, as the trial court found, that prior to the mediation, in an e-mail on 7 March 2007, the Blackwelder defendants objected to the absence of any party from the mediation. Thus, because the sanctioned plaintiffs were not excused from attending the mediation, they could be sanctioned by the superior court unless they showed good cause for their absences. In *Triad Mack Sales & Serv., Inc. v. Clement Bros. Co.*, 113 N.C. App. 405, 408, 438 S.E.2d 485, 487 (1994) (quoting *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197, 211, 2 L. Ed. 2d 1255, 1267, 78 S. Ct. 1087, 1095 (1958)), this Court defined "good cause" in this context as a party's "inability to attend caused 'neither by its own conduct nor by circumstances within its control.' "

The sanctioned plaintiffs contend that an award of sanctions was improper because contrary to Rule 5 of the Rules for Statewide Mediated Settlement Conferences, defendants' motions did not "set[] forth the reasons that said Plaintiffs failed to attend without 'good cause.' " Rule 5 specifies that a party seeking sanctions "shall do so in a written motion stating the grounds for the motion and the relief sought."[1] Defendants' motions, each stating that the sanctioned plaintiffs had not been excused from physically attending the mediated settlement conference and had provided no reason or explanation for their absence, adequately met the requirement in Rule 5 that they state the grounds for the motion.

Turning to the trial court's order, however, we agree with the sanctioned plaintiffs that the trial court did not make sufficient findings of fact on the issue of "good cause." The sanctioned plaintiffs, with the exception of Chris Perry, submitted affidavits explaining the reason for their physical absence. Although the trial court determined that these affidavits were not timely filed, it specifically stated that it had considered them in deciding defendants' motions for sanctions.

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1. N.C. Gen. Stat. § 7A-38.1(g) was amended effective 1 January 2009 to contain an identical requirement that the party seeking sanctions "do so in a written motion stating the grounds for the motion and the relief sought."

Although the affidavits of Elizabethe Perry and Bessie Fletcher each provided a concrete explanation for their absence, the trial court never explained why it decided those reasons did not amount to "good cause." Elizabethe Perry stated that her employer unexpectedly refused to give her time off from work and attending the mediation would have cost her her job. Bessie Fletcher asserted that she did not have the financial means to attend. Each of these reasons could—if believed—arguably qualify as "good cause" under *Triad Mack Sales*, although we do acknowledge that Ms. Fletcher did not include any explanation in her affidavit for not raising the issue earlier. In any event, the trial court did not address the explanations provided by Elizabethe Perry and Bessie Fletcher for their absence. Indeed, although the trial court specifically found that Chris Perry "possessed the financial means to make arrangements to attend the mediation," the trial court made no similar finding as to either Elizabethe Perry or Bessie Fletcher.

The only finding set out in the order related to the trial court's determination that Elizabethe Perry and Bessie Fletcher lacked "good cause" for their absence is the court's finding that "until the affidavits of Irene Egerton Perry, Bessie Fletcher and Elizabeth [sic] I. Perry were filed with the Court on July 12, 2007, no explanation was given for the failure of Bessie Fletcher and Elizabeth [sic] Perry to attend the Mediation in person on May 15, 2007." This finding does not specifically address whether Elizabethe Perry and Bessie Fletcher had shown "good cause" for their absence. While the lack of an earlier explanation may be relevant to the credibility of the explanation or other aspects of the sanctions determination, it does not, standing alone, support a conclusion that no "good cause" existed despite the parties' affidavits.

With respect to Chris Perry, the court noted the absence of an affidavit from him. Both the mediator's report and his mother's affidavit, however, provided an explanation for his absence, and the trial court's order contains no specific determination that it would not consider either Ms. Perry's affidavit or the mediator's report in deciding whether to sanction Chris Perry. While the trial court did find that Mr. Perry had the financial means to attend the mediation, it did not specifically explain why it had concluded that his flight problems did not constitute "good cause."

On appeal, defendants have suggested various reasons why the trial court could have deemed the sanctioned plaintiffs' explanations

insufficient under *Triad Mack Sales*. None of defendants' proffered reasoning is, however, reflected in the trial court's findings of fact, and we cannot speculate regarding the bases for the trial court's decision. In order to ensure meaningful review on appeal, "[t]he trial court must . . . make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005). *See also Davis v. Wrenn*, 121 N.C. App. 156, 160, 464 S.E.2d 708, 711 (1995) (remanding for further findings of fact when trial court's order failed to include findings of fact explaining how plaintiff's conduct violated Rule 11), *cert. denied*, 343 N.C. 305, 471 S.E.2d 69 (1996), *overruled in part on other grounds by Forbis v. Neal*, 361 N.C. 519, 649 S.E.2d 382 (2007). Because the order awarding sanctions contains insufficient findings of fact to explain the trial court's decision to award sanctions, we reverse the order and remand for further findings of fact.

In the event that the trial court on remand again determines that sanctions are appropriate, the trial court must also make additional findings of fact as to the amount of those sanctions. In the order granting sanctions, the trial court simply recited the amounts of attorneys' fees sought without making any findings regarding the reasonableness of the fees.

In reviewing attorneys' fee awards in other contexts, including under Rules 11 and 37 of the Rules of Civil Procedure and pursuant to N.C. Gen. Stat. § 6-21.1 (2007), this Court has required that the trial court make findings of fact to support the amount of attorneys' fees awarded. *See*, *e.g.*, *Parker v. Hensley*, 175 N.C. App. 740, 742, 625 S.E.2d 182, 184 (2006) (holding that "where a trial court awards attorney fees under North Carolina General Statute section 6-21.1, the trial court must also make findings of fact supported by competent evidence concerning the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence" (internal quotation marks omitted)); *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 672, 554 S.E.2d 356, 366 (2001) (explaining in Rule 11 case that "an award of attorney's fees usually requires that the trial court enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence"), *appeal dismissed and disc. review denied*, 355 N.C. 348, 563 S.E.2d 562 (2002); *Benfield v. Benfield*, 89 N.C. App.

415, 422-23, 366 S.E.2d 500, 504-05 (1988) ("[A]s Rule 37(a)(4) requires the award of expenses to be reasonable, the record must contain findings of fact to support the award of any expenses, including attorney's fees. . . . The trial court simply awarded attorney's fees in the amount of $250. The order contained no findings of fact to support any conclusion that the fees were reasonable. Therefore, the award of attorney's fees is vacated and remanded for findings to support the award.").

We see no reason to distinguish an award of sanctions under N.C. Gen. Stat. § 7A-38.1 and Rule 5 from sanctions awarded under Rule 11, Rule 37, and N.C. Gen. Stat. § 6-21.1, all of which require a finding of reasonableness. Defendants concede in their brief that "awards of attorneys' fees typically require some finding that the expenses were incurred and were reasonable," but argue that under *Dyer v. State*, 331 N.C. 374, 416 S.E.2d 1 (1992), the trial court's findings were sufficient to support its award.

In *Dyer*, however, the primary issue before the Supreme Court was whether the evidence supported the trial court's findings of fact. *Id.* at 378, 416 S.E.2d at 3. The trial court in *Dyer* did not simply award the amount of fees sought by the party, but rather asked counsel how many hours he had spent on the case, then determined on its own that $50.00 an hour would be a reasonable hourly rate. The court then found that counsel had spent more than 75 hours preparing and trying the case and awarded $3,500.00 as attorneys' fees. The Supreme Court held that the trial court was entitled to rely upon the representation of the attorney and its own observations of the quality of trial counsel's representation. *Id.* The Court then concluded that "[t]he findings of fact are supported by the evidence and the findings of fact support the conclusion of the court. The court did not abuse its discretion in awarding the attorney's fee." *Id.* The Supreme Court did not specifically address what findings of fact the trial court was required to make.

In this case, the trial court made no findings of fact at all other than to reiterate the amount of attorneys' fees sought by each party. We hold, consistent with this Court's prior opinions regarding the required findings of fact for attorneys' fee awards, that the trial court erred in failing to make any findings related to the reasonableness of the attorneys' fees sought and awarded. On remand, therefore, the trial court must also make further findings of fact regarding the amount of any sanction ultimately awarded.

Finally, plaintiffs have argued that no sanction at all is appropriate because defendants waived their right to seek sanctions by participating in the mediation for eight and a half hours without objecting to the sanctioned plaintiffs' absence. In support of this argument, plaintiffs cite two cases in which this Court held that a party waived its right to challenge an arbitration award by participating without objection in the arbitration. *See Miller v. Roca & Son, Inc.*, 167 N.C. App. 91, 94-95, 604 S.E.2d 318, 320 (2004) (holding that insurance company waived its right to object to arbitration award because it agreed to arbitrate without reserving right to proceed later on particular issue in superior court); *McNeal v. Black*, 61 N.C. App. 305, 307-08, 300 S.E.2d 575, 577 (1983) (holding that because stockbroker participated in arbitration without objecting or demanding jury trial, stockbroker waived his right to object to arbitration award later). This waiver argument was not specifically addressed by the trial court, and any determination of that issue would first require resolution of a factual dispute.

The sanctioned plaintiffs' argument depends upon their contention that defendants did not, at the mediation, object to their absence. In response to this argument, defendants submitted to this Court the affidavit of David S. O'Quinn, an attorney that attended the mediation, stating that counsel for the Blackwelder defendants objected at the beginning of the mediation to the sanctioned plaintiffs' absence.

Mr. O'Quinn's affidavit was not part of the record before the trial court and, therefore, is not properly considered by this Court. *See Penland v. Bird Coal Co.*, 246 N.C. 26, 34, 97 S.E.2d 432, 438 (1957) ("[T]he Supreme Court acts upon the record that was before the Superior Court, and upon that alone, and if the record was defective, it should have been amended in the Superior Court. The Supreme Court can judicially know only what appears in the record which was before the Superior Court. Accordingly, matters which were not in the record before the Superior Court, but which are sent up with the transcript to the Supreme Court, are no more a part of the record in the Supreme Court than they were in the Superior Court, and may not be made so by certificate of the court below." (internal citations omitted)). Since we are remanding this matter to the trial court for further findings of fact, the trial court may, on remand, address the waiver argument, including resolution of any factual disputes related to that issue.

Motion for Costs

[2] All of the plaintiffs appeal the award of costs to the Blackwelder defendants following plaintiffs' voluntary dismissal without prejudice of this action. They first argue that the trial court erred by relying upon the amended version of N.C. Gen. Stat. § 7A-305(d) (2007) in determining what expenses were properly included as costs. *See* 2007 N.C. Sess. Laws ch. 212, § 3. Plaintiffs contend that the statute does not apply to them because their case was dismissed before it went into effect.

The plain language of the session law is, however, to the contrary. The session law specifically provided as to the amendments to N.C. Gen. Stat. § 7A-305: "This act becomes effective August 1, 2007, and applies *to all motions* for costs filed on or after that date." 2007 N.C. Sess. Laws ch. 212, § 4 (emphasis added). The motion for costs in this case was filed on 3 August 2007. The amended version of N.C. Gen. Stat. § 7A-305(d) was, therefore, applicable to that motion.

Plaintiffs also argue that the trial court erred in citing N.C. Gen. Stat. § 6-20 (2007), as well as § 7B-305(d), as the basis for its award of costs, when the Blackwelder defendants cited only § 7A-305(d) in their motion. The applicable version of N.C. Gen. Stat. § 6-20 provides: "In actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes." Since there is no dispute that the trial court, in its order, only taxed costs permitted by N.C. Gen. Stat. § 7A-305(d), we cannot see how inclusion of N.C. Gen. Stat. § 6-20 in the order prejudices plaintiffs. We, therefore, overrule this assignment of error and affirm the order granting the Blackwelder defendants' motion for costs.

Conclusion

We reverse the order awarding sanctions under N.C. Gen. Stat. § 7A-38.1(g) and remand for further findings of fact as to the issue of good cause. If the trial court determines that one or more of the plaintiffs lacked good cause for failing to attend the mediation, then the court must determine whether sanctions are appropriate. If attorneys' fees are awarded, the order must include findings of fact as to the reasonableness of the fees. We affirm the trial court's order granting costs to defendants.

Affirmed in part; reversed and remanded in part.

Judges ROBERT C. HUNTER and ELMORE concur.

STATE OF NORTH CAROLINA v. JOSHUA PAUL RYDER, DEFENDANT

No. COA08-489

(Filed 7 April 2009)

1. Constitutional Law— right to fair trial—trial court remarks—questioning prosecutor regarding whether witness had made in-court identification of defendant

The trial court did not violate defendant's right to a fair trial in a robbery with a dangerous weapon, second-degree kidnapping, and assault with a deadly weapon inflicting serious injury case by asking the prosecutor whether a witness had made an in-court identification of defendant because: (1) the remarks were not made in front of the jury; (2) given the facts and circumstances, it cannot be said that the trial court's question to the prosecutor crossed the line so as to deprive defendant of his right to an impartial jury when the trial court also has the duty to supervise and control a defendant's trial including the direct and cross-examination of witnesses to ensure fair and impartial justice for both parties; (3) a trial court has the duty to question a witness in order to clarify testimony or to elicit overlooked pertinent facts; (4) the trial court was not required to assume that the State would fail to recognize its error and remain silent so that defendant would be advantaged by the State's mistake; (5) the trial court could reasonably have anticipated that the State would realize its error and then attempt to recall its witness, thus avoiding the inconvenience to the witness and the waste of judicial resources; and (6) the limited inquiry did not suggest a lack of impartiality warranting a new trial.

2. Evidence— prior crimes or bad acts—testimony—unrelated criminal charges—plain error analysis

The trial court did not commit plain error in a robbery with a dangerous weapon, second-degree kidnapping, and assault with a deadly weapon inflicting serious injury case by allowing a detective to testify about unrelated criminal charges that were pending

against defendant because: (1) defendant failed to make a showing that absent this testimony, the jury would have reached a different verdict; (2) defendant made no argument regarding the impact of the testimony in light of the significant amount of evidence presented by the State tending to identify defendant as the perpetrator; and (3) it cannot be concluded that the brief mention of other unspecified charges tipped the scales in favor of defendant's conviction.

3. Kidnapping; Robbery— failure to instruct on lesser-included offenses—false imprisonment—common law robbery

The trial court erred by refusing to instruct the jury on false imprisonment as a lesser-included offense of second-degree kidnapping and common law robbery as a lesser-included offense of armed robbery because a reasonable jury could have found that: (1) defendant formed the intent to rob the victim of her car only when she got out of the car after he removed the car keys from the ignition; (2) defendant formed the intent to rob the victim only after the restraint was over and thus defendant had not restrained the victim for the purpose of robbing her; and (3) the victim was induced to relinquish her car to defendant by the threat of being hit with defendant's fist rather than the use or threatened use of a gun, a fist is not considered a dangerous weapon for the purposes of armed robbery, and the State cannot argue on appeal inconsistently with the indictment that the car itself rather than the gun was the dangerous weapon.

4. Assault— deadly weapon inflicting serious injury—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury based on alleged insufficient evidence of an assault, even though defendant contends the victim caused her own injury by holding onto the car as defendant was driving off, because a jury could infer from the victim's testimony that she was trying to escape from the car and defendant, but got caught between the door and the car frame when defendant backed up, thus causing her to stumble, and thereafter she was holding onto the car door to steady herself as defendant drove off with the car door still open dragging the victim along.

5. Appeal and Error—writ of certiorari denied—new trial ordered and potential new sentences

The Court of Appeals, in its discretion, chose not to grant defendant's petition for certiorari to review only the assault with a deadly weapon inflicting serious injury sentence because it ordered a new trial and potentially new sentences on the second-degree kidnapping and robbery with a dangerous weapon charges.

Appeal by defendant from judgments entered 7 November 2007 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

GEER, Judge.

Defendant Joshua Paul Ryder appeals his convictions for robbery with a dangerous weapon, second degree kidnapping, and assault with a deadly weapon inflicting serious injury ("AWDWISI"). On appeal, defendant primarily contends that the trial court erred in failing to instruct the jury on the lesser included offenses of false imprisonment and common law robbery. Based upon our review of the record, we conclude that, viewing the evidence in the light most favorable to defendant, a jury could reasonably find that defendant committed the crime of false imprisonment rather than second degree kidnapping and that he committed common law robbery rather than robbery with a dangerous weapon. Accordingly, we hold that defendant is entitled to a new trial on the charges of second degree kidnapping and robbery with a dangerous weapon. We find defendants' arguments regarding his AWDWISI conviction unpersuasive and, therefore, uphold that conviction.

Facts

The State's evidence tended to show the following facts. On 3 May 2006, at 11:00 a.m., while leaving Carolina Place Mall in Charlotte, North Carolina, Saundra Graunke was approached by a man in the parking lot. The man, ultimately identified as defendant, told her that he was from New York, had been dropped off, and

needed a ride to Wal-Mart. When Ms. Graunke told defendant she could not take him to Wal-Mart, he asked if she could instead take him to the next gas station. Ms. Graunke inspected defendant's driver's license and agreed to give him a ride.

After they left the mall in Ms. Graunke's black 1999 Ford Escort, defendant told her "that he had drugs in his bag, and that he had a gun." Ms. Graunke asked if she could still drop him off as agreed, but the man told her she was "a stupid bitch for giving him a ride," and he was going to teach her a lesson. He grabbed her crotch and said that he could rape her, but that he was not going to do so.

Defendant had Ms. Graunke turn right on South Boulevard and then into a neighborhood, telling her as they drove that he needed to get rid of his drugs. He then had her return to South Boulevard and take a left onto Westinghouse Boulevard. When he directed her onto a street with a dead-end sign, Ms. Graunke became afraid that she was too far from the main road, and no one could see her to help. She refused to turn onto the road and instead tried to turn the car around, but defendant held the steering wheel and pulled the parking brake. Defendant then took the keys out of the ignition. When Ms. Graunke asked him to give them back, he raised his fist as if to hit her.

Ms. Graunke opened the car door, hoping that other drivers would see the struggle and come to her aid. She got out of the car, and defendant "scotched over to the driver's side." Ms. Graunke asked him not to take the car, but he backed up, causing her to stumble when she was caught between the car and the door. She grabbed hold of the door, but, then, as he drove forward, she fell and was dragged by the car. Ms. Graunke's finger either got stuck in the door or broke when she fell.

As defendant drove off in the car, Ms. Graunke began screaming, and someone stopped and called an ambulance and the police. Ms. Graunke was taken to the hospital, where she gave a statement to the police and was treated for her injuries, including scrapes on her back and knee, a bruised wrist, and a broken finger that required surgery.

The next day, 4 May 2006, Pamela Galati noticed a black 1999 Ford Escort in the driveway of her neighbor Jeff Kaderli's house. Ms. Galati thought this was unusual because she knew that Mr. Kaderli did not own a car, so she wrote down the car's license plate number. After she saw a news report about a stolen black 1999 Ford Escort with the same license plate number as the car in Mr. Kaderli's drive-

way, she called 911. She then observed Mr. Kaderli and a man she subsequently identified as defendant leave in the car. When they returned, she called the police, who arrived about 10 minutes later and took defendant and Mr. Kaderli into custody.

When the two men arrived at the police station, Detective Chris Perez called Ms. Graunke and asked her to come down to the station for a "show up." After Detective Perez interviewed Ms. Graunke, he showed Mr. Kaderli and defendant to her, and she identified defendant as the perpetrator. A subsequent forensic investigation of Ms. Graunke's car uncovered latent fingerprints that matched defendant's fingerprints and a cigarette butt with a DNA profile that matched defendant's DNA profile.

Defendant was indicted for robbery with a dangerous weapon, AWDWISI, attempted rape, and first degree kidnapping. At trial, defendant presented no evidence, but moved to dismiss all of the charges against him. The trial court dismissed the charges of attempted rape and first degree kidnapping, but submitted charges of sexual battery, second degree kidnapping, robbery with a dangerous weapon, and AWDWISI to the jury. Over defendant's objection, the court refused to instruct the jury on the lesser included offenses of false imprisonment, common law robbery, and larceny of a motor vehicle.

The jury found defendant not guilty of the charge of sexual battery, but guilty of the remaining charges. The trial court imposed a presumptive-range sentence of 116 to 149 months imprisonment for the robbery conviction, a consecutive presumptive-range sentence of 45 to 63 months imprisonment for the second degree kidnapping conviction, followed by a third consecutive presumptive-range sentence of 45 to 63 months imprisonment for the AWDWISI conviction. Defendant timely appealed to this Court.

I

[1] Defendant first contends that certain remarks made by the trial judge deprived him of his right to a fair trial and an unprejudiced jury. During the State's direct examination of Ms. Graunke, the prosecutor did not ask her to make an in-court identification of defendant. Defense counsel then proceeded with the cross-examination of Ms. Graunke. The court recessed and the following morning, when court was back in session, but before the jury had been brought in, the following exchange took place:

> THE COURT: And the other question I have, was there an identification of the defendant from Ms. Graunke during the testimony?
>
> [PROSECUTOR]: Not yesterday, sir.
>
> THE COURT: All right. I just wanted to make sure I was clear on that.

On re-direct examination by the State, Ms. Graunke identified defendant as the man who had committed the offenses against her.

Defendant argues that the trial court's remarks, by prompting the prosecutor to elicit an important piece of evidence, violated his right to a fair trial under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. "Every person charged with a crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in keeping with substantive and procedural due process requirements of the Fourteenth Amendment." *State v. Britt*, 288 N.C. 699, 710, 220 S.E.2d 283, 290 (1975). In this case, the remarks were not made in front of the jury and, therefore, this appeal does not present any question of the trial court's prejudicing the jury by expressing an opinion in its presence.

Not every action or remark by a trial court that could be viewed as assisting the State in its prosecution of a defendant violates the defendant's right to an impartial trial. In *State v. Wise*, 178 N.C. App. 154, 161-62, 630 S.E.2d 732, 736-37 (2006), the State had rested without presenting evidence on an issue that the trial court believed was an element of the charge. The trial court called the omission to the attention of the prosecutor, countered the prosecutor's contention that the issue was a question of law, and allowed the State to reopen its case to present the necessary evidence. *Id.* The defendant contended that he was denied a fair trial because "the judge acted as the prosecutor by allowing the prosecution to reopen the case and suggesting to the prosecution that it needed to make a motion to reopen the case." *Id.* at 162, 630 S.E.2d at 737. The Court rejected this argument, holding that "given the facts and circumstances of the present case . . . the judge did not depart from his neutral role as a judicial officer by discussing the law with the attorneys or by permitting the State to reopen its case." *Id.* at 162-63, 630 S.E.2d at 737.

We think the same is true in this case. Given the facts and circumstances, we cannot say that the trial judge's question to the prosecutor regarding whether the witness had made an in-court identification of defendant crossed the line so as to deprive defendant of his right to an impartial judge. As our Supreme Court has emphasized in addressing a similar argument, "[t]he trial judge also has the duty to supervise and control a defendant's trial, including the direct and cross-examination of witnesses, to ensure fair and impartial justice for both parties." *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732 (holding that trial judge was impartial despite his suggesting to counsel how to re-phrase questions, informing prosecutor that certain statements by witness would be inadmissible, explaining why he had sustained or overruled objections, and intervening to correct improper questions), *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274, 120 S. Ct. 351 (1999). The Court added: " 'Furthermore, it is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts.' " *Id.* (quoting *State v. Rogers*, 316 N.C. 203, 220, 341 S.E.2d 713, 723 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177, 118 S. Ct. 248 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988)).

In this case, the trial court was not required to assume that the State would fail to recognize its error and remain silent so that defendant would be advantaged by the State's mistake. Indeed, the trial court could reasonably have anticipated that the State would realize its error in failing to ask for an identification and then attempt to recall its witness. By raising the issue while Ms. Graunke was still on the stand, the trial court avoided the inconvenience to Ms. Graunke and the waste of judicial resources of having the State later seek to recall Ms. Graunke or even reopen its case. The limited inquiry by the trial court in this case does not suggest a lack of impartiality warranting a new trial. We, therefore, overrule this assignment of error.

II

[2] Defendant next contends the trial court erred in allowing Detective Perez to testify about unrelated criminal charges that were pending against defendant. Because he failed to object to this testimony at trial, defendant asks us to review the issue for plain error. "Under the plain error standard of review, defendant has the burden of showing: '(i) that a different result probably would have been

reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.' " *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)), *cert. denied*, 543 U.S. 1023, 160 L. Ed. 2d 500, 125 S. Ct. 659 (2004).

Detective Perez testified that when officers arrived at Mr. Kaderli's house, "they encountered two individuals. And one would have been under arrest in any event for unrelated charges, and there was another one that was willing to come to the police department voluntarily to talk to us about that vehicle . . . ." Subsequently, Detective Perez testified that when he conducted the show up, he started with Mr. Kaderli because "Mr. Kaderli was there on a voluntary basis." Defendant contends that this testimony, taken as a whole, "tended to show that Mr. Ryder was charged with some other, unrelated crimes" in violation of Rule 404(b) of the North Carolina Rules of Evidence.

Defendant has not, however, made any showing that in the absence of this testimony, the jury would have reached a different verdict. The State presented evidence that Ms. Graunke identified defendant as her attacker, that Ms. Graunke's car was found to contain defendant's fingerprints and DNA, and that an eyewitness saw defendant with Ms. Graunke's car the day after her car was stolen. Defendant makes no argument regarding the impact of Detective Perez' testimony in light of the significant amount of evidence presented by the State tending to identify defendant as the perpetrator. We cannot conclude that the brief mention of other, unspecified charges pending against defendant tipped the scales in favor of defendant's conviction. *See State v. Lewis*, 68 N.C. App. 575, 580-81, 315 S.E.2d 766, 769-70 (holding that deputy sheriff's testimony that defendant "was being sought on other warrants at the time he was arrested on the instant charges" was not prejudicial given "overwhelming evidence against defendant"), *appeal dismissed and disc. review denied*, 312 N.C. 87, 321 S.E.2d 904 (1984).

III

[3] Defendant next contends the trial court erred in refusing to instruct the jury on the lesser included offenses of false imprisonment and common law robbery. "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d

767, 771 (2002). When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant. *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994).

Defendant first argues the trial court was required to instruct the jury on the charge of false imprisonment as a lesser included offense of second degree kidnapping. "The crime of false imprisonment is a lesser included offense of kidnapping." *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). "The difference between kidnapping and the lesser-included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person. If the purpose of the restraint was to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39, then the offense is kidnapping. However, if the unlawful restraint occurs without any of the purposes specified in the statute, the offense is false imprisonment." *State v. Claypoole*, 118 N.C. App. 714, 717-18, 457 S.E.2d 322, 324 (1995).

The trial court instructed the jury that in order to convict defendant of kidnapping, it had to find that defendant kidnapped Ms. Graunke for the purpose of facilitating the robbery. Defendant contends that it is possible that a jury could reasonably find, based on the evidence viewed in the light most favorable to defendant, that defendant did not possess the intent to rob Ms. Graunke when he kidnapped her. Viewing Ms. Graunke's account of what occurred in the light most favorable to defendant, we agree that a reasonable jury could have found that defendant formed the intent to rob Ms. Graunke of her car only when she got out of the car after he removed the car keys from the ignition. Based on Ms. Graunke's testimony, a reasonable jury could have found that defendant formed the intent to rob Ms. Graunke only after the restraint was over and thus that defendant had not restrained Ms. Graunke for the purpose of robbing her. Therefore, we hold that the trial court was required to instruct the jury on the lesser included offense of false imprisonment, and defendant is entitled to a new trial on the second degree kidnapping charge.

Defendant also contends the trial court was required to instruct the jury on common law robbery as a lesser included offense of N.C. Gen. Stat. § 14-87 (2007), robbery with a dangerous weapon. "The essential elements of robbery with a dangerous weapon are: '(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person

is endangered or threatened.' " *State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382, 124 S. Ct. 475 (2003). On the other hand, "[r]obbery at common law is the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear." *State v. McNeely*, 244 N.C. 737, 741, 94 S.E.2d 853, 856 (1956). The difference between the two crimes is the use of a dangerous weapon in the commission of the robbery. *State v. Lyles*, 9 N.C. App. 448, 449-50, 176 S.E.2d 254, 255-56 (1970).

Defendant contends that viewing the evidence in the light most favorable to him, a reasonable jury could have found that defendant robbed Ms. Graunke of her car without the use of a dangerous weapon. The evidence indicated that shortly after defendant entered Ms. Graunke's car, he mentioned that he had a gun. Ms. Graunke did not, however, testify that he ever mentioned it again during the incident, including when he took the car from Ms. Graunke. Ms. Graunke testified that she never saw a gun on defendant's person or in the bag he was carrying. Additionally, Ms. Graunke testified that she decided to get out of the car when defendant "raised his fist" as if to hit her when she asked him to give her back the keys to her car.

This testimony would allow a reasonable jury to conclude that Ms. Graunke was induced to relinquish her car to defendant by the threat of being hit with defendant's fist, rather than because of the use or threatened use of a gun. This Court has held that a fist is not considered a dangerous weapon for the purposes of armed robbery. *State v. Duff*, 171 N.C. App. 662, 672, 615 S.E.2d 373, 381 (holding that "an individual's bare hands, fists, and feet are not considered dangerous weapons for the purposes of N.C. Gen. Stat. § 14-87"), *disc. review denied*, 359 N.C. 854, 619 S.E.2d 853 (2005). In light of this evidence, we believe a reasonable jury could acquit defendant of robbery with a dangerous weapon, but convict defendant of common law robbery.

The State argues alternatively that the car itself, rather than the gun, was the dangerous weapon used to perpetrate the robbery. This argument is, however, inconsistent with the indictment, which alleged that defendant used "a firearm" to rob Ms. Graunke. When an indictment charges a crime that requires the use of a deadly weapon, the State is required to " '(1) name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege

such facts as would *necessarily* demonstrate the deadly character of the weapon.' " *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (quoting *State v. Palmer*, 293 N.C. 633, 639-40, 239 S.E.2d 406, 411 (1977)). The State cannot, on appeal, change the identity of the dangerous weapon from that specified in the indictment in order to support the conviction.

Consequently, we agree with defendant that the trial court erred in failing to instruct the jury on both false imprisonment and common law robbery. Defendant is, therefore, entitled to a new trial on the charges of second degree kidnapping and robbery with a dangerous weapon.

IV

[4] With respect to his AWDWISI conviction, defendant contends that the trial court erred in denying his motion to dismiss. When we review a trial court's denial of a motion to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "If so, the motion is properly denied." *Id.* Substantial evidence is that amount of evidence "sufficient to persuade a rational juror to accept a particular conclusion." *State v. Goblet*, 173 N.C. App. 112, 118, 618 S.E.2d 257, 262 (2005). We view the evidence in the light most favorable to the State. *Id.*

N.C. Gen. Stat. § 14-32(b) (2007) provides that "[a]ny person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon." "The elements of a charge under G.S. § 14-32(b) are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990).

Defendant contends that the State failed to present sufficient evidence of an assault. To establish the element of assault, the State must present evidence "of an overt act showing an intentional offer by force and violence to do injury to another sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm." *State v. Musselwhite*, 59 N.C. App. 477, 481, 297 S.E.2d 181, 184 (1982). Defendant contends that no assault occurred because the victim caused her own injury by holding on to the car as he was driving off.

Ms. Graunke testified that when defendant grabbed the keys to her car and raised his fist, she "thought this would be a good time to get out of the car because this is definitely not going well." She opened the car door in hopes that people in cars driving by might realize something was wrong and try to help her. She then explained what happened next:

> [H]e scotched over to the driver's side.
>
> And I was standing in the car door and he backed up. And I asked him not to take my car. He backed up and I stumbled back. And then he drove forward and I had held on to the car. I was between the car and the door. And I held on to it and then he drove forward and I got dragged a little. I think my finger either got stuck in the door or it broke when I fell. And then I just got dragged a little.
>
> And then he drove off, and I saw him driving off closing the door.

A jury could infer from this testimony that Ms. Graunke was trying to escape from the car and defendant, but got caught between the door and the car frame when defendant backed up, causing her to stumble. Then, as she was holding on to the car door to steady herself, he drove off with the car door still open, dragging her along. We believe that this evidence is sufficient to support a finding of an assault and, therefore, the trial court properly denied defendant's motion to dismiss the AWDWISI charge.

V

[5] Finally, we address defendant's petition for writ of certiorari, in which he argues that the trial court erred in failing to impose a mitigated-range sentence and by imposing consecutive sentences. Because defendant was sentenced within the presumptive range, he had no right to appeal his sentence. *State v. Brown*, 146 N.C. App. 590, 593, 553 S.E.2d 428, 430 (2001), *appeal dismissed and disc. review denied*, 356 N.C. 306, 570 S.E.2d 734 (2002); N.C. Gen. Stat. § 15A-1444(a1) (2007). N.C. Gen. Stat. § 15A-1444(a1), however, provides that a defendant "may petition the appellate division for review of this issue by writ of certiorari."

In mitigation, defendant presented evidence that he suffered from substance abuse and anxiety and had been treated for bipolar disorder on multiple occasions. Defendant's evidence indicated that he

had been unable to get his prescriptions renewed and was in the middle of a manic episode when the incident took place. Defendant asked the trial court to consolidate the three convictions for sentencing and impose a mitigated-range sentence, but the trial court did neither.

We have, however, ordered a new trial on the charges of armed robbery and second degree kidnapping. As there will be a new trial and potentially new sentences on two of the charges against defendant, we choose, in our discretion, not to grant defendant's petition for certiorari to review only the AWDWISI sentence.

New trial in part; no error in part.

Judges ROBERT C. HUNTER and ELMORE concur.

NORTH IREDELL NEIGHBORS FOR RURAL LIFE, JERRY O. MISHOE, REBECCA MISHOE, BRYAN EDWARD LEACH, SHERLENE NINA LEACH, WILLIAM B. PITT, LUCINDA D. PITT, DWIGHT R. BRIDGES, JUANITA BRIDGES, BARRY D. MASON, RANDA J. MASON, FRANKLIN D. REAVIS, AMY L. REAVIS, ASHLEY DEAN REAVIS, ROBERT E. REAVIS, JANE REAVIS, RICKEY EUGENE REAVIS, CYNTHIA REAVIS, ROBERT LOUIS TAYLOR, CARROLL EUGENE WARD, NANCY WARD, STEVE KENNETH SOMERS AS TRUSTEE FOR THE STEVE KENNETH SOMERS REVOCABLE LIVING TRUST, DONNA S. SOMERS AS TRUSTEE FOR THE DONNA S. SOMERS REVOCABLE LIVING TRUST, AND LORRIE E. MARION BARKER, PLAINTIFFS v. IREDELL COUNTY, HARRY PHILLIP MCLAIN, LOUISE DUARTE MCLAIN, CHARLES MICHAEL MCLAIN, AND JANET HEWITT MCLAIN, DEFENDANTS

No. COA08-1068

(Filed 7 April 2009)

1. Appeal and Error— appealability—interlocutory order—substantial right

Three interlocutory orders in a declaratory judgment case regarding a rezoning ordinance affected a substantial right and were immediately appealable by plaintiffs because the trial court's finding that the production of biodiesel by a farmer on farm premises for agricultural purposes is a bona fide farm use and exempt from county zoning ordinances effectively rendered moot plaintiffs' challenge of the rezoning of the individual defendants' property.

2. Jurisdiction— standing—affirmative averment showing legal existence and capacity to sue required

The trial court did not err in a declaratory judgment action by finding NINRL lacked standing and by granting the county's motion for summary judgment in part because: (1) N.C.G.S. § 1A-1, Rule 9(a) required NINRL to affirmatively aver that it was an unincorporated nonprofit association; and (2) plaintiffs failed to make an affirmative averment showing NINRL's legal existence and capacity to sue.

3. Zoning— biodiesel production—not bona fide farm use

The trial court erred in a declaratory judgment action when it found the production of biodiesel by a farmer on farm premises for agricultural purposes was a bona fide farm use and exempt from county zoning ordinances because: (1) under the unique set of facts presented in this case, the landowners' intended biodiesel production was not a bona fide farm use since the hauling of raw materials from surrounding farms, and the production of 500,000 gallons of biodiesel per year, when the landowners' farming operation required only 100,000 gallons of biodiesel per year, removed this production from the realm of bona fide farm use to a non-farm independent commercial enterprise; and (3) the added industrial process did not fall under the list in N.C.G.S. § 106-581.1, and thus the intended biodiesel production was subject to zoning which the landowners recognized by applying for and receiving rezoning of their property from single-family residential to heavy manufacturing conditional use district.

4. Injunction— denial of motion pending appeal—building and operation of biodiesel refinery

The trial court did not abuse its discretion in a declaratory judgment action when it refused to grant injunctive relief under N.C.G.S. § 1A-1, Rule 62(c) preventing the building and operation of a biodiesel refinery while the legality of that refinery was an open question because plaintiffs failed to show that the trial court's ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision.

Appeal by plaintiffs from judgments entered 4 February 2008 by Judge Kimberly S. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 11 February 2009.

Womble Carlyle Sandridge & Rice, PLLC, by Kurt E. Lindquist II and Sarah L. Buthe, for plaintiff-appellants.

Pope McMillan Kutteh Privette Edwards & Schieck, PA, by Martha N. Peed and William H. McMillan, for the McLains defendant-appellees.

Pope McMillan Kutteh Privette Edwards & Schieck, PA, by Martha N. Peed and William P. Pope, for Iredell County defendant-appellee.

North Carolina Farm Bureau Federation, Inc., by Secretary and General Counsel H. Julian Philpott, Jr., and Associate General Counsel Stephen A. Woodson, amicus curiae.

HUNTER, JR., Robert N., Judge.

North Iredell Neighbors for Rural Life ("NINRL"), Jerry O. Mishoe, et seq. (collectively, "plaintiffs") appeal orders entered: (1) granting Iredell County's ("the County") motion for summary judgment against NINRL and (2) granting Harry Phillip McLain's, et seq. (collectively, "the McLains") motion for summary judgment against plaintiffs. Plaintiffs also appeal the trial court's denial of their motion for injunctive relief pending appeal. *See North Iredell Neighbors for Rural Life v. Iredell County*, 196 N.C. App. ——, —— S.E.2d —— (Apr. 7, 2009) (No. COA08-1010). We affirm in part and reverse in part.

I. Background

On 5 September 2007, plaintiffs filed a verified complaint seeking a declaratory judgment that a rezoning ordinance adopted by the Iredell County Board of Commissioners was void and of no effect. Plaintiffs alleged that on or about 20 February 2007 the McLains applied to have a 7.88-acre tract of land rezoned from single-family residential to heavy manufacturing conditional use district. "The stated purpose of the request was to allow for the 'manufacture of soybeans and other crops to biodiesel,' and the application indicate[d] that the proposed specific permitted land use was the 'manufacture of biodiesel.' "

The property in question "is part of a larger tract of land consisting of approximately 218 acres, located off Snow Creek Road in . . . an unincorporated area known as the Snow Creek Community." NINRL "represents the residents of the Snow Creek Community who are opposed to the [r]ezoning and the operation of a biodiesel manufacturing facility in the community[.]" The remaining plaintiffs are

"the owners of properties that either adjoin or are located in close proximity to the [p]roperty" in question.

The County Board of Commissioners considered the McLains' application at a 7 August 2007 "quasi-judicial" public hearing. "The minutes of the . . . meeting reflect that the Board of Commissioners first voted four to one in favor of amending the Land Use Plan" and then "voted four to one in favor of the 'proposed zoning map amendment.' " "During its August 21, 2007 meeting and by a vote of four to one, the Board of Commissioners voted to adopt findings of fact for the conditional use permit that should have been adopted at the same time the [r]ezoning was approved."

Plaintiffs' complaint alleged: (1) "the Board of Commissioners lacked the authority to adopt a conditional use district rezoning that authorizes [biodiesel manufacturing;]" (2) "the Board of Commissioners failed to follow their own procedure as required by the Zoning Ordinance[;]" and (3) "the [r]ezoning . . . constitutes illegal spot zoning . . . ." Plaintiffs requested injunctive relief "until such time . . . as the [rezoning] has been approved or ratified by a court of law." On 26 September 2007, plaintiffs filed an amended, verified complaint and further alleged "the County failed to comply with statutory notice requirements . . . ."

The County filed a motion for summary judgment on 27 December 2007. The County's motion alleged plaintiffs "are not aggrieved persons and lack standing to pursue this matter" and "[NINRL] is a non-existent entity or one without power and authority to commence suit or to invoke and use the jurisdiction of the Courts of this State." The McLains also filed a motion for summary judgment on 27 December 2007. The McLains' motion alleged that "the Iredell County Board of Commissioners lacks authority to regulate the activities and that the activities contemplated by the defendants are bona fide farm activities and are not within the authority of the Iredell County Board of Commissioners to regulate pursuant to its zoning power."

On 4 February 2008, the trial court entered two orders. The first order granted the County's motion for summary judgment against NINRL and denied it against the remaining plaintiffs. The trial court found NINRL failed to "make an affirmative averment showing its legal existence and capacity to sue as required by Rule 9A of the North Carolina Rules of Civil Procedure." The second order granted the McLains' motion for summary judgment against plaintiffs. The trial court found that "[t]he production of biodiesel by a farmer on

farm premises for agricultural purposes is a bona fide farm use and as such the production of biodiesel is exempt from county zoning ordinances pursuant to N.C. Gen. Stat. § 153A-340 (2007)." The trial court further stated that "[s]o long as the McLains do not expand their production activity beyond 500,000 gallons and the biodiesel so produced is used for agricultural purposes on their farm or sold for agricultural use, the production of biodiesel is a bona fide farm use as a matter of law." Plaintiffs filed their notice of appeal from these judgments on 8 March 2008.

On 14 April 2008, plaintiffs filed a motion for an injunction pending appeal. Plaintiffs requested the trial court to

> enter an injunction pursuant to N.C. R. Civ. P. 62(c), enjoining the McLains from constructing or erecting any of the facilities associated with the biodiesel plant or operating the biodiesel plant pending the outcome of the appeal of this action, and also enjoining . . . [the] County from issuing any permits for the construction or operation of a biodiesel plant on the McLains' property.

The trial court denied plaintiffs' motion for an injunction pending appeal on 30 April 2008. Plaintiffs appeal.

II. Interlocutory Appeal

[1] As a preliminary matter, we note that this appeal is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

> A party may appeal an interlocutory order under two circumstances. First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. N.C.G.S. § 1A-1, Rule 54(b) (1990). Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment."

Dep't of Transp. v. Rowe, 351 N.C. 172, 174-75, 521 S.E.2d 707, 709 (1999) (quoting *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381).

Here, plaintiffs appeal three orders entered by the trial court. None of the orders appealed from were certified pursuant to Rule

54(b) by the trial court. Nonetheless, plaintiffs' appeal affects a substantial right and is immediately appealable. *Id.* at 175, 521 S.E.2d at 709. The trial court's finding that the "[t]he production of biodiesel by a farmer on farm premises for agricultural purposes is a bona fide farm use and . . . exempt from county zoning ordinances" effectively renders plaintiffs' challenge of the rezoning of the McLains' property moot. Plaintiffs may therefore appeal the trial court's orders because they "affect[] some substantial right . . . and will work an injury to [plaintiffs] if not corrected before an appeal from the final judgment." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381.

III. Issues

Plaintiffs argue the trial court erred when it: (1) granted the County's motion for summary judgment in part; (2) granted the McLains' motion for summary judgment; and (3) denied their motion for an injunction pending appeal.

IV. NINRL's Standing

[2] Plaintiffs argue the trial court erred when it found NINRL lacked standing and granted the County's motion for summary judgment in part because the trial court improperly "imposed pleading requirements where none existed [and] ignored record evidence . . . ." We disagree.

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).

N.C. Gen. Stat. § 1-69.1 (2007) states:

(a) Except as provided in subsection (b) of this section:

(1) All unincorporated associations, organizations or societies, or general or limited partnerships, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it.

(2) Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated.

(3) *Any unincorporated association*, organization, society, or general partnership bringing a suit in the name *by which it is commonly known and called must allege the specific location of the recordation required by G.S. 66-68.*

(b) *Unincorporated nonprofit associations are subject to Chapter 59B of the General Statutes and not this section.*

(Emphasis added.)

N.C. Gen. Stat. § 1A-1, Rule 9(a) (2007) states:

Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue. . . . When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(Emphasis added.)

The County's motion for summary judgment filed 27 December 2007 alleged, among other things, that "[NINRL] is a non-existent entity or one without power and authority to commence suit or to invoke and use the jurisdiction of the Courts of this State." The trial court entered the following findings of fact in its order granting the County's motion for summary judgment with regard to NINRL:

1. [NINRL] did not allege a specific location of recordation as required by *N.C. Gen. Stat.* § 1-69.1 for unincorporated associations bringing a suit in the North Carolina courts.

2. [NINRL] did not allege that it is a nonprofit unincorporated association bringing suit with standing under Chapter 59B.

3. [NINRL] did not make an affirmative averment showing its legal existence and capacity to sue as required by Rule 9A of the North Carolina Rules of Civil Procedure.

Plaintiffs' amended complaint stated only that "[NINRL] represents the residents of the Snow Creek Community who are opposed to the Rezoning and the operation of a biodiesel manufacturing facility in the community[.]" While N.C. Gen. Stat. § 1-69.1(b) eliminates the pleading requirements set forth in N.C. Gen. Stat. § 1-69.1(a)(3), N.C. Gen. Stat. § 1A-1, Rule 9(a) required NINRL to affirmatively aver that it was an unincorporated nonprofit association. Plaintiffs failed to "make an affirmative averment showing [NINRL's] legal existence and capacity to sue." N.C. Gen. Stat. § 1A-1, Rule 9(a). The trial court properly found that NINRL "d[id] not have standing to bring suit in this matter." This assignment of error is overruled.

V. Bona Fide Farm Use

[3] Plaintiffs argue the trial court erred when it found "[t]he production of biodiesel by a farmer on farm premises for agricultural purposes is a bona fide farm use and . . . exempt from county zoning ordinances . . . ." We agree.

> [W]hen the General Assembly granted authority to the counties to regulate and restrict the use of land by means of zoning ordinances in N.C. Gen. Stat. § 153A-340, including the power to regulate and restrict the "use of buildings, structures, and land for trade, industry, residence, or other purposes," it carved out one important exception to the counties' jurisdiction: the authority to regulate land being used for "bona fide farm purposes." Specifically, county zoning "regulations may not affect bona fide farms, but any use of farm property for nonfarm purposes is subject to the regulations." Although the statute does not define "bona fide farm," it does define "bona fide farm purposes"[.]

Sedman v. Rijdes, 127 N.C. App. 700, 703, 492 S.E.2d 620, 622 (1997) (citation omitted). "[B]ona fide farm purposes include the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products as defined in G.S. 106-581.1 having a domestic or foreign market." N.C. Gen. Stat. § 153A-340(b)(2) (2007).

> When performed on the farm, "agriculture", "agricultural", and "farming" also include the marketing and selling of agricultural products, agritourism, the storage and use of materials for agricultural purposes, packing, treating, processing, sorting, storage, and other activities performed to add value to crops, livestock,

> and agricultural items produced on the farm, and similar activities incident to the operation of a farm.

N.C. Gen. Stat. § 106-581.1(6) (2007).

Five cases decided by this Court provide additional clarification on the definition of a bona fide farm use. *See County of Durham v. Roberts*, 145 N.C. App. 665, 671, 551 S.E.2d 494, 498 (2001) (explaining that removal of soil in preparation of a horse pasture and subsequent selling of the soil "was related and incidental to the farming activities of boarding, breeding, raising, pasturing and watering horses[]"); *Ball v. Randolph County Bd. of Adjust.*, 129 N.C. App. 300, 304, 498 S.E.2d 833, 836 (1998) ("Although sometimes referred to as 'land farming,' soil remediation does not fit within the above description of agricultural uses. No products are grown or sold and the tilling of the soil is related to a chemical process rather than to production of crops or plants."), *disc. review improvidently allowed*, 349 N.C. 348, 507 S.E.2d 272 (1998); *Sedman*, 127 N.C. App. at 704, 492 S.E.2d at 622 ("[T]he activities in which Multiflora is engaged including the construction of a driveway, the use of the driveway by large trucks to export plants from the premises, the operation of thirty-seven fans emitting low frequency sound and the selling of plants on the premises, fall within the bona fide farm purposes exemption . . . ."); *Baucom's Nursery Co. v. Mecklenburg Co.*, 62 N.C. App. 396, 401, 303 S.E.2d 236, 239 (1983) (holding the nursery and greenhouse to be a bona fide farm because agricultural operations included growing vegetables, flowers, and shrubs), *disc. review denied*, 322 N.C. 834, 371 S.E.2d 274 (1988); *Development Associates v. Board of Adjustment*, 48 N.C. App. 541, 547, 269 S.E.2d 700, 704 (1980) ("[D]ogs are not included in the classification of livestock and [ ] dog breeding and the operation of a dog kennel are not 'farming' activities within the meaning of G.S. 153A-340."), *disc. review denied*, 301 N.C. 719, 274 S.E.2d 227 (1981). While these cases provide some guidance on how this Court has interpreted bona fide farm use in the past, none are particularly instructive on the facts before us.

Here, the trial court entered the following findings of fact in its order granting the McLains' motion for summary judgment:

> 1. The production of biodiesel involves the pressing of oil seeds including soybeans, canola and sunflower seeds to extract the oil. The oil is treated in order to estrify the oil converting the oil to a combustible fuel. The byproducts include seed meal and glycerin.

There is no factual dispute concerning the means and methods of production of biodiesel.

2. The McLains intend to produce 500,000 gallons per year of biodiesel fuel from various oil seeds grown by them and by their neighbors. The biodiesel produced is to be consumed in the McLains' farm operation which covers approximately 5000 acres and requires approximately 100,000 gallons of diesel per year. Any excess biodiesel production will be sold for farm uses.

3. Biodiesel is a preferable fuel for farm equipment since it requires no additives as does diesel produced from petroleum. Biodiesel is suitable for fuel in all types of farm equipment. The key byproduct of biodiesel production is seed meal which is an important ingredient in animal feed. The local dairy, cattle and poultry farmers comprise a ready market for the seed meal.

4. The raw materials for the production of biodiesel will be grown by the McLains and their neighbors, pressed for oil on the McLain farm and the resulting product will be used to fuel the tractors, trucks, combines and other farm machinery owned and operated by the McLains. Any excess will be sold for farm use.

Under the unique set of facts presented here, we hold that the McLains' intended biodiesel production, as found by the trial court, is not a bona fide farm use. The hauling of raw materials from surrounding farms, and the production of 500,000 gallons of biodiesel per year, when the McLains' farming operation requires only 100,000 gallons of biodiesel per year, removes this production from the realm of bona fide farm use to a non-farm independent commercial enterprise. While the McLains' large scale industrial farming operation has certainly fit under the bona fide farm exception to date, this added industrial process, as they currently intend, is not "the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products as defined in G.S. 106-581.1 having a domestic or foreign market." N.C. Gen. Stat. § 153A-340(b)(2). The McLains' intended biodiesel production is therefore subject to zoning.

We note that the McLains seem to have recognized this fact when they applied for and received rezoning of their property from single-family residential to heavy manufacturing conditional use district. It is only after receiving the conditional use permit from the County

that the McLains asserted their "bona fide" exemption. The new characterization of "exempt" activity undermines plaintiffs' contentions on appeal.

We also recognize that there may come a time when the economies of scale are such that a farming operation may be able to produce, through its own crops, only that amount of biodiesel necessary for its own operations, but those facts are not before us and we express no opinion on whether that would be a bona fide farm use as a matter of law.

The trial court erred when it entered summary judgment in favor of the McLains. In light of this holding, it is unnecessary to review plaintiffs' remaining assignments of error relating to the McLains' motion for summary judgment.

VI. Injunction Pending Appeal

[4] Plaintiffs argue the trial court erred when it "refused to grant injunctive relief preventing the building and operation of the biodiesel refinery while the legality of that refinery is an open question." We disagree.

N.C. Gen. Stat. § 1A-1, Rule 62(c) (2007) states:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, *the court in its discretion may* suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(Emphasis added.)

We review the trial court's denial of plaintiffs' Rule 62(c) motion for an abuse of discretion. Id. "An abuse of discretion results where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Long v. Harris*, 137 N.C. App. 461, 464-65, 528 S.E.2d 633, 635 (2000) (citation omitted).

In *Investors, Inc. v. Berry*, our Supreme Court stated:

> A preliminary injunction . . . is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (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.

293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (citations omitted). While no North Carolina court appears to have articulated the standard which a trial court should use when ruling on a Rule 62(c) motion, we hold the two-pronged test articulated by our Supreme Court in Berry to be applicable.

The trial court stated in its order denying plaintiffs' Rule 62(c) motion:

> Irrespective of whether [plaintiffs] prevail on the issue of biodiesel fuel not being a bonafide farm operation, this Court is nevertheless firmly of the opinion that the crushing of soybean and canola seed into oil for sale is, in this Court's opinion, a bonafide farm operation and that the . . . McLain[s] should be allowed to proceed to crush and extract these respective oils. [The] McLain[s] state in an affidavit that there are no immediate plans to convert the bean and seed oil into biodiesel fuel; however, if [the McLains] choose to continue refinery construction, they do so at their own risk. This Court will not impose an interim injunction specifically noting that from Judge Taylor's order of February 4, 2008, until the institution of this petition for injunction filed on April 14, 2008, some two months elasped without any contention by [plaintiffs] of an urgent threat of irreparable harm and after having reviewed the standards set forth in both the federal and North Carolina cases, this Court does not believe that the ultimate outcome of this case requires injunctive relief until an appellate decision has been reached.
>
> [Plaintiffs] further seek to restrain Iredell County from issuing any permits for the construction or operation of a biodiesel plant on the McLain property. This Court has received assurances that no applications have been made to Iredell County for such a permit however this Court will not restrain the permitting process in the event an application is submitted.

Plaintiffs have failed to show that "the [trial] court's ruling [was] manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Long*, 137 N.C. App. at 465, 528 S.E.2d at 635 (citation omitted). The trial court did not abuse its discretion when it denied plaintiffs' Rule 62(c) motion for an injunction pending appeal. This assignment of error is overruled.

VII. Conclusion

Plaintiffs failed to "make an affirmative averment showing [NINRL's] legal existence and capacity to sue." N.C. Gen. Stat. § 1A-1, Rule 9(a). The trial court did not err when it found NINRL lacked standing. The trial court's 4 February 2008 order granting the County's motion for summary judgment in part is affirmed.

The trial court erred when it found "[t]he production of biodiesel by a farmer on farm premises for agricultural purposes is a bona fide farm use and . . . exempt from county zoning ordinances[.]" The trial court's 4 February 2008 order granting the McLains' motion for summary judgment against plaintiffs is reversed, and this matter is remanded for further proceedings consistent with this opinion.

The trial court did not abuse its discretion when it denied plaintiffs motion for an injunction pending appeal. The trial court's 30 April 2008 order denying plaintiffs' Rule 62(c) motion is affirmed.

Affirmed in part; reversed in part; and remanded.

Judges McGEE and JACKSON concur.

NORTH IREDELL NEIGHBORS FOR RURAL LIFE, JERRY O. MISHOE, REBECCA MISHOE, BRYAN EDWARD LEACH, SHERLENE NINA LEACH, WILLIAM B. PITT, LUCINDA D. PITT, DWIGHT R. BRIDGES, JUANITA BRIDGES, BARRY D. MASON, RANDA J. MASON, FRANKLIN D. REAVIS, AMY L. REAVIS, ASHLEY DEAN REAVIS, ROBERT E. REAVIS, JANE REAVIS, RICKEY EUGENE REAVIS, CYNTHIA REAVIS, ROBERT LOUIS TAYLOR, CARROLL EUGENE WARD, NANCY WARD, STEVE KENNETH SOMERS AS TRUSTEE FOR THE STEVE KENNETH SOMERS REVOCABLE LIVING TRUST, DONNA S. SOMERS AS TRUSTEE FOR THE DONNA S. SOMERS REVOCABLE LIVING TRUST, AND LORRIE E. MARION BARKER, PLAINTIFFS v. IREDELL COUNTY, HARRY PHILLIP MCLAIN, LOUISE DUARTE MCLAIN, CHARLES MICHAEL MCLAIN, AND JANET HEWITT MCLAIN, DEFENDANTS

No. COA08-1010

(Filed 7 April 2009)

Appeal by plaintiffs from judgment entered 30 April 2008 by Judge John L. Holshouser, Jr., in Iredell County Superior Court. Heard in the Court of Appeals 11 February 2009.

Womble Carlyle Sandridge & Rice, PLLC, by Kurt E. Lindquist II and Sarah L. Buthe, for plaintiff-appellants.

Pope McMillan Kutteh Privette Edwards & Schieck, PA, by Martha N. Peed and William H. McMillan, for the McLains defendant-appellees.

HUNTER, JR., Robert N., Judge.

For the reasons stated in *North Iredell Neighbors for Rural Life, et al. v. Iredell County et al.*, No. COA08-1068, (filed 7 April 2009), the trial court's judgment denying plaintiff-appellants' motion for injunctive relief pending appeal is affirmed.

Affirmed.

Judges McGEE and JACKSON concur.

NARLEY CASHWELL v. DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, AND MICHAEL WILLIAMSON, DIRECTOR, RETIREMENT SYSTEMS DIVISION

No. COA08-432

(Filed 7 April 2009)

Pensions and Retirement— Consolidated Judicial Retirement System—Teachers' and State Employees Retirement System—entitlement to tax free pension

The trial court did not err by denying petitioner a state tax free pension under the Consolidated Judicial Retirement System and the Teachers' and State Employees Retirement System because: (1) N.C.G.S. §§ 135-5 and 135-4 read in conjunction provide that a member of a state retirement system who leaves state service and withdraws contributions in the retirement system has no rights to any benefits within the retirement system except for the right to repay previously withdrawn contributions as provided in N.C.G.S. § 135-4; (2) petitioner acquired the right to repay his previously withdrawn contributions since he vested in the retirement system in 1995, and it would be a strained statutory interpretation to allow his vesting date to shift depending on the amount of previously withdrawn contributions the employee

chooses to repay; and (3) petitioner's repayment of contributions withdrawn prior to 12 August 1989 does not entitle petitioner to a tax-free pension, and the repayment of previously withdrawn contributions serves only to increase the years of service creditable to an employee.

Appeal by petitioner from order entered 18 February 2008 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 9 October 2008.

Poyner & Spruill, LLP, by Edwin M. Speas, Jr., for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for respondent-appellee.

CALABRIA, Judge.

Narley Cashwell ("petitioner") appeals an order denying petitioner a tax free pension[1] under the Consolidated Judicial Retirement System ("CJRS") and the Teachers' and State Employees Retirement System ("TSERS"). We find no error.

I. TSERS and CJRS

The TSERS and CJRS are retirement systems created by the General Assembly for North Carolina state employees. Both systems are similarly structured, administered by the Retirement Systems Division of the Department of the State Treasurer ("respondent"), and funded by contributions from eligible employees ("members"). Each month a portion of each member's salary is deducted through payroll deductions and transferred to the Retirement Systems Division. If a member leaves eligible employment, the member has discretion to withdraw contributions from the retirement system. This action effectively terminates a member's rights in the plan. If a former member later returns to eligible employment, after five years of membership service, previously withdrawn contributions can be repaid to the retirement system.

II. Tax Exemptions

Prior to 1989, retirement benefits ("pensions") paid by state-administered retirement plans were exempt from state income tax.

1. The legislation, and therefore this decision, only addresses petitioner's right to a pension free from state income tax. Petitioner's federal income tax obligations are not implicated.

N.C. Gen. Stat. § 135-9 (1988) (TSERS); N.C. Gen. Stat. § 135-52(a) (1988) (CJRS). Effective 12 August 1989, the legislature repealed the complete tax exemption on state pensions and replaced them with an exemption on only the first $4,000 of state pensions paid to a retiree each year. N.C. Gen. Stat. § 105-134.6 (1989). This statute was challenged. The North Carolina Supreme Court held in *Bailey v. State*, 348 N.C. 130, 167, 500 S.E.2d 54, 76 (1998), that the legislature's repeal of the tax exemption was an unconstitutional impairment of the contractual rights for members of state-administered retirement systems who had previously vested by completing five continuous years of service on or before 12 August 1989. Therefore, after *Bailey*, any member who was vested in a state retirement plan prior to 12 August 1989 must receive a pension wholly exempt from state income tax, while only the first $4,000 of annual payments is exempt from state income taxation for those members who vested after 12 August 1989.

III. Background

Petitioner was employed as an assistant district attorney, and was enrolled as a member of TSERS from March 1976 through February 1982. During that time, he accrued approximately five years, eleven months of service. When petitioner resigned from his employment in 1982, he requested and received all his TSERS contributions pursuant to N.C. Gen. Stat. § 135-5(f). Upon withdrawing his TSERS contributions, petitioner's membership in the system ceased. Specifically, he no longer was entitled to rights or benefits under TSERS, except for the right to repay his withdrawn contributions as provided by N.C. Gen. Stat. § 135-4(k).

Between February 1982 and August 1986, petitioner served as a district court judge. As a judge, petitioner was enrolled as a member of CJRS. At the end of his service he requested and received a return of his accumulated CJRS contributions. When petitioner's membership in CJRS ended, he was not entitled to any future benefits from CJRS, aside from his right to repay his withdrawn contributions as provided by N.C. Gen. Stat. § 135-4(k).

After engaging in the private practice of law from September 1986 through December 1990, petitioner returned to the judiciary as a superior court judge in January 1991. Petitioner again became a member of CJRS and continued as a member for a sixteen year period.

Petitioner became vested in CJRS after five years of service in 1996. As a vested member of the CJRS, petitioner was eligible to purchase credit in CJRS for his previously withdrawn CJRS con-

tributions from his service as district court judge. In addition, he was also eligible to purchase credit in TSERS for his previously withdrawn TSERS contributions from his service as an assistant district attorney.

In March 1996, pursuant to N.C. Gen. Stat. § 135-4(k), petitioner repaid all contributions he had previously withdrawn from CJRS when his term ended as a district court judge in 1986. In August 1999 and August 2001, petitioner repaid all the contributions he had withdrawn from TSERS when he resigned his employment as an assistant district attorney in 1982. Petitioner's repaid TSERS contributions were transferred to his CJRS account.

In August 2006, petitioner sent a letter to respondent asking about a specific section regarding an income tax withholding election. Petitioner quoted from Section E, page 2 on form 290. "Retirement benefits are exempt from North Carolina income tax provided you had five (5) or more years of maintained creditable service in the Retirement System as of August 12, 1989." Petitioner asked if this language applied to his retirement benefits since he accumulated 9.5833 years of creditable service prior to 12 August 1989.

The respondent informed petitioner that he would not be entitled to a tax-free pension because he had not vested in the retirement system prior to 12 August 1989. Therefore, only the first $4000 annually would not be subject to state income tax.

Petitioner's retirement was effective 1 January 2007 and he began to receive his pension without a complete tax exemption. Respondent counted petitioner's repurchased service in computing and paying his retirement benefits but refused to consider the corresponding dates of petitioner's repurchased service for purposes of his eligibility for a tax-free pension.

On 9 April 2007, petitioner requested, and received, a declaratory ruling from respondent. Petitioner believed the declaratory ruling was incorrect as a matter of law and filed a petition for judicial review in Wake County Superior Court on 19 June 2007. The Honorable R. Allen Baddour, Jr. issued a memorandum and order on 18 February 2008 affirming respondent's declaratory ruling. Petitioner appealed.

IV. Standard of Review

The issue presented on appeal is a question of statutory construction.

> The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute. The first step in determining a statute's purpose is to examine the statute's plain language. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.

State v. Hooper, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) (internal citations and quotations omitted). "In determining whether an agency erred in interpreting a statutory term, an appellate court employs a *de novo* review." *County of Durham v. N.C. Dep't of Env't & Natural Resources*, 131 N.C. App. 395, 396, 507 S.E.2d 310, 311 (1998).

V. Arguments

Petitioner contends that "credit for the service forfeited at the time of withdrawal" as used in N.C. Gen. Stat. § 135-4 serves not only to increase his years of service for retirement purposes but also requires the respondent to treat the petitioner as if he had never withdrawn the corresponding contributions at all. Petitioner contends the legislature intended that employees who repay previously withdrawn credit should be treated as if they never withdrew the credit. Therefore, he is entitled to the benefits he would have been entitled to as if he had never withdrawn his contributions.

Respondent argues that the repayment of the withdrawn funds serves only to increase the creditable years of service, and does not entitle petitioner to any benefits that would have been available to petitioner at the time of withdrawal, or revive the prior years of service for benefits purposes. Pursuant to N.C. Gen. Stat. § 135-5(f), when an employee leaves state service and withdraws previous contributions in the retirement system not only does membership in the retirement system cease but rights to any benefits within the retirement system also cease, except for the right to repay previously withdrawn contributions as provided in N.C. Gen. Stat. § 135-4(k).

Respondent further argues that petitioner's interpretation of the statutes fails to deal with the underlying premise of *Bailey*, since petitioner vested after 12 August 1989. According to respondent, up until the moment petitioner vested in the CJRS in 1995, he had no rights of any kind in the retirement system arising from his prior service. Upon vesting in 1995, the only right petitioner had regarding his prior service was the right to repay his previously withdrawn contributions.

Petitioner does not rely on vested rights or vesting to establish his eligibility to obtain the benefits provided by the legislature; rather he relies on the relevant statutes, N.C. Gen. Stat. §§ 135-5(f) and 135-4(k). When an employee leaves state employment and seeks to recover contributions:

> Should a member cease to be a teacher or State employee except by death or retirement under the provisions of this Chapter, he shall upon submission of an application be paid . . . his contributions. . . . Upon payment of such sum his membership in the System shall cease and, if he thereafter again becomes a member, no credit shall be allowed for any service previously rendered except as provided in G.S. 135-4, and such payment shall be in full and complete discharge of any rights in or to any benefits otherwise payable hereunder.

N.C. Gen. Stat. § 135-5(f) (2008).

When an employee returns to service and completes five years of service, the employee can repay an amount that corresponds with the contributions that were previously withdrawn.

> Notwithstanding any other provision of this Chapter, any person who withdrew his contributions in accordance with the provisions of G.S. 128-27(f) or G.S. 135-5 . . . and who subsequently returns to service may, upon completion of five years of membership service, repay . . . any and all of the accumulated contributions previously withdrawn . . . and receive credit for the service forfeited at the time of withdrawal. . . .

N.C. Gen. Stat. § 135-4(k) (2008).

Petitioner argues that by using the language "[n]otwithstanding any other provision of this Chapter" the legislature intended to prohibit the application of, not just provisions that might contradict N.C. Gen. Stat. § 135-4, but also any provisions that could be read in conjunction with N.C. Gen. Stat. § 135-4. Petitioner contends the language of N.C. Gen. Stat. § 135-5(f) should be disregarded when determining the meaning of N.C. Gen. Stat. § 135-4.

In the alternative, petitioner argues, even if the "notwithstanding" language requires both statutes should be given effect, the language "[e]xcept as provided in N.C. Gen. Stat. § 135-4" indicates that the legislature intended N.C. Gen. Stat. § 135-5(f) has no effect on a claim for benefits under N.C. Gen. Stat. § 135-4. We disagree.

Our Supreme Court specifically addressed the meaning of "notwithstanding any other provision of this Chapter" as used throughout N.C. Gen. Stat. § 135-4. *Osborne v. Consolidated Judicial Retirement System*, 333 N.C. 246, 424 S.E.2d 115 (1993). In *Osborne*, a judge who was a member of the CJRS challenged respondent's method of calculating his cost to purchase retirement credits based upon his prior military service. *Id.* at 246, 424 S.E.2d at 116. The resolution depended upon the interpretation of a section of N.C. Gen. Stat. § 135-4 that was in effect on 7 December 1980 when the judge became eligible to purchase retirement credits based on his military service. The section began "[n]otwithstanding any other provision of this Chapter" and set out a formula to calculate his costs. *Id.* at 247, 424 S.E.2d at 116. The second section of 135-4 stated the purchase had to be made within three years. *Id.* at 248, 424 S.E.2d at 117. The judge argued the "notwithstanding" language precluded the application of the statute which imposed a three year limitation. The judge also argued that the plain meaning of these words is that no other provision of Section 135 could be read to limit the section in which this language is found. *Id.* at 248, 424 S.E.2d at 117. The Supreme Court disagreed.

Although the section beginning "notwithstanding" gave the judge the right to purchase retirement credits, there was nothing in the statute that said how long his rights remained open. The three year limitation in the second section did not make the two subsections inconsistent. *Id.* at 248, 424 S.E.2d at ——. The Court read both subsections together to "give effect to both subsections." *Id.*

Just as the Supreme Court in *Osborne* gave effect to both relevant subsections of N.C. Gen. Stat. § 135, we too must read N.C. Gen. Stat. § 135-5 in conjunction with N.C. Gen. Stat. § 135-4. Read together, the statutes make clear that a member of a state retirement system who leaves state service and withdraws contributions in the retirement system has no rights to any benefits within the retirement system except for the right to repay previously withdrawn contributions as provided in N.C. Gen. Stat. § 135-4.

The legislature made a special provision for employees who return to state employment. Specifically, if an employee returns to service and completes five years of service, the employee has the right to repay "any and all of the accumulated contributions previously withdrawn." N.C. Gen. Stat. § 135-4(k). This provision gives the employee the option to either repay all previously withdrawn contributions, or a portion of any previously withdrawn contributions. If we accepted

petitioner's interpretation requiring the respondent to treat an employee who repays previously withdrawn contributions as if he had not withdrawn his original contributions, we would be giving employees the opportunity to create their own vesting date. While petitioner contends that his argument is not based on vested rights, the practical effect of treating an employee who purchases previously withdrawn credit as if the contributions had never been withdrawn is to change the employee's vesting date.

Petitioner acquired the right to repay his previously withdrawn contributions because he vested in the retirement system in 1995. It would be a strained statutory interpretation to allow his vesting date to shift depending on the amount of previously withdrawn contributions the employee chooses to repay.

Petitioner's argument is weakened further upon a close examination of the definitions sections of both TSERS, and CJRS. "Creditable Service" is defined in the definition section of the TSERS chapter as "the total of 'prior service' plus 'membership service' plus service, both noncontributory and purchased, for which credit is allowable as provided in G.S. 135-4. In no event, however, shall 'creditable service' be deemed 'membership service' for the purposes of determining eligibility for benefits accruing under this Chapter." N.C. Gen. Stat. § 135-1(8) (2007). The CJRS provides a similar, albeit more concise definition of "Creditable Service:" "the total of his prior service plus his membership service." N.C. Gen. Stat. § 135-53(6) (2007). The statute makes clear that the character of the service changes. Specifically, service purchased as allowed by N.C. Gen. Stat. § 135-4 does not retain the same character as it had as membership service.

While not addressing the exact statute before this Court, on 2 October 2000 the North Carolina Office of the Attorney General provided its interpretation of a similar provision related to the repayment of credit in the Local Government Employees' Retirement System. *Opinion of Attorney General to Mr. Ralph D. Karpinos, Town Attorney, Town of Chapel Hill*, 2000 N.C. AG LEXIS 12 (10/2/2000). In applying *Bailey*, the Attorney General's Office determined that a purchase of credit would provide employees credit at the present for service rendered in the past. It could not change the fact that, as of 12 August 1989, the employees were not vested in the retirement system. "Purchasing the service credit in 2000 does not retroactively vest them as of 1989, but instead gives them current credit for the purchased time." *Id.* at 2.

"In determining whether an agency erred in interpreting a statutory term, an appellate court employs a *de novo* review. However, even when reviewing a case *de novo*, courts recognize the long-standing tradition of according deference to the agency's interpretation." *County of Durham*, 131 N.C. App. at 397, 507 S.E.2d at 311. "It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation . . . [as] long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Carpenter v. N.C. Dept. of Human Resources*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992). However, when "the only authority for the agency's interpretation of the law is the decision in that case, that interpretation may be viewed skeptically on judicial review. . . . [I]f the agency's interpretation of the law is not simply a 'because I said so' response to the contested case, then the agency's interpretation should be accorded . . . deference. . . ." *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252-3 (2007).

The Department of the State Treasurer had not, prior to this case, provided an interpretation of N.C. Gen. Stat. §§ 135-5(f) and 135-4, so its present argument does not enjoy the deference to which it might otherwise be entitled. However, upon the request by petitioner for a declaratory ruling, the agency provided a ruling with a thorough analysis of the issue and case law. Respondent's interpretation is not a "because I said so" response. Moreover, it is reasonable and based on a permissible construction of the statutes.

VI. Conclusion

After contributing to either TSERS or CJRS continuously for five years, members become vested in the retirement system. Petitioner was vested in the TSERS in 1981 and at that time would have been entitled to a tax-free pension under *Bailey*. Petitioner withdrew his contributions in the TSERS in 1982. By withdrawing his contributions from the TSERS in 1982, petitioner had no rights within the system. Petitioner, upon completing five years of service in CJRS in 1995, again became vested within the system. It is only due to his vesting in 1995 that petitioner gained the right to purchase all previously withdrawn contributions.

Petitioner had "a contractual right to rely on the terms of the retirement plan as these terms existed at the moment [his] retirement rights became vested." *Bailey*, at 141, 500 S.E.2d at 60 (citations omitted). Conversely, petitioner may not rely on the terms of the retire-

ment plan as they existed prior to his vesting date. The state may change the terms of state retirement plans and those changes are binding on state employees who have not yet vested in the retirement system. Upon withdrawing his contributions in the TSERS, petitioner divested himself as a member of the retirement systems and gave up any right to the benefits he would have been entitled to had he remained vested in the system.

On the *Bailey* date, 12 August 1989, petitioner was not vested in the retirement system, was not a member of the *Bailey* class, and therefore was not entitled to a tax-free pension. Petitioner's repayment of contributions withdrawn prior to 12 August 1989 does not entitle petitioner to a tax-free pension. The repayment of previously withdrawn contributions serves only to increase the years of service creditable to an employee. The trial court's decision is affirmed.

Affirmed.

Judges STEELMAN and STROUD concur.

MAHATAM S. JAILALL, PETITIONER v. NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, RESPONDENT

No. COA08-352

(Filed 7 April 2009)

Administrative Law— termination without just cause by reduction in force—OAH jurisdiction

The Office of Administrative Hearings (OAH) did not have subject matter jurisdiction of a petition for a contested case hearing brought by a former career employee of the Department of Public Instruction alleging that he had been discharged without just cause when his employment was terminated as a result of a reduction in force (RIF) because: (1) N.C.G.S. § 126-34.1 provides the statutory list of exclusive appeal grounds, and the list does not provide for appeals to OAH of RIFs based on lack of just cause; (2) the Court of Appeals is bound by the decision in *University of North Carolina at Chapel Hill v. Feinstein*, 161 N.C. App. 700 (2003), and the distinction between university employees as opposed to DPI employees is immaterial to the

analysis; and (3) the prior Court of Appeals decision in *White v. N.C. Dep't of Corr.*, 117 N.C. App. 521 (1995), is not relevant to the facts of this case because *White* held that the employer cannot avoid the requirement of "just cause" by placing the label of involuntary "leave without pay" on an action that is in actuality a suspension, and petitioner has not specifically argued in his contested case petition, his petition for judicial review, or on appeal that the RIF in this case was not actually a RIF, but instead was a sham RIF falling within the scope of *White*.

Appeal by petitioner from order entered 3 March 2008 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 11 September 2008.

Law Offices of Michael C. Byrne, P.C., by Michael C. Byrne, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for respondent-appellee.

State Employees Association of North Carolina, Inc., by Thomas A. Harris, General Counsel, for amicus curiae State Employees Association of North Carolina, Inc.

GEER, Judge.

Petitioner Mahatam S. Jailall appeals from the superior court's order affirming the dismissal of his contested case by the Office of Administrative Hearings ("OAH"). Jailall's petition for a contested case hearing alleged that he had been discharged without just cause when his employment was terminated as a result of a reduction in force ("RIF"). Both the OAH administrative law judge ("ALJ") and the superior court concluded that *Univ. of N.C. at Chapel Hill v. Feinstein*, 161 N.C. App. 700, 590 S.E.2d 401 (2003), *disc. review denied*, 358 N.C. 380, 598 S.E.2d 380 (2004), required that the contested case be dismissed. Although Jailall contends that *Feinstein* is distinguishable, we have concluded it controls this appeal, and, under *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), we are required to affirm the decision below. The concerns raised by both Jailall and the amicus curiae, State Employees Association of North Carolina, Inc., as to the consequences of *Feinstein* cannot influence this panel's decision, but rather must be addressed to the Supreme Court and the General Assembly.

Facts

In 2007, Jailall was employed as an education consultant by respondent North Carolina Department of Public Instruction ("DPI"). Because he had in excess of 24 months of continuous state service, he was a career State employee under N.C. Gen. Stat. § 126-1.1 (2007). On 30 August 2007, DPI sent Jailall a "Notice of Reduction in Force (RIF) Separation." The notice stated that his position was 100% funded by a federal program that had been discontinued and, therefore, the funding for his position would expire on 30 September 2007. The notice advised Jailall that he had a right to appeal the decision to terminate his employment and that he was entitled to priority re-employment.

On 2 October 2007, Jailall filed a petition for a contested case with OAH, alleging that he was selected for the RIF because of "(a) his race and national origin (Asian Indian and Guyana, respectively), in violation of state and federal law, and (b) for the additional discriminatory reason of protecting from RIF on the grounds of race the positions of one or more African-American females having less seniority than Petitioner, also in violation of state and federal law." After following DPI's internal grievance procedures and obtaining a final agency decision upholding his RIF on 2 November 2007, Jailall filed a second petition with OAH on 7 November 2007, alleging that he was "involuntarily separated from employment without just cause." In this petition, Jailall alleged that DPI "(1) [e]xceeded its authority or jurisdiction, (2) [a]cted erroneously, (3), [sic] [f]ailed to use proper procedure, (4) [f]ailed to act as required by law or rule, and/or (5) was arbitrary, capricious, and/or abused its discretion."

On 10 December 2007, DPI moved to dismiss the 7 November 2007 petition pursuant to N.C.R. Civ. P. 12(b)(1) or (b)(6) or alternatively for summary judgment. DPI noted that the petition asserted that the RIF was without just cause. DPI contended that *Feinstein* precluded such a claim and, therefore, OAH had no jurisdiction over Jailall's petition. On 21 December 2007, the OAH ALJ granted DPI's motion pursuant to N.C.R. Civ. P. 12(b)(1).

On 2 January 2008, Jailall filed a petition for judicial review in Wake County Superior Court. The Honorable A. Leon Stanback entered an order on 3 March 2008, noting that Jailall alleged that he was involuntarily separated from employment due to a RIF and that he was entitled to appeal his involuntary RIF separation under N.C. Gen. Stat. § 126-34.1 (2007) for lack of just cause and for procedural

violations. The trial court ruled: "Based upon reviewing the legal question raised in this petition for judicial review on a *de novo* basis, this Court finds that it is constrained by the Court of Appeals' decision in *Univ. of N.C. at Chapel Hill v. Feinstein*, 161 N.C. App. 700, 590 S.E.2d 401 (2003), [*disc. review denied*], 358 N.C. 380, 598 S.E.2d 380 (2004), holding that career state employees separated under a RIF could not bring either just cause or procedural appeals based on that separation." The trial court, therefore, affirmed the ALJ's decision dismissing Jailall's contested case petition. Jailall timely appealed to this Court.

Discussion

Jailall argues that the trial court erred in affirming the ALJ's decision dismissing Jailall's contested case for lack of subject matter jurisdiction. Jailall first contends that N.C. Gen. Stat. § 126-34.1, read in conjunction with N.C. Gen. Stat. § 126-35 (2007), provides OAH jurisdiction to hear contested cases brought by former state employees alleging that their involuntary separation due to a RIF was without just cause. Jailall also argues that OAH has subject matter jurisdiction to hear his contested case based on the allegation in his petition that DPI "[f]ailed to use proper procedure" in conducting the RIF.[1]

N.C. Gen. Stat. § 126-34.1 provides in pertinent part:

> (a) A State employee or former State employee may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes only as to the following personnel actions or issues:
>
> (1) Dismissal, demotion, or suspension without pay based upon an alleged violation of G.S. 126-35, if the employee is a career State employee.
>
> . . . .
>
> (e) Any issue for which appeal to the State Personnel Commission through the filing of a contested case under Article 3 of Chapter 150B of the General Statutes has not been specifically

1. Because the ALJ dismissed the petition under Rule 12(b)(1) for lack of subject matter jurisdiction, the documents attached to DPI's motion were properly considered. *See Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 327, 605 S.E.2d 161, 163 (2004) ("In considering a motion to dismiss for lack of subject matter jurisdiction, it is appropriate for the court to consider and weigh matters outside of the pleadings."), appeal dismissed and disc. review denied, 359 N.C. 326, 611 S.E.2d 853, cert. denied, 546 U.S. 819, 163 L. Ed. 2d 59, 126 S. Ct. 350 (2005).

> authorized by this section shall not be grounds for a contested case under Chapter 126.

N.C. Gen. Stat. § 126-34.1(a)(1) and (e). In turn, N.C. Gen. Stat. § 126-35, the provision referenced in N.C. Gen. Stat. § 126-34.1(a)(1), states:

> (a) No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. . . .
>
> . . . .
>
> (c) For the purposes of contested case hearings under Chapter 150B, an involuntary separation (such as a separation due to a reduction in force) shall be treated in the same fashion as if it were a disciplinary action.

N.C. Gen. Stat. § 126-35(a) and (c).

Jailall reads the reference in N.C. Gen. Stat. § 126-34.1(a)(1) to N.C. Gen. Stat. § 126-35 as establishing OAH jurisdiction over his just cause RIF claim "given [that] 126-35 itself states that the statute is violated not only by a disciplinary dismissal without just cause, but also by an involuntary separation, 'such as . . . a [RIF],' without just cause . . . ." *Feinstein*, however, holds to the contrary.

In *Feinstein*, three state employees who worked in the university system had their positions eliminated as a result of a RIF. 161 N.C. App. at 701-02, 590 S.E.2d at 402. On appeal, this Court addressed whether N.C. Gen. Stat. § 126-34.1 "excludes appeals to OAH of RIFs on grounds of lack of just cause and procedural violations." *Id.* at 702, 590 S.E.2d at 402.

With respect to whether an employee dismissed as a result of a RIF may assert a claim for dismissal without just cause, the panel in *Feinstein* noted first:

> N.C. Gen. Stat. § 126-34.1(a)(1) specifically refers to "dismissal, demotion, or suspension" without just cause but does not mention RIFs for lack of just cause as a basis for appealing a RIF. RIFs are specifically referred to only twice in the statute. The General Assembly clearly stated in N.C. Gen. Stat. § 126-34.1 that a contested case that "has not been *specifically authorized* by this section *shall not* be grounds for a contested case under Chapter 126." N.C. Gen. Stat. § 126-34.1(e) (2001) (emphasis supplied).

Id. at 704, 590 S.E.2d at 403. The Court reiterated: "The language of N.C. Gen. Stat. § 126-34.1 clearly and unambiguously states that the statutory list of appeal grounds in N.C. Gen. Stat. § 126-34.1 is exclusive. *This list does not provide for appeals to OAH of RIFs based on lack of just cause.*" *Id.* (emphasis added).

The Court acknowledged the language in N.C. Gen. Stat. § 126-35(c) providing that a separation due to a reduction in force "shall be treated in the same fashion as if it were a disciplinary action," N.C. Gen. Stat. § 126-35(c), but noted that § 126-34.1 was enacted five years after N.C. Gen. Stat. § 126-35. *Feinstein*, 161 N.C. App. at 704, 590 S.E.2d at 403. The Court then reasoned:

> By its own terms of exclusion, N.C. Gen. Stat. § 126-34.1 supersedes and controls over any contrary earlier enactments. N.C. Gen. Stat. § 126-35(c) existed as statutory law when N.C. Gen. Stat. § 126-34.1(e) was enacted. Our Supreme Court has held that construing conflicting statutes to give validity and effect to both is only possible if it can be done without destroying the evident intent and meaning of the later enacted act. Given its clear and unambiguous language, the later enacted N.C. Gen. Stat. § 126-34.1 supplants N.C. Gen. Stat. § 126-35. Otherwise, the evident intent of the later enacted N.C. Gen. Stat. § 126-34.1 in setting out the specific contested cases that are appealable to OAH would be eliminated.

Id. (internal citations omitted).

With respect to the employees' claim that the university had violated the procedures governing RIFs, the panel in *Feinstein* reviewed the legislative history of the bills resulting in N.C. Gen. Stat. § 126-34.1 and concluded:

> Here, the General Assembly considered granting state employees the right to bring RIF policy violations as a contested case before OAH. Both the House and Senate bills were amended to delete this particular ground from contested cases. The ratified bill enacted excluded this ground. The General Assembly clearly intended to deny OAH jurisdiction over challenges to RIFs on procedural violation grounds and to grant state employees the right to bring only those RIF claims that are specifically set out in N.C. Gen. Stat. § 126-34.1 before OAH.

Feinstein, 161 N.C. App. at 705, 590 S.E.2d at 404.

The Court then concluded: "The trial court erred in holding that the later enacted N.C. Gen. Stat. § 126-34.1 does not supersede N.C. Gen. Stat. § 126-35(c) and that OAH has jurisdiction to determine whether respondents' RIFs were based on lack of just cause or procedural violations." *Id.* at 706, 590 S.E.2d at 404. The Court reversed and remanded to the superior court for entry of an order directing OAH to grant the university's motion to dismiss. *Id.*

Jailall and the amicus each argue that the *Feinstein* panel's analysis of the applicable statutes and the legislative history of N.C. Gen. Stat. § 126-34.1 is flawed. We are not, however, free to revisit that panel's analysis. *See State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004) ("While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court.").

Alternatively, Jailall argues that *Feinstein* is distinguishable because the employees in *Feinstein* were former employees of the North Carolina University system and, therefore, exempt from the contested case provisions in the Administrative Procedure Act ("APA"). *See* N.C. Gen. Stat. § 150B-1(f) (2007) (exempting University system from all but judicial review provisions of APA). Jailall points to *Feinstein's* acknowledgement of the employees' exemption from the APA and the panel's subsequent assertion that "[t]he rights of university employees to challenge any employment action in OAH must derive independently, from [t]he State Personnel Act." 161 N.C. App. at 703, 590 S.E.2d at 402. The Court further stated that "OAH's jurisdiction over appeals of university employee grievances exists solely within the limits established by the State Personnel Act." *Id.*, 590 S.E.2d at 403 (citing *Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Res.*, 337 N.C. 569, 579, 447 S.E.2d 768, 774 (1994)).

Jailall notes that DPI employees, in contrast to the *Feinstein* employees, are subject to both the APA and the State Personnel Act ("SPA"). He contends that, based on this distinction, even if he cannot bring his just cause RIF claim as a contested case under N.C. Gen. Stat. § 126-34.1(a)(1), he is entitled to bring it under Article 3 of the APA, N.C. Gen. Stat. §§ 150B-22 through 150B-37 (2007). In making this argument, he relies upon the Supreme Court's decision in *Empire Power*.

In *Empire Power*, the Supreme Court "reaffirmed" the general principle that "the NCAPA confers upon any 'person aggrieved' the right to commence an administrative hearing to resolve a dispute with an agency involving the person's rights, duties, or privileges." 337 N.C. at 584, 447 S.E.2d at 777. A petitioner is entitled to bring a contested case under N.C. Gen. Stat. § 150B-23 (2007) "to resolve a dispute involving his rights, duties, or privileges, unless (1) he is not a 'person aggrieved,' by the decision of the [agency], or (2) the organic statute . . . amends, repeals or makes an exception to the NCAPA so as to exclude him from those expressly entitled to appeal thereunder." *Empire Power*, 337 N.C. at 588, 447 S.E.2d at 779 (internal citation omitted). *Accord North Buncombe Ass'n of Concerned Citizens, Inc. v. N.C. Dep't of Env't, Health & Natural Res.*, 338 N.C. 302, 304, 449 S.E.2d 451, 453 (1994) ("[T]he APA grants the right to a contested case hearing to all persons aggrieved by a state agency decision unless jurisdiction is expressly excluded by the APA or the organic act which created the right.").

There is no dispute that Jailall is a "person aggrieved" within the meaning of the APA, N.C. Gen. Stat. § 150B-2(6) (2007). As the Supreme Court acknowledged in *Empire Power*, the organic statute at issue for state employees is the SPA:

> For example, permanent state employees of agencies not expressly exempted from the administrative hearing provisions of the NCAPA, as was the case in *Batten* [*v. N.C. Dep't of Corr.*, 326 N.C. 338, 389 S.E.2d 35 (1990), *overruled in part by Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Res.*, 337 N.C. 569, 447 S.E.2d 768 (1994)], and subject to the State Personnel Act, are entitled to an administrative hearing by virtue of the NCAPA as well as the State Personnel Act. In turn, it is only because the latter act, N.C.G.S. § 126-35, creates a right in public employment, *i.e.*, the right not to be discharged, suspended or reduced in pay or position except for just cause, *see Batten*, 326 N.C. at 343, 389 S.E.2d at 38-39, that the employee is entitled to a hearing by virtue of the NCAPA also. But for N.C.G.S. § 126-35, those employees can have no dispute involving their *rights*, *duties*, *or privileges*, within the meaning of N.C.G.S. § 150B-22.

337 N.C. at 583 n.1, 447 S.E.2d at 777 n.1.

Article 8 of the SPA, the "organic statute" in this case, is titled "Employee Appeals of Grievances and Disciplinary Action." Within this Article falls N.C. Gen. Stat. § 126-34.1, which is entitled "Grounds

for contested case under the State Personnel Act defined."[2] The SPA, through N.C. Gen. Stat. § 126-34.1(a) and (e), expressly "define[s]" the "only" types of "personnel actions or issues" that may be grounds for a contested case in OAH under Article 3 of the APA and unequivocally excludes from OAH jurisdiction those contested cases based on grounds "not . . . specifically authorized" by the statute. Under *Empire Power*, OAH's jurisdiction over DPI employees' contested cases derives exclusively from the SPA and not from the APA. *See also Dunn v. N.C. Dep't of Human Res.*, 124 N.C. App. 158, 161, 476 S.E.2d 383, 385 (1996) ("By [enacting N.C. Gen. Stat. § 126-34.1(e)], the General Assembly has indicated its intent to create grounds for appeal to the Commission through a contested case hearing only on issues for which appeal has been specifically authorized in G.S. section 126-34.1."). In other words, the distinction between *Feinstein* and this case—university employees as opposed to DPI employees—is immaterial to the analysis. *Feinstein's* holding is, therefore, controlling.

The amicus argues, however, that *Feinstein* effectively overruled a prior decision of this Court: *White v. N.C. Dep't of Corr.*, 117 N.C. App. 521, 451 S.E.2d 876 (1995). As the amicus notes, when two opinions of this Court conflict, we are obligated to follow "the older of the two cases." *In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005). *White* is not, however, relevant to the alleged facts of this case. As this Court stated in *White*, the question presented for review was: "[W]hen respondent placed petitioner on leave without pay, was this the equivalent of suspension for disciplinary reasons within the meaning of N.C.G.S. § 126-35?" *White*, 117 N.C. App. at 528, 451 S.E.2d at 881. After acknowledging that leave without pay can be a benefit to the employee, the Court pointed out that the employee "made no application for leave without pay. Instead, respondent placed him involuntarily on sick leave until his accumulated time elapsed, then required him to expend his accumulated vacation, and finally placed him on leave without pay." *Id.* at 529, 451 S.E.2d at 882. The Court concluded that involuntarily placing an employee on leave without pay cannot be distinguished from a suspension: "This was, in essence, a suspension, which could not be made without just cause." *Id.*

Amicus asserts that *White* established "[t]he principle . . . that a state career state [sic] employee's involuntary displacement from his

2. Empire Power was decided prior to the 1995 amendments to the SPA and, therefore, does not specifically mention N.C. Gen. Stat. § 126-34.1, which was enacted as part of those amendments. See 1995 N.C. Sess. Laws ch. 141.

job by his employer is, in essence, a disciplinary action for which Gen. Stat. § 126-35(a) requires just cause . . . ." *White* cannot be read this expansively. Instead, it holds that the employer cannot avoid the requirement of "just cause" by placing the label of involuntary "leave without pay" on an action that is in actuality a suspension.

While *White* is not inconsistent with *Feinstein*, it does protect employees from the negative consequences of *Feinstein* forecast by the amicus. According to amicus, "[t]he Superior Court's ruling, as it stands, allows a state agency employer to avoid OAH review of any disciplinary dismissal of an employee by simply stating that the purported reason for the dismissal is a RIF." Under *White*, however, an employee can still argue that the termination of his employment was not actually the result of a RIF, but rather the RIF label was used to disguise a dismissal without cause that would fall within the scope of N.C. Gen. Stat. § 126-34.1(a)(1). Moreover, an employee bringing a contested case under N.C. Gen. Stat. § 126-34.1(a)(2) may still argue that his purported RIF was a pretext for unlawful discrimination. *See, e.g.*, *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1194 (10th Cir. 2006) ("Where an employee is selected for RIF termination solely on the basis of position elimination, qualifications become irrelevant and one way that employee can show pretext is to present evidence that his job was not in fact eliminated but instead remained a single, distinct position." (internal quotation marks omitted)); *Christie v. Foremost Ins. Co.*, 785 F.2d 584, 586-87 (7th Cir. 1986) (holding that failure of defendant to comply with its own RIF policy allowed jury to conclude RIF was pretextual).

In this case, however, Jailall has not specifically argued in his contested case petition, his petition for judicial review, or on appeal that the RIF in this case was not actually a RIF, but instead was a sham RIF falling within the scope of *White*. The amicus' theory, arising out of *White*, cannot, therefore, serve as a basis for reversing the order below.[3] Under *Feinstein*, the trial court properly upheld the ALJ's decision dismissing Jailall's claim that his RIF lacked just cause and was the result of procedural violations. Accordingly, we must affirm the trial court's order.

Affirmed.

Judges STEELMAN and STEPHENS concur.

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3. Although the amicus suggests that Jailall's reference to the "purported RIF" suggests that he was making the argument proposed by the amicus, the mere use of the

STATE OF NORTH CAROLINA v. HARVEY LEE NEAL, JR.

No. COA08-690

(Filed 7 April 2009)

1. Drugs— possession of cocaine with intent to sell or deliver—sale of cocaine—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of possession of cocaine with intent to sell or deliver and the sale of cocaine because: (1) defendant cited no North Carolina cases holding or implying that the trial court may override a jury's duty to weigh the credibility of a witness, and thus this argument is deemed abandoned under N.C. R. App. P. 28(b)(6); and (2) although defendant argued that the quantity of the drug seized was a relevant factor in determining whether defendant had an intent to sell, defendant admitted in his brief that the State presented evidence of defendant's actual sale of cocaine.

2. Jury— observation of defendant's prior criminal record—failure to question jury

The trial court did not err in a possession of cocaine with intent to sell or deliver and the sale of cocaine case by failing to question the jury about whether it had observed defendants' criminal record when the State reviewed a printed copy of it at counsel table during the jury charge because: (1) the trial court took judicial notice that the first row of the jury box was twenty feet from the State's counsel table and that it would be physically impossible from that distance for any juror to read the papers; and (2) the trial court exercised sound discretion in deciding not to disturb deliberations to individually question the jurors.

3. Sentencing— habitual felon—same underlying felony used for underlying conviction

The trial court did not err by using defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious

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word "purported" without argument or discussion is too slim a reed on which to base a conclusion that Jailall intended to argue that his RIF falls within White. We also note that Jailall's contested case petition based on discrimination is still pending and not before us. Nothing in this opinion is intended to express any opinion on that contested case petition.

injury as an underlying prior felony for both the possession of a firearm by a felon charge and the habitual felon charge because the Court of Appeals has previously held that elements used to establish an underlying conviction may also be used to establish a defendant's status as an habitual felon.

4. Constitutional Law— right to fair and impartial jury—magistrate judge with prior involvement in case seated on jury

A defendant was deprived of his right to a fair and impartial jury in a drug case by the seating of a magistrate judge as a member and foreperson of the jury when the magistrate judge had prior involvement with defendant's case and had previous knowledge of defendant, and defendant's motion for appropriate relief is granted with defendant being given a new trial, because: (1) a specific inquiry into the mind of the person directly involved is not necessary to hold that a defendant's right to due process was violated by that person's participation; (2) defendant need not demonstrate that the magistrate shared the information about defendant with the other members of the jury since defendant was entitled to a jury of twelve; (3) having been a part of the process of charging defendant, the magistrate inherently cannot be wholly disinterested in the conviction or acquittal of defendant; and (4) whether the magistrate remembers his prior involvement with defendant, his participation as a jury member so undermined the confidence in the integrity of defendant's trial that defendant's conviction was obtained in violation of the United States and North Carolina Constitutions.

Appeal by Defendant from judgments entered 28 November 2007 by Judge Jack A. Thompson in Superior Court, Johnston County. Heard in the Court of Appeals 14 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly D. Potter, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Charles K. McCotter, Jr. for Defendant-Appellant.

McGEE, Judge.

Harvey Lee Neal, Jr. (Defendant) was convicted by a jury of possession of cocaine with the intent to sell or deliver and the sale of cocaine in 06 CRS 54823 on 28 November 2007. Defendant entered

pleas of guilty to possession of a firearm by a felon in 06 CRS 53645[1] and to being a habitual felon in 07 CRS 04060 on 28 November 2007. Defendant's convictions in 06 CRS 54823 were consolidated for judgment and the trial court sentenced Defendant to a term of 107 months to 138 months in prison. Defendant's sentences in 06 CRS 53645 and 07 CRS 04060 were consolidated and the trial court sentenced Defendant to a term of 107 months to 138 months in prison for those charges. Defendant's sentences run concurrently. Defendant appealed and filed a motion for appropriate relief with his appeal.

At trial, the State presented the following evidence: Carlotta Watson (Watson), a confidential informant, testified that on 3 March 2006, she met with officers of the Kenly Police Department in a graveyard to discuss making buys from persons selling illegal drugs. While in the graveyard, Defendant passed by and the officers asked Watson to make a drug purchase from Defendant. Watson agreed and officers placed a wire on her. Watson testified that she walked to a nearby trailer park where she found Defendant. Watson gave Defendant twenty dollars and Defendant gave her crack cocaine in return.

Chief Joshua Gibson with the Kenly Police Department also testified regarding the arranged buy between Watson and Defendant on 3 March 2006. Chief Gibson said officers wired Watson and tape recorded the drug sale. However, the tape recording was lost prior to trial. Chief Gibson testified that while there was surveillance of the drug purchase, he did not actually see it take place.

Lori Knops (Knops), a forensic chemist for the State Bureau of Investigation, testified regarding the chain of custody of the substance Watson purchased from Defendant. Knops testified the substance analyzed from the purchase was one-tenth of a gram of cocaine base.

At the close of the State's evidence, Defendant moved to dismiss the charges for insufficiency of the evidence. The trial court denied Defendant's motion. Defendant presented no evidence and renewed his motion to dismiss. The trial court again denied Defendant's motion.

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1. The record indicates the State dismissed Defendant's possession of a firearm charge in 06 CRS 53645 on 15 February 2007 and recharged Defendant with possession of a firearm by a felon in 07 CRS 1183. However, the transcript of Defendant's plea, prior record level worksheet, judgment, and the notice of appeal all reference 06 CRS 53645 as the case number for Defendant's charge of possession of a firearm by a felon.

I.

[1] Defendant assigns error to the trial court's denial of his motions to dismiss the charges of possession of cocaine with the intent to sell or deliver and the sale of cocaine for insufficiency of the evidence. Defendant contends that (1) issues with Watson's credibility warranted dismissal and (2) the quantity of cocaine seized did not support the "intent to sell" element.

The standard of review for a motion to dismiss in a criminal trial is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lessor offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "In reviewing challenges to the sufficiency of the evidence, [our Court] must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)).

The offense of possession with intent to sell or deliver has three elements: (1) there must be possession of a substance, (2) the substance must be a controlled substance, and (3) there must be an intent to distribute or sell the controlled substance. *State v. Casey*, 59 N.C. App. 99, 116, 296 S.E.2d 473, 483-84 (1982). The offense of sale of cocaine has two elements: (1) the sale or delivery of (2) a controlled substance (cocaine). N.C. Gen. Stat. § 90-95(a)(1) (2007).

Credibility of a witness is generally an issue for jury determination. *State v. Smith*, 360 N.C. 341, 348, 626 S.E.2d 258, 262 (2006). Defendant cites no North Carolina decisions holding or implying that the trial court may override a jury's duty to weigh the credibility of a witness. Therefore, pursuant to N.C.R. App. P. 28(b)(6), we deem this argument abandoned.

Defendant argues the quantity of the drug seized is a relevant factor in determining whether Defendant had an intent to sell. However, Defendant admits in his brief that the State presented evidence of Defendant's *actual* sale of cocaine. Therefore, we find the State clearly presented substantial evidence of each element of the offenses. Defendant's first argument is without merit.

II.

[2] Defendant next argues the trial court erred in not questioning the jury about whether the jury had observed Defendant's criminal record

when the State reviewed a printed copy of Defendant's criminal record at counsel table during the jury charge. Defendant cites his right to have a "panel of impartial, indifferent, jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 6 L. Ed. 2d 751, 755 (1961). A trial court has the duty and responsibility to make investigations to ensure jurors remain impartial, uninfluenced by outside forces, and free from misconduct. *See State v. Williams*, 330 N.C. 579, 583, 411 S.E.2d 814, 817 (1992); *State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1984), *disc. review denied*, 313 N.C. 335, 327 S.E.2d 897 (1985). " '[T]he determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal.' " *State v. Buckom*, 126 N.C. App. 368, 382, 485 S.E.2d 319, 328 (1997), *cert. denied*, 522 U.S. 973, 139 L. Ed. 2d 326 (1997) (quoting *State v. Gilbert*, 47 N.C. App. 316, 319, 267 S.E.2d 378, 379 (1980)).

After the jury retired, Defendant brought to the trial court's attention the fact that the State physically reviewed a printed copy of Defendant's criminal record during the jury charge. Defendant expressed concern that there was a possibility that one or more jurors were aware the State was looking at Defendant's printed criminal record. After hearing Defendant's argument, the trial court determined that no prejudicial error had been committed and that it was not necessary to interrupt jury deliberations to specifically question the jurors. Defendant contends that by refusing to specifically question the jurors, the trial court abused its discretion by failing in its responsibility to ensure the jurors remained impartial. However, the trial court took judicial notice that the first row of the jury box was twenty feet from the State's counsel table. The trial court noted it would be physically impossible from that distance for any juror to read the papers at the State's counsel table. Therefore, we find the trial court exercised sound discretion in deciding not to disturb deliberations to individually question the jurors. Defendant's second argument is without merit. [T. P. 163]

III.

[3] Defendant argues the trial court erred in using Defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious injury as an underlying prior felony for both the possession of a firearm by a felon charge and the habitual felon charge. Defendant contends the use of the same felony for both charges violates his right to be free from double jeopardy. However, our Court has determined that "elements used to establish an underlying conviction may also be used to establish a defendant's status as a habitual felon." *State v.*

Glasco, 160 N.C. App. 150, 160, 585 S.E.2d 257, 264, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003) (citing *State v. Misenheimer*, 123 N.C. App. 156, 158, 472 S.E.2d 191, 192-93, *cert. denied*, 344 N.C. 441, 476 S.E.2d 128 (1996)); *see also State v. Crump*, 178 N.C. App. 717, 632 S.E.2d 233 (2006), *disc. review denied*, 361 N.C. 431, 648 S.E.2d 851 (2007). Therefore, Defendant's third argument is without merit.

IV.

[4] Defendant argues both on appeal and in a motion for appropriate relief filed with our Court that he was deprived of his right to a fair and impartial jury by the seating of Johnston County Magistrate James Michael Whitley (Magistrate Whitley) as a member and foreperson of the jury because Magistrate Whitley had prior involvement with Defendant's case and had previous knowledge of Defendant. The relevant facts pertaining to this issue are as follows.

It is undisputed by the State that Magistrate Whitley had prior knowledge of Defendant dating back to 1997, and he was directly involved in the charges for which Defendant was being tried and for which Magistrate Whitley was sitting as foreperson of the jury. Magistrate Whitley was the magistrate on the return of service when Defendant was arrested on two prior drug charges in 1997. The judgment in those cases, 97 CRS 6074 and 97 CRS 6075, was attached to the indictment for possession of a firearm by a felon, and as supporting the habitual felon indictment to which Defendant pled on 28 November 2007. In addition, the two 1997 drug charges were listed on the prior record worksheet as prior felonies supporting Defendant's criminal history in the present case.

The record further shows that Magistrate Whitley signed the return of service on the warrants for possession of cocaine with the intent to sell or deliver and the sale of cocaine for which Defendant was being tried. Magistrate Whitley also signed the return of service for Defendant's charges of possession of a firearm by a felon and robbery with a dangerous weapon. Further, Magistrate Whitley was the magistrate who set the conditions of Defendant's release for the above charges as well as for an assault with a deadly weapon charge.

Magistrate Whitley was juror number twelve in the present case, and he was eventually selected to be the foreperson of the jury. There is no transcript in the record of the *voir dire* examination of the jurors. However, Defendant contends that questioning of Magistrate Whitley during the jury selection process did not reveal that

Magistrate Whitley had knowledge of Defendant's prior and current charges. After the judgments were entered and Defendant reviewed the record, Defendant realized Magistrate Whitley's personal involvement with Defendant's charges. Defendant states that had he realized Magistrate Whitley was the magistrate on the return of service in his present and prior charges, he would have challenged Magistrate Whitley for cause.

Defendant contends that allowing Magistrate Whitley to sit on the jury, both as a member of the jury and as foreperson, deprived Defendant of his right to a fair and impartial jury, and violated the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and Article I, §§ 19 and 24 of the North Carolina Constitution. However, constitutional issues not raised at trial will not ordinarily be considered for the first time on appeal. N.C.R. App. P. 10(b)(1). *See also State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). By not challenging for cause Magistrate Whitley as a juror during the jury selection process and by failing to object to Magistrate Whitley serving as a juror at any point during the trial, Defendant failed to preserve his argument that Magistrate Whitley's participation violated Defendant's constitutional rights.

However, Defendant filed a motion for appropriate relief with our Court on 14 July 2008, pursuant to N.C. Gen. Stat. § 15A-1418. N.C. Gen. Stat. § 15A-1418 states:

> (a) When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division.
>
> . . .
>
> (b) When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it. . . . If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

N.C. Gen. Stat. § 15A-1418 (2007).

The State does not dispute that Magistrate Whitley had prior knowledge of Defendant, and that he was directly involved in the charges for which Defendant was being tried and for which

Magistrate Whitley was sitting as foreperson of the jury. Further, attached to his motion for appropriate relief, Defendant submitted affidavits and copies of Defendant's previous warrants signed by Magistrate Whitley. Therefore, we are satisfied we can determine Defendant's motion for appropriate relief based on the materials before us.

In Defendant's motion for appropriate relief, Defendant contends he is entitled to appropriate relief under N.C. Gen. Stat. § 15A-1415(b)(3) because his conviction was obtained in violation of the Constitution of the United States and the Constitution of North Carolina. After review, we agree.

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant to a trial by an impartial jury. The requirement of neutrality and the appearance of impartiality are vital safeguards fiercely protected by our Courts. Our United States Supreme Court has "always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty." *Young v. U.S. ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 810, 95 L. Ed. 2d 740, 760 (1987). The United States Supreme Court has held that

> the Due Process Clause would not permit any "procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused."

Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 64 L. Ed. 2d 182, 188 (1980) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532, 71 L. Ed. 749, 758 (1927)). While we have found no prior decisions involving facts similar to the case before us where a magistrate participated in the process of charging a defendant and then sat on the defendant's jury for those same charges, several United States Supreme Court decisions are instructive on the due process requirement of the neutrality of participants in the adjudicatory process.

In *Mayberry v. Pennsylvania*, our U.S. Supreme Court concluded that "by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." *Mayberry v. Pennsylvania*, 400 U.S. 455, 466, 27 L. Ed. 2d 532, 540 (1971). In *Morrissey v. Brewer*, after concluding the require-

ments of due process in general applied to parole revocations, the Supreme Court held that "due process require[d] that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case." *Morrissey v. Brewer*, 408 U.S. 471, 485, 33 L. Ed. 2d 484, 497 (1972). In *Re Murchison*, petitioners sought review of their contempt convictions by a trial judge who had also served as the "one-man grand jury." *Re Murchison*, 349 U.S. 133, 99 L. Ed. 942 (1955). The Supreme Court in *Murchison* said:

> It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single "judge-grand jury" is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

Id. at 137, 99 L. Ed. at 946-47 (footnotes omitted).

A specific inquiry into the mind of the person directly involved is not necessary to hold that a defendant's right to due process is violated by that person's participation. *Morrissey*, 408 U.S. at 486, 33 L. Ed. 2d at 497. Further, Defendant need not demonstrate that Magistrate Whitley shared the information about Defendant with the other members of the jury because Defendant is entitled to a jury of twelve. *See State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975). If Magistrate Whitley's participation violates Defendant's right to an impartial jury, his participation also violates Defendant's right to a jury of twelve. "A trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand." *State v. Bunning*, 346 N.C. 253, 257, 485 S.E.2d 290, 292 (1997).

The United States Supreme Court, in deciding the above cases, emphasized the importance of neutrality and impartiality required by the Due Process Clause. In the case before us, Defendant had previously appeared before Magistrate Whitley. Magistrate Whitley had not only set Defendant's pre-trial release conditions, he was the magis-

trate who signed the return of service on Defendant's present charges. Further, Magistrate Whitley had signed the return of service for Defendant's two 1997 drug charges that were virtually identical to the charges in the present case for which Defendant was tried and which Magistrate Whitley sat as foreperson of the jury.

We hold Defendant's constitutional right to an impartial jury was violated because Magistrate Whitley served on Defendant's jury while having personal knowledge of Defendant's prior drug charges and after having direct involvement with the charges for which he ultimately participated in deciding Defendant's guilt or innocence. As in *Murchison*, having been a part of the process of charging Defendant, Magistrate Whitley inherently cannot be wholly disinterested in the conviction or acquittal of Defendant. *Murchison* at 137, 99 L. Ed. at 947. The requirement of neutrality and the appearance of impartiality are cornerstones upon which our system of justice rests. The perception of impermissible bias in a juror shakes the foundation of a defendant's constitutional right to an impartial jury. Therefore, whether or not Magistrate Whitley remembered his prior involvement with Defendant, we find Magistrate Whitley's participation as a jury member so undermines the confidence in the integrity of Defendant's trial that Defendant's conviction was obtained in violation of the United States and North Carolina Constitutions. Therefore, Defendant's motion for appropriate relief is granted and Defendant must be given a new trial.

New trial.

Judges JACKSON and HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. MATEO FELIPE CASTANEDA

No. COA08-790

(Filed 7 April 2009)

1. Appeal and Error— substantial appellate rules violations—invocation of Rule 2 to prevent manifest injustice

Although defendant's noncompliance with N.C. R. App. P. 28(b)(6) in a first-degree murder case constituted a gross and substantial violation warranting dismissal under N.C. R. App. P.

34(a)(3), the exceptional circumstances of the case justified the Court of Appeals' invocation of N.C. R. App. P. 2 to review the merits of defendant's appeal in order to prevent manifest injustice, even though the better course for defendant would have been to amend his record on appeal.

2. Criminal Law— deviation from requested instruction— accomplice—prejudicial error

The trial court committed prejudicial error in a first-degree murder case by instructing the jury that the actual shooter was an accomplice because: (1) the transcript showed that during the charge conference the trial court agreed, at defendant's request, to modify the jury instructions to include the phrase "alleged accomplice," and the trial court deviated from the agreed upon instruction; (2) where the trial court charges correctly at one point and incorrectly at another, a new trial is necessary since the jury may have acted upon the incorrect part; (3) the trial court's attempt to clarify which person the trial court was referring to inadvertently resolved the disputed issue of fact for the jury; and (4) there was a reasonable possibility that, had the erroneous jury instruction not been given, a different result would have occurred.

Appeal by Defendant from judgment entered 8 November 2007 by Judge John W. Smith in Superior Court, Forsyth County. Heard in the Court of Appeals 11 February 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant-Appellant.

McGEE, Judge.

Mateo Felipe Castaneda (Defendant) was found guilty by a jury on 8 November 2007 of first-degree murder of Fabrico Leopoldo Orellana (Orellana). Defendant was convicted on the theory that he aided and abetted the actual shooter, Christian Pacheco-Torres (Torres). The trial court sentenced Defendant to life imprisonment without parole. Defendant appeals.

The relevant evidence presented at trial tended to show that Orellana was shot and killed in front of the mailboxes outside his

apartment in Winston-Salem at 7:00 p.m. on 12 August 2005. Orellana's seven-year-old daughter, R.O., was in Orellana's car at the time and witnessed the shooting. R.O. told the police that her father got out of the car to check his mailbox when a man with a gun came up and shot him. She described the shooter as a Hispanic man wearing a white shirt with a skinned head and a tattoo on his neck.

The Winston-Salem Police Department obtained cell phone records (the records) showing calls to and from the cell phones owned by Orellana, Defendant, and Luz Orellana (Luz). Luz was Orellana's ex-wife and was currently married to Defendant. On the day of the shooting, the records showed calls from Defendant's cell phone to a telephone registered to Cecilia Contreras (Contreras). Investigators learned from a police database that Contreras was living with Torres, who matched the description of the shooter. Detective Stanley Nieves (Detective Nieves) with the Winston-Salem Police Department, called Torres at his job. Detective Nieves told Torres it was important that the police talk to him, and that detectives would come and pick him up at his place of employment. However, Torres fled before officers could arrive.

Torres was later charged with first-degree murder of Orellana. Torres was arrested in Texas on 27 December 2005 and brought to Forsyth County on 2 February 2006. Investigators attempted to interrogate Torres, but after being advised of his *Miranda* rights, Torres exercised his right to an attorney. Months later, Torres' attorney notified the State that Torres wanted to provide information about the case. When Torres was questioned by officers on 9 April 2007, he confessed to shooting Orellana. However, Torres stated that he was hired by Defendant and Luz to kill Orellana.

At trial, the jury heard two conflicting versions of events leading up to 12 August 2005. Torres testified that Luz, who was his coworker, approached Torres at work and asked him to beat up her exhusband, Orellana. Torres said Luz later told him she wanted him to kill Orellana. Torres testified that Luz and Defendant wanted Orellana dead because they felt Orellana was mistreating Luz's daughter, R.O. Torres testified regarding details of the plan to kill Orellana, including a promise by Luz and Defendant to pay Torres money to kill Orellana. Torres also testified about discussions he had with Luz and Defendant, as well as preparations they made, such as Luz and Defendant giving Torres a gun and taking him to Orellana's apartment complex.

Defendant testified that he knew Torres through Defendant's wife, Luz. However, Defendant denied asking Torres to kill Orellana, paying Torres to do so, or giving Torres a gun. Defendant admitted he and Luz were having difficulty with Orellana over Orellana's treatment of Luz's daughter. Defendant said he went to Orellana's apartment twice in order to try to talk with Orellana. Defendant said Torres had offered to come along as a witness to Defendant's confronting Orellana. Defendant admitted being at Orellana's apartment complex with Torres on the evening Orellana was killed. However, Defendant testified that while waiting in the car for Orellana to arrive, Defendant spoke with Luz on the phone. Luz told Defendant that Orellana had already picked up R.O. Defendant said he told Torres they would leave because Defendant did not want to talk to Orellana when R.O. was present. Defendant said Torres told Defendant to wait for him. Torres then got out of the car and went toward the apartments. When Torres ran back to the car, Defendant said he asked Torres what had happened and that Torres responded that "nothing" had happened and to "just go." Defendant testified he did not know Orellana had been shot and killed until the police notified him later that evening.

During the charge conference, the trial court inquired whether Defendant requested a jury instruction on accomplice testimony and Defendant's counsel said no. However, the State then requested the instruction. Defense counsel responded that the core issue of fact in the case was whether Torres was an accomplice. The trial court, defense counsel, and the State agreed to alter the pattern jury instruction to say that Torres was *alleged* to be an accomplice.

During jury instructions, the trial court did not give the modified jury instruction agreed to in the charge conference. Instead, the trial court gave the following jury instruction:

> I instruct you that the witness, Mr. Torres, *was an accomplice*, and you should examine every part of such a witness's testimony with the greatest care and caution. An accomplice is a person who joins with another in the commission of a crime. *The accomplice—and in this case, Mr. Torres*—may actually take part in the acts necessary to accomplish the crime or may knowingly help and encourage another in the commission of the crime, either before or during its commission.

(emphasis added). Defendant argues that the trial court committed prejudicial error by giving the above jury instruction instead of the instruction agreed upon in the charge conference.

I.

[1] We first address the State's contention that we should overrule Defendant's argument that the trial court erred because Defendant's assignment of error and argument in his brief do not correspond, in violation of N.C.R. App. P. 28(b)(6). In his brief, Defendant references assignment of error number nine in which Defendant argues that the trial court committed plain error in instructing the jury that Torres was an accomplice in the case. However, in Defendant's accompanying argument he argues that the trial court committed prejudicial error in giving the wrong jury instruction.

We note that " '[c]ompliance with the rules [of Appellate Procedure] . . . is mandatory.' " *Azar v. Presbyterian Hosp.*, 191 N.C. App. 357, 369, 663 S.E.2d 450, 452 (2008) (quoting *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 362 (2008)). N.C.R. App. P. 28(b)(6) states "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated . . . will be taken as abandoned." *See State v. Price*, 170 N.C. App. 672, 675, 613 S.E.2d 60, 63 (2005); *State v. Lemonds*, 160 N.C. App. 172, 180, 584 S.E.2d 841, 846 (2003). Additionally, because Defendant's argument does not correspond to his assignment of error, his argument is also deemed abandoned. *See Guerrier v. Guerrier*, 155 N.C. App. 154, 159-60, 574 S.E.2d 69, 72 (2002) (citing *State v. Purdie*, 93 N.C. App. 269, 278, 377 S.E.2d 789, 794 (1989)).

Defendant's violations of N.C.R. App. P. 28(b)(6) are nonjurisdictional in nature. Therefore, pursuant to *Dogwood*, we must

> first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If [we] so [conclude], [we] should then determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if [we] [conclude] that dismissal is the appropriate sanction, [we] may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

Dogwood, 362 N.C. at 201, 657 S.E.2d at 367.

In order to evaluate whether appellate rules violations are "substantial" or "gross" we may consider "whether and to what extent the noncompliance impairs [our] task of review and whether and to what extent review on the merits would frustrate the adversarial process." *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366-67. Even when a non-

jurisdictional violation is "substantial" or "gross," our Supreme Court has expressed a "systemic preference" for sanctions other than dismissal in order to review the merits of the appeal whenever possible. *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366. However, in *Dogwood*, our Supreme Court further noted that "in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review." *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 367. Our Supreme Court specifically referenced a violation of N.C.R. App. P. 28(b)(6) as an example of when a default may preclude substantive review. *Id.*

Defendant violated N.C.R. App. P. 28(b)(6) when he failed to argue plain error, and instead argued prejudicial error, for which there was no corresponding assignment of error in the record. Defendant's violations substantially impair this Court's task of review by presenting two different bases for error, neither of which fully comply with the North Carolina Rules of Appellate Procedure, making it unclear to the Court which error is Defendant's intended argument. *See Jones v. Harrelson & Smith Contrs., LLC*, 194 N.C. App. ——, ——, 670 S.E.2d 242, 256-57 (2008) (stating "broadside" and "ineffective" assignments of error do not present any arguable issues for the Court to review and therefore warrant dismissal of the appeal). Further, Defendant's failure to set out "prejudicial error" in his assignments of error, frustrates the adversarial process by failing to give notice to the other party of Defendant's intended arguments at the time of settlement of the record on appeal. Due to these considerations, in addition to the language of *Dogwood* that violations of N.C.R. App. P. 28(b)(6) may constitute default precluding substantive review, we find Defendant's rule violations are "substantial" and "gross" and warrant dismissal of the appeal under N.C.R. App. P. 34(a)(3).

Although we find that Defendant's noncompliance with the rules constitutes a "gross" and "substantial" violation warranting dismissal, we next consider, according to the procedure outlined in *Dogwood*, whether the circumstances of the case before us justify invoking N.C.R. App. P. 2 to reach the merits of the appeal. *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. Rule 2 of the North Carolina Rules of Appellate Procedure allows this Court to reach the merits of an appeal to "prevent manifest injustice to a party." However, this Court should only invoke Rule 2 on "rare occasions" and under "exceptional circumstances." *Id.* (citing *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)). Our Courts "[have] tended to invoke Rule 2 for the prevention of 'manifest injustice' in circumstances in which substan-

tial rights of an appellant are affected." *Hart*, 361 N.C. at 316, 644 S.E.2d at 205.

In the case before us, Defendant faces life imprisonment and makes a compelling argument that the trial court's error prejudiced him. Given the circumstances of this case, to ignore Defendant's argument would be manifestly unjust and we are therefore compelled to invoke Rule 2 under these exceptional circumstances. *See State v. Batchelor*, 190 N.C. App. 369, 377-78, 660 S.E.2d 158, 164 (2008). However, we note that although in this case we elect to use our discretion under Rule 2 to review the merits of Defendant's appeal, the better course for Defendant would have been to amend his record on appeal. N.C.R. App. P. 9(b)(5) states that "[o]n motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content." When Defendant's counsel determined that Defendant had preserved his objection to the jury instructions at trial and wanted to argue prejudicial error rather than the more stringent plain error, Defendant's counsel should have moved to amend the assignments of error, preventing the need to invoke Rule 2 to reach the merits of the case.

II.

[2] Defendant argues the trial court committed prejudicial error by instructing the jury that Torres was an accomplice. The State argues Defendant failed to preserve his objection because Defendant failed to object to the jury instructions when the trial court gave the erroneous instruction. At the end of the jury instructions, the trial court gave Defendant an opportunity to offer any corrections or additions to the jury instructions. Although N.C.R. App. P. 10(b)(2) requires a party to affirmatively object to the jury instructions before the jury retires,

> a request for an instruction at the charge conference is sufficient compliance with [Rule 10(b)(2)] to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

State v. Ross, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988). *See also State v. Keel*, 333 N.C. 52, 56-57, 423 S.E.2d 458, 461 (1992); *State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992).

The transcript clearly shows that during the charge conference the trial court agreed, at Defendant's request, to modify the jury

instructions to include the phrase "alleged accomplice." The trial court erred by deviating from the agreed upon instruction. However, an error in jury instructions is prejudicial and requires a new trial only if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2007). *See also State v. Maske*, 358 N.C. 40, 57, 591 S.E.2d 521, 532 (2004). The defendant has the burden of demonstrating prejudice. N.C. Gen. Stat. § 15A-1443(a) (2007).

In the case before us, the trial court gave the following instruction to the jury:

> I instruct you that the witness, Mr. Torres, *was an accomplice*, and you should examine every part of such a witness's testimony with the greatest care and caution. An accomplice is a person who joins with another in the commission of a crime. *The accomplice—and in this case, Mr. Torres*—may actually take part in the acts necessary to accomplish the crime or may knowingly help and encourage another in the commission of the crime, either before or during its commission.

(emphasis added). Defendant argues that because he was charged with first-degree murder on the theory that he aided and abetted the actual shooter, whether or not Torres was an accomplice was a disputed issue of fact for resolution by the jury that went to the heart of the case. Defendant contends that by giving the above instruction, the trial court answered the disputed issue of fact which was the linchpin in determining Defendant's guilt or innocence.

The State relies on the doctrine of "lapsus linguae" to argue that the trial court's erroneous jury instruction was not prejudicial to Defendant. The State contends that the jury could not have been confused by the trial court's failure to state that Torres was "alleged" to be an accomplice. Our Supreme Court has held that a slip of the tongue "not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction." *State v. Baker*, 338 N.C. 526, 565, 451 S.E.2d 574, 597 (1994); *See also State v. Hazelwood*, 187 N.C. App. 94, 101-02, 652 S.E.2d 63, 68 (2007), *cert. denied*, 363 N.C. 133, —— S.E.2d —— (2009). In *Baker*, the trial court erroneously instructed the jury to find the defendant *guilty* if they had reasonable doubt. *Baker*, 338 N.C. at 564, 451 S.E.2d at 597. However, the trial court made this error only once,

and repeatedly instructed the jury that the State had the burden of proving the defendant was guilty beyond a reasonable doubt. *Baker*, 338 N.C. at 565, 451 S.E.2d at 597. Therefore, our Supreme Court held in *Baker* that the trial court's slip of the tongue did not constitute prejudicial error. *Id.*

The case before us is distinguishable from *Baker*. In the present case, the trial court *twice* identified Torres as an accomplice and further, defined accomplice as "a person who joins with another in the commission of a crime." Although the trial court later correctly instructed the jury that the State was required to prove that Defendant "knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime," this instruction did not cure the earlier error. " '[W]here the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. This is particularly true when the incorrect portion of the charge is the application of the law to the facts.' " *State v. Harris*, 289 N.C. 275, 280, 221 S.E.2d 343, 347 (1976) (quoting *State v. Parrish*, 275 N.C. 69, 76, 165 S.E.2d 230, 235 (1969)). "It must be assumed on appeal that the jury was influenced by that portion of the charge which is incorrect." *Id.* (citing *State v. Starnes*, 220 N.C. 384, 386, 17 S.E.2d 346, 347 (1941)).

> It has long been held in this State that even the slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with a jury; and, therefore, the court must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial.

State v. McLean, 17 N.C. App. 629, 632, 195 S.E.2d 336, 338 (1973) (citing *State v. Ownby*, 146 N.C. 677, 61 S.E. 630 (1908)). "[I]t is error for the trial judge to intimate that controverted facts have or have not been established." *Id.* (citing *State v. Hall*, 11 N.C. App. 410, 181 S.E.2d 240 (1971)). Further, N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 prohibit the trial court from expressing any opinion in the presence of the jury on any question of fact to be decided by the jury. N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 (2007).

In the case before us, Defendant admitted at trial that he knew Torres and was with Torres at the apartment complex where Orellana was killed on the night of the murder. The only issue in dispute at trial was whether Defendant joined Torres in the commission of the shooting or whether Torres was acting alone. We acknowledge that the trial

court's error occurred during the attempt to clarify which person the trial court was referring to—Defendant versus Torres. However, in so doing, the trial court unfortunately inadvertently erred such that the trial court resolved the disputed issue of fact for the jury. In light of the severity of the error, we cannot find that the full jury instructions remedied the error. We find that because the jury instructions resolved the factual issue in dispute, there is a reasonable possibility that, had the erroneous jury instruction not been given, a different result would have occurred.

For the reasons stated, Defendant must be granted a new trial.

New trial.

Judges JACKSON and HUNTER, JR. concur.

RONALD D. QUESINBERRY, PLAINTIFF v. AMANDA P. QUESINBERRY, DEFENDANT v. MARK AND LISA PARRISH AND ROGER AND LOUISE QUESINBERRY, INTERVENORS

No. COA08-239

(Filed 7 April 2009)

1. Child Support, Custody, and Visitation— grandparents seeking visitation—custody dispute resolved

The trial court did not err in a child custody case by denying defendant mother's motion to dismiss the grandparents' claim for visitation even though the parents entered into a consent judgment resolving their custody dispute because: (1) once grandparents have become parties to a custody proceeding, whether as formal parties or as de facto parties, then the court has the ability to award or modify visitation even if no ongoing custody dispute exists between the parents at the time; and (2) standing is measured at the time the pleadings are filed, and the trial court's jurisdiction once attached will not be ousted by subsequent events.

2. Child Support, Custody, and Visitation— visitation schedule for grandparents—sufficiency of findings of fact

The trial court erred in a child custody case by failing to make adequate findings of fact to explain and support its decision to

take the grandparents' vacation visitation time out of defendant mother's summer custodial time while taking no vacation visitation from plaintiff father's custodial time, and the case is remanded for further findings of fact as to the visitation schedule established for the grandparents.

Appeal by defendant from orders entered 31 July 2007 and 3 August 2007 by Judge Mark Badgett in Surry County District Court. Heard in the Court of Appeals 22 October 2008.

No brief filed on behalf of plaintiff-appellee. J. Clark Fischer for defendant-appellant.

Sarah Stevens for intervenors-appellees.

GEER, Judge.

Defendant Amanda P. Quesinberry appeals the trial court's award of visitation with her son to intervenors Mark and Lisa Parrish and Roger and Louise Quesinberry, the boy's maternal and paternal grandparents ("the grandparents"). Defendant contends the trial court should have dismissed the grandparents' claim for visitation once she and plaintiff Ronald D. Quesinberry entered into a consent judgment resolving their custody dispute. Since the trial court allowed the grandparents to intervene in an order not challenged on appeal, the grandparents were parties and were entitled to have their claim for visitation decided notwithstanding the decision of the parents to resolve their differences in an interlocutory consent judgment. We agree with defendant, however, that the trial court's order setting out the visitation schedule does not include sufficient findings of fact to explain the trial court's reasoning in setting the schedule given the terms of the consent judgment. Consequently, we remand for further findings of fact regarding the basis for the visitation schedule.

Facts

Plaintiff and defendant married on 16 October 1999; their son was born 11 October 2002. For the first four years of their son's life, he lived with his parents in Surry County, North Carolina, in a house 10 to 15 minutes away from both sets of grandparents, as well as his extended family and close friends. The grandparents saw the child weekly and developed a very close relationship with him.

On 30 April 2006, plaintiff and defendant decided to separate. Defendant moved out of the house they shared and began dating a

man named Jerry Goedert, with whom she lived on the weekends. At the time of trial, defendant planned to permanently move to Huntersville, North Carolina to live with Mr. Goedert. Defendant's relationship with the grandparents deteriorated significantly as a result of her decision to move to Huntersville, and the grandparents began to have difficulty getting permission from defendant to see their grandson.

On 1 November 2006, plaintiff filed this action against defendant, seeking custody of his son. On 11 April 2007, both sets of grandparents jointly filed a motion to intervene in order to seek visitation with their grandson. On 10 May 2007, the trial court entered an order allowing the grandparents' motion to intervene based on its conclusion that the grandparents were properly before the court because there was an ongoing custody action and the grandparents had alleged a substantial relationship with their grandson.

After two days of trial, plaintiff and defendant entered into a consent judgment filed on 13 June 2007. The grandparents were not parties to that consent judgment, and the memorandum of judgment did not address their pending claim for visitation. In the consent judgment, plaintiff and defendant agreed that they would share joint legal custody of their son. The child would live with plaintiff during the school year, although he would stay with defendant every other weekend. The parties agreed that their son would live with defendant during the summer, but, during that time, he would stay with plaintiff every other weekend. After setting out various other terms regarding the parents' agreement, the memorandum of judgment stated in closing:

> That this Memorandum shall be received by the District Court as the Memorandum of the parties agreement, to be entered by the Court, with the consent of the parties, a formal order containing the terms of this Memorandum of Judgment shall be prepared by F. Christian DiRusso, to be approved by W. David White and then signed as a the [sic] Final Order by the Court with regard to the issues set forth in this memorandum. Should no other formal order be prepared, then this order shall suffice as a final order in this action.

On 31 July 2007, the trial court entered an order awarding visitation to the grandparents. In that order, the trial court found that the grandson "ha[d] a meaningful relationship to both sets of grandparents having spent time with each set at least one day per week since

his birth." The court found that both sets of grandparents lived within minutes of the boy's former home and that they regularly attended his activities, had him spend the night at their homes, and were involved with his medical care. The court also found that defendant's move to Huntersville would move the child "80 miles away from the Plaintiff and the Intervenors" and would "require the parties to travel Interstate 77 for every exchange of the minor child." The court concluded that "[t]he best interest of the child will be served by allowing the grandparents/Intervenors to have regular and frequent contact with the minor child as allowed by G.S. 50-13.2(b1)."

Consequently, the court ordered that the grandparents have "extended and reasonable visitation" with their grandson. Each set of grandparents was awarded two overnight visits with the child in every month except August, to be taken from plaintiff's custodial time during the school year and from defendant's custodial time in the summer. The court also awarded each set of grandparents an additional seven-day period of vacation visitation during the summer, to be taken from the custodial time of defendant. Additionally, the court provided that during Christmas, each set of grandparents was entitled to an overnight visit to be taken from the time of plaintiff and a minimum of four hours on either Christmas eve or Christmas day. Finally, the court awarded the grandparents a minimum of two hours of visitation on their grandson's birthday and directed that "[t]here shall be such other periods of visitation with the grandparents/ Intervenors as the parties may mutually agree."

On 3 August 2007, the trial court entered an amended visitation order stating that "[t]he Intervenors have not been able to exercise their visitation this summer due to an inability of the parties to agree on a time and because an order has not been signed." The court directed that because the grandparents had not received their six overnights during the summer, they "shall be allowed to make them up by taking the extra third weekends awarded to the Defendant in September and October of 2007 and in January 2008." The court ordered that "[d]uring the future summers, the Intervenors will schedule the weeks in the summer by April 15 of each year. The four overnights every month shall be scheduled at least sixty days in advance." The court then concluded that "[e]xcept as clarified herein, the order entered on June 13, 2007 and signed on July 31, 2007 shall remain in full force and effect."

Defendant gave timely notice of appeal of the trial court's 31 July 2007 order allowing the grandparents' visitation and the amendment

to that order filed on 3 August 2007. Defendant did not appeal from the trial court's order filed on 10 May 2007 allowing the grandparents to intervene.

Discussion

[1] Defendant first contends that once she and plaintiff entered into the consent judgment resolving their custody dispute, the trial court was required to dismiss the grandparents' claim for visitation. Defendant does not dispute that the grandparents had standing to intervene in the custody action and seek visitation at the time they filed their motion to intervene. As this Court has recently held, when "the custody of the child [is] still 'in issue' and [is] 'being litigated' by the parents," then "[t]he grandparents . . . [have] standing to seek intervention under N.C. Gen. Stat. § 50-13.2(b1) [(2007)]." *Smith v. Barbour*, 195 N.C. App. ——, ——, 671 S.E.2d 578, 584 (2009).

Defendant instead contends that even though the grandparents were properly allowed to intervene and were parties to the action, once the underlying custody dispute was resolved, the grandparents lost the right to obtain visitation. Defendant cites no authority to support this position, and *Sloan v. Sloan*, 164 N.C. App. 190, 195, 595 S.E.2d 228, 231 (2004), holds to the contrary.

In *Sloan*, this Court held that once grandparents have become parties to a custody proceeding—whether as formal parties or as *de facto* parties—then the court has the ability to award or modify visitation even if no ongoing custody dispute exists between the parents at the time. *Id.* The mother, in that case, had previously been awarded permanent custody, and the father and paternal grandparents were granted visitation. When the father was unexpectedly killed, the grandparents filed a motion to intervene and to modify the previous custody order to seek additional visitation. *Id.* at 192, 595 S.E.2d at 230. The mother filed a motion to dismiss the motions to intervene and modify, arguing, like defendant in this case, that the court had no jurisdiction to award visitation because of the lack of an ongoing custody dispute between the parents. *Id.* The trial court denied the mother's motions, allowed the grandparents to intervene, and granted the motion to modify. *Id.* at 192-93, 595 S.E.2d at 230.

On appeal, this Court affirmed, holding that "while it is clear that statutory authority and case law would support defendant's contention if the issue of grandparent visitation and/or custody had been raised for the first time when intervenors filed their motions," *id.* at 194, 595 S.E.2d at 231, the mother's arguments did not apply when the

trial court had already made the grandparents *de facto* parties to the action by granting them visitation at the time the mother was awarded custody. *Id.* at 195, 595 S.E.2d at 231. We think the principle expressed in *Sloan* applies with even more force here, as the grandparents were not just *de facto* parties that had previously been granted visitation in the custody dispute—they were actual, formal parties to the proceeding.

Defendant appears to be arguing that standing should be determined not only at the time of the filing of the pleadings, but also when the order is signed by the trial court, a contention that is contrary to our long-established principles of standing. Our courts have repeatedly held that standing is measured at the time the pleadings are filed. The Supreme Court has explained that "[w]hen standing is questioned, the proper inquiry is whether an actual controversy existed" when the party filed the relevant pleading. *Simeon v. Hardin*, 339 N.C. 358, 369, 451 S.E.2d 858, 866 (1994) (holding that plaintiffs had standing to challenge district attorney's authority to set court calendar because there were cases pending against them when they filed their complaint, even though cases were no longer currently pending). Moreover, "once [the trial court's] jurisdiction attaches, 'it will not be ousted by subsequent events.' " *Id.* (quoting *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978), *cert. denied sub nom. Judicial Standards Comm'n of N.C.*, 442 U.S. 929, 61 L. Ed. 2d 297, 99 S. Ct. 2859 (1979)).

As the Court explained in *Peoples*:

> "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding. . . . If the converse of this were true, it would be within the power of the defendant to preserve or destroy jurisdiction of the court at his own whim."

296 N.C. at 146, 250 S.E.2d at 911 (quoting *Silver Surprize, Inc. v. Sunshine Mining Co.*, 74 Wash. 2d 519, 523, 445 P.2d 334, 336-37 (1968)). *See also Hamilton v. Freeman*, 147 N.C. App. 195, 203, 554 S.E.2d 856, 860 (2001) (holding that plaintiffs had standing to challenge Department of Correction's modification of their sentences because they had standing at time they filed complaint), *appeal dismissed and disc. review denied*, 355 N.C. 285, 560 S.E.2d 803 (2002).

When plaintiff and defendant entered into their consent judgment, the grandparents' claim was still pending and subject to the

jurisdiction of the trial court. Defendant could not wipe out that claim simply by resolving her custody dispute with plaintiff. This Court has stressed that " '[a]fter intervention, an intervenor is as much a party to the action as the original parties are and has rights equally as broad. . . . Once an intervenor becomes a party, he should be *a party for all purposes*.' " *Williams v. Walker*, 185 N.C. App. 393, 397, 648 S.E.2d 536, 539 (2007) (quoting *Leonard E. Warner, Inc. v. Nissan Motor Corp.*, 66 N.C. App. 73, 78-79, 311 S.E.2d 1, 4-5 (1984)).

For example, although ordinarily a plaintiff is free to voluntarily dismiss her case at any time before she rests, when the defendant has asserted a counterclaim or some other claim for affirmative relief arising out of the plaintiff's claim, the plaintiff cannot take a voluntary dismissal without the defendant's consent. *Lafferty v. Lafferty*, 125 N.C. App. 611, 613, 481 S.E.2d 401, 402, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 549 (1997). Similarly, here, the grandparents sought affirmative relief in the form of visitation, and thus their claim remained pending before the trial court even after plaintiff and defendant had agreed to dismiss their custody claims through the consent judgment. *See, e.g.*, *In re Roxsane R.*, 249 S.W.3d 764, 772-73 (Tex. App.-Fort Worth 2008) ("If a party nonsuits its claims or its claims are dismissed, a remaining party's right to be heard on any of its pending claims for affirmative relief is not prejudiced, and the trial court retains jurisdiction over the remaining claims."); *State v. Northern Prods., Inc.*, 440 A.2d 1070, 1072 n.4 (Me. 1982) ("Even a dismissal by agreement of all parties except the intervenor will have no effect on the intervenor's petition, which remains for hearing and decision.").

In fact, the text of the consent judgment itself reflects plaintiff's and defendant's understanding that the consent judgment would not finally resolve all pending claims in the proceeding. The last paragraph of the order explicitly states that it would be the final order only for those issues addressed in the consent judgment: the sharing of custody between plaintiff and defendant. We, therefore, hold that the consent judgment between plaintiff and defendant did not divest the trial court of its jurisdiction to resolve the grandparents' claim for visitation, and thus the trial court properly denied defendant's motion to dismiss.

[2] Defendant's only other argument on appeal is that the trial court failed to make adequate findings of fact to explain and support its decision to take the grandparents' vacation visitation time out of de-

fendant's summer custodial time while taking no vacation visitation from plaintiff's custodial time. In *Lamond v. Mahoney*, 159 N.C. App. 400, 405, 583 S.E.2d 656, 660 (2003), this Court required that a trial court's detailed visitation award be supported by adequate findings of fact. In that case, the trial court "significantly extended the visitation of [the parent] with his son without making findings specifically related to those extensions." *Id.* The Court explained that while the order indicated that "the trial court implicitly resolved the issues raised by the evidence, . . . that resolution [was] not reflected in the findings of fact." This Court was, therefore, "unable to determine with any confidence whether the order [was] supported by evidence and whether [the trial court] properly applied the 'best interests' standard." *Id.* at 407, 583 S.E.2d at 661.

The same is true here. The trial court made no explanation in its findings of fact as to why it determined that it was preferable to take the majority of the grandparents' vacation visitation time out of defendant's custodial time. Moreover, because the trial court did not specifically address the terms of the consent judgment in its order awarding visitation, it is not clear that the trial court considered the possible interaction between the terms of the two orders. *Cf. In re K.S.*, 183 N.C. App. 315, 330-31, 646 S.E.2d 541, 549-50 (2007) (remanding for further findings and clarification of respondent's visitation rights because although trial court ordered visitation to take place according to "the visitation schedule," record indicated that there was no such schedule or other visitation plan in effect). Because the trial court did not explain its reasoning in the order, we have no basis upon which to determine whether the trial court's particular award was an abuse of discretion. We must, therefore, remand for further findings of fact as to the visitation schedule established for the grandparents.

Affirmed in part; vacated and remanded in part.

Judges ROBERT C. HUNTER and ELMORE concur.

LARRY CRAIG HODGIN AND DELORIS H. HODGIN, JOHN W. DESTEFANO AND CATHERINE DESTEFANO, AND JED PATTON, PLAINTIFFS v. JEFFREY N. BRIGHTON AND CARRIE L. BRIGHTON, DEFENDANTS

No. COA08-347

(Filed 7 April 2009)

Deeds— restrictive covenants—construction of attached garage

The trial court did not err by granting summary judgment in favor of defendants in a case seeking to enforce a subdivision's restrictive covenants after defendants constructed a garage attached to their residence that allegedly violated the side yard setback requirements contained in the restrictions because: (1) the language of the pertinent restrictions expressly excepted attached garages from the setback restrictions applicable to other outbuildings, and nothing in the restrictions suggested that an attached garage was subject to the twenty-five feet setback for the primary residence; and (2) the Court of Appeals will not rewrite the restrictions nor go back and examine extrinsic evidence to interpret them.

Judge STROUD concurring.

Appeal by plaintiffs from order entered 4 January 2008 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2008.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Hatcher Kincheloe, Harmony W. Taylor, and Gerald A. Stein, II, for plaintiff-appellants.

James, McElroy & Diehl, P.A., by Gary S. Hemric, Adam L. Ross, and Sarah M. Brady, for defendant-appellees.

STEELMAN, Judge.

Where a Restriction Agreement is clear and unambiguous, this Court will not re-write the restrictions nor go back and examine extrinsic evidence to interpret the restrictions.

I. Factual and Procedural Background

Jeffrey N. and Carrie L. Brighton (defendants) own Lot 18, Block 4 of Tuckaway Park Subdivision located in Charlotte, North Carolina.

A plat of the Subdivision is recorded in the office of the Register of Deeds for Mecklenburg County in Deed Book 1580 at page 511. The plaintiffs also own property in the Subdivision; Larry Craig and Deloris H. Hodgin's (Hodgins) property adjoins defendants' property.

Tuckaway Park is a restricted residential subdivision. A Restriction Agreement dated 29 March 1954 is recorded in Deed Book 1673 at page 553 of the Mecklenburg County Register. An amendment to the restrictions was filed 20 September 1971 in Deed Book 3348 at page 539. In pertinent part, the restrictions provide:

> A. Residence. No residence may be located nearer to the front property line than fifty (50') feet, or nearer to an inside property line than twenty-five (25') feet; except that as to Lot 4, Block 2, and Lot 4, Block 4, no residence may be located nearer the front property line on Carmel Club Drive than twenty-five (25') feet; and, as to lots 6 and 7, Block 3, no residence may be located nearer the front property line than forty (40') feet.
>
> B. Outbuildings. No outbuilding, except a garage attached to the main residence may be located nearer to the front property line than One Hundred (100') feet, or nearer to an inside property line than seven (7') feet.

Defendants constructed a garage, attached to their residence, on the side of their lot that adjoins the Hodgins' property. On 16 February 2007, plaintiffs Hodgin filed a complaint against defendants asserting that the structure violated the side yard setback requirements contained in the restrictions. By order dated 5 July 2007, plaintiffs were allowed to amend their complaint. The amended complaint asserted that defendants had violated the restrictive covenants for the Subdivision. Plaintiffs requested that the trial court permanently enjoin defendants "from violating any of the restrictions set forth in the Restriction Agreement[,]" and "enter an Order requiring the Defendants to remove any improvements on Defendants' property that are in violation of the Restrictions[.]"

Defendants' answer asserted a number of affirmative defenses including that the residences of the plaintiffs violated the Restriction Agreement and that they were barred from enforcing the restrictions based upon unclean hands, breach of contract, waiver, estoppel, acquiescence, and abandonment. Defendants further asserted a contingent counterclaim based upon front setback violations of the plaintiffs' residences.

On 29 October 2007, defendants served a Motion for Partial Summary Judgment as to "Plaintiffs' claim for a permanent injunction." Both parties submitted affidavits in support of and in opposition to the motion for summary judgment.

On 4 January 2008, the trial court entered an Order Granting Partial Summary Judgment. Although the order is captioned "Order Granting Partial Summary Judgment," the trial court granted summary judgment as to all of plaintiffs' claims and dismissed plaintiffs' action.

Plaintiffs appeal.

II. Standard of Review

The appellate courts of this state review the granting of a motion for summary judgment based upon whether there was a material issue of fact and whether one of the parties was entitled to judgment as a matter of law. *Coastal Plains Utilities., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004). It is based upon the pleadings, affidavits, and depositions presented to the court. *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 447, 579 S.E.2d 505, 507 (2003).

III. Ambiguity of the Restriction Agreement

In their first argument, plaintiffs contend the restrictions are ambiguous as to limits on outbuildings; therefore, "[b]y the sheer definition of ambiguity, the parties to this Restriction Agreement have brought forth a genuine issue of material fact as to the meaning and intent of the Restriction Agreement . . . ." We disagree.

Plaintiffs filed affidavits with the court asserting that their interpretation of the restrictions was that the garage could be located no closer than twenty-five feet from a side lot line. They further argue that the conflict between the interpretation set forth in their affidavits and the defendants' affidavits creates a material issue of fact making the granting of summary judgment improper.

> Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms.

Hemric v. Groce, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (2005) (quoting *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975)), *cert. denied*, 359 N.C. 631, 616 S.E.2d 234 (2005). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citing *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624-25 (1973)). If the language is clear and only one reasonable interpretation exists, "the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." *Gaston Cty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 300, 524 S.E.2d 558, 563 (2000) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978)).

We hold that the language of the restrictions is clear and unambiguous. Plaintiffs argue the terms of the restrictions are ambiguous, and an attached garage is not an "outbuilding" but is a "residence." They contend that once a garage is attached to the main residence, it becomes part of the residence and is therefore subject to the twenty-five feet setback requirement.

The restrictions do not define either "outbuilding" or "garage;" however, "garage" is mentioned in Paragraph III(B), under the heading Outbuildings, "No garage may provide space for more than three (3) automobiles."

The use of outbuildings is restricted by paragraph II(C) of the restrictions:

> C. Outbuildings. No outbuilding may be erected on any lot other than such as is customarily incidental to residential use. No outbuilding, trailer, or temporary, or incomplete structure, may be used as a residence, except that the family of a servant of the family occupying the main residence may occupy a permanent outbuilding.

The restrictions further state in paragraph IV(B), under the heading Outbuildings, "No outbuilding, *except a garage* attached to the main residence may be located . . . ." (emphasis added). This language expressly excepts attached garages from the setback restrictions applicable to other outbuildings. Nothing in the restrictions suggests that an attached garage is subject to the twenty-five feet setback for the primary residence. Therefore, we conclude that the restrictions

are clear and unambiguous, and we will not re-write the restrictions nor go back and examine extrinsic evidence to interpret them. Because we conclude that the restrictions are unambiguous, we do not reach plaintiffs' remaining arguments.

AFFIRMED.

Judge JACKSON concurs.

Judge STROUD concurs in separate opinion.

STROUD, Judge concurring in separate opinion.

While I concur with the mandate of the majority opinion, I write separately to address other issues the majority opinion has chosen not to address. I reiterate, as the majority opinion notes, that in plaintiffs' amended complaint plaintiffs requested that the trial court (1) permanently enjoin the defendants "from violating any of the restrictions set forth in the Restriction Agreement[,] and (2) "enter an Order requiring the Defendants to remove any improvements on Defendants' property that are in violation of the Restrictions[.]" Furthermore, on or about 6 August 2007, defendants filed an answer to plaintiffs' amended complaint which included counterclaims contingent on certain determinations of the trial court. Defendants' 6 August 2007 answer reads, "In the event that the Court finds and concludes that the Restriction Agreement and the setback restrictions contained therein remains in full force and effect, and that the Brightons are *not* in violation of that Agreement, the Brightons assert the following Counterclaims against the Hodgins and the Destefanos . . . ."[1] (Emphasis added.)

On 4 January 2008, the trial court entered its order, entitled "ORDER GRANTING PARTIAL SUMMARY JUDGMENT[.]" The order stated in pertinent part as follows:

> [f]rom a review of the Complaint, it appears that the only claim for relief by the Plaintiffs is one for an Order enjoining Defendants from building an addition on to their house. Although denominated as a Motion for Partial Summary Judgment on the claim for a "permanent injunction," in fact, the Motion is one for

1. There is some indication in the record that the word "not" was a typographical error, so that the condition for the counterclaim should have read "that the Brightons *are* in violation of that Agreement . . .[;]" (emphasis added), if this is correct, the condition for the counterclaim was not fulfilled.

> Summary Judgment on the Complaint of the Plaintiffs against Defendants. . . .

The trial court thereafter granted summary judgment for defendants as to plaintiffs' claims and dismissed plaintiffs' complaint in its entirety.

The trial court order did not specifically address the contingencies in defendants' counterclaims, and it is unclear from the record whether defendants currently have pending counterclaims. The conditions stated for defendants' counterclaims were that "the [c]ourt finds and concludes [(1)] that the Restriction Agreement and the setback restrictions remain in full force and effect, and [(2)] that the [defendants'] are not in violation of that Agreement[.]" These conditions were fulfilled, which would indicate that the counterclaims were active based upon the order granting "partial" summary judgment.

The trial court order reads, "There is no just reason for delay in entry of this Judgment. Accordingly, this Judgment is a final Judgment on the merits of the Complaint." This language is similar to the language of North Carolina Rule of Civil Procedure 54(b) for certification by the trial court for immediate appeal of an interlocutory order. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b). Therefore, both the title of the order, "ORDER GRANTING PARTIAL SUMMARY JUDGMENT[,]" and the order's language which seems to mirror "certification" language, *see id.*, could be read as an indication that the trial court did not consider its order a final order which disposed of all claims as to all parties, so that certification of this interlocutory order was necessary for this Court to review the issues which were determined. *See id.* However, no party has argued that this appeal is interlocutory, and the majority opinion has addressed this appeal on its merits as a final judgment which dismissed the case in its entirety as to all claims and parties.

The trial court also effectively converted defendants' motion for partial summary judgment into a motion for summary judgment and dismissed plaintiffs' entire complaint because "it appears that the only claim for relief by the Plaintiffs is one for an Order enjoining Defendants from building an addition on to their house." We note that defendants contributed to the trial court's misconception as the last sentence in their 29 October 2007 motion for partial summary judgment is, "WHEREFORE, the Brightons respectfully request that the Court enter an Order granting them partial summary judg-

ment on Plaintiffs' *sole claim for relief-permanent injunction*." (Emphasis added.)

However, plaintiffs' amended complaint also clearly requests "an Order requiring the Defendants to remove any improvements on Defendants' property that are in violation of the Restrictions." Therefore, the trial court order erred in stating that the plaintiff had only brought forth one claim for relief. Plaintiffs requested both (1) injunctive relief to prevent defendants from continuing construction in the future and (2) an order requiring defendants to remove the portion of the construction that had already been done. Plaintiffs' suit included both future relief, an injunction prohibiting future violations, as well as relief for past actions of defendants, removal of construction already done. It is true that the two claims for relief arise out of the same legal theory, violation of the Restriction Agreement, but there are differences between the remedies of equitable, injunctive relief to prevent future violations and legal relief to address a past violation. In addition, as noted above, defendants had raised possible counterclaims which are not clearly addressed in the record.

The majority has assumed that the trial court's order was in fact a final order which disposed of all claims by all parties, and this assumption is probably correct, but I prefer not to base an opinion upon assumptions. To the extent that these assumptions are correct, I agree entirely with the majority's analysis of the substantive issues, and for this reason I concur in the result. I therefore write separately to state my concerns regarding the lack of clarity in the trial court's order and in the record and to admonish the trial court to take care to address clearly each pending claim of each party.

FORD v. PADDOCK

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

RONALD E. FORD, SR., ADMINISTRATOR OF THE ESTATE OF SEAN PADDOCK (FORMERLY KNOWN AS SEAN FORD), DECEDENT, PLAINTIFF v. JOHNNY PADDOCK, AND WIFE LYNN PADDOCK; WAKE COUNTY DEPARTMENT OF HUMAN SERVICES; MARIA F. SPAULDING, IN HER CAPACITY AS DIRECTOR OF THE WAKE COUNTY DEPARTMENT OF HUMAN SERVICES; WARREN LUDWIG, IN HIS CAPACITY AS WAKE COUNTY DIRECTOR OF CHILD WELFARE AND MENTAL HEALTH; AND CHILDREN'S HOME SOCIETY OF NORTH CAROLINA, INC., DEFENDANTS

No. COA08-1012

(Filed 7 April 2009)

1. Appeal and Error—appealability—interlocutory order—denial of motion to transfer venue

Although defendants' appeal from the denial of a motion to transfer venue is an appeal from an interlocutory order, the order affects a substantial right and is immediately appealable.

2. Venue—denial of motion to transfer—county where acts or omissions occurred

The trial court did not err in a wrongful death case by denying defendants' motions to transfer venue on the ground that they are entitled as a matter of right to have the case moved from Johnston County to Wake County because: (1) a cause of action under N.C.G.S. § 1-77 arises in the county where the acts or omissions constituting the basis of the action occurred; and (2) plaintiff's complaint alleged that defendants Wake County Health and Human Services, Spaulding and Ludgwig (altogether WCHS) committed acts of negligence in Johnston County, that defendant Children's Home Society of North Carolina, Inc. acted as an agent of the WCHS defendants and committed acts of negligence in Johnston County, and that there were negligent omissions by defendants of acts which should have taken place in Johnston County.

Appeal by defendants from order entered 2 July 2008 by Judge E. Lynn Johnson in Johnston County Superior Court. Heard in the Court of Appeals 12 February 2008.

Twiggs, Beskind, Strickland & Rabenau, PA, by Karen M. Rabenau, Jerome P. Trehy, Jr. and Jesse H. Rigsby, IV for plaintiff-appellee.

David F. Mills, PA, by David F. Mills, for plaintiff-appellee.

Bailey & Dixon, LLP, by David S. Coats and J.T. Crook, for defendant-appellant Children's Home Society of North Carolina, Inc.

Office of the County Attorney, by Assistant County Attorneys Lucy Chavis and Roger A. Askew, and County Attorney Scott W. Warren, for defendant-appellants Wake County Department of Human Services, Maria F. Spaulding, and Warren Ludwig.

Paul A. Meyer, for North Carolina Association of County Commissioners, Amicus Curiae.

STEELMAN, Judge.

Where some part of plaintiff's cause of action arose in Johnston County, the trial court did not err in denying defendants' motions to transfer venue.

I. Factual and Procedural Background

In January 2003, the Wake County Department of Human Services ("WCHS") assumed custody of Sean Ford ("the minor child"). In the fall of 2004, WCHS partnered with Children's Home Society of North Carolina, Inc. ("CHS"), a private child placement and adoption agency which does business in Johnston County, to effect the adoption of the minor child and his siblings by defendants Lynn and Johnny Paddock. In January of 2005, the minor child and his siblings began visiting the Paddock home. On 24 January 2005, WCHS and CHS decided to place the children with the Paddocks for adoption, and gave the Paddocks full-time custody of the children the following weekend. On 11 March 2005, the minor child was placed with the Paddocks for adoption. On 25 July 2005, the adoption was finalized in the courts of Johnston County. On 25 February 2006, Mrs. Paddock wrapped and bound the minor child with blankets so tightly that the minor child suffocated and died. Mrs. Paddock was convicted of first-degree murder on 12 June 2008.

On 20 February 2008, plaintiff Ronald Ford, the minor child's biological paternal grandfather, filed a complaint in the Superior Court of Johnston County, seeking compensatory and punitive damages for the wrongful death of the minor child. The complaint named as defendants Johnny and Lynn Paddock; WCHS; Maria Spaulding, in her capacity as Director of WCHS; Warren Ludwig, in his capacity as Wake County Director of Child Welfare and Mental Health; and CHS.

Plaintiff's complaint alleged that both WCHS and CHS were negligent in the placement of the minor child with the Paddocks, and in supervising and investigating complaints of inappropriate actions by the Paddocks prior to the finalization of the adoption proceedings. Plaintiff alleged that these acts of negligence were a proximate cause of the minor child's death.

Defendants WCHS, Maria Spaulding, and Warren Ludwig (collectively referred to as "WCHS defendants") answered on 15 April 2008, and asserted affirmative defenses, including sovereign and governmental immunity. The WCHS defendants moved to change venue to Wake County. On 2 May 2008, CHS filed an answer and a motion to transfer venue to Wake County. CHS's motion to transfer venue was not based on an independent claim that venue in Johnston County was improper as to CHS, but rather was based on the assertion that venue was improper in Johnston County with respect to the WCHS defendants. Following a hearing on 27 May 2008, the trial court denied the motions to transfer venue. Defendants appeal.

II. Interlocutory Appeal

[1] We first address the issue of whether the denial of defendants' motions to transfer venue 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 (citation omitted), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Although defendants' appeal is interlocutory, we have previously held that a denial of a motion to transfer venue affects a substantial right." *Morris v. Rockingham Cty.*, 170 N.C. App. 417, 418, 612 S.E.2d 660, 662 (2005) (quotation omitted). Thus, although this appeal is interlocutory, we hold that immediate review is proper. *See id.*

III. Venue

[2] In their sole argument on appeal, defendants contend that the trial court erred in denying their motions to transfer venue on the grounds that they are entitled as a matter of right to have the case moved to Wake County. We disagree.

When reviewing a decision on a motion to transfer venue, the reviewing court must look to the allegations of the plaintiff's complaint. *Wellons Constr., Inc. v. Landsouth Props., LLC*, 168 N.C. App.

403, 405, 607 S.E.2d 695, 697 (2005); *see also McCrary Stone Service v. Lyalls*, 77 N.C. App. 796, 799, 336 S.E.2d 103, 105 (1985), *disc. review denied*, 315 N.C. 588, 341 S.E.2d 26 (1986).

N.C. Gen. Stat. § 1-77 provides that an action against a public officer, or person appointed to execute his or her duties, for acts performed in his or her official capacity, "must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial[.]" N.C. Gen. Stat. § 1-77(2) (2007). "Any consideration of G.S. 1-77(2) involves two questions: (1) Is defendant a 'public officer or person especially appointed to execute his duties'? (2) In what county did the cause of action in suit arise?" *Coats v. Hospital*, 264 N.C. 332, 333, 141 S.E.2d 490, 491 (1965). Venue is proper in any county in which the acts or omissions which form the basis of the suit occurred. *Frink v. Batten*, 184 N.C. App. 725, 730, 646 S.E.2d 809, 812 (2007). "[T]hose acts and omissions may arise in multiple counties." *Id.*

The parties do not dispute that the WCHS defendants are public officers or persons especially appointed to execute official duties. Additionally, the allegations of negligence in plaintiff's complaint center on the adoption of the minor child, which acts were done by defendants by virtue of their public office. *See* N.C. Gen. Stat. § 1-77(2). Thus, the only pertinent inquiry in this case is where the cause of action arose.

Defendants argue that the cause of action arose solely in Wake County. Defendants contend that "when the acts or omissions constituting the basis of the action . . . are analyzed in the context of a statutory officer, any failure to act is predicated upon the decision or lack of decision of the officer and necessarily would 'occur' where the officer is charged by law to carry out his duties." Defendants further contend that all of their decision-making authority is derived from Wake County, and therefore Wake County is the only place where venue is proper. On the other hand, plaintiff contends, and the trial court held, that since the death of the minor child, the adoption, and the placement of the child by WCHS occurred in Johnston County, at least "some part" of the cause arose in Johnston County.

The facts of the instant case are analogous to those in *Frink*, *supra*. In *Frink*, the plaintiffs brought an action in Robeson County against Robeson County, Columbus County, and various public officials and employees of those counties, for the alleged wrongful death of the decedent, a Columbus County jail inmate who commit-

ted suicide. Plaintiffs alleged that the decedent was initially taken into custody at the Columbus County jail, and subsequently transferred to the Robeson County Detention Center pursuant to an agreement between the two counties. Plaintiffs further alleged that the decedent made several suicide attempts while in the custody of Robeson County, and that officials at the Detention Center contacted Columbus County officials, explained the situation, and requested that the decedent be transferred back to Columbus County. The decedent was transferred back to Columbus County, and two days later he committed suicide.

On appeal, Columbus County argued that, pursuant to N.C. Gen. Stat. § 1-77, venue was proper only in Columbus County because that is where the injury occurred. This Court rejected Columbus County's argument, first recognizing the longstanding rule that the cause of action under N.C. Gen. Stat. § 1-77 arises in the county where the acts *or omissions* constituting the basis of the action occurred. The Court went on to analyze the phrase in N.C. Gen. Stat. § 1-77 "where the cause of action *or some part thereof* arose," and concluded that since "some part" of plaintiffs' cause of action arose in Robeson County, venue was proper there. *Frink* at 730-31, 646 S.E.2d at 812.

In the instant case, plaintiff made the following factual allegations in his complaint:

> 34. Upon information and belief, on or about January 26, 2005, [WCHS defendants] received a report that the minor child had been mistreated and improperly disciplined by one or both of the Paddocks on a visit the previous weekend to the Paddock home.
>
> . . .
>
> 39. Upon information and belief, on or about January 27, 2005, [WCHS defendants] received additional information regarding neglect, abuse, and improper discipline relating to the minor child. The report indicated: When Lynn returned the minor child and his siblings to the foster home on January 23, 2005, the minor child had a bruise on his bottom. Lynn told the foster mother that the minor child had fallen off a bed resulting in the bruise. However, the minor child reported to his foster mother that Lynn had hit him in the bathroom for playing with the dog. The minor child's siblings also reported that Lynn had hit the minor child for playing with the dog and

that the minor child was not allowed to eat because he did not want to jump on the trampoline for exercise.

. . .

44. Upon information and belief, [WCHS defendants] conducted an interview with the minor child and the minor child's siblings on January 27, 2005. The minor child told [WCHS defendants] that Lynn had hit him. The investigator saw the bruise on the minor child's bottom. The investigator spoke to the minor child's siblings, both of whom reported that Lynn had hit the minor child. One of the siblings reported that Lynn hit the minor child with her hand because the minor child was "messing with the dog." The siblings again reported that Lynn did not allow the minor child to eat because he would not jump on the trampoline for exercise. Both siblings expressed "diminished enthusiasm" for the Paddocks to [WCHS defendants].

. . .

54. Upon information and belief, on March 11, 2005, [WCHS defendants] moved the minor child into the home of the Paddocks full time for purposes of adoption placement.

55. Upon information and belief, [WCHS defendants] did not visit the Paddock home again until March 21, 2005.

56. Upon information and belief, on or about March 22, 2005, [WCHS defendants] reported to the juvenile court that the report of improper discipline was unsubstantiated.

57. Upon information and belief, [WCHS defendants] failed to disclose to the [Johnston County] court all pertinent and available information of which it was aware, and that the juvenile court should have heard, and that suggested that the Paddock home was a dangerous and inappropriate placement for the minor child, or at least, would have revealed that [WCHS defendants] and/or CHS had not performed a comprehensive and complete investigation and assessment of the home.

. . .

60. Upon information and belief, [WCHS defendants] delegated its responsibilities to CHS.

61. Upon information and belief, after March 21, 2005, [WCHS defendants] did not again visit the Paddock home or have any contact with the Paddocks until after the minor child's death.

. . .

64. Upon information and belief, neither [WCHS defendants] nor CHS provided the Johnston County Clerk of Superior Court with information about the inappropriate discipline, the placing of plastic pipe around the house used for threatening and hitting the minor child and his siblings, the bruising on the minor child, the reports by the siblings of the inappropriate discipline, the consistency of the reports, the Paddocks' history of substance abuse, the Paddocks' religious beliefs that called for harsh physical discipline of the children . . . or other matters of which they were aware that could and should have delayed or prevented the final adoption decree and of which the Clerk of Superior Court should have been made aware.

. . .

66. Upon information and belief, after July 22, 2005, neither [WCHS defendants] nor CHS had further contact with the Paddocks or the minor child and took no steps to monitor or insure the safety of the minor child.

Plaintiff further alleged the following negligent conduct by the WCHS defendants occurring in Johnston County:

e) . . . failing to obtain timely and appropriate assessment and training for the Paddocks in appropriate discipline techniques;

f) . . . failing to remove the minor child from a dangerous environment; to wit, the Paddocks' home;

. . .

j) . . . failing to promote the safety of the minor child . . .

r) . . . failing to initiate an assessment of the circumstances of the minor child, including a visit to the Paddock home, upon the earliest report of concerns of abuse . . .

v) . . . failing to follow up with the Paddocks and the minor child after the adoption[.]

Plaintiff's complaint alleged that the WCHS defendants committed acts of negligence in Johnston County. Further, plaintiff's com-

plaint alleged that CHS acted as an agent of the WCHS defendants and committed acts of negligence in Johnston County. Finally, plaintiff alleged that there were negligent omissions by the defendants of acts which should have taken place in Johnston County. *See Ducey v. United States*, 713 F.2d 504, 508 fn. 2 (9th Cir. 1983) (holding that, under the Federal Tort Claims Act, a negligent omission should be deemed to occur "where the act necessary to avoid negligence should have occurred").

We hold that the trial court correctly concluded that venue was proper in Johnston County. *See Frink* at 731, 646 S.E.2d at 812 ("In short, even though the complaint also alleges acts and omissions that occurred in Columbus County, since 'some part' of plaintiffs' cause of action arose in Robeson County, the trial court appropriately found venue to be proper in Robeson County.")

This argument is without merit.

AFFIRMED.

Judges GEER and STEPHENS concur.

CYNTHIA SMITH GIBSON, PLAINTIFF v. WILLIAM THOMAS "PETE" USSERY, JR.; CAROLYN B. USSERY; CAROLYN'S MILL, INCORPORATED (A NORTH CAROLINA CORPORATION); AND CAROLYN'S MILL CONDOMINIUM ASSOCIATION (A NONPROFIT NORTH CAROLINA CORPORATION), DEFENDANTS

No. COA08-1002

(Filed 7 April 2009)

Premises Liability—directed verdict—fall down unfinished stairway—failure to show proximate cause

The trial court did not err by dismissing on a motion for directed verdict plaintiff's negligence claims arising from injuries sustained after a fall down an unfinished stairway at an unfinished condominium development because: (1) although negligence cases typically do not call for resolution by a directed verdict at the trial level, plaintiff did not introduce evidence on the element of proximate cause; and (2) the evidence taken in the light most favorable to plaintiff did not permit a finding of all ele-

ments of a negligence claim against defendants, provided no more than mere speculation, and provided insufficient evidence to support a reasonable inference that the injury was the result of defendants' negligence.

Appeal by plaintiff from judgment entered 23 April 2008 by Judge Michael E. Beale in Richmond County Superior Court. Heard in the Court of Appeals 28 January 2009.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson and Fred D. Poisson, Jr., for plaintiff.

West & Smith, LLP, by Stanley W. West, for defendants.

ELMORE, Judge.

Facts

Joseph Gibson as Executor of the Estate of Cynthia Gibson (plaintiff) appeals from an order dismissing his claims on a motion for directed verdict. The claim arises from a 27 April 2003 visit by Cynthia Gibson[1] (Cynthia) to an open house at Carolyn's Mill, an historic mill. Carolyn's Mill is owned by William B. Ussery, Carolyn B. Ussery, Carolyn's Mill, Inc., and Carolyn's Mill Condominium Association (together, defendants) and, at the time of Cynthia's visit, was being renovated into a condominium development. It is undisputed that not all of the condos had been completed. Several of the units were finished; other adjacent units were still under construction and incomplete.

At issue in this appeal is plaintiff's claim that Cynthia fell down an unfinished stairway and was injured as a result of defendants' negligence. It is undisputed that the stairway was located on the unfinished side of the building. Plaintiff concedes that this stairway was different and apart from the stairs through which she entered the building, where the finished units were. However, plaintiff has alleged that the stairs were accessible to visitors without any warning signs or blockades to prevent use of the stairs.

Plaintiff's claims relevant to this appeal were that defendants were negligent, primarily in allowing visitors to access the hallway leading to the unfinished units and the unfinished stairs. Defendants counter that plaintiff has not presented enough evidence to sup-

1. After she filed this suit, Cynthia Gibson died of unrelated causes.

port the element of proximate cause, and that Cynthia was contributorily negligent.

According to plaintiff's evidence presented at trial, Cynthia and her friends viewed the finished units before walking through an unencumbered hallway and viewing the unfinished units. It is central to plaintiff's negligence claims that none of these witnesses, Cynthia's friends, remembered encountering any locked or closed doors, warning signs, wood barricades, or other barriers that prevented entry to the unfinished areas.

The testimony consistently showed that once Cynthia and her friends viewed the unfinished waterfront unit, they descended an unfinished staircase on that side of the building rather than the stairs through which they had entered. Cynthia was the second-to-last person to descend, followed by her friend, Mrs. Dickinson, who testified at trial. All members of the group testified that they observed that the stairs were in an unfinished condition, but that they appeared safe. These witnesses further testified that they each had no trouble descending the staircase and did not notice any wobbles, defects, or obstructions as they walked.

The only testimony about Cynthia's fall came from Mrs. Dickinson, who observed that Cynthia "fell forward" on the stairs and landed on the floor. Not one witness was able to testify as to the cause or the exact place where she lost her footing. All of the witnesses testified that they had no trouble descending the stairs. One witness, Ms. Waters, testified that after the fall, she inspected the staircase and discovered that one of the boards wobbled slightly. However, neither she nor any of the other witnesses testified that they knew whether Cynthia fell on that step or because of that step.

The trial court denied defendants' first motion for directed verdict at the close of plaintiff's evidence. Defendants renewed their motion for directed verdict after presenting their case. The trial court granted the motion for directed verdict because plaintiff did not present evidence sufficient to permit a finding of all of the elements of negligence. Specifically, the trial court concluded, and we agree, that plaintiff did not introduce evidence on the element of proximate cause to support its claims. The Honorable Michael Beale signed an order granting defendants' renewed motion for directed verdict at the close of all of the evidence, thereby dismissed plaintiff's claims with prejudice. It is from this order that plaintiff appeals, and we affirm the decision of the trial court.

Directed Verdict

The purpose of a motion for a directed verdict is to test whether evidence is legally sufficient "to take the case to the jury and support a verdict for the plaintiff." *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 88, 555 S.E.2d 303, 305 (2001) (quoting *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)). To determine whether a directed verdict is warranted, "the trial court must consider the evidence in the light most favorable to the non-moving party, giving it the benefit of all reasonable inferences to be drawn therefrom, and resolving all conflicts in the evidence in its favor." *Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 273, 488 S.E.2d 617, 619 (1997) (citation omitted). Accordingly, we evaluate whether the trial court properly allowed the motion for directed verdict based on insufficient evidence to support all elements of a negligence claim.

Plaintiff correctly notes in his brief that negligence cases typically do not call for resolution by a directed verdict at the trial level. *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987). As a general matter, the elements of negligence, including whether a defendant exercised the appropriate standard of care, are matters for the jury. *Id.* at 734, 735, 360 S.E.2d at 799. It is only appropriate for the trial judge to remove a matter from the purview of the jury if there is no evidence in the record that would permit a finding to support the claim. *Id.* at 734, 360 S.E.2d at 799. "Ordinarily, such a judgment is not proper unless it appears as a matter of law that a recovery simply cannot be had by plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Id.* (citation omitted).

Proximate Cause

To establish a *prima facie* case of actionable negligence, a plaintiff must allege facts showing: (1) the defendant owed the plaintiff a duty of reasonable care, (2) the defendant breached that duty, (3) the defendant's breach was an actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages as the result of the defendant's breach. *Winters v. Lee*, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124 (1994) (citations omitted). To sustain the action, "[t]he plaintiff must do more than show the possible liability of the defendant for the injury. He must go further and offer at least some evidence which reasonably tends to prove every fact essential to his success." *Byrd v. Express Co.*, 139 N.C. 230, 232, 51 S.E. 851, 852 (1905).

We agree with defendants that "[t]he crux of this appeal is . . . whether the evidence raises the necessary inference of proximate

cause to have been submitted to the jury." In order to survive the motion for directed verdict, plaintiff must present sufficient evidence that defendants' alleged negligence was the proximate cause of Cynthia's fall and her injuries. To make a showing on this element, plaintiff must present evidence tending to establish that defendants' negligence was the "cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed." *Burkhead v. White*, 22 N.C. App. 432, 435, 206 S.E.2d 502, 504 (1974) (quotations and citation omitted). Without more, conjecture is not enough to raise the necessary inference. *Id.* at 434, 205 S.E.2d at 504.

At trial, plaintiff presented evidence in the form of witness testimony that Cynthia fell forward on the staircase, and that she did not appear to trip on anything. Testimony also showed that she was one of several to descend the staircase, but the only one to fall; none of the witnesses noticed any problems with the condition of the staircase as they descended. One witness testified that she went back to inspect the stairs and found the third step from the bottom to "wobble to and fro" under her foot. However, there was no testimony about which stair Cynthia fell on and no testimony that anyone observed what caused her to fall.

We agree with the trial court's conclusion that this evidence, taken in the light most favorable to plaintiff, does not permit a finding of all elements of a negligence claim against defendants. In evaluating the record, we look for evidence that takes the element of proximate cause out of the realm of suspicion. All of the testimony, taken in the light most favorable to plaintiff, provides no more than mere speculation that defendants' alleged negligence was the proximate cause of Cynthia's fall and the injuries that may have resulted from it. Doubtless Cynthia was injured in some manner as a result of her fall, but there is insufficient evidence to support a reasonable inference that the injury was the result of defendants' negligence.

Analogous Cases

In analogous cases, our courts have upheld directed verdicts for defendants on this issue when the plaintiffs made insufficient showings to support a negligence claim. *Carter v. Carolina Realty Company*, cited by both parties, discusses relevant points of law on the element of proximate cause that arose from closely analogous facts. 223 N.C. 188, 25 S.E.2d 553 (1943). In *Carter*, the plaintiff

brought an action after she fell down a dimly lit stairwell maintained by her landlord. Our Supreme Court stated:

> There must always, in actions of this kind, be a causal connection between the alleged act of negligence and the injury which is supposed to have resulted therefrom. The breach of duty must be the cause of the damage. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established, and the negligent act of the defendant must not only be the cause, but the proximate cause of the injury.

Id. at 192, 25 S.E.2d at 555 (citations omitted).

In *Carter*, the Supreme Court considered the trial court's decision on a motion by the defendants, as we are here, and concluded that the plaintiff's testimony was insufficient to show "the causal relation between alleged negligence and the injury," despite the poor lighting conditions which the plaintiff alleged constituted negligence. *Id.* The plaintiff's evidence was insufficient to support all the elements of a negligence claim, specifically on the element of proximate cause. We find the same principle to be applicable in the case before us today, where plaintiff has alleged negligence, but has not presented evidence showing that the alleged negligence was the proximate cause of Cynthia's injury.

In *Hedgepeth v. Rose's Stores*, this Court affirmed a directed verdict for the defendant when the plaintiff alleged that the worn or slick condition of a stairway was enough evidence of negligence to submit to the jury. 40 N.C. App. 11, 251 S.E.2d 894 (1979). We disagreed, holding that the plaintiff did not submit evidence of a particular defect that caused the injury. *Id.* at 14-15, 251 S.E.2d at 896–97. In that case, the plaintiff did not submit evidence as to which step or what exactly caused her to fall. We further concluded that there is "no presumption or inference of negligence from the mere fact that an invitee fell to his injury while on the premises[.]" *Id.* at 16, 251 S.E.2d at 897 (quotations and citation omitted). Rather, "the plaintiff has the burden of showing negligence and proximate cause." *Id.* (quotations and citation omitted). As in *Hedgepeth*, plaintiff's evidence here presents some facts suggesting negligence or a defect of some kind, but does not support a finding of proximate cause.

This Court also upheld a directed verdict for the defendant when plaintiff was one of several to descend a newly constructed staircase

in a rental property. *Sawyer v. Shackleford*, 8 N.C. App. 631, 637, 175 S.E.2d 305, 310 (1970). The trial court concluded that the plaintiff did not submit sufficient evidence to support findings of proximate cause where the condition of the stairs was "patent and obvious." *Id.* We agreed that a directed verdict for the defendant was proper because the plaintiff observed and admitted the design and nature of the stairs and presented no other evidence that the defendant's alleged negligence was the proximate cause of her fall. *Id.* By contrast, in *Fields v. Robert Chappell Associates*, we found that a directed verdict was not appropriate when the plaintiff submitted that her shoe became lodged in an existing crack in the staircase as she descended, resulting in her fall down the stairs and her injuries; this was sufficient evidence of negligence and proximate cause. 42 N.C. App. 206, 209, 256 S.E.2d 259, 260 (1979). Unlike the record in *Fields*, the record before us shows no indication of the specific cause of Cynthia's fall, only speculation.

Conclusion

After reviewing the record in its entirety, we conclude that plaintiff's evidence is insufficient to show actionable negligence by defendants. Specifically, plaintiff has not made a sufficient showing on the element of proximate cause. Taking the facts in the light most favorable to plaintiff, there is no evidence beyond mere conjecture and speculation that defendants' alleged negligence was the proximate cause of Cynthia's fall and her injuries. Without more, plaintiff has failed to make a *prima facie* case on all the elements of negligence and a directed verdict is appropriate. For these reasons, the decision of the trial court is affirmed.

Affirmed.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA v. JOHN C. ROOKS

No. COA08-551

(Filed 7 April 2009)

1. Confessions and Incriminating Statements— written statement—motion to suppress improperly granted—sufficiency of findings of formal arrest

The trial court erred in a case arising out of the sexual abuse of a child by granting defendant's motion to suppress his written statement, and the case is remanded because a review of the facts and circumstances revealed that the trial court's findings did not support a conclusion that there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest.

2. Search and Seizure— consensual search—exclusion of evidence improper

The trial court erred in a case arising out of the sexual abuse of a child by excluding evidence seized as a result of a consensual search because Miranda warnings are inapplicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent.

Appeal by the State from order entered 5 December 2007 by Judge Richard Brown in Hoke County Superior Court. Heard in the Court of Appeals 4 December 2008.

Attorney General Roy Cooper by Special Deputy Attorney General Robert C. Montgomery for the State.

Glover & Petersen, P.A. by Ann B. Petersen for defendant-appellee.

CALABRIA, Judge.

The State appeals the trial court's grant of John C. Rooks' ("defendant's") motion to suppress. We reverse and remand.

On 9 November 2006, Detective John Kivett of the Hoke County Sheriff's Department ("Detective Kivett") was dispatched to defendant's home in response to a call reporting an alleged sexual assault on a child. Defendant's wife told law enforcement she observed defend-

ant on his knees with his penis placed on his daughter's stomach and between her legs.

Detective Kivett was the second officer to arrive at the couple's home. When Detective Kivett arrived, he noticed defendant sitting outside speaking with his brother, C.M. Rooks. Detective Kivett did not speak to defendant at that time. Detective Kivett entered the home, where he spoke with the first officer to arrive and defendant's wife. He then went outside and introduced himself to the defendant, who was sitting in his parked car in front of his home. Detective Kivett informed defendant that he was there to conduct an investigation and asked defendant to join him in his unmarked patrol car. Defendant agreed. Detective Kivett told defendant that he was not under arrest.

Detective Kivett sat in the driver's seat and defendant sat in the front passenger's seat of the patrol car. Defendant was not restrained with handcuffs. The doors were unlocked. Detective Kivett told defendant he needed a statement from him and said defendant agreed to give a statement. Detective Kivett asked defendant if he knew why he was there. Defendant answered yes. Detective Kivett asked defendant to tell him "why [he] was there." Defendant said "it was the worse possible thing." Detective Kivett asked defendant to tell him "what that was." Detective Kivett testified defendant told him "[Detective Kivett] was there because [defendant] had molested his daughter."

Detective Kivett spoke with defendant for a little over an hour. Defendant responded to approximately fourteen questions by Detective Kivett describing the incident his wife witnessed, as well as several other incidents involving his daughter. Other law enforcement officers interrupted the interview to ask Detective Kivett questions about collecting evidence from the home. C.M. Rooks also interrupted the questioning to find out "how much longer" it was going to take. Detective Kivett documented defendant's answers to his questions and then had him review and initial the statement ("the written statement"). Defendant also signed a consent to search form. Detective Kivett did not read defendant his *Miranda* rights.

After defendant gave Detective Kivett his statement, Detective Kivett exited the patrol car and entered defendant's home. Detective Kivett remained in the home for about twenty to twenty-five minutes to ensure the other officers had collected evidence and taken pho-

tographs.[1] When Detective Kivett finished, he placed defendant under arrest and restrained him with handcuffs.

On 12 March 2007, defendant was indicted on thirteen counts of indecent liberties with a child, two counts of crime against nature, five counts of disseminating obscenity to a minor under thirteen, and four counts of first-degree statutory sexual offense. Defendant moved to suppress his statements and "all evidence found resulting from the illegally obtained statements."

The trial court conducted an evidentiary hearing on the motion to suppress and heard testimony from Detective Kivett and C.M. Rooks. C.M. Rooks testified that when he arrived at defendant's home, defendant was crying and reluctant to talk. After defendant entered Detective Kivett's patrol car and while he was being questioned by Detective Kivett, C.M. Rooks waited for the interview to conclude. After waiting about six minutes, C.M. Rooks determined his brother would not be leaving the car and left.

The trial court concluded that defendant's first statement, that he had molested his daughter, was voluntary and would be allowed. The trial court also found, *inter alia*, that five other police officers were present, that defendant was in a position to see Detective Kivett enter his home before speaking with him, that Detective Kivett was plain-clothed but identified himself as a Hoke County Sheriff's Department detective, that defendant acted like he was in trouble, held his head down, was not talkative, and that defendant's brother believed defendant would not be leaving the car. The trial court granted the motion to suppress as to both the written statement and the evidence seized as a result of the consent form. The trial court determined a reasonable person in defendant's position would have understood that he was in custody. The State appeals the order excluding the written statement and the evidence seized as a result of the consent to search.

I. Standard of Review

"[W]hether an individual is in custody is a mixed question of law and fact." *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733

1. The parties presented conflicting evidence on whether defendant remained in the patrol car after questioning. Detective Kivett testified that after defendant finished giving his statement, defendant left the vehicle and spoke with his brother. Defendant's brother testified he left while Detective Kivett was speaking with defendant and did not return or talk to defendant afterwards or see defendant exit the patrol car. The trial court made no findings as to whether defendant remained in the patrol car after questioning or not.

(2004) (citing *Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394 (1995)). "[W]e review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *Id.* (citation and internal quotation marks and brackets omitted).

II. Custodial Interrogation

[1] We first address the State's argument that the trial court erred in excluding the written statement.

> The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. "In *Miranda*[,] . . . the United States Supreme Court determined that the prohibition against self-incrimination requires that prior to a custodial interrogation, the alleged defendant must be advised that he has the right to remain silent and the right to the presence of an attorney." *State v. Warren*, 348 N.C. 80, 97, 499 S.E.2d 431, 440 (citing *Miranda*, 384 U.S. at 479, 86 S.Ct. at 1630, 16 L. Ed. 2d at 726), *cert. denied*, 525 U.S. 915, 119 S.Ct. 263, 142 L. Ed. 2d 216 (1998).

State v. Rollins, 189 N.C. App. 248, 261, 658 S.E.2d 43, 51, *disc. review granted by* 362 N.C. 478, 667 S.E.2d 272 (2008). "The rule in *Miranda* applies only when a defendant is subjected to custodial interrogation." *State v. Hipps*, 348 N.C. 377, 396, 501 S.E.2d 625, 637 (1998) (citing *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404 (1997)).

"[I]n determining whether a suspect is in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Buchanan*, 353 N.C. 332, 338, 543 S.E.2d 823, 827 (2001) (quotation omitted), *appeal after remand at* 355 N.C. 264, 559 S.E.2d 785 (2002)) ("*Buchanan I*"). "This is an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances." *State v. Jones*, 153 N.C. App. 358, 365, 570 S.E.2d 128, 134 (2002) (internal quotation marks and citation omitted).

In *State v. Jones*, this Court affirmed the trial court's determination that defendant was not in custody where the defendant volun-

tarily accompanied police officers to the police department for an interview, was not handcuffed, was told he was not under arrest, was offered the use of the bathroom, no threats or promises were made, and defendant was left unattended while the interviewing officers took a break. *Id.* at 365-66, 570 S.E.2d at 134. In *State v. Hipps*, the Court determined a defendant was not subject to custodial interrogation where he voluntarily entered the officer's patrol car, sat in the front seat, was not restrained with handcuffs, and was not told he was under arrest or that he could not leave. *Hipps*, 348 N.C. at 399, 501 S.E.2d at 638; *see also State v. Parker*, 59 N.C. App. 600, 607, 297 S.E.2d 766, 770 (1982) (no restraint on defendant's freedom where defendant voluntarily agreed to sit in officer's patrol vehicle); *cf. U.S. v. Colonna*, 511 F.3d 431, 435 (4th Cir. 2007) (although defendant was told he was not under arrest, because defendant was awakened by armed agents, continuously guarded during a three-hour interrogation, and told twice that lying to a federal agent was a federal offense, defendant was subject to custodial interrogation for purposes of *Miranda*) and *State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002) (holding defendant was in custody after he was ordered out of his vehicle at gun point, handcuffed, and placed in the back of a patrol vehicle).

In the instant case, the trial court found that defendant was asked politely by the detective to enter an unmarked police car and answer questions. He was told that he was not under arrest. The car was unlocked and defendant was left unattended after the officer completed the interview. No evidence was presented indicating that the officer displayed a weapon, or otherwise threatened the defendant. Considering all the facts and circumstances, we conclude there are insufficient findings to support a conclusion that "there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *Buchanan I*, 353 N.C. at 338, 543 S.E.2d at 827.

Defendant contends his earlier confession was a significant factor in determining whether he was in custody and cites *State v. Buchanan*, 355 N.C. 264, 559 S.E.2d 785 (2002) ("*Buchanan II*"). We find *Buchanan II* distinguishable from the case at bar.

In *Buchanan*, an officer arrived at defendant's workplace and told defendant he needed to speak with him regarding a double murder that had occurred. *Buchanan I*, 353 N.C. at 333, 543 S.E.2d at 824. The officer asked defendant to come to the police station. *Id.* The officer gave defendant the option of riding to the police station in his

own vehicle, or with the officer. *Id.* The defendant chose to ride with the officer. *Id.* The officer told defendant he was not under arrest and he was free to leave at any time. *Id.* The defendant was not restrained with handcuffs and rode in the front passenger seat of the officer's car. *Id.* Upon arrival at the police station, both of them entered a back door and walked through the officers' break room. *Id.* at 334, 543 S.E.2d at 824. Defendant asked to use the restroom and after receiving directions from the officer, he went unaccompanied to the restroom. *Id.*

When defendant returned, he was questioned in the presence of two officers. *Id.* at 334, 543 S.E.2d at 825. At one point defendant admitted that he had gone "berserk" and shot at the two victims. *Id.* Shortly after this confession, defendant asked to use the restroom. *Id.* Unlike his first trip to the restroom, this time defendant was accompanied by two officers who entered the restroom with defendant. *Id.* at 334-35, 543 S.E.2d at 825. Upon returning to the office, defendant was again advised that he was not under arrest and was free to leave. *Id.* at 335, 543 S.E.2d at 825. Defendant made further incriminating statements and eventually signed a written statement admitting he shot the victims. *Id.* Defendant was not advised of his *Miranda* rights until after he had signed his confession. *Id.* On appeal, the Supreme Court remanded for the trial court to consider the facts under an objectively reasonable person standard. *Id.* at 342, 543 S.E.2d at 829-30.

After remand, the Supreme Court affirmed the trial court's conclusion that

> a reasonable person in defendant's position would have believed he was in custody—restrained in his movement to the degree associated with a formal arrest,—when, after admitting to his station house interrogators that he had participated in a homicide, those same interrogators accompanied him to the bathroom, with an officer staying with defendant at all times.

Buchanan II, 355 N.C. at 265, 559 S.E.2d at 785 (internal citation and quotation marks omitted). The *Buchanan II* Court found it significant that the level of security over defendant elevated after he confessed. *Id.*

Here, after defendant finished his written statement, in which he confessed to several offenses involving his daughter, Detective Kivett exited the patrol car and entered the house. There is nothing in the

record to suggest Detective Kivett increased security over the defendant after his confession as the officers did in *Buchanan II*. Detective Kivett's instructions to the officers to collect evidence and transport the victim to the hospital during the interview does not affect this Court's analysis. Detective Kivett's actions did not restrain defendant's freedom of movement. The fact that defendant held his head down, was not talkative, and "was acting like he was in trouble" might suggest he did not feel free to leave. However, the defendant's subjective belief has no bearing here. *Jones*, 153 N.C. App. at 365, 570 S.E.2d at 134. To hold otherwise would defeat the objective reasonable person standard. *See Yarborough v. Alvarado*, 541 U.S. 652, 663, 158 L. Ed. 2d 938, 950 (2004) ("the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned" (quoting *Stansbury v. California*, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L. Ed. 2d 293 (1994) (per curiam)). These facts and circumstances do not support a conclusion that defendant was subjected to custodial interrogation.

III. Consent to Search

[2] The State also assigns error to the trial court's exclusion of evidence seized as a result of the search. Defendant concedes this error. We agree.

The trial court concluded defendant was subject to custodial interrogation and his written statement "is excluded together with any items seized an [sic] a result of the consent to search signed by the defendant at the conclusion of that interrogation." This conclusion was in error. "*Miranda* warnings 'are inapplicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent.'" *State v. Cummings*, 188 N.C. App. 598, 602, 656 S.E.2d 329, 332 (quoting *State v. Frank*, 284 N.C. 137, 142, 200 S.E.2d 169, 173 (1973), *review denied*, 362 N.C. 364, 661 S.E.2d 743 (2008)).

The trial court's order granting the motion to suppress is reversed. We remand to the lower court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges STEELMAN and STROUD concur.

STATE OF NORTH CAROLINA v. MARCOS DEVON BRYANT

No. COA08-962

(Filed 7 April 2009)

1. Homicide— first-degree murder—failure to instruct on voluntary manslaughter

The trial court did not err in a first-degree murder case by refusing to instruct the jury on voluntary manslaughter based on imperfect self-defense because, even assuming *arguendo* the trial court was required to do so, the error was rendered harmless by the jury verdict when the trial court submitted the possible verdicts of first-degree murder based on premeditation and deliberation, second-degree murder, and not guilty, and the jury found defendant guilty of first-degree murder based on premeditation and deliberation.

2. Search and Seizure— warrant—motion to suppress—notebook with rap lyrics

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress rap lyrics about the murders found in a notebook seized from his vehicle even though defendant contends the notebook and its contents were not listed as items to be seized in the warrant and were not immediately apparent to the officer as evidence of the crime because: (1) the seizure of the notebook was authorized by the terms of the search warrant when the warrant expressly stated the police were looking for documents showing ownership, control, and access that constituted evidence of a crime and the identity of the person(s) participating in a crime; (2) it was not unreasonable for a detective to examine the contents of the notebook and conclude the rap lyrics were evidence of the crime after the detective made out the identifying information on the front of the notebook; and (3) discussion of the plain view exception is not necessary when the seizure of the notebook was based upon a valid search warrant.

Appeal by defendant from judgment entered 13 February 2008, by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 29 January 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Edwin W. Welch, for the State.

Kathryn L. VandenBerg for the defendant-appellant.

STEELMAN, Judge.

Any error by the trial court in failing to instruct the jury on voluntary manslaughter based on imperfect self-defense was rendered harmless by the jury's verdict of first-degree murder under the theory of premeditation and deliberation. The seizure of a notebook from defendant's vehicle was based upon a valid search warrant.

I. Factual and Procedural Background

On 16 January 2006, at about 2:30 a.m., William Chavis Miller (Miller) fired approximately twenty rounds from an AK-47 assault rifle into the residence occupied by Marcos Devon Bryant (defendant) and others in Winston-Salem. No one was injured by the shooting. Defendant's roommate identified Miller as the shooter. Miller subsequently acknowledged that he was the perpetrator of the shooting to several people. The motivation for the shooting is not clear from the record.

On the morning after the shooting, defendant stated that "I got to get him" and "he was sending for his chopper." On 16 January 2006, defendant traveled to Loris, South Carolina, where he purchased a MAK-90 assault rifle. On 17 January 2006 at 8:18 p.m., defendant purchased four or five boxes of 7.62 mm. ammunition at a Wal-Mart in Winston-Salem. The ammunition was three boxes of Winchester Brand and possibly one box of Remington Brand. Defendant worked at the Wal-Mart. At about 11:15 p.m. on 17 January 2006, defendant called Miller and told him that he wanted to "squash the beef before somebody got hurt." He also offered to sell Miller some athletic shoes and some marijuana. Defendant called Miller again at about 11:40 p.m. and told him to meet him at the intersection of First and Lowery. Defendant picked up "Turk" Perry (Perry) and Brandon Staton (Staton), who accompanied defendant to the meeting. Defendant was armed with his MAK-90, and Perry was armed with his AK-47. Defendant and Perry got out of the car and waited for Miller. Staton remained in the car.

About 12:40 a.m. on 18 January 2006, Miller drove up accompanied by Marcus Wilson (Wilson). As soon as Miller and Wilson got out of their car, defendant and Perry emerged from the shadows on a

porch and began firing their assault rifles. Miller and Wilson ran behind some houses. Defendant chased them down, firing his assault rifle. The bodies of Miller and Wilson were found in a field approximately 100 yards behind the house. Each had six bullet wounds, mostly in the back. Defendant fired almost all of the thirty rounds in the clip for his MAK-90. Crime scene investigators found thirty-six shell casings, most of which were fired from defendant's weapon. Approximately eight casings were from another weapon. There were no weapons of any kind found upon or near Miller and Wilson. The entire melee lasted for about thirty seconds.

At trial, defendant testified that when Miller arrived, he observed a red light in Miller's car that seemed to be pointed at him. He also testified that he heard a shot. Defendant then began shooting at Miller and Wilson, chasing them, and ultimately killing them. He testified he was concerned that if he stopped shooting, Miller and Wilson would shoot him.

After the shootings, defendant voluntarily went to the police department the afternoon of 18 January 2006 for an interview. Defendant initially told police he had not met with Miller on the night of the shootings. He admitted to owning the MAK-90 but said it had been stolen. Defendant took police out to his vehicle and provided them with two items: a slip of paper with Miller's cell phone number written on it, and the receipt for the MAK-90. Defendant also consented to a search of his vehicle and his residence.

On 7 February 2006, defendant was arrested while attending class at Winston-Salem State University. Defendant's vehicle was locked and sitting in a parking lot. Police seized defendant's vehicle and obtained a search warrant on 9 February 2006.

During the course of the search, police seized a tan jacket from defendant's vehicle, which defendant wore on the night of the shootings. The jacket tested positive for gunshot residue. Police also seized a black notebook from the front floorboard of the vehicle. Detective Taylor testified that he could "make out" defendant's first name and two phone numbers on the front of the notebook. Inside the notebook, police found rap lyrics defendant had written about the shootings. Defendant later admitted that he wrote the song.

On 22 January 2008, defendant filed a Motion to Suppress and Motion to Exclude Evidence of "Writings" dated "1-24-2006." The trial court denied defendant's motion and held that the search warrant was supported by probable cause, and after looking at the totality of

the circumstances, "detectives did not need a search warrant to legally seize and subsequently search the defendant's vehicle on February 8, 2006, given that the search was incident to a valid arrest of the defendant and given the inherent mobility of the subject of the search . . . ."

As to each murder charge, the trial court instructed the jury on first-degree murder under a theory of premeditation and deliberation, first-degree murder under a theory of lying in wait, second-degree murder, and not guilty. The trial court denied defendant's request for an instruction on voluntary manslaughter based on imperfect self-defense. Defendant was found guilty of each charge of first-degree murder under the theory of premeditation and deliberation. Defendant was sentenced to concurrent life sentences.

Defendant appeals.

II. Instruction on Voluntary Manslaughter based on imperfect self-defense

[1] In his first argument, defendant contends the trial court erred in refusing to instruct the jury on voluntary manslaughter based on imperfect self-defense. We disagree.

Defendant contends that his killing of Miller and Wilson was a result of his reasonable fear of death or bodily harm because Miller shot into his residence two days earlier, and he heard a gun shot when the victims stepped out of their vehicle. Defendant argues that the jury could have found it reasonable for defendant to believe that deadly force was reasonably necessary to protect himself from harm.

We decline to discuss this issue because even assuming *arguendo* that the trial court was required to instruct the jury on voluntary manslaughter based on self-defense, we conclude the error was rendered harmless by the jury verdict.

Our law states "that when the trial court submits to the jury the possible verdicts of first-degree murder based on premeditation and deliberation, second-degree murder, and not guilty, a verdict of first-degree murder based on premeditation and deliberation renders harmless the trial court's improper failure to submit voluntary or involuntary manslaughter." *State v. Price*, 344 N.C. 583, 590, 476 S.E.2d 317, 321 (1996).

One rationale is that in finding the defendant guilty beyond a reasonable doubt of first-degree murder based on premeditation and

> deliberation and rejecting second-degree murder, the jury necessarily rejected, beyond a reasonable doubt, the possibilities that the defendant acted in the heat of passion or in imperfect self-defense (voluntary manslaughter) or that the killing was unintentional (involuntary manslaughter).

Id.

This argument is without merit.

III. Admission of the Rap Lyrics Contained in a Notebook Seized from Defendant's Vehicle

[2] In his second argument, defendant contends that the trial court erred in denying his motion to suppress rap lyrics found in a notebook seized from his vehicle because the notebook and its contents were not listed as items to be seized in the warrant and were not immediately apparent to the officer as evidence of a crime. We disagree.

In reviewing the trial court's denial of a motion to suppress, our standard of review is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law. *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (2003) (citing *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991)), *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003).

> [A trial court's] findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). "Conclusions of law that are correct in light of the findings are also binding on appeal." *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996).

State v. Brewington, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001).

When denying defendant's motion to suppress, the trial court stated "there was not the necessity for the state to put on evidence as the state normally does on a motion to suppress, because I believe counsel were basically in agreement about what the facts were . . . ." In its Conclusions of Law, the trial court held:

> That in any event the search warrant at issue was supported by probable cause, and that the detectives' failure to mention

> the name of the witness who provided the description of the defendant's car does not render the search warrant invalid under the totality of the circumstances, and especially in light of the fact that the defendant admitted to operating his 1995 Oldsmobile Aurora in the vicinity of the crimes near the time of the shootings[.]

We conclude that the seizure of the notebook was authorized by the terms of the search warrant. The application for a search warrant stated:

> [R]equest that the court issue a warrant to search the item(s) described in this application and to find, seize, and examine the contents there of the property describe[d] in this application. There is probable cause to believe that a firearm, ammunition, firearm documentation, blood, DNA, trace, fingerprint evidence, and documents showing ownership, control and access constitutes evidence of a crime and the identity of the person(s) participating in a crime.

At trial, Detective Taylor testified that he could see defendant's name and two phone numbers imprinted on the front of the notebook. The numbers were significant to him because the two phone numbers corresponded to the two phones defendant had on his person when he was arrested. Once Detective Taylor could make out the identifying information on the front of the notebook, it was not unreasonable for him to examine the contents of the notebook and conclude that the rap lyrics were evidence of the crime. The warrant expressly stated that police were looking for "documents showing ownership, control and access [that] constitutes evidence of a crime and the identity of the person(s) participating in a crime."

"G.S. 15A-242(4) allows the seizure of items pursuant to a search warrant when there is probable cause to believe that the items constitute 'evidence of an offense or the identity of a person participating in an offense.' " *State v. Tate*, 58 N.C. App. 494, 499-500, 294 S.E.2d 16, 19 (1982), *disc. review denied*, 306 N.C. 750, 295 S.E.2d 763 (1982). The notebook was such an item.

Contrary to defendant's assertion, we hold that the notebook and its contents were encompassed in the search warrant's description of items for which the officers were permitted to search. The trial court properly allowed the notebook, and therefore, the contents of the notebook (rap lyrics) into evidence.

Defendant also contends that the trial court "made no factual findings relating to the plain view exception or whether the scope of the search was reasonable or permissible." Defendant argues that the trial court's findings only related to whether there was probable cause to support the search. Because we find that the seizure of the notebook was based upon a valid search warrant, it is not necessary for us to discuss the plain view exception.

This argument is without merit.

Defendant has failed to argue his remaining assignments of error in his brief, and they are thus deemed abandoned pursuant to Rule 28(b)(6) of the Rules of Appellate Procedure.

NO ERROR.

Judges GEER and STEPHENS concur.

GREGORY SCOTT KRANZ, PLAINTIFF v. HENDRICK AUTOMOTIVE GROUP, INC.; AND JERRY HOLLIFIELD, DEFENDANTS

No. COA08-253

(Filed 7 April 2009)

1. Employer and Employee— wrongful discharge—failure to show public policy violations—summary judgment

The trial court did not err in a wrongful discharge case by granting summary judgment in favor of defendants even though plaintiff contends he presented ample evidence to show that he was dismissed in violation of established public policy because plaintiff failed to show that: (1) defendant HAG actually violated state or federal law; (2) HAG's policies violated state or federal law; (3) HAG requested that plaintiff violate any law; (4) plaintiff ever raised the possibility with HAG that it was violating state or federal law; or (5) that any other basis existed for suggesting a violation of public policy.

2. Employer and Employee— failure to pay bonus after termination—summary judgment

Plaintiff former at-will employee was not entitled to receive a bonus under his compensation plan where he was terminated prior to the annual bonus payment date and his compensation plan stated that he "must be an employee on each payment date in order to received the bonuses."

Appeal by plaintiff from judgment entered 21 September 2007 by Judge Timothy Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 September 2008.

Robertson, Medlin & Blocker, PPLLC, by Jonathan Wall, for plaintiff.

Ogletree, Deakins, Nash, Smoak, & Stewart, PC, by David B. Hawley, for defendant.

ELMORE, Judge.

Gregory Scott Kranz (plaintiff) appeals from an order granting a motion for summary judgment by Hendrick Automotive Group, Inc. (HAG), and Jerry Hollifield (together, defendants). For the reasons below, we affirm.

I.

Plaintiff was employed by defendant HAG in its information technology department beginning in 2000. From 2000 to 2005, plaintiff worked under the company's chief financial officer; in 2005, he was promoted to vice president of information technology.

Some time in 2005, plaintiff recommended to defendants that the procedures for authorizing users and access to certain databases of customer information be updated. In March and April 2006, plaintiff brought concerns regarding the classification of certain fixed assets for depreciation purposes to an outside firm for an outside assessment of the issues. In April 2006, plaintiff again raised the issue of access to customer databases at a strategy meeting.

On 18 May 2006, plaintiff was terminated by defendant HAG for failing to meet certain deadlines. Plaintiff brought suit for wrongful discharge on 21 June 2006. On 21 September 2007, defendants' motion for summary judgment was granted. Plaintiff appeals that ruling.

II.

A.

[1] Plaintiff first argues that the trial court erred in granting summary judgment to defendants as to his wrongful discharge claim because he presented ample evidence to show that he was dismissed in violation of established public policy. We disagree.

Specifically, plaintiff argues that he was wrongfully discharged due to his insistence that defendants comply with certain laws, an action which he argues violated our state's public policy.

> In North Carolina, the employer-employee relationship is governed by the at-will employment doctrine, which states that "in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." However, our Supreme Court has recognized a cause of action for wrongful discharge in violation of the public policy of North Carolina.
>
> "There is no specific list of what actions constitute a violation of public policy. . . . However, wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employer's request, . . . (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy[.]"

Whitings v. Wolfson Casing Corp., 173 N.C. App. 218, 221, 618 S.E.2d 750, 752-53 (2005) (citations omitted; alterations in original). Further, "[t]he public policy exception to the at-will employment doctrine is confined to the express statements contained within our General Statutes or our Constitution." *Id.* at 222, 618 S.E.2d at 753.

Based on our review of the evidence submitted by plaintiff, we must conclude that he has failed to present a sufficient forecast of evidence to establish a wrongful discharge claim. "Under [the] public policy exception, the employee has the burden of pleading and proving that the employee's dismissal occurred for a reason that violates public policy." *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003). Plaintiff has asserted that he was fired for insisting that HAG comply with (1) state and federal laws requir-

ing that HAG ensure the security of sensitive client information maintained in its computer database and (2) state and federal laws requiring proper classification and depreciation of fixed assets for tax and banking purposes.

With respect to customer privacy, plaintiff presented an affidavit of F. Stan Wentz, a certified information system security professional. Mr. Wentz stated that "internal controls over the safeguarding of sensitive customer [information] at HAG [were] not functioning in accordance with stated policy and regular practices of other entities." In addition, after noting that sensitive customer information was not encrypted, Mr. Wentz stated: "Most companies encrypt or securely isolate sensitive customer information to protect that data in case of a security breach." Mr. Wentz never stated that HAG was violating any state or federal law regarding security of sensitive client information. At most, he indicated that HAG was violating its own policies and not acting in a manner consistent with what other companies or entities were doing.

Plaintiff's affidavit likewise does not state that HAG was violating any law regarding sensitive customer information. In his deposition, when asked whether he had ever suggested to anyone at HAG that HAG was violating any data privacy law, he testified that he did not know that he "would have used that terminology" and the he was "not sure [he] ever framed it as a privacy issue but customer access, third-party access was discussed." He repeatedly indicated that the only violations of data privacy laws that he remembered complaining about involved "do not call" laws—not the issue relied upon by plaintiff in his wrongful discharge action.

Thus, although plaintiff points to various state and federal statutes regarding the privacy of customer information, he has not shown any violation of those laws or that he was even asked to violate those laws. It is not sufficient to simply point to public policy that may be implicated in issues that an employee has raised. The employee must show that "the public policy of North Carolina was contravened when defendant terminated plaintiff from his at-will employment." *McDonnell v. Tradewind Airlines, Inc.*, 194 N.C. App. ——, ——, 670 S.E.2d 302, 307 (2009). Plaintiff has failed to make that showing here and, therefore, summary judgment was appropriate. *See Salter*, 155 N.C. App. at 694, 575 S.E.2d at 52 (affirming grant of summary judgment when plaintiff failed to substantiate any statutory violations even though the statute at issue could be a source of public policy for purposes of wrongful discharge claim).

In addition, in *Garner v. Rentenback Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999), our Supreme Court held that a violation of a statute, standing alone, is not sufficient for a wrongful discharge claim, but rather there must be "a degree of intent or wilfulness on the part of the employer." In that case, because the plaintiff had not shown that the defendant employer "knew, or even suspected" that it had violated the statute at issue, the trial court properly granted summary judgment on the wrongful discharge in violation of public policy claim.

In this case, in plaintiff's deposition, when asked about the response of HAG when he raised "the third-party access issue" (the issue now couched as a violation of data privacy laws), he responded: "I don't think they understood, had any idea what I was talking about." On another occasion, when asked what reception he had received when expressing privacy concerns to the executive committee, he replied: "Marginal, marginal reception. I don't think people actually understood the significance of the issue." Thus, even if plaintiff had presented evidence of a violation of state or federal privacy laws, he has failed to demonstrate that HAG knew of the violations and, therefore, summary judgment was also proper under *Garner* as to this public policy theory.

With respect to plaintiff's fixed assets contentions, plaintiff submitted the affidavit of John C. Compton, a certified public accountant. Mr. Compton reviewed HAG documents regarding its internal controls over the accounting for fixed assets. He concluded that "internal control over fixed assets at Hendrick Auto Group (HAG) was not functioning in accordance with stated policy and regular practices of other entities." According to Mr. Compton, "[s]uch lack of control has the potential for causing errors in accurately reporting information to outside parties such as federal, state and local governments, thereby causing possible improper reporting of tax liabilities to those governments."

In addition to Mr. Compton's affidavit, plaintiff asserted in his own affidavit that he was told by a person in HAG's accounting department that "the Fixed Asset System had been 'screwed up for years.' " In plaintiff's deposition, he indicated only that he raised the issue of fixed assets because he found they were being miscategorized, thereby creating a potential for inaccurate information and depreciation. When asked if he ever told Mr. Hollifield that HAG was violating any law through its Fixed Asset System, he said: "I don't know if I phrased it quite like that." In an e-mail upon which

plaintiff relies, he sought authorization to hire an accountant to assist him with the categorization of IT assets because correcting the problem could lead to cost savings. The e-mail did not reference any violation of law or any potential for misreporting of financial data to the government.

Although plaintiff, on appeal, cites numerous state statutes regarding proper and accurate filing of tax returns and argues that he was attempting to ensure that "perceived tax reporting improprieties" did not go "unchecked," his summary judgment showing included no evidence of any "tax reporting improprieties." Indeed, he presented no evidence that any law, state or federal, was violated, or even that HAG was failing to comply with Generally Accepted Accounting Principles. His expert witness's affidavit indicated only that HAG was violating its own policies and that its accounting was inconsistent with how other companies handled fixed assets. While the expert stated that the internal controls were such that improper tax reporting could *possibly* occur, he never concluded that improper tax reporting necessarily would occur or had occurred. Thus, as with the data privacy issue, plaintiff failed to make any showing that any state or federal law was violated as to the reporting of fixed assets or more generally as to tax reporting.

In short, plaintiff failed to show (1) that HAG actually violated state or federal law, (2) that HAG's policies violated state or federal law, (3) that HAG requested that plaintiff violate any law, (4) that plaintiff ever raised the possibility with HAG that it was violating state or federal law, or (5) that any other basis exists for suggesting a violation of public policy. Plaintiff's general assertions of wrongdoing by defendants are insufficient to place his discharge in the narrow public policy exception carved out by our case law. As such, we overrule this assignment of error.

B.

[2] Plaintiff next argues that the trial court erred in granting summary judgment as to plaintiff's breach of contract claim. This argument is without merit.

Plaintiff signed a compensation plan for 2005, then a new compensation plan for 2006. Plaintiff's compensation plan for 2006 lists his salary and benefits, then, under "Bonus," states: "Bonuses to be determined based on meeting defined objectives. *You must be an employee on each payment date in order to receive the bonuses*." The bonus would have been paid at the end of the calendar year.

Plaintiff's employment with defendant ended on 18 May 2006. As such, regardless of whether plaintiff had earned the annual bonus in the five and a half months of 2006 he worked, by the terms of his compensation plan, he was not entitled to the bonus. We overrule this assignment of error.

Affirmed.

Judges HUNTER, Robert C., and GEER concur.

DERICK BLANTON, Plaintiff v. C. RANDALL ISENHOWER as Administrator of the Estate of Glen Boyd Smith, Defendant

No. COA08-864

(Filed 7 April 2009)

Arbitration and Mediation— UIM award—prejudgment interest—modification of award

The trial court could not modify an underinsured motorist (UIM) arbitration award to allow prejudgment interest where prejudgment interest was not specifically stated in the arbitration award.

Appeal by plaintiff from order entered 7 May 2008 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 10 December 2008.

DeVore, Acton, & Stafford, PA, by Fred W. DeVore, III, for plaintiff-appellant.

Willardson Lipscomb & Miller, L.L.P., by William F. Lipscomb, for unnamed defendant-appellee Farm Bureau.

Robinson Elliot & Smith, by W. Lewis Smith, Jr., for unnamed defendant-appellee Nationwide.

Burton & Sue, L.L.P., by Gary K. Sue, for unnamed defendant-appellee Allstate.

BRYANT, Judge.

Plaintiff Derick Blanton appeals from an order entered 7 May 2008 in Catawba County Superior Court denying his motion for relief

of order denying interest on UIM arbitration award. For the reasons stated herein, we affirm the order of the trial court.

This matter arises from a motor vehicle accident that occurred on 24 April 2004. Blanton was among three passengers in a motor vehicle operated by Joseph Ingerling when Ingerling's vehicle was struck head-on by a vehicle driven by Glen Smith. Both Ingerling and Smith died as a result of the collision. Blanton suffered serious injury and, on 7 February 2007, filed a complaint against the estate of Glen Smith alleging negligence and damages in excess of $10,000.00.

Given the death of Ingerling as well as the severity of the injuries of other passengers, Smith's automobile insurance policy was insufficient to fully compensate all victims. Blanton received $16,500.00. However, at the time of the accident Blanton lived with his parents—David Blanton and Elaine Carter. David Blanton maintained automobile insurance policies with Allstate Insurance Company which provided UIM coverage up to $100,000.00 and Farm Bureau Insurance Company which provided UIM coverage up to $250,000.00. Elaine Carter maintained an automobile insurance policy with Nationwide Mutual Insurance Company which provided UIM coverage up to $100,000.00. Each policy contained an arbitration provision to be invoked by the insured should there be a need to determine the amount of UIM proceeds to be paid as a result of an automobile accident. On 30 April 2007, the trial court entered a consent order to stay proceedings pending binding arbitration.

The arbitration award entered 12 November 2007 stated that Blanton was entitled to recover $296,732.72 in damages from Smith's estate. On 14 January 2008, the trial court confirmed the award but denied Blanton's request that he be allowed to recover interest and costs. On 23 January 2008, Blanton filed a "Motion For Relief Of Order Denying Interest On The UIM Arbitration Award" in which he requested that the trial court confirm the arbitration award, reduce it to a civil judgment, and allow the recovery of interest and costs. On 7 May 2008, the trial court denied the motion. Blanton appeals.

On appeal, Blanton raises two questions: Did the trial court commit reversible error by (I) denying his request that prejudgment interest be included in the judgment with the arbitration award and (II) denying his motion for relief from the order denying interest.

I & II

Blanton first questions whether the trial court committed reversible error by denying his request for prejudgment interest on the UIM arbitration award. Blanton argues that we should read N.C. Gen. Stat. § 1-569.25 in conjunction with N.C. Gen. Stat. § 24-5(b) as requiring a trial court to include prejudgment interest upon the entry of an arbitration award as a judgment. We disagree.

In *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 499 S.E.2d 801 (1998), the plaintiff argued that the trial court erred in failing to include prejudgment interest in its order confirming an arbitration award. *Id.* at 496, 499 S.E.2d at 806. This Court reasoned that implicit in the argument was a request to modify the arbitrator's award. *Id.* While the Court acknowledged that the Uniform Arbitration Act, then codified in the General Statutes, provided for the modification of an arbitration award by a trial court in limited circumstances, the Court rejected the argument that an arbitrator's award was to be treated as a jury verdict whereupon a trial court could award prejudgment interest upon entry of the verdict. *Id.* at 498, 499 S.E.2d at 807.

Under North Carolina General Statute, section 1-569.25 an arbitration award entered as a judgment may be "recorded, docketed, and enforced as any other judgment in a civil action." N.C.G.S. § 1-569.25 (2007). Under North Carolina General Statute, section 24-5(b), "[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). However, as reasoned in *Palmer*, an arbitrator's award is not to be treated as a fact finder's verdict. *See also Sprake v. Leche*, 188 N.C. App. 322, 658 S.E.2d 490 (2008) (holding arbitration panel had authority to award prejudgment interest and trial court properly confirmed arbitration award as written); *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 654 S.E.2d 47 (2007) (holding arbitrator's authority was not exceeded by including prejudgment interest in an arbitration award). Moreover, we do not interpret N.C.G.S. §§ 1-569.25 and 24-5(b) as expanding the limited circumstances in which a trial court is required to modify an arbitration award.

Here, as in *Palmer*, implicit in Blanton's request for prejudgment interest exists a request to modify the arbitration award. Under the Revised Uniform Arbitration Act, codified at N.C. Gen. Stat.

§§ 1-569.1 *et seq.*, a trial court shall modify or correct an arbitration award if:

> (1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;
>
> (2) The arbitrator has made an award on a claim not submitted to the arbitrator . . . ; or
>
> (3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

N.C. Gen. Stat. § 1-569.24 (2007). We hold these circumstances to be the only circumstances in which a trial court may modify an arbitration award.

Further, contrary to Blanton's assertions regarding this Court's rulings in other arbitration cases involving prejudgment interest, we are unaware of any case in which this Court has upheld a trial court's modification of an arbitration award allowing prejudgment interest if such was not specifically stated in the arbitration award. *See*, *e.g.*, *King v. Lingerfelt*, No. 07-1193, 2008 N.C. App. LEXIS 1007 (N.C. Ct. App., May 20, 2008) (unpublished) (affirming the trial court's enforcement of an arbitration award as written where the award specifically left "the issue of prejudgment interest . . . to be addressed by [the] Court . . . ."). Therefore, the trial court did not err in denying Blanton's request for prejudgment interest, and this assignment of error is overruled.

Having found no error in the trial court's denial of Blanton's request for prejudgment interest, we find no error in the trial court's denial of Blanton's motion for relief. The judgment of the trial court is affirmed.

Affirmed.

Judges McGEE and GEER concur.

IN THE MATTER OF S.M.S.

No. COA08-970

(Filed 7 April 2009)

Juveniles— delinquency—second-degree trespass—sufficiency of evidence

The trial court did not err by denying respondent juvenile's motion to dismiss the petition charging him with second-degree trespass in violation of N.C.G.S. § 14-159.13 based on an incident where the juvenile and another boy ran through the girls' locker room at a high school while the girls were changing clothes because: (1) the sign marked "Girl's Locker Room" was reasonably likely to give respondent notice that he was not authorized to go into the girls' locker room; and (2) respondent's admission that he violated school rules by entering the girls' locker room supported a reasonable inference that he knew he was not permitted in the locker room.

Appeal by respondent from order entered 20 March 2008 by Judge G. Galen Braddy in Pitt County District Court and order entered 24 March 2008 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 11 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General Gaines M. Weaver, for the State.

Sofie W. Hosford for respondent-appellant.

HUNTER, JR., Robert N., Judge.

S.M.S. ("respondent") appeals from adjudication and disposition as a delinquent juvenile for second-degree trespass in violation of N.C. Gen. Stat. § 14-159.13 (2007). For reasons stated herein, we affirm.

I. Background

On 20 March 2008, respondent was adjudicated delinquent for the offense of second-degree trespass. At the hearing on this matter, the State's evidence tended to show the following: On 31 October 2007, respondent was a fifteen-year-old student at J.H. Rose High School. At approximately 1:00 p.m. on 31 October 2007, G.H., B., and E.J., fourteen-year-old girls, (collectively "the girls"), were changing

clothes in the girls' locker room at J.H. Rose High School when they heard boys' voices. The girls started screaming when they saw respondent and another boy run through their locker room.

When Coach Gibson heard the girls screaming and noticed two boys going into the girls' locker room, he approached the locker room door, blew his whistle, and asked the boys to come out. Immediately upon Coach Gibson's order, respondent and the other boy exited the locker room.

Coach Gibson contacted Officer Carlton Joyner of the Greenville Police Department, who was assigned to J.H. Rose High School. After reviewing school surveillance videos, Officer Joyner identified respondent as one of the boys who had been in the girls' locker room. At all relevant times, there was a sign on the front door of the locker room, marked "Girl's Locker Room."

At the 4 March 2008 Juvenile Session of Pitt County District Court, with the Honorable G. Galen Braddy presiding, respondent denied committing delinquent acts of second-degree trespass and secretly peeping into a room occupied by another person. At the close of the State's evidence, respondent moved to dismiss both charges. In an adjudication order entered 20 March 2008, the trial court dismissed the petition charging respondent with secretly peeping and adjudicated respondent delinquent for the offense of second-degree trespass. The matter was continued to the 11 March 2008 Juvenile Session of Pitt County District Court, with the Honorable P. Gwynett Hilburn presiding. On 24 March 2008, the trial court entered a level 1 disposition, which included probation and five 24-hour periods of intermittent confinement to be imposed upon any probation violation. Respondent appeals.

II. Standard of Review

We review a trial court's denial of a motion to dismiss *de novo*. *State v. Hart*, 179 N.C. App. 30, 39, 633 S.E.2d 102, 108 (2006), *aff'd in part, reversed in part on other grounds, and remanded*, 361 N.C. 309, 644 S.E.2d 201 (2007). "Where the juvenile moves to dismiss, the trial court must determine 'whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense.' " *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). " 'Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion.' " *In re S.R.S.*, 180 N.C. App. 151, 156, 636

S.E.2d 277, 281 (2006) (quoting *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005)). When reviewing a motion to dismiss a juvenile petition, courts must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference of fact that may be drawn from the evidence. *In re Brown*, 150 N.C. App. 127, 129, 562 S.E.2d 583, 585 (2002).

III. Discussion

Respondent argues that the trial court erred in denying his motion to dismiss the petition charging him with second-degree trespass. Respondent argues that, although he violated school rules by going into the girls' locker room, his conduct did not support the charge of second-degree trespass. This Court reverses adjudications where the evidence shows no more than ordinary misbehavior or rule-breaking. *In re S.M.*, 190 N.C. App. 579, 582-83, 660 S.E.2d 653, 656 (2008); *see also In re Brown*, 150 N.C. App. at 131-32, 562 S.E.2d at 586 (reversing an adjudication of disorderly conduct when the juvenile talked during a test, slammed a door, and begged the teacher not to send him to the office).

In the case before us, respondent was convicted of second-degree trespass, pursuant to N.C. Gen. Stat. § 14-159.13, which provides:

> (a) Offense.—A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another:
>
> (1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person; or
>
> (2) That are posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the premises.

N.C. Gen. Stat. § 14-159.13 (2007). Respondent contends that he was lawfully permitted to enter the girls' locker room because it was located on school property, which is open to the public. When premises are open to the public, "the occupants of those premises have the implied consent of the owner/lessee/possessor to be on the premises, and that consent can be revoked only upon some showing the occupants have committed acts sufficient to render the implied consent void." *State v. Marcoplos*, 154 N.C. App. 581, 582-83, 572 S.E.2d 820, 821-22 (2002), *aff'd and remanded*, 357 N.C. 245, 580 S.E.2d 691 (2003); *see also State v. Winston*, 45 N.C. App. 99, 101-02,

262 S.E.2d 331, 333 (1980) (reversing unlawful entering charge where the defendant entered a clerk's office in the courthouse when it was open to the public, and evidence failed to disclose that defendant, after entry, committed acts sufficient to render the implied consent void). Respondent argues that his actions cannot constitute trespass, because he left the locker room immediately upon Coach Gibson's order to leave.

The sign marked "Girl's Locker Room" was reasonably likely to give respondent notice that he was not authorized to go into the girls' locker room, pursuant to N.C. Gen. Stat. § 14-159.13(a)(2). Furthermore, respondent's admission that he violated school rules by entering the girls' locker room supports a reasonable inference that he knew he was not permitted in the locker room. This evidence supports the trial court's denial of respondent's motion to dismiss. We overrule this assignment of error. Although respondent's actions, in the case *sub judice*, provided sufficient evidence of second-degree trespass, it is unclear to us why our Courts were involved in this matter when the school, in its administrative capacity, was fully capable of dealing with respondent's conduct and disciplining him appropriately.

IV. Conclusion

There was no reversible error in the trial court's denial of respondent's motion to dismiss. Accordingly, we affirm.

Affirmed.

Judges McGEE and JACKSON concur.

JOSEPH MICHAEL GRIFFITH, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, MR. THEODIS BECK, AND MR. BOYD BENNETT, DEFENDANTS

No. COA08-966

(Filed 7 April 2009)

Prisons and Prisoners— inmate's pro se complaint alleging violation of statute—argument not frivolous

The trial court erred by dismissing plaintiff inmate's civil action *in forma pauperis* against defendant North Carolina Department of Correction (DOC) alleging that DOC was violating

N.C.G.S. § 12-3.1 by charging a $10.00 administrative fee for any disciplinary guilty disposition, and the case is remanded, because it cannot be said that plaintiff failed to present any rational argument based upon the evidence or law such that his claim was so lacking in merit as to be frivolous.

Appeal by plaintiff from an order entered 30 June 2008 by Judge Michael E. Beale in Anson County Superior Court. Heard in the Court of Appeals 11 February 2009.

Joseph Michael Griffith, Pro se, plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Yvonne B. Ricci, for defendants-appellees.

JACKSON, Judge.

Joseph Michael Griffith ("plaintiff") appeals the dismissal of his civil action *in forma pauperis* against the North Carolina Department of Correction ("DOC"), Theodis Beck, and Boyd Bennett (collectively "defendants"). For the reasons stated below, we reverse and remand.

Plaintiff is an inmate in the care and custody of defendants. On or about 19 June 2008, he filed a petition to sue as an indigent, along with a proposed complaint, with the Anson County Superior Court. The complaint alleged that defendants, by charging a $10.00 administrative fee for any disciplinary guilty disposition, were violating North Carolina General Statutes, section 12-3.1. The trial court determined that the complaint was frivolous and dismissed the action. Plaintiff appeals.

> A claim is frivolous if a proponent can present no rational argument based upon the evidence or law in support of [it]. In determining whether a complaint is frivolous, the standard is not the same as in a ruling on a motion under Rule 12(b)(6). Instead, we look with a far more forgiving eye in examining whether a claim rests on a meritless legal theory. We review such dismissals for abuse of discretion.

Gray v. Bryant, 189 N.C. App. 527, 528, 658 S.E.2d 537, 538 (2008) (internal quotation marks and citations omitted) (alteration in original).

Here, plaintiff identified North Carolina General Statutes, section 12-3.1 which states that "[o]nly the General Assembly has the power

to authorize an agency to establish or increase a fee or charge for the rendering of any service or fulfilling of any duty to the public." N.C. Gen. Stat. § 12-3.1(a) (2007). He alleged that defendants exceeded their statutory authority by establishing a rule that "[a]ll inmates whose offenses result in a guilty disposition will be assessed an administrative fee of $10.00 . . . ." Division of Prisons, N.C. Dep't of Correction, *Policy and Procedure Manual*, B.0203 (Apr. 25, 2008). He sought declaratory and injunctive relief pursuant to North Carolina General Statutes, section 7A-245.

Section 12-3.1(a) further provides that "[n]otwithstanding any other law, a rule adopted by an agency to establish . . . a fee or charge shall not go into effect until the agency has consulted with the Joint Legislative Commission on Governmental Operations on the amount and purpose of the fee or charge to be established . . . ." N.C. Gen. Stat. § 12-3.1(a) (2007). Here, the State argues in its brief that the broad authority inherent in section 148-11(a)—granting the Secretary of Correction the authority to adopt rules for the government of the State prison system—gives the Secretary the authority to impose the fee at issue, but makes no mention that the agency has met its obligation to consult with the Joint Legislative Commission on Governmental Operations.

If plaintiff's allegations were proven, he could have a viable cause of action. We cannot say that plaintiff failed to present any rational argument based upon the evidence or law such that his claim was so lacking in merit as to be frivolous. He may or may not leave the courthouse victorious, but he has at least stated sufficient allegations to get through the front door.

Reversed and remanded.

Judges McGEE and HUNTER, JR., ROBERT N. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 APRIL 2009)

CADLEROCK, L.L.C. v. CAROLINA KOOLERS OF VA, L.L.C. No. 08-974	Mecklenburg (06CVS14158)	Dismissed
CADLEROCK, L.L.C. v. CAROLINA KOOLERS, L.L.C. No. 08-975	Mecklenburg (06CVS14157)	Dismissed
ELEEN v. HEIL No. 08-861	Onslow (05CVS2544)	No error
GARLAND v. BRANCH BANKING & TR. CO. No. 08-1296	Harnett (07CVS855)	Dismissed
GENTRY v. BIG CREEK UNDERGROUND UTILS, INC. No. 08-922	Surry (07CVS356)	Affirmed
GOODSON v. MAFCO HOLDINGS, INC. No. 08-415	Indus. Comm. (IC177963)	Affirmed in part; reversed and remanded in part
HOLT v. PETE WALL PLUMBING No. 08-579	Indus. Comm. (IC024253)	Remanded
HOOTS v. HOOTS No. 08-385	Henderson (04CVD860)	Vacated and remanded
IN RE A.L. No. 08-1439	Harnett (08J14)	Affirmed
IN RE D.L.M., C.S., C.S., S.S., L.S., C.S. No. 08-1113	Pasquotank (07JT67-72)	Affirmed
IN RE ESTATE OF McINTOSH No. 08-638	Carteret (04E622)	Reversed and remanded in part; affirmed in part
IN RE G.V., C.A., Z.H. No. 08-1487	Currituck (06J6-8)	Vacated and remanded
IN RE J.C., D.C., K.C. No. 08-1339	Onslow (07JA332-34)	Affirmed
IN RE J.M.W. & R.M.W. No. 08-1427	Alamance (07JT39-40)	Affirmed
IN RE K.H. No. 08-528	Durham (06J336)	No prejudicial error

IN RE M.A.M. No. 08-968	Guilford (05JB664)	Reversed and remanded
IN RE M.B. No. 08-768	Mecklenburg (07JB650)	Affirmed in part, reversed in part, remanded for resentencing
IN RE W.W. No. 08-893	Mecklenburg (08J08)	Vacated
JOHANN v. JOHANN No. 08-671	Orange (06CVD1204)	Reversed and remanded
LYNN-CLIFF, INC. v. POOLE No. 08-741	Pender (04CVD772)	Reversed
MACHINERY TRANSP., INC. v. BEATTY No. 08-699	Wake (07CVS5988)	Affirmed
NORTON v. GOODS No. 08-963	Caswell (07CVD405)	Affirmed
ON TRADING CORP. v. N.C. INS. UNDERWRITING ASS'N No. 08-669	Dare (05CVS495)	Affirmed
PARATA SYS., LLC v. NAVAJO HEALTH FOUND.-SAGE MEM. HOSP., INC. No. 08-793	Durham (06CVS4330)	Affirmed
PROCTOR v. LOCAL GOV'T EMPLOYEES' RET. SYS. No. 08-976	Wake (07CVS11806)	Affirmed
PULLEY v. CITY OF WILSON No. 08-716	Indus. Comm. (IC517718) (IC517717)	Affirmed
RAPER v. MANSFIELD SYS., INC. No. 08-1099	Indus. Comm. (IC377149)	Affirmed
SAAVEDRA v. CANDOR HOSIERY MILLS No. 08-353	Indus. Comm. (IC520594)	Affirmed
SMITH v. ADAMS No. 08-763	Mecklenburg (04CVS21571)	Affirmed
STATE v. ANGRAM No. 08-810	Henderson (07CRS1990-91)	No error
STATE v. BAILEY No. 08-544	Harnett (07CRS51340-41) (06CRS57771)	No error

STATE v. BETHEA No. 08-705	Buncombe (06CRS62556-57)	Dismissed in part; no error in part
STATE v. BETTIE No. 08-1015	Clay (07CRS50178) (07CRS50183) (07CRS130)	No error
STATE v. BEVILL No. 08-368	Brunswick (06CRS52675-76)	No error
STATE v. BURROUGHS No. 08-891	Mecklenburg (05CRS224248)	Reversed and remanded
STATE v. BYRD No. 08-636	Mecklenburg (06CRS206153)	No error
STATE v. CANADY No. 08-1168	Guilford (07CRS80039)	No error
STATE v. CHAFIN No. 08-895	Burke (03CRS0502-04)	Affirmed
STATE v. COTTON No. 08-984	Rowan (05CRS57681-83)	No error
STATE v. GADDY No. 08-971	Durham (06CRS55811)	No error
STATE v. HATTEN No. 08-874	Cleveland (06CRS54629-30)	No error
STATE v. JORDAN No. 08-637	Guilford (06CRS86874) (06CRS86877) (06CRS86872)	No error in part, re- versed in part and remanded
STATE v. MCFADDEN No. 08-1125	Mecklenburg (98CRS10267)	Affirmed
STATE v. MCMURRIN No. 08-838	Pasquotank (07CRS3405)	Affirmed
STATE v. MCNAIR No. 08-469	Nash (07CRS6513) (07CRS53410)	No error in part; new trial in part
STATE v. MILLER No. 08-427	Bladen (07CRS50849) (07CRS50840)	No error
STATE v. MORGAN No. 08-742	Wake (06CRS79763)	No error
STATE v. ORR No. 08-744	Mecklenburg (06CRS250541)	Reversed and remanded

STATE v. PLATT No. 08-926	Guilford (07CRS24112-13) (06CRS102408)	No error
STATE v. REARDON No. 08-780	Cleveland (05CRS53222) (05CRS53248)	No error
STATE v. SWEAT No. 08-848	Lee (07CRS5185) (07CRS50743)	Reversed
STATE v. UBEDA No. 08-497	Mecklenburg (06CRS238984-85)	No error
STATE v. WASHINGTON No. 08-868	Forsyth (05CRS53900) (02CRS60317)	Affirmed in part; reversed and remanded in part
STATE v. WILLIAMS No. 08-875	Wake (07CRS37638-39)	No error
STATE v. WOLFE No. 08-38	Alamance (06CRS54790)	Dismissed in part, no error in part
TATUM v. SKIN SURGERY CENTER P.A. No. 08-1243	Forsyth (07CVS4457)	Affirmed
WOMBLE v. G & D TRANSP. No. 08-804	Indus. Comm. (IC528358) (IC456073)	Affirmed

STATE OF NORTH CAROLINA v. TYRONE LAMONT DEAN

No. COA08-344

(Filed 7 April 2009)

1. Criminal Law— disruptive spectators—removal

Defendant was not entitled to a new trial for first-degree murder because the judge removed four spectators from the courtroom where the jurors had heard testimony about gang involvement and that one of the spectators was a codefendant; the judge was informed by a bailiff that jurors were concerned for their safety; the judge knew that jurors during the first trial (which ended in a hung jury) had been intimidated and afraid, in part because of the presence and conduct of people in the gallery; and the trial judge specifically found that the spectators who were removed were talking in the courtroom in violation of his pretrial order and that they did not follow the orders of the court.

2. Evidence— prior crimes or bad acts—admissibility

The trial court did not abuse its discretion in a first-degree murder prosecution by admitting evidence that defendant had earlier shot another victim with the same gun where the evidence was relevant to defendant's identity and its probative value was significant.

3. Evidence— objectionable—other evidence of guilt—no plain error

There was no plain error in a first-degree murder prosecution where there was no question that some of the evidence at trial was objectionable but was not the only evidence that tended to show that defendant was guilty of first-degree murder. The challenged evidence did not tilt the scales and cause the jury to reach its verdict.

4. Criminal Law— prosecutor's closing argument—brevity of challenged remarks—context—no intervention ex mero motu

The trial court did not abuse its discretion in a first-degree murder prosecution by failing to intervene in the State's closing argument, considering both the relative brevity of the allegedly improper arguments and the context.

Judge GEER concurring in part and concurring in the result only in part.

Appeal by Defendant from judgment entered 30 July 2007 by Judge J.B. Allen, Jr., in Durham County Superior Court. Heard in the Court of Appeals 11 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for Defendant.

STEPHENS, Judge.

The facts of this case are easily stated but hardly understood. Around 2:00 a.m. on 6 May 2004, twenty-two-year-old Reginald Johnson was outside an apartment complex on Weaver Street in Durham, where he lived with his mother. Nineteen-year-old Tyrone Lamont Dean ("Defendant") and five other men, all of whom were members of the "Eight-Trey Crips" gang, were outside the apartment complex selling cocaine. The men mistook Reginald Johnson for a leader of a rival gang, the "Bloods." According to one of the men who was with Defendant that night, the Crips "just ran down and started shooting." Reginald Johnson was struck and killed by the gunfire.

The Durham County Grand Jury indicted Defendant on 16 August 2004 for first-degree murder. The case was called for trial in February 2007, Judge Orlando F. Hudson presiding. On 6 March 2007, Judge Hudson declared a mistrial after the jury was unable to reach a unanimous verdict. The case was again called for trial in July 2007, Judge J.B. Allen, Jr., presiding. Defendant did not present any evidence in his defense, and the jury convicted Defendant of first-degree murder. Judge Allen sentenced Defendant to life imprisonment without parole. Defendant appeals.

STATE'S EVIDENCE

Anjelica "Jelly" Johnson, who was not related to Reginald Johnson ("Reginald"), testified that she was outside the Weaver Street apartment complex on the night Reginald was killed. Jelly testified that she saw a group of men run toward Reginald, heard gunshots, and saw Reginald get hit by a bullet. Jelly, herself a member of the Crips gang, testified that she recognized Defendant as one of the men who ran toward Reginald and that Defendant was the only man she recognized. Jelly's testimony was contradicted by three prior statements. In a statement Jelly wrote and signed the same day of the shooting, she did not identify Defendant as one of the men she saw

that night. About three weeks after the shooting, Jelly saw a newspaper story about the shooting which included pictures of Defendant and another man, Mario Fortune. After seeing the story, Jelly identified Mario Fortune from a photo lineup as the man she saw on 6 May 2004. At another point after the shooting, Jelly told a police officer that she was "100 percent sure" that the shooter was DeMario Boyd. Jelly acknowledged at trial that, prior to 2007, she never told anyone that she saw Defendant on the night of the shooting.

Anthony Douglas testified that he walked past Jelly and Reginald on his way home on the night of the shooting. Douglas testified that he saw shots being fired and that Defendant was one of the people shooting. Douglas' trial testimony was contradicted by two prior statements. In a statement Douglas signed the same day as the shooting, Douglas identified another man as the only person he recognized and did not identify Defendant as one of the shooters. In a second statement written and signed by Douglas soon after the shooting, Douglas did not identify Defendant as one of the shooters. At the time he gave the second statement, Douglas was not on probation and did not have any criminal charges pending against him. At the time of trial, Douglas was incarcerated and serving 28-43 months in prison, having pled guilty to conspiracy to commit armed robbery and two felony assault charges. Douglas testified that his decision to testify against Defendant was not part of his plea agreement.

Phillipe Parker testified that he was one of the men with Defendant on Weaver Street on the night of the shooting. Parker testified that he and all of the men with him were members of the Crips gang. Parker testified that on 5 May 2004 he was with Defendant, Deshawn Mitchell, Mario Fortune, Joshua "Juicie" Johnson, and Jeffrey Allen at a duplex on Holloway Street in Durham smoking marijuana. The six men went to an apartment near Weaver Street, continued smoking marijuana, then went outside to sell cocaine. According to Parker, he was the only one of the six who was unarmed that night. Defendant had a .38 caliber weapon. The men saw Reginald, mistook him for a rival gang leader, and "just ran down and started shooting." Parker testified that he saw Defendant, Mitchell, and Juicie fire their guns at Reginald. After the shooting, Parker testified, the men went back to the Holloway Street duplex to smoke marijuana.

Parker further testified that he was arrested on 19 May 2004, along with Defendant, Fortune, and Juicie, at the Holloway Street duplex. Parker testified that at the time of his arrest he was served with a warrant for an unrelated murder and that he had five other

felony charges pending against him. Parker pled guilty to the five felony charges in August 2004 and received a probationary sentence. Parker was incarcerated for two years for his involvement in the unrelated murder, but was never charged for his involvement in Reginald's murder. Parker acknowledged that he got a "[p]retty good deal[.]"

Durham Police Department Sergeant Jack Cates testified that he participated in the 19 May 2004 arrest at the Holloway Street duplex. During the arrest, Cates testified, police officers discovered a .38 caliber handgun which Parker later identified as the gun used by Defendant on 6 May 2004. Cates testified that the gun was submitted to the State Bureau of Investigation for Integrated Ballistics Identification System ("IBIS") testing. The IBIS testing revealed that the gun had been used in five other incidents in Durham: an aggravated assault on 4 May 2004, two aggravated assaults on 22 April 2004, an aggravated assault on 24 June 2003, and a vehicle shooting on 20 March 2003. Cates never testified that Defendant was involved in either the April 2004 or the 2003 incidents. Cates acknowledged on cross-examination that it was "exceptionally clear"[1] that Willie Hopps committed one of the 22 April 2004 assaults and that Shamera Barbie committed the 24 June 2003 assault. During Cates' testimony, the State introduced, without objection from Defendant, a poster-size street map of Durham showing the locations of all of the prior incidents, the location of the Holloway Street duplex, and the location of the shooting on Weaver Street. While Cates testified that he "did not make any formal deals" with Parker, he acknowledged that Parker "did get a good break."

Crime scene technician Mark Bradford testified that he responded to the scene of the Weaver Street shooting on 6 May 2004. Bradford testified that he collected three different caliber shell casings at the scene, including two .38 caliber casings.

Crime scene investigator Eric Campen testified that he participated in the search of the Holloway Street duplex where he collected the following items: a .38 caliber handgun; an ammunition box containing seventeen .38 caliber bullets; a "yellow piece of paper with gang graffiti"; a "white piece of paper containing gang graffiti"; and a composition notebook. Campen examined the gun, ammunition box, and bullets for fingerprints. Campen lifted one fingerprint from the

1. Cates testified that "[e]xceptionally clear is when you have a suspect but the witnesses are—they refuse to cooperate and you have enough that you can proceed with charging the person, but however no one will testify."

box and one fingerprint from one of the bullets inside the box. Campen testified that the lifted fingerprints matched fingerprints contained on an ink fingerprint card "assigned" to Defendant.

Cletus Paylor, fingerprint liaison officer for Durham County, testified that he collected Defendant's fingerprints on the ink fingerprint card used by Campen to identify the fingerprints he found on the ammunition box and bullet. Paylor testified that Defendant was a "detainee" on 12 March 2002 when he "rolled" Defendant's prints. The ink fingerprint card listed Defendant's name and stated that he was charged with possession of a schedule II controlled substance. The State introduced the card created by Paylor into evidence without objection from Defendant and without redacting any of the information contained on the card.

Durham Police Department Detective Anthony Smith testified that he participated in the 19 May 2004 search of the Holloway Street duplex. Smith then testified extensively about gang culture in general and the specific meanings of graffiti contained on the papers collected by Campen at the duplex. Smith stated, "There's no way to know exactly who wrote this graffiti, other than the fact that the individuals that I came into contact with in this residence are Crips."

Harvey Jones testified that he was at an apartment on Liberty Street in Durham on the afternoon of 4 May 2004 when Defendant "busted in the door[]" with a silver handgun and told Jones to "give it up." Jones testified that Defendant shot him in the neck, took his money, and "ran on out the door." Jones acknowledged on cross-examination that he spent ten years in prison on "a murder charge[.]"

Crime scene technician Rebecca Reid testified that she responded to the shooting at the apartment on Liberty Street and collected a .38 caliber shell casing from the apartment.

Special Agent Adam Tanner of the State Bureau of Investigation testified that the shell casing collected by Reid at the apartment on Liberty Street and the .38 caliber shell casings collected by Bradford at the scene of the shooting on Weaver Street were all fired from the handgun collected by Campen at the Holloway Street duplex. Tanner also testified that the bullet identified by a medical examiner as having caused Reginald's death was fired from a nine millimeter handgun.

ISSUES

Defendant presents seven issues for our review. He contends he is entitled to a new trial because: (1) Judge Allen erroneously banished four spectators from the courtroom during the trial; (2) the admission of the poster-size street map of Durham amounts to plain error; (3) the trial court erred in admitting Jones' testimony concerning the 4 May 2004 assault; (4) the admission of the fingerprint card created by Paylor amounts to plain error; (5) Parker's testimony that Defendant used and sold drugs on the night of the shooting amounts to plain error; (6) the admission of the papers collected by Campen at the duplex and Smith's testimony concerning gang beliefs in general and gang graffiti contained on the papers amounts to plain error; and (7) the prosecutor made several improper closing arguments.

ANALYSIS

1. REMOVAL OF COURTROOM SPECTATORS

[1] Defendant argues that he is entitled to a new trial because Judge Allen erroneously removed four spectators from the courtroom during the second trial. Before the jury was selected in that trial, the prosecutor expressed concerns about "courtroom security" to Judge Allen. According to the prosecutor, several members of the jury in the first trial sent notes expressing concerns for their safety to Judge Hudson. The prosecutor also advised Judge Allen that courtroom spectators had used cell phone cameras during the first trial. The prosecutor asked Judge Allen to enter an order banning the use of cell phones in the courtroom and asked Judge Allen to instruct the bailiffs to "be on the lookout" for "gang signs[.]" In response to the State's request, Judge Allen posted the following written order on the door of the courtroom:

> NO CELL PHONES SHALL BE ALLOWED IN COURTROOM;
>
> NO TALKING WHILE COURT IS IN SESSION;
>
> MUST HAVE SEAT AND REMAIN SEATED UNTIL RECESS, ANYONE LEAVING WHILE COURT IS IN SESSION WILL NOT BE ALLOWED BACK IN FOR THE DURATION OF THE TRIAL;
>
> NO CONTACT WITH ANY JURORS AND NO CLOSE PROXIMITY TO ANY JURORS;
>
> ANYONE ENTERING SUBJECT TO SEARCH BY BALIFF [sic].
>
> **Any violations will be subject to contempt of court.**

The jury was selected, opening statements were given, and court adjourned for the day.

The next day, during the State's direct examination, Parker testified that Mitchell was one of the three men he saw fire a gun at Reginald Johnson. Parker then testified as follows:

> Q Mitchell, okay. And do you see him in the courtroom today?
>
> A Yeah.
>
> Q Where is he?
>
> A Right over there.
>
> Q Is he in the back with the white t-shirt?
>
> A Yeah.

Judge Allen adjourned court for the day before the State concluded examining Parker. In the middle of the State's examination the next day, Judge Allen excused the jurors from the courtroom and ordered one of the bailiffs to be sworn and examined. The bailiff testified as follows:

> Q Did juror number five make a comment to you just now as he come [sic] back in?
>
> A Yes, sir.
>
> Q And what did he tell you?
>
> A He said the jurors were talking amongst one another about the presence of what they thought were gang members in the courtroom and they were getting nervous.

Judge Allen then ordered Mitchell and three other men to approach.[2] One of the men stated that he was "[j]ust listening[]" to the proceedings. Two of the other men stated that they were Defendant's friends, and one of those men stated that he was Mitchell's "first cousin." Mitchell acknowledged that he was a "co-defendant" in the case. Judge Allen ordered all four men to leave the courtroom and not to return during the remainder of the proceedings, then stated as follows:

> All right, I want to put on the record that the court took drastic measures here. That it had been reported to this court that

2. Although not entirely clear from the transcript, all four of the men were apparently sitting together "on the back row[.]"

> when this case was tried back in February 2007 with the Honorable Orlando Hudson and the court has read numerous notes from jurors indicating that they were intimidated or appeared to be intimidated and were scared and afraid, and that that was a hung jury.
>
> Now this jury here has now indicated that the jury is concerned about "gangs in Durham County" and the court has taken this action in [sic] ensure that the State of North Carolina receive[s] a fair trial and also to ensure that the defendant receive[s] a fair and impartial trial.

The jury returned to the courtroom, the State concluded its direct examination of Parker, and Defendant conducted a thorough cross-examination. Judge Allen then ordered the morning recess. At the conclusion of the morning recess, before the jury returned to the courtroom, defense counsel stated as follows:

> On behalf of [Defendant] he wanted to state an objection to the court excusing his friends and family support, or his friends and support from the courtroom. And he wanted me to note that objection. Absent any findings that they done [sic] anything wrong they was [sic] excluded from the courtroom and they [sic] wanted them there for his support.

Judge Allen then read from six notes passed to Judge Hudson from jurors during the first trial and made more extensive findings concerning his earlier action. In at least three of the notes, jurors expressed concerns for their personal safety due to the presence and behavior of courtroom spectators. As for findings, Judge Allen stated as follows:

> And the court was made aware of the concerns of the jury in the first trial. The court has noted that the young men that were asked to leave did not follow the orders of the court. They did not come in here and [sic] start. And some of them got up and left. They were talking in the courtroom. They were all dressed alike in white shirts. And one of the jurors on this jury . . . has already informed the court that this jury appears to have become intimidated by gangs here in Durham.

Judge Allen stated that he was "taking a position that it is necessary for this court to act in its discretion in order that both the State of North Carolina and the defendant receive a fair and impartial trial." The State called its next witness and the trial resumed.

Defendant contends on appeal that the removal of the four spectators violated N.C. Gen. Stat. § 15A-1033 and Defendant's constitutional rights "to open courts, public trial, law of the land, and due process of law under the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, §§ 18 and 24 of the N.C. Constitution." Defendant argues (1) there was no evidence the spectators' conduct disrupted the trial or violated a courtroom security order, and (2) the trial court made inadequate findings of fact to support the removal. In response, the State argues (1) Defendant did not timely object to the trial court's action and has therefore waived appellate review of this issue, (2) even if Defendant's objection was timely, Defendant did not present any constitutional arguments to the trial court and has therefore waived review of such claims, and (3) the trial court did not abuse its discretion in ordering the spectators removed.

First, we think there is some merit to the State's contention that the objection Defendant presented to the trial court was not timely. "[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. and Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008). However, we elect not to resolve this issue on that ground and proceed as if the objection were timely.

Second, we agree with the State that Defendant never presented any constitutional arguments to the trial court, and we will not address such arguments for the first time on appeal. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003) ("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."); *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal.") (quoting *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003), *cert. denied*, 541 U.S. 944, 158 L. Ed. 2d 370, (2004)), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). Defendant's objection was premised only on his contention that there were no findings that the spectators did "anything wrong[.]"

Third, we disagree with Defendant's contention that a trial court *must* make findings of fact to support an order removing from the courtroom spectators whose conduct disrupts a trial. Although a trial court "must . . . [e]nter in the record the reasons" for removing a

defendant whose conduct is "so disruptive that the trial cannot proceed in an orderly manner[,]" N.C. Gen. Stat. § 15A-1032 (2003), Section 15A-1033 imposes no such requirement. Moreover, the only case Defendant cites in support of his contention, *State v. Jenkins*, 115 N.C. App. 520, 445 S.E.2d 622, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 753 (1994), is clearly distinguishable. The defendant in that case was on trial for raping a student at North Carolina Central University. Pursuant to N.C. Gen. Stat. § 15-166, the trial court removed everyone except "counsel, defendant, court personnel, and members of the press" from the courtroom during the student's testimony. *Id.* at 525, 445 S.E.2d at 625. *See* N.C. Gen. Stat. § 15-166 (2007) ("In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case."). "[T]he trial court made no findings of fact to support the closure during the student's testimony." *Jenkins*, 115 N.C. App. at 525, 445 S.E.2d at 625. We granted a new trial, stating that

> [i]n clearing the courtroom, the trial court must determine if the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure. *Waller v. Georgia*, 467 U.S. 39, 48, 81 L. Ed. 2d 31, 39 (1984).

Id. Jenkins does not support Defendant's contention that a trial court must make findings of fact before removing disruptive spectators from the courtroom.

Finally, we conclude that the removal of the spectators does not entitle Defendant to a new trial. "[A] transcript is an imperfect tool for conceptualizing the events of a trial." *State v. Lasiter*, 361 N.C. 299, 305, 643 S.E.2d 909, 912 (2007). "In the conduct of jury trials, much must necessarily be left to the judgment and good sense of the judge who presides over them . . . ." *State v. Laxton*, 78 N.C. 564, 570 (1878), *cited in State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986). A judge may remove any person other than a defendant from the courtroom when that person's conduct disrupts the conduct of the trial. N.C. Gen. Stat. § 15A-1033 (2003). *See also* N.C. Gen. Stat. § 15A-1034(a) (2003) ("The presiding judge may impose reasonable limitations on access to the courtroom when necessary to en-

sure the orderliness of courtroom proceedings or the safety of persons present.").

We discern no abuse of discretion in Judge Allen's removal of the spectators from the courtroom. At the time Mitchell, his cousin, and the two other men were removed from the courtroom, the jurors had heard testimony that Mitchell was a co-defendant in the case and had fired shots at Reginald Johnson, and the jurors were aware that Mitchell was present in the courtroom. Judge Allen was informed by a bailiff that jurors were concerned for their safety. Judge Allen knew that jurors during the first trial were intimidated and afraid, and that at least some of those feelings were engendered by the presence and conduct of people in the gallery. Moreover, Judge Allen specifically found that the men "were talking in the courtroom" in violation of his pre-trial order and that the men "did not follow the orders of the court." Under these circumstances, we defer to Judge Allen's judgment and good sense and conclude that Defendant is not entitled to a new trial on this issue.

2. MAY 4 ASSAULT

[2] Defendant argues that the trial court erred in admitting Jones' testimony concerning the 4 May 2004 assault. Pre-trial, Defendant filed a motion *in limine* to exclude Jones' testimony under Rules 403, 404(a), and 404(b) of the Rules of Evidence. The trial court deferred ruling on the motion until trial. Immediately before Jones testified, the court conducted a *voir dire* hearing on Defendant's motion. At the conclusion of *voir dire*, defense counsel argued that Jones' testimony should be excluded under the Rules of Evidence. The State responded that Jones' testimony was "a major identity piece of evidence" because subsequent evidence would show that a shell casing recovered from the scene of the assault on Jones was fired from the same gun which left casings at the scene of Reginald Johnson's murder. The trial court ruled that Jones' testimony was relevant and admissible under Rules 401, 402, and 404(b), and that the testimony should not be excluded under Rule 403.

Initially, although Defendant argues in his brief that Jones' testimony was "irrelevant and inadmissible under Evidence Rules 401-404 and the Fourteenth Amendment[,]" Defendant made no constitutional argument to the trial court. Additionally, other than this passing reference to the Fourteenth Amendment, Defendant does not assert constitutional error in his brief. Accordingly, we do not review the trial court's ruling for constitutional error. *Wiley*, 355 N.C. at 615, 565 S.E.2d at 39.

"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 (2003).

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). Rule 404(b) is a rule of inclusion, "subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Where evidence of other crimes, wrongs, or acts is relevant to an issue other than the defendant's propensity to commit the charged offense, "the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988); *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005). " 'Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court . . . . Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree.' " *State v. Agee*, 326 N.C. 542, 550, 391 S.E.2d 171, 176 (1990) (quoting *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56).

Jones' testimony was relevant to show Defendant's identity as the perpetrator of Reginald Johnson's murder. Special Agent Tanner testified that a shell casing recovered from the scene of the assault on Jones was fired from the same gun which ejected shell casings at the scene of Reginald Johnson's murder. Jones' testimony, in turn, tended to show that Defendant was in possession and control of that gun less than forty-eight hours before the murder. We conclude that Jones' testimony was admissible under Rule 404(b).

We also discern no abuse of discretion in the trial court's determination that the dangers of unfair prejudice, confusion of the issues, or misleading the jury did not substantially outweigh the probative

value of Jones' testimony. In showing that Defendant was in possession of and fired a gun that was used at the scene of Reginald Johnson's murder less than forty-eight hours before the murder, the probative value of Jones' testimony was significant. Defendant does not contend that the evidence's probative value was at all diminished because of the incidents' temporal proximity. Rather, Defendant contends that the evidence's probative value was diminished because of the incidents' dissimilarity. We disagree.

The Supreme Court addressed a similar issue in *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992).

> In that case the defendant was tried for armed robbery and first-degree murder of Eva Harrelson. The State sought to admit evidence showing the defendant had attempted to murder a taxicab driver three weeks after the murder of Harrelson. Evidence revealed that on both occasions the assailant had used the same gun. The Court found no error in the admission of the evidence, holding that "the evidence concerning the defendant's attempted murder of the taxicab driver three weeks later with the same gun tended to prove the defendant's possession and control of the weapon at a time close in proximity to that of the Harrelson murder."

State v. Abraham, 338 N.C. 315, 337, 451 S.E.2d 131, 142 (1994) (quoting *Garner*, 331 N.C. at 509, 417 S.E.2d at 512). In the case at bar, Jones' testimony tended to show that Defendant shot Jones with the same gun used at the scene of Reginald Johnson's murder. We conclude that the trial court did not abuse its discretion in admitting Jones' testimony.

3. PLAIN ERROR

[3] Next, we address Defendant's arguments concerning plain error. Defendant argues that his trial was infected with plain error by the admission of the following evidence: (1) the poster-size map showing the results of the IBIS test, (2) the fingerprint card which showed that Defendant had been previously detained for possessing a controlled substance, (3) Parker's testimony that Defendant sold and used drugs on 6 May 2004, and (4) Smith's testimony generally concerning gang beliefs and culture, and specifically concerning gang graffiti found on papers at the Holloway Street duplex. We conclude that most, if not all, of this evidence was objectionable at trial; however, we also conclude that the introduction of this evidence did not result in a miscarriage of justice entitling Defendant to a new trial.

A. Standard of Review

Our Supreme Court has adopted the plain error rule in criminal cases to temper the "potential harshness" of a rigid application of Rules 10(b)(1) and (2) of the Rules of Appellate Procedure, which require a defendant to have presented an objection to the trial court in order to preserve certain issues for appellate review. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983); *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983). "[T]he term 'plain error' does not simply mean obvious or apparent error, but rather has the meaning given it by the [Fourth Circuit] in [*United States v. McCaskill*, 676 F.2d 995 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982))]." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

> [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."

McCaskill, 676 F.2d at 1002 (footnotes omitted).

> Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

State v. Walker, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986) (citations omitted).

" '[P]lain error analysis applies only to instructions to the jury and evidentiary matters.' " *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000) (quoting *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000)), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Before applying plain error analysis to jury instructions, "it is necessary to determine whether the instruction complained of constitutes error." *State v. Cummings*, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007), *cert. denied*, —— U.S. ——, 170 L. Ed. 2d 760 (2008). Before applying plain error analysis to evidentiary matters, it is necessary to determine whether the evidence was "objectionable[.]" *Black*, 308 N.C. at 741, 303 S.E.2d at 807. In other words, a defendant must show that he "could have prevailed on an objection" had one been made. *State v. Lawson*, 159 N.C. App. 534, 540, 583 S.E.2d 354, 358 (2003). *But see State v. Spencer*, 192 N.C. App. 143, 152, 664 S.E.2d 601, 607 (2008) ("A prerequisite to our engaging in a 'plain error' analysis is the determination that the [evidentiary admission] complained of constitutes 'error' at all.") (quoting *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986)). Finally, the plain error rule may not be applied on a cumulative basis, but rather a defendant must show that each individual error rises to the level of plain error. *State v. Holbrook*, 137 N.C. App. 766, 769, 529 S.E.2d 510, 512 (2000).

B. Analysis

There is no question but that some of the evidence that Defendant now contends amounts to plain error was objectionable at trial. The inclusion of four of the prior assaults on the poster-size map was, at best, of questionable relevance. *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991) (stating that evidence of "other crimes, wrongs, or acts," is "relevant only if the jury can conclude by a preponderance of the evidence that the extrinsic act occurred and that the defendant was the actor[]"), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992). The State acknowledges in its brief that there was no evidence linking Defendant to those four prior assaults. In fact, Cates testified that it was exceptionally clear that two different people committed two of the earlier assaults. Thus, we think Defendant could have prevailed on a relevancy objection to the map as admitted. Additionally, while Parker's testimony that *he* was using and selling drugs on the night of the murder bore directly on his credibility, Parker's testimony that *Defendant* was using and selling drugs was objectionable under Rule 404(b). We also think Defendant could

have prevailed on a relevancy objection to Smith's testimony concerning gang beliefs generally and the specific graffiti contained on the papers discovered in the duplex. Finally, we think Defendant could have prevailed on an objection to the admission of the unredacted fingerprint card and Paylor's accompanying testimony. *State v. Jackson*, 284 N.C. 321, 331-33, 200 S.E.2d 626, 632-33 (1973) ("The introduction in evidence of a fingerprint record containing extraneous material which in itself is incompetent may or may not constitute reversible error, depending on such factors as whether the material was or was not seen by the jury or whether the objection thereto was waived by the defendant.") (quotation marks and citation omitted). We do not conclude, however, that the jury *probably* would have reached a different verdict had any or even all[3] of the challenged evidence been excluded.

The now-challenged evidence was not the only evidence which tended to show that Defendant was guilty of first-degree murder. The competent and non-objectionable evidence introduced by the State tended to show that Defendant was present at the scene of the shooting and was firing the .38 caliber gun at Reginald Johnson.[4] We acknowledge that the testimony of some of the State's witnesses placing Defendant at the scene was repeatedly contradicted or was otherwise seemingly incredible. That testimony, however, was competent for the jury's consideration, and it was for the jury to resolve contradictions and credibility issues. Given the non-objectionable evidence against Defendant and in light of the requirement that at least one of the objectionable pieces of evidence would have to rise to the level of plain error for Defendant to be entitled to a new trial, we are of the opinion that the challenged evidence did not tilt the scales and cause the jury to reach its verdict. Accordingly, we conclude that the admission of these evidentiary items does not amount to plain error.

4. CLOSING ARGUMENT

[4] In his final argument, Defendant contends that he is entitled to a new trial because the prosecutor made no fewer than six improper statements during closing argument. Defendant objects to the following emphasized portions of statements made by the prosecutor during the argument:

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3. *But see Holbrook*, *supra*.

4. Under the principle of acting in concert, Defendant need not have fired the bullet that killed Reginald in order to be found guilty.

You don't want to believe [Parker] and you don't want to believe Anthony Douglas? What do we find? We find two buildings on Weaver Street with a driveway in between, with a van pointed that way, with a dumpster at the end with a playground behind it, with a rec center over there. We find .380 casings basically exactly where [Parker] said [Defendant] was. We find nine millimeter casings basically exactly where [Parker] said Juicie was standing. And we find .40 caliber casings just about exactly where [Parker] said [Mitchell] was standing.

You don't have to like Phillipe Parker. But the evidence shows that he's telling you *the truth*.

. . . .

You have to remember what the evidence is. . . . We had 18 witnesses. All 18 witnesses either have to be wrong, mistaken, or lying, or some combination thereof to bring this to you. Because it makes too much sense together to be anything else.

A mistake is one thing. This would have to be an outright conspiracy. . . .

This is not a mistake. This is too cohesive to be anything but an elaborate conspiracy to be anything else but *the absolute truth*.

. . . .

If you don't want to trust anything else why don't you trust the forensic evidence that really wasn't cross examined. . . .

Ms. Reid picked up a shell casing that was found on Liberty Street. Adam Tanner was the one that tested it and told you this morning this gun fired it.

What a monumental coincidence that the same gun is used May 4th on Liberty Street, May 6th on Weaver Street, and found May 19th on Holloway Street with [Defendant's] fingerprint in the ammunition box right next to it.

That's even taking [Parker] out of it. That's even taking [Parker] out, saying don't even worry about *[Parker] saying that this is the gun [Defendant] had and that he was shooting*. Take [Parker] out of it, that's what you've got. That in and of itself again shows you [Defendant] was shooting this gun.

. . . .

We have [Defendant's] fingerprint being on a gun with those shell casings found on the scene.

. . . .

[Parker] was not charged with this incident. Take that for what it's worth. Could he be charged with it? Sure. . . . In a perfect world, . . . all six of them would be convicted and go away for first degree murder. In a perfect world. The problem is we don't live in a perfect world.

And sometimes to prove these cases and to get the people who as best as we can determine really deserve to go to trial or to face the charge we've got to make some tough decisions. And so the decision was made in this case, let's use [Parker] and try and go after the shooters. Because that's what the evidence shows is that others were shooting.

. . . .

The fingerprint report talking about points of identification. . . . Remember [Campen] talking about . . . the numbers of the points of identification in a fingerprint that you can find and how there are up to what was it, 75 to 125 points on everybody's finger and stuff. And he found nine points on one of the ID's for—in this case and ten on another one.

Well, my goodness, if there are so many points of identification and you only have, you know, nine or ten, how can you make an identification based on that?

Well, weigh the circumstances as you find it from the evidence in this trial. You have [Campen] who [said] he's been basically working in this field I think he said since 1974. . . .

He's been doing fingerprints I believe it clearly was from the '80s sometime. And that he has testified as an expert several times, both here in State courts and in Federal courts for fingerprint identification and examination.

Does it make sense to you that he would be so far off and all these other courts would be qualifying him as an expert and that he'd be allowed to be qualified as an expert here—and you judge him. You judge him for his credibility.

(Emphasis added.) Defendant acknowledges that he did not object to any of the statements when they were made, but argues that the com-

ments were so grossly improper as to require the trial court to intervene *ex mero motu*.

It is well-settled that counsel is permitted to argue to the jury the facts that have been presented as well as all reasonable inferences that can be drawn therefrom. *State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000).

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2003). A trial court is not required to intervene *ex mero motu* " 'unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial.' " *Smith*, 351 N.C. at 269, 524 S.E.2d at 41 (quoting *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999)). Where a defendant does not object to statements made during an argument, the standard of review on appeal is whether the prosecutor's remarks were so grossly improper that the trial court's decision not to intervene *ex mero motu* constituted an abuse of discretion. *State v. Barden*, 356 N.C. 316, 356, 572 S.E.2d 108, 134 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003).

Even assuming that at least one of the prosecutor's statements was improper, we nevertheless conclude that Defendant has not met "the heavy burden of showing that the trial court erred in not intervening on his behalf." *State v. Thompson*, 188 N.C. App. 102, 110, 654 S.E.2d 814, 819, *disc. review denied*, 362 N.C. 371, 662 S.E.2d 391 (2008). Defendant cites only one case in which a new trial was ordered because the trial court erred in failing to intervene during a closing argument: *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971). In that case, the Supreme Court described the following as "the more flagrant" of the prosecutor's "transgressions[]" during the argument:

> "I know when to ask for the death penalty and when not to. This isn't the first case; it's the ten thousandth for me. . . . I did . . . have in this courtroom three weeks ago a man charged with a sexual assault . . . who was as innocent of it as I. . . . I hope my reputa-

> tion in this community where you elected me to this office that I try not an innocent man . . . . When I found that out about that case . . . no one was on his feet faster than I to come to his defense . . . . I wanted to tell you about that and get back to the facts of this case."
>
> In characterizing the defendant, the solicitor said that a man who would do what this woman says this defendant did is "lower than the bone belly of a cur dog."
>
> During the State's evidence, the investigating officer had quoted the defendant as saying that he worked for his employer, the bus company, on May 8, 1969. The solicitor said: "Liar! No, Mr. Smith, State's Exhibit #2 says you were not working that day." Exhibit #2 introduced in evidence by the State was the bus company's work record showing that on May 8, 1969, the defendant began work at 5:43 a.m., was off duty from 9:26 a.m. until 2:22 p.m. and was checked out at 5:14 p.m.
>
> In discussing the defendant's evidence of his good character the solicitor said: "I don't care who they bring in here . . . to say to you that his character and reputation in the community in which he lives is good. I tell you it isn't worth a darn. . . . I don't believe a living word of what he says about this case, members of the jury . . . ."

Id. at 165-66, 181 S.E.2d at 459-60. None of the allegedly improper statements in the case at bar stray as far from the bounds of propriety as the prosecutor's comments in *Smith* which warranted a new trial in that case. Considering the context in which the statements were made and their relative brevity as compared to the closing argument as a whole, as we must, *State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008), we conclude that the trial court did not abuse its discretion in electing not to intervene *ex mero motu*.

CONCLUSION

Defendant's trial was free of reversible error.

NO ERROR.

Judge STEELMAN concurs.

Judge GEER concurs in part and concurs in the result in part in separate opinion.

GEER, Judge, concurring in part and concurring in the result only in part.

I concur in the majority opinion, but write separately because I have a somewhat different view of certain of the evidentiary issues. I concur fully with the majority's discussion of the removal of the courtroom spectators, the admission of the testimony of Harvey Jones, and the State's closing argument.

With respect to the evidence that the .380 was used in other crimes, I believe that defendant's argument on appeal regarding plain error disregards the defense presented at trial. Defendant repeatedly elicited from the State's witnesses the fact that guns were shared by gang members. Defendant then, after the State presented the evidence of the other crimes committed using the gun, established on cross-examination that on at least two of the occasions, the police had established that someone other than defendant had been using the gun. In addition, defendant elicited testimony that the gun had been used in the killing of Carlos Clayton, a murder attributed to the State's key witness, Phillipe Parker.

In defense counsel's closing argument, he argued at length that the State's evidence regarding the use of the gun in other crimes meant that the State could not prove that defendant was using the gun on 6 May 2004. In a portion of that part of defense counsel's closing, he asserted:

> Isn't it amazing that when the SBI folk testified about all the times the gun's been used, Cates even said that this is an astronomical amount of times that gun's been used. A .380 handgun's been used quite frequently.
>
> Why is that important? Because I contend to you that gun passed around as much as a dollar bill. The fact that somebody has a[] dollar bill in their pocket, does that mean that you had it two day [sic] prior or three days prior? No. When something transfers and it gets shared so much you can't say when somebody had it unless they had it in their possession.
>
> Same thing with this weapon, this .380 handgun. Used by many persons. Many. Even up to April 22, 2004, Little Whammer, AKA William Cox, had the weapon. This is only a week right before Mr. Jones got shot.

In other words, defendant did not object to this evidence at trial because it supported his defense. Under those circumstances, the admission of the evidence cannot be plain error.

For the same reason, I do not believe the admission of Mr. Parker's testimony that defendant used and sold drugs the night of the shooting was plain error. *Defense counsel* emphasized that Mr. Parker was using drugs *with defendant*. Defense counsel contended in closing that Mr. Parker's testimony was the linchpin of the State's case and that Mr. Parker's testimony should be deemed not credible, among other things, because of his extensive drug use the night at issue. Defense counsel outlined all of Mr. Parker's drug usage (which necessarily included defendant's drug usage) on 5 May to 6 May 2004 and then argued: "So now the State's number one witness is on drugs and high with a buzz. One who made all these diagrams, reportedly, gave all this testimony. High on drugs." Again, defense counsel did not object to the testimony regarding drug usage—which included Mr. Parker's and defendant's joint drug usage—because it was important to the impeachment of the State's most important witness.

With respect to the evidence of gang beliefs and gang graffiti, the entire theory of the trial for both the State and defendant was that this murder was a gang shooting. Defendant argued only that he did not participate in the gang shooting. Far from attempting to exclude gang-related evidence, defendant sought to establish that the State's witnesses were each gang members. Defendant even elicited evidence suggesting that the victim, Mr. Johnson, was a gang member. Defendant also used the evidence of gang beliefs and practices himself to suggest alternative theories as to what occurred on 6 May 2004. Given the State's theory and defendant's defense, I am not convinced that the evidence was irrelevant. Certainly, however, its admission cannot be plain error given the arguments made in the case and the unchallenged evidence presented by both the State and defendant.

Finally, I agree with defendant that if there had been an objection, then the arrest information on the fingerprint record should have been excluded. I cannot, however, conclude that evidence that defendant had been arrested two years earlier for drug possession tilted the scales when the jury was deciding whether or not to convict defendant of murder. Accordingly, I agree with the majority opinion that there was no plain error.

SUNSET BEACH DEVELOPMENT, LLC, PLAINTIFF-APPELLANT v. AMEC, INC.; AMEC EARTH & ENVIRONMENTAL, INC.; AMEC EARTH & ENVIRONMENTAL, INC. OF NORTH CAROLINA; MICHAEL T. BALL; ROBERT L. BELLAMY & ASSOCIATES, INC.; GGSH ASSOCIATES; JERRY L. SELLERS; SUE GORE TYSON AND JULIE GORE MONROE, IN THEIR CAPACITY AS EXECUTRICES OF THE ESTATE OF JULIAN DALE GORE; FRANKLIN DALE GORE; AND RICHARD P. HERDMAN, DEFENDANTS-APPELLEES

No. COA08-324

(Filed 7 April 2009)

1. Real Estate— sale of coastal land for development—wetlands—fraud

Summary judgment was properly granted for defendants on a fraud claim arising from their sale of coastal land for development. The representatives of plaintiff and defendant were sophisticated businessmen with experience in real property development in coastal communities, plaintiff had unfettered access to the tract, and plaintiff chose to purchase the land despite clear deficiencies in the wetlands delineations and the Master Wetlands Map. Plaintiff did not reasonably rely on any misrepresentations made by defendants.

2. Unfair Trade Practices— sale of coastal land for development—wetlands—reasonable reliance on information

The trial court did not err by granting defendants' motion for summary judgment on an unfair and deceptive trade practice in an action arising from defendants' sale of coastal land for development. Plaintiff had experience in developing coastal communities and had unfettered access to the tract, and the wetlands delineations and map were so facially flawed that plaintiff could not have reasonably relied on them in deciding to purchase the tract.

3. Real Estate— sale of coastal land for development—wetlands—warranties

Summary judgment should not have been granted for defendants on a breach of contract claim arising from defendants' sale of coastal land for development. The contract included warranties that there were no known violations of environmental laws, but there was evidence that required permits may not have been obtained and that drainage activities may have violated regulations.

4. Real Estate— sale of coastal land for development—breach of contract—amount of wetlands—merger with deed

The trial court did not err by granting summary judgment for defendants in a breach of contract claim arising from defendants' sale of coastal property where the claim focused on a representation of the amount of wetlands in the tract. Unlike the section of the contract regarding environmental violations, there is no evidence that plaintiff and defendants intended the section of the contract concerning the amount of wetlands to survive closing. This provision merged with the deed at closing and plaintiff's opportunity to avail itself of the provision was lost.

5. Real Estate— covenant of good faith and fair dealing—wetlands—summary judgment

The trial court erred by granting summary judgment for defendants on a claim for breach of the covenant of good faith and fair dealing in an action arising from defendants' sale of coastal real estate for development. There are issues of material fact yet to be decided relevant to this claim.

6. Real Estate— rescission—sale of coastal real estate—reliance on wetlands map—not reasonable

The trial court did not err by granting summary judgment for defendants on a claim for rescission in an action arising from defendants' sale of coastal real estate for development. Plaintiff argued that its mistake about the size of the wetlands in the tract was induced by misrepresentation, but reliance on a wetlands map that was deficient on its face was not reasonable, nor did the map provide sufficient knowledge of the wetlands to justify the mistake.

7. Damages and Remedies— reserved for trial—summary judgment not proper

The trial court erred by granting summary judgment for defendants on any issue related to damages in an action arising from the sale of coastal real estate for development where the court had stated that damages would be addressed at trial if plaintiffs' claim survived summary judgment.

8. Evidence— spoiliation—summary judgment—not applicable

The trial court erred by granting summary judgment for defendant based on spoiliation in an action arising from the sale of coastal real estate for development. Spoiliation lies within the

province of the trier of fact and cannot, by its mere existence, be determinative of a claim.

Appeal by Plaintiff from order entered 16 November 2007 by Judge D. Jack Hooks, Jr. in Superior Court, Brunswick County. Heard in the Court of Appeals 22 September 2008.

Lewis & Roberts, PLLC, by James A. Roberts, III, Kimberly R. Wilson, and Matthew C. Bouchard, for Plaintiff-Appellant.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Clay A. Collier and Justin K. Humphries, for Defendants-Appellees.

McGEE, Judge.

Sunset Beach Development, LLC (Plaintiff) was formed in 2002 for the purpose of identifying and acquiring undeveloped real property for development and resale. The majority members of Sunset Beach are corporate entities owned by Ralph Teal (Teal) and Blair Tanner (Tanner). Plaintiff began the process of acquiring four separate but contiguous parcels of land (the four tracts) in Brunswick County, North Carolina from four separate owners in late summer 2002. Plaintiff prepared its preliminary land plan for development of the four tracts in early 2003, subject to the required delineation of jurisdictional wetlands. Plaintiff intended to develop the four tracts into a residential development if the delineation of jurisdictional wetlands established that development was feasible on the four tracts.

Plaintiff entered into contracts of sale in 2003 with the four owners. Plaintiff closed with one owner in August 2003. Plaintiff closed with the remaining three owners in November 2003, including the contract of sale with Defendant GGSH Associates (GGSH) for the purchase of GGSH's 453-acre parcel (the GGSH tract) for $4,500,000.

Tanner's father, Don Tanner, developed Sandpiper Bay, which abuts the land purchased by Plaintiff, through a business entity he controlled. During the early to mid-1990s, Don Tanner considered purchasing the GGSH tract, and in 1998 hired Michael Ball (Ball) to conduct a "wetlands assessment" of the GGSH tract. At that time, Ball was the president of East Coast Environmental Consultants, Inc. Relevant to the instant case, Ball was a senior project manager for AMEC, Inc., AMEC Earth & Environmental, Inc., and AMEC Earth & Environmental, Inc. of North Carolina (collectively AMEC). Ball's wetlands assessment of the GGSH tract estimated that approximately

seventy percent of it was uplands and thirty percent was wetlands. Don Tanner did not purchase the GGSH tract.

GGSH also hired Ball in 1999 to perform a wetlands assessment of the GGSH tract. Ball's 1999 assessment of the GGSH tract indicated areas of wetlands and provided "an approach to utilizing such areas for development or marketing purposes." Ball's assessment of the GGSH tract concluded that about "112.2 acres of the [GGSH tract] could be considered wetlands." Jerry L. Sellers (Sellers), a general partner in GGSH, disagreed with Ball's assessment of the amount of wetlands in the GGSH tract and told Ball he thought there were fewer acres of wetlands on the GGSH tract.

The GGSH tract was the linchpin of Plaintiff's planned development. Between the time Plaintiff showed interest in purchasing the GGSH tract and the time Plaintiff closed the sale, GGSH provided Gene Blanton (Blanton), an employee of Plaintiff, with a key to the GGSH tract, giving Plaintiff unfettered access to it.

As stated above, Plaintiff and GGSH entered into a contract of sale for the GGSH tract on 18 April 2003. The contract of sale contained certain environmental warranties in which GGSH warranted and represented that "[t]here are no known violations of environmental laws on or which have occurred with respect to the [GGSH tract.]" The contract of sale also stated that Plaintiff's obligation to close was contingent on GGSH's providing Plaintiff with "a wetlands delineation approved by the [United States Army Corps of Engineers], which shall not vary more than three (3) acres over or under twenty-five (25) acres. A price adjustment shall be negotiated if the variation is greater or less than three (3) acres." GGSH hired Ball to perform the required wetlands delineation on the GGSH tract. GGSH never provided Plaintiff with a delineation of the GGSH tract before closing.

Plaintiff hired Ball to perform the wetlands delineations for the three contiguous tracts not owned by GGSH. Plaintiff also asked Ball to produce a composite map of all four tracts (the Master Wetlands Map), which was received on 29 August 2003.

Prior to the signing of the contract of sale between Plaintiff and GGSH, Ball informed GGSH that the effects of drainage ditches had reduced the jurisdictional wetlands on the GGSH tract to twenty-five acres. Plaintiff argues that the "twenty-five acres of wetlands" referred to in the contract of sale is based on representations made by Ball to Sellers, who in turn made those representations to Plaintiff.

Plaintiff also asserts that Sellers admitted to representing to Plaintiff that there were twenty-five acres of wetlands on the GGSH tract.

Plaintiff's engineering firm was Robert L. Bellamy & Associates, Inc. (Bellamy). John Poston (Poston), a licensed professional engineer, was the main Bellamy engineer responsible for overseeing Bellamy's work. Poston received a composite wetlands map, including the GGSH tract, from Ball on 19 August 2003. Poston informed Plaintiff on or about 25 August 2003 that "the wetland[s] information received was not sufficient for design due to the lack of information concerning wetland size, type and directional/distance ties to an established property boundary." Poston noted that the only date on the map was 9 January 1998. Poston also questioned whether, in addition to the signed plat depicting the location and extent of the wetlands on the GGSH tract, the United States Army Corps of Engineers (the Corps) was required to issue a separate letter of wetlands certification.

Teal, one of Plaintiff's majority members, also raised concerns about Ball's wetlands delineations and advised Poston to do whatever was necessary to ensure the wetlands issues were properly addressed. Poston requested and received from Ball the Master Wetlands Map on 29 August 2003. This map provided the information that was missing from the map Poston received on 19 August 2003. Plaintiff's corporate attorney, Larry Ferree (Ferree), testified that Teal raised concerns to him about the Master Wetlands Map.

Sellers testified that at some point before closing, he offered to pay Ball $90,000 for Ball's work so long as the sale occurred for the original purchase price of $4,500,000. Plaintiff contends it was unaware of this agreement between Ball and GGSH. Plaintiff contends Ball led Plaintiff to believe Ball's delineation work would cost GGSH "about $15,000." Plaintiff asserts that because of this contingent payment of $90,000 to Ball, Ball forged the name of Allen Davis (Davis), a prior employee of the Corps, on five wetlands maps, including a map showing twenty-five acres of wetlands on the GGSH tract. Ball admitted in his deposition that, rather than performing an actual delineation on the GGSH tract, he used AutoCAD software to "shrink" the wetlands depicted on the 1999 assessment he prepared of the GGSH tract. By using the AutoCAD software, the wetlands depicted on Ball's 1999 assessment were shown to be twenty-five acres.

A few days after the sale closed, Sellers met Ball at a steakhouse outside Myrtle Beach and paid Ball $90,000. Ball was paid by a check

made out to "Todd Ball" and not to his employer, AMEC. Ferree testified in his deposition that had he been aware of the undisclosed $90,000 payment, he did "not think we would be here." Plaintiff claims it was not aware of the $90,000 payment to Ball until an official from the North Carolina Department of Natural Resources, Division of Water Quality (DWQ) advised Poston that neither the Corps nor DWQ could verify that the wetlands delineations for the GGSH tract and the other three contiguous lots were valid. Plaintiff received a letter from the Corps on 1 March 2004 stating the Corps never received a verified wetlands delineation from Ball, and that if this problem was not remedied within ten days, work on the GGSH tract must cease, and the drained wetlands must be restored to their prior condition.

Plaintiff filed a complaint in Superior Court, Mecklenburg County on 24 August 2004 against GGSH; AMEC, Inc.; AMEC Earth & Environmental, Inc.; AMEC Earth & Environmental, Inc. of North Carolina; Michael T. Ball; Robert L. Bellamy & Associates, Inc.; Jerry L. Sellers; Julian Dale Gore; Franklin Dale Gore; and Richard P. Herdman. GGSH, along with Defendants Jerry L. Sellers, Julian Dale Gore, Franklin Dale Gore, and Richard P. Herdman filed an answer and motions for change of venue on 17 December 2004. The trial court entered an order on 4 May 2005 transferring the action to Superior Court, Brunswick County.

Plaintiff filed a motion on 30 August 2005 to substitute as defendants Sue Gore Tyson and Julie Gore Monroe in their capacity as joint executors of the Estate of Julian Dale Gore. Plaintiff also filed a motion for leave to file its first amended complaint on 16 October 2006. The trial court allowed Plaintiff's motions in an order dated 16 February 2007. Plaintiff thereafter filed its first amended complaint.

Plaintiff voluntarily dismissed with prejudice all claims against Defendant Robert L. Bellamy & Associates, Inc. on 23 May 2007. Plaintiff voluntarily dismissed with prejudice its claims against Defendants AMEC, Inc.; AMEC Earth & Environmental, Inc.; and AMEC Earth & Environmental, Inc. of North Carolina on 24 October 2007. The trial court stayed Plaintiff's claims against Ball in its 16 November 2007 summary judgment order. Therefore, the remaining defendants in the instant appeal are GGSH; Jerry L. Sellers; Franklin Dale Gore (Gore); Richard P. Herdman; and Sue Gore Tyson and Julie Gore Monroe in their capacity as joint executors of the Estate of Julian Dale Gore (Defendants). Plaintiff's amended complaint includes claims against Defendants for: (1) breach of contract, (2)

fraud, (3) unfair and deceptive trade practices, (4) breach of covenant of good faith and fair dealing, and (5) rescission of the executed real estate contract on the ground of mutual mistake of material fact. Defendants filed an answer to Plaintiff's amended complaint on 2 April 2007.

Defendants filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 on 31 August 2007. The trial court entered an order dated 16 November 2007 allowing Defendants' motion for summary judgment and dismissing Plaintiff's claims with prejudice. The trial court certified the matter for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Plaintiff appeals the trial court's summary judgment order. Additional facts will be included in the body of our opinion.

I.

[1] In Plaintiff's first argument, it contends that the trial court erred in granting Defendants' motion for summary judgment because genuine issues of material fact exist as to Plaintiff's fraud claim and the defenses of lack of reasonable reliance and *caveat emptor*. We disagree.

A motion for summary judgment should be granted upon a showing "that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted).

> A plaintiff makes out a *prima facie* case for fraud by establishing:
>
> (a) that [the] defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it [the] defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury.

Bolick v. Townsend Co., 94 N.C. App. 650, 652, 381 S.E.2d 175, 176 (1989) (emphasis omitted). Our Court has previously held that "[s]ummary judgment is generally inappropriate in an action alleging

fraud, as the existence of fraud must include fraudulent intent which is usually proven by circumstantial evidence." *Id.* (citations omitted); *see also Parker v. Bennett*, 32 N.C. App. 46, 54, 231 S.E.2d 10, 15 (1977) (in actions for fraud "where motives, intent, subjective feelings and reactions, consciousness and conscience, are to be searched, the issues may not be disposed of on summary judgment").

In the present case, however, summary judgment is appropriate because Plaintiff failed to show that it reasonably relied on the representations of Defendants regarding wetlands delineations. In cases involving the purchase of real property,

> "[r]eliance is not reasonable if a plaintiff fails to make any independent investigation" unless the plaintiff can demonstrate: (1) "it was denied the opportunity to investigate the property," (2) it "could not discover the truth about the property's condition by exercise of reasonable diligence," or (3) "it was induced to forego additional investigation by the defendant's misrepresentations."

RD&J Properties v. Lauralea-Dilton Enters., LLC, 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2004) (quoting *State Properties, LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002)). In *RD&J Properties*, we held the plaintiff did not reasonably rely on the defendants' representations where the parties were dealing at arm's length; the parties were all sophisticated businessmen; two of the plaintiff's partners were experienced in operating mobile home parks; the plaintiff voluntarily purchased the parks which specifically included the septic system "as is"; the defendants did not deny the plaintiff an opportunity to inspect the property; and the defendants did not engage in any artifice designed to induce the plaintiff to forego an investigation. *RD&J Properties*, 165 N.C. App. at 746-47, 600 S.E.2d at 499-500.

In *MacFadden v. Louf*, 182 N.C. App. 745, 643 S.E.2d 432 (2007), our Court held that summary judgment was appropriate in an action for fraud in which the plaintiff claimed to have relied on a "Residential Disclosure Statement" provided by the defendant and a letter from a sheet metal company which stated that there were no leaks in the residence the plaintiff was purchasing. *Id.* at 748-49, 643 S.E.2d at 435. We held that the plaintiff "failed to establish that her reliance was justifiable because she conducted a home inspection before closing and that inspection report put her on notice of potential problems with the home." *Id.* at 748, 643 S.E.2d at 434. The plaintiff failed to follow the instructions in the home inspection she commissioned, which included that she "have a roofing contractor inspect

the roof because there was potential for water to pond above the kitchen/breeze-way area." *Id.* Accordingly, our Court held that the plaintiff's reliance on the residential disclosure statement was unreasonable as a matter of law. *Id.* at 748-49, 643 S.E.2d at 435.

In the present case, Plaintiff argues Defendants engaged in an artifice to induce Plaintiff to forego its individual investigation into the wetlands by misrepresenting the size of the wetlands on the GGSH tract. *See Little v. Stogner*, 162 N.C. App. 25, 30, 592 S.E.2d 5, 9 (2004).

Plaintiff asserts the following actions by Defendants constituted an artifice to induce Plaintiff into forgoing further investigation into the wetlands delineations: (1) Sellers admitted to telling Plaintiff that the GGSH tract contained approximately twenty-five acres of jurisdictional wetlands; (2) GGSH represented in the contract of sale that there were no known violations of environmental laws on the GGSH tract; and (3) Defendants entered into an undisclosed agreement with Ball for the payment of $90,000 conditioned on the GGSH tract selling for $4,500,000. However, we cannot agree that the above actions by GGSH induced Plaintiff to forego further investigation. Plaintiff had notice of the deficiencies in the Master Wetlands Map provided by Ball and yet chose not to address these deficiencies with either the Corps or GGSH.

Ferree testified in his deposition that it had come to his attention through Teal that the work Ball had done for the GGSH tract, and other tracts owned by Plaintiff, were signed by Davis who was not working for the Corps at the time the delineations and the Master Wetlands Map were completed. Ferree testified that he informed Teal that "we need to get to the bottom of this," and that someone needed to talk to Ball and Davis. Ferree testified: "I think [Teal] knew we needed to do some investigation." Ferree further testified that Teal raised concerns that there was no legend on the delineations and the Master Wetlands Map, which was required by the Corps. Ferree testified that he wrote a letter to Poston concerning these issues, and that Teal had contacted Poston about them as well. Ferree also contacted Tanner, and informed him of the potential issues with the delineations and the Master Wetlands Map, to which Tanner responded: "Let's check it out." Ferree advised Blanton "not to use anything with Davis' signature until we investigate." At least one of the maps purportedly approved by Davis had his name typed as "Alan Davis" below the signature Ball has acknowledged he forged. Davis' first name is spelled "Allen." In a letter to Blanton reas-

suring him that there were no problems with the maps, Ball incorrectly spelled Davis' first name "Alan." Ferree testified he did not believe Plaintiff ever contacted Davis to investigate. Blanton testified that he was told by Plaintiff not to talk to Sellers about the concerns raised by the delineations and the Master Wetlands Map, that "it was just best not to say anything."

We hold the present case to be analogous to *RD&J Properties* and *MacFadden*. Here, the representatives of Plaintiff and Defendants were sophisticated businessmen with experience in real property development in coastal communities. Plaintiff, upon learning that the Master Wetlands Map was dated more than two years prior to the date it was delivered, and that the map was signed by an individual who no longer worked for the Corps, did not contact the Corps or seek reassurance from GGSH regarding the wetlands. Plaintiff chose to purchase the GGSH tract despite these clear deficiencies in the wetlands delineations and the Master Wetlands Map. Moreover, Defendants provided Plaintiff with a key to the GGSH tract giving Plaintiff unfettered access to the GGSH tract and ample opportunity to inspect the GGSH tract. We therefore hold that Plaintiff did not reasonably rely on any misrepresentations made by Defendants. This argument is without merit. Because we hold that summary judgment was properly granted on this claim, we do not address Plaintiff's argument concerning *caveat emptor*.

II.

[2] In Plaintiff's second argument, it contends that the trial court erred in granting Defendants' motion for summary judgment because genuine issues of material fact exist as to Plaintiff's claim for unfair and deceptive trade practices. We disagree.

A claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75.1-1 must allege that: "(1) the [defendant] committed an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the [plaintiff] or to the [plaintiff's] business." *Walker v. Sloan*, 137 N.C. App. 387, 395, 529 S.E.2d 236, 243 (2000). "Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show 'actual reliance' on the alleged misrepresentation in order to establish that the alleged misrepresentation 'proximately caused' the injury of which plaintiff complains." *Tucker v. Blvd. at Piper Glen LLC*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002).

Plaintiff contends that the facts alleged in its first argument tend to show that GGSH bribed Ball with the promise of a $90,000 payment to Ball if the GGSH tract sold for $4,500,000. Plaintiff argues that this bribe created an incentive for Ball to misrepresent the amount of wetlands on the Master Wetlands Map, which constituted an unfair and deceptive trade practice. However, as held above, Plaintiff has failed to establish that it actually relied on the misrepresentations in the Master Wetlands Map.

We hold that Ball's wetlands delineations and the Master Wetlands Map were so facially flawed that Plaintiff could not have reasonably relied on them in deciding to purchase the GGSH tract. In light of Plaintiff's experience in developing coastal communities and the fact that Plaintiff had unfettered access to the GGSH tract, we cannot determine that Plaintiff actually relied on the Master Wetlands Map that was dated more than two years earlier and signed by an individual no longer employed by the Corps. Thus, the trial court did not err in granting summary judgment on the issue of unfair and deceptive trade practices. This argument is without merit.

III.

[3] In Plaintiff's third argument, it contends that the trial court erred in granting Defendants' motion for summary judgment because genuine issues of material fact exist with respect to Plaintiff's breach of contract claim and whether the claim is barred by the doctrine of merger. We agree in part.

The trial court found that Plaintiff's breach of contract claim was barred by the doctrine of merger which states that "[g]enerally, a contract for the sale of land is not enforceable when the deed fulfills all the provisions of the contract, since the executed contract then merges into the deed." *Biggers v. Evangelist*, 71 N.C. App. 35, 38, 321 S.E.2d 524, 526 (1984). "However, it is well-recognized that the intent of the parties controls whether the doctrine of merger should apply." *Id.* Because the parties in *Biggers* included a survival clause in their contract and because there was no language in the deed suggesting that survivability had been waived, our Court held the plaintiffs were "entitled to bring an action on the contract" *Id.* at 38-39, 321 S.E.2d at 527.

Plaintiff argues Defendants breached the environmental warranties contained in the contract of sale. The contract in the instant case contains a survival clause in the "Representations and War-

ranties of Seller" section which states that: "Seller's representations and warranties shall survive closing." Included in this same section is the warranty that "[t]here are no known violations of environmental laws on or which have occurred with respect to the [GGSH tract]." Plaintiff and Defendants clearly intended the warranty regarding the environmental violations to survive closing, and thus we hold that Plaintiffs were entitled to bring an action on the contract for any violations of the "Representations and Warranties" section of the contract, including the section covering "known violations of environmental laws."

Defendants argue that there is no evidence that they "knew" of any violations of environmental law because there had been no final determination by any governmental body that the roads and ditches they constructed upon the GGSH tract had violated any environmental laws. However, evidence presented at the hearing, when viewed in the light most favorable to Plaintiff, tends to show the following: On 11 February 1985, Defendants' attorney, Benjamin H. Bridges, III (Bridges) met with a staff member of the Corps to discuss obtaining a permit to disturb wetlands regulated by the Corps for the purposes of a residential development. Defendants submitted their application for said permit, which was received by the Corps on 13 August 1985. By letter received 14 November 1985, Defendants informed the Corps that they intended to withdraw their application for developing the GGSH tract, and indicated that they wished to use the GGSH tract for timber harvesting and farming activities instead.

Defendants hired environmental consultants Larry Baldwin (Baldwin) and Robert Moul (Moul) to create a drainage plan on the GGSH tract in 1987. By letter dated 7 November 1987, Baldwin advised Gore and Moul that: "A large majority of the 464 acre tract has wetland soils. Thus, most of the tract would require intensive drainage in order to lower the water table and convert it from its' [sic] wetland status. The major problem to drain this area is a suitable outlet." "To convert the [GGSH tract] from its' [sic] wetland status will require intensive drainage improvements of nearly the entire tract. [N]o natural drainage outlet on the tract make[s] it difficult to drain." "Since no natural outlet exists on the tract a drainage easement(s) will have to be obtained from adjacent property owner(s)." " '404' regulations [of the Clean Water Act] prohibit any fill to be placed onto wetland sites." "After all drainage improvements are established it will take 5 to 12 months to lower the water table 12 inches below the soil surface. Subsequent successional changes in

vegetation would take 12 to 24 months and possibly longer. All drainage improvements must be maintained to allow constant drainage or the area will revert to wetlands."

By letter dated 2 August 1989, the Corps acknowledged a letter dated 21 July 1989 in which a representative of Defendants had again informed the Corps of Defendants' intention to use the GGSH tract for timber harvesting. In the Corp's response, it stated:

> Construction of timber roads is exempt from the provisions of Section 404 of the Clean Water Act provided the following conditions are met:
>
> a. Widths are held to a practicable minimum;
>
> b. Normal surface flows are maintained by culverting, bridging, etc.;
>
> c. Borrow ditches are not connected to outside waters;
>
> . . . .
>
> e. A change in use of the road for purposes other than timber harvest or management will require Department of the Army permit authorization. Failure to obtain this approval is a violation of Federal Law and will result in removal of all road fill in its entirety and/or civil or criminal penalties.

Defendants contacted Charles Adams (Adams), a golf course architect, in 1989. Defendants and Adams agreed that Adams could obtain a twenty percent interest in GGSH if, among other things, he did all the architectural work necessary to lay out two eighteen-hole golf courses, and build and construct all roads and drainage ditches necessary therefor. Defendants informed Adams where the roads and drainage ditches were to be located. Adams constructed the roads and ditches for Defendants in late 1989 through approximately mid-1990. Adams was never informed that the roads were being built for timber harvesting purposes. After Adams dug the ditches, they filled with water and drained off of the GGSH tract.

In a letter dated 19 July 1991, Lee Anderson (Anderson), an environmental consultant retained by Defendants, informed Defendants that because of "the added asset of being drained by ditching, previous to October 1990, . . . the vegetation is beginning to appear with a majority of upland [non-wetland] vegetation." Anderson further stated:

> It is also important to make mention that we do not change the name of this project. If we were to do so it would give the Federal Agency an opportunity to issue an updated correspondent number and we would not be able to enjoy the benefits of the grandfather clauses that were in use prior to the physical year 1991. That was the purpose in the beginning for obtaining continual correspondence with the agencies. It is necessary from time to time for me to discuss this project although it is in the embryonic stages so that I may keep this file active.
>
> In these meetings very little is ever discussed or decided upon. It only allows our project to remain active. If the file becomes dormant for an extended period of time it then becomes in jeopardy for closure due to lack of interest.
>
> In my opinion, I feel that with all of our diligent efforts we should be somewhere right around that figure [reduction to twenty-five percent jurisdictional wetlands]. I do not want an approved delineation at this time, because, until a development plan can be established it would be futile and self destructive to have a final delineation before we have a final project. If this were the case we would be forced to make the project fit around the wetlands which are constantly decreasing in size as time elapses.
>
> The wetlands are deteriorating just as we had expected. This would also limit the versatility of any future buyers and would only increase the adversity of selling a tract of land of this size.
>
> In closing, I must say that, this property is very suitable for a golf course development and I will help your firm in any way possible.

Plaintiff presented the deposition testimony of two proposed expert witnesses, and an affidavit of a third, at the summary judgment hearing. Robert Riggs (Riggs), who had worked for the Corps for thirty-seven years, testified that in his opinion the roads and ditches were "constructed for the development and the draining of the wetlands." Riggs opined that the size, number and spacing of the ditches indicated a clear intent "to drain the wetlands and make them non-wetlands." He testified that the ditches were in violation of law because, contrary to timber harvesting permit regulations, they were connected to "offsite or other water courses" and allowed the "discharge of dredged or fill material into waters of the United States."

Thomas Rowland (Rowland), a Society of American Foresters certified forester and a registered forester in the states of North and

South Carolina, testified that the roads built on the GGSH tract were, in his opinion, not for the purpose of timber harvesting. Rowland testified that timber harvesting roads were required to be as narrow as practicable, in order to limit the impact on the land. He testified that the roads on the GGSH tract were twice the width of normal timber roads, and the ditches were much larger than would be needed. According to Rowland: (1) the expense of the road and ditch work done on the GGSH tract would have been greater than the value of the harvestable timber, (2) Defendants did not begin any harvesting for five years after the roads were completed, and (3) Defendants sold the timber for twenty-five percent of its estimated value based on figures approximately seven years old. Rowland testified that though he did see some evidence of timber harvesting, it was minimal, haphazard and unprofessional. He testified that, unlike the road system he observed upon the GGSH tract, which tended to travel around the perimeter of the property, logging roads usually cut through the middle of the property. Rowland noticed that none of the harvested land had been replanted, and determined that there was no forest management plan for the tract.

Gary A. Mitchell (Mitchell), a senior vice president of Clark Environmental and a previous employee of the Wilmington office of the Corps, executed an affidavit in which he gave his assessment of the GGSH tract. Mitchell stated that at the time "the roads and ditches were installed [on the GGSH tract], it was (and still is), without first obtaining a permit, unlawful under the regulations to construct 'drainage ditches' for purposes of reducing wetlands in order to develop the property." Mitchell observed that the fill material excavated from the ditches was "sidecasted" or deposited in the wetlands, "which, without a permit or exemption, was (and still is) unlawful under the regulations." The ditches constructed on the GGSH tract violated the "minor drainage" limitation exemption for timber harvesting usage. His opinion was that the ditches and roads on the GGSH tract were in violation of the Clean Water Act. After Mitchell consulted with the Environmental Protection Agency, he opined that the drained wetlands must be treated as wetlands for any delineation purposes. His firm conducted a delineation of the GGSH tract, and determined that 419 acres of the approximately 453 acres of the GGSH tract were "jurisdictional wetlands regulated by the Corps of Engineers."

Plaintiff also presented as evidence a letter from the Environmental Protection Agency stating that "some of the ditches [on the

GGSH tract] were not excavated in compliance with the Clean Water Act (CWA)." The letter also stated that "a final jurisdictional analysis [would need to] be performed [to] accurately determine the full extent of the wetlands that were on the [GGSH tract] prior to the ditching activity."

It is undisputed that Defendants never applied for an updated permit from the Corps that would allow for development of a golf course or any other development upon the GGSH tract. We hold that the evidence, when viewed in the light most favorable to Plaintiff, presents issues of material fact concerning whether Defendants knew of violations of environmental laws on, or which have occurred with respect to, the GGSH tract. We reverse the judgment of the trial court, and remand for a trial on the merits on this issue.

[4] Plaintiff also argues that Defendants breached the section of the contract which represented that the GGSH tract contained approximately twenty-five acres of jurisdictional wetlands because it was later revealed that more than twenty-five acres of the property were wetlands. The section regarding the wetlands delineation is in a section separate from the "Representations and Warranties" section of the contract. It is clear from the contract that the survivorship language was meant only to apply to those items under the "Representations and Warranties" section of the contract, and not to any other section. Thus, unlike the section of the contract regarding environmental violations, there is no evidence Plaintiff and Defendants intended the section of the contract concerning the amount of wetlands on the GGSH tract to survive closing. We hold that this provision merged with the deed at the time of closing. Plaintiff's opportunity to avail itself of this provision has thus been lost. This part of Plaintiff's argument is without merit.

IV.

[5] In Plaintiff's fourth argument, it contends the trial court erred in granting summary judgment because genuine issues of material fact existed with respect to Plaintiff's claim for breach of the covenant of good faith and fair dealing. We agree.

"In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation and quotation marks omitted). We have held that issues of

material fact exist concerning Defendants' potential violations of environmental law. If it is ultimately determined that environmental violations occurred, this would render the GGSH tract unsuitable for the purpose intended and contemplated by both parties in the contract for sale of the GGSH tract. We hold that there are issues of material fact yet to be decided relevant to Plaintiff's claim for breach of implied covenant of good faith and fair dealing. The trial court erred in deciding this issue at the summary judgment stage.

V.

[6] In Plaintiff's fifth argument, it contends the trial court erred in finding that no issue of material fact exists with respect to Plaintiff's claim for rescission and whether that claim is barred by the doctrine of unclean hands. We disagree.

In *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975), the North Carolina Supreme Court held that

> because of the uncertainty surrounding the law of mistake we are extremely hesitant to apply this theory to a case involving the completed sale and transfer of real property. Its application to this type of factual situation might well create an unwarranted instability with respect to North Carolina real estate transactions and lead to the filing of many non-meritorious actions.

Id. at 432-33, 215 S.E.2d at 109. Although in *Hinson*, the Supreme Court rejected the theory of mutual mistake of fact as the basis for rescission of an executed real estate contract, our Court recently held in *Taylor v. Gore*, 161 N.C. App. 300, 304, 588 S.E.2d 51, 55 (2003) that " 'certain mistakes will justify the rescission of an executed real estate contract; [and] a mistake induced by a misrepresentation is as persuasive a case for rescission as any.' " *Id.* (quoting *Howell v. Waters*, 82 N.C. App. 481, 491, 347 S.E.2d 65, 71 (1986)). Therefore, because Plaintiff argues its mistake as to the size of the wetlands on the GGSH tract was induced by a misrepresentation, we address the merits of Plaintiff's argument.

In *Howell*, which involved a mutual mistake of fact concerning property boundaries, our Court held the elements for rescission of a contract based on mutual mistake of fact were:

> (1) Did [the] plaintiff exercise due diligence in discovering the alleged mistake such that his action is not barred by the three year statute of limitations in N.C. Gen. Stat. 1-52(9)?;

(2) Has [the] plaintiff presented clear, cogent and convincing evidence establishing that he was mistaken regarding the boundaries of the property to be conveyed?;

(3) If [the] plaintiff was mistaken, did [the] defendant or [the] defendant's agent have reason to know of [the] plaintiff's mistake or cause [the] plaintiff's mistake?;

(4) Was the mistake material?; and

(5) Did [the] plaintiff assume the risk of a mistake by:

(a) unreasonably relying on [the defendant's] representations or

(b) treating his limited knowledge of the boundaries of the property to be conveyed as sufficient?

Howell, 82 N.C. App. at 491-92, 347 S.E.2d at 72. If the trier of fact answers the first four questions affirmatively and the fifth negatively, then the plaintiff is entitled to rescission of the contract. *Id.* We find no reason why the amount of wetlands on a property should be treated differently than the location of the boundaries of a property.

In the present case, we have held above that Plaintiff did not reasonably rely on Ball's representations of the size of the wetlands on the GGSH tract. Ball's Master Wetlands Map contained clear deficiencies on its face. Reliance on the map was not reasonable, nor did the map provide Plaintiff with sufficient knowledge of the wetlands to justify Plaintiff's mistake. Because we hold that Plaintiff is not entitled to rescission of the contract, GGSH's defense of the doctrine of unclean hands need not be addressed.

VI.

[7] In Plaintiff's sixth argument, it contends the trial court erred in finding that Plaintiff's damages were speculative. We agree.

At the end of the summary judgment hearing, the trial court stated:

Well, frankly if it survives summary judgment on the liability issues, damages matters—I don't know, I suppose that they could be properly dealt with here, it seems that y'all haven't made any here that aren't more properly addressed 7 days from now. If we're there at 7 days from now.

Because the trial court did not address the issue of damages at the summary judgment hearing and instead stated that damages would be

addressed at trial if Plaintiff's claims survived summary judgment, it was error for the trial court to base its grant of summary judgment in favor of Defendants on any issue related to damages.

VII.

[8] In Plaintiff's seventh argument, it contends the trial court erred in finding that Plaintiff spoliated evidence. We agree.

Evidence of spoliation by a party allows the trier of fact to make an inference that the spoliated evidence was detrimental to that party's case. The inference is not mandatory, but lies within the province of the trier of fact. *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 183-85, 527 S.E.2d 712, 715-17 (2000). For this reason, it is improper to base the grant or denial of a motion for summary judgment on evidence of spoliation. It is not an issue to be decided as a matter of law, and cannot, by its mere existence, be determinative of a claim. *See id.* The trial court erred in granting summary judgment on the basis of spoliation.

We affirm in part, and reverse and remand in part for further action consistent with the holdings in this opinion.

Affirmed in part, reversed and remanded in part.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA v. ANTAVIO DERRELL BEST

No. COA08-659

(Filed 7 April 2009)

1. Accomplices and Accessories— accessory after the fact— duress—conflicting evidence

Duress would not have been an appropriate ground for dismissal of charges of being an accessory after the fact to first-degree murder and first-degree kidnapping where the evidence was conflicting. The trial court's denial of defendant's motion to dismiss was correct.

2. Criminal Law— duress—accessory after-the-fact—instructions in context

The court's failure to specifically instruct on duress in reference to the accessory after the fact charges was not prejudicial to the defendant because, considered contextually, the trial court instructed on duress as a defense to all of the charges. Moreover, the jury necessarily found that defendant did not act under duress when it found him guilty of "knowingly and willfully" rendering assistance.

3. Criminal Law— requested instructions—given in substance

A requested instruction was given in substance even though it was not given specifically where the requested instruction was that defendant could rely on evidence presented in the State's case-in-chief and the given instruction was that the jury should consider all of the evidence.

4. Constitutional Law— double jeopardy—accessory to kidnapping and accessory to murder—basis of murder not clear

Double jeopardy forbids punishing a defendant for both a felony murder and the underlying felony. Judgment on a conviction for being an accessory after the fact to first-degree kidnapping was arrested where defendant was also convicted of being an accessory after the fact to first-degree murder and the jury's verdict did not indicate whether that conviction was based on premeditation or on felony murder derived from the kidnapping.

5. Accomplices and Accessories— instructions—not confusing in context

An allegedly confusing instruction on accessory after the fact to first-degree kidnapping was not plain error when considered in context with the clear, extensive, and repeated instructions on accessory after the fact to burglary and first-degree murder.

6. Criminal Law— omission of element from substantive instruction—included in mandate—no plain error

The omission of an element of accessory after the fact to first-degree murder from the substantive instruction was not plain error where defendant conceded that the mandate was correct.

7. Sentencing— restitution—accessory after the fact—causal link to harm

A restitution award after convictions for being an accessory after the fact to first-degree murder and kidnapping was vacated because there was no direct and proximate causal link between defendant's actions as an accessory and the harm caused to the victims' families.

Appeal by defendant from judgments entered 3 October 2007 by Judge Phyllis Gorham in Superior Court, Sampson County. Heard in the Court of Appeals 17 November 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.

Parish, Cooke & Condlin, by James R. Parish, for defendant.

WYNN, Judge.

A defendant "may not be punished both for felony murder and for the underlying, 'predicate' felony, even in a single prosecution."[1] Defendant Antavio Derrell Best argues that his sentences for accessory-after-the-fact to first-degree murder and accessory-after-the-fact to first-degree kidnapping violate double jeopardy. Because the jury could have found Defendant guilty of accessory after the fact to first-degree murder based on the kidnapping, pursuant to the felony murder rule, we arrest judgment on Defendant's convictions for accessory-after-the-fact to first-degree kidnapping. We also vacate the award of restitution because there is an insufficient causal link to support the award.

On 15 November 2003, Defendant drove his car to pick up his friends Stephen Antonio Bell and Rafty Brown. After spending 20 to 60 minutes at a "bootleg liquor house," Defendant drove to a store, where Mr. Brown gave him money to buy duct tape. Defendant bought the tape, gave it to Mr. Brown, and said he needed to get home to his family. However, Mr. Brown said he needed to go to someone's house, and gave directions as Defendant drove there. Mr. Brown instructed Defendant to turn out the headlights and to wait in the car; thereafter, he and Mr. Bell went inside the house.

About 10 to 15 minutes later, Mr. Brown returned to the car and told Defendant that he had duct taped some people and needed to

1. *State v. Gardner*, 315 N.C. 444, 460, 340 S.E.2d 701, 712 (1986).

take them away. Defendant told Mr. Brown that "he didn't want any part of this." In response, Mr. Brown pointed a shotgun at Defendant and told him that he would kill Defendant and his family if Defendant did not help. Mr. Brown instructed Defendant to open the trunk of his car, and Defendant complied. Thereafter, Mr. Brown and Mr. Bell led three people, one after the other, out of the house to Defendant's car; they placed a male (later identified as Randolph Carr) and a female (later identified as Carrie Jones) into the trunk, and another male (later identified as Jimmy Ray Turner) into the back seat.[2] Mr. Bell got into the front passenger's seat and Mr. Brown sat in the back seat on the driver's side, directly behind Defendant.

Defendant drove, following Mr. Brown's directions. In a statement he later gave to police, Defendant recalled hearing Mr. Brown scream at the male victim in the back seat, "Where are the drugs, Jimmy?"

At some point after riding for several miles, Mr. Brown directed Defendant to stop the car; he got out of the car, removed some logs from a driveway, and instructed Defendant to back his car in. Mr. Brown told Defendant to open the trunk, and not to move. Then, Mr. Bell took the male victim out of the backseat of the car; Mr. Brown removed the other victims from the trunk. Mr. Brown and Mr. Bell then walked the three victims into the woods while Defendant stayed in the car. Defendant stated that he heard Mr. Brown tell the three victims, "You are going to die." After Mr. Bell came back and stood by the driver's side window of Defendant's car, Defendant heard sounds of people being beaten and a shotgun being cocked, but not discharged. Mr. Brown came back to Defendant's car, retrieved a cinder block, and returned to the woods. Defendant stated that he heard sounds of people being beaten for the next 10 to 15 minutes.

Thereafter, Mr. Brown returned to Defendant's car with blood on his face, and without his shirt. Mr. Brown then instructed Defendant to drive to Mr. Brown's mother's house where he obtained a large gasoline jug, got back into Defendant's car, and instructed him to drive back to where the three victims were located.

When they returned to the scene, Mr. Brown told Mr. Bell to burn the three bodies, but Mr. Bell refused. Mr. Brown then took the gas container into the woods, and Defendant recalled seeing flames shortly thereafter. Mr. Brown returned to Defendant's car and in-

2. Defendant does not contest that these three individuals were murder victims; accordingly, we refer to them in this opinion as victims.

structed him to drive back to Mr. Brown's mother's house, where Mr. Brown left the gas container. Mr. Brown got back into the car, and directed Defendant to drive to the Village Inn Motel in Warsaw. When they arrived, Mr. Brown and Mr. Bell got out, and Mr. Brown told Defendant that he would kill him and his family if Mr. Brown heard anything about the murders.

After leaving Mr. Brown and Mr. Bell, Defendant washed the exterior and vacuumed the interior of his car. In his statement to police, Defendant said that he did not report the crimes after leaving Mr. Brown and Mr. Bell because he feared for the safety of himself and his family. The next morning, Mr. Bell called Defendant from the motel for a ride to Mount Olive. Defendant went to pick up Mr. Brown and Mr. Bell, but they had already checked out when he arrived.

At trial, Cassandra Harding testified that she had been in a relationship with Mr. Brown, knew Mr. Bell and Defendant, and that she had picked up Mr. Brown and Mr. Bell from the motel on 16 November 2003. Ms. Harding also testified that she attended a party that evening, where she saw Defendant and Mr. Bell "standing side-by-side basically the whole time that I was there."

On 21 November 2003, Defendant went with his father to the police station to give a statement. After giving his statement, Defendant was placed under arrest and read his *Miranda* rights. He then gave a second statement which was substantially similar to the first.

Defendant was indicted for three counts each of first-degree murder, first-degree kidnapping, accessory-after-the-fact to first-degree murder, accessory-after-the-fact to first-degree kidnapping, one count of burglary, and one count of accessory-after-the-fact to burglary. A jury acquitted Defendant of the three first-degree murder charges, but deadlocked on the remaining charges. At a second trial on the remaining charges, the jury found Defendant not guilty of the three counts of kidnapping, the count of first-degree burglary, and the count of accessory-after-the-fact to burglary. However, Defendant was found guilty of three counts each of accessory-after-the-fact to first-degree murder and accessory-after-the-fact to first-degree kidnapping.

Defendant appeals from these judgments arguing: (I) the evidence was insufficient to support the accessory-after-the-fact to first-degree murder and accessory-after-the-fact to first-degree kidnapping charges; (II) the trial court committed plain error by failing to instruct the jury that duress could be a defense to accessory-after-the-fact to

first-degree murder and accessory-after-the-fact to first-degree kidnapping; (III) the trial court erred by failing to instruct that Defendant could rely on evidence presented in the State's case-in-chief; (IV) his convictions for accessory-after-the-fact to first-degree murder and accessory-after-the-fact to first-degree kidnapping violate his right against double jeopardy because the same evidence was used to establish elements of both crimes, and because kidnapping was the predicate offense to his accessory-after-the-fact to first-degree murder convictions; (V) the trial court committed plain error by giving a confusing and incomplete instruction; (VI) the trial court committed plain error by omitting an element from its instruction on accessory-after-the-fact to first-degree murder; and (VII) the trial court erred by ordering him to pay restitution.

I.

[1] In his first assignment of error, Defendant argues that the trial court should have granted his motion to dismiss the accessory-after-the-fact charges because the State introduced exculpatory evidence and its case-in-chief established, if anything, that Defendant was a principal offender, not an accessory. We disagree.

To withstand a motion to dismiss, the State must present "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (citation omitted). The State is entitled to the most favorable view of the evidence, including all reasonable inferences. *Id.* (citation omitted).

The elements of accessory-after-the-fact are: (1) a principal has committed the felony; (2) Defendant gave assistance to the principal to evade detection, arrest or punishment; and (3) Defendant knew the principal committed the felony. *State v. Barnes*, 116 N.C. App. 311, 316, 447 S.E.2d 478, 480 (1994) (citing *State v. Duvall*, 50 N.C. App. 684, 691, 275 S.E.2d 842, 849, *rev'd on other grounds*, 304 N.C. 557, 284 S.E.2d 495 (1981)). Moreover, accessory-after-the-fact "is a substantive crime-not a lesser degree of the principal crime," so a defendant may not be charged and tried as a principal, but convicted as an accessory. *State v. Johnson*, 136 N.C. App. 683, 695, 525 S.E.2d 830, 837 (2000).

Here, notwithstanding any exculpatory evidence in its case-in-chief, the State presented substantial evidence of each element of

accessory-after-the-fact to first-degree murder and kidnapping. Specifically, the State's evidence showed that Defendant watched Mr. Brown and Mr. Bell put the bound victims into his car. He heard Mr. Brown telling the victims they were going to die as Mr. Brown led them into the woods. After hearing the sounds of people being beaten, he drove Mr. Brown and Mr. Bell from the crime scene to Mr. Brown's mother's house, and then back to the crime scene. Defendant heard Mr. Brown tell Mr. Bell to set the victims on fire; he also heard Mr. Bell's refusal. After watching Mr. Brown go back into the woods with the gas container, and seeing flames and smoke coming from the crime scene, Defendant drove Mr. Brown and Mr. Bell to the motel. Significantly, he washed the exterior and vacuumed the interior of his car the same night. Finally, he went back to pick up Mr. Brown and Mr. Bell the next day, and appeared at a party with Mr. Bell the next night. Defendant reported the events to police several days later.

Moreover, any evidence in the State's case-in-chief tending to show that Defendant acted under duress did not require the trial court to dismiss the accessory-after-the-fact charges. Defendant's duress defense presented a question of fact for the jury to decide; indeed, in the face of conflicting evidence, duress was not an appropriate ground for the trial court to grant Defendant's motion to dismiss. *Compare State v. Lane*, 3 N.C. App. 353, 355, 164 S.E.2d 618, 619 (1968) (dismissal not appropriate in homicide prosecution where State relied upon statement by defendant containing exculpatory and inculpatory evidence on whether killing was accidental); *with State v. Carter*, 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961) (where State relies on a defendant's exculpatory statements, which are "not contradicted or shown to be false by any other facts or circumstances in evidence," dismissal is appropriate). Giving the State the most favorable view of the evidence, substantial evidence was presented on each element of both accessory-after-the-fact charges. Accordingly, Defendant's first two assignments of error are without merit.

II.

[2] Defendant next argues that the trial court committed plain error by failing to instruct the jury that the duress defense also applied to the accessory-after-the-fact charges.

A trial court is required to give a requested instruction "at least in substance if it is a correct statement of the law and supported by the evidence." *State v. Corn*, 307 N.C. 79, 86, 296 S.E.2d 261, 267 (1982) (citing *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976)). A jury

instruction must be construed contextually, and if "the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal." *State v. Chandler*, 342 N.C. 742, 751-52, 467 S.E.2d 636, 641 (1996) (citations omitted). "Furthermore, insubstantial technical errors which could not have affected the result will not be held prejudicial." *Id.* (citations omitted).

Defendant cites *State v. Sherian*, 234 N.C. 30, 34, 65 S.E.2d 331, 333 (1951), in support of his argument that the trial court's failure to specifically instruct that duress is applicable to accessory-after-the-fact amounts to plain error. However, this Court recognized in *State v. White*, 77 N.C. App. 45, 52-53, 334 S.E.2d 786, 792 (1985), that in *Sherian* "the court failed entirely to instruct the jury on the defense of duress." In *White*, on the other hand, the trial court "repeatedly and fully instructed on the elements of [duress]." Therefore, this Court deemed any omission insignificant, and distinguished *Sherian* on that basis. *Id.* Thus, the Court in *White* held that the defendant received a trial free of prejudicial error.

Likewise, *Sherian* is also distinguishable from this case. Here, the trial court fully instructed on the elements of duress, although not specifically in reference to the accessory-after-the-fact charges. The trial court gave the following instruction on duress:

> There is evidence in this case tending to show that the defendant acted only because of duress. The burden of proving duress is upon the defendant. It need not be proven beyond a reasonable doubt, but only proved to your satisfaction. The defendant would not be guilty of these crimes if his actions were caused by a reasonable fear that he or another would suffer immediate death or serious bodily injury if he did not commit the crime. His assertion of duress is a denial that he committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

Thereafter, and with specific reference to the accessory-after-the-fact to first-degree murder charge, the trial court instructed as follows:

> So I charge you that if you find from the evidence beyond a reasonable doubt that another person committed three counts of first-degree murder . . . and that thereafter, on or about the alleged date, the defendant, knowing another person to have committed three counts of first-degree murder knowingly and willfully assisted him in attempting to escape detection, arrest

> and punishment, it would be your duty to return a verdict of guilty as an accessory after the fact to first-degree murder.

Therefore, considering the jury instructions contextually, the trial court in fact instructed on duress as a defense to all charges. By generally instructing that Defendant would not be guilty of "these crimes" if the jury found duress, and that Defendant's assertion of duress is a denial that he committed "any crime," the trial court's failure to specifically instruct on duress in reference to the accessory-after-the-fact charges was not prejudicial to Defendant.

Moreover, the trial court specifically instructed that the jury would have to find that Defendant "knowingly and willfully" assisted the principal before it could find him guilty as an accessory-after-the-fact to first-degree murder. The concept of "knowingly and willfully" giving assistance is contrary to the concept of duress; therefore, the jury necessarily found that Defendant did not act under duress when it found him guilty of "knowingly and willfully" rendering assistance. *See State v. Strickland*, 307 N.C. 274, 297, 298 S.E.2d 645, 660 (1983) ("No act done 'fully under the compulsion of fear' could be a willful act under this instruction. The jury was required to find that the defendant did not act voluntarily (willfully), but rather in response to coercion based on fear."), *overruled on other grounds*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Accordingly, this assignment of error is without merit.

III.

[3] Defendant next argues that the trial court erred by failing to instruct that Defendant could rely on evidence presented in the State's case-in-chief.

As noted above, a trial court must give a requested instruction if it is a correct statement of the law and it is supported by substantial evidence. *Corn*, 307 N.C. at 86, 296 S.E.2d at 267 (citations omitted). Still, the trial court's instructions must be viewed contextually and insubstantial technical errors will not be deemed prejudicial. *Chandler*, 342 N.C. at 751-52, 467 S.E.2d at 641 (citations omitted).

In this case, although the trial court declined to give the specific instruction Defendant requested, he still received the benefit of such instruction from the following:

> You should consider *all of the evidence*, arguments, contentions, and positions urged by attorneys and any other contention that

arises from the evidence and using your common sense, you must determine the truth in this case.

Thus, the trial court gave the requested instruction in substance, even though the court declined to give it specifically. Accordingly, this assignment of error is without merit.

IV.

[4] Defendant next makes two related arguments that his convictions for accessory-after-the-fact to first-degree kidnapping should be vacated because of double jeopardy concerns: (1) evidence that the victims were seriously injured was used to establish first-degree murder and first-degree kidnapping; and (2) the jury could have found first-degree murder based on the kidnapping, pursuant to the felony murder rule. Defendant did not object at sentencing, or move to amend or arrest judgment, nor did he assign plain error in this appeal. Thus, he has failed to preserve this assignment of error for our review. However, finding that the second of Defendant's double jeopardy arguments has merit, we address that issue pursuant to N.C. R. App. P. 2 (2007).

Under the Double Jeopardy Clause, a defendant "may not be punished both for felony murder and for the underlying, 'predicate' felony, even in a single prosecution." *State v. Gardner*, 315 N.C. 444, 460, 340 S.E.2d 701, 712 (1986). However, the legislature may specifically approve cumulative punishments for the same conduct without offending the Double Jeopardy Clause. *Id.* (citing *Missouri v. Hunter*, 459 U.S. 359, 368-69, 74 L. Ed. 2d 535, 544 (1983)). In the absence of legislative authorization, the consolidation of multiple convictions for the same conduct does not alleviate double jeopardy concerns "because the separate convictions may still give rise to adverse collateral consequences." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citing *Ball v. United States*, 470 U.S. 856, 84 L. Ed. 2d 740 (1985)).

Here, after the trial judge rendered her judgment of sentencing in open court, the Assistant District Attorney asked: "Your Honor, are you arresting judgment on the kidnappings?" The judge responded: "I consolidated them, consolidated all three of them. There are three judgments, so there's three. I have consolidated them into that." However, Defendant points out that the jury's verdict sheets do not indicate whether it found first-degree murder on the basis of premeditation and deliberation, or felony murder based on first-degree kidnapping. Thus, if the jury found felony murder based upon the kid-

napping, consolidation of the convictions did not cure a double jeopardy violation. *Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683.

The State argues that double jeopardy is not implicated by Defendant's sentencing for both offenses because accessory-after-the-fact is a separate and distinct crime from both of the principal felonies. This would be a persuasive argument if the jury's verdicts indicated that it found first-degree murder on the basis of premeditation and deliberation, and not pursuant to the felony murder rule, because the kidnapping would not be the "predicate" offense to first-degree murder. However, the jury's verdict is ambiguous, and it was instructed on both theories of first-degree murder. Therefore, this Court must treat the convictions as if the jury found first-degree murder pursuant to the felony murder rule. *See, e.g.*, *State v. McLaughlin*, 286 N.C. 597, 610-11, 213 S.E.2d 238, 246-47 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976).

We are persuaded that the rationale for the general rule—that a principal may not be punished for felony murder and the underlying felony—should be equally applicable to convictions for being an accessory-after-the-fact to felony murder and the underlying felony. The State cites no authority holding otherwise. Accordingly, we arrest judgment on Defendant's convictions for accessory-after-the-fact to first-degree kidnapping. *See State v. Thompson*, 280 N.C. 202, 217, 185 S.E.2d 666, 676 (1972) (arresting judgment on felonious breaking and entering and felonious larceny convictions where those convictions provided basis for felony murder conviction).

V.

[5] Defendant next argues that the trial court's confusing instruction on accessory-after-the-fact to first-degree kidnapping was plain error. In support of his contention, Defendant points to the following excerpt of the trial court's instructions:

> If you find from the evidence beyond a reasonable doubt that another person committed first-degree kidnapping, then it would be your duty to find that another committed first-degree kidnapping. If you do not so find or if you have a reasonable doubt as to one or more of these things, then you will not find that another person committed first-degree kidnapping.
>
> If you do not so find or have a reasonable doubt that the other person committed first-degree kidnapping, then you must consider whether the other person committed first-degree burglary.

Defendant points only to this excerpt, ignoring the preceding portion of the accessory-after-the-fact to first-degree kidnapping instruction, which correctly stated the law as follows:

> Now I charge that for you to find the defendant guilty as an accessory after the fact to first-degree kidnapping, you must find that the other person unlawfully confined a person or restrained a person or removed a person from one place to another; that the person did not consent to this restraint or removal; that the other person restrained or confined or removed that person for the purpose of doing serious bodily injury to that person; that the confinement or restraint or removal was a separate, complete act, independent of and apart from the injury or for the purpose of terrorizing that person; that the person was not released in a safe place or had been seriously injured.

"A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct." *Chandler*, 342 N.C. at 751-52, 467 S.E.2d at 641. Moreover, the alleged confusing portion of the trial court's instruction cannot be considered prejudicial to Defendant in light of the clear, extensive, and repeated instructions the trial court gave on accessory-after-the-fact to burglary and accessory-after-the-fact to first-degree murder. Accordingly, this assignment of error is without merit.

VI.

[6] In his sixth assignment of error, Defendant argues that the trial court committed plain error by omitting the second element from its substantive instruction on accessory-after-the-fact to first degree murder.

In his brief, however, Defendant concedes that "during the mandate the trial court instructed the jury that the State had the burden of proving the second element i.e. 'the defendant, knowing another person to have committed three counts of first-degree murder knowingly and willfully assisted him in attempting to escape detection, arrest and punishment . . . .'" Assuming the trial court erroneously omitted the second element from the substantive portion of its instructions, "insubstantial technical errors which could not have affected the result will not be held prejudicial." *Chandler*, 342 N.C. at 751-52, 467 S.E.2d at 641 (citations omitted). Therefore, this assignment of error is without merit.

VII.

[7] In his final assignment of error, Defendant argues that the trial court erred by ordering him to pay restitution. Here again, Defendant made no objection to the trial court's award of restitution, and did not move to amend judgment. Therefore, this issue is not properly before this Court. *See State v. Canady*, 153 N.C. App. 455, 460, 570 S.E.2d 262, 266 (2002) ("Where a defendant fails to object to the judgment or the amount of restitution ordered at the sentencing hearing or to a trial court's order that a defendant make restitution, an appeal concerning the appropriateness of an imposition of restitution is not properly before this Court.") (citations omitted). Nevertheless, this issue has merit, so we reach it pursuant to N.C. R. App. P. 2 to prevent a manifest injustice.

North Carolina's restitution statute authorizes an award of restitution to a crime victim, defined as "a person *directly and proximately* harmed as a result of the defendant's commission of the criminal offense." N.C. Gen. Stat. § 15A-1340.34(a) (2007) (emphasis added). There is a dearth of guidance in North Carolina caselaw regarding an accessory-after-the-fact's liability for restitution on the principal offenses. Therefore, we find helpful guidance in two federal cases cited by the State.

United States v. Quackenbush, 9 F. App'x. 264 (4th Cir. 2001) (unpublished), addressed an accessory-after-the-fact's liability for restitution under a nearly identical federal restitution statute. *See* 18 U.S.C.A. § 3663A(a)(2) (2000). In *Quackenbush*, the defendant was convicted of being an accessory-after-the-fact to a bank robbery because he drove the principal offenders to various locations after the robbery and helped them spend the money. *Quackenbush*, 9 F. App'x. at 265. The trial court held the defendant jointly and severally liable with the principal offenders for restitution to the bank. The Fourth Circuit identified the "relevant question" as "whether the victims' losses were proximately caused by the specific conduct for which Quackenbush was convicted, i.e., being an accessory-after-the-fact by virtue of his acts of driving the bank robbers to and from various locations following the bank robbery, harboring them, helping them count and spend the money, and helping them hide from the police." *Id.* at 268. The Fourth Circuit upheld the defendant's liability for restitution, finding that "the district court very well could have found that the bank's inability to recover the stolen money was directly attributable to Quackenbush's act of helping the bank robbers hide after the robbery." *Id.* at 269. There was a direct causal link

between the defendant's actions as an accessory-after-the-fact and the bank's losses.

Similarly, in *United States v. Roach*, 2008 WL 163569 (W.D.N.C. 2008) (unpublished), the District Court found that an accessory-after-the-fact to murder could be liable for restitution to the victim's family. In *Roach*, the defendant shot and killed the victim. Codefendant "Slee" was present at the murder scene, drove the defendant from the murder scene, and later accepted cash and drugs from the defendant as an inducement not to reveal his knowledge of the murder. *Id.* at *1-2. Another codefendant, "Squirrel," disposed of the murder weapon after the defendant told "Squirrel" about the murder. *Id.* The District Court ruled that "Slee" and "Squirrel" could be jointly and severally liable for restitution to the victim's family, as accessories-after-the-fact, because they "deliberately obstructed the murder investigation by authorities and delayed the apprehension of Roach." *Id.* at 6. *Accord State v. Latimer*, 604 N.W.2d 103, 105 (Minn. Ct. App. 1999) (restitution award against accessory-after-the-fact to murder only appropriate for "any losses [the victim's] parents experienced as a result of Latimer's actions to cover up the murder.").

In this case, the only evidence that Defendant attempted to cover up the murders and kidnappings was that he washed the exterior and vacuumed the interior of his car, and attempted to pick up Mr. Brown and Mr. Bell at the motel the day after the murders. However, there was no evidence that these actions actually obstructed the murder investigation, or assisted the principals in evading detection, arrest, or punishment. Moreover, there was contrary evidence tending to show that Defendant ultimately assisted in Mr. Brown's and Mr. Bell's apprehension. Defendant voluntarily went to the police station and gave a statement, although it was several days after his involvement. The cases above make it clear that there must be a direct causal link between an accessory-after-the-fact's actions and the harm to the "victim" defined in the restitution statute; in the case of accessory-after-the-fact to murder, the direct causal link is obstruction of the investigation, or covering up evidence. Defendant's actions after the principal crimes were committed—cleaning the car and making a failed attempt to pick up Mr. Brown and Mr. Bell—did not cover up any evidence or obstruct the investigation. Therefore, there is no "direct and proximate" causal link between Defendant's actions as an accessory-after-the-fact and the harm caused to the victims' families. N.C. Gen. Stat. § 15A-1340.34(a). Accordingly, we vacate the trial court's award of restitution.

In sum, we arrest judgment on the accessory-after-the-fact to first-degree kidnapping convictions, remand this matter for resentencing on the three remaining charges of accessory-after-the-fact to first-degree murder, and vacate the award of restitution.

Reversed in part and remanded for resentencing; vacated in part.

Chief Judge MARTIN and Judge STEPHENS concur.

IN THE MATTER OF J.D.B., JUVENILE

No. COA08-499

(Filed 7 April 2009)

Confessions and Incriminating Statements— juvenile—interviewed at school—not a custodial interrogation

The trial court correctly denied a juvenile's motion to suppress statements made during interactions with officers at school where a reasonable person in the juvenile's position would not have believed himself to be in custody or deprived of his freedom of action in some significant way. All of the circumstances surrounding the interactions with officers must be examined and an objective test applied; the juvenile's subjective belief that he was not free to leave is not determinative of whether he was in custody.

Judge BRYANT concurring.

Judge BEASLEY dissenting.

Appeal by juvenile from order filed 16 October 2007, *nunc pro tunc*, 13 December 2005, by Judge Joseph M. Buckner in Orange County District Court. Heard in the Court of Appeals 12 January 2009.

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

Lisa Skinner Lefler, for juvenile-appellant.

MARTIN, Chief Judge.

On 19 October 2005, juvenile petitions were filed against juvenile J.D.B. for two counts each of felonious breaking and entering and lar-

ceny. Subsequently, J.D.B. filed a motion to suppress certain inculpatory statements made to law enforcement officers, as well as other evidence obtained by them, on the grounds that the statements and evidence were obtained through an unlawful custodial interrogation which occurred on 29 September 2005. After hearing evidence, the trial court denied the motion to suppress. Reserving his right to appeal the denial of his motion to suppress, J.D.B. entered a transcript of admission to both counts of felonious breaking and entering and larceny as alleged in the petitions. The trial court adjudicated J.D.B. delinquent and entered a disposition order placing J.D.B. on probation and awarding restitution to the victims. J.D.B. then appealed the denial of his motion to suppress and the portion of the disposition order requiring him to pay restitution.

This Court issued an opinion affirming the order of restitution but remanding this case for proper findings of fact to support the trial court's denial of the motion to suppress. *See In re J.B.*, 183 N.C. App. 299, 644 S.E.2d 270 (2007) (unpublished) (remanding to the trial court for proper findings of fact regarding whether the juvenile was in custody for *Miranda* purposes). Upon remand, the trial court filed and entered its order making findings of fact, conclusions of law, and denying J.D.B.'s motion to suppress. J.D.B. now appeals from this second order. In denying the motion, the trial court made, upon remand, the following findings of fact which have not been challenged on appeal:

> 5. [J.D.B.] is in the seventh grade and enrolled in special education classes.
>
> 6. [J.D.B.] was escorted from his class and into a conference room to be interviewed. Present in the room were Investigator DiCostanzo, Assistant Principal David Lyons, a school resource officer and an intern. The door was closed, but not locked.
>
> 7. [J.D.B.] was not administered Miranda warning [sic] and was not offered the opportunity to speak to a parent or guardian prior to the commencement of questioning. Additionally, no parent or guardian was contacted prior to [J.D.B.]'s removal from class.
>
> 8. Investigator DiCostanzo asked [J.D.B.] if he would agree to answer questions about recent break-ins. [J.D.B.] consented.
>
> 9. [J.D.B.] stated that he had been in the neighborhood looking for work mowing lawns and initially denied any criminal activity.

10. Mr. Lyons then encouraged [J.D.B.] to "do the right thing" and tell the truth.

11. The investigator questioned him further and confronted him with the fact that the camera had been found.

12. Upon [J.D.B.]'s inquiry as to whether he would still be in trouble if he gave the items back, the investigator responded that it would be helpful, but that the matter was still going to court and that he may have to seek a secure custody order.

13. [J.D.B.] then confessed to entering the houses and taking certain items together with another juvenile.

14. The investigator informed [J.D.B.] that he did not have to speak with him and that he was free to leave. He asked him if understood [sic] that he was not under arrest and did not have to talk with the investigator.

15. [J.D.B.] indicated by nodding "yes" that he understood that he did not have to talk to the officer and that he was free to leave. He continued to provide more details regarding where certain items could be located.

16. [J.D.B.] wrote a statement regarding his involvement in the crime.

17. The bell rang signaling the end of the day and [J.D.B.] was allowed to leave to catch his bus home.

18. The interview lasted from 30 to 45 minutes.

19. The investigator had informed [J.D.B.] that he would see him later and would be speaking to his grandmother and aunt.

20. Investigator DiCostanzo and Officer Hunter went to the home of [J.D.B.], but found no one home. When [J.D.B.] arrived, he told the officers they could look around and he would show them where the jewelry was located.

21. Investigator DiCostanzo informed [J.D.B.] that he needed to obtain a search warrant and left Officer Hunter to wait outside [J.D.B.]'s home.

22. While awaiting the search warrant, [J.D.B.] brought a ring to the officer from inside the home.

23. Upon the investigator's return with the warrant, [J.D.B.] entered the home with the officers and handed them several stolen

items and led the investigator to where other items could be found on the roof of a gas station down the road. During the entire time that the officers were at his residence and travelling [sic] with him to the BP station, no parent or guardian was contacted or advised of the situation. [J.D.B.] was not advised of his Miranda warnings or told he had the right to speak to or have a parent or guardian present.

24. Investigator DiCostanzo left his card and a copy of the search warrant at [J.D.B.]'s residence.

25. All of [J.D.B.]'s responses to the officer's questions were appropriately responsive, indicating that he was capable of understanding the fact that he did not have to answer questions.

26. All of [J.D.B.]'s responses to counsel during the suppression hearing were appropriately responsive.

Based on these findings, the trial court concluded that at no point during the course of events on 29 September 2005 was J.D.B. in custody. The trial court also concluded that all of the statements made by J.D.B. and actions taken by J.D.B. in the presence of law enforcement occurred voluntarily. Based on these conclusions of law, the trial court ordered that the motion to suppress be denied.

On appeal, J.D.B. assigns error to the trial court's denial of his motion to suppress, arguing that his statement to officers occurred during a custodial interrogation where officers failed to administer the proper warnings under *Miranda* and N.C.G.S. § 7B-2101(a), thus violating his Fifth Amendment rights. As part of this argument, J.D.B. contends that, because "no reasonable special education, thirteen-year-old seventh grader without his guardian or some other advocate would [have felt] free to leave," the trial court should have concluded that J.D.B. was in custody for purposes of *Miranda* and N.C.G.S. § 7B-2101(a). We disagree.

We begin by noting that the trial court's findings of fact after a hearing concerning the admissibility of a confession are conclusive and binding on this Court when supported by competent evidence. *See State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993), *cert. denied*, 512 U.S. 1239, 129 L. Ed. 2d 865 (1994). The trial court's conclusions of law, however, are reviewable *de novo*. *See id.* Under this standard, the legal significance of the findings of fact made by the trial court is a question of law for this Court to decide. *See State v. Davis*, 305 N.C. 400, 415, 290 S.E.2d 574, 583 (1982).

The Fifth Amendment of the United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the United States Supreme Court determined that the prohibition against self-incrimination requires that, prior to a custodial interrogation, a defendant must be advised

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479, 16 L. Ed. 2d at 726. The *Miranda* rule "was conceived to protect an individual's Fifth Amendment right against self-incrimination in the inherently compelling context of custodial interrogation by police officers." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001); *see also Miranda*, 384 U.S. at 467, 16 L. Ed. 2d at 706.

In addition to the warnings required by the *Miranda* decision, our General Assembly has mandated other protections for juveniles, as set out in N.C.G.S. § 7B-2101(a). Under this statute, prior to questioning, an in-custody juvenile must be advised that:

> (1) he has the right to remain silent; (2) any statement he makes can be and may be used against him; (3) that he has a right to have a parent, guardian, or custodian present during questioning; [and] (4) that he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation.

In re W.R., 179 N.C. App. 642, 645, 634 S.E.2d 923, 926 (2006) (citing N.C. Gen. Stat. § 7B-2101(a) (2005)). However, the rights protected by *Miranda* and N.C.G.S. § 7B-2101(a) apply only to custodial interrogations. *See State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404-05, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997) (noting that "the rule of *Miranda* applies only where a defendant is subjected to custodial interrogation," and that, "similarly, N.C.G.S. § 7A-595(d) [now N.C.G.S. § 7B-2101(a)] pertains only to statements obtained from a juvenile defendant as the result of custodial interrogation").

"[C]ustodial interrogation . . . mean[s] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant

way." *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706 (1966); *Buchanan*, 353 N.C. at 337, 543 S.E.2d at 826. "[I]n determining whether a suspect is in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827. This involves " 'an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way.' " *State v. Sanders*, 122 N.C. App. 691, 693, 471 S.E.2d 641, 642 (1996) (quoting *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992)). No single factor controls the determination of whether an individual is "in custody" for purposes of *Miranda*. *State v. Garcia*, 358 N.C. 382, 397, 597 S.E.2d 724, 737 (2004) (citing *State v. Barden*, 356 N.C. 316, 338, 572 S.E.2d 108, 124 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Circumstances supporting an objective showing that one is "in custody" might include a police officer standing guard at the door, locked doors, or application of handcuffs. *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. The subjective belief of the defendant as to his freedom to leave is not in and of itself determinative. *State v. Hall*, 131 N.C. App. 427, 432, 508 S.E.2d 8, 12 (1998), *aff'd*, 350 N.C. 303, 513 S.E.2d 561 (1999). Furthermore, our Supreme Court has held that an objective "free to leave test" is broader than, and not synonymous with, the appropriate test for determining the custody issue. *See Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828.

Here, the trial court found that J.D.B. was escorted from class and into the conference room by a uniformed school resource officer. Present in the room were Investigator DiCostanzo, two school officials, and the school resource officer. The door was closed but not locked. J.D.B. was not searched or handcuffed. J.D.B. only began speaking with Investigator DiCostanzo after agreeing to answer questions. Furthermore, J.D.B.'s responses and questions indicated that he understood he did not have to answer questions, that he was not under arrest, and that "the matter was still going to court." After writing his own statement regarding his involvement in the crime, J.D.B. left the conference room and school property when the bell rang, the interview having lasted approximately 30 to 45 minutes. Later, when officers met with J.D.B. at his home, J.D.B. freely offered to let the officers look around the house and even brought a piece of stolen jewelry out to Officer Hunter after Investigator DiCostanzo had gone to get a search warrant. When Investigator DiCostanzo returned with

the warrant, J.D.B. voluntarily led the officers through the house and to the locations of other stolen items. These findings are uncontested. Although J.D.B. argues on appeal that Investigator DiCostanzo threatened him with a secure custody order, we note that the trial court did not make any finding of fact that J.D.B. was threatened. The trial court's Finding of Fact 12, which provides that, "*upon [J.D.B.]'s inquiry*, . . . the investigator *responded* that . . . he may have to seek a secure custody order," (emphasis added), is supported by competent evidence and thus binding upon this Court on appeal. *See Barber*, 335 N.C. at 129, 436 S.E.2d at 111.

As discussed above, the appropriate standard for determining whether an individual is "in custody" is whether a reasonable person in the individual's position would have believed himself to be in custody or deprived of his freedom of action in some significant way. *Sanders*, 122 N.C. App. at 693, 471 S.E.2d at 642. This test is "objective . . . based upon the reasonable person standard, and is 'to be applied on a case-by-case basis considering all the facts and circumstances.' " *Hall*, 131 N.C. App. at 432, 508 S.E.2d at 12 (quoting *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993)). "The objective test furthers 'the clarity of [*Miranda's*] rule,' ensuring that the police do not need to 'gues[s] as to [the circumstances] at issue before deciding how they may interrogate the suspect.' " *Yarborough v. Alvarado*, 541 U.S. 652, 667, 158 L. Ed. 2d 938, 945 (2004) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 430-31, 82 L. Ed. 2d 317, 329 (1984)). Thus, J.D.B.'s subjective belief that he was not free to leave is not, in and of itself, determinative of whether he was "in custody." *See Hall*, 131 N.C. App. at 432, 508 S.E.2d at 12. Instead, we must examine all of the circumstances surrounding J.D.B.'s interactions with officers and apply the objective test discussed above. *See Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827.

An individual's mental capacity and age, standing alone, are not determinative of whether he is "in custody" for purposes of *Miranda* and N.C.G.S. § 7B-2101(a). In fact, "consideration of a suspect's individual characteristics—including age—could be viewed as creating a subjective inquiry." *Yarborough*, 541 U.S. at 668, 158 L. Ed. 2d at 945 (citing *Oregon v. Mathiason*, 429 U.S. 492, 495-96, 50 L. Ed. 2d 714, 719 (1977) (noting that facts arguably relevant to whether an environment is coercive may have "nothing to do with whether respondent was in custody for purposes of the *Miranda* rule")). Instead, an individual's subnormal mental capacity and age are factors to be considered when determining whether a knowing and intelligent *waiver*

of rights has been made. *See State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (citing *State v. Jenkins*, 300 N.C. 578, 268 S.E.2d 458 (1980) (holding that though defendant was mildly mentally retarded, he knowingly and intelligently waived his right to counsel before making a custodial statement); *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1976) (holding that, 19-year-old defendant with an I.Q. of 55 was capable of waiving his rights)). The rights protected by *Miranda* and N.C.G.S. § 7B-2101(a) only apply to custodial interrogations. *See Gaines*, 345 N.C. at 661, 483 S.E.2d at 404-05 (citing *State v. Phipps*, 331 N.C. 427, 442, 418 S.E.2d 178, 185 (1992)). As such, the question of whether those rights have been waived is irrelevant unless the individual was in custody.

Here, the trial court utilized the appropriate standard for determining whether J.D.B. was in custody during his 29 September 2005 interactions with officers. Upon our review of the trial court's uncontested findings of fact, we conclude that a reasonable person in J.D.B.'s position would not have believed himself to be in custody or deprived of his freedom of action in some significant way. Because J.D.B. was not in custody during his interactions with officers in the case at bar, we need not decide any issue regarding waiver of J.D.B.'s rights under *Miranda* or N.C.G.S. § 7B-2101(a). Accordingly, we conclude that the trial court correctly denied J.D.B.'s motion to suppress.

Affirmed.

Judge BRYANT concurs with separate opinion.

Judge BEASLEY dissents with separate opinion.

BRYANT, Judge, concurring in a separate opinion.

I write separately to reiterate that the test for determining whether a juvenile is in custody thereby warranting a *Miranda* warning is an objective test to be applied on a case-by-case basis based on the totality of the circumstances. *State v. Buchanan*, 353 N.C. 332, 339-40, 543 S.E.2d 823, 828 (2001). I also write to distinguish the instant case from *In re W.R.*, 179 N.C. App. 642, 634 S.E.2d 923 (2006), where this Court vacated a juvenile adjudication when the juvenile's incriminating statement was obtained during questioning without being given the proper *Miranda* warnings.

In *W.R.*, we considered whether the questioning of the juvenile was non-custodial and, as such, did not require a *Miranda* warning. *Id.* at 644, 634 S.E.2d at 925. The juvenile, a fourteen-year-old, middle school student, was taken from his classroom to the Assistant Principal's office where he was repeatedly questioned for thirty minutes by the Principal, Assistant Principal, and the School Resource Officer (SRO) (who was also an officer with the Greensboro Police Department) regarding whether he possessed a knife at school on the previous day. *Id.* at 623, 634 S.E.2d at 924-25. No indication was given that the juvenile was free to leave. In fact "the juvenile was kept in the office under the supervision of [the SRO] while both the Principal and Assistant Principal stepped out to interview other students." *Id.* at 646, 634 S.E.2d at 927. Additionally, after approximately fifteen minutes into the questioning, and after repeated denials by the juvenile, the juvenile was subjected to a search of his person by the SRO. Further, the juvenile was detained by the SRO for an additional one and one-half hours until his mother picked him up. *Id.* Based on the totality of the circumstances, this Court held that "a reasonable person standing in the place of the juvenile would have believed that he was restrained in his movement to the degree associated with a formal arrest." *Id.*

Unlike *W.R.*, the totality of the circumstances in the present case would not lead a reasonable person in J.D.B.'s position to believe he was "in custody or that he had been deprived of his freedom of action in a significant way." *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827. Although the juveniles in both cases were middle-school students and were questioned by several adults, including police officers, the circumstances in the present case do not include the same indicia of restraint as *W.R.* Unlike *W.R.*, the record indicates J.D.B. was informed and indicated he understood that he did not have to answer any questions and was free to leave at any time. Further, J.D.B. was not detained for over an hour, but was released after half an hour. However, most notably, J.D.B.'s person was not searched during the questioning. Based on the totality of the circumstances in the instant case, a reasonable person would not have believed he was restrained in his movement. Therefore, I concur in the majority opinion affirming the trial court's denial of J.D.B.'s motion to surpress.

BEASLEY, Judge, dissenting.

The issue is whether the court's findings of fact support its conclusion of law that the juvenile (J.D.B.) was not in custody when he

was questioned by Detective DiCostanzo. Because I believe that the court's findings of fact clearly show that J.D.B. was in custody, I respectfully dissent.

"[T]he initial inquiry in determining whether *Miranda* warnings were required is whether an individual was 'in custody.' " *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001). "In *Miranda*, the Supreme Court defined 'custodial interrogation' as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' . . . The Supreme Court of North Carolina [has recognized that] 'in determining whether a suspect [is] in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest.' " *Buchanan*, 353 N.C. at 337, 338, 543 S.E.2d at 826, 828 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966); and *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997)).

"[U]nder *Miranda*, whether an individual is in custody is a mixed question of law and fact. Accordingly, . . . we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions 'reflect[] a correct application of [law] to the facts found.' In doing so, this Court must look first to the circumstances surrounding the interrogation and second to the effect those circumstances would have on a reasonable person." *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004) (quoting *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) and citing *Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394 (1995) (internal quotation omitted).

Review of the trial court's findings of fact makes it clear that J.D.B. was in custody at the time of his initial inculpatory statements. Findings 1 through 5 state, as relevant to the issue of custody, the following:

1. [In September 2005, homes] were broken into and various items were stolen, including jewelry [and] a digital camera.

2. The juvenile, at the time 13 years old, was interviewed by police on the same day as the break-ins after he was seen behind a residence in the same neighborhood.

3. . . . [P]olice were informed that the juvenile had been seen in possession of [the stolen] digital camera at school[.]

4. Investigator Joseph DiCostanzo of the Chapel Hill Police Department . . . went to the juvenile's school to speak with him.

5. The juvenile is in the seventh grade and enrolled in special education classes.

These findings establish that J.D.B. was a thirteen year old seventh grader in the special education program at his school. The majority opinion correctly notes that an objective standard governs the issue of custody, and that J.D.B.'s "mental capacity and age, standing alone, are not determinative of whether he was 'in custody' for purposes of *Miranda* and N.C. Gen. Stat. § 7B-2101(a)." However, the fact that J.D.B. was a middle school aged child is certainly among the circumstances relevant to "whether a reasonable person in [J.D.B.'s] position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828. To hold otherwise would lead to the absurd result that, when required to determine whether a "reasonable person in the defendant's situation" would consider himself in custody, courts would apply exactly the same analysis, regardless of whether the individual was eight or thirty-eight years old. *Id.*

Findings of fact 6 and 8 state:

6. The juvenile was escorted from his class and into a conference room to be interviewed. Present in the room were Investigator DiCostanzo, Assistant Principal David Lyons, a school resource officer and an intern. The door was closed, but not locked.

. . . .

8. Investigator DiCostanzo asked the juvenile if he would agree to answer questions about recent break-ins. The juvenile consented.

I would hold that J.D.B. was in custody after: (1) he was escorted by a uniformed school resource officer, rather than being allowed to report to the office on his own; (2) he was taken to an office and the door was shut; (3) four adults were in the room with J.D.B., including Police Officer DiCostanzo, the school resource officer, an assistant principal, Mr. Lyons, and an administrative intern; and (4) Officer DiCostanzo asked J.D.B. to answer questions about recent crimes.

The majority opinion notes that J.D.B. was not subjected to the more severe indicia of physical control, such as the application of handcuffs, a locked door, or an armed officer standing guard. However, the offense was nonviolent, and J.D.B. was outnumbered by two police officers, a school administrator, and another adult. J.D.B. presented no threat to the officers' safety. They had no reason to hold J.D.B. at gunpoint, handcuff him, or lock the door, precisely because J.D.B. was a thirteen year old in a closed room with four adults. I conclude that the mere absence of these circumstances contributes little to our analysis.

Furthermore, even assuming, *arguendo*, that J.D.B. was not yet in custody, the next findings of fact remove any doubt about his situation:

> 9. The juvenile stated that he had been in the neighborhood looking for work mowing lawns and initially denied any criminal activity.
>
> 10. Mr. Lyons then encouraged the juvenile to "do the right thing" and tell the truth.
>
> 11. The investigator questioned him further and confronted him with the fact that the camera had been found.
>
> 12. Upon the juvenile's inquiry as to whether he would still be in trouble if he gave the items back, the investigator responded that it would be helpful, but that the matter was still going to court and that he may have to seek a secure custody order.

Thus, after J.D.B. answered the officer's questions, he was not released to return to class and the law enforcement officers and assistant principal made it clear that they would not accept his answers.

An argument can be made that Mr. Lyons acted as an agent of the police when he participated in their interrogation of J.D.B. by urging J.D.B. to "do the right thing" and "tell the truth." *See State v. Morrell*, 108 N.C. App. 465, 470, 424 S.E.2d 147, 151 (1993) ("when an accused's statements stem from custodial interrogation by one who in effect is acting as an agent of law enforcement, such statements are inadmissible unless the accused received a Miranda warning prior to questioning").

The following excerpt from the hearing transcript amplifies the factual background of finding of fact 12. Officer DiCostanzo testified that when J.D.B. denied involvement in the break-ins, he confronted him with the fact that witnesses had seen J.D.B. in possession of a

camera that was identified by serial number as the one taken in a recent break-in. He testified further:

> DISTRICT ATTORNEY: Did [J.D.B.] make any response to this—you having found the camera?
>
> OFFICER DICOSTANZO: He really remained quiet . . . like he wasn't sure what he wanted to say. And that's when [the assistant principal] you know, was encouraging him, said that he had had long conversations with [J.D.B.], said he really wanted [J.D.B.] to do the right thing because the truth always comes out in the end. [J.D.B.] asked at this point if he got the stuff back was he still gonna be in trouble? And I told [J.D.B.] that it would help to get the items back but that, quote, this thing is going to court. I specifically said, what's done is done, [J.D.B.], now you need to help yourself by making it right. I told [J.D.B.] that with the information that I had been given, that if I felt that he was going to go out and break into other people's houses again because he really didn't care, then I would have to look at getting a secure custody order. And he asked what that was. And I explained to him that it's where you get sent to juvenile detention before court. And at that time I said, [J.D.B.], you don't have to speak to me; you don't have to talk to me; if you want to get up and leave, you can do so, but that I hoped he would listen to what I had to say. And I said to him, do you understand you're not under arrest and you don't have to talk to me about this. He nodded his head yes, and that's when he just started rambling really quickly about [details of the break-ins.] . . .
>
> (emphasis added).

This testimony reveals that after J.D.B. made an incriminating statement (asked whether he would still be in trouble if he returned the stolen items), Officer DiCostanzo informed J.D.B. that he now had enough information that the matter was definitely "going to court." The officer then issued what is best construed as a threat, saying that J.D.B. should "help himself" and that if the officer "felt" that J.D.B. would break into more homes, then he would try to get a secure custody order. By inquiring about the secure custody order, J.D.B. was attempting to understand the consequences of his failure to cooperate with Officer DiCostanzo. The unmistakable implication is that, to prevent Officer DiCostanzo from having the "feeling" that J.D.B. might engage in future break-ins, J.D.B. would have to "help himself" by providing the police with more information.

Officer DiCostanzo's testimony supports the findings of fact, and also establishes that Officer DiCostanzo told J.D.B. he was not required to stay and talk and was not "under arrest" only after (1) J.D.B. was coerced to "do the right thing and to "help himself"; (2) J.D.B. had made incriminating statements; (3) Officer DiCostanzo told J.D.B. that the case was definitely going to court; and (4) Officer DiCostanzo suggested that unless J.D.B. demonstrated that he was not likely to commit future break-ins, the officer might "feel like" J.D.B. needed to be locked up.

The North Carolina legislature has granted additional protection to juveniles, beyond that required by the holding of *Miranda.* Under N.C. Gen. Stat. § 7B-2101 (2007), a juvenile who is in custody "must be advised prior to questioning" of his "right to have a parent, guardian, or custodian present" during questioning. Moreover, if "the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney." N.C. Gen. § 7B-2101(a)(3), and (b) (2007). "In my view, the enactment of a lengthy and detailed juvenile code shows great concern on the part of the legislature not only for dealing effectively with juvenile crime, . . . but also for safeguarding the individual rights of juveniles. Juveniles are not, after all, miniature adults. Our criminal justice system recognizes that their immaturity and vulnerability sometimes warrant protections well beyond those afforded adults." *In re Stallings*, 318 N.C. 565, 576, 350 S.E.2d 327, 333 (1986) (Martin, J., dissenting).

The United States Supreme Court has held that, to be legally effective, the required warnings must be given before the suspect is questioned and a confession obtained. *Missouri v. Seibert*, 542 U.S. 600, 604, 159 L. Ed. 2d 643, 651 (2004) ("midstream recitation of warnings after interrogation and unwarned confession" does "not effectively comply with *Miranda's* constitutional requirement"). Similarly, Officer DiCostanzo's perfunctory recitation that J.D.B. did not have to talk came only after the boy had "let the cat out of the bag." Thereafter:

> 13. The juvenile then confessed to entering the houses and taking certain items together with another juvenile.
>
> 14 The investigator informed the juvenile that he did not have to speak with him and that he was free to leave. He asked him if

[he] understood that he was not under arrest and did not have to talk with the investigator.

15. The juvenile indicated by nodding "yes" that he understood that he did not have to talk to the officer and that he was free to leave. He continued to provide more details regarding where certain items could be located.

16. The juvenile wrote a statement regarding his involvement in the crime.

17. The bell rang signaling the end of the day and the juvenile was allowed to leave to catch his bus home.

18. The interview lasted from 30 to 45 minutes.

To summarize, the findings of fact stated that J.D.B. was sitting in a seventh grade special education classroom, when a uniformed school resource officer arrived and led him away from class. He was taken to a room where he was met by the assistant principal, an intern, and a city law enforcement officer. The door was shut and J.D.B. was asked if he would answer questions about recent break-ins. When he denied wrongdoing, the assistant principal joined in, urging J.D.B. to "tell the truth" and Officer DiCostanzo revealed that he had evidence of J.D.B.'s possession of a stolen camera. J.D.B. then asked if he could get out of trouble by returning the stolen items. Officer DiCostanzo responded to this incriminating question by telling J.D.B. that the case would definitely go to court, warning J.D.B. that if the officer "felt" that J.D.B. would commit more break-ins he might seek an order for secure custody, and urging the juvenile to "help himself." Only after this did Officer DiCostanzo tell J.D.B. that he did not have to answer questions and was not under arrest.

Application of common sense and the correct legal standard to the court's findings of fact leads to an inescapable conclusion that J.D.B. was in custody when he made inculpatory statements. Moreover, the physical evidence obtained as a result of this unconstitutional interrogation was "fruit of the poisonous tree," *see Wong Sun v. United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455 (1963), and should also be suppressed. Accordingly, I respectfully dissent.

BARBARA GLOVER MANGUM, TERRY OVERTON, DEBORAH OVERTON, AND VAN EURE, PETITIONERS-APPELLEES v. RALEIGH BOARD OF ADJUSTMENT, PRS PARTNERS, LLC, AND RPS HOLDINGS, LLC, RESPONDENTS-APPELLANTS

No. COA06-1587-2

(Filed 7 April 2009)

1. Zoning— special use permit—distance from adult business—variance not needed

A variance was not needed to obtain a special use permit for an adult business where the ordinance prohibited an adult establishment within a 2,000 foot radius of a speciality school and there was a karate school within that distance if the measurement was to the closest point of each lot. While the city code expressly states that the entire property of the adult establishment is to be included in measuring distances, it does not contain a similar provision for protected places. The proper measure should have been from subject property to the part of the karate school regularly used in furtherance of instruction, in this case a rented space within a building that was outside the 2,000 foot radius.

2. Zoning— board of adjustment—delegation of authority—compliance with conditions

The trial court erred by concluding that a board of adjustment improperly delegated its authority to determine the effect on adjoining landowners of secondary impacts from a special use permit for an adult business. There is a necessary interplay between a board of adjustment and other governmental bodies for both the issuance of special use permits and the assurance of compliance.

3. Zoning— special use permit—board of adjustment findings—competent supporting evidence

The trial court erred by ruling that a board of adjustment did not make the necessary findings to support its issuance of a special use permit for an adult business. There was competent evidence in the record to support the board's findings concerning the secondary impacts on adjoining landowners, and the trial court was without authority to conduct a de novo review.

Appeal by Respondents from order entered 12 September 2006 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Court of Appeals originally on 22 August 2007, and opinion filed

on 20 November 2007. Remanded to the Court of Appeals for consideration of additional issues by order of the North Carolina Supreme Court on 12 December 2008.

Smith Moore LLP, by James L. Gale, David L. York, and Laura M. Loyek, for Petitioners-Appellees.

Poyner & Spruill LLP, by Robin Tatum Currin and Keith H. Johnson, for Respondents-Appellants PRS Partners, LLC and RPS Holdings, LLC.

McGEE, Judge.

PRS Partners, LLC and RPS Holdings, LLC (Respondents) applied to the City of Raleigh Inspections Department on 15 November 2005 for a special use permit to operate a "[Gentlemen's]/Topless Adult Upscale Establishment" at 6713 Mt. Herman Road (the subject property) in Raleigh, North Carolina. The Raleigh Board of Adjustment (the Board of Adjustment) held a hearing on 9 January 2006 regarding issuance of the requested special use permit. At the hearing, both Respondents and those in opposition to the requested permit introduced evidence. At the conclusion of the hearing, the Board of Adjustment made numerous findings of fact and conclusions of law. The Board of Adjustment determined Respondents were entitled to a special use permit and the permit was issued.

Barbara Glover Mangum, Terry Overton, Deborah Overton, and Van Eure (collectively Petitioners) filed a petition for writ of certiorari on 24 March 2006 in Superior Court, Wake County. Petitioners alleged in the petition that they, "as adjacent landowners, testified [at the hearing before the Board of Adjustment] regarding the adverse effects [the subject property] would have on their properties, including concerns regarding inadequate parking, safety and security, stormwater runoff, trash, and noise."

Respondents filed a motion to dismiss the petition for writ of certiorari for lack of subject matter jurisdiction. Specifically, Respondents argued that Petitioners lacked standing to contest the issuance of the special use permit. In an order entered 12 September 2006, the trial court denied Respondents' motion to dismiss and reversed the Board of Adjustment's decision approving Respondents' application for a special use permit. Respondents appealed. Our Court held Petitioners lacked standing and vacated the order of the trial court. *Mangum v. Raleigh Bd. of Adjustment*, 187 N.C. App. 253, 652 S.E.2d 731 (2007) (*Mangum I*). Our Supreme Court held that

Petitioners did have standing to bring this action, and reversed the holding of our Court, remanding for consideration of arguments on appeal not addressed in *Mangum I. Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 669 S.E.2d 279 (2008).

I.

[1] In Respondents' second argument on appeal, they contend the trial court erred in affirming the Board of Adjustment's decision that Respondents needed a variance in order to obtain a special use permit for the subject property. We agree.

The issuance of a special use permit for adult establishments in Raleigh is controlled by the Raleigh City Code (the Code).

> In performing its functions and duties under this chapter, the Board of Adjustment following the submittal of a plan containing the information required in § 10-2132.1(b) and after making the necessary findings is authorized to issue special use permits to allow the enumerated buildings, uses, and designs in the districts specified in subsection (b) below. The districts referred to herein apply to general use and conditional use districts unless the applicable conditional use district ordinance specifically states otherwise.

Raleigh City Code § 10-2144(a) (2008). Subsection (b) enumerates the requirements for issuing a special use permit for adult establishments.

> To permit an adult establishment in industrial districts, Shopping Center, Neighborhood Business, Business Zone, and Thoroughfare Districts after the [Board of Adjustment] finds that the evidence presented at the hearing establishes each of the following:
>
> (1) Off-street parking.
>
> . . . .
>
> (2) Advertisements.
>
> . . . .
>
> (3) Overconcentration.
>
> . . . .
>
> (4) Residential proximity.
>
> No adult establishment is located within a two thousand (2,000) foot radius (determined by a straight line and not street distance)

> of any . . . specialty school. . . . Adult establishments, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when they are located near a residential zoning district or certain other districts which permit residential uses. Special regulation of these establishments is necessary to insure that these adverse effects will not contribute to a downgrading or blighting of surrounding residential districts or certain other districts which permit residential uses, unless otherwise[] determined by subparagraph (5) below.
>
> (5) Variances.
>
> The Board of Adjustment shall vary the radius requirements in subparagraph (3) and (4) above when it finds [certain enumerated provisions].
>
> (6) The proposed use will not adversely impact public services and facilities such as parking, traffic, police, etc., and that the secondary effects of such uses will not adversely impact on adjacent properties. The secondary effects would include but not be limited to noise, light, stormwater runoff, parking, pedestrian circulation and safety.

Raleigh City Code § 10-2144(b) (2008). "Specialty school," as included in section 10-2144(b)(4), is defined as: "A place of regular sessions of teaching for avocational activities including, but not limited to, baton twirling, charm and finishing, gymnastics, language and martial arts. Dance and music studios are not considered specialty schools." Raleigh City Code § 10-2002 (2008).

The Board of Adjustment determined that a karate school was located within 2,000 feet of Respondents' property line, and therefore a variance was required for the issuance of a special use permit for the subject property. Respondents argue the karate school is not located within 2,000 feet of their property line.

When the Superior Court reviews a Board of Adjustment decision:

> If a petitioner contends the Board's decision was based on an error of law, "de novo" review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the "whole record" test.
>
> . . . .

> Upon further appeal to this Court, we must examine "the trial court's order for error of law" just as with any other civil case.
>
> The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the [trial] court did so properly.

Sun Suites Holdings, L.L.C. v. Board of Aldermen of Garner, 139 N.C. App. 269, 272-73, 533 S.E.2d 525, 527-28 (2000) (citations omitted).

Pursuant to Raleigh City Code, section 10-2002, "Definitions": "All words and terms . . . have their commonly accepted and ordinary meaning unless they are specifically defined in this Code or the context in which they are used clearly indicates to the contrary." Further, "[w]hen vagueness or ambiguity is found to exist as to the meaning of any word or term used . . . any appropriate cannon [sic], maxim, principle or other technical rule of interpretations or construction used by the courts of this state may be employed to resolve vagueness and ambiguity in language." Raleigh City Code § 10-2002.

In the case before us, the Board of Adjustment interpreted the 2,000-foot buffer requirement between adult establishments and specialty schools to run between the closest points of the lots upon which each establishment is situated. By this calculation, the Board of Adjustment determined that the distance between Respondents' subject property and the karate school was less than 2,000 feet, and therefore a variance under section 10-2144(b)(5) was required.

Section 10-2144 of the Code expressly addresses the method of calculating distances from adult establishments: "Annotation: Adult establishment. When computing distances the term 'adult establishment' includes the entire property such as parking area used for required off-street parking." The full context of this sentence makes the meaning of "entire property" vague. If "entire property" is meant to be interpreted as the entire lot upon which the adult establishment is situated, then that meaning could have easily been specifically expressed. The language "such as parking area used for required off-street parking" invites a reasonable interpretation that something less than the entire lot—i.e., only those portions of the lot actually used for operation of the adult establishment—is included in the meaning of "entire property." Because "zoning and subdivision regulations are in derogation of private property, such provisions should be liberally

construed in favor of the owner." *River Birch Assoc. v. Raleigh*, 326 N.C. 100, 110, 388 S.E.2d 538, 544 (1990) (citation omitted).

Assuming *arguendo* that the Board of Adjustment was correct in interpreting the term "adult establishment" to include the entire lot upon which the adult establishment sits, we cannot find, on the specific facts of this case, that the "specialty school" (the karate school), should also be interpreted to include the entire lot upon which it sits. Specialty school is defined in part as a "place of regular sessions of teaching for avocational activities. . . ." The plain meaning of this language limits the location of a specialty school to the location where the regular teaching sessions take place. There is nothing in this definition to suggest the bounds of a specialty school extend beyond the areas in which regular teaching occurs.

The public policy underlying the establishment of the 2,000-foot buffer is in no way offended by this interpretation. In this case, the karate school is situated within a rented space in a building. The owner of the karate school rents the space, and owns no part of the building or the lot upon which the karate school sits. There is no evidence in the record that karate instruction takes place anywhere other than in the space rented for that purpose. The physical structure of the karate school itself, and thus its patrons, are more than 2,000 feet away from the subject property. Had the lot upon which the karate school sits been smaller, or a different shape, there would have been no material change concerning the effect of the subject property on the karate school, yet the Board of Adjustment would have determined that no section 10-2144(b)(5) variance was required. Conversely, under the Board of Adjustment's interpretation, assuming the karate school sat upon a very large lot, the subject property could be, for example, two or more miles distant, and the Board of Adjustment would have required a variance. We do not believe such arbitrary results were intended by the enactment of the relevant portions of the Code.

Finally, according to the Code, where ambiguity exists, we are to look to the accepted rules of interpretation and construction. *See also Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 303, 554 S.E.2d 634, 638 (2001) (Rules of statutory interpretation apply when construing municipal zoning ordinances.). " 'Intent is determined . . . by examining (i) language, (ii) spirit, and (iii) goal of the ordinance. Since zoning ordinances are in derogation of common-law property rights, limitations and restrictions not clearly within the scope of the language employed in such ordinances

should be excluded from the operation thereof.' " *Id.* at 304, 554 S.E.2d at 638 (citation omitted). One of the long-standing rules of interpretation and construction in this state is *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another. *Baker v. Martin*, 330 N.C. 331, 337, 410 S.E.2d 887, 890-91 (1991); *Board of Drainage Comm'rs v. Credle*, 182 N.C. 442, 445, 109 S.E. 88, 90 (1921). In clarifying how distances from adult establishments are to be calculated, section 10-2144 of the Code expressly states that the "entire property" of the adult establishment is to be included, but this section contains no similar provision for protected places contained in section 10-2144(b)(4), such as the karate school. Had the City's intent been to include the "entire property" upon which any specialty school or other protected establishment sits for the purposes of section 10-2144(b)(4), it should have been included in section 10-2144. Because section 10-2144 expressly expands the definition of adult establishment beyond the physical structure itself, but remains silent concerning specialty schools and other protected establishments, we must construe the ordinance as limiting this more expansive definition of "property" to adult establishments.

We hold that the Board of Adjustment erred in its calculation of the distance between the subject property and the karate school and, on the facts before us, the proper measure for the 2,000-foot buffer required in section 10-2144(b)(4) is from the "entire property" of the subject property to that part of the karate school—meaning those areas of the building regularly used by the karate school in furtherance of its instruction—closest to the subject property. Because evidence shows the building in which the karate school is located is more than 2,000 feet from the "entire property" of the subject property, even assuming *arguendo* that includes the entire lot upon which the facilities of the subject property would sit, we hold that to obtain a special use permit, Respondents did not require any variance under section 10-2144(b)(5). This holding is limited to the facts of this case, and should not be interpreted to apply to facts not before us. For example, a different analysis might be necessary for a fact situation where a specialty school conducts "regular sessions of teaching" outside its building, on a portion of the lot upon which it sits, that falls within 2,000 feet of an adult establishment.

II.

[2] In their fourth argument, Respondents contend that the trial court erred in determining the Board of Adjustment improperly delegated its authority. We agree.

The trial court concluded that the Board of Adjustment violated the mandate of section 10-2144(b)(6) in that it improperly delegated its quasi-judicial authority to make ultimate determinations concerning whether secondary impacts deriving from the issuance of a special use permit to Respondents would adversely affect adjacent property owners. *See County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 508-09, 434 S.E.2d 604, 613 (1993). The trial court concluded that by "conditioning its grant of the Special Use Permit upon the subsequent determination by administrative personnel that [Respondents'] plans comply with minimum Code requirements," the Board of Adjustment improperly abdicated its quasi-judicial obligations.

> A special use permit "is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist."
>
> "When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record."

Harts Book Stores, Inc. v. Raleigh, 53 N.C. App. 753, 757, 281 S.E.2d 761, 763-64 (1981) (finding the petitioner presented substantial evidence that special use permit should issue for its adult book store where zoning inspector testified: " 'This particular location meets all the criteria as set out in the Code.' " *Id.* at 757-58, 281 S.E.2d at 764 (citation omitted)).

The order of the trial court does not indicate any specific ways in which the Board of Adjustment abdicated its responsibilities. Petitioners argue that the Board of Adjustment abdicated its duty in making the following three findings of fact: (1) Respondents "submitted a proposed plot plan that either has or will conform to the parking requirements established in the Raleigh City Code for the proposed use." (2) Respondents "will be required to comply with all applicable provisions of the Code in order to obtain the special use permit." (3) That the "development will meet all stormwater runoff, landscape and parking requirements of the Raleigh City Code before a special use permit can be issued." These findings of fact, by their express language, relate conditions precedent before the Board of Adjustment would issue the special use permit. These findings of fact

do not constitute the issuance of a special use permit, and therefore cannot support Petitioners' argument that the Board of Adjustment delegated its responsibilities in issuing the special use permit.

The relevant conclusions of law of the Board of Adjustment, based in part upon the challenged findings of fact, include a conclusion that a special use permit *should* be issued to Respondents. The actual special use permit issued to Respondents includes the following relevant provisions: (1) "The parking, landscaping and lighting plan will comply with [Respondents'] Exhibits 11, 12 and 13 which are incorporated herein by reference." (2) "Customers of [the subject property] must park on-site. [Respondents] shall be responsible for preventing customers from parking on Mt. Herman Road or on property . . . not owned or leased by [Respondents]." (3) This "approval is contingent upon . . . the approval of a . . . plot plan[.]" (4) "All decisions of the [Board of Adjustment] are subject to further review under Code Section 10-2141(d) regardless of whether the Board puts any restrictions on the request. Your special use permit is subject to review . . . for violations . . . of either any provision of Chapter 10 of the Raleigh City Code or an imposed limiting condition[.]"

Respondents testified that they "would have to meet with water quality regulations, water quantity regulations, nitrogen controls, and it was determined at this time the preference was to use underground storage that would be located under the parking facility and a variety of other measures around the periphery."

The special use permit is by its terms contingent upon approval of the required plans and limiting conditions to assure conformity with the Board of Adjustment's conditions, such as those related to stormwater runoff, and the requirements of the Code. The Board retains authority to review its decision and modify or rescind the special use permit if it determines that Respondents are not in compliance.

Further, section 10-2144(a) of the Code states: "the [Board of Adjustment] following the submittal of a plan containing the information required in § 10-2132.1(b) and after making the necessary findings is authorized to issue special use permits[.]" Section 10-2132.1(b) outlines the data to be included in plot plans. There is no mention in this section of the Code concerning stormwater runoff. Therefore, Respondents' plot plan was not required to show the method by which they would handle stormwater runoff prior to the issuance of the special use permit. In fact, there is nothing in section 10-2144 that

mandates Respondents prove their plan will comply with Code requirements for stormwater runoff prior to the issuance of a special use permit by the Board of Adjustment. The only provision in section 10-2144 relating specifically to stormwater runoff is 10-2144(b)(6), which requires the Board of Adjustment to find evidence that issuance of the special use permit will not adversely impact adjacent properties by secondary effects such as stormwater runoff. Respondents will have to pass all inspections and comply with all relevant provisions of the Code before they will be allowed to open for business. Assuring compliance with building codes, however, is not the responsibility of the Board of Adjustment. The Board of Adjustment found as fact that Respondents' development plan must show compliance with Code requirements for stormwater runoff before the special use permit would issue. We conclude this finding evinces the Board of Adjustment's discretionary judgment that compliance with Code stormwater runoff requirements would be sufficient to avoid adverse impact to the adjoining properties.

We do not find this kind of provisional grant to be an improper delegation of the authority of the Board of Adjustment. There will be no definitive way to determine whether Respondents have complied with all the requirements of the special use permit until all work has been completed. Until that time, the Board of Adjustment retains the authority to review, amend, or withdraw the special use permit to assure that the mandates of the Code and the Board of Adjustment's own limiting conditions are being met. Further, section 10-2081, involving off-street parking; section 10-2132.1(b), involving plot plans; and section 10-9023, involving stormwater runoff, all require the involvement of the Department of Inspections for approvals, issuance of permits, and assurance of compliance. There is a necessary interplay between the Board of Adjustment and other governmental bodies for both the issuance of special use permits and assurance of compliance.

III.

[3] In their fifth argument, Respondents contend that the trial court erred in ruling that the Board of Adjustment did not make the necessary findings of fact to support its issuance of the special use permit. We agree.

> [The Board of Adjustment's] findings of fact are binding if supported by substantial competent evidence presented at the hearing. The reviewing court may not substitute its own judgment for

> that of the body when the record contains competent and substantial evidence supporting the findings indicated by the quasi-judicial body, even though conflicting evidence in the record would have allowed the court to reach a contrary finding if proceeding *de novo*.

Tate Terrace Realty Investors v. Currituck County, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849 (1997) (citations omitted). The task of this Court is to determine if the trial court properly applied the correct standard of review. *Sun Suites*, 139 N.C. App. at 273, 533 S.E.2d at 528. "Compliance with the requirements of the [Code] ensures that each application for approval of a [special use permit] will be considered on its own merits, and not granted or denied based on improper or irrelevant factors." *Guilford Fin. Servs. v. City of Brevard*, 356 N.C. 655, 576 S.E.2d 325 (2003), *adopting Judge Tyson's dissent in Guilford Fin. Servs., LLC v. City of Brevard*, 150 N.C. App. 1, 10, 563 S.E.2d 27, 33 (2002).

In its order, the trial court specifically ruled that the Board of Adjustment did not make the required findings concerning section 10-2144(b)(6), which requires:

> The proposed use will not adversely impact public services and facilities such as parking, traffic, police, etc., and that the secondary effects of such uses will not adversely impact on adjacent properties. The secondary effects would include but not be limited to noise, light, stormwater runoff, parking, pedestrian circulation and safety.

The trial court limited its ruling to the "secondary effects" on adjacent properties, and supported its determination by including as findings of fact evidence presented by Petitioners: specifically, testimony from Petitioners regarding the negative impact inadequate parking might have on their properties and businesses, including testimony that a single vehicle parked along the side of Mt. Herman Road could render the road impassable; testimony that their properties would be subject to water runoff from the subject property; testimony that patrons and employees will travel in close proximity to the subject property; and testimony that the subject property would have adverse secondary effects on their businesses.

In its findings of fact, the Board of Adjustment specifically addressed the requirements of section 10-2144(b)(6) of the Code. The Board of Adjustment found the following: (1) that the subject property would be located on a dead-end road, where the adjacent uses

"include a heavy equipment rental company, a commercial steel company, a lumber company, an electrical transformer plant and a parking and storage facility[;]" (2) that the portion of Mt. Herman Road upon which the subject property would be located is "a destination location, with all access being by vehicular, not pedestrian traffic[;]" (3) that the "development plan will meet all stormwater runoff, landscape and parking requirements of the Raleigh City Code before a special use permit can be issued[;]" (4) that the "hours of operation of the [subject property] would be restricted to evening hours during the week. Most of the visits to [the subject property] will be made during periods that are later than normal peak traffic usages for office, retail and manufacturing uses[;]" (5) that the subject property would comply with Raleigh noise ordinances; (6) that a licensed appraiser studied the impact of other, larger adult establishments in Raleigh, all of which have more residents living within a one-mile radius than the subject property, and "did not find any depreciation in land values" of surrounding properties; and (7) that Respondents would be "required to prohibit [] patrons from parking on [Mt. Herman Road] or on adjacent properties."

We find competent evidence in the record to support these findings of fact, and thus they were binding on the trial court. The trial court was without authority to conduct a *de novo* review of the evidence and base its rulings on the testimony of Petitioners when it is the sole province of the Board of Adjustment to weigh the competent evidence and make determinations of credibility. *See Guilford Fin. Servs.*, 356 N.C. 655, 576 S.E.2d 325, *adopting Judge Tyson's dissent*, 150 N.C. App. at 11, 563 S.E.2d at 34 ("In reviewing the sufficiency and competency of the evidence, this Court determines 'not whether the evidence before the superior court supported that court's order[,] but whether the evidence before the [municipal body] supported [its] action.' "). We hold the Board of Adjustment's findings of fact sufficiently support its conclusion that the subject property would not run afoul of section 10-2144(b)(6) of the Code.

We hold that the trial court erred in reversing the decision of the Board of Adjustment to grant Respondents a special use permit for their subject property. We reverse and remand to the trial court for action consistent with this opinion.

Reversed and remanded.

Judges WYNN and STEPHENS concur.

ANITA BIGGERSTAFF, EMPLOYEE, PLAINTIFF v. PETSMART, INC., EMPLOYER, ST. PAUL TRAVELERS, CARRIER, DEFENDANTS

No. COA08-937

(Filed 7 April 2009)

1. Workers' Compensation— carpal tunnel syndrome—pet groomer—findings supported by evidence

Findings in a workers' compensation case about plaintiff's work as a pet groomer and her carpal tunnel syndrome were supported by competent evidence, which supported the conclusion that plaintiff suffered a compensable occupational disease.

2. Workers' Compensation— temporary total disability—wage earning period—remanded for further findings

A workers' compensation award of temporary total disability was remanded for further findings where it could not be determined from the record whether plaintiff earned wages during a relevant period.

Appeal by defendants from Opinion and Award entered 22 May 2008 by the Full Commission in the North Carolina Industrial Commission. Heard in the Court of Appeals 10 December 2008.

Scudder & Hedrick, PLLC, by John A. Hedrick, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by J. Michael Ricci and Ashley Baker White, for defendant-appellants.

BRYANT, Judge.

Defendants Petsmart, Inc. and St. Paul Travelers appeal from an Opinion and Award entered 22 May 2008 in the North Carolina Industrial Commission which denied plaintiff Anita Biggerstaff's claim of injury to her back but awarded total disability compensation at a weekly rate of $730.00 for Biggerstaff's claim of bilateral carpal tunnel syndrome arising out of the course of her employment. For the reasons stated herein, we affirm in part and reverse and remand in part the Opinion and Award of the Commission.

On 14 July 2006, Petsmart filed a Form 19, employer's report of employee's injury or occupational disease to the Industrial Commission, in which it stated that on 6 July 2006 Biggerstaff reported a

lower back or lumbar area injury. The injury was alleged to have occurred on 20 June 2006. Also, on 14 July 2006, Petsmart filed a Form 61, denial of worker's compensation claim. On 19 July 2006, Biggerstaff filed a Form 18, notice of accident to employer and claim, in which Biggerstaff described that on 20 June 2006 "while lifting a large dog onto [a] grooming table, [she] experienced back pain." She also filed a Form 33, request that her claim be assigned for hearing, stating that the injury affected her back and hands. On 21 August 2006, Petsmart filed a Form 33R, response to request that Biggerstaff's claim be assigned for hearing, and, on 6 October 2006, filed a Form 61, denial of worker's compensation claim.

At an initial pre-trial conference, the parties identified the issues for decision by the Commission: (a) whether Biggerstaff sustained a low back injury as a result of an accident or specific traumatic incident arising out of and in the course of her employment on 20 June 2006; (b) whether Biggerstaff contracted the occupational disease carpal tunnel syndrome as a result of her employment; and (c) what compensation was Biggerstaff entitled to receive as a result of her lower back injury and alleged carpal tunnel syndrome.

A hearing was held before Deputy Commissioner Philip A. Holmes on 17 April 2007. Deputy Commissioner Holmes concluded as follows:

1. [Biggerstaff] did not sustain a compensable injury by accident or specific traumatic incident arising out of and in the course of her employment with Petsmart on or about 20 June 2006.

2. The expert testimony was insufficient to establish the causal connection between [Biggerstaff's] alleged work injury on June 20, 2006 and her current condition.

Deputy Commissioner Holmes denied Biggerstaff's claim for workers' compensation benefits. Biggerstaff filed notice of appeal to the Full Commission.

On 19 March 2008, the Full Commission reviewed the prior Opinion and Award of the deputy commissioner, reviewed the briefs of the parties, and heard oral arguments. Therefore, the Commission made the following findings of fact regarding Biggerstaff's occupational disease claim—carpal tunnel:

39. Defendants retained Allan Gorrod, an ergonomist, to evaluate and prepare an ergonomic report in regard to plaintiff's Salon

Manager position with [Petsmart]. Although Mr. Gorrod was unable to quantify what amount of vibration is necessary to increase exposure to conditions consistent with cumulative trauma, as [Biggerstaff] has alleged, he expressed in his report that the duties of a Salon Manager did not place persons employed in the positions at "increased exposure to conditions consistent with cumulative trauma." However, the Full Commission finds that Mr. Gorrod mistakenly believed that approximately forty percent (40%) of [Biggerstaff's] duties were clerical in nature, when the greater weight of the evidence shows that approximately ninety percent (90%) of plaintiff's duties involved "hands-on" grooming of animals. In his testimony, Mr. Gorrod stated that he knew nothing about [Biggerstaff] or how she performed her work, and acknowledged that if [Biggerstaff's] duties involved more grooming than he had originally understood, the job would place her at greater risk of developing a cumulative trauma disorder, such as bilateral carpel [sic] tunnel syndrome, than was shown in his report. Also, the Full Commission finds that Mr. Gorrod observed [Petsmart's] groomers on, what the record shows, to be a slow day. Therefore, the work observed by Mr. Gorrod did not accurately reflect the typical pace of the work performed by [Biggerstaff].

. . .

41. Dr. Edwards and Dr. Krakauer, [Biggerstaff's] treating physician, are equally experienced and qualified to offer expert opinion evidence regarding the cause of carpal tunnel syndrome and whether an employment places an employee at an increased risk of developing that condition as compared to members of the general public not so employed. In reviewing the testimony of each physician in this matter, the Full Commission gives greater weight to the [o]pinions of Dr. Krakauer as opposed to Dr. Edwards. The Full Commission finds that Dr. Edwards opinions were based in part on Mr. Gorrod's report, which inaccurately represented that [Biggerstaff] performed clerical duties for forty percent (40%) of her day. Finally, Dr. Edwards never examined or evaluated [Biggerstaff].

42. Conversely, Dr. Krakauer was of the opinion that [Biggerstaff's] employment with [Petsmart] caused or significanly aggravated [Biggerstaff's] bilateral carpal tunnel

syndrome. He also expressed the opinion that [Biggerstaff's] employment placed her at an increased risk of developing bilateral carpal tunnel syndrome as compared to members of the general public. The Full Commission finds that Dr. Krakauer, as [Biggerstaff's] treating physician, personally examined an[d] evaluated [Biggerstaff]. Further, Dr. Krakauer testified that he was aware of the duties of a dog groomer, including exposure to vibrating clippers, and the hand, wrist, and arm motions necessary to perform those duties. In addition, Dr. Krakauer was aware that [Biggerstaff's] grooming duties consumed approximately 85 to 90% of her work day, as opposed to 40 to 60%, as assumed by Dr. Edwards and Mr. Gorrod.

43. Based on the greater weight of the evidence of record, the Full Commission finds that [Biggerstaff's] employment with [Petsmart] significantly contributed to her development of bilateral carpal tunnel syndrome. Further, [Biggerstaff's] employment placed her at an increased risk of developing bilateral carpal tunnel syndrome as compared to members of the general public.

. . .

45. The Full Commission finds that all medical treatment, examinations, and evaluations received by plaintiff for her hands, wrists and arms were reasonably necessary to effect a cure, provide relief, or lessen her period of disability.

Based on these findings, the Commission concluded that "[Biggerstaff] has shown through the greater weight of evidence of record that her bilateral carpal tunnel syndrome is due to causes and conditions that were characteristic of and peculiar to her employment with [Petsmart] and is, thus, an occupational disease." The Commission denied Biggerstaff's claim for injury by accident to her back. The Commission then awarded Biggerstaff temporary total disability compensation at the weekly rate of $730.00 from 28 June 2006 and continuing until further order of the Commission. Defendants appeal.

On appeal, defendants question whether the Commission's findings of fact were supported by competent evidence in (I) determining Biggerstaff suffered from a compensable occupational disease and (II) awarding Biggerstaff temporary total disability.

Standard of Review

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

> An appellate court reviewing a workers' compensation claim does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. In reviewing the evidence, we are required, in accordance with the Supreme Court's mandate of liberal construction in favor of awarding benefits, to take the evidence in the light most favorable to plaintiff.

Trivette v. Mid-South Mgmt., Inc., 154 N.C. App. 140, 143-44, 571 S.E.2d 692, 695 (2002) (internal citations and quotations omitted).

I

[1] First, defendants question whether the Commission's findings of fact supporting its conclusion that Biggerstaff suffered from a compensable occupational disease as described under N.C. Gen. Stat. § 97-53(13) were supported by competent evidence.

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

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

In order to show entitlement to compensation for disability resulting from an occupational disease covered by N.C.G.S. § 97-53(13), a plaintiff must show the following:

> (1) that her disablement results from an occupational disease encompassed by G.S. 97-53(13), i.e., an occupational disease due to causes and conditions which are characteristic of and pecu-

> liar to a particular trade, occupation or employment as distinguished from an ordinary disease of life to which the general public is equally exposed outside of the employment; and (2) the extent of the disablement resulting from said occupational disease, i.e., whether she is totally or partially disabled as a result of the disease.

Morrison v. Burlington Indus., 304 N.C. 1, 12, 282 S.E.2d 458, 466-67 (1981) (emphasis omitted). Defendants challenge the Commission's findings of fact numbered 39, 41, 42, 43, and 45.

Defendants first challenge finding of fact number 39 that "Mr. Gorrod mistakenly believed that approximately forty percent (40%) of [Biggerstaff's] duties were clerical in nature, when the greater weight of evidence shows that approximately ninety percent (90%) of [Biggerstaff's] duties involved 'hands-on' grooming of animals."

Natalie Kurtz, a Petsmart Salon Manager who worked with Biggerstaff while she was employed at Petsmart, testified that she groomed seven to eight dogs a day and, on average, grooming took one to two hours per dog. Biggerstaff also testified that during 2005 and 2006, on an average day, she would groom seven to eight dogs, and it would take seven and a half hours or more depending on what she had to do that day. Further, Biggerstaff testified that she spent "[p]robably ninety-five percent" of her average work day grooming animals. Therefore, we hold there was sufficient evidence for the Commission to find that the "evidence shows that approximately ninety percent (90%) of [Biggerstaff's] duties involved 'hands-on' grooming of animals."

Also, under finding of fact number 39, defendants contest the Commission's finding that "Mr. Gorrod . . . acknowledged that if [Biggerstaff's] duties involved more grooming than he had originally understood, the job would place her at greater risk of developing a cumulative trauma disorder, such as bilateral carpel [sic] tunnel syndrome, than was shown in his report."

During his deposition, Gorrod testified that he was familiar with NIOSH studies regarding cumulative trauma disorders. And, those studies state that vibration is an ergo stressor or risk factor for cumulative trauma disorders that is to be considered within a job. Gorrod testified that if Biggerstaff's workday was split eighty percent (80%) grooming and twenty percent (20%) administrative, rather than his initial assessment of sixty percent (60%) grooming and forty percent (40%) salon management, her risk factor/ergo stressor on a scale of

zero to ten (0-10) would increase from two, low risk, and "more likely be a five, moderate." Therefore, we hold there was sufficient evidence for the Commission to find that "Mr. Gorrod . . . acknowledged that if [Biggerstaff's] duties involved more grooming than he had originally understood, the job would place her at greater risk of developing a cumulative trauma disorder, such as bilateral carpel [sic] tunnel syndrome, than as shown in his report."

Also, under finding of fact number 39, defendants contest the Commission's finding that "Mr. Gorrod stated that he knew nothing about [Biggerstaff] or how she performed her work . . . ." However, Gorrod testified as follows during his deposition:

Counsel: For the record, Mr. Gorrod, you've never met Ms. Biggerstaff?

Gorrod: No, sir.

Counsel: You've never spoken with Ms. Biggerstaff?

Gorrod: Not that I'm aware of. No, sir.

Counsel: You've never had an opportunity to observe her working as a groomer?

Gorrod: No.

Therefore, we hold there was sufficient evidence presented for the Commission to find that Gorrod stated that he "knew nothing about [Biggerstaff] or how she performed her work . . . ."

Also, under finding of fact number 39, defendants contest the Commission's finding that "Mr. Gorrod observed [Petsmart's] groomers on, what the record shows, to be a slow day. Therefore, the work observed by Mr. Gorrod did not accurately reflect the typical work or the typical pace of the work performed by [Biggerstaff]."

Gorrod testified that he observed the groomers in the Petsmart grooming salon for approximately an hour and fifty minutes. Tommy Wayne Fulcher, the store director at the Petsmart at which Biggerstaff was employed, testified that he was present when Gorrod came to assess the groomers. Fulcher testified that Gorrod "spent a couple of hours" with the groomers along with the salon manager. When asked if "it was a normal day at the store as far as the pace of work[,]" Fulcher responded, "If anything, it might have been a little slow." Natalie Kurtz, the salon manager on duty when Gorrod performed his assessment also testified that "[i]t was slower that day. There

weren't as many dogs." Therefore, we hold there was sufficient evidence presented for the Commission to find that "Mr. Gorrod observed [Petsmart's] groomers on, what the record shows, to be a slow day. Therefore, the work observed by Gorrod did not accurately reflect the typical work or the typical pace of the work performed by [Biggerstaff]."

Defendants next challenge the Commission's finding of fact number 41 that after "reviewing the testimony of each physician in this matter, the Full Commission gives greater weight to the [o]pinions of Dr. Krakauer as opposed to Dr. Edwards." Defendants contest the Commission's finding that "Dr. Edwards opinions were based in part on Mr. Gorrod's report, which inaccurately represented that [Biggerstaff] performed clerical duties for forty percent (40%) of her day." After a review of the record evidence, we cannot conclusively determine that Dr. Edwards' opinion was based on Gorrod's report; however, as previously stated, the Commission is "the sole judge of witness credibility and the weight to be given to witness testimony . . . ." *Hassell*, 362 N.C. at 306, 661 S.E.2d at 715 (citations and quotations omitted). Therefore, we overrule defendants' argument.

Defendants next challenge the Commission's findings of fact numbers 42 and 43. In finding of fact number 42, the Commission found that Dr. Krakauer had examined Biggerstaff and he was aware of the duties of a dog groomer as well as the "hand, wrist, and arm motions necessary to perform those duties. In addition, Dr. Krakauer was aware [Biggerstaff] groomed pets for approximately 85 to 90% of her work day . . . ."

Dr. Krakauer testified that he first saw Biggerstaff as a patient on 11 July 2006 when she exhibited numbness and tingling in her hands. Dr. Krakauer testified that he reviewed a video and letter provided to him by Biggerstaff. The video was of a self-employed dog groomer illustrating the physical activity involved in dog grooming. The letter described the video as well as disparities between the actions illustrated on the video and actions Biggerstaff took when she groomed dogs. The letter also included two questions involving the potential effects dog grooming may have had on Biggerstaff. Dr. Krakauer testified that he had responded in the affirmative to the first question:

> Considering the physical demands of Ms. Biggerstaff's duties as a dog groomer, specifically including the pace of her work, her use of vibrating clippers and the use of her hands and wrists, in your opinion, to a reasonable degree of medical certainty, did Ms.

Biggerstaff's work as a dog groomer cause or *significantly contribute to* her development of carpal tunnel syndrome?

(Emphasis added). But, Dr. Krakauer further testified that, as opposed to counsel, he felt more comfortable putting greater emphasis on the phrase "significantly contributed to."

Krakauer: I think we feel more comfortable talking about contributing factors, and as she described the work to me and as I reviewed it, coming to the conclusion that that work put her at increased risk compared to the general population, I feel comfortable with that. The view that the work is a—was—a contributor to her development of carpal tunnel syndrome, I feel comfortable with that.

Counsel: Okay. Do you hold those opinions, Doctor, to a reasonable degree of medical certainty?

Krakauer: Yes.

Counsel: Would your opinions that you just expressed change any if the Industrial Commission was to find that Ms. Biggerstaff groomed for less than seven and a half hours a day, for instance, for seven hours a day?

Krakauer: No.

Therefore, we hold that there was sufficient evidence of record for the Commission to find that Dr. Krakauer was aware of the duties of a dog groomer as well as the "hand, wrist, and arm motions necessary to perform those duties. [And,] [i]n addition, Dr. Krakauer was aware [Biggerstaff] groomed pets for approximately 85 to 90% of her work day . . . ."

In finding of fact number 43, the Commission found that "[Biggerstaff's] employment with [Petsmart] significantly contributed to her development of bilateral carpal tunnel syndrome. Further, [Biggerstaff's] employment placed her at an increased risk of developing bilateral carpal tunnel syndrome as compared to members of the general public." Based upon the previous discussion, we hold there was sufficient evidence to support this finding.

In finding of fact number 45, the Commission found that "all medical treatment, examinations, and evaluations received by [Biggerstaff] for her hands, wrists and arms were reasonably nec-

essary to effect, provide relief, or lessen her period of disability." Though defendants assigned error to this finding, they failed to present us with an argument on this issue. Thus, we deem this assignment of error abandoned. *See* N.C. R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned.").

For the aforementioned reasons, we hold the Commission's findings of fact numbers 39, 41, 42, and 43 were supported by competent evidence in the record that in turn support the conclusion of law that Biggerstaff suffered a compensable occupational disease. Accordingly, these arguments and assignments of error are overruled.

II

[2] Next, defendants argue that the Commission's award of temporary total disability benefits from the date of injury and continuing are not supported by competent evidence of record. We agree.

"The term 'disability' 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." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). "In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997) (citation omitted).

> [T]o support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard, 305 N.C. at 595, 290 S.E.2d at 683.

> [A] plaintiff may satisfy this initial burden by one of several approaches: (1) the production of medical evidence that 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 he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is

> capable of some work but that it would be futile because of pre-existing conditions, i.e., age, experience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Trivette, 154 N.C. App. 140, 146, 571 S.E.2d 692, 696 (2002) (citing *Russell*, 108 N.C. App. at 765-66, 425 S.E.2d at 457 (internal citations omitted)).

Dr. Krakauer saw Biggerstaff on 11 July 2006. An EMG test was performed 18 July 2006 which showed that she suffered from " '[l]eft mild to moderate median neuropathy,' that's carpal tunnel. 'Median neuropathy at the wrist as evidenced by left median motor distal latency that was relatively prolonged. Right borderline median neuropathy at the wrist. No evidence of ulnar neuropathy. No evidence of cervical radiculopathy or brachioplexopathy.' " On 21 September 2006, Dr. Krakauer performed a right carpal tunnel release surgery and, on 27 November 2006, performed a left carpal tunnel release surgery. On 3 January 2007, Dr. Krakauer wrote Biggerstaff a note that she was not to return to work. On 22 February 2007, Dr. Krakauer wrote that Biggerstaff may return to work 19 March 2007 but due to her injury was restricted from lifting, pushing, or pulling twenty-five pounds or more with both hands.

In an affidavit submitted to the Commission along with a motion to receive additional evidence, Biggerstaff asserts that the last day she worked for Petsmart was 27 June 2006 whereupon she did not work again until 7 December 2007 at which time she was employed by Johnston County Public Schools as a substitute teacher who earned $140.00 during that month. On 22 March 2008, the Commission awarded Biggerstaff "temporary total disability compensation at the weekly rate of $730.00 from June 28, 2006, and continuing until further order of the Commission."

We cannot determine from the record evidence whether plaintiff earned wages in any employment between 28 June 2006 and 7 December 2007 and, if so, whether her injury prevented her from earning any wages or prevented her from earning the same wages as before her injury. Therefore, we reverse the Commission's award of temporary total disability payments and remand for further findings as to whether Biggerstaff (1) was incapable after her injury of earning the same wages she had earned before her injury in the same employment, (2) was incapable after her injury of earning the same wages

she had earned before her injury in any other employment, and (3) whether her incapacity was caused by her injury.

Affirmed in part; reversed and remanded in part.

Judges McGEE and GEER concur.

IN THE MATTER OF: K.L.

No. COA08-1353

(Filed 7 April 2009)

Child Abuse and Neglect— summons—amendment—after termination of parental rights appealed

The trial court lacked jurisdiction to enter an order allowing amendment of the summons in an abuse, neglect, and dependency proceeding after respondent appealed a related termination of parental rights (TPR) order. N.C.G.S. § 7B-1003(c) provides that the trial court has jurisdiction (in both a TPR action and the underlying abuse, neglect and dependency action) only for a temporary order affecting the custody or placement of the juvenile if the termination of parental rights order resulting from a petition has been appealed.

On writ of certiorari to review the order entered 23 April 2008 by Judge Wayne L. Michael in Davidson County District Court. Heard in the Court of Appeals 11 March 2009.

Charles E. Frye, III for petitioner-appellee.

Robert W. Ewing for respondent-appellant.

Laura B. Beck for guardian ad litem.

GEER, Judge.

Respondent mother appeals from an order of the trial court granting a motion by the Davidson County Department of Social Services ("DSS") to amend the summons in an abuse, neglect, and dependency proceeding. Respondent's parental rights have been terminated in a separate order ("TPR order") that is currently on appeal. In that ap-

peal, respondent has argued that the TPR order should be vacated because the clerk of court failed to sign the summons in the abuse, neglect, and dependency proceeding. During the pendency of that appeal, DSS filed a motion in the trial court to amend the summons. Under N.C. Gen. Stat. § 7B-1003(c) (2007), however, when a party has appealed an order terminating parental rights that arose out of a petition to terminate parental rights, the trial court has no authority—even in the underlying abuse, neglect, and dependency action—to enter any orders other than ones affecting the custody and/or placement of the juvenile. As a result, we agree with respondent that the trial court had no jurisdiction to enter an order allowing DSS to amend the summons while the appeal of the TPR order was pending. We, therefore, vacate the trial court's order.

Facts

On 28 March 2006, DSS filed a petition alleging that K.L. ("Kim") was a neglected and dependent juvenile in file no. 06 J 71.[1] On 8 September 2006, the trial court entered orders in file no. 06 J 71 adjudicating Kim neglected and directing that she remain in DSS custody. On 12 April 2007, DSS filed a petition to terminate respondent's parental rights in file no. 06 JT 71. On 15 January 2008, the trial court entered an order terminating respondent's parental rights in file no. 06 JT 71.

On 31 January 2008, respondent gave notice of appeal from the TPR order. On 22 February 2008, respondent served on DSS a copy of the proposed record on appeal. In the proposed record on appeal, respondent included an assignment of error contending that the trial court did not acquire jurisdiction over the underlying juvenile case, file no. 06 J 71, in which Kim was adjudicated neglected because the summons was not signed, and therefore not issued, by the clerk of court.

On 4 March 2008, DSS filed a motion in the underlying juvenile case, file no. 06 J 71, to amend the summons under N.C.R. Civ. P. 4(i). Attached to DSS' motion was the affidavit of Deputy Clerk of Superior Court Kimla Kirkman explaining that she had filled in the summons to be served on respondent by assigning a file number and adding the name of the attorney assigned to represent respondent and the date and time set for the hearing. Ms. Kirkman stated that "due to an oversight, [she] inadvertently failed to sign" the summons. DSS asked

1. The pseudonym "Kim" will be used throughout the opinion to protect the minor's privacy and for ease of reading.

"that the Court enter an order directing the Deputy Clerk to sign the Juvenile Summons and Notice of Hearing and to allow the amendment of such Juvenile Summons."

On 7 March 2008, respondent filed a motion to set aside the judgment in file no. 06 J 71 on the ground that the summons was not signed. On 23 April 2008, the trial court entered an order allowing DSS' motion to amend the summons. The trial court determined that respondent's motion to set aside the judgment had been rendered moot and, therefore, dismissed that motion.

Respondent gave notice of appeal from the 23 April 2008 order on 7 May 2008. On 18 September 2008, this Court dismissed the appeal, but, on 2 October 2008, allowed respondent's petition for writ of certiorari.

Discussion

We first note that only the 23 April 2008 order allowing the motion to amend the summons in file no. 06 J 71 is before this panel. On 19 August 2008, another panel of this Court vacated the trial court's TPR order for lack of subject matter jurisdiction on the ground that, "because no valid summonses issued, the trial court did not have jurisdiction over the underlying juvenile file, and it lacked jurisdiction to terminate respondent's parental rights." *See In re K.J.L.*, 192 N.C. App. 272, 274, 665 S.E.2d 504, 505 (2008). On 22 September 2008, the guardian ad litem filed a petition for rehearing that was allowed on 30 September 2008. On 16 December 2008, the panel issued a new opinion replacing the 19 August 2008 opinion. *See In re K.J.L.*, 194 N.C. App. 386, 670 S.E.2d 269 (2008). The Court again vacated the TPR order for lack of jurisdiction based on the defective summons in the underlying juvenile action. *Id.* at 387-88, 670 S.E.2d at 270. Judge Robert C. Hunter dissented. DSS and the guardian ad litem filed a notice of appeal to the Supreme Court based on that dissent on 9 January 2009.

Although respondent devotes a significant portion of her brief to the question whether the trial court lacked jurisdiction over the underlying juvenile file in 06 J 71 because of the defective summons, that issue was presented in the first appeal and is currently pending before the Supreme Court. We need not decide whether the lack of jurisdiction found in the first appeal precluded the trial court from entering the 23 April 2008 order amending the summons under N.C.R. Civ. P. 4(i) because we have concluded that the trial court lacked jurisdiction under N.C. Gen. Stat. § 7B-1003(c).

As a general rule, a perfected appeal "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." N.C. Gen. Stat. § 1-294 (2007). Our Supreme Court has observed that this general rule "is true unless a specific statute addresses the matter in question." *In re R.T.W.*, 359 N.C. 539, 550, 614 S.E.2d 489, 496 (2005). In the context of abuse, neglect, and dependency proceedings and termination of parental rights proceedings (governed by Subchapter I of Chapter 7B of the General Statutes), our General Assembly has, in N.C. Gen. Stat. § 7B-1003, enacted a specific statute addressing the authority of trial courts pending appeals. *R.T.W.*, 359 N.C. at 550, 614 S.E.2d at 496. *See also In re Huber*, 57 N.C. App. 453, 459, 291 S.E.2d 916, 920 ("Although N.C.G.S. 1-294 states the general rule regarding jurisdiction of the trial court pending appeal, it is not controlling here [in juvenile cases], where there is a specific statute addressing the matter in question."), *appeal dismissed and disc. review denied*, 306 N.C. 557, 294 S.E.2d 223 (1982).

The current version of N.C. Gen. Stat. § 7B-1003 provides:

> (a) During an appeal of an order entered under this Subchapter, the trial court may enforce the order unless the trial court or an appellate court orders a stay.
>
> (b) Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:
>
> (1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and
>
> (2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.
>
> (c) Pending disposition of an appeal of an order entered under Article 11 of this Chapter where the petition for termination of parental rights was not filed as a motion in a juvenile matter initiated under Article 4 of this Chapter, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile. Upon the affirmation of the order of adjudication or disposition

> of the court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of an appeal, the court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interests of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the case on appeal was pending, provided that if the modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if there be any, within 10 days thereafter, as to why the modifying order should be vacated or altered.

The parties to this appeal disagree on the proper construction of this statute in determining whether the trial court had jurisdiction to enter its order allowing amendment of the summons.

Resolving this dispute requires us to determine the intent of the General Assembly as to the authority of trial courts to enter orders while appeals under Subchapter I of Chapter 7B of the General Statutes are pending. *See Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977) ("In interpreting statutes, the primary duty of this Court is to ascertain and effectuate the intent of the Legislature."). As our Supreme Court has recently observed, "[w]hen 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).

The circumstances surrounding the enactment of N.C. Gen. Stat. § 7B-1003 are important to an understanding of the General Assembly's intent. The statute was substantially amended in 2005. *See* 2005 N.C. Sess. Laws ch. 398, § 12. Prior to that amendment, appeals from TPR orders and dispositions pending those appeals were specifically addressed in N.C. Gen. Stat. § 7B-1113 (2003), which fell within Article 11 of Subchapter I, the article addressing the termination of parental rights. N.C. Gen. Stat. § 7B-1003 fell within Article 10, which appeared to govern appeals related to abuse, neglect, and dependency proceedings.

The Court in *R.T.W.*, 359 N.C. at 549, 614 S.E.2d at 495, addressed whether a trial court had jurisdiction to terminate parental rights while an appeal from an order in an abuse, neglect, and dependency proceeding was pending. As the Supreme Court noted, *id.* at 549, 614 S.E.2d at 495, the Court of Appeals had held that N.C. Gen. Stat.

§ 7B-1003 divested the trial court of jurisdiction to enter a TPR order when statute provided (as then written):

> "Pending disposition of an appeal, the return of the juvenile to the custody of the parent or guardian of the juvenile, with or without conditions, may issue unless the court orders otherwise. . . . *For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.*"

R.T.W., 359 N.C. at 550, 614 S.E.2d at 496 (quoting N.C. Gen. Stat. § 7B-1003 (2003)). The Supreme Court, in concluding that the General Assembly did not intend in § 7B-1003 to prohibit termination of parental rights proceedings under Article 11, pointed out that "[o]n its face, N.C.G.S. § 7B-1003 nowhere references orders terminating parental rights." *R.T.W.*, 359 N.C. at 550, 614 S.E.2d at 496. The Court explained further: "Rightly understood, then, N.C.G.S. § 7B-1003 conserves the ability of trial courts to protect children during the pendency of custody order appeals. The statute is silent on proceedings to terminate parental rights." *Id.* at 551, 614 S.E.2d at 496. The Court further concluded that N.C. Gen. Stat. § 1-294 did not preclude the trial court from acting to terminate respondent's parental rights. *R.T.W.*, 359 N.C. at 551, 614 S.E.2d at 497.

Immediately after *R.T.W.*, the General Assembly passed substantial amendments to Subchapter I of Chapter 7B of the General Statutes. 2005 N.C. Sess. Laws ch. 398. As reflected in the current version of N.C. Gen. Stat. § 7B-1003, the General Assembly, in those amendments, repealed the separate appeal provision relating to termination of parental rights proceedings set out in N.C. Gen. Stat. § 7B-1113 (repealed 2005). Article 10 now contains all provisions relating to appeals of orders entered under Subchapter I of Chapter 7B, including TPR orders. N.C. Gen. Stat. § 7B-1001 (2007) specifies the orders from which an appeal may be taken, while N.C. Gen. Stat. § 7B-1003 sets out the trial court's authority to enter orders pending appeal. The amendments superceded *R.T.W.* by specifically providing that pending an appeal, a trial court "shall . . . [c]ontinue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes [relating to termination of parental rights]." N.C. Gen. Stat. § 7B-1003(b)(1).

Subsection (b) of § 7B-1003 now addresses the authority of a trial court pending any appeal "unless directed otherwise by an ap-

pellate court *or subsection (c) of this section applies*." N.C. Gen. Stat. § 7B-1003(b) (emphasis added). Subsection (c) addresses the authority of a trial court "[p]ending disposition of an appeal of an order entered under Article 11 of this Chapter [governing termination of parental rights] where the petition for termination of parental rights was not filed as a motion in a juvenile matter initiated under Article 4 of this Chapter." N.C. Gen. Stat. § 7B-1003(c). In other words, if DSS files a motion in the cause to terminate parental rights, then § 7B-1003(b) applies, but if DSS files a petition, initiating a new action (as occurred in this case), then N.C. Gen. Stat. § 7B-1003(c) applies.

This case involves an intersection of the two provisions. Because DSS chose to file a petition to terminate parental rights, there are now two actions relating to Kim: the neglect proceeding (file no. 06 J 71) and the TPR proceeding (file no. 06 JT 71). DSS argues that because the appeal occurred in file no. 06 JT 71, only the trial court's authority in 06 JT 71 was affected. According to DSS, the trial court was free to act in 06 J 71. We do not believe that such an interpretation of N.C. Gen. Stat. § 7B-1003 would accord with the legislature's intent, as revealed by the long-standing interpretation given to § 7B-1003 and its predecessor versions, as well as the recent amendments.

As the Supreme Court acknowledged in *R.T.W.*, 359 N.C. at 551, 614 S.E.2d at 496, the purpose of N.C. Gen. Stat. § 7B-1003 is to "conserve[] the ability of trial courts to protect children during the pendency of custody order appeals." Indeed, 17 years ago, this Court noted, with respect to a predecessor statute similarly granting a trial court authority to enter, pending appeal, temporary orders affecting the custody or placement of the juvenile, that "[w]ithout authority of the district court to provide for the treatment of [the child] pending appeal, a recalcitrant party could frustrate the efforts of the court to provide for her best interests by simply entering notice of appeal. The law is not so foolish." *Huber*, 57 N.C. App. at 459, 291 S.E.2d at 920. As the Court explained further, "N.C.G.S. 1-294 and the cases decided thereunder control further action by the trial court in general pending appeal, but with respect to proceedings concerning infants the rule is appropriately different. Infants require, and are entitled to, the uninterrupted protection of the courts." *Id.*

Thus, our appellate courts have long recognized that N.C. Gen. Stat. § 7B-1003 and its predecessors were intended to authorize continued jurisdiction for a limited purpose: protection of the child pending appeal. Prior to the 2005 amendments, N.C. Gen. Stat. § 7B-1003 limited the trial court's jurisdiction pending an appeal to (1) returning

the child to the parents, and (2) "[f]or compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State." N.C. Gen. Stat. § 7B-1113 similarly limited the jurisdiction of the trial court pending appeals from TPR orders to the entry of "a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the best interests of the State."

With the 2005 amendments, the General Assembly did not expand this jurisdiction, but rather further limited it by expressly providing that the trial court lacks jurisdiction to conduct TPR proceedings following an appeal, whether DSS proceeds by a motion in the cause or begins a new action by filing a petition. N.C. Gen. Stat. § 7B-1003(b)(1). As to the trial court's authority to enter orders pending an appeal, the rule adopted by the General Assembly for abuse, neglect, and dependency proceedings is that the trial court may only "[e]nter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile." N.C. Gen. Stat. § 7B-1003(b)(2). If the appeal arises out of a TPR petition, then the court "may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile." N.C. Gen. Stat. § 7B-1003(c). The language in both subsections limits the trial court's authority to the traditionally-recognized need to protect children pending appeals.

We are not willing to conclude, as DSS urges, that the General Assembly, on the one hand, intended to perpetuate this limited jurisdiction during appeals (and further limit it by superceding *R.T.W.*), but yet still intended, when TPR petitions are filed, to allow the trial court to enter any order at all in the abuse, neglect, and dependency proceeding. DSS' position that, for purposes of dispositions pending an appeal, the "jurisdiction" of the trial court in the abuse, neglect, and dependency action is entirely separate from the "jurisdiction" of the trial court in the TPR action was the view adopted by *R.T.W.* and rejected by the General Assembly in the 2005 amendments.

"The words and phrases of a statute must be interpreted contextually, and read in a manner which effectuates the legislative purpose." *In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 705, 446 S.E.2d 594, 595 (1994) (internal quotation marks omitted). In this case, we would not effectuate the General Assembly's purpose in enacting the 2005 amendments if we were to construe N.C. Gen. Stat. § 7B-1003(b) to restore the dichotomy between the proceedings in a

manner that allows the trial court to proceed in the abuse, neglect, and dependency action wholly independent from what is occurring in the TPR proceeding.

Moreover, DSS' approach would negate the caveat in N.C. Gen. Stat. § 7B-1003(b) that the trial court shall continue to exercise jurisdiction "unless . . . subsection (c) of this section applies." Subsection (c) only applies when a separate action has been initiated by a petition. If we were to adopt DSS' contention, then—because the abuse, neglect, and dependency proceeding is a separate action—the trial court could continue to exercise jurisdiction notwithstanding the express language otherwise in subsection (b). It is, however, well established that "[w]hen interpreting a statutory provision, '[t]he legislature is presumed to have intended a purpose for each sentence and word in a particular statute, and a statute is not to be construed in a way which makes any portion of it ineffective or redundant.' " *In re Appeal of Briarfield Farms*, 147 N.C. App. 208, 217, 555 S.E.2d 621, 627 (2001) (quoting *Peace River Elec. Coop. v. Ward Transformer Co.*, 116 N.C. App. 493, 502, 449 S.E.2d 202, 209 (1994), *disc. review denied*, 339 N.C. 739, 454 S.E.2d 655 (1995)), *disc. review denied*, 355 N.C. 211, 559 S.E.2d 798 (2002).

The plain language of the statute requires us to instead hold that N.C. Gen. Stat. § 7B-1003(c) provides that if a TPR order resulting from a petition has been appealed, then the trial court has jurisdiction—in both the TPR action and the underlying abuse, neglect, and dependency action—*only* to "enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile." N.C. Gen. Stat. § 7B-1003(c).

Based on this construction of § 7B-1003(c), once respondent, in this case, appealed the TPR order, the trial court lacked jurisdiction to enter the order allowing amendment of the summons. We, therefore, must vacate that order. Because of our resolution of this issue, we find it unnecessary to address respondent's remaining arguments.

Vacated.

Judges ELMORE and STEELMAN concur.

SHARYN'S JEWELERS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, PLAINTIFF v. IPAYMENT, INC., IPAYMENT OF VALENCIA, VERICOMM, AND JPMORGAN CHASE BANK, DEFENDANTS

No. COA08-651

(Filed 7 April 2009)

1. Civil Procedure— Rule 60—relief from default judgment—timeliness of motion

It was error for the trial court to not consider defendant Vericomm's Rule 60(b)(6) motion for relief from a default judgment, under the peculiar circumstances of the case, where the motion was filed seventeen months after the entry of the default judgment. The entry of the default judgment, and not actual notice, is the appropriate point from which to consider the timeliness of the motion, but this case presented the unique circumstance of the trial court granting more relief than was authorized.

2. Damages and Remedies— default judgment—relief partially exceeding pleadings—remanded

A default judgment arising from credit card verifications was set aside in part where the allegations against defendant Vericomm did not include all of the requests for relief made against the other defendants and did not support all of the relief granted against defendant Vericomm.

Judge ROBERT C. HUNTER concurring.

Appeal by Defendant Vericomm from order entered 25 February 2008 by Judge Russell J. Lanier, Jr. in Superior Court, Carteret County. Heard in the Court of Appeals 13 January 2009.

Howard, Stallings, From & Hutson, P.A., by B. Joan Davis, Richard P. Leissner, Jr., and Philip W. Paine, for defendant-appellant Vericomm.

John A. J. Ward, PLLC, by Catherine R. Piwowarski, and John A. J. Ward, for plaintiff-appellee.

WYNN, Judge.

"A default judgment which grants plaintiff's relief in excess of that to which they are entitled upon the facts alleged in the verified

complaint is irregular."[1] Defendant Vericomm argues that the trial court erred by denying its motions for relief from judgment because the default judgment was void, or alternatively, because other extraordinary circumstances exist which justify such relief. We hold that while the default judgment was not void, the relief granted in the default judgment exceeds the relief prayed for in the complaint; accordingly, we vacate the default judgment in part.

The facts tend to show that Sharyn's Jewelers, LLC is a jewelry store in Emerald Isle, North Carolina operated independently by Sharyn Cushing. In 2003, Ms. Cushing contracted with a single salesperson to acquire machinery and services to accept and process credit card transactions at Sharyn's Jewelers. The contracts Ms. Cushing signed called for Defendant Vericomm, a California corporation and the sole appellant here, to provide credit card terminals that received customers' credit card information and relayed it to Defendants Ipayment and JPMorgan, which "were responsible for verifying, authorizing, processing, and settling all credit card transactions performed at Sharyn's Jewelers place of business."

On 25 August 2004, Sharyn's Jewelers received a telephone order from a customer paying by credit card. From that time through 14 October 2004, Sharyn's Jewelers accepted numerous orders charged to the same credit card. Each order was reported by the credit card terminal provided by Vericomm as "authorized." "During this same time period [Ms. Cushing and her] store attendant called Ipayment/Vericomm at least seven times questioning the validity and acceptability of this particular credit card name and address. At no time did they inform [Ms. Cushing or her store attendant] that there was a problem of any sort with this credit card." Meanwhile, Ipayment continued withdrawing fees for processing the transactions from Sharyn's Jewelers' account.

Toward the end of October 2004, Ms. Cushing received phone calls from Ipayment and JPMorgan representatives informing her that the credit card had been reported stolen on 2 September 2004, and accusing her of conducting fraudulent transactions involving the credit card since that time. Ipayment allegedly insisted that Sharyn's Jewelers would be responsible for all amounts charged beyond the card's $20,000 limit, and that Ipayment intended to report Sharyn's Jewelers to the MATCH system, with the consequence that Sharyn's

1. *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 717, 220 S.E.2d 806, 811 (1975) (citation omitted), *disc. review denied*, 289 N.C. 619, 223 S.E.2d 396 (1976).

Jewelers would be "blacklisted" or disqualified from accepting credit cards in the future. By the end of October 2004, Sharyn's Jewelers' credit card machine was in fact "frozen," and unable to accept or process credit card transactions.

On 27 January 2005, Sharyn's Jewelers filed suit against Ipayment, Vericomm, and JPMorgan, asserting the following claims for relief: 1) breach of fiduciary duty; 2) constructive fraud; 3) Unfair and Deceptive Trade Practices; 4) negligent misrepresentation; 5) fraud; 6) breach of contract; 7) breach of third-party beneficiary contract; 8) punitive damages; and 9) injunctive relief. Only JPMorgan filed a responsive pleading.

On 23 March 2005, Sharyn's Jewelers filed a Motion for Entry of Default against Vericomm. The Clerk of Carteret County Superior Court entered a Default against Vericomm the same day. Sharyn's Jewelers moved for default judgment against Vericomm and Ipayment on 15 February 2006, and the trial court granted the motion on 10 April 2006.

In its default judgment, the trial court adjudicated Ipayment and Vericomm jointly and severally liable for compensatory damages, attorneys' fees, and punitive damages. The trial court also imposed injunctive relief, ordering Ipayment and Vericomm to permanently refrain from "black-listing or black-balling" Sharyn's Jewelers or any person related to Sharyn's Jewelers. Sharyn's Jewelers assigned its interest in the default judgment to Judgment Recovery Group, LLC in November 2006. Vericomm filed motions for relief from judgment pursuant to N.C. R. Civ. P. 60 (b) on 21 September 2007, and an amended motion for relief from judgment on 18 October 2007. After a hearing, the trial court denied the motions in an order filed on 25 February 2008. The trial court's order denied relief pursuant to Rule 60(b)(4) (void judgment) and Rule 60(b)(6) (any other reason justifying relief).

Vericomm appeals from the denial of its Rule 60(b) motions, arguing that the trial court erred because the default judgment was void under Rule 60(b)(4); and under Rule 60(b)(6), its motion was brought within a reasonable time and demonstrated extraordinary circumstances justifying relief. We summarily reject Vericomm's contention that the excess relief granted by the trial court voided the default judgment because a "default judgment which grants plaintiff's relief in excess of that to which they are entitled upon the facts alleged in the verified complaint is irregular," not void. *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 717, 220 S.E.2d 806, 811 (1975).

Accordingly, the dispositive issues on appeal are (1) whether Vericomm brought its Rule 60(b)(6) motion within a reasonable time, and (2) if so, did the trial court award excessive relief which constituted extraordinary circumstances justifying relief from the default judgment. We hold that Vericomm's motion was brought within a reasonable time and that the trial court's award of excessive relief merits vacating the default judgment in part.

I.

[1] Vericomm first argues that its Rule 60(b)(6) motion was brought within a reasonable time. Rule 60(b)(6) motions must be reasonably timely, depending upon the circumstances of each individual case. *Sea Ranch II Owners Ass'n, Inc. v. Sea Ranch II, Inc.*, 180 N.C. App. 226, 229, 636 S.E.2d 332, 334 (2006) (citations omitted), *disc. review denied*, 361 N.C. 357, 644 S.E.2d 233 (2007). We review the denial of a motion pursuant to Rule 60(b)(6) for an abuse of discretion. *Ollo v. Mills*, 136 N.C. App. 618, 624, 525 S.E.2d 213, 217 (2000) (citations omitted).

The record shows that Vericomm's motions for relief from judgment were not filed until more than seventeen months after entry of the default judgment. Still, Vericomm argues that its Rule 60(b)(6) motion was brought within a reasonable time because Sharyn's Jewelers did not serve the default judgment and Vericomm did not receive actual notice of it until August 2007. Accordingly, Vericomm contends that the timeliness of its Rule 60(b)(6) motion should be considered from the date it received actual notice, and not the date the default judgment was entered. However, Sharyn's Jewelers responds that it was not required to serve the default judgment on Vericomm pursuant to N.C. R. Civ. P. 5(a) (2007):

> Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, *but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.*

(emphasis added).

An order finding Vericomm in default was entered on 23 March 2005, long before entry of the default judgment. Therefore, Sharyn's Jewelers was not required to serve the default judgment on Vericomm. Moreover, the record contains proof that Vericomm was properly served with all pleadings and the entry of default. Thus, at the very least, Vericomm had notice of its status as a defendant to this litigation, and the potential that an adverse judgment could be rendered against it. Accordingly, entry of the default judgment, and not the point of Vericomm's actual notice, is the appropriate point in time to consider the timeliness of Vericomm's Rule 60(b)(6) motion.

In determining whether Vericomm acted within a reasonable time to assert its Rule 60(b)(6) motion, we are aware that this Court has held that periods as short as six months between entry of judgment and filing of a Rule 60(b) motion have been held not to be reasonably timely. *See Sea Ranch Owners II*, 180 N.C. App. at 230, 636 S.E.2d at 335 (holding that the trial court did not abuse its discretion in denying Rule 60(b)(6) motion where order entered in default was not void and the motion was not filed until six months after entry of the underlying order). Nonetheless, the unique circumstance on the face of the record—that the trial court granted more relief beyond than was authorized—leads us to conclude that extraordinary circumstances justify considering Vericomm's Rule 60(b)(6) motion. Accordingly, under the particular circumstances of this case, we hold that it was error for the trial court to not consider Vericomm's Rule 60(b)(6) motion, filed seventeen months after entry of the default judgment, as reasonably timely.

II.

[2] Having determined that extraordinary circumstances justify considering Vericomm's Rule 60(b)(6) motion, we address Vericomm's contention that the trial court awarded excessive relief. Movants under Rule 60(b)(6) have the burden to demonstrate that: 1) extraordinary circumstances exist; 2) justice demands relief from judgment; and 3) they have a meritorious defense. *Oxford Plastics, a div. of Plastics Eng'g Corp. v. Goodson*, 74 N.C. App. 256, 259-60, 328 S.E.2d 7, 9-10 (1985).

The record confirms Vericomm's argument that most of the complaint's factual allegations refer specifically to "Defendants Ipayment and JPMorgan." In its first three claims for relief—breach of fiduciary duty, constructive fraud, and Unfair and Deceptive trade Practices—Sharyn's Jewelers made no factual allegations against Vericomm. In

its fourth claim for relief, for negligent misrepresentation, Sharyn's Jewelers alleged:

> 71 Defendant Vericomm supplied equipment that indicated authorization in the stolen credit card transactions and, if such equipment malfunctioned, then such equipment was provided without reasonable care and such lack of care resulted in false reporting to Plaintiff that the credit card at issue in this litigation was valid and not stolen or maxed.
>
> 72. Plaintiff reasonably relied upon the information provided by Defendants, including the false representations that the credit card at issue in this litigation was valid and not stolen or maxed.

Sharyn's Jewelers fifth claim for relief, for fraud, makes no specific allegations against Vericomm. In its sixth claim for relief, for breach of contract, Sharyn's Jewelers makes the following allegation:

> 81. To the extent that this Court finds that the Merchant Processing Agreement was a contract between Plaintiff and any or all of the Defendants and/or any other agreement between Plaintiff and some or all of the parties was binding, Defendants breached such contract by failing to properly provide credit card authorization services to Plaintiff.

In its seventh, eighth and ninth claims for relief—breach of third party beneficiary contract, punitive damages, and injunctive relief—Sharyn's Jewelers made no specific allegations against Vericomm. In the demand for judgment, the complaint prays that "judgment be entered against Defendants, in a sum in excess of $10,000," but refers specifically to "Defendants Ipayment and JPMorgan" in reference to joint and several liability, Unfair and Deceptive Trade Practices, and punitive damages. Finally, Sharyn's Jewelers' complaint requests that attorneys' fees be awarded against "Defendants," and that the "Court grant Plaintiff such other relief as it deems just and appropriate."

The trial court's default judgment held Vericomm jointly and severally liable with Ipayment for compensatory damages, attorneys' fees, and punitive damages, imposed a permanent injunction on Vericomm, and declared Sharyn's Jewelers' contract with Vericomm null and void. Accordingly, the trial court's default judgment awarded relief against Vericomm beyond the relief supported by the allegations in Sharyn's Jewelers complaint.

However, the following allegations expressly include, or could include, Vericomm:

33. The equipment supplied by Vericomm should not have allowed any transactions to be completed if an electronic message was received that the credit card used in such transaction was declined for any reason, including because it had been either stolen or was maxed.

34. However, each time Sharyn's sought electronic verification regarding the stolen and maxed credit card, the Vericomm equipment showed that Ipayment and JPMorgan had authorized the transactions because the credit card was valid.

35. In addition to seeking electronic verification of the credit card's authenticity, Sharyn's made several telephone calls to the telephone number provided by Defendants for telephone authorizations and asked whether the credit card was stolen. Each time Sharyn's called, it was informed that the credit card was valid.

38. Defendants have threatened to report or have reported Sharyn's to a list of merchants involved in fraudulent activities. . . .

40. Upon information and belief, Defendants continued to authorize transactions after they knew the credit card was stolen and maxed because Defendants believed they would be able to retain all fees and commissions and yet shift liability to Sharyn's for the charges to the stolen credit card.

41. Upon information and belief, Defendants engage in the practice of authorizing stolen credit card transactions by merchants and have used their relative position of power . . . to retain their fees and commissions while recouping from such merchants losses related to such stolen credit card transactions.

In light of our examination of the allegations in the complaint and the relief sought by Sharyn's Jewelers, we hold that the trial court erred by awarding relief against Vericomm in excess of the relief supported by the allegations in Sharyn's Jewelers' complaint. We hold that the complaint only states claims for relief from Vericomm on theories of breach of contract and negligent misrepresentation. The complaint does not support the default judgment's award of punitive damages against Vericomm. *See Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 301 (1976) (stating that North Carolina follows the general rule that punitive damages are not available even for a wilful or malicious breach of contract, but where the breach also constitutes an independent tort, punitive damages may be available).

Likewise, on the claims for Unfair and Deceptive Trade Practices and injunctive relief, the complaint demands relief specifically from "Defendants Ipayment and JPMorgan," but nowhere requests relief from Vericomm on those claims. Therefore, the judgment against Vericomm for Unfair and Deceptive Trade Practices, attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1 (2007), and injunctive relief cannot stand.

In sum, we vacate that part of the default judgment imposing liability on Vericomm for punitive damages, Unfair and Deceptive Trade Practices, attorneys' fees, and injunctive relief. Because the allegations in Sharyn's Jewelers' complaint support the award of compensatory damages against Vericomm, however, that part of the judgment is affirmed.

Affirmed in part; vacated in part.

Judge ROBERT C. HUNTER concurs in a separate opinion.

Judge ERVIN concurs.

HUNTER, Robert C., Judge, concurring.

I concur with the result reached by the majority, but write separately because I disagree with the majority's conclusion that the entry of the default judgment is the appropriate time to consider timeliness in a Rule 60(b)(6) motion under these circumstances. I would find that the appropriate measuring point occurs when the defendant has first notice of the excess relief unsupported by the complaint.

This Court has held that individual circumstances define "reasonable time" under Rule 60(b)(6). *See Nickels v. Nickels*, 51 N.C. App. 690, 692, 277 S.E.2d 577, 578 (1981); *McGinnis v. Robinson*, 43 N.C. App. 1, 8, 258 S.E.2d 84, 88 (1979). This Court has held that a defendant's filing of a Rule 60(b) motion 15 months after first notice of the judgment and 19 months after filing of the default judgment was reasonable where defendant was unaware that a default judgment had been entered. *J & M Aircraft Mobile T-Hangar, Inc. v. Johnston County Airport Auth.*, 166 N.C. App. 534, 536-38, 603 S.E.2d 348, 350-51 (2004). In *J & M Aircraft*, this Court found that the defendant's response was within a "reasonable time" when the defendant "immediately retained counsel, tried to attack the judgment . . . and filed the Rule 60 motion within 15 months of having notice for the first time

that there was a . . . judgment against [the defendant]." *Id.* at 538, 603 S.E.2d at 351.

This Court's measuring point in *J & M Aircraft*, is appropriate in instances where a defendant chooses not to respond to a complaint. For example, if a defendant receives plaintiff's complaint, the contents of which he knows are true, a defendant may choose not to respond and avoid the associated time and expense. In that circumstance the measuring point would be upon service of the entry of default as the defendant is fully aware of the consequences of his or her inaction. However, if the default judgment following the entry of default contains relief in excess of the relief supported by the plaintiff's case, time should accrue when the defendant becomes aware of the excess relief. As the entry of default is entered before the default judgment, defendant could not possibly be aware of the default judgment's excess relief. Whether a defendant's Rule 60(b) motion is timely would be based upon the time between when the defendant becomes aware of the excess relief granted and the filing of defendant's 60(b) motion.

This Court's rationale in *J & M Aircraft*, can be applied in the instant case. In that case, this Court did not focus on the amount of time between the entry of default and the defendant's response. Instead, the Court focused on the time between when defendant first knew of the contents of the judgment and the defendant's motion under Rule 60(b) in determining timeliness. Similarly, in the instant case, Vericomm was unaware that the trial court's judgment provided relief in excess of the relief supported by plaintiff's complaint upon entry of default. Vericomm learned of the North Carolina judgment, which contained the excess relief, when it was served with "Notice of Entry of Judgment on a Sister State Judgment" on 7 September 2007. On 21 September 2007, Vericomm filed its Motion for Relief from Judgment. Following the rationale from *J & M Aircraft* in determining reasonable time under these circumstances, a defendant's first notice of the excessive relief unsupported by the complaint is the appropriate point in time to consider the timeliness of the defendant's response.

Accordingly, I concur with the majority that under these particular circumstances, Vericomm's Rule 60(b)(6) motion was timely; however, I would hold that the point of actual notice of the excess relief is the appropriate point in time to consider the timeless of the 60(b) motion in such situations, not the entry of the default judgment as the majority holds.

SCOTT & JONES, INC., PLAINTIFF v. CARLTON INSURANCE AGENCY, INC., AND HUGH CARLTON INDIVIDUALLY, DEFENDANTS

No. COA08-745

(Filed 7 April 2009)

1. Statutes of Limitation and Repose— insurance agents— professional malpractice time limit—not applicable

The four-year professional malpractice statute of limitations of N.C.G.S. § 1-15(c) did not apply to an action against an insurance agency where plaintiff was alleging that the agency had not obtained coverage of risks as promised. Case law does not support the argument that insurance agents provide professional services.

2. Statutes of Limitation and Repose— insurance sales—discovery of uncovered risk

The "discovery" provision of the statute of limitations in N.C.G.S. § 1-52(16) did not apply to extend the limitations period on a claim against an insurance agency for not procuring coverage. The absence of completed products coverage should have been apparent to plaintiff on the date plaintiff received the policy, or immediately upon the injury at the latest.

3. Statutes of Limitation and Repose— insurance agency not procuring coverage—negligence—barred

Plaintiff's negligence claim against an insurance agency for not procuring promised coverage was barred by the applicable 3 year statute of limitations where plaintiff filed its complaint 3 years and 9 months after the claim could possibly have accrued even if defendant had procured the coverage.

4. Statutes of Limitation and Repose— insurance agency not procuring coverage—breach of contract—barred

Plaintiff's claim for breach of contract against an insurance agency for not procuring the promised coverage was barred by the three-year statute of limitations where the complaint was filed about 3 years and 9 months after the date of the injury, which was the last possible date defendants could have breached their contract. Even if defendants had properly advised plaintiff and procured completed products coverage after a person was injured in a fall, it would have no effect on the current action.

Appeal by plaintiff from order entered 28 March 2008 by Judge Kenneth F. Crow in Superior Court, Duplin County. Heard in the Court of Appeals 20 November 2008.

Eugene C. Covington, Jr., for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Susan K. Burkhart, for defendants-appellees.

STROUD, Judge.

Plaintiff appeals order allowing defendants' motion for summary judgment. We affirm, as plaintiff's action is barred by the statute of limitations.

I. Background

On 31 October 2006, plaintiff filed a complaint against defendants for negligence and breach of contract. Plaintiff alleged:

> 4. Defendants Carlton Insurance and Hugh Carlton, have acted as the insurance agent for Scott & Jones, Inc. for many years. Scott & Jones, Inc. is unsophisticated in the area of insurance and relied upon the Defendants for insurance advice and counsel. The Defendants undertook the responsibility of procuring and advising Scott & Jones, Inc. on the insurance coverage Scott & Jones needed in the operation of its business. Relying on the Defendants, Scott & Jones Inc. has for many years obtained commercial general liability policies of insurance in connection with the operation of the business of Scott & Jones, Inc.
>
> 5. On January 24, 2002, Ohio Casualty Insurance Company issued a commercial package policy and commercial general liability policy (hereinafter "Primary Policy"), Policy No. BKO(03)52 48 77 99 and a commercial umbrella coverage policy (hereinafter "Umbrella Policy"), Policy No. BKO(03) 52 48 77 99, to Plaintiff Scott & Jones, Inc. The policies effective dates were from March 1, 2002 to March 1, 2003. A true and accurate copy of these policies is attached hereto as Exhibit A. Both policies were procured by the Defendants for the Plaintiff Scott & Jones, Inc.
>
> 6. That on or about March 1998, Scott & Jones, Inc. in the normal course of their business, installed a grain silo at C&M Hog Farms, Inc., located in Latta, South Carolina.

7. That on February 3, 2003, an employee at C&M Hog Farms, Inc., Willie MacMillan, was severely injured and rendered paraplegic in a fall from the ladder that was attached to the silo installed by Scott & Jones, Inc. in March of 1998.

8. On October 6, 2004, a suit was filed by Willie MacMillan against Defendant Scott & Jones, Inc., et al. (hereinafter "McMillan Litigation[") in the Court of Common Pleas, County of Dillon, South Carolina, arising out of the fall on February 3, 2003. The Complaint alleged that Scott & Jones was negligent in the installation of the grain silo in March of 1998. On November 15, 2004, the action was removed to the US District Court, Florence Division (#4:04-22972).

9. On March 14, 2005, a declaratory judgment action was filed by Ohio Casualty Insurance Company against Scott & Jones, Inc., in the US District Court, Florence Division (#4:05-807) to determine Ohio Casualty's obligations under its contracts of insurance with Scott & Jones, Inc. On August 25, 2006, the US District Court found in favor of Ohio Casualty Insurance Company, issuing an Order that Ohio Casualty has no duty to defend or indemnify Scott & Jones, Inc. in the McMillan Litigation inasmuch as the policies procured by the Defendants did not include a separate products completed operations coverage, leaving Scott & Jones, Inc, completely uninsured with regard to the MacMillan Litigation (See attached Exhibit B).

10. On August 18, 2006, judgment was entered in favor of MacMillan against Scott & Jones, Inc. in the amount of $5,000,000.00. (See attached Exhibit C).

11. That at all times relevant hereto, the Defendants represented and assured Scott & Jones, Inc. that the insurance coverage they had purchased covered all reasonable and necessary risks of Scott & Jones, Inc. business, including claims after completion of the Plaintiff's work.

On or about 6 February 2007, defendants filed an amended answer alleging several affirmative defenses, including the statute of limitations. On or about 21 February 2008, defendants filed a motion for summary judgment. On 28 March 2008, defendants' motion for summary judgment was allowed and plaintiff's action was dismissed with prejudice. Plaintiff appeals arguing the trial court erred in granting defendants' motion for summary judgment.

II. North Carolina Rules of Appellate Procedure Violation

> We [first] note that the argument section of appellant's brief is single spaced in violation of Rule 28(j) of 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.

State v. Hudgins, 195 N.C. App. ——, ——, —— S.E.2d ——, ——, (17 February 2009) (No. COA08-441).

III. Statute of Limitations

The trial court's order did not state the specific reason for its order granting summary judgment in favor of defendant. However, defendant asserted several defenses, including the statute of limitations, in its amended answer. Plaintiff argues that the statute of limitations is not a proper ground upon which to base dismissal of its claims by summary judgment.

> When the affirmative defense of the statute of limitations has been pled, the burden is on the plaintiff to show that his cause of action accrued within the limitations period. On appeal from an order granting summary judgment, our standard of review is *de novo*, and we view the evidence in the light most favorable to the non-movant.

Baum v. John R. Poore Builder, Inc., 183 N.C. App. 75, 80, 643 S.E.2d 607, 610 (2007) (citations and quotation marks omitted).

> Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, where the statute of limitations is properly pled and the facts are not in conflict, the issue becomes a matter of law, and summary judgment is appropriate.

Rowell v. N.C. Equip. Co., 146 N.C. App. 431, 434, 552 S.E.2d 274, 276 (2001) (citations and quotation marks omitted).

A. Professional Malpractice

[1] Plaintiff argues that its claims for negligence and breach of contract constitute claims for professional malpractice, and thus the applicable statute of limitations is up to four years pursuant to N.C. Gen. Stat. § 1-15(c) and relevant case law, instead of three years pursuant to N.C. Gen. Stat. § 1-52, which identifies the statute of limita-

tions for general negligence and breach of contract claims. Plaintiff contends it is subject to the professional malpractice statute of limitations in N.C. Gen. Stat. § 1-15(c) because defendants breached a professional fiduciary duty. Though plaintiff argues that the professional malpractice statute of limitations is applicable in the present case, plaintiff has not directed us to, nor have we found, any North Carolina case in which the professional malpractice statute of limitations has been applied to insurance agents.

N.C. Gen. Stat. § 1-15(c) provides,

> Except where otherwise provided by statute, a cause of action for malpractice *arising out of the performance of or failure to perform professional services* shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action . . . .

N.C. Gen. Stat. § 1-15(c) (2005) (emphasis added).

Under the plain language of N.C. Gen. Stat. § 1-15(c), a cause of action for professional malpractice must arise from "the performance of or failure to perform professional services[.]" *See id.* Neither N.C. Gen. Stat. § 1-15(c), nor Chapter 1 in general provides a definition for "professional services" and our case law has not provided much additional assistance in defining this term. Our Supreme Court has noted that "[t]he term 'professional services' refers to those services where a professional relationship exists between plaintiff and defendant—such as a physician-patient or attorney-client relationship." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 665, 488 S.E.2d 215, 223 (1997) (citations and quotation marks omitted). In *Roberts v. Durham County Hosp. Corp.*, the plaintiffs argued N.C. Gen. Stat. § 1-15(c) "is unconstitutionally vague because it fails to define 'malpractice' or 'professional services' " and that "it is difficult to determine whether certain occupations fall within the statute so as to be entitled to assert the limitation period within N.C. Gen. Stat. § 1-15(c)." 56 N.C. App. 533, 537, 289 S.E.2d 875, 878 (1982), *aff'd per curiam*, 307 N.C. 465, 298 S.E.2d 384 (1983). Our Supreme Court determined that N.C. Gen. Stat. § 1-15(c) was not unconstitutionally vague as applied to a medical doctor and a hospital, noting that "[t]he potential vagueness of a statute as applied in hypothetical cases is no ground for holding the statute unconstitutional. A defendant cannot claim that a statute is unconstitutional in some of its reaches if it is constitutional as applied to him." *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L. Ed. 2d 830 (1973)). The Court also stated that "[w]here a term

such as . . . 'professional service' has been used over such a lengthy period of time that its usage has given the term well-defined contours such a term will not be found inadequate." *Id.* at 537-38, 289 S.E.2d at 878 (citation omitted). As we are not aware of any North Carolina case which has held that insurance agents are providers of "professional services" for the purpose of the statute of limitations in N.C. Gen. Stat. § 1-15(c), we certainly cannot cite to usage of the term as to insurance agents over "a lengthy period of time" nor does the term have "well-defined contours" as a "professional service" in the context of this case. *Id.*

In addition, we believe that *Pierson v. Buyher* is persuasive authority with which to conclude that insurance agents are not providers of "professional services" for purposes of the extended statute of limitations under N.C. Gen. Stat. § 1-15(c). 330 N.C. 182, 409 S.E.2d 903 (1991). The specific issue addressed in *Pierson* was "a narrow one: When does a cause of action accrue for negligent advice of an insurance agent when the person bringing the suit is the beneficiary of the life insurance policy issued in reliance on that advice?" *Id.* at 183, 409 S.E.2d at 904. In its discussion, the Supreme Court noted that the Court of Appeals had erred by analogizing the case to professional malpractice cases. *Id.* at 184, 409 S.E.2d at 905. The *Pierson* case had not been considered as a "professional service" or malpractice case by the trial court, as the trial court had cited N.C. Gen. Stat. § 1-52 in its dismissal of the action, and the plaintiff had conceded at oral argument before the Supreme Court that the insurance agent, defendant, "was not a professional[.]" *Id.* at 184-85, 409 S.E.2d at 905. Thus, although the Supreme Court was not directly addressing the issue of whether an insurance agent could be treated as a provider of a "professional service" under N.C. Gen. Stat. § 1-15(c), the Supreme Court stated that "[w]e therefore disavow the discussion of professional malpractice and N.C.G.S. § 1-15(c) in the Court of Appeals' opinion." *Id.* at 185, 409 S.E.2d at 905. As case law does not support plaintiff's argument that insurance agents provide "professional services", they are not subject to N.C. Gen. Stat. § 1-15(c) regarding professional malpractice. *See* N.C. Gen. Stat. § 1-15(c); *Pierson*, 330 N.C. 182, 409 S.E.2d 903; *Roberts* at 537-38, 289 S.E.2d at 878.

B. Discovery

[2] As to its professional malpractice claim, plaintiff cites N.C. Gen. Stat. § 1-15(c) as the applicable statute of limitations and argues that

the statute of limitations should be extended beyond the standard three year limitation because

> the loss or damage "originates under such circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin," such that it is "discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action," in which case "suit must be commenced within one year from the date discovery is made," and still no more than four years after the occurrence of the last act of the defendant. N.C. Gen. Stat. § 1-15(c); *Bolton v. Crone*, 162 N.C. App. 171, 589 S.E.2d 915 (2004); *Ramboot, Inc. v. Lucas*[,] 361 NC 695, 652 S.E.2d 650 (2007)[.]

Though we have determined that N.C. Gen. Stat. § 1-15(c) does not apply to this case, N.C. Gen. Stat. § 1-52 which governs the statute of limitations for negligence and breach of contract also contains a "discovery" provision. N.C. Gen. Stat. § 1-52(16) reads,

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property *becomes apparent or ought reasonably to have become apparent to the claimant*, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-52(16) (2005) (emphasis added).

N.C. Gen. Stat. § 1-52(16) is also inapplicable to plaintiff's claim. It "ought reasonably to have become apparent" to the plaintiff that any claim under products completed coverage would not be covered as the second page of the policy in effect at the time of Mr. McMillan's injury reads in all caps, "PRODUCTS-COMPLETED OPERATIONS AGGREGATE LIMIT [-] EXCLUDED[.]" We therefore conclude that the absence of completed products coverage should have been apparent to plaintiff on the date plaintiff received the policy, *see id.*, or at the latest, it should have been apparent to plaintiff immediately upon Mr. McMillan's injury. Under these circumstances, plaintiff has no valid argument regarding extension of the statute of limitations due to late discovery of the lack of completed products coverage.

C. Negligence

[3] Plaintiff alleges in its complaint:

> 13. Defendants were negligent, willful, wanton, reckless and grossly negligent in the following:
>
> A. In failing to use reasonable skill, care, and diligence to procure proper insurance coverage;
>
> B. In negligently conveying false advice;
>
> C. In misrepresenting the scope of insurance coverage;
>
> D. In breach of the fiduciary duty to inform Plaintiff that the policies did not cover completed products coverage;
>
> E. In breach of the fiduciary duty to keep insured correctly informed as to its insurance coverage;
>
> F. In failing to notify insured to procure insurance; and
>
> G. In misrepresenting to insured that completed products coverage had been procured and was a part of the policies the Plaintiff purchased.

Plaintiff's brief contends that although the "last act of the defendant giving rise to the cause of action" was 3 February 2003, the date Willie McMillan ("Mr. McMillan") was injured, defendants' actions and/or inactions resulted in a "continuing breach of the fiduciary duty to procure, inform and not misrepresent the insurance coverage" even after 3 February 2003.

However, plaintiff's argument ignores the fact that even if defendants had procured completed products coverage for plaintiff after Mr. McMillan's fall, it would have no effect on the current action involving the injury of Mr. McMillan.[1] Therefore, the last date defendants could have negligently performed and/or negligently failed to perform any action that could have had any effect on plaintiff's alleged damages was 3 February 2003, the date of Mr. McMillan's injury.

"N.C. Gen. Stat. § 1-52 . . . imposes a three-year statute of limitations for negligence actions." *Pompano Masonry Corp. v. HDR*

1. We note that defendants' brief asserts that they "could have procured completed operations coverage that would have covered the McMillan claim" until 1 March 2003, the date of expiration of the policy which was in effect at the time of the injury. We are unaware of any insurance policy that allows for the purchase of coverage for an injury that has already occurred. Furthermore, defendants do not direct us towards any language in the policy or other documents which indicates that insurance could be purchased for coverage after the injury has occurred.

Architecture, Inc., 165 N.C. App. 401, 409, 598 S.E.2d 608, 613, *disc. review allowed*, 359 N.C. 70, 604 S.E.2d 671 (2004), *appeal withdrawn*, 359 N.C. 412, 612 S.E.2d 130 (2005). "A cause of action based on negligence accrues when the wrong giving rise to the right to bring suit is committed, even though the damages at that time be nominal and the injuries cannot be discovered until a later date." *Harrold v. Dowd*, 149 N.C. App. 777, 781, 561 S.E.2d 914, 918 (2002).

Plaintiff filed its complaint on 31 October 2006, approximately three years and nine months after its negligence claim could possibly have accrued; therefore, plaintiff's claim for negligence is barred by the statute of limitations. *See Pompano Masonry Corp.* at 409, 598 S.E.2d at 613.

D. Breach of Contract

[4] Plaintiff also alleges, "Defendants breached their contractual obligation [(1)] by failing to reasonably counsel the Plaintiff and [(2)] by failing to include completed products coverage in the insurance policies the Defendants sold to the Plaintiff."[2] However, plaintiff's argument again ignores the fact that even if defendants had properly advised plaintiff and procured completed products coverage after Mr. McMillan's fall, it would have no effect on the current action involving the injury of Mr. McMillan.

> Limitations of actions for breach of contract are governed by G.S. § 1-52(1), the three-year statute of limitations, which applies to actions 'upon a contract, obligation or liability arising out of a contract, express or implied,' with exceptions not pertinent to this case. The statute begins to run when the claim accrues; for a breach of contract action, the claim accrues upon breach.

Miller v. Randolph, 124 N.C. App. 779, 781, 478 S.E.2d 668, 670 (1996) (citations, brackets, and ellipses omitted).

Mr. McMillan fell on 3 February 2003. Plaintiff's complaint was not filed until 31 October 2006, approximately three years and nine months after the latest possible date defendants could have breached their contract. Thus, plaintiff's claim for breach of contract is barred by the statute of limitations. *See id.*

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2. Plaintiff does not allege a breach of its insurance contract; the allegation is that plaintiff had a contract with defendant to provide advice regarding insurance coverage and to procure coverage. For purposes of this opinion only, we assume that such a contract existed and we need not decide whether this breach of contract claim could be a valid claim which is somehow separate and distinct from the negligence claim.

IV. Conclusion

We conclude that the trial court properly allowed defendant's motion for summary judgment.

AFFIRMED.

Judges CALABRIA and STEELMAN concur.

PHILLIP E. HEJL, PLAINTIFF-APPELLEE v. HOOD, HARGETT & ASSOCIATES, INC., DEFENDANT-APPELLANT

No. COA08-1065

(Filed 7 April 2009)

1. Appeal and Error— declaratory judgment order—reviewed as summary judgment

A trial court order concluding that a non-solicitation agreement was void as a matter of law was reviewed as a summary judgment where it appeared that the complaint for declaratory relief had been treated as a summary judgment, there were no disputed issues of fact, and summary judgment was an appropriate procedure in a declaratory judgment action.

2. Employer and Employee— non-compete agreement—consideration

A non-solicitation agreement signed after plaintiff had been working for defendant for fourteen years and after a payment of $500 was not void for lack of consideration. There was no allegation of inducement by fraud and the consideration was not illusory. The parties rather than the courts judge the adequacy of the consideration.

3. Employer and Employee— non-compete agreement—time limitation—reasonable

A non-solicitation agreement was reasonable as to time where the restriction was three years.

4. Employer and Employee— non-compete agreement—insurance—territory—not reasonable

A non-solicitation agreement signed by an insurance account executive was not reasonable as to territory and was not enforce-

able where the geographic area included the city where the office of the insurance company (defendant) was located, two states where defendant may offer services, and any person, firm, or entity to whom defendant had sold or quoted any product or service. Defendant's attempt to prevent plaintiff from obtaining clients where defendant had failed to do so was an impermissible restraint.

Appeal by Defendant from judgment dated 27 February 2008 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. Heard in the Court of Appeals 11 February 2009.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Robert C. Dortch, Jr., for Plaintiff-Appellee.

Cozen O'Connor, by Paul A. Reichs and Kimberly Sullivan, for Defendant-Appellant.

McGEE, Judge.

Phillip E. Hejl (Plaintiff) was hired as an account executive by the insurance company, Hood, Hargett & Associates, Inc. (Defendant) in July 1991. Defendant presented a non-solicitation contract (the Agreement) to Plaintiff fourteen years later, in January 2005. Defendant offered Plaintiff $500.00 to sign the Agreement, and Plaintiff signed the Agreement on 11 January 2005. The Agreement provided in relevant part:

1. **Consideration**. As consideration for the restrictions contained herein, [Defendant] shall pay [Plaintiff] the sum of FIVE HUNDRED DOLLARS ($500.00). [Plaintiff] acknowledges that this is reasonable and adequate consideration for the promises contained herein.

2. **Restrictive Covenant: Solicitation.** [Plaintiff] acknowledges that [Plaintiff's] services as an Account Executive/ Producer and as a key employee in a position of trust are of a special and unusual character having unique value to [Defendant], the loss of which cannot adequately be compensated by damages in an action at law. [Plaintiff] further acknowledges that [Defendant] has invested or will be required to invest significant time and money in training [Plaintiff], and that [Defendant] has or will be required to disclose to [Plaintiff] confidential and proprietary information, including, but not limited to, customer lists and rate structure information.

In consideration of employment, the mutual agreements contained herein and the payment of such compensation and benefits as agreed herein, [Plaintiff] agrees as follows:

(a) For a period of two years following [Plaintiff's] termination of employment, [Plaintiff] shall not:

(i) On behalf of himself, another insurance company and/or agency, directly or indirectly, seek to induce, promote, facilitate, solicit, quote rates for, receive, write, bind, broker, transfer or accept replacement or renewal of insurance or otherwise provide insurance and/or insurance services on behalf of any person, firm or entity to whom [Defendant] has sold any product or service, or quoted any product or service, whether or not for compensation, in the one year prior to the time [Plaintiff] ceases to be employed by [Defendant]. Nor will [Plaintiff] induce or seek to induce the discontinuance or lapse of any insurance coverage or service provided or placed by [Defendant] in the one year prior to the time [Plaintiff] ceases to be employed by [Defendant]. This restriction applies regardless of whether [Plaintiff], directly or indirectly contacts the policyholder or prospect, or whether the policyholder or prospect contacts or seeks to contact [Plaintiff].

. . .

(b) . . . [Plaintiff] covenants to refrain from performing or engaging in the activity prohibited by paragraph 2(a) hereof and its subparts in (1) Charlotte, North Carolina, or (2) in any other city, town, borough, township, village or other place in the State of North Carolina or the State of South Carolina in which city, borough, township, village or other place [Defendant] is engaged in rendering its services or selling its products.

After signing the Agreement, Plaintiff continued to work for Defendant two more years. Defendant terminated Plaintiff's employment on 5 February 2007.

Plaintiff filed a complaint for declaratory relief on 10 September 2007. In his complaint, Plaintiff alleged he:

> intends to seek to induce, solicit, quote rates for, receive, write, bind, broker, transfer, or accept placement or renewal of insurance on behalf of persons or entities to whom Defendant sold any product or service in the one year prior to the time Plaintiff was terminated by Defendant. Plaintiff intends to undertake those actions in North Carolina and South Carolina.

Plaintiff requested that the trial court declare the rights and obligations of the parties regarding the enforceability of the Agreement. Specifically, Plaintiff asked the trial court to determine whether the Agreement was void because it: (1) lacked material and substantial consideration, (2) was overly broad with regard to length of time and breadth, or (3) was overly broad with regard to geographic scope.

Defendant filed an answer and counterclaim on 21 November 2007. Defendant admitted the facts alleged in Plaintiff's complaint, and joined Plaintiff in asking the trial court to determine the validity of the Agreement by considering the issues of consideration and the time and geographic scope of the Agreement. In addition, Defendant counterclaimed for breach of contract, seeking damages in accordance with the Agreement. Plaintiff filed a reply to Defendant's counterclaim on 2 January 2008.

The matter was heard on 27 February 2008. After considering pleadings, affidavits, briefs, and arguments of counsel, the trial court entered an order on 6 March 2008. The trial court concluded the Agreement was void as a matter of law due to the lack of adequate and valuable consideration. The trial court ordered that the Agreement was unenforceable and dismissed Defendant's counterclaim with prejudice. Defendant appeals.

[1] Defendant first argues the trial court erred in finding the Agreement void due to a lack of adequate and valuable consideration. Defendant further argues the trial court should not have dismissed Defendant's counterclaim as the Agreement was reasonable as to time and scope and was therefore valid and enforceable.

"The Declaratory Judgment Act, [N.C. Gen. Stat. §] 1-253 *et seq.*, affords an appropriate procedure for alleviating uncertainty in the interpretation of written instruments and for clarifying litigation." *Bellefonte Underwriters Insur. Co. v. Alfa Aviation*, 61 N.C. App. 544, 547, 300 S.E.2d 877, 879 (1983) (citing *Insurance Co. v. Curry*, 28 N.C. App. 286, 221 S.E.2d 75, *disc. review denied*, 289 N.C. 615, 223 S.E.2d 396 (1976)), *aff'd per curiam*, 310 N.C. 471, 312 S.E.2d 426

(1984). "North Carolina courts have held that summary judgment is an appropriate procedure in an action for declaratory judgment." *Medearis v. Trustees of Myers Park Baptist Church*, 148 N.C. App. 1, 4, 558 S.E.2d 199, 202 (2001) (citing *Conner Co. v. Spanish Inns*, 294 N.C. 661, 242 S.E.2d 785 (1978), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002); *see also Montgomery v. Hinton*, 45 N.C. App. 271, 262 S.E.2d 697 (1980)). "Summary judgment may be entered . . . under Rule 56 of the North Carolina Rules of Civil Procedure, and the Rule applies in an action for declaratory judgment." *Bellefonte*, 61 N.C. App. at 547, 300 S.E.2d at 879 (citing *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 42-43 (1972)). Therefore, on review of a declaratory judgment action, we apply the standards used when reviewing a trial court's determination of a motion for summary judgment. *Medearis*, 148 N.C. App. at 4, 558 S.E.2d at 202.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (citing *Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E.2d 411 (1958) and *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956)).

In the present case, the existence and provisions of the Agreement are admitted, and the facts are not in controversy. The controversy is the legal significance of those facts. Further, although Plaintiff's complaint was labeled "Complaint for Declaratory Relief," it appears the trial court treated it as a motion for summary judgment. With no disputed issues of fact, and with summary judgment being an appropriate procedure in a declaratory judgment action, we review the trial court's judgment as a motion for summary judgment determining whether the trial court's judgment can be sustained on any grounds.

I. Consideration

[2] We first review Defendant's argument that the trial court erred in its conclusion of law that the Agreement was not a valid contract due to the lack of adequate and valuable consideration. Our Courts have

held that a covenant not to compete is valid if the covenant is: " '(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy.' " *Exterminating Co. v. Griffin and Exterminating Co. v. Jones*, 258 N.C. 179, 181, 128 S.E.2d 139, 140-41 (1962) (quoting *Asheville Associates v. Miller and Asheville Associates v. Berman*, 255 N.C. 400, 402, 121 S.E.2d 593, 594. (1961)). "Where the covenant is entered into in connection with an employee's being hired for a job, it is generally held that 'mutual promises of employer and employee furnish valuable considerations each to the other for the contract.' " *Reynolds & Reynolds Co. v. Tart*, 955 F. Supp. 547, 553 (W.D.N.C. 1997) (quoting *Greene Co. v. Kelley*, 261 N.C. 166, 168, 134 S.E.2d 166, 167 (1964)). However, when the restrictive covenant is entered into after an already existing employment relationship, the covenant must be supported by "new consideration." *Greene Co.*, 261 N.C. at 168, 134 S.E.2d at 167 (emphasis added) (citing *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944)).

In the present case, Plaintiff signed the Agreement after he had been working for Defendant for fourteen years. Therefore, in order to be valid, the Agreement must be supported by "new consideration," *Greene Co.*, 261 N.C. at 168, 134 S.E.2d at 167, or "separate consideration." *Stevenson v. Parsons*, 96 N.C. App. 93, 97, 384 S.E.2d 291, 292-93 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990) and *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 597, 632 S.E.2d 563, 571 (2006). Our Courts have held the following benefits all meet the "new" or "separate" consideration required for a non-compete agreement entered into after a working relationship already exists: continued employment for a stipulated amount of time;[1] a raise, bonus, or other change in compensation;[2] a promotion;[3] additional training;[4] uncertificated shares;[5] or some other increase in responsibility or number of hours worked.[6] In addition to being

1. *Amdar, Inc. v. Satterwhite*, 37 N.C. App. 410, 246 S.E.2d 165, *disc. review denied*, 295 N.C. 645, 248 S.E.2d 249 (1978).

2. *See Associates, Inc. v. Taylor*, 29 N.C. App. 679, 225 S.E.2d 602 (1976); *Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824 (1989).

3. *Associates, Inc. v. Taylor*, 29 N.C. App. 679, 225 S.E.2d 602 (1976).

4. *Sales & Service v. Williams*, 22 N.C. App. 410, 206 S.E.2d 745 (1974).

5. *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 652 S.E.2d 284 (2007), *disc. review denied*, 362 N.C. 177, 658 S.E.2d 485 (2008).

6. *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824 (1989).

"new" and "separate," the consideration must not be illusory. Where the consideration is illusory, a party will not be bound to the agreement and the Court may set aside the contract for lack of consideration. *See Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 870, 433 S.E.2d 811, 814 (1993) (holding where the contract recited consideration but did not actually bind the employer to any promise, the consideration was illusory at best and therefore the contract was unenforceable).

Defendant argues the $500.00 constitutes new and adequate consideration to bind Plaintiff to the Agreement entered into after Plaintiff's employment began. Plaintiff counters that the consideration was not adequate because it was not a raise, promotion, or "anything of substance." However, the undisputed facts show Plaintiff received $500.00 as consideration for signing the Agreement.

Our Courts have not evaluated the *adequacy* of the consideration. Rather, the parties to a contract are the judges of the adequacy of the consideration. " 'The slightest consideration is sufficient to support the most onerous obligation, the inadequacy, . . . is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.' " *Machinery Co. v. Insurance Co.*, 13 N.C. App. 85, 90-91, 185 S.E.2d 308, 311-12 (1971) (quoting *Young v. Highway Commission*, 190 N.C. 52, 57, 128 S.E. 401, 403 (1925)), *cert. denied*, 280 N.C. 302, 186 S.E.2d 176 (1972). Where there is no fraud and the " 'parties have dealt at arms length and contracted, the Court cannot relieve one of them because the contract has proven to be a hard one.' " *Bald Head Island Utils., Inc. v. Village of Bald Head Island*, 165 N.C. App. 701, 704, 599 S.E.2d 98, 100 (2004) (quoting *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 722, 127 S.E.2d 539, 543 (1962)).

Plaintiff makes no allegation the Agreement was induced by fraud. Further, the consideration was not illusory because Plaintiff accepted the $500.00 at the time he signed the contract. Therefore, because the parties dealt at arms length, and the Plaintiff received $500.00 as consideration for signing the Agreement, we find the Agreement is not void due to lack of consideration.

II. Scope

We next consider Defendant's argument that the Agreement is valid because, in addition to being supported by consideration, the Agreement was reasonable as to time and territory.

A. Time

[3] The Agreement restricted Plaintiff's business activities for "a period of two years following [Plaintiff's] termination of employment." In addition, the Agreement included a one-year look-back period that prevented Plaintiff from providing services to anyone Defendant had as a client or had quoted products or service to for one year prior to Plaintiff's termination. Thus, the time restriction was three years. *Farr Assocs. v. Baskin* 138 N.C. App. 276, 280, 530 S.E.2d 878, 881 (2000). Our Supreme Court held a covenant of five years' duration to be valid in *Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961), and Plaintiff in the present case offers no case law holding a three-year covenant to be invalid; therefore, we find the time restraint in this Agreement does not invalidate the Agreement.

B. Territory

[4] "A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in maintaining [its] customers." *Manpower, Inc. v. Hedgecock*, 42 N.C. App. 515, 523, 257 S.E.2d 109, 115 (1979). "[T]o prove that a geographic restriction in a covenant not to compete is reasonable, an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships." *Hartman v. Odell and Assocs., Inc.*, 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995). " '[T]he territory embrace[d] [by the covenant] shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer.' " *A.E.P. Industries v. McClure*, 308 N.C. 393, 408, 302 S.E.2d 754, 763 (1983) (quoting *Asheville Associates v. Miller and Asheville Associates v. Berman*, 255 N.C. 400, 404, 121 S.E.2d 593, 595 (1961)).

> The Agreement in this case defines the territory restriction as:
>
> (1) Charlotte, North Carolina, or (2) in any other city, town, borough, township, village or other place in the State of North Carolina or the State of South Carolina in which city, borough, township, village or other place [Defendant] is engaged in rendering its services or selling its products.

These geographic areas included the city where Defendant's office is located and two states where Defendant may offer services. The Agreement also prevented Plaintiff from offering insurance services to "any person, firm or entity to whom [Defendant] has sold any product or service, *or quoted* any product or service." (emphasis added).

The geographic area is not limited to locations where Plaintiff had customers as an employee of Defendant. Rather, the geographic area encompasses two states regardless of whether Plaintiff had any personal knowledge of Defendant's customers in those areas. Further, the Agreement's restrictive covenant reaches not only current and former customers of Defendant, but also includes any person, firm, or entity to whom Defendant had merely quoted a product or service. Defendant's attempt to prevent Plaintiff from obtaining clients where Defendant had failed to do so, is an impermissible restraint on Plaintiff. Non-compete agreements may be directed at protecting a legitimate business interest. But in the case before us, where the Agreement reaches not only clients, but potential clients, and extends to areas where Plaintiff had no connections or personal knowledge of customers, the Agreement is unreasonable. *See Medical Staffing Network, Inc. v. Ridgway*, 197 N.C. App. ——, ——, 670 S.E.2d 321, 327-38 (2009). Therefore we hold the Agreement is invalid and unenforceable because the territory and customers encompassed by the Agreement are overly broad and not reasonably restricted to protect Defendant's legitimate business interests. The trial court's order determining the Agreement invalid and dismissing Defendant's counterclaim with prejudice is affirmed.

Affirmed.

Judges JACKSON and HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. JOHN JUNIOR RUSH, II

No. COA08-871

(Filed 7 April 2009)

1. Criminal Law— prosecutor's remarks—not grossly improper

The prosecutor's closing remarks in a prosecution for the murder of a thirteen-year old boy were not grossly improper where their purpose was to convince the jury to convict defendant specifically to deter defendant's unlawful behavior. Assuming that the argument was grossly improper, it could not have been prejudicial considering the uncontested overwhelming evidence of guilt.

2. Homicide— attempted first-degree murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence of attempted first-degree murder where defendant contended that the evidence of premeditation and deliberation was insufficient. The victim was shot while defendant and a co-conspirator were robbing a convenience store and there was sufficient evidence of premeditation and deliberation through the doctrine of acting in concert.

3. Sentencing— felony murder merger doctrine—arrest of underlying judgment

Judgment on an armed robbery conviction should have been arrested pursuant to the felony murder merger doctrine.

Appeal by defendant from judgments entered 5 December 2007 by Judge William Z. Wood, in Guilford County Superior Court. Heard in the Court of Appeals 11 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kevin L. Anderson, for the State.

Duncan B. McCormick for defendant-appellant.

HUNTER, JR., Robert N., Judge.

John Junior Rush, II ("defendant") appeals his convictions of first-degree murder, attempted first-degree murder, and robbery with a dangerous weapon. After review, we conclude that defendant received a trial free of prejudicial error, and remand for the trial court to arrest judgment on defendant's conviction of robbery with a dangerous weapon.

I. FACTUAL BACKGROUND

At trial, the State's evidence showed the following: Tam Nguyen and his thirteen-year-old son, Phi Nguyen, worked at the McConnell Road Mini Mart ("the Mini Mart"), a convenience store in Greensboro owned by the Nguyen family. Because of prior robberies, Tam Nguyen carried a .45 caliber Colt. The Nguyens kept the doors of the store locked at night, permitting only regular customers to enter.

On the night of 31 August 2005, defendant and Akheem Sterling ("Sterling") planned to rob the Mini Mart while Tam and Phi Nguyen, were working. Before the robbery, defendant and Sterling circled the Mini Mart three to four times, stopped at a nearby store to buy gloves for the robbery, and sent a woman known as "Noodles" to scout out

the store. After scouting out the store, "Noodles" drove defendant and Sterling to the Mini Mart. When defendant and Sterling approached the Mini Mart, Sterling knocked on the door. Phi opened the door and defendant ran past Phi to the register. After defendant found the register empty, he observed money on the counter to the left of the cash register and began putting the money in a plastic bag.

Sterling moved toward the back of the store, where Tam was located, and pointed his nine-millimeter handgun at Tam, whereupon Tam and Sterling exchanged gunfire. Sterling shot Tam at least twice and Sterling was shot once. After being shot, Sterling returned to the front of the store and shot Phi in the back of his head, in his chest, and in his back. Defendant and Sterling left the store with approximately $85.00. Tam survived the robbery, but shortly after being shot, Phi died. After the robbery, Sterling told defendant that he thought he killed both Tam and Phi Nguyen.

Subsequently, defendant and Sterling were arrested. On 14 September 2005, defendant, in a statement to the police, admitted that he and Sterling planned to rob the Mini Mart, and that during the course of the robbery, Sterling shot Tam and shot and killed Phi Nguyen.

On 3 January 2006, a grand jury indicted defendant on charges of first-degree murder, attempted first-degree murder, and robbery with a dangerous weapon. Defendant pled not guilty and was tried before a jury on 3-5 December 2007. Defendant's motions to dismiss all charges were denied. The jury convicted defendant of first-degree murder on the basis of the felony murder rule, attempted first-degree murder on the basis of premeditation and deliberation, and robbery with a dangerous weapon. Defendant was sentenced to life imprisonment for the first-degree murder of Phi Nguyen, 157 to 197 months' imprisonment for the attempted first-degree murder of Tam Nguyen and 64 to 86 months' imprisonment for robbery with a dangerous weapon. The sentences for attempted first-degree murder and robbery with a dangerous weapon run concurrently with defendant's life sentence for first-degree murder. Defendant gave notice of appeal in open court.

On appeal, defendant contends that the trial court erred by (1) failing to intervene *ex mero motu* during the prosecutor's closing argument, (2) denying defendant's motion to dismiss the charge of attempted first-degree murder, and (3) failing to arrest judgment on defendant's robbery with a dangerous weapon charge.

II. FAILURE TO INTERVENE *EX MERO MOTU*

[1] Defendant contends that the trial court erred by failing to intervene *ex mero motu* during the prosecutor's closing remarks. After reviewing the prosecutor's statements, we conclude that the remarks were not grossly improper, and therefore, do not rise to the level of prejudice that would warrant a new trial.

Because defendant failed to object to the prosecutor's remarks at trial, our review is limited to " ' "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." ' " *State v. Taylor*, 362 N.C. 514, 545, 669 S.E.2d 239, 265 (2008) (quoting *State v. McNeill*, 360 N.C. 231, 244, 624 S.E.2d 329, 338, *cert. denied*, 549 U.S. 960, 166 L. Ed. 2d 281 (2006)). Pursuant to this standard, " ' "only an extreme impropriety on the part of the prosecutor will compel [the] Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." ' " *Id.* (citations omitted).

In the present case, the prosecutor made the following closing argument to the jury:

> You know who committed this crime. You know how it was committed. Your difficulty is going to be in applying the law. And I say your difficulty. I hope you don't have any difficulty, but I anticipate you will, because you know that when you find this man guilty, he goes to prison for the rest of his life.
>
> Mercy? The State is not asking you to execute this man. They're not seeking the death penalty. That's a lot more mercy than was shown this 13 year old. A lot more mercy. We're asking you to find him guilty and let him spend the rest of his life in prison, so another 13 year old boy isn't innocently gunned down.

Defendant contends that the prosecutor's remarks were grossly improper because the statements suggested that convicting defendant would have a general deterrent effect on the conduct of others. During closing remarks, the prosecution may not argue that convicting the defendant will have a general deterrent effect; however, "the prosecution may argue specific deterrence, that is, the effect of conviction on the defendant himself." *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994). The prosecutor's closing remarks asked the jury "to find [defendant] guilty and let him spend the rest of his life in prison, so another 13 year old boy isn't innocently gunned

down." The purpose of the prosecutor's argument was to convince the jury to convict defendant to specifically deter defendant's unlawful behavior. As such, we conclude that the prosecutor's statements were not grossly improper.

Assuming *arguendo* that the prosecutor's argument was grossly improper, given the amount of evidence against defendant, it could not have been prejudicial. During trial, the State presented overwhelming evidence of defendant's guilt, including defendant's admissions to the police that he and Sterling planned and executed the robbery and that Sterling shot both Tam and Phi Nguyen. Moreover, this evidence was uncontested by defendant at trial and on appeal. Based on this evidence, the prosecutor's statements were not prejudicial, because it was unlikely that his statements impacted the jury's verdict.

We conclude that the prosecutor's remarks were not so grossly improper as to require *ex mero motu* action by the trial court. Moreover, even if the remarks were improper, they were not prejudicial because the record provides sufficient support for defendant's convictions. Accordingly, we hold that the trial court did not err by failing to intervene *ex mero motu* during the prosecutor's closing remarks.

III. MOTION TO DISMISS

[2] Defendant argues that the trial court erred in denying his motion to dismiss the charge of attempted first-degree murder on the grounds that there was insufficient evidence to prove the elements of premeditation and deliberation. We disagree.

When considering a motion to dismiss, based on insufficiency of evidence, the standard of review is "whether the State has offered substantial evidence to show the defendant committed each element required to be convicted of the crime charged." *State v. Jackson*, 189 N.C. App. 747, 753, 659 S.E.2d 73, 77, *disc. review denied*, *appeal dismissed*, 362 N.C. 512, 668 S.E.2d 564 (2008), *cert. denied*, 2009 U.S. LEXIS 1704. " ' "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ' " *State v. Edwards*, 174 N.C. App. 490, 496, 621 S.E.2d 333, 338 (2005) (citations omitted). In making a determination, the court must view the evidence admitted in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132

L. Ed. 2d 818 (1995). " 'The motion to dismiss should be denied if there is substantial evidence supporting a finding that the offense charged was committed.' " *State v. Poag*, 159 N.C. App. 312, 318, 583 S.E.2d 661, 666 (citations omitted), *appeal dismissed*, *disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (2003).

"A person commits the crime of attempted first degree murder if he: '[1] specifically intends to kill another person unlawfully; [2] he does an overt act calculated to carry out that intent, going beyond mere preparation; [3] he acts with malice, premeditation, and deliberation; and [4] he falls short of committing the murder.' " *Jackson*, 189 N.C. App. at 653, 659 S.E.2d at 77-78 (quoting *State v. Cozart*, 131 N.C. App. 199, 202-03, 505 S.E.2d 906, 909 (1998), *disc. review denied*, 350 N.C. 311, 534 S.E.2d 600 (1999)), *appeal dismissed*, *cert. denied*, 362 N.C. 512, 651 S.E.2d 225 (2007). A person acts with premeditation when " 'the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation.' " *State v. Jones*, 342 N.C. 628, 630, 467 S.E.3d 233, 234 (1996) (citation omitted). Deliberation is defined as "an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose[.]" *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 836 (1994). In determining whether there is evidence of premeditation and deliberation, our Court should consider the following factors: "(1) lack of provocation by the intended victim or victims; (2) conduct and statements of the defendant both before and after the attempted killing; (3) threats made against the victim or victims by the defendant; and (4) ill will or previous difficulty between the defendant and the intended victim or victims." *Cozart*, 131 N.C. App. at 202, 505 S.E.2d at 909.

To be convicted of a crime under the theory of acting in concert, the defendant need not do any particular act constituting some part of the crime. *State v. Moore*, 87 N.C. App. 156, 159, 360 S.E.2d 293, 295 (1987), *disc. review denied*, 321 N.C. 477, 364 S.E.2d 664 (1988). All that is necessary is that the defendant be "present at the scene of the crime" and that "he . . . act[] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *Id.* at 159, 360 S.E.2d at 295-96.

In the present case, the victim was shot while defendant and a confederate co-conspirator, were robbing the Mini Mart. Pursuant to the law of acting in concert, " '[i]f two or more persons join in a purpose to commit robbery with a firearm, each of them, if actually or

constructively present, is not only guilty of that crime if the other commits the crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a firearm, or as a natural or probable consequence thereof.' " *Poag*, 159 N.C. App. at 320, 583 S.E.2d at 667 (citation omitted).

Pursuant to the acting in concert doctrine, there was sufficient evidence presented at trial to find that defendant acted with premeditation and deliberation. The evidence in the record shows that defendant and Sterling planned the robbery of the Mini Mart. Prior to the robbery, defendant and Sterling circled the Mini Mart, sent "Noodles" inside to scout out the place, and purchased gloves to use. Furthermore, Sterling armed himself with a nine-millimeter handgun, and shot Tam Nguyen at least twice during the course of the robbery. This was sufficient evidence to show premeditation and deliberation. *See State v. Welch*, 316 N.C. 578, 590, 342 S.E.2d 789, 796 (1986) (holding that there was sufficient evidence of premeditation and deliberation when the defendant previously planned to commit the robbery, armed himself with a shotgun, and shot the victim during the robbery), *cert. denied*, 1998 N.C. LEXIS 515; *State v. Allen*, 162 N.C. App. 587, 592, 592 S.E.2d 31, 36 (finding that there was sufficient evidence of premeditation and deliberation when the defendant armed himself with a rifle as part of a plan to rob someone at an apartment, and only a brief period of time passed between the time he entered the apartment and shot the victim), *appeal dismissed*, 358 N.C. 546, 599 S.E.2d 557 (2004).

We hold that the trial court did not err in failing to dismiss defendant's charge of attempted first-degree murder because defendant acted in concert with Sterling to commit the robbery, wherein Sterling shot Tam Nguyen with premeditation and deliberation. We overrule the assignment of error.

IV. FAILURE TO ARREST ROBBERY CONVICTION

[3] Defendant contends that the trial court erred in failing to arrest judgment on the robbery with a dangerous weapon judgment and asks this Court to remand for resentencing. The State concedes that the sentence for the underlying robbery with a dangerous weapon conviction should have been arrested pursuant to the felony murder merger doctrine. We agree.

The felony murder merger doctrine provides that "[w]hen a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the mur-

der conviction." *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002). "[W]hen the sole theory of first-degree murder is the felony murder rule, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder[.]" *State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996) (quoting *State v. Small*, 293 N.C. 646, 660, 239 S.E.2d 429, 438-39 (1977)); *compare State v. Lewis*, 321 N.C. 42, 50, 361 S.E.2d 728, 733 (1987) (stating that if a defendant's conviction of first-degree murder is based on both the felony murder rule and premeditation and deliberation, a defendant may be sentenced for both first-degree murder and the underlying felony). In the present case, defendant's first-degree murder conviction was based on the felony murder rule, with the underlying felony of robbery with a dangerous weapon. In accordance with the felony murder merger doctrine, defendant's robbery with a dangerous weapon conviction merges with his first-degree murder conviction.

The trial court erred in failing to arrest judgment on robbery with a dangerous weapon as " 'the underlying felony must be arrested under the merger rule.' " *State v. Young*, 186 N.C. App. 343, 353, 651 S.E.2d 576, 583 (2007) (citations omitted), *appeal dismissed*, 362 N.C. 372, 662 S.E.2d 394 (2008). "The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment[.]" *State v. Marshall*, 188 N.C. App. 744, 752, 656 S.E.2d 709, 715 (quoting *State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966)), *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). Accordingly, we remand this case for the trial court to arrest judgment on the underlying felony of robbery with a dangerous weapon.

V. CONCLUSION

Defendant received a fair trial, free of prejudicial error. For the reasons stated herein, we hold that the trial court did not err in failing to intervene *ex mero motu* during the prosecutor's closing remarks. Moreover, the trial court properly denied defendant's motion to dismiss the charge of attempted first-degree murder. We remand to the trial court with instructions to arrest judgment on the robbery with a dangerous weapon conviction.

No error in part; remanded in part.

Judges McGEE and JACKSON concur.

DARRELL W. MUNNS, EMPLOYEE-PLAINTIFF v. PRECISION FRANCHISING, INC., EMPLOYER-DEFENDANT, AND KEY RISK INSURANCE CO., CARRIER-DEFENDANT

No. COA08-1034

(Filed 7 April 2009)

1. Workers' Compensation— refusal of suitable employment— wages in new job—further findings needed

A workers' compensation case was remanded for further findings as to the wages the employee would have earned in the job that was offered to him and that he declined. Without such a finding, the Commission could not have compared the wages the employee would have earned in the new position with those he was earning at the time of the injury and thus could not determine the suitability of the employment offered to the employee.

2. Workers' Compensation— refusal of suitable employment— make work

A job offered to an injured employee was a real job and not make work, and the Industrial Commission's conclusion that the employee refused suitable employment was not disturbed on this ground.

3. Workers' Compensation— refusal of suitable employment— physical suitability

The issue of whether an employee was justified in refusing a job offer after an injury on the ground that it was not physically suitable was remanded for further findings of fact. The Industrial Commission recited evidence rather than making findings.

4. Workers' Compensation— refusal of suitable employment— additional findings needed—disability not addressed

The issue of disability in a workers' compensation case was not addressed on appeal where the case was remanded for additional findings on the issue of suitable employment.

Appeal by employee from an Opinion and Award entered 30 May 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 February 2009.

Hardison & Associates, PLLC, by Benjamin T. Cochran and J. Jackson Hardison, for employee-appellant.

The Prather Law Firm, by J.D. Prather, for defendant-appellees.

STEELMAN, Judge.

Where the Commission failed to make adequate findings of fact regarding the suitability of the employment, the case is remanded to the Commission for additional findings.

I. Factual and Procedural Background

On 24 July 2004, Darrell Munns ("employee") was employed as a service technician at Precision Tune Auto Care ("employer"). On that date, employee sustained a compensable injury when a vehicle rolled over his left leg and foot. Employer accepted liability for employee's injury by filing a Form 60 on 6 August 2004, and employee received temporary total disability payments based on the average weekly wage of $730.38, which yielded a weekly compensation rate of $486.94. A plate was placed in employee's leg and he began physical therapy. In early 2005, employee received a Functional Capacity Evaluation ("FCE"), which demonstrated that he could do moderately heavy work, but that he could not stand for long periods of time. Employee was assigned restrictions of no walking, standing, or crawling for longer than thirty minutes without a fifteen-minute break, and was restricted from climbing on ladders. In April 2005, employee unsuccessfully attempted to return to work.

On 14 November 2005, Dr. Sanitate assigned employee permanent work restrictions of sedentary work only, frequent position changes, and no lifting over ten pounds. On 2 February 2006, Dr. Sanitate assigned a twenty-five percent permanent partial impairment rating to employee's left lower extremity. On that date, Dr. Sanitate approved a job description for a service writer/advisor position with employer as being within employee's physical abilities.

On 9 February 2006, employer offered employee the service writer/advisor position in its customer service department. Employee refused this position on the grounds that the job was not physically suitable or did not adequately take into consideration his work restrictions, that it was not a real job, or that the wages were not sufficiently similar to those of employee's prior position with employer so as to constitute suitable employment. On 20 November 2006, employer filed a Form 24 application, seeking to suspend employee's temporary total disability compensation for his refusal to accept the service writer/advisor position. A Special Deputy Commissioner disapproved the application on the grounds that the job description did not adequately describe the physical requirements of the position and the documented pay scale was not comparable to employee's pre-

injury average weekly wage. Employer offered the position to employee a second time on 15 January 2007, and again employee refused to accept the position.

On 24 January 2007, employer filed a second Form 24 application. The matter was referred for a full evidentiary hearing before a Deputy Commissioner. On 11 April 2007, Dr. Sanitate met with employee and continued the restrictions of sedentary work only, frequent position changes, and no lifting over ten pounds. Dr. Sanitate reviewed the job description for the service writer/advisor position for a second time and confirmed his approval of the position.

The Full Commission filed an Opinion and Award on 30 May 2008, concluding employee unjustifiably refused suitable employment and suspending employee's temporary total disability payments as of 11 April 2007. The Opinion and Award directed employer to pay for employee's ongoing medical treatment. Employee appeals.

II. Standard of Review

"The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001) (citation omitted). "Therefore, if there is competent evidence to support the findings, they are conclusive on appeal even though there is plenary evidence to support contrary findings." *Id.* The Commission's findings may only be set aside where there is a complete lack of competent evidence. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). "This Court reviews the Commission's conclusions of law *de novo*." *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006) (citation omitted).

III. Suitable Employment

In his first argument, employee contends the Commission erred in concluding that employee unjustifiably refused an offer of suitable employment. We remand this issue for additional findings.

N.C. Gen. Stat. § 97-32 provides that an injured employee shall not be entitled to compensation if he unjustifiably "refuses employment procured for him suitable to his capacity." N.C. Gen. Stat. § 97-32 (2007). "Suitable employment" is defined as "any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience." *Shah v. Howard Johnson*,

140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000) (quotation omitted). The burden is on the employer to show that an employee refused suitable employment. *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002). Once the employer makes this showing, the burden shifts to the employee to show that the refusal was justified. *See, e.g.*, *Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 389-90, 561 S.E.2d 315, 320 (2002).

Wages

[1] Employee first contends that the service writer/advisor job was not "suitable employment" because it did not offer wages comparable to those he earned in his job as a service technician prior to his injury.

"The disparity between pre-injury and post-injury wages is one factor which may be considered in determining the suitability of post-injury employment." *Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 921, 563 S.E.2d 235, 241 (2002) (citing *Dixon v. City of Durham*, 128 N.C. App. 501, 504, 495 S.E.2d 380, 383 (1998)).

The Commission made two findings of fact regarding the wages for the service writer/advisor position:

> 21. On January 24, 2007, defendants filed a second Form 24 Application, this time including a chart showing the amount [employee] would have earned as a service writer/advisor in the year preceding his injury vis-a-vis what [employee] actually earned as a service technician during that period. The calculations were based on a 49-hour work-week and the store's sales during that period. The average pay for the service writer/advisor position was figured as $670.88 per week. [Employee] contended that the position was make-work, alleging that no one had been a full-time service writer/advisor at [employee's] store. Special Deputy Commissioner Rawls referred the matter for a full evidentiary hearing.
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> . . .
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> 25. The last full-time service writer/advisor who had worked at [employee's] store was John Linton, who had worked there about a year prior. Mr. Linton was paid $10 per hour plus a weekly bonus of one percent of the store's sales if the sales exceeded $12,500. . . .

As the sole fact-finding agency in this case, the Industrial Commission had a duty to make findings of fact which were "more than a

mere summarization or recitation of the evidence," and which resolved any conflicting testimony. *Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) (citation omitted). Moreover, it is well-established that, "[w]hile the Industrial Commission is not required to make specific findings of fact on every issue raised by the evidence, it is required to make findings on crucial facts upon which the right to compensation depends." *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5, 613 S.E.2d 715, 719 (2005) (citation omitted).

Finding of fact 21 merely recites the evidence submitted by employer in its second Form 24 application. It does not make a finding of the wages employee would have earned as a service writer/advisor when that job was offered to employee on 15 January 2007. Without such a finding, the Commission could not have compared the wages employee would have earned in the new position with those he was earning at the time of injury. In fact, the Commission made no such comparison. Without such comparison, the Commission could not determine the suitability of the employment offered by employer. We thus cannot say that the Commission's conclusion that employee refused suitable employment is supported by adequate findings of fact. Accordingly, this case is remanded for additional findings of fact. *See id.* ("Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact.").

"Make Work"

[2] Employee next contends that the job was "make work" in that it was not a real job.

In *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986), the North Carolina Supreme Court held that employers may not "avoid paying compensation merely by creating for their injured employees makeshift positions not ordinarily available in the market[.]" *Id.* at 444, 342 S.E.2d at 810. "[I]f other employers would not hire the employee with the employee's limitations at a comparable wage level. . . . [or] if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market, the job is 'make work' and is not competitive." *Jenkins v. Easco Aluminum*, 165 N.C. App. 86, 95, 598 S.E.2d 252, 258 (2004) (quotation omitted).

The Commission found that "[d]efendant-employer has offered this position to the general public in the past and there have been multiple service writers/advisors at the location where [employee] worked." At the hearing, Roy Stahl, president of operations of employer, testified that employer had service writers and service advisors in more than half of its stores, and that employer had offered the service writer/advisor position to the general public in the past. Mr. Stahl further testified that he needed a service writer/advisor to improve his business. Suzanne Weigand, a personnel director for employer, testified that, at the time of the hearing, she had an advertisement running for the service writer/advisor position.

We hold that the Commission's finding regarding the availability of the position in the job market is supported by competent evidence. The service writer/advisor position offered to employee was a "real job," and was available in the competitive job market. We do not disturb the Commission's conclusion that employee refused suitable employment on this ground.

Physical Suitability

[3] Employee next contends that he was justified in refusing the job offer on the grounds that employer failed to show that it was physically suitable.

The Commission made the following findings regarding the physical suitability of the service writer/advisor position:

15. On the February 2, 2006 visit, Dr. Sanitate also reviewed a job description for a "service writer/advisor" position with defendant-employer. According to the job description, the position involves customer service, with the employee being "the first point of contact with customers both on the phone and in person" and "act[ing] as liaison between the customer and the services that [defendant-employer] offers, coordinating the flow of information and ensuring good customer service." [Employee] expressed his concerns at the appointment regarding his lack of computer skills, his inability to operate a clutch on a manual transmission (the job description calls for the employee to "assist shop flow by moving vehicles in and out of service bays"), and his trouble with wearing a shoe for more than an hour because of discomfort.

16. At the February 2, 2006 visit, defendants' nurse case manager, Mary Anne Peterson, presented the job description to

Dr. Sanitate and noted the concerns that [employee] himself expressed verbally at the appointment. Additionally, Ms. Peterson presented to Dr. Sanitate the January 31, 2006 letter that [employee's] counsel had presented to her under the Commission's Rehabilitation Rules. In that letter, [employee's] counsel pointed out that the job description is silent as to the amount of standing and walking that is required in the position and he noted that some of the duties appear nonsedentary in nature, with prolonged standing required.

17. Dr. Sanitate approved the job description as being within [employee's] physical abilities.

. . .

22. On April 11, 2007, defendants sent [employee] back to Dr. Sanitate for clarification of [employee's] work restrictions and again review the job description. Ms. Peterson and a representative from [employee's] counsel's law firm attended the evaluation with [employee] to ensure that all of [employee's] concerns regarding the job, including his concerns regarding prolonged standing and walking, were presented to and addressed by Dr. Sanitate. Dr. Sanitate noted left lower extremity atrophy and he left in place the restrictions of sedentary work only, frequent position changes and no lifting over 10 pounds. He further noted that any job requiring long distance walking, crawling or kneeling was ill-advised, that infrequent use of a clutch was not contraindicated, and that [employee] should be allowed position changes as needed. Dr. Sanitate reviewed and approved the job description a second time.

These findings again constitute recitations of the evidence and not findings of fact that support the Commission's conclusions as to suitability. The Opinion and Award contains no findings addressing employee's ability to perform the service writer/advisor job "considering his age, education, physical limitations, vocational skills and experience." *Shah*, *supra*. This issue is also remanded to the Commission for further findings of fact.

IV. Conclusion of Law

[4] In his second argument, employee contends that the Commission erred in concluding that he did not meet his burden of proving disability.

The Commission concluded that "[employee] was offered suitable employment, which had been approved by his treating physician taking into account any concerns [employee] had regarding the position, on April 11, 2007," and that employer was "entitled to suspend [employee's] [temporary total disability payments] as of April 11, 2007[.]" Because we are remanding this case to the Commission for additional findings on the issue of suitable employment, we do not address the issue of disability.

The Opinion and Award is remanded for additional findings of fact.

REMANDED.

Judges GEER and STEPHENS concur.

ROD BRIND'AMOUR, PLAINTIFF v. KELLE BRIND'AMOUR, DEFENDANT

No. COA08-543

(Filed 7 April 2009)

1. Child Support, Custody, and Visitation— child support— *Pataky* presumption—rebutted

The trial court did not abuse its discretion in a child support case by determining that the *Pataky* presumption (that the amount agreed upon in the parties' agreement is just and reasonable) had been rebutted. The parties submitted substantial evidence of expenses related to the children's needs and the court made numerous, in-depth findings regarding the children and their expenses; the trial court has the discretionary authority to enter an order establishing child support in an amount less than that established by a separation or child support agreement.

2. Child Support, Custody, and Visitation— child support— amount—supported by findings

A child support order was supported by adequate findings where the court made over one hundred findings supported by the evidence, painstakingly reviewed the evidence, compared the evidence, and in its discretion determined an amount that would address the needs of the children. Although defendant argued

that the order deprived the children of advantages and luxuries they otherwise would have received, in its discretion the court determined that a portion of the expenses defendant claimed were either not related to need or were exorbitant. This includes the determination that the cost of a nanny was not necessary.

Appeal by defendant from judgment entered 7 December 2007 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 3 December 2008.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, D. Caldwell Barefoot, Jr., and Tobias S. Hampson, for plaintiff-appellee.

Gailor, Wallis & Hunt, P.L.L.C., by Kimberly A. Wallis, for defendant-appellant.

BRYANT, Judge.

Kelle Brind'Amour (defendant) appeals from an order entered 7 December 2007 ordering Rod Brind'Amour (plaintiff) to pay to defendant child support in the amount of $9,147.00 per month. We affirm.

Facts

Plaintiff and defendant were married 4 August 1996 and separated 10 September 2003. The parties have three minor children who were born of the marriage. On 11 September 2003, plaintiff filed a complaint seeking child custody and equitable distribution. Defendant filed an answer and counterclaim seeking alimony and child support on 5 December 2003. Before the claims were resolved, and because plaintiff, a professional hockey player, faced a possible "lock out" by NHL owners, the parties executed a "Memorandum of Agreement of Equitable Distribution and Support Between Rod Brind'Amour and Kelle Brind'Amour" (the Agreement) which provided for child support and settled all issues relating to equitable distribution of the parties' marital property. The agreement provided that plaintiff would pay $15,000.00 per month in non-taxable child support to defendant. In the event a "lock out" occurred, plaintiff would pay $2,500.00 per month until the NHL Hockey season resumed. The agreement also provided:

Either party will have the right to file a claim regarding the support of the children in the event: (1) a NHL lockout occurs during

> the 2004-2005 season and [plaintiff] is employed and earning income as a hockey player; (2) a NHL lockout will occur or continue into the 2005-2006 or 2006-2007 hockey season; or (3) prior to the beginning of the 2006-2007 hockey season after the expiration of [plaintiff]'s current contract. Payment of $2,500 per month child support is consensual and is not evidence of or to be construed as a presumption that the amount of child support in this Memorandum of Agreement is just and reasonable, or reflects the children's reasonable needs or [plaintiff]'s ability to pay. . . .

No portion of the Agreement was incorporated into a court order.

On 2 August 2004, pursuant to the Agreement, the parties voluntarily dismissed with prejudice their claims against each other but expressly excluded their claims for child custody and child support.

Plaintiff filed a Motion in the Cause for Establishment of Child Support on 8 September 2006. On 31 January 2007, defendant also filed a Motion in the Cause for Establishment of Child Support and for Attorney Fees and alleged plaintiff refused to pay certain extracurricular activities expenses as required by the agreement.

On 7 December 2007, the trial court entered an order awarding defendant $9,147.00 per month in child support. In addition, plaintiff was required to pay for all health care expenses, extracurricular activities expenses, and pay for all reasonable remaining educational expenses not covered by the agreement. In the order, the trial court made the following relevant findings:

> 20. Given the temporary nature of the parties' agreement with regard to child support amounts, the presumption accorded child support in unincorporated separation agreements—that the amount agreed to by the parties is just and reasonable—is rebutted by the intent of the parties as evidenced in the Agreement and in their conduct both before and after the execution of the Agreement.
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> . . .
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> 23. The Brind'Amour children have enjoyed advantages that are not available to most children. These advantages include large homes, travel, and exposure to a multitude of extracurricular activities including fine arts classes, participation in sports, and attendance at plays, musicals, museums and magic shows.
>
> . . .

25. Plaintiff and Defendant have divergent views on the lifestyle each wants for the children. The Custody Order provides the parents with joint decision-making authority regarding major decisions affecting the health and welfare of the children. The custody Order further provides that day-to-day decisions concerning the children will be made by the parent the children are with at the time.

. . .

27. Plaintiff has a strong desire to instill the value of frugality and hard work in his children, notwithstanding his high income. With the exception of the expenses related to the former marital residence, which has been for sale almost since its completion more than 5 years ago, Plaintiff's living expenses for himself and the minor children when they are in his care are substantially lower than those of the Defendant and the minor children when they are in her care.

. . .

35. As noted above, Defendant has waived her rights to and dismissed her claims for spousal support. An amount in excess of the amount awarded as child support, below, would essentially result in Plaintiff providing support to Defendant and/or result in Plaintiff subsidizing Defendant's choices regarding the children's standard of living—choices that Plaintiff has historically not supported and are inconsistent with his own lifestyle and the choices he has made for the minor children.

. . .

36. It is unreasonable for Plaintiff to be required to pay more child support than the amount set forth herein because the Defendant's expenses related to the children are excessive (as detailed below). Requiring Plaintiff to pay more than the amount set forth herein would involuntarily transfer the power of discretionary spending on the children to Defendant and result in a windfall to her that would benefit her, and her choices, more than it would serve to benefit any reasonable needs of the children.

. . .

38. The parties have abided by the terms of the Custody Order resulting in Plaintiff having the children at least forty percent

(40%) of the time and Defendant having the children no more than sixty percent (60%) of the time.

. . .

51. Defendant spends $15,600 annually ($1,300) per month on a nanny. In addition, Defendant provides a separate automobile for the nanny to use.

. . .

53. Because of the flexibility in her schedule, when the children are in the care of Defendant, the children's need for supervision and transportation can be met by Defendant without assistance of a nanny. Currently there is only one evening per week when the children are in Defendant's care for which the children's scheduled activities conflict. The cost of a nanny is not a reasonable expense when the children are in Defendant's care.

. . .

55. Defendant owns two (2) vehicles, that she keeps for the nanny's use. . . . The cost of the second vehicle is not an expense that is reasonably related to the needs of the children.

. . .

71. Defendant spends approximately $1,130.37 per month on the children's entertainment and recreation. . . .

. . .

73. Defendant has provided insufficient evidence to determine what portion of her expenditures for recreation and entertainment was solely for the children's parties as opposed to parties she threw for her friends. In addition, Defendant has provided insufficient evidence to determine the entertainment costs for the children for the other local activities.

74. It is excessive and unreasonable for Defendant to spend $1,130.37 per month on the children's entertainment. A more reasonable amount is $355 per month, which allows for spending $500 on each child's birthday party, $300 on each child's end of school pool party, and $60 per week for the time the children are in her custody.

. . .

107. It is reasonable and in the best interests of the children for Plaintiff to pay prospective child support to Defendant in the amount of $9,147 per month . . . .

Defendant appeals.

On appeal, defendant argues: (I) the trial court erred in holding that the child support obligation agreed upon in the parties' unincorporated agreement was not entitled to a presumption of reasonableness; (II) the trial court's order for child support is not supported by adequate findings of fact and conclusions of law; and (III) the trial court erred by intervening to reduce or relieve the plaintiff of his contractual obligations to support his children.

I

[1] Defendant argues the trial court erred by concluding that the amount of child support payments established in the parties' agreement was not entitled to a presumption of reasonableness or that the *Pataky* presumption was rebutted. We disagree.

" '[I]n the absence of evidence to the contrary,' the court must respect a presumption that 'the amount mutually agreed upon in the parties' child support agreement is just and reasonable.' " *Pataky v. Pataky*, 160 N.C. App. 289, 303, 585 S.E.2d 404, 413 (2003) (quoting *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963)). To rebut this presumption, a party must "show the amount of support necessary to meet the reasonable needs of the child[ren] at the time of the hearing. . . . While evidence of a change in circumstances . . . may be relevant to the issue of reasonableness, such evidence is not an absolute requirement to justify an increase." *Boyd v. Boyd*, 81 N.C. App. 71, 76, 343 S.E.2d 581, 585 (1986). "To accord sufficient weight to parties' separation agreements, as our common law directs, the benchmark for comparison must be the amount needed for the children *at the time of the hearing*, compared with that provided in the agreement." *Pataky*, 160 N.C. App. at 303, 585 S.E.2d at 413 (emphasis supplied).

Our review of a child support order is limited to determining whether the trial court abused its discretion. *Roberts v. McAllister*, 174 N.C. App. 369, 374, 621 S.E.2d 191, 195 (2005). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing

court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Id.*

Defendant contends the trial court erred by concluding that the *Pataky* presumption did not apply to the parties' separation agreement. However, because the trial court also concluded that even if the *Pataky* presumption applied it had been rebutted, we need not address defendant's first contention. We must only determine whether sufficient evidence was presented to overcome the *Pataky* presumption.

In the present case, both parties submitted substantial evidence of expenses related to the children's needs at the time of the hearing. The trial court made numerous, in-depth findings regarding the children's accustomed standard of living, the needs of the children, and the variance between the expenses incurred by defendant on behalf of the children and expenses incurred by plaintiff on behalf of the children. These findings are sufficient to support the trial court's conclusion that the *Pataky* presumption was rebutted. Although in most cases, the custodial parent obtains an increase in child support, a court has discretionary authority to enter an order establishing child support in an amount less than the amount established by a separation or child support agreement. *See Bottomley v. Bottomley*, 82 N.C. App. 231, 234-35, 346 S.E.2d 317, 320 (1986) (holding trial court had discretionary authority to enter order setting child support amount as less than that provided for in the parties' separation agreement). We hold the trial court did not abuse its discretion by determining that the *Pataky* presumption had been rebutted.

II

[2] Defendant also argues the trial court's order was not supported by adequate findings. We disagree.

The trial court, in its order, made over one hundred findings of fact regarding the evidence presented at trial. Although the sheer number of findings does not automatically mean the findings were supported by the evidence, in the instant case, the trial court painstakingly reviewed the evidence presented, compared the evidence, and, in its discretion, determined an appropriate amount of child support that would address the needs of the children.

Defendant essentially argues that, given plaintiff's income, the trial court's order deprives the children of advantages and luxuries they otherwise would have received. However, the trial court care-

fully considered the advantages and luxuries the children received—such as private school—and ensured the children were able to continue to have the advantages. The trial court's numerous substantive findings indicate the trial court carefully considered the evidence presented by defendant regarding the needs of the children and their accustomed standard of living. The trial court, in its discretion, determined that a portion of the expenses defendant claimed as related to the needs of the children were either unrelated to need or were exorbitant. We cannot say the trial court abused its discretion by refusing to include a portion of the expenses claimed by defendant as necessary to meet the reasonable needs of the children.

Defendant specifically contends the trial court erred by determining that the cost of a nanny was unnecessary. However, the trial court found that plaintiff had the children 40% of the time, defendant had the children 60% of the time, and because of defendant's schedule, defendant could meet the children's transportation needs without the assistance of a nanny. The trial court also found that because defendant was able to transport the children, expenditures for an additional car for the nanny's use were unnecessary. The evidence presented established that defendant was not employed outside of the home and there was only one instance per week where the children's activity schedules overlapped. We hold the trial court's finding was supported by competent evidence in the record and the trial court did not abuse its discretion.

III

Defendant argues the trial court erred by intervening and reducing the amount of child support agreed upon by the parties. We disagree.

In *Bottomley*, this Court affirmed a trial court's ability to reduce the amount of child support agreed to in an agreement if the evidence presented supported a finding that the amount agreed upon was excessive. *Id.* at 234-35, 346 S.E.2d at 320. Having already established that a trial court may in its discretion reduce the amount of child support and having determined the trial court in the present case did not abuse this discretion, we reject defendant's argument. This assignment of error is overruled.

AFFIRMED

Judges McGEE and STEELMAN concur.

THE STATE OF NORTH CAROLINA v. ANTHONY JACQUE JOHNSON

No. COA08-604

(Filed 7 April 2009)

1. Homicide— instruction—lapse in one instance—no plain error

There was no plain error in the trial court's second-degree murder instruction in context where the trial court omitted in one instance "with a deadly weapon" from the phrase "intentionally and with malice wounded [the victim] with a deadly weapon."

2. Sentencing— mitigating factors—failure to find—no abuse of discretion

The trial court did not abuse its discretion by not finding certain statutory mitigating factors when sentencing defendant for second-degree murder. It was within the court's discretion to determine that defendant's home life and mental health issues did not significantly reduce his culpability, or that defendant did not have a good treatment prognosis.

Appeal by defendant from judgment entered 23 July 2003 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 10 December 2008.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Hollis, for the State.

Public Defender Jennifer Harjo, by Assistant Public Defender Nora Henry Hargrove, for defendant-appellant.

BRYANT, Judge.

Defendant Anthony Johnson, born 12 July 1986, appeals from judgments and commitments entered 23 July 2007 consistent with a jury verdict finding him guilty of two counts of second degree murder. For the reasons stated herein, we find no error.

On 18 April 2005, defendant was indicted for two counts of first degree murder in the deaths of Regina Shelton and Bobby Handy. At trial, evidence presented by the State tended to show that on 18 December 2003 Jacob Snipes, a long-time friend of defendant's, sold crack cocaine to Regina Shelton and Bobby Handy along Randleman Road in Greensboro, North Carolina. Snipes and Shelton exchanged

phone numbers, and Shelton called Snipes the next afternoon to arrange another cocaine purchase. Snipes did not have the requested amount of cocaine so he manufactured "counterfeit dope to make up the difference between what [he] had . . . and what [he] didn't have." Snipes was with defendant that afternoon and told defendant that Shelton and Handy were spending $100.00 every time they purchased cocaine from him. Snipes also told defendant about his plan to sell Shelton and Handy "counterfeit dope."

That evening, Snipes traveled to Shelton and Handy's room at AmeriSuites where he sold them fake drugs for $150.00. Before Snipes made it back home, Handy called to complain. He wanted either real drugs or his money back. Snipes said he was unaware the drugs were not real, but if Handy agreed to buy more drugs, he would get an extra $50.00 worth of cocaine. Handy agreed.

When Snipes returned home, he informed defendant what had happened. Snipes stated, "I'm about to head back out there," and defendant responded, "Well, we need to go ahead and get them."

Counsel: What did he mean, "We need to go ahead and get them"?

Snipes: Just to get the money and leave.

Counsel: Are you saying that was [defendant's] idea?

Snipes: Yes, sir.

Counsel: Was he going to sell them any drugs at any time?

Snipes: No, sir.

Snipes acquired four grams of crack cocaine and along with defendant headed to meet Shelton and Handy. At approximately 9:00 p.m., on 19 December 2003, Snipes and defendant entered Shelton and Handy's hotel room. Snipes sold two grams of cocaine, the first of which Shelton and Handy smoked immediately. Snipes then excused himself to use a bathroom where defendant called him on his cell phone and told him to "get it all started."

When Snipes returned from the bathroom, he attacked Handy, but Handy soon got the upper hand. Defendant pushed Handy away and told Snipes "to go get the girl." Shelton had begun to scream and had reached the outside door when Snipes pulled her back inside. Snipes held her by the neck and choked her until she was no longer moving. Defendant also stood over an unconscious Handy.

Counsel: What did [defendant] do when he got up?

Snipes: He stood up and went over to—We already knew where the money was at by that time, so we went over there, got the money—dumped the pocketbook out on the bed, got the money, and then we picked up the cell phone.

Then he grabbed the iron and hit Regina [Shelton] in the head with the iron two times and then went over there and hit Mr. Handy like three times with the iron.

Defendant testified that he sold Shelton and Handy cocaine in the hotel room and that Shelton attacked him to get more drugs. Although he saw Snipes pick up an iron, he left the room before anyone was struck with any kind of blunt object.

Dr. Maryane Gaffney-Kraft, qualified as an expert in forensic pathology, testified that the cause of death of Bobby Handy was asphyxia by strangulation. Dr. Thomas Owens, also qualified as an expert in forensic pathology, testified that the cause of death of Regina Shelton was some type of attack, "unspecified homicidal violence" but most likely asphyxiation.

After the close of the evidence, during the charge conference, the trial court stated that it would give a second degree murder instruction that the State had to prove "malice, unlawfulness, intent to wound with a deadly weapon . . . but [did not] have to prove specific intent to kill, premeditation or deliberation." In its instructions to the jury, the trial court stated the following:

Court: In order for you to find [defendant] guilty of second-degree murder, the State must prove beyond a reasonable doubt that [defendant], or someone acting in concert with him, intentionally and *with malice wounded Ms. Shelton* and thereby proximately caused her death.

If the State proves beyond a reasonable doubt that [defendant], or someone acting in concert with him, intentionally inflicted a wound upon Ms. Shelton that proximately caused her death, you may infer, first, that the killing was unlawful, and second, that it was done with malice, but you are not compelled to do so.

You may consider the inferences, along with all other facts and circumstances, in determining whether the killing was

> unlawful and done with malice. If it was unlawful and done with malice, [defendant] would be guilty of second-degree murder.

(Emphasis added). Once the jury was excused, the trial court addressed counsel for both the State and defendant.

> Court: [A]s to what I've told them so far, any objections, corrections or additions to the charge as given? Its a complicated charge, so if I did not say it right just let me know.
>
> State: None from the State, Your Honor.
>
> Defense: Not from the defense.

For the deaths of Bobby Handy and Regina Shelton, the jury found defendant guilty of two counts of second degree murder. The trial court entered judgments in accordance with the jury's verdicts and committed defendant to two consecutive terms of 264 to 326 months in the custody of the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant raises the following two questions: (I) Did the trial court commit plain error in instructing the jury on second degree murder; and (II) did the trial court commit reversible error in sentencing defendant.

I

[1] First, defendant argues that the trial court committed plain error in instructing the jury on the charge of second degree murder as it pertained to Regina Shelton. Defendant argues that the trial court failed to require that the jury find that "[defendant], acting alone or together with others, intentionally and with malice wounded Ms. Shelton *with a deadly weapon* . . . ." (Emphasis added). We disagree.

When reviewing jury instructions, our Supreme Court has stated the following:

> The charge of the [trial] court must be read as a whole . . . . It will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. Hooks, 353 N.C. 629, 634, 548 S.E.2d 501, 505 (2001) (internal and external citations omitted). "Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *Id.* at 633, 548 S.E.2d at 505 (citation omitted).

"Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citation omitted).

Here, the trial court defined second degree murder as "the unlawful killing of a human being with malice, but without premeditation and deliberation." Malice was described as follows:

> If the State proves beyond a reasonable doubt that [defendant], or someone acting in concert with him, intentionally killed Ms. Shelton with a deadly weapon or intentionally inflicted a wound upon Ms. Shelton with a deadly weapon, and that that proximately caused Ms. Shelton's death, then you may infer that the killing was unlawful and that it was done with malice, but you are not compelled to do so.
>
> . . .
>
> Hands or other body parts can be a deadly weapon under some circumstances, as can ordinarily household items, such as irons or telephones, but whether such items or body parts are used as deadly weapons, alone or in conjunction with each other, in this case is a factual question to be determined by you in light of all the evidence and circumstances you find.

The trial court stated that "[i]n order for you to find [defendant] guilty of second-degree murder, the State must prove beyond a reasonable doubt that [defendant], or someone acting in concert with him, intentionally and *with malice wounded Ms. Shelton* and thereby proximately caused her death." (Emphasis added). The trial court then recapped its second degree murder instruction with the following statement:

> So[,] if you find from the evidence beyond a reasonable doubt that on or about December 19th, 2003 [defendant], acting alone or together with others, intentionally and *with malice wounded Ms. Shelton with a deadly weapon* and that this proximately caused

> her death, it would be your duty to return a verdict of guilty of second-degree murder.

(Emphasis added).

Furthermore, the trial court also instructed the jury on the charges against defendant as they pertained to Bobby Handy.

> For you to find [defendant] guilty of second degree murder the State must prove beyond a reasonable doubt that [defendant], or someone acting in concert with him, unlawfully, intentionally and *with malice wounded Mr. Handy with a deadly weapon*, thereby proximately causing his death . . . .

(Emphasis added). Also, in recapping its instructions on second degree murder, the trial court stated the following:

> If you find from the evidence beyond a reasonable doubt that on or about December 19th of 2003 [defendant], acting by himself or together with others, intentionally and *with malice . . . wounded Mr. Handy with a deadly weapon*, thereby proximately causing Mr. Handy's death, it would be your duty to return a verdict of guilty to second-degree murder.

(Emphasis added).

We hold that the trial court's lapse in stating "with a deadly weapon" when describing the State's theory as to the element of malice did not prejudice defendant. *See State v. Perez*, 182 N.C. App. 294, 300, 641 S.E.2d 844, 849 (2007) (holding that where the charge viewed as a whole, contextually leaves no reasonable cause to believe the jury was misled there was no prejudicial error). Accordingly, this assignment of error is overruled.

II

[2] Next, defendant argues the trial court erred in failing to find substantial and uncontested mitigating factors prior to sentencing and he is entitled to a new sentencing hearing wherein his mitigating evidence will be reconsidered. We disagree.

> Prior to imposing a sentence other than the presumptive term for a particular offense, the trial court is required to consider the statutory list of aggravating and mitigating sentencing factors listed in N.C.G.S. § 15A-1340.16 [], to make written findings of fact concerning the factors, and to determine whether one set outweighs the other or whether they are counterbalanced.

State v. Hilbert, 145 N.C. App. 440, 442, 549 S.E.2d 882, 884 (2001) (citation omitted). "A sentencing judge must find a statutory mitigating sentence factor if it is supported by a preponderance of the evidence. A mitigating factor is proven when the evidence is substantial, uncontradicted, and there is no reason to doubt its credibility." *State v. Kemp*, 153 N.C. App. 231, 241, 569 S.E.2d 717, 723 (2002) (internal citations omitted). "A trial judge is given wide latitude in determining the existence of . . . mitigating factors, and the trial court's failure to find a mitigating factor is error only when no other reasonable inferences can be drawn from the evidence." *State v. Norman*, 151 N.C. App. 100, 105-06, 564 S.E.2d 630, 634 (2002) (citation omitted).

Here, defendant asked the trial court to find the following statutory mitigating factors:

1) [T]hat the defendant was suffering from a mental or physical condition that was insufficient to constitute a defense, but significantly reduced his culpability for the offense;

2) [T]hat the defendant's age or immaturity significantly reduced his culpability for the act;

3) [T]hat the defendant acted under strong provocation;

4) [T]hat the defendant has a good treatment prognosis.

The trial court found only one statutory mitigating factor, that "defendant's age, or immaturity, at the time of the commission of the offense significantly reduced the defendant's culpability for the offense."

Defendant states that his youth and home life "were abysmal" and that he has been diagnosed with mental health issues such as attention deficit disorder, conduct disorder, and adjustment disorder; however, we hold it was within the trial court's discretion to determine that such conditions did not significantly reduce defendant's culpability.

Evidence was also presented on the issue of defendant's redeemability. Dr. Jerry Noble, an expert in clinical psychology, testified that he thought there was hope for defendant, that he was redeemable given a structured setting and resources such as are available in the Department of Correction. On such evidence, we hold the trial court was within its discretion to determine that defendant did not have a good treatment prognosis. Accordingly, this assignment of error is overruled.

Further, we hold defendant's argument that he acted under strong provocation to be without merit.

No error.

Judges McGEE and GEER concur.

CAROLINA PHOTOGRAPHY, INC., A NORTH CAROLINA CORPORATION, PLAINTIFF v. REGINALD S. HINTON, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA08-609

(Filed 7 April 2009)

1. Taxation— sales and use—photography sitting fees—taxable income

Sitting fees charged each student before the student ordered printed photographs are part of the sales price of those printed photographs and constituted taxable income under the Sales and Use Tax Act. Carolina Photography could not produce or sell a printed photograph if it did not first arrange the sitting to take the picture. N.C.G.S. § 105-164.3(16).

2. Taxation— bulletin and administrative decision—publication

The argument that a Department of Revenue Sales and Use Tax Technical Bulletin and an administrative decision were not applicable because they were not published was rejected where the bulletin was available on a website, the administrative decision in a Lexis database, and plaintiff had the option of contacting the Department of Revenue to inquire about its liability.

Appeal by defendant from order entered 12 February 2008 by Judge John B. Lewis, Jr. in Superior Court, Lincoln County. Heard in the Court of Appeals 17 November 2008.

Philip M. Moilanen, P.C., by Philip M. Moilanen, and Pendleton, Pendleton & Deaton, PA, by Wesley L. Deaton, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for defendant-appellant.

WYNN, Judge.

Under the Sales and Use Tax Act, revenue derived from the "sales price" of tangible personal property is taxable income.[1] In this matter, the Secretary of Revenue argues that the trial court erred by ruling that "sitting fees" charged by Carolina Photography on photographs ultimately sold to high school seniors did not constitute taxable income. Because Carolina Photography's "sitting fees" are charges for fabrication labor of printed photographs, we hold that the "sitting fees" constitute taxable income and therefore reverse the trial court's ruling.

Carolina Photography engaged in the business of photographing underclass and senior students at various North Carolina high schools. Carolina Photography arranged a variety of poses, backgrounds, and lighting for senior students, for which they were charged a "sitting fee," regardless of whether the students ultimately purchased printed photographs. The "sitting fee" was charged at the time the photographs were taken. If a senior student ultimately ordered printed photographs, Carolina Photography charged additional fees to cover the cost of production. Approximately 30% of students that paid a "sitting fee" did not purchase any finished prints.

On 10 June 2002, the Secretary of Revenue audited Carolina Photography's records for the period between 1 March 1999 to 31 January 2002. As a result of the audit, the Secretary of Revenue assessed additional sales tax on Carolina Photography for its collection of "retouching fees," "copyright fees," and "sitting fees" from senior students. However, the Secretary of Revenue did not assess sales tax on "sitting fees" that did not precede an order for printed photographs. Thus, the Secretary of Revenue's audit resulted in additional tax only on those "sitting fees" that were ultimately followed by an order for printed photographs.

Following the audit, Carolina Photography paid all additional sales tax, but filed suit under N.C. Gen. Stat. § 105-267 (1999) for a refund of all additional amounts paid. On cross-motions for summary judgment, the trial court entered an order on 12 February 2008 that, in relevant part:[2] (1) granted Carolina Photography a refund for additional tax paid for its "sitting fees;" and (2) reserved judgment on the

1. N.C. Gen. Stat. § 105-164.3(16) (1999).

2. The trial court's order also adjudicated Carolina Photography's liability for additional tax on "copyright fees" and "retouching fees," but the parties agree that those charges are not in dispute before this Court.

amounts Carolina Photography actually paid. On 25 February 2008, the trial court entered a consent judgment allocating the amounts to be refunded or paid.

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[1] On appeal, the Secretary of Revenue argues that the "sitting fees" fall within the plain language of N.C. Gen. Stat. § 105-164.3(16) (1999), which defines "sales price" as:

> the total amount for which tangible personal property is sold including charges for any services that go into the fabrication, manufacture or delivery of such tangible personal property and that are a part of the sale valued in money whether paid in money or otherwise and includes any amount for which credit is given to the purchaser by the seller without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest charged, losses or any other expenses whatsoever.

N.C. Gen. Stat. § 105-164.3(16) (1999). As support for its position, the Secretary of Revenue also cites *Young Roofing Co. v. Dep't of Revenue*, 42 N.C. App. 248, 256 S.E.2d 306 (1979), Department of Revenue Sales and Use Tax Technical Bulletin § 32-2(B), and several Department of Revenue administrative decisions. We consider these authorities in turn.

In *Young Roofing*, this Court considered whether "fabrication labor, of sheet metal articles made to order for taxpayer's customers" was within the taxable sales price of the sheet metal products ultimately sold. *Young Roofing*, 42 N.C. App. at 249, 256 S.E.2d at 307. The Court held that the fabrication labor was within the taxable sales price because the statute "expressly provid[ed] the cost of labor shall not be deducted in the calculation of the sales price." *Id.* at 250, 256 S.E.2d at 307.

The Sales and Use Tax Technical Bulletin and administrative interpretations the Secretary of Revenue cites are consistent with the reasoning in *Young Roofing*. A rule, bulletin, or directive promulgated by the Secretary of Revenue which interprets a law under the Sales and Use Tax Act is *prima facie* correct, N.C. Gen. Stat. § 105-264 (1999); however, the construction given a law in an administrative decision by the Secretary of Revenue is not deemed *prima facie* correct, although it is entitled to due consideration by the courts. *Campbell v. Currie*, 251 N.C. 329, 333, 111 S.E.2d 319, 322-23 (1959); *Nat'l Serv. Indus., Inc. v. Powers*, 98 N.C. App. 504, 507, 391 S.E.2d 509, 511, *disc. review denied*, 327 N.C. 431, 395 S.E.2d 685 (1990).

North Carolina Sales and Use Tax Technical Bulletin § 32-2 (issued 1 June 1996) was issued in part under the authority of N.C. Gen. Stat. § 105-264, and the Bulletin addresses the taxability of "photo supplies, photographs and materials." Subsection (B) provides, in pertinent part:

> *Gross receipts from sales of photographs* including all charges for developing or printing by commercial or portrait photographers or others are subject to the general rate of State tax and any applicable local sales or use tax.

N.C. Sales and Use Tax Technical Bulletin § 32-2(B) (1996), *available at* http://www.dor.state.nc.us/practitioner/sales/bulletins/toc.html (emphasis added) (last visited 21 November 2008).

The Department of Revenue decided several refund actions after the Bulletin was issued, each of which are consistent with the reasoning in *Young Roofing* that charges for the fabrication of tangible personal property are taxable. In *Docket No. 99-187*, 1999 N.C. Tax LEXIS 27 (Dec. 20, 1999), for example, the taxpayer was engaged in the business of advertising and design, in which it performed certain "creative services" in association with the sale of tangible personal property. *Id.* at *5-6. The taxpayer collected sales tax on the tangible personal property it sold, but did not collect sales tax on the "creative services," although it invoiced those separately. *Id.* As Carolina Photography does in this case, the taxpayer in *Docket No. 99-187* argued that the "creative services" were rendered separately from the transaction for the sale of the tangible personal property, and thus not a part of the "sales price" of that property. The Assistant Secretary of Revenue rejected this interpretation of N.C. Gen. Stat. § 105-164.3(16) and its accompanying regulation, 17 N.C. Admin. Code 7B.0901(c) (1999), because the "sales and use tax is a transaction oriented tax and the application of the tax is dependent upon the nature of the transaction entered into between the parties." *Id.* at *9. Because the "true nature of the transactions in question . . . involved the acquisition of tangible personal property," the Assistant Secretary of Revenue declined to view the transaction for "creative services" as distinct from the taxable transaction for tangible personal property. *Id.* The "creative services" "were an inseparable function of the fabrication process that produced the tangible personal property sold." *Id.*

In *Docket No. 2004-348*, 2005 N.C. Tax LEXIS 2 (May 18, 2005), the Assistant Secretary of Revenue reached the same conclusion regarding a photographer's "sitting fees" and "overtime charges." The

photographer was a retailer of wedding photographs and videos. To compensate for the extended time and editing work that sometimes accompanied production of the photographs and videos, the photographer occasionally charged "sitting fees" and "overtime charges." *Id.* at *9-10. The photographer argued that the "sitting fees" and "overtime charges" should be excluded from the sales price of the printed photographs and videos as a nontaxable service. *Id.* at *10. The Assistant Secretary of Revenue again rejected the argument, finding that the term "gross receipts" in Sales and Use Tax Technical Bulletin § 32-2(B) "includes overtime charges and sitting fees." *Id.* at *12. The Assistant Secretary of Revenue concluded that the "sitting fees" and "overtime charges" were services necessary to complete the sale of the tangible personal property that was the ultimate object of the transaction. *Id.* at *12-13. Thus, in its interpretations before and after the audit period in this case, the Department of Revenue has interpreted the meaning of "sales price" in N.C. Gen. Stat. § 105-164.3(16) to include charges for fabrication labor preceding a sale of tangible personal property.

Nonetheless, Carolina Photography seeks to distinguish *Young Roofing* and the Department of Revenue's administrative decisions by arguing that its "sitting fees" are unique because they were charged and billed separately, regardless of whether the student ultimately purchased printed photographs. Furthermore, Carolina Photography argues that the Bulletin and the administrative decisions should not be applicable because there is no evidence that they were published by the Department of Revenue. This distinction is without merit.

Indeed, Carolina Photography was assessed additional sales tax only for "sitting fee" charges that preceded a sale of printed photographs. Therefore, following the reasoning in *Young Roofing*, the Bulletin, and the Department of Revenue's administrative decisions, the "sitting fee" charges preceding the sale of printed photographs must be considered charges for labor to fabricate the printed photographs. Stated another way, Carolina Photography could not produce, or ultimately sell, a printed photograph if it did not first arrange the "sitting" to take the picture. Accordingly, we hold that the "sitting fees" Carolina Photography charged each senior student before the student ordered printed photographs, are part of the sales price of those printed photographs.

[2] Finally, we are not persuaded by Carolina Photography's argument that Sales and Use Tax Technical Bulletin § 32-2 and the Department of Revenue's administrative decisions should not apply

because they were not published. First, the Department of Revenue maintains a website where the Sales and Use Tax Technical Bulletins are available. *See* http://www.dor.state.nc.us/practitioner/sales/bulletins. Also, the Department of Revenue's administrative decisions are published on the Lexis database. Finally, Carolina Photography had the option, which it did not exercise, to contact the Department of Revenue to inquire about its liability to collect tax on its "sitting fees."

In sum, we reverse the trial court's order granting a refund to Carolina Photography for the tax assessed on its "sitting fee" charges.

Reversed.

Judges STEPHENS and JOHNSON concur.

HAMMER PUBLICATIONS, D/B/A THE RHINOCEROS TIMES, PLAINTIFF V. THE KNIGHTS PARTY, DEFENDANT

No. COA08-654

(Filed 7 April 2009)

Appeal and Error— appealability—summary judgment—injunction—distribution of newsletter—violation of settlement agreement—damages to be determined

Appeal from a summary judgment and permanent injunction involving distribution of defendant's newsletters was interlocutory where the amount of damages was left to be determined, the trial judgment did not certify the summary judgment or the permanent injunction for immediate appeal, and there was no jeopardy to a substantial right. Although defendant argued loss of First Amendment rights, the presence of protected First Amendment material does not mean that defendant is exempt from the general laws, such as those governing the settlement agreement involved here. Assuming that First Amendment rights are affected, defendant's own statements demonstrate a myriad of other ways to distribute its newsletters.

Appeal by defendant from summary judgment order and permanent injunction entered on or about 18 March 2008 by Judge

V. Bradford Long in Superior Court, Guilford County. Heard in the Court of Appeals 4 December 2008.

Smith, James, Rowlett & Cohen, L.L.P. by Seth R. Cohen, for plaintiff-appellee.

The Law Offices of David E. Sherrill, by David E. Sherrill, for defendant-appellant.

STROUD, Judge.

Defendant appeals from two orders entered on 18 March 2008, one granting partial summary judgment for plaintiff and the other a permanent injunction. For the reasons as stated below, we dismiss defendant's appeal as interlocutory.

I. Background

Plaintiff's complaint alleges the following: Plaintiff is the publisher of The Rhinoceros Times ("*The Rhino Times*"), "a weekly newspaper published in Guilford County[.]" Defendant "is a Nevada non-profit corporation" which does business in Guilford County and solicits "paid memberships to its organization." On 19 December 2006, plaintiff filed a lawsuit against defendant[1] seeking a temporary restraining order and permanent injunction against defendant to prevent defendant from distributing its newsletters by placing them within *The Rhino Times*. Following mediation, the parties entered into a Settlement Agreement on 5 October 2007. The Settlement Agreement provided in pertinent part that

> 1. The Knights Party, by and through its officers and agents, including Thomas Robb, National Director of The Knights Party ("Mr. Robb") acknowledge that there may have been copies of newsletters, published by The Knights Party, being placed in or about publications of The Rhino Times. If such distribution did occur, The Knights Party denies that it is aware of the source of activity.
>
> 2. The Knights Party and Mr. Robb acknowledge that it has been their policy that copies of the newsletter distributed by The Knights Party should not be distributed by placing them inside copies of The Rhino Times.

1. The named defendants in the prior lawsuit were Knights of the Ku Klux Klan, Knights of the Ku Klux Klan d/b/a The Knights Party, and The Knights Party. The Settlement Agreement from the prior lawsuit identified all of these parties collectively as "The Knights Party." However, in this lawsuit, The Knights Party is the only defendant.

> 3. The Knights Party and Mr. Robb agree that it [sic] will discourage and take reasonable actions as set out below to prevent their newsletter, i.e., The Knights Party Newsletter, or any other newsletter distributed by The Knights Party, from being placed inside The Rhino Times.
>
> 4. The Knights Party and Mr. Robb agree to contact all members of its organization residing in North Carolina, so as to put these individuals on notice that The Knights Party newsletter should not be distributed by placing such newsletters inside *The Rhino Times* for the reason stated in paragraph 2.

On or about 21 October 2007, plaintiff filed the present complaint and motions for a temporary restraining order and preliminary injunction. Plaintiff alleged it was entitled to compensatory and punitive damages for breach of contract because defendant violated the Settlement Agreement by making statements on The Knights Party web site encouraging use of *The Rhino Times*" as a means to distribute the Knights Party newsletters, in direct contravention of defendant's agreement to affirmatively discourage such activity." Plaintiff also requested entry of a temporary restraining order, a preliminary injunction, and a permanent injunction "requiring defendant to abide by the terms of the Settlement Agreement[.]"

Defendant filed its answer on 10 January 2008. Although defendant admitted the allegations of the complaint as to the entry of the Settlement Agreement and specifically as to the terms of paragraphs 3 and 4 of the agreement, defendant also alleged an affirmative defense of mutual mistake as to the Settlement Agreement. In its answer, defendant also asserts that the Settlement Agreement only prevented it from placing its newsletter inside *The Rhino Times* newspaper for distribution, but that it was still free to wrap its newsletter around a newspaper for distribution.

On 14 February 2008, plaintiff filed a motion for summary judgment as to defendant's liability for breach of contract. On 18 March 2008, the trial court granted plaintiff's motion for summary judgment as to liability for breach of contract and entitlement to compensatory and punitive damages. The summary judgment order also noted that "plaintiff is entitled as a matter of law to compensatory and punitive damages in amounts to be determined by the trier of fact." On the same date, the trial court entered a permanent injunction requiring defendant to "abide by the terms of the Settlement Agreement, including paragraphs 3 and 4 of that Agreement." The injunction further

ordered defendant to "immediately cease and desist" and "permanently enjoined [defendant] from distributing its newsletters by placing them inside, outside, around, or together with *The Rhinoceros Times*." Defendant appeals from both the order granting summary judgment and the permanent injunction.

II. Interlocutory Appeal

The summary judgment order and permanent injunction have not resolved all of the claims raised by plaintiff as the trial court left the amount of damages "to be determined by the trier of fact." Thus, the order and injunction are interlocutory. *See Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 851, 668 S.E.2d 114, 116 (2008) (citation and quotation marks omitted) ("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.") "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568 (2007) (citation and quotation marks omitted).

> Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citations, quotation marks, and ellipses omitted). Our Supreme Court has also noted that the appellant must demonstrate that the delay of the appeal affecting a substantial right "will work injury if not corrected before final judgment." *Harris* at 269, 643 S.E.2d at 569 (citation, quotation marks, and brackets omitted).

The trial court did not certify either the summary judgment order or the permanent injunction for immediate appeal. Therefore, defendant's brief correctly notes that it "has the burden of showing the Court

that the orders in question deprive the Appellant of a substantial right which would be jeopardized absent review prior to the final determination on the merits." Defendant argues that it has a "substantial right to distribute its information [which] will be jeopardized absent an immediate review[,]" and that its First Amendment rights will be "stripped away from it during the pendency of this action until the trial on damages [is] held."

The North Carolina Supreme Court has determined that "First Amendment rights are substantial[.]" *Harris* at 270, 643 S.E.2d at 569. However, "[i]t is not determinative that the trial court's order affects a substantial right. The order must also work injury if not corrected before final judgment." *Id.* Thus, if defendant's First Amendment rights are not merely affected, but rather "threatened or impaired by an interlocutory order, immediate appeal is appropriate." *Id.* at 270, 643 S.E.2d at 570. Thus, for immediate appeal to be proper, we must conclude that either or both the order and injunction (1) affect defendant's First Amendment rights and (2) "threaten[] or impair[]" defendant's First Amendment rights. *Id.*

Defendant's argument that its First Amendment rights are even implicated is weak. The fact that a newsletter contains speech and ideas which may be subject to First Amendment protection does not mean that defendant as an organization is exempt from general laws, including those governing contracts, i.e. the Settlement Agreement. *See generally Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132, 81 L. Ed. 2d 953, 961 (1937) ("The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.")

However, even if we assume *arguendo* that defendant's First Amendment rights are affected by the injunction or summary judgment order, defendant has failed to demonstrate that the order or injunction "will work injury if not corrected prior to final judgment." *Harris* at 269, 643 S.E.2d at 569 (citation, quotation marks, and brackets omitted). Defendant does not articulate any particular reason why it must use *The Rhino Times* for distribution of its newsletter. The permanent injunction does not prevent defendant from distributing its literature in any way other than use of *The Rhino Times*. De-

fendant's own statements in the record belie its assertion that the injunction preventing it from use of *The Rhino Times* as a means to distribute its literature would work a substantial hardship, or indeed any hardship at all. Defendant claims on its web site that it was using pages of *The Rhino Times* only as a weight to wrap the newsletter around so that it might be more easily thrown into yards. Defendant stated that "[i]t is a common practice among many in the patriotic and evangelical movement to purchase or collect recycled newsprint, use a few sheets for weight purposes, and wrap an informational leaflet around the outside of the newsprint." Defendant makes the same point in its brief: "[w]rapping literature around discarded sheets of newsprint as an economical means of sharing information with the general public, whether that newsprint is the New York Times, the circular from a department store, or the Rhino Times . . . was and continues to be fully legal." Defendant does not contend that the permanent injunction has prevented it from publishing and distributing its newsletter or any other literature. Defendant itself noted that it could use another newspaper or the "circular from a department store" for the same purpose. Thus, neither the summary judgment order or the permanent injunction jeopardize a substantial right of defendant, as defendant's own statements demonstrate that defendant has a myriad of other ways to distribute its newsletters. Even with the order and injunction in full force and effect, defendant remains free to publish and distribute its newsletters in any manner it chooses, other than use of *The Rhino Times*. Defendant's First Amendment rights have not been "threatened or impaired[,]" *Harris* at 270, 643 S.E.2d at 570, simply because defendant is unable to distribute its newsletter in *The Rhino Times* while all other legal means of distribution are still available to it. As defendant's First Amendment rights have not been "injur[ed]," *id.*, we will not review defendant's appeal. *See Harris* at 269, 643 S.E.2d at 568-69; *Jeffreys* at 379, 444 S.E.2d at 253.

III. Conclusion

For the reasons stated above, defendant's appeal from the order granting partial summary judgment and the permanent injunction is dismissed.

DISMISSED.

Judges CALABRIA and STEELMAN concur.

LARRY W. PIGG, AND WIFE, GLORIA VANDIVER, PLAINTIFFS v. BOYD B. MASSAGEE, JR. AND PRINCE, YOUNGBLOOD AND MASSAGEE, PARTNERSHIP, DEFENDANTS

No. COA08-1270

(Filed 7 April 2009)

1. Appeal and Error— appealability—denial of Rule 60 motion

An appeal was dismissed as interlocutory where the order appealed from was a denial of a Rule 60(b) motion, did not contain a certification, and the brief did not address why there was no just reason for delay or the substantial right that would be lost without immediate appeal.

2. Appeal and Error— sanctions—attempt to re-litigate

A motion for sanctions against plaintiff was granted on appeal where the appeal was a transparent attempt to re-litigate prior orders from several trial courts, prior appellate opinions, and an order denying plaintiffs' previous petition for discretionary review by the Supreme Court.

Appeal by plaintiffs from order entered 24 June 2008 by Judge John W. Smith in Henderson County Superior Court. Heard in the Court of Appeals 12 March 2009.

Gloria A. Vandiver and Larry W. Pigg, Pro se, for plaintiffs-appellants.

No brief, for defendants-appellees.

PER CURIAM.

Larry W. Pigg and his wife, Gloria Vandiver, (together, "plaintiffs") appeal from an order denying plaintiffs' motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure for relief from judgment in a collateral matter. Boyd B. Massagee, Jr. ("defendant") and the partnership, Prince, Youngblood & Massagee, (collectively, "defendants") have moved this Court to dismiss plaintiffs' appeal and to enter sanctions against plaintiffs. Plaintiffs also have moved this Court to grant sanctions against defendants. For the reasons set forth below, we deny plaintiffs' motion, grant defendants' motion to dismiss plaintiffs' appeal, and remand the matter to the trial court for a hearing on sanctions to be entered against plaintiffs.

In addition to the relevant procedural facts set forth below, we note that in *Etter v. Pigg*, 175 N.C. App. 419, 623 S.E.2d 368, 2006 WL 10918 (2006) (unpublished) ("*Etter I*") and *Etter v. Pigg*, 186 N.C. App. 679, 652 S.E.2d 71, 2007 WL 3256828 (2007) (unpublished) ("*Etter II*"), *disc. rev. denied*, 362 N.C. 176, 658 S.E.2d 483 (2008), plaintiffs previously were the respondents in a collateral matter relating to a property line dispute. Although plaintiffs proceeded *pro se* throughout most of the *Etter* litigation at both the trial and appellate levels, defendants represented plaintiffs by filing a response and counterclaim at the beginning of the *Etter v. Pigg* property line dispute.

On 23 October 2006, plaintiffs filed a complaint against defendants seeking relief for defendants' alleged (1) professional negligence, (2) breach of implied contract, and (3) partnership liability for the individual defendant's actions. On 16 June 2008, plaintiffs filed a motion pursuant to North Carolina Rules of Civil Procedure, Rule 60 for relief from a final judgment entered on 5 June 2006.[1] On 24 June 2008, the trial court entered an order denying plaintiffs' motion. On 22 July 2008, plaintiffs appealed from an order denying their motion. On 20 November 2008, defendants moved this Court to dismiss plaintiffs' frivolous appeal and to enter sanctions against plaintiffs. On 25 November 2008, plaintiffs in turn moved this Court to grant sanctions against defendants.

[1] Initially, we hold that the trial court's order entered on 24 July 2008 is interlocutory in that it does not dispose of the entire case. *See Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("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.") (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916)). Such orders ordinarily are not immediately appealable. *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, when "(1) the order represents a final judgment as to one or more claims in a multiple claim lawsuit or one or more parties in a multi-party lawsuit," and (2) the trial court certifies that "there is no just reason to delay the appeal," Rule 54 of the North Carolina Rules of Civil Procedure permits an immediate appeal.

1. The final judgment entered 5 June 2006 was entered with respect to the prior *Etter v. Pigg* proceedings rather than the current *Pigg v. Massagee* lawsuit. *See Etter II*, 186 N.C. App. 679, 652 S.E.2d 71, 2007 WL 3256828 at *1.

Harris v. Matthews, 361 N.C. 265, 269 n.1, 643 S.E.2d 566, 569 (2007) (citing N.C. Gen. Stat. § 1A-1, Rule 54(b)).

Appellants have the burden of showing that an appeal is proper. *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (per curiam) (2005). When an appeal is from an interlocutory order, "the appellant[s] must include in [their] statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Id.* (quoting N.C. R. App. P. 28(b)(4)). However, the appellants must do more than merely assert that the order affects a substantial right; they must show why the order affects a substantial right. *Id.* "Where the appellant fails to carry the burden of making such a showing to the [C]ourt, the appeal will be dismissed." *Id.* (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)).

In the case *sub judice*, plaintiffs assert that their appeal follows from a final judgment of the superior court pursuant to North Carolina General Statutes, section 7A-27(b). Notwithstanding plaintiff's bald assertion, the trial court's order denying plaintiffs' Rule 60(b) motion does not contain a certification pursuant to North Carolina Rules of Civil Procedure, Rule 54, and plaintiffs' brief does not address (1) why there is no just reason to delay the appeal, or (2) what substantial right will be lost absent immediate appeal. "It is not the duty of this Court to construct arguments for or find support for appellant[s'] right to appeal from an interlocutory order[.]" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Because plaintiffs have failed to carry their burden of showing this Court that this appeal is properly before us, we grant defendants' motion to dismiss this appeal as interlocutory.

[2] With regard to defendants' motion for sanctions, we note that plaintiffs' motion was made pursuant to North Carolina Rules of Civil Procedure, Rule 60(b)(4) to set aside a purportedly void judgment in a collateral matter. Plaintiffs argue that the underlying judgment was void for failure to join necessary parties in the previously litigated property dispute resolved in *Etter I* and *Etter II*. However, in *Etter II* we squarely addressed this issue and held that the purportedly necessary parties, the Fosters, other neighbors whose land also adjoined the Etters' property, were not necessary parties. *See Etter II*, 186 N.C. App. 679, 652 S.E.2d 71, 2007 WL 3256828 at *2. Our Supreme Court subsequently denied plaintiffs' petition for discretionary review. *See Etter v. Pigg*, 362 N.C. 176, 658 S.E.2d 483.

We view this appeal as a transparent attempt to re-litigate prior orders from several trial courts, prior opinions of this Court, and an order denying plaintiffs' previous petition for discretionary review by the Supreme Court. Although we do not wish to discourage legitimate efforts to seek a just result pursuant to the laws of the State, we are satisfied upon a thorough review of the record and our prior opinions that the same theory posited by plaintiffs in the case *sub judice* already has been vetted and held to be unpersuasive and incorrect. Accordingly, we grant defendants' motion for sanctions against plaintiffs and remand the matter for a hearing on sanctions pursuant to Rule 34(c) of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 34(c) (2007).

Dismissed; Remanded for hearing on sanctions.

Panel consisting of:

Judges JACKSON, STEPHENS, and STROUD.

JULIA CONNETTE AS GUARDIAN AD LITEM FOR A.M.R, A MINOR, PLAINTIFF-APPELLEE v. TINA JONES, DEFENDANT-APPELLANT

No. COA08-981

(Filed 7 April 2009)

Process and Service— service by publication—wrong county indicated

The trial court abused its discretion by denying defendant's motion to set aside a default judgment where the case was begun in Brunswick County but the service by publication indicated New Hanover County. Defendant would not have found the pending case against her if she had seen the publication and responded in New Hanover County. N.C.G.S. § 1A-1, Rule 4(j1).

Appeal by Defendant from orders entered 13 May 2008 and 11 June 2008 by Judge Thomas H. Lock in Superior Court, Brunswick County. Heard in the Court of Appeals 24 February 2009.

Shipman & Wright, LLP, by Gary K. Shipman and James T. Moore, for Plaintiff-Appellee.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Justin K. Humphries and Clay A. Collier, for Defendant-Appellant.

McGEE, Judge.

Tina Jones, also known as Faustina Jones (Defendant), was employed as a teacher's assistant at Lincoln Primary School in Brunswick County in May of 2001. A.M.R. was a student at Lincoln Primary School at that time. Julia Connette (Plaintiff), as Guardian ad Litem for A.M.R., filed a civil action against Defendant for battery on 19 March 2003, alleging that Defendant washed A.M.R.'s mouth out with soap on 13 May 2001.

Plaintiff served Defendant with notice of the battery action by publication. The notice by publication was published in the Wilmington Star News for three consecutive weeks beginning 21 May 2003. Plaintiff filed a motion for entry of default on 11 December 2003. The Clerk of Superior Court for Brunswick County entered a notice of default against Defendant on that same day. The trial court entered a default judgment against Defendant on 12 May 2004.

Plaintiff sent a notice of right to have exemptions designated to Defendant at Defendant's mailing address on 25 February 2008, nearly four years after entry of default judgment. [R. P. 17] Defendant received the notice by certified mail on 27 February 2008.

Defendant filed a motion for relief from judgment and a supporting affidavit on 14 March 2008. Defendant alleged she was not aware of Plaintiff's action against her and that the default judgment should be set aside for misnomer and as void for lack of proper service. Defendant's motion was heard on 12 May 2008. The trial court entered an order denying Defendant's motion on 13 May 2008 and a second order on 11 June 2008 denying Defendant's motion. Defendant appeals.

Defendant argues the trial court erred in denying Defendant's motion for relief from judgment because the default judgment was void. N.C. Gen. Stat. § 1A-1, Rule 55(d) (2007) provides that a default judgment may be set aside in accordance with N.C. Gen. Stat. § 1A-1, Rule 60(b). Rule 60(b) states that "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) [t]he judgment is void[.]" N.C.G.S. § 1A-1, Rule

60(b) (2007). Motions for relief from judgment are reviewed for an abuse of discretion. *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 621, 610 S.E.2d 469, 470 (2005) (citing *Grant v. Cox*, 106 N.C. App. 122, 124-25, 415 S.E.2d 378, 380 (1992)).

Defendant argues in her first assignment of error that the default judgment is void for failure to serve process in conformity with N.C. Gen. Stat. § 1A-1, Rule 4(j1). Defendant argues that the trial court did not have personal jurisdiction over Defendant because the notice of service by publication incorrectly identified New Hanover County as the county in which the action was filed.

N.C.G.S. § 1A-1, Rule 4(j1) states: "The notice of service of process by publication shall (i) designate the court in which the action has been commenced." N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2007). "Service of process by publication is in derogation of the common law and statutes authorizing it are strictly construed . . . in determining whether service has been made in conformity with the statute." *Emanuel v. Fellows*, 47 N.C. App. 340, 345, 267 S.E.2d 368, 371 (1980) (citing *Sink v. Easter*, 284 N.C. 555, 560, 202 S.E.2d 138, 142, *rehearing denied*, 285 N.C. 597 (1974); and *Thomas v. Thomas*, 43 N.C. App. 638, 645, 260 S.E.2d 163, 168 (1979)).

Our Supreme Court held that a judgment in a divorce action was void because the notice of service by publication listed the wrong county in which the action had been commenced. *Guerin v. Guerin*, 208 N.C. 457, 181 S.E. 274 (1935). In *Guerin*, the publication notice should have named Alamance County as the court where the action was commenced, but instead listed Durham County. *Id.* at 458, 181 S.E. at 274. Our Supreme Court stated:

> It is manifest that the defendant has never been given notice of any action by her husband against her in Alamance [C]ounty. . . . "Jurisdiction of the party, obtained by the court in some way allowed by law, is essential to enable the court to give a valid judgment against him." Since the defendant . . . has never been given notice of any action pending against her in Alamance County, she has never been served with process, and for that reason the judgment entered against her was void.

Id. (quoting *Stancill and Gay v. Gay*, 92 N.C. 462, 463 (1885)).

In the case before us, the publication notice stated, "NOTICE OF SERVICE OF PROCESS BY PUBLICATION STATE OF NORTH CAROLINA, NEW HANOVER COUNTY IN THE SUPERIOR COURT."

However, the case was actually commenced in Brunswick County. Similar to *Guerin*, even had Defendant seen the publication notice and responded to it in New Hanover County, Defendant would not have found the pending case against her commenced in Brunswick County. We find *Guerin* controlling and therefore agree with Defendant that the default judgment was void since the service by publication in this case failed to correctly list Brunswick County as the county where the action was commenced.

Because the default judgment was void, we find the trial court abused its discretion in not granting Defendant's motion to set aside the judgment. *See Cotton v. Jones*, 160 N.C. App. 701, 586 S.E.2d 806 (2003) (holding the trial court abused its discretion in denying the defendant's motion for relief from judgment where the judgment was void because the plaintiff failed to make diligent efforts to locate the defendant before service by publication). Therefore, we are required to reverse the 13 May 2008 and 11 June 2008 orders denying Defendant's relief from judgment. Based on the above, we need not address Defendant's remaining assignments of error.

Reversed and remanded.

Judges GEER and BEASLEY concur.

CHAD LAIL, BY AND THROUGH HIS GUARDIANS AD LITEM, TERESA P. LAIL, AND TIMOTHY D. LAIL, PLAINTIFFS v. BOWMAN GRAY SCHOOL OF MEDICINE AND NORTH CAROLINA BAPTIST HOSPITAL, INC., DEFENDANTS

No. COA08-811

(Filed 21 April 2009)

1. Medical Malpractice— mentioning prior suit and settlement—curative instruction—invited error—waiver

The trial court did not err in a medical malpractice case by allowing the introduction of evidence regarding plaintiffs' prior suit and settlement against Grace Hospital because: (1) plaintiffs failed to point to any portion of the transcript which referred to the Grace Hospital litigation other than the trial court's curative instruction; (2) if plaintiffs' exception was to the response to its own questions, a party may not assert error based on a course he himself pursued at trial; and (3) if plaintiffs excepted to some other evidence of the Grace Hospital litigation admitted at trial, the assignment of error is dismissed since the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with N.C. R. App. P. 10(a).

2. Discovery— motion in limine—failure to state standard of review—failure to object—waiver

The trial court did not commit reversible error in a medical malpractice case by its pre-trial exclusion of the prior discovery deposition of a doctor because plaintiffs waived review of this issue by failing to call the doctor to testify at trial. N.C. R. App. P. 10(b)(1).

3. Medical Malpractice— surprise causation opinions contrary to written diagnosis and treatment records—failure to designate expert witness—treating physician exception

The trial court did not commit reversible error in a medical malpractice case by allowing a defense witness doctor to offer "surprise causation" opinions contrary to the written diagnosis and treatment records contained in the hospital records of defendant hospital even though plaintiffs contend the witness was never properly designated as an expert witness because: (1) even though plaintiffs' restatement of and agreement with the trial court's ruling that the witness was a treating physician was not invited error, plaintiffs' counsel's comments did waive appellate review of the witness's testimony insofar as it arose from his

role as treating physician; (2) plaintiff failed to include a standard of review in his brief as required by N.C. R. App. P. 28(b)(6), and the admission or exclusion of opinion testimony, whether from a fact witness or an expert witness, is reviewed only for abuse of discretion; (3) the witness was excluded from mandatory designation as an expert witness since the treating physician exception is a bright line exception, and none of the pertinent testimony, including his testimony about why discharge summaries sometimes contain errors and omissions, fell outside the witness's role as treating physician; and (4) the witness was included in a class of persons named in defendants' designation of expert witnesses even if he was not specifically named.

4. Medical Malpractice— rebuttal witness—factual testimony of treating physician

The trial court did not abuse its discretion in a medical malpractice case by excluding the rebuttal testimony of a doctor that was proffered by plaintiffs to rebut the testimony of a defense witness doctor because: (1) the defense witness's testimony as to the erroneous discharge summary was not expert opinion testimony regarding causation that necessitated expert rebuttal since it was simply factual testimony by a treating physician about the minor child's diagnosis, the method of preparation of the medical records, and why the doctor considered that the records contained serious omissions; (2) the trial had already lasted nearly three weeks when plaintiffs proffered the doctor as a rebuttal witness, and the jury had already heard the doctor's extensive prior testimony regarding his certainty as to the accuracy of the medical records; (3) the transcript showed that the trial court carefully considered each part of the testimony of plaintiffs' doctor and excluded his testimony about accuracy of the medical records as needlessly cumulative and time-wasting, but allowed testimony regarding defendant doctor's diagrams which it considered new evidence in the case; and (4) neither the substance of the rebuttal evidence, nor the procedure where the trial court considered this evidence outside the presence of the jury, suggested that the trial court made an arbitrary or unreasonable decision.

5. Medical Malpractice— standard of care—motion to strike testimony

The trial court did not err in a medical malpractice case by failing to strike the testimony of a doctor who allegedly applied

the incorrect standard of care to another doctor's treatment of the minor child because: (1) plaintiffs pointed to no portion of the doctor's testimony on direct examination, and none was found, where he defined the standard of care he was using; (2) the record reflected that plaintiffs' counsel's question was directed only to the doctor's testimony in his deposition and not at trial; and (3) although it was proper for plaintiffs to point out the discrepancy between the doctor's deposition testimony and his trial testimony for purposes of impeachment, the record did not support plaintiffs' argument for a motion to strike when the doctor was never asked and never expressed the standard of care.

6. Trials— motion for new trial—failure to make substantive argument

The trial court did not err in a medical malpractice case by denying plaintiffs' motion for a new trial because: (1) plaintiffs made no substantive argument regarding any legal basis for a new trial, and their motion for a new trial referred generally to the same issues previously considered; and (2) no error was found in the trial court's ruling on the issues presented for appeal.

Appeal by plaintiffs from judgment entered 24 September 2007 by Judge Anderson D. Cromer in Catawba County Superior Court. Heard in the Court of Appeals 11 December 2008.

W. Wallace Respess, Jr. and W. Russ Johnson, III, for plaintiff-appellant.

Wilson & Coffey, LLP, by Tamura D. Coffey, Kevin B. Cartledge and Lorin J. Lapidus, for defendant-appellee.

STROUD, Judge.

This appeal arises from a medical malpractice action. Plaintiffs appeal from a judgment of dismissal, entered upon the jury's verdict that the minor child, Chad Lail, was not injured by the negligence of defendants. On appeal, plaintiffs argue that they are entitled to a new trial because of five errors made by the trial court in the admission of evidence. For the following reasons, we find no error and affirm the judgment of the trial court.

I. Background

On 17 January 1991, plaintiff Teresa Lail ("Teresa") was admitted to Grace Hospital in Morganton, Burke County with pre-term labor.

Teresa was treated by Dr. Robert Lundquist to retard labor. On 18 January 1991, she was transferred to Forsyth Memorial Hospital in Winston-Salem, where she gave birth to plaintiff Chad Lail ("Chad") at 12:30 p.m. on 20 January 1991. Although Chad was born at approximately 30 weeks gestation and weighed about 3 lbs. 13 oz., his Apgar scores were good. Chad also was "vigorous, with good cry" at birth.

At the time of Chad's birth, Dr. David Berry ("Dr. Berry") was an assistant professor of medicine at Bowman Gray School of Medicine. Dr. Berry was the attending physician of record for Chad on the day of his birth, although he did not personally see Chad on that date. Dr. Berry was supervising Dr. Martha Simpson ("Dr. Simpson"), a third year neonatology resident who actually treated Chad at Forsyth Memorial Hospital.

Within the first few hours of Chad's life, his condition began to deteriorate and he developed respiratory distress. Dr. Simpson had ordered his intubation and began administration of antibiotics. However, "[t]ransfer to the NCBH [North Carolina Baptist Hospital] Intensive Care Nursery was arranged with Dr. Berry[,]" for ventilatory support soon thereafter. Chad's admission note to NCBH "[r]uled out sepsis." The admission note named Dr. Robert Dillard as "Attending Physician, Pediatrics[,]" but was signed by Dr. Michael O'Shea.

At NCBH, Chad was treated with oxygen, dopamine, dobutamine, antibiotics and other medicines. NCBH discharged Chad on 1 March 1991. Chad's NCBH discharge summary named Dr. Berry as "Attending Physician, Pediatrics," but the discharge summary was signed by Dr. Michael O'Shea. The Admission Diagnosis on the discharge summary listed "Prematurity" and "Respiratory distress syndrome" ("RDS"). The discharge summary further noted that "[u]pon admission, cultures revealed E. Coli sepsis" and that Chad's problems included RDS and "E. Coli sepsis and meningitis with pos[illegible] post-infectious leading to hydrocephalus."

Plaintiffs filed suit (02 CVS 2507) against Dr. Lundquist and Grace Hospital, Inc. ("the Grace Hospital litigation") seeking damages for the treatment received by Teresa. On 11 November 2004 Dr. Berry was deposed in connection with the Grace Hospital litigation by Phillip Jackson, attorney for Grace Hospital, Inc. The deposition was recorded on video.

On or about 30 March 2005, plaintiffs filed a complaint (02 CVS 981) against Martha K. Simpson, M.D., individually; Novant Health, Inc. d/b/a Forsyth Medical Center; Forsyth Memorial Hospital, Inc.;

Forsyth Medical Center; Wake Forest University North Carolina Baptist Hospital; Wake Forest University Baptist Medical Center; Wake Forest University Health Sciences; and David Berry, M.D., individually. The complaint alleged that Chad Lail developed cerebral palsy as a result of defendants' negligence and sought damages for personal injury, pain and suffering, economic loss and medical expenses. Plaintiffs' complaint alleged that shortly after his birth, Chad developed an E. coli infection which spread to his cerebrospinal fluid and ultimately caused meningitis, cerebral palsy, and brain damage. Plaintiffs alleged that defendants were negligent in their failure to recognize and respond promptly to various sepsis risk factors and that the delay in treatment of the E. Coli infection caused Chad's injuries and permanent disability.

Defendant Dr. Berry filed an answer on 5 July 2005 denying negligence. The other defendants filed an answer on 11 July 2005 denying that Chad's treatment fell below the applicable standard of care.

On or about 15 April 2005, Grace Hospital, Inc., moved to consolidate for trial the Grace Hospital litigation with this action. Grace Hospital's motion to consolidate was denied by the trial court on or about 1 August 2005. The Grace Hospital litigation ultimately settled.[1]

On or about 14 November 2005 Dr. Berry moved to exclude his 11 November 2004 deposition in the Grace Hospital litigation from use in the case *sub judice*, on the grounds that "it was obtained and influenced as a result of improper communications by Plaintiffs' counsel." This motion was denied by Judge Timothy S. Kincaid on 3 February 2006.

On 21 November 2006, plaintiffs voluntary dismissed with prejudice Martha K. Simpson, M.D., individually; Novant Health, Inc. d/b/a Forsyth Medical Center; Forsyth Memorial Hospital, Inc.; Forsyth Medical Center; Wake Forest University Baptist Medical Center; and David Berry, M.D., individually. The parties agreed to substitute North Carolina Baptist Hospital, Inc. and Bowman Gray School of Medicine as defendants.

The case was tried before a jury in Superior Court, Catawba County from 16 August 2007 to 10 September 2007, Judge Anderson D. Cromer presiding. The jury found that Chad Lail was not injured by the negligence of defendants. The trial court entered judgment pur-

1. Our search of the record did not reveal, and neither party mentioned, the date the Grace Hospital litigation was filed or resolved.

suant to the jury verdict, dismissing plaintiffs' claims with prejudice and taxing costs against plaintiffs. Plaintiffs filed a motion for new trial on or about 26 September 2007. The motion for new trial was denied on 13 December 2007. Plaintiffs appeal from both the judgment entered pursuant to the jury verdict and the denial of the motion for new trial.

II. Evidence Regarding the Grace Hospital Litigation

[1] Plaintiffs argue that the trial court erred by allowing the introduction of evidence regarding the plaintiffs' prior suit and settlement against Grace Hospital and that this error was not cured by the trial Court's subsequent instructions to the jury to disregard this evidence. Plaintiffs argue that "defendant's counsel was allowed over numerous pretrial objections to offer evidence of a prior settlement with Grace Hospital arising out of their failure to provide correct medication to [Teresa Lail] to delay the onset of premature labor." Defendants argue that plaintiffs invited the purported error by introducing evidence of the Grace Hospital litigation and settlement.

Although plaintiffs argue that they made "numerous pretrial objections" to introduction of evidence regarding the Grace Hospital litigation, their brief fails to direct us in the record or transcript to any such objection, and their assignments of error direct us only to the entire transcript section containing the motion *in limine* argument before the trial judge. The record contains no written motion *in limine* filed by plaintiffs, although the pretrial order notes that both parties would have motions *in limine* to be heard prior to trial. Thus, it appears that plaintiffs are referring to their motion "to exclude references to the prior lawsuit and the prior settlement [based upon the fact that] its relevance, the probative value, if any, is outweighed substantially by the danger of unfair prejudice." The motion was based on the grounds that evidence of the Grace Hospital litigation would influence the jury to decide that Grace Hospital, not defendants, were responsible for Chad's injuries.

After extensive argument, the trial court ruled that

> in light of everything involved in this case, the Court has weighed the relevance and materiality of the [Grace Hospital litigation] and the Court has further weighed its probative value versus its prejudicial effect under Rule 403, and balancing test, the Court has concluded that the fact that Grace litigation was instituted may be admitted and further that a settlement was reached. . . .

> [T]he Court is inclined to prevent any other information concerning the litigation or the settlement from being offered to the jury. . . . The doors may be open[ed] for those types of things but I'll be here, as the gatekeeper, to determine whether they have; but if you think the door has been [opened], then you best check with me before you ask a question about it.

The next day, the trial court mentioned the Grace Hospital litigation again:

> THE COURT: Everybody understand the Court's ruling yesterday on the settlement agreement and the previous lawsuit?
>
> [PLAINTIFFS' COUNSEL]: Plaintiff understands and I'm going to ask two questions. Did you sue Grace? Did you settle? Yes. Yes.
>
> THE COURT: Yes sir, I understand. I just wanted to make sure everybody—if they had any additional thoughts overnight after they heard my ruling yesterday. If they wanted to be heard any more.
>
> [DEFENDANTS' COUNSEL]: No, sir.
>
> [PLAINTIFFS' COUNSEL]: Not from plaintiff.

Plaintiffs have not assigned error to or directed our attention to any specific evidence admitted during the trial regarding the Grace Hospital litigation to which plaintiffs objected. However, in reading through the transcript we find that on direct examination of Teresa, *plaintiffs' counsel* asked the following:

> Q. Incidentally, the—was there a prior lawsuit brought on behalf of Chad against the Grace Hospital folks?
>
> A. Yes.
>
> Q. And was that settled?
>
> A. Yes

On cross-examination defendants' counsel asked nearly identical questions and received the same answers. Plaintiffs have not pointed us to any other portion of the transcript which referred to the Grace Hospital litigation, other than the trial court's curative instruction.

If plaintiffs' exception is to the response to its own questions quoted above, it is well settled that "a party may not assert error based on a course he himself pursued at trial." *Crump v. Bd. of*

Education, 93 N.C. App. 168, 188, 378 S.E.2d 32, 44 (1989), *modified on other grounds and aff'd*, 326 N.C. 603, 392 S.E.2d 579 (1990). Furthermore,

> our system of justice is based upon the assumption that trial jurors are women and men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so. Thus, any error was corrected by the trial court's prompt curative instructions.

State v. Hartman, 344 N.C. 445, 472, 476 S.E.2d 328, 343 (1996) (citations and quotation marks omitted), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997).

On the other hand, if plaintiffs excepted to some other evidence of the Grace Hospital litigation admitted at trial, the assignment of error is dismissed because "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C.R. App. P. 10(a). According to Rule 10, "[a]n assignment of error is [not] sufficient [unless] it directs the attention of the appellate court to the particular error about which the question is made, with *clear and specific record or transcript references*." N.C.R. App. P. 10(c)(1) (emphasis added).

III. Dr. Berry's Deposition Testimony

[2] Plaintiffs argue that the trial court committed reversible error by its exclusion of the prior discovery deposition of David Berry, M.D. because the deposition was previously ordered admitted into evidence by another Superior Court judge and there was not a sufficient showing by defendants of a substantial change in circumstances warranting a different or new disposition of the matter. Defendants argue that plaintiffs waived appellate review of this issue because "plaintiff never called Dr. Berry to testify—[plaintiff] simply chose not to do so despite ample opportunity throughout trial."

We first note that plaintiffs have failed to state any standard of review for this issue as required by Rule 28(b)(6). "Though we could impose a monetary penalty for this oversight, we elect instead to admonish [plaintiffs'] counsel to exercise care when preparing briefs submitted to this Court." *Devaney v. Miller*, 191 N.C. App. 208, 211, 662 S.E.2d 672, 675 (2008). In fact, we do not need a standard of review because we conclude that plaintiffs waived review of this issue for the reasons that follow. *See* N.C.R. App. P. 10(b)(1).

This Court has held that

> [a] ruling on a motion *in limine* is merely preliminary and not final. A trial court's ruling on a motion *in limine* is subject to change during the course of trial, depending upon the actual evidence offered at trial. For this reason, a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence. It follows that a party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted).

Xiong v. Marks, 194 N.C. App. 644, 647, 668 S.E.2d 594, 597 (2008) (citations, quotation marks and brackets omitted).

It may seem logical to make an exception to this rule in the case *sub judice* and review on the merits, because the trial court's ruling, based on lack of notice per Rule 32 of the North Carolina Rules of Civil Procedure, was not dependent on the actual evidence offered at trial and therefore was not "subject to change" during the course of the trial. However, we are bound by *Condellone v. Condellone*, a case where a "motion in limine" was also granted on the basis of a rule of civil procedure and would not have been subject to change during the course of the trial. 129 N.C. App. 675, 501 S.E.2d 690, *disc. review denied*, 349 N.C. 354, 517 S.E.2d 889 (1998).

In *Condellone*,

> Plaintiff made a motion *in limine* requesting the trial court to exclude any evidence that Plaintiff had cohabited with an adult male to whom she was not related or married, on the ground that cohabitation constituted *an affirmative defense which Defendant had not raised in his answers*. The trial court granted Plaintiff's motion *in limine*, and did not allow Defendant to present evidence of Plaintiff's cohabitation.

129 N.C. App. at 678, 501 S.E.2d at 693 (emphasis added). After the trial court granted the plaintiff's motion *in limine*, the "[d]efendant did not offer evidence of [p]laintiff's cohabitation at trial." 129 N.C. App. at 681, 501 S.E.2d at 695. On appeal, defendant assigned error to denial of the motion *in limine*. *Id.* This Court dismissed the assignment of error, holding:

> A trial court's ruling on a motion *in limine* is preliminary and is subject to change depending on the actual evidence offered at trial. The granting or denying of a motion *in limine* is not appealable. To preserve the evidentiary issue for appeal where a motion *in limine* has been granted, the non-movant must attempt to introduce the evidence at trial. In this case, the trial court granted Plaintiff's motion *in limine* to exclude evidence of her cohabitation with an unrelated adult male. Defendant did not offer evidence of Plaintiff's cohabitation at trial, and thus has not preserved this evidentiary issue for appeal.

Id. (citations omitted). Accordingly, we dismiss this assignment of error.

IV. Testimony of Dr. Steven Block

[3] Plaintiffs argue that the trial court committed reversible error by allowing defense witness Steven Block, M.D. to offer "surprise causation" opinions contrary to the written diagnosis and treatment records contained in the hospital records of defendant North Carolina Baptist Hospital on the grounds that Dr. Block was never properly designated as an expert witness.

Defendants urge us to dismiss this assignment of error on the basis that plaintiffs failed to properly preserve their objection to Dr. Block's testimony and thus waived appellate review under N.C.R. App. P. 10(b)(1). Defendants claim that plaintiffs in fact "actually invited the purported error" by agreeing with the trial court's ruling. (Emphasis in original.) Defendants further argue that if we consider the assignment of error on its merits, Dr. Block's testimony was admissible because "the treating physician . . . [has a] right to speak to the conclusions drawn [at the time of treatment]."

A. Preservation for Appellate Review

At trial, defendants "tender[ed] Dr. Block as an [sic] neonatologist for the purposes of potential causation questions only." Plaintiffs objected based upon the fact that Dr. Block had not been identified as an expert witness by defendants. A lengthy bench conference ensued outside of the presence of the jury. At the end of the bench conference, the trial court ruled that Dr. Block "is the only one that I've seen thus far . . . who falls into th[e] category [of treating physician]. So . . . I'm going to allow him to testify." Plaintiffs' counsel responded, "I think that's fair, Judge. To the extent that [Dr. Block] treated the kid and where [defendants] showed that he was treating

this child, I think from that point forward he can testify to what his conclusions were and what his records show. So I agree."

Even though plaintiffs' restatement of and agreement with the trial court's ruling was not "invited error," *see, e.g.*, *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) ("invited error" arose from statements elicited by appellant on cross-examination at trial), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008); *State v. Yang*, 174 N.C. App. 755, 760, 622 S.E.2d 632, 635 (2005) ("invited error" arose from jury instructions appellant "helped craft at trial"), plaintiffs' counsel's comments did waive appellate review of Dr. Block's testimony insofar as it arose from his role as treating physician.

B. On the Merits

Plaintiff again failed to include a standard of review in his brief as required by Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. Our research reveals that the admission or exclusion of opinion testimony, whether from a "fact" witness or an expert witness is reviewed only for abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). Abuse of discretion means the trial court's decision is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hutchinson*, 139 N.C. App. 132, 137, 532 S.E.2d 569, 573 (2000) (citation and quotation marks omitted).

The record contains Defendants' Designation of Expert Witnesses, filed on 23 October 2006. The document designated "[a]ll treating physicians identified by plaintiffs, subject to objection[,]" but did not list Dr. Block by name. Dr. Block was further not listed as a witness by plaintiffs in the pre-trial order.

A plaintiff is entitled to a new trial if in response to a proper request he is not given "the opportunity to depose [all testifying expert witnesses] prior to trial and adequately prepare for his cross-examination." *Prince v. Duke University*, 326 N.C. 787, 790-91, 392 S.E.2d 388, 390 (1990); N.C. Gen. Stat. § 1A-1, Rule 26(b)(4). However, this rule does not apply to an " 'expert whose information was not acquired in preparation for trial but rather because he was *an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit*.' " *Turner v. Duke University*, 325 N.C. 152, 168, 381 S.E.2d 706, 715-16 (1989) (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(4) comment (1983)) (emphasis added).

Plaintiffs acknowledge the treating physician exception recognized in *Turner*, but contend that the "exception [for treating physicians] is not without limits," specifically arguing:

> As a result of his participation in assisting the defense and his dramatically changed opinions as to causation, Dr. Block no longer fell within the ambit of a treating physician who may render opinions as to diagnosis and treatment actually rendered. Instead, he became a defense expert who proffered new and previously undisclosed opinions over fourteen years after the hospital records were completed.
>
> . . . .
>
> [Dr. Block] stepped far outside his limited role . . . when he took a position contrary to the hospital records that he himself had adopted and approved years earlier, but that also supported defense theories and strategies and offered opinions on why the earlier hospital records were incorrect as to the diagnoses. . . . [Dr. Block also] opined that [the hospital's] policy caused [the discharge summaries] to contain errors . . . .

Plaintiffs essentially urge us to find some gray area in *Turner* and to adopt an exception to the treating physician exception, to wit: that when a treating physician "t[akes] a position contrary to the hospital records that he himself had adopted and approved a year earlier" and also "support[s] defense theories and strategies," the treating physician is an expert who must be designated as such before trial. We disagree.

Tzystuck v. Chicago Transit Authority, 529 N.E.2d 525 (Ill. 1988), was cited with approval in *Turner*. 325 N.C. at 168, 381 S.E.2d at 716. The statement of the law in *Tzystuck* is instructive:

> While treating physicians may give opinions at trial, those opinions are developed in the course of treating the patient and are completely apart from any litigation. Such an opinion is not formed in anticipation of a trial, but is simply the product of a physician's observations while treating the patient, which coincidentally may have value as evidence at a trial. In this respect, the opinions of treating physicians are similar to those of occurrence witnesses who testify, not because they were retained in the expectation they might develop and give a particular opinion on a disputed issue at trial, but because they witnessed or partici-

> pated in the transactions or events that are part of the subject matter of the litigation.

529 N.E.2d at 528-29.

Accordingly, we read the "treating physician exception" to be a bright line exception—either the physician is a treating physician, or he is not. Plaintiff concedes in his brief that Dr. Block was one of Chad's treating physicians; this ends the argument. Furthermore, even if we assume that there could be some searching inquiry which would divide a treating physician's testimony into admissible "treating physician" opinion and inadmissible "expert" opinion, none of the testimony *sub judice* fell "outside Dr. Block's role" as treating physician.

Dr. Block testified that at the time of the events giving rise to this lawsuit, he was an attending neonatologist and medical director of nurseries at NCBH. Dr. Block then explained the hospital rotation and call system to show that he was one of Chad's treating physicians even though his name did not appear on Chad's medical records. Dr. Block then took the jury step-by-step through Chad's treatment, including defining the relevant medical terms found in the hospital records.

Dr. Block testified that recurrent tension pneumothorax[2] led to hemorrhaging in the brain and ultimately to hydrocephalus. Dr. Block further testified that he did not agree with the discharge summary which stated "E. Coli sepsis and meningitis with pos[illegible] post-infectious leading to hydrocephalus[,]" because he felt the discharge summary was incomplete as to the cause of Chad's hydrocephalus.

Dr. Block explained the fact that the medical records stated an arguably incorrect diagnosis as follows:

> The department of pediatrics had a very strong, very autocratic chairman, and he had certain ironclad rules. And the rule was the discharge summary needed to be dictated before the chart left the floor, and that had to be within I think it was three to four hours after the baby went home. So there was a short window of time in which the house staff, the residents, had in which to get the discharge summary done.

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2. A pneumothorax . . . is when "air leaks out into the space between the lung and the chest wall so that the underlying lung collapses" and may lead to a sudden drop in blood pressure or heart rate.

> The activities of the unit don't stop. There are babies being admitted. There are babies requiring procedures. There are emergencies and crises that need to be taken care of and this discharge summary. So in a somewhat rushed fashion . . . the residents would take this large chart, often to be about 12 to 15 inches tall, weigh about 30 pounds, and page through this rapidly taking notes as they go along, and then from their notes dictate as quickly as possible the discharge summary, which is then transcribed. . . . In that hurried process, it was less than perfect. Errors occurred. . . . The resident may or may not have had an opportunity to review it. And in this particular case, Dr. Wadsworth, who dictated it, never signed it, so I know she never reviewed it.
>
> [I]t's a very disorganized note. So within the respiratory distress syndrome section they talk about hydrocephalus requiring a shunt, but they don't comment there at all why the hydrocephalus occurred.
>
> . . . .
>
> It says, [p]rematurity, respiratory distress syndrom, E. Coli sepsis and meningitis and hydrocephalus, *without any mention of the hemorrhage which actually caused this*. . . . [W]hat can I say? It's wrong.

(Emphasis added.)

We conclude that all of Dr. Block's testimony, including his testimony about why discharge summaries sometimes contain errors and omissions, was derived from his participation, as treating physician, in the events that gave rise to this lawsuit. As such, Dr. Block was excluded from mandatory designation as an expert witness. Furthermore, Dr. Block was included in a class of persons named in the Defendants' Designation of Expert Witnesses, even if he was not specifically named. This case is distinguishable from *Prince*, where the testifying physician performed the autopsy, but never "treated" the patient, which *Prince* noted must occur while the patient is still alive. 326 N.C. at 790, 392 S.E.2d at 390. This assignment of error is without merit.

V. Rebuttal Testimony of Dr. Karotkin

[4] Plaintiffs next argue that the trial court committed reversible error by excluding the rebuttal testimony of Edward Karotkin, M.D.

which was proffered by the plaintiffs to rebut the testimony of Dr. Block. Specifically, plaintiffs argue that "[a]fter the Court erroneously allowed Dr. Block to testify about a new theory of causation when defendants never designated him as an expert who would testify as to causation, plaintiffs attempted to soften the prejudicial blow of such testimony by calling Edward Karotkin, M.D. . . . as a rebuttal witness." Plaintiffs asked to have Dr. Karotkin testify on rebuttal as to (1) a diagram which Dr. Block drew during his testimony to illustrate his testimony as to Chad's injuries, and (2) Dr. Block's testimony that "the medical records were just wrong and the reasons that he gave for the medical records being incorrect."

Plaintiffs argue that "following the surprise testimony claiming the invalidity of the diagnosis contained in the medical records, Dr. Karotkin's rebuttal testimony was necessary to remedy the prejudice suffered by the plaintiff and went directly to the evidence presented by the defendants." Plaintiffs' brief goes on to stress cases, e.g., *Green v. Maness*, 69 N.C. App. 292, 316 S.E.2d 917, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 922 (1984), which have addressed issues of "late-breaking discovery and unfair surprise" in expert medical testimony as to causation.

Defendants rely on *Harris v. Miller*, which found no abuse of discretion when the trial court excluded "rebuttal" testimony which was needlessly cumulative. 103 N.C. App. 312, 330, 407 S.E.2d 556, 566 (1991), *rev'd on other grounds*, 335 N.C. 379, 438 S.E.2d 731 (1994). Defendants argue that Dr. Karotkin had already testified on plaintiffs' behalf and plaintiffs sought simply to "repeat his causation opinions."

The standard of review of the trial court's ruling upon admissibility of testimony by a rebuttal witness is abuse of discretion. *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 338, 626 S.E.2d 716, 724 (2006). "In determining relevant rebuttal evidence, we grant the trial court great deference, and we do not disturb its rulings absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation and quotation marks omitted).

"Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981) (citations omitted). Rebuttal evidence is still subject to the Rules of Evidence.

Hutton v. Willowbrook Care Center, Inc., 79 N.C. App. 134, 137-38, 338 S.E.2d 801, 803-04 (1986) (no error to exclude "rebuttal" evidence which was needlessly cumulative or reversibly prejudicial).

In plaintiffs' proffer of Dr. Karotkin's testimony as to the medical records, Dr. Karotkin stated that Dr. Block's explanation of errors and omissions in the discharge summary was "not a very good excuse." Dr. Karotkin also stated that there is a "universal convention" that if a medical record contains an error, the doctor should "draw a line through it and make a notation that this is an error, put [his] name on it, and then . . . [rewrite] it, and date the note at the time [he] wrote the note." Dr. Karotkin also would have testified that when a doctor signs a discharge summary, "it is very much like reading a contract or taking out a loan or buying a car; when you sign the document, you're agreeing to what the text says above your signature."

After extended arguments by counsel, the trial court determined that Dr. Block's diagram was new evidence and allowed rebuttal testimony from Dr. Karotkin as to Dr. Block's diagram. However, the trial court ruled that testimony as to Dr. Block's explanation of the medical records would be excluded. The trial court announced the basis for its ruling:

> [T]he accuracy of the records, I'm not going to allow [Dr. Karotkin] to testify about that. I mean, what can he say that's going to make it better, [or] any worse for anybody? . . . Dr. Block [testified to] the procedure that [the hospital] had to get [the records] done. . . . [I won't allow] you to put somebody up here to talk about [something] that doesn't add anything to the case in my view as far as rebuttal is concerned. . . . [A]s long as [Dr. Karotkin's rebuttal testimony] touches upon [Dr. Block's diagram] . . . the Court will allow it.

It appears that the trial court excluded the testimony about the medical records on the basis of Rule 403, that the probative value of the evidence was "substantially outweighed . . . by considerations of . . . undue delay, . . . or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403; *see also Hutton*, 79 N.C. App. at 137-38, 338 S.E.2d at 803-04.

As discussed in *supra* Part II, plaintiffs had objected to Dr. Block's testimony and later argued that Dr. Karotkin's testimony was made necessary on the grounds that Dr. Block was offering an *expert opinion on causation* without having been identified prior to trial as an expert witness. However, Dr. Block's testimony as to the erro-

neous discharge summary was *not* expert opinion testimony regarding causation and not testimony that would have possibly been subject to plaintiffs' objection to Dr. Block's testimony—it was simply factual testimony by a treating physician about Chad's diagnosis, the method of preparation of the medical records and why he considered that the records contained serious omissions. Therefore, Dr. Block's testimony as treating physician did not necessitate expert rebuttal.

Furthermore, the trial *sub judice* had already lasted nearly three weeks when Dr. Karotkin was proffered as a rebuttal witness. The jury had already heard Dr. Karotkin's extensive prior testimony regarding his certainty as to the accuracy of the medical records.

In sum, "[t]he transcript shows that the trial court carefully considered each part of [Dr. Karotkin's proffered] testimony." *State v. Bagley*, 183 N.C. App. 514, 522, 644 S.E.2d 615, 621 (2007). The trial court excluded Dr. Karotkin's testimony about the accuracy of the medical records as needlessly cumulative and time-wasting. However, the trial court did allow rebuttal testimony regarding Dr. Block's diagrams, which it considered new evidence in the case. "Neither the substance of th[e rebuttal] evidence, nor the careful procedure by which the trial court considered this evidence outside the presence of the jury, suggests that the trial court made an arbitrary or unreasonable decision. Accordingly, we find no error[.]" *Id.* This assignment of error is overruled.

VI. Testimony of Dr. Cotten

[5] Plaintiffs next argue that the trial court erred by failing to strike the testimony of Charles M. Cotten, M.D. because Dr. Cotten "applied the incorrect standard of care" to Dr. Martha Simpson's treatment of Chad. Plaintiffs state that "[p]rior to the commencement of the trial, counsel stipulated that the standard of care applicable to Dr. Simpson was that of a neonatologist." Plaintiffs further argue that "Dr. Cotten's testimony regarding an unidentified standard of care applicable to Dr. Martha Simpson was irrelevant." Alternatively, plaintiffs argue "[e]ven if Dr. Cotten's testimony was relevant for any purpose other than proving Dr. Simpson's conformity with the applicable standard of care, it should have been excluded" because it "risked misleading the jury[.]"

A. Standard of Review

Plaintiff has again failed to state the standard of review. We find that where "testimony is first admitted without objection, a subse-

quent motion to strike the testimony is addressed to the sound discretion of the court and its ruling will not be disturbed unless an abuse of discretion has been shown." *Invesco Financial Services, Inc. v. Elks*, 29 N.C. App. 512, 513, 224 S.E.2d 660, 661 (1976).

B. Pertinent Facts

In Dr. Cotten's deposition, plaintiffs' attorney specifically asked:

> Q. All right. When you say that Martha Simpson complied with the standard of care, define that for me. Define for me what you mean by the standard of care, please.
>
> A. What a reasonable neonatologist, or not neonatologist, what a reasonable person caring for a baby like Chad Lail would do given his circumstances.

On direct examination at trial, without objection from plaintiffs, defendants asked Dr. Cotten:

> Q. [D]o you believe you're familiar with the standard of care applicable to Dr. Simpson as she worked at Forsyth Medical Center in 1991, January 1991?
>
> A. Yes.
>
> . . . .
>
> Q. Based on your review of the medical records, all of your clinical training and experience and all of your research, do you have an opinion to a reasonable degree of medical certainty and satisfactory to yourself as to whether or not Dr. Simpson complied with the standard of care in her treatment of Chad Lail.
>
> A. I believe she did.

Defendants then asked Dr. Cotten a long series of questions, with only one unrelated objection from plaintiffs, as to Chad's specific symptoms and the appropriateness of specific treatments rendered by Dr. Simpson. At the end of the series, defendants asked Dr. Cotten, again without objection from plaintiffs:

> Q. Do you have an opinion as to whether Dr. Simpson exercised reasonable care and diligence in the application of her skill and knowledge to the care and treatment of Chad Lail?
>
> A. I believe she did.
>
> Q. Doctor, do you believe Martha Simpson complied with the standard of care in her treatment of Chad Lail?

A. I believe she did.

Despite these and other references to the standard of care rendered in various stages of Chad's treatment, plaintiffs point to no portion of Dr. Cotten's testimony on direct examination, and we find none, where he *defined* the standard of care he was using.

On cross-examination, plaintiffs' counsel asked Dr. Cotten a series of questions about his prior deposition testimony, stating, "I'm going to read the questions and you read your answers in your deposition." In the midst of cross-examining Dr. Cotten based on his deposition, the following series of questions and answers ensued:

Q. Now, you agree, do you not, sir, that if a resident fails to call an attending under the facts of this case to report the respiratory distress, that that attending [sic] breached the local standard of care, true?

A. No I don't.

[DEFENSE COUNSEL:] Object to form.

A. The way you worded your question? How was it you worded that in the deposition?

Q. Let's look [at] how it was worded in the deposition. If I misworded it—

A. I think you said that the attending breached the standard just now.

Q. Do you agree that if the resident fails to call an attending under facts similar to these, that that resident breached the local standard of care.

[DEFENSE COUNSEL:] Object.

A. Do you agree with that?

[DEFENSE COUNSEL:] Objection to the form.

THE COURT: Overruled.

A. I agree we talked about it at the deposition and that I said that I agreed with it as part of the standard of care during the deposition. But I also think that it's important in the deposition—and we went back and forth several times about clarification of standard of care versus expectations of residents . . . . I know we went back and forth and it was very unclear . . . in my mind

how to make that distinction between standard of care and standard of expectations that we would expect a resident to call us, an attending.

Q. All right, sir. When you say that Martha Simpson complied with the standard of care in this case, you don't mean the standard—you didn't mean—*when you had those opinions in your deposition*, you didn't mean that she complied with the standard of care for a neonatologist, true?

[DEFENSE COUNSEL:] Objection.

A. That's correct.

THE COURT: Overruled.

Q. You mean she complied with the standard of care for a reasonable person under the circumstances, true.

A. Or a reasonable—

[DEFENSE COUNSEL:] Object.

A. —physician, a well-trained physician, in the circumstances.

THE COURT: Overruled.

[PLAINTIFFS' COUNSEL:] Judge, based on that I move to strike his opinions on standard of care, and we can be heard later.

(Emphasis added.) Plaintiffs' counsel continued his questioning of Dr. Cotten for another 13 transcript pages. After the completion of Dr. Cotten's testimony, plaintiffs' counsel was heard on his motion to strike Dr. Cotten's testimony. Plaintiffs' counsel stated that he moved to strike "simply based upon the fact that the witness testified he didn't apply the standard of care that has been stipulated[3] is the standard of care that's applicable to this doctor[.]"

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3. In their brief, plaintiffs did not reference the transcript or record for any stipulation that the standard of care would be that of a neonatologist. No such stipulation is in the Pre-Trial Order. In fact a long discussion as to the standard of care ensued as plaintiffs were heard on their motion to strike. The only reference we were able to find to a "stipulation" was the trial judge's comment: "[T]his goes back to about two weeks ago. I asked everybody and everybody told me, no, she's held to the standard of care of neonatologist." However, the trial judge later acknowledged confusion over the standard of care: "The [confusion] was whether or not it was standard of care of a pediatrician, third-year pediatrician or a neonatologist."

In the jury charge, the trial court instructed, without objection:

The law in the state of North Carolina holds that resident physicians who manage care in the place of the attending physician caring for the patient are under a duty to bring the patient the level of care of an attending physician. In the matter at

Plaintiffs argued to the trial court that Dr. Cotten had admitted that he used the wrong standard of care, not just in his deposition testimony, but also in his trial testimony. Plaintiffs' counsel insisted that

> I asked [Dr. Cotten] the question: In this case you did not apply a standard of care of what a reasonable and prudent neonatologist would do in this case, true? True. And for that reason I move to strike his testimony based upon the stipulation of counsel as it relates to standard of care obviously, not the causation.

Defendants' counsel argued that Dr. Cotten was referring only to the standard of care he used in his *deposition* testimony. Plaintiffs' counsel responded, "I know exactly what I asked. I said, In your deposition *and in fact here you have* . . . then the question. And the record will reflect that." (Emphasis added). However, the record does not reflect that. The record, as emphasized above, reflects that plaintiffs' counsel's question was directed only to Dr. Cotten's testimony in his deposition and not at trial.

The trial judge stated his initial reaction to plaintiffs' motion and took the motion under advisement pending plaintiffs' tender of legal authority: "In direct examination he asked . . . standard of care questions of Dr. Cotten. Dr. Cotten gave his opinions. There's no objections to those questions. They all came in." When the trial judge later ruled on plaintiffs' motion he specifically said, "I'm going to deny the motion to strike his testimony. I believe his testimony came in during direct examination without objection. Later on cross-examination you asked him a question concerning what standard of care he was applying."

C. Legal Analysis

Certainly it was proper for plaintiffs to point out this discrepancy between Dr. Cotten's deposition testimony and his trial testimony for purposes of impeachment, but the record simply does not support plaintiffs' argument for their motion to strike. Dr. Cotten's extensive trial testimony on the standard of care was admitted without objection. Dr. Cotten was never asked, and never expressed the standard of care he was applying in his trial testimony. Accordingly, we find no abuse of discretion in the trial court's denial of the motion to strike. This assignment of error is overruled.

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hand, the evidence has shown that the attending physicians were specialists in the field of neonatology. Therefore, the duties applicable to the resident physician in this matter are that of a neonatologist.

VII. Motion for New Trial

[6] Plaintiffs finally argue that the trial court abused its discretion and erred by its denial of plaintiffs' motion for a new trial based upon "numerous irregularities and inequities that prevented the plaintiff[s] from receiving a fair trial." However, plaintiffs make no substantive argument regarding any legal basis for a new trial, and their motion for new trial referred generally to the same issues as we have previously considered above. As we have found no error in the trial court's ruling on the issues presented on appeal, and plaintiffs have failed to argue any other basis for a new trial, this assignment of error is without merit.

Plaintiffs' additional assignments of error, numbers 5, 9 and 11, were not argued in plaintiffs' brief and are therefore deemed abandoned. N.C.R. App. P. 28(b)(6).

For the reasons stated above, we find that plaintiffs received a fair trial, free of reversible error and we affirm the judgment of the trial court.

AFFIRMED.

Judges WYNN and CALABRIA concur.

AZALEA GARDEN BOARD & CARE, INC., PLAINTIFF v. MEREDITH DODSON VANHOY, PERSONAL REPRESENTATIVE OF THE ESTATE OF RICKY C. DODSON, DECEASED; LARRY S. GIBSON, NINA G. GIBSON, DANIEL W. TUTTLE; TIMOTHY D. SMITH; AND HARVEY ALLEN, JR., DEFENDANTS

No. COA08-640

(Filed 21 April 2009)

1. Appeal and Error— summary judgment—interlocutory order—possibility of inconsistent verdicts

Appeal from a summary judgment was interlocutory but involved a substantial right where this lawsuit against the personal representative of an estate arose from the sale of a rest home, bankruptcy by the rest home, the failure of the closing, and actions against all of the buyers. A substantial right is affected because of the possibility of two trials on the same issues and inconsistent verdicts.

2. Estates— claim against—no actual knowledge of claim—motion for summary judgment by estate—affidavits of personal representative—sufficiency

Affidavits from the personal representative of an estate and an attorney that they lacked actual knowledge of a claimant and a claim are competent and sufficient to satisfy the initial burden of forecasting evidence on a motion for summary judgment. The estate cannot meet its burden of forecasting evidence that it lacked knowledge without offering affidavits from an interested party, and the proscription of N.C.G.S. § 1A-1, Rule 56(e) does not apply to a personal representative or estate's assertion that it lacked actual knowledge of a claimant and a claim.

3. Estates— claim against—summary judgment motion—claimant's forecast of evidence—actual knowledge

Azalea Garden's forecast of evidence in response to an estate's summary judgment motion on Azalea Garden's claim against it failed to create a genuine issue of material fact as to whether its identity and its claim were reasonably ascertainable by the personal representative of an estate within 75 days of her qualification and that the estate was required to provide Azalea Garden with individual notice.

Appeal by plaintiff from an order entered 7 March 2008 by Judge Ben F. Tennille in Davidson County Superior Court. Heard in the Court of Appeals 13 January 2009.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher A. Raines, for plaintiff-appellant.

Sharpless & Stavola, P.A., by Frederick K. Sharpless, for defendant-appellee Meredith Dodson Vanhoy.

HUNTER, Robert C., Judge.

Plaintiff Azalea Garden Board & Care, Inc. ("plaintiff" or "Azalea Garden") appeals from an order entered 7 March 2008 by Judge Ben F. Tennille ("Judge Tennille") in Davidson County Superior Court granting summary judgment in favor of defendant Meredith Dodson Vanhoy ("Ms. Vanhoy") in her capacity as personal representative of her father's, Ricky C. Dodson ("Mr. Dodson"), estate (the "Estate") and dismissing plaintiff's breach of contract action based on: (1) N.C. Gen. Stat. § 28A-19-3 (2007), i.e., North Carolina's non-

claim statute; and (2) N.C. Gen. Stat. § 1-52(1) (2007), i.e., the three-year statute of limitations. The central issue in this appeal is whether the trial court erred in granting summary judgment for Ms. Vanhoy when she did not, pursuant to N.C. Gen. Stat. § 28A-14-1(b) (2007), "personally deliver or send by first class mail" to Azalea Garden a copy of the general notice of claims that she published in a local Watauga County newspaper pursuant to N.C. Gen. Stat. § 28A-14-1(a). As discussed *infra*, because we conclude that the forecast of evidence in this case does not create a genuine issue of material fact as to whether Azalea Garden and its claim against Mr. Dodson were "actually known" or "reasonably ascertain[able]" by Ms. Vanhoy, we conclude, as a matter of law, that she was not required to provide Azalea Garden with individual notice. N.C. Gen. Stat. § 28A-14-1(b). Consequently, after careful review, we affirm the trial court's order based on the application of the non-claim statute.[1]

I. Background

On or about 6 May 1999, defendants Timothy Smith ("Mr. Smith") and Nina Gibson ("Ms. Gibson") executed an "Offer to Purchase Contract" (the "Contract") with Azalea Garden for the purchase of Brookside of Winston-Salem Rest Home ("Brookside"). David Wagner ("Mr. Wagner"), the President of Azalea Garden, signed the Contract on plaintiff's behalf underneath the seller heading; Mr. Smith and Ms. Gibson signed underneath the purchaser heading; and Mr. Dodson, who was an employee of The Interstate Companies of America, Inc. ("Interstate"), signed underneath the broker headings that were located underneath both the seller and purchaser headings. The Contract contained two "Addendum[s]." Mr. Smith and Ms. Gibson signed both Addendums as purchasers, and Mr. Wagner signed both as seller. The word "Seal" appears next to their respective signatures on Addendum B. Neither Addendum contains Mr. Dodson's signature.

On or about 13 July or 20 July 1999,[2] these same individuals signed an agreement modifying the Contract (the "Modification"). As with the Contract, Ms. Gibson and Mr. Smith signed under the purchaser heading; Mr. Wagner signed under the seller heading; and Mr.

1. Because we determine that summary judgment was properly granted in Ms. Vanhoy's favor based on the non-claim statute, we do not address the separate statute of limitations ground. Also, because the current, pertinent statutory provisions are substantively identical to those that were in effect at the time this cause of action arose, we cite to the most recent published versions.

2. The face of the Modification has two different dates. The date written on the seller's side is 13 July and the date written on the purchaser's side is 20 July.

Dodson signed under both broker headings. The Modification stated that the closing was to occur on 31 August 1999. Both the Contract and the Modification required the purchasers to provide $25,000.00 in earnest money; this money was deposited with Interstate.

The face of both the Contract and the Modification indicate that Mr. Dodson signed merely as a broker. However, according to plaintiff, at some point subsequent to the execution of the Contract and Addendums, but prior to the execution of the Modification, Mr. Dodson asked plaintiff to release him from his broker status in order to join a group that planned to acquire and operate Brookside, and Mr. Wagner granted his request.

In 1999, Azalea Garden was in reorganization under a Chapter 11 bankruptcy filing and was purportedly in default on its obligations as to Brookside. The buyers declined to proceed with the purchase because they believed that Azalea Garden could not convey marketable title on the date of closing, an issue which plaintiff disputed and continues to dispute. The closing never occurred.

On 23 October 2000, Mr. Dodson died in Watauga County, which was his county of residence, and on 27 October 2000, his death certificate was filed with the Watauga County Register of Deeds. On 5 January 2001, Ms. Vanhoy qualified to administer her father's estate in Watauga County. Subsequent to this, she hired attorney Martha Peddrick ("Ms. Peddrick") to assist her with the administration of the Estate. Pursuant to N.C. Gen. Stat. § 28-14-1(a), Ms. Vanhoy published a general notice to creditors in The Watauga Democrat for four consecutive weeks on 7, 14, 21, and 28 March 2001 informing them to present their claims to the Estate by 8 June 2001 or that said notice would be pled as a bar to their recovery. It is undisputed that this notice fully complied with N.C. Gen. Stat. § 28A-14-1(a).

On 30 August 2002, Azalea Garden filed a lawsuit in Davidson County, naming Mr. Dodson, Ms. Gibson, Larry Gibson ("Mr. Gibson"), Danny Tuttle ("Mr. Tuttle"), Dr. Harvey Allen, Jr. ("Dr. Allen, Jr."), Interstate, and The Trillium Residential Systems, LLC ("Trillium") as defendants and asserting that these defendants breached the contract to purchase Brookside. Specifically, Azalea Garden asserted that Ms. Gibson and Mr. Tuttle[3] were "partners" with the other defendants and that they "were acting on behalf of these partners" when they signed the Contract and Modification. In addition, Azalea Garden asserted

3. As stated *supra*, the documents in the record indicate that Ms. Gibson and Mr. Smith signed the Contract and Modification, not Mr. Tuttle.

that it was entitled to the $25,000.00 in earnest money that had been given to Mr. Dodson and/or Interstate, that Dodson's and Interstate's failure to provide Azalea Garden with the earnest money constituted an unfair and deceptive trade practice, and that it was entitled to punitive damages against Dodson and Interstate. Azalea Garden never served the 30 August 2002 complaint on Mr. Dodson, who had died almost two years earlier.

After Azalea Garden's initial 30 August 2002 complaint and summons to Mr. Dodson were returned unserved, it obtained an alias and pluries summons directed to him on 26 November 2002. Following this, Azalea Garden did not obtain an additional alias and pluries summons to keep its original action against Mr. Dodson alive. In spite of this, on 3 June 2003, Azalea Garden filed a "Motion to Substitute Party" in Davidson County Superior Court seeking to substitute Ms. Vanhoy as a defendant in her capacity as representative of the Estate in its original action. In its motion, Azalea Garden claimed that when it filed its 30 August 2002 complaint, neither it nor any of its officers or agents "knew or could have reasonably known" either that Mr. Dodson had died or that it was required to present its claims to the personal representative of the Estate.

On 22 July 2003, Judge Mark E. Klass entered an "Order Substituting Personal Representative as Party Defendant"; Azalea Garden filed an "Amendment to Complaint" substituting Ms. Vanhoy as a party-defendant in her capacity as personal representative of the Estate in the original action; and a summons was issued to Ms. Vanhoy. The 22 July 2003 summons was returned unserved; however, an alias and pluries summons was issued to Ms. Vanhoy on 27 August 2003. In September 2005, plaintiff voluntarily dismissed its original case without prejudice.

On 21 March 2006, Azalea Garden filed the instant breach of contract action against Ms. Vanhoy, as personal representative of the Estate; Mr. Smith; Mr. Tuttle; Mr. Gibson; Ms. Gibson; and Dr. Allen, Jr. pertaining to the failed Brookside transaction[4]. Specifically, Azalea Garden asserted that the named defendants had formed "a joint venture for the purpose of acquiring and operating a rest home for profit [and] . . . held themselves out to plaintiff as being members or participants in a joint venture[.]" Azalea Garden further asserted that Ms. Gibson and Mr. Smith had

4. Unlike the 2002 complaint, the 2006 complaint asserts no claim regarding and makes no reference to the earnest money.

executed the Offer to Purchase Contract and Modification on their own behalf and in their capacities as co-adventurers with defendants and in the course and scope and furtherance of the joint venture or apparent joint venture. As such, all defendants, as members of the joint venture or apparent joint venture or as persons who ratified the actions of [Ms.] Gibson and [Mr.] Smith and the contract, were bound by the terms, conditions and obligations of the Offer to Purchase Contract and Modification, including, but not limited to, the purchase of Brookside from plaintiff.

By order dated 31 May 2007, the case was designated as a complex business case and assigned to Judge Tennille. On 13 August 2007, Ms. Vanhoy filed a motion for summary judgment, along with, *inter alia*: (1) copies of the Contract and the Modification; (2) her affidavit; and (3) an affidavit from Ms. Peddrick. Ms. Vanhoy's affidavit stated, *inter alia*, that: (1) the facts contained in her affidavit were based on her personal knowledge; (2) "[a]t the time [she] caused the general Notice to Creditors to be published, [she] did not know that Azalea Garden . . . allegedly had a claim against [her] father's estate"; and (3) "[a]t the time [she] caused the general Notice to Creditors to be published, [she] had no way of ascertaining that Azalea Garden . . . had an alleged claim against [her] father's estate." Ms. Peddrick's affidavit stated, *inter alia*, that: (1) the facts contained in her affidavit were based on her personal knowledge; (2) she "had not received notice of Azalea Garden['s] . . . attempt to substitute the Estate" prior to "the week of" 25 August 2003; and (3) she "had not seen, nor was [she] aware of the existence of, the Complaint or any other document setting forth Azalea Garden['s] . . . claims against the Estate before August, 2003."

In opposition to Ms. Vanhoy's motion, Azalea Garden produced, *inter alia*: (1) numerous pieces of correspondence regarding the Brookside transaction which were purportedly contained in Interstate's files, including several letters from Azalea Garden demanding specific performance as to the Brookside transaction and delivery of the $25,000.00 in earnest money; (2) portions of a deposition from Interstate's president, Dennis Maddox ("Mr. Maddox"), in which Mr. Maddox stated that a representative of the Estate had met with him for the purpose of entering into a "Stock Purchase Agreement" which provided that Mr. Maddox would indemnify the Estate against liabilities arising out of Mr. Dodson's employment; (3) portions of a deposition from James Keen ("Mr. Keen"), the banker who had handled the anticipated financing for the Brookside trans-

action, in which Mr. Keen stated that a representative of the Estate had met with him regarding an unrelated matter, that he had documents in an unrelated file pertaining to the Brookside transaction, and that he believed Mr. Dodson was one of the potential purchasers; and (4) a letter dated 8 September 1999, purportedly sent from Mr. Smith to Mr. Dodson at Interstate, in which Mr. Smith stated that he had "decided not to become a partner with [Mr. Dodson], [Mr.] Tuttle, and . . . [the] Gibson[s]" regarding Azalea Garden and that he wished Mr. Dodson and the others "the upmost [sic] success with Azalea Gardens [sic]."

A hearing regarding Ms. Vanhoy's motion was held on 27 November 2007. At this hearing, the parties' dispute regarding the non-claim statute largely centered on whether Azalea Garden and its claim were "actually known or . . . reasonably ascertain[able] by [Ms. Vanhoy] within 75 days" of her becoming personal representative of the Estate, and thus whether she should have provided Azalea Garden with individual notice. N.C. Gen. Stat. § 28A-14-1(b).

Ms. Vahnoy acknowledged that as the party moving for summary judgment, she had the burden of raising the non-claim statute as a defense and of producing a sufficient forecast of evidence to support her assertion that Azalea Garden's claim was barred by the non-claim statute. Ms. Vanhoy contended that she had met this burden by showing: (1) the latest possible date on which Azalea Garden's claim arose (14 September 1999); (2) the date of Mr. Dodson's death and his county of residence (23 October 2000); (3) the date she qualified as personal representative of the Estate (5 January 2001); (4) that the general notice to creditors had been properly published in accordance with section 28A-14-1(a); (5) the bar date contained in the general notice (8 June 2001); and (6) that Azalea Garden did not serve her with its claim until well outside this date (27 August 2003). Ms. Vanhoy further argued that once she had met her burden, Azalea Garden was obligated to produce evidence setting forth specific facts that raised a genuine issue of material fact as to whether she knew, or could have reasonably ascertained of Azalea Garden and its claim within seventy-five days of her qualifying as personal representative. She contended that Azalea Garden had not offered a sufficient forecast of evidence to this effect, that consequently Azalea Garden was not entitled to individual notice, and that Azalea Garden's claim was therefore barred pursuant to section 28A-19-3 based on its failure to present its claim before the 8 June 2001 time bar contained in the general notice that she had published.

Azalea Garden acknowledged that it had failed to present its claim to Ms. Vanhoy within the time bar contained in the general notice that she had published in The Watauga County Democrat and did not dispute that this notice complied with N.C. Gen. Stat. § 28A-14-1(a). However, Azalea Garden argued that Ms. Vanhoy was barred from utilizing the non-claim statute as a defense to its breach of contract claim because: (1) Azalea Garden and its claim were known or reasonably ascertainable by Ms. Vanhoy, thus entitling it to individual notice pursuant to section 28A-14-1(b); and (2) Ms. Vanhoy failed to provide it with individual notice. As to who had the burden of establishing whether or not Azalea Garden and its claim were known or reasonably ascertainable, i.e., whether Azalea Garden should have been provided with individual notice pursuant to N.C. Gen. Stat. § 28A-14-1(b), Azalea Garden asserted that it was on Ms. Vanhoy because she was the representative of the Estate and the party moving for summary judgment. In this respect, Azalea Garden objected to the portion of Ms. Vanhoy's affidavit which stated that she " 'had no way of ascertaining that Azalea Garden . . . had an alleged claim against [her] father's estate[,]' " and to the portion of Ms. Peddrick's affidavit which stated that she " 'had not received notice of Azalea Garden['s] . . . attempts to substitute the estate in this lawsuit' " prior to the week of 25 August 2003. Specifically, Azalea Garden asserted that these statements violated N.C.R. Civ. P. 56(e) because they were legal conclusions that failed to set forth facts that would be admissible into evidence and consequently, that these statements could not be considered by the court in support of Ms. Vanoy's and the Estate's lack of notice as to Azalea Garden's identity or its claim. Furthermore, Azalea Garden claimed that, in order to meet her burden of forecasting evidence on this issue, Ms. Vanhoy had to affirmatively provide what steps she and Ms. Peddrick undertook to uncover Azalea Garden's identity and claim and to show that these steps reflected reasonable diligence, which she had failed to do. Finally, in the alternative, Azalea Garden asserted that, even if it had the burden to show that it was entitled to individual notice pursuant to N.C. Gen. Stat. § 28A-14-1(b), it had produced sufficient evidence to establish that a genuine issue of material fact existed as to whether its identity and its breach of contract claim were actually known or could have been reasonably ascertained by Ms. Vanhoy, and as a result, that the grant of summary judgment in Ms. Vanhoy's favor was error.

On 7 March 2008, Judge Tennille entered an extensive and detailed order granting summary judgment in Ms. Vanhoy's favor and

dismissing Azalea Garden's breach of contract claim based on the non-claim statute and the three-year statute of limitations respectively. As to the non-claim statute, Judge Tennille stated:

> Based on the . . . undisputed facts, the Court concludes that Defendant Vanhoy neither knew nor should have known that Plaintiff had an unsatisfied claim against Mr. Dodson. Having no knowledge of even a potential unsatisfied claim, she was under no duty to conduct an investigation nor was she required to send direct notice to Plaintiff. Her lack of knowledge stands in stark contrast to the actual knowledge of the representative in *[In re Estate of] Mullins*.
>
> The Court finds that Defendant Vanhoy complied with North Carolina General Statute section 28A-14-1 and that Plaintiff did not file the current claim against the estate of Mr. Dodson in accordance with North Carolina General Statute section 28A-19-3. These findings are sufficient to grant Defendant Vanhoy's Motion for Summary Judgment.

Judge Tennille also noted, *inter alia*, that: (1) once a personal representative establishes that she has properly published notice in accordance with N.C. Gen. Stat. § 28A-14-1(a), "the burden falls on a claimant to prove direct personal notice was required", i.e., that its identity and claim were known or reasonably ascertainable within 75 days of the qualification of the personal representative; (2) he only considered "the factual assertions" contained in Ms. Vanhoy's and Ms. Peddrick's affidavits and not the legal conclusions; and (3) "[t]he absence of actual knowledge [was] uncontroverted."[5] This appeal followed.

II. Analysis

A. Interlocutory Order

[1] Azalea Garden acknowledges that Judge Tennille's order is interlocutory,[6] but claims we should review the merits of the instant appeal because it affects "a substantial right" pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d) (2007). Specifically, Azalea Garden

5. In fact, Azalea Garden specifically conceded that it did not have any "actual-knowledge evidence."

6. Subsequent to the filing of the Notice of Appeal in the instant case, Azalea Garden voluntarily dismissed with prejudice its breach of contract claim against Mr. Smith. However, with the exception of Mr. Smith and Ms. Vanhoy, it appears that Azalea Garden's breach of contract claim against the other named defendants remains.

asserts that if we do not review this appeal, it "will lose a substantial right to have common issues relating to the liability of multiple defendants tried at one time."

"[O]ur Supreme Court [has] stated that ' "the right to avoid the possibility of two trials on the same issues can be such a substantial right." ' " *Josyln v. Blanchard*, 149 N.C. App. 625, 627, 561 S.E.2d 534, 535-36 (2002) (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)).

> "This general proposition is based on the following rationale: when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn 'creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.' "

Id., 561 S.E.2d at 536 (quoting *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989)). In addition, "[t]he 'right to have the issue of liability as to all parties tried by the same jury' and the avoidance of inconsistent verdicts in separate trials have been held by our Supreme Court to be substantial rights." *Vera v. Five Crow Promotions, Inc.*, 130 N.C. App. 645, 648, 503 S.E.2d 692, 695 (1998) (quoting *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408-09 (1982)).

We agree with plaintiff that the instant appeal affects a substantial right because of the possibility that two trials may occur on the same issues as well as the possibility of inconsistent verdicts. Here, Judge Tennille granted summary judgment in Ms. Vanhoy's favor based solely on the lack of timeliness of Azalea Garden's breach of contract claim without addressing the underlying merits of the claim itself. Should Azalea Garden be successful in the instant appeal, the issue remains as to whether Mr. Dodson and the other named defendants breached the contract to purchase Brookside. Two key issues in that determination are whether Azalea Garden could have delivered marketable title to the Brookside facility at closing and whether defendants had joined in a joint venture for its purchase. The parties dispute both of these issues, which involve the consideration and resolution of a common set of facts. Consequently, we address the merits of Azalea Garden's appeal.

B. Standard of Review

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. A defendant may show she is entitled to summary judgment by: " '(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.' " *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, (quoting *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986)), *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000). Our standard of review is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

C. Non-claim Statute

[2] On appeal, both parties essentially raise the same arguments they asserted below. As discussed *infra*, we essentially agree with Ms. Vanhoy, particularly in light of this Court's decision in *Mullins. In re Estate of Mullins* 182 N.C. App. 667, 643 S.E.2d 599, *disc. review denied*, 361 N.C. 693, 652 S.E.2d 262-63 (2007). Prior to discussing *Mullins*, we first address the parties' arguments regarding their respective burdens of forecasting evidence on the individual notice issue.

In North Carolina, when a claim is brought against a decedent, there are two statutory mechanisms that limit the time in which a claimant can bring the suit against the decedent's estate: (1) the non-claim statute (section 28A-19-3) and (2) the applicable statute of limitations. "A cause of action may be barred by either or both of these statutes." *Ragan v. Hill*, 337 N.C. 667, 671, 447 S.E.2d 371, 374 (1994). Seeking to "clarify the nature and operation of section 28A-19-3[,]" our Supreme Court has stated:

> This section is the type of statute that is commonly referred to as a "non-claim statute." Though similar to a statute of limitations, it serves a different purpose and operates independently of the statute of limitations that may also be applicable to a given claim. Section 28A-19-3 is a part of Chapter 28A . . . [which was] enacted . . . to provide faster and less costly procedures for administering estates. The time limitations prescribed by this section allow the personal representative to identify all claims to be made against the assets of the estate early on in the process of administering the estate. The statute also promotes the early and final resolution of claims by barring those not presented within the identified period of time.

Id. N.C. Gen. Stat. § 28A-19-3(a) provides in pertinent part:

> All claims against a decedent's estate which arose before [his] death[,] . . . which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a) or in those cases requiring the delivery or mailing of notice as provided for in G.S. 28A- 14-1(b), within 90 days after the date of the delivery or mailing of the notice if the expiration of said 90-day period is later than the date specified in the general notice to creditors, are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

Hence, in order for a claimant to avoid having its claim barred by the non-claim statute, it must: (1) present its claim to the decedent's estate in the form and manner mandated by section 28-19-1 (2007); and (2) do so within the time period stated in the general notice that an estate is required to publish pursuant to N.C. Gen. Stat. § 28A-14-1(a), or if N.C. Gen. Stat. § 28A-14-1(b) applies and the claimant is entitled to individual notice, within ninety days of the delivery or mailing of said notice if said period expires subsequent to the time bar contained in the published notice.

As stated *supra*, it is undisputed that Azalea Garden did not present its breach of contract claim to Ms. Vanhoy and the Estate until well outside the 8 June 2001 time bar contained in the published notice. However, Azalea Garden contends its failure to present its breach of contract claim within the time period provided in the published notice is of no import because it was entitled to individual

notice under N.C. Gen. Stat. § 28A-14-1(b) and it is undisputed that Ms. Vanhoy did not provide Azalea Garden with individual notice.

N.C. Gen. Stat. § 28A-14-1 provides in pertinent part:

> (a) Every personal representative and collector after the granting of letters shall notify all persons, firms and corporations having claims against the decedent to present the same to such personal representative or collector, on or before a day to be named in such notice, which day must be at least three months from the day of the first publication or posting of such notice. The notice shall set out a mailing address for the personal representative or collector. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. . . .
>
> (b) Prior to filing the proof of notice required by G.S. 28A-14-2, every personal representative and collector shall personally deliver or send by first class mail to the last known address a copy of the notice required by subsection (a) of this section to all persons, firms, and corporations having unsatisfied claims against the decedent who are actually known or can be reasonably ascertained by the personal representative or collector within 75 days after the granting of letters. . . .

In other words, subsection (a) mandates that the general notice must always be published in order to inform all claimants, whether known or unknown, to present their claims to the estate, and subsection (b) mandates that known claimants or those claimants who are reasonably ascertainable by the personal representative or collector within 75 days must be individually provided with the published notice mandated by subsection (a).

Our appellate case law is clear that before an estate can avail itself of the non-claim statute as a defense, it must demonstrate that it complied with N.C. Gen. Stat. § 28A-14-1(a). In *Anderson v. Gooding*, 300 N.C. 170, 173, 265 S.E.2d 201, 203-04 (1980), our Supreme Court considered whether an executor's publication of a general notice to creditors that failed to name a bar date for the bringing of claims against the estate was sufficient "to start the running of" the non-claim statute. The Court held that it was not, stating:

> When an administrator or executor pleads G.S. 28A-19-3(a) as a defense against claims presented against the estate, he

> must establish the fact that he did advertise as required by G.S. 28A-14-1. Failure of such proof causes failure of the defense made under G.S. 28A-19-3(a). [Where] the proofs do not sustain the defense . . . the limiting statute is no bar to the suit. The time limitations for presentation of claims provided in G.S. 28-19-3(a) will not aid an executor or administrator who fails to observe its requirements.

Id. at 174, 265 S.E.2d at 204 (citations omitted); *see also Lee v. Keck*, 68 N.C. App. 320, 329, 315 S.E.2d 323, 329-30 (1984) (holding that where a defendant moves for summary judgment and asserts section 28A-19-3(a) as a bar, the defendant bears "the burden of showing that [she] ha[s] a complete defense as a matter of law[,]" and the defendant fails to meet this burden where the record is silent as to whether the general notice to creditors was published).

However, while it is clear that a defendant-personal representative has the burden of demonstrating that she properly published the general notice required by N.C. Gen. Stat. § 28A-14-1(a), there is no North Carolina case law addressing whether a personal representative also has the burden of forecasting evidence to support her assertion that a particular claimant and claim were not actually known or reasonably ascertainable by her within 75 days, i.e., that said claimant was not entitled to individual notice pursuant to N.C. Gen. Stat. § 28A-14-1(b). As noted *supra*, Judge Tennille concluded that once an estate establishes that it properly complied with the publication requirement and that the claimant failed to present its claim before the time bar set out in the published notice, the burden then shifts to the claimant to produce a forecast of evidence based on specific facts which demonstrates that a genuine issue of material fact exists as to whether it was entitled to individual notice pursuant to N.C. Gen. Stat. § 28A-14-1(b). As discussed *infra*, we essentially agree.

i. Actual Knowledge

At the outset, we note that even assuming, *arguendo*, that a personal representative/estate has the initial burden of forecasting evidence to support its assertion that it lacked actual knowledge of a claimant's identity and claim, we fail to see how an estate could meet this burden without offering affidavits from an "interested" party stating that she lacks actual knowledge. Hence, while we agree with Azalea Garden and Judge Tennille that certain legal conclusions contained in Ms. Vanhoy's and Ms. Peddrick's affidavits technically cannot be considered by the court due to N.C.R. Civ. P. 56(e), we do not

believe this proscription applies to a personal representative's/estate's assertion that it lacked actual knowledge of a claimant and its claim. Indeed, were we to accept Azalea Garden's argument, we fail to see how an estate would ever be able to support its lack of actual knowledge when moving for summary judgment based on the non-claim statute. In effect, this would undermine the central purpose of chapter 28A, which was "designed to encourage speedy presentation of claims and to expedite the administration, and ultimately, the closing, of estates." *In re Estate of English*, 83 N.C. App. 359, 365, 350 S.E.2d 379, 383 (1986), *disc. review denied*, 319 N.C. 403, 354 S.E.2d 711-12 (1987). As such, assuming, *arguendo*, that when a personal representative of an estate moves for summary judgment based on the non-claim statute, she has the initial burden of forecasting evidence to demonstrate her lack of actual knowledge, we believe that affidavits from the personal representative and the attorney she hired to help administer the estate which state that these individuals lacked actual knowledge are competent and sufficient to satisfy this burden.

ii. Reasonably Ascertainable Claimant and Claim

[3] At the outset, we note that with regard to the issue of whether a particular claimant and claim are reasonably ascertainable within the time frame contained in N.C. Gen. Stat. § 28A-14-1(b), we tend to agree with Azalea Garden that the statements contained in Ms. Vanhoy's and Ms. Peddrick's affidavits appear to essentially be bare legal conclusions that should not be considered pursuant to N.C.R. Civ. P. 56(e). In addition, it appears that the individual notice requirement contained in subsection (b) was designed to strike a balance between being fair to certain claimants whose identities and claims could be ascertained without imposing an overly onerous burden on the estate and allowing the personal representative to efficiently administer and close the estate with finality. That being said, we believe that imposing the initial burden on the claimant to produce a forecast of evidence demonstrating that a material issue of fact exists as to whether its identity and its claim were reasonably ascertainable is a more sensible and logical approach to arrive at this balance without imposing an overly onerous burden on either party.

In this respect, first, we note that if this burden was imposed on the personal representative of the estate, she would be obligated to establish a negative. Such approach does not possess much logical appeal. In addition, even if a personal representative affirmatively details in her affidavit all of the actions she has undertaken to admin-

ister and close the estate, a claimant would still be afforded the opportunity to produce a forecast of evidence showing that the estate should have looked elsewhere or done more to try and ascertain its identity and its claim, and that had the estate done so, a material issue of fact exists as to whether the claimant's identity and claim were reasonably ascertainable. In fact, unlike with a personal representative, who may or may not be aware of the decedent's dealings with a particular claimant, the claimant should know: (1) of its dealings with the decedent; and (2) what documents or conversations it believes would have reasonably alerted the estate of its identity and claims. This is especially true under the facts of the instant case. Here, Azalea Garden's claim is not based on the provision of personal services to Mr. Dodson, such as where a hospital had provided medical services to a decedent and the Estate would likely receive a bill or be on notice of said services. Rather, Azalea Garden asserts that Mr. Dodson breached the contract to purchase Brookside because he had entered into a joint venture with the other named defendants even though Mr. Dodson only signed as a broker and Azalea Garden could not locate or produce any written agreement releasing Mr. Dodson from his broker status or establishing a joint venture between him and the other named defendants, which might have alerted the Estate of this claim.

Accordingly, we hold that in the instant case, Ms. Vanhoy produced a sufficient forecast of evidence in support of her summary judgment motion to shift the burden to Azalea Garden to produce a forecast of evidence setting forth specific facts, as opposed to mere allegations, establishing that a genuine issue of material fact exists as to whether its identity and claim were reasonably ascertainable, i.e., that it was entitled to individual notice. *See*, *e.g.*, *Beck v. City of Durham*, 154 N.C. App. 221, 229, 573 S.E.2d 183, 189 (2002) ("Once defendants, as the moving party, ma[ke] and support[] their motion for summary judgment, the burden . . . shift[s] to plaintiff, as the nonmoving party, to introduce evidence in opposition to the motion that set[s] forth specific facts showing that there is a genuine issue for trial." (internal quotation marks omitted)).

In support of its argument that it met this burden, Azalea Garden highlights the evidence we noted *supra*. We disagree with Azalea Garden that its forecast of evidence adequately sets forth specific facts showing that a material issue of fact exists as to whether Ms. Vanhoy and the Estate could have reasonably ascertained its identity and its claim, particularly in light of this Court's opinion in *Mullins*.

In *Mullins*, the petitioners also argued that they were entitled to personal notice pursuant to N.C. Gen. Stat. § 28A-14-1(b). *In re Estate of Mullins* 182 N.C. App. at ——, 643 S.E.2d at 603. In support of their argument, the petitioners noted that: (1) they had filed a law suit against the testator in December 2000[7]; (2) they had entered into a tolling agreement as to this lawsuit with the testator and the respondent on 1 June 2002[8]; (3) on 12 May 2004, after negotiations had broken down, the petitioners' attorney told the testator and the respondent that petitioners intended to sue them; (4) on 21 May 2004, petitioners sent a demand letter to the attorney representing both the testator and the respondent informing them that they would bring suit if their demands were not met; (5) on 26 May 2004, the day after the testator died, petitioners filed a declaratory judgment action against him and the respondent; (6) petitioners informed the attorney for the testator and the respondent that they would delay serving the 26 May 2004 lawsuit; and (7) petitioners engaged in settlement discussions with said attorney in late 2004. *Id.* at ,—— , —— 643 S.E.2d at 600, 603. Taking all of these facts into consideration, this Court held:

> The record is clear that respondent did not have knowledge of any unsatisfied claim against testator or the Estate. Petitioners had settled and dismissed their December 2000 lawsuit against testator without prejudice. Petitioners never served the 26 May 2004 lawsuit. Nothing in the record indicates petitioners filed a claim against the Estate prior to its closing on 12 January 2005. Nothing in the record before us indicates respondent was on notice of any "unsatisfied claim" by petitioners. Petitioners were not entitled to personal notice under N.C. Gen. Stat. § 28A-14-1(b).

Id. at 673, 643 S.E.2d at 603 (citation omitted).

While Azalea Garden tries to differentiate *Mullins* from the instant case based on the standard of review, we find this argument unconvincing. First, in *Mullins* this Court explicitly stated that it reviewed questions of law *de novo*. *Id.* at ——, 643 S.E.2d at 602. Next, though the Court in *Mullins* was not reviewing a grant of summary judgment, even when the evidence here is considered in the light most favorable to Azalea Garden, its forecast of evidence pales in

7. The testator in *Mullins* died on 25 May 2004.

8. The respondent became the executor of the estate subsequent to the testator's death on 25 May 2004.

comparison to the facts that this Court deemed insufficient to require individual notice in *Mullins*.

Here, there are no allegations that Ms. Vanhoy or the Estate had any dealings with Azalea Garden or an attorney acting on its behalf. Nor are there any allegations that any materials regarding Azalea Garden or its purported claim were contained in any of Mr. Dodson's personal files. In addition, the demand letters that were purportedly contained in Interstate's files do not state that Azalea Garden planned to file suit against Mr. Dodson either in a personal capacity or otherwise, or for that matter, against any of the named defendants. Furthermore, nothing on the face of the Contract or the Modification indicate that Mr. Dodson was involved as anything other than a broker, and Azalea Garden did not tender any evidence of a written agreement to support its theory that Mr. Dodson had abdicated his role as broker to enter into a partnership agreement with any of the other named defendants which might have arguably put the Estate on notice that he was engaged in a joint venture in a personal capacity or that an unsatisfied breach of contract claim existed. As such, like Judge Tennille, we do not believe that Ms. Vanhoy had the "affirmative duty to shift [sic] through all the work files accumulated during Mr. Dodson's career to determine whether any one of them could possibly be the basis of an unsatisfied claim that could be asserted against the estate."

In addition, there is no evidence that the Estate's respective meetings and conversations with Mr. Maddox and Mr. Keen, both of which occurred long before Azalea Garden filed suit, pertained to anything other than the routine closing of the Estate. Nor is there any evidence that Mr. Maddox or Mr. Keen had any knowledge of the existence of Azalea Garden's breach of contract claim at this time or that said meetings/conversations would have put the Estate on notice as to any unsatisfied claim against the Estate or against Mr. Dodson personally. Finally, even though Mr. Keen stated in his deposition that he believed that Mr. Dodson was one of the potential purchasers of Brookside and Mr. Smith's letter likewise appears to indicate his belief that Mr. Dodson was a member of the group who planned to purchase Brookside, this evidence is not sufficient to create a genuine issue of material fact as to whether Azalea Garden's breach of contract claim, which was not filed until 30 August 2002, was reasonably ascertainable by the Estate.

In sum, we conclude that Azalea Garden's forecast of evidence failed to create a genuine issue of material fact as to whether its iden-

tity and its breach of contract claim were reasonably ascertainable by Ms. Vanhoy within 75 days of her qualification as personal representative of the Estate, i.e., that the Estate was required to provide Azalea Garden with individual notice, especially given this Court's analysis and conclusion in *Mullins*.

III. Conclusion

Given that: (1) it is undisputed that the Estate properly published the general notice to creditors in accordance with N.C. Gen. Stat. § 28A-14-1(a) and that Azalea Garden did not present its claim before 8 June 2001; and (2) that Azalea Garden failed to produce a sufficient forecast of evidence consisting of specific facts which show that a material issue of fact exists as to whether Azalea Garden's identity and claim were reasonably ascertainable and that it was entitled to individual notice under N.C. Gen. Stat. § 28A-14-1(b), we conclude, as a matter of law, that Azalea Garden's breach of contract claim against Ms. Vanhoy and the Estate is barred by N.C. Gen. Stat. § 28A-19-3. Accordingly, we affirm Judge Tennille's order granting summary judgment in Ms. Vanhoy's favor on this ground.

Affirmed.

Judges WYNN and ERVIN concur.

STATE OF NORTH CAROLINA v. ANTHONY LEON McNEIL

No. COA08-1169

(Filed 21 April 2009)

1. Homicide— failure to provide special instructions—not guilty by reason of self-defense

The trial court did not commit plain error in a first-degree murder case by failing to provide specific instructions on "not guilty by reason of self-defense" as a possible verdict because: (1) the jury instructions considered as a whole were correct, and the jury understood that the burden was upon the State to satisfy it beyond a reasonable doubt that defendant did not act in self-defense and the circumstances under which it should return a verdict of not guilty by reason of self-defense; and (2) the trial

court made it clear to the jury that a verdict of not guilty by reason of self-defense was permissible.

2. Appeal and Error— preservation of issues—failure to make constitutional argument at trial—failure to assert plain error

Although defendant contends the trial court abused its discretion in a first-degree murder and possession of a firearm by a felon case by overruling defendant's objection to closing the courtroom to the public, this assignment of error is dismissed because: (1) defendant did not object to the trial court's closing of the courtroom on the constitutional bases he now argues on appeal, and defendant did not specifically and distinctly allege plain error as required by N.C. R. App. P. 10(c)(4); and (2) plain error review is only available in criminal appeals for challenges to jury instructions and evidentiary issues.

3. Firearms and Other Weapons— possession of firearm by felon—denial of request for special instructions—justification

The trial court did not err by denying defendant's written request for special jury instructions on the justification defense for the possession of a firearm by a felon charge because: (1) North Carolina courts have not recognized justification as a defense to a charge of possession of a firearm by a felon; (2) the evidence showed that defendant possessed the shotgun inside his home and away from the victim, at which time there was no imminent threat of death or serious bodily injury; and (3) without deciding the availability of the justification defense, the Court of Appeals held that the evidence in this case did not support giving a special instruction.

4. Homicide— denial of request for jury instruction—absence of duty to retreat

The trial court did not err in a first-degree murder case by denying defendant's request for a jury instruction regarding the absence of a duty to retreat because: (1) the evidence did not support a jury instruction on defendant's lack of duty to retreat; and (2) the evidence did not suggest defendant was free from fault in bringing on the difficulty with the victim, nor was defendant attacked in his own home or on his own premises.

5. Criminal Law— trial court's alleged failure to maintain impartiality—expression of opinion—clarification of testimony—prevention of delay

The trial court did not err in a first-degree murder and possession of a firearm by a felon case by allegedly failing to maintain its impartiality by becoming an active participant in the trial and expressing an opinion as to a factual issue for the jury, the weight of the evidence, credibility of certain witnesses, and defendant's guilt because the contested comments which were made in the presence of the jury were intended to clarify confusing or contradictory testimony or to prevent an unnecessary delay in the trial; and defendant failed to demonstrate that any of the trial court's comments intimated an opinion as to a factual issue, defendant's guilt, the weight of the evidence, or a witness's credibility.

Appeal by Defendant from judgments entered 22 May 2008 by Judge Clifton W. Everett, Jr. in Superior Court, Wilson County. Heard in the Court of Appeals 12 March 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III, for the State.

Sue Genrich Berry for Defendant.

STEPHENS, Judge.

On 22 May 2008, a jury found Anthony Leon McNeil ("Defendant") guilty of first degree murder and possession of a firearm by a felon. The trial court sentenced Defendant to life imprisonment without parole for the first degree murder conviction and a consecutive sentence of fifteen to eighteen months imprisonment for the possession of a firearm by a felon conviction.

I. Facts

The State's evidence presented at trial tended to show the following: On 15 March 2007, William Frederick Barnes ("Barnes") rode his bicycle up to the passenger side window of Vashawn Tomlin's ("Tomlin") car at approximately 10:00 a.m. Tomlin testified that Barnes wanted to wash Tomlin's car. Approximately five minutes later, Tomlin saw Defendant walk out of Defendant's house by Tomlin's car and then walk into another house. Defendant walked out of the second house and spoke to Tomlin and Barnes. Barnes asked Defendant, "What's up[?]" to which Defendant replied, "You got a

nerve speaking to me, I ain't forgot what you did, I was going with her then." Barnes asked Tomlin what Defendant was talking about. Defendant tried to argue with Barnes, and "kept saying . . . 'I'll burn your ass[.]' " Defendant also told Barnes he would "put a hot one in him."

Tomlin testified that Defendant walked back into the first house and returned carrying a shotgun. Defendant walked from his porch toward Barnes, who was still sitting on a bicycle and leaning against the door of Tomlin's car, and Defendant shot Barnes with the shotgun. Tomlin testified Defendant walked back toward his house, then turned and walked into the street, stood over Barnes, aimed the shotgun at Barnes and fired. After shooting Barnes the second time, Defendant walked back to his house and stood in the doorway "looking crazy." Defendant then got into his vehicle and left the scene. Tomlin tried to comfort Barnes, and testified that he never saw any weapons on Barnes.

Dr. M.G.F. Gilliland ("Dr. Gilliland"), professor of pathology at the Brody School of Medicine at East Carolina University, testified for the State that Barnes had shotgun wounds to his pelvis and abdomen. Dr. Gilliland testified that the first wound to Barnes' pelvis appeared to have been inflicted by a shotgun fired approximately fifteen to twenty feet away, or possibly further. The second wound to Barnes' abdomen indicated the shotgun had been fired approximately five to fifteen feet away. The gun shots caused injuries to Barnes' internal organs, including the bowel, pancreas, and heart. The cause of Barnes' death was determined to be shotgun wounds of the torso.

Officer Arnold Samuel of the Wilson Police Department was the first officer to arrive at the scene, and he testified that he did not see any firearm in the vicinity of where Barnes was lying in the street. Adam Rech, an evidence and identification specialist with the Wilson Police Department, testified that he recovered a camouflage-patterned Mossberg shotgun from a house located a few houses away from Defendant's house. Michael Summers ("Summers"), an evidence identification specialist with the Wilson Police Department, testified that Adam Rech recovered a shotgun shell from the chamber of the 12-gauge Mossberg shotgun. Summers also identified two spent 12-gauge cartridge casings that were collected from the scene in the roadway.

At the conclusion of the State's evidence, Defendant presented evidence which tended to show the following: Mildred Woodard

("Woodard"), Barnes' cousin, testified that on a prior occasion she had seen Barnes hit Defendant on the head for no reason. Woodard testified that Defendant did not retaliate and walked away. Woodard also testified that Barnes had a reputation in the community for being a bully. On cross-examination, Woodard testified that she had given a statement to a law enforcement officer on 17 March 2007 that she was going to say she had seen Barnes with a weapon, but that she did not because it was not true. Woodard also admitted that the officer stopped the statement after catching her in several lies. Woodard told the officer that Defendant's mother had instructed Woodard to tell the police that Woodard had seen Tomlin take a gun from Barnes' body. Woodard did not do as Defendant's mother instructed, and Woodard told the officer that she knew nothing about the details of Barnes' shooting.

Sergeant Kelly Lamm ("Lamm") with the Wilson Police Department testified that he interviewed Defendant on 15 March 2007. Lamm read Defendant's statement to the court:

> I've known [Barnes] since around the year 2000. I really just knew him from the streets. Then I started going to Shamone Farmer who is now my wife, Shamone McNeil. After we started dating I found out that [Barnes] used to date Shamone's mother. I learned that [Barnes] had tried to rape Shamone when she was pregnant with my child. [Barnes] and I have had problems for years. [Barnes] is always bothering me and picking on me. [Barnes] worked at the club and I would go to the club and [Barnes] would always mess or pick on me. He would call me names and tell me he was going to get me . . . . Today I was at my house getting ready to cook some chicken outside. I saw [Barnes] ride by on a bike. He rode by and just had a smile on his face. He rode back by the house and asked me about my car. I told him the car was not for sale. Then I asked him why he was talking to me. I told him, ["]you don't like me and I don't like you so why don't you just leave.["] [Barnes] told me, ["]you don't want it["] and started—and was staring at me. [Barnes] said, ["]I will smoke your ass.["] [Barnes] then reached towards his back as if he had a gun. I started walking toward the house. I told him I didn't want any trouble. [Barnes] kept saying, ["]you don't want none, I will smoke your ass.["] I went inside and got the shotgun. It was a pump shotgun. We keep it loaded in the house. The shotgun is loaded with five or six shells. I took the shotgun and went back outside. I came down from the porch and into the street. [Barnes]

> was still sitting on his bike in the street. I told him to go the hell on and leave me alone. [Barnes] kept his hand by his back as if he had a gun. [Barnes] kept saying, ["]I will smoke your ass.["] That's when I shot him. [Barnes] fell off his bike. As soon as I shot him I pumped another shell in the gun. I walked closer to [Barnes] and shot him again while he was on the ground. I turned around and went back inside my house. I told my wife to call the police. I took the shotgun and put it in my car. I drove to my grandmother's house. I put the gun in her house. I told [my] grandmother what happened. My grandmother called my Uncle Edward McNeil and Chris McNeil. They came over to her house. My uncles walked back to [sic] down to my house with me and that's when I turned myself into [sic] the police. I regret everything that has happened today[.]

Defendant testified at trial that Barnes had a reputation for violence in the community and that he was afraid of Barnes on the day he shot him. Defendant testified that on 15 March 2007, he believed Barnes had a weapon, and that Defendant saw Barnes reach behind his back like he was reaching for a weapon. Defendant had seen Barnes make that gesture on a prior occasion when Barnes put a gun in the back of his pants while at a car wash. Defendant testified that he shot Barnes upon seeing Barnes reach behind his back because Defendant was afraid. After he shot Barnes, Defendant heard something fall under Tomlin's car and he saw Barnes reaching under the car. Defendant shot Barnes a second time because he feared Barnes was reaching under the car for a weapon. Defendant never saw Barnes with a weapon, however.

Grover Crumel, Jr. ("Crumel") testified at trial that he lived in the home of a drug dealer around the corner from Defendant's house. Crumel heard a loud "pow" and a "boom" from inside the house, and ran outside to see what had caused the noise. Crumel saw Barnes lying in the street, and then saw Tomlin remove a pistol from Barnes' body before Tomlin ran inside his house.

Dr. Ezekiel Alston ("Alston"), a preacher near Defendant's house, testified that on 15 March 2007, he was ministering at another house in the neighborhood. While he was there, Barnes came into the house and made several comments that he was going to "mess [Defendant] up." Alston saw Barnes with a black gun. Alston testified that Barnes left the house and fired his gun as he rode down the street on a bicycle.

At the close of all the evidence, Defendant asked for a special jury instruction on the defense of justification for the charge of possession of a firearm by a felon. The trial court refused Defendant's request. The trial court charged the jury with the pattern instruction on self-defense, N.C.P.I. Crim. 206.10, as applied to first degree and second degree murder Although the trial court instructed the jury on the law relating to self-defense, it did not include "not guilty by reason of self-defense" as a possible verdict in its final mandate. Defendant did not object to the trial court's instructions on self-defense. In response to a jury request for re-instruction, the trial court repeated its final mandate. Defendant did not object.

The jury found Defendant guilty of first degree murder and possession of a firearm by a felon. From the trial court's judgments, Defendant appeals.

II. Jury Instructions on Self-Defense

[1] Defendant argues the trial court committed plain error by failing to provide specific instructions on "not guilty by reason of self-defense" as a possible verdict. We disagree.

Our review of matters Defendant did not object to at trial is limited to plain error. N.C. R. App. P. 10(b)(1), (c)(4). Plain error is "error so fundamental that it tilted the scales and caused the jury to reach its verdict convicting the defendant." *State v. Bagley*, 321 N.C. 201, 211, 362 S.E.2d 244, 250 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988) (internal quotation marks omitted). "In deciding whether a defect in the jury instruction constitutes 'plain error', [sic] the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). "[A] charge must be construed 'as a whole in the same connected way in which it was given.' When thus considered, 'if it fairly and correctly presents the law, it will afford no ground for reversing the judgment, even if an isolated expression should be found technically inaccurate.' " *State v. Tomblin*, 276 N.C. 273, 276, 171 S.E.2d 901, 903 (1970) (quoting *State v. Valley*, 187 N.C. 571, 572, 122 S.E. 373, 374 (1924)).

In *State v. Dooley*, 285 N.C. 158, 166, 203 S.E.2d 815, 820 (1974), our Supreme Court held that the trial court's failure to include an instruction on self-defense in its final mandate to the jury was reversible error entitling the defendant to a new trial. The Court based its holding on the following:

> Although the [trial] court prior to the final mandate explained the law relating to self-defense, in his final instruction he omitted any reference to self-defense other than to say 'but [if] you are satisfied that the defendant killed [the victim] without malice, or that he killed him in the heat of a sudden passion, and that in doing so, that he used excessive force in the exercise of self-defense, it would be your duty to return a verdict of manslaughter.' Here in the final mandate the [trial] court gave special emphasis to the verdicts favorable to the State, including excessive use of force in self-defense as a possible verdict. At no time in this mandate did the [trial] court instruct the jury that if it was satisfied by the evidence that defendant acted in self-defense, then the killing would be excusable homicide and it would be their duty to return a verdict of not guilty.
>
> The 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.

In our recent opinion in *State v. Tyson*, 195 N.C. App. ——, —— 672 S.E.2d 700, 708 (2009), we held that where the defendant was charged with statutory rape, "[t]he trial court's failure to include 'not guilty by reason of unconsciousness' in the final mandate to the jury constitute[d] plain error[.]" In *Tyson*, "the trial court correctly instructed that the jury should find [the defendant] 'not guilty' if it had a reasonable doubt as to any of the elements of statutory rape[.]" *Id.* However, "the trial court failed to include in its final mandate that the jury should find [the defendant] 'not guilty' if it had a reasonable doubt as to [the defendant's] consciousness." *Id.* In our holding, we noted that as was the case in *Dooley*, "even if the State proved all the statutory elements of statutory rape, [the defendant] would be not guilty if his actions were blameless due to his unconsciousness." *Id.* Also "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." *Id.* Because of the trial court's omission, "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." *Id.*

The present case is distinguishable from *Dooley* and *Tyson*, however. Here, the trial court's instruction to the jury as to murder and manslaughter included the following:

> For you to find the Defendant guilty of first degree murder, the State must prove six things, six, beyond a reasonable doubt. . . . And the sixth and last element, that the Defendant did not act in self-defense or that the Defendant was the aggressor in bringing on the fight with the intent to kill or inflict serious bodily harm upon the deceased.
>
> Now, second degree murder differs from first degree murder in that neither specific intent to kill, premeditation nor deliberation is a necessary element. For you to find the Defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the Defendant unlawfully, intentionally and with malice wounded the victim thereby proximately causing his death and that the Defendant did not act in self-defense. Or if the Defendant did act in self-defense that he was the aggressor with the intent to kill or inflict serious bodily harm in bringing on the fight.
>
> Voluntary manslaughter is the unlawful killing of a human being without malice and without pre-meditation and without deliberation. A killing is not committed with malice if the Defendant acts . . . in the heat of passion upon adequate provocation.
>
> . . . .
>
> Voluntary manslaughter is also committed if the Defendant kills in self-defense but uses excessive force under the circumstances or was the aggressor without murderous intent in bringing on the fight in which the killing took place.
>
> The burden is on the State to prove beyond a reasonable doubt that the Defendant did not act in self-defense. However, if the State proves beyond a reasonable doubt that the Defendant, though otherwise acting in self-defense, used excessive force or was the aggressor though he had no murderous intent when he entered the fight, the Defendant would be guilty of voluntary manslaughter.

In its final mandate, the trial court instructed:

> Now, ladies and gentlemen of the jury, if you find from the evidence beyond a reasonable doubt that on or about the alleged

date, that is, March the 15th last year, 2007, the Defendant, Mr. McNeil, intentionally *but not in self-defense* killed the victim, Mr. Barnes, thereby proximately causing the victim's death and that the Defendant acted with malice, with premeditation and with deliberation, it would be your duty to return a verdict of guilty of first degree murder. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of first degree murder.

If you do not find the Defendant guilty of first degree murder, you must determine whether he is guilty of second degree murder. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, March 15th, 2007, the Defendant, Mr. McNeil, intentionally and with malice *but not in self-defense* wounded the victim, Mr. Barnes, thereby proximately causing Mr. Barnes' death, it would be your duty to return a verdict of guilty of second degree murder. If you do not so find or . . . have a reasonable doubt as to one or more of these things, you will not return a verdict of second degree murder.

If you do not find the Defendant guilty of second degree murder, you must consider whether he's guilty of voluntary manslaughter. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, March 15, 2007, the Defendant, Mr. McNeil, intentionally wounded the victim, Mr. Barnes, and thereby proximately caused Mr. Barnes' death and that the Defendant, Mr. McNeil was the aggressor in bringing on the fight or use of excessive force, it would be your duty to return a verdict of guilty of voluntary manslaughter *even if the State has failed to prove that the Defendant did not act in self-defense.*

Or if you find from the evidence beyond a reasonable doubt that on or about the alleged date, March 15th, 2007, the Defendant, Mr. McNeil, intentionally *and not in self-defense* wounded the victim, Mr. Barnes, and thereby proximately caused the victim's death but the State has failed to satisfy you beyond a reasonable doubt that the Defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.

If you do not so find or have a reasonable doubt as to one or more of these things, ladies and gentlemen, then you would return a verdict of not guilty.

(Emphasis added).

Although the trial court did not include "not guilty by reason of self-defense" as a possible verdict in its final mandate, the jury instructions considered as a whole were correct. "Many decisions of this Court hold that 'a charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct.' " *State v. Jones*, 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978) (quoting *State v. Gaines*, 283 N.C. 33, 43, 194 S.E.2d 839, 846 (1973)). Here, when the trial court's instructions to the jury are considered as a whole, "[w]e think the jury clearly understood that the burden was upon the State to satisfy it beyond a reasonable doubt that [D]efendant did not act in self-defense and clearly understood the circumstances under which it should return a verdict of not guilty by reason of self-defense." *Id.* Unlike in *Dooley* and *Tyson*, the trial court made it clear to the jury that a verdict of not guilty by reason of self-defense was permissible, and under what circumstances the jury should return such a verdict. This assignment of error is overruled.

III. Closing the Courtroom to the Public

[2] In his second assignment of error, Defendant argues the trial court erred as a matter of law, or in the alternative, abused its discretion, by overruling Defendant's objection to closing the courtroom to the public in violation of the United States and North Carolina Constitutions. We disagree.

At trial, Judge Everett closed the courtroom during Tomlin's testimony because Tomlin was concerned that his and his family's safety would be jeopardized if Tomlin's testimony was heard by the public. Defendant objected to closing the courtroom on the bases that "the public has a right to hear all the evidence" and that defense counsel may not be able to reference Tomlin's testimony during closing arguments unless the courtroom was also closed to the public during closing arguments. Defendant did not object to the trial court's closing of the courtroom on the constitutional bases which he now argues on appeal, however. A question that is "not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action" may be considered on appeal as plain error. N.C. R. App. P. 10(c)(4). However, "because [D]efendant did not 'specifically and distinctly' allege plain error as required by North Carolina Rule of Appellate Procedure 10(c)(4), [D]efendant is not entitled to plain error review of this issue." *State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 757 (per curiam), *disc. rev. denied*, 360 N.C. 69, 622 S.E.2d 113 (2005) (citing N.C. R. App. P. 10(c)(4)). Additionally, "plain error review is [only] available in criminal appeals for challenges to

jury instructions and evidentiary issues." *Dogwood Development and Management Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (internal citations omitted). This assignment of error is dismissed.

IV. Jury Instructions on Justification Defense

[3] Defendant's third assignment of error asserts the trial court erred by denying Defendant's written request for special jury instructions on the justification defense in the possession of a firearm by a felon charge.

> In North Carolina, requests for special jury instructions are allowable under N.C.G.S. §§ 1-181 and 1A-1, Rule 51(b) of the North Carolina General Statutes. N.C. Gen. Stat. §§ 1-181, 1A-1, Rule 51(b) (2003). It is well settled that the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence. *See Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995). "The proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case." *State v. Scales*, 28 N.C. App. 509, 513, 221 S.E.2d 898, 901 (1976). "However, the trial court may exercise discretion to refuse instructions based on erroneous statements of the law." *Roberts*, 120 N.C. App. at 726, 464 S.E.2d at 83 (citation omitted).

State v. Craig, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005).

At trial, Defendant requested a special jury instruction on the defense of justification for the charge of possession of a firearm by a felon, which the trial court denied. "[T]he courts of this State have not recognized justification as a defense to a charge of possession of a firearm by a felon." *State v. Napier*, 149 N.C. App. 462, 464, 560 S.E.2d 867, 869 (2002). However, Defendant asks us to adopt the test set out by the Eleventh Circuit in *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir.), *cert. denied*, 530 U.S. 1264, 147 L. Ed. 2d 988 (2000), for determining the applicability of the justification defense to possession of a firearm by a felon. The *Deleveaux* court set out four elements a defendant must show to establish this defense:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;
>
> (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;

(3) that the defendant had no reasonable legal alternative to violating the law; and

(4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 1297. The *Deleveaux* court noted, however, that this defense is only available under federal law in "extraordinary circumstances." *Id.*

Our Court declined to recognize justification as a defense to possession of a firearm by a felon in *State v. Craig*, 167 N.C. App. 793, 795-96, 606 S.E.2d 387, 388-89 (2005). In *Craig*, the defendant was involved in an altercation at an auto garage where he fired a pistol. *Id.* at 794, 606 S.E.2d at 388. After the altercation, the defendant carried the pistol to a friend's house, where he "was not under any imminent threat of harm." *Id.* at 796-97, 606 S.E.2d at 389 (citation omitted). We held that "the evidence did not support giving a special instruction on justification because there was a time period where [the defendant] was under no imminent threat while possessing the gun." *Id.*

We also declined to recognize the justification defense in *Napier*, 149 N.C. App. at 465, 560 S.E.2d at 869. In *Napier*, the defendant was involved in an on-going feud with his neighbor and his neighbor's son. *Id.* at 462, 560 S.E.2d at 868. The defendant's neighbor had fired a shotgun in the air above defendant's property over the course of a few days beforehand, when the defendant walked across the street with a holstered nine millimeter handgun attached to his hip. *Id.* at 462-63, 560 S.E.2d at 868. The defendant was convicted of possession of a firearm by a felon, and on appeal argued the trial court abused its discretion in denying his request for a special jury instruction on the justification defense. *Id.* at 463, 560 S.E.2d at 868. Although this Court did not decide whether the defense of justification would be recognized in North Carolina, we held that it did not apply where the defendant while armed, voluntarily walked onto his neighbor's property, asked his neighbor and his neighbor's son if they wanted him to take the gun home, and then remained on the premises for several hours. *Id.* at 465, 560 S.E.2d at 869.

As in *Craig* and *Napier*, the evidence in the present case shows that Defendant possessed the shotgun inside his home and away from Barnes, at which time there was no imminent threat of death or serious bodily injury. *See Deleveaux*, 205 F.3d at 1297. Without deciding the availability of the justification defense in possession of a firearm

by a felon cases in North Carolina, we hold that the evidence in this case did not support giving a special instruction on justification.

V. Jury Instructions on Absence of Duty to Retreat

[4] Defendant also asserts the trial court erred by denying Defendant's request for a jury instruction regarding the absence of a duty to retreat. We disagree.

"It is well settled that the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence." *Napier*, 149 N.C. App. at 463-64, 560 S.E.2d at 868. Our Courts have described the common law right of an individual to defend himself from death or bodily harm on his premises as:

> Ordinarily, when a person who is free from fault in bringing on a difficulty [] is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self[-]defense, regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm.

State v. Blue, 356 N.C. 79, 86, 565 S.E.2d 133, 138 (2002) (internal quotation marks and citation omitted).

The evidence in the present case does not support a jury instruction on Defendant's lack of a duty to retreat. The evidence does not suggest Defendant was "free from fault in bringing on [the] difficulty" with Barnes, nor was he "attacked in his own home or on his own premises[.]" *Id.* The trial court did not err in denying Defendant's request for a jury instruction on the absence of a duty to retreat.

VI. Trial Court's Expression of Opinion

[5] Lastly, Defendant argues the trial court failed to maintain its impartiality by becoming an active participant in the trial and expressing an opinion as to a factual issue for the jury, the weight of the evidence, credibility of certain witnesses, and Defendant's guilt. We disagree.

> It is well established by our case law and statutory enactments that it is improper for a trial judge to express in the presence of the jury his opinion upon any issue to be decided by the jury or to indicate in any manner his opinion as to the weight of the evidence or the credibility of any evidence properly before the jury.

> *See* N.C. Gen. Stat. § 15A-1222 (1983); *State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983). Even so, every such impropriety by the trial judge does not result in prejudicial error. Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant. *State v. Brady*, 299 N.C. 547, 264 S.E.2d 66 (1980); *State v. Greene*, [285] N.C. 482, 206 S.E.2d 229 (1974). Thus, in a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results. *State v. Yellorday*, 297 N.C. 574, 256 S.E.2d 205 (1979). In this connection it is well settled that it is the duty of the trial judge to supervise and control the course of a trial so as to insure justice to all parties. In so doing the court may question a witness in order to clarify confusing or contradictory testimony. *State v. Greene*, 285 N.C. 482, 206 S.E.2d 229.

State v. Blackstock, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985).

Defendant identifies several remarks from the trial court in support of his argument which he contends denied him a fair trial. First, Defendant submits the following from the trial court's interruption during defense counsel's cross-examination of Dr. Gilliland:

> [DEFENSE COUNSEL:] So when you say several seconds, are you saying two, three, four, five or is it just determinative on [Barnes] himself?
>
> THE COURT: Several means more than two; doesn't it? More than one.
>
> THE WITNESS: Yes, it's more than one.
>
> . . . .
>
> [DEFENSE COUNSEL:] Having viewed those x-rays and realizing that the projectiles travelled [sic] that far up into the body, is it reasonable to say that he was a fairly good distance away from him within the parameters that you described, five to fifteen feet?
>
> THE COURT: You're talking for the abdominal wound?
>
> THE WITNESS: Yes, that was my understanding of the question.
>
> [DEFENSE COUNSEL]: Yes, that's correct.

THE COURT: Are you asking her was he five to fifteen feet away when that wound was inflicted?

. . . .

[DEFENSE COUNSEL:] Now realizing that that automobile may or may not be in the exact same position it was that particular day, will that photograph aid you in explaining where the projectiles—

THE COURT: Did she say there was an automobile there that day? Has anybody said there was an automobile there that day?

[DEFENSE COUNSEL]: Not yet, Judge.

THE COURT: Oh, okay. Well, ask your question again. She's already said the photograph was made at some later time. Didn't you?

[DEFENSE COUNSEL]: Yes, Judge.

Defendant also identified the following exchanges between Defense Counsel and the trial court in support of his argument. These communications occurred outside the presence of the jury.

THE COURT: The jury is going to hear [closing arguments].

[DEFENSE COUNSEL]: I understand and I just want to make sure in closing arguments I will not be prohibited from using that material if need be.

THE COURT: If it's germane. I don't know how it's germane to this but you can manufacture something I presume.

. . . .

[DEFENSE COUNSEL]: The last two [jury instructions] I address is [sic] 308.60, self-defense of family member or other, and 308.80, defense of habitation.

[THE STATE]: Judge, I object to—

THE COURT: No, I'm just going to give self-defense.

[DEFENSE COUNSEL]: And, again, I renew my exception to those under 5th, 6th, 8th and 14th Amendment[s] of the United States Constitution.

THE COURT: You want to continually compound this case, I'm not going to let you do it. Go ahead. Note your objection. We want to keep this case clean. We don't want anybody—I sure don't

> want another judge to have to listen to this mess again. What horror that would be.
>
> All right. Anything else?
>
> [DEFENSE COUNSEL]: Nothing else, Judge.
>
> THE COURT: Drug it out until the inth [sic] degree, I can't believe it. Here it is five minutes to 5:00 on Wednesday and we've taken a little simple case and gone into Thursday. Okay. See you all in the morning.

Defendant argues the above remarks, *inter alia*,[1] by the trial court demonstrated a negative attitude toward Defendant and an exasperation with the length of the trial. Defendant contends the trial court's statements influenced the jury's decision and caused the jury to deliberate for only fifty minutes before finding Defendant guilty of first degree murder and possession of a firearm by a felon. "Jurors respect the judge and are easily influenced by suggestions, whether intentional or otherwise, emanating from the bench." *State v. Holden*, 280 N.C. 426, 429, 185 S.E.2d 889, 892 (1972). Defendant also argues the trial court's remarks constituted an improper opinion upon factual issues in violation of N.C. Gen. Stat. § 15A-1222 which provides "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury."

The fact that a trial court asks questions or clarifies a witness' testimony, however, does not amount to error *per se*.

> [I]t does not necessarily follow that every ill-advised comment by the trial judge which may tend to impeach the witness is so harmful as to constitute reversible error. The comment should be considered in light of all the facts and attendant circumstances disclosed by the record, "and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless."

State v. Brady, 299 N.C. 547, 560, 264 S.E.2d 66, 73-74 (1980) (quoting *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950)); *see State*

1. Defendant identified several other exchanges between Defense Counsel and the trial court in support of his contention that the trial court failed to maintain its impartiality. We have not included these other communications, however, because the portions of the transcript we have included are representative of Defendant's argument and any further excerpts would be superfluous.

v. Artis, 91 N.C. App. 604, 608, 372 S.E.2d 905, 908 (1988) (holding that trial court's remark that it had "entertained a lot of irrelevant evidence that nobody objected to[,]" was not prejudicial as it was clearly "directed at the State's repetitious and irrelevant questions rather than at defendant's evidence or witnesses.").

In *State v. Rushdan*, 183 N.C. App. 281, 285, 644 S.E.2d 568, 572, *disc. review denied*, 361 N.C. 574, 651 S.E.2d 557 (2007), we held the defendant failed to show she was prejudiced by the trial court's comments throughout a trial for obtaining property by false pretense and related offenses. The trial court's comments included:

> (1) clarifying whether a witness was involved in her bond-setting process; (2) clarifying that it would be customary for a detective to report whether defendant denied committing the offenses; (3) stating, "all right," after a detective's testimony; (4) correcting himself when he stated [the defendant's friend's] mother would help pay for an attorney instead of [defendant's friend's] mother would help pay for a car; (5) asking about the tone of the recorded telephone conversation between defendant and [her friend]; and (6) stating, "I know," after defendant explained the Belk's merchandise was new and not worn.

Id. at 285-86, 644 S.E.2d at 572. In light of the overwhelming evidence in support of the defendant's guilt, we held the trial court's comments did not result in sufficient prejudice to warrant a new trial. *Id.* at 286, 644 S.E.2d at 572-73.

In the present case, of the comments identified by Defendant which he argues prejudiced the jury, some were made outside the presence of the jury, and thus, could not have possibly conveyed any impression to the jury. The contested comments which were made in the presence of the jury were clearly intended to clarify confusing or contradictory testimony or to prevent an unnecessary delay in the trial. Defendant has failed to demonstrate that any of the trial court's comments "intimated an opinion as to a factual issue, the [D]efendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985).

NO ERROR.

Judges JACKSON and STROUD concur.

STATE OF NORTH CAROLINA v. MICHAEL GEORGE FULLER, DEFENDANT

No. COA08-589

(Filed 21 April 2009)

1. Appeal and Error— preservation of issues—alternate basis—failure to cross-assign error

Although the State contends defendant lacks standing under the Fourth Amendment to challenge the seizure of evidence in a drug case, this issue was not properly preserved for appellate review because: (1) the trial court did not deny defendant's motion to suppress on this ground; and (2) the State did not cross-assign error to the court's failure to do so as required by N.C. R. App. P. 10(d).

2. Search and Seizure— warrantless entry into mobile home to pursue defendant—motion to suppress evidence—exigent circumstances

The trial court did not err in a drug case by denying defendant's motion to suppress evidence seized after officers' warrantless entry into a mobile home in pursuit of defendant because exigent circumstances existed justifying the warrantless entry where: (1) the officers had probable cause to arrest defendant based on an outstanding warrant; (2) two detectives were aware that defendant had absconded from his probation violation hearing a month earlier and thus was a flight risk, that defendant was previously conviction for armed robbery as well as his other narcotics convictions and assaultive behavior, and that defendant was normally armed; and (3) the detectives saw defendant run inside the mobile home after law enforcement announced their presence, and from the totality of circumstances the officers reasonably believed that a dangerous situation existed for them and the remaining occupants of the mobile home.

3. Drugs— trafficking in cocaine by possession—possession with intent to sell or deliver cocaine—possession of drug paraphernalia—constructive possession—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, and possession of drug paraphernalia because the State presented sufficient evi-

dence of constructive possession of cocaine and the drug paraphernalia, and there was other incriminating evidence including that: (1) defendant was occupying the mobile home even though it was without permission; (2) after the officers announced their presence, defendant fled to the back bedroom where he was found with white powder on his forearms and wrists; (3) defendant made statements that suggested he had just disposed of the cocaine; (4) the officers found drug paraphernalia in the kitchen, more than 50.8 grams of cooked crack cocaine in a kitchen drawer, and $2,420 in $100 and $20 bills on defendant's person; and (5) none of the three other people occupying the trailer when the officers arrived had any residue, money, contraband, or paraphernalia on them, and none had left the living room.

4. Firearms and Other Weapons— possession of firearm by felon—constructive possession—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a felon even though defendant contends there was insufficient evidence that he was in constructive possession of a handgun because: (1) in addition to the fact that defendant was found in the same room with the gun and the evidence regarding the drug-related charges, the handgun itself was not sitting out in the open where anyone could have access to it, but was instead tucked under the mattress of the bed near where a person's head would be; (2) defendant's shoes were found right next to that bed; and (3) while there were indications that defendant was residing in the trailer at the time of the search given the constant presence of his car and the finding of personal papers, there was no indication that anyone else was residing in the trailer once the tenant left.

5. Drugs— trafficking in cocaine by manufacturing—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in cocaine by manufacturing because the evidence tended to prove that: (1) defendant was occupying the trailer at 212 Briar Creek Park Lane; (2) it was defendant's solo efforts to dispose of cocaine upon the arrival of the officers; (3) defendant would have had to run through the kitchen where drug paraphernalia was located in order to reach the bathroom where the cocaine was apparently flushed; and (3) defendant carried on his person $2,420 in $100 and $20 bills.

6. Drugs— maintaining a dwelling for purpose of keeping or selling controlled substance—sufficiency of evidence

The State's evidence was insufficient to support a charge of "maintaining" a dwelling for the purpose of keeping or selling a controlled substance, and this conviction is reversed, because: (1) the State presented no evidence that defendant paid the rent; (2) the State presented no evidence that defendant paid the utilities for the mobile home, paid for any repairs, made any repairs, or otherwise took responsibility for the mobile home; and (3) at most the evidence suggested that defendant occupied the mobile home for approximately two months. The case is remanded for resentencing as to the possession of cocaine with intent to sell or deliver conviction since it was consolidated with this erroneous conviction.

Appeal by defendant from judgments entered 26 February 2008 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 19 November 2008.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

Geoffrey W. Hosford for defendant-appellant.

GEER, Judge.

Defendant Michael George Fuller appeals from his convictions of trafficking in cocaine by possession, trafficking in cocaine by manufacturing, possession of drug paraphernalia, possession of cocaine with intent to sell or deliver ("PWISD"), intentionally maintaining a dwelling for the purpose of keeping or selling cocaine, and possession of a firearm by a felon. On appeal, defendant argues that the trial court erred in denying his motion to suppress and his motion to dismiss.

With respect to the motion to suppress, defendant contends that the officers violated the Fourth Amendment when they entered the mobile home without a search warrant in order to arrest him pursuant to a pending warrant for his arrest. We hold that the trial court's unchallenged findings of fact in its order denying the motion establish that exigent circumstances existed, justifying the warrantless entry. The trial court, therefore, did not err in denying the motion to suppress.

As for the motion to dismiss, the State presented substantial evidence to support each charge with the exception of intentionally maintaining a dwelling for keeping or selling controlled substances. As to the latter charge, although the State's evidence indicates that defendant may have been occupying the mobile home without permission for a limited period of time, the record contains no evidence to support a finding that he "maintained" the mobile home. Accordingly, we reverse that conviction. Because the trial court consolidated that conviction with the PWISD conviction for purposes of sentencing, we remand for resentencing on the PWISD conviction.

Facts

The State's evidence tended to show the following facts. In 2003, defendant was convicted of possession of cocaine and placed on supervised probation in Carteret County. On 5 June 2006, defendant was present for a parole violation hearing during which the trial court ordered an immediate drug test. After testing positive for cocaine, defendant failed to return to the hearing, and the court issued a warrant for defendant's arrest.

The Onslow County Sheriff's Department, which was already investigating defendant for drug trafficking, received a copy of defendant's arrest warrant and photographs of defendant. By searching DMV records, the Sheriff's Department learned that defendant drove a black Dodge Charger. Detective Robert Ides spotted a black Dodge Charger leaving a fast food restaurant around 7:00 p.m. on 12 July 2006. Ides followed the Charger and confirmed that it was defendant's car. When deputies stopped the Charger, defendant was not in the car, but one of the occupants indicated that defendant could be found at 212 Briar Creek Park Lane.

Detective Ides, along with Detective Jack Springs, other sheriff's deputies, and defendant's probation officer went to that address. Ides approached the front door of the mobile home located at the address while other officers went around to the back door. Ides could see into the trailer through a gap in the blinds and recognized defendant sitting on the couch. There was also another man and two women; they appeared to be playing dominoes. When Ides knocked on the door, someone inside asked who was there, and Ides responded: "Sheriff's Department." Through the blinds, Ides saw defendant stand up and run to the back of the trailer out of Ides' field of view. Ides yelled to the other deputies: "[H]e's running."

Ides told the man that answered the door that they were looking for defendant and asked where he had gone. The man told Ides that he did not know what Ides was talking about and that defendant was not there. Ides told the man that he had seen defendant inside and that they were going to come in to arrest him. The deputies entered the mobile home and began searching for defendant. They found defendant in the back master bedroom, standing on the far side of the bed, near the door to an adjoining bathroom.

While handcuffing defendant, Springs saw white powder on defendant's forearms and wrists and all over the bathroom. After reading defendant his *Miranda* rights, Springs asked him what all the white powder was. Defendant responded: "If you don't have my shit, then you can't charge me with shit." Suspicious that defendant had been trying to dispose of cocaine, Springs went into the bathroom, and defendant stated: "Too bad the shit's gone, huh' " Springs still saw white powder in the sink, on the counter, on the floor, on the toilet, and in the toilet. The white powder looked like cocaine in the form "just before they're about to cook it." The deputies field tested the white powder, and based on the field test, the deputies "froze" the scene and obtained a search warrant.

Defendant was moved from the bedroom to the living room with the three other individuals. Although when he was ultimately booked, defendant said he was unemployed, officers, when they searched defendant, found on his person 18 $100 and 31 $20 bills, totaling $2,420 in cash. When they searched the other three individuals, they found no residue, contraband, money, or drug paraphernalia.

During the search pursuant to the search warrant, the deputies found a loaded .45 caliber handgun under the mattress in the bedroom where defendant was found. Sneakers belonging to defendant were next to the bed. A bullet proof vest was found in the living room. The kitchen was only eight feet from the master bedroom, and defendant would have run through the kitchen to get to the bedroom. In the kitchen, officers found bullets matching the gun. Also in the kitchen, deputies found several items associated with "cooking" cocaine, including baking soda, a microwave oven, a Pyrex measuring cup, a tablespoon, a razorblade, and a digital scale, all with cocaine residue on them. Four pre-packaged bags of crack cocaine were found in a kitchen drawer. The SBI ultimately weighed two of the bags and determined that one weighed 25.0 grams and the other weighed 25.8 grams. The crack cocaine appeared to have been cooked within a couple of hours of being seized as it was still damp.

During the search of the mobile home, officers found a gym membership contract and a receipt belonging to defendant, although neither identified the Briar Creek Park Lane mobile home as defendant's residence. At trial, Jasmine Chance testified that she began leasing the trailer located at 212 Briar Creek Park Lane in February 2006 and that she lived there alone with her son. Defendant would come to the trailer to visit Chance at least once a week. At some point, Chance and defendant talked about him taking over her rent because she could not afford the trailer, but they never came to an agreement.

Towards the end of March or early April 2006, Chance's landlord, Leamon Parker, began seeing a black Charger at the 212 Briar Creek Park Lane residence "pretty much on a daily basis." Chance moved out of the mobile home in late April or early May 2006, without notifying her landlord or turning off the utilities. She took her clothes, but left most of the furniture. Chance did not give anyone, including defendant, permission to stay in the trailer after she moved out. Parker, however, testified that someone, who was not identified, had paid the rent on the trailer through July 2006. Parker entered the trailer in mid-July 2006 and found it "vacated" and the utilities turned off.

On 10 April 2007, defendant was indicted for (1) trafficking in cocaine by possession, (2) trafficking in cocaine by manufacturing, (3) possession of drug paraphernalia, (4) possession with intent to manufacture, sell, or deliver cocaine, (5) manufacturing cocaine, (6) maintaining a dwelling for keeping or selling a controlled substance, and (7) possession of a firearm by a felon. Defendant moved to suppress all evidence seized on 12 July 2006, arguing that it was seized in violation of his Fourth Amendment rights because of the lack of a search warrant or, if seized after the warrant was obtained, constituted fruit of the poisonous tree.

The trial court conducted a suppression hearing prior to trial, during which the State presented the testimony of Ides and Springs. Defendant presented no evidence. The trial court orally denied the motion and subsequently entered a written order on 26 February 2008. In that order, the trial court found that the deputies had probable cause to believe defendant was in the mobile home after seeing him run to the rear of the trailer and concluded that exigent circumstances justified the warrantless entry as "[t]he officers reasonably believed that a dangerous situation existed for them and the remaining occupants of the mobile home from the totality of the circumstances aware to them."

After denying defendant's motion to suppress, the trial court took a lunch recess prior to beginning the trial. Defendant did not return to court after the recess. The trial court denied defendant's motions to dismiss at the close of the State's evidence and the close of all the evidence. The trial court submitted to the jury the charges of trafficking in cocaine by possession, trafficking in cocaine by manufacture (with a possible verdict of manufacture of cocaine listed as a lesser included offense), possession of drug paraphernalia, PWISD, and intentionally maintaining a dwelling house for the purpose of keeping and selling cocaine (with a possible verdict of knowingly maintaining a dwelling house as a lesser included offense).

The jury convicted defendant of all the charges, including the greater offenses of trafficking in cocaine by manufacture and intentionally maintaining a dwelling house. The trial court sentenced defendant to 35 to 42 months imprisonment on the trafficking by possession, trafficking by manufacture, and possession of drug paraphernalia convictions. Defendant was sentenced to a consecutive term of 20 to 24 months imprisonment for the possession of a firearm by a felon conviction. Finally, defendant was sentenced to a consecutive term of 11 to 14 months for the PWISD and maintaining a dwelling convictions. Defendant timely appealed to this Court.

Motion to Suppress

In reviewing the denial of a motion to suppress, the appellate court determines whether the trial court's findings of fact are supported by competent evidence and whether those findings, in turn, support the court's conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Where, as here, the defendant does not challenge the findings of fact on appeal, they are binding, and the only question before this Court is whether those findings support the trial court's conclusions. *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).

[1] As an initial matter, we note that the State argues in its brief that defendant lacks standing under the Fourth Amendment to challenge the seizure of the evidence. The trial court did not, however, deny defendant's motion on this ground, and the State did not cross-assign error to the court's failure to do so under Rule 10(d) of the Rules of Appellate Procedure. The State thus failed to properly preserve for appellate review this alternative basis for upholding the trial court's order. *See Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 685

(2002) ("[P]laintiff failed to cross-assign error pursuant to Rule 10(d) to the trial court's failure to render judgment on these alternative grounds. Therefore, plaintiff has not properly preserved for appellate review these alternative grounds.").

[2] Turning to the actual bases for the trial court's order, " '[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.' " *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (quoting *Payton v. New York*, 445 U.S. 573, 586, 63 L. Ed. 2d 639, 651, 100 S. Ct. 1371, 1380 (1980)). Our Supreme Court has explained, however, that "in the presence of an emergency or dangerous situation described as an 'exigent circumstance,' officials may lawfully make a warrantless entry into a home to effect an arrest." *State v. Guevara*, 349 N.C. 243, 250, 506 S.E.2d 711, 716 (1998) (quoting *Payton*, 445 U.S. at 583, 63 L. Ed. 2d at 648-49, 100 S. Ct. at 1378), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013, 119 S. Ct. 1809 (1999). In deciding whether exigent circumstances were present, "we must consider the totality of the circumstances." *Id.* Our Supreme Court pointed out that the United States Supreme Court has indicated that "a suspect's fleeing or seeking to escape could be considered an exigent circumstance," as well as " 'imminent destruction of evidence, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling.' " *Id.* (quoting *Minnesota v. Olson*, 495 U.S. 91, 100, 109 L. Ed. 2d 85, 95, 110 S. Ct. 1684, 1690 (1990)).

In *Guevara*, the police spoke to the defendant, who was accompanied by a young child, outside a mobile home. When the officer stated that he was going to arrest the defendant on an outstanding arrest warrant, the defendant entered the trailer and slammed the door. *Id.* at 248-49, 506 S.E.2d at 715. An officer immediately entered the trailer behind the defendant. The Supreme Court held that "the defendant's actions, in suddenly withdrawing into his home and slamming the door, created the appearance that he was fleeing or trying to escape, and this coupled with the presence of a young child suddenly caught in such circumstances created an exigent circumstance justifying [the officer's] entry without a warrant." *Id.* at 250-51, 506 S.E.2d at 717. The Court concluded that the trial court, therefore, properly denied the motion to suppress evidence obtained as a result of the entry. *Id.* at 251, 506 S.E.2d at 717.

This case presents similar circumstances. Defendant does not dispute that the officers had probable cause to arrest defendant based on the outstanding warrant. The trial court's unchallenged find-

ings further establish that Detectives Ides and Springs were aware that defendant had absconded from his probation violation hearing a month earlier and thus was a flight risk. The detectives also knew of "defendant's previous conviction for armed robbery as well as his other narcotics convictions and assaultive behavior" and that defendant was normally armed. The trial court found that, based on this knowledge, when the officers saw defendant run out of view when the deputies announced their presence, "Ides and the other law enforcement officers became seriously alarmed about where [defendant] had run to in the mobile home and what he was doing. These actions raised concerns in Ides and the other law enforcement officers for their safety and the other occupants in the mobile home." The trial court then concluded that "[t]he officers reasonably believed that a dangerous situation existed for them and the remaining occupants of the mobile home from the totality of the circumstances aware to them."

Based on *Guevara*, these findings of fact are sufficient to support the trial court's conclusion that exigent circumstances existed justifying the warrantless entry into the mobile home in pursuit of defendant. The officers reasonably believed that defendant was attempting to escape and that there was a risk of danger to the officers (some of whom were behind the trailer), as well as the other occupants of the trailer. *See also State v. Harris*, 145 N.C. App. 570, 581, 551 S.E.2d 499, 506 (2001) (finding sufficient exigent circumstances to justify warrantless entry when detectives had reason to believe defendant was in hotel room, delay could have led to destruction of controlled substances, and there was a risk to other guests if defendant attempted to escape), *appeal dismissed and disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002).[1] The trial court, therefore, properly denied defendant's motion to suppress.

Motion to Dismiss

[3] Defendant next contends that the trial court erred in denying his motion to dismiss. A defendant's motion to dismiss should be denied

1. Defendant cites *State v. Johnson*, 64 N.C. App. 256, 307 S.E.2d 188 (1983), in support of his contentions. The Supreme Court, however, on appeal based on the dissent in *Johnson*, declined to adopt this Court's reasoning, but instead determined that the trial court's findings of fact were inadequate and remanded for new voir dire proceedings, including the taking of evidence and further findings of fact and conclusions of law. *State v. Johnson*, 310 N.C. 581, 589, 313 S.E.2d 580, 584-85 (1984). Even assuming that this Court's decision in *Johnson* has precedential value in light of the Supreme Court decision, it predates *Guevara*, which is controlling with respect to the facts of this case.

if there is substantial evidence of each essential element of the offense charged and 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 it the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869. Contradictions and discrepancies in the evidence do not warrant dismissal, but rather are for the jury to resolve. *Id.*

With respect to the offenses of trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, and possession of drug paraphernalia, defendant contends that the State presented insufficient evidence that defendant possessed the cocaine or the drug paraphernalia. Possession of a controlled substance may be actual or constructive. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002). In contrast, constructive possession exists when the defendant, " 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the narcotics." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)).

When a defendant does not have exclusive possession of the location where the drugs are found, the State is required to show " 'other incriminating circumstances' " in order to establish constructive possession. *Id.*, 556 S.E.2d at 271 (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)). "[C]onstructive possession depends on the totality of circumstances in each case." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986).

In this case, the State presented evidence that would permit the jury to find that defendant was occupying the mobile home (although without permission), including evidence of his interactions with Chance, the regular parking of his car at the mobile home, and the presence of personal papers and his shoes in the home. When the officers announced their presence, defendant fled to the back bedroom of the mobile home, where he was found with white powder on his forearms and wrists. When asked about the white powder that was

found in the adjoining bathroom—in the sink, on the counter, in a trail along the floor, on the toilet, and in the toilet—defendant made statements that suggested he had just disposed of the cocaine. One officer testified without objection, based on his training and experience, that he believed that defendant had been trying to flush the cocaine down the toilet.

In the kitchen, which was eight feet from the bedroom where defendant was found and through which defendant would have run to reach the bedroom, the officers found a measuring cup, digital scale, razorblade, and microwave oven, all of which were covered in cocaine residue. The officers found more than 50.8 grams of recently "cooked" crack cocaine in a kitchen drawer and $2,420 in $100 and $20 bills on defendant's person. None of the three other people occupying the trailer when the officers arrived had any residue, money, contraband, or paraphernalia on them, and none of them had left the living room.

This evidence constituted sufficient evidence of other incriminating circumstances to warrant denial of defendant's motion to dismiss the charges of trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, and possession of drug paraphernalia. *See State v. Battle*, 167 N.C. App. 730, 733, 606 S.E.2d 418, 420 (2005) (holding that State presented sufficient evidence of constructive possession of cocaine found in motel room when, even though room was rented to someone else, defendant was seen in room, room contained some of defendant's clothing and personal papers, and defendant's car was parked in motel parking lot); *State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001) ("Other incriminating evidence, connecting Defendant with the drugs, includes his 'lunge' into the bathroom and the placing of his hands into the bathroom ceiling, where the drugs were later found."); *State v. Morgan*, 111 N.C. App. 662, 665-66, 432 S.E.2d 877, 879-80 (1993) (holding State presented sufficient evidence of other incriminating circumstances when, even though defendant was not present in apartment, officers found wallet containing defendant's personal documents and $2,600 in cash in bedroom where crack cocaine was found; cash included marked bills used in controlled sale; defendant used bedroom; and defendant ran into apartment during course of controlled sale); *State v. Neal*, 109 N.C. App. 684, 688, 428 S.E.2d 287, 290 (1993) (concluding evidence of incriminating circumstances was sufficient when defendant fled bathroom where cocaine was being flushed as police entered residence); *State v. Alston*, 91 N.C. App. 707, 710-11, 373

S.E.2d 306, 309 (1988) (finding evidence of other incriminating circumstances sufficient when defendant was in close proximity to the cocaine and had large amount of cash on his person). The trial court, therefore, properly denied the motion to dismiss these charges.

[4] With respect to defendant's conviction for possession of a firearm by a felon, defendant similarly argues that the State presented insufficient evidence that he was in constructive possession of the handgun. In *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998), this Court explained that to show possession of a firearm when more than one person may have access to it, there must be "a showing of some independent and incriminating circumstance, beyond mere association or presence, linking the person(s) to the item . . . ."

Here, while defendant was found in the same room with the gun, that was not the only circumstance. In addition to the evidence outlined above in connection with the drug-related charges, the handgun itself was not sitting out in the open where anyone could have access to it, but rather was tucked under the mattress of the bed near where a person's head would be. Defendant's shoes were found right next to that bed. While there were indications that defendant was residing in the trailer at the time of the search given the constant presence of his car and the finding of his shoes and certain personal papers, there was no indication that anyone else was residing in the trailer once the tenant left—the only other documentation found was junk mail addressed to the actual tenant. After defendant's arrest, the trailer was then vacant. We hold that this evidence is sufficient to support the possession of a firearm charge. *Compare id.*, 508 S.E.2d at 319 (finding evidence of possession insufficient when gun was lying on console of defendant's brother's car between defendant's wife, who was driving, and defendant who was in passenger seat, and gun was bought and owned by defendant's wife).

[5] Next, defendant contends that the State failed to present sufficient evidence with respect to the charge of trafficking in cocaine by manufacturing that defendant was the person manufacturing cocaine at 212 Briar Creek Park Lane. The evidence tending to prove that defendant was occupying the trailer at 212 Briar Creek Park Lane, the evidence of defendant's solo efforts to dispose of cocaine upon the arrival of the officers, the fact that defendant would have had to run through the kitchen to reach the bathroom where the cocaine was apparently flushed, and defendant's carrying on his person $2,420 in $100 and $20 bills was sufficient evidence to warrant denial of the

motion to dismiss this charge. *See State v. Brown*, 310 N.C. 563, 569-70, 313 S.E.2d 585, 589 (1984) (holding that there were circumstances other than defendant's proximity to contraband "which tend to buttress the inference that defendant was the person engaged in the manufacture of cocaine" when defendant had a key to apartment where cocaine was found, defendant had $1,700 in cash in his pockets, and defendant, while under surveillance, was always seen at apartment and not at his claimed residence).

[6] Finally, defendant challenges the sufficiency of the evidence to support the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance. To obtain a conviction for knowingly or intentionally keeping or maintaining a place for the purpose of keeping or selling controlled substances under N.C. Gen. Stat. § 90-108(a)(7) (2007), the State has the burden of proving a defendant: "(1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance." *Frazier*, 142 N.C. App. at 365, 542 S.E.2d at 686.

Defendant argues that the State failed to present evidence of the first element: that he maintained the residence within the meaning of N.C. Gen. Stat. § 90-108(a)(7). To determine whether a person keeps or maintains a place under N.C. Gen. Stat. § 90-108(a)(7), the court considers the following factors, none of which are dispositive: "ownership of the property, occupancy of the property, repairs to the property, payment of utilities, payment of repairs, and payment of rent." *State v. Baldwin*, 161 N.C. App. 382, 393, 588 S.E.2d 497, 506 (2003). The determination depends on the totality of the circumstances. *Id. See also State v. Boyd*, 177 N.C. App. 165, 174, 628 S.E.2d 796, 804 (2006) ("A pivotal factor is whether there is evidence that defendant owned, leased, maintained, or was otherwise responsible for the premises.").

Here, even viewing the evidence in the light most favorable to the State, the only evidence in the record relevant to the issue of "maintaining" is (1) that defendant discussed with Chance, the mobile home's actual tenant, taking over the rent payments for the mobile home, but never reached an agreement for defendant to do so; (2) that a black Charger, similar to defendant's, was regularly parked outside the trailer even after Chance vacated the trailer; and (3) defendant's shoes and some of his personal papers were found in the mobile home. The State presented no evidence that defendant paid the rent; the evidence indicated only that someone other than Chance paid it for June and July 2006. The State also presented no evidence that

defendant paid the utilities for the mobile home, paid for any repairs, made any repairs, or otherwise took responsibility for the mobile home. At most, therefore, the evidence suggested that defendant occupied the mobile home trailer for approximately two months.

Under the controlling precedent, this evidence is not sufficient to support defendant's conviction for maintaining a dwelling for the purpose of keeping or selling a controlled substance. In *State v. Harris*, 157 N.C. App. 647, 652, 580 S.E.2d 63, 66-67 (2003), this Court held that the State's evidence was insufficient to support a conviction under N.C. Gen. Stat. § 90-108(a)(7) when the State only presented evidence that the defendant was seen at the residence several times over a two-month period, an officer spoke with the defendant there twice during that time, and the defendant's personal property was found in a bedroom. The record contained "no evidence that defendant owned the property, bore any expense of renting or maintaining the property, or took any other responsibility for the property." *Id.*

Similarly, in *State v. Bowens*, 140 N.C. App. 217, 221-22, 535 S.E.2d 870, 873 (2000), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001), this Court concluded the evidence was inadequate when it showed only that the defendant was observed frequenting a residence and male clothes were found in a closet there, but there was no evidence that defendant's name was on a lease or utility bills or that he was in any way responsible for the dwelling's upkeep. We find *Harris* and *Bowens* materially indistinguishable from the evidence in this case. *See also State v. Carter*, 184 N.C. App. 706, 709-10, 646 S.E.2d 846, 849 (2007) (finding evidence insufficient when State showed only that defendant was sole occupant of residence at time of search warrant's execution, and officers had found three photographs of defendant in house and various significant personal papers belonging to defendant, but State "presented no evidence indicating that defendant owned the property, bore any expense for renting or maintaining the property, or took any other responsibility for the residence").

The State argues, however, that it presented evidence establishing several of the factors articulated in *Frazier*: finding in the trailer large amounts of cash, drugs, and drug paraphernalia. The State misreads *Frazier*. That evidence was relevant to the question "whether a particular place is used to keep or sell controlled substances," 142 N.C. App. at 366, 542 S.E.2d at 686 (internal quotation marks omitted), and not to "[w]hether a person 'keep[s] or maintain[s]' a place," *id.* at 365, 542 S.E.2d at 686 (first alteration added) (quoting N.C. Gen.

Stat. § 90-108(a)(7)). On the issue before this Court, the State, in *Frazier*, had not only presented evidence that the defendant lived in the hotel room where the drugs were found for six or seven weeks, but also that he had, at times, paid the rent for the room. *Id.* at 366, 542 S.E.2d at 686. Since the State presented no evidence in this case that defendant paid any amount towards the cost of the mobile home, *Frazier* does not control, and we must hold that the trial court erred in failing to grant the motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance.

We, therefore, reverse defendant's conviction on the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance. Because the trial court consolidated that conviction with defendant's PWISD conviction into a single judgment for sentencing purposes, we must remand for resentencing as to the PWISD conviction. *See State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 70 (1999) (remanding, after vacating one of defendant's convictions, for resentencing on remaining conviction as Court could not "assume that the trial court's consideration of two offenses, as opposed to one, had no affect [sic] on the sentence imposed").

No error in part; reversed and remanded for resentencing in part.

Judges McGEE and BRYANT concur.

IN THE MATTER OF: THE DENIAL OF NC IDEA'S REFUND OF SALES AND USE TAX FOR THE PERIOD JANUARY 1, 2003 THROUGH JUNE 30, 2003 BY THE SECRETARY OF REVENUE OF NORTH CAROLINA

No. COA08-561

(Filed 21 April 2009)

Taxation— appeal to superior court—standard of review—mixed law and fact

The trial court erred by applying a pure de novo standard of review to a review of the Tax Review Board that involved issues of law and fact. Moreover, the trial court's review erroneously rests on a factual basis which is either inconsistent with or not contained in the agency findings. The matter was remanded, given the complexity of the record and that the parties were heard on issues that remain unresolved.

IN RE DENIAL OF N.C. IDEA'S REFUND

[196 N.C. App. 426 (2009)]

Appeal by the Secretary of Revenue of North Carolina from judgment entered 8 February 2008 by Judge Howard E. Manning, Jr., Wake County Superior Court. Heard in the Court of Appeals 10 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General Gregory P. Roney, for Appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth V. LaFollette and William G. McNairy, for Appellee.

ERVIN, Judge.

The North Carolina Secretary of Revenue (Appellant) appeals from a judgment entered in Wake County Superior Court on 8 February 2008 reversing the 1 November 2006 decision by the Tax Review Board in Administrative Decision No. 498. The Tax Review Board's decision affirmed the Assistant Secretary of Revenue's conclusion that NC IDEA is not a charitable organization and was not, therefore, entitled to sales and use tax refunds pursuant to N.C. Gen. Stat. § 105-164.14(b)(3). We reverse and remand this case to the trial court for further proceedings not inconsistent with our decision.

NC IDEA was incorporated on 28 May 2002. On 24 July 2003, NC IDEA filed a non-profit and governmental entity claim for semiannual refunds of the sales and use taxes paid on direct purchases of tangible personal property for use in carrying on charitable operations. On 16 January 2004, the Department of Revenue notified NC IDEA that it was not eligible to receive the requested refund. NC IDEA protested the Department of Revenue's decision and filed an application for a hearing with the Department of Revenue.

In August 2005, Assistant Secretary of Revenue Eugene J. Cella (Assistant Secretary) heard NC IDEA's protest of the denial of its claim for refund of sales and use tax for the period of 1 January 2003 through 30 June 2003. The question before the Assistant Secretary of Revenue was whether NC IDEA was a non-profit entity pursuant to N.C. Gen. Stat. § 105-164.14(b). The final decision of the Secretary of Revenue contained the following pertinent findings of fact:

13. Taxpayer conducts lobbying activities.

14. Taxpayer paid one lobbying firm, Barfield Associates, $352,865 in its 2002 fiscal year and $290,439 in its 2003 fiscal year.

15. During its 2003 fiscal year, the Taxpayer's president devoted 10% to 20% of his time to lobbying activities.

. . . .

22. During the period at issue in the Claim for Refund, Taxpayer conducted two primary businesses: (1) venture capital investing ("VC") and (2) research and development ("R&D") under contracts to design or construct computer software systems and electronic systems.

. . . .

26. Taxpayer owns and manages two venture capital funds: (1) MCNC Ventures, LLC, (100% owned by Taxpayer) and (2) MCNC Enterprise Fund, LP (owned approximately 49% by Taxpayer, 50% by MCNC, and 1% by MCNC Ventures, LLC).

27. Taxpayer acts as the management company for both entities, and the Taxpayer's activities include the management of both entities.

28. Taxpayer's VC investing is not limited to any geographic area and is not limited to any charitable class.

29. The VC activities are dedicated to profitability where the Taxpayer, like any for-profit investor, will invest money, take preferred stock or convertible preferred debt, and seek a profitable exit opportunity.

30. Taxpayer's VC investing is a for-profit operation investing in the same businesses as other for-profit corporations and providing "traditional" VC funding.

31. Taxpayer conducts commercial VC investing.

32. Taxpayer competes with other for-profit companies for VC funding opportunities.

33. Taxpayer's R&D services were purchased by many for-profit, corporate customers.

34. Taxpayer is not conducting and disseminating fundamental research for public benefit.

35. Taxpayer's R&D services service commercial and industrial operations to design, construct, and commercialize products.

. . . .

42. Taxpayer's R&D operations are commercial and have the goal to produce commercial products.

43. Taxpayer competes with other for-profit companies for R&D contracts.

Based on these and other findings of fact, the Secretary of Revenue reached certain conclusions, some of which are more properly delineated as findings of fact, including the following determinations:

17. Taxpayer's objective is to create profitable, commercial products with its R&D activities or make profitable VC investments.

18. Taxpayer did not use its tangible property to carry on a charitable purpose because Taxpayer had a commercial, profit-driven purpose.

19. Taxpayer lacks a humane and philanthropic objective.

20. Taxpayer's VC activities benefit the commercial businesses that receive funding from Taxpayer.

21. Taxpayer's R&D activities benefit the commercial businesses that employ Taxpayer to help commercialize their products.

22. Neither the R&D nor the VC investing benefit a broad charitable class.

23. Taxpayer operates both VC and R&D to maximize commercial gain.

. . . .

28. Taxpayer's VC funding benefits private companies and competes with other sources of financing for private businesses.

29. Taxpayer's R&D activities are conducted for compensation, focus on research contracts to design and build commercial products, and the results are not freely disseminated.

30. Taxpayer's lobbying activities are not charitable.

31. Taxpayer does not offer its facilities for public use.

32. Taxpayer's primary activities do not provide a public benefit.

33. Taxpayer operates like a private business seeking to make profits from VC and R&D activities.

Based on these and other findings and conclusions, the Assistant Secretary concluded that "[t]he level of charitable activity required to meet the definition of a charitable organization under North Carolina law exceeds that found among the general population of commercial businesses which often make efforts to help the community;" that "[a] charitable organization must primarily operate to further its charitable purpose and not substantially operate to further non-charitable purposes;" that "Taxpayer's VC, R&D, and lobbying activities are substantial, while its grant making and educational activities are insubstantial;" and that "[a]ny incidental benefits to the community from the Taxpayer's VC or R&D are not charitable and are commercial." As a result, the Assistant Secretary concluded that NC IDEA did not qualify for a refund of sales and use tax as a charitable organization pursuant to N.C. Gen. Stat. § 105-164.14(b)(3).[1]

NC IDEA sought review of the Assistant Secretary's decision by the Tax Review Board. "[A]fter conducting an administrative hearing in this matter during which [NC IDEA] appeared and presented oral argument through counsel," the Tax Review Board concluded in Administrative Decision No. 498, which was entered on 1 November 2006, that "the findings of fact made by the Assistant Secretary were supported by competent evidence in the record[;] that[,] based upon the findings of fact, the Assistant Secretary's conclusions of law were fully supported by the findings of fact[;] . . . that the final decision of the Assistant Secretary was supported by the conclusions of law[;]" and "that the Assistant Secretary's final decision is AFFIRMED."

NC IDEA sought judicial review of the Tax Review Board's decision in the Superior Court of Wake County on 1 December 2006. The Secretary of Revenue filed a response to NC IDEA's petition for judicial review on 2 January 2007. After reviewing the administrative record and the briefs submitted by the parties and after hearing oral argument on 6 July 2007, the trial court entered a Judgment and Order reversing the Tax Review Board's decision on 8 February 2008.

In its Judgment and Order, the trial court initially reviewed the procedural history of this matter and then discussed the applicable

1. N.C. Gen. Stat. § 105-164.14(b)(3) (2007) states that "[a] nonprofit entity . . . is allowed a semiannual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services[.]" Included in the list of nonprofit entities entitled to a refund are the following: "Churches, orphanages, and other charitable or religious institutions and organizations not operated for profit." We also note that this section was repealed by Session Laws 2008-107, s. 28.22(a), effective 1 July 2008, and applicable to purchases made on or after that date.

standard of review. The trial court concluded, in reliance on the decision of this Court in *Vanderburg v. N.C. Dep't of Revenue*, 168 N.C. App. 598, 608-09, 608 S.E.2d 831, 839 (2005), that the Tax Review Board's decision was subject to *de novo* review. After stating that most of the facts are not in dispute and that, "[t]o the extent factual disputes exist, the Court has reviewed the facts in the light most favorable to the Department of Revenue," the trial court proceeded to specify what, in its opinion, the record evidence established.

According to the trial court, "the record clearly show[ed] that" "NC IDEA and its predecessor, MCNC Research & Development Institute ("MCNC-RDI") exist for the sole purpose of promoting economic development in North Carolina by attracting, forming, growing, and retaining microelectronic, wireless, networking, and related technology businesses in North Carolina;" that NC IDEA's "original purpose of promoting economic development in the microelectronic and other high technology industries for the benefit of the people and State of North Carolina has remained constant;" that, "[a]lthough [NC IDEA] has operated as a venture capital company that invests in small technology companies," it had never "operate[d] as a for-profit corporation;" that NC IDEA "has consistently remained a non-profit corporation that seeks to inject funds into nascent companies so that they in turn can grow and become successful and benefit the State of North Carolina and its people by creating jobs and tax revenues;" that, "even though [NC IDEA] looks to make a profit and get a return on investments, the so-called 'profit' made provides funds that can be invested back into growing technology companies in North Carolina and does not inure to the benefit of any individual or for-profit entity;" that "the stated intent and purpose of [NC IDEA] is economic development to create jobs and benefit the people and economy of North Carolina;" and that "the manner in which [NC IDEA] accomplished its objectives does not detract from its charitable nature." The trial court further concluded "as a matter of law, based on the undisputed evidence and taking the disputed evidence in the light most favorable to the Department of Revenue, that [NC IDEA's] economic development activities, carried out by its research and development and venture capital activities," during and after the Refund Period "promote social welfare, lessen the burdens of government, aid the citizens of North Carolina, and dispense public good;" that these "are charitable purposes within the meaning of" N.C. Gen. Stat. § 105-164.14(b)(3); and that NC IDEA "has . . . satisfied its burden of demonstrating that it is entitled to sales and use tax refunds pursuant to [N.C. Gen. Stat.] § 105-164.14(b)(3) "for the Refund Period." As a

result, the trial court reversed the decision of the Tax Review Board. From this judgment, the Department of Revenue appeals.

On appeal, the Secretary contends that the trial court erred by applying an incorrect standard of review. We agree with the Secretary, reverse the trial court's judgment, and remand this matter to the trial court for further proceedings not inconsistent with this opinion.

Judicial review of the final decision of an administrative agency in a contested case is governed by section 150B-51(b) of the Administrative Procedures Act (APA). N.C. Gen. Stat. § 150B-51(b) (2007). According to well-established law, it is the responsibility of the administrative body, not the reviewing court, "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980). In other words, "[w]hen the trial court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004).

During judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review. *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). According to the relevant provisions of the APA, an agency's final decision may be reversed or modified only if the reviewing court determines that the petitioner's substantial rights might have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2007). The first four grounds for reversing or modifying an agency's decision—that the decision was "in violation of constitutional provisions," "in excess of the statutory authority or jurisdiction of the agency," "made upon unlawful procedure," or "affected by other error of law," N.C. Gen. Stat. § 150B-51(b)(1)-(4)—are "law-based" inquiries. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894. The final two grounds—that the decision was "unsupported by substantial evidence . . . in view of the entire record" or "arbitrary or capricious," N.C. Gen. Stat. § 150B-51(b)(5),(6)—involve "fact-based" inquiries. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

In cases appealed from administrative agencies, "[q]uestions of law receive *de novo* review," whereas fact-intensive issues "such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Specifically, in cases where the gravamen of an assigned error is that the agency is subject to reversal under subsections 150B-51(b)(1), (2), (3), or (4) of the APA, a court engages in *de novo* review. *See Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 665, 670, 509 S.E.2d 165, 171 (1998). However, where the substance of the alleged error involves an allegation that the agency's decision should be overturned pursuant to subsections 150B-51(b)(5) or (6), the reviewing court must apply the "whole record test." *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

Under the *de novo* standard of review, the trial court "consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's[.]" *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002). When the trial court reviews an administrative decision under the whole record test, it "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). In conducting "whole record" review, the trial court must examine all the record evidence in order to determine whether there is substantial evidence to support the agency's decision. *Id.* "Substantial evidence" is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8b) (2007).

This Court's review of "a superior court order entered upon review of an administrative agency decision, . . . [involves a] two-fold

task: (1) [to] determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) [to] decide whether the court did so properly." *County of Wake v. N.C. Dep't of Env't & Natural Res.*, 155 N.C. App. 225, 233-34, 573 S.E.2d 572, 579 (2002) (quotation omitted). In performing this task, this Court need only consider "those grounds for reversal or modification argued by the petitioner before the superior court and properly assigned as error on appeal to this Court." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994) (quotation omitted).

After careful consideration of the record, we agree with the Secretary that the trial court applied an incorrect standard of review in its examination of the Assistant Secretary's decision, which the Tax Review Board affirmed without significant further discussion. The essence of NC IDEA's appeal to the superior court appears to have been that the Assistant Secretary erred by making incomplete and inaccurate factual findings and by applying an incorrect legal standard to the properly found facts. Rather than subjecting the Assistant Secretary's decision to pure *de novo* review, the trial court should have examined the Assistant Secretary's decision in order to ascertain (1) whether the factual findings made by the Assistant Secretary were supported by substantial evidence in view of the whole record, N.C. Gen. Stat. § 105-B-51(b)(5); (2) whether the Assistant Secretary failed to make findings of fact addressing any material issue arising on the evidentiary record, N.C. Gen. Stat. § 150B-51(b)(4); (3) whether the Assistant Secretary's legal conclusions embodied a correct understanding of the applicable law, N.C. Gen. Stat. § 150B-51(b)(4); and (4) whether the Assistant Secretary's factual findings supported his ultimate legal conclusion that NC IDEA was not entitled to a refund of sales and use tax payments pursuant to former N.C. Gen. Stat. § 105-164.14(b)(3) because it did not qualify as a "charitable . . . organization not operated for profit." N.C. Gen. Stat. § 150B-51(b)(4). Since not all of these steps involved the resolution of "law-based" issues properly subject to *de novo* review, the trial court erred by reviewing the Tax Review Board's decision under that standard of review.

The trial court's review of the Tax Review Board's decision to affirm the Assistant Secretary's determination on a *de novo* basis appears to have resulted in the commission of a more specific error: A trial court reviewing an agency decision may not engage in independent fact-finding. *See Carroll*, 358 N.C. at 662, 599 S.E.2d at 896.

In other words, a reviewing court may not independently weigh the record evidence or substitute its evaluation of the evidence for that of the adjudicating agency. *In re Appeal of AMP, Inc.*, 287 N.C. 547, 561-62, 215 S.E.2d 752, 761 (1975). As a result, the principal duty of a reviewing court in examining an administrative agency's factual findings involves evaluating all the evidence for the purpose of determining whether the agency's findings have a "rational basis" in the record. *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979).

As we have already noted, the trial court attempted to specify the facts that the "undisputed evidence and . . . [the] disputed evidence [taken] in the light most favorable to the Department of Revenue" tended to show. However, the trial court's recitation of the applicable facts cannot be reconciled with the factual findings made by the Assistant Secretary.

For example, the trial court stated that "NC IDEA and its predecessor, MCNC Research & Development Institute ("MCNC-RDI") exist for the sole purpose of promoting economic development in North Carolina by attracting, forming, growing, and retaining microelectronic, wireless, networking, and related technology businesses in North Carolina." After careful review, we have not found any language in the Assistant Secretary's findings of fact that addresses the purpose for which NC IDEA was formed and is operated. However, the Assistant Secretary did find that "Taxpayer's VC investing is not limited to any geographic area and is not limited to any charitable class," a finding which may be inconsistent with the trial court's determination that NC IDEA's efforts are focused on North Carolina-based economic development activities.

Furthermore, the trial court stated that the evidence tended to show that, while NC IDEA "has operated as a venture capital company that invests in small technology companies, it did not during the Refund Period, nor does it now, operate as a for-profit corporation." On the contrary, the trial court indicated that NC IDEA "has consistently remained a non-profit corporation that seeks to inject funds into nascent companies so that they in turn can grow and become successful and benefit the State of North Carolina and its people by creating jobs and tax revenues." Although the Assistant Secretary does not appear to have addressed NC IDEA's ultimate goals in his findings of fact, he did determine that "[t]he VC activities are dedicated to profitability where the Taxpayer, like any for-profit investor, will invest money, take preferred stock or convertible preferred debt, and seek a profitable exit opportunity;" that "Taxpayer's VC investing

is a for-profit operation investing in the same businesses as other for-profit corporations and providing 'traditional' VC funding;" that "Taxpayer conducts commercial VC investing;" that "Taxpayer competes with other for-profit companies for VC funding opportunities;" that "Taxpayer is not conducting and disseminating fundamental research for public benefit;" that "Taxpayer's R&D services serve commercial and industrial operations to design, construct, and commercialize products;" that "Taxpayer's R&D operations are commercial and have the goal to produce commercial products;" and that "Taxpayer competes with other for-profit companies for R&D contracts." Once again, these findings of fact are, arguably, inconsistent with the trial court's view of the undisputed evidence and the evidence taken in the light most favorable to the Department.

Finally, the trial court stated that "the undisputed evidence" and the "disputed evidence [viewed] in the light most favorable to the Department of Revenue" indicated that, despite the fact that NC IDEA "looks to make a profit and get a return on investments, the so-called 'profit' made provides funds that can be invested back into growing technology companies in North Carolina and does not inure to the benefit of any individual or for-profit entity;" that "the stated intent and purpose of [NC IDEA] is economic development to create jobs and benefit the people and economy of North Carolina;" and that, "in this case, the manner in which [NC IDEA] accomplished its objectives does not detract from its charitable nature." Once again, the Assistant Secretary's findings of fact do not contain a discussion of the treatment of the "profit" that NC IDEA earns by virtue of its activities. In addition, the Assistant Secretary's findings, as quoted in detail above, tend to suggest that NC IDEA's operations cannot be meaningfully distinguished from those of a for-profit entity. Thus, this portion of the trial court's discussion of the evidentiary record is arguably inconsistent with the Assistant Secretary's findings of fact.

As this analysis suggests, it appears that the trial court's review of the Tax Review Board's affirmance of the Assistant Secretary's decision erroneously rests on a factual basis which is either inconsistent with or simply not contained within the Assistant Secretary's findings of fact. Put another way, the trial court's judgment is susceptible to the interpretation that the trial court engaged in impermissible independent factfinding during his review of the administrative agency's decision. Any determination that the trial court had the authority to disregard or supplement the administrative agency's factual determi-

nations would be inconsistent with the applicable standard of review and rest upon a misapplication of governing law.

When an "order or judgment appealed from was entered under a misapprehension of the applicable law," an appellate court may remand for application of the correct legal standards. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004). "The trial court's erroneous application of the standard of review does not automatically necessitate remand[,]" *Carroll*, 358 N.C. at 666, 599 S.E.2d at 898, if the "court [may] reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b)[.]" *Id.*

Here, however, the trial court's erroneous application of a *de novo* standard of review necessitates remand for further proceedings in the court below. Although the suggestion was made at oral argument that this Court should proceed to conduct an appropriate review of the Tax Review Board's decision to affirm the Assistant Secretary's determination based on the existing administrative record, we do not believe that we should act in that manner. First, the scope of this Court's review is limited to "those grounds for reversal or modification . . . assigned as error on appeal to this Court." *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118 (quotation omitted). Given the procedural posture of this case, there are no specific assignments of error directed to the Assistant Secretary's findings of fact and conclusions of law upon which we could base such independent review of the Assistant Secretary's decision. Secondly, and even more importantly, we have not had the benefit of briefing and argument directed toward the sufficiency of the Assistant Secretary's findings of fact and conclusions of law. Given the complexity of the record in this matter and the fact that the parties have not had an opportunity to be heard before this Court with respect to the issues which remain unresolved, we conclude that we should remand this case to the superior court for further proceedings not inconsistent with this opinion.

Thus, we hold that the trial court failed to apply the appropriate standard of review in examining the Tax Review Board's Administrative Decision No. 498 affirming the Assistant Secretary's decision to deny NC IDEA's request for a sales and use tax refund. Accordingly, the decision of the trial court is reversed and the case is remanded to the trial court for further review of the Tax Review Board's decision

in light of the appropriate standard of review. If the trial court deems it necessary, after further review of the Tax Review Board's decision, the court may further remand this case to the Secretary of Revenue for the purpose of making further findings of fact and conclusions of law.[2]

REVERSED and REMANDED.

Judges WYNN and STEPHENS concur.

STATE OF NORTH CAROLINA v. KYLE JARON BUNCH

No. COA08-558

(Filed 21 April 2009)

Constitutional Law— trial by jury—error in instructions—not structural—harmless error review

Failure to instruct on an essential element of a crime is not structural error, reversible per se, but subject to harmless error review. Here, the omission of two of the elements of the crime from a felony murder instruction was harmless error because the instructions were sufficient overall and there was overwhelming evidence to satisfy the two elements.

Judge ELMORE dissenting.

Appeal by defendant from judgments entered 20 September 2006 by Judge Clifton W. Everett, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 19 November 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Appellate Defender Staples Hughes, by Benjamin Dowling-Sendor, for defendant.

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2. The Court notes that the General Assembly abolished the Tax Review Board and created a new structure for adjudicating tax disputes at the administrative level, effective 1 January 2008. 2007 N.C. Sess. Laws 491.

JACKSON, Judge.

Kyle Jaron Bunch ("defendant") appeals his 20 September 2006 conviction of first-degree murder and robbery with a dangerous weapon. For the reasons stated below, we hold any error harmless.

On 1 March 2004, three African-American men dressed in black and wearing black fabric masks over their faces entered a home occupied by James Arthur "Art" Bowen ("Bowen"), Richard Preston Hewlin, Jr., and Brian Jarrod Pender ("Pender"). One of the intruders had a handgun and another had a shotgun. The intruders ordered the men down and to surrender any cell phones or cash. One intruder repeatedly asked, "Where is it at?" Bowen, apparently unaware of what the intruder was referring to, responded that the men had nothing of value but that the intruders could take anything they wanted from the house, including the keys to Bowen's new truck. As the robbery was winding down and the intruders prepared to leave, the man holding the shotgun pointed it at Pender, "racked" the gun, and then pulled the trigger. The gun went off, killing Pender. Several men were involved in planning the robbery. Three of the other men involved identified defendant as the man holding the shotgun.

Defendant was tried for first-degree murder, first-degree burglary, and robbery with a dangerous weapon. The State proceeded on two theories of first-degree murder: felony murder and first-degree murder by malice, premeditation, and deliberation. On 18 September 2006, a jury convicted defendant of (1) first-degree murder pursuant to the felony murder rule but not malice, premeditation, and deliberation; (2) first-degree burglary; and (3) robbery with a dangerous weapon. After hearing testimony as to sentence, the jury recommended defendant be sentenced to life imprisonment. The trial court sentenced defendant to life imprisonment without parole for the murder and an additional 103 to 133 months imprisonment as a Level III felon for robbery with a dangerous weapon. Defendant now appeals.

Defendant argues that he is entitled to a new trial because the trial court failed to instruct the jury about two elements of felony murder, violating his constitutional right to a trial by jury. We disagree.

The State concedes that the trial court omitted two elements from its first-degree felony murder instructions, but argues that the jury instructions "as a whole" presented the law of felony murder fairly and clearly to the jury; any error was harmless error. Defendant, on the other hand, argues that the error is reversible

per se pursuant to Article I, Section 24, of the North Carolina Constitution, and that no harmless error analysis is necessary. This appears to be an issue of first impression.

Article I, Section 24, establishes the right to have a jury trial in criminal cases. It states, in full, that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial *de novo*." N.C. Const. art. I, § 24 (2005). Unlike the right to a jury trial established by the Sixth Amendment of the U.S. Constitution, the right to a jury trial pursuant to Article I, Section 24, cannot be waived. *State v. Thompson*, 118 N.C. App. 33, 41, 454 S.E.2d 271, 276, *disc. rev. denied*, 340 N.C. 262, 456 S.E.2d 837 (1995) (citations omitted).

Defendant contends that our Supreme Court's opinion in *State v. Cox*, 265 N.C. 344, 144 S.E.2d 63 (1965), demonstrates that a violation of the right to a jury trial pursuant to Article I, Section 24, requires automatic reversal of a conviction. In *Cox*, the defendant was convicted in district court of "the unlawful possession, transportation, and possession for the purpose of sale of 39 gallons of nontaxpaid whiskey." *Id.* at 344, 144 S.E.2d at 63. On appeal to the superior court, the defendant entered a plea of not guilty and waived a jury trial. *Id.* The superior court convicted the defendant, who appealed, "assigning as error the admission of certain evidence and the failure of the court to allow his motion for nonsuit." *Id.* Our Supreme Court issued the following short *per curiam* opinion:

> On the face of the record there appears a fatal error which the Court will notice *ex mero motu*. This case is controlled by *State v. Muse*, 219 N.C. 226, 13 S.E.2d 229, in which the Court said:
>
> > When a defendant in a criminal prosecution in the Superior Court enters a plea of not guilty he may not, without changing his plea, waive his constitutional right of trial by jury, the determinative facts cannot be referred to the decision of the court even by consent—they must be found by the jury.
>
> Since the guilt of defendant has not been established by a verdict, the sentence imposed by the judge is a nullity. No trial has been had. The case is remanded to the Superior Court for a trial by jury as the law provides.

Id. at 345, 144 S.E.2d at 64 (quotation marks and additional citations omitted).

Here, defendant reasons that the deficient jury instruction resulted in the waiver of his right to a jury trial because his guilt was not established by a jury verdict; therefore, the sentence is a nullity and "[n]o trial has been had."

"[O]ne charged with crime in this state is entitled as a matter of right, under both the federal and state Constitutions, to a jury trial as to every essential element of the crime charged." *State v. Field*, 75 N.C. App. 647, 648, 331 S.E.2d 221, 222, *disc. rev. denied*, *appeal dismissed*, 314 N.C. 671, 337 S.E.2d 582 (1985) (citing *State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968)). "[T]he determinative facts cannot be referred to the decision of the court even by consent—they must be found by the jury." *State v. Muse*, 219 N.C. 226, 227, 13 S.E.2d 229, 229 (1941) (citation omitted). That defendant potentially may have waived his right through his attorney's carelessness does not affect the outcome. "[A]n attorney has no right, in the absence of express authority, to waive or surrender by agreement or otherwise the substantial rights of his client." *State v. Mason*, 268 N.C. 423, 426, 150 S.E.2d 753, 755 (1966) (citation omitted). Certainly, the right to a jury trial is a substantial one.

The State concedes that the right to a jury trial pursuant to Article I, Section 24 cannot be waived, but contends that the omission of essential elements of a crime from a jury instruction is not the equivalent of a waiver. The United States Supreme Court has held that the omission of an essential element from jury instructions does not constitute structural error and is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 15, 144 L. Ed. 2d 35, 51 (1999). The Court did not address the possibility of multiple omissions in *Neder*, but it appears that the number of omissions could be a factor in harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 307-08, 113 L. Ed. 2d 302, 330 (1991) (noting that all of the cases involving constitutional errors that the U.S. Supreme Court used harmless error to evaluate "involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt"). However, we note that *Neder* and *Fulminante* were decided pursuant to the Sixth Amendment, not Article I, Section 24.

Our Supreme Court reached the threshold of this question in *State v. Blackwell*, 361 N.C. 41, 52, 638 S.E.2d 452, 459 (2006), *cert. denied*, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007), but did not cross it. In *Blackwell*, the defendant alleged constitutional errors pursuant to the

Sixth Amendment and Article I, Section 24, because the judge at his trial did not submit aggravated sentencing factors to a jury. Our Supreme Court held that this failure constituted an error pursuant to *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), but that *Blakely* errors are subject to federal harmless error review. *Id.* at 51, 638 S.E.2d at 459. Our Supreme Court held that, in the defendant's case, the error was harmless and no new trial was necessary pursuant to the Sixth Amendment. *Id.* The defendant also argued that "the trial court's failure to submit an aggravated sentencing factor to the jury [was] reversible *per se*" pursuant to Article I, Section 24 because "the State Constitution provides additional protection to criminal defendants above and beyond [*Washington v.*] *Recuenco*, [548 U.S. 212, 165 L. Ed. 2d 466 (2006)] and therefore, *Blakely*-type error is reversible per se under state law." *Id.* The Court did not reach the question "of whether harmless error or structural error would apply under this provision of the State Constitution" because "aggravating factors are not, and have never been, elements of a 'crime' for purposes of Article I, Section 24 analysis." *Id.* at 51-52, 638 S.E.2d at 459-60.

Neither this Court nor our Supreme Court has addressed the question since *Blackwell*, and *Blackwell* certainly leaves open the possibility that the omission of an essential element of a crime during a jury instruction is reversible error *per se*. However, this Court recently explained that a violation of Article I, Section 24's "twelve juror" requirement "requires automatic reversal only where a jury was 'improperly constituted' in terms of its numerical composition. . . . [W]here the verdict was rendered by a jury of less than twelve fully-participating jurors . . . the verdict is a nullity." *State v. Wilson*, 192 N.C. App. 359, 368-69, 665 S.E.2d 751, 756 (2008). If "the error did not affect the numerical structure of the jury, but rather resulted in jurors acting on unequal instructions from the trial court in reaching a verdict," then the error is subject to harmless error review. *Id.*

We note that several older cases ordered new trials following the omission of an essential element of the crime charged from the jury instructions. For example, in *State v. Mundy*, 265 N.C. 528, 144 S.E.2d 572 (1965), the defendant was tried for armed robbery, but the trial judge did not submit the element of a "taking of personal property with felonious intent," which "is an essential element of the offense of armed robbery." *Id.* at 529, 144 S.E.2d at 574. The Court did not engage in any constitutional analysis or even refer to either constitution, and instead concluded simply, "An instruction [on felonious intent], though not necessarily in these words, is *essential* in robbery

cases. New trial." *Id.* at 530, 144 S.E.2d at 574 (emphasis added). *Mundy* relies upon *State v. Spratt*, 265 N.C. 524, 144 S.E.2d 569 (1965), in which the defendant also was charged with armed robbery. *Id.* at 525, 144 S.E.2d at 571. About defendant Spratt's trial the Supreme Court stated:

> A taking with "felonious intent" is an essential element of the offense of armed robbery, of attempt to commit armed robbery, and of common law robbery, and it is *prejudicial error* for the court to charge that defendant may be convicted of such offense even though the taking was without felonious intent.

Id. at 526, 144 S.E.2d at 571 (citation omitted) (emphasis added). *See also State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985) ("Knowledge being an essential element of the crime, the failure of the trial judge to instruct on this element must be held to be *prejudicial error*." (citation omitted) (emphasis added). These cases suggest that no further analysis is necessary once we have determined that the trial court omitted an essential element from the jury trial.

Although the term "structural error" as we understand it today did not exist when *Mundy* and *Spratt* were decided, the analytical process is identical: Upon identifying the error, we order a new trial. Although, we may infer that these prior decisions indicate "structural error," we just as easily could infer that in applying harmless error analysis the errors in those cases were not "harmless;" they were prejudicial. Intent is a mental attitude which rarely is provable by direct evidence but ordinarily must be shown by circumstances from which it may be inferred. *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (citations omitted). It is understandable why our Courts previously have ordered a new trial based upon the absence of instructions on such a subjective element.

In *State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991), *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992), this Court stated that "[a]n instructional error of the type here presented is not unlike the errors at issue in *Pope* and *Rose* and is not, as defendant urges, reversible error *per se*; instead, such an error is subject to either a harmless error or plain error analysis . . . ." *Id.* at 505-06, 410 S.E.2d at 231 (referring to *Pope v. Illinois*, 481 U.S. 497, 95 L. Ed. 2d 439 (1987)—in which harmless error analysis was applied to an obscenity instruction which erroneously charged the jury to apply a contemporary community standard to the "value" element of the offense—and

Rose v. Clark, 478 U.S. 570, 92 L. Ed. 2d 460 (1986)—in which harmless error analysis was applied to a malice instruction in a murder trial which unconstitutionally shifted the burden of proof to the defendant). In *Wallace*, the trial court failed to instruct the jury on actual or constructive presence to prove a theory of acting in concert. *Id.* at 501, 410 S.E.2d at 228.

Given this Court's recent opinion in *Wilson*, and our prior opinion in *Wallace*, it appears that failure to instruct on an essential element of a crime is not structural error, reversible *per se*, but rather an error to which we may apply harmless error review.

Here, in its first mention of the first-degree murder charge during the jury instructions, the trial court stated:

> In case number 04 CRS 50597, you will be called upon to answer by your unanimous verdict whether [defendant] is guilty of first degree murder and if you answer that yes, was it on the basis of malice, premeditation, and deliberation, or under the first degree felony murder rule or both or whether he is guilty of second degree murder or not guilty.

After giving the jury an overview of the charges, the trial court then instructed the jury on first-degree murder based upon a theory of malice, premeditation, and deliberation, including an instruction on acting in concert. The trial court then instructed:

> Now I further charge that for you to find the Defendant guilty of first degree murder under the first degree felony murder rule, the State must prove three [3] things beyond a reasonable doubt.
>
> First, that the Defendant or someone with whom he was acting in concert committed first degree burglary and/or robbery with a dangerous weapon.

The trial court then instructed on the elements of first-degree burglary and robbery with a dangerous weapon without enumerating the other two elements of first-degree felony murder; it gave the mandate and continued to the instructions for second-degree murder. However, these elements are not absent from the instructions as a whole.

Pursuant to the North Carolina Pattern Jury Instructions, after instructing on the underlying felonies, the trial court should have continued:

> Second, that while committing or attempting to commit first-degree burglary or robbery with a dangerous weapon, the defendant killed the victim with a deadly weapon.
>
> And Third, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

N.C.P.I. Crim. 206.14 (2006). Although these elements were not included in the felony murder rule instructions, the jury was instructed on these elements as part of the jury instructions *in toto*.

As part of the instructions with respect to first-degree murder by malice, premeditation, and deliberation, the jury was instructed that "the State must prove . . . beyond a reasonable doubt . . . that the Defendant or someone with whom he was acting in concert . . . killed the victim with a deadly weapon." This instruction, combined with the instructions given on acting in concert and first-degree burglary sufficiently instructs the jury as to the second element of first-degree murder by the felony murder rule.

Also as part of the first-degree murder by malice, premeditation, and deliberation instructions, the jury was instructed that "the State must prove that the Defendant's act or the act of someone with whom he was acting in concert was [the] proximate cause of the victim's death. A proximate cause is a real cause. A cause without which the victim's death would not have occurred." This instruction sufficiently instructs the jury as to the third element of first-degree murder by the felony murder rule.

Pursuant to harmless error analysis, the evidence is quite clear that one of the robbers, with whom defendant was acting in concert, shot Pender with a shotgun (a deadly weapon) and that this shot was the proximate cause of his death. Further, the jury found defendant guilty of robbery with a dangerous weapon. This demonstrates that the jury found beyond a reasonable doubt that defendant used a dangerous weapon, by at least acting in concert.

The fact that the jury did not find defendant guilty of first-degree murder by malice, premeditation and deliberation does not detract from the effectiveness of the trial court's instructions. The element of malice, premeditation, and deliberation, like felonious intent, is a subjective element. Had the trial court not instructed on it, and the jury found defendant guilty by that theory, we may be more inclined

to determine that the error was not harmless and a new trial is warranted. Further, had the omitted instructions not been given at any time during the jury charge, we might be more inclined to so rule. However, because in this case the instructions, *in toto*, were sufficient, and there was overwhelming evidence to satisfy the two elements on which the trial court failed to instruct as to the theory of felony murder, any error was harmless.

No prejudicial error.

Judge ELMORE dissents in a separate opinion.

Judge ROBERT C. HUNTER concurs.

ELMORE, Judge, dissenting.

For the reasons stated below, I respectfully dissent from the majority opinion and would vacate defendant's conviction.

The majority notes that we could as easily infer from *Mundy* and *Spratt* that the omission of essential elements from a jury instruction is an error *per se* as we could infer that the omission was not harmless error. I would argue that inferring harmless error analysis where there is none requires reading significant language into *Mundy* and *Spratt* that does not otherwise exist. In those cases, the Court noted that essential elements were omitted from the jury instructions and then, without further analysis, ordered new trials. Accordingly, I would hold that the trial court's failure to instruct the jury on two of the three elements of felony murder is reversible error *per se*, or "structural error" in the current parlance, and requires a new trial. Our state Constitution guarantees all felony defendants a nonwaivable right to a jury trial; omitting two-thirds of the elements from the jury instructions amounts to the judge, not the jury, having the final say on those elements.

Furthermore, if I were to apply harmless error analysis to defendant's case, I would still grant defendant a new trial. The jury delivered a verdict sheet indicating that it had found defendant guilty of first degree murder on the basis of the first degree felony murder rule, but not on the basis of malice, premeditation, and deliberation. The jury had the option of returning a verdict finding defendant guilty of both types of first degree murder, just one of the two types, neither type, or second degree murder. Of course, the jury also had the option of

finding defendant not guilty. The trial court's felony murder instruction was limited to whether "[d]efendant or someone with whom he was acting in concert committed first degree burglary and/or robbery with a dangerous weapon." Although the majority argues that the two missing elements were adequately covered by the jury instructions for first degree murder on the basis of malice, premeditation, and deliberation, I cannot agree. It is untenable to encourage or allow a jury to reach a guilty verdict for a particular crime by substituting elements of other crimes for which the defendant is charged. Even though the two missing elements are nearly identical to two of the five elements of premeditated murder, it is unclear to me how the jury would have known to apply those two elements during its felony murder analysis. The trial court discussed the felony murder rule several times in its instructions, but did not accurately describe the rule or the elements during any of them. Although we will uphold instructions that, when "viewed in their entirety, present the law fairly and accurately to the jury," *State v. Roache*, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004), in my opinion, these instructions fall outside the intended scope of that rule. I cannot uphold a verdict that is based upon an assumption that a jury cobbled together a fair and accurate representation of the felony murder rule from the instructions given on premeditated murder.

Accordingly, for the reasons stated above, I would vacate defendant's conviction and order a new trial.

JEAN H. GASKIN, AS EXECUTRIX OF THE ESTATE OF E. REED GASKIN, DECEASED; LEWIS GASKIN; ANTHONY WILLIAM PACKER; AND LARRY ESTES, PLAINTIFFS v. THE J.S. PROCTOR COMPANY, LLC; ANNA JONES PROCTOR AND RICHARD E. MARSH, JR. AS CO-EXECUTORS OF THE ESTATE OF JOHN S. PROCTOR, JR.; AND PAUL LEONARD, DEFENDANTS

No. COA08-732

(Filed 21 April 2009)

Partnerships— individual suit—standing—special duty—separate and distinct injury-—third party

Plaintiff limited partners of a partnership that owned and operated an apartment complex had no standing to sue the general partners individually and on their own behalf for injuries sustained by the partnership because: (1) the only two exceptions to

the general rule of partner standing to bring an individual action (that one partner may not sue in his own name and for his benefit upon a cause of action in favor of a partnership) are that a plaintiff alleges an injury separate and distinct to himself, or the injuries arise out of a special duty running from the alleged wrongdoer to plaintiff; (2) contrary to plaintiffs' assertion, *Norman*, 140 N.C. App. 390 (2000), did not create an additional exception; (3) plaintiffs failed to show a special duty based on powerlessness when plaintiffs collectively owned 90% of the shares in the limited partnership; although defendant general partners controlled the board of directors, the agreement gave the limited partners the right to convert their limited partnership interests into general partnership interests; there was no evidence that plaintiffs and defendants are in a family business where close relationships have broken down; there was no evidence tending to show that creditors of the partnership would not be prejudiced if the lawsuit went forward and resulted in recovery by plaintiffs rather than the partnership, and in fact the complaint alleged the partnership was in dire financial condition and in default on its obligations; there was a danger of multiple lawsuits when the partnership and two partners who held 10% of the limited partnership shares were not parties to the lawsuit; and no special duty arose from two contractual agreements plaintiffs entered into with defendants; and (4) plaintiffs failed to show separate and distinct injury when there were no facts alleged which would support the existence of an injury to themselves apart from diminution in the value of their investment, a circumstance which would have similarly affected the partnership and all the partners. Nor could plaintiffs bring an individual suit against defendant third party management company when the general rule of partner standing is the same regardless of whether plaintiff is seeking to recover from another partner within the partnership or a third party unrelated to the partnership, and the complaint alleged the same duty and same injury against the third party management company and general partners.

Appeal by plaintiffs from order entered on or about 7 January 2008 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 November 2008.

Jackson & McGee, LLP, by Sam McGee, for plaintiff-appellants.

Hamilton Moon Stephens Steele & Martin, PLLC, by Jackson N. Steele and Mark R. Kutny, for defendant-appellants The J.S. Proctor Company, LLC, and Anna Jones Proctor as Executor of the Estate of John S. Proctor, Jr.

K&L Gates LLP, by John H. Culver, III and Glenn E. Ketner, III, for defendant-appellee Paul Leonard.

STROUD, Judge.

Plaintiffs appeal from the order dismissing their complaint with prejudice pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The dispositive question is whether a limited partner can bring suit in his personal capacity for injuries to the partnership when he does not sufficiently allege a special duty or a separate and distinct injury. Because we conclude that he cannot, we affirm.

I. Background

Plaintiffs' complaint, which must be "taken as true" at this stage of the proceedings, *Rowlette v. State*, 188 N.C. App. 712, 714, 656 S.E.2d 619, 621, *disc. review denied and appeal dismissed*, 362 N.C. 474, 666 S.E.2d 487 (2008), alleged: Tryon Hills Associates ("the partnership") was formed as a limited partnership on 27 July 1983 for the purpose of owning and operating Tryon Hills Apartments ("the apartment complex"). At formation, E. Reed Gaskin was the sole limited partner; John Crosland Company, John S. Proctor, Jr. and Paul R. Leonard, Jr. were the general partners. In August 1983, E. Reed Gaskin transferred thirty percent of his interest in the partnership to Anthony William Packer (10%), Lewis R. Gaskin (5%), John L. Sullivan, Jr. (5%), Larry D. Estes (5%), and John A. Thompson, Jr. (5%). The J.S. Proctor Company, LLC, was hired to manage the apartment complex. John Crosland Company withdrew as a general partner prior to the events giving rise to the lawsuit. (R 7) E. Reed Gaskin died in 2003; his partnership interest remained in his estate.

Revenues for the apartment complex began to decline in 2004. The limited partners recommended that the general partners take steps to reduce expenses but the general partners did not do so. In August 2005 the partnership discontinued making mortgage payments on the apartment complex. The mortgage note was sold to Compass Partners on 21 June 2006. The partnership provided Compass Partners with a deed in lieu of foreclosure on 1 August 2006.

On 16 May 2007 plaintiffs filed a complaint in Superior Court, Mecklenburg County. The complaint alleged that the general partners in the partnership, defendants Paul R. Leonard, Jr. and John S. Proctor, Jr.[1] injured plaintiffs by breach of fiduciary duty, negligence, breach of contract, and constructive fraud. Specifically, the complaint alleged that Proctor and Leonard

> [1] operat[ed] Tryon Hills in a manner calculated to enrich Defendant The J.S. Proctor Company, LLC, at the expense of Plaintiffs; [2] discontinu[ed] mortgage payments in or about August 2005; [3] conceal[ed] from Plaintiffs their discontinuation of mortgage payments for a period of approximately nine months; [4] fail[ed] to take steps available to ensure that the assets of Tryon Hills were protected and maximized; [5] enter[ed] into continuing negotiations for months with a party who on the most superficial inquiries, would have been shown to have no ability to purchase the property; and [6] fail[ed] to explore or pursue available options to protect Plaintiffs' interest in Tryon Hills.

The complaint further alleged that the same acts and injuries were attributable to the negligence of corporate defendant The J.S. Proctor Company, LLC. The complaint sought compensatory and punitive damages.

On 20 June 2007, The J.S. Proctor Company, LLC, and the executors of the estate of John S. Proctor, Jr. (collectively "the Proctor defendants") moved to dismiss the action pursuant to Rule 12(b)(6), alleging that plaintiffs lacked standing to bring the action and alternatively that defendant The J.S. Proctor Company, LLC, owed no duty to plaintiffs. The case was designated as a complex business case on 29 June 2007. Defendant Leonard moved to dismiss on 30 July 2007. The trial court granted both motions to dismiss on or about 7 January 2008.[2] Plaintiffs appeal.

II. Standard of Review

"The standard of review on a motion to dismiss under Rule 12(b)(6) is whether, if all the plaintiff's allegations are taken as true, the plaintiff is entitled to recover under some legal theory." *Rowlette*, 188 N.C. App. at 714, 656 S.E.2d at 621 (citation and quotation marks

1. John S. Proctor, Jr. died in December 2006. Plaintiffs' complaint sought recovery from Mr. Proctor's estate.

2. Defendant Marsh was voluntarily dismissed from the case without prejudice on 8 November 2007.

omitted). When a plaintiff's standing to bring suit is challenged in a 12(b)(6) motion this Court reviews *de novo*. *Marriott v. Chatham Cty.*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007); *see also Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) ("Since [the limited partner] cannot maintain an action in its own capacity, it lacks standing and has failed to state a claim upon which relief may be granted.").

III. Analysis

The general rule of partner standing to sue individually is stated in *Energy Investors*: "It is settled law in this State that one partner may not sue in his own name, and for his benefit, upon a cause of action in favor of a partnership." 351 N.C. at 336-37, 525 S.E.2d at 445 (citation and quotation marks omitted). The rule includes a cause of action against other partners in the partnership, *Jackson v. Marshall*, 140 N.C. App. 504, 508, 537 S.E.2d 232, 235 (2000), *disc. review denied*, 353 N.C. 375, 547 S.E.2d 10 (2001), as well as a cause of action against an unrelated third party, *Energy Investors*, 351 N.C. at 336-37, 525 S.E.2d at 445. "The *only two* exceptions to this rule are: (1) a plaintiff alleges an injury 'separate and distinct' to himself, or (2) the injuries arise out of a 'special duty' running from the alleged wrongdoer to the plaintiff."[3] 351 N.C. at 335, 525 S.E.2d at 444 (emphasis added) (recognizing the two exceptions in a suit brought by a limited partner and citing *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660, 488 S.E.2d 215, 220 (1997), which recognized the same two exceptions in a suit brought by shareholders in a corporation).

A. The Purported "Additional Exception" of *Norman*

Plaintiffs first contend despite the general rule and the recognition of only two exceptions in *Energy Investors*, that *Norman v.*

3. These two exceptions are sometimes conflated in case law because they are "often overlapping." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997) (quoting 12B *Fletcher Cyclopedia of the Law of Private Corporations* § 5911, at 484 (perm. ed. 1993). *Compare Livingston v. Adams Kleemeier Hagan Hannah & Fouts*, 163 N.C. App. 397, 405-06, 594 S.E.2d 44, 50 ("Since no facts have been alleged which lead to the inference of a special duty being owed to plaintiff that is separate and distinct from that owed to the other entities, plaintiff lacks standing."), *disc. review denied*, 359 N.C. 190, 607 S.E.2d 275 (2004), *with Crosby v. Beam*, 548 N.E.2d 217, 221 (Ohio 1989) ("Where majority or controlling shareholders in a close corporation breach their heightened fiduciary duty to minority shareholders by utilizing their majority control of the corporation to their own advantage, . . . the minority shareholder is individually harmed."), *and Noakes v. Schoenborn*, 841 P.2d 682, 687 (Or. App. 1992) ("When the majority shareholders of a closely held corporation . . . breach . . . their fiduciary duties of loyalty, good faith and fair dealing[, those] actions . . . result in both derivative and individual harm[.]").

Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248 (2000), recognized "[a]n additional exception to the general rule[,]" which plaintiffs call the "closely held exception." Plaintiffs further contend that "[b]y adopting and applying this exception, the *Norman* court relied upon two primary considerations: (1) the closely held nature of the company, and (2) the domination of the company by the defendants and resulting powerlessness of the plaintiffs." Plaintiffs then reason that because the partnership *sub judice* is a closely held partnership, and because plaintiffs are powerless within the partnership, they should be able to maintain this action in their own names and for their own benefit. We disagree with plaintiffs' interpretation of *Norman* and consequently with their conclusion that *Norman* grants them standing to bring this action.

Plaintiff is correct in stating *Norman* purports to create an additional exception:

> Generally speaking, our decision[] in . . . *Barger* parallel[s] the majority view among our sister states that a shareholder can maintain an individual action against a third party only if he can show a special relationship with the wrongdoer *and* also show an injury peculiar to himself. During the last quarter of the Twentieth Century, however, there has been an "evolution" in the development of, and protection for, the rights of minority shareholders in closely held corporations.

140 N.C. App. at 398-99, 537 S.E.2d at 255 (citation omitted and emphasis added); *see also Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 383-84 (7th Cir. 1990) ("[A] few . . . states, ha[ve] expanded the "special injury" doctrine into a general exception for closely held corporations . . . . [but] not all states have joined the parade."), *cert. denied*, 500 U.S. 952, 114 L. Ed. 2d 710 (1991).

We first note that *Norman* misstated *Barger*, which held that

> a shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show [1] that the wrongdoer owed him a special duty <u>or</u> [2] that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself.

346 N.C. at 658-59, 488 S.E.2d at 219 (emphasis added). Second, this Court could not have and did not create "an additional exception" in

light of the North Carolina Supreme Court's clear holding in *Energy Investors*, decided only eight months before *Norman*, that there are *only two* exceptions to the general rule of partner standing to bring an individual action. 351 N.C. at 335, 525 S.E.2d at 444.

Finally, and most important, *Norman* expressly found standing to bring an individual lawsuit on its facts based not on the "evolution" of minority shareholder protection, but based squarely on one of the two exceptions to the shareholder/limited partner standing rule found in *Energy Investors* and *Barger*:

> Even if we assume, however, that plaintiffs must show that they have standing to maintain a direct action against the business defendants under the rule set out in . . . *Barger*, and the recent decision of our Supreme Court in *Energy Investors Fund*, we hold that plaintiffs have alleged facts which bring them within the requirements of those cases.
>
> . . . .
>
> [P]laintiffs['] . . . allegations are sufficient to give rise to a fiduciary relationship between plaintiffs and the defendants and *establish that defendants owed plaintiffs a "special duty"* within the meaning of the *Barger* decision.

Norman, 140 N.C. App. at 406-07, 537 S.E.2d at 259-60 (citations omitted and emphasis added).

We therefore conclude that *Norman's* extensive discussion of the closely held nature of the company and the powerlessness of the minority shareholders offers tools for a careful examination of the particular facts of a case to determine if a special duty or distinct injury exists within the meaning of *Barger* and *Energy Investors* rather than "an additional exception."

In examining the facts to find that a special duty was owed by majority shareholders to those in the minority, *Norman* relied on the presence of two indicators of powerlessness: (1) the difficulty faced by minority shareholders in dissolving the entity, either because of legal impediments to dissolving the corporation or because of the complex relationships involved in a family business; and (2) whether recovery would be left in control of the alleged wrongdoers. 140 N.C. App. at 404-05, 537 S.E.2d at 258-59.

Because there were only six limited partners, the "closely held" nature of the limited partnership *sub judice* is undeniable. However,

beyond that fact, the limited partnership *sub judice* has little factual similarity to the closely held corporation in *Norman*. The complaint *sub judice* does not allege and the record does not reflect that plaintiffs hold only a minority of shares in the limited partnership. Rather, plaintiffs collectively own ninety percent (90%) of the shares in the limited partnership.

Furthermore, while defendants, as the general partners, do control the "board of directors," *see Energy Investors*, 351 N.C. at 334-35, 525 S.E.2d at 443-44 (equating limited partners to corporate shareholders and general partners to corporate directors for the purpose of applying the rule of partner standing), plaintiffs are not "powerless." Even though the partnership agreement *sub judice* expressly forbids the limited partners from withdrawing, the agreement also gave the limited partners the right to convert their limited partnership interests into general partnership interests, which may participate in the management of the business or withdraw from the partnership under certain conditions.

There is also no evidence *sub judice* that plaintiffs and defendants are in a family business where "close relationships . . . [have] tragically br[oken] down[.]" 140 N.C. App. at 404, 537 S.E.2d at 258. While some of the plaintiffs appear related to other plaintiffs, and some defendants appear to be related to other defendants, there is no evidence in the record which suggests that any family relationship existed between plaintiffs and defendants. The record therefore does not show that plaintiffs are in the minority, or powerless to withdraw from the entity or to participate in any recovery from the lawsuit.

Additionally, *Norman* cautioned that even if a special duty might otherwise be found to exist based on majority ownership in a closely held corporation, a court should consider the potential impact of a direct or individual lawsuit on third-party creditors, and the potential impact of such a suit on the legal system, i.e., danger of multiple lawsuits, before concluding that a plaintiff has standing to sue individually. 140 N.C. App. at 406, 537 S.E.2d at 259. There is no evidence in the record which tends to show that creditors of the partnership would not be prejudiced if the lawsuit went forward and resulted in recovery by plaintiffs rather than the partnership. To the contrary, the complaint alleges that the partnership is in "dire financial condition" and in default on its obligations, implying that creditors of the partnership might go unpaid if plaintiffs received the benefit of any judgment against the general partners of the partnership. Finally, there is a danger of multiple lawsuits in the case *sub judice*, as the partner-

ship and two partners who hold ten percent (10%) of the limited partnership shares are not parties to the lawsuit.

In sum, plaintiffs have not alleged facts consistent with the *Norman* analysis by which we could conclude that plaintiffs were owed a "special duty" by defendants sufficient to convey standing. Accordingly, this argument is without merit.

B. Contractual Duties

Plaintiffs argue that even if the *Norman* "exception" does not apply, a special duty arises from two contractual agreements plaintiffs entered into with defendants: (1) "each limited partner appointed each general partner as its 'true and lawful attorney in fact' with regard to certain partnership functions[;]" and (2) "[t]he partnership agreement and the amendments thereto . . . govern the details of the management of the partnership and constitute a contract between the general and limited partners. This contract creates contractual duties as contemplated by *Barger*[.]"

Plaintiffs reliance on *Barger* is misplaced, as the type of contractual duties created in this case are not distinct from those in any limited partnership.

> To support the right to an individual lawsuit, the duty must be one that the alleged wrongdoer owed directly to the shareholder as an individual. The existence of a special duty thus would be established by facts showing that defendants owed a duty to plaintiffs that was personal to plaintiffs as shareholders and was *separate and distinct from the duty defendants owed the corporation.*

Barger, 346 N.C. at 659, 488 S.E.2d at 220 (citation omitted and emphasis added).

The power of attorney granted in the partnership agreement gave the general partners authority to "execute, sign, acknowledge, deliver and file" certain documents related to the partnership. There is no duty in the power of attorney grant which is not owed to the partnership. Furthermore, absent a specific statutory exception not relevant *sub judice*, "*[e]very partner* is an agent of the partnership for the purpose of its business[.]" N.C. Gen. Stat. § 59-39(a) (2007) (emphasis added); *see also* N.C. Gen. Stat. § 59-403(a) (2007) ("Except as provided in this Article or in the partnership agreement, a general partner of a limited partnership has the rights and powers . . . of a partner in a partnership without limited partners."). Contrary to plaintiffs' argument, the general partners' duty as plaintiffs' attorneys in fact

was exactly the same as the duty owed the partnership—to conduct the business of the partnership. To hold that a contractual provision appointing the general partners as legal agents or attorneys in fact with regard to certain partnership functions creates a "special duty" would expand the exception to the point that it would entirely swallow the rule. We decline plaintiffs' invitation to do so.

Likewise, every limited partnership is based on an agreement or contract between the partners. *See* N.C. Gen. Stat. § 59-102(7) (2007) (" 'Limited partner' means a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement."); N.C. Gen. Stat. § 59-102(10) (2007) (" 'Partnership agreement' means any valid agreement of the partners as to the affairs of a limited partnership, the conduct of its business, and the responsibilities and rights of its partners. The term 'partnership agreement' includes any written or oral agreement, whether or not the agreement is set forth in a document referred to by the partners as a 'partnership agreement[.]' "). To hold that the existence of a partnership agreement creates a "special duty" would also expand the exception to the point that it would entirely swallow the rule. This argument is overruled.

C. Separate and Distinct Injury

Defendants further rely on *Norman* to argue that when a complaint alleges that "individual defendants and the business entities they control[led] divert[ed] assets and business opportunities from the Company to the business defendants (and thereby to the individual defendants) and thus enrich[ed] themselves at the expense of the Company and the plaintiffs[,]" 140 N.C. App. at 408, 537 S.E.2d at 260, plaintiffs have alleged a separate and distinct injury sufficient to give them standing to pursue their claims individually. However, because we concluded *supra* that the existence of a special duty was dispositive in *Norman*, we also must conclude that the above-quoted statement is non-binding *dicta* unnecessary to the disposition of the case. Instead, this issue is controlled by *Energy Investors* which states:

> [A]n injury is peculiar or personal to the shareholder if a legal basis exists to support plaintiffs' allegations of an individual loss, *separate and distinct from any damage suffered by the corporation*. In applying this rule of shareholder law to that of limited partnerships, we find that the complaint shows [the limited partner plaintiff's] injury is the loss of its investment, which is identi-

> cal to the injury suffered by the other limited partners and by the partnership as a whole. . . . [H]opes for profits are hardly unique.

351 N.C. at 335-36, 525 S.E.2d at 444 (citations, brackets in original and quotation marks omitted; emphasis added). Furthermore *Jackson v. Marshall*, a case decided by this Court on the same day as *Norman*, stated "[t]he question is not whether the [limited partner] plaintiff is in a less favorable position than the general partner, but whether the plaintiff is in a less favorable position when compared to all other limited partners." 140 N.C. App. at 509, 537 S.E.2d at 235.

All the injuries complained of by plaintiffs—(1) operation of the apartment complex in a manner calculated to enrich Defendant The J.S. Proctor Company, [LLC,] at the expense of Plaintiffs; (2) discontinuation of mortgage payments which led to loss of the partnership's primary asset; (3) concealment of the discontinuation of mortgage payments; (4) failure to ensure that the assets of the apartment complex—were protected and maximized; (5) failure to be diligent to quickly find a buyer for the apartment complex, and (6) failure to protect the value of plaintiffs' investment in the apartment complex would have equally affected all of the limited partners, not just plaintiffs. Plaintiffs alleged no facts which would support the existence of an injury to themselves apart from diminution in the value of their investment, a circumstance which would have similarly affected the partnership and all the partners, both limited and general. *Jackson*, 140 N.C. App. at 509, 537 S.E.2d at 235; *See also Barger*, 346 N.C. at 659, 488 S.E.2d at 220 ("[D]iminution or destruction of the value of their shares as the result of defendants' negligent or fraudulent misrepresentations of [the corporation's] financial status. . . . is *precisely the injury suffered by the corporation itself*." (Emphasis added.)).

D. The J.S. Proctor Company, LLC

Plaintiffs lastly contend that they may bring an individual suit against The J.S. Proctor Company based on their ability to bring suit against the other defendants, because The J.S. Proctor company is "inextricably wedded" to the other defendants. We disagree.

The general rule of partner standing is the same regardless of whether the plaintiff is seeking to recover from another partner within the partnership, or a third party unrelated to the partnership. *Compare Barger* 346 N.C. at 658-59, 488 S.E.2d at 219-20 (shareholders sued third-party accounting firm), *and Energy Investors*, 351 N.C. at 336-37, 525 S.E.2d at 445 (limited partner sued third-party vendor), *with Jackson*, 140 N.C. App. at 508, 537 S.E.2d at 235 (limited partner

sued general partner). In the case *sub judice*, the complaint alleges exactly the same duty and exactly the same injury against the third party management company as against the general partners. For the same reasons that plaintiffs have no standing to bring a suit against the general partners, they have no standing to bring a suit against the third party management company, whether the management company is "inextricably wedded" to the general partners or not.

IV. Conclusion

Plaintiffs' complaint alleged no special duty or separate and distinct injury to themselves. Therefore, we hold that they lacked standing to bring their suit in their own names and for their own benefit. Accordingly, the trial court's order dismissing plaintiffs' complaint for failure to state a claim for which relief may be granted is affirmed.

AFFIRMED.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. ARGENIS ALVAREZ OSORIO

No. COA08-1199

(Filed 21 April 2009)

1. Jury— deadlock—trial court required continuation of deliberations

The trial court did not abuse its discretion or commit plain error in a trafficking in cocaine case by failing to *ex mero motu* declare a mistrial and requiring the jurors to continue their deliberations after the jury announced it was deadlocked because a review of the totality of circumstances revealed that the trial court's instructions merely served as a catalyst for further deliberations, and defendant failed to point to any statement, act, or omission by the trial court which could be interpreted as coercive; and although defendant noted that the jury deliberated nine hours without a mistrial being declared, the amount of time that the jury deliberated in this case was not so long as to be coercive in nature.

2. Drugs— acting in concert—instruction—sufficiency of evidence

A de novo review revealed that the trial court did not err in a trafficking in cocaine case by instructing on the theory of acting in concert because there was sufficient evidence that another person, Hernandez, was involved, including that: (1) Hernandez opened the door to admit a detective to the residence prior to the drug deal; and (2) defendant stated that he either handed the bricks of cocaine to the detective himself with Hernandez present, or Hernandez handed the cocaine to the detective and defendant subsequently shook the detective's hand.

3. Jury— failure to individually poll jurors—substitution of defense counsel during jury deliberations

The trial court did not commit reversible or plain error in a trafficking in cocaine case by failing to individually poll the jurors and by allowing the substitution of counsel during the jury deliberations because: (1) neither the polling of the jury nor the substitution of counsel issue is subject to plain error analysis when defendant did not argue that the trial court's instructions to the jury were erroneous; (2) defendant waived any error by failing to object to the trial court's polling of the jury by show of hands and did not request individual polling as required by N.C. R. App. P. 10; and (3) there was no indication the trial court abused its discretion, nor that defendant suffered any prejudice, by the substitution of the public defender as defense counsel during jury deliberations when the assistant public defender was ill.

4. Appeal and Error— preservation of issues—failure to assign error

Although defendant contends his substitute counsel was ineffective for failing to request that the jury be polled following the return of the verdicts in accordance with N.C.G.S. § 15A-1238, this issue was not properly preserved because defendant failed to assign as error any ineffective assistance of counsel.

Appeal by defendant from judgment entered 1 February 2008 by Judge Thomas D. Haigwood in Forsyth County Superior Court. Heard in the Court of Appeals 25 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for the State.

Geoffrey W. Hosford, for defendant-appellant.

STEELMAN, Judge.

The trial court did not abuse its discretion when instructing a jury to continue deliberations after two days and allowing substitution of counsel during jury deliberations. The trial court did not err in instructing the jury on acting in concert when a defendant's own statements implicated a second party in a drug transaction. Where defendant did not request individual polling of the jury at trial, the question is not preserved on appeal.

I. Factual and Procedural Background

On 6 March 2007, the Winston-Salem Police Department conducted an undercover drug operation at 5555 Indiana Avenue in Winston-Salem, North Carolina. The operation was initiated when a confidential informant told police he could arrange the purchase of a large amount of cocaine.

A search warrant was obtained, which allowed the search of the premises if the informant observed at least three kilograms of cocaine. The informant went to the premises accompanied by Detective T.D. James (Detective James) of the Winston-Salem Police Department. Detective James, acting undercover as the informant's uncle, was to have remained in the car. The informant was to contact Detective James if he saw the required amount of cocaine. However, Detective James was called into the residence by the informant when the occupants became nervous about him remaining in the car.

When Detective James arrived at the sliding glass door of the dwelling, he was admitted by a person later identified as Lucas Reyes Hernandez. According to the testimony of Detective James, defendant was standing beside the kitchen table on which a shoe box was situated and began pulling out brick-shaped packages, which were wrapped in plastic. Detective James asked if it was good, and defendant nodded and replied in English, "[I]t's good."

The informant then called on his cell phone, ostensibly to request the money to consummate the purchase of the cocaine. This was the signal that the search warrant conditions were met. The police entry team announced their presence and entered the premises. Defendant ran into the back bedroom. Detective James pulled out his badge, drew his weapon, announced he was a police officer, and followed defendant into the bedroom.

Following his arrest, defendant gave conflicting accounts of the events of 6 March 2007 to Detective Gomez of the Winston-Salem

Police Department. In one account, defendant stated that he stayed in the kitchen where he saw Mr. Hernandez let Detective James inside the premises, and he saw Mr. Hernandez hand the detective a "quadro." "Quadro" is Spanish for square and is a common term used by people that are dealing in drugs to refer to a kilogram of powder cocaine. In another version, defendant stated he saw Mr. Hernandez give Detective James a "quadro," and defendant subsequently shook hands with Detective James.

Defendant was charged with maintaining a dwelling for the sale or distribution of controlled substances, possession of cocaine with intent to sell and deliver, trafficking in cocaine by possession of 400 grams of cocaine or more, and conspiracy to traffic in cocaine by possession of 400 grams or more.

At trial, the charge of maintaining a dwelling for the sale or distribution of controlled substances was dismissed by the trial court after the close of the State's evidence. Defendant's motion to dismiss the remaining charges was denied. Defendant did not introduce any evidence at trial.

The remaining charges were submitted to the jury on 30 January 2008. The jury continued its deliberations on 31 January 2008. At 11:00 a.m., the trial court received a note from the jury stating they were unable to reach a unanimous verdict. The trial court advised counsel that he intended to give the jury an *Allen* charge, and neither counsel objected. The jurors were instructed to continue their deliberations without the surrender of conscientious convictions. Later that day the jury communicated that it had reached a unanimous decision as to one charge but were deadlocked on the remaining two charges.

On 1 February 2008, defendant's counsel, Mr. Ferguson, an Assistant Public Defender, was ill, and Pete Clary, the Public Defender, appeared as counsel for defendant. Defendant initially told the trial court if somebody had sent Mr. Clary that it was "okay" if he represented him. Thereafter, defendant expressed concern that no one had told him Mr. Ferguson would not be there, and he did not understand what was "going on." The trial court, through a translator, advised defendant that Mr. Ferguson was sick, and this had not been known previously. The trial court then granted Mr. Clary's motion to be substituted for Mr. Ferguson.

At 10:20 a.m., after the trial court requested the jury take a formal vote, the jury reported to the trial court that they were dead-

locked 11-1 on the remaining two charges and had been deadlocked since around noon on the day before. The trial court noted the progress that was made the morning before and again instructed the jury that it was their duty to try to reach a verdict. The trial court admonished the jury not to surrender their "conscientious convictions" or their "convictions as to the weight or effect of the evidence" because of the opinions of other jurors for the mere purpose of returning a verdict. Neither counsel objected to this instruction, and the jury returned to their deliberations.

At 12:40 p.m. on 1 February, the jury reported it had reached a unanimous verdict on a second charge, and it was still deadlocked 11-1 on the third charge. Following a lunch break, the trial court proposed returning the jury to the courtroom and taking the two verdicts that had been reached. Both counsel stated they had no objection.

The jury returned verdicts of guilty on the charge of trafficking in cocaine by possessing 400 or more grams and not guilty of conspiracy to commit trafficking in cocaine. After the reading of each verdict, the trial court asked the jurors to raise their hands if they agreed with the verdict, and each time, all of the jurors raised their hands. The trial court asked the respective counsel if they had anything further, and both replied in the negative. The State dismissed the charge of possession with intent to sell and deliver cocaine with respect to which the jury was unable to reach a verdict.

Defendant was sentenced to the mandatory active term of 175 months to 219 months imprisonment, a fine of $250,000.00, and costs of court. The trial court further recommended that upon completion of his sentence that defendant be released to immigration authorities for deportation due to his status as an illegal alien.

Defendant appeals.

II. Failure to Declare a Mistrial

[1] In his first argument, defendant contends that the trial court abused its discretion or committed plain error in failing to *ex mero motu* declare a mistrial and requiring the jurors to continue their deliberations after the jury announced they were deadlocked. We disagree.

We first note that plain error analysis only applies to instructions to the jury and evidentiary matters. *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (2000) (citing *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109 (1998), *cert. denied*, 526 U.S. 1126, 143 L. E. 2d 1036

(1999)), *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000). Defendant did not move for a mistrial at any point during trial or during deliberations and did not preserve the mistrial issue for appellate review. *See* N.C.R. App. P. 10(b) (2008). Therefore, the mistrial issue was not preserved at trial, not subject to plain error review, and is not properly before this Court.

N.C. Gen. Stat. § 15A-1235 addresses jury deliberations and deadlocked juries, and provides trial judges with clear standards for instructions urging jury verdicts. *State v. Baldwin*, 141 N.C. App. 596, 607, 540 S.E.2d 815, 823 (2000). Subsections (c) and (d) provide:

> (c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C. Gen. Stat. § 15A-1235 (c) and (d) (2007).

The appellate court must decide whether a trial court's instructions forced a verdict or merely served as a catalyst for further deliberations. *See State v. Fernandez*, 346 N.C. 1, 21, 484 S.E.2d 350, 362-63 (1997) (citing *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985)). The appellate court must look to the "totality of the circumstances" in determining whether the trial court coerced a verdict from the jury. *State v. Porter*, 340 N.C. 320, 335, 457 S.E.2d 716, 723 (1995) (citing *State v. Patterson*, 332 N.C. 409, 416, 420 S.E.2d 98, 101 (1992)). Some factors to be considered are "whether the trial court conveyed an impression to the jurors that it was irritated with them for not reaching a verdict and whether the trial court intimated to the jurors that it would hold them until they reached a verdict." *Id.*

Defendant contends that at the time the jury announced they were deadlocked after deliberating nine hours over three days that the trial court should have declared a mistrial because the instruction given at that time led the jurors to believe they had to reach a verdict before they would be allowed to go home. However, in reviewing the totality of the circumstances the trial judge did not abuse his discretion when instructing the jury pursuant to N.C. Gen. Stat. § 15A-1235(c) and (d). The circumstances under which the

instructions were made establishes that the trial court's instructions merely served as a catalyst for further deliberations. *See id.*

The jurors reported the first impasse on 31 January after only deliberating a few hours. The trial judge instructed the jurors:

> [L]et me first point to you . . . that you folks have only been deliberating a little over two hours and that this is just Thursday morning. Let me say to you that I want to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable women and attempt to reconcile your difference, if you can, without surrender of conscientious convictions.

Neither counsel objected when the trial court encouraged the jury to continue deliberations. The same day the jury requested clarification on the definition of intent. The trial court instructed the jury with regards to that definition, and the jury reported having reached a verdict on one of the charges.

A second impasse was reported 1 February. When the foreman reported the jury was deadlocked on the remaining two charges, the trial court instructed the jury to take a formal vote. At that time the trial court instructed the jurors:

> As you heard me say to you previously, . . . it's your duty to apply the law as I have given it to you and not as you think the law is or as you might like the law to be. . . . This is important because justice requires that everyone tried for the same crimes, wherever that might be in North Carolina, be treated in the same way and have the same law applied in each such case. . . . Now, if you ladies will be so kind as to go to the jury room and take some formal votes and let me—and let me know when you're ready so that you can answer these questions. Thank you.

After the jury reported that it was deadlocked 11-1, the trial court further instructed the jury:

> I'm going to ask you to go to the jury room, the jury, and consider what I have said to you folks moments ago. And let me say this to you further. I want to emphasize the fact that it's your duty to do whatever you can to reach verdicts. You should reason the matter over together as reasonable women and attempt to reconcile your differences, if you can, without the surrender of conscientious convictions, bearing in mind, of course, that it's your duty to fol-

> low the law as I've given it to you, your sworn duty. However, you should not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your f[e]llow jurors or for the mere purpose of returning a verdict.

The jury twice requested clarification on the law after this instruction, and the trial court, after informing each counsel on the intended instructions, gave the instruction at issue. After the trial court read the instructions, it asked if there was anything from the State or defendant, and each responded in the negative. Thereafter, the jury reached a second verdict but remained deadlocked on the third charge.

There is no evidence in the record to suggest that the trial court expressed irritation with the jury for not reaching a verdict. The record reveals that the trial judge was polite, considerate, and accommodating toward the jury. The judge instructed the jurors to reason the matter over as reasonable jurors but not to surrender conscientious convictions. There was also no indication that the trial court intimated to the jury that it would hold them until they reached a verdict. The only time the trial court noted time was on 31 January when the trial court stated that the jury had only been deliberating a couple of hours. After each instruction, the jury posed questions to the trial court, and the trial court noted the progress that was made after the first purported deadlock when the jury reached a verdict on one charge. When viewing the totality of the circumstances, the trial judge did not abuse his discretion when instructing the jurors to continue deliberations. Defendant has failed to point to any statement, act, or omission by the trial court which could be interpreted as coercive.

Defendant also notes that the jury deliberated nine hours without a mistrial being declared. However, our prior cases indicate that the amount of time that the jury deliberated in the case at bar was not so long as to be coercive in nature. *See State v. Jones*, 47 N.C. App. 554, 562, 268 S.E.2d 6, 11 (1980) (stating a two-day period is not an "unreasonable" period under N.C. Gen. Stat. § 15A-1235); *see also State v. Beaver*, 322 N.C. 462, 465, 368 S.E.2d 607, 609 (1988) (holding that there was no coercion by the trial court where the jury deliberated all day Friday and all day Saturday). Without any other evidence of coercion or error on the part of the trial court, defendant's contention that the duration of the deliberations alone is enough to warrant a mistrial is without merit. The nine hours of deliberation is not itself indicative

of coercive conduct, and when viewing the totality of the circumstances, the trial judge did not abuse his discretion in instructing the jurors pursuant to N.C. Gen. Stat. § 15A-1235.

This argument is without merit.

III. Acting in Concert

[2] In his second argument, defendant contends that the trial court erred by giving a jury instruction on acting in concert. We disagree.

Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court. *See, e.g.*, *State v. Ligon*, 332 N.C. 224, 241-42, 420 S.E.2d 136, 146-47 (1992); *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 434 (1990). An instruction about a material matter must be based on sufficient evidence. *See Childress v. Johnson Motor Lines, Inc.*, 235 N.C. 522, 530, 70 S.E.2d 558, 564 (1952).

In order to support a jury instruction on acting in concert, the State must prove that the defendant is "present at the scene of the crime" and acts "together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). "If the defendant is present with another and with a common purpose does some act which forms a part of the offense charged, the judge must explain and apply the law of 'acting in concert.' " *State v. Mitchell*, 24 N.C. App. 484, 486, 211 S.E.2d 645, 647 (1975).

Defendant argues there is no evidence that Mr. Hernandez participated in the events of 6 March and that an acting in concert instruction was not proper. However, there was sufficient evidence presented at trial that Hernandez was involved in the transaction. Hernandez opened the door to admit Detective James to the residence prior to the drug deal. In addition, defendant's own statements implicated Hernandez in the drug transaction. Defendant stated that defendant either handed the bricks of cocaine to Detective James himself with Hernandez present, or Hernandez handed the cocaine to Detective James and defendant subsequently shook the detective's hand. This evidence was sufficient to support an instruction on acting in concert.

This argument is without merit.

IV. Polling of the Jury

[3] In his third argument, defendant contends that the trial court committed reversible or plain error in failing to individually poll the jurors and in allowing the substitution of counsel during the jury deliberations. We disagree.

As noted previously, plain error analysis only applies to instructions to the jury and evidentiary matters. *Greene*, 351 N.C. at 566, 528 S.E.2d at 578. Defendant does not argue that the trial court's instructions to the jury were erroneous. Therefore, neither the polling of the jury issue nor the substitution of counsel issue are subject to plain error analysis.

We first address the issue of whether the trial court committed reversible error by failing to poll the jurors individually. In order to preserve an issue for appellate review:

> [A] party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C.R. App. P. 10(b)(1) (2008). "[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C.R. App. P. 10(a) (2008). Defendant waived any error by failing to object to the trial court's polling of the jury by show of hands and did not request individual polling. Accordingly, defendant has failed to preserve this issue for appellate review.

We next address the issue of whether the trial court committed reversible error by allowing a substitution of counsel during jury deliberations. Prior cases indicate that the decision to allow substitution of counsel rests within the sound discretion of the trial court. *See State v. Gary*, 348 N.C. 510, 516, 501 S.E.2d 57, 62, (1998) (citing *State v. Robinson*, 290 N.C. 56, 66, 224 S.E.2d 174, 180 (1976)). After reviewing the record, there is no indication that the trial judge abused his discretion in allowing the substitution of defendant's counsel during jury deliberations.

On 1 February, defendant's counsel, the Assistant Public Defender, was ill, and the Public Defender, Mr. Clary, appeared as coun-

sel for the defendant. Defendant requested that he be heard by the trial court regarding the substitution of counsel and stated by interpreter, "If somebody send him here, okay, let him represent me." The translator further stated, "He said, if somebody sent him, let him represent me. That's the translation, Your Honor."

The trial judge explained to defendant that Mr. Clary was being substituted for defendant's counsel because his counsel was ill. The trial judge further stated, "We're simply waiting for the jury to return a verdict. Help me understand what your problem is." Defendant expressed confusion and then stated that he did not even know what was "going on." The trial judge then said to defendant that he was sorry for any confusion and addressed Mr. Clary's motion to be substituted as counsel for defendant:

> [T]hat motion is allowed. I don't see any prejudice that could be—come to the defendant by your presence here through the taking of the verdict. Now, if it results—if the verdict is something that calls upon me to impose a judgment or sentence in the case, then I'll be more than happy to hear any concerns that anyone might have about those aspects of it. But I see at this point, we're simply waiting for a jury's verdict. And I'll certainly explain to the jury, unless you object, that Mr. Ferguson is sick at home and that you're his boss, and that you're here in his place this morning.

Mr. Clary consented to this instruction and requested that the trial judge not inform the jury that he was from the Public Defender's office. The trial judge agreed to this request.

After reviewing the record and transcript, we agree that defendant did not suffer any prejudice from the substitution of counsel under these circumstances. Mr. Clary was substituted for Mr. Ferguson during jury deliberations. The trial court noted this when addressing defendant and attempted to explain the situation to defendant when he expressed confusion. The trial judge did not abuse his discretion in allowing the substitution of counsel.

V. Ineffective Assistance of Counsel

[4] Finally, defendant appears to argue that his substitute counsel was ineffective for failing to request that the jury be polled following the return of the verdicts in accordance with N.C. Gen. Stat. § 15A-1238. Defendant failed to assign as error any ineffective assist-

ance of counsel, and this issue is not properly before this Court. *See* N.C.R. App. P. 10(a).

NO ERROR

Judges BRYANT and ELMORE concur.

LEONARD J. KAPLAN, PLAINTIFF v. O.K. TECHNOLOGIES, L.L.C., LAURENT OLIVIER, DAVID F. MESCHAN, JEFFREY BOWMAN, AND AQUATIC EVOLUTION INTERNATIONAL, INC., DEFENDANTS

No. COA08-1297

(Filed 21 April 2009)

1. Fiduciary Relationship— limited liability company—member-manager—no fiduciary duty to other member-managers

A limited liability company (LLC) member did not owe a fiduciary duty as a member of the LLC to other members where he was a minority shareholder of the LLC. Nor did he owe a fiduciary duty as a manager of the LLC to other members and managers because he owed a fiduciary duty as a manager only to the company and not to individual members and managers.

2. Fiduciary Relationship— limited liability company—sole investor—no fiduciary duty to other members

The trial court did not err by granting summary judgment for plaintiff Kaplan in an action involving the dissolution of a limited liability company (LLC) and the disputed repayment of loans made by plaintiff to the LLC. Plaintiff's status as the sole investor in the LLC, absent more, was not sufficient to find a fiduciary relationship between plaintiff and defendants who were the other members of the LLC.

3. Fiduciary Relationship— limited liability company—closely-held—operating agreement—no fiduciary duty to other members

Plaintiff's status as a member-manager of a closely-held limited liability company (LLC) did not create a fiduciary duty by plaintiff to other members of the LLC where the parties expressly limited the duties of the member-managers in their operating

agreement, and plaintiff's liability for breach of his duties under the agreement would extend only to the company, which is not an appellant in this matter.

4. Fiduciary Relationship— limited liability company—no fiduciary duty by member to another company

Plaintiff limited liability company (LLC) member did not have a fiduciary duty to a corporation which had assigned all of its intellectual property to the LLC where the corporation's shareholders were the LLC's other members; the corporation was not a subsidiary of the LLC and the LLC did not market, manufacture or sell the corporation's components; plaintiff did not provide any money to the corporation; and plaintiff had no dominance or control over the corporation.

Appeal by Defendants Laurent Olivier, Jeffrey Bowman, and Aquatic Evolution International, Inc. from order entered 7 July 2008 by Judge Ben F. Tennille in Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 12 March 2009.

Smith Moore Leatherwood LLP, by Alan W. Duncan and Manning A. Connors, for Plaintiff-Appellee.

Hunter, Higgins, Miles, Elam & Benjamin, PLLC, by James W. Miles, Jr., for Defendants-Appellants Laurent Olivier, Jeffrey Bowman, and Aquatic Evolution International, Inc.

STEPHENS, Judge.

Laurent Olivier ("Olivier"), Jeffrey Bowman ("Bowman"), and Aquatic Evolution International, Inc. ("AEI") (collectively "Appellants") appeal from an order granting summary judgment in favor of Leonard J. Kaplan ("Kaplan").

I. Facts and Procedural History

In 2002, Defendants Olivier and Bowman formed AEI for the purpose of developing, manufacturing, and selling aquarium components. Olivier, Bowman, and Kaplan formed O.K. Technologies, L.L.C. ("O.K.") in September 2003. At this time, AEI assigned all of its intellectual property to O.K. Under O.K.'s operating agreement, Kaplan held 51% of the ownership interest, while Olivier held 43%, and Bowman held 6%. The operating agreement stipulated that management decisions would be made by the "Majority in Interest[,]" meaning the members whose interests in O.K. constituted a majority. In

July 2004, David Meschan ("Meschan") joined O.K. As a result of Meschan's admission as a member, Kaplan held 41.5% of the ownership interest in O.K., Olivier held 37.5% interest, Meschan held 15% interest, and Bowman held 6% interest.

Under O.K.'s operating agreement, Kaplan was obligated to provide $200,000 in equity capital to O.K. Kaplan completed his $200,000 equity contribution in May 2004. The operating agreement also obligated Kaplan to provide $500,000 in loans to O.K. Kaplan ultimately provided $1,864,749 in loans to O.K. between May 2004 and 31 July 2006. Although Kaplan did not seek approval of the other members prior to making these loans, O.K. and its members accepted Kaplan's loans and used them to discharge O.K.'s costs and obligations. In May 2005, Kaplan requested a promissory note for the amounts he had loaned to O.K. On 28 June 2006, Kaplan requested repayment of the loans.

On 31 July 2006, Kaplan, Olivier, Bowman, and Meschan voted to dissolve O.K. During the 31 July 2006 meeting, the members could not agree on a mechanism for repaying the loans made by Kaplan. Also during this meeting, Meschan moved to designate Olivier and himself as O.K.'s representatives for the purpose of initiating future contact with any potential buyers or licensees and negotiating any sale of assets or licensing of any technologies owned by or assigned to O.K. Meschan, Olivier, and Bowman voted their combined membership interest of 58.5% in favor of Meschan's motion and Kaplan voted his 41.5% interest against the motion.

On 21 September 2006, Kaplan filed a complaint against O.K., Olivier, Meschan, Bowman, and AEI alleging a breach of fiduciary duty and seeking a declaratory judgment that O.K. had failed to repay loans from Kaplan. This matter was designated as a complex business case in an order filed 26 September 2006, and Special Superior Court Judge Ben F. Tennille ("the trial court") was assigned to preside over the case. On 4 October 2006, the trial court appointed William P. Miller as Receiver for O.K. and directed him to wind up the affairs of O.K.

Appellants filed an answer, crossclaims, and counterclaims on 18 January 2007 alleging, *inter alia*, breaches of fiduciary duty and fraud by Kaplan. Olivier and Bowman filed a motion to amend counterclaim and crossclaim on 5 December 2007 to assert derivative claims on behalf of O.K. against Kaplan. Kaplan filed a motion for summary judgment on 17 December 2007, seeking judgment as a

matter of law on all claims and counterclaims. In a written order filed 7 July 2008, the trial court granted Kaplan's motion for summary judgment to enforce the operating agreement and Kaplan's motion for summary judgment on all counterclaims asserted by Appellants. Appellants appeal from this order.

II. Existence of Fiduciary Relationship

Appellants assign as error the trial court's granting of Kaplan's motion for summary judgment and argue that material issues of fact exist as to whether Kaplan violated his fiduciary duties.[1] We hold the trial court did not err.

"A trial court's ruling on a motion for summary judgment is reviewable *de novo* to determine whether there is any genuine issue of material fact and whether either party is entitled to judgment as a matter of law." *Showalter v. North Carolina Dept. of Crime Control and Public Safety*, 183 N.C. App. 132, 134, 643 S.E.2d 649, 651 (2007). "We review the record in the light most favorable to the non-moving party." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 165, 557 S.E.2d 610, 612 (2001), *aff'd*, 355 N.C. 485, 562 S.E.2d 422 (2002) (citation omitted).

"For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). A fiduciary relationship has been defined by our Supreme Court as

> one in which "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . , [and] it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other*."

Id. at 651, 548 S.E.2d at 707-08 (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (internal quotation marks and citation omitted)). The trial court held that no fiduciary relationship existed between Kaplan and Appellants. Kaplan's relationship with Olivier and Bowman differs from Kaplan's relationship to AEI, and thus, we address these relationships separately.

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1. Appellants do not assign error to the trial court's entry of summary judgment for Kaplan on their remaining counterclaims.

A. Kaplan's Relationship with Olivier and Bowman

Initially, we address Kaplan's relationship with Olivier and Bowman. Olivier and Bowman argue Kaplan's fiduciary duties to them arose from the following: (1) Kaplan's role as a member-manager of O.K.; (2) Kaplan's minority interest in O.K. coupled with his control over the company's finances and operations; and (3) Kaplan's role as a member in a closely-held limited liability company ("LLC"). We address each of these relationships in turn.

i. Kaplan as a Member and Manager

[1] First, we consider Kaplan's relationship with Olivier and Bowman based on his position as a member and a manager of O.K. Kaplan, Olivier, and Bowman were members of O.K. O.K.'s operating agreement states O.K. shall be managed by its members. Thus, as members, Kaplan, Olivier, and Bowman were also managers of O.K.

Kaplan's status as a member of O.K. did not create a fiduciary relationship between Kaplan and Olivier and Bowman. The North Carolina Limited Liability Company Act, N.C. Gen. Stat. § 57C-1-01 *et seq.*, does not create fiduciary duties among members. Members of a limited liability company are like shareholders in a corporation in that members do not owe a fiduciary duty to each other or to the company. *See Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993) (holding "[a]s a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation") (citing Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 11.4 (4th ed. 1990)). An exception to this rule is that a controlling shareholder owes a fiduciary duty to minority shareholders. *Id.*; *see Gaines v. Long Mfg. Co.*, 234 N.C. 340, 344, 67 S.E.2d 350, 353 (1951) (holding majority shareholders of a corporation owe a fiduciary duty to minority shareholders). Kaplan's interest in O.K. was reduced to 41.5% when Meschan became a member of O.K., and therefore Kaplan was a minority shareholder with no fiduciary duty to the other members.

Nor did Kaplan's relationship with Olivier and Bowman as a manager of O.K. create a fiduciary duty. Pursuant to the North Carolina Limited Liability Act, a manager of a limited liability company "shall discharge his duties as manager in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances, and in the manner the manager reasonably believes to be in the best interests of the limited liability company." N.C. Gen.

Stat. § 57C-3-22(b) (2007). These duties are owed by the manager to the company, rather than to other managers, however. *See id.* Managers of limited liability companies are similar to directors of a corporation in that "[u]nder North Carolina law, directors of a corporation generally owe a fiduciary duty *to the corporation*, and where it is alleged that directors have breached this duty, the action is properly maintained *by the corporation* rather than any individual creditor or stockholder." *Governors Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 248, 567 S.E.2d 781, 786-87 (2002) (citing *Underwood v. Stafford*, 270 N.C. 700, 703, 155 S.E.2d 211, 213 (1967)), *aff'd*, 357 N.C. 46, 577 S.E.2d 620 (2003); *see also Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 26, 560 S.E.2d 817, 822, *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002). Thus, like directors, managers of a limited liability company also owe a fiduciary duty to the company, and not to individual members. Accordingly, Kaplan did not owe any fiduciary duty to Olivier and Bowman based on their relationship as managers of O.K.

ii. Kaplan as O.K.'s Sole Investor

[2] Second, we consider Kaplan's relationship with Olivier and Bowman based on his status as O.K.'s sole investor. Olivier and Bowman argue that Kaplan made O.K. completely dependent upon Kaplan's financing and that this resulted in such domination and control as to create a fiduciary relationship. Although our courts have broadly defined fiduciary relationships, no such relationship arises absent the existence of dominion and control by one party over another. *See Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001). The trial court found that "[l]ike an investor in a corporation, Kaplan's position as the holder of the purse strings did not create a fiduciary duty." We agree.

In *Dalton*, our Supreme Court considered whether the relationship between an employee and employer involved the requisite level of dominion and influence to find that a fiduciary relationship existed where the employee was a production manager for the employer's publishing business. *Id.* at 651, 548 S.E.2d at 708. The Court found that the employer had reposed a certain level of confidence in the employee, and as a confidant of his employer, the employee was bound to act in good faith and with due regard for the employer's interests. *Id.* at 651-52, 548 S.E.2d at 708. However, the Court found these circumstances to be true of virtually all employer-employee relationships and, without more, they were inadequate to establish the employee's obligations as fiduciary in nature. *Id.* at 652, 548

S.E.2d at 708. In holding that no evidence suggested the employee's position in the workplace resulted in dominion and influence over the employer, the *Dalton* Court noted:

> [The employee] was hired as an at-will employee to manage the production of a publication. His duties were those delegated to him by his employer, such as overseeing the business's day-to-day operations by ordering parts and supplies, operating within budgetary constraints, and meeting production deadlines. In sum, his responsibilities were not unlike those of employees in other businesses and can hardly be construed as uniquely positioning him to exercise dominion over [the employer]. Thus, absent a finding that the employer in the instant case was somehow subjugated to the improper influences or domination of his employee—an unlikely scenario as a general proposition and one not evidenced by these facts in particular—we cannot conclude that a fiduciary relationship existed between the two.

Id.

In *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 391 S.E.2d 831 (1990), this Court considered whether a distributor's dependence on a manufacturer resulted in the existence of a fiduciary relationship. The plaintiffs were distributors of decorative tin items, and the defendants were manufacturers of these items. *Id.* at 664, 391 S.E.2d at 832. These decorative tin items constituted 80% of the plaintiff's sales. *Id.* at 665, 391 S.E.2d at 833. The plaintiff argued that its dependence on the defendants required plaintiff to place the special kind of "trust and confidence in defendants" that establishes a fiduciary relationship. *Id.* at 665, 391 S.E.2d at 832-33. This Court held that "the evidence [was] insufficient to submit to the jury the issue of whether a fiduciary relationship existed between the parties." *Id.* at 666, 391 S.E.2d at 833.

In *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 348 (4th Cir. 1998), the Fourth Circuit noted that "[o]nly when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Id.* (citing *Lazenby v. Godwin*, 40 N.C. App. 487, 253 S.E.2d 489 (1979)) (internal quotation marks omitted). In *Lazenby*, our Court considered whether such "special circumstances" existed to establish a fiduciary duty between the parties with regard to the sale of the plaintiffs' minority interests in a closely-held family corpora-

tion to the defendant. *Lazenby*, 40 N.C. App. 487, 253 S.E.2d 489. The defendant in *Lazenby* was the president, manager, and majority shareholder of the corporation. *Id.* at 488, 253 S.E.2d at 489. "Although the plaintiffs were technically codirectors of the corporation, they did not take part in the management of the corporation. They placed their trust in the business skills and judgment of the defendant because the plaintiffs had less experience than defendant in corporate affairs." *Id.* at 494, 253 S.E.2d at 493. This Court concluded there was sufficient evidence that the plaintiffs did not have equal access to information regarding a purchase of the corporation's assets, and that the defendant, therefore, owed a special duty to the plaintiffs in negotiating the sale of their minority interests. *Id.* at 495, 253 S.E.2d at 493.

In the present case, Olivier and Bowman argue that Kaplan "made himself the sole source of funding" for O.K., which resulted in the level of domination contemplated by our Courts in defining a fiduciary relationship. Our Courts have previously held that no fiduciary relationship exists between managers of an organization and its creditors. "Ordinarily, '[t]he duties and liabilities of directors . . . run directly to the corporation and indirectly to its shareholders; they do not run to third parties, such as creditors.' " *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 57, 554 S.E.2d 840, 845 (2001) (quoting Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.08 (6th ed. 2000)). Thus, without more, we cannot find that Kaplan's status as O.K.'s sole investor creates a fiduciary relationship between Kaplan and Olivier and Bowman.

Unlike in *Lazenby*, Kaplan's relationship to Olivier and Bowman was not the kind where one party figuratively held all the cards. *See Lazenby*, 40 N.C. App. 487, 253 S.E.2d 489; *Broussard*, 155 F.3d 331, 348. First, Olivier and Bowman were not inexperienced businessmen. Olivier completed a two-year business course at a school in New Caledonia; he worked for the government of New Caledonia as the equivalent of an "environmental engineer" for approximately seven years; and he spent three years operating his own business, catching and exporting exotic tropical fish and selling and marketing aquariums. Bowman started AEI with Olivier, had experience servicing aquariums, and was the individual who approached Kaplan about forming O.K. in the first place.

Olivier and Bowman argue that Kaplan manipulated O.K. to ensure that he was the only source of funds for the company and then used this position to direct the company's resources to further his

own agenda. However, under the terms of the operating agreement agreed to and signed by all the parties, Kaplan was the only member required to provide equity capital and loans to O.K. Although Kaplan provided loans in excess of his obligations under the operating agreement, Olivier and Bowman accepted these loans and used them to discharge the company's costs and obligations, including payment of their salaries and reimbursement of their expenses.

Furthermore, Kaplan was a minority shareholder of O.K., and the alliance formed by Olivier, Bowman and Meschan represented the majority. O.K.'s operating agreement provided that the vote of the majority controlled management decisions. Olivier, Bowman, and Meschan exhibited their ability to control management decisions in the vote on 31 July 2006 regarding a repayment plan for Kaplan's loans to O.K. Olivier, Bowman, and Meschan outvoted Kaplan to pass a motion designating Olivier and Meschan as representatives for communicating and negotiating with potential buyers and licensees in winding up the company. Clearly, Kaplan's position as "the holder of the purse strings" was insufficient to override the will of the majority.

Finally, Olivier expressly discussed the inability of one member to make unilateral decisions for O.K. in an email to the other partners on 15 August 2006. In this email Olivier stated, "[J]ust . . . remember every[]body, no member has to give any order to other member, about what they have to do, only a majority vote can impose that[.]" Olivier also specifically commented on Kaplan's inability to control the actions of the other members based on his financial contributions to O.K. Olivier wrote:

> For Leonard [Kaplan], I'm sorry to tell you, you don't own any asset of [O.K.] Technologies, the company owns them. This is not your money anymore, and you cannot tell me or other members what they have to do, or take initiative in the company other than try to help us to sell the asset.

Thus, Olivier himself disputed Kaplan's ability to control the other members. Accordingly, Olivier and Bowman's contention that Kaplan exercised dominion and control over the other members so as to create a fiduciary relationship is wholly unconvincing. This argument is rejected.

iii. Kaplan as a Member in a Closely-held LLC

[3] Lastly, we consider Kaplan's relationship with Olivier and Bowman by virtue of Kaplan's status as a member in a closely-held

LLC. Although we primarily addressed this issue above, Olivier and Bowman also argue that Kaplan owed them a fiduciary duty based on the sole fact that O.K. was a closely-held LLC. Olivier and Bowman argue that the relationship between members of a closely-held LLC is like the fiduciary relationship between partners in a partnership. *See Compton v. Kirby*, 157 N.C. App. 1, 15, 577 S.E.2d 905, 914 (2003); *Casey v. Grantham*, 239 N.C. 121, 124-25, 79 S.E.2d 735, 738 (1954) ("It is elementary that the relationship of partners is fiduciary"). Olivier and Bowman, however, ignore the fact that by their operating agreement, the parties expressly limited the duties the member-managers owed.

> N.C. Gen. Stat. § 57C-3-32 (2008) provides:
>
> (a) Subject to subsection (b) of this section, the articles of organization or a written operating agreement may:
>
> (1) Eliminate or limit the personal liability of a manager, director, or executive for monetary damages for breach of any duty provided for in G.S. 57C-3-22 . . . .
>
> . . . .
>
> (b) No provision permitted under subsection (a) of this section shall limit, eliminate, or indemnify against the liability of a manager, director, or executive for (i) acts or omissions that the manager, director, or executive knew at the time of the acts or omissions were clearly in conflict with the interests of the limited liability company, (ii) any transaction from which the manager, director, or executive derived an improper personal benefit, or (iii) acts or omissions occurring prior to the date the provision became effective[.]

Consistent with N.C. Gen. Stat. § 57C-3-32, the members of O.K. contractually agreed to limit their duties and corresponding liability as managers. Section 5.3 of O.K.'s operating agreement provides:

> Notwithstanding any other provision to the contrary contained in this Agreement, no Member shall be liable, responsible, or accountable in damages or otherwise to the LLC or to any other Member or assignee of a Member for any loss, damage, cost, liability, or expense incurred by reason of or caused by any act or omission performed or omitted by such Member, whether alleged to be based upon or arising from errors in judgment, negligence, gross negligence, or breach of duty (including alleged breach of

> any duty of care or duty of loyalty or other fiduciary duty), except for (i) acts or omissions the Member knew at the time of the acts or omissions were clearly in conflict with the interests of the LLC, (ii) any transaction from which the Member derived an improper personal benefit, or (iii) a willful breach of this Agreement. Without limiting the foregoing, no Member shall in any event be liable for (A) the failure to take any action not specifically required to be taken by the Member under the terms of this Agreement, (B) any action or omission taken or suffered by any other Member, or (C) any mistake, misconduct, negligence, dishonesty or bad faith on the part of any employee or other agent of the LLC appointed by such Member in good faith.

This section of the operating agreement clearly limits the members' liability to the three exceptions listed above. Olivier and Bowman argue Kaplan's actions subjected him to liability under sections 5.3(i) and (ii) of the operating agreement. Assuming *arguendo* that Kaplan breached his duties under the operating agreement, his liability would extend only to the company, and not to Olivier and Bowman. As O.K. is not a named appellant in this matter, we will not address Kaplan's potential liability to O.K. Accordingly, no genuine issues of material fact exist as to the issue of Kaplan's fiduciary obligations to Olivier and Bowman by virtue of their relationship as members in a closely-held LLC.

B. Kaplan's Relationship with AEI

[4] Appellants have not specifically argued how Kaplan's tenuous relationship with AEI resulted in the existence of a fiduciary duty from Kaplan to AEI. The trial court found that:

> Kaplan had only a tenuous relationship with AEI. Olivier and Bowman are the sole shareholders of AEI. AEI was not a subsidiary of O.K. nor did O.K. market, manufacture or sell AEI's components. Kaplan did not provide any money to AEI after O.K. was formed. Kaplan had no dominance or control over AEI.

Appellants have not presented any facts that indicate the relationship between Kaplan and AEI was "one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence[.]" *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (internal quotation marks and citation omitted). "[I]t is fundamental that a fiduciary relationship must exist

between the parties in order for a breach of fiduciary duty to occur." *Branch v. High Rock Realty, Inc.* 151 N.C. App. 244, 251, 565 S.E.2d 248, 253 (2002), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003). No fiduciary relationship existed between Kaplan and AEI, and therefore, no fiduciary duty was owed.

AFFIRMED.

Judges JACKSON and STROUD concur.

SAMUEL KEITH BRUNSON, PETITIONER v. GEORGE TATUM, COMMISSIONER, OF NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA08-386

(Filed 21 April 2009)

1. Administrative Law— superior court review of administrative decision—standard sufficiently identified—appellate review

The superior court sits as an appellate court on a writ of certiorari to review an administrative decision. The court applies a de novo or whole record standard to individual issues, and must identify the standard used. Here, the judgment was sufficient to permit review on appeal to the Court of Appeals but could have been more specific.

2. Appeal and Error— review of administrative decision—standard of review in superior court—standard of review in appellate court

Although a superior court review of an administrative decision could have been read as applying the whole record test to all of the issues before it, including issues of law, remand was not required since the Court of Appeals is required to review such issues de novo.

3. Motor Vehicles— conditional driving privilege—ignition interlock violation—attempt to start vehicle

A hearing officer?s determination that petitioner violated an agreement conditionally restoring his driving privileges was supported by a finding that he attempted to operate his truck by

blowing into an ignition interlock device with intent to drive the vehicle after he took cold medicine containing alcohol.

4. Motor Vehicles— violation of conditional driving privilege—hearing officer decision—supported by evidence

The appeal of a determination that petitioner violated a conditional driving privilege concerned the hearing officer's written decision and not the hearing officer's oral remarks. There was substantial evidence supporting DMV's conclusion that petitioner attempted to operate his vehicle after consuming alcohol in violation of his restoration agreement, and it was not necessary to consider violation of any other term of the agreement because the agreement provided that driving privileges would be revoked for violation of any term of the agreement.

Appeal by petitioner from judgment entered 12 December 2007 by Judge Phyllis M. Gorham in Sampson County Superior Court. Heard in the Court of Appeals 8 October 2008.

McLeod & Harrop, by Donald E. Harrop, Jr., for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton and Associate Attorney General Jess D. Mekeel, for respondent-appellee.

GEER, Judge.

Petitioner Samuel Keith Brunson appeals from the superior court's judgment upholding the decision of the Department of Motor Vehicles ("DMV") cancelling petitioner's conditional restoration agreement that had conditionally restored his driving privileges. Petitioner primarily argues that DMV erroneously concluded that he had violated that agreement by attempting to operate his truck after consuming alcohol. Petitioner does not dispute that he intended to drive his truck, that he had consumed cold medicine containing alcohol, that he blew into his truck's ignition interlock device, and that the device locked the ignition after detecting the alcohol. He argues, however, that he could only have "attempted" to operate his vehicle in violation of the agreement by actually switching on the ignition. We find petitioner's interpretation of the agreement unreasonable and hold that petitioner attempted to drive his truck when he had the intent to drive and blew into the ignition interlock device in order to start the truck so that he could drive it. Because we find peti-

tioner's remaining contentions also unpersuasive, we affirm the superior court's decision.

Facts

On 14 April 1999, petitioner's driving privileges were permanently revoked afer his third conviction for driving while impaired. Seven years later, on 14 August 2006, petitioner and DMV entered into an agreement that conditionally restored petitioner's driving privileges. As part of the conditional restoration agreement, petitioner agreed that if he violated any condition of the agreement, the restoration of driving privileges would be revoked. The agreement also required that petitioner only operate a vehicle equipped with an approved ignition interlock device.

On 22 January 2007, DMV held a non-compliance hearing to determine whether petitioner had violated the terms of the restoration agreement. Monitech, Inc., the company responsible for installing and monitoring the ignition interlock device installed in petitioner's truck, had submitted to DMV a non-compliance report indicating that on 26 November 2006 petitioner's device registered a "fail" due to a blood alcohol content ("BAC") reading of .062 at 8:02 p.m. and, at 8:20 p.m. that same night, another "fail" due to a BAC reading of .058. In addition, on 2 December 2006, the device registered a "warn" BAC of .022 at 4:16 p.m. and another "warn" BAC reading of .020 at 4:21 p.m.

At the non-compliance hearing, DMV's hearing officer asked petitioner about the two failure readings. Petitioner explained that he had been sick with the flu around Thanksgiving and that he had been taking Nyquil and 666 over-the-counter cold medicine "two, three times a day." Petitioner testified that he had gotten into his car on 26 November 2006 to go to the store to buy more cough medicine when he blew the two failure readings that caused the lockout of his ignition. Petitioner acknowledged that Monitech had cautioned him and that he had read in the device's manual that many cough medicines contain alcohol and would register on the device.

The hearing officer concluded at the hearing that petitioner had violated the conditional restoration agreement. His written hearing decision, dated 22 January 2007, concluded that petitioner had violated terms three and six of that agreement, which provide:

> 3. Licensee promises and agrees that he will under no circumstances drive or operate or attempt to drive or operate any motor vehicle upon the public streets, highways or public

vehicular areas after having consumed any type of alcoholic beverages, drugs or other impairing substances.

. . . .

6. The licensee shall at no time during this restoration be found by the Division to have become an excessive user of alcohol or drugs.

Based on the decision's findings of fact and conclusions of law, the hearing officer canceled petitioner's conditional restoration agreement.

On 7 February 2007, petitioner filed a petition for writ of certiorari in Sampson County Superior Court requesting review of DMV's decision. On 15 February 2007, the superior court entered an order enjoining DMV from revoking petitioner's driving privileges pending a hearing. The superior court subsequently entered a judgment on 12 December 2007 that granted the petition for writ of certiorari, but upheld the DMV's decision to cancel petitioner's conditional restoration of his driving privileges. Petitioner timely appealed to this Court. On 17 January 2008, the superior court stayed its order pending appeal, leaving in effect the prior 15 February 2007 order enjoining the DMV from cancelling petitioner's conditional restoration agreement.

Discussion

[1] "When reviewing an appeal from a petition for writ of certiorari in superior court, this Court's scope of review is two-fold: (1) examine whether the superior court applied the appropriate standard of review; and, if so, (2) determine whether the superior court correctly applied the standard." *Cole v. Faulkner*, 155 N.C. App. 592, 596, 573 S.E.2d 614, 617 (2002). Petitioner first argues that the superior court failed to use the appropriate standard of review in reviewing each of the issues raised by his petition for writ of certiorari.

The superior court "sits as an appellate court on review pursuant to writ of certiorari of an administrative decision." *Blue Ridge Co. v. Town of Pineville*, 188 N.C. App. 466, 469, 655 S.E.2d 843, 845, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 742 (2008). If a petitioner appeals an administrative decision "on the basis of an error of law, the [superior] court applies *de novo* review; if the petitioner alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record

test." *Id.*, 655 S.E.2d at 845-46. The superior court may properly use both standards of review in a given case, but "the standards are to be applied separately to discrete issues, and the reviewing superior court must identify which standard(s) it applied to which issues[.]" *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 15, 565 S.E.2d 9, 18 (2002) (internal citations and quotation marks omitted).

In this case, the superior court's judgment recited that it had considered the record and arguments of counsel. The judgment then stated:

> Upon review of the whole record under a Petition for Writ of Certiorari, the Court finds substantial evidence in the record that the decision of the Respondent to cancel Petitioner's conditional restoration of his driving privileges was not in violation of constitutional provisions, was not in excess of statutory authority, was made upon lawful procedure, was unaffected by error of law, was supported by substantial evidence, and was neither arbitrary nor capricious.

Petitioner argues that this judgment was not sufficiently specific regarding the bases for the superior court's decision.

As this Court has explained, "[t]he trial court, when sitting as an appellate court to review an administrative agency's decision, must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999). "It is not necessary, however, that it 'make findings of fact and enter a judgment thereon in the same manner as the court would be when acting in its role as trial court.' " *Id.* (quoting *Shepherd v. Consol. Judicial Ret. Sys.*, 89 N.C. App. 560, 562, 366 S.E.2d 604, 605 (1988)). Indeed, "the duty of the superior court, and our duty as well, is not to make findings of fact, but rather to apply the appropriate standard of review to the findings and conclusions of the underlying tribunal." *Avant v. Sandhills Ctr. for Mental Health, Developmental Disabilities & Substance Abuse Servs.*, 132 N.C. App. 542, 545, 513 S.E.2d 79, 82 (1999).

The judgment in this case indicates what the superior court considered in making its decision—the entire record and the arguments of counsel—and that DMV's decision was supported by substantial evidence, was not arbitrary and capricious, was not in violation of the

constitution or statutory authority, and was not affected by error of law. Although the judgment could be more specific, it is sufficient to permit review by this Court. *See Shepherd*, 89 N.C. App. at 562, 366 S.E.2d at 606 ("Judge Bailey's judgment of 1 May 1987 recited that the court had reviewed the record and matters on file and had considered the oral arguments and relevant statutory provisions. Based on these considerations Judge Bailey concluded that the declaratory ruling of [the agency] was not erroneous as a matter of law and should be affirmed. We hold this judgment meets all the requirements of G.S. 150B-51 and is clearly sufficient as a matter of law.").

[2] Petitioner next contends that the superior court erred in applying the standard of review. We agree with petitioner that his petition for writ of certiorari asserted not only issues governed by the whole record test, but also issues of law requiring de novo review. The superior court's order can, however, be read as applying only the whole record test in determining all of the issues before it, including issues of law. Nevertheless, any error in failing to apply a de novo standard of review to the issues does not require remand since in any event, this Court is required to review such issues de novo. *See Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting) ("[A]n appellate court's obligation to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." (internal citation omitted)), *adopted per curiam*, 355 N.C. 269, 559 S.E.2d 547 (2002).

[3] Turning to petitioner's contentions regarding the DMV decision, petitioner first argues that the hearing officer erred in construing term three of the conditional restoration agreement that prohibited him from "driv[ing] or operat[ing] or attempt[ing] to drive or operate any motor vehicle . . . after having consumed any type of alcoholic beverages, drugs or other impairing substances." Petitioner asserts that the word "attempt" in the agreement should be construed consistent with criminal law, which requires "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). DMV argues, however, that since license revocation is a civil matter, the criminal definition of "attempt" is irrelevant, and the word, as used in the agreement, should be construed in accordance with its ordinary meaning. *See Black's Law Dictionary* 137 (8th ed. 2004)

("The act or an instance of making an effort to accomplish something, esp. without success."). We need not resolve this dispute between the parties because the hearing officer's finding of fact is sufficient to meet the criminal definition of attempt.

The hearing officer found:

> That petitioner stated that he had been sick and drank a lot [sic] of "Nyquil and 666" cold medication during the day of November 26, 2006. Around 8 pm petitioner was on his way to the store to get more cold medication when he blew into the ignition interlock and then got his alcohol failure two times.

There is no dispute that this finding meets the first requirement for an attempt: petitioner intended to drive his car on the public highways to go to the store after having consumed alcoholic beverages in the form of cold medication. Petitioner argues, however, without citing any authority, that blowing into the ignition interlock device is not an act that goes beyond preparation.

According to petitioner, the only act that could actually constitute an attempt to drive the car would be "switching on the ignition and then turning the key forward," thereby starting the car. It is, however, well established in North Carolina that once the car engine is running, the person behind the steering wheel is considered to be driving or operating the car. *See* N.C. Gen. Stat. § 20-4.01(25) (2007) (defining "[o]perator" of motor vehicle as "[a] person in actual physical control of a vehicle which is in motion *or which has the engine running*" (emphasis added)); *State v. Fields*, 77 N.C. App. 404, 406-07, 335 S.E.2d 69, 70 (1985) ("In this case the State's evidence showed that the defendant sat behind the wheel of the car in the driver's seat and started the engine. This evidence was sufficient to show that the defendant was in actual physical control of a vehicle which had the engine running. Thus, the State's evidence was sufficient to show that the defendant 'drove' a vehicle within the meaning of G.S. 20-138.1."); *State v. Turner*, 29 N.C. App. 163, 165, 223 S.E.2d 530, 532 (1976) ("The evidence was plenary that defendant was seated behind the steering wheel of a car which had the motor running. The evidence brings defendant within the purview of the statute as to operation of the vehicle, and the evidence is plenary to support a conviction of driving under the influence.").

Consequently, under petitioner's interpretation—that an "attempt" only occurs once the person in the driver's seat has switched

on the ignition—every "attempt" to operate the car would also qualify as the completed act of actually operating the car. Petitioner's interpretation in effect writes "attempt" out of the conditional restoration agreement. As our Supreme Court has stressed, however, "[i]n interpreting contracts, . . . '[t]he various terms of the [contract] are to be harmoniously construed, and if possible, *every word and every provision is to be given effect*.' " *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003) (quoting *Gaston County Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 300, 524 S.E.2d 558, 563 (2000)).

Moreover, petitioner's interpretation assumes that the ignition of a car with an ignition interlock device can be "switched on . . . after consuming alcohol." While it appears that this may be the case for a very low BAC level—resulting in a warning rather than a failure—that is not the case at other BAC levels. Petitioner's contention would, consequently, mean that a person could only violate the "attempt" prong of term three of the agreement when he had a very low BAC. For individuals with a high BAC, "attempt" would be impossible. Such a result cannot have been the intent of the agreement.

Instead, a more reasonable construction of the contract is that an act short of turning on the ignition is sufficient to constitute an "attempt" within the meaning of term three of the conditional restoration agreement. Since a person with an ignition interlock device cannot start his car—and thus operate it—without successfully blowing into the ignition interlock device, such an act goes beyond mere preparation and constitutes the necessary overt act. Accordingly, we hold that if petitioner, with the intent to drive his truck, blew into the ignition interlock device, he attempted to operate his vehicle as set out in term three of the conditional restoration agreement.

The hearing officer, in this case, made the necessary finding that petitioner, after consuming alcohol, intended to drive his car to the store and, in order to do so, blew into the ignition interlock device. That finding in turn supports the hearing officer's determination that petitioner violated term three of the agreement.

[4] Petitioner next argues that the hearing officer's findings regarding term three are not supported by substantial evidence in light of the whole record. When applying the "whole record" test, "a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to jus-

tify the agency's decision." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). " 'Substantial evidence' is 'relevant evidence a reasonable mind might accept as adequate to support a conclusion.' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (quoting N.C. Gen. Stat. § 150B-2(8b) (2003)). Importantly, however, when applying the whole record test, the superior court "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Watkins*, 358 N.C. at 199, 593 S.E.2d at 769.

In support of his argument, petitioner points to the transcript and the hearing officer's following statement in support of his finding of a violation of term three: "So you've told me you were going to the store and that's where you were headed and you had consumed this before you cranked up the vehicle." Petitioner argues that the record contains no evidence that he "cranked up the vehicle." It is, however, the hearing officer's written decision that is on review and not his oral remarks at the hearing.

With respect to the written decision, petitioner simply repeats his contention that any evidence that he unsuccessfully blew into the ignition interlock device is insufficient to establish an "attempt." We have already rejected that contention. The evidence is undisputed that petitioner had consumed alcohol, that he went out to his truck with the intent to drive it to the store to buy cold medicine, that he blew into the ignition interlock device on two occasions the same evening, that the device registered two "fail" alcohol readings of .062 BAC and .058 BAC, and that the device was functioning properly. This evidence constitutes substantial evidence supporting DMV's conclusion that petitioner attempted to operate his vehicle after consuming alcohol in violation of term three of his restoration agreement. Petitioner makes no further arguments regarding term three.

Petitioner, however, also challenges DMV's determination that he violated term six of the agreement by "currently consuming alcohol to excess." We need not address petitioner's arguments relating to term six because the restoration agreement provided that petitioner's driving privileges would be revoked if he was determined to be in "violation of *any* term, restriction, or condition of this agreement . . . ." (Emphasis added.) Since we have upheld DMV's decision that petitioner violated term three, it is immaterial

whether DMV erred as to term six. The superior court, therefore, did not err in affirming DMV's decision cancelling the conditional restoration agreement.

Affirmed.

Judges ROBERT C. HUNTER and ELMORE concur.

CAROLYN MATHIS PARKER, PLAINTIFF v. BRENT HYATT, INDIVIDUALLY, DEFENDANT

No. COA08-907

(Filed 21 April 2009)

1. **Appeal and Error— appealability—summary judgment—interlocutory order—qualified immunity**

   Although defendant's appeal from the grant of summary judgment in a false imprisonment case was an appeal from an interlocutory order, the substantial right of qualified immunity was at issue and thus the case was subject to immediate appeal.

2. **False Imprisonment; Immunity— wildlife officer stopping vehicle for suspected DWI —qualified immunity**

   The trial court erred by granting summary judgment in favor of plaintiff in a false imprisonment case arising out of defendant wildlife officer stopping plaintiff's vehicle for suspected driving while impaired, based on defendant's affirmative defense of qualified immunity, and the case is reversed and remanded because defendant was authorized to arrest plaintiff under N.C.G.S. § 113-136(d), pursuant to the terms of N.C.G.S. § 15A-401(b)(1), since the officer had probable cause to believe that a criminal offense occurred in his presence which constituted a threat to public peace and order tending to subvert the authority of the State if ignored.

Appeal by defendant from an order entered 2 June 2008 by Judge Richard K. Walker in Macon County District Court. Heard in the Court of Appeals 27 January 2009.

Williams & Cassady, P.L.L.C., by Rich Cassady, for plaintiff-appellee.

Attorney General Roy A. Cooper, III, by Assistant Attorney General C. Norman Young, Jr., for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Wildlife Officer appeals from a grant of summary judgment for plaintiff as to liability by claiming that he is entitled to qualified immunity, a complete bar to plaintiff's recovery. After careful review, we reverse and remand.

Background

On 3 November 2006, Brent Hyatt ("defendant") was employed by the North Carolina Wildlife Resources Commission as a sworn Wildlife Officer.[1] That evening, defendant and fellow Wildlife Officer Andrew Helton ("Officer Helton") were patrolling the area near N.C. Highway 28 ("N.C. 28") for unauthorized night deer hunting as well as fishing activity near the Little Tennessee River in Macon County, North Carolina. At around 10:00 p.m., defendant and Officer Helton were at the intersection of Telico Road and N.C. 28 when a minivan turned onto N.C. 28 in front of them traveling in the same direction. Defendant approximated the minivan's speed at 25 miles per hour in a 55 mile per hour zone and observed the minivan cross the center line several times over the course of a mile or less. Defendant told Officer Helton that he believed the driver of the minivan was impaired. Defendant "was concerned that this vehicle might cause a wreck and hurt someone if not stopped . . ." and he therefore decided to stop it. Officer Helton "called the tag" and defendant turned on his vehicle's blue lights.

The minivan pulled over and defendant determined that the driver was Carolyn Parker ("plaintiff"). Defendant asked plaintiff for her license, which she stated she did not have. Plaintiff claimed that her husband was ill and that she was taking him to the emergency room. At that time, plaintiff declined an ambulance. Defendant smelled alcohol emanating from plaintiff and asked plaintiff if she had been drinking. Plaintiff responded "yes, and that they [she and her husband] had been celebrating their marriage." Defendant then asked plaintiff to perform field sobriety tests. Based on her perform-

1. Defendant is a "protector" as the term is used in the statutes discussed in this case.

ance, defendant believed plaintiff was impaired and called the State Highway Patrol. Trooper Leah McCall ("Trooper McCall") arrived, summoned an ambulance for plaintiff's husband, called for a "roll-back" to pick up plaintiff's minivan, and arrested plaintiff. Defendant and Officer Helton waited until plaintiff's vehicle was removed and then resumed their assigned duties.

Plaintiff was subsequently convicted of Level I Driving While Impaired ("DWI") and driving while license revoked in the District Court of Macon County from which she timely appealed to the Superior Court. In Superior Court, plaintiff filed a motion to suppress the evidence of the stop, claiming that defendant did not have authority to stop her on suspicion of driving while impaired. The trial court denied the motion, finding that while defendant acted outside of his statutory authority, there was no showing of a "substantial violation" of plaintiff's statutory rights under Chapter 15A of the North Carolina General Statutes, and plaintiff's constitutional rights were not violated. Plaintiff's case was remanded to district court where her DWI conviction became final.

Plaintiff filed a civil action against defendant in his individual capacity on 17 October 2007, claiming that defendant was acting outside of his lawful authority when he stopped her vehicle on 3 November 2006. As a result of the unlawful stop, plaintiff asserted that the tort of false imprisonment was committed against her. Plaintiff sought compensatory as well as punitive damages. Defendant filed a motion for summary judgment on 24 March 2008, asserting that the stop was within his lawful authority, and he was therefore entitled to qualified immunity while acting in his official capacity. Plaintiff also filed a motion for partial summary judgment as to liability on 7 April 2008. These motions were heard on 14 May 2008 in District Court before Judge Richard K. Walker. On 2 June 2008, Judge Walker denied defendant's motion for summary judgment and granted plaintiff's motion for partial summary judgment. Defendant appeals from the trial court's interlocutory order.

Analysis

I. Interlocutory Appeal

[1] It is well established that:

> Usually, the trial court's denial of a motion for summary judgment is not immediately appealable, as it is interlocutory. However,

> where a substantial right is affected, an interlocutory order may be immediately appealable. In [his] statement of grounds for appellate review, defendant[] ha[s] correctly pointed out that this Court has held that where an order denies Officers the benefit of qualified immunity, as here, it affects a substantial right and is thus subject to immediate appeal.

Rogerson v. Fitzpatrick, 170 N.C. App. 387, 390, 612 S.E.2d 390, 392 (2005) (citation omitted). As in *Rogerson*, the present case is properly before this Court, despite its interlocutory status, because the substantial right of qualified immunity is at issue.

II. Standard of Review—Summary Judgment

[2] Defendant appeals from a denial of summary judgment, which is reviewed *de novo* by this Court. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The record "must be viewed in the light most favorable to the party opposing the motion, and such party is entitled to the benefit of all inferences in his favor which may be reasonably drawn from such material." *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974) (citation omitted).

> The party moving for summary judgment bears the burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. A movant may meet its burden by showing either that: (1) an essential element of the non-movant's case is nonexistent; or (2) based upon discovery, the non-movant cannot produce evidence to support an essential element of its claim; or (3) the movant cannot surmount an affirmative defense which would bar the claim.

Moore v. City of Creedmoor, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995) (citations omitted), *rev'd in part on other grounds*, 345 N.C. 356, 481 S.E.2d 14 (1997). Defendant argues that he is entitled to the affirmative defense of qualified immunity, which is a total bar to plaintiff's recovery. Therefore, he claims the trial court erred in denying his motion for summary judgment and granting plaintiff's motion for partial summary judgment.

III. Qualified Immunity

At the time of the alleged tort, defendant was "[a]n employee of the North Carolina Wildlife Resources Commission sworn in as an officer and assigned to duties which include exercise of law-enforcement powers." N.C. Gen. Stat. § 113-128(9) (2007). "The general rule is that suits against public officials are barred by the doctrine of governmental immunity where the official is performing a governmental function, such as providing police services." *Thomas v. Sellers*, 142 N.C. App. 310, 314, 542 S.E.2d 283, 286 (2001). While defendant in this case is not a "police officer," he is imbued with law enforcement powers, and as a state official, he is entitled to the defense of qualified immunity.

Plaintiff sued defendant in his individual capacity, but in order to surmount the defense of qualified immunity, she must show that defendant's alleged tortious conduct was " 'malicious,' " " 'corrupt,' " or " 'outside the scope of [his] official authority.' " *Webb v. Nicholson*, 178 N.C. App. 362, 366, 634 S.E.2d 545, 547 (2006) (quoting *Mabrey v. Smith*, 144 N.C. App. 119, 122, 548 S.E.2d 183, 186, *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001)). Plaintiff claims that defendant acted outside the scope of his authority when he pulled her van over and therefore he abandoned the cloak of qualified immunity and may be sued in his individual capacity.

IV. Scope of Defendant's Duties

The crux of this case is whether defendant had the authority to stop plaintiff and conduct the field sobriety tests. If defendant was within his statutory authority, then he is entitled to qualified immunity, a bar to plaintiff's claim, and was therefore entitled to summary judgment.

Defendant's law enforcement powers are found in N.C. Gen. Stat. § 113-136 (2007), which states in pertinent part:

> (a) Inspectors and protectors are granted the powers of peace officers anywhere in this State, and beyond its boundaries to the extent provided by law, in enforcing all matters within their respective subject-matter jurisdiction as set out in this section.
>
> . . . .
>
> (d) Inspectors and protectors are additionally authorized to arrest without warrant under the terms of G.S. 15A-401(b) for felonies, for breaches of the peace, for assaults upon them or in

their presence, and for other offenses evincing a flouting of their authority as enforcement officers or constituting a threat to public peace and order which would tend to subvert the authority of the State if ignored. In particular, they are authorized, subject to the direction of the administrative superiors, to arrest for violations of G.S. 14-223, 14-225, 14-269, and 14-277.

(d1) In addition to law enforcement authority granted elsewhere, a protector has the authority to enforce criminal laws under the following circumstances:

(1) When the protector has probable cause to believe that a person committed a criminal offense in his presence and at the time of the violation the protector is engaged in the enforcement of laws otherwise within his jurisdiction; or

(2) When the protector is asked to provide temporary assistance by the head of a State or local law enforcement agency or his designee and the request is within the scope of the agency's subject matter jurisdiction.

While acting pursuant to this subsection, a protector shall have the same powers invested in law enforcement officers by statute or common law. When acting pursuant to (2) of this subsection a protector shall not be considered an officer, employee, or agent for the state or local law enforcement agency or designee asking for temporary assistance. Nothing in this subsection shall be construed to expand the authority of protectors to initiate or conduct an independent investigation into violations of criminal laws outside the scope of their subject matter or territorial jurisdiction.

. . . .

(f) Inspectors and protectors are authorized to stop temporarily any persons they reasonably believe to be engaging in activity regulated by their respective agencies to determine whether such activity is being conducted within the requirements of the law, including license requirements. If the person stopped is in a motor vehicle being driven at the time and the inspector or protector in question is also in a motor vehicle, the inspector or protector is required to sound a siren or activate a special light,

bell, horn, or exhaust whistle approved for law-enforcement vehicles under the provisions of G.S. 20-125(b) or 20-125(c).

(g) Protectors may not temporarily stop or inspect vehicles proceeding along primary highways of the State without clear evidence that someone within the vehicle is or has recently been engaged in an activity regulated by the Wildlife Resources Commission. Inspectors may temporarily stop vehicles, boats, airplanes, and other conveyances upon reasonable grounds to believe that they are transporting seafood products; they are authorized to inspect any seafood products being transported to determine whether they were taken in accordance with law and to require exhibition of any applicable license, receipts, permits, bills of lading, or other identification required to accompany such seafood products.

. . . .

(l) Nothing in this section authorizes searches within the curtilage of a dwelling or of the living quarters of a vessel in contravention of constitutional prohibitions against unreasonable searches and seizures.

Defendant claims that his authority to stop an individual he believes is intoxicated lies under § 113-136(d), the relevant text being—"[i]nspectors and protectors are additionally authorized to arrest without warrant under the terms of G.S. 15A-401(b) for . . . offenses evincing a flouting of their authority as enforcement officers *or constituting a threat to public peace and order which would tend to subvert the authority of the State if ignored*." N.C. Gen. Stat. § 113-136(d) (emphasis added). This statute points to the terms of N.C. Gen. Stat. § 15A-401(b) (2007), which states in pertinent part:

(b) Arrest by Officer Without a Warrant.—

(1) Offense in Presence of Officer.—An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

(2) Offense Out of Presence of Officer.—An officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested, or

2. May cause physical injury to himself or others, or damage to property unless immediately arrested; or

c. Has committed a misdemeanor under G.S. 14-72.1, 14-134.3, 20-138.1, or 20-138.2; or

Specifically, as it pertains to this case, § 15A-401(b)(1) grants authority for an officer to arrest a person when the officer has probable cause to believe that the person has committed a crime in his or her presence.

A reasoned analysis of the facts in this case would suggest that defendant had probable cause to believe that plaintiff was committing the crime of impaired driving *in his presence*, which would be a situation governed by § 15A-401(b)(1). We note that reasonable suspicion, not probable cause, is required to make the initial stop of a driver for suspected DWI. *State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217, 221 (1989) (trial court did not err in finding that reasonable suspicion existed for an officer to stop the defendant where the defendant was weaving in his own lane at a speed 20 miles per hour below the posted speed limit). Probable cause must then exist to arrest without a warrant for DWI. N.C. Gen. Stat. § 15A-401(b).

Because we find that § 15A-401(b)(1) grants law enforcement the power to arrest for crimes committed in the officer's presence, as in the case *sub judice*, we need not address the applicability of § 15A-401(b)(2)(c), which grants authority for an officer to arrest without a warrant if a person, out of the officer's presence, has violated N.C. Gen. Stat. § 20-138.1 (2007), which criminalizes impaired driving.

We acknowledge that § 113-136(d) only authorizes an officer to arrest if one of the enumerated offenses has occurred. We find that driving while impaired constitutes "a threat to public peace and order which would tend to subvert the authority of the State if ignored." N.C. Gen. Stat. § 113-136(d). Driving while impaired clearly is a threat to public peace as there is a high risk of a single or multiple vehicular accidents on our public roadways. *See Bullins v. Schmidt*, 322 N.C. 580, 584, 369 S.E.2d 601, 604 (1988) ("[D]runken drivers are a deadly menace to innocent persons. Officers have a duty to remove them from the highways."), *abrogated on other*

grounds by *Young v. Woodall*, 343 N.C. 459, 471 S.E.2d 357 (1996). The State has criminalized this behavior and the authority of the State to charge an offender would be subverted if an officer imbued with power to arrest was required to ignore the crime occurring in his or her jurisdiction.

Plaintiff points out that § 113-136(d1) states, "[n]othing in this *subsection* shall be construed to expand the authority of protectors to initiate or conduct *an independent investigation* into violations of criminal laws outside the scope of their subject matter or territorial jurisdiction." N.C. Gen. Stat. § 113-136(d1) (emphasis added). Plaintiff claims that this language refers to § 113-136(d) *and* § 113-136(d1) and that defendant was conducting an unauthorized independent investigation into her sobriety when he pulled her over and conducted the field sobriety tests. Upon review, we find that the language pertaining to independent investigation only applies to § 113-136(d1) and not § 113-136(d).

> It is an elementary rule of statutory construction that, all sections and subsections of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable intendment. Any irreconcilable ambiguity in such cases should be resolved so as to effectuate the true legislative intent.

In re Forestry Foundation, 35 N.C. App. 414, 422, 242 S.E.2d 492, 497 (1978) (citations omitted).

Here, § 113-136(d) grants law enforcement authority to inspectors and protectors, while § 113-136(d1) lists two *additional* situations where authority to enforce criminal laws is granted to protectors only, and the language regarding independent investigation falls therein. In reviewing the statute as a whole, we recognize that § 113-136(l) states, "[n]othing in this *section* authorizes searches within the curtilage of a dwelling or of the living quarters of a vessel in contravention of constitutional prohibitions against unreasonable searches and seizures." (Emphasis added.) Clearly, the legislature intended § 113-136(l) to pertain to all portions of § 113-136 in order to establish constitutional parameters to the authority given to protectors and inspectors. Conversely, § 113-136(d1) uses the term "subsection" in reference to § 113-136(d1) alone. Had the legislature intended for the independent investigation language to pertain to the entire

statute, including § 113-136(d), the term "section" would have been utilized as opposed to "subsection."[2]

Conclusion

In sum, we find that defendant in this case was authorized to arrest plaintiff pursuant to N.C. Gen. Stat. § 113-136(d), under the terms of N.C. Gen. Stat. 15A-401(b)(1), because the officer had probable cause to believe that a criminal offense occurred in his presence, which constituted a threat to public peace and order which would tend to subvert the authority of the State if ignored.[3] Because defendant was acting within his capacity as a state official, he is entitled to qualified immunity. Accordingly, we must reverse the trial court's grant of summary judgment for plaintiff and remand this case for further proceedings not inconsistent with this opinion.[4]

Reversed and remanded.

Judges WYNN and ERVIN concur.

STATE OF NORTH CAROLINA v. STACY ADJA WELLS

No. COA08-1310

(Filed 21 April 2009)

1. Criminal Law— flight—instruction supported by evidence

The trial court did not commit plain error by giving an instruction on flight where the evidence showed that defendant left the scene of a shooting, drove to his mother's house, hid the handgun on his mother's property, did not respond to knocks on the door by deputy sheriffs, and did not speak with law enforce-

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2. Plaintiff also claims that according to § 113-136(f) and § 113-136(g), defendant was not allowed to temporarily stop a vehicle unless there was clear evidence that an activity regulated by the Wildlife Resources Commission was at issue. We need not address this argument as these subsections do not pertain to the police powers of § 113-136(d) nor do they reference that subsection or the section as a whole.

3. We note that defendant chose to call Trooper McCall to effectuate the arrest, but he was not required to do so.

4. Based on our determination, we need not address defendant's argument regarding good faith qualified immunity.

ment until his mother came home. The evidence was sufficient to support an instruction on flight.

2. Sentencing— prior record level—convictions serving as basis for habitual felon status—excluded

A sentence for armed robbery as a prior record level IV was remanded where defendant was also sentenced as being an habitual felon. With the three convictions that provided the basis for the habitual felon status being excluded, the prior record level should have been III.

Appeal by defendant from judgments entered on 8 May 2008 by Judge Kenneth Crow in Sampson County Superior Court. Heard in the Court of Appeals 23 March 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley, for the State.

Haral E. Carlin for defendant-appellant.

STEELMAN, Judge.

Where sufficient evidence was shown that defendant fled the scene of a crime to avoid apprehension, a jury instruction on flight was properly given. Where defendant pled guilty to habitual felon status, the trial court was required to sentence defendant as an habitual felon on the charge of assault with a deadly weapon with intent to kill inflicting serious injury.

I. Factual and Procedural Background

On 2 May 2007, Venor Webb (Webb) went to visit friends at a mobile home park. Webb had previously lived at the mobile home park in a trailer owned and occupied by Ernestine Cash (Cash). Stacy Adja Wells (defendant) moved in with Cash after Webb moved out of the trailer at the end of April 2007. Neither Cash nor defendant were at home when Webb arrived, so he sat in Cash's Ford Escort (Escort) parked in her backyard. Defendant and Cash eventually arrived in Cash's Lexus. Cash and defendant exited the Lexus and went into Cash's trailer through the back door. Approximately two minutes later, Webb heard the back door of the trailer close and saw defendant coming toward the Escort. Defendant stood beside the Escort and fired a handgun five or six times into the passenger side of the car. Defendant then got into the Lexus and drove off. Webb, who sus-

tained multiple gunshot wounds to his abdominal area, was transported to a hospital.

The next day, detectives with the Sampson County Sheriff's Department collected evidence at the scene and went to defendant's mother's home to locate defendant. The detectives knocked on the front and back doors, but no one answered. The detectives waited a few minutes in the front yard and then telephoned defendant's mother at her workplace. After defendant's mother came home and went inside, defendant surrendered. Detectives took defendant into custody and advised defendant of his *Miranda* rights. Defendant subsequently waived his *Miranda* rights and admitted to the detectives that he shot Webb. Detectives later returned to defendant's mother's house and, with permission to search the premises, recovered a handgun from a pump house on the property.

Defendant was charged with eight substantive offenses in three separate indictments. In case number 07 CRS 51473, defendant was indicted for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a firearm into occupied property. In case number 07 CRS 4381, defendant was indicted for possession of a firearm by a convicted felon. In case number 08 CRS 1094, defendant was indicted for four counts of discharging a firearm into occupied property. In three indictments designated as "ancillary" indictments, defendant was charged with having attained the status of habitual felon.

A jury found defendant guilty of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a convicted felon, and of three counts of discharging a firearm into occupied property. Defendant subsequently pled guilty to having attained the status of habitual felon.

The trial judge entered four judgments imposing active prison terms as follows: (1) for attempted first-degree murder and habitual felon based upon one count of discharging a firearm into occupied property, 251-311 months; (2) for assault with a deadly weapon with intent to kill inflicting serious injury, 133-169 months; (3) for habitual felon based upon one count of possession of a firearm by a felon, 93-121 months; and (4) for two counts of habitual felon based on two counts of discharging a firearm into occupied property, 93-121 months. Judgments (2) and (3) were to run at the expiration of judgment (1).

Defendant appeals.

II. Flight Instruction

[1] In his first argument, defendant contends the trial court erred by instructing the jury on flight. Defendant did not object to the trial court's instructions, and therefore, asks this Court to review for plain error. We disagree.

Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)(quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). Defendant, therefore, "must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)(citation omitted).

"A flight instruction is proper '[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged. . . .' " *State v. Norwood*, 344 N.C. 511, 534, 476 S.E.2d 349, 359 (1996) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

The evidence shows that defendant left the scene of the shooting, drove to his mother's house, hid the handgun on his mother's property, did not respond to knocks on the door by deputy sheriffs while he was inside his mother's house, and did not speak with law enforcement until his mother came home. We hold this evidence sufficient to support the instruction on flight. *See State v. Eubanks*, 151 N.C. App. 499, 503, 565 S.E.2d 738, 741 (2002) (holding evidence was sufficient to support instruction on flight when the defendant left the scene without rendering aid or assistance to the victim, he disposed of the weapon, and he "did not voluntarily contact the police or turn himself into the police[,] but" merely cooperated with the police once contacted). Defendant has not shown error much less plain error in the trial court's flight instruction. This argument is without merit.

III. Conviction for Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury

[2] In his second argument, defendant contends the trial court erred in sentencing him for the assault with a deadly weapon conviction under structured sentencing to 133-169 months as a Class C felon with a record level IV. Defendant asserts, and the State agrees, that the trial court was required to sentence him as an habitual felon pursuant to N.C. Gen. Stat. § 14-7.2 and 14-7.6. We agree.

The Habitual Felons Act, contained in Article 2A of Chapter 14, North Carolina General Statutes, specifies that when a defendant has previously been convicted of or pled guilty to three non-overlapping felonies, defendant 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).

The punishment for habitual felons is set out in Section 14-7.2 and provides, in pertinent part:

> When any person is charged by indictment with the commission of a felony under the laws of the State of North Carolina and is also charged with being an habitual felon as defined in G.S. 14-7.1, he must, upon conviction, be sentenced and punished as an habitual felon. . . .

N.C. Gen. Stat. § 14-7.2 (2008). Section 14-7.6 further provides:

> When an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article . . . be sentenced as a Class C felon.

N.C. Gen. Stat. § 14-7.6 (2008).

The jury found defendant guilty of the assault charge, and defendant pled guilty to having attained habitual felon status. Under the provisions of N.C. Gen. Stat. § 14-7.2 and 14-7.6, the trial court was required to sentence defendant as an habitual felon. *See* N.C. Gen. Stat. § 14-7.5 (2008); *Murphy*, 193 N.C. App. at 237, 666 S.E.2d at 883. (once jury returns a verdict of guilty that defendant has attained the status of an habitual felon, then the court must sentence defendant as an habitual felon pursuant to N.C. Gen. Stat. § 14-7.2).

Under the provisions of N.C. Gen. Stat. § 14-7.6, for purposes of sentencing as an habitual felon, the three prior felony convictions,

which provide the basis for a defendant's habitual felon status, may not be counted in determining defendant's prior record level. In this case, the trial court sentenced defendant on the charge of assault with a deadly weapon with intent to kill inflicting serious injury as a prior record level IV, based upon fourteen felony sentencing points. When the convictions for the three felonies that were the basis for defendant's habitual felon status are removed, defendant has only eight felony sentencing points and would be a prior record level III.[1]

No error in part; sentence in file number 07 CRS 51473 for assault with a deadly weapon with intent to kill inflicting serious injury is vacated and remanded for resentencing in accordance with this Opinion.

NO ERROR as to judgments for attempted murder and three counts of habitual felon status.

VACATED and REMANDED as to conviction for assault with a deadly weapon with intent to kill inflicting serious injury.

Judges HUNTER, ROBERT C. and JACKSON concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF v. DEBREILLE MORGAN AND MICHAEL E. BREEDLOVE, EXECUTOR FOR THE ESTATE OF NORA BREEDLOVE, DEFENDANTS

No. COA08-1206

(Filed 21 April 2009)

Insurance— auto liability–regular use exception—inapplicability

The driver of a vehicle involved in an accident while the owner was a passenger did not have the "regular use" of the passenger's vehicle within the meaning of an exclusion in the driver's automobile insurance policy which barred coverage for the use of any vehicle other than the covered automobile "furnished for your regular use," although the driver drove the vehicle three or

1. Under the provisions of G.S. 14-7.6, a defendant convicted of a Class A, B1 or B2 felony is not sentenced as a Class C felon even though guilty of being an habitual felon.

four times a week, where she never drove without the owner-passenger; the car was not regularly available to the driver and she did not keep the keys; she had no permission to take the vehicle for her personal errands; the car was almost always parked at the owner-passenger's house; and the owner-passenger took care of the maintenance of the vehicle.

Appeal by plaintiff from judgment entered 13 June 2008 by Judge James E. Hardin in Wake County Superior Court. Heard in the Court of Appeals 11 March 2009.

Cranfill Sumner & Hartzog, LLP, by George L. Simpson, IV, for plaintiff-appellant.

Anderson & Anderson, by Michael J. Anderson, for defendant-appellee Debreille Morgan.

Royster, Cross & Hensley, LLP, by Dale W. Hensley, for defendant-appellee Michael E. Breedlove, Executor of the Estate of Nora Breedlove.

BRYANT, Judge.

Farm Bureau appeals from an order entered 13 June 2008 in Wake County Superior Court which denied Farm Bureau's motion for summary judgment and granted summary judgment in favor of defendants Debreille Morgan (Morgan) and Michael E. Breedlove, executor for the estate of Nora Breedlove. For the reasons stated herein, we affirm.

On 14 July 2006, Nora Breedlove was involved in a two vehicle collision with Morgan on Capital Boulevard in Wake County. At the time of the collision, Breedlove was driving a car owned by Ellsworth Whitaker who was riding in the front passenger seat. Morgan filed a negligence action against Breedlove.

Whitaker's auto insurance carrier was Allstate Insurance Company. Breedlove maintained auto insurance coverage with Farm Bureau. Morgan requested that Farm Bureau participate in the settlement of the personal injury claim against Nora Breedlove's estate; however, Farm Bureau asserted that its policy did not provide coverage for the allegations made by Morgan against Breedlove.

On 4 January 2008, Farm Bureau initiated this action for declaratory judgment to determine whether its auto insurance policy

provided coverage for the claims alleged by Morgan against Breedlove. Morgan filed her answer on 30 January 2008 and Michael Breedlove, as executor of Nora Breedlove's estate, filed an answer on 3 March 2008. Both defendants requested that the trial court rule that the terms of the Farm Bureau policy covered Morgan's claims against Breedlove.

On 28 March 2008, Farm Bureau moved for summary judgment, and the motion was heard by the Honorable James E. Hardin on 12 June 2008. Judge Hardin entered an order on 13 June 2008 which denied Farm Bureau's motion and entered summary judgment for defendants. Farm Bureau appeals.

The sole issue on appeal is whether the trial court erred by granting defendant's motion for summary judgment based on the "regular use" exclusion contained in Breedlove's auto policy.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1 Rule 56(c) (2007).

"When the facts of a case are undisputed, construction and application of an insurance policy's provisions to those facts is a question of law. Because the trial court was only required to apply the law to the undisputed facts in this case, this case is appropriately resolved by summary judgment." *See McGuire v. Draughon*, 170 N.C. App. 422, 424-25, 612 S.E.2d 428, 430 (2005) (citation omitted). A trial court's grant of summary judgment is reviewed de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

In *Whaley v. Great American Ins. Co.*, 259 N.C. 545, 131 S.E.2d 491 (1963), our Supreme Court stated that "regular use" does not have an "absolute definition" and "[e]ach case must be decided on its own facts and circumstances." *Id.* at 552, 131 S.E.2d at 496-97. When evaluating whether the conduct falls within the "regular use" exception of the insurance policy, the Court held that "coverage depends upon the availability of the [vehicle] for use by [the non-owner] and the frequency of its use by [the non-owner]." *Id.* at 545, 131 S.E.2d at 498 (emphasis omitted).

In *Nationwide Mut. Ins. Co. v. Walters*, 142 N.C. App. 183, 541 S.E.2d 773 (2001), this Court found that the non-owner made "regular

use" of the vehicle based on the test set forth in *Whaley*. In *Nationwide* the facts relied on by the Court were as follows: the non-owner kept the vehicle at his house; the non-owner drove the vehicle to the exclusion of all others daily for eight weeks; the non-owner used the vehicle to drive the owner to work and drive the owner's children to school; the non-owner was responsible for putting gasoline in the vehicle; and the non-owner did not have to give the car back to the owner during the eight weeks. *Id.* at 189, 541 S.E.2d at 776-77. We went on to note that although there was evidence the non-owner used the vehicle only with the permission of the owner and to the benefit of the owner, the facts did not negate the availability of the vehicle to the non-owner. *Id.* at 189, 541 S.E.2d at 777.

In *Nationwide Mut. Ins. Co. v. Bullock*, 21 N.C. App. 208, 203 S.E.2d 650 (1974), this Court, using the *Whaley* availability and frequency analysis, found that the non-owner made "regular use" of a vehicle where she used the vehicle to transport the owner to medical appointments and to run errands for the owner, used the vehicle to drive herself to and from work, usually received permission from the owner to use the vehicle for trips made for her personal benefit, kept the vehicle at her residence, and paid for gasoline and oil for the vehicle. *Id.* at 209-10, 203 S.E.2d at 651. *See also Devine v. Aetna Casualty & Surety Co.*, 19 N.C. App. 198, 198 S.E.2d 471 (1973) (holding that continued possession and unrestricted use constitutes "regular use").

Here, Breedlove's auto policy barred coverage for "the ownership, maintenance or use of . . . [a]ny vehicle, other than your covered auto, which is . . . furnished for your regular use." However, the policy does not define "regular use."

After Whitaker's wife passed away, Breedlove and Whitaker became friends. Breedlove began to help Whitaker drive to various places around Raleigh and Durham because Whitaker was unfamiliar with the area and he was uncomfortable driving in traffic. By September 2005, Breedlove was driving Whitaker three or four times a week using Whitaker's car. Usually, Whitaker would drive his car and pick-up Breedlove at her house and then Breedlove would drive from there. Once in a while, Breedlove would drive her car to Whitaker's house and then they would drive from there. This driving arrangement was consistent until the accident in July 2006.

Although Whitaker's vehicle may have been frequently used by Breedlove because she often drove it three or four times a week, this

is not regular use as defined in our case law because the use fails the availability prong of *Whaley*. *See McGuire*, 170 N.C. App. at 426, 612 S.E.2d at 431 (declining to accept a bright line rule that equates "regular" with "daily," but rather finding that non-owners driving the vehicle two or three times per week for almost two years satisfies the frequency prong).

Whitaker's vehicle was not regularly available to Breedlove. Breedlove did not have keys to the car, and she never drove the car without him being present. Further, Breedlove did not have permission to take Whitaker's car for her personal errands. The car was parked at Breedlove's house only once or twice when they came home late at night, but the remainder of the time, Whitaker's car was parked at his house. Whitaker took care of the maintenance of the vehicle: he would get the car inspected and put gas in it when needed. This arrangement is different from that in prior cases in which the court has found regular use. *See McGuire*, 170 N.C. App. at 425, 612 S.E.2d at 431 (finding that vehicle was available to the non-owner based on facts showing the vehicle was left in a shared driveway between the owner and the non-owner's houses, the owner did not require the non-owner to ask permission before using the vehicle, the owner did not drive the vehicle herself, the owner allowed the non-owner to take the vehicle out of town, and the non-owner possessed a key to the car); and *North Carolina Farm Bureau Mut. Ins. Co. v. Warren*, 326 N.C. 444, 445, 390 S.E.2d 138, 139 (1990) (finding a van was available to the non-owner where she retained the keys and routinely kept the van in her driveway overnight between trips, even though "she was not permitted to use the van for personal business or pleasure"). *See also Walters*, 142 N.C. App. 183, 541 S.E.2d 773; and *Bullock*, 21 N.C. App. 208, 203 S.E.2d 650. *Compare Whisnant v. Nationwide Mut. Ins. Co.*, 264 N.C. 195, 141 S.E.2d 268 (1965) (not finding "regular use").

From these undisputed facts, Breedlove's activities do not fall within the "regular use" exception of her auto policy. Accordingly, the trial court correctly entered summary judgment in favor of defendants, and we therefore affirm the order of the trial court.

Affirmed.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. WESLEY TYLER CORBETT

No. COA08-1300

(Filed 21 April 2009)

Assault— not a lesser included offense to sexual battery—additional elements

Assault is not a lesser included offense to misdemeanor sexual battery; sexual battery does not include as essential elements an act or attempt to do immediate physical injury that would put a person of reasonable firmness in fear of immediate bodily harm.

Appeal by defendant from judgment entered 6 February 2008 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 25 March 2009.

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

Grace, Tisdale & Clifton, P.A., by Christopher R. Clifton, for defendant-appellant.

STEELMAN, Judge.

Assault is not a lesser included offense of the crime of misdemeanor sexual battery.

I. Factual and Procedural Background

In August 2006, Jessica Head (Jessica) enrolled in the carpentry program at Forsyth Technical Community College (Forsyth Tech). A member of her class was Wesley Tyler Corbett (defendant). Defendant sat directly behind Jessica in class. Defendant would grunt, groan, and talk to himself during class.

Approximately two weeks after the class began, the students started having lessons in the workshop. Jessica sat across the room from defendant in the workshop. About a week after being in the workshop, defendant was removed from the class. When defendant returned, he was accompanied by a social worker. Forsyth Tech staff asked the classmates to keep a log of defendant's strange and unusual behavior, which Jessica did on her cell phone.

Approximately three weeks after the class began, the students relocated to a jobsite, building Habitat for Humanity houses. The stu-

dents took a tour of the site, and defendant followed Jessica, staying right behind her. Defendant tried to talk to Jessica several times.

Defendant made Jessica feel uneasy because of a series of incidents, which occurred over the duration of the class: he exposed his penis in class and fondled himself, making rapid up-and-down movements; he referred to himself as, and insisted on being called, "Nighthawk;" and on one occasion, defendant told Jessica she was beautiful and that "he was a lesbian and he would love to be [her] girlfriend."

On 24 October 2006, Jessica and defendant were at the Habitat for Humanity jobsite. Jessica was installing a two-by-four, and defendant stood right behind her breathing in her ear. Every time Jessica would pound the nail with a hammer, defendant would yell, "Whack it, baby." Defendant started panting and getting very excited. Jessica panicked, handed her hammer to defendant, and went to lunch with classmates. After lunch, Jessica went to retrieve her tool belt and saw defendant "hunkered down" behind some scaffolding. Upon seeing defendant, Jessica became very nervous, grabbed her tool belt, and put it on. Jessica "leapt into the house and he was right on [her] heels." Defendant picked Jessica up by her hips and lifted her so her feet did not touch the ground. Defendant performed several pelvic thrusts against Jessica's buttocks. Both Jessica and defendant had their clothes on. A classmate, Joseph Pitts (Pitts), testified that defendant performed three or four thrusts into Jessica's buttocks. Pitts heard defendant grunt several times while he held Jessica and Jessica yell "Get off of me" and "Leave me alone." Jessica hit defendant with her elbow and was able to extricate herself.

Jessica ran to two classmates and "wedged" herself in between them, with defendant following her and stepping on her shoes. Defendant walked off "moaning and groaning and complaining." Jessica testified she was embarrassed and told the two classmates, "He just picked me up and humped me."

Defendant was charged with a misdemeanor sexual battery pursuant to N.C. Gen. Stat. § 14-27.5A(a).

Following his arrest, Officer M.C. Merritt (Officer Merritt) testified defendant made an "unsolicited, spontaneous utterance, stating 'I did not touch her.'" Officer Merritt had not told defendant who "her" was. Officer Merritt testified that after being fingerprinted

at the police station, defendant stood up, put his hands behind his back and stated in an excited manner, "Ooh, ooh I want you to put the cuffs on me."

On 4 February 2008, defendant was tried before a jury. Defendant's mother, Pamela Corbett (Corbett), a clinical psychologist, testified defendant has Tourette's syndrome, which has an underlying feature of obsessive-compulsive behavior, and he has two developmental delays: language and emotional. Corbett further testified defendant also has coprolalia, which means compulsive swearing and using offensive terms. Corbett testified that defendant takes medication for his conditions.

Psychiatrist Kyle Long (Dr. Long) also testified. Dr. Long testified that none of defendant's diagnoses cause hypersexuality, and defendant's medication would not cause him to be more sexually aggressive.

At the jury charge conference, defendant requested an instruction on the offense of simple assault, as a lesser included offense of sexual battery. The trial court denied defendant's request. The jury found defendant guilty of sexual battery. Defendant was sentenced to seventy-five days in the common jail of Forsyth County. This sentence was suspended, and defendant was placed on supervised probation for twenty-four months.

Defendant appeals.

II. Analysis

In his first argument, defendant contends that the trial court erred in refusing to instruct the jury on simple assault as a lesser included offense of sexual battery. We disagree.

Our Supreme Court has stated that the issue of jury instructions is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion. *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152 (2002), *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). "By definition, all the essential elements of a lesser included offense are also elements of the greater offense." *State v. Martin*, 195 N.C. App. ——, ——, 671 S.E.2d 53, 61 (2009) (citing *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987)). "[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." *Id.*

> [T]he *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982) (internal citations omitted), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993).

The elements of sexual battery are: (1) engaging in sexual contact with another person, (2) by force and against the will of the other person, and (3) for the purpose of sexual arousal, sexual gratification, or sexual abuse. N.C. Gen. Stat. § 14-27.5A (2007); *see also* N.C.P.I.-Crim. 207.90 (Jan. 2004).

Assault is a statutory offense, but the statute contains no definition of the crime. *See* N.C. Gen. Stat. § 14-33(a) (2007). Assault is governed by common law. *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). Our Supreme Court has generally defined assault as: (1) an overt act or an attempt, or the unequivocal appearance of an attempt, (2) with force and violence, (3) to do some immediate physical injury to the person of another, (4) which would put a person of reasonable firmness in fear of immediate bodily harm. *Id.* (citations omitted). Emphasis is placed on the intent or state of mind of the accused. *Id.* Case law has also created another rule known as the "show of violence rule," which places the emphasis on the reasonable apprehension of the person assailed. *Id.*

The crime of assault possesses two elements which are not elements of sexual battery: (1) whether the accused committed or attempted to commit an act to do some immediate physical injury to the person of another, and (2) whether the act or attempted act would put a person of reasonable firmness in fear of immediate bodily harm. We hold that the crime of assault is not a lesser included offense of sexual battery because all the essential elements of assault are not essential elements of sexual battery.

This argument is without merit.

Because we hold that assault is not a lesser included offense of sexual battery, we do not address defendant's remaining arguments.

Defendant has failed to argue the remaining assignments of error in his brief, and they are thus deemed abandoned pursuant to Rule 28(b)(6) of the Appellate Rules of Procedure. N.C.R. App. P. 28(b)(6).

NO ERROR

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. WILLIAM GEOFFERY THACKER

No. COA08-1090

(Filed 21 April 2009)

1. Sexual Offenses— second-degree sexual offense—anal intercourse

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree sexual offense where there was substantial evidence that defendant had anal intercourse with another person by force and against that person's will.

2. Appeal and Error— plain error review—discretion of court

The Court of Appeals did not exercise its discretion to review as plain error the issue of whether the trial court should have instructed on sexual battery as a lesser-included offense of second-degree sexual offense where defendant did not object to the instructions at trial, request an instruction on a lesser-included offense, or allege that the instructions amounted to plain error.

Appeal by defendant from judgment entered 13 March 2008 by Judge Paul C. Ridgeway in Alamance County Superior Court. Heard in the Court of Appeals 6 April 2009.

Roy Cooper, Attorney General, by Jane Ammons Gilchrist, Assistant Attorney General, for the State.

Duncan B. McCormick, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment entered upon jury verdicts finding him guilty of one count of second-degree sexual offense and

two counts of assault on a female. In the two assignments of error brought forward in his brief, defendant argues the trial court erred by (1) denying, at the close of the State's evidence and at the close of all the evidence, his motions to dismiss the sexual offense charge for insufficient evidence, and (2) not instructing the jury on the offense of sexual battery, which defendant contends is a lesser-included offense of second-degree sexual offense.

[1] First, it is of course well-settled that by offering evidence following the trial court's denial of a motion to dismiss at the close of the State's evidence, a defendant waives review of the trial court's denial of that motion. N.C. Gen. Stat. § 15-173 (2007); N.C.R. App. P. 10(b)(3) (2009); *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985). Accordingly, we only review whether the trial court erred by denying the motion made at the close of all the evidence. To answer this question, we consider the evidence in the light most favorable to the State and allow every reasonable inference which can be drawn from the evidence in order to determine if there was substantial evidence of each element of the offense charged. *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008); *see also State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (defining "substantial evidence"). The elements of second-degree sexual offense in this case are (1) sexual act, (2) against the will and without the consent of another person, and (3) using force sufficient to overcome any resistance of the other person. N.C. Gen. Stat. § 14-27.5(a)(1) (2007); *State v. Jones*, 304 N.C. 323, 330, 283 S.E.2d 483, 487 (1981); *see also* N.C. Gen. Stat. § 14-27.1(4) (2007) (defining "sexual act").

Defendant testified at trial that he had anal intercourse, a "sexual act," with another person. Defendant contends on appeal that there was insufficient evidence that he engaged in this act by force and against the other person's will. The woman with whom defendant acknowledged having anal intercourse testified as follows:

> [Defendant] told me we need to talk, we need to go upstairs right now, we need to talk. And so I was like okay. We went upstairs. And he slapped me in the face and called me a bitch . . . . He pushed me down on the bed and . . . . [h]e told me that we were going to have sex. I told him I didn't want to 'cause Crystal was downstairs. . . . I was crying, and I told him I didn't want to do it. And I did it anyways because I didn't want to fight about it. . . . Then he told me he wanted to stick it in my . . . butt, and I said no I didn't want to because it was hurt, it was going to hurt and it

> wasn't natural. . . . He did it anyways, and I was crying 'cause it hurt. And he put a pillow over my face, and I couldn't breath [sic] and I guess he knew I couldn't breath [sic]. So he took it off of my face, and then he put his hand on my face, and he told me that if Crystal heard me crying, it was going to be some shit. And I bit his hand, and he moved his hand off of my face.

The woman testified that she was crying the entire time she was upstairs with defendant. The woman also testified that, on other occasions, defendant hit her when she told him she did not want to have intercourse and that she did not leave the room either after defendant told her he wanted to have sex or after defendant told her he wanted to have anal intercourse because she "didn't want to be hurt anymore." A police officer who interviewed the woman afterwards testified that the woman said defendant had "forced" her to have sex with him and had "raped" her. We conclude that there was substantial evidence that defendant had anal intercourse with another person by force and against that person's will. This assignment of error is overruled.

[2] Second, it is equally well-settled that a defendant may not challenge a trial court's failure to instruct a jury on lesser-included offenses when the defendant did not object to the instructions given and did not request instructions on lesser offenses. N.C.R. App. P. 10(b)(2) (2009); *State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993). In such instances, a defendant may challenge jury instructions by specifically and distinctly contending that the instructions amount to plain error. N.C.R. App. P. 10(c)(4) (2009). In the absence of a proper assignment of error, an appellate court nevertheless has the discretion to review jury instructions for plain error. *State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007), *cert. denied*, —— U.S. ——, 170 L. Ed. 2d 760 (2008).

Defendant does not assert, and the record on appeal does not reveal, that he either objected to the trial court's instructions or requested an instruction on a lesser-included offense. Defendant does not allege that the trial court's instructions amount to plain error. We do not exercise our discretion to review the instructions for plain error. *See State v. Pettis*, 186 N.C. App. 116, 120, 651 S.E.2d 231, 233-34 (2007) (stating that, because the offense of sexual battery includes a purpose element, sexual battery is not a lesser-included offense of second-degree rape), *disc. review denied*, 362 N.C. 369, 662 S.E.2d 387, *cert. denied*, —— U.S. ——, 172 L. Ed. 2d 337 (2008). This assignment of error is dismissed.

NO ERROR.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. DONALD LAMOND

No. COA08-940

(Filed 21 April 2009)

Sentencing— supervised probation—twenty-four months—required findings—not made

The trial court erred by sentencing defendant to supervised probation for twenty-four months for simple assault without making the findings required by N.C.G.S. § 15A-1343.2(d), which requires specific findings for misdemeanants sentenced to community punishment for more than eighteen months.

Appeal by defendant from judgment entered 30 January 2008 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 6 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Donna D. Smith, for the State.

Don Willey, for defendant-appellant.

STEELMAN, Judge.

Where the trial court failed to enter the required findings of fact necessary to impose a probationary period longer than eighteen months, the judgment is vacated and this case is remanded for resentencing.

I. Factual and Procedural Background

Defendant was charged with simple assault, and was found guilty by a jury on 30 January 2008. The trial court imposed a community based punishment and sentenced defendant to forty-five days imprisonment. This sentence was suspended and defendant was placed on supervised probation for twenty-four months. Defendant appeals.

II. Required Findings of Fact

In his only argument, defendant contends that the trial court erred in placing him on probation for twenty-four months without making the findings required by N.C. Gen. Stat. § 15A-1343.2(d). The State concedes this error and we agree.

N.C. Gen. Stat. § 15A-1343.2(d) provides, in part, that "[u]nless the court makes specific findings that longer or shorter periods of probation are necessary," the length of probation for misdemeanants sentenced to community punishment shall be "not less than six nor more than 18 months[.]" N.C. Gen. Stat. § 15A-1343.2(d)(1) (2007). The judgment contains no finding supporting the twenty-four month period of probation. Nor does the trial transcript indicate that the trial court verbally made any such finding.

The judgment is vacated and this matter is remanded to the trial court for a new sentencing hearing.

Defendant does not argue his remaining assignments of error, and they are deemed abandoned. N.C.R. App. P. 28(b)(6) (2008).

NO ERROR AS TO TRIAL, JUDGMENT VACATED AND REMANDED FOR A NEW SENTENCING HEARING.

Chief Judge MARTIN and Judge CALABRIA concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 APRIL 2009)

BERARDI v. CRAVEN CTY. SCHOOL DIST. No. 08-920	Ind. Comm. (I.C. No. 385656)	Affirmed
CASCADDEN v. HOUSEHOLD REALTY CORP. No. 08-805	Onslow (08CVS1000)	Affirmed
CRAWFORD v. PHILLIPS No. 08-615	Ind. Comm. (I.C. No. 504754) (PH-1327)	Affirmed in part, reversed and remanded in part
GABICE v. HARBOR No. 08-634	Mecklenburg (02CVD20064)	Dismissed
GARNER v. SMITH No. 08-1117	Carteret (07CVS415)	Affirmed
IN RE D.J.D., O.D.D. No. 08-1431	Wayne (00JT201-02)	Affirmed
IN RE J.R.B., N.B.B. No. 08-1232	Robeson (07JT303-04)	Vacated and remanded for additional findings of fact and conclusions of law
JACKSON v. DANIELS No. 08-822	Craven (07CVS191)	Affirmed
PAIT v. SOUTHEASTERN REG'L HOSP. No. 08-955	Ind. Comm. (I.C. NO. 426774)	Dismissed
STATE v. AMICK No. 08-760	Wake (07CRS4133-34)	No error
STATE v. BAKRI No. 08-853	Johnston (04CRS6069) (04CRS51162) (06CRS8030)	No error
STATE v. BARNES No. 08-1096	Moore (07CRS50500)	No error
STATE v. BLOOD No. 08-645	Mecklenburg (06CRS239139)	No error
STATE v. DAVIDSON No. 08-850	Buncombe (07CRS51429-30) (07CRS412)	No error

STATE v. FLOWE No. 08-1311	Mecklenburg (07CRS227049) (07CRS50489)	No prejudicial error
STATE v. GEORGE No. 08-1301	Guilford (05CRS24686) (05CRS89242) (05CRS89244)	No error
STATE v. HAIRSTON No. 08-767	Forsyth (06CRS60789) (06CRS60791) (07CRS3079)	No error
STATE v. JOHNSON No. 08-990	Mecklenburg (06CRS258590)	No error
STATE v. KINGSTON No. 08-1201	Rockingham (06CRS51545 (07CRS46)	No error
STATE v. LYNCH No. 08-1175	Nash (01CRS51600-01)	Affirmed and remanded for correction of clerical error
STATE v. McDUFFIE No. 08-1302	Forsyth (06CRS29686) (06CRS59274) (07CRS54655)	No error
STATE v. MURPHY No. 08-956	Davidson (06CRS53737)	No error
STATE v. ROBINSON No. 08-865	Carteret (07CRS5491) (07CRS54447)	No error in part, remanded in part
STATE v. SHIVE No. 08-921	Gaston (07CRS10585) (07CRS10588-94) (07CRS57055-56) (07CRS57058)	No error
STATE v. SMITH No. 08-1031	Wayne (07CRS55293)	No error
STATE v. UNDERWOOD No. 08-949	Jackson (07CRS51104) (07CRS51106-08) (07CRS51110)	No error
STATE v. WALSTON No. 08-889	Wake (07CRS30442)	No error
STATE v. WARE No. 08-581	Mecklenburg (07CRS66789)	No error

STATE v. WARRAN No. 08-931	Perquimans (05CRS50589-90)	No error; remanded for correction of judgment
STATE v. WOODS No. 08-1006	Alamance (07CRS53734) (07CRS15379)	No error
WILLIAMS v. WILLIAMS No. 08-692	Iredell (04CVD3190)	Affirmed in part and remanded in part

FORMAL ADVISORY OPINION: 2010-03

April 9, 2010

QUESTION:

1) May a judge consult in the writing of a federal grant application to request funding for the production of instructional materials explaining the procedure to establish problem-solving courts for child support disputes?

2) May a judge publish a book for retail sale, based on the judge's experience in child support court that will feature true life stories of parents, some of whom still have matters pending, and how they became involved in the court system?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined 1) the judge may consult in the writing of a federal grant to request funding for the production of instructional materials explaining the procedure to start a problem solving court for child support disputes. 2) During the judge's tenure in judicial office, the judge may not publish a book for personal profit that contains accounts of court proceedings involving parties that have appeared before the judge or currently have related matters pending before the court.

DISCUSSION:

A judge is prohibited from active assistance in raising funds for any cultural, educational, historical, religious, charitable, fraternal, civic, economic or legal organization or government agency by Canons 4C and 5B(2) of the Code of Judicial Conduct. In question 1) above, the judge's activities are not active assistance in raising funds. The grant request is not made in the name of nor is the grant signed by the judge.

Both Canons 4A and 5A of the Code allow a judge to engage in a variety of activities, specifically including writing, so long as the activities do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties. In the course of these activities, Canon 3A(6) requires a judge to "abstain from public comment about the merits of any pending proceeding arising in North Carolina or addressing North Carolina law. However, a judge may discuss previously issued judicial decisions when teaching or lecturing as part of educational courses or programs." In addition, in financial

and business dealings, a judge may not exploit the judge's judicial position nor use information acquired by the judge in the judge's official capacity for financial gain or any purpose unrelated to the judge's judicial duties. (Canons 5C(1) & 5C(7)).

In all things, a judge is required by Canons 1 and 2A of the Code to personally observe standards of conduct that both preserve and publicly promote confidence in the integrity and impartiality of the judiciary.

Thus, in question 2) above, while a judge may write on a variety of topics, a judge may not write about the personal travails of litigants, some of whom currently have matters pending before the court. Such conduct does not promote confidence in the integrity and impartiality of the judiciary, and no matter how well intentioned, appears to take advantage of the judge's judicial position. Such endeavors should be postponed until after one's judicial service has ended.

Reference:

North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 3A(6)
Canon 4A
Canon 4C
Canon 5A
Canon 5B(2)
Canon 5C(1)
Canon 5C(7)

FORMAL ADVISORY OPINION: 2010-04

May 14, 2010

QUESTION:

May an emergency or retired/recalled judge ethically accept an appointment to concurrently serve as a compensated appellate judge for a Native American tribal court?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined an emergency or retired/recalled state court judge may ethically accept an appointment to concurrently serve as an appellate judge for a Native American tribal court. Such dual service is conditional upon the impartial, independent and proper discharge of the judge's state court judicial duties.

DISCUSSION:

Service as an emergency or retired/recalled state court judge is part-time and compensated on a per diem basis. Emergency or retired/recalled judges are free to decline an offered commission to hold court. Therefore there is little likelihood the dual appointments would conflict. During the course of such dual service, the judge should be vigilant and disqualify from any matter in which his/her impartiality could reasonably be called into question. The public report provisions of Canon 6C will require the judge to report compensation in excess of $2,000.00 received for service as an appellate judge for a Native American tribal court.

Reference:

North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 3C(1)
Canon 6

STATE OF NORTH CAROLINA v. TRAVIS BERNARD THOMAS, DEFENDANT

NO. COA08-515

(Filed 5 May 2009)

1. Rape— assault on female as lesser alternate charge—instruction denied

The trial court in a prosecution for rape and kidnapping correctly denied a request for an instruction on assault on a female as a lesser alternative charge to first degree rape as provided under N.C.G.S. § 15-144.1, under which defendant was indicted. The conduct on which defendant relied occurred during the kidnapping rather than the rape; the statute does not provide that the short form indictment is sufficient to support convictions on events not directly related to the rape.

2. Kidnapping— second degree—evidence sufficient

There was sufficient evidence of second degree kidnapping where defendant threatened the victim with a gun while she was in his car; grabbed her and pulled her back into the car when she tried to escape, spraying her with mace; drove her away from her car and children and told her that he had his hand on a rifle's trigger and would kill her if she tried to jump out; stopped the car and again forced her into the car at gunpoint when she jumped; and drove to a secluded, wooded area where he raped her. Additionally, the jury could have concluded that defendant deceived the victim into voluntarily going with him by telling her he had something important to show her, which is sufficient for a conviction of kidnapping.

Judge ELMORE concurring in the result.

Appeal by defendant from judgments entered 15 November 2007 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 8 October 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Joyce S. Rutledge, for the State.

Robert W. Ewing for defendant-appellant.

GEER, Judge.

Defendant Travis Bernard Thomas appeals from the judgments and commitments imposing sentences for second degree kidnapping

and first degree rape. Defendant primarily argues on appeal that the trial court should have instructed the jury on the offense of assault on a female as a lesser alternative charge to first degree rape as provided in N.C. Gen. Stat. § 15-144.1 (2007). Because the conduct that defendant relies upon as supporting a charge of assault on a female is unrelated to the conduct that gave rise to the first degree rape charge, we hold that the trial court properly, under N.C. Gen. Stat. § 15-144.1, declined to instruct the jury regarding assault on a female.

Facts

The State's evidence tended to show the following facts. From 2000 to 2006, defendant was romantically involved with "Jane" while both lived in Wilson, North Carolina.[1] In April or May 2006, the two ended their romantic relationship, and defendant moved to Georgia. According to Jane, she broke up with defendant because of his tendency to "date other women" and her realization that she "could do better." Between April 2006 and 20 November 2006, Jane spoke with defendant five or six times on the phone. Jane reported that the communication "wasn't hostile, but it wasn't pleasant either."

In November 2006, defendant made a visit to North Carolina to see his mother. In early November, defendant and Jane had dinner, but Jane did not want to see him again although defendant made frequent phone calls to her while he was still in North Carolina. On 20 November 2006, defendant called Jane on her cell phone and told her that he had something "really important" to show her before he returned to Atlanta. When Jane told him that she was on her way home with her son and nephew, he told her that he would meet her at her house.

Defendant arrived a little after 9:00 p.m. Jane agreed to accompany him to see what he wanted to show her, but only if she could bring the two boys with her because they had not spent any time together that day. She expected to return home within 20 to 30 minutes and left wearing her bedroom slippers.

Jane followed defendant's car in her own. She noticed that defendant was driving further and further into the countryside. Because she was becoming concerned about the distance, she used her cell phone to call defendant's cell phone and ask where they were going. She got his voice mail, but he called her back and told her that

1. We use the pseudonym "Jane" to protect the privacy of the prosecuting witness.

they were "almost here" and immediately turned into an abandoned area with an older house and several barns. Defendant told Jane that the farm had belonged to his grandmother, that he had grown up on it, and that he had recently purchased it.

Defendant then convinced Jane to get into his car where they talked for a while. Defendant told Jane, "I just want to know what we are." She replied, "We are friends. If the Lord decides to do something different, you know, intervene and [to] change things, then fine. But, right now, I think it's best for us just to be friends." He responded, "See. That's all I wanted. I just wanted you to be honest with me." Defendant then told her that he had "got something" for her "in case [they did not] see [each other] again."

Defendant went to his trunk and retrieved an object wrapped in a blue blanket. After he got back into the car, he told Jane, "Turn your head to the left side and count to 20." She replied, "What? You done lost your mind." He urged her, saying "I'm going to surprise you. I'm going to surprise you." Jane testified that she heard something click and asked defendant if he had a gun inside the blanket. He denied it, saying that he was afraid of guns. After she heard another click, Jane grabbed the blanket and felt the barrel of a gun.

At that point, Jane tried to escape from the car, but defendant sprayed her with mace and drove off, leaving the two boys alone in Jane's car. The boys saw that defendant had driven off while Jane was trying to get out of the car—her feet were initially being dragged along the road. Jane's son called his father, Dwight Joyner. Joyner set out to find the boys and called 911 twice to summon the police.

Jane asked defendant what he was doing, and he responded: "Shut the fuck up. Shut up. Shut up. I'm so damn tired of you. Now, I'm in control. I'm in damn control now. Shut the fuck up." Jane begged defendant not to kill her. He replied, "Shut up. . . . [Jane], you jump out of the car, I got my hand on the trigger. I will kill you." She pled with him some more, asking him to think of her son, her nephew, defendant's daughters, and their pastor.

Jane then jumped out of defendant's car while it was still moving. She suffered a number of injuries to her head, foot, knees stomach, and arms from hitting the road. Defendant stopped the car, put a rifle to her head, and threatened, "If you holler, I'll kill you." He then dragged her back to the car, scraping her stomach raw, and put her back inside. He drove to a secluded, wooded area and told her to pull

her pants down. She said that she could not move, so he removed her pants and got on top of her. He then had sexual intercourse with her. Jane was unable to push him off because her arm was injured.

After defendant finished, he said, "Man, see. It wasn't supposed to go down like this, man. It wasn't supposed to go down like this." Jane asked him to take her back to the boys so that they could go to the emergency room, and she promised not to tell anybody about the rape. Defendant explained that the road they were on was a loop and started driving again. As they went around the loop, she saw flashing lights and realized that the boys had turned on the hazard lights and that she was near her car. She again jumped out of defendant's car and ran to her own. Defendant then drove off.

Jane tried to drive back to her house, but had trouble seeing because the mace was still burning her eyes. As Jane was trying to drive home, they encountered Joyner, her son's father. The police and emergency medical technicians met Jane at her house and took her to the emergency room. Jane reported that defendant had raped her. Officers could smell the odor of mace on Jane. When inspecting the crime scene, officers found Jane's bedroom slippers in the middle of the road.

The next day, defendant contacted the Sheriff's Department in Wilson County to ask whether there were any warrants for his arrest. He told Detective Williams that he had raped someone, "but it wasn't like that." He ultimately gave a voluntary statement to the Greene County Sheriff's Department that same day in which he admitted many of the events described by Jane, but claimed that they had consensual sex. Defendant acknowledged, however, that Jane had injured herself when jumping out of his car and that he had asked if she wanted to go to the emergency room.

The SBI seized defendant's car and collected a .22 rifle, an empty .22 ammunition box, duct tape, handcuffs, binoculars, and handwritten letters. In one letter, defendant wrote: "You have done played with my feelings long enough. Now it's time for payback." Defendant also wrote: "I have taken enough shit from you, and this is the last straw. I know people will be shocked and hurt, but I can't take someone playing games with me and my feelings." He ended by saying that he was "[s]orry" to his parents, siblings, Jane's mother, Jane's son, and Jane's nephew.

Defendant was indicted for first degree kidnapping and first degree rape. At trial, defendant testified on his own behalf, asserting

that the sexual intercourse was consensual. He admitted that he removed a rifle from his trunk, wrapped it in a blue blanket, and moved it to the back seat, but claimed that he never displayed it to Jane. He testified that his can of pepper spray "went off by accident." On cross-examination, the prosecutor asked, "So how did you get consensual sex out of somebody who had a broken arm, a stomach that was ripped up, a knee that had injuries on it, feet that had injuries . . . ?" Defendant explained that he only knew that Jane's arm was hurting and that her eyes were watering from the mace; he learned about her other injuries later. He explained: "There was never no pushing, no, 'Get off me,' screaming. It's the same way we've been having sex. The difference is at that particular night her arm was hurting." He added: "She didn't say no."

The jury convicted him of first degree kidnapping and first degree rape. The trial court sentenced defendant to a presumptive-range sentence of 216 to 269 months for the first degree rape conviction. The trial court arrested judgment on the first degree kidnapping charge and sentenced defendant for second degree kidnapping to a consecutive presumptive-range sentence of 24 to 38 months. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred by denying his request that the court instruct the jury on the lesser alternative offense of assault on a female. Defendant acknowledges that assault on a female is not a lesser included offense of rape. *See State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) ("We, therefore, conclude that assault on a female is not a lesser included offense of rape, because assault on a female contains elements not present in the greater offense of rape."). Defendant argues, however, that he was entitled to an assault on a female instruction by virtue of N.C. Gen. Stat. § 15-144.1.

The State, in charging defendant with first degree rape, used a short form indictment pursuant to N.C. Gen. Stat. § 15-144.1, which provides that an indictment pursuant to that statute is sufficient to charge not only first degree rape, but also second degree rape, attempted rape, or the lesser alternative charge of assault on a female. The effect of N.C. Gen. Stat. § 15-144.1 is that, even if the conduct that is the subject of the indictment is not sufficient to constitute rape, the State may still obtain a conviction, with respect to that conduct, for assault on a female.

In this case, defendant did not dispute that vaginal intercourse occurred, but claimed that it was consensual. On appeal, defendant contends that the jury could reasonably have believed that the intercourse was consensual, but still have found him guilty of assault on a female based on (1) his threat, while holding a rifle, to kill Jane if she left his vehicle; (2) his spraying mace in Jane's face; and (3) his dragging Jane back to his vehicle when she attempted to escape. Defendant's reasoning is, however, flawed because the short-form indictment related to one set of actions—defendant "unlawfully, willfully, and feloniously did ravish and carnally know [Jane] by force and against the victim's will"—while defendant's evidence of assault on a female involves conduct not the subject of the indictment. That conduct occurred during the course of Jane's kidnapping, but not during the "carnal[] know[ing]."

N.C. Gen. Stat. § 15-144.1 cannot reasonably be read to provide that the short-form rape indictment is sufficient to support a conviction based on events not directly relating to the alleged rape. While, in this case, such a reading would benefit the defendant, it would raise serious notice concerns if the State, unable to prove rape or attempted rape, could nonetheless obtain a conviction for an uncharged assault occurring before or after the sexual encounter.

This conclusion is supported by this Court's decision in *State v. Jeffries*, 57 N.C. App. 416, 291 S.E.2d 859, *appeal dismissed and disc. review denied*, 306 N.C. 561, 294 S.E.2d 374 (1982). Although this Court, in *Jeffries*, did not specifically address the short-form indictment statute, the Court addressed an argument identical to the one made here. In *Jeffries*, the defendant had been indicted for and convicted of second degree rape. At the time of the *Jeffries* decision, our Supreme Court had not yet held that assault on a female is not a lesser included offense of rape. Thus, the procedural posture in *Jeffries* was the same as the one here: the indictment for rape could support the submission of the charge of assault on a female as a lesser included offense of rape.

The defendant in *Jeffries* contended at trial that the sexual intercourse had been consensual. On appeal, the defendant argued that "two sets of occurrences" during the incident at issue could arguably have supported a verdict of assault on a female. *Id.* at 418, 291 S.E.2d at 860. "The first set of occurrences consist[ed] of defendant's wrestling with [the victim], kissing her, and pressing his body on hers." *Id.* This Court identified the question as to the first set of

occurrences as "whether the evidence of these occurrences, coupled with defendant's evidence that [the victim] consented to having intercourse with defendant, is evidence of the lesser included offense of assault on a female." *Id.*

In rejecting the defendant's contention that this evidence supported submission of assault on a female to the jury, the Court reasoned:

> Assault is a requisite element of assault on a female, and is defined as an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. Although defendant's wrestling, kissing, and pressing himself against another without that other's consent may constitute assault, when such acts are merely the preliminaries to consensual sexual intercourse they can hardly suffice as an overt act of force and violence to do harm to another sufficient to put a reasonable person in fear of bodily harm. In the present case, the occurrences portrayed by defendant's evidence involve nothing more than consensual contact between [the victim] and defendant, prior to their act of intercourse; such contact could not constitute assault. The evidence under consideration presents a situation in which the jury could not reasonably find that defendant's intercourse with [the victim] was consensual and therefore that he did not commit the offense charged in the indictment, but that he did commit the lesser included offense of assault on a female; hence, with respect to the first set of circumstances, it was not error to withdraw the lesser included offense from the jury's consideration.

Id., 291 S.E.2d at 860-61 (internal citations omitted).

The Court then turned to the defendant's second set of circumstances: "that defendant hit [the victim] in the face while trying to have intercourse with her after she hit him." *Id.* at 419, 291 S.E.2d at 861. The Court stated that "[t]he question this set of circumstances poses is whether defendant's evidence that he had consensual sexual intercourse with [the victim] and that he hit her after she hit him constitutes evidence of the lesser included offense of assault on a female." *Id.*

With respect to this evidence, the Court held:

> "[O]ffenses are not the same if, upon the trial of one, proof of an additional fact is required which is not necessary to be proven in the trial of the other . . . ." *State v. Freeman*, 162 N.C. 594, 596, 44 S.E. 780, 781 (1913). The circumstances presently under consideration constitute evidence that defendant committed two separate and distinct offenses. First, there was evidence tending to show his commission of second degree rape, which, according to G.S. § 14-27.3, is vaginal intercourse with another person by force and against the will of that other person; second, there was evidence that defendant committed an assault on a female completely independent of and distinct from, as opposed to being inherent in and incident to, his forceful intercourse with [the victim] against her will. Proof of the assault on a female required evidence which was not necessary to the proof of second degree rape, to wit, evidence that defendant hit [the victim] while having intercourse with her; in its proof of second degree rape, the State did not need to rely on this evidence of defendant's blow to [the victim], since there was ample evidence that he had used other forceful measures to subdue [the victim] and subject her to intercourse against her will. In fact, defendant's own testimony was that he did not hit [the victim] until he was already having intercourse with her. Hence, the evidence under consideration is of two distinct offenses involving distinct occurrences, and is not of a greater offense and a lesser included offense.

Id. at 419-20, 291 S.E.2d at 861.

The Court pointed out that defendant had only been indicted for second degree rape "and not for any distinct offense, arising from another set of acts, of assault on a female." *Id.* at 420, 291 S.E.2d at 861. The Court stressed: " 'It is essential to jurisdiction that a criminal offense be charged in the warrant or indictment upon which the State brings the defendant to trial.' " *Id.*, 291 S.E.2d at 861-62 (quoting *State v. Vestal*, 281 N.C. 517, 520, 189 S.E.2d 152, 155 (1972)). The Court then concluded that "[s]ince there was no indictment for the separate offense of assault on a female, the court did not err in withdrawing such offense from the jury's consideration of possible verdicts." *Id.*

Jeffries is consistent with the Supreme Court's opinion in *State v. Edmondson*, 302 N.C. 169, 273 S.E.2d 659 (1981). In *Edmondson*, our Supreme Court held:

> [W]here all the evidence reveals a completed act of sexual intercourse and the only dispute is whether the act was accomplished by consent or by force, the lesser included offenses of assault with intent to commit rape and assault upon a female need not be submitted to the jury. This is because lesser included offenses must be submitted only where there is evidence to support them. Where the only dispute is whether an admitted act of sexual intercourse was accomplished by consent or by force there is no evidence of assault with intent to commit rape or assault upon a female; hence it is firmly established that these lesser included offenses need not be submitted to the jury.

Id. at 171, 273 S.E.2d at 660 (internal citations omitted).

The defendant, in *Edmondson*, argued, however, not unlike the defendant in this case, that he was entitled to a charge of the lesser offense of assault with intent to commit rape "on the basis of incidents which might have preceded the sexual intercourse." *Id.* at 172, 273 S.E.2d at 661. In rejecting this argument, the Court reasoned:

> When a defendant charged with rape admits that he had sexual intercourse, we believe the better view to be that neither the state nor the defendant is entitled to have the jury consider a lesser included offense on the basis of incidents which might have preceded the sexual intercourse because the bill of indictment charging only rape does not encompass such earlier incidents. It is directed only to the sexual intercourse itself. On the *rape* indictment, the question of whether defendant is guilty of some crime which might have preceded the sexual intercourse simply does not arise. If the state contends defendant committed some other crime, such as assault, prior to the rape itself, it should file a separate indictment or add a count to the rape indictment charging this other crime.

Id. at 172-73, 273 S.E.2d at 661. The Court then flatly held: "[W]here the only dispute is whether an admitted act of sexual intercourse was accomplished by consent or by force the lesser included offenses of assault with intent to commit rape and assault upon a female should not be submitted to the jury." *Id.* at 173, 273 S.E.2d at 661. *See also State v. Davis*, 291 N.C. 1, 13, 229 S.E.2d 285, 293 (1976) ("[T]he rule has been in prosecutions for rape that when all the evidence tends to show a completed act of intercourse and the only issue is whether the act was the prosecuting witness's consent or by force and against her

will, it is not proper to submit to the jury lesser offenses included within a charge of rape.").

We hold that *Edmondson* and *Jeffries* are controlling in this case. The reasoning in those two cases applies with equal force whether the offense of assault on a female is considered a lesser included offense or a lesser alternative offense.

The concurring opinion asserts that this reasoning "forecloses the use of § 15-144.1 to support any conviction for assault on a female, which renders that portion of § 15-144.1 a nullity." The concurring opinion then explains its position more specifically: "The majority opinion appears to foreclose the possibility of using a short form rape indictment to support a conviction for assault on a female when intercourse with the victim is consensual, but any attendant violence against the victim is not."

The fact that a lesser charge of assault on a female would not be available when a defendant asserts that the intercourse was consensual does not, however, nullify the reference in N.C. Gen. Stat. § 15-144.1 to assault on a female. A jury could find a defendant not guilty of rape based on evidence that defendant's penis had not vaginally penetrated the victim. *See* N.C. Gen. Stat. § 14-27.2 (2007) (specifying that first degree rape requires "vaginal intercourse"); N.C. Gen. Stat. § 14-27.3 (2007) (specifying that second degree rape requires "vaginal intercourse"); *State v. Watson*, 179 N.C. App. 228, 247, 634 S.E.2d 231, 243 (2006) ("Vaginal intercourse is defined as 'the slightest penetration of the female sex organ by the male sex organ.' " (quoting *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984))), *disc. review denied*, 361 N.C. 437, 649 S.E.2d 896 (2007). A defendant contending that no penetration occurred could, depending on the precise nature of the evidence, seek instructions on the lesser offenses of attempted rape or assault on a female. Under those circumstances, there would be evidence of "lesser offenses embraced within the indictments" warranting submission to the jury of those offenses. *State v. Bynum*, 282 N.C. 552, 557, 193 S.E.2d 725, 728, *cert. denied*, 414 U.S. 836, 869, 38 L. Ed. 2d 72, 116, 94 S. Ct. 182 (1973). Accordingly, the result in this case does not "nullify" any portion of N.C. Gen. Stat. § 15-144.1.

In this case, in support of his argument that a jury could reasonably have found defendant not guilty of rape, but guilty of assault on a female, defendant points, on appeal, only to conduct unrelated to the sexual intercourse that was the subject of the rape indictment.

Indeed, the conduct in this case—threatening Jane with a rifle if she left the car, macing her, and dragging her back to the car after an escape attempt—was even less connected to the charged rape than in *Jeffries*, where the defendant hit the victim during the sexual intercourse. None of the incidents relied upon by defendant on appeal were necessary for the State to obtain a conviction for rape and, therefore, as in *Edmondson* and *Jeffries*, in the absence of a separate indictment for assault on a female, the trial court did not err in refusing to instruct the jury on the offense of assault on a female.

II

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the kidnapping charge for insufficient evidence.

> "Our review of the trial court's denial of a motion to dismiss is well understood. [W]here the sufficiency of the evidence . . . is challenged, we consider the evidence in the light most favorable to the State, with all favorable inferences. We disregard defendant's evidence except to the extent it favors or clarifies the State's case. When a defendant moves for dismissal, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion."

State v. Hinkle, 189 N.C. App. 762, 766, 659 S.E.2d 34, 36-37 (2008) (quoting *State v. Dexter*, 186 N.C. App. 587, 594-95, 651 S.E.2d 900, 905 (2007), *disc. review denied*, 362 N.C. 178, 658 S.E.2d 658 (2008)).

A person is guilty of second degree kidnapping if, in addition to certain other elements, he is found to have "unlawfully confine[d], restrain[ed], or remove[d] from one place to another, any other person 16 years of age or over without the consent of such person[.]" N.C. Gen. Stat. § 14-39 (2007). Defendant points to *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978), in which our Supreme Court stated:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant

> for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

Defendant argues that, in this case, the State failed to prove that defendant restrained the victim beyond the restraint inherent in the commission of first degree rape.

> This Court has explained:
>
> In determining whether the restraint is sufficient for a kidnapping charge: The court may consider whether the defendant's acts place the victim in greater danger than is inherent in the other offense, or subject the victim to the kind of danger and abuse that the kidnapping statute was designed to prevent. The court also considers whether defendant's acts cause additional restraint of the victim or increase the victim's helplessness and vulnerability.

State v. Simpson, 187 N.C. App. 424, 432, 653 S.E.2d 249, 254 (2007) (internal quotation marks omitted). Moreover, "[a]sportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape." *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987).

Here, defendant threatened the victim with a gun while she was in his car. Then, when she tried to escape, he grabbed her and pulled her back into the car and sprayed her in the face with mace. He drove her away from her car and children and told her that if she tried to jump out, he had his hand on the rifle's trigger and he would kill her. When she jumped out, he stopped the car and again forced her back into the car at gunpoint. He drove to a secluded, wooded area and, only then, committed the rape.

This evidence is sufficient to establish that defendant confined, restrained, or removed the victim from one place to another place independent of the restraint required to undertake the rape. *See*, *e.g.*, *State v. Oxendine*, 150 N.C. App. 670, 676, 564 S.E.2d 561, 565 (2002) ("Defendant's act of forcing [the victim] to the bedroom at knifepoint in order to prevent her children from either witnessing or hindering the intended rape constituted a separate act and properly supports

the charge of first or second-degree kidnapping."), *disc. review denied*, 356 N.C. 689, 578 S.E.2d 325 (2003); *State v. Hill*, 116 N.C. App. 573, 583, 449 S.E.2d 573, 579 (holding that evidence of separate restraint was sufficient when defendant could have committed rape in front of store, but, before committing rape, defendant threatened victim with gun to force her to store restroom and tied her hands with telephone cable), *disc. review denied*, 338 N.C. 670, 453 S.E.2d 183 (1994); *Walker*, 84 N.C. App. at 543, 353 S.E.2d at 247 ("The facts in the instant case show that defendant, after threatening the victim with physical harm and forcing her back into the car, drove the car to a more secluded area, in back of one of the church buildings, before committing the rape. Defendant could have perpetrated the crime when he first stopped the car, but instead decided to take greater precautions to prevent others from witnessing or hindering his crimes. This additional action on defendant's part was sufficient to prevent dismissal of the kidnapping charge.").

In addition, the jury could have concluded that defendant deceived Jane into voluntarily going with him that evening by telling her he had something important to show her. Such deceit, unnecessary for the rape, is sufficient to support a conviction of kidnapping. *See State v. Sexton*, 336 N.C. 321, 365, 444 S.E.2d 879, 904 ("[D]efendant's evidence, if believed, sufficed to show trickery employed to accomplish removal . . . . Therefore, we conclude the trial court did not err in instructing the jury as to kidnapping that consent obtained or induced by fraud or by fear is not consent."), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429, 115 S. Ct. 525 (1994). The trial court, therefore, did not err in denying defendant's motion to dismiss.

No error.

Judge ROBERT C. HUNTER concurs.

Judge ELMORE concurs in the result in a separate opinion.

ELMORE, Judge, concurring in the result.

I concur in the result of Part I of the majority opinion but write separately to articulate my disagreement with part of the reasoning of the majority opinion. I concur fully in Part II of the majority opinion.

The majority opinion focuses on the due process concerns raised by the short form indictment for first degree rape, as set out in N.C.

Gen. Stat. § 15-144.1. I share in the majority's worry that "the State, unable to prove rape or attempted rape, could nonetheless obtain a conviction for an uncharged assault occurring before or after the sexual encounter." However, it seems that the majority opinion forecloses the use of § 15-144.1 to support any conviction for assault on a female, which renders that portion of § 15-144.1 a nullity.

The majority opinion relies on *State v. Jeffries*, a case that predates the Supreme Court's holding that assault on a female is not a lesser included offense of rape. 57 N.C. App. 416-17, 291 S.E.2d 860 (1982); *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988). In *Jeffries*, the defendant was charged with and convicted of second degree rape. *Jeffries*, 57 N.C. App. at 416, 291 S.E.2d at 859. He argued that he was entitled to instructions on the lesser included offense of assault on a female and put forth two possible "occurrences" that he argued could support a charge of assault on a female: (1) before penetration, he wrestled with the victim, kissed her, and pressed his body against hers; and (2) during intercourse, he hit the victim. *Id.* at 418, 291 S.E.2d at 860. With respect to the first "occurrence," we explored the hypothetical situation that the victim had consented to intercourse. *Id.*, 291 S.E.2d at 861. Assuming consent, we concluded that the defendant's acts of wrestling, kissing, and pressing his body against the victim's were part of his sexual "preliminaries" and could not be considered to be an assault. *Id.* Because a jury could not reasonably find both that the intercourse was consensual and that the "sexual preliminaries" constituted an assault on a female, the trial court properly withdrew the charge of assault on a female from jury consideration. *Id.* at 419, 291 S.E.2d at 861.

We then turned to the second "occurrence," during which the victim allegedly struck the defendant during hypothetically consensual intercourse and, in retaliation, the defendant struck her back, while still engaged in hypothetically consensual intercourse. *Id.* Again assuming that the intercourse was consensual, as the defendant alleged, we concluded the strike was "evidence that [the] defendant committed an assault on a female completely independent of and distinct from, as opposed to being inherent in and incident to, his forceful intercourse with [the victim] against her will." *Id.* The remainder of our analysis of the second occurrence focused on demonstrating that the strike and the rape involved "two distinct occurrences," rather than a "greater offense and a lesser included offense." *Id.* at 420, 291 S.E.2d at 861. We explained that because the strike had occurred after the two had already commenced in-

tercourse and was not used to subdue the victim, the strike could not be considered a lesser included offense of the rape. *Id.* at 419-20, 291 S.E.2d at 861. We concluded that, because the defendant had only been indicted for second degree rape, he could not be convicted of assault on a female based upon the strike during intercourse and thus was not entitled to an instruction on assault on a female. *Id.* at 420, 291 S.E.2d at 861-62.

The majority opinion relies upon *Jeffries* to explain why defendant's indictment does not support an instruction on assault on a female, but this reliance creates the following conundrum: A defendant who assaults a victim during consensual intercourse, as in the *Jeffries* hypothetical, cannot receive an instruction on assault on a female because the assault is not integral to the rape. However, a defendant who assaults a victim immediately before or after intercourse, but who alleges that the victim consented to the intercourse, also cannot receive an instruction on assault on a female because the assault is not integral to the rape. It appears, then, that there is not a set of facts that would support an instruction for assault on a female stemming from a rape indictment, despite the clear directive in N.C. Gen. Stat. § 15-144.1 that the short form rape indictment supports a verdict of assault on a female.

In my opinion, the *Jeffries* court was constrained by the existing rule that assault on a female was a lesser included offense of rape and, as a result, the reasoning is not completely transferable to the case at hand. In *Jeffries*, the scenario put forth by the defendant was that the victim consented to the intercourse, but not to the strike during the intercourse. That factual scenario appears to be the type that would support an instruction for assault on a female, were *Jeffries* before us today: the intercourse was consensual, but the attendant violence was not. The majority opinion appears to foreclose the possibility of using a short form rape indictment to support a conviction for assault on a female when intercourse with the victim is consensual, but any attendant violence against the victim is not. My worry is that the majority opinion too narrowly construes *Jeffries* and its application to the case at hand.

Nevertheless, I agree that defendant in this case was not entitled to an instruction on the lesser, alternative offense of assault on a female. As defendant correctly avers, a proper short-form indictment for first degree rape will also "support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female." N.C. Gen. Stat. § 15-144.1(a) (2007). How-

ever, simply because an indictment may support a particular charge, the trial court is not required to give that charge to the jury. Both our Supreme Court and the U.S. Supreme Court have held that "due process requires an instruction on a lesser-included offense only 'if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841 (1995) (quoting *Beck v. Alabama*, 447 U.S. 625, 635 65 L. Ed. 2d 392 (1980)). If "there is no evidence to negate [the elements of the crime charged] other than [the] defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of [a lesser included offense.]" *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 771 (2002) (quotations and citations omitted).

Here, the only evidence to negate the elements of first or second degree rape was defendant's denial that he raped the victim and his assertion that their intercourse was consensual. Moreover, the jury was given the choice between first degree and second degree rape and still returned a verdict of first degree rape after fewer than thirty minutes of deliberation. "The crime[s] of first degree rape and second degree rape contain essentially the same elements. The sole distinction between first degree rape and second degree rape is the element of the use or display of a dangerous weapon." *State v. Barkley*, 144 N.C. App. 514, 524, 551 S.E.2d 131, 138 (2001) (quotations and citation omitted). It is clear that the jury did not believe defendant's testimony that he did not use or display a dangerous weapon and found his testimony that their intercourse was consensual similarly incredible. A jury would not have rationally found defendant guilty of assault on a female and acquitted him of first or second degree rape. Accordingly, I agree that defendant was not entitled to an instruction on the lesser-included offense of assault on a female and that the trial court did not err by declining to so instruct the jury.

JERRY ALAN REESE, PLAINTIFF v. THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION AND COUNTY OF MECKLENBURG, NORTH CAROLINA, DEFENDANTS

No. COA08-397

(Filed 5 May 2009)

1. Evidence— consideration of exhibit—resolution—Interlocal Agreement

The trial court did not err in a declaratory judgment action by considering one of the exhibits, a written resolution, attached to defendant board of education's answer in deciding defendants' Rule 12(c) motion to dismiss because: (1) the resolution merely ratified and memorialized in writing the actions of the board at its 8 May 2007 meeting approving an Interlocal Agreement with the county; (2) under the specific circumstances of this case, the complaint made clear reference to the events of 8 May 2007 which was memorialized in the resolution; and (3) even assuming *arguendo* that it was error for the trial court to consider the resolution, any error was harmless since by plaintiff's own admission, the Interlocal Agreement was properly before the trial court.

2. Schools— board of education—transfer of property to county—compliance with statutes

A county board of education's proposed transfer of an office site to the county as part of a redevelopment plan in exchange for use of office space in a county government center plus funds for developing replacement space complied with statutes authorizing the board, "upon such terms and conditions as it determines," to exchange property it determined was no longer suitable or necessary for public school purposes, N.C.G.S. §§ 160A-274 and 115C-518, because the board's determination that the replacement office space in the government center was "more suitable" for its needs was adequate to meet the unnecessary or unsuitable requirement in N.C.G.S. § 115C-518. Furthermore, plaintiff failed to overcome the presumption of legality of the acts of public officials.

3. Schools— board of education—transfer of property to county—absence of bad faith

A proposed transfer of a county board of education's office property to the county in exchange for use of space in a county

government center as part of the county's plan for redevelopment was not so "hastily arranged" that the transfer was tainted by bad faith as an attempt to circumvent statutory requirements for the primary benefit of private developers where: (1) a letter sent by plaintiff to the board five months prior to a board resolution authorizing the exchange noted that the board's staff was then negotiating the "land swap" transaction; and (2) plaintiff failed to overcome the presumption of legality of acts of public officials.

4. Schools— board of education—county—exchange of property—not arbitrary or abuse of discretion

Plaintiff's complaint against a county board of education and the county regarding an agreement to exchange board property for county office space and certain funds as part of a county plan for redevelopment failed to state a claim that the conduct of public officials who entered the agreement was arbitrary and capricious and a manifest abuse of discretion where the complaint alleged that public officials acted to the detriment of other interested parties, but the complaint failed to allege that the public officials acted to enrich themselves or acted in wanton disregard of the public good, and the complaint did not recite any procedure or guideline that was allegedly violated.

5. Counties— exchange of property with board of education—statutory and special legislative authority

A county had authority to enter into an agreement with the county board of education under which the board agreed to transfer board property to the county, which the county would convey in part to a private developer for a mixed-use development, in exchange for office space in a county government center and funds to develop additional office space because: (1) the transaction clearly falls within the provisions of N.C.G.S. § 160A-274(b) which no longer contains a "for use by the county" restriction; (2) the county will retain a portion of the property for use as a public park; and (3) the county was authorized by special legislation to engage in such a transaction.

6. Schools— board of education—transfer of property—unilateral expectation of property interest—due process claim

Plaintiff's allegation that he and others similarly situated were not afforded a process whereby they could submit a proposal to purchase county board of education property which the

board transferred to the county as part of an exchange agreement stated only a unilateral expectation of a property interest in the board's site that was insufficient to support a due process claim.

7. Pleadings— overview section of answer—not scandalous or unresponsive—denial of motion to strike

The trial court did not err by denying plaintiff's motion to strike the overview section of defendant county's answer to plaintiff's complaint regarding an exchange agreement between the county and the county board of education as "scandalous material" or "unresponsive to any allegation" where the trial court found that the county's answer complied with the Rules of Civil Procedure, that the allegedly objectionable language ascribed a motive for plaintiff's institution of the litigation, and that the matter might have a bearing upon the litigation.

Appeal by plaintiff from judgment entered 12 October 2007 by Judge Lindsay R. Davis, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2008.

Jerry Alan Reese, pro se.

Womble Carlyle Sandridge & Rice, PLLC, by James P. Cooney III, and G. Michael Barnhill, for defendant Mecklenburg County.

Helms Mulliss & Wicker, PLLC, by James G. Middlebrooks and J. Trevor Johnston, for defendant Charlotte-Mecklenburg Board of Education.

STEELMAN, Judge.

Where plaintiff's complaint made clear references to the events memorialized in a Resolution, the trial court did not err in considering the document in deciding defendants' Rule 12(c) motion to dismiss, even though the document itself was not specifically referenced in the complaint. The transactions encompassed by an Interlocal Cooperation Agreement between the Charlotte-Mecklenburg Board of Education and Mecklenburg County were authorized by the General Statutes and Local Acts of the North Carolina General Assembly. Plaintiff's constitutional claims were based upon a unilateral expectation of a property interest and were properly dismissed. The trial court did not abuse its discretion in denying plaintiff's motion to strike.

I. Factual and Procedural Background

In January 2007, Mecklenburg County (County) entered into a Memorandum of Understanding with Cornerstone Real Estate Advisors, Inc. (Cornerstone) pertaining to the development and construction of Brooklyn Village, a mixed-use development to be located in Second Ward of the City of Charlotte. The Memorandum recited that County "owns or is in the process of acquiring 493,971 square feet of land located in Second Ward bounded by South McDowell Street, Third Street, Second Street and the First Baptist Church property . . . ." County agreed to swap a portion of this property for property owned by Cornerstone's parent company, with the balance of the land being retained by County for development as an urban park. The 493,971 square feet of property consists of two parcels: (1) a 5.91 acre parcel owned by the Charlotte-Mecklenburg Board of Education (Board), upon which its administrative offices are currently located; and (2) Marshall Park.

At its 1 May 2007 public meeting, the Mecklenburg County Board of Commissioners approved a resolution authorizing the execution of the Brooklyn Village Interlocal Cooperation Agreement with the Board. On or about 8 May 2007, the Board, by majority vote, approved the execution of the Brooklyn Village Interlocal Cooperation Agreement. This agreement referenced a 2002 Master Plan which was adopted by County, Board, and the City of Charlotte. It also referenced the Memorandum of Understanding between County and Cornerstone. It further recited:

> ***WHEREAS***, pursuant to G.S. 115C-518, the Board of Education desires to convey tax parcel #12507120 as shown on the map attached hereto as Attachment B (referred to as "BOE Office Building Site") to the County in exchange for more suitable replacement office space which (i) has a fair market value equal to or greater than the fair market value [of] the BOE Office Building Site which has been determined by appraisal to be $14,900,000 and (ii) provides equivalent or better utility to Charlotte-Mecklenburg Schools staff[.]

Under the terms of the Interlocal Agreement, Board agreed to convey to County its Office Building site. In exchange, County was to make available to Board $13,750,000.00 to develop additional replacement space, plus the use of one floor in the Government Center for twenty years. The agreement stated that the value of what was received by Board was not less than the fair market value of the Office Building

site. It was acknowledged that the Board property was "needed for an exchange with Cornerstone Real Estate Advisors which will allow the County to obtain a site in Third Ward . . . to be used as the site for a new County park and allow Cornerstone Real Estate Advisors and Spectrum Investment Services to develop Brooklyn Village." This agreement was executed by Board on 4 June 2007.

On 15 January 2007, plaintiff, writing on behalf of Brooklyn Renaissance, L.L.C., wrote to Dr. Peter C. Gorman, Superintendent of the Charlotte-Mecklenburg County Schools. In this letter, plaintiff expressed his opposition to the proposed interlocal agreement where Board's Office Property would be transferred to County. The letter acknowledged that the transaction had been reported to the County Commission at its 19 December meeting. It further demanded that other parties be given an opportunity to submit a proposal for acquisition of Board's Office Property and threatened to spend "3-5 years in litigation with CMS" if Board proceeded with the Interlocal Agreement. The letter closed with an offer to discuss plaintiff's plans for the Brooklyn Renaissance Project and how the Charlotte-Mecklenburg School properties would fit into these plans.

Plaintiff commenced this action (Mecklenburg County case 07 CVS 9456) by filing a summons and a notice of *lis pendens* on the Board of Education property on 11 May 2007. Plaintiff's complaint was filed on 31 May 2007 and asserted seven claims for relief as follows: (1) for a declaratory judgment that the proposed conveyance of Board's property was unlawful under the provisions of N.C. Gen. Stat. § 115C-518; (2) for a declaratory judgment that the proposed conveyance of Board's property was unlawful under the provisions of N.C. Gen. Stat. § 115C-518; (3) for a declaratory judgment that the proposed method of disposition of Board's property was unlawful under the provisions of N.C. Gen. Stat. § 160A-266; (4) for a declaratory judgment that Board abused its discretion in the proposed disposition of its property; (5) for a declaratory judgment that County's acquisition of Board's property was unlawful under the provisions of N.C. Gen. Stat. § 153A-158; (6) for a declaratory judgment that the actions of Board and County violated plaintiff's rights to due process and equal protection; and (7) for a preliminary and permanent injunction prohibiting Board from transferring the property to County.

On 4 June 2007, plaintiff filed a second complaint in Mecklenburg County Superior Court (case 07 CVS 9577) seeking to block County's acquisition of property from the City of Charlotte for part of the

Brooklyn Village project. Plaintiff also filed a notice of *lis pendens* on the property of the City of Charlotte. On 11 July 2007, the Chief Justice designated both cases as "exceptional" cases pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts (2007).

Defendants filed answers to plaintiff's complaint, denying the material allegations contained therein, and attached to their answers a number of exhibits, which included documents referenced in plaintiff's complaint. On 3 August 2007, defendants in both lawsuits filed motions to strike plaintiff's notice of *lis pendens*, and for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. On 17 September 2007, plaintiff filed a motion to strike a portion of County's answer pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure.

On 12 October 2007, the trial court filed an order encompassing both lawsuits that granted defendants' motions for judgment on the pleadings, dismissing both of plaintiff's actions. Defendants' motions to cancel the notices of *lis pendens* were also granted, and plaintiff's motion to strike was denied.

Plaintiff appeals.

II. Consideration of Document not Referenced in Plaintiff's Complaint

[1] In his first argument, plaintiff contends that the trial court erred in considering one of the exhibits attached to Board's answer. We disagree.

Board and County attached to their answers copies of certain documents. Plaintiff acknowledges that all but one of the documents were referred to in his complaint and were thus properly considered by the trial court. However, he contends that the written resolution entitled "Resolution Ratifying Execution Of The Brooklyn Village Interlocal Cooperation Agreement With The County Of Mecklenburg, North Carolina" (Resolution) (Exhibit B to Board's answer) was not referenced in the complaint and should not have been considered by the trial court. The Board approved the Brooklyn Village Interlocal Agreement (Exhibit A to Board's answer) at its 8 May 2007 meeting and authorized its chairman to execute the agreement. Plaintiff filed a summons on 11 May 2007 and his complaint on 31 May 2007. The Interlocal Agreement was signed on 4 June 2007, and the Resolution was signed on 26 June 2007.

Plaintiff argues that the Resolution was signed after he filed his complaint and could not possibly be referenced in his complaint. He further argues that by considering matters outside of the pleadings, the trial court converted defendants' Rule 12(c) motion into a Rule 56 motion for summary judgment, and he was entitled to respond to the motion and conduct discovery before the motion to dismiss was heard.

We review the trial court's granting of a Rule 12(c) motion *de novo*. *Carpenter v. Carpenter*, 189 N.C. App. 755, 659 S.E.2d 762, 764 (2008). A "document attached to the moving party's pleading may not be considered in connection with a Rule 12(c) motion unless the non-moving party has made admissions regarding the document." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 205, 652 S.E.2d 701, 708 (2007).

Plaintiff's complaint contains the following allegations relevant to the Resolution:

> 16. Upon information and belief, on May 1, 2007, the Mecklenburg County Board of County Commissioners approved a resolution authorizing the Chairman of the Board to execute a "Land Swap Interlocal Agreement" between Defendant County and CMS.
>
> 17. Upon information and belief, on or about May 8, 2007, the Charlotte-Mecklenburg Board of Education by majority vote authorized the Chairman of CMS to execute the land swap agreement.
>
> 18. Upon information and belief, on or prior to May 30, 2007, Defendant County, by and through its Chairman, Jennifer Roberts, executed that certain undated Brooklyn Village Interlocal Agreement between Defendant County and Defendant CMS (hereinafter referred to in this Complaint as the "Agreement").
>
> 19. Upon information and belief, the Agreement, executed by Defendant County, has been delivered to CMS and approved by its Director of Insurance and Risk Management and is pending signature by its Chairman, Joe White.
>
> 20. Upon information and belief, both Defendants have directed their respective staffs, administrative personnel and legal counsel to prepare appropriate documentation for the con-

> summation of the transactions contemplated by and described in the Agreement.

Plaintiff's complaint goes on to make multiple references to the Interlocal Agreement entered into between Board and County.

We first note that the Resolution merely ratifies and memorializes in writing the actions of Board at its 8 May 2007 meeting approving the Interlocal Agreement. Plaintiff's complaint expressly acknowledges this action and also that Board and its staff were moving forward to "prepare appropriate documentation." Plaintiff does not contend that Exhibit B to Board's answer is in any way inaccurate. We hold that under the specific circumstances of this case, where the complaint makes clear reference to the events of 8 May 2007, which was memorialized in the Resolution, that the trial court did not err in considering the Resolution in the context of defendants' Rule 12(c) motion to dismiss.

Further, even assuming *arguendo* that it was error for the trial court to have considered the Resolution, any error was harmless because, by plaintiff's own admission, the Interlocal Agreement was properly before the trial court.

This argument is without merit.

III. Statutory Claims

In his next two arguments, plaintiff contends that both defendants exceeded their statutory authority by agreeing to an exchange in which the Board site would ultimately be conveyed to a private third party. He further contends that he has alleged facts, which, when considered as true, demonstrate that Board cannot lawfully comply with the terms of the Brooklyn Village Interlocal Agreement because the Board site is crucial to its operations and is suitable and necessary for public school purposes.

Before analyzing plaintiff's arguments, we first review the relevant statutes and the rulings by the trial court.

A. Intergovernmental Exchanges

The current version of N.C. Gen. Stat. § 160A-274 provides that:

> (b) Any governmental unit may, upon such terms and conditions as it deems wise, with or without consideration, exchange with, lease to, lease from, sell to, or purchase from any other governmental unit any interest in real or personal property.

N.C. Gen. Stat. § 160A-274(b) (2007). Within its definition of "governmental unit," the statute includes any county and any school administrative unit. N.C. Gen. Stat. § 160A-274(a) (2007). The statute was amended in 2001 to eliminate a "joint use" clause from subsection (b).

Chapter 115C of the North Carolina General Statutes governs state and local educational agencies. Local boards of education are authorized to dispose of school property. N.C. Gen. Stat. § 115C-518 (2007). In relevant part, the statute requires that:

> When in the opinion of any local board of education the use of any building site or other real property or personal property owned or held by the board is unnecessary or undesirable for public school purposes, the local board of education may dispose of such according to the procedures prescribed in General Statutes, Chapter 160A, Article 12, or any successor provisions thereto. Provided, when any real property to which the board holds title is no longer suitable or necessary for public school purposes, the board of county commissioners for the county in which the property is located shall be afforded the first opportunity to obtain the property. The board of education shall offer the property to the board of commissioners at a fair market price or at a price negotiated between the two boards. If the board of commissioners does not choose to obtain the property as offered, the board of education may dispose of such property according to the procedure as herein provided. Provided that no State or federal regulations would prohibit such action.

N.C. Gen. Stat. § 115C-518(a) (2007).

Finally, defendant County has been authorized by the General Assembly to dispose of any real property interest by public sale or by negotiated private sale "when the Board of Commissioners determines that a sale or disposition of property will advance or further any county or municipality-adopted economic development, transportation, urban revitalization, community development, or land-use plan or policy." 2007 N.C. Sess. Law 33 (extending the limited authority first granted in 2000 N.C. Sess. Law 65, which included only five parcels of land fronting North College Street in the City of Charlotte, to include "property owned by Mecklenburg County").

B. Rulings of the Trial Court

The trial court held that plaintiff's complaint failed to state claims against Board upon which relief could be granted because Board's

actions were authorized under the applicable statutes. First, the trial court concluded that Board acted within its authority pursuant to N.C. Gen. Stat. § 115C-36 in determining the suitability of the Board site. Second, the trial court concluded that such a determination complied with N.C. Gen. Stat. § 115C-518, even though it did not put the determination in writing until after the complaint was filed. Regarding plaintiff's allegations that the transaction was a "sham" designed to circumvent statutory provisions, the trial court held that:

> The complaint alleges that the School Board had not previously considered disposing of its headquarters, and "hastily" considered the Agreement; and that board members were somehow pressured to approve it, without any formal disposition plan, and without considering alternatives or even consulting real estate professionals. These largely conclusory allegations are negated by the contents of documents attached to and made part of the pleadings, which show that CMS was approached about the matter months before the Agreement was authorized and entered [sic]; that CMS stood to receive in exchange for the Education Center property in excess of appraised value; and that CMS considered the considerable age of the property and infeasibility [of] renovation.

The trial court concluded that the Interlocal Agreement was lawful under N.C. Gen. Stat. § 160A-274(b).

Having dismissed plaintiff's statutory claims against Board, the trial court then dismissed plaintiff's statutory claims against County on the basis that its acquisition of the Board site was authorized under the provisions of N.C. Gen. Stat. § 160A-274(a).

C. Standard of Review

Insofar as plaintiff's arguments involve matters of statutory interpretation, our standard of review is *de novo*. *In re Appeal of Murray*, 179 N.C. App. 780, 786, 635 S.E.2d 477, 481 (2006). We do note that there is a presumption of legality afforded to public officials. *Gregg v. Commissioners*, 162 N.C. 479, 484, 78 S.E. 301, 302 (1913).

Regarding the specificity of the pleadings, "[t]he purpose of Rule 8(a) is to establish that the plaintiff will be entitled to some form of relief should he prevail on the claim raised by the factual allegations in his complaint[.]" *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 346, 452 S.E.2d 233, 237 (1994).

D. Plaintiffs' Claims Against the Board[1]

[2] In his second argument, plaintiff contends that the trial court erred in its determination that Board properly acted under N.C. Gen. Stat. §§ 115C-36, 115C-518, and 160A-274(b). We disagree.

1. Unlawful Disposition and Conveyance Claims

Plaintiff contends that the trial court erred in dismissing his first two claims against Board because: (1) Board was first required to determine that the subject property was unsuitable and unnecessary for public school purposes; (2) Board's continued occupancy of the building on the disputed property demonstrates that the site is necessary under Chapter 115C; and (3) the failure of Board to determine that the site was unsuitable or unnecessary renders its actions unlawful under Chapter 115C.

Having reviewed the record, we cannot agree with plaintiff's assertions that these claims sufficiently alleged any claim upon which he would be entitled to relief. *Holloway* at 346, 452 S.E.2d at 237. The Board's resolution to authorize its Chairman to approve the Brooklyn Village Interlocal Agreement is afforded a presumption of legality and correctness. *Gregg* at 484, 78 S.E. at 302. N.C. Gen. Stat. §§ 160A-274 and 115C-518 authorized Board, "upon such terms and conditions as it deems wise," to exchange property owned by Board, based upon a determination that the property was no longer suitable and necessary for public school purposes. Board determined that the replacement office space in the Government Center was "more suitable" for its needs. We hold that: (1) this determination is adequate to meet the unnecessary or unsuitable requirement of N.C. Gen. Stat. § 115C-518, and (2) plaintiff has failed to overcome the presumption of legality afforded public officials. *Gregg* at 484, 78 S.E. at 302.

This argument is without merit.

2. Allegations Involving N.C. Gen. Stat. § 160A-266

[3] In his Third Claim for Relief, plaintiff sought a declaratory judgment that the Agreement represented "an unlawful 'sham' transaction structured and arranged for the sole purpose of circumventing the statutory requirements [of] (N.C.G.S. §160A-266) and for the primary benefit" of private developers. Plaintiff argues that the planned conveyance merely interposed County as a "strawman" to circumvent legislative limits on Board's authority to dispose of the property in a

1. First, Second, Third, and Fourth Claims for Relief.

private sale. We have already determined that the transactions at issue were authorized by statute. We consider this argument only to the extent that plaintiff alleged that the transaction was "hastily arranged" and thus tainted.

A "mere assertion of a grievance" against a governmental entity is insufficient to state a claim for relief. *Alamance County v. Dept. of Human Resources*, 58 N.C. App. 748, 750, 294 S.E.2d 377, 378 (1982) (some degree of factual particularity is required to satisfy the requirements of the substantive law giving rise to the pleadings).

Plaintiff alleged that Board "considered none of the available statutory methods for the disposition of the Education Center Property, but instead has in bad faith engaged in a hastily arranged structuring of a transaction to circumvent the public property disposition statutes for the sole benefit of Cornerstone/Spectrum[.]"

Plaintiff must overcome the presumption of legality afforded to public officials. *Gregg*, 162 N.C. at 484, 78 S.E. at 302. Moreover, where a source document, attached as an exhibit, is referred to by the pleadings, and its terms are inconsistent with the language of the pleading, the terms of the source document control. *See Wilson v. Development Co.*, 276 N.C. 198, 206, 171 S.E.2d 873, 879 (1970) ("The terms of such exhibit control other allegations of the pleading attempting to paraphrase or construe the exhibit, insofar as these are inconsistent with its terms."); *Hall v. Refining Co.*, 242 N.C. 707, 711, 89 S.E.2d 396, 399 (1955) (sustaining demurrer where contracts, incorporated in the complaint by amendment, "neutralized the allegations of the original complaint and put to naught the cause of action asserted therein"); *Williamson v. Miller*, 231 N.C. 722, 726, 58 S.E.2d 743, 746 (1950) (looking to the provisions of the contract attending the complaint rather than "the more broadly stated allegations . . . or the conclusions of the pleader as to its character and meaning").

In the instant case, plaintiff's allegations refer to his 7 January 2007 demand letter to Board. The first sentence of the letter states:

> I am informed and believe that CMS staff is currently negotiating an inter-governmental agreement whereby CMS would relinquish title to the [Board site] as part of the so-called "Third Ward land swap" transaction. I am writing to express my adamant opposition to the transaction and the procedures being used by CMS in the contemplated disposition of this valuable public asset.

Because the letter was referenced in the complaint, it was properly before the court as part of the pleadings. *Wilson*, 276 N.C. at 206, 171 S.E.2d at 879. The letter pre-dates Board's May 2007 resolution by five months. We hold that the language of the letter controls over plaintiff's allegations, *id.*, and refutes his argument that the exchange of properties contemplated by the Interlocal Agreement was hastily arranged. Plaintiff's third claim failed to overcome the presumption of legality afforded to acts by public officials. *Gregg*, 162 N.C. at 484, 78 S.E. at 302. The trial court correctly concluded that plaintiff's allegations were grievances, *Alamance County*, 58 N.C. App. at 750, 294 S.E.2d at 378, rather than allegations sufficient to demonstrate bad faith circumvention of the law.

This argument is without merit.

3. Discretionary Powers of the Board

[4] Plaintiff contends that the allegations in his Fourth Claim for Relief were sufficient to withstand defendants' motion because they are "more than adequate" to show arbitrary and capricious conduct and a manifest abuse of discretion by Board. Plaintiff contends that the complaint alleges the following: The Interlocal Agreement was presented to Board only minutes before its consideration and approval; prior to its consideration of the Interlocal Agreement or the meeting where the Agreement was approved, Board had no plan for disposition of the Board site, had not engaged a consultant or real estate broker to advise it on the most effective means of disposal, or evaluated or considered any alternative disposition method which would have yielded a greater financial benefit; Board was "pressed into a hasty approval" of the Agreement by County. Specifically, plaintiff alleged that defendants "actions . . . are in bad faith with the primary motive of enriching Cornerstone and Spectrum to the detriment of other parties who might be interested in purchasing or developing the Education Center Property."

In support of his arguments, plaintiff cites three cases that predated the legislature's enactment of N.C. Gen. Stat. § 160A-274. In particular, he relies upon *Barbour v. Carteret County*, 255 N.C. 177, 120 S.E.2d 448 (1961), for the proposition that "allegations that . . . [c]ounty commissioners paid twice the value for land without proper investigation stated a cause of action for arbitrary conduct and abuse of discretion."

In *Barbour*, our Supreme Court reversed a judgment sustaining a demurrer when the *Barbour* defendants "admit[ted that] the commis-

sioners [had], without appraisal or other investigation as to value and for reasons known only to them, hastily agreed to pay $75,000 for property reasonably worth less than half that sum." *Id.* at 182, 120 S.E.2d at 452. In the instant matter, plaintiff's complaint does not allege, nor do defendants' answers admit, that either defendant had agreed, hastily or otherwise, to pay or exchange property for less than the appraised or fair market value.

The *Barbour* Court stated that:

> Courts have no right to pass on the wisdom with which [county commissioners] act. Courts cannot substitute their judgment for that of the county officials honestly and fairly exercised. For a court to enjoin the proposed expenditure, there must be allegation and proof that the county officials acted in wanton disregard of public good. *Burton v. Reidsville*, 243 N.C. 405, 90 S.E.2d 700; *Kistler v. Board of Education*, 233 N.C. 400, 64 S.E.2d 403; *Waldrop v. Hodges*, *supra*; *Jackson v. Commissioners*, 171 N.C. 379, 88 S.E. 521; *Commissioners v. Commissioners*, 165 N.C. 632, 81 S.E. 1001; *Newton v. School Comm.*, 158 N.C. 186, 73 S.E. 886; *Jeffress v. Greenville*, 154 N.C. 490, 70 S.E. 919.

Id. at 181, 120 S.E.2d at 451. Although plaintiff's complaint alleges that the public officials acted "to the detriment of other [interested] parties[,]" there are no allegations that those officials acted to enrich themselves or in wanton disregard of the public good. We hold that plaintiff's complaint failed to satisfy the pleading requirements of *Barbour*, and his reliance on *Barbour* is misplaced.

Before this Court, plaintiff orally argued that his pleadings alleged customary procedures in the marketplace that demonstrated Board's failure to follow its own procedures for disposing of property. This argument is disingenuous. Plaintiff's complaint does not recite a single procedure or guideline of either Board or County, much less allege that such procedures were violated.

This argument is without merit.

E. Plaintiffs' Claims Against the County[2]

[5] In his third argument, plaintiff contends that the trial court erred in its determination that County was authorized to enter into the exchange of properties because N.C. Gen. Stat. § 153A-158 limits its authority to acquire land "for use" by County, and County has no plans to use the Board site. We disagree.

2. First, Second, Third, and Fifth Claims for Relief.

Plaintiff's primary argument is that N.C. Gen. Stat. § 160A-274 is not independent authority that obviates the limitations established by N.C. Gen. Stat. § 153A-158. He contends that intergovernmental exchanges involving acquisition of land by a county must still comply with the provisions of § 153A-158, and that, under *Carter v. Stanly County*, 125 N.C. App. 628, 482 S.E.2d 9, *disc. review denied*, 356 N.C. 276, 487 S.E.2d 540 (1997), County may not acquire the property to convey it to a private developer. County asserts that N.C. Gen. Stat. § 160A-274 is independent authority.

In *Carter*, Stanly County sought to purchase privately-owned land as an enticement to the State for the building of a prison. The *Carter* plaintiff sought declaratory judgment that the proposed transaction exceeded Stanly County's statutory authority under N.C. Gen. Stat. §§ 153A-158 and 160A-274(b). The trial court dismissed the complaint, and Carter appealed. Before this Court heard the appeal, the General Assembly enacted legislation authorizing the transaction. 1996 N.C. Sess. Law 600. This Court first analyzed Stanly County's authority under the general statutes and Dillon's Rule[3], concluding that, absent the special statute, the transaction would indeed exceed Stanly County's authority. Instead, the Court concluded that "Stanly County's actions are now authorized by the General Assembly." *Carter*, 125 N.C. App. at 634, 482 S.E.2d at 13.

Plaintiff's argument rests entirely upon *Carter's* analysis of N.C. Gen. Stat. §§ 153A-158 and 160A-274(b) and its application of Dillon's Rule to hold that, in the absence of the special legislation authorizing the transaction, Stanly County was not authorized to consummate the transaction. However, this analysis is not applicable to the facts of this case.

At the time of the *Carter* decision, N.C. Gen. Stat. § 160A-274(b) read as follows:

> Any governmental unit may, upon such terms and conditions as it deems wise, with or without consideration, exchange with, lease to, lease from, sell to, purchase from, or enter into agreements *regarding the joint use* by any other governmental unit of any interest in real or personal property that it may own.

3. *Carter* quotes the case of *White v. Union County*, 93 N.C. App. 148, 377 S.E.2d 93 (1989) for 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 accomplishment of the declared objects and purposes of the corporation. . . .' " *Carter*, 125 N.C. App. at 632, 482 S.E.2d at 11.

N.C. Gen. Stat. § 160A-274(b) (as quoted and emphasized in *Carter*, 125 N.C. App. at 632, 482 S.E.2d at 12.) The "agreements" clause including its limiting language as to "joint use" was eliminated in 2001 N.C. Sess. Laws ch. 328 § 6. *Carter* relied upon the "for use by the county . . ." language contained in N.C. Gen. Stat. § 153A-158, and the "joint use by any other governmental unit" language to hold that "both statutes place express limits on who may use the property purchased by the County." *Carter*, 125 N.C. App. at 633, 482 S.E.2d at 12. The transaction at issue clearly falls under the provisions of N.C. Gen. Stat. § 160A-274(b), which no longer contains the "use" restriction present at the time *Carter* was decided. Thus, *Carter* is not controlling in this case.

Second, in the instant case, County will be retaining a portion of the property received from Board to be used as a public park. *Carter* placed great weight on the fact that Stanly County would not be using the property for its own governmental functions or jointly with the State. The instant case is thus factually distinguishable from *Carter*.

Finally, plaintiff focuses entirely upon the portion of the *Carter* opinion which is essentially *dicta*. The ultimate holding in *Carter* was to affirm the trial court's dismissal of plaintiff's complaint, based upon the special legislation. As in *Carter*, there is special legislation authorizing County to engage in this type of transaction. 2000 N.C. Sess. Laws 65; *see also* 2007 N.C. Sess. Laws 33. While these acts are not as transaction specific as the legislation described in Carter, they are sufficiently broad enough to encompass the transactions that are the subject of this litigation and to meet the requirements of Dillon's Rule.

IV. Constitutional Claims

[6] In a portion of his third argument, plaintiff contends that defendants' "collusive actions" show intentional and purposeful discrimination and violated his constitutional rights to due process and equal protection. We disagree.

In his Sixth Claim for Relief and to this Court, plaintiff asserts that he and others similarly situated were not "afforded a process by which they could submit a proposal" to purchase the Board site. He cites a "demand letter" sent to Board on 7 January 2007, in which he threatened litigation and demanded that

> should CMS decide to dispose of the [Board site], such disposition should be conducted in accordance with a process that gives

> an equal opportunity for any qualified and interested party to submit a proposal for the acquisition and development of the site in the context of the current facilities needs of [the Board].

In the letter, plaintiff requested an opportunity to discuss his proposal to develop a four component campus for Board.

The threshold question in any due process claim is whether "a constitutionally protected property interest exists." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994). "To demonstrate a property interest under the Fourteenth Amendment, a party must show more than a mere expectation; he must have a legitimate claim of entitlement." *Id.* (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548 (1972)). "A legitimate claim of entitlement requires more than a unilateral expectation of a property interest." *Sack v. N.C. State Univ.*, 155 N.C. App. 484, 499, 574 S.E.2d 120, 131 (2002) (citations and internal quotations omitted).

We agree with the trial court that plaintiff's complaint failed to allege anything more than a unilateral expectation of a property interest. Unilateral expectations are insufficient to demonstrate a property interest. *McDonald's* at 447, 450 S.E.2d at 890; *Sack* at 499, 574 S.E.2d at 131.

As to plaintiff's claims of equal protection violations, these claims are grounded in his allegations that defendants abused their discretion in negotiating urban development. Having determined that those allegations were unfounded, we decline to address his equal protection claim.

This argument is without merit.

V. Motion to Strike

[7] In his final argument, plaintiff contends that the trial court erred in denying his motion to strike the overview section of County's answer because said section was "scandalous material" and "unresponsive to any allegation." We disagree.

"Rule 12(f) of the North Carolina Rules of Civil Procedure, allows the court to strike 'from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.' " *Carpenter*, 189 N.C. App. at 759, 659 S.E.2d at 765 (quoting N.C.R. Civ. P. 12(f) (2005)).

Rule 12(f) motions are "addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of dis-

cretion." *Id.* (citation and internal quotations omitted). " 'Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied.' " *Id.*, 659 S.E.2d at 766 (quoting *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108, *disc. review denied*, 295 N.C. 735, 249 S.E.2d 804 (1978)).

In denying plaintiff's motion, the trial court found that County's answer complied with Rule 8(b) and (c) of the N.C. Rules of Civil Procedure and that the objectionable language "ascribe[d] a motive for the plaintiff's institution of litigation that is personal to him as one engaged in business pursuits [with an] 'alternative plan' for the [subject] properties . . . ." The court further found that the matter might have a bearing upon the litigation. We hold that the trial court did not abuse its discretion when it denied the motion to strike.

This argument is without merit.

VI. Conclusion

The trial court properly considered defendants' exhibits as part of the record before it in defendants' Rule 12(c) motion. The trial court did not err in granting defendants' motion for judgment on the pleadings when the challenged transactions were authorized under prevailing law. The trial court did not abuse its discretion in denying plaintiff's motion to strike a portion of the County's answer when the answer complied with the provisions of Rule 8 of the North Carolina Rules of Civil Procedure.

AFFIRMED.

Judges JACKSON and STROUD concur.

JERRY ALAN REESE, PLAINTIFF v. THE CITY OF CHARLOTTE AND MECKLENBURG COUNTY, NORTH CAROLINA, DEFENDANTS

No. COA08-398

(Filed 5 May 2009)

1. Pleadings— motion for judgment on—attachments to documents

The trial court did not err on a Rule 12 (c) motion for judgment on the pleadings by considering attachments to a document (the Interlocal Cooperation Agreement) which was itself attached to defendants' answer. By referencing the agreement in his complaint, plaintiff placed the entire agreement before the court, including the attachments.

2. Cities and Towns; Counties— transfer of land—economic development—requirements for undertaking—severance of relationships

An Interlocal Agreement between a city and county involving the transfer of land designed to foster economic development met the requirements for an undertaking in N.C.G.S. § 160A-460. The power to engage in joint undertakings of necessity includes the power to sever such relationships.

3. Cities and Towns; Counties— transfer of property for economic development—private ownership

An Interlocal Agreement between a city and county transferring property for economic development did not violate the provisions of N.C.G.S. § 160A-266. While plaintiff alleged that city property will end up in private hands without compliance with statutory provisions, there is special legislation authorizing the action in the city charter and amendments to the Session Laws.

4. Cities and Towns; Counties— economic development—alleged abuse of discretion—pleading not sufficient

A complaint alleging that an economic development project involving the city and county was an abuse of discretion did not meet the pleading requirements of *Barbour v. Carteret County*, 255 N.C. 177, because the complaint did not allege that public officials acted to enrich themselves or in wanton disregard of the public good. Furthermore, the complaint stated merely conclusory allegations.

5. Cities and Towns; Counties— economic development project—strawman transfer

A claim that an economic development project involving a city and county was a strawman for the transfer of property to private entities was without merit.

6. Cities and Towns; Counties— economic development—constitutional issues

Constitutional claims arising from an economic development project were without merit.

7. Pleadings— motions to strike—denial—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiff's motion to strike portions of defendants' answer where the trial court held that the relevant portions of defendants' pleadings were an assertion that their actions were lawful and that plaintiff was seeking to have the courts supervise the activities of governmental units.

Appeal by plaintiff from judgment entered 12 October 2007 by Judge Lindsay R. Davis, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2008.

Jerry Alan Reese, pro se.

Womble Carlyle Sandridge & Rice, PLLC, by James P. Cooney III, and G. Michael Barnhill, for defendant Mecklenburg County.

Robert E. Hageman, Senior Assistant City Attorney for defendant City of Charlotte.

STEELMAN, Judge.

The trial court properly considered attachments to documents referred to in plaintiff's complaint in deciding defendants' Rule 12(c) motion to dismiss. The transactions encompassed by an Interlocal Cooperation Agreement between the City of Charlotte and Mecklenburg County were authorized by the General Statutes and Local Acts of the North Carolina General Assembly. Plaintiff's constitutional claims were based upon a unilateral expectation of a property interest and were properly dismissed. The trial court did not abuse its discretion in denying plaintiff's motion to strike.

I. Factual and Procedural Background

In January 2007, Mecklenburg County (County) entered into a Memorandum of Understanding with Cornerstone Real Estate Advisors, Inc. (Cornerstone) pertaining to the development and construction of Brooklyn Village, a mixed-use development to be located in Second Ward of the City of Charlotte. The Memorandum recited that County "owns or is in the process of acquiring 493,971 square feet of land located in Second Ward bounded by South McDowell Street, Third Street, Second Street, and the First Baptist Church property[.]" County agreed to swap a portion of this property for property owned by Cornerstone's parent company, with the balance of the land being retained by County for development as an urban park. The 493,971 square feet of property consists of two parcels: (1) a 5.91 acre parcel owned by the Charlotte-Mecklenburg Board of Education, and (2) Marshall Park, a 5.432 acre parcel owned by the City of Charlotte (City).

On 1 May 2007, the Mecklenburg County Board of Commissioners adopted a resolution approving an Interlocal Cooperation Agreement with the City of Charlotte and authorizing its Chair to execute the Agreement. On 14 May 2007, the Charlotte City Council adopted a resolution approving the Interlocal Agreement with Mecklenburg County and authorizing its officials to execute the Interlocal Agreement. The Interlocal Agreement was subsequently executed by both parties and referenced the Memorandum of Understanding between County and Cornerstone. It further referenced N.C. Gen. Stat. § 160A-274 as the authority for City and County to enter into the Interlocal Agreement. Under the terms of the Interlocal Agreement, City would convey to County the Marshall Park property and the Spirit Square property.

Plaintiff commenced this action (Mecklenburg County case 07-CVS-9577) by filing a summons and notice of *lis pendens* on the Marshall Park property on 15 May 2007. Plaintiff's complaint was filed on 4 June 2007 and asserted six claims for relief as follows: (1) for a declaratory judgment that the Interlocal Agreement was not a joint undertaking and was thus unlawful; (2) for a declaratory judgment that City disposed of the Marshall Park property in a manner not permitted by law; (3) for a declaratory judgment that City abused its discretion by disposing of the Marshall Park property in a hasty and ill-conceived manner; (4) for a declaratory judgment that County's acquisition of the Marshall Park property was not authorized by law; (5) for a declaratory judgment that the actions of City

and County violated plaintiff's rights to due process and equal protection; and (6) for a preliminary and permanent injunction prohibiting City from transferring the Marshall Park property to County.

On 31 May 2007, plaintiff filed a complaint (Mecklenburg County case 07-CVS-9577) seeking to prohibit the Charlotte-Mecklenburg County Board of Education from conveying property adjoining the Marshall Park property to County as part of the Brooklyn Village project. Plaintiff also filed a notice of *lis pendens* on the property of the Board of Education. On 11 July 2007, the Chief Justice designated both cases as "exceptional" cases pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts (2007).

Defendants filed answers to plaintiff's complaint, denying the material allegations contained therein, and attached to their answers a number of exhibits. On 3 August 2007, defendants in both lawsuits filed motions to strike plaintiff's notice of *lis pendens* and for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. On 17 September 2007, plaintiff filed a motion to strike a portion of the answers of City and County pursuant to Rule 12 (f) of the North Carolina Rules of Civil Procedure.

On 12 October 2007, the trial court filed an order encompassing both lawsuits that granted defendants' motions for judgment on the pleadings and dismissing both of plaintiff's motions. Defendants' motions to cancel the notice of *lis pendens* were also granted, and plaintiff's motion to strike was denied.

Plaintiff appeals.

II. Consideration of Documents Not Attached to Complaint

[1] In his first argument, plaintiff contends that the trial court erred in considering certain exhibits attached to both answers of City and County. We disagree.

City and County attached to their answers copies of certain documents. These were: (1) the Interlocal Cooperation Agreement with attachments A through K; (2) Memorandum of Understanding for the Development of Brooklyn Village; (3) Resolution of City Authorizing Execution of the Interlocal Cooperation Agreement; and (4) Resolution of County Authorizing Execution of the Interlocal Cooperation Agreement. Plaintiff acknowledges that each of these four documents were referenced in his complaint but argues that attachments C through K to the Interlocal Agreement were improperly considered by the trial court because they were not specifi-

cally referenced in the complaint. He also argues that these documents "may have not been available to Reese at the time the Complaint was filed." Plaintiff contends that by considering matters outside of the pleadings, the trial court converted defendant's Rule 12(c) motion into a Rule 56 motion for summary judgment, and he was entitled to respond to the motion and conduct discovery before the motion was heard.

We review the trial court's granting of a Rule 12(c) motion *de novo*. *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008). A "document attached to the moving party's pleading may not be considered in connection with a Rule 12(c) motion unless the non-moving party has made admissions regarding the document." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 205, 652 S.E.2d 701, 708 (2007).

In the instant case, plaintiff's complaint specifically referred to the Interlocal Agreement. Indeed, many of his claims are based upon the alleged invalidity of the Interlocal Agreement. The Interlocal Agreement specifically refers to each of the attachments A through K. The attachments are an integral part of the agreement. It is disingenuous for plaintiff to argue that since he did not specifically refer to every attachment in his complaint that they were not properly before the trial court upon defendant's Rule 12(c) motion. We hold that by referencing the agreement in his complaint, plaintiff placed the entire agreement, including all referenced attachments, before the trial court for consideration of the Rule 12(c) motion. Plaintiff's vague contention that the attachments C through K "may have not been available" is unavailing.

This argument is without merit.

III. Dismissal of Plaintiff's Claims

[2] In his second and third arguments, plaintiff contends that the trial court erred in dismissing the first five claims for relief set forth in his complaint. We disagree and address each of plaintiff's claims in turn.

A. First Claim—Validity of Interlocal Agreement Under Article 20 of Chapter 160A

§160A-461. Interlocal cooperation authorized.

> Any unit of local government in this State and any one or more other units of local government in this State or any other state (to the extent permitted by the laws of the other state) may enter

> into contracts or agreements with each other in order to execute any undertaking. The contracts and agreements shall be of reasonable duration, as determined by the participating units, and shall be ratified by resolution of the governing board of each unit spread upon its minutes.

N.C. Gen. Stat. § 160A-461 (2007).

> §160A-460. Definitions.
>
> (1) "Undertaking" means the joint exercise by two or more units of local government, or the contractual exercise by one unit for one or more other units, of any power, function, public enterprise, right, privilege, or immunity of local government.

N.C. Gen. Stat. § 160A-460(1) (2007).

Plaintiff contends that the Interlocal Agreement does not constitute a joint exercise by City and County and fails to meet the requirements of an "undertaking" as set forth in N.C. Gen. Stat. § 160A-460. Plaintiff's argument is that the Interlocal Agreement is "actually a severance of certain public enterprises, Spirit Square and the Cultural Facilities." He further contends that when all of the land swaps and severance of interests take place, there will be no joint undertakings between City and County.

Plaintiff's reading of these statutes is too narrow. The Interlocal Agreement recites its ultimate purposes:

> ***WHEREAS***, both the City and County support the concept proposed by County Manager Harry Jones in his letter to Pam Syfert dated November 2, 2006 which is attached as Attachment C (the "Concept"), which would result in 1) a site for a park in the Third Ward of Center City Charlotte with connection to South Tryon Street; 2) implementation of the first phase of the Second Ward Master Plan in accordance with the Vision Statement and Master Plan attached as Attachment D (referred to as "Brooklyn Village"); and 3) development of a new stadium for the Charlotte Knights' minor league baseball team on a site in the Third Ward of Center City Charlotte, and wish to enter into this Agreement to assist each other in the accomplishment of these goals, which would advance or further City and County economic development, urban revitalization, community development and land use plans[.]
>
> . . .

> ***WHEREAS***, pursuant to the Concept, the City desires to convey certain real property to the County at no cost to the County to assist in both the development of Brooklyn Village, a Third Ward park and development of a minor league baseball stadium in Center City Charlotte; and
>
> ***WHEREAS***, the County desires to assign its future ownership interest in the Wachovia Cultural Facilities to the City at no cost to the City[.]

These recitals clearly demonstrate an undertaking by City and County to achieve the specific government-related goals of development of an urban park, a mixed-use, residential-commercial community in Second Ward (Brooklyn Village), a baseball stadium in Third Ward, and sale of Spirit Square to fund infrastructure improvements for the baseball facility. All of these projects are designed to foster economic development within City and County. We reject plaintiff's arguments that N.C. Gen. Stat. § 160A-460 requires some sort of ongoing joint undertaking on the part of local government entities. The statute authorizes agreements "in order to execute any undertaking." This is very broad language, which authorizes the undertakings embodied in the Interlocal Agreement. The severance of City and County's relationships as to Spirit Square and the Wachovia Cultural Facilities does not affect this holding. The power of governmental entities to engage in joint undertakings of necessity brings with it the power to sever such relationships.

We also note that the Interlocal Agreement specifically cites as additional authority the provisions of N.C. Gen. Stat. § 160A-274. This statute provides:

> (b) Any governmental unit may, upon such terms and conditions as it deems wise, with or without consideration, exchange with, lease to, lease from, sell to, or purchase from any other governmental unit any interest in real or personal property.

N.C. Gen. Stat. § 160A-274(b) (2007).

We hold that this provision constitutes additional statutory authority for the Interlocal Agreement between City and County, in particular the provision allowing for disposition without consideration.

This argument is without merit.

B. Second Claim—Alleged Unlawful Disposition of Property by City under 160A-266

[3] §160A-266. Methods of Sale; limitation.

> (a) Subject to the limitations prescribed in subsection (b) of this section, and according to the procedures prescribed in this Article, a city may dispose of real or personal property belonging to the city by:
>
> (1) Private negotiation and sale;
>
> (2) Advertisement for sealed bids;
>
> (3) Negotiated offer, advertisement, and upset bid;
>
> (4) Public auction; or
>
> (5) Exchange.

N.C. Gen. Stat. § 160A-266(a) (2007).

Plaintiff alleged in his complaint that ultimately City property will end up in private hands without compliance with the provisions of N.C. Gen. Stat. § 160A-266. He alleges that "absent special legislation, the disposition of real property is not authorized by private negotiation and sale . . . ." There is special legislation authorizing the ultimate disposition by County. First, Session Law 2000-21 revised and consolidated the Charter of the City of Charlotte. Section 8.22(d) of the Charter provides:

> (d) When the Council determines that a sale or disposition of property will advance or further any Council-adopted economic development, transportation, urban revitalization, community development, or land-use plan or policy, the City may, in addition to other authorized means, sell, exchange, or transfer the fee or any lesser interest in real property, either by public sale or by negotiated private sale.[1]

While City is not directly disposing of any property by direct private sale, this charter provision provides authority for City's actions based on plaintiff's argument that the Interlocal Agreement was a

1. Section 8-22(d) of the City of Charlotte charter does not require ten days public notice prior to the adoption of the resolution authorizing a private sale. Plaintiff made no allegation of lack of notice. Further, paragraph 40 of plaintiff's complaint alleges that on 9 January 2007, plaintiff wrote to the City Manager requesting an opportunity to bid on the Marshall Park property. This was several months prior to the adoption of the resolution authorizing the Interlocal Agreement.

sham transaction designed to circumvent the provisions of N.C. Gen. Stat. § 160A-266.

In addition, Session Laws 2000-65 and 2007-33 specifically amended N.C. Gen. Stat. § 160-266 as it applied to Mecklenburg County to authorize private sales using the identical language contained in section 8.22(d) of the City of Charlotte Charter. Based upon the recitals in the Interlocal Agreement showing that the purpose was to achieve the goals of economic development, urban revitalization, and community development, and the language of Session Law 2000-65 leaving the determination of whether the transaction advances or furthers to the Board of County Commissioners, we hold that the Interlocal Agreement between City and County, and its contemplated transfers, did not violate the provisions of N.C. Gen. Stat. § 160A-266.

This argument is without merit.

C. Third Claim—Alleged Abuse of Discretion by City

[4] Plaintiff's complaint alleged that City manifestly abused its discretion by hastily arranging for approval of the Interlocal Agreement, failing to adopt a formal plan for the disposition of Marshall Park, failing to consider alternative dispositions of Marshall Park, not engaging a consultant or real estate broker, failing to issue a Request for Proposal to gauge interest from other parties in the Marshall Park property, and allowing County to pressure it into the Interlocal Agreement without having first thoroughly analyzed the potential value of the Marshall Park property. He contends that this stated a valid claim under *Barbour v. Carteret County*, 255 N.C. 177, 120 S.E.2d 448 (1961). We disagree.

This argument was also raised in the companion case of *Reese v. Charlotte-Mecklenburg Bd. of Educ.*, 196 N.C. App. ——, —— S.E.2d —— (2009). The complaint in the instant case fails to allege that public officials acted to enrich themselves or in wanton disregard of the public good. As discussed in the companion case, plaintiff's complaint failed to satisfy the pleading requirements of *Barbour*.

Further, we note that the complaint and the documents referenced therein reveal that these transactions had been proposed in November of 2006 and were not "hastily arranged." The documents further reveal that City was to receive property valued at $29,500,000.00 in exchange for properties valued at $23,232,000.00 exclusive of the interest in Spirit Square. Plaintiff's complaint "states

merely conclusory allegations of grievances and offers no indication of the existence of facts which, if proven, would permit a finding of fraud, manifest abuse of discretion, or unlawful conduct." *Alamance County v. Dept. of Human Resources*, 58 N.C. App. 748, 750, 294 S.E.2d 377, 378 (1982).

This argument is without merit.

D. Fourth Claim—Dismissal of Claims Against Mecklenburg County

[5] Plaintiff's complaint alleges that County was not acquiring the property from City for its own use but was acting as a strawman for the property to eventually be transferred to Cornerstone and Spectrum. He argues on appeal that N.C. Gen. Stat. § 153A-158 restricts County to the acquisition of property "for use by the county" or its agencies and does not permit acquisition for the subsequent transfer to a private party. *See* N.C. Gen. Stat. § 153A-158 (2007). We disagree.

This argument is virtually identical to the third argument discussed in our opinion in *Reese v. Charlotte-Mecklenburg Bd. of Educ.*, 196 N.C. App. ——, —— S.E.2d—— (2009). For the reasons stated in that opinion, we hold this argument is without merit.

E. Fifth Claim—Due Process and Equal Protection

[6] In his fifth claim, plaintiff asserts that the actions of defendants violated his rights of due process and equal protection under the United States and North Carolina Constitutions. Specifically, plaintiff contends that he was deprived of his "privilege of contracting." We disagree.

This same argument was raised and discussed as plaintiff's Sixth Claim in our opinion in *Reese v. Charlotte-Mecklenburg Bd. of Educ.*, 196 N.C. App. ——, —— S.E.2d —— (2009). For the reasons stated in that opinion, we hold that this argument is without merit.

IV. Denial of Motion to Strike

[7] In his fourth argument, plaintiff contends that the trial court erred in denying his motion to strike portions of defendants' answer. We disagree.

Plaintiff's complaint contains lengthy sections dealing with parties, jurisdiction, venue, and standing; procedure; and background facts. Defendants' answers contain a section styled as "Overview," which address plaintiff's standing to bring the action and questions the right of plaintiff to seek to have the courts act as a *de facto*

receiver for the public properties at issue. Plaintiff's motion to strike is directed to the "Overview" portion of each answer.

"Rule 12(f) of the North Carolina Rules of Civil Procedure, allows the court to strike 'from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.' " *Carpenter*, 189 N.C. App. at 759, 659 S.E.2d at 765 (2008) (quoting N.C.R. Civ. P. 12(f) (2005)). Rule 12(f) motions are "addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion." *Id.* (citation and internal quotations omitted). " ' Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied.' " *Id.*, 659 S.E.2d at 766 (quoting *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108, *disc. review denied*, 295 N.C. 735, 249 S.E.2d 804 (1978)).

The trial court held that:

> The 'Overview' asserts, in words or substance, that the actions of the defendants are lawful, and characterize the relief that plaintiff seeks as efforts to have the courts supervise the activities of governmental units. These parts are sufficiently related to the allegations of the complaints that [the] motion to strike should be denied.

We discern no abuse of discretion on the part of the trial court in denying plaintiff's motion to strike.

This argument is without merit.

V. Conclusion

The trial court properly considered the documents referenced in plaintiff's complaint in hearing defendants' Rule 12(c) motion to dismiss. The trial court did not err in granting defendants' motions and dismissing plaintiff's complaint. The trial court did not abuse its discretion in denying plaintiff's motion to strike.

AFFIRMED.

Judges JACKSON and STROUD concur.

WHITE v. THOMPSON

[196 N.C. App. 568 (2009)]

CHARLES M. WHITE AND EARL ELLIS, INDIVIDUALLY AND NOW OR FORMERLY D/B/A ACE FABRICATION AND WELDING, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFFS v. ANDREW THOMPSON, DOUGLAS THOMPSON, AND FRAN LURKEE, ALIAS DEFENDANTS

No. COA08-953

(Filed 5 May 2009)

1. Unfair Trade Practices— withdrawing partner—independent work—no affect on commerce

The trial court erred by trebling the damage award in a partnership dispute under N.C.G.S. § 75-1.1. Defendant partner's independent work harmed the partnership but had no impact in the broader marketplace and did not affect commerce.

2. Unfair Trade Practices— partnership dispute—outside accountant—services in commerce

The trial court did not err in a partnership dispute by trebling damages under N.C.G.S. § 75-1.1 against a defendant who provided accounting services to the partnership. His actions cannot be characterized as matters of internal partnership management, but instead was the provision of a business service that may be considered an unfair practice in or affecting commerce.

3. Evidence— damages—gross earnings—accountant's testimony—admissible

The trial court did not err by allowing an accountant to testify in a partnership dispute about the gross earnings of a business formed by one of the partners who allegedly sought and performed work independently. The accountant was subject to cross-examination, and the evidence was sufficient to permit a reasonable calculation by the jury.

4. Appeal and Error— abandonment of argument—contentions of appellant

Defendants abandoned an argument on appeal concerning the acceptance of an accountant as an expert where they cited only nonbinding accounting standards and pointed to the portion of the transcript where the accountant was tendered and accepted as an expert. They made no substantive argument about why the accountant lacked independence.

5. Damages and Remedies— evidence before jury—sufficiency for rational decision—award not excessive

The trial court did not abuse its discretion by denying a motion for a new trial based on an allegedly excessive damage award where there was evidence sufficient for a reasonable, rational calculation of damages and there was no indication that the jury disregarded the trial court's instructions.

6. Evidence— withdrawing partner—suggestions of theft from third party—questions relevant

The trial court did not abuse its discretion in an action arising from a partnership dispute by allowing questions suggesting that a partner who allegedly sought and performed work independently was discharged from a job because he was caught stealing. The evidence was relevant to questions of usurped opportunities and lost profits.

Judge ERVIN concurring in part and dissenting in part.

Appeal by Defendants Andrew Thompson and Douglas Thompson from judgment entered 12 February 2008 by Judge Douglas B. Sasser in Superior Court, Columbus County. Heard in the Court of Appeals 10 February 2009.

Lee & Lee, Attorneys, by Junius B. Lee, III, for plaintiffs.

Ralph G. Jorgensen, for defendants Andrew Thompson and Douglas Thompson.

WYNN, Judge.

To establish a claim for unfair or deceptive trade practices, evidence must show that the alleged unfair or deceptive acts were in or affecting commerce.[1] Defendants Andrew Thompson and Douglas Thompson argue that because their alleged unfair and deceptive acts were not in or affecting commerce, the trial court erred by trebling the award of damages against them. We reverse as to Defendant Andrew Thompson (internal partnership acts not in or affecting commerce) but affirm as to Defendant Douglas Thompson (accounting acts in or affecting commerce).

In October 2000, Plaintiffs Charles M. White and Earl Ellis formed a partnership, "Ace Fabrication and Welding ("Ace Welding"), with

1. N.C. Gen. Stat. § 75-1.1 (2007).

Defendant Andrew Thompson. The partners agreed that each would be entitled to a third of the partnership's assets and hourly wages. Ace Welding hired Defendant Douglas Thompson (Defendant Andrew Thompson's father) to keep the partnership's accounting records. From the outset, Ace Welding won bids for several lucrative specialty fabrication projects at the Smithfield Packing Plant in Tarheel, North Carolina where Fran Lurkee was an "engineer over maintenance" and Carl Barnes was a superintendent.

The parties in this action presented contrasting positions on the nature of the partners' involvement in Ace Welding. Plaintiff White testified that, soon after Ace Welding began operating, he discovered Defendant Andrew Thompson working on jobs without informing or incorporating the other Ace Welding partners. He stated that Defendant Andrew Thompson misreported the days on which jobs were to begin, resulting in the other partners missing out on jobs altogether.

On the other hand, Defendant Andrew Thompson testified that his two partners were unavailable or left in the middle of jobs. He stated: "[I]t became apparent that I was going to have to do it all . . . ." He testified that he told his partners he wanted out of Ace Welding in January 2001.

However, Plaintiff White stated that he first learned of Defendant Andrew Thompson's desire to leave Ace Welding in February 2001. He stated that although Defendant Andrew Thompson denied that he was forming another company, Mr. Lurkee revealed that Defendant Andrew Thompson had decided to work independently and was bidding for jobs at the Smithfield Packing Plant under the business name of "Pal." Defendant Andrew Thompson acknowledged that near the end of February 2001, he was finishing "jobs in Ace Welding name and was also working in the Pal name."

Plaintiff White testified that Plaintiffs had problems trying to communicate with Defendants about Ace Welding's finances after determining that Defendant Andrew Thompson had done work without informing Plaintiffs. He stated after determining that "[s]ome of the money wasn't being deposited," he "went to the bank to move the money that was in the Ace Welding account . . . in a separate account until we got all this resolved."

At some point, the three men divided Ace Welding's tools, and Plaintiffs had an attorney draft a partnership withdrawal agreement;

however, none of the partners signed that agreement. Plaintiffs continued as partners under the name "Whelco" but ceased operations a couple of months after its formation. Pal continued to do jobs at the Smithfield plant until October 2001.

In October 2002, Plaintiffs brought this action alleging that Defendant Andrew Thompson breached his fiduciary duties; conspired with Mr. Lurkee and Mr. Barnes to usurp Ace Welding's opportunities;[2] and conspired with Defendant Douglas Thompson to improperly keep and maintain Ace Welding's accounting records. Plaintiffs also alleged that Defendants' acts amounted to unfair and deceptive trade practices.

The jury rendered a special verdict finding: 1) Defendant Andrew Thompson breached a fiduciary duty to Plaintiffs, resulting in $138,195 damages; 2) Defendant Douglas Thompson breached a fiduciary duty to Plaintiffs, resulting in $750 damages; and 3) Plaintiffs did not breach fiduciary duties they owed to Defendant Andrew Thompson. Thereafter, the trial court trebled the damages against Defendants.

On appeal, Defendants argue the trial court erred by: (I) trebling the awards under N.C. Gen. Stat. § 75-16 (2007); (II) allowing evidence from the court-appointed accountant about Defendant Andrew Thompson's gross earnings in Pal; (III) allowing biased testimony by the accountant; (IV) failing to set aside the jury's award of excessive damages which showed a manifest disregard for the court's instructions; and (V) permitting Plaintiffs' counsel to suggest that Defendant Andrew Thompson's employment at Smithfield was discontinued because he was caught stealing.

I.

[1] First, Defendants argue the trial court erred by trebling the damage awards because the partnership dispute did not meet the "in or affecting commerce" requirement of N.C. Gen. Stat. § 75-1.1 (2007), which states in relevant part:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

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2. Plaintiffs originally named Fran Lurkee and Carl Barnes as defendants. Neither are parties to this appeal: The trial court stated that "Carl Barnes was discharged in bankruptcy," and Plaintiffs did not appeal from the trial court's directed verdict in favor of Fran Lurkee.

> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

Our courts have construed the term "commerce" broadly, encompassing more than mere business activity between sellers and buyers. *Harrington Mfg., Inc. v. Powell Mfg., Inc.*, 38 N.C. App. 393, 396, 248 S.E.2d 739, 742 (1978) ("G.S. 75-1.1(b) speaks in terms of declaring and providing civil means of maintaining ethical standards of dealings 'between persons engaged in business,' as well as between such persons and the consuming public."). To establish a claim for unfair or deceptive trade practices, a party must present evidence showing: "(1) an unfair or deceptive act or practice by defendant, (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff." *Wilson v. Blue Ridge Elec. Membership Corp.*, 157 N.C. App. 355, 357, 578 S.E.2d 692, 694 (2003) (citations omitted). "The proper inquiry 'is not whether a contractual relationship existed between the parties, but rather whether the defendants' allegedly deceptive acts affected commerce.' " *Durling v. King*, 146 N.C. App. 483, 488-89, 554 S.E.2d 1, 4 (2001) (original emphasis) (citations omitted).

In this case, we agree that the claim against Defendant Andrew Thompson differs from the typical claim for unfair and deceptive trade practices because his relationship to Plaintiffs was a partner, not a competitor or consumer. Indeed, Plaintiffs alleged and sought to establish at trial that Defendant Andrew Thompson formed and worked for Pal while representing that he was seeking and completing jobs for Ace Welding; conspired with Smithfield management to "siphon off work originally contracted for by Ace Welding;" and conspired with Defendant Douglas Thompson to conceal Ace Welding's accounting records. These allegations relate to Defendant Andrew Thompson's breach of duties owed to the Ace Welding partnership.

The proper inquiry in an unfair or deceptive trade practices case is not on the nature of the contractual relationship between the parties; rather, it must be shown that the alleged unfair or deceptive acts had an impact in the marketplace. *See id.* ("What is an unfair or deceptive trade practice usually depends upon the facts of each case and the impact the practice has in the marketplace."). The allegations against Defendant Andrew Thompson do not amount to practices impacting the marketplace; instead, Plaintiffs complain of Defendant Andrew Thompson's breach of partnership duties—matters germane to the partners' contractual agreement to form and operate Ace

Welding. *Cf. Wilson*, 157 N.C. App. at 358, 578 S.E.2d at 694 ("Matters of internal corporate management, such as the manner of selection and qualifications for directors, do not affect commerce as defined by Chapter 75 and our Supreme Court.").

This Court confronted an unfair and deceptive trade practices claim in a partnership context in *Compton v. Kirby*, 157 N.C. App. 1, 577 S.E.2d 905 (2003). In *Kirby*, the partnership at issue was a real-estate brokerage firm. *Id.* at 4, 577 S.E.2d at 907. "One of the main goals of [the partnership] was to handle referrals" from an affiliated company and to win additional business in the Raleigh marketplace. *Id.* at 4-5, 577 S.E.2d at 908. The defendant-partner excluded the plaintiff-partners from multiple transactions, including the sale of a business, resulting in the defendant-partner becoming a principal owner in a company created to accomplish the stated partnership goals. *Id.* at 6-7, 577 S.E.2d at 909-10. This Court easily concluded that the defendant's actions were "in or affecting commerce" because they "revolved around the sale of a business," the availability of a real estate brokerage firm, "and the general marketing and sale of commercial real estate in [the Raleigh] market." *Id.* at 20, 577 S.E.2d at 917.

Plaintiffs' allegations and the evidence in this case are dissimilar to the real estate brokerage referrals and business sales that clearly impacted the marketplace in *Kirby*. Here, the evidence showed that Defendant Andrew Thompson sought and completed work at the Smithfield Packing Plant independently, or in the Pal business name, breaching his agreement to seek and complete the same work as an Ace Welding partner. Moreover, the Ace Welding partnership existed for the limited purpose of procuring and completing jobs at the Smithfield Packing Plant—a much narrower purpose than the multi-entity brokerage referrals that necessarily impacted the marketplace in *Kirby*. Nor did Defendant Andrew Thompson engage in any transactions, such as the sale of a business, that would inherently impact the marketplace. In sum, Defendant Andrew Thompson took for himself opportunities at the Smithfield Packing Plant that he agreed to pursue with Plaintiffs in the Ace Welding partnership; this usurpation harmed Ace Welding and Plaintiffs, but had no impact in the broader marketplace. Accordingly, we reverse the trial court's award of treble damages against Defendant Andrew Thompson.

[2] On the other hand, Defendant Douglas Thompson was hired to provide accounting services to Ace Welding; therefore, he was not situated as a partner or a partnership insider such that his ac-

tions can be characterized as matters of internal partnership management. Instead, Defendant Douglas Thompson was engaged in the business activity of providing accounting services to the partnership, and his actions may be considered unfair practices "in or affecting commerce."

Furthermore, because the jury determined that Defendant Douglas Thompson breached a fiduciary duty, not a mere contractual duty, we summarily reject his contention that mere breach of contract is insufficient to show an unfair trade practice. *See S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008) ("A fiduciary relationship 'exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' "). Accordingly, we uphold the trial court's award of treble damages against Defendant Douglas Thompson.

II.

[3] Defendants next argue that the trial court erred by allowing the accountant to testify to Pal's gross earnings, as opposed to net earnings or profits, after Ace Welding dissolved. We disagree.

"The party seeking damages bears the burden of proving them in a manner that allows the fact-finder to calculate the amount of damages to a reasonable certainty." *Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 95, 618 S.E.2d 739, 744 (2005) (citations omitted), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006). "Substantial damages may be recovered though plaintiff can only give his loss proximately." *Id.* So long as the party claiming damages introduces sufficient evidence to permit a reasonable calculation, the fact finder may be left to determine the proper measure of damages. *See id.* at 96, 618 S.E.2d at 745.

Here, Defendants take issue with the trial court's allowance of evidence of Pal's gross earnings, contending that "the correct measure of damages is the net profit of the business . . . ." However, the accountant was subject to cross-examination and also testified to expenses and payments Defendant Andrew Thompson made from the Ace Welding account and the Pal account. Moreover, Plaintiff White testified that he typically recouped 60% of his gross earnings as profits; this testimony suggested that figure as a useful comparison to Defendant Andrew Thompson's profits with Pal.

All the testimony concerning Pal's earnings after Ace Welding's dissolution, taken together with Defendants' opportunity to cross-examine the accountant, provided "sufficient evidence to permit a reasonable calculation" by the jury. *Id.* Moreover, the jury awarded substantially less in damages against Defendants than the amount Plaintiffs argued was lost to usurped opportunities. Therefore, the trial court did not err by allowing the accountant to testify regarding Pal's gross earnings in 2001.

III.

[4] Defendants next argue the trial court erred by allowing the accountant to testify because she lacked independence and was biased. However, in their brief, Defendants cite only nonbinding accounting standards rules and point to the portion of the transcript where the accountant was tendered and accepted as an expert. Defendants make no substantive argument before this Court regarding why the accountant lacked independence. Therefore, we must hold that Defendants abandoned this issue pursuant to N.C. R. App. P. 28(b)(6) (argument section of the brief should contain "the contentions of the appellant with respect to each question presented.").

IV.

[5] Next, Defendants argue the trial court erred by denying their motion for a new trial under N.C. Gen. Stat. 1A-1, Rule 59(a)(5) & (6) (2007) because the jury's award of damages was excessive and showed a manifest disregard for the court's instructions. We disagree.

Under Rule 59(a)(6), a trial court may grant a new trial on the ground that the jury awarded excessive damages under the influence of passion or prejudice. N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (2007). We review the trial court's decision whether to grant a new trial on this basis for an abuse of discretion; however, the trial court's discretion is "practically unlimited." *Decker v. Homes, Inc.*, 187 N.C. App. 658, 665, 654 S.E.2d 495, 500 (2007).

Defendants contend that the award against Defendant Andrew Thompson was "speculative," and there was "no rational basis" to support the award against Defendant Douglas Thompson. We have already concluded above that testimony given by the accountant and Plaintiff White was sufficient to permit the jury's reasonable calculation of the damages caused by Defendant Andrew Thompson's breach of fiduciary duty to the Ace Welding partnership.

Likewise, the jury heard testimony from Defendant Douglas Thompson and other witnesses concerning his keeping of Ace Welding's accounting records, and his failure to respond to Plaintiffs' requests to settle accounting disputes. Considering that tax statements, check receipts, bank statements, and other accounting documents were submitted for the jury's consideration, we cannot agree that the jury had "no rational basis" to calculate an award of damages against Defendant Douglas Thompson.

Nor is there any indication in the record that the jury disregarded the trial court's instructions. The trial court gave specific instructions on how the jury should interpret each interrogatory, and there were no inconsistencies on the verdict sheet or in the verdict itself that would suggest the jury disregarded the trial court's instructions. Accordingly, the record shows that the trial court was well within its discretion to deny Defendants' motion for a new trial.

V.

[6] Finally, Defendants contend the trial court erred by permitting Plaintiffs' counsel to suggest that Defendant Andrew Thompson's employment at Smithfield was discontinued because he was caught stealing. We disagree.

During Defendant Andrew Thompson's cross-examination, Plaintiffs' counsel initiated the following exchange:

> Q: Can I have just a minute. Now when did Pal, the business that you formed, the unincorporated business that you formed, Pal, when did it quit doing work at Smithfield?
>
> A: I'm not sure of the date. I think it was around October.
>
> Q: Why did it quit doing business at Smithfield?
>
> A: Because [Charles White] and Earl was running around with those checks that you just called out saying that I was paying bribes and bid rigging and bribery and got me fired.
>
> Q: That's not the real reason, is it, sir?
>
> A: Yes sir.
>
> Q: You got caught stealing from the plant, didn't you?
>
> A: No sir.

Thereafter, defense counsel objected, moved to strike, and requested a bench conference. After the bench conference, the trial court overruled the objection and permitted the cross-examination to continue.

Defendants argue that Plaintiffs' counsel's question was irrelevant under N.C. Gen. Stat. § 8C-1, Rule 401. Under Rule 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. . . ." N.C. Gen. Stat. § 8C-1, Rule 401 (2007).

Here, evidence of the reason for Defendant Andrew Thompson's discontinued employment at Smithfield was relevant to the extent of opportunities usurped from Ace Welding and the resulting lost profits—the main issues in the case. Therefore, the evidence bore substantial probative value and minimal risk of confusing the issues, misleading the jury, or unfairly prejudicing Defendants. Accordingly, the trial court did not abuse its discretion in allowing Plaintiffs' counsel to ask questions concerning an alleged theft from Smithfield.

In summation, we reverse the award of treble damages imposed against Defendant Andrew Thompson, and otherwise affirm the trial court's judgment.

Affirmed in part; reversed in part.

Judge ROBERT C. HUNTER concurs.

Judge ERVIN concurs in part and dissents in part.

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

Although I concur in the remainder of the Court's opinion, I respectfully dissent from the majority's conclusion that the trial court erred by trebling the jury's damage award against Defendant Andrew Thompson pursuant to N.C. Gen. Stat. § 75-1.1, *et seq*. As a result, I would affirm the judgment entered by the trial court in its entirety.

N.C. Gen. Stat. § 75-1.1(a) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." "In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and

(3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

"Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citation omitted). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988); *see also Boyd v. Drum*, 129 N.C. App. 586, 501 S.E.2d 91 (1998), *disc. rev. den.* 349 N.C. 227, 515 S.E.2d 699 (1998), *affd.* 350 N.C. 90, 511 S.E.2d 304 (1999). As a general proposition, a practice is deceptive if it "possessed the tendency or capacity to mislead, or created the likelihood of deception[.]" *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403; *see also Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (stating that "[a] practice is unfair if it is unethical and unscrupulous, and it is deceptive if it has a tendency to deceive"). "[C]onduct which constitutes breach of a fiduciary duty and constructive fraud is sufficient to support a UFDTP claim." *Compton v. Kirby*, 157 N.C. App. 1, 20, 577 S.E.2d 905, 917 (2003).

"Commerce," as that term is used in N.C. Gen. Stat. § 75-1.1(a), "includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). " 'Business 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." *HJAMM Co. v. House of Raeford Farms*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). Liability under N.C. Gen. Stat. § 75-1.1 is not limited "to cases involving consumers" or to claims between businesses that "concern[] fraudulent advertising and buyer-seller relationships." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988); *see also*, *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711. " 'Commerce" in its broadest sense comprehends intercourse for the purposes of trade in any form." *Sara Lee Corp. v. Carter*, 351 N.C. 27, 32, 519 S.E.2d 308, 311 (1999) (quoting *Johnson*, 300 N.C. at 261, 266 S.E.2d at 620 (internal quotation omitted)). "Although this statutory definition is expansive, the Act is not intended to apply to all wrongs in a business setting."

HJAMM Company, 328 N.C. at 593, 403 S.E.2d at 492. For example, N.C. Gen. Stat. § 75-1.1 does not apply to "most employer-employee disputes." *Dalton*, 353 N.C. at 657, 548 S.E.2d at 711; *see also Gress v. The Rowboat* Co., —– N.C. App. ——, ——, 661 S.E.2d 278, 281-82 (2008); *Buie v. Daniel International*, 56N.C. App. 445, 289 S.E.2d 118 (1982), *dis. rev. den.*, 305 N.C. 759, 292 S.E.2d 574 (1982).

As I understand the Court's decision, the majority has concluded that no unfair and deceptive trade practices claim is available against Defendant Andrew Thompson under the facts at issue here because "[t]he allegations against [him] do not amount to practices impacting the marketplace" and because the dispute between the parties amounts to a matter of internal partnership management. I cannot agree with either of these conclusions.

As I have already noted, a successful claim under N.C. Gen. Stat. § 75-1.1 is, contrary to Defendant Andrew Thompson's apparent contention, available in situations other than those involving disputes between consumers and businesses. *United Laboratories*, 322 N.C. at 665, 403 S.E.2d at 492. All that has to be shown in support of a successful claim under N.C. Gen. Stat. § 75-1.1 is the existence of an unfair or deceptive act in or affecting commerce that proximately caused injury to Plaintiffs.

At trial, the jury appears to have credited Plaintiffs' evidence that Defendant Andrew Thompson, while engaged in a partnership with Plaintiffs, obtained certain specialty fabrication jobs at the Smithfield Packing plant in Tarheel for himself rather than for the partnership. In order to achieve this result, Plaintiffs' evidence suggested that Defendant Andrew Thompson gave his partners incorrect information concerning the date on which those jobs were to begin.

Impairing the ability of others to compete for work in this fashion is tantamount to unfair competition, a type of conduct which is clearly actionable under N.C. Gen. Stat. § 75-1.1. *Manufacturing Co. v. Manufacturing Co.*, 38 N.C. App. 393, 400, 248 S.E.2d 739, 744 (1978), *dis. rev. den.*, 296 N.C. 411, 251 S.E.2d 469 (1979) (stating that "[u]nfair competition has been referred to in terms of conduct 'which a court of equity would consider unfair' " (quoting *Extract Co. v. Ray*, 221 N.C. 269, 273, 20 S.E.2d 59, 61 (1942)). The effect of such conduct was to deprive the partnership of the ability to actually perform certain specialty fabrication jobs for Smithfield Packing, a fact which clearly implicates the "activities the business regularly engages in and for which it [was] organized." *HJAMM Company*, 328 N.C. at 594, 403

S.E.2d at 493. Furthermore, depriving the partnership of the opportunity to perform these specialty fabrication jobs inevitably affected its financial viability, producing an inevitable impact on competitive conditions in the market for the performance of specialty fabrication jobs in the area served by the partnership. *United Laboratories*, 322 N.C. at 665, 403 S.E.2d at 389 (stating that "[a]fter all, unfair trade practices involving only businesses affect the consumer as well").

The Court concludes, based upon an analysis of this Court's decision in *Compton*, that, while actions " 'revolv[ing] around the sale of a business,' the availability of a real estate brokerage firm, 'and the general marketing and sale of commercial real estate in [the Raleigh] market" are "in commerce" *quoting Compton*, 157 N.C. App. at 20, 577 S.E.2d at 917, the record in this case merely shows that Defendant Andrew Thompson "sought and completed work at the Smithfield Packing Plant independently, in the Pal business name, breaching his agreement to seek and complete the same work as an Ace Welding partner;" that "the Ace Welding partnership existed for the limited purpose of procuring and completing jobs at the Smithfield Packing Plant—a much narrower purpose than the multi-entity brokerage referrals that necessarily implicated the marketplace in [*Compton*];" and that Defendant Andrew Thompson did not "engage in any transactions, such as the sale of a business, that would inherently impact the marketplace." As a result, although the Court concedes that "Defendant Andrew Thompson took for himself opportunities at the Smithfield Packing Plant that he agreed to pursue with Plaintiffs in the Ace Welding partnership," it concludes that "this usurpation harmed Ace Welding and Plaintiffs, but had no impact in the broader marketplace." I cannot, unfortunately, agree with the Court's approach or this conclusion.

First, the Court's analysis suggests that satisfying the "in commerce" element of a claim lodged pursuant to N.C. Gen. Stat. § 75-1.1 requires proof that a particular unfair and deceptive trade practice had a certain quantitative impact. I do not believe that there is any such requirement in either the literal language of the statute, which merely requires that the relevant conduct be "in or affecting commerce," or in the decisions of the Supreme Court and this Court construing N.C. Gen. Stat. § 75-1.1. On the contrary, this Court specifically held in *Kent v. Humphries*, 50 N.C. App. 580, 589, 275 S.E.2d 176, 183 (1981), *mod. on other grounds and aff'd* by 303 N.C. 675, 281 S.E.2d 43 (1981), that "the leasing of just one commercial lot satisfied the Chapter 75 requirement of being in or affecting commerce." *Wilder v. Hodges*, 80 N.C. App. 333, 334, 342 S.E.2d 57, 58 (1986); *see*

also Adams v. Moore, 96 N.C. App. 359, 361, 385 S.E.2d 799, 801 (1989), *dis. rev. den.*, 326 N.C. 46, 389 S.E.2d 83 (1990) (concluding that allegations relating to the sale of a single residence are sufficient to withstand a motion to dismiss for failure to state a claim where there was no showing that defendants did not "buy and sell houses as a business"); *Robertson v. Boyd*, 88 N.C. App. 437, 444, 363 S.E.2d 672, 677 (1988) (concluding that a transaction involving the sale of a single residence is sufficiently "in commerce" to support claims against a pest control business and a real estate agency under N.C. Gen. Stat. § 75-1.1); *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E.2d 574, 582-83 (1977), *dis. rev. den.*, 299 N.C. 441, 241 S.E.2d 843 (1978) (concluding that an incident involving the lease of a single residence was sufficient to support a finding of liability under N.C. Gen. Stat. § 75-1.1). Thus, I do not believe that the Court's emphasis upon what it believes to be the relatively limited economic impact of Defendant Andrew Thompson's conduct rests on a correct understanding of the "in commerce" element of an unfair and deceptive trade practices claim.

Secondly, unlike the majority, I do not believe that there is any material difference between the conduct found to be "in commerce" in *Compton* and the conduct at issue here. As noted above, the conduct of Defendant Andrew Thompson affected the nature and extent of the market in which Smithfield Packing procures speciality fabrication products. Moreover, the record suggests that Defendant Andrew Thompson's activities resulted in the elimination of Ace Welding as a viable competitor in that market. Finally, although the record suggests that Ace Welding was formed for the purpose of providing speciality fabrication products to Smithfield Packing, its inability to survive necessarily affected the broader market for speciality fabrication products in the area in which Ace Welding chose to operate. I do not believe that there is any qualitative difference between the sale of a competitor in the Raleigh real estate market at issue in *Compton* and the elimination of a potential competitor in the speciality fabrication business in the area around the Smithfield Packing plant. Furthermore, I do not believe that there is any material difference between the "availability of a real estate brokerage firm in Raleigh" at issue in *Compton* and the availability of the speciality fabrication business at issue here. Finally, while the Raleigh real estate market may be larger than the market for the provision of speciality fabrication products to the Smithfield Packing plant, there is no qualitative difference between the impact of the conduct at issue in *Compton* on the Raleigh real estate market and the impact of Defend-

ant Andrew Thompson's conduct on the market for the provision of speciality fabrication products to Smithfield Packing. Thus, for all of these reasons, I believe that there has been a more than adequate showing of an impact on "commerce" in this case and that the Court has erred by both requiring a showing of some quantitative market impact and by concluding that the evidence in this case fails to show that the actions of Defendant Andrew Thompson were "in and affecting commerce[.]"

Furthermore, this case does not involve either a pure employer-employee dispute, *see Dalton*, 353 N.C. at 656-58, 548 S.E.2d at 710-12 (concluding that there was no liability where an employee who had neither a fiduciary relationship with his employer nor functioned as a buyer or seller entered into a contract to publish a magazine for the employer's customer in a situation involving no aggravating circumstances), or an internal business governance controversy, *see Wilson v. Blue Ridge Electric Membership Corp.*, 157 N.C. App. 355, 358, 578 S.E.2d 692, 694 (2003) (concluding that there was no claim under N.C. Gen. Stat. § 75-1.1 where employer changes rules governing eligibility for service on employer's board of directors since "[a]lteration of [employer's] by-laws . . . is not a day-to-day, regular business activity"). Here, however, we face a very different situation in which one partner has been found by a jury to have diverted an opportunity that should have been available to the partnership for his own gain.

As a result of the fact that a partner in a partnership has a fiduciary relationship with his or her partners, *see Casey v. Grantham*, 239 N.C. 121, 124-25, 79 S.E.2d 735, 738 (1954), self- dealing and similar activities constitute breach of a partner's fiduciary obligations. *Reddington v. Thomas*, 45 N.C. App. 236, 262 S.E.2d 841 (1980). "[A] breach of a fiduciary duty amounts to constructive fraud," which is sufficient to support an unfair and deceptive trade practices claim. *Compton*, 157 N.C. App. at 16, 577 S.E.2d at 914. Under similar logic, this Court upheld a finding of liability under N.C. Gen. Stat. § 75-1.1 against a partner who sold the partnership business to a third party without the consent of his partners or without informing the purchaser that the other partners had an ownership interest in the business. *Compton*, 157 N.C. App. at 19-20, 577 S.E.2d at 916-18; *see also Carter*, 351 N.C. at 31-34, 519 S.E.2d at 311-12 (concluding that an employee who was responsible for purchasing computer hardware and services at the best possible price for his employer, and who had a fiduciary duty to his employer, was properly found liable where he

purchased computer parts and services from businesses he controlled for his employer at an excessive price); *Adams*, 96 N.C. App. at 362, 385 S.E.2d at 801 (concluding that two ministers, who had agreed to assist the plaintiff with her financial problems by taking title to and making a payment on her residence and then sold the residence for a large profit, owed a fiduciary duty to the plaintiff and were subject to liability under N.C. Gen. Stat. § 75-1.1 because their alleged conduct constituted a violation of a fiduciary duty to the plaintiff).

I believe that the evidence in the present record amply supports a finding that Defendant Andrew Thompson engaged in acts that amount to constructive fraud, a type of conduct which clearly supports a finding of liability under N.C. Gen. Stat. § 75-1.1. The fact that Defendant Andrew Thompson's conduct involves a breach of fiduciary duty also renders the general rule that a mere breach of contract without aggravating circumstances does not support a finding of liability under N.C. Gen. Stat. § 75-1.1, *see Johnson v. Colonial Life & Accident Insurance Co.*, 173 N.C. App. 365, 370, 618 S.E.2d 867, 871 (2005), *disc. rev. den.*, 360 N.C. 290, 627 S.E.2d 620 (2006), inapplicable. Thus, for all of these reasons, I am unable to accept the Court's conclusion that Defendant Andrew Thompson's activities were not in "commerce" because of the fact that he was involved in a partnership relationship with the Plaintiffs.

As a result, I believe that the evidence received at trial fully supports the trial court's conclusion that Defendant Andrew Thompson's conduct was actionable under N.C. Gen. Stat. § 75-1.1. Thus, I respectfully dissent from that portion of the Court's opinion reversing the trial court's award of treble damages against Defendant Andrew Thompson. As noted above, however, I do concur in the remainder of the Court's opinion.

MICHAEL SCHWARTZ AND DAWN GRAY, PLAINTIFFS v. BANBURY WOODS HOMEOWNERS ASSOCIATION, INC., DEFENDANT

No. COA08-964

(Filed 5 May 2009)

1. Deeds— restrictive covenants—motor home—campers and all similar property

The trial court did not err in a declaratory judgment action by concluding that plaintiffs' motor home fell within the definition of "campers and all similar property" that was required to be parked in a garage or screened area as stated in Article XIV of the pertinent Declarations of Covenants, Conditions and Restrictions.

2. Associations; Deeds— restrictive covenants—campers and all similar property—resolution defining "screened areas"—plaintiffs not targeted—enactment not arbitrary, unreasonable or in bad faith

A subdivision homeowners association did not specifically target plaintiff homeowners and did not act arbitrarily, unreasonably, or in bad faith when it enacted a resolution defining the term "screened areas" for the purpose of enforcing a restrictive covenant requiring campers and all similar property to be parked in a garage or screened area, and the association could thus enforce the covenant in accordance with the resolution, where the association's board of directors had been considering and debating this issue for at least two years prior to plaintiffs' ownership of a lot in the subdivision.

3. Deeds; Injunction— restrictive covenants—mandatory injunction—not overly broad or excessive

An injunction issued by the trial court requiring that subdivision homeowners comply with the screening requirements of a subdivision restrictive covenant when parking their motor home on their subdivision lot was a proper exercise of the court's discretion and was not overly broad or excessive.

4. Associations; Deeds— restrictive covenants—fines for violation

A subdivision homeowners association validly assessed and collected $400 in fines pursuant to N.C.G.S. § 47F-3-107.1, the statute governing procedures for imposing fines in planned communities, against homeowners who violated a subdivision restric-

tive covenant requiring them to keep their motor home in a garage or approved screened area.

Appeal by plaintiffs from orders entered 17 December 2007 by Judge Donald W. Stephens, 4 January 2008 by Judge Paul C. Ridgeway, and 13 May 2008 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 January 2009.

Linck Harris Law Group, PLLC, by David H. Harris, Jr., for plaintiffs-appellants.

Jordan Price Wall Gray Jones & Carlton, by Henry W. Jones, Jr., and Brian S. Edlin, for defendant-appellee.

MARTIN, Chief Judge.

Michael Schwartz and Dawn Gray (collectively "plaintiffs") appeal from orders denying their motions for a temporary restraining order, a preliminary injunction, and partial summary judgment, and granting defendant Banbury Woods Homeowners Association's motion for summary judgment. For the reasons discussed below, we affirm.

On 20 August 1985, the Declarations of Covenants, Conditions and Restrictions ("CC&Rs") for defendant and the Banbury Woods Subdivision were recorded in the Wake County Register of Deeds. When it was first recorded in 1985, Article XIV of the CC&Rs provided as follows:

> Parking. Adequate off-street parking shall be provided by the owner of each lot for the parking of motor vehicles owned by such owner, and owners of lots shall not be permitted to park their automobiles on the streets in the development. Owners of lots shall not be permitted to park boats, trailers, *campers and all other similar property* on the streets in the development, and such property *shall be parked in a garage or screened area.*

(Emphasis added.) On 17 August 2005, Amendments to the 1985 CC&Rs were recorded, which modified the last sentence of Article XIV as follows:

> Owners of lots shall not be permitted to park boats, trailers, campers and all similar property on the streets in the development, and such property shall be parked in a garage or screened

> area *which is approved by the Architectural Committee in accordance with rules governing such items adopted by the Board of Directors of the Association.*

(Emphasis added.)

On 29 December 2005, plaintiffs became the record owners of the property located at 1500 Acres Way in Raleigh, North Carolina, in the Banbury Woods Subdivision. Plaintiff Gray is also the titleholder of a 2004 Tioga self-propelled motor home, which plaintiffs use "for overnight travel as a portable hotel room" and "as an extra automobile, in the same way that someone might use a truck or large passenger van." Plaintiffs also use their motor home for extra refrigerator and freezer space, and as a " 'granny unit,' a place for visitors to sleep where they have their own 'apartment' accommodations." In May 2006, "after completing improvements that provided additional parking space next to the garage as well as driving access to the concrete pad [behind the garage]," plaintiffs began parking their motor home on their Banbury Woods property.

On 6 June 2006, defendant's Architectural Committee Chairman Dick Brady spoke with plaintiff Schwartz about plaintiffs' decision to park their motor home on their Acres Way property. The next day, Brady and plaintiff Gray corresponded by e-mail regarding Brady's assertion that plaintiffs' motor home was subject to the parking restrictions identified in Article XIV of the CC&Rs. In his 7 June 2006 e-mail, Brady stated, "I don't believe we interpret the covenants to say that you can never have your boat/trailer/RV parked in your driveway but that it cannot be parked there as a means of permanent storage." Brady advised, "I don't see any way that you could screen something as big as an RV with shrubs so, if you want to store the vehicle in the neighborhood, I think fencing is the only viable option." "The bottom line, I think, is that you need to either enclose your RV with a fence or appeal to the Board." "You would need to convince the Board that [(a)] your RV does not violate the covenants, or [(b)] you should be exempt from the existing restrictions or [(c)] you should be allowed to screen your RV by other than the currently accepted methods."

On 11 October 2006, Brady sent a letter to plaintiffs stating, "It has now been 4 months since our original discussion and nearly 2 months since our follow-up discussion regarding the screening of your RV." "As the Architectural Committee has still not received a request for approval from you regarding your screening plan, it is my

obligation to the Association to formalize this issue by way of written documentation and establishment of a timeline for compliance." Brady requested that plaintiffs submit a Request for Architectural Approval for their planned screening method no later than 10 November 2006, and stated that failure to comply "may result in fines being levied by the Association."

Plaintiffs submitted a Request for Architectural Approval to construct a "privacy fence" on 1 November 2006. On 13 November 2006, the Architectural Committee denied plaintiffs' request, stating, "Fence architecture is fine but may not provide significant screening. The Board has requested that you delay any efforts to screen your RV until further notice." In a letter to plaintiffs following the Architectural Committee's denial, Brady wrote, "Until such time as you receive further direction from the Architectural Committee and/or the Board of Directors, you will not be liable for or subject to any fines or other punitive actions specific to the storage and screening of your RV."

Correspondence continued on this issue during Spring 2007 between plaintiffs and both defendant's President Edward C. Lingenheld, and defendant's Architectural Committee then-Chairman Howard A. Goodman. On 17 September 2007, Goodman sent a letter to plaintiffs stating, "The only solution that appears to have a chance of meeting screening requirements per our Covenants would involve a plantings approach. . . . Therefore I am writing to ask that you submit a Request for Approval (RFA) proposal of your own to resolve this issue." Goodman requested that plaintiffs submit their proposal by 30 September 2007 in order to avoid "an official notice of violation of covenant from [defendant's] independent inspector, which if ignored could result in monetary fines, as stipulated by [defendant's] Covenants and Resolution 1993-1, Rev. 1." On 28 September 2007, plaintiffs sent a letter to Goodman requesting an extension until the end of October 2007 to complete their research and submit their proposal.

On 2 October 2007, defendant's covenants inspector sent a Covenants Violation Notice to plaintiffs stating that "proper screening is required for the camper parked behind your home" and that the manner in which they parked the motor home "d[id] not appear to be in compliance with Banbury Woods Covenants, Article XIV." The covenants inspector requested that plaintiffs take action "within the next 30 days" to correct the violation. On 4 October 2007, Goodman sent a letter to plaintiffs "confirm[ing] that [they] currently have until

October 23, 2007, to submit to [sic] an Architectural Review Request with proposal for adequate screening of your recreational vehicle (RV)." Goodman continued, "If your proposal is submitted any later than that, we cannot guarantee a decision and response before November 1, 2007, by which time our independent covenant violations inspector will have conducted her monthly inspection and may have to issue a *second* violation notice." Goodman further wrote:

> According to Banbury Woods Covenants, and in particular Policy Resolution 1993-1 Rev. 1, fines may be levied. For your information, this Policy Resolution states that the fine for a first non-compliance or violation is to be "not in excess of Fifty Dollars.["] Second non-compliance or violation: "not in excess of One Hundred Dollars." Third and subsequent non-compliance or violation (following homeowners' receipt of first and second Covenants Violation Notices) is "not to exceed One Hundred Dollars for each week and/or any portion of a week of continued violation or non-compliance." . . .
>
> Receipt of your Architectural Review request and proposal will, in my opinion, effectively "stop the clock" on penalties such as fines at least until the outcome of the committees's review.

On 23 October 2007, plaintiffs' counsel sent a letter to Lingenheld and Goodman stating that plaintiffs did not believe they were in violation of the CC&Rs and asserting that plaintiffs would "not be submitting any request for Architectural Committee approval." On 5 November 2007, defendant's Covenants Inspector sent a Covenants Violation Second Notice to plaintiffs, citing plaintiffs' continued violation of Article XIV. The notice stated that plaintiffs needed to provide a screening proposal and if the matter was not "taken care of within the requested time frame[,] further action will be pursued."

On 6 November 2007, Lingenheld sent a letter to plaintiffs advising that, in light of the Covenants Violation Second Notice, "failure to correct the violation within 7 days will result in the assessment of penalties," (internal quotation marks omitted), and that plaintiffs will be subject to an "escalating system of fines that would continue until [plaintiffs] have complied with Article XIV regarding the required screening of your RV/Camper." Lingenheld further stated that fines would not begin to be assessed until plaintiffs had the chance to meet with defendant's Board of Directors to appeal the matter, and invited plaintiffs to meet with the Board during the week of 26 November 2007. Plaintiffs did not respond to Lingenheld's 6 November letter.

On 30 November 2007, Lingenheld sent a letter to plaintiffs' counsel advising that defendant's Board of Directors determined plaintiffs were in violation of Article XIV. Lingenheld stated that the Board "further decided to impose a fine of $100.00 per violation in accordance with [N.C.]G.S. § 47F-3-107.1," which would be assessed daily beginning 7 December 2007 "until [plaintiffs] bring themselves into compliance with the [CC&Rs]." After incurring $400.00 in fines, plaintiffs relocated their motor home to an off-site storage facility.

Plaintiffs filed a "Complaint and Motion for Rule 65 Relief" in Wake County Superior Court on 11 December 2007. Plaintiffs sought a declaratory judgment stating that their motor home did not "fall within the purview of Article XIV." Plaintiffs also asked the court to declare that defendant's Policy Resolution 2007-1—which defined the term "screened" as used in Article XIV of the CC&Rs—"and its implementation against [p]laintiffs is an arbitrary action in violation of Chapter 47F." Plaintiffs further sought a temporary restraining order and preliminary injunction against defendant from imposing any fines or "taking any punitive actions against [p]laintiffs for any alleged violation of CC&R Article XIV with regard to [p]laintiff's motor home" until the matter was heard and decided on the merits.

On 17 December 2007, the trial court denied plaintiffs' motion for a temporary restraining order. On 4 January 2008, the court denied plaintiffs' motion for a preliminary injunction, and "specifically [found] that the [p]laintiffs have an adequate remedy at law under the provisions set forth in Chapter 47F of the General Statutes, including without limitation, [N.C.G.S.] § 47F-3-116." On 28 January 2008, plaintiffs filed a Motion for Summary Judgment. On 5 February 2008, plaintiffs filed an Amended Motion for Partial Summary Judgment. On 21 April 2008, plaintiffs filed a Second Amended Motion for Partial Summary Judgment.

On 11 February 2008, defendant filed its Affirmative Defenses, Motion to Dismiss, Answer and Counterclaim. Defendant sought a permanent injunction "staying and enjoining the [p]laintiffs . . . to keep their camper out of the [Banbury Woods] Subdivision unless it is properly screened in compliance with the [CC&Rs]." Plaintiffs filed a reply to defendant's counterclaim on 25 March 2008. Defendant filed a Motion for Summary Judgment on 22 April 2008.

On 1 May 2008, the superior court heard plaintiffs' Second Amended Motion for Partial Summary Judgment and defendant's Motion for Summary Judgment. On 13 May 2008, the court entered its

order in which it denied plaintiffs' Second Amended Motion for Partial Summary Judgment and granted defendant's Motion for Summary Judgment. The court "specifically [found] that [p]laintiffs' Tioga Class C Motor Home falls within the definition of 'camper and all similar property' as stated in Article XIV of the Declaration of Covenants, Conditions and Restrictions for Banbury Woods Subdivision, as amended," and ordered plaintiffs to comply with Article XIV of the CC&Rs by *not* parking their motor home on their lot "unless it is in a garage or screened area which is approved by [defendant's] Architectural Committee in accordance with the rules and regulations governing such items adopted by the [defendant's] Board of Directors . . . pursuant to Article XIV of the [CC&Rs]." The court further determined that the fines "were validly assessed and collected" by defendant. Plaintiffs gave notice of appeal to this Court on 22 May 2008 from the following orders: the 17 December 2007 order denying plaintiffs' motion for a temporary restraining order; the 4 January 2008 order denying plaintiffs' motion for a preliminary injunction; and the 13 May 2008 order denying plaintiffs' Second Amended Motion for Partial Summary Judgment, granting defendant's Motion for Summary Judgment, and issuing a Mandatory Injunction in favor of defendant.

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "[O]n appellate review of an order for summary judgment, the evidence is considered in the light most favorable to the nonmoving party," *see Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999), and the order is reviewed *de novo*. *See Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

I.

[1] The first issue before this Court is whether plaintiffs' motor home falls within the definition of "campers and all similar property" as stated in Article XIV of the CC&Rs. We hold that it does.

"The law looks with disfavor upon covenants restricting the free use of land." *Cummings v. Dosam, Inc.*, 273 N.C. 28, 32, 159 S.E.2d 513, 517 (1968). "Because restrictive covenants are in derogation of the free and unfettered use of land, they are to be strictly construed in favor of the unrestricted use of property." *Rosi v. McCoy*, 319 N.C. 589, 592, 356 S.E.2d 568, 570 (1987). "The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent." *J.T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981). "Even so, we pause to recognize that clearly and narrowly drawn restrictive covenants may be employed in such a way that the legitimate objectives of a development scheme may be achieved." *Id.*

Although restrictive covenants must be strictly construed, "they should not be construed 'in an unreasonable manner or a manner that defeats the plain and obvious purpose of the covenant.' " *Hultquist v. Morrow*, 169 N.C. App. 579, 582, 610 S.E.2d 288, 291 (quoting *Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 521, 581 S.E.2d 94, 97 (2003)), *disc. review denied*, 359 N.C. 631, 616 S.E.2d 235 (2005). "In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and . . . their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967). "However, this intention may not be established by parol. Neither the testimony nor the declarations of a party is competent to prove intent.' " *Hultquist*, 169 N.C. App. at 585-86, 610 S.E.2d at 293 (quoting *Stegall v. Hous. Auth. of Charlotte*, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971)). Additionally, it is "not primarily the intention of the parties which the court is seeking, but the meaning of the words at the time and place when they were used." *Angel v. Truitt*, 108 N.C. App. 679, 682, 424 S.E.2d 660, 662 (1993) (internal quotation marks omitted). Doubt will be resolved in favor of "the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land." *Long*, 271 N.C. at 268, 156 S.E.2d at 239 (internal quotation marks omitted).

Here, Article XIV requires that "[a]dequate off-street parking shall be provided by the owner of each lot for the parking of motor ve-

hicles owned by such owner," and property owners "shall not be permitted to park their automobiles on the streets in the development." However, while the CC&Rs also restrain property owners from parking "boats, trailers, campers and all similar property" on the streets in the development, the CC&Rs further require that "boats, trailers, campers and all similar property" must be parked in a garage or screened area which is approved by the Architectural Committee in accordance with the governing rules adopted by defendant's Board of Directors. Thus, if the trial court erred by determining that plaintiffs' motor home falls within the definition of "campers and all similar property," then plaintiffs are exempt from the Article XIV screening requirements for their motor home.

The record does not contain any evidence regarding the circumstances surrounding the execution of the CC&Rs or the situation of the parties at the time the CC&Rs were executed. Additionally, there is no evidence before this Court to suggest that the term "campers" was modified in any way by the drafters to represent anything other than its natural meaning. *See Hobby*, 302 N.C. at 71, 274 S.E.2d at 179 ("[E]ach part of the covenant must be given effect according to the natural meaning of the words, provided that the meanings of the relevant terms have not been modified by the parties to the undertaking."). In fact, the only evidence in the record that directly bears on intent—the affidavit of Alton L. Smith, III, who "executed the Declaration in [his] capacity as an owner and Managing Partner of . . . the developer of Banbury Woods Subdivision"—is evidence that we cannot consider, since the declarations of a party are not competent to prove intent. *See Hultquist*, 169 N.C. App. at 585, 610 S.E.2d at 293.

Plaintiffs assert that selected provisions in Chapter 20 of the General Statutes make "clear that [plaintiffs' motor home] is not a 'camper.' " However, since the statutory provisions upon which plaintiffs attempt to rely were enacted between six and sixteen years *after* the CC&Rs referring to "campers and all similar property" were drafted and recorded, we conclude that these statutory provisions are not material to the issue of the drafters' intent in 1985, and plaintiffs' reliance on these provisions is misplaced. *See* 2001 N.C. Sess. Laws 1019-20, ch. 341, § 1 (enacting N.C.G.S. § 20-4.01(32a), which defines the terms "[t]ravel trailer" and "[c]amping trailer"); North Carolina Motor Vehicle Repair Act, 1999 N.C. Sess. Laws 1772-73, ch. 437, § 1 (enacting N.C.G.S. § 20-354B, which was renumbered as N.C.G.S. § 20-354.2 at the direction of the Revisor of Statutes and which

defines the term "[m]otor vehicle"); 1991 N.C. Sess. Laws 895-96, ch. 449, § 2 (enacting N.C.G.S. § 20-4.01(27)d2, which defines the term "[m]otor home or house car").

Thus, in the absence of any evidence of intent regarding the meaning of the term "camper," we must interpret the term consistent with its natural meaning, and must define the term according to its customary definition in 1985, when the CC&Rs were first drafted and recorded. *See Angel*, 108 N.C. App. at 683, 424 S.E.2d at 663. The 1985 edition of *Merriam-Webster's Collegiate Dictionary* defines "camper" as "a portable dwelling (as a specially equipped trailer *or automotive vehicle*) *for use during casual travel and camping*." *Merriam-Webster's Collegiate Dictionary* 199 (9th ed. 1985) (emphasis added). The same dictionary defines "automotive" as "self-propelled." *Id.* at 118 (9th ed. 1985). Additionally, the term "motor home" is defined as "an automotive vehicle built on a truck or bus chassis and equipped as a self-contained traveling home." *Id.* at 775 (9th ed. 1985).

Plaintiffs maintain that their motor home is "self-propelled," and assert that they "use their [motor home] to travel to the grocery store and run errands *in addition to camping*." (Emphasis added.) Further, although the term "motor home" is not expressly listed as a type of property that is subject to the screening requirements of Article XIV, based on the natural meaning of the term "camper" at the time the CC&Rs were drafted and recorded, we conclude that it would "defeat the plain and obvious purposes of [the parking] restriction" to strictly construe Article XIV so as to exclude plaintiffs' motor home from the ambit of this restrictive covenant. *See Long*, 271 N.C. at 268, 156 S.E.2d at 238-39 (internal quotation marks omitted). Therefore, we hold that plaintiffs' motor home falls within the definition of "campers and all similar property" in Article XIV of defendant's CC&Rs, and is subject to the screening requirements applicable to such property. Accordingly, we overrule this assignment of error.

II.

[2] Plaintiffs next contend the trial court erred by denying their Second Amended Motion for Partial Summary Judgment because defendant's Resolution No. 2007-1 was enacted for the purpose of "target[ing]" plaintiffs and, so, was arbitrary, capricious, unreasonable, and enacted in bad faith. We disagree.

On 8 November 1989, sixteen years prior to plaintiffs' ownership of their lot in the Banbury Woods Subdivision, defendant's Board of

Directors "recognize[d] the need for further interpretation" of the term "screened" as used in Article XIV of the CC&Rs, and so adopted Policy Resolution No. 1990-2, entitled "Screened Area Definition," which provided that

> "screened" shall mean an area within the rear lot space of such lot, which area shall be shielded from public view and observation from each adjoining lot by one of the following methodologies:
>
> 1. Planting of shrubbery of at least six feet in height along as many sides of the object to be screened as are necessary to screen such object from view from adjoining lots; or
>
> 2. Erection of a fence of appropriate height, quality, style and location and as approved pursuant to Article V of the [CC&Rs] . . . .

On 15 April 2007, defendant's Board of Directors unanimously adopted Policy Resolution No. 2007-1, which revised and superseded Policy Resolution No. 1990-2 as follows:

> "screened *AREAS*" shall mean an area within the rear lot space of such lot. *Such* "*Screened Area*" shall be shielded from public view, *including the streets within the Subdivision*, and observation from each adjoining lot by one of the following methodologies:
>
> 1. Planting of shrubbery of at least six feet in height *at the time of planting* along as many sides of the object to be screened as are necessary to screen such object from view; *Natural wooded areas are not a substitute for screening, but may be considered part of the screening depending on seasonal density*; or
>
> 2. Erection of a fence of appropriate height, quality, style and location and as approved *by the Architectural Committee* pursuant to Article V *and X* of the [CC&Rs] . . . .

(Emphasis added.)

Viewed in the light most favorable to the nonmoving party, the evidence before us shows that defendant had been addressing concerns about ongoing violations of Article XIV and examining its definition of "screening" as used in Article XIV *prior* to plaintiffs' acquisition of their lot in the Banbury Woods Subdivision at the end of

December 2005. For example, the evidence shows that, on 11 January 2004, the Architectural Committee reported to defendant's Board of Directors that the Banbury Woods Subdivision's covenant inspector issued five inspection violation notice letters in December 2003 and seven letters in January 2004 to property owners for violations which included "camper parking," "boat parking and screening," "boat screening," "trailer parking," and "boat or trailer parking." The Board's minutes from this meeting also included the following entry under "Covenants violations" in its "New Business" section:

> An overall review of our enforcement policies and practices began with the issue of boats, trailer[s], campers and the like that are parked on homeowners' lots. This type of violation is one of the most often cited by any of our inspectors. The covenants clearly call for such items to be parked in a garaged or screened area, the latter having been defined by the Board via Resolution No. 1990-2. While no documentation has been found, the Board seems to have adopted some practices that may be contrary to the intent of that resolution, e.g., approving visibility from the street, approving natural tree lines between properties as screening and approving plantings that are initially must less than 6 feet in height. The Board discussed whether the appropriate starting point was to rewrite the resolution from scratch or to agree on interpretation and possible amendment of the resolution as currently written. It was suggested and agreed that a good starting point would be to ask for the opinion of the community on what constituted appropriate parking and screening of these items. Dick will create an opinion poll and circulate to the Board for review. Susan will include the poll in her scheduled January publication.

As a result, defendant's 14 March 2004 Board meeting minutes reflect that a Feedback Survey was circulated to the homeowners and returned to the Board, prompting the Board to decide to rewrite the resolution addressing the screening requirements of Article XIV. The 23 May 2004 meeting minutes of defendant's Board further reflect the ongoing discussion about whether property subject to the screening requirements of Article XIV should be allowed to be visible from the street—an issue over which the Board "was split," until it resolved the issue by adopting Resolution No. 2007-1.

Thus, the evidence in the record demonstrates that defendant's Board of Directors had been considering and debating this issue for

at least two years prior to plaintiffs' ownership of their lot in Banbury Woods, and plaintiffs have produced no evidence that defendant "targeted" plaintiffs or acted arbitrarily, unreasonably, or in bad faith when defendant's Board passed Resolution No. 2007-1. Accordingly, we overrule this assignment of error.

III.

[3] In its 13 May 2008 order, the trial court decreed that, because "[p]laintiffs' Tioga Class C Motor Home falls within the definition of 'camper and all similar property' as stated in Article XIV of the [CC&Rs]," "[p]laintiffs are hereby ordered to comply with Article XIV of the [CC&Rs] by not parking their Tioga Class C Motor Home on their Lot *unless* it is in a garage or screened area which is approved by [defendant's] Architectural Committee." (Emphasis added.) Plaintiffs contend this injunction was "overly broad and excessive." We disagree.

"When enforcing a restrictive covenant and restoring the status quo, a mandatory injunction is the proper remedy." *Buie v. High Point Assocs. Ltd. P'ship*, 119 N.C. App. 155, 160, 458 S.E.2d 212, 216, *disc. review denied*, 341 N.C. 419, 461 S.E.2d 755 (1995). " 'Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court . . . and the appellate court will not interfere unless such discretion is manifestly abused.' " *Id.* at 161, 458 S.E.2d at 216 (omission in original) (quoting 20 Am. Jur. 2d *Covenants*, *Conditions*, *and Restric-tions* § 313 (1965)).

Plaintiffs assert that they should be "entitled to the same rights to park the[ir motor home] on their property temporarily to clean it, maintain it, prepare it for trips and unload it following trips as long as they do not park it there 'as a means of permanent storage,' " but that they will be prohibited from doing so in light of the mandatory injunction issued by the trial court. To support their assertion, plaintiffs direct this Court's attention to an e-mail sent to them by defendant's Architectural Committee then-Chairman Dick Brady on 7 June 2006, in which Brady wrote:

> Regarding your RV, I don't think I can agree with your examples of existing situations/violations although I can readily accept that there may be situations I am unaware of. I don't believe we interpret the covenants to say that you can never have your boat/trailer/RV parked in your driveway but that it cannot be

> parked there as a means of permanent storage. I know there was a large RV parked in a driveway behind you. I discussed that with the homeowner and learned that the RV belonged to visiting guests and would be there for a couple of weeks. I did not consider this a problem because it clearly wasn't being parked there permanently. I am actually not aware of any other RVs that are being stored in Banbury Woods.

In other words, plaintiffs assert that defendant's prior decision to allow another motor home to be parked for a limited time on a homeowner's lot in the Banbury Woods Subdivision without being "screened" should allow plaintiffs to park their motor home on their property for limited purposes before and after it is used on trips.

However, we conclude the relief granted in the court's 13 May 2008 order was the same relief sought by defendant in its 11 February 2008 Counterclaim against plaintiffs, and requires only that plaintiffs comply with the screening requirements of Article XIV of the CC&Rs when parking their motor home on their lot in the Banbury Woods Subdivision. Since the court properly determined that plaintiffs' motor home is subject to the screening requirements of Article XIV, we conclude that the trial court did not manifestly abuse its discretion by issuing its 13 May 2008 injunction against plaintiffs, which required only that plaintiffs comply with the plain language of the CC&Rs. Thus, we hold the injunctive relief granted by the court to restrain plaintiffs from violating Article XIV was a proper exercise of the court's sound discretion, and was not overly broad or excessive. Accordingly, we overrule this assignment of error.

IV.

[4] Finally, plaintiffs contend the trial court erred by concluding that "the fines in this case were validly assessed and collected" by defendant. Again, we disagree.

The North Carolina Planned Community Act, codified in Chapter 47F of the North Carolina General Statutes, became effective as of January 1, 1999, and "applies to all planned communities created within this State on or after January 1, 1999." *See* N.C. Gen. Stat. § 47F-1-101 (2007); N.C. Gen. Stat. § 47F-1-102(a) (2007); N.C. Gen. Stat. § 47F-1-102 official commentary (2007). However, several provisions in the Chapter—including N.C.G.S. § 47F-3-107.1, which establishes procedures for imposing fines—"apply to all planned communities *created* in this State *before* January 1, 1999 [with re-

spect to events and circumstances occurring on or after January 1, 1999], unless the articles of incorporation or the declaration expressly provides to the contrary." N.C. Gen. Stat. § 47F-1-102(c) (emphasis added).

N.C.G.S. § 47F-3-107.1 provides, in part:

> *Unless a specific procedure for the imposition of fines or suspension of planned community privileges or services is provided for in the declaration*, a hearing shall be held before the executive board or an adjudicatory panel appointed by the executive board to determine if any lot owner should be fined or if planned community privileges or services should be suspended pursuant to the powers granted to the association in G.S. 47F-3-102(11) and (12). . . . The lot owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. If it is decided that a fine should be imposed, a fine not to exceed one hundred dollars ($100.00) may be imposed for the violation and without further hearing, for each day more than five days after the decision that the violation occurs. Such fines shall be shall be [sic] assessments secured by liens under G.S. 47F-3-116.

N.C. Gen. Stat. § 47F-3-107.1 (2007) (emphasis added); *see also* N.C. Gen. Stat. § 47F-3-116 (2007) (describing the procedures by which a property owners' association may seek to recover unpaid assessments).

In the present case, after defendant's covenants inspector issued a second violation notice to plaintiffs for failing to comply with the screening requirements of Article XIV for their motor home, defendant's Board of Directors President Lingenheld sent a letter to plaintiffs advising that " 'failure to correct the violation within 7 days will result in the assessment of penalties' " "as specified in Board Resolution No. 1993-1, Rev. 1." However, Lingenheld further stated that defendant's Board of Directors would "not initiate these fines . . . until [plaintiffs] . . . had a chance to meet with the Board to appeal." Lingenheld went on to suggest the date of 27 November 2007 for the meeting, and then wrote, "If that date does not work for you, please suggest one or two alternative dates during the week of November 26."

On 17 November 2007, Lingenheld sent another letter to plaintiffs, in which he indicated that defendant's Board of Directors "has

not received a response to [its] letter dated November 6." The letter continued that "the Board would be pleased to meet with you on Tuesday, November 27 to give you the opportunity to appeal the two violation notices you have received regarding screening for your RV/camper. . . . You may appear at that time should you wish to discuss the matter."

On 30 November 2007, Lingenheld sent a letter to plaintiffs' counsel stating that defendant's Board of Directors conducted a hearing on 27 November 2007 and determined that plaintiffs were in violation of Article XIV of the CC&Rs. Accordingly, Lingenheld stated that defendant would impose a fine of $100 "in accordance with G.S. § 47F-3-107.1," which would be assessed daily beginning 7 December 2007 "until [plaintiffs] bring themselves into compliance with the [CC&Rs]."

Since there is no evidence in the record that Resolution No. 1993-1 was added by amendment to the recorded CC&Rs at the time plaintiffs' fines were assessed against them in December 2007, we conclude that defendant was bound by statute to assess fines against plaintiffs in accordance with the procedures established in N.C.G.S. § 47F-3-107.1. *See* N.C. Gen. Stat. §§ 47F-1-102(c), 47F-3-107.1. Consequently, after reviewing the evidence before us, we hold that defendant properly complied with the procedural requirements of N.C.G.S. § 47F-3-107.1 prior to assessing $400 against plaintiffs for violating Article XIV. Accordingly, we overrule this assignment of error.

In light of our disposition, we need not consider plaintiffs' appeal with respect to the trial court's orders denying plaintiffs' motions for a temporary restraining order and a preliminary injunction.

Affirmed.

Judges BRYANT and BEASLEY concur.

MERRITT, FLEBOTTE, WILSON, WEBB & CARUSO, PLLC, A NORTH CAROLINA LIMITED LIABILITY CORPORATION, PLAINTIFF v. AARON C. HEMMINGS, KELLY A. STEVENS, AND HEMMINGS & STEVENS, P.L.L.C., A NORTH CAROLINA LIMITED LIABILITY CORPORATION, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. PRE-PAID LEGAL SERVICES, INC., JAMES MERRITT, DANIEL R. FLEBOTTE, JOSEPH M. WILSON, JOY RHYNE WEBB, AND HEATHER CARUSO, THIRD PARTY DEFENDANTS

No. COA08-1333

(Filed 5 May 2009)

1. Appeal and Error— preservation of issues—raised in complaint and argued at trial

Arguments concerning breach of contract that were asserted in the complaint and argued to the trial court were considered on appeal, but arguments that were not asserted in the pleadings nor argued before the trial court were not considered.

2. Agency— office manager of law firm—social remarks—no issue of fact as to agency

Summary judgment was properly granted for plaintiffs in an action arising from the departure of plaintiffs from defendants' law firm where there had been a settlement, plaintiffs filed an action asserting that defendants failed to pay amounts owed under the agreement, and defendants asserted that plaintiffs' breaches of the agreement excused their nonperformance. Defendants contended that plaintiffs violated a nondisparagement clause in the settlement through the remarks of an office manager during a social conversation late at night in a bar, but failed to produce any evidence raising an issue of fact as to whether the office manager acted as plaintiffs' agent during that conversation.

3. Compromise and Settlement— confidentiality agreement—internal email

An internal email from plaintiffs' office manager to members of the law firm did not violate a confidentiality clause in a settlement agreement arising from defendants' departure from plaintiffs' law firm and the settlement of accounts. Such communications are permitted under the settlement agreement, and the trial court did not err by granting summary judgment for plaintiffs.

4. Fraud— ledger showing expenses—no accompanying demand

Plaintiffs did not breach a settlement agreement arising from the departure of some attorneys from a law firm by making a fraudulent demand for payment of expenses where defendants asked plaintiffs for information about expenses and plaintiffs provided a ledger. The listing was not accompanied by a letter, invoice, or any demand or request. The trial court did not err by entering summary judgment for plaintiffs.

5. Slander— per se—statute of limitations

Defendants' counterclaim for slander per se arising from the departure of attorneys from a law firm was outside the statute of limitations, and the trial judge did not err by granting summary judgment for plaintiff.

6. Privacy— invasion—website—biographical information—links removed

The trial court did not err by granting summary judgment for plaintiffs on a counterclaim for invasion of privacy arising from the departure of attorneys from a law firm and a settlement agreement. Defendants contended that their images and biographical information from plaintiffs' website could be accessed by Internet search engines, but plaintiffs did not own the server which contained the information, they had removed the links to the information from their website and it was not possible to go from plaintiffs' website to the information, plaintiffs did not intend to preserve the files, and defendants offered no evidence that the public had accessed the files. Defendants did not articulate how this would constitute misappropriation of their image or biography for any commercial purpose.

Appeal by Defendants/Third Party Plaintiffs from judgment entered 9 June 2008 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 24 March 2009.

Glenn, Mills, Fisher & Mahoney, P.A., by William S. Mills, for Plaintiff-Appellees/Third Party Defendant-Appellees.

Crawford & Crawford, LLP, by Robert O. Crawford, III, and Heather J. Williams; and Hemmings & Stevens, P.L.L.C., by Aaron C. Hemmings and Kelly A. Stevens, for Defendant-Appellants/Third Party Plaintiff-Appellants.

BEASLEY, Judge.

Defendants/Third Party Plaintiffs (Aaron C. Hemmings, Kelly A. Stevens, and Hemmings & Stevens, P.L.L.C.) (hereafter Defendants) appeal from an order denying their motion to compel discovery and granting summary judgment in favor of Plaintiff-Appellees/Third Party Defendant-Appellees (Merritt, Flebotte, Wilson, Webb & Caruso, PLLC; Pre-Paid Legal Services, Inc., James Merritt, Daniel R. Flebotte, Joseph M. Wilson, Joy Rhyne Webb, and Heather Caruso) (hereafter Plaintiffs). We affirm.

The relevant facts may be summarized as follows: Defendants Aaron Hemmings and Kelly Stevens are attorneys who are licensed to practice law in North Carolina. They previously were associates at the firm of Browne, Flebotte, Wilson & Webb, (Brown, Flebotte) the predecessor of Plaintiff law firm Merritt, Flebotte, Wilson, Webb & Caruso (Merritt, Flebotte). In September 2005 Hemmings and Stevens left Brown, Flebotte to start their own law practice (Hemmings & Stevens). Defendants kept some former clients after they left Plaintiff law firm, and disputes arose among the parties about division of attorney's fees and reimbursement of client costs that had been advanced by Brown, Flebotte. These disagreements led to litigation, which ended on 24 February 2006, when the parties executed a settlement agreement that resolved the parties' claims and counterclaims, addressed disbursement of fees and repayment of costs, and provided that its terms would remain confidential and that the parties would not "intentionally or knowingly make any false statements about each other or statement[s] which would be considered defamatory, or injurious to the reputation of the other parties."

On 11 June 2007, Plaintiffs filed a new lawsuit against Defendants, asserting that Defendants had failed to pay Plaintiffs the money owed under the settlement agreement, and had improperly disbursed attorney's fees to themselves. Plaintiffs sought an accounting of the attorney's fees received in cases covered by the settlement agreement, damages for breach of contract, and an injunction requiring Defendants to retain in trust the fees and costs for cases covered by the settlement agreement.

On 24 July 2007, Defendants filed an answer denying the material allegations of Plaintiffs' complaint and asserting that Plaintiffs' "substantial and material" breaches of the parties' contract excused their non-performance and refusal to make payments owed under the settlement agreement. With their answer, Defendants also filed a coun-

terclaim against Plaintiffs for breach of contract, slander *per se*, and invasion of privacy or misappropriation of likeness. Defendants alleged: (1) that after Defendants left Plaintiff law firm, the Plaintiffs' website continued to list Defendants as attorneys with the firm; (2) that Plaintiffs had made a "demand" for repayment of "fraudulent expenses", and; (3) that Plaintiffs had made "false and defamatory" statements about Defendants.

In addition, Defendants filed a third party complaint against James Merritt, Daniel R. Flebotte, Joseph M. Wilson, Joy Rhyne Webb, Heather Caruso, and Pre-Paid Legal Services, Inc. The third party complaint made essentially the same assertions as the counterclaim, and sought similar relief. Defendants later dismissed their claims against Pre-Paid Legal Services, which is not a party to this appeal. Defendants also moved for dismissal of Plaintiffs' claims for insufficiency of service of process, failure to state a claim for relief, previous dismissal of the same claims, false and scandalous allegations, *res judicata* and collateral estoppel; their motions to dismiss were denied by the trial court on 11 September 2007.

On 26 September 2007 Plaintiffs filed a reply to Defendants' counterclaim and an answer to Defendants' third party complaint. Plaintiffs denied the material allegations, asserted defenses, and moved for dismissal of Defendants' claims. On 28 March 2008 Defendants filed a motion to compel discovery, seeking an order compelling Pre-Paid Legal Services to respond to Defendants' interrogatories and requiring Defendant Joy Webb to answer questions about the firing of an employee. On 16 May 2008 Plaintiffs filed a motion for summary judgment on all claims and counterclaims.

On 9 June 2008 the trial court entered an order granting Plaintiffs' motions for summary judgment and denying Defendants' motion to compel discovery. The order granted summary judgment in favor of Plaintiffs, ordered Defendants to pay $256,834 for attorney's fees and $17,642.76 for costs advanced, and dismissed all of Defendants' counterclaims, defenses, and third party claims against Plaintiffs. Defendants have appealed the denial of their motion to compel discovery, the dismissal of their claims against Plaintiffs, and the entry of summary judgment in favor of Plaintiffs.

Standard of Review

Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). "The purpose of the rule is to avoid a formal trial where only questions of law remain and where an unmistakable weakness in a party's claim or defense exists. . . . '[A]n issue is genuine if it is supported by substantial evidence,' which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion. . . . '[A]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.' " *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 123-24 (2002) (quoting *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002); and *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)) (citations omitted).

"The moving party bears the initial burden of coming forward with a forecast of evidence tending to establish that no triable issue of material fact exists." *Briley v. Farabow*, 348 N.C. 537, 543, 501 S.E.2d 649, 653 (1998) (citation omitted). "The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2007).

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

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to

testify to the matters stated therein." Rule 56(e). "A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (citations omitted).

"Our Supreme Court has stated that a mediated settlement agreement constitutes a valid contract between the settling parties which is 'governed by general principles of contract law.' " *McClure Lumber Co. v. Helmsman Constr., Inc.*, 160 N.C. App. 190, 197, 585 S.E.2d 234, 238 (2003) (quoting *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001)). In resolving the issues raised on appeal, we treat the settlement agreement as a contract.

Defendants argue first that the trial court erred by granting summary judgment in favor of Plaintiffs on the parties' claims and counterclaims for breach of contract. We disagree.

As discussed above, "[t]he party moving for summary judgment has the burden of showing that there is no triable issue of material fact." *Nicholson v. American Safety Utility Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997) (citations omitted). "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

In the instant case, Defendants do not dispute that they have failed to pay the full amount of attorney's fees due to Plaintiffs under the terms of the contract. Defendants assert that their nonperformance is excused by Plaintiffs' substantial and material breaches of the contract. Defendants contend that they presented evidence of three breaches of the contract. With respect to each of these we conclude that (1) Plaintiffs supported their summary judgment motion with evidence showing that Defendants could not prove that there had been a breach of contract, and; (2) Defendants failed to produce evidence showing any issue of material fact.

[1] Preliminarily, we address the scope of our review. In their answer and counterclaim to Plaintiffs' complaint, Defendants asserted that Plaintiffs had materially and substantially breached the parties' settlement agreement by breaching the contract's non-disparagement clause and by making a fraudulent demand for expense payments. At

the summary judgment hearing, Defendants relied on the same allegations. On appeal Defendants again argue that Plaintiffs breached the contract by violating the non-disparagement clause and by demanding expenses that were not actually covered under the contract. We will address Defendants' arguments on these issues, which were asserted in Defendants' complaint and argued to the trial court.

However, on appeal Defendants also argue that Plaintiffs violated the parties' contract by "failing to timely accept or reject payments under the contract" and by "failing to act in good faith under the contract." These alleged breaches of contract were neither asserted in Defendants' pleadings nor argued before the trial court. The Supreme Court "has long held that issues and theories of a case not raised below will not be considered on appeal[.]" *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (citation omitted). *See also* N.C.R. App. P. 10(b)(1) ("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 . . . [and] obtain[ed] a ruling upon the party's request, objection or motion"). Accordingly, we do not consider these arguments.

[2] Defendants contend that the evidence raised genuine issues of material fact about whether the Plaintiffs violated a "non-disparagement" clause in the settlement agreement. This clause states that "the parties agree that they will not intentionally or knowingly make any false statements about each other or statement[s] which would be considered defamatory, or injurious to the reputation of the other parties." Accordingly, the clause does not apply to every "disparaging" remark, but only to statements of parties, and only if the party intentionally (1) makes a false statement about another party, or (2) makes a statement about another party that is defamatory or injurious to the party's reputation. " 'Presumably the words which the parties select [for inclusion in a contract are] deliberately chosen and are to be given their ordinary significance.' " *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 405, 584 S.E.2d 731, 738 (2003) (quoting *Briggs v. American & Efird Mills, Inc.*, 251 N.C. 642, 644, 111 S.E.2d 841, 843 (1960)).

Defendants assert that Brad Rhyne, the office administrator for Plaintiff law firm, violated the clause in a conversation with Adrienne Lopez, a social acquaintance of his. Lopez's deposition testimony may be summarized in pertinent part as follows: Lopez previously dated

Aaron Hemmings. She knew Rhyne as a casual social acquaintance whom she sometimes saw at a bar or restaurant. Lopez recalled a conversation with Rhyne that took place at a Raleigh bar, "White Collar Crimes," between 9:00 p.m. and midnight on a night in February or March of 2006. Lopez had gone to the bar with friends. When she noticed that Rhyne was there, she approached him and they talked for about ten minutes. During the conversation, Rhyne commented that "Aaron had changed" and was "untrustworthy" and made another remark about which Lopez recalled only that it "suggested" that "Aaron did something wrong or committed some sort of crime when he left the firm."

Defendants assert that Plaintiffs are liable for Rhyne's late night comments at the White Collar Crimes bar, on the grounds that Rhyne was acting as an agent of Plaintiffs' law firm. However, it is axiomatic that a "principal is not liable when the agent is about his own business, or is acting beyond the scope and range of his employment. This is true irrespective of the intent of the agent." *Snow v. Equitable distribution Butts*, 212 N.C. 120, 123, 193 S.E. 224, 227 (1937).

In support of their summary judgment motion, Plaintiffs submitted the affidavits of James Merritt and Joy Rhyne Webb, who are members of Plaintiff law firm. Regarding Rhyne's employment and the scope of his authority, each averred that:

> Brad Rhyne is an employee of the Merritt Flebotte [law firm.] He is the firm's office administrator. . . . He is not authorized to speak on behalf of the law firm of Merritt Flebotte except to employees in his role as human resource manager and to vendors of supplies and services to the firm. Other than those situations he has no authority to speak on behalf of the firm. Nor does he have the authority to sign checks for the firm or incur financial obligations. . . . [T]o the extent that Brad Rhyne spoke with Ms. Lopez about Aaron Hemmings at a bar in Raleigh during evening hours, it was not within the course and scope of his employment to have such a conversation.

"At this point, in our opinion, movant's evidence that [Rhyne] was not acting as the agent of the [Plaintiff law firm] within the scope of his authority at the times complained of carried the burden placed upon it by Rule 56(c) by showing the absence of one of the essential elements of [Defendants'] claim." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 27-28, 209 S.E.2d 795, 803 (1974).

Defendants offer no evidence suggesting that Plaintiffs' description of Rhyne's job was inaccurate; nor do they contend that his conversation with Lopez might fall within his job description. Rather, Defendants assert that "Rhyne was the plaintiff's office administrator. As such, he was an agent of [Plaintiff law firm]. As their agent he was bound by the contractual non-disparagement clause whether he was sitting in his office or socializing at a bar." Defendants note that Rhyne had actual knowledge of the terms of the settlement agreement and was the brother of an attorney in Plaintiff law firm, but articulate no legal connection between these facts and the legal relationship of principal and agent. Defendants offered no evidence that the scope of Rhyne's employment included barroom gossip about members of the firm, and cite no appellate opinions suggesting that an employee is considered an "agent" of his employer even when he acts far outside the scope of his employment.

We conclude that Defendants failed to produce any evidence raising an issue of fact as to whether Rhyne acted as Plaintiffs' agent during his conversation with Lopez.

[3] Next, we consider Defendants' contention that Rhyne breached the contract by sending an email to members of Plaintiff law firm, in which he complained about Defendants' failure to reimburse Plaintiffs for some of the costs that had been advanced. The email was addressed to "Partners" and was received by three members of the firm; Joy Webb, Dan Flebotte, and Joey Wilson. It stated:

> Dan, Please find the attached advanced costs reports for Kelly and Aaron. These reports show that on several cases such as [redacted] that they paid us $261.05 for reimbursement for advance costs when in fact they owed us $476.25. They need to go back and pay us for all the cases that they neglected to even pay a dime in advanced costs (to date they have only paid advanced costs in three out of twelve cases).
>
> Even more frustrating, as I was talking to Jennie Phillips, I found out that Stephanie Minor and Tiffany Doster had been emailing Jennie to get the advanced costs of cases they settled. Even worse than that . . . several were cases that they have paid us for attorney fees already but have neglected to pay advanced costs . . . so they knew what the advanced costs were and just didn't pay it.
>
> Please don't forget that we need the trust ledgers for the cases that they have already paid us for and for the ones that they send

> us checks [for] in the future. If we could simply get the trust ledger, then we can see the disbursements that were made and verify the amount that we received. It's that simple.

The settlement agreement provides that the terms of the contract are to remain confidential, but that the parties "shall be allowed to discuss such provisions of this Agreement as is deemed necessary with those members, employees and financial/legal advisors on a need to know basis." As conceded by Defendants Stevens and Hemmings in their respective depositions, this clause permits "in-house" communication about the terms of the agreement.

In support of their summary judgment motion, Plaintiffs tendered a copy of the email showing that it was sent only to members of the firm, and the deposition of Rhyne, in which he testified that he sent the email only to the recipients shown on the copy of the email. Plaintiffs' evidence, which shows that the email was not a breach of the parties' agreement, made incumbent upon Defendants to respond with evidence raising an issue of fact about the email.

When Dan Flebotte, a member of Plaintiff law firm, received the email, he sent a copy to Defendants as part of their ongoing attempts to resolve issues arising from the settlement agreement. The email copy that Hemmings received did not include the names of the original recipients. On this basis, Defendants speculate that perhaps the email had been sent to others outside the firm. However, Defendants failed to produce any evidence that this had occurred, and offered no evidence to contradict Plaintiffs' sworn testimony that the email was only sent to members of the firm.

We conclude that the uncontradicted evidence was that this email was from an employee of Plaintiff law firm to members of the firm. Such communications are permitted under the settlement agreement. Defendants failed to demonstrate any genuine issue of material fact about this email. Accordingly, Plaintiffs were entitled to entry of summary judgment on this issue.

[4] Defendants also argue that Plaintiffs breached contract by making a "fraudulent" demand for payment of expenses. This argument is without merit.

The settlement agreement required Defendants to reimburse Plaintiffs for costs advanced in certain cases. It provided that Defendants would submit a check for the dollar amount that they determined was owed, and if Plaintiffs deposited or cashed the

check, they were deemed to have accepted Defendants' proposed amount of expenses. Defendants concede that Plaintiffs had no obligation under the settlement agreement to provide accounting information to Defendants, calculate costs, or otherwise assist Defendants in determining the amount of costs owed. Plaintiffs' role was simply to accept or reject the proffered amount. Nonetheless, Defendants asked Plaintiffs for information about expenses. In response, Plaintiffs used QuickBooks® software to generate a list of all checks written for the cases at issue and sent the resulting document to Defendants in a loose-leaf binder. It is this ledger which Defendants characterize as a "fraudulent demand" for money.

Defendants concede that the ledger does not include a demand for payment, that it was not accompanied by a letter demanding payment, and that Plaintiffs never expressed a "demand" for payment of the costs set out in the notebook. Thus, it is undisputed that Plaintiffs sent this listing unaccompanied by a letter, invoice, or any demand or request to be paid any particular amount.

We conclude that the evidence offered on summary judgment did not raise a genuine issue of material fact on Plaintiffs' alleged breaches of the settlement agreement. We specifically conclude that Defendants failed to produce evidence that (1) Rhyne's alleged remarks to Lopez were a breach of the settlement agreement; (2) Rhyne's email to members of the firm was a breach of the settlement agreement, or that; (3) the ledger records compiled by Plaintiffs constituted a "demand" or a "fraudulent demand" for money. As we have concluded that Defendants failed to present evidence that Plaintiffs had breached the settlement agreement, we do not reach the issues of whether the alleged breaches were material and substantial; or whether a material and substantial breach, if one had been shown, would have entitled Defendants to suspend payments due under the settlement agreement.

We conclude that the trial court did not err by entering summary judgment in favor of Plaintiffs on Defendants' assertions and defenses predicated on Plaintiffs' alleged breaches of the settlement agreement.

Counterclaims

[5] Defendants brought counterclaims against Plaintiffs for slander *per se*, breach of contract, and for invasion of privacy and misappropriation of likeness. Defendants argue on appeal that the trial court

erred by entering summary judgment for Plaintiffs on these claims. We disagree.

We conclude that Defendants' counterclaim against Plaintiffs for slander *per* se was barred by the statute of limitations.

Under N.C. Gen. Stat. § 1-54(3) (2007), the statute of limitations for a claim of slander or libel is one year. On appeal, Defendants assert that "sometime in February-March 2006, Brad Rhyne . . . made derogatory statements in public to Adrianne Lopez, an acquaintance of Aaron Hemmings." In her deposition, Lopez testified that the allegedly slanderous remarks were part of a conversation with Rhyne in "February or March" of 2006. Defendants' counterclaim was not filed until 24 July 2007, which is several months after 31 March 2007.

Defendants argue that the cause of action did not accrue until Hemmings "discovered" the slanderous remarks. This argument has been rejected by our appellate courts. " 'To escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues, G.S. 1-54(3), and the action accrues at the date of the publication of the defamatory words, regardless of the fact that plaintiff may discover the identity of the author only at a later date.' " *Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 287, 465 S.E.2d 56, 58 (1996) (quoting *Price v. Penney Co.*, 26 N.C. App. 249, 252, 216 S.E.2d 154, 156 (1975)).

Moreover, Defendants did not argue to the trial court that the statute of limitations should be tolled until Defendants learned of Rhyne's statements, and cannot raise this issue for the first time on appeal. N.C. R. App. P. 10(b)(1). We conclude that Defendants' claim for slander *per se* was barred by the statute of limitations. Therefore we do not reach the issue of whether Rhyne's remarks constituted slander *per se*.

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[6] Defendants next argue that the trial court erred by entering summary judgment, on the grounds that there were genuine issues of material fact as to Defendants' counterclaim/third party claim for invasion of privacy and misappropriation of the Defendants' names and likenesses. We disagree.

"It is well known that the concept of a right of privacy recognizable in law appears to have originated in a law review article by Louis D. Brandeis, later a Justice of the Supreme Court of the United States,

and his law partner, Samuel D. Warren. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)." *Hall v. Post*, 323 N.C. 259, 262, 372 S.E.2d 711, 713 (1988). "The Supreme Court of North Carolina has recognized that 'an invasion of privacy by the appropriation of a plaintiff's photographic likeness for the defendant's advantage as a part of an advertisement constitutes a tort giving rise to a claim for relief recognizable at law.' " *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 322, 312 S.E.2d 405, 411 (1984) (citing *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938)).

Plaintiff law firm, Merritt Flebotte, maintains a website that displays information about the firm, including information about its attorneys. While Hemmings and Stevens worked at the firm, the website had links to brief biographical sketches of each. Defendants contend that Plaintiffs continued to display Defendants' photographs and biographical information on the Merritt Flebotte website after Defendants left the firm. On this basis, Defendants assert that Plaintiffs invaded their privacy by misappropriating their images and professional reputation. However, Plaintiffs supported their motion for summary judgment with uncontradicted evidence that:

> [a]fter Hemmings and Stevens left the firm, Rhyne contacted the firm's technical support service, and asked them to delete Stevens and Hemmings from the firm's website.
>
> On 13 September 2005 the technical support staff deleted Defendants' names and biographical information from the website, and removed all links on Plaintiffs' website that connected to information about Defendants.
>
> After Defendants were deleted from the firm's website, it was no longer possible to navigate from the firm's homepage to pages about the Defendants. A visitor to the firm's website would not see Defendants names among the attorneys and none of the links on the website led to information or pages about Defendants.

In her 3 April 2006 email to Defendant Joy Webb, Stevens stated "I understand you took our names off the actual web page[.]" In her deposition testimony, Stevens conceded that it was not possible to access any web links or information about her or Hemmings after they were deleted from the website, and that she had no evidence to contradict Plaintiffs' evidence that this was done on 13 September 2005. When Hemmings was deposed, he also admitted that there was

no way to navigate from Plaintiffs' website to any information about him or Stevens. Plaintiffs also offered testimony showing that when Hemmings and Stevens quit the firm, Plaintiffs wanted to remove all references to Defendants from Plaintiffs' website and took action to accomplish this removal, and that after Defendants left the firm, Plaintiffs did not use information about Defendants for any purpose.

Thus, Plaintiffs' uncontradicted evidence established that: (1) shortly after Defendants left the law firm, Plaintiffs directed their technical support service to delete Defendants from the Plaintiffs' website; (2) on 13 September 2005 the technical service deleted Defendants' names and informational pages from Plaintiffs' website; (3) after Defendants were deleted from the website, there was no information about Defendants on the website, and no way to navigate from Plaintiffs' website to information about Hemmings or Stevens, and; (4) after Defendants left Plaintiffs' law firm, Plaintiffs made no use of information about Defendants. This evidence, which showed that Defendants could not prove that Plaintiffs had misappropriated or used Defendants' photographs or biographical information after Defendants quit Plaintiffs' law firm, met Plaintiffs' initial burden of "proving that an essential element of the opposing party's claim is nonexistent, or . . . that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427 (citations omitted). This shifted the burden to Defendants to produce evidence showing a genuine issue of material fact regarding their counterclaim.

Defendants did not produce evidence contradicting Plaintiffs' evidence that, when Plaintiffs instructed the technical support service to delete Defendants from the website, the consultant removed links referring to Defendants from the website. The files for these documents were stored as html code files on another computer, called a server. Plaintiffs did not own the server, and no evidence was presented to suggest that Plaintiffs intended to preserve a copy of the deleted files. But, because the actual html code was not removed from the server, it was theoretically possible to use Google or another search engine to retrieve and view the deleted pages. Defendants offered no evidence that any member of the public had accessed these files.

Defendants did not allege that Plaintiffs were negligent, but instead brought a claim for the intentional tort of invasion of privacy. Assuming, *arguendo*, that after Plaintiffs removed all informa-

tion and links pertaining to Defendants from Plaintiffs' website, an internet search engine might return links to some of the deleted biographical pages, Defendants fail to articulate how this would constitute misappropriation of their image or biographies for any commercial purpose:

> [a]ccording to [Defendant] he was able to access [documents deleted from Plaintiffs' website] by entering the extended URL address . . . [Defendant] claims he was also able to access the [documents] through various website searches conducted through Google. . . . [Defendant] was able to unearth what is for all practical purposes a cyberspace artifact[.] . . . Indeed, it is undisputed that after the [13 September file deletions] the link[s] on [Plaintiffs'] website to [Defendants] . . . [were] deleted[.] . . . Beyond saying that his Google searches took him to [a] link that took him to [a copy of the deleted files,] . . . [Defendant] explains nothing that would constitute clear and convincing evidence of contumacy by [Plaintiffs].

Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc., 2006 U.S. Dist. LEXIS 29082 (N.D. Ill. May 10, 2006) , *aff'd* 471 F.3d 745, 2006 U.S. App. LEXIS 30271 (7th Cir. Ill. 2006). We conclude that Defendants failed to produce evidence of Plaintiffs' invasion of their privacy by misappropriation of likeness. This assignment of error is overruled.

Finally, Defendants argue that the trial court erred by denying their motion to compel discovery, on the grounds that it was reasonably likely to lead to admissible evidence. We have reviewed this assertion and find it to be without merit. This assignment of error is overruled.

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

Affirmed.

Judges McGEE and GEER concur.

HARBIN YINHAI TECHNOLOGY, DEVELOPMENT COMPANY, LTD., PLAINTIFF v. GREENTREE FINANCIAL GROUP, INC., AND R. CHRISTOPHER COTTONE, DEFENDANTS

No. COA08-1115

(Filed 5 May 2009)

1. Appeal and Error— appealability—order denying partial summary judgment—order dismissing complaint—writ of certiorari

Plaintiff's appeal from an interlocutory order denying its motion for partial summary judgment was dismissed. However, the Court of Appeals treated plaintiff's appeal from an interlocutory order of dismissal of the complaint without prejudice as a writ of certiorari and allowed the petition in its discretion because: (1) the dismissal involved a motion to dismiss on the eve of trial and a misapplication of law by the trial judge which may have been supplied with incomplete statutory authority by defendants; and (2) the ruling, unless reversed, may prejudice plaintiff should it attempt to refile this action.

2. Appeal and Error— notice of appeal—timeliness

Plaintiff's notice of appeal from an order of dismissal without prejudice was timely filed, even though it was filed prior to entry of the dismissal order, where the trial court announced its decision to deny the motion to set aside dismissal and the motion for Rule 11 sanctions on 30 April 2008, plaintiff filed notice of appeal on 6 May 2008 explaining that the order being appealed was rendered orally by the court on 30 April 2008 and was to be entered shortly, and the order was subsequently entered on 27 May 2008.

3. Appeal and Error— appellate rules violations—standard of review—incorrect references to record in assignments of error

The trial court did not err by concluding plaintiff did not violate the Rules of Appellate Procedure in its brief because: (1) contrary to defendants' assertion, plaintiff set forth the standard of review in its brief as required by N.C. R. App. P. 28(b)(6); and (2) although defendants assert that plaintiff violated N.C. R. App. P. 10(c) based on incorrect references to the record in its assignments of error, all such errors were remedied by plaintiff when the Court of Appeals granted its motion to amend the page references contained in its assignments of error.

4. Corporations— Chinese corporation—contract for services—not transacting business in this state—certificate of authority not required to maintain lawsuit

Plaintiff Chinese corporation was not transacting business in North Carolina and thus was not required to obtain a certificate of authority in order to maintain a lawsuit in this state because: (1) N.C.G.S. § 55-15-01(b) provides that maintaining a lawsuit shall not be considered as transacting business; (2) by contracting with a Florida corporation with an office in this state and its North Carolina attorney for services involving reverse merger transactions with Nevada corporations, plaintiff was engaged in interstate commerce or was carrying on activities concerning its internal affairs, both of which were exempt from the certificate requirement by N.C.G.S. § 55-15-01(b)(2) and (8); (3) defendants and their attorney acted as independent contractors when rendering services to plaintiff, and the activities of an independent contractor cannot be attributed to a foreign corporation when determining if the corporation is required to obtain a certificate of authority; and (4) the purpose of plaintiff's corporation was to prepare documents for financial institutions in China, there was no evidence that plaintiff carried on any such activity in North Carolina, plaintiff did not maintain offices in this state and did not solicit business to any North Carolina corporations, and plaintiff's representatives had not even visited North Carolina prior to this lawsuit.

5. Appeal and Error— appealability—motion to set aside order of dismissal—mootness

Although plaintiff contends the trial court abused its discretion by concluding it lacked jurisdiction to deny plaintiff's motion under N.C.G.S. § 1A-1, Rule 60(b) to set aside dismissal of its complaint based on fraud, misrepresentation, and misconduct of defendants' counsel, the issue of whether the trial court should have set aside the order of dismissal is moot because the Court of Appeals reversed the order of dismissal.

6. Pleadings— Rule 11 sanctions—remanded for further proceedings

The trial court's denial of N.C.G.S. § 1A-1, Rule 11 sanctions for defendants' counsel based upon plaintiff's argument that defendants' counsel violated Rule 11 because its motion to dismiss was legally insufficient, filed for an improper purpose, and

failed to disclose relevant legal authority is vacated and remanded for further proceedings.

Appeal by plaintiff from order entered on 28 February 2008 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court and orders entered 8 April 2008 and 27 May 2008 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 February 2009.

Bishop, Capitano & Moss, P.A., by J. Daniel Bishop and Joseph A. Davies, for plaintiff-appellant.

Leslie C. Rawls and Newkirk Law Office, by Robert B. Newkirk, III, for defendant-appellees.

HUNTER, JR., ROBERT N., Judge.

Plaintiff Harbin Yinhai Technology Development Company, Ltd. appeals three orders which deny partial summary judgment, dismiss its complaint without prejudice, and deny its motion to set aside judgment of dismissal for fraud and misconduct and for Rule 11 sanctions. Defendants filed a motion to dismiss plaintiff's appeal. We dismiss the appeal for the order denying partial summary judgment as interlocutory. We agree that the order dismissing the complaint without prejudice is interlocutory; however, in our discretion under Rule 21 of the Rules of Appellate Procedure as discussed *supra*, we treat the appeal of that issue as a *writ of certiorari*, and reverse and remand. We hold that the trial court erred in concluding that it did not have jurisdiction to set aside the dismissal for attorney fraud, but dismiss the appeal on this matter as moot. We vacate the trial court's denial of Rule 11 sanctions and remand for consideration in light of this opinion.

I. Background

Plaintiff Harbin Yinhai Technology Development Company, Ltd. ("plaintiff") is a corporation, organized under the laws of the People's Republic of China, engaged in specialty printing for financial institutions in China. Defendant Greentree Financial Group, Inc. ("Greentree") is a Florida corporation, which provides financial advisory and consulting services, with an office in Cornelius, North Carolina. Defendant, R. Christopher Cottone ("Cottone"), an officer of Greentree, is a resident of Florida. On 18 October 2004, plaintiff contracted with Greentree and Cottone (collectively "defendants") for assistance in arranging a reverse merger transaction with a public

shell corporation whose shares were traded in the over-the-counter bulletin board of NASDAQ.

Plaintiff asserts it paid defendants $70,000.00 for consulting services, and deposited $500,000.00 into escrow, to be released upon the closing of the reverse merger. Upon defendants' recommendation, plaintiff retained the services of defendants' North Carolina Attorney, Harold H. Martin.

Defendants identified WorldTeq Group International, Inc. ("WorldTeq"), a Nevada Corporation, as a suitable reverse merger target. However, after WorldTeq was delisted, defendants identified GFR Pharmaceuticals, Inc. ("GFRP"), a Nevada corporation, as a substitute target for the merger.

On 15 August 2005, defendants faxed plaintiff a letter confirming that plaintiff "will not incur any additional expenses to close the deal with GFRP instead of WorldTeq" and that the "$500,000 paid into Greentree's escrow will be applied to the GFRP deal in lieu of WorldTeq." In October of 2005, plaintiff terminated the merger with GFRP because of its concern that the transaction would give rise to significant liabilities, following the merger. Around 11 October 2005, plaintiff asked defendants to return its escrow deposit of $500,000.00. Defendants replied that there was only $350,000.00 in escrow funds because defendants had applied the remaining $150,000.00 to cover expenses. Plaintiff contends that defendants did not return the escrow funds of $350,000.00 until April of 2006.

On 10 April 2007, plaintiff filed claims against defendants for: breach of contract, breach of fiduciary duty, conversion, civil theft and embezzlement, unfair and deceptive trade practices, and constructive fraud. Defendants filed answers denying plaintiff's allegations. Defendants failed to respond in a timely manner to plaintiff's requests for admissions and were deemed, by order entered 28 February 2008, to have conclusively admitted that "[plaintiff] deposited a total of $500,000 into escrow with [defendants] as escrow agent". Plaintiff moved for partial summary judgment and the matter was heard on 26 February 2008. The Honorable Yvonne Mims Evans denied the motion on 28 February 2008 ("order denying partial summary judgment").

On 31 March 2008, when the matter was scheduled for trial, defendants moved to dismiss on the grounds that plaintiff had failed to obtain a certificate of authority to do business as a foreign corpo-

ration, pursuant to N.C. Gen. Stat. § 55-15-02. Lacking prior notice of defendants' motion, plaintiff requested that the trial court allow it a brief period to research the issue. The Honorable Timothy S. Kincaid denied plaintiff's request and dismissed the case without prejudice on 31 March 2008. A written order of dismissal "order of dismissal") was subsequently entered on 8 April 2008.

On 31 March 2008, plaintiff filed a motion to reconsider dismissal order. On or about 10 April 2008, plaintiff filed a joint motion to set aside judgment of dismissal for fraud and misconduct and for Rule 11 sanctions. Plaintiff claimed that defendants' attorney had violated Rule 11 because its motion to dismiss was lacking in legal merit. Plaintiff contended that defendants' counsel misled the trial court by failing to disclose the controlling legal authority of N.C. Gen. Stat. § 55-15-01. The Honorable Timothy S. Kincaid denied plaintiff's motions on 30 April 2008. A written order was entered on 27 May 2008 that denied the motion to set aside judgment of dismissal for fraud and misconduct "denial of the motion to set aside dismissal") and motion for Rule 11 sanctions("denial of Rule 11 sanctions").

Plaintiff filed notice of appeal on 6 May 2008. Defendants filed a motion to dismiss this appeal on 24 November 2008.

II. Defendants' Motion to Dismiss Appeal

Defendants move to dismiss this appeal and argue that: 1) both the order denying partial summary judgment and the order of dismissal are interlocutory; 2) this Court lacks jurisdiction over the order denying the motion to set aside dismissal and Rule 11 sanctions; and 3) plaintiff violated the Rules of Appellate Procedure. We grant defendants' motion to dismiss plaintiff's appeal of the order denying partial summary judgment.

A. Interlocutory Orders.

[1] 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." *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993). There is generally no right to appeal an interlocutory order. *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App.

654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985).

Orders which deny summary judgment are ordinarily interlocutory and not appealable. *Cagle*, 111 N.C. App. at 245, 431 S.E.2d at 802. A party is only permitted to appeal from an interlocutory order if there has been a final determination of at least one claim, and the trial court certifies there is no just reason to delay the appeal or if delaying the appeal would prejudice a substantial right. *Liggett Group v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993). As neither exception applies, we dismiss plaintiff's appeal of the order denying partial summary judgment.

We also agree with defendants that trial court's order of dismissal without prejudice is interlocutory. Unless an exception applies, an order of dismissal without prejudice is interlocutory. *See Atkins v. Peek*, 193 N.C. App. 606, 609, 668 S.E.2d 63, 65 (2008) (holding that the order of the dismissal without prejudice was interlocutory because it did not deprive the appellant of a substantial right). It is our view that the administration of justice will be best served by using our discretionary authority under Rule 21 of the N.C. Rules of Appellate Procedure to issue a *writ of certiorari* on the following question: Did the trial court err as a matter of law in determining that the plaintiff was transacting business in North Carolina and needed a certificate of authority to maintain its lawsuit within the meaning of N.C. Gen. Stat. §55-15-02?" *See* N.C. R. App. P. 21(a)(1) (2009).

A *writ of certiorari* "will only be issued upon a showing of appropriate circumstances in a civil case where the right of appeal has been lost by failure to take timely action or where no right to appeal from an interlocutory order exists." *Graham v. Rogers*, 121 N.C. App. 460, 464, 466 S.E.2d 290, 293 (1996). Because the dismissal in this case involves a motion to dismiss on the eve of trial, a misapplication of law by the trial judge which may have been supplied with incomplete statutory authority by defendants and because this ruling, unless reversed, may prejudice plaintiff should it attempt to refile this action, we find there to be "appropriate circumstances" in which to grant the writ. Furthermore, the parties have fully briefed these issues. Thus, we reach the merits of this issue.

B. Lack of Jurisdiction

[2] Defendants assert that this Court does not have jurisdiction over the order denying the motion to set aside dismissal and motion for Rule 11 sanctions because the notice of appeal was not timely filed.

Rule 3 of the North Carolina Rules of Appellate Procedure requires a notice of appeal to be filed "within 30 days after entry of judgment[.]" N.C. R. App. P. 3(c)(1) (2009). We have previously held that:

> "rendering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice, while entry of an order initiates the thirty-day time limitation within which notice of appeal *must* be filed and served."

Merrick v. Peterson, 143 N.C. App. 656, 660, 548 S.E.2d 171, 174 (citation omitted), *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001).

On 30 April 2008, the trial court announced its decision to deny the motion to set aside dismissal and the motion for Rule 11 sanctions. Plaintiff filed notice of appeal on 6 May 2008, explaining that the order being appealed was "rendered orally by [the court] on April 30, 2008 and to be entered shortly." The order was subsequently entered on 27 May 2008. Defendants' contention that plaintiff was required to file another notice of appeal after 27 May 2008 is incorrect, and therefore, plaintiff's notice of appeal was timely filed.

C. Appellate Procedure Violations

[3] Defendants argue that plaintiff violated the Rules of Appellate Procedure, in its brief, by: 1) failing to state the standard of review in its first argument, 2) failing to make clear references to the record and transcript in its assignments of error, 3) assigning error to matters that were not ordered by the trial court in its fifth assignment of error, and 4) failing to state the legal basis for its sixth assignment of error. Defendants' contentions, if correct, concern nonjurisdictional violations, and are not of an egregious nature warranting dismissal.

Our Supreme Court described three commonly occurring circumstances of default under the appellate rules: "(1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008). The Court stressed that "only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate." *Id.* at 200, 657 S.E.2d at 366. The nonjurisdictional rules at issue in the present case are Rule 10(c)(1), which directs the form of assignments of error, and Rule 28(b), which governs the content of the appellant's brief. *See* N.C. R. App. P. 10(c)(1), 28(b) (2009).

Defendants claim that plaintiff failed to state the standard of review in its first argument, as required by Rule 28(b)(6) of the Rules of Appellate Procedure. We disagree. In its brief, plaintiff set forth the standard of review when it stated that:

> dismissal of the complaint was error because the facts [the trial court] found did not support its conclusion that [plaintiff] is "transacting business" in this state. Harold Lang Jewelers, Inc. v. Johnson, 156 N.C. App. 187, 189, 191, 576 S.E.2d 360, 361, 362 (applying standard of review), disc. review denied, 357 N.C. 458, 585 S.E.2d 765 (2003)[.]

Defendants assert that plaintiff violated Rule 10(c) because it made incorrect references to the record in its assignments of error. *See* N.C. R. App. P. 10(c)(1) (requiring each assignment of error to have clear and specific references to the record or transcript). All such errors were remedied by plaintiff when we granted its motion to amend the page references contained in its assignments of error.

III. Issues

Plaintiff's remaining arguments are that the trial court erred in: (1) ordering dismissal of the case for plaintiff's failure to obtain a certificate of authority, (2) denying its motion to set aside dismissal, and (3) denying its motion for Rule 11 sanctions.

IV. Order of Dismissal

[4] Plaintiff assigns error to the order of dismissal for plaintiff's failure to obtain a certificate of authority pursuant to N.C. Gen. Stat. § 55–15-02. When determining whether a party is required to obtain a certificate of authority, our Court reviews whether the trial court's factual findings support its conclusions of law. *Harold Lang Jewelers, Inc. v. Johnson*, 156 N.C. App. 187, 191, 576 S.E.2d 360, 362-63, *disc. review denied*, 357 N.C. 458, 585 S.E.2d 765 (2003). We reverse the order of dismissal and hold that the trial court erred in concluding that plaintiff was required to obtain a certificate of authority.

A foreign corporation is not required to obtain a certificate of authority unless it is "transacting business" in North Carolina. N.C. Gen. Stat. § 55-15-02 provides:

> No foreign corporation *transacting business in this State* without permission obtained through a certificate of authority . . . shall be permitted to maintain any action or proceeding in any

court of this State unless the foreign corporation has obtained a certificate of authority prior to trial.

N.C. Gen. Stat. § 55-15-02 (2007) (emphasis added).

N.C. Gen. Stat. § 55-15-01(b) provides a list of activities which "shall not be considered to be transacting business in this State solely for the purposes of this Chapter[.]" N.C. Gen. Stat. § 55-15-01(b) (2007). Some of the relevant exclusions include:

(1) Maintaining or defending any action or suit . . . ;

(2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs;

. . . .

(8) Transacting business in interstate commerce[.]

Id.

The trial court found that plaintiff's initiation of a lawsuit against defendants constituted transacting business. However, N.C. Gen. Stat. § 55-15-01(b) provides that maintaining a lawsuit shall not be considered as transacting business. N.C. Gen. Stat. § 55-15-01(b)(1). "[A] foreign corporation need not obtain a certificate of authority in order to maintain an action or lawsuit so long as the company is not otherwise transacting business in this State." *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, 175 N.C. App. 483, 486, 623 S.E.2d 793, 796 (2006); *see also* N.C. Gen. Stat. § 55-15-01 Official Comment (2007) ("[A] corporation is not 'transacting business' solely because it resorts to the courts of the state to recover an indebtedness, enforce an obligation, . . . or pursue appellate remedies.").

The trial court also found that plaintiff transacted business in North Carolina by contracting with defendants and their attorney, Harold H. Martin ("Martin"), to perform the following services: locating a shell corporation so that plaintiff could become a publicly traded company, executing a plan of exchange for a reverse merger into a Nevada corporation, serving as an escrow agent, and preparing corporate documents and SEC filings. The trial court erred when it concluded that plaintiff was transacting business by engaging in those activities because each activity is excluded by the provisions in N.C. Gen. Stat. § 55-15-02(b) governing interstate commerce and internal affairs. *See* N.C. Gen. Stat. § 55-15-02(b).

The Commerce Clause grants and reserves to Congress the regulation of "commerce with foreign nations, and among the several

states[.]" U.S. Const. art. I, § 8, cl. 3. A foreign corporation shall not be considered to be transacting business in this state for "[t]ransacting business in interstate commerce[.]" N.C. Gen. Stat. § 55-15-01(b)(8); *see also Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20, 42 L. Ed. 2d 195 (1974) (holding that a foreign corporation transacting interstate business cannot be required to qualify before maintaining suit). "[E]very negotiation, contract, trade and dealing between citizens of different states . . . whether it be of goods, persons or information, is a transaction of interstate commerce." *Snelling & Snelling v. Watson*, 41 N.C. App. 193, 198, 254 S.E.2d 785, 789 (1979) (citation omitted) (deciding that the plaintiff's solicitation and negotiation of interstate licensing agreements in North Carolina were transactions of interstate commerce).

Defendants and Martin acted as independent contractors when rendering services to plaintiff. The activities of an independent contractor cannot be attributed to a foreign corporation when determining if the corporation is required to obtain a certificate of authority. *See id.* at 202, 254 S.E.2d at 792. Furthermore, any attempts to execute reverse mergers with WorldTeq and GFRP were interstate transactions, as both corporations are organized in Nevada.

Independent of the interstate commerce exclusion, plaintiff's interactions with defendants and Martin were excluded as "carrying on other activities concerning its internal affairs[.]" N.C. Gen. Stat. § 55-15-01 (b)(2). Plaintiff's relationship with defendants and Martin related exclusively to its efforts to reorganize as a publically traded company in the United States. Our Court has interpreted transacting business to " 'require the engaging in, carrying on or exercising, in North Carolina, some of the functions for which the corporation was created.' " *Harold Lang Jewelers, Inc.*, 156 N.C. App. at 190, 576 S.E.2d at 362 (quoting *Canterbury v. Hardware Imports*, 48 N.C. App. 90, 96, 268 S.E.2d 868, 872 (1980)). The activities carried on by a corporation in North Carolina must be substantial, continuous, systematic, and regular. *Canterbury*, 48 N.C. App. at 96, 268 S.E.2d at 872. "Typical conduct requiring a certificate of authority includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general corporate purposes." N.C. Gen. Stat. § 55-15-01 Official Comment.

The purpose of plaintiff's corporation was to prepare documents for financial institutions in China. There is no evidence that plaintiff

carried on any such activity in North Carolina. Plaintiff did not maintain offices in this state nor did it solicit business to any North Carolina corporations. The evidence indicates that plaintiff's representatives had not even visited North Carolina prior to this lawsuit.

Defendants argue that even though some of plaintiff's activities, viewed in isolation, do not constitute transacting business, "this lawsuit combined with multiple other activities [are] sufficient to constitute conducting business." Defendants claim that in order to determine whether plaintiff was transacting business, this Court should evaluate the "cumulative effect of its activities in North Carolina." This contention is contrary to N.C. Gen. Stat. § 55-15-01(b) which provides that "a foreign corporation shall not be considered to be transacting business in this State solely for the purposes of this Chapter, by reason of carrying on in this State *any one or more of the following activities*[.]" N.C. Gen. Stat. § 55-15-01(b); *see also* Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 30.03 at 1 (2007) ("[C]onducting more than one of the listed activities [in N.C. Gen. Stat. § 55-15-01(b)] will not have the cumulative effect of requiring qualification."). Each of plaintiff's interactions with defendants and Martin concern interstate commerce or its internal affairs, and are therefore, excluded by N.C. Gen. Stat. § 55-15-01(b). The trial court erred in concluding that plaintiff transacted business in North Carolina and was required to obtain a certificate of authority. We reverse the order of dismissal and remand for further proceedings.

V. Denial of the Motion to Set Aside Dismissal

[5] The trial court denied plaintiff's motion to set aside dismissal because of fraud, misrepresentation, and misconduct of defendants' counsel. Plaintiff argues that the trial court erred in concluding it lacked jurisdiction under Rule 60(b) to set aside an order of dismissal for fraud by a party's attorney. We agree.

We review an order ruling upon a Rule 60(b) motion to determine whether the trial court abused its discretion. *State ex rel. Davis v. Adams*, 153 N.C. App. 512, 515, 571 S.E.2d 238, 240 (2002). " 'A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.' " *Id.* (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

Rule 60(b) provides that upon motion, the court may relieve a party from a final judgment if there is fraud, misrepresentation, or

other misconduct of an *adverse* party. N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) (2007). Relief from attorney fraud on the court "is to be granted only where the judgment was obtained by the improper conduct of the party in whose favor it was rendered." *Purcell Int'l Textile Grp., Inc. v. Algemene AFW N.V.*, 185 N.C. App. 135, 138, 647 S.E.2d 667, (citation omitted) *disc. review denied*, 362 N.C. 88, 655 S.E.2d 840 (2007).

Here, plaintiff claimed that the dismissal was a result of the fraud and misrepresentation of defendants' attorney in its motion to dismiss for plaintiff's failure to obtain a certificate of authority. Plaintiff argued that defendants' counsel argued the motion in a misleading way by failing to provide the court with the relevant legal authority of N.C. Gen. Stat. § 55-15-01, which was paramount in the determination of whether plaintiff was required to obtain a certificate of authority. *See* N.C. Gen. Stat. § 55-15-01. The trial court erred in concluding that it lacked jurisdiction under Rule 60(b) to set aside an order of dismissal for attorney fraud. Because we are reversing the order of dismissal, the issue of whether the trial court should have set aside the order of dismissal is moot.

VI. Denial of Rule 11 Sanctions

[6] Plaintiff contends that the trial court erred in denying Rule 11 sanctions for defendants' counsel. "[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); N.C. R. App. P. 11(a) (2009). 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).

After the trial court granted defendants' motion to dismiss for plaintiff's failure to obtain a certificate of authority, plaintiff filed a motion for Rule 11 sanctions and argued that defendants' counsel violated Rule 11 because its motion to dismiss was legally insufficient, filed for an improper purpose, and failed to disclose the relevant legal authority of N.C. Gen. Stat. § 55-15-01. We vacate the trial court's denial of Rule 11 sanctions and remand for further proceedings in light of this opinion.

VII. Conclusion

We grant defendants' motion to dismiss plaintiff's appeal of the order denying partial summary judgment. We reverse the order of dismissal and remand for further proceedings. We dismiss the appeal of the denial of the motion to set aside dismissal as moot and vacate the denial of Rule 11 sanctions and remand for consideration in light of this opinion.

Appeal dismissed in part; reversed and remanded in part; and vacated and remanded in part.

Judges HUNTER, Robert C., and CALABRIA concur.

DENNIS E. BULLARD, M.D. AND WENDY W. BULLARD, PETITIONERS v. TALL HOUSE BUILDING COMPANY, INC., A NORTH CAROLINA CORPORATION, RESPONDENT

No. COA08-839

(Filed 5 May 2009)

Arbitration and Mediation— trial court order—confirming, vacating, modifying—new arbitration ordered—not appealable

An appeal was dismissed as interlocutory where a trial court order confirmed, vacated, and modified an initial arbitration order, and compelled further arbitration, but the order was not certified for immediate appeal and did not impair a substantial right. Both of the arguments as to impairment of substantial rights focus on the new arbitration proceeding that was ordered by the trial court, but an order compelling arbitration does not deprive a party of a substantial right, and only new issues were to be addressed, so that the new award could not be inconsistent. Furthermore, avoiding the time and expense of arbitration is not a substantial right justifying immediate appeal.

Appeal by respondent from amended order entered 18 April 2008 by Judge Orlando F. Hudson, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 14 January 2009.

Troutman Sanders LLP, by Gary S. Parsons and D. Kyle Deak, for petitioners-appellees.

Patterson Dilthey, LLP by Ronald C. Dilthey and Hedrick, Gardner, Kincheloe & Garafalo L.L.P., by Scott Lewis, for respondent-appellant.

STROUD, Judge.

As the trial court ordered further arbitration, the order from which defendants appeal is interlocutory, and we therefore dismiss this appeal.

I. Background

On or about 10 March 2003, Dennis and Wendy Bullard ("the Bullards") entered into a Building Agreement with Tall House Building Company ("Tall House"). The Building Agreement included an arbitration provision which read,

> Any claim, controversy or dispute arising out of or related to this Agreement, or the breach thereof, not resolved by mediation, shall be settled by arbitration in accordance with the Construction Industry Arbitration by a panel of three (3) arbitrators, one selected by each party and the third by the two appointed arbitrators, rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof. Prior to arbitration, the parties shall endeavor to resolve their disputes by mediation per Section XIII hereof. Notice of demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association.
>
> . . . .
>
> A party who files a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded. When a party fails to include a claim through oversight, inadvertence or excusable neglect, or when a claim has matured or been acquired subsequently, the arbitrators may permit amendment.
>
> The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

On or about 24 January 2006, the Bullards and Tall House entered into an Arbitration Agreement which read, "The parties agree to submit all disputes to private arbitration in accordance with the Contract for Construction dated March 2003 . . . ." On or about 14 February 2006, the Bullards submitted a "Demand for Arbitration" regarding various defects with the house constructed pursuant to the Building Agreement. (Original in all caps.) On or about 4 August 2006, the arbitrators entered an award addressing the issues presented in the Bullards' "Demand for Arbitration[.]" (Original in all caps.)

On or about 19 December 2006, the Bullards filed a "Motion For Partial Vacation of Arbitration Award" with the trial court and a "Demand for Arbitration and/or Amendment to the Original Demand for Arbitration" with the arbitration panel. (Original in all caps.) The Bullards alleged the arbitration award should be partially vacated because of fraudulent concealment and misrepresentations on the part of Tall House which kept them from discovering defects with the floor framing. The Bullards requested that "[i]f Respondent contends that Petitioners are prohibited from litigating the floor framing issues before the arbitration panel" that the trial court "vacate that portion of the arbitration panel's award that addresses flooring issues so as to permit floor framing issues to be heard[.]"

On 19 January 2007, Tall House responded to the Bullards' Motion to Vacate requesting "the Court deny Petitioners' Motion for Vacation of the Arbitration Award in its entirety and allow the Arbitration Panel to whom the parties have agreed to submit this matter to decide on the questions of whether any new claims should be heard[.]" On or about 23 August 2007, the arbitration panel concluded that

> [t]he evidence also does not support the contention that respondent concealed any structural defects. In fact, at the hearings before the initial award, it was very clear that there were potential structural problems, and the panel even inquired about those issues. All of the issues addressed in the "new" demand could have been discovered, albeit with some effort, prior to the first round of hearings. The initial award was intended—both by the panel and the parties—to resolve all issues that were raised or could have been raised at the time. All issues subsequently raised could have been discovered and presented earlier, and are barred by the prior award.

On 15 October 2007 Tall House filed an amendment to its response to the Bullards' motion to vacate. The amendment noted:

> 1. Subsequent to Petitioners' Motion filed herein on December 19, 2006, seeking an order to vacate a portion of the original Award of the Arbitration Panel dated August 4, 2006, and the Orders of the Panel dated September 21, 2006, and October 25, 2006, the Arbitration Panel conducted an additional hearing on motions and requests of Petitioners' on June 22, 2007, and then issued a final, dispository AWARD dated August 23, 2007 . . . .
>
> 2. In its four (4) page AWARD, the Arbitration Panel concluded: "The Panel denies any and all other claims for relief presented by Petitioners. All costs of these proceedings shall be taxed equally to the parties." . . . .

On 18 October 2007, the Bullards requested from the trial court

> an order (1) confirming in part and vacating in part the August 23, 2007, Arbitration Award rendered in the private arbitration proceeding between parties, and (2) compelling Respondent to arbitrate those issues set forth in Petitioners December 19, 2006, and May 25, 2007, Amended and Supplemental Demands for Arbitration.

On 13 November 2007, Tall House responded to the Bullards' 18 October 2007 request and "respectfully move[d] the Court that the Petitioner's Motion to Vacate in Part and Confirm in Part Arbitration Award and Motion to Compel Arbitration be Denied."

On 27 March 2008, the trial court entered an order regarding the Bullards' motions. On 10 April 2008, the Bullards filed a motion "to correct a clerical mistake" in the trial court order. On 18 April 2008, the trial court amended its order granting the Bullards' "Motion for Partial Vacation of the August 4, 2006, Arbitration Award[,]" "Motion to Vacate in Part and to Confirm in Part the August 23, 2007, Arbitration Award[,]" and "Motion to Compel Arbitration[.]" From the amended order, Tall House appeals.

II. Applicable Law

The parties entered into their Building Agreement which contained a provision requiring arbitration on 10 March 2003. On 24 January 2006, the parties entered into an Arbitration Agreement which controlled the specifics of their arbitration, modifying their

Building Agreement, but explicitly stating that the Building Agreement remained "in full force and effect" where it did not conflict with the Arbitration Agreement. In its 18 April 2008 amended order, the trial court referenced and quoted the Revised Uniform Arbitration Act ("RUAA") as the applicable law.

The RUAA is only applicable to agreements to arbitrate "made on or after January 1, 2004" or "made before January 1, 2004, if all parties to the agreement or to the arbitration proceeding agree in a record that this Article applies." N.C. Gen. Stat. § 1-569.3 (2005). Here, the parties have not assigned error to the trial court's use of the RUAA as the applicable law and both parties have also cited the RUAA as applicable law in various documents, including memorandum of law and briefs to this Court. Accordingly, we conclude that the RUAA controls this case.

III. Motion to Dismiss

A. The Parties' Contentions

On 29 July 2008 the Bullards filed a motion to dismiss this appeal. The Bullards argue Tall House's appeal should not be heard pursuant to N.C. Gen. Stat. § 1-569.28(a) which reads,

> (a) An appeal may be taken from:
>
> (1) An order denying a motion to compel arbitration;
>
> (2) An order granting a motion to stay arbitration;
>
> (3) An order confirming or denying confirmation of an award;
>
> (4) An order modifying or correcting an award;
>
> (5) An order vacating an award without directing a rehearing; or
>
> (6) A final judgment entered pursuant to this Article.

N.C. Gen. Stat. § 1-569.28(a) (2005). The Bullards argue "N.C.G.S. § 1-569.28(a)(5) expressly provides that an appeal does not lie from an order vacating an award which also directs a rehearing. Rather, the statute permits an immediate appeal only from 'an order vacating an award without directing a rehearing.' "

On or about 8 August 2008, Tall House filed a response to the Bullards' motion to dismiss arguing

1. Respondent-appellant's appeal from the trial court's modification of the Arbitration Awards involving the Pyrolave counters is not interlocutory pursuant to G.S. 1-569.28(4).

2. Respondent-appellant's appeal from the remainder of the trial court's Amended Order is not interlocutory pursuant to G.S. 1-569.28(5).

3. In the alternative, if the Court finds the appeal is interlocutory in whole or in part, the Amended Order affects a substantial right and Respondent has the right of immediate appeal.

Both the Bullards and Tall House argue that certain provisions within N.C. Gen. Stat. § 1-569.28(a) apply. The Bullards argue that the trial court vacated an award and directed a rehearing. Tall House argues the trial court modified an award and did not order a rehearing as the hearing the trial court ordered was intended to address *new* issues which had not yet been considered. We agree in part with Tall House as the trial court did indeed modify an award and did not direct a rehearing, but rather a new hearing; however, we disagree with Tall House that these conclusions render the order appealable.

B. The Bullards' Motion to the Trial Court

The Bullards' motion to the trial court was entitled "MOTION TO VACATE IN PART AND CONFIRM IN PART ARBITRATION AWARD AND MOTION TO COMPEL ARBITRATION[.]" Within the Bullards' motion it requested the trial court:

1. To **confirm** that portion of the August 23, 2007 Arbitration Award directing Tall House to "pay to Petitioner damages in the amount of Eighty-Eight Thousand Five Hundred and Eighty-Six Dollars ($88,586.00)" for the work associated with the media terrace;

2. To **vacate** those portions of the August 23, 2007 Arbitration Award:

   a. Denying Petitioners relief for the Pyrolave counters;

   b. Exercising authority over the December 2006 and May 2007 Arbitration Demands;

   c. Concluding that the Panel had authority to decide the arbitrability of the December 2006 and May 2007 Arbitration Demands; and

d. Concluding that the issues presented in the December 2006 and May 2007 Arbitration Demands ". . . could have been discovered and presented earlier, and are barred by the prior August 4, 2006 Award."

3. To **liquidate** the Award concerning the countertops and order Respondent to pay to Petitioners the sum of $26,696.40, the value of the countertop it admittedly was ordered to replace but did not replace;

4. To **order a new set of arbitrators be empanelled** as permitted by G.S. § 1-569.23;

5. To **order a hearing before the new panel of arbitrators** of the issues presented in the December 2006 and May 2007 Amended and Supplemental Demands for Arbitration, as permitted by G.S. § 1-569.23; and

6. To grant Petitioners such other and further relief as the court shall deem just and proper.

(Bracket omitted.) (Emphasis added.) The above language from the Bullards' motion can best be classified, respectively, as requests to: (1) confirm, (2) vacate, (3) modify, as the Bullards are requesting relief which has not previously been granted, and (4-5) compel arbitration.

C. Trial Court's Order

In the 18 April 2008 amended order the trial court

ORDERED, ADJUDGED, and DECREED [in pertinent part], that:

3. Petitioners' **Motion for Partial Vacation** of the August 4, 2006, Arbitration Award is hereby **granted**.

4. Petitioners' **Motion to Vacate in Part and to Confirm in Part** the August 23, 2007, Arbitration Award is hereby **granted**.

5. Petitioners' **Motion to Compel Arbitration** is hereby **granted**.

6. That portion of the August 23, 2007 Arbitration Award directing Respondent to "pay to Petitioner damages in the amount of Eighty-Eight Thousand Five Hundred and Eighty-Six Dollars ($88,586.00)" for the work associated with the media terrace is hereby **confirmed**.

7. Petitioners shall have and recover of Respondent the sum of $88,586.00, and the acceptance of those funds on or after the date of entry of this Order shall not be deemed to constitute an abandonment of any challenge by Petitioners to any other provision of the August 4, 2006, or the August 23, 2007, Arbitration Awards.

8. Those portions of the August 23, 2007, Arbitration Award denying Petitioners relief for the Pyrolave counters, exercising authority over the December 2006 and May 2007 Arbitration Demands, concluding that the Panel had authority to decide the arbitrability of the December 2006 and May 2007 Arbitration Demands and concluding that the issues presented in the December 2006 and May 2007 Arbitration Demands ". . . could have been discovered and presented earlier, and are barred by the prior [August 4, 2006] Award" are hereby **vacated**.

9. Because the evidence at the June 22, 2007, hearing established without contradiction that Respondent did not complete the work regarding the Pyrolave counters set forth in the August 4, 2006, Arbitration Award, and that the value of the Pyrolave counter that Respondent failed to replace in conformity with that Award was $26,696.40, and because the Panel liquidated the other Completion Item that Respondent failed and refused to complete, the Court hereby **liquidates** the award regarding the Pyrolave counter in the amount of $26,696.40.

10. Petitioners shall have and recover of Respondent the sum of $26,696.40, and the acceptance of those funds on or after the date of entry of this Order shall not be deemed to constitute an abandonment of any challenge by Petitioners to any other provision of the August 4, 2006, or the August 23, 2007, Arbitration Awards.

11. A **new panel of arbitrators shall be empanelled**, as permitted by G.S. § 1-569.23, to hear and determine the claims set forth in the December 2006 and May 2007 Arbitration Demands, and that panel of arbitrators shall hear and determine all claims set forth in those demands, under the procedures and terms set forth in the March 10, 2003, Building Agreement.

The trial court's order thus: (6-7) confirmed, (8) vacated, (9-10) modified, as neither arbitration award appealed from provided this relief, and (11) compelled arbitration. Having properly classified the trial court's order, we now turn to the controlling statute.

D. Controlling Statute—N.C. Gen. Stat. § 1-569.28

N.C. Gen. Stat. § 1-569.28(a) allows for an appeal from:

(1) An order denying a motion to compel arbitration;

(2) An order granting a motion to stay arbitration;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A final judgment entered pursuant to this Article.

N.C. Gen. Stat. § 1-569.28(a).

E. Statutory Construction

We first consider the plain language of the statute, and "[w]e rely on the general rule of statutory construction that the inclusion of certain items implies the exclusion of others." *New Hanover Child Support v. Rains*, 193 N.C. App. 208, 212, 666 S.E.2d 800, 803 (2008) (citation omitted). Therefore, we conclude that the list enumerated in N.C. Gen. Stat. § 1-569.28(a) includes the only possible routes for appeal under the Revised Uniform Arbitration Act. *See id.* Furthermore, the statute reads that "[a]n appeal *may* be taken . . . ." *See* N.C. Gen. Stat. § 1-569.28(a) (emphasis added). "Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (citations omitted). Thus, the orders and judgment enumerated in N.C. Gen. Stat. § 1-569.28(a) are the only situations where an appeal could possibly be taken under the RUAA, though one is not required. *See Hanover Child Support* at 212, 666 S.E.2d at 803; *In re Hardy* at 97, 240 S.E.2d at 372.

F. Analysis

N.C. Gen. Stat. § 1-569.28(a) first allows for an appeal from "[a]n order denying a motion to compel arbitration[.]" N.C. Gen. Stat. § 1-569.28(a)(1). Here, the trial court explicitly granted a motion to compel arbitration. Not only is an order granting a motion to com-

pel arbitration not listed in N.C. Gen. Stat. § 1-569.28(a) as an appealable order, it is explicitly recognized not to have a right of appeal within our case law. *Laws v. Horizon Housing, Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696 (2000) (citation and quotation marks omitted) ("[T]here is no immediate right of appeal from an order compelling arbitration.")

N.C. Gen. Stat. § 1-569.28(a) next allows for an appeal from "[a]n order granting a motion to stay arbitration[.]" N.C. Gen. Stat. § 1-569.28(a)(2). No orders or motions regarding a stay of arbitration are applicable to this appeal.

N.C. Gen. Stat. § 1-569.28(a) also allows for an appeal from "[a]n order confirming or denying confirmation of an award[.]" N.C. Gen. Stat. § 1-569.28(a)(3). Here, the trial court confirmed some portions of the 23 August 2003 award.

The trial court also modified an award as it ordered damages to be paid for the Pyrolave counters, which neither previous arbitration award had ordered. N.C. Gen. Stat. § 1-569.28(a) allows for an appeal from "[a]n order modifying or correcting an award[.]" N.C. Gen. Stat. § 1-569.28(a)(4).

N.C. Gen. Stat. § 1-569.28(a)(5) allows for an appeal from "[a]n order vacating an award without directing a rehearing[.]" N.C. Gen. Stat. § 1-569.28(a)(5). The Bullards argue that the trial court vacated an award and directed a rehearing, and thus N.C. Gen. Stat. § 1-569.28(a)(5) is inapplicable. However, the trial court actually vacated an award and compelled a new arbitration to be conducted in front of a new panel of arbitrators. The trial court did not order a rehearing on issues already considered by an arbitration panel, but rather a new hearing, based upon the Bullards' December 2006 and May 2007 arbitration demands, which the arbitration panel on 23 August 2007 refused to consider because they concluded that "[a]ll issues subsequently raised could have been discovered and presented earlier, and are barred by the prior award." Thus, N.C. Gen. Stat. § 1-569.28(a)(5) is applicable as the trial court did vacate "an award without directing a rehearing[.]" N.C. Gen. Stat. § 1-569.28(a)(5).

Lastly, N.C. Gen. Stat. § 1-569.28(a)(6) allows for an appeal from "[a] final judgment entered pursuant to this Article." N.C. Gen. Stat. § 1-569.28(a)(6). As the order before us directs further arbitration, it is not a final judgment, and thus N.C. Gen. Stat. § 1-569.28(a)(6) is not applicable.

In summary, Tall House appeals from an order which has both currently appealable and non-appealable issues. The arbitration statute itself offers us no guidance as to an order such as this one, which contains both provisions which are immediately appealable and provisions which are not immediately appealable. Tall House argues it should be allowed to proceed with its appeal as to the currently appealable issues; however, this is contrary to our well-established case law regarding interlocutory appeals. *See*, *e.g.*, *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007).

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Id. (citation omitted). "An interlocutory order is generally not immediately appealable." *Id.* (citation omitted).

> Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citations, quotation marks, and ellipses omitted).

Here, the trial court did not certify its order for immediate appeal; therefore, Tall House must show that the order deprives it of a substantial right which will be jeopardized if an immediate appeal is not permitted. *See id.* Tall House argues, "The Amended Order contains the trial court's improper vacation of the Awards based on its failure to apply the proper standard of review, which causes sig-

nificant prejudice to Respondent. Additionally, the potential for multiple inconsistent awards, received only after a significant expense, also affects a substantial right." We disagree.

Tall House first argues that its substantial rights are affected because the trial court vacated portions of the award based upon an improper standard. Tall House contends that

> [t]he trial court's failure to apply the correct standard affects a substantial right because Respondent will be forced to undergo a new round of arbitration with a new panel before this Court can correct the Amended Order. The expense associated with the new arbitration and the delay it will cause to Respondent affect a substantial right.

Tall House's second argument is that there is "potential for multiple inconsistent arbitration awards." Tall House again claims the order for a new hearing also affects a substantial right because of "large amounts of money already spent defending the first round of lengthy arbitrations . . . and the expected unavoidable and lengthy delays associated with re-arbitrating the issues to a new panel." Thus, both of Tall House's arguments as to impairment of its substantial rights focus on the new arbitration proceeding which was ordered by the trial court.

We first note that N.C. Gen. Stat. § 1-569.28(a) does *not* permit an immediate appeal of an order compelling arbitration, which is the portion of the order which Tall House cites as the primary cause for impairment of its substantial rights. "A substantial right is one which will clearly be lost or irremediably 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). This Court has previously determined that an order compelling arbitration does not deprive a party of a substantial right. *See Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 285, 314 S.E.2d 291, 293 (1984) ("An order compelling the parties to arbitrate is an interlocutory order. We do not believe it affects a substantial right and works an injury to the appellant if not corrected before an appeal from a final judgment."). As to Tall House's second argument regarding inconsistent verdicts, the trial court ordered a new arbitration panel to address only issues which were not addressed in the original arbitration awards, so we do not find that the new award could be inconsistent with the others. Finally, as to any costs or delay associated with the new arbitration hearing, "avoiding the time and expense

of trial is not a substantial right justifying immediate appeal." *Reid v. Cole*, 187 N.C. App. 261, 266-67, 652 S.E.2d 718, 721-22 (2007) (quotation marks omitted) (quoting *Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001)). Based on *Reid*, we conclude that "avoiding the time and expense of [arbitration] is not a substantial right justifying immediate appeal." *Id.* We therefore conclude that Tall House has not shown that a substantial right has been impaired. As Tall House's substantial rights have not been affected, we dismiss this appeal.

III. Conclusion

As Tall House has appealed from an interlocutory order which was not certified for immediate appeal and which does not impair a substantial right, we dismiss.

DISMISSED.

Judges CALABRIA and ELMORE concur.

JOHN WESKETT POWERS, PLAINTIFF v. GEORGE TATUM, COMMISSIONER OF THE N.C. DIVISION OF MOTOR VEHICLES, DEFENDANT

No. COA08-137

(Filed 5 May 2009)

1. Collateral Estoppel and Res Judicata— civil drivers license revocation—not precluded by criminal dismissal

A civil driver's license revocation proceeding was not precluded by collateral estoppel where the revocation was for refusing an Intoxilyzer test and the preceding criminal action had been dismissed for violation of petitioner's right to have a witness present during the test. The criminal proceeding did not reach the issue of willful refusal to take the test; moreover, collateral estoppel is not applicable where there is a lower standard of proof in the subsequent action. Here, the original action was criminal, the subsequent action civil.

2. Motor Vehicles— driver's license revocation—refusal of alcohol test

The trial court did not err by failing to conclude that a violation of petitioner's right to a witness obviated his duty to submit

to chemical analysis and precludes a legal determination that he willfully refused an Intoxilyzer test. The unchallenged findings were that petitioner was informed of his statutory rights and was given the opportunity to exercise them, he was kept informed of the time period as it passed, he was provided with multiple opportunities to take the test, and he was not marked as a refusal until after the period expired. The trial court properly determined that petitioner refused the test for reasons not related to the right to have a witness present.

Appeal by plaintiff from judgment entered 18 May 2007 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 24 September 2008.

George B. Currin, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks and Associate Attorney General Jess D. Mekeel, for respondent-appellee.

STEELMAN, Judge.

The district court's dismissal of the criminal charge of driving while impaired based upon a violation of petitioner's right to have a witness present did not operate as collateral estoppel on the issue of willful refusal to submit to an Intoxilyzer test in a subsequent administrative license revocation hearing. Where petitioner fails to challenge any of the trial court's findings of fact on appeal, they are binding on the appellate court, and establish that petitioner's refusal to take the Intoxilyzer test was not based upon the fact that his witness was not present.

I. Factual and Procedural Background

On 12 April 2006, John Weskett Powers (petitioner) was arrested and charged with driving while impaired. Petitioner was taken to the Wake County Public Safety Center, where he was advised of his right to select a witness to view the chemical analysis testing procedures (Intoxilyzer test) pursuant to N.C. Gen. Stat. § 20-16.2(a)(6). Petitioner stated that he wanted to have a witness present for the test and called his girlfriend. Approximately, thirty-four minutes later, at 12:29 a.m., Officer Holmes, requested that petitioner submit to the Intoxilyzer test to determine his blood alcohol content. Petitioner refused.

On 11 May 2006, petitioner was informed by the Division of Motor Vehicles (DMV) that his license had been revoked for a period of one year due to his willful refusal to submit to chemical analysis pursuant to N.C. Gen. Stat. § 20-16.2(d). Petitioner requested and was granted a hearing before DMV on 14 August 2006, which was then continued until 2 October 2006. After the hearing was conducted, DMV sustained petitioner's license revocation, "effective October 14, 2006 at 12:01 a.m." On 13 October 2006, petitioner filed an action in the Superior Court of Wake County seeking (1) *de novo* judicial review of the administrative agency decision pursuant to N.C. Gen. Stat. § 20-16.2(e) and (2) an order staying DMV's license revocation. An order was entered that same day staying the revocation pending a final hearing in superior court.

On 23 January 2007, while his civil action was pending in superior court, petitioner filed a motion to dismiss the criminal charge of driving while impaired in the District Court of Wake County. On 13 April 2007, the district court granted defendant's motion based upon the finding that defendant's witness had made reasonable and diligent efforts to locate defendant prior to the expiration of the thirty-minute time period allowed for her arrival, and through no fault of her own was denied access to defendant. The district court concluded the denial of access to his witness violated defendant's constitutional rights under Article 1, § 23 of the North Carolina Constitution and defendant's statutory rights under N.C. Gen. Stat. § 20-16.2.

The petition for *de novo* review of the administrative revocation was heard in Wake County Superior Court on 18 April 2007. Petitioner argued that DMV was collaterally estopped from proceeding with the revocation because the district court had found that his statutory rights under N.C. Gen. Stat. § 20-16.2 had been violated. In a judgment entered 18 May 2007, Judge Gessner affirmed DMV's revocation order. Petitioner appeals.

II. Collateral Estoppel

[1] In petitioner's first two arguments, he contends that the superior court erred in concluding that collateral estoppel did not bar DMV from revoking his driving privileges. We disagree.

"Under the doctrine of collateral estoppel, also known as issue preclusion, parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were neces-

sary to the prior determination." *Scarvey v. First Fed. Savings & Loan Ass'n of Charlotte*, 146 N.C. App. 33, 38, 552 S.E.2d 655, 658-59 (2001) (quotation omitted). The burden of establishing that an issue is barred by collateral estoppel is on the party relying thereon. *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (citation omitted), *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). To carry this burden, the moving party must show: (1) a prior suit resulting in a final judgment or decree; (2) between identical parties or those in privity; (3) involving one or more identical issues; (4) that the specific issue was litigated and necessary to the prior judgment; and (5) that the specific issue was actually determined. *State v. Summers*, 351 N.C. 620, 622, 528 S.E.2d 17, 20 (2000). Whether the doctrine of collateral estoppel is applicable and bars a specific claim or issue is a question of law subject to *de novo* review. *Bluebird Corp.*, 188 N.C. App. at 678, 657 S.E.2d at 61 (citation omitted).

In regards to collateral estoppel in the context of driving while impaired in both civil and criminal proceedings, our Supreme Court has stated:

> Under implied consent statutes such as G.S. 20-16.2, the general rule is that neither an acquittal of a criminal charge of operating a motor vehicle while under the influence of intoxicating liquor, nor a plea of guilty, nor a conviction has any bearing upon a proceeding before the licensing agency for the revocation of a driver's license for a refusal to submit to a chemical test. It is well established that the same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other, and the outcome of one is of no consequence to the other.

Joyner v. Garrett, 279 N.C. 226, 238, 182 S.E.2d 553, 562 (internal citation and quotation omitted), *reh'g denied*, 279 N.C. 397, 183 S.E.2d 241 (1971). Notwithstanding this precedent, our appellate courts have allowed the doctrine of collateral estoppel to be applied when the same issue existed in a civil revocation proceeding and a separate criminal proceeding. *See*, *e.g.*, *Summers*, *supra*; *Brower v. Killens*, 122 N.C. App. 685, 472 S.E.2d 33 (1996), *disc. review improvidently allowed*, 345 N.C. 625, 481 S.E.2d 86 (1997).

In *Summers*, our Supreme Court distinguished its holding in *Joyner* and upheld this Court's determination that where the superior court overturned a DMV license revocation upon finding that the defendant did not willfully refuse to submit to the Intoxilyzer test, this decision estopped the relitigation of that same issue in the defendant's criminal prosecution for driving while impaired. *Summers*, 351 N.C. at 626, 528 S.E.2d at 22.

In *Brower*, this Court addressed the issue of whether the superior court, on *de novo* review of the DMV's revocation order, erred by concluding the DMV was estopped from relitigating whether the officer had probable cause to arrest the defendant for driving while impaired, when the district court had previously found there was insufficient evidence and granted the defendant's motion to dismiss in a criminal proceeding. *Brower*, 122 N.C. App. at 686, 472 S.E.2d at 35. We noted that "there is no legal distinction between probable cause to arrest in a criminal proceeding and 'reasonable ground to believe' that the accused was driving while impaired in a license revocation hearing." *Id.* at 690, 472 S.E.2d at 37 (citations omitted). This Court affirmed the trial court's order, which collaterally estopped the DMV from relitigating the issue of probable cause on the basis that "the quantum of proof necessary to establish probable cause to arrest in criminal driving while impaired cases and civil license revocation proceedings, notwithstanding the different burdens on the remaining elements, is virtually identical." *Id.* However, this Court carefully limited its holding to probable cause determinations in order to comport with our Supreme Court's ruling in *Joyner*. *Id.* at 689, 472 S.E.2d at 36.

Petitioner cites the preceding authority for the proposition that collateral estoppel is applicable in the instant case. Petitioner's argument is unavailing for two separate reasons.

First, petitioner has failed to demonstrate that the issue of willful refusal was previously litigated and determined by the district court. *Summers*, 351 N.C. at 622, 528 S.E.2d at 20. In the present case, Judge Gessner determined that:

> 2. The Respondent is not collaterally estopped from proceeding in this matter, as the district court's order makes no finding as to willfulness of the Petitioner's refusal.
>
> 3. The issue of whether the Petitioner's refusal was willful or not was not a matter before the district court . . . . The issue in that

> matter concerned whether the petitioner was denied his right to a witness to observe the intoxilyzer proceeding. Accordingly, the issue of whether the Petitioner's refusal was willful has not [been] litigated by the parties and has not been ruled upon by the district court or a court of competent jurisdiction.

Unlike *Summers*, where the order from the civil proceeding addressed the issue of willful refusal, a review of the order of the district court in the criminal proceeding confirms that the issue of willful refusal was not decided by that court. Instead, having determined that petitioner's right to a witness had been violated, the district court never reached the issue of willful refusal. In fact, petitioner concedes in his brief that the district court's order "did not determine that [p]etitioner had 'willfully refused' to submit to the breath test," but argues that collateral estoppel is applicable on the basis that the order "finally determine[d] the underlying issues of ultimate fact of whether [p]etitioner's statutory right to have a witness under [N.C. Gen. Stat. § 20-16.2] had been violated." Petitioner's contention is without merit. Judge Gessner properly concluded that the issue of willful refusal had not been litigated by the parties or determined in the criminal proceeding.

Second, we reiterate the fundamental difference between criminal prosecutions and civil license revocation proceedings as recognized by our appellate courts in *Joyner* and *Brower*. It is well-established that the burden of proof necessary to convict a defendant of a criminal offense is beyond a reasonable doubt, which is substantially higher than that required in civil actions, i.e., by the preponderance of the evidence. *Ellett v. Ellett*, 157 N.C. 161, 163, 72 S.E. 861, 861 (1911). Our Court has held that the doctrine of collateral estoppel is inapplicable where there is a lower burden of proof in the subsequent action than that required in the original trial. *See State v. Safrit*, 154 N.C. App. 727, 729, 572 S.E.2d 863, 865 (2002) (providing that where the burden of proof was by the preponderance of the evidence during a sentencing hearing to determine a defendant's prior record level, instead of the much more exacting burden of proof of beyond a reasonable doubt, the issues litigated were not the same and collateral estoppel was inapplicable), *disc. review denied*, 357 N.C. 65, 579 S.E.2d 571 (2003); *see generally Hussey v. Cheek*, 31 N.C. App. 148, 149, 228 S.E.2d 519, 521 (1976) ("When the burden of proof at the second trial is less than at the first, the failure to carry that burden at the first trial cannot raise an estoppel to carrying the lesser burden at the second trial."). Therefore, assuming *arguendo* the district court

had found the State had failed to prove beyond a reasonable doubt that petitioner willfully refused to submit to the Intoxilyzer test to determine his blood alcohol content, the State would not have been precluded from attempting to prove the same by a preponderance of the evidence at a civil license revocation proceeding.

For these reasons, petitioner's contentions are without merit.

III. Revocation of Petitioner's Driving Privilege

[2] In petitioner's remaining arguments, he contends that the trial court erred in failing to conclude that a violation of his rights obviated his duty to submit to chemical analysis and precludes a legal determination that he willfully refused the Intoxilyzer test. We disagree.

A person's license may be revoked if he has willfully refused to submit to an Intoxilyzer test after being charged with an implied-consent offense. N.C. Gen. Stat. § 20-16.2 (2007). Under the statute, an individual who exercises his right to have a witness present may not delay the test for more than 30 minutes, and must take the test "at the end of 30 minutes even if . . . [the] witness has not arrived." N.C. Gen. Stat. § 20-16.2(a)(6). An individual whose license is revoked under N.C. Gen. Stat. § 20-16.2 has a right to a hearing before an officer of DMV. Subsection (d) of the statute states, in relevant part:

> The hearing shall be . . . limited to consideration of whether:
>
> (1) The person was charged with an implied-consent offense or the driver had an alcohol concentration restriction on the drivers license pursuant to G.S. 20-19;
>
> (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;
>
> . . .
>
> (4) The person was notified of the person's rights as required by subsection (a); and
>
> (5) The person willfully refused to submit to a chemical analysis.

N.C. Gen. Stat. § 20-16.2(d). "Although the Division's determination is subject to *de novo* review by the [s]uperior [c]ourt, the hearing in [s]uperior [c]ourt is limited to the same five issues." *In re Suspension*

of License of Rogers, 94 N.C. App. 505, 506, 380 S.E.2d 599, 599 (1989) (citation omitted).

The issues to be determined by the superior court are unrelated to either the legality of the arrest or whether the test was performed according to applicable rules and regulations. *See In re Gardner*, 39 N.C. App. 567, 573, 251 S.E.2d 723, 727 (1979) (legality of arrest); *Gibson v. Faulkner*, 132 N.C. App. 728, 734, 515 S.E.2d 452, 456 (1999) (applicable rules and regulations). On appeal, this Court is bound by the trial court's findings of fact if they are "supported by competent evidence, even though there may be evidence to the contrary," *Gibson*, 132 N.C. App. at 732-33, 515 S.E.2d at 455 (1999) (quotation omitted), or if "no exception is taken" to an individual finding by appellant, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

In the instant case, Judge Gessner found that:

17. Officer Thomas completed advising the petitioner of his rights at 11:55 p.m.

. . . .

23. At 12:29 a.m., Officer Holmes, in the presence of Officer Thomas, requested that the petitioner provide a valid sample of breath on the Intoxilyzer.

24. Petitioner stood up and informed the officers that he would not take the test because he was innocent.

. . . .

26. Petitioner was provided several opportunities to provide a valid sample of breath into the Intoxilyzer. The petitioner was also warned that if he failed to provide a valid sample, he would be marked as a refusal.

27. Petitioner informed the officers several times that he would not take the intoxilyzer test.

. . . .

29. Upon the request to take the Intoxilyzer test, the petitioner made no attempt to take the test.

30. Thirty-four minutes after being advised of his rights and upon request to take the Intoxilyzer test, the petitioner did not

know whether or not a witness had arrived to view him take the Intoxilyzer test.

31. At 12:29 a.m., Officer Thomas marked the petitioner as a refusal.

We note that petitioner failed to assign error to any of the thirty-one findings of fact contained in Judge Gessner's order, thus they are presumed to be correct and are binding on appeal. *Id.*

Upon the findings of fact, Judge Gessner concluded that:

1. Petitioner was arrested for an implied consent offense based upon reasonable grounds.

2. Petitioner was notified of his rights by a qualified chemical analyst pursuant to G.S. § 20-16.2(a).

3. Petitioner willfully refused to submit to a chemical analysis upon request of the charging officer.

Petitioner challenges only conclusion of law number 3.

1. *Rogers*

In part, petitioner contends that the trial court erred in failing to find facts and to enter conclusions of law that demonstrate a consideration of the legal issues presented in the case. He argues that this Court's holding in *Rogers*, *supra*, required the trial court to make findings to resolve the issue of whether petitioner's refusal to take the test was related to the violation of his rights under N.C. Gen. Stat. § 20-16.2(a) to have a witness present, and that the failure of the trial court to make such findings is reversible error. Petitioner further argues that the evidence compelled a finding that he was willing to submit to the Intoxilyzer test with a witness present and that the trial court could not, as a matter of law, conclude that his refusal was willful when his right to have a witness present was violated. We find these arguments to be without merit.

Petitioner's reliance upon *Rogers* is misplaced. In *Rogers*, this Court reversed revocation of an operator's license and remanded the matter for a determination of whether the petitioner willfully refused the test. *Id.* at 510, 380 S.E.2d at 601-02.

Under G.S. 20-16.2, a willful refusal occurs where a motorist: (1) is aware that he has a choice to take or to refuse to take the test;

> (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test. *Etheridge v. Peters*, *Comr. of Motor Vehicles*, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980). The purpose of the statute is fulfilled when the motorist is given the option to take or refuse to take the test after being informed of his statutory rights. *Rice v. Peters*, *Comr. of Motor Vehicles*, 48 N.C. App. 697, 700-01, 269 S.E.2d 740, 742 (1980).

Id. at 508-09, 380 S.E.2d at 600-01. In the instant case, petitioner was informed of his statutory rights, and given the opportunity to exercise those rights. Petitioner was kept informed of the thirty-minute time period as it elapsed, made aware of the choice he had to take or refuse the test, and provided multiple opportunities to submit to the test. Petitioner was not marked as a refusal until four minutes past the elapsed time limit. After being informed and kept apprised of his rights, petitioner was given the option to take or refuse the Intoxilyzer test, and the purpose of the statute was thus fulfilled. *Id.*

2. *Gilbert Engineering Co.*

The appropriate standard of review for the trial court's order is found in *Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. 350, 328 S.E.2d 849, *disc. review denied*, 314 N.C. 329, 333, S.E.2d 485 (1985).

> In cases where the trial judge sits as the trier of facts, he is required to (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971); G.S. 1A-1, Rule 52(a). The facts required to be found are the ultimate facts established by the evidence which are determinative of the questions involved in the action and essential to support the conclusions of law reached. *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). The requirement is designed to "dispose of the *issues raised by the pleadings*" and to permit "a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (emphasis supplied). The court's findings of fact are conclusive on appeal if supported by competent evidence, even though there may be evi-

dence to the contrary. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975).

Id. at 364, 328 S.E.2d at 857-58.

In the instant case, the evidence before the superior court was conflicting. The officers asserted that petitioner was marked as a refusal after refusing the test "because he was innocent." Petitioner testified that he refused the test because his right to have a witness present was violated. However, petitioner concedes through finding of fact 30 that he did not know whether or not his witness was present, and therefore did not know that his rights had been violated. Findings of fact 24 and 30 are the ultimate findings of fact required to support the trial court's conclusion that petitioner's refusal was willful. *Id.*

We agree with the *Rogers* Court that "[c]onsiderations of fairness and accuracy are not present . . . when a motorist refuses to take a test for wholly unrelated reasons." *Rogers*, 94 N.C. App. at 509, 380 S.E.2d at 601. In light of findings of fact 24 and 30, we hold that the trial court properly determined that petitioner refused to take the test for reasons unrelated to the violation of his right to have a witness present under N.C. Gen. Stat. § 20-16.2.

The trial court's conclusion that petitioner willfully refused to submit to the Intoxilyzer test is an accurate statement of the law under N.C. Gen. Stat. § 20-16.2 based upon findings of fact 17, 23-24, 26-27, and 29-31. By concluding that petitioner's refusal was willful, the trial court resolved any issue of whether the refusal was related to the State's violation of petitioner's right to have a witness present during chemical analysis. We hold that the order of the trial court properly resolved all matters raised by the pleadings and complies with the requirements of *Gilbert Engineering Co.*

Petitioner argues only eleven of fourteen assignments of error in his brief. His remaining assignments of error are deemed abandoned. N.C.R. App. P. 28 (2008).

AFFIRMED.

Judges McGEE and STROUD concur.

STATE OF NORTH CAROLINA v. WILLIAM EDWARD McKOY

No. COA08-923

(Filed 5 May 2009)

1. **Rape; Sexual Offenses— indictments—initials of victim—no periods**

   The trial court did not err by denying defendant's motion to dismiss charges of second-degree rape and second-degree sexual offense where the indictments alleged the victim's name as "RTB" rather than stating the full name. Periods need not be added in order to accomplish the common sense understanding that initials represent a person. Furthermore, the indictments tracked the statutory language.

2. **Rape; Sexual Offenses— short-form indictments—use of initials**

   Indictments for second-degree rape and second-degree sexual offense were sufficient under the short-form indictment statutes where the victim was identified as "RTB." A person of common understanding would know the intent of the indictments, and it appears from the record that defendant was not confused about the identity of the victim and had sufficient notice to prepare his defense.

3. **Rape; Sexual Offenses— indictments—victim—no further legal status needed**

   A rape and sexual offense victim need not have any additional legal status for the charges to lie and the indictments here were not defective, unlike indictments for larceny which must allege the ownership status of the victim.

Appeal by Defendant from judgment entered 20 September 2007 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 28 January 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Jennie Wilhelm Hauser, for the State.

Glenn Gerding for Defendant-Appellant.

McGEE, Judge.

William Edward McKoy (Defendant) was convicted on 20 September 2007 of second-degree sexual offense and second-degree

rape. The trial court sentenced Defendant to a term of 80 to 105 months in prison on the charge of second-degree sexual offense, and to a consecutive term of 80 to 105 months in prison on the second-degree rape charge. Defendant appeals.

The victim, R.B., testified at trial that she was homeless and had met Defendant at a soup kitchen in Raleigh on 7 November 2006. Defendant offered R.B. a place to sleep at his apartment. However, when R.B. accompanied Defendant to where he was living, it was an eighteen wheeler truck, so R.B. left. R.B. saw Defendant two evenings later in Chavis Park. R.B. testified Defendant told her he came to "make sure [she] was alright." After Defendant left, R.B. went to sleep under a park bench. She was awakened around 2:00 a.m. and found Defendant kneeling over her. R.B. testified Defendant hit her in the face and threatened to kill her if she did not have sex with him. He forced her to perform oral sex and then penetrated her vaginally. Defendant only stopped assaulting R.B. when she told him she had to go to work. Defendant then left on his bicycle. R.B. waited for daylight and walked to the police station to report the attack.

Officer S.F. McKenna (Officer McKenna) with the Raleigh Police Department testified that he was called to the police station on the morning of 10 November 2006 to interview R.B. R.B.'s left eye was swollen with a contusion and she had a bloodied, swollen lip. R.B. recounted the attack to Officer McKenna who then transported R.B. to Wake Medical Center to obtain a rape kit. Officer McKenna called Detective Scott Meyers (Detective Meyers) with the Raleigh Police Department to conduct an additional interview with R.B.

Detective Meyers testified he met R.B. and Officer McKenna at the hospital where he interviewed R.B., and prepared a report of her statement. R.B.'s statements to the two officers were essentially the same as her trial testimony. The officers testified R.B. told them Defendant had threatened to kill her if she did not have sex with him, and that Defendant had punched her in the face five or six times. R.B. did not know Defendant's name but provided a detailed description of him. After the rape kit was completed, R.B. accompanied Detective Meyers and Officer McKenna to locations where Defendant frequented. However, their search for Defendant was unsuccessful.

Detective Michael Galloway (Detective Galloway) with the Raleigh Police Department testified that he received a call on 10 November 2006 indicating that a person matching the description of the suspect had been transported to the Raleigh Police Department.

Detective Galloway interviewed Defendant. Defendant waived his *Miranda* rights and made three statements to Detective Galloway. Defendant first denied going to Chavis Park and having sex with anyone. In his second statement, Defendant admitted he "[knew] the girl." He said he had met R.B. on the prior Tuesday and they "had sex . . . at a hotel room downtown." Defendant said he also saw R.B. on 9 November 2006 and they went "to Chavis Park . . . and had sex and that was that." In his third statement, Defendant said he "recently met that girl," and that he "gave her twenty dollars this past Tuesday, and [they] had sex outside near the bus station." Defendant said that later in the week he "went to Chavis Park to find [R.B.]." Defendant said he "found [R.B.] under the shelter asleep. [He] woke her up, and . . . asked her if she was trying to do anything. [R.B.] said yes. [Defendant] gave [R.B.] twenty dollars." However, Defendant said R.B. changed her mind and she would not give back his money. Defendant then admitted he "slapped [R.B.] in the face with an open hand two or three times. [He] asked her again if she was trying to do anything, and she said yes." Defendant said R.B. performed oral sex on him and that they had sexual intercourse.

Defendant moved to dismiss the charges at the close of the State's evidence, arguing insufficiency of the evidence and that the indictments were fatally defective for failing to name the victim. The trial court denied Defendant's motion to dismiss.

Defendant presented the testimony of Ivy McMillan (McMillan) a DNA analyst with the State Bureau of Investigation. McMillan testified she was unable to find a DNA profile from the sperm fractions of the vaginal swabs and cuttings from toilet tissue because the quantity of spermatozoa was too few. Defendant renewed his motion to dismiss at the close of all the evidence. The trial court again denied Defendant's motion.

I.

[1] Defendant assigns error to the trial court's denial of his motion to dismiss the charges of second-degree rape and second-degree sexual offense, alleging the indictments were fatally defective because they failed to state the full name of the victim. On appeal, we review the sufficiency of an indictment *de novo*. *See State v. Sturdivant*, 304 N.C. 293, 307-11, 283 S.E.2d 719, 729-31 (1981). Defendant's indictment for second-degree rape states:

> The jurors for the State upon their oath present that on or about November 10, 2006, in Wake County, . . . [D]efendant named

> above unlawfully, willfully and feloniously did ravish and carnally know and attempt to ravish and carnally know RTB, by force and against the victim's will. This was done in violation of N.C.G.S. § 14-27.3.

Defendant's indictment for second-degree sexual offense states:

> The jurors for the State upon their oath present that on or about November 10, 2006, in Wake County, . . . [D]efendant named above unlawfully, willfully and feloniously did engage in a sex offense with RTB by force and against the victim's will. This act was done in violation of N.C.G.S. § 14-27.5.

Defendant argues that the indictments are invalid in failing to set out an element of the offenses, specifically the element that the offenses were committed against "another person."

N.C. Gen. Stat. § 14-27.3 defines the crime of second-degree rape as: "(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with *another person*: (1) By force and against the will of the other person." N.C. Gen. Stat. § 14-27.3(a)(1) (2007) (emphasis added). Second-degree sexual offense is defined by N.C. Gen. Stat. § 14-27.5 as: "(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with *another person*: (1) By force and against the will of the other person." N.C. Gen. Stat. § 14-27.5(a)(1) (2007) (emphasis added).

As Defendant points out, it is correct that both criminal statutes require the act to be committed against "another person." Defendant contends, however, that the use of "RTB" in both indictments does not meet the element of another person because "RTB" without periods following each letter does not constitute "initials" of a person's name. His argument implies that had there been periods between the letters, he would have understood them to be initials of a person's name, satisfying the statutory element that the crimes be against "another person."

Defendant's contention that the indictments do not meet the element of "another person" is without merit. Our Supreme Court has held that judgments should not be set aside based on hyper-technical arguments. *State v. Bell*, 311 N.C. 131, 138, 316 S.E.2d 611, 615 (1984). In *Bell*, the Supreme Court found no merit in the defendant's contention that the indictments for rape were insufficient because the indictments failed to allege the victims were females. *Id.* Similarly, in *Sturdivant*, our Supreme Court rejected the defendant's argu-

ment that his indictment was fatally defective under N.C. Gen. Stat. § 14-39(a) because it failed to allege specifically that the kidnapping was effected without the victim's consent. *Sturdivant*, 304 N.C. at 310, 283 S.E.2d at 731. The Court held that although the indictment did not specifically allege "without consent," the indictment did not fail because "common sense dictates that one cannot unlawfully kidnap or unlawfully restrain another with his consent." *Id.*

The same analysis applies in the case before us. Where the statutes defining second-degree rape and second-degree sexual offense require the offenses to be against "another person," the indictments charging these offenses do not need to state the victim's full given name, nor do they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person. Further, an indictment for a statutory offense is generally sufficient when it charges the offense in the language of the statute. *State v. Penley*, 277 N.C. 704, 707, 178 S.E.2d 490, 492 (1971) (citing *State v. Hord*, 264 N.C. 149, 157, 141 S.E.2d 241, 246 (1965)). The indictments in the present case tracked the statutory language of N.C.G.S. §§ 14-27.3(a)(1) and 14-27.5(a)(1). Therefore, we find Defendant's first argument fails since the indictment tracked the language of the statute and "RTB" was sufficient to inform Defendant he was charged with second-degree rape and second-degree sexual offense against "another person."

II.

[2] Defendant further argues that even if the use of "RTB" in the indictments is sufficient to charge him under N.C.G.S. §§ 14-27.3 and 14-27.5, the indictments are insufficient under North Carolina's short-form indictment statutes for rape and sexual offense. Defendant argues the trial court lacked subject matter jurisdiction because the failure to state the victim's full name did not meet the naming requirement of the short-form statutes and therefore rendered the indictments fatally defective under N.C. Gen. Stat. § 15-144.1 and N.C. Gen. Stat. § 15-144.2.

"A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case." *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008) (citing *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001)). "Indictments alleged to be facially invalid are . . . reviewed *de novo*." *Id.* at 476, 664 S.E.2d at 342 (citing *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008)).

N.C. Gen. Stat. § 15-144.1(a) (2007) sets out the language which is sufficient for a short-form indictment for rape:

> (a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, *naming her*, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and *sufficient* in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape, or assault on a female.

(emphasis added).

N.C. Gen. Stat. § 15-144.2(a) (2007) provides the language which is sufficient for a short-form indictment for sexual offense:

> (a) In indictments for sex offense it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, *naming the victim*, by force and against the will of such victim and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and *sufficient* in law as an indictment for a first degree sex offense and will support a verdict of guilty of a sex offense in the first degree, a sex offense in the second degree, an attempt to commit a sex offense or an assault.

(emphases added).

Both short-form statutes include the language "naming her" or "naming the victim" as part of the allegations to be set forth in the indictment. An indictment drawn in accordance with N.C.G.S. §§ 15-144.1 or 15-144.2 is deemed to be sufficient. *State v. Lowe*, 295 N.C. 596, 247 S.E.2d 878 (1978). *See also State v. Walker*, 84 N.C. App.

540, 542, 353 S.E.2d 245, 247 (1987) (holding that because the indictment met the criteria of N.C. Gen. Stat. § 15-144.1, the indictment was sufficient to allow the defendant to prepare a defense and to be protected from double jeopardy). Therefore, by enacting the statutes for short-form indictments, the General Assembly provided a method by which indictments can be certain to be sufficient to withstand constitutional challenges.

In reviewing Defendant's argument that the indictments were insufficient, we must determine if it necessarily follows that an indictment is fatally defective if it is not drawn in exact accordance with the short-form indictment. Our Courts have held "[a]n indictment is not facially invalid as long as it notifies an accused of the charges against him sufficiently to allow him to prepare an adequate defense and to protect him from double jeopardy." *Haddock*, 191 N.C. App. at 476-77, 664 S.E.2d at 342 (citing *Lowe*, 295 N.C. at 603, 247 S.E.2d at 883). Further, "[n]otification is sufficient if the illegal act or omission alleged in the indictment is 'clearly set forth so that a person of common understanding may know what is intended.' " *Id.* at 476-77, 664 S.E.2d at 342 (quoting *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984)).

In *Haddock*, the defendant was charged with second-degree rape using a short-form indictment. *Haddock*, 191 N.C. App. at 477, 664 S.E.2d at 342. The defendant argued that the indictment was fatally defective for including "and/or" in alleging the victim was "mentally disabled, mentally incapacitated *and/or* physically helpless." *Id.* at 476, 664 S.E.2d at 342. Except for the insertion of the words "and/or" in place of "or," the indictment tracked the language of N.C. Gen. Stat. § 15-144.1(c). *Id.* at 477, 664 S.E.2d at 343. In holding the indictment was valid, our Court applied the tests set forth in *Coker* and *Lowe* and said:

> From reading the indictment, a person of common understanding would know that the intent of the indictment was to accuse [the] defendant of having sexual intercourse with a person deemed by law to be incapable of giving consent. In turn, this language was sufficient to notify [the] defendant of the charges against him in order to prepare an adequate defense and to protect him from being punished a second time for the same act. The indictment *sub judice* might have been clearer if only the word "or" or the word "and" had been used, but we hold that the use of "and/or" did not render the indictment facially invalid.

Id. at 477-78, 664 S.E.2d at 343.

Similar to *Haddock*, Defendant's indictments in the present case tracked the language of N.C. Gen. Stat. §§ 15-144.1 and 15-144.2. Although the indictments would have been clearer had they alleged the victim's full name, they still "named" the victim by using her initials. We have found no decision by our North Carolina Courts directly interpreting whether "naming" the victim can only be satisfied by using the victim's full name, or whether a nickname, initials or other identification method would be sufficient.[1] However, our Court has stated that "[n]ames are used to identify people and if the spelling used . . . fairly identifies the right person and the defendant is not misled to his prejudice, he has no complaint." *State v. Wilson*, 135 N.C. App. 504, 508, 521 S.E.2d 263, 265 (1999) (citing *State v. Staley*, 71 N.C. App. 286, 287, 321 S.E.2d 551, 552 (1984)). Therefore, in order to determine if the lack of the victim's full name renders the indictments in the present case fatally defective, we will apply the tests set forth in *Coker* and *Lowe* to inquire (1) whether a person of common understanding would know that the intent of the indictments was to charge Defendant with second-degree rape and second-degree sexual offense, and (2) whether Defendant's constitutional rights to notice and freedom from double jeopardy were adequately protected by the use of the victim's initials. *Coker*, 312 N.C. at 435, 323 S.E.2d at 346; *Lowe*, 295 N.C. at 603, 247 S.E.2d at 883.

As discussed above in analyzing Defendant's first argument, the indictments tracked the statutory language of N.C.G.S. §§ 14-27.3(a)(1) and 14-27.5(a)(1). Where the statutes defining second-degree rape and second-degree sexual offense require the offenses to be against "another person," the indictments charging these offenses do not need to state the victim's full name, nor do they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person. Therefore, we reiterate that the test in *Coker* that a person of common understanding would know the intent of the indictments is met in the present case. *Coker*, 312 N.C. at 435, 323 S.E.2d at 346.

The record on appeal demonstrates that Defendant had notice of the identity of the victim. The arrest warrants served on Defendant

1. Although our North Carolina Courts have not directly decided this issue, there is federal case law that supports the use of initials in indictments. *See United States v. Wabo*, 290 F. Supp.2d 486, 490 (D.N.J. 2003) (holding "it is not essential that an indictment identify victims by their given names" and an indictment identifying victims by their initials contains "sufficient factual and legal information for the defense to prepare its case.").

listed the victim by her initials "R.T.B.," with periods after each letter. When first questioned at the police station on 10 November 2006, Defendant gave three voluntary statements in which he admitted in two of them that he knew R.T.B. Further, Defendant made no argument on appeal that he had difficulty preparing his case because of the use of "RTB" instead of the victim's full name. Thus, it appears Defendant was not confused regarding the identity of the victim, and therefore the use of "RTB" in the indictments provided Defendant with sufficient notice to prepare his defense.

Further, Defendant did not argue on appeal that the use of "RTB" placed him at risk of being subjected to double jeopardy. In addition, R.B. testified at trial and identified herself in open court. Thus, we find Defendant is protected from double jeopardy.

We conclude that the use of initials to identify a victim will require the trial court to employ the *Coker* and *Lowe* tests to determine if an indictment is sufficient to impart subject matter jurisdiction. We find the indictments in the case before us charging Defendant with second-degree rape and second-degree sexual offense were sufficient to meet the tests outlined in *Coker* and *Lowe*.

III.

[3] Finally, Defendant argues by analogy that we should find the indictments in the present case fatally defective because our Court has held an indictment for larceny fatally defective where, in identifying the victim, the indictment insufficiently alleged the legal ownership status of the victim. *See State v. Patterson*, 194 N.C. App. 608, 614, —— S.E.2d ——, —— (2009); *State v. Norman*, 149 N.C. App. 588, 593, 562 S.E.2d 453, 457 (2002). In *Patterson*, our Court held the indictment charging larceny of church property was fatally defective because it did not indicate that the church was a legal entity capable of owning property. *Patterson*, 194 N.C. App. 608, 614, —— S.E.2d ——, —— (2009). Our Court held that a defect is fatal if the indictment fails to state some necessary and essential element of the offense. *Id.* at 612, —— S.E.2d at ——. The legal status of the church was a necessary element because it is essential to a larceny charge to allege ownership of property. Where the property is alleged to have been stolen from a corporation, it must be clear from the indictment that the corporation is a legal entity capable of owning property. *Id.*

However, the case before us is distinguishable from *Patterson* and *Norman*. In those cases, the indictment was defective for failing

to allege the essential element of the victim's ability to own property. In the case before us, the victim need not have any additional legal status in order for the rape and sexual offense charges to lie.

In review, we hold that the intent of the indictments in the present case would be understood by a person of common understanding as charging Defendant with second-degree rape and second-degree sexual offense. Further, the indictments in the present case provided sufficient notice to Defendant for Defendant to prepare his defense and protect him from double jeopardy. Therefore, the indictments in this case are upheld and Defendant's assignments of error are overruled.

No error.

Judges JACKSON and HUNTER, JR. concur.

LENTON CREDELLE BROWN, ADMINISTRATOR OF THE ESTATE OF CLAMON BROWN, PLAINTIFF v. KINDRED NURSING CENTERS EAST, L.L.C., KINDRED HEALTH CARE OPERATING, INC., KINDRED HEALTH CARE, INC., PATRICIA EVELYN DIX, N.P., STEVEN FERGUSON, M.D., AND EASTERN CAROLINA FAMILY PRACTICE, P.A., DEFENDANTS

No. COA08-584

(Filed 5 May 2009)

Medical Malpractice— Rule 9(j) certification—amended complaint filed within extended limitations period

The trial court erred by dismissing with prejudice plaintiff's complaint for medical malpractice under N.C.G.S. § 1A-1, Rule 9(j) because: (1) plaintiff sought and received a Rule 9(j) extension and filed his amended complaint complying with Rule 9(j) within the extended limitations period; (2) nothing in the statute required that a motion for the extension be granted prior to the expiration of the statute of limitations, but only that the motion be brought prior to the expiration of the statute of limitations; (3) nothing in the statute required plaintiff to seek this extension prior to the filing of an original complaint, but only that it be sought in order to file a complaint that complied with the pleading requirements; (4) even if plaintiff's original pro se complaint was treated as a legal nullity, the amended complaint,

treated as an original complaint filed within the extended limitations period, contained the requisite Rule 9(j) certification; and (5) the legislature included a provision allowing for up to 120 days "in order to comply with this Rule" upon a showing of good cause, and otherwise the ability to obtain an extension would serve no purpose.

Judge ELMORE dissenting.

Appeal by plaintiff from order entered 10 March 2008 by Judge Cy A. Grant, Sr., in Hertford County Superior Court. Heard in the Court of Appeals 19 November 2008.

Gugenheim Law Offices, P.C., by Stephen J. Gugenheim, for plaintiff-appellant.

Harris, Creech, Ward and Blackerby, P.A. by Thomas E. Harris, W. Gregory Merritt, and Jay C. Salsman, for defendants-appellees.

JACKSON, Judge.

Lenton Credelle Brown ("plaintiff") appeals the 10 March 2008 dismissal, with prejudice, of his complaint against Patricia Evelyn Dix, N.P., Steven Ferguson, M.D., and Eastern Carolina Family Practice, P.A.[1] ("defendants"), for negligence, wrongful death, and medical malpractice. For the reasons stated below, we reverse.

On or about 24 December 2002, Clamon Brown ("Brown") was admitted to Guardian Care of Ahoskie. Approximately one year later, Brown received a feeding tube. By March 2004, Brown's feeding tube had been replaced with a smaller one. On 25 March 2004, nursing staff first noticed problems with the feeding tube. Over the course of the next several days, the tube continued to leak and was replaced with larger and larger tubes in an attempt to correct the problem. On 2 April 2004, Brown was admitted to a hospital; he was septic, malnourished, and dehydrated. He died approximately twelve hours later.

Plaintiff is Brown's son. On 29 March 2006, plaintiff, as administrator of Brown's estate, filed a *pro se* complaint (the "original complaint")[2] in Hertford County Superior Court alleging that his father's

1. The remaining defendants in the original suit are not parties to this appeal.

2. The original complaint did not name Patricia Evelyn Dix, N.P. or Eastern Carolina Family Practice P.A. as defendants.

feeding tube had been improperly replaced with a much smaller one, and that Brown had "died an agonizing slow and painful death with bed sores covering large portions of his body" as a result of the "poor care" administered by defendants at Guardian Care of Ahoskie, where Brown was an Alzheimer's patient.

On that same date, plaintiff drafted[3] a "Request For 9J Extension." Two days later, on 31 March 2006, plaintiff filed a "Motion for 9J Extension," which included language identical to his previous "Request For 9J Extension" with the addition of a statement that his motion was filed within the period allowed by law.

On 3 May 2006, then-defendants filed motions to dismiss, arguing that plaintiff's complaint did not comply with the requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure. They contended (1) that plaintiff's complaint did not assert that the questioned medical care had been reviewed by a person who was reasonably expected to qualify as an expert witness or whom plaintiff would seek to have qualified as an expert witness who was also willing to testify that the medical care did not meet the applicable standard of care, (2) that plaintiff's 9(j) "Extension Request demonstrates that expert review of the claim did not take place before the complaint was filed," (3) that the trial court did not enter an order granting an extension of time in accordance with Rule 9(j), and (4) that plaintiff's statute of limitations had expired as a result of his failure to comply with Rule 9(j).

Plaintiff filed a request to amend his complaint on 24 May 2006. On 31 May 2006, plaintiff filed a response to the motions to dismiss. On 2 June 2006, the trial court granted "plaintiff's motion for a 120 day extension for filing a 9J Statement" and made the "motion retroactive to March 29, 2006." On 11 July 2006, plaintiff—now represented by counsel—again moved to file an amended complaint to include the Rule 9(j) pleading requirements, as well as to add additional defendants.[4]

On 18 September 2007, defendants brought a motion to dismiss plaintiff's case for failure to state a claim, and alternatively, for a judgment on the pleadings because the statute of limitations had expired. Defendants also moved to dismiss pursuant to Rule 41 for plaintiff's failure to comply with Rule 9(j). On 10 March 2008, following a hear-

3. There is no date stamp on the extension request and it is not clear from the record whether plaintiff filed it. It may have been attached to the complaint.

4. Defendants Patricia Evelyn Dix, N.P. and Eastern Carolina Family Practice P.A.

ing, the trial court allowed defendants' motion to dismiss pursuant to Rules 9(j), 12(b)(6), and 41 and dismissed plaintiff's complaint with prejudice. Plaintiff appeals.

Plaintiff argues that the trial court erred in dismissing his complaint because he sought and received a Rule 9(j) extension and filed his amended complaint complying with Rule 9(j) within the extended limitations period. We agree.

"[O]ur review of Rule 9(j) compliance is *de novo*, because such compliance 'clearly presents a question of law[.]' " *Smith v. Serro*, 185 N.C. App. 524, 527, 648 S.E.2d 566, 568 (2007) (quoting *Phillips v. Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002), *aff'd*, 357 N.C. 576, 597 S.E.2d 669 (2003) (per curiam)). Rule 9(j) states, in relevant part:

> Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> > (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
> >
> > . . . .
>
> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 . . . may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action *in order to comply with this Rule*, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2007) (emphasis added).

Here, plaintiff's father died on 3 April 2004. Therefore, the statute of limitations would have expired, absent a Rule 9(j) extension, on 3 April 2006. Plaintiff, appearing *pro se*, filed the original complaint on 29 March 2006. On 31 March 2006, plaintiff filed a motion to extend the statute of limitations pursuant to Rule 9(j). Nothing in the statute

requires that a motion for the extension be granted prior to the expiration of the statute of limitations, only that the motion be brought prior to the expiration of the statute of limitations. Plaintiff complied with this requirement. Moreover, nothing in the statute requires that a plaintiff seek this extension prior to the filing of an "original" complaint, only that it be sought in order to file "a" complaint that complies with the pleading requirements.

As evidence of "good cause" and that "the ends of justice would be served" by granting an extension, plaintiff, appearing *pro se*, stated that he had consulted with expert witnesses who agreed that his case had merit but were unwilling to testify. On 24 May 2006, plaintiff, still appearing *pro se*, filed a request to amend his complaint to allege that he had consulted with experts prior to the filing of his complaint but that none were willing to express their opinions "on the record." No ruling was obtained, and no amended complaint was filed at that time.

The motion for Rule 9(j) extension was granted on 2 June 2006, setting the 120-day extension of time to run from 29 March 2006, the date the original complaint was filed. On 11 July 2006—within the extended limitations period—plaintiff, now represented by counsel, filed a motion to amend plaintiff's complaint, along with an amended complaint.[5] The amended complaint alleged: "The medical care at issue in this case has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care."

In *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002), our Supreme Court "granted discretionary review to determine if an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j)." *Id.* at 204, 558 S.E.2d at 166. Although the Court concluded that "[i]n light of the plain language of the rule, the title of the act, and the legislative intent . . . , it appears review must occur *before* filing to withstand dismissal[,]" *id.* (emphasis added), the Court also concluded that "once a party receives *and exhausts* the 120-day extension of time in

5. Leave was required only as to defendant Kindred Nursing Centers East, L.L.C. because none of the other defendants had answered the original complaint. On or about 9 November 2006, plaintiff voluntarily dismissed, with prejudice, Kindred Nursing Centers East, L.L.C., Kindred Healthcare Operating, Inc., and Kindred Healthcare, Inc.

order to comply with Rule 9(j)'s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification." *Id.* at 205, 558 S.E.2d at 167 (emphasis added).

In *Thigpen*, the plaintiff had obtained a Rule 9(j) extension and filed an original complaint, without a Rule 9(j) certification, on the last day of the extended limitations period. *Id.* at 199-200, 558 S.E.2d at 164. Although the *amended* complaint contained an allegation that would satisfy the Rule 9(j) pleading requirements, it was not filed within the extended limitations period. *Id.* at 200, 558 S.E.2d at 164. In holding that a party cannot amend his complaint to comply with Rule 9(j) after exhausting the extended limitations period, *Thigpen* left open the possibility that an amended complaint *could* be filed prior to the exhaustion of the extension.

Ordinarily, the issue with an amended pleading is whether the amendment "relates back" to the original filing for statute of limitations purposes. Pursuant to the Rules of Civil Procedure,

> [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). In *Thigpen*, our Supreme Court stated that "permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature." *Id.* at 204, 558 S.E.2d at 166. Our Supreme Court discounted this Court's discussion in the *Thigpen* case of the interplay between Rules 15 and 9(j), *id.* at 200, 558 S.E.2d at 164; however, because the amendment was filed *after* the statute of limitations had expired, there was a question of whether the amendment *could* "relate back" to the original complaint.

Clearly, the original complaint in *Thigpen* did not comply with Rule 9(j)'s pleading requirements. Pursuant to the Court's ruling, an amendment filed after the statute of limitations had expired could not cure the defect. Here, too, the original complaint did not comply with Rule 9(j)'s pleading requirements. However, even if plaintiff's original *pro se* complaint were treated as a legal nullity, the amended complaint, treated as an original complaint, filed within the extended limitations period, contains the requisite Rule 9(j) certification. Here, there is no need to invoke Rule 15's "relation back" doctrine.

The certification states that the case *has been reviewed* by an expert who was willing to testify. Pursuant to our standard of review on motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, we must treat this allegation as true. *See Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 480, 593 S.E.2d 595, 598 ("On a motion to dismiss pursuant to Rule 12(b)(6) . . . , the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." (internal quotation marks and citation omitted)), *disc. rev. denied*, 358 N.C. 543, 599 S.E.2d 48 (2004).

Although it is quite clear that plaintiff could not satisfy Rule 9(j) at the time he filed his original *pro se* complaint, in the time between that filing and the filing of the amended complaint, plaintiff, with the assistance of his newly acquired counsel, may have succeeded in locating expert witnesses who were willing to testify to a breach of the appropriate standard of care, thus satisfying Rule 9(j). According to his allegations, he did, in fact, locate such experts.

In establishing Rule 9(j), "[t]he legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint." *Thigpen* 355 N.C. at 203-04, 558 S.E.2d at 166. Perhaps anticipating that this more stringent procedure could impose a hardship, the legislature also included a provision allowing a trial court to extend the limitations period for up to 120 days—*in order to comply with this Rule*—upon a showing of good cause. Reversing the trial court in this case is consistent with both the legislature's intent to require expert certification and its intent to allow additional time to obtain such certification. Otherwise, the ability to obtain an extension would serve no purpose.

Because plaintiff met the requirements of Rule 9(j), the trial court erred in dismissing his complaint. As our holding on plaintiff's first argument is dispositive, we need not address his remaining argument.

Reversed.

Judge ELMORE dissents in a separate opinion.

Judge Robert C. HUNTER concurs.

ELMORE, Judge, dissenting.

For the reasons stated below, I respectfully dissent from the majority opinion and would vote to affirm the order of the trial court. I would hold that the trial court properly dismissed plaintiff's claim for failure to comply with the plain language of Rule 9(j).

On 24 May 2006, plaintiff filed a request to amend his complaint. He explained:

> As my Motion for 9J Extension indicates, I did consult with two different physicians in the same area of specialization as Dr. Fergusion [*sic*] prior to the initial filing of this case which was March 29, 2006. Each physician came to the independent conclusion that there was significant evidence of gross medical malpractice on the part of Dr. Ferguson. However, neither one want [*sic*] to say so on the record. The complaint needs to be amended to express this fact.
>
> * * *
>
> I did consult with a registered nurse prior to the initial filing of this case which was March 29, 2006, [*sic*] the nurse came to the conclusion that standard nursing procedures and practices were not followed by the nursing staff at Guardian Care as regards patient Clamon Brown. The complaint needs to be revised to reflect this.

Plaintiff also filed a response to defendants' motions to dismiss on 31 May 2006, again explaining that he had consulted with two physicians who could have reasonably expected to qualify as expert witnesses, but that neither physician wished to share his opinion "on the record."

On 2 June 2006, the trial court granted "[p]laintiff's motion for a 120 day extension for filing a 9 J Statement" and made the motion retroactive to 29 March 2006. On 11 July 2006, plaintiff—now represented by counsel—again moved to file an amended complaint to include the Rule 9(j) pleading requirements. The first amended complaint, also filed 11 July 2006, included the following language:

> The medical care at issue in this case has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

On 10 March 2008, following a hearing, the trial court allowed defendants' motion to dismiss pursuant to Rules 9(j), 12(b)(6), and 41 and dismissed plaintiff's complaint with prejudice. Plaintiff now argues that, as a matter of course, he was entitled to an extension to file his 9(j) certification after he had already filed his medical malpractice complaint.

Rule 9(j) mandates that a medical malpractice claim be dismissed if it does not contain the required expert certification. *Thigpen v. Ngo*, 355 N.C. 198, 203, 558 S.E.2d 162, 166 (2002). Furthermore, "permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature." *Id.* at 204, 558 S.E.2d at 166.

In *Thigpen*, the Supreme Court "granted discretionary review to determine if an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j)." *Id.* at 204, 558 S.E.2d at 166-67. The Court concluded that such an allegation does not satisfy Rule 9(j):

> To survive dismissal, the pleading must "specifically assert[] that the medical care *has been reviewed*." N.C.G.S. § 1A-1, Rule 9(j), para. (1), (2) (emphasis added). Significantly, the rule refers to this mandate twice (in subsections (1) and (2)), and in both instances uses the past tense. *Id.* In light of the plain language of the rule, the title of the act, and the legislative intent previously discussed, it appears review must occur *before* filing to withstand dismissal. Here, in her amended complaint, plaintiff simply alleged that "plaintiff's medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness." (Emphasis added.) There is no evidence in the record that plaintiff alleged the review occurred before the filing of the original complaint. . . . Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an *Id.* expert would pervert the purpose of Rule 9(j).

Id. In my opinion, this language leaves no doubt that the questioned medical care must be reviewed *before* the plaintiff files his original complaint. Not only must this review occur before the plaintiff files his original complaint, but the review must be conducted by a person

who is reasonably expected to qualify as an expert witness and who is *willing to testify* as to that opinion.

Here, plaintiff's amended complaint uses language nearly identical to the language rejected in *Thigpen*. As in *Thigpen*, plaintiff did not specify that the review occurred before he filed his original complaint or present evidence to support such a statement. In fact, plaintiff's March 2006 filings all state that the medical care had been reviewed only by potential experts who were not willing to testify. The plaintiff in *Thigpen* merely suffered from an absence of evidence showing that the medical care had been properly reviewed before the original complaint was filed. Here, plaintiff himself filed affirmative statements that he had not obtained proper review of his father's medical care before filing his original complaint. Accordingly, I would hold that plaintiff did not meet the requirements for 9(j) certification and that the trial court properly dismissed his complaint.

STATE OF NORTH CAROLINA v. LUCIAN JEFFERSON PEELE, JR., DEFENDANT

No. COA08-713

(Filed 5 May 2009)

Search and Seizure— driving while impaired—grounds for stop not reasonable—tip from dispatcher—weaving within lane

The trial court erred by denying defendant's motion to suppress evidence of impaired driving obtained as a result of an anonymous tip to the dispatcher and the officer's observation of one instance of weaving within the lane. The tip had no indicia of reliability, and no corroboration, and defendant's conduct fell within the broad range of normal driving behavior.

Appeal by defendant from judgment entered 6 February 2008 by Judge Thomas D. Haigwood in Martin County Superior Court. Heard in the Court of Appeals 3 December 2008.

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

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellant.

GEER, Judge.

Defendant Lucian Jefferson Peele, Jr. appeals from his conviction for driving while impaired ("DWI"). Defendant contends primarily that the trial court erred in denying his motion to suppress on the grounds that the police officer who stopped him lacked the necessary reasonable articulable suspicion. The State responds that an anonymous tip combined with the officer's own observations were sufficient to supply reasonable suspicion. We have concluded, however, that the State failed to demonstrate either that the tip was reliable or that it was corroborated by the police officer. In addition, the police officer's own observations of defendant—involving a single instance of weaving within his lane of travel over a tenth of a mile—were insufficient to provide reasonable suspicion. Finally, given the totality of the circumstances, we cannot conclude that the uncorroborated anonymous tip combined with the officer's observation of a single instance of weaving was sufficient to give rise to reasonable suspicion. Consequently, we hold that the trial court erred in denying defendant's motion to suppress. We, therefore, reverse and remand for a new trial.

Facts

At approximately 7:50 p.m. on 7 April 2007, Sergeant James Sullivan of the Williamston Police Department responded to a dispatch regarding "a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection." The vehicle was described as a burgundy Chevrolet pickup truck. Sergeant Sullivan arrived at the intersection "within a second" and observed a burgundy Chevrolet pickup truck. After following the truck for about a tenth of a mile and seeing the truck weave within his lane once, Sergeant Sullivan pulled defendant over for questioning. Defendant was subsequently transported to the Martin County Courthouse and administered an Intoxilyzer test. The test recorded an alcohol concentration of .08, and defendant was issued a DWI citation.

Defendant was found guilty of DWI in Martin County district court on 2 July 2007. He appealed to superior court for a trial by jury. On 2 November 2007, defendant filed a pretrial motion to suppress evidence obtained as a result of Sergeant Sullivan's stop and defendant's subsequent arrest. At trial, following voir dire of Sergeant Sullivan, the trial court denied defendant's motion to suppress, ruling:

> [T]he standard here is a reasonable grounds of suspicion based on the totality of the circumstances, and, based upon the testi-

> mony that I've heard, I'm satisfied that the State has produced sufficient evidence that there was a reasonable ground of suspicion based on the information communicated to the officer by radio, which was immediately corroborated by him as far as the location and description of the vehicle, and the subsequent operation of the vehicle and the weaving in its lane of travel; that that generated a reasonable ground of suspicion to stop the motor vehicle in question, and so I'm going to respectfully overrule and deny your motion.

After the jury found defendant guilty of DWI, the trial court sentenced defendant to 60 days imprisonment, suspended that sentence, and placed defendant on 12 months of supervised probation. Defendant timely appealed to this Court.

Discussion

Defendant contends that Sergeant Sullivan lacked reasonable suspicion to stop him and, therefore, the trial court erred in denying his motion to suppress. "The scope of review of the denial of 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. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231, 122 S. Ct. 1323 (2002). "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Under the Fourth Amendment, which prohibits unreasonable searches and seizures, a police officer is permitted to "conduct a brief investigatory stop of a vehicle and detain its occupants without a warrant." *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003). "[I]n order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity." *Hughes*, 353 N.C. at 206-07, 539 S.E.2d at 630. "The reasonable suspicion must arise from the officer's knowledge prior to the time of the stop." *Id.* at 208, 539 S.E.2d at 631.

"Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d

438, 439 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576, 120 S. Ct. 673, 675-76 (2000)). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, 109 S. Ct. 1581, 1585 (1989)). "[T]he overarching inquiry when assessing reasonable suspicion is always based on the *totality* of the circumstances." *State v. Maready*, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008).

In this case, the trial court based its denial of the motion to dismiss on the dispatch and the court's finding that defendant had been "weaving in [his] lane of travel." Defendant, however, argues that this latter finding is not supported by competent evidence. To the extent that the trial court's finding can be read to indicate that defendant was continuously weaving in the lane, we agree with defendant that such a finding is not supported by the State's evidence.

Sergeant Sullivan testified that he "followed [defendant] a short distance and observed [him] weave into the center, bump the dotted line, and then fade to the other side and bump the fog line, and then pretty much go back into the middle of the lane." He did not testify to any other instance of weaving. This evidence only supports a finding that Sergeant Sullivan observed defendant weave once within his lane of travel. Accordingly, we must determine whether the dispatch when combined with the single instance of weaving is sufficient to warrant a determination that Sergeant Sullivan had reasonable suspicion to stop defendant.

We first note that Sergeant Sullivan's observation of a single instance of weaving within his lane was not sufficient to establish reasonable suspicion to stop defendant. In *State v. Fields*, 195 N.C. App. ——, ——, 673 S.E.2d 765, 769 (2009), this Court held "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."

Sergeant Sullivan, however, also testified—and the trial court found—that he received a radio communication from dispatch. That communication stated: "Williamston cars be advised, report of a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection." The dispatch then described the vehicle as a burgundy Chevrolet pickup truck. Defendant contends that this dispatch reflected an anonymous tip. The State argues that the tip was not nec-

essarily anonymous, but can point to no evidence that indicates that the report to the police came from an identified caller. Indeed, at trial, defense counsel specifically argued, without objection, that the caller was anonymous. On this record, therefore, the tip regarding a careless and reckless driver must be considered anonymous.

"An anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability." *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630. On the other hand, "a tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration." *Id.* In sum, to provide the justification for a warrantless stop, an anonymous tip "must have sufficient indicia of reliability, and if it does not, then there must be sufficient police corroboration of the tip before the stop may be made." *Id.*

Here, the State contends that the tip was sufficiently reliable either standing alone or based on police corroboration "[b]ecause all information provided by the caller was correct in every detail" and "Sergeant Sullivan verified details provided by the informant through his independent observations." As our Supreme Court explained in *Hughes*, however, "reasonable suspicion does not arise merely from the fact that the individual met the description given to the officers." *Id.* at 209, 539 S.E.2d at 632. The Court explained:

> "An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."

Id. (quoting *Florida v. J.L.*, 529 U.S. 266, 272, 146 L. Ed. 2d 254, 261, 120 S. Ct. 1375, 1379 (2000)).

This Court applied this principle in *McArn*, in which an anonymous tip reported, without more, that a white Nissan on Franklin and Sessoms Street in Lumberton, North Carolina was involved in a drug deal:

> Here, the fact that the anonymous tipster provided the location and description of the vehicle may have offered some limited indicia of reliability in that it assisted the police in identifying the

> vehicle the tipster referenced. It has not gone unnoticed by this Court, however, that the tipster never identified or in any way described an individual. Therefore, the tip upon which Officer Hall relied did not possess the indicia of reliability necessary to provide reasonable suspicion to make an investigatory stop. The anonymous tipster in no way predicted defendant's actions. The police were thus unable to test the tipster's knowledge or credibility. Moreover, the tipster failed to explain on what basis he knew about the white Nissan vehicle and related drug activity.

159 N.C. App. at 214, 582 S.E.2d at 375. Because the sole basis for the officer's stop was the anonymous tip, this Court reversed the denial of the motion to suppress and remanded for a new trial. *Id.*

Similarly, in this case, the anonymous caller accurately described the car's physical characteristics and location, but did not give the police any way to test the caller's credibility. The record contains no information about who the caller was, no details about what the caller had seen, and no information even as to where the caller was located. The caller did not "predict defendant's specific future action," *Hughes*, 353 N.C. at 208, 539 S.E.2d at 631, other than that he was driving from one stoplight to the next. *Id.* at 210, 539 S.E.2d at 632 (holding that confirmation that defendant was heading in general direction indicated by tipster "is simply not enough detail in an anonymous tip situation").

Moreover, Sergeant Sullivan "did not seek to establish the reliability of the assertion of illegality." *Id.* at 209, 539 S.E.2d at 632. He observed defendant at the stoplight and making the turn. He then followed him for no more than a tenth of a mile. During that time, he saw defendant one time "float[]" over to touch the dotted line and then move over to touch the fog line. The officer agreed that he "never saw any operation at all [of defendant's vehicle] that was consistent with careless or reckless operation of the vehicle[.]" The officer thus did not corroborate the caller's assertion of careless and reckless driving. We, therefore, do not believe that this case can be meaningfully distinguished from *McArn* and, consequently, the anonymous tip lacked sufficient reliability standing alone to provide reasonable suspicion for the stop.

The question remains whether the single instance of weaving combined with the uncorroborated anonymous tip is enough to give rise to reasonable suspicion. This Court noted in *Fields* that "weaving can contribute to a reasonable suspicion of driving while impaired" if

"coupled with additional specific articulable facts" that also indicate that the defendant was driving while impaired. 195 N.C. App. at ——, 673 S.E.2d at 768. Here, however, the trial court found none of the factors that have, in prior cases, led to a determination that reasonable suspicion existed. *See, e.g.*, *State v. Thompson*, 154 N.C. App. 194, 197, 571 S.E.2d 673, 675-76 (2002) (weaving within lane plus exceeding speed limit); *State v. Aubin*, 100 N.C. App. 628, 632, 397 S.E.2d 653, 655 (1990) (weaving within lane plus driving only 45 miles per hour on interstate), *appeal dismissed and disc. review denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 502 U.S. 842, 116 L. Ed. 2d 101, 112 S. Ct. 134 (1991); *State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217, 221 (1989) (weaving towards both sides of lane plus driving 20 miles per hour below speed limit), *appeal dismissed and disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990); *State v. Adkerson*, 90 N.C. App. 333, 336, 368 S.E.2d 434, 436 (1988) (weaving within lane five to six times plus driving off road).

In addition, defendant was not driving late at night, and the record contains no evidence, and the trial court did not find, that he was in proximity to any bars—which are other factors that have been considered. *See Fields*, 195 N.C. App. at ——, 673 S.E.2d at 768 ("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.").

The totality of the circumstances in this case are simply that the police received an anonymous call at 7:50 p.m. reporting that the driver of a burgundy Chevrolet pickup truck was driving carelessly and recklessly with no further details. The police officer, who responded to the dispatch, found a burgundy Chevrolet pickup truck at a stoplight, but did not observe any careless or reckless driving as defendant negotiated the intersection, turned, and drove down the road. At most, the officer saw defendant on a single occasion float to the dotted line and then float back to the fog line. The trial court did not identify and the State does not argue any other suspicious circumstances.

In short, all we have is a tip with no indicia of reliability, no corroboration, and " 'conduct falling within the broad range of what can be described as normal driving behavior.' " *State v. Roberson*, 163 N.C. App. 129, 133-34, 592 S.E.2d 733, 736 (quoting *State v. Emory*, 119 Idaho 661, 664, 809 P.2d 522, 525 (Ct. App. 1991)), *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). *Compare Maready*, 362 N.C. at 619-20, 669 S.E.2d at 567-68 (holding that reasonable suspicion

existed based on (1) reliable tip by obviously distressed driver of minivan, who was traveling immediately in front of defendant's car, flagged down officers, and told them face-to-face that car behind her had been running stop signs and stop lights; and (2) officers had observed intoxicated man stumbling across road to enter defendant's car), *with Roberson*, 163 N.C. App. at 134, 592 S.E.2d at 737 (holding officer lacked reasonable suspicion that defendant was driving under the influence when officer observed defendant, at 4:30 a.m. in area with bars, waiting at green traffic light for eight to ten seconds because "[a] motorist waiting at a traffic light can have her attention diverted for any number of reasons"). If we were to uphold the trial court's decision, we would be, as the Court in *Fields* cautioned against, "extend[ing] the grounds for reasonable suspicion farther than our Courts ever have." *Fields*, 195 N.C. App. at ——, 673 S.E.2d at 769. We decline to do so and, therefore, reverse the trial court's order denying defendant's motion to suppress and remand for a new trial. Because of our disposition of this issue, we need not address defendant's remaining assignments of error.

Reversed and remanded.

Judges McGEE and BRYANT concur.

JEFFREY H. NEWCOMB, EMPLOYEE, PLAINTIFF v. GREENSBORO PIPE COMPANY, EMPLOYER, SELECTIVE INSURANCE COMPANY, CARRIER, DEFENDANTS-APPELLANTS, AND MABE TRUCKING COMPANY, EMPLOYER, THE PHOENIX FUND, INC., IN REHABILITATION, CARRIER, DEFENDANTS-APPELLEES

No. COA08-783

(Filed 5 May 2009)

Workers' Compensation— successive injuries—disability benefits—apportioned where possible—joint liability otherwise

The Industrial Commission did not abuse its discretion in a workers' compensation case by apportioning disability benefits between a current and a prior back injury, and by assigning joint and several liability for those disability benefits that the doctor could not determine stemmed from one injury or the other. If the General Assembly had intended to adopt a "last injurious expo-

sure" rule for accidental injuries as well as occupational disease, it would have done so explicitly.

Appeal by defendants-appellants from opinion and award entered 10 March 2008 by Commissioner Laura Kranifeld Mavretic, for the Full Commission. Heard in the Court of Appeals 28 January 2009.

Rudisill, White & Kaplan, P.L.L.C., by Bradley H. Smith, for defendants-appellants.

Jones, Hewson & Woolard, by R.G. Spratt III, for defendants-appellees.

ELMORE, Judge.

Greensboro Pipe Company and its insurance carrier, Selective Insurance Company (together, Greensboro Pipe), appeal from an opinion and award entered 10 March 2008 by the Full Commission in favor of Jeffrey H. Newcomb (plaintiff). For the reasons stated below, we affirm the opinion and award.

The Full Commission found the following relevant facts, which the parties do not challenge on appeal and which are therefore binding on this Court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). On 5 June 2003, plaintiff sustained a compensable injury to his back while employed as a truck driver at Greensboro Pipe. Plaintiff saw Dr. Jeffrey C. Beane on 10 June 2003, who diagnosed plaintiff with a large, broad-based disc herniation at L5-S1, as well as an annular tear at L4-5. Dr. Beane performed a surgical microdiskectomy at L5-S1 and eventually placed plaintiff at maximum medical improvement on 24 November 2003, assessing him with a fifteen percent partial impairment rating to the back. Plaintiff continued to have chronic back pain after the surgery. By June 2004, plaintiff was seeing Dr. Beane for back pain, left leg pain, right buttock pain, and right leg pain down to his heel. Dr. Beane noted that plaintiff suffered from spondylosis and epidural fibrosis at L5-S1 and non-compressive disc protrusion with effacement in the lateral recess and moderate central canal stenosis at L4-5.

On 26 July 2004, plaintiff began working at Mabe Trucking Company (Mabe Trucking)[1] as a load coordinator, a desk job that required no heavy lifting. On 17 March 2005, Dr. Beane saw plaintiff

1. Mabe Trucking's insurer, Phoenix Fund, Inc., In Rehabilitation, is included here.

for chronic right lower extremity radicular pain, numbness, and tingling. Dr. Beane kept plaintiff out of work from 26 April 2005 until 12 June 2005 because plaintiff could not even perform his desk job. A 5 June 2005 lumbar meylogram and CT scan showed a herniation at L4-5 on the left and a protrusion at L5-S1 on the left with a 6 millimeter retrolisthesis at that level. Dr. Beane offered to perform either decompression or lumbar fusion surgery, but plaintiff declined.

On 12 June 2005, plaintiff was examined by Dr. Parish A. McKinney. He explained that he had returned to work because he could not afford to be out of work, but that he was still having back problems and that Dr. Beane wanted to perform another surgery. Dr. McKinney advised that plaintiff might require surgery within a month. On 29 July 2005, Dr. Beane's partner, Dr. Richard D. Ramos, performed repeat bilateral facet injections at L4-5 and L5-S1. On 16 August 2005, Dr. Ramos noted that plaintiff was "doing at least 95% better and that he was having minimal pain." However, plaintiff's pain returned in September 2005. Plaintiff periodically told his supervisor at Mabe Trucking that he was having ongoing back problems. Sometimes plaintiff missed work because of them.

On 23 January 2006, plaintiff was on his way to work with Mabe Trucking when he slipped on a tile floor and fell. The floor was wet because it was raining. Plaintiff went to the hospital later that day. Following increased pain and repeated visits to his various doctors, plaintiff was reporting pain on both his right and left sides by 8 March 2006. On 4 May 2006, Dr. Beane performed a microdiskectomy at L4-5 and L5-S1 on the left. Drs. Beane and Ramos kept plaintiff out of work continuously until 29 December 2006. Dr. Beane then assigned restrictions of no prolonged sitting or standing, no unsupported or repetitive bending at the waist, and no lifting more than ten pounds.

Dr. Beane testified that plaintiff's second accident aggravated plaintiff's underlying back condition and precipitated his need for surgery. Dr. Beane could not apportion a certain percentage of plaintiff's condition between the two accidents. The Full Commission found that plaintiff's 4 May 2006 surgery "was due to a combination of the accidents that he sustained on June 5, 2003 and January 23, 2006" and that the L4-5 and L5-S1 herniations "were proximately caused by the accident of June 5, 2003." Plaintiff reached maximum medical improvement on 29 December 2006, and Dr. Beane indicated that plaintiff had returned to his pre-January 2006 baseline. Dr. Beane imposed nearly the same restrictions on plaintiff's work as he had following the 5 June 2003 accident.

The Full Commission concluded that plaintiff was unable to work as a practical matter because of his vocational background and Dr. Beane's restrictions. The Full Commission determined that plaintiff "was totally disabled from any employment from May 21, 2004 to June 3, 2004, June 16, 2004 to July 25, 2004, and April 26, 2005 to June 12, 2005, as a proximate result of the accident he suffered with Greensboro Pipe on June 5, 2003." It also determined that plaintiff "was totally disabled from any employment from February 6, 2006 to February 19, 2006 and February 22, 2006 and continuing as a proximate result of a combination of the injuries suffered in the accident with Greensboro Pipe on June 5, 2003 and the accident with Mabe Trucking on January 23, 2006." Finally, the Full Commission determined that "[t]he medical evidence presented does not show the relative contribution to plaintiff's injuries and disability resulting from the June 5, 2003 or January 23, 2006 incidents. Therefore, apportionment is not possible and both carriers shall be jointly and severally liable for payment of plaintiff's compensation."

The Full Commission also made the following relevant findings of fact, which Greensboro Pipe now challenges:

> 6. As a proximate result of the combination of the compensable accidents on June 5, 2003 and January 23, 2006, plaintiff has been disabled from work and is entitled to temporary total disability benefits at a rate of $389.75 per week from February 6, 2006 to February 19, 2006, and from February 22, 2006 and continuing until he returns to work or until further order of the Commission. N.C. Gen. Stat. §97-29[.]
>
> 7. While plaintiff has reached his pre-January 2006 baseline and his current restrictions are essentially the same as they were before the accident on January 23, 2006, he has not returned to work. Equity dictates that both defendant-employers are equally liable for the payment of plaintiff's ongoing temporary total disability benefits. However, Greensboro Pipe and Selective Insurance Company would be prejudiced by paying half of plaintiff's compensation at the higher rate that is attributable to plaintiff's employment with Mabe Trucking. Accordingly, Greensboro Pipe and Selective Insurance Company shall pay compensation to plaintiff at a weekly rate of $173.64 (half of $347.29), and Mabe Trucking and Phoenix Fund, Inc., In Rehabilitation shall pay the remaining weekly rate of $216.11, so that plaintiff receives the full compensation rate of $389.75.

> 9. Defendants are jointly and severally responsible for all medical treatment incurred by the plaintiff since January 23, 2006 or to be incurred by plaintiff in the future as a result of his compensable back injuries. *Royce v. Rushco Food Stores*, 139 N.C. App. 322, 533 S.E.2d 284 (2000).

The Full Commission ordered Mabe Trucking and Greensboro Pipe to pay disability benefits consistent with the conclusions of law above. Greensboro Pipe now appeals the opinion and award.

As a preliminary matter, we note that our "review is limited to a consideration of whether there was any competent evidence to support the Full Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law." *Ard v. Owens-Illinois*, 182 N.C. App. 493, 496, 642 S.E.2d 257, 259 (2007) (quotations, citations, and emphasis omitted). Here, Greensboro Pipe did not challenge any of the findings of fact, making them binding on appeal. Thus, our examination is limited to whether these findings of fact support the conclusions of law.

We also note that our Supreme Court has dictated that the Full Commission award "proper and equitable compensation" and "has no discretion to make an improper or inequitable award. What constitutes a 'proper and equitable award' calls for the exercise of judgment and balancing." *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986).

> The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. The test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. The intended operation of the test may be seen in light of the purpose of the reviewing court. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made, be the product of reason.

Id. (quotations and citations omitted).

Greensboro Pipe's sole argument on appeal is that the findings of fact do not support the conclusions of law because the Full Commis-

sion applied the wrong legal standard. Greensboro Pipe frames the issue as follows:

> The legal issue before this Court is whether the "last injurious exposure" rule, the rule of apportionment[,] or some variation of these rules should apply when determining the liability of multiple employers and/or insurers for total disability and medical benefits when an employee sustains a compensable injury which aggravates a pre-existing work-related [injury] sustained with a prior employer or insurer.

Greensboro Pipe argues that the Full Commission should have applied the "last injurious exposure" rule, which it describes as

> provid[ing] that the insurer on the risk at the time of the last injury is fully liable for any disability following the last date of injury, and is applied even if the last injury would have been significantly less severe but for the presence of the pre-existing injury.

(Citing generally to *Geathers v. 3V, Inc.*, 371 S.C. 570, 578, 641 S.E.2d 29, 33 (2007).) Under the rule as defined by Greensboro Pipe, Mabe Trucking and its insurer would be solely responsible for any disability benefits following the 23 January 2006 accident.

Although Greensboro Pipe correctly asserts that this is an issue of first impression, our Workers' Compensation case law and statutes are not entirely bereft in the area of apportionment. The General Assembly adopted the "last injurious exposure" rule with respect to occupational disease, apportioning the entire liability for the employee's disability benefits to the employee's last employer. *See* N.C. Gen. Stat. § 97-57 (2007) ("In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable."). However, the General Assembly did not adopt such a rule with respect to compensable injuries resulting from accidents. Instead, it adopted § 97-33, which calls for proration of a second disability award if an employee had already sustained permanent disability or injury at a previous job, preventing double recoveries. N.C. Gen. Stat. § 97-33 (2007) ("If any employee . . . has a permanent disability or has sustained a permanent injury . . . in another employment other than that in which he received a subsequent permanent injury by accident . . . he shall be entitled to compensation only for the

degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed."). Although there is no equivalent rule with respect to temporary disability resulting from injury, § 97-33 is still instructive.

We also summarized the use of apportionment in Workers' Compensation cases as follows:

> North Carolina's Worker's [*sic*] Compensation Act contains two provisions for apportionment of disability awards: (1) N.C.G.S. § 97-33 (1991) (providing for prorating of a permanent disability award where employee sustained prior disability due to epilepsy, military service, or injuries in another employment); and (2) N.C.G.S. § 97-35 (1991) (providing for apportionment of permanent injury award when employee has previously incurred partial disability through loss of one of specific body parts). Apportionment also has been allowed by our Courts when a non-work-related disease or infirmity actually causes part of an employee's total disability. *Gray v. Carolina Freight Carriers, Inc.*, 105 N.C. App. 480, 487, 414 S.E.2d 102, 106 (1992) (citations omitted). However, apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. *Id.* at 485, 414 S.E.2d at 107. An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 52 (1985).

Errante v. Cumberland County Solid Waste Management, 106 N.C. App. 114, 119, 415 S.E.2d 583, 586 (1992).

It appears clear that the Full Commission did not abuse its discretion by apportioning those disability benefits that Dr. Beane could determine stemmed from one injury or the other, and by assigning joint and several liability for those disability benefits that Dr. Beane could not determine stemmed from one injury or the other. If the General Assembly had intended to adopt a "last injurious exposure" rule for accidental injuries as well as occupational disease, it would have done so explicitly. Although N.C. Gen. Stat. § 97-33 does not apply here because the disability benefits at issue relate to temporary total disability compensation rather than permanent disability com-

pensation, the General Assembly clearly chose not to apply the "last injurious exposure" rule when an employee suffers an accident at a subsequent employer after suffering a permanent injury at a prior employer. Finally, we have held that when the Industrial Commission cannot determine what percentage of a plaintiff's permanent disability is attributable to his compensable injuries, as opposed to non-work-related conditions, that plaintiff is entitled to full compensation without apportionment. *Id.* at 120, 415 S.E.2d at 586-87.

It is not apparent to us why the Full Commission should apply a different apportionment standard to cases of temporary disability than it does to cases of permanent disability. Here, as in *Errante*, the Full Commission could not determine what percentage of plaintiff's disability stemmed from his compensable 2006 injury and what percentage stemmed from a previous condition. We recognize that there is a difference between the *Errante* plaintiff's previous condition, which was unrelated to any employment, and this plaintiff's previous condition, which was related to his prior employment with Greensboro Pipe. Nevertheless, the reasoning is the same. In *Errante*, had the Full Commission been able to determine what percentage of the plaintiff's disability stemmed from his compensable injury, the employer would only have been responsible for that percentage of the disability benefits. However, the Full Commission could not make that determination, so the employer became responsible for the full amount because there was no other party to take responsibility; an employee cannot be jointly and severally responsible for his own compensable injury. Here, had the Full Commission been able to determine what percentage of plaintiff's disability stemmed from his 2003 compensable injury and what percentage stemmed from his 2006 compensable injury, then the Full Commission would have apportioned responsibility for the disability benefits accordingly. Because the Full Commission could not so determine, both employers became responsible for the full amount, resulting in joint and several liability.

The Full Commission's opinion and award is supported by reason and shows the exercise of good judgment and consideration of equitable principles. Accordingly, we affirm the order and award of the Full Commission.

Affirmed.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. CHUBASCO REAVES

No. COA08-1128

(Filed 5 May 2009)

1. Appeal and Error— preservation of issues—motion in limine—failure to object when evidence offered at trial

Although defendant contends the trial court erred in a first-degree sexual offense with a child case by admitting N.C.G.S. § 8C-1, Rule 404(b) evidence detailing defendant's sexual encounters with his minor stepdaughter, this assignment of error is dismissed because defendant waived his objections to the trial court's ruling on the motion in limine by failing to object when the evidence was offered at trial.

2. Evidence— exclusion—threats and motivation for incriminating statements—failure to show prejudicial error

The trial court did not violate defendant's right to present a defense in a prosecution for first-degree sexual offense with a child in violation of N.C.G.S. § 14-27.4(a)(1) by excluding evidence of alleged threats from the minor victim's father and the motivation for his incriminating statements because: (1) assuming arguendo that the trial court erred by excluding this testimony, defendant suffered no prejudice since the evidence was eventually admitted; and (2) the State cross-examined defendant extensively about the alleged threats.

3. Evidence— recross-examination—scope

The trial court did not abuse its discretion in a first-degree sexual offense with a child case by failing to restrict the scope of recross-examination of defendant's wife because: (1) although defendant complains about the State's use of the medical report of his stepdaughter's genital examination which had not been admitted into evidence, this objection was not preserved for review since defendant did not object when the prosecutor referred to this evidence as required by N.C. R. App. P. 10(b)(1); (2) even assuming the trial court erred by allowing the prosecutor to question defendant's wife about his stepdaughter's statements to a social worker, defendant has not shown that prejudice resulted based on prior extensive testimony from two detectives and defendant on the issue of whether defendant had sexual intercourse with his stepdaughter; and (3) the trial court suffi-

ciently controlled the manner and scope of cross-examination, and it cannot be concluded that any argumentative questions improperly influenced the verdict.

4. Sexual Offenses— first-degree sexual offense with child— motion to dismiss—sufficiency of evidence—touching

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree sexual offense with a child in violation of N.C.G.S. § 14-27.4(a)(1), even though defendant contends the evidence of a "touching" was insufficient, because although the ten-year-old victim testified that her eyes were closed and it was dark when defendant allegedly entered the room, other circumstances to which the victim testified, as well as defendant's inculpatory statements, amounted to substantial evidence that defendant's penis touched the victim's mouth.

Appeal by Defendant from judgment entered 28 February 2008 by Judge Knox Jenkins in Superior Court, Columbus County. Heard in the Court of Appeals 9 March 2009.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III & Kirby H. Smith, III, for defendant.

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

WYNN, Judge.

Defendant Chubasco Reaves appeals from a conviction of first-degree sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.4(a)(1) (2007). Defendant contends the trial court erred by denying his motion to dismiss and making certain evidentiary rulings. After careful review, we hold that Defendant received a trial free of prejudicial error.

The facts giving rise to Defendant's conviction tended to show that Defendant engaged in sexual acts with a ten-year-old female, who along with her two younger siblings, was spending the night with Defendant's stepdaughter at Defendant's house. The children slept in a room across the hall from a room occupied by Defendant and his wife, the mother of Defendant's stepdaughter. While the children slept, Defendant allegedly went into the room, kissed the ten-year-old female on the mouth, and attempted to engage in fellatio with her. The ten-year-old female testified at trial that after Defendant tapped

the other children to see if they were asleep, she felt his tongue on her lips; heard him pull down his shorts; felt something wet, which she described as his "private" on her mouth; felt his skin and finger around her mouth; gritted her teeth together so that his "private" would not go into her mouth; and heard Defendant's wife call for him which caused him to leave the room. She stated the Defendant returned a short time later and attempted to engage in fellatio with her again but she prevented his second attempt by turning her head, and he again left the room. She said Defendant returned a third time and turned the light on when she began crying and told him that she wanted to go home. Thereafter, Defendant drove the ten-year-old female home.

At her house, the ten-year-old female ran to her mother's bathroom to brush her teeth while continuing to cry. Eventually, she told her mother of the incidents which ultimately led to a police investigation after the mother reported the matter.

Defendant gave various statements during the police investigation. On 26 September 2006, Defendant went to the Sheriff's Office and gave a statement to Detective Trina Godwin denying any wrongdoing. However, following subsequent allegations by Defendant's stepdaughter that Defendant had engaged in sexual intercourse with her on at least three occasions, on 24 October 2006, Defendant's wife drove him to the police station where he made a statement to Detective Mack Brazelle "that he had had sex with his daughter, stepdaughter, three times and had put his penis in the other little girl's mouth." Sometime later, Detective Godwin arrived and Defendant gave a detailed account of three sexual encounters with his stepdaughter.

Based upon his statements, Defendant was charged with multiple counts of first-degree rape of his stepdaughter and first-degree sexual offense of the ten-year-old female. However, the State dropped the charges of first-degree rape against the stepdaughter after she recanted her allegations and a genital exam neither supported nor refuted her allegations.

In a letter dated 18 January 2007, Defendant wrote to Detective Godwin, claiming for the first time that his confessions were false and motivated by a desire to keep himself and his family safe from threats received from the ten-year-old female's father. The letter explained that, because of the threats, Defendant sought a gun permit, but having failed, he resorted to a false confession to keep his

family safe and to prevent the Department of Social Services from taking his stepdaughter from his wife.

At trial, Defendant made a motion in limine to exclude any Rule 404(b) evidence relating to the alleged sexual encounters between Defendant and his stepdaughter. Also, the State made a motion in limine to exclude any evidence that Defendant was charged with sexual offenses relating to his stepdaughter and that those charges were dismissed. The trial court granted the State's motion and denied Defendant's. The trial court also denied Defendant's motion to suppress his statements to Detectives Brazelle and Godwin.

Following the presentation of evidence at trial, a jury returned a verdict of guilty against Defendant on the charge of first-degree sexual offense against the ten-year-old female. The trial court entered judgment consistent with the jury's verdict and sentenced Defendant to a term of 240 to 297 months imprisonment. Defendant appeals arguing that the trial court erred by: (I) allowing the Rule 404(b) evidence, but excluding evidence that the related charges were dismissed; (II) sustaining objections to Defendant's testimony about the alleged threats; (III) allowing the State's re-cross examination of his wife to become argumentative and to exceed its proper scope; and (IV) denying his motion to dismiss.

I.

[1] First, Defendant argues the trial court erred in admitting the Rule 404(b) evidence because the court used an incorrect procedure and the evidence was not relevant or offered for a permissible purpose. However, the State contends that Defendant failed to preserve the pertinent assignments of error for this Court's review because he failed to object when the evidence was offered at trial.

Our Supreme Court has stated:

> [A] motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial. Rulings on motions in limine are preliminary in nature and subject to change at trial, depending on the evidence offered, and thus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.

State v. Hayes, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (citations and quotation marks omitted). Thus, a defendant

must "object when the evidence that was the subject of the motion in limine [is] offered at trial . . . ." *Id.* Likewise, a party objecting to the grant of a motion in limine must attempt to offer the evidence at trial to properly preserve the objection for appellate review. *See State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997); *see also State v. Hernendez*, 184 N.C. App. 344, 347, 646 S.E.2d 579, 582 n.3 (2007) (noting that the defendant properly preserved his objection to the trial court's grant of the State's motion in limine where he "requested voir dire examination of the challenged witnesses and made offers of proof of the testimony he sought to have admitted into evidence.").

In this case, the first witness to testify about the Rule 404(b) evidence was Detective Brazelle; Defendant did not object to Detective Brazelle's testimony. Later, during Detective Godwin's direct examination, Defendant objected when the prosecutor asked what Defendant told Detective Godwin "about what he had done to [his stepdaughter]." The trial court denied Defendant's objection, and thereafter Detective Godwin read Defendant's entire statement, detailing sexual encounters with his stepdaughter, without objection. During his case-in-chief, Defendant made no offer of proof or other attempt to introduce evidence that charges relating to the Rule 404(b) evidence were dismissed. Under *Hayes* and *Hill*, we are compelled to hold that Defendant waived his objections to the trial court's rulings on the motions in limine.[1] Accordingly, we dismiss this assignment of error.

II.

[2] Next, Defendant argues the trial court violated his right to present a defense by excluding evidence of alleged threats and the motivation for his incriminating statements. We disagree.

During Defendant's direct examination, he attempted to testify that he had received threats from the ten-year-old female's father, and that those threats motivated him to give false confessions. The trial court sustained the State's objections during this series of questions and denied defense counsel's request to be heard. No basis was offered by the State for its objections or by the trial court for its rulings. However, assuming *arguendo* that the trial court erred by

1. We note that Defendant's seventh assignment of error alleges plain error, but Defendant makes no corresponding argument in his brief. Accordingly, we have not reviewed this issue for plain error. *See* N.C. R. App. P. 10(c)(4) & 28(a) (2009) (assignment of error not presented and discussed in brief is deemed abandoned); *State v. Cummings*, 352 N.C. 600, 636-37, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

excluding this testimony, Defendant suffered no prejudice because the evidence was eventually admitted.

Just moments after the trial court sustained the State's objections, Defendant testified as follows:

> Q: You say you were afraid for your life. Why were you afraid for your life?
>
> A: I had been receiving threats.
>
> . . .
>
> Q: Now between that time—between September 26th of '06 and October the 24th of '06, the second time you talked with the officers, would you describe your mental state during that period of time?
>
> A: I didn't know—I didn't know what was going on. I didn't—couldn't understand why she would say something like that about me.
>
> . . .
>
> Q: When you say you were going to turn yourself in, what do you mean?
>
> A: Well because of—because of the threats.

Furthermore, the State cross-examined Defendant extensively about the alleged threats. Accordingly, assuming the trial court erred by initially excluding Defendant's testimony about the threats and his state of mind before making the incriminating statements, he cannot show that such error was prejudicial. N.C. Gen. Stat. § 15A-1443(a) (2007). This assignment of error is without merit.

III.

[3] In his next assignment of error, Defendant argues the trial court committed prejudicial error by failing to restrict the scope of his wife's re-cross examination. We disagree.

Under the Rules of Evidence, trial courts should "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C. Gen. Stat. § 8C-1, Rule 611(a) (2007).

However, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." *Id.* § 8C-1, Rule 611(b). "On appeal, the trial court's decision to limit cross-examination is reviewed for abuse of discretion, and rulings in controlling cross examination will not be disturbed unless it is shown that the verdict was improperly influenced." *State v. Jacobs*, 172 N.C. App. 220, 228, 616 S.E.2d 306, 312 (2005) (citations omitted).

First, Defendant complains of the State's use of the medical report of his stepdaughter's genital examination, which had not been admitted into evidence, during re-cross examination of Defendant's wife. However, Defendant did not object as the prosecutor referred to this evidence; accordingly, this objection has not been preserved for our review. N.C. R. App. P. 10(b)(1) (2008).

Second, Defendant contends that the State's use of his stepdaughter's statements to social worker Lauretta Freeman was improper because there was no foundation and the statements were hearsay. Ms. Freeman did not testify at trial, and Defendant notes that the DSS report containing his stepdaughter's statements was not admitted into evidence. The trial court denied Defendant's timely objection. However, the prosecutor's questions involved whether his stepdaughter told Ms. Freeman that Defendant had had sexual intercourse with her—an issue on which there had already been extensive testimony from Detective Brazelle, Detective Godwin, and Defendant. Therefore, even assuming that the trial court erred by allowing the prosecutor to question Defendant's wife about Defendant's stepdaughter's statements to Ms. Freeman, Defendant has not shown that prejudice resulted. N.C. Gen. Stat. § 15A-1443(a) (2007).

Finally, Defendant's argument that his wife's re-cross examination became argumentative does not amount to error. Indeed, the trial court sustained Defendant's objections to argumentative questions. In short, the trial court sufficiently controlled the manner and scope of cross-examination, and we cannot conclude that any argumentative questions improperly influenced the verdict. *Jacobs*, 172 N.C. App. at 228, 616 S.E.2d at 312.

IV.

[4] Defendant contends in his last argument that the trial court erroneously denied his motion to dismiss because the State's evidence of a "touching" was insufficient to prove a sexual act occurred. We disagree.

The State argues that Defendant has not preserved this issue for appellate review because his motion to dismiss was untimely. "[I]f a defendant fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." N.C. R. App. P. 10(b)(3) (2008). Here, Defendant's motion to dismiss at the end of the State's evidence was denied. Defendant presented evidence but did not renew his motion to dismiss until after closing arguments. The trial court denied Defendant's renewed motion to dismiss.

In arguing that Defendant's renewed motion to dismiss was untimely, the State relies on two unpublished cases, *State v. Overby*, 183 N.C. App. 158, 2007 WL 1246427 (2007) (unpublished) and *State v. Freeman*, 163 N.C. App. 612, 2004 WL 743767 (2004) (unpublished). Both cases held that the motions to dismiss, made after the jury was instructed in *Freeman* and after the defendant was sentenced in *Overby*, were untimely. *Overby*, 2007 WL 1246427 at *5; *Freeman*, 2004 WL 743767 at *2. However, the common basis for the holdings in both cases is expressed in this language from *Overby*: "Defendant's failure to renew the motion to dismiss [at the close of all the evidence], *combined with the trial court's failure to rule on the motion*, waives defendant's right to appellate review of this issue." *Overby*, 2007 WL 1246427 at *5 (emphasis added); *see also Freeman*, 2004 WL 743767 at *2. The trial court ruled on Defendant's renewed motion to dismiss in this case; thus *Overby* and *Freeman* are distinguishable. Accordingly, we reach the merits of Defendant's argument.

Under N.C. Gen. Stat. § 14-27.4,

> A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim . . . .

N.C. Gen. Stat. § 14-27.4(a)(1) (2007). Where the "sexual act" is fellatio, evidence of "any touching of the male sexual organ by the lips, tongue, or mouth of another person" will suffice. *State v. Johnson*, 105 N.C. App. 390, 393, 413 S.E.2d 562, 564, *disc. review denied*, 332 N.C. 348, 421 S.E.2d 158 (1992). To survive a motion to dismiss, the State must present substantial evidence, viewed in the light most favorable to the State, of each element of the offense. *State v. Murphy*, 100 N.C. App. 33, 36, 394 S.E.2d 300, 302 (1990).

Defendant contends that the State's evidence of a "touching" was insufficient because the ten-year-old female testified that her eyes were closed and it was dark when Defendant allegedly entered the room. However, other circumstances to which the ten-year-old female testified, and Defendant's inculpatory statements, when viewed most favorably to the State, amount to substantial evidence that Defendant's penis touched the ten-year-old female's mouth. The ten-year-old female testified that she heard a "swishing" sound made by undershorts being pulled down, and felt skin and wetness on her mouth. Moreover, in Defendant's inculpatory statements, he admitted putting his penis in the "other little girl's mouth." The jury could reasonably infer from this admission that Defendant was referring to the ten-year-old female. Accordingly, this assignment of error is overruled.

No prejudicial error.

Chief Judge MARTIN and Judge ERVIN concur.

STATE OF NORTH CAROLINA v. GEORGE DAMEL YOUNG

No. COA08-872

(Filed 5 May 2009)

1. Homicide— second-degree murder—instruction—aiding and abetting

The trial court did not err in a second-degree murder case by instructing the jury on the theory of aiding and abetting even though defendant contends there was insufficient evidence to show he intentionally aided a fellow gang member or knew that he was going to shoot the victim because: (1) there was no factual issue preventing defendant from having the requisite *mens rea* for the crime; and (2) the evidence was sufficient to support the conclusion that the shooting was committed by the gang member, defendant encouraged and aided the gang member, and defendant's actions contributed to the commission of the crime.

2. Homicide— second-degree murder—refusal to instruct on lesser-included offense of involuntary manslaughter

The trial court did not err in a second-degree murder case by refusing to instruct on the lesser-included offense of involuntary manslaughter because: (1) involuntary manslaughter is the unintentional killing of a human being without malice, and in contrast the intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice; and (2) taken in the light most favorable to defendant, the evidence indicated that either defendant intentionally fired the shot that killed the victim or defendant aided and abetted the commission of an intentional crime. Contrary to the State's assertion, defense counsel properly preserved this issue for review and no additional objection at the time of the jury charge was required since counsel objected to the trial court's ruling at the time of the charge conference.

Appeal by defendant from judgment entered 2 July 2007 by Judge Ronald L. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 23 February 2009.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey, for the State.

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

WYNN, Judge.

Under North Carolina law, to prove aiding and abetting the State must show, *inter alia*, that "the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime."[1] Here, Defendant George Damel Young argues the State failed to show he knowingly aided James Batiste in murdering Douglas Jamal Mangum. Because evidence in the record supports the conclusion that Defendant encouraged and aided James Batiste in murdering Douglas Mangum, we uphold his conviction.

At trial, the evidence (pertinent to supporting the jury's verdict finding Defendant guilty of second-degree murder on the theory of aiding and abetting) tended to show that about 9:30 p.m. on 4 June 2006, Douglas Mangum died from a single gunshot wound, inflicted

1. *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citation omitted).

while he was standing in the driveway of his Holly Springs' residence. Among the witnesses testifying for the State were Sharrod Mangum (Douglas Mangum's brother), Michael George (a relative of Douglas Mangum), and James Batiste (a member of a gang called "the Crips" to which Defendant also allegedly belonged).

Sharrod Mangum testified that shortly after his brother left the house to "get some air," he heard a shot and saw his brother running up the driveway toward the house. He saw the passenger's side window of a black vehicle being rolled up as it passed in front of the house.

Michael George testified that he heard two gunshots while standing outside of his house that evening. He observed "a black Suburban or Tahoe just stopped right in front of the house right in the road . . . it crept by, and when it got closer to Blalock [a cross street], it kind of picked up the [sic] speed and just took off." He said that the vehicle's headlights were off.

James Batiste, who at the time of the trial had been charged as an accessory-after-the-fact, testified that he and Defendant first met when Batiste was twelve or thirteen years old. They lived in the same neighborhood, were "tight," and were members of the Crips at the time of the shooting. He described Defendant as a high-ranking "original gangster" or "big man" in the Crips, and as instrumental in Batiste's decision to leave his former gang, Folk Nation, to become a low-level Crips' "foot soldier."

Batiste testified that on 4 June 2006 he called Defendant to come and get him from Ricky Spruill's house, where he had been drinking throughout the day. Defendant arrived to pick him up; got into an argument during a telephone call with Batiste's cousin, Sharise Cofield; and told Batiste that he was going to go fight Cofield on "the hill"—an area of Holly Springs associated with another gang called "the Bloods." Defendant then told Batiste to call "P" and "Slug" so he'd have some back-up in the fight. Defendant drove his black Chevrolet Tahoe to a parking lot, picked up P and Slug, and drove to "the hill." Batiste rode in the front passenger's seat during the entire trip.

Batiste stated that, when they arrived near the hill, they saw a "big tent with a lot of people" and decided to "circle back around." As they drove down West Holly Springs Road, they saw "the boy with the red shirt"—the color associated with members of the Bloods. De-

fendant stopped the car, grabbed the rifle, and aimed it outside the passenger's side window. Batiste stated, "When I seen (sic) him pick the gun up, I grabbed it because he started aiming it and I grabbed it, tried to grab it from him, we (sic) tussling. . . . and it just went off." He testified that Defendant laughed and said, "I know that shirt is really red now." Afterward, Defendant drove off and "tossed" the shell casing out of the driver's side window as they drove down a dirt road. He then dropped Batiste, P, and Slug off in Cary.

The State also presented testimony from David Williams, the owner of Five Points Auto in Fuquay-Varina, who stated that on 20 May 2006 he sold a 1996 Chevrolet Tahoe to William Talavera, and that Defendant traded in his 1992 Mercedes Benz to satisfy part of the down payment. The State also presented evidence the Tahoe was cleaned at a local car wash the day after the shooting, Defendant purchased a nine millimeter rifle from a pawn shop, and the shot that killed Douglas Mangum was fired from his rifle.

Defendant offered a different version of the events on 4 June 2006 through his testimony and that of his second cousin, Ricky Spruill. Spruill testified that Batiste had spent the night at his house and that Batiste had gotten into a fight with an individual named "Kenny" that afternoon. Spruill stated that there were holes in his wall, the bed and dresser had been turned over, and Batiste had a "face full of blood." He heard Kenny arguing and antagonizing Batiste on the phone, saying he got the best of him that day. Later, Spruill and Defendant teased and laughed at Batiste for getting "whooped like that." Batiste told Spruill, "I'm going to prove myself tonight." Spruill also testified that Batiste called him days after the shooting and confessed to having shot someone.

Defendant testified that he was planning to take Batiste to his mother's home when Batiste received a call from P and Slug asking for a ride. After picking them up, Defendant followed Batiste's directions to his mother's house, which Defendant knew was somewhere near West Holly Springs Road. Defendant stated that Batiste told him "to hold up" so he stopped, waiting for the passengers to get out. Batiste then grabbed the gun and fired a shot. Defendant stated, "I didn't know who he shot or what he shot." Defendant said he didn't know Batiste was going to shoot anyone and did not discuss with him any plan to shoot anyone. Defendant denied knowing Douglas Mangum, making any comments about Douglas Mangum's shirt, or throwing the shell casing out of the window. He stated that Batiste kept the rifle and later told him "it's in the water," and

that he did not report the incident because he feared Batiste would harm his son.

Defendant also testified that he "shared" a black Chevrolet Tahoe with William Talavera, and that he was driving the Tahoe on the evening of 4 June. On cross-examination, Defendant stated that the day after the shooting, he and Mr. Talavera drove the Tahoe to Charlotte, and that he later drove the vehicle to Brooklyn, New York and back.

Despite searches of the area, the police did not locate the rifle or the gun shell. Further, neither P nor Slug testified at the trial.

On 8 August 2006, Defendant was indicted for the first-degree murder of Douglas Mangum; however, the State chose not to prosecute the matter capitally. At his trial and following the conclusion of the evidence, the trial court granted Defendant's motion to dismiss the first-degree murder charge. Thereafter, the trial court submitted the charge of second-degree murder to the jury on the alternate legal theories that Defendant was guilty as the actual perpetrator of the crime or as an aider and abetter of the crime. The jury returned a verdict of guilty on the charge of second-degree murder on the theory of aiding and abetting.

Following the trial court's judgment, consistent with the jury's verdict, and sentence of 96 to 125 months' imprisonment, Defendant appealed to this Court. He argues that the trial court erred by (I) instructing the jury on the theory of aiding and abetting, and (II) refusing to instruct the jury on the lesser-included offense of involuntary manslaughter.

I.

[1] Defendant first argues that the trial court erred in instructing the jury on the theory of aiding and abetting the perpetrator of the crime because the State presented insufficient evidence to show that Defendant intentionally aided Batiste or knew that he was going to shoot Douglas Mangum. In charging the jury, the trial court stated that Defendant may be found guilty of second-degree murder on one of two legal theories—"[a]s a principal to the crime" or "as an aider and abetter of the crime." Thereafter, the jury found Defendant guilty of second-degree murder under the theory that he aided and abetted the principal or actual perpetrator, James Batiste.

Under North Carolina law, a jury instruction on aiding and abetting is supported by sufficient evidence if there is evidence that "(i)

the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person." *Goode*, 350 N.C. at 260, 512 S.E.2d at 422 (citation omitted). Further,

> [a] person is not guilty of a crime merely because he is present at the scene even though he may silently approve of the crime or secretly intend to assist in its commission; to be guilty he must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission. The communication or intent to aid does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators.

Id. at 260, 512 S.E.2d at 422 (internal citations omitted). Additionally, because intent is rarely provable by direct evidence, "[i]t must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993).

Defendant relies on this Court's recent decision in *State v. Bowman*, 188 N.C. App. 635 , 647, 656 S.E.2d 638, 649 (2008), arguing that "[i]t is not enough for the State to prove that a defendant committed acts which actively assisted the perpetrator in the commission of the crime." Defendant's reliance on *Bowman* is misplaced. In *Bowman*, this Court ordered a new trial based upon the trial court's denial of the defendant's request for an instruction that he had to have known the age of the victim to be convicted of aiding and abetting statutory rape. *Id.* Here, unlike the statutory rape charge in *Bowman*, there is no factual issue that prevents Defendant from having the requisite *mens rea* for the crime of second-degree murder. To establish that Defendant aided and abetted in the commission of second-degree murder, it is sufficient to present circumstantial evidence at trial that would permit a reasonable inference of Defendant's knowledge and intent to encourage and assist James Batiste in the killing of Douglas Mangum.

Indeed, the evidence presented at trial tended to show that Defendant drove Batiste to the neighborhood; stopped the vehicle in front of Douglas Mangum's residence with the headlights off; sped away from the scene after the shooting; threw the shell casing out of

the car window; and dropped Batiste and the other passengers off in Cary, telling them to "get low" or "get missing." There was also evidence that the rifle used in the shooting belonged to Defendant, Defendant frequently kept the loaded rifle in the vehicle, and the vehicle was detailed before Defendant left town the next day. Further, the trial court heard testimony that Defendant and Batiste were "tight"; they were both members of the Crips; Defendant had a superior rank of "original gangster" to Batiste's low-rank of "foot soldier"; and Defendant knew that Batiste was planning to redeem his reputation that night in a neighborhood known as Bloods' territory.

We hold that this evidence was sufficient to support a jury instruction on aiding and abetting Batiste in the killing of Douglas Mangum. The evidence presented at trial supports the conclusion that the shooting was committed by Batiste, Defendant encouraged and aided Batiste, and Defendant's actions contributed to the commission of the crime. *See*, *e.g.*, *State v. Baskin*, 190 N.C. App. 102, 110-11, 660 S.E.2d 566, 572 (2008) (evidence that defendant drove the getaway car while holding the victim's property was sufficient for a jury instruction on aiding and abetting felony breaking and entering a motor vehicle); *State v. Little*, 278 N.C. 484, 488, 180 S.E.2d 17, 20 (1971) (evidence that defendant borrowed a shotgun used in the shooting, drove the principals to the site of the shooting, opened the trunk containing shotguns, and drove away afterward was sufficient for a jury instruction on aiding and abetting manslaughter). Accordingly, we uphold the trial court's jury instruction on a theory of aiding and abetting second-degree murder.

II.

[2] Defendant also argues that the trial court erred in refusing to instruct the jury on the lesser-included offense of involuntary manslaughter. However, the State contends that Defendant failed to properly preserve this objection for appeal because defense counsel did not object to the exclusion of involuntary manslaughter from the jury instruction at the time of the charge pursuant to Rules 10(b)(2) and 10(c)(2) of the N.C. Rules of Appellate Procedure. We disagree.

In *Wall v. Stout*, 310 N.C. 184, 188, 311 S.E.2d 571, 574 (1984), our Supreme Court held that Rule 10(b)(2) does not require a party "to repeat their objections to the jury instructions after the charge was given in order to preserve their objections for appellate review[,]" where the party's objection was stated at the charge conference. Here, defense counsel presented his request for a jury instruction on

the charge of involuntary manslaughter at the charge conference; the trial court denied the request, and noted the objection. By objecting to the trial court's ruling at the time of the charge conference, defense counsel properly preserved the issue for review by this Court. Contrary to the State's contention, no additional objection at the time of the jury charge was required. *See id.* at 188, 311 S.E.2d at 574. Accordingly, the issue of whether the jury should have been instructed on involuntary manslaughter is properly before us.

Defendant argues that the trial court erred by failing to instruct the jury on the lesser-included offense of involuntary manslaughter because there was evidence presented at trial to permit a reasonable jury to find that his actions "constituted culpable negligence." A defendant is entitled to instruction on a lesser-included offense "only when there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954). "Conversely, where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *State v. James*, 342 N.C. 589, 594, 466 S.E.2d 710, 714 (1996) (internal quotation marks and citations omitted).

"Involuntary manslaughter is the unintentional killing of a human being *without* malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976) (emphasis added) (citation omitted), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). Additionally, "[t]he intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice." *State v. Judge*, 308 N.C. 658, 661, 303 S.E.2d 817, 820 (1983). Here, the evidence presented at trial, taken in the light most favorable to the Defendant, indicates that either Defendant intentionally fired the shot that killed the victim or Defendant aided and abetted the commission of an intentional crime. Having found positive evidence on the element of malice and no evidence that the victim's death resulted from unintentional conduct, we find no error and uphold the ruling of the trial court.

No error.

Chief Judge MARTIN and Judge ERVIN concur.

PETER T. AND LINDA BOOR, HUSBAND AND WIFE, PLAINTIFFS v. SPECTRUM HOMES, INC., A NORTH CAROLINA CORPORATION, DEFENDANT

No. COA08-888

(Filed 5 May 2009)

Statutes of Limitation and Repose— construction of house— drainage problems—six-year statute of repose

The trial court correctly granted summary judgment for defendant on claims arising from the construction of a house where plaintiffs filed their claims for breach of implied warranty of habitability, breach of express warranty, negligence per se, and unfair and deceptive trade practices seven years after the date of substantial completion, outside the six-year statute of repose. Plaintiffs did not allege any act by defendant after that date, nor any fraud or willful or wanton negligence. N.C.G.S. § 1-50(a)(5)(a).

Appeal by plaintiffs-homeowners from judgment entered 28 April 2008 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 9 March 2009.

Law Office of Matthew I. Van Horn, PLLC, Matthew I. Van Horn, for plaintiffs-appellants.

Lewis & Roberts, PLLC, by Daniel K. Bryson and Scott C. Harris, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiffs-appellants Peter T. and Linda Boor ("plaintiffs") appeal from an order granting summary judgment in favor of defendant-appellee Spectrum Homes ("defendant").

The documents in the record before the court established the following undisputed facts: On 7 June 1999, Evergreen Construction, Inc., an affiliate of defendant, received a building permit to construct a home at 1809 Kenwyck Manor Way in Raleigh, North Carolina. On 18 May 2000, the City of Raleigh Inspections Department issued a certificate of occupancy for the home, stating that the work performed under the permit had been found to be in substantial compliance with the applicable building codes. On 4 April 2001, defendant and G. Stephen Martin and Rebecca Martin ("the Martins") entered into a contract for the sale of the home. The sale was fi-

nalized on 12 June 2001 and the Martins received a general warranty deed that day.

At the closing, defendant provided the Martins with an express warranty, entitled "Limited Warranty," to cover the construction of the home. The warranty provided in part:

> To Whom Given: This Warranty is extended to you as the purchaser of the home identified on the cover page of this Warranty and automatically to any subsequent owners.
>
> . . . .
>
> Coverage During First through Sixth Years: Your Builder warrants that during the second through sixth year of the commencement date: The home will be free from Major Structural Defects. A "Major Structural Defect" is actual physical damages to the following designated load-bearing portions of the home caused by failure of such load-bearing portions which affects their load-bearing functions to the extent that the home becomes unsafe, unsanitary or otherwise unlivable:
>
> 1. Foundation systems and footings;
> 2. Beams;
> 3. Girders;
> 4. Lintels;
> 5. Columns;
> 6. Walls and partitions;
> 7. Floor systems; and
> 8. Roof framing systems.
>
> Remedy: If a defect occurs in an item which is covered by this Warranty, you [sic] Builder will repair, replace, or pay you the reasonable cost of repairing or replacing the defective item. Your Builder's total liability under this Warranty is limited to the purchase price of the home stated on the cover sheet of this Warranty. The choice among repair, replacement, or payment is your Builder's. Steps taken to correct defects shall not act to extend the time of this Warranty.

A later section of the warranty provided that:

> Repair of a Major Structural Defect is limited (1) to repair of the damage to the load-bearing elements of the home themselves which is necessary to restore their load-bearing ability; and (2) to the repair of those items of the home damaged but [sic] the Major Structural Defect which make the home unsafe, unsanitary or otherwise unlivable.
>
> Damage to the following non-load bearing elements do [sic] not constitute a major structural defect (See Note 1).
>
> a. Roof shingles and sheathing;
>
> b. Dry wall and plaster;
>
> c. Exterior siding;
>
> d. Brick, stone or stucco veneer;
>
> e. Subfloor and flooring materials;
>
> f. Wall tile or other wall covering;
>
> g. Non-load bearing partitions;
>
> h. Concrete floors in attached garages and basements that are built separate from foundation walls or other structural elements of the home.
>
> i. Electrical, heating, cooling, ventilation, mechanical, and plumbing systems, appliances, equipment, fixtures, paint, doors, windows, trim, cabinet, hardware, and insulation.

On 20 October 2006, plaintiffs purchased the home from the Martins. On 8 December 2006, plaintiffs made a written request to defendant for Warranty Service under the "Limited Warranty" in regards to rotting apparently caused by water infiltration. Defendant responded to plaintiffs' request for Warranty Service by asserting that, upon inspection, the damage seemed to be caused by a non-structural component of the house and was therefore not covered by the "Limited Warranty." On 4 April 2007, plaintiffs made an additional written request for Warranty Service and offer for settlement. Having received no response, on 11 June 2007, plaintiffs filed a complaint against defendant alleging breach of implied warranty, breach of express warranty, negligence per se, and violations of the North Carolina Unfair and Deceptive Trade Practices Act, and sought $26,500.00 in damages. In their complaint, plaintiffs alleged that "severe water damage to the front areas of the home has been caused

by [defendant's] improper installation of exterior stone masonry components onto the wood frame and sheathed walls of the house." Plaintiffs further alleged that, because "[t]he stone masonry assemblies were installed [by defendant] with no direct path or other means by which water or moisture could drain, . . . it gathered against the wall cavities and at the lower portions of the wall and the structural framing of the home, causing the wood structural portions of the wall to rot." Subsequently, defendant filed an answer and motion to dismiss plaintiffs' claims, followed by a motion for summary judgment. Plaintiffs filed a memorandum in opposition to defendant's motion for summary judgment which provided in part:

> [A] survey of the damages completed by a consultant hired by plaintiff [sic] and numerous photographs taken by plaintiffs, and others, show convincingly that the damage to the plaintiff[s'] home involves structural damages. *See Vista Services Examination and Consultation Report* and Photographs submitted herewith. Moreover, issues such as the specific condition of the home are ripe for a trial, not for a summary judgment proceeding.

On 28 April 2008, the trial court, finding that there was "no genuine issue as to any material fact," entered an order granting summary judgment upon defendant's motion. Plaintiffs appeal from the order granting summary judgment.

Plaintiffs argue that there was a material question of fact as to their claims for breach of implied warranty of habitability, breach of express warranty, negligence per se, and violations of the North Carolina Unfair and Deceptive Trade Practices Act. As part of this argument, plaintiffs contend their claims were not barred by the six-year statute of repose under N.C.G.S. § 1-50(a)(5) or the statute of limitations applicable to each claim. For the reasons hereinafter stated, we affirm.

The standard of review on appeal from the granting of a motion for summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007); *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603, *disc. review denied*, 354 N.C. 371, 555 S.E.2d 280 (2001). While "[e]vidence presented by the parties is viewed in the light most favorable to the non-movant," *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829,

835 (2000)), the moving party has the burden of establishing the lack of any triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000) (citing *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998)), *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001).

Our Supreme Court has articulated the difference between a statute of limitations and a statute of repose:

> . . . the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. . . . Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.

Black v. Littlejohn, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985) (internal citations omitted). As such, "[a] statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained." *Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (citing *Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982)), *reh'g denied*, 338 N.C. 672, 453 S.E.2d 177 (1994). "[A] plaintiff is required to plead and prove that the statute of repose is not a bar to the maintenance of the action." *Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 862 (citing the holding in *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 117, 446 S.E.2d 603, 605 (1994), *aff'd per curiam*, 340 N.C. 257, 456 S.E.2d 308 (1995)), *disc. review denied*, 360 N.C. 545, 635

S.E.2d 62 (2006). "If the action is not brought within the specified period, the plaintiff 'literally has no cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.' " *Tipton*, 116 N.C. App. at 117-18, 446 S.E.2d at 605 (quoting *Boudreau v. Baughman*, 322 N.C. 331, 340-41, 368 S.E.2d 849, 857 (1988)).

The statute of repose applicable to a claim arising out of an improvement to real property is set forth in N.C.G.S. § 1-50(a)(5)(a), which provides:

> No 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) (2007). N.C.G.S. § 1-50(a)(5)(a) thus "provides an outside limit of six years for bringing an action coming within its terms." *Whittaker*, 176 N.C. App. at 187, 625 S.E.2d at 861 (citing *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 427-28, 302 S.E.2d 868, 873 (1983)). N.C.G.S. § 1-50(a)(5)(b) provides:

> For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> 1. Actions to recover damages for breach of a contract to construct or repair an improvement to real property;
>
> 2. Actions to recover damages for negligent construction or repair of an improvement to real property;
>
> . . . .
>
> 4. Actions to recover damages for economic or monetary loss;
>
> 5. Actions in contract or in tort or otherwise;

N.C. Gen. Stat. § 1-50(a)(5)(b) (2007). N.C.G.S. § 1-50(5) is designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property. *Lamb*, 308 N.C. at 427-28, 302 S.E.2d at 873. However, the six-year limitation prescribed by N.C.G.S. § 1-50(a)(5)(a) "shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence in . . . construction of an improvement to real property." N.C. Gen. Stat. § 1-50(a)(5)(e) (2007).

Under the statute, a plaintiff has the burden of showing that he or she brought the action within six years of either (1) the substantial completion of the house or (2) the specific last act or omission of defendant giving rise to the cause of action. *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 76, 518 S.E.2d 789, 791 (1999) (citing *Sink v. Andrews*, 81 N.C. App. 594, 597, 344 S.E.2d 831, 833 (1986)), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000). The *Nolan* court added:

> N.C.G.S. § 1-50(a)(5)(c) defines "substantial completion" as being "that degree of completion of a project, improvement or specified area or portion thereof upon attainment of which the owner can use the same for the purpose for which it was intended." An owner of a residential dwelling may use it as a residence when the appropriate government agency issues a final certificate of compliance. N.C.G.S. § 153A-363 (Supp. 1998); N.C.G.S. § 160A-423 (1994). The owner may then utilize the residence for the purpose which it was intended and the home is substantially completed under N.C.G.S. § 1-50(a)(5).

Id. This Court has also noted that, "since all liability has its genesis in the contractual relationship of the parties, an owner's claim arising out of defective construction accrues on completion of performance 'no matter how a claim is characterized in the complaint—negligence, malpractice, breach of contract.' " *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 241, 515 S.E.2d 445, 450 (1999) (quoting *City Sch. Dist. v. Stubbins & Assocs.*, 650 N.E.2d 399, 400-01).

Here, the City of Raleigh Inspections Department issued a certificate of occupancy for the home on 18 May 2000, stating that "work performed under this permit has been found to be in substantial compliance with applicable building codes." Under this certificate of compliance, an owner could utilize the property as a residence on that date. *See Nolan*, 135 N.C. App. at 76, 518 S.E.2d at 791; N.C.G.S. § 153A-363 (2007); N.C.G.S. § 160A-423 (2007). Plaintiffs have alleged no act by defendant after 18 May 2000, nor any fraud or willful or wanton negligence in defendant's construction of the home pursuant to N.C.G.S. § 1-50(a)(5)(e). As such, the date of "substantial completion" for purposes of N.C.G.S. § 1-50(a)(5)(c) was 18 May 2000. Because plaintiffs filed their claims for breach of implied warranty of habitability, breach of express warranty, negligence per se, and unfair and deceptive trade practices on 11 June 2007, they cannot prove that the six-year statute of repose is not a bar to the maintenance of this

action. N.C. Gen. Stat. § 1-50(a)(5)(a), (b); *see also Whittaker*, 176 N.C. App. at 187, 625 S.E.2d at 862. Accordingly, plaintiffs failed to raise any genuine issue of material fact, and the trial court correctly granted summary judgment on these claims.

Affirmed.

Judges WYNN and ERVIN concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. MICHAEL LEON WILKERSON, DEFENDANT

No. COA08-819

(Filed 5 May 2009)

Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—identity as perpetrator

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder even though defendant contends there was insufficient evidence of his identity as the perpetrator of his ex-wife's murder because: (1) there was ballistic and physical evidence linking defendant to the murder weapon, and evidence of defendant's motive and evidence that defendant left work early on the day of the incident with sufficient time to drive from his workplace to the victim's residence to arrive by the time of the shooting; (2) the State presented evidence that defendant had believed the victim's younger child was his but later learned by DNA testing that the child was not his, and the victim was shot in the uterus; and (3) although much of the evidence was circumstantial, viewed in the light most favorable to the State and giving the State the benefit of reasonable inferences led to the conclusion that there was sufficient evidence to survive a motion to dismiss.

Appeal by defendant from judgment entered on or about 22 October 2007 by Judge James E. Hardin, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 14 January 2009.

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

Amos Granger Tyndall, P.A., by Amos Granger Tyndall, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgment entered pursuant to a jury verdict finding him guilty of first degree murder. The dispositive question before this Court is whether evidence that the murder weapon was owned by defendant and was found in his possession three days after the murder, along with evidence pointing to defendant's motive and opportunity, is sufficient to sustain a conviction for first degree murder as to the identity of the perpetrator.[1] Because we conclude that it is, we find no error.

I. Background

On 25 March 2006, Ms. Torrie Carpenter ("Ms. Carpenter" or "the victim") lived with her two children, Sam and Anna,[2] at the Redwood Apartments in Selma, Johnston County. Defendant is Ms. Carpenter's ex-husband. He believed that he was the father of one-year old Sam, until DNA testing determined otherwise.

At the time, defendant worked as a security guard at Saint Augustine's College in Raleigh, about 45 minutes drive from the victim's residence. Defendant normally left work at 5:00 a.m., but on 25 March 2006 he signed out and turned in his keys at 4:00 a.m.

At approximately 5:30 a.m. on 25 March 2006, Ms. Carpenter's neighbors were awakened by loud banging and gunshots. One of the neighbors called 911 to report the shooting.

Officer Miguel Duran answered the 911 call "within minutes." There was no sign of forced entry to the victim's residence. Officer Duran found the body of Ms. Carpenter lying in a pool of blood in the doorway of her apartment. Ms. Carpenter had been shot at least seven times at close range: left forehead, right cheek, right kidney, spine,

1. We note that the Attorney General's brief in this case stated the question presented as whether "the evidence was insufficient to establish every element of the charge of *voluntary manslaughter*[.]" (Emphasis added.) The record very clearly shows that defendant was charged with and convicted of only first degree murder.

2. We have used pseudonyms to protect the identity of the children who are regrettably involved in this case.

uterus, bladder, and left leg. Officer Duran secured the crime scene as other law enforcement and emergency personnel arrived. SBI Agent Blane Hicks collected nine 9mm shell casings from the scene and four projectiles, including two projectiles from underneath the victim's corpse. An additional projectile was removed from the victim's spine by the medical examiner.

On 28 March 2006, defendant was interviewed by Investigator Vaughn of the Selma Police Department. At the interview, defendant consented to a police search of his car. During the search of the car Investigator Vaughn discovered defendant's 9mm Ruger handgun and receipts for the purchase of the handgun and a box of 9mm ammunition. Defendant voluntarily submitted the Ruger to Investigator Vaughn for testing by the SBI.

Defendant's Ruger, the shell casings and projectiles recovered from the scene of the murder, and the projectile removed from the victim's spine by the medical examiner were tested by Neal Morin, a firearm toolmark examiner with the SBI. Morin determined that "all the bullets and cartridge cases that were submitted to me were, in fact, fired from the Ruger pistol that was also submitted."

Defendant was arrested on 29 March 2006. The Johnston County Grand Jury indicted defendant for first degree murder on 8 May 2006. Defendant was tried before a jury at the 15 October 2007 Criminal Session of Johnston County Superior Court. On 22 October 2007, defendant was found guilty of first degree murder on the basis of malice, premeditation and deliberation and under the first degree felony murder rule. Upon the jury verdict, defendant was sentenced to life imprisonment without parole. Defendant appeals.

II. Standard of Review

The standard of review for a trial court's denial of a motion to dismiss for insufficient evidence is well-settled:

> Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.
>
> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court does not weigh the evidence,

> consider evidence unfavorable to the State, or determine any witness' credibility. Evidence is not substantial if it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong. This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*.

State v. Robledo, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008) (citations, quotation marks, brackets and ellipses omitted). "If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case goes to the jury." *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005) (citation omitted).

III. Analysis

Defendant's sole argument on appeal is that the State's evidence as to his identity as the perpetrator of his ex-wife's murder was not substantial, raising only a strong suspicion. We disagree.

Defendant relies on *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971), a case in which the North Carolina Supreme Court held that the evidence presented by the State was insufficient to sustain the defendant's conviction for second degree murder. *Id.* at 67, 184 S.E.2d at 866. In *Jones*, the defendant was tried and convicted for the murder of his wife, Peggy. *Id.* at 60, 184 S.E.2d at 862. The State presented evidence that Peggy was shot six times with .22-caliber bullets. *Id.* at 60, 184 S.E.2d at 862. Peggy's body was found in a pool of blood in the storage room of the general store she and the defendant owned and operated together. *Id.* at 64, 184 S.E.2d at 864. The defendant had purchased six .22-caliber revolvers eighteen days before the murder, and six revolvers were found in a pasteboard box in the storage room when Peggy's body was discovered. *Id.* at 64, 184 S.E.2d at 865. When the defendant was arrested less than five hours after the murder, he was highly intoxicated from alcohol and drugs, his pocket contained "five empty .22-caliber cartridges and three live rounds" and his jacket had several spots of type O blood, the blood type of both the defendant and Peggy. *Id.* at 64-65, 184 S.E.2d at 865.

The trial court denied the defendant's motion to dismiss for insufficient evidence that the deceased died as a result of the defend-

ant's actions. *Id.* at 66, 184 S.E.2d at 866. The Supreme Court reversed, holding:

> The State's evidence in this case establishes a brutal murder. It shows that defendant had the opportunity to commit it and begets suspicion in imaginative minds. All the evidence engenders the question, if defendant didn't kill his wife, who did? To raise such a question, however, will not suffice to sustain a conviction.

Id. (citation, quotation marks and brackets omitted).

The State responds that the case *sub judice* is apposite to *State v. Stone*, 323 N.C. 447, 373 S.E.2d 430 (1988). In *Stone*, the State presented evidence that: (1) the defendant was the last person to see the victim alive, *id.* at 454, 373 S.E.2d at 434; (2) the defendant made false statements during a police interview, *id.* at 454, 373 S.E.2d at 434; (3) after the police interview the defendant delivered a .22-caliber pistol with "eight lands and grooves of rifling with a right hand twist" and a box of ammunition to her father; tests showed that the victim was shot with a pistol with "eight lands and grooves of rifling with a right hand twist" and that bullets from the box of ammunition were very similar in composition to the bullets removed from the victim, *id.* at 449-50, 373 S.E.2d at 432; and (4) tire tracks matching the tires of the car the defendant was driving on the night of the murder were found near the victim's body, *id.* at 453, 373 S.E.2d at 434. The Supreme Court concluded that the State had presented sufficient evidence as to the identity of the defendant as perpetrator. *Id.* at 453-54, 373 S.E.2d at 434-35.

The case *sub judice* has less evidence that defendant was the perpetrator than *Stone*, but more than *Jones*, so neither of those cases is strictly apposite. Our own research reveals a case with very similar facts, *State v. Cannada*, 114 N.C. App. 552, 442 S.E.2d 344 (1994), *rev'd per curiam*, 340 N.C. 101, 455 S.E.2d 158 (1995), and we conclude that *Cannada* controls this case.

In *Cannada*, the State presented evidence that:

> About 5:30 p.m. on the evening of the killing, the victim and the defendant, who had been drinking, were overheard arguing loudly with each other inside the victim's house. The victim was last seen alive around 6:30 p.m. The defendant was seen around 7:30 p.m., dressed in a t-shirt and shorts and barefooted, walking

> from the house to the truck which was parked in the street in front of the victim's house. At 7:50 p.m., the victim's BMW, which had been parked in the victim's driveway, was seen barreling from the house and down the street. No one saw the defendant walking in the neighborhood on the evening of the killing nor had defendant ever been seen walking in the neighborhood.
>
> When the police arrived at the victim's residence at 8:20 p.m., they found the defendant sitting barefooted on the front porch of the house, and the BMW in the driveway. The victim was found lying on the kitchen floor and no gun was found in the house. The defendant told the police that he did not know what had happened as he had been out walking for about an hour and on his return found his gun missing and the victim dead on the floor. He also told the police that it had been a long time since he and the victim had argued. Upon questioning the defendant in one of the patrol cars, an unfired shotgun shell, which was later determined had been chambered in the gun which had killed the victim, fell from the defendant's pocket. The gun was found several days later near a road not far from the victim's residence, at a place where the defendant was seen, the day after the killing, driving by very slowly.

Cannada, 114 N.C. App. at 561, 442 S.E.2d at 349 (Greene, J., dissenting).

This Court, citing *State v. Jones*, the case relied on *sub judice* by defendant, ruled in favor of defendant:

> We note that there were no eye witnesses to the shooting; that there were no eye witnesses who saw defendant with the murder weapon; that *there was no physical evidence found at the scene of the crime or on defendant connecting him with the murder*; that defendant made no out-of-court incriminating statements; and that the entire case was circumstantial and speculative, resting solely on evidence suggesting defendant may have had a motive to kill Ms. Gilmore because she wanted to break up with him, and because defendant and Ms. Gilmore had an argument shortly before her death.

Cannada, 114 N.C. App. at 559, 442 S.E.2d at 348 (emphasis added). On appeal, however, the North Carolina Supreme Court reversed *per curiam*, citing Judge Greene's dissent. 340 N.C. at 101, 455 S.E.2d at 158.

Though not specifically mentioned in Judge Greene's dissent nor in the opinion of the Supreme Court, our review of the cases leads us to conclude that the differences between *Jones* and *Cannada* are: (1) primarily the State's evidence of a connection between the defendant and the murder weapon, 114 N.C. App. at 556, 442 S.E.2d at 346, which this Court appears to have overlooked when it opined "that there was no physical evidence found at the scene of the crime or on defendant connecting him with the murder[,]" 114 N.C. App. at 557–58, 442 S.E.2d at 347; and (2) secondarily the State's evidence of motive and opportunity. Because the case *sub judice* contains ballistic and physical evidence linking defendant to the murder weapon, evidence of defendant's motive and evidence that defendant left work early on the day of the incident with sufficient time to drive from his workplace to the victim's residence to arrive by the time of the shooting, we conclude that *Cannada* controls.

In *Jones*, empty cartridges of the same caliber as the bullets that killed the victim were found on the defendant's person, but the State did not present evidence to connect the empty cartridges found on the defendant's person with the bullets that killed the victim. 280 N.C. at 65, 184 S.E.2d at 865. In *Cannada*, to the contrary, scientific evidence linked a shotgun shell recovered from the defendant's person to the murder weapon and witness testimony placed defendant, the day after the murder, near where the murder weapon was hidden. 114 N.C. App. at 556, 442 S.E.2d at 346. Furthermore, in *Cannada* the State presented evidence that the defendant argued with the victim around two hours before the murder; 114 N.C. App. at 558, 442 S.E.2d at 347-48; in this case the State presented evidence that defendant had believed the victim's child Sam was his but later learned by DNA testing that the child was not his and that the victim was shot in the uterus. Finally, the State presented evidence that defendant left work early with sufficient time to reach the home of the victim.

Although much of the evidence is circumstantial, when we consider all of the evidence, viewed in the light most favorable to the State, and giving the State the benefit of reasonable inferences, we conclude that the State presented sufficient evidence to survive defendant's motion to dismiss.

NO ERROR.

Judges CALABRIA and ELMORE concur.

TRAVIS T. BUMPERS AND TROY ELLIOTT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. COMMUNITY BANK OF NORTHERN VIRGINIA, DEFENDANT

No. COA08-1135

(Filed 5 May 2009)

Appeal and Error— appealability—interlocutory order—improper Rule 54(b) certification—attorney fees and costs remaining

Defendant's appeal from a trial court's order in a class action against defendant bank in a lawsuit, asserting violations of Chapter 24 of the North Carolina General Statutes for excessive fees and unfair trade practices based on duplicative fees and charging a mortgage loan discount fee charge when the loan was not discounted, was from an interlocutory order and dismissed even though the trial court certified it under N.C.G.S. § 1A-1, Rule 54(b) because: (1) the trial court awarded damages and trebled them under Chapter 75, leaving only the amount of attorney fees to be determined in the future; (2) court costs do not constitute a separate claim for purposes of Rule 54(b) analysis, but are instead ancillary to the claim under Chapter 75; and (3) it was error to certify the order as final as to a claim without first assessing attorney fees and other costs.

Appeal by defendant from judgments entered 22 April 2008 and 10 May 2008 by Judge John B. Lewis, Jr. in Wake County Superior Court. Heard in the Court of Appeals 25 February 2009.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, and Financial Protection Law Center, by Mallam J. Maynard, for plaintiff-appellees.

Ellis & Winters LLP, by Matthew W. Sawchak, for defendant-appellant.

STEELMAN, Judge.

While we give great deference to a trial court's certification pursuant to Rule 54(b) of the Rules of Civil Procedure, the ultimate decision as to whether a matter is appealable rests with the appellate courts. An order of the trial court which resolved all issues except the amount of attorney's fees is a non-appealable interlocutory order and is dismissed.

I. Factual and Procedural Background

Both Travis T. Bumpers (Bumpers) and Troy Elliott (Elliott) each closed second mortgage loans with Community Bank of Northern Virginia (Community Bank).

In 1999, Bumpers responded to a mailed solicitation advertising loans offered by Community Bank. He called the listed 800 number, submitted a loan application over the phone, made a few more telephone calls, faxed requested documents, and then was directed to a women's lingerie store to sign the closing documents. A notary public worked at the store. Bumpers was approved for a $28,450.00 loan, with an interest rate of 16.99%. Title America provided the closing services for the loan. Community Bank and Title America charged Bumpers fees totaling $4,827.88.

In 1999, Elliott also responded to a mailed solicitation advertising loans offered by Community Bank. Elliott testified he called the 800 number because of the advertised 12.99% interest rate contained in the mailed solicitation. He submitted a loan application over the phone, made a few more telephone calls, faxed requested documents, and then went to a person's house, Tyler Toulane (Toulane), to sign loan papers. Toulane explained to Elliott that he was a notary public. Elliott was approved for a $35,000.00 loan, with a 12.99% interest rate. Title America provided the closing services for the loan. Community Bank and Title America charged Elliott fees totaling $5,650.00.

In September 2001, plaintiffs filed a lawsuit against Community Bank and Chase Manhattan Bank asserting violations of Chapter 24 of the North Carolina General Statutes based on excessive fees, violations of N.C. Gen. Stat. § 53-238 and N.C. Gen. Stat. § 75-1.1 based on duplicative fees, violations of N.C. Gen. Stat. § 75-1.1 based on a loan discount fee charge when the loan was not discounted, and violations of N.C. Gen. Stat. § 24-1.1A(c)(1)(e), 24-8(d), 53-238,[1] and 75-1.1 based on the fees charged by Title America.

In October 2001, the case was removed to federal court, and then in August 2002, the case was remanded to Wake County Superior Court. In April 2003, the trial court entered an order granting certain aspects of defendants' motions to dismiss and denying defendants'

1. Plaintiffs' complaint recites N.C. Gen. Stat. § 53-238; however, this statute was repealed in 1988 by Session Laws 1987 ch. 1017, § 1. The applicable provision has been recodified in Article 19A of Chapter 53. Plaintiffs' claim for relief based on this statute was dismissed by the Wake County Superior Court by order filed 1 May 2003.

motions to dismiss as to the claims under N.C. Gen. Stat. § 75-1.1. Plaintiffs then filed a notice of withdrawal as to the claims that were dismissed by the April 2003 order and waived all rights of appeal with respect to those claims.

In June 2003, Community Bank removed the case to the United States District Court for the Eastern District of North Carolina. A number of cases had been commenced against Community Bank in the United States District Court for the Western District of Pennsylvania, and in August 2003, the parties consented to have this case transferred to join a national class action against Community Bank and other defendants in the Western District of Pennsylvania.

In December 2003, the federal court approved a class action settlement, which was subsequently set aside and remanded for further proceedings in August 2005 by the United States Third Circuit Court of Appeals. In August 2006, the federal class representatives signed a modified settlement agreement with Community Bank and other defendants, which the United States District Court conditionally approved in January 2008. On 22 January 2008, the instant case was transferred to the United States District Court for the Eastern District of North Carolina for remand to the Wake County Superior Court for lack of subject matter jurisdiction in the federal court because "plaintiffs' state court complaint sounded purely in North Carolina statutory and common law."

Bumpers and Elliott sought to have their motion for class certification and motion for summary judgment ruled upon. In March 2008, the United States District Court for the Western District of Pennsylvania granted an injunction prohibiting Bumpers and Elliott from proceeding with class certification efforts but declined to halt the proceedings on the summary judgment motion. On 28 April 2008, an order was filed granting plaintiffs' motion for partial summary judgment on the issues of liability, holding that Community Bank's practice of charging a loan discount fee without providing a loan with a discounted interest rate constituted an unfair and deceptive trade practice under Chapter 75. This order further held that Community Bank's duplicative fees constituted systematic overcharging also in violation of Chapter 75. In a second order filed 15 May 2008, each of the plaintiffs were awarded damages and treble damages pursuant to N.C. Gen. Stat. § 75-16, along with interest on the excess settlement charges but not the trebled amount. The order expressly stated that the trial court did not consider attorney's fees pursuant to N.C. Gen.

Stat. § 75-16.1, "but nonetheless determines that there is no just cause for delay and that the judgment resulting from this order should be entered as a final judgment."

On 14 August 2008, the United States District Court for the Western District of Pennsylvania entered final orders approving and enforcing the settlement. Elliott is appealing the United States District Court for the Western District of Pennsylvania's rulings on the ground that the nation-wide settlement does not afford North Carolina borrowers the relief to which they are entitled under North Carolina law. Bumpers "opted out" of the nation-wide class and is not affected by the order enforcing the settlement.

Defendant appeals.

II. Interlocutory Appeal

On 22 April 2008 and 10 May 2008, the trial court entered summary judgment rulings on the issues of liability and damages. The only issue left for resolution by the trial court was the amount of attorney's fees to be awarded pursuant to N.C. Gen. Stat. § 75-16.1. The trial court certified defendant's appeal as immediately appealable pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Not every judgment or order of the Superior Court is appealable to the Court of Appeals. No appeals are granted as a matter of right and can only be taken from judgments and orders that are designated by the statutes regulating the right to appeal. *See* N.C. Gen. Stat. § 1-271 (2007); *see also McKinley Bldg. Corp. v. Alvis*, 183 N.C. App. 500, 501, 645 S.E.2d 219, 221 (2007); N.C.R. App. P. 28(b)(4).

"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) (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916)). Because the trial court's order did not dispose of the entire case and left the matter of attorney's fees unresolved, it was an interlocutory order. Interlocutory orders are "immediately appealable in only two instances: (1) if the trial court certifies that there is no just reason to delay the appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) or (2) when the challenged order affects a substantial right the appellant would lose without immediate review." *Wiggs v. Peedin*, 194 N.C.

App. ——, ——, 669 S.E.2d 844, 847 (2008) (citing *Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001)). In this case, defendant does not contend that a substantial right was affected but only that the trial court's Rule 54(b) certification entitles it to an immediate appeal. We thus do not discuss whether any substantial right was affected.

"[T]he trial court's determination that there is no just reason to delay the appeal, while accorded great deference, . . . cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (citations and quotations omitted); *see also Wiggs*, 194 App. at ——, 669 S.E.2d at 847.

Rule 54(b) provides:

> (b) *Judgment upon multiple claims or involving multiple parties.*—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C.R. Civ. P. 54(b). This rule contemplates the entry of a judgment as to fewer than all claims or parties. *Tridyn Industries, Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). It does not contemplate the fragmentation of the claims themselves or provide for the immediate appeal of less than the entire claim.

In *Tridyn*, the trial court was presented with cross summary judgment motions on a question of coverage under an insurance policy issued by defendant to plaintiff. The trial court found in favor of plaintiff on the question of coverage, holding that defendant's refusal to defend claims against plaintiff was a breach of contract, and plaintiff was entitled to recover reasonable attorney's fees from defendant. However, the trial court determined that damages, attorney's fees, and costs were to be determined at a later time. The trial court then stated that " 'this is a final judgment and there is no just reason for delay.' " *Id.* at 488, 251 S.E.2d at 445.

Our Supreme Court held: "That the trial court declared it to be a final, declaratory judgment does not make it so. This is not an action for a declaratory judgment but a claim by plaintiff for damages." *Id.* at 491, 251 S.E.2d at 447. Our Supreme Court further stated "[t]he cases uniformly hold" that "a partial summary judgment entered for plaintiff on the issue of liability only leaving for further determination at trial the issue of damages" is not immediately appealable. *Id.* at 492, 251 S.E.2d at 448. The appeal was dismissed despite the trial court's Rule 54(b) certification.

The facts of the instant case are stronger for dismissal than those in *Tridyn*. The trial judge actually awarded damages and trebled them pursuant to Chapter 75, leaving only the amount of attorney's fees to be determined in the future. N.C. Gen. Stat. § 75-16.1 provides that attorney's fees in an unfair and deceptive trade practices claim are in the discretion of the trial court. *Birmingham v. H & H Home Consultants & Designs, Inc.*, 189 N.C. 435, 444, 658 S.E.2d 513, 518 (2008). The statute provides that attorney's fees are "to be taxed as a part of the court costs and payable by the losing party[.]" N.C. Gen. Stat. § 75-16.1 (2007); *see also* N.C. Gen. Stat. § 7A-305(d)(3) (2007).

We hold that court costs do not constitute a separate claim for purposes of Rule 54(b) analysis. Rather, the court costs are ancillary to the claim under Chapter 75 of the General Statutes. It was improper for the trial court to certify its order as final as to a claim without first assessing attorney's fees and other costs.

The instant case has been pending in the courts of North Carolina and the federal courts since 13 February 2001. It has a long procedural history, which has resulted in inordinate delays in its final resolution.

Fragmentary appeals do not further justice but only serve to bring unnecessary delay and expense to the courts and the parties. Our Supreme Court has stated, "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382. Our system of appeals is designed, with very limited exceptions, to decide the entire case on appeal, not its separate pieces, in order to obtain a final resolution of the matter as expeditiously as possible. The appeals process is not designed to be a tool used by counsel to obtain advantage in the case.

The trial court's certification of this matter pursuant to Rule 54(b) was in error, this appeal is from a non-appealable interlocutory order, and is dismissed.

DISMISSED.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. DARNELL LAMAR DAWKINS

No. COA08-1257

(Filed 5 May 2009)

1. Homicide— felony murder—armed robbery—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felony murder based on alleged insufficient evidence of the underlying felony of armed robbery because there was substantial circumstantial evidence from which the jury could conclude that defendant was the one who had robbed the victim and killed him in the process including that: (1) defendant was with the victim in the victim's car when he was last seen alive; (2) the victim rarely let anyone drive his vehicle, defendant was found driving the victim's vehicle with the victim's blood in it and a missing driver's side tinted window, and the window was found with the victim's body; (3) defendant bought bleach shortly after the victim's body was found, and the victim's broken cell phones were discovered behind the convenience store where defendant purchased the bleach; (4) the victim told a customer he was going to North Carolina to buy marijuana to sell it, and defendant had over $2,600, some of which had the victim's blood on it, and several bags of marijuana on his person when he was apprehended; and (5) hours after the victim was dead, defendant told his cousin that he and the victim were back in Virginia.

2. Firearms and Other Weapons— possession of firearm by felon—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a felon because:

(1) a deputy testified that as defendant exited the victim's vehicle, he saw an object fall from defendant's person and a loaded five-shot .357 revolver was recovered at the place where the deputy saw the object fall; and (2) the victim was known to carry a .40 caliber weapon in a holster, he was shot with a .40 caliber weapon that was never recovered, and the jury could infer that defendant possessed the .40 caliber weapon in order to shoot the victim and continued to possess it until he later disposed of it.

3. Jury— request to review testimony—plain error analysis inapplicable

The trial court did not commit plain error by denying the jury's request to review the testimony of two witnesses because: (1) plain error analysis applies only to instructions to the jury and evidentiary matters; and (2) defendant's argument concerns neither the jury instructions nor the admissibility of evidence.

Appeal by defendant from judgments entered 27 March 2008 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 26 March 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General W. Dale Talbert, for the State.

Reita P. Pendry, for defendant-appellant.

JACKSON, Judge.

Darnell Lamar Dawkins ("defendant") appeals his 27 March 2008 convictions of first-degree murder, assault with a deadly weapon on a government official, possession of a firearm by a felon, and fleeing to elude arrest with a motor vehicle. For the reasons stated below, we hold no error.

On 18 September 2006, Rahsaan Greenidge ("Greenidge") told Crystal Mullins ("Mullins"), to whom he frequently sold marijuana, that he was going out of town the next day to acquire marijuana to sell. Greenidge lived in Virginia with his fiancé, Letrice Dentley ("Dentley"). On the morning of 19 September 2006, Greenidge told Dentley that he was driving to North Carolina that day. Greenidge left home in a silver, 2004 Ford Crown Victoria with tinted side windows at approximately 8:30 a.m. Greenidge was very possessive of the car, rarely allowing anyone to drive it, even his fiancé in whose name it was titled. Greenidge typically carried two cell phones and two hand-

guns—a .40 caliber at his side in a holster, and a .357 revolver concealed in a pocket or in his car.

Shortly after leaving his home, Greenidge arrived at the home of Gloria Hurst ("Hurst"), a woman with whom he had been developing a romantic relationship, notwithstanding his engagement to Dentley. Greenidge arrived with defendant, who was Hurst's cousin. On a prior occasion, defendant and Greenidge had spoken privately outside Hurst's home; when Hurst asked about the conversation, Greenidge responded, "the less you know, the less you have to worry about." Greenidge and defendant left Hurst's home at approximately 9:30 a.m.

Greenidge spoke to Dentley and Hurst several times that day. The last time Dentley heard from him was between 1:00 and 1:15 p.m.; he told her he was on his way home. The last time Hurst heard from him was at 1:32 p.m.; he told her he would call her back later. Greenidge called Mullins at 2:08 p.m. and told her that he was not back in Virginia yet but would have marijuana to sell her when he returned. Beginning at approximately 2:00 p.m., Dentley placed several unsuccessful calls to Greenidge's phone. The first few rang, but were unanswered. Subsequent attempts resulted in a recorded message indicating that either the phone was turned off or not getting reception. Hurst attempted to call Greenidge several times between 5:00 and 7:00 p.m. None of her calls were answered.

At approximately 2:15, Greenidge's dead body was discovered lying face up across the center line of McConnell Loop. His body was riddled with bullets. Among the items police recovered at the scene were .40 caliber shell casings and tinted automobile window glass with a hole in it. Greenidge had over $500.00 in cash in his front pants pocket. The shell casings were fired from the same .40 caliber weapon. The bullets recovered from Greenidge's body also were all fired from the same gun, probably a .40 caliber. However, without a test weapon, it was impossible to determine whether the shell casings were fired from the same gun as the bullets. The trajectory of the bullets' path through Greenidge's body indicated that the fatal shots were fired from his right side at a relatively short distance.

At approximately 2:30 to 3:00 p.m., defendant purchased bleach at a convenience store near the location where Greenidge's body was found. He returned several times to purchase more bleach. At approximately 3:00 p.m., defendant attempted to visit Tynesha Holland ("Holland") at her apartment near the convenience store which also was near where the body was found. Although Holland was not at

home, defendant spoke to her neighbor. The neighbor described the car defendant was driving as a "gray, four door" with a window down even though it was raining.

At approximately 7:00 p.m., Hurst called defendant who told her that he and Greenidge were back in Virginia and that Greenidge had dropped him off in Portsmouth. At approximately 10:30 p.m., defendant was with Holland at her place of employment, a "gentleman's club" near her apartment, the convenience store, and the crime scene in North Carolina.

At approximately 12:00 a.m., Deputy Sheriff Kevin Wallace ("Deputy Wallace") observed defendant driving Greenidge's silver Crown Victoria, which had been reported stolen. When Deputy Wallace and Deputy Sheriff Julia Emory ("Deputy Emory") attempted to initiate a traffic stop, defendant failed to yield. A pursuit ensued, during which Corporal Terry Scott ("Corporal Scott") of the Greensboro Police Department attempted to block defendant's path with his unmarked patrol vehicle. Defendant struck the front, left corner of Corporal Scott's vehicle. The pursuit reached speeds of eighty to eighty-five miles per hour in a thirty-five mile per hour residential area.

Eventually, defendant lost control of the Crown Victoria and crashed into a chain-link construction fence. Defendant fled the car on foot. As defendant fled, Deputy Scott saw an object fall from his person. A loaded, five-shot .357 revolver was recovered at the location where Deputy Scott saw the object fall. Defendant was located hiding behind a residence a few hundred yards from the crash site, beneath an upside-down, deflated child's swimming pool. He had over $2,600.00 in his pockets, some of which was stained with Greenidge's blood, as well as several bags of marijuana.

The remains of two broken cell phones were recovered behind the convenience store where defendant had purchased bleach. Investigators were able to retrieve information from the SIM cards, including phone numbers for Dentley, Hurst, Mullins, and defendant.

Greenidge's blood was found in several locations within his car. Defendant's blood also was on the .357 revolver. The floor mats and driver's side window were missing from Greenidge's vehicle.

On 27 March 2008, a jury found defendant guilty of assault with a deadly weapon on a government official, possession of a firearm by a felon, fleeing to elude arrest with a motor vehicle, and first-degree

murder pursuant to the felony murder rule. The trial court consolidated the charges and sentenced defendant to a term of life imprisonment without the possibility of parole. Defendant appeals.

[1] In his first two arguments, defendant challenges his conviction for first-degree murder. He argues that the trial court erred in denying his motion to dismiss the charge, and therefore, erred in instructing the jury on the charge. We disagree.

In order to survive a motion to dismiss criminal charges, the State must present 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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted).

> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The terms "more than a scintilla of evidence" and "substantial evidence" are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary.

State v. Earnhardt, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (internal quotation marks and citations omitted).

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Powell, 299 N.C. at 99, 261 S.E.2d at 117 (citations omitted).

> The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both. When the motion . . . calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. In passing on the motion, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. This is especially

> true when the evidence is circumstantial since one bit of such evidence will rarely point to a defendant's guilt.

Id. at 99, 261 S.E.2d at 117-18 (internal quotation marks and citations omitted) (alteration in original).

Here, although the State pursued the first-degree murder charge under theories of both (1) premeditation and deliberation and (2) felony murder, defendant was convicted only under a theory of felony murder. Defendant contends there was insufficient evidence to support the underlying felony of armed robbery.

"[T]he elements necessary to prove felony murder are that the killing took place while the accused was perpetrating or attempting to perpetrate one of the [statutorily] enumerated felonies." *State v. Richardson*, 341 N.C. 658, 666, 462 S.E.2d 492, 498 (1995). The enumerated felonies include robbery "or other felony committed or attempted with the use of a deadly weapon[.]" N.C. Gen. Stat. § 14-17 (2005). "The essential elements of robbery with a dangerous weapon are: '(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened.' " *State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003); *see* N.C. Gen. Stat. § 14-87(a) (2005).

Defendant submits that there was no direct evidence of the identity of the perpetrator of the robbery and murder of Greenidge. However, there was substantial circumstantial evidence from which the jury could conclude that defendant was the perpetrator.

Greenidge left Virginia with defendant. Greenidge was alive at 2:08 p.m. and apparently still with defendant. Greenidge's body was found at approximately 2:15 p.m. with tinted automobile glass with a hole in it. Defendant was driving Greenidge's car, which had Greenidge's blood in it and was missing the driver's side tinted window. Greenidge rarely let anyone drive his car.

Defendant bought bleach shortly after Greenidge's body was found. Greenidge's broken cell phones were discovered behind the convenience store where defendant purchased the bleach. Greenidge had told Mullins he was going to North Carolina to buy marijuana to sell. Defendant had over $2,600.00—some of which had Greenidge's blood on it—and several bags of marijuana on his person when he

was apprehended. Hours after Greenidge was dead, defendant told Hurst that he and Greenidge were back in Virginia.

From this evidence, the jury could infer that defendant was the one who had robbed Greenidge and killed him in the process. Therefore, the trial court did not err in denying defendant's motion to dismiss and in instructing the jury accordingly. These arguments are without merit.

[2] In his next two arguments, defendant challenges his conviction for possession of a firearm by a felon. As in his prior arguments, he contends the trial court erred in denying his motion to dismiss the charge and in instructing the jury as to that charge. We disagree.

The essential elements of possession of a firearm by a felon are that (1) defendant was previously convicted of a felony and (2) thereafter possessed a firearm. *See* N.C. Gen. Stat. § 14-415.1(a) (2005). Defendant stipulated to the fact that he previously had been convicted of a felony.

Deputy Scott testified that as defendant exited the vehicle, he saw an object fall from defendant's person. A loaded, five-shot .357 revolver was recovered at the place where Deputy Scott saw the object fall. From this evidence, the jury could infer that defendant had the .357 in his possession just prior to exiting the vehicle.

In addition, Greenidge was known to carry a .40 caliber weapon in a holster. Greenidge was shot with a .40 caliber weapon. Greenidge's .40 caliber weapon was never recovered. From this evidence, the jury could infer that defendant possessed the .40 caliber weapon in order to shoot Greenidge and continued to possess it until he later disposed of it.

Because there was sufficient evidence presented that defendant possessed a firearm, having been convicted of a felony, the trial court did not err in denying defendant's motion to dismiss and instructing the jury on that charge. Accordingly, these arguments are without merit.

[3] Finally, defendant argues that the trial court committed plain error when it denied the jury's request to review the testimony of two witnesses. We disagree.

"[P]lain error analysis applies only to instructions to the jury and evidentiary matters." *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (2000). Because defendant's argument concerns neither the

jury instructions nor the admissibility of evidence, we decline to address it.

For the foregoing reasons, we discern no error in the trial below.

No error.

Judges STEPHENS and STROUD concur.

DONALD SULLIVAN, PLAINTIFF v. PENDER COUNTY, DEFENDANTS

No. COA08-1037

(Filed 5 May 2009)

1. Appeal and Error— violations of Appellate Rules—arguments heard in discretion of court

The Court of Appeals elected to hear a pro se appellant's arguments concerning property taxes, despite violations of the Rules of Appellate Procedure.

2. Taxation— ad valorem—nature of property transfer

A pro se appellant's argument that he was not a taxpayer because his property had been transferred with a bill of sale rather than a warranty deed was determined against him in a prior case, *Sullivan I*.

3. Appeal and Error— remarks by trial judge—transcript not included

Assignments of error concerning statements by the trial court could not be reviewed on appeal where the transcript was not included in the record.

4. Civil Procedure— summary judgment—nonmoving party

The trial court had authority to grant summary judgment for defendant even without a request from defendant where plaintiff had moved for summary judgment.

5. Constitutional Law— property taxes as taking—no supporting authority

An argument that property taxes were an unconstitutional taking was not supported by authority and was overruled.

Appeal by Plaintiff from judgment entered 16 May 2008 by Judge James H. Faison, III, in Pender County District Court. Heard in the Court of Appeals 10 March 2009.

Donald Sullivan, Pro Se.

No appellee brief filed for Pender County.

PER CURIAM.

Donald Sullivan (Plaintiff) appeals from entry of summary judgment in favor of Pender County (Defendant). We affirm.

The factual and procedural history of this case, as documented by the Record on Appeal, is summarized in relevant part as follows: On 1 June 2007 Plaintiff wrote a letter to the Pender County Board of Commissioners (the Commissioners), challenging Defendant's assessment of property taxes on his property. On 29 August 2007 Plaintiff wrote another letter to the Commissioners, informing them that he was continuing his "challenge of the validity of the attempts by the county tax office to assess and collect property tax on [his] private buildings and lands[.]" Plaintiff stated that he was seeking a hearing before the Commissioners and a refund of previously paid property tax, and that he was "of the opinion the State of North Carolina has no authority to tax private property, including land, without the consent of the individual owner." He also contended that there was a distinction between property transferred using a warranty deed and property transferred through a bill of sale.

Plaintiff asserts on appeal that, when the Commissioners did not respond to his letter, he filed a small claims action against Defendant seeking refund of $1,572.00 in property taxes. He further alleges that a Pender County magistrate dismissed his small claims action. The record does not include Plaintiff's complaint or the magistrate's dismissal, but does contain a copy of Plaintiff's appeal to the district court of Pender County. Plaintiff's case was referred to arbitration, and on 21 February 2008 the arbitrator entered an Award and Judgment that awarded Plaintiff nothing, dismissed his claim, and ordered Plaintiff to pay the costs of the action. Plaintiff appealed for a trial *de novo* in Pender County district court, and moved for summary judgment on 22 April 2008. On 16 May 2008 Pender County district court Judge James H. Faison, III, entered an order denying Plaintiff's summary judgment motion and granting summary judgment in favor of Defendant. From this order Plaintiff has appealed.

Standard of Review

"Our standard of review of the grant of a motion for summary judgment is well established. Summary judgment is properly granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' N.C. Gen. Stat. § 1A-1, Rule 56(c) [(2007)]. In conducting this review, we consider the evidence in the light most favorable to the non-moving party." *Cockerham-Ellerbee v. Town of Jonesville*, 190 N.C. App. 150, 152-53, 660 S.E.2d 178, 180, *dis. review denied*, 362 N.C. 680, 669 S.E.2d 745 (2008) (citations omitted).

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[1] We first address Plaintiff's violations of Rule 28(b) of the N.C. Rules of Appellate Procedure. Rule 28 provides in relevant part that the

> appellant's brief in any appeal shall contain[:]
>
> . . . .
>
> (5) A full and complete statement of the facts . . . a non-argumentative summary of all material facts . . . supported by references to pages in the transcript . . . the record on appeal, or exhibits, as the case may be.
>
> (6) An argument . . . with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. . . . The argument shall contain a concise statement of the applicable standard(s) of review for each question presented[.] . . . [T]he argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. . . .

Plaintiff's statement of facts violates Rule 28(b)(5) in several respects. It includes argumentative assertions; for example, Plaintiff contends that Defendant "taxed [his] private properties where no such authority or jurisdiction to tax exists[,]" and "seeks to destroy [his] natural, primordial right to property by imposing an unlawful tax on it[.]" Plaintiff also includes facts unsupported by reference

to the record and facts not relevant to the legal issues presented by his appeal.

Following his statement of facts, Plaintiff's brief has a section titled simply "Argument" without reference to any specific assignments of error or questions presented. This section consists largely of Plaintiff's personal opinions on, *e.g.*, "paradigms" of which "we are all victims" or the "artificial reality" in which we live; Plaintiff's interpretation of certain Biblical verses; Plaintiff's views on selected incidents and events in world and United States history; and Plaintiff's personal background. Much of this section is inappropriate and does not constitute proper legal argument on appeal.

Plaintiff also fails to properly support his assertions with legal authority. For example, he asserts that, as a "Free Person" whose property was transferred by a bill of sale rather than a warranty deed, Plaintiff is not subject to local property taxes, and asks this Court to "overturn the obvious violation of [his] federal and state constitutional rights" evidenced by Defendant's collection of property tax. Plaintiff directs our attention to U.S. and North Carolina constitutional provisions stating certain general rights of all citizens, but cites no North Carolina cases and no cases addressing the constitutionality of property taxation. Plaintiff also fails to state the standard of review, a violation of N.C.R. App. P. 28(b)(6). After his Argument section, Plaintiff lists six "Questions Presented" each followed by a brief argument. Plaintiff again fails to state the appropriate standard of review or to cite to specific assignments of error or record pages.

Plaintiff's violation of the Rules of Appellate Procedure subjects his appeal to dismissal. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008). In our discretion, we elect to address the merits of Plaintiff's arguments, but we caution Plaintiff that compliance with the Rules is mandatory. *Id.*

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[2] Plaintiff first argues that the trial court erred by treating Plaintiff as a "Taxpayer" rather than an "individual, natural person[.]" Plaintiff's contention that he is not a "taxpayer" rests on his assertion of a legally significant distinction between property transferred with a warranty deed and property transferred with a bill of sale. However, Plaintiff's argument was expressly overruled by this Court in *In re Appeal of Sullivan*, 195 N.C. App. 325, —— S.E.2d —— (unpublished) (2009) (*Sullivan I*). In *Sullivan I*, the instant Plaintiff appealed from a ruling of the N.C. Property Tax Commission, making

some of the same arguments raised in the present appeal. This Court held, *inter alia*, that:

> Sullivan first argues that the Commission erred in classifying him as a "taxpayer," which is defined by N.C. Gen. Stat. § 105-273(17) (2007) as "any person whose property is subject to *ad valorem* property taxation by any county[.]" . . . Sullivan asserts (1) that he is not a "person" as defined by N.C. Gen. Stat. § 105-273(12) (2007), and (2) that his property is not subject to *ad valorem* taxation because he obtained his property by "bills of sales," not by warranty deeds. Sullivan's first assertion is meritless, and we do not address it. *See* N.C. Gen. Stat. § 105-273(12) (defining "person" in part as "any individual"). . . .
>
> Nothing in our Constitution or our General Statutes supports Sullivan's argument that property conveyed by bill of sale is not subject to *ad valorem* taxation. All privately held real property in this State is subject to *ad valorem* taxation unless exempted from taxation by the General Assembly. Sullivan's property is not exempt. This assignment of error is overruled.

"It has long been recognized that 'once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal.' Even unpublished opinions, which are normally without precedential value, or an erroneous decision by the Court of Appeals becomes the law of the case for that case only." *Prior v. Pruett*, 143 N.C. App. 612, 618-19, 550 S.E.2d 166, 170-71 (2001) (quoting *Southern Furniture Co. v. Dep't of Transp.*, 133 N.C. App. 400, 408, 516 S.E.2d 383, 388 (1999); and citing *Wrenn v. Maria Parham Hosp., Inc.*, 135 N.C. App. 672, 522 S.E.2d 789 (1999)) (other citations omitted). This assignment of error is overruled.

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[3] In Plaintiff's next three arguments, he asserts that the trial court erred by making certain statements during the hearing of this matter. Plaintiff contends that the trial court said that property rights are not absolute, that taxes support the activities and security of the courts, and that Plaintiff's property is "no different from anybody else's" as regards local property taxes. However, Plaintiff failed to include in the Record on Appeal the transcript of the hearing during which the court is alleged to have made these statements. "It is well established that this Court can judicially know only what appears in the record." *County of Durham v. Roberts*, 145 N.C. App. 665, 671, 551 S.E.2d 494,

498 (2001) (citations omitted). Without the transcript, we have no way to ascertain what the parties said during the hearing, and cannot review this issue on its merits. We observe, however, that the challenged statements appear to be innocuous, accurate statements of fact. This assignment of error is overruled.

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[4] Plaintiff argues next that, because Defendant did not request summary judgment, the trial court lacked authority to enter summary judgment for Defendant. We disagree.

"Summary judgment may, when appropriate, be rendered against the party moving for such judgment. Summary judgment in favor of the non-movant is appropriate when the evidence presented demonstrates that no material issues of fact are in dispute, and the nonmovant is entitled to entry of judgment as a matter of law." *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 447-48 (1979) (citations omitted). Indeed, N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007), expressly authorizes the trial court to enter summary judgment if "any party is entitled to a judgment as a matter of law." (emphasis added). This assignment of error is overruled.

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[5] Plaintiff also argues that entry of summary judgment "den[ied] Appellant his constitutionally guaranteed right to property, which property shall not be taken except by condemnation with just compensation." We again disagree.

"The Federal Takings Clause, also commonly known as the Just Compensation Clause, of the Fifth Amendment of the United States Constitution forbids the taking of private property by the government without just compensation." *Pfaff v. Washington*, 2008 U.S. DIST. LEXIS 98804 (W.D. Wash. Dec. 8, 2008) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning*, 535 U.S. 302, 306 N.1, 152 L. Ed. 2d 517 (2002)). "[A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, this Court has inferred such a provision as a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution." *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14 (1989) (citations omitted).

Plaintiff asserts that taxation of his property is unconstitutional because he purchased his property "without any moneylenders' interference and without the necessity for any commercial docu-

mentation." Presumably this refers to Plaintiff's argument that property purchased with a bill of sale is not subject to *ad valorem* taxation. As discussed above, this Court has previously rejected this argument.

> In *Latta v. Jenkins*, 200 N.C. 255 (258), 156 S.E. 857, it is said: "By virtue of the provisions of section 3 of Article V of the Constitution of North Carolina, all property, real and personal, in this State is subject to taxation[.] . . ." In *Town of Benson v. County of Johnston*, 209 N.C. 751, 185 S.E. 6, it is declared: "Taxation is the rule and exemption the exception. The rule has repeatedly been laid down by this Court, the exemptions from taxation are to be strictly construed[.]"

Mecklenburg County v. Sterchi Bros. Stores, Inc., 210 N.C. 79, 86, 185 S.E. 454, 459 (1936). Plaintiff cites no authority for his assertion that local property taxes are an unconstitutional "taking" and we find none. This assignment of error is overruled.

Finally, we quote from the opinion issued in *Sullivan v. United States*, 2004 U.S. Dist. LEXIS 27890 (E.D.N.C. July 6, 2004), *aff'd Sullivan v. United States*, 127 Fed. Appx. 673, 2005 U.S. App. LEXIS 7749 (4th Cir. N.C. 2005), another appeal by the instant Plaintiff, wherein the Court stated that:

> [t]he court directs plaintiff to Rule 11 of the Federal Rules of Civil Procedure. By presenting his complaints to this court, plaintiff is certifying that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2). . . . [If] this court were to find that Fed. R. Civ. P. 11(b) has been violated, the court is authorized to impose monetary and other sanctions upon the offending party, including a *pro se* litigant. . . . Plaintiff would be well advised to consult with an attorney and carefully consider that attorney's professional advice before filing any other action in this court.

"As North Carolina's Rule 11 is substantially similar to the federal rule, the decisions of the federal courts are instructive." *In re T.R.P.*, 360 N.C. 588, 604, 636 S.E.2d 787, 798 (2006) (citations omitted). We agree that "Plaintiff would be well advised to consult with an attorney and carefully consider that attorney's professional advice before filing any other action in this court." *Sullivan v. United States*, *id.*

For the reasons discussed above, we conclude that the trial court did not err and that its summary judgment order should be

Affirmed.

Panel consisting of:

Judges McGEE, GEER and BEASLEY.

BENJI HAMBY, Plaintiff v. ADAM P. WILLIAMS, Defendant

No. COA08-662

(Filed 5 May 2009)

1. Insurance— UIM—compensatory damages—prejudgment interest

A UIM policy provided for prejudgment interest where it stated that the UIM carrier would pay all sums the insured was legally entitled to recover as compensatory damages. It has been held that prejudgment interest is part of the compensatory damages for which a UIM carrier is liable.

2. Arbitration and Mediation— prejudgment interest—deferred to trial court—award not a modification

The trial court erred by not awarding prejudgment interest to plaintiff where an arbitration award had deferred the issue to the trial court. The award of interest here would not be a modification of the arbitration award, and cases involving an interest award by the trial court where the arbitration award had not included interest were not applicable. The interest provision in N.C.G.S. § 24-5(b) for compensatory damages is mandatory.

3. Judgments— prejudgment interest—credit for payments made

In a case arising from an automobile accident and involving tortfeasors' insurance, workers' compensation insurance, and UIM insurance, plaintiff was to be awarded interest from the date of the filing of the complaint until the dates of payment of amounts credited and paid, and interest on unpaid balances from the filing of the complaint until paid.

Appeal by plaintiff from judgment entered 5 February 2008 by Judge Christopher M. Collier in Rowan County Superior Court. Heard in the Court of Appeals 4 December 2008.

Ramsay Law Firm, P.A., by Martha L. Ramsay, for plaintiff-appellant.

York, Williams, Barringer & Lewis, L.L.P., by Gregory C. York and Angela M. Easley, for defendant-appellee.

STEELMAN, Judge.

Where the underinsured motorists provision of an automobile insurance policy provides for payment of "compensatory damages" and the arbitration award defers the issue of prejudgment interest to the trial court, the trial court erred in refusing to award plaintiff prejudgment interest on the amount of the arbitration award.

I. Factual and Procedural Background

Benji Hamby (plaintiff) filed this action on 17 May 2006 to recover monetary damages for bodily injuries suffered in an automobile accident that occurred in the course and scope of his employment on 22 May 2003. Defendant Adam Williams was the driver of the other vehicle in the accident, which was owned by Jane Williams. Prior to the filing of plaintiff's complaint, Williams' insurer, Encompass Insurance, tendered its full policy limits of $30,000.00 to plaintiff. The Williamses are not parties to this appeal.

Plaintiff was operating a vehicle owned by his employer at the time of the accident. The insurance policy on that vehicle had underinsured motorists insurance coverage. On 31 July 2006, plaintiff requested binding arbitration with the underinsured motorist carrier (UIM carrier), which was an unnamed party to this action. On 14 August 2006, the parties entered into a Consent Order compelling binding arbitration of plaintiff's underinsured motorist claim. This action was stayed, with the trial court retaining jurisdiction of the matter until it was fully concluded. Prior to the arbitration hearing, the parties entered into stipulations, including that: "The parties agree that the issue to be determined by the arbitration panel is: What amount is the Plaintiff entitled to recover for his damages resulting from the auto accident of May 22, 2003?"

On 21 November 2007, the arbitration panel heard arguments from counsel and reviewed the evidence. The question of whether

plaintiff was entitled to prejudgment interest was raised before the arbitration panel. On 7 December 2007, plaintiff was awarded $250,000.00, with interest and costs specifically being excluded. Rather than deciding whether plaintiff was entitled to prejudgment interest, the arbitration panel passed this issue back to the trial court by stating: "Counsel for Plaintiff presented the issue of prejudgment interest, together with evidence of the filing date of the lawsuit. Counsel for Defendant did not consent to our awarding a specific stated sum on this issue. The matter is therefore deferred to the Superior Court for further review."

On 7 January 2008, plaintiff filed a Motion for Interest and Determination of Workers' Compensation Payments. Plaintiff asserted that UIM carrier had made payment in the amount of $112,138.26 on 21 December 2007 and that UIM carrier had erroneously calculated plaintiff's workers' compensation benefits in the amount of $109,114.29. Plaintiff asserted the correct amount was $103,160.68. Plaintiff further requested an award for payment of interest on the arbitration award in the amount of $31,178.07, confirmation of the current amount of workers' compensation benefits paid to and on behalf of plaintiff, and confirmation of the award against UIM carrier.

On 16 January 2008, UIM carrier filed a Memorandum in Opposition to plaintiff's motion and argued plaintiff was not entitled to interest on the arbitration award. UIM carrier also requested a determination of the amount of workers' compensation payments made to plaintiff.

The matter was heard on 22 January 2008. By order filed on 5 February 2008, the trial court denied plaintiff's motion for interest and confirmed the arbitration award. The trial court further ordered: (1) UIM carrier was entitled to an offset in the amount of $133,160.68 based upon the payment of $30,000.00 by the liability carrier and the payment of $103,160.68 in workers' compensation benefits and (2) UIM carrier had made payment in partial satisfaction of the arbitration award in the amount of $112,138.26 on 21 December 2007. Plaintiff appeals.

II. Prejudgment Interest

Plaintiff brings forward five assignments of error contending that the trial court erred in confirming the arbitration award without prejudgment interest. We agree, and consolidate the five assignments of error for purposes of analysis.

In the instant case, a copy of the applicable insurance policy was certified by UIM carrier, and is included in the record on appeal. The policy appears to provide for underinsured motorists coverage of $1,000,000.00. It contains an endorsement for uninsured motorist coverage, but no endorsement for underinsured motorist coverage. The parties and, in particular, UIM carrier have treated the provisions of the uninsured motorists coverage endorsement as controlling, making specific reference to those pages of the policy. We treat this as a stipulation that the referenced provisions control.

A. Was Prejudgment Interest Authorized by Policy?

[1] We first determine whether the insurance policy provided for prejudgment interest. UIM carrier contends that the policy "does not specify anywhere that a party is entitled to prejudgment interest on an arbitration or jury award." This assertion is incorrect. The applicable provision of the policy provides that "[UIM carrier] will pay all sums the 'insured' is legally entitled to recover as compensatory damages . . . ." In *Sprake v. Leche*, 188 N.C. App. 322, 658 S.E.2d 490 (2008), this Court held that prejudgment interest is part of compensatory damages for which an UIM carrier is liable. *Id.* at 325, 658 S.E.2d at 492 (citing *Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 11, 430 S.E.2d 895, 901 (1993) and *Austin v. Midgett*, 159 N.C. App. 416, 419, 583 S.E.2d 405, 409 (2003)). Since the policy specifically provides for payment of "compensatory damages" these cases control. The arbitration provision provides that if the parties disagree on the amount of damages, then the matter may be arbitrated. The arbitration provision in no manner limits the scope of "compensatory damages" and the above-referenced provision of the policy controls.

B. Cases Dealing with Failure of Arbitrator to Award Interest

[2] Our Courts have previously considered cases where the arbitrator does not award interest on a compensatory award. Plaintiff argues that the cases of *Sprake v. Leche*, *supra*, and *Lovin v. Bird*, 178 N.C. App. 381, 631 S.E.2d 58 (2006) control, while UIM carrier contends that the cases of *Eisinger v. Robinson*, 164 N.C. App. 572, 596 S.E.2d 831 (2004), and *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 499 S.E.2d 801 (1998) control.[1] We hold that this case is con-

1. On 7 April 2009, this Court decided the case of *Blanton v. Isenhower*, 196 N.C. App. ——, ——, S.E.2d —— (April 7, 2009) (No. 08-864). This case is not cited or argued by the parties, but its holding is consistent with those in *Palmer* and *Eisinger*. In *Blanton*, the arbitrator did not award prejudgment interest, nor was there a reservation of that issue by the arbitrator to the trial court for resolution. Further, the plaintiff con-

trolled by the *Lovin* case, and that the trial court erred in not awarding prejudgment interest to plaintiff.

The issue presented in these cases is whether a trial court should award prejudgment interest where the arbitration award did not include interest. In *Palmer*, the arbitration award did not provide for prejudgment interest. Plaintiff moved the trial court for an award of prejudgment interest, which was denied. On appeal, this Court held that since neither the arbitration agreement nor the arbitration award made provision for prejudgment interest, the trial court properly affirmed the award as written. *Palmer*, 129 N.C. App. at 498, 499 S.E.2d at 807. In *Eisinger*, it appears that the arbitration award contained no provision for prejudgment interest, and the trial court confirmed the award, without interest. This Court followed the rationale of *Palmer*, and affirmed the trial court. *Eisinger*, 164 N.C. App. at 576-77, 596 S.E.2d at 833-34.

In *Lovin*, the arbitration award specifically stated that it did not include prejudgment interest and left that question for "a Superior Court Judge in Richmond County to decide." *Lovin*, 178 N.C. App. at 382, 631 S.E.2d at 59. The trial court entered judgment, which included an award of prejudgment interest. The defendant argued that the trial court improperly modified the arbitration award in violation of N.C. Gen. Stat. § 1-569.24. We held that given the language of the arbitration award reserving any computation of prejudgment interest to the trial court, that there was no modification. We further distinguished both *Palmer* and *Eisinger* because the arbitration agreement and award in *Lovin* contemplated an award of prejudgment interest. *Id.* at 384-85, 631 S.E.2d at 60-61. In *Sprake*, the arbitration panel awarded prejudgment interest, and the trial court confirmed the award. This Court held that the language of the arbitration agreement giving the panel authority to address "compensatory damages" was ambiguous as to prejudgment interest. We then resolved the ambiguity against the insurance company, citing *Register v. White*, 358 N.C. 691, 695, 599 S.E.2d 549, 553 (2004), and upheld the award of interest. *Sprake*, 188 N.C. App. at 326, 658 S.E.2d at 492.

In the instant case, the parties consented to arbitrate plaintiff's UIM claim "in accordance with the terms of the policy of insurance[.]" The parties stipulated that the issue to be determined was the amount of plaintiff's "damages resulting from the auto accident of

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ceded in his appellate brief that the issue of prejudgment interest was never raised before the arbitration panel. *Blanton* is thus distinguishable from the instant case.

May 22, 2003[.]" The terms of the policy provided for "compensatory damages," which included prejudgment interest. *Id.* at 325, 658 S.E.2d at 492. We thus hold the arbitration agreement did encompass prejudgment interest. Since the arbitration agreement encompassed prejudgment interest, and this issue was deferred to the trial court for resolution, *Palmer*, *Eisinger*, and *Blanton* are not applicable, and an award of prejudgment interest would not constitute a modification of the arbitration award. N.C. Gen. Stat. § 24-5(b) (2007) provides that: "[i]n an action other than contract, any portion of a money judgment designated by the factfinder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied." We hold this provision to be mandatory and not discretionary on the part of the trial court, and that the trial court erred in not awarding prejudgment interest to plaintiff. The portion of the trial court's order denying prejudgment interest to plaintiff is reversed and this matter is remanded for entry of judgment awarding plaintiff prejudgment interest.

C. Finding of Compensatory Damages

Finally, UIM carrier argues that "no factfinder designated the Arbitration Award as 'compensatory damages' " and that any award of prejudgment interest is not authorized under N.C. Gen. Stat. § 24-5(b). We find this argument to be disingenuous. As discussed above, the scope of damages was set forth in the insurance policy as "compensatory damages[.]" The arbitration award clearly stated that the award was exclusive of interest and costs. This argument is without merit.

D. Computation of Award of Prejudgment Interest

[3] We note that plaintiff did not appeal the portions of the trial court's order awarding UIM carrier a credit for the $30,000.00 paid by the tortfeasors' insurance carrier and the $103,160.68 in workers' compensation benefits paid to plaintiff. Plaintiff is not to be awarded interest on either of those two credits after the date of payment to plaintiff. Plaintiff is not to be awarded interest on the partial payment of $112,138.26 made by UIM carrier on 21 December 2007, after that date. Plaintiff is to be awarded interest from the date of filing of the complaint, 17 May 2006, until the dates of payment of the amounts credited and paid, as set forth above. N.C. Gen. Stat. § 24-5(b). Plaintiff is to be awarded interest on any unpaid balances from the date of filing of the complaint, until paid.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges CALABRIA and STROUD concur.

PATRICIA P. COYNE LIPTRAP, PLAINTIFF v. CHRISTOPHER L. COYNE, ADMINISTRATOR OF THE ESTATE OF LOUIS PATRICK COYNE, DEFENDANT

No. COA08-991

(Filed 5 May 2009)

1. Sureties— right to reimbursement of monthly payments from estate of deceased principal—guaranty agreement

The trial court did not err by requiring the estate of a deceased husband to reimburse monthly payments made by plaintiff wife under a guaranty agreement on a note executed by the husband, and compelling the estate to pay the balance of a note, because: (1) *Montsinger*, 240 N.C. 441 (1954), was inapplicable since plaintiff was obligated to pay the note by a guaranty agreement she executed which was a primary, and not a secondary, obligation; and the holding was superseded by statute in 1959 giving a surety who makes payment on the principal debtor's note the right to sue for reimbursement in addition to the common law equitable remedy of subrogation; and (2) N.C.G.S. § 26-3.1 provides plaintiff with ample authority to require defendant administrator to reimburse the amounts which she paid under a guaranty agreement as surety of the deceased.

2. Marriage; Sureties— prenuptial agreement—not a waiver of right to reimbursement or subrogation—guaranty agreement

The trial court did not err by concluding that plaintiff wife did not waive her right to reimbursement or subrogation arising from plaintiff's payment of a note under a guaranty agreement based on the parties entering into a prenuptial agreement because none of the language in the prenuptial agreement evidenced an intention on the part of plaintiff to relinquish her statutory right to sue for reimbursement of payments made as surety for a debt of the deceased, and particularly one which was incurred after entry into the agreement.

Appeal by defendant from order entered 14 May 2008 by Judge W. Allen Cobb, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 28 January 2009.

L. Patten Mason, for plaintiff-appellee.

Forman Rossabi Black, P.A. by T. Keith Black, for defendant-appellants.

STROUD, Judge.

This case presents two issues for review: (1) whether a surviving spouse who makes payments pursuant to a guaranty agreement on a note executed by her deceased husband is entitled to reimbursement from the estate of the deceased and (2) whether the surviving spouse's suit for reimbursement was barred by the prenuptial agreement entered into by plaintiff and her deceased husband. Because we answer yes to the first question and no to the second, we affirm.

I. Background

On 6 March 1998, Patricia P. Coyne Liptrap nee Crump ("plaintiff") and Louis P. Coyne ("the deceased") entered a prenuptial agreement. Plaintiff married the deceased on or about 7 March 1998.

On 4 December 2002, plaintiff and the deceased purchased the Sand Dollar Motel in Carteret County, taking it as tenants by the entirety. The deceased executed a promissory note to BB&T in exchange for a loan in the amount of $455,700.00 to purchase the property. Plaintiff and the deceased executed a deed of trust on the property to secure payment of the note. Plaintiff also executed a guaranty of payment of "all indebtedness" of the deceased.

The deceased died intestate on 20 September 2005. After his death, plaintiff made monthly payments on the promissory note to BB&T per the guaranty agreement.

On 23 February 2007, plaintiff filed a verified complaint against the estate of the deceased seeking reimbursement of the monthly payments she had made and an order compelling the estate to pay the balance of the note. Defendant filed an answer on or about 9 May 2007. The answer asserted the affirmative defense of accord and satisfaction, and counterclaimed for breach of the prenuptial agreement.

Plaintiff filed a motion for summary judgment on or about 13 February 2008. The trial court granted the motion for summary judgment on 14 May 2008, ordering defendant to reimburse plaintiff for

monthly payments made to BB&T since the death of the deceased and to pay the balance of the note to BB&T. Defendant appeals.

II. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party." *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

III. Entitlement to Reimbursement

[1] Defendant argues that "[n]o authority exists for requiring [d]efendant to reimburse [p]laintiff for . . . any payments made by [p]laintiff since [her deceased husband's] death." Defendant, citing *Montsinger v. White*, 240 N.C. 441, 82 S.E.2d 362 (1954), contends that "by making payments [plaintiff] has stepped into the shoes of BB&T and must first exhaust the asset [subject to the mortgage] before she can pursue [d]efendant." Defendant further contends that because "the value of the property exceeds the balance owing at the time of Mr. Coyne's death, [p]laintiff has no action for contribution against [d]efendant." We disagree.

Montsinger held:

> When a debtor dies, . . . the holder of a note executed or assumed by the deceased, and secured by a deed of trust or mortgage, must first exhaust the security and apply the same on the debt, and may then file a claim against the estate for the balance due, if any. . . . [I]n the instant case, the [mortgagee] would not have been permitted, under our decisions, to prove a claim against the estate of [the deceased] until it first exhausted its security, and then only for the balance that might have remained unpaid after applying as a credit on the indebtedness the net proceeds realized from the foreclosure sale.
>
> The plaintiff [surviving spouse] was under no legal obligation to pay the note held by the [mortgagee because the note was endorsed by her deceased husband alone], and [the mortgagee] could not have obtained a personal judgment against [the surviv-

> ing spouse] on the note. But when [the surviving spouse] paid off the note for the purpose of exonerating her own estate from the outstanding lien, *she obtained no better position in relation to the debt as against the estate of her husband, than the [mortgagee] had prior thereto*. Even so, by making such payment she became subrogated to its rights.

Montsinger, 240 N.C. at 443-44, 82 S.E.2d at 364-65 (emphasis added).

Montsinger is unavailing because it is distinguishable on facts. In *Montsinger*, "[t]he plaintiff was under no legal obligation to pay the note" but paid it "for the purpose of exonerating her own estate from the outstanding lien[.]" *Id.* at 444, 82 S.E.2d at 364-65. In the case *sub judice*, plaintiff was obligated to pay the note by a guaranty agreement she executed which was "a primary, and not a secondary, obligation and liability, payable immediately upon demand without recourse first having been had by Bank against the Borrower . . . and without first resorting to any property held by Bank as collateral security[.]" (R 20) Furthermore, in 1959, five years after *Montsinger* was decided, the above-italicized portion of its holding was superseded by statute, giving a surety who makes payment on the principal debtor's note the right to sue for reimbursement in addition to the common law equitable remedy of subrogation. *Compare* N.C. Gen. Stat. § 26-3.1 (2007), *with In re Declaratory Ruling by N. C. Comm'r of Ins.*, 134 N.C. App. 22, 24, 517 S.E.2d 134, 137 ("[T]he [common law] doctrine of subrogation allows a party who has compensated a creditor under the color of some obligation, to step into the shoes of the creditor, thereby succeeding to the creditor's rights to proceed against the debtor for reimbursement." (Citing *Journal Pub. Co. v. Barber*, 165 N.C. 478, 487-88, 81 S.E. 694, 698 (1914))), *appeal dismissed and disc. review denied*, 351 N.C. 105, 540 S.E.2d 356 (1999).

Contrary to defendant's argument, N.C. Gen. Stat. § 26-3.1[1] provides plaintiff with ample authority to require defendant to reimburse

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1. Section 26-3.1 states:

> (a) A surety who has paid his principal's note, bill, bond or other written obligation, *may either sue his principal for reimbursement* ***or*** sue his principal on the instrument and may *maintain any action or avail himself of any remedy which the creditor himself might have had against the principal debtor. . . .*
>
> (b) The word "surety" as used herein includes a guarantor, accommodation maker, accommodation indorser, or other person who undertakes liability for the written obligation of another.

N.C. Gen. Stat. § 26-3.1 (2007).

the amounts which she paid pursuant to a guaranty agreement as surety of the deceased. Accordingly, this argument is overruled.

IV. The Prenuptial Agreement

[2] Defendant spends most of his brief arguing that the prenuptial agreement between plaintiff and the deceased controls, therefore any right to reimbursement or subrogation arising from the plaintiff's payment of the note pursuant to the guaranty agreement is trumped by the prenuptial agreement entered into by the plaintiff and the deceased. Defendant argues that by entering the prenuptial agreement plaintiff relinquished all rights to the "separate property" of the deceased. Defendant argues therefrom that because the entire estate consists of the property designated as separate property in the prenuptial agreement, plaintiff is entitled to nothing from the estate to pay the note to BB&T or otherwise. We disagree.

Specifically, defendant relies on the following language in the prenuptial agreement:

> Each party acknowledges that the right of the other to retain, manage, and control such separate property as granted above extends not merely for the duration of the marriage but continues perpetually unless this agreement is revoked . . . . Each party specifically waives relinquishes, renounces and gives up any claim that each may have to the other's separate property under the laws of this state.
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> . . . .
>
> Prospective wife . . . hereby releases and relinquishes unto Prospective Husband, his heirs [and] executors . . . all . . . rights . . . to any and all property or interest in property, real, personal, and mixed, now owned or hereafter acquired by Prospective Husband, and . . . further does hereby release, relinquish, and renounce any and all right to administer upon his estate.

Defendant contends that this case is analogous to by *Brown v. Ginn*, 181 N.C. App. 563, 640 S.E.2d 787, *disc. review denied*, 361 N.C. 350, 645 S.E.2d 766 (2007), which he contends interpreted a prenuptial agreement with "similar language" to bar a surviving spouse from receiving proceeds derived from the separate assets of her deceased husband which he had specifically devised to his children. We disagree.

"The principles of construction applicable to contracts also apply to premarital agreements. Contracts are interpreted according to the intent of the parties. The intent of the parties is determined by examining the plain language of the contract." *Brown*, 181 N.C. App. at 566-67, 640 S.E.2d at 789-90 (citations, quotation marks and brackets omitted). "A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court. If the agreement is ambiguous, however, interpretation of the contract is a matter for the jury." *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 421-22, 547 S.E.2d 850, 852 (2001) (citations and quotation marks omitted).

The prenuptial agreement *sub judice* is plain and unambiguous, therefore subject to judicial interpretation. The dispositive question is whether the prenuptial agreement intentionally waived plaintiff's statutory rights to sue for reimbursement of payments pursuant to a guaranty agreement on a separate obligation of the deceased which was incurred after entry into the prenuptial agreement.

"Waiver is an *intentional* relinquishment or abandonment of a known right or privilege. Almost any right may be waived, so long as the waiver is not illegal or contrary to public policy." *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 10, 558 S.E.2d 199, 206 (2001) (citations and quotation marks omitted and emphasis added), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002).

None of the language in the prenuptial agreement *sub judice* evidences an intention on the part of plaintiff to relinquish her statutory right to sue for reimbursement of payments made as surety for a debt of the deceased, particularly one which was incurred after entry into the agreement. The case *sub judice* is distinguishable from *Brown*, where this Court held that proceeds derived from separate property of the defendant's late husband were properly awarded to his estate when the defendant surviving spouse had specifically disclaimed her rights to any proceeds derived from her late husband's separate property. 181 N.C. App. at 567, 640 S.E.2d at 790. Accordingly, this argument is overruled.

V. Conclusion

Plaintiff's payments pursuant to a guaranty agreement on a note executed by her late husband vested her with a statutory right to seek reimbursement from her late husband's estate. Furthermore, plaintiff did not waive this right in the prenuptial agreement

she entered into with her late husband. Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Judges CALABRIA and ELMORE concur.

DEBORAH MAE TABOR, PLAINTIFF-APPELLANT v. ADAM WOLFGANG KAUFMAN, JASON THIBODEAUX, AND ANNA CLARE MONLEZUN THIBODEAUX, DEFENDANTS-APPELLEES

No. COA08-1249

(Filed 5 May 2009)

1. **Appeal and Error— Rules violations—gross and substantial—double costs as sanction**

   Plaintiff's attorney was ordered to pay double costs as sanctions for non-jurisdictional violations of the Rules of Appellate Procedure that were gross and substantial.

2. **Motor Vehicles— chain reaction collision—intervening negligence—foreseeability—issue of fact**

   Summary judgment was erroneously granted for defendant in an automobile accident case arising from a chain reaction collision where defendant stopped suddenly in front of plaintiff and turned left without a signal, plaintiff and the next car were able to stop but the third car struck the second, which was driven into plaintiff's car, causing plaintiff's injury. There was an issue of fact as to whether the collision caused by the negligence of the third driver (Thibodeaux) was a foreseeable result of defendant's negligent actions.

Appeal by Plaintiff from order entered 11 July 2008 by Judge Ronald K. Payne in Superior Court, Watauga County. Heard in the Court of Appeals 24 March 2009.

The Law Offices of Cameron M. Ferguson, P.A., by Richard T. Dail, for Plaintiff-Appellant.

Bennett & Guthrie, P.L.L.C., by Rodney A. Guthrie and Roberta B. King, for Defendant-Appellee.

McGEE, Judge.

Deborah Mae Tabor (Plaintiff) filed a complaint against Adam Wolfgang Kaufman, Jason Thibodeaux, and Anna Clare Monlezun Thibodeaux for negligence on 9 March 2007. In her complaint, Plaintiff alleged the following facts. Plaintiff was traveling in the northbound lane of Jefferson Highway near Boone at approximately 5:10 p.m. on 18 September 2004. Adam Wolfgang Kaufman (Defendant) was traveling directly in front of Plaintiff when Defendant came to a sudden stop and turned left without using his turn signal. Plaintiff and the driver of a vehicle traveling directly behind her (vehicle two) slammed on their brakes and were able to come to a complete stop on the highway. A third vehicle traveling directly behind vehicle two and driven by Jason Thibodeaux (Thibodeaux) was unable to stop. Thibodeaux's vehicle collided with the rear of vehicle two. This caused vehicle two to collide with Plaintiff's vehicle, causing injury to Plaintiff.

Plaintiff, Thibodeaux, and Anna Clare Monlezun Thibodeaux executed a settlement agreement and release of all claims resulting from the collision on 4 December 2007. Plaintiff dismissed her claims against Thibodeaux and Anna Clare Monlezun Thibodeaux on 31 December 2007 and they are not parties to this appeal.

Defendant filed a motion to dismiss Plaintiff's claims against him on 30 August 2007. A hearing on Defendant's motion to dismiss was held on 29 May 2008. At the hearing, the trial court suggested that Defendant convert his motion to dismiss into a motion for summary judgment. The trial court granted summary judgment in favor of Defendant on 11 July 2008. Plaintiff appeals.

I. Defendant's Motion to Dismiss Plaintiff's Appeal

[1] Defendant filed a motion to dismiss Plaintiff's appeal on 11 February 2009. Defendant argues Plaintiff's appeal should be dismissed because Plaintiff grossly violated the North Carolina Rules of Appellate Procedure.

Plaintiff's brief violates the North Carolina Rules of Appellate Procedure by: (1) failure to include a statement of the grounds for appellate review as required by N.C.R. App. P. 28(b)(4); (2) failure to include a concise procedural history of the case as required by N.C.R. App. P. 28(b)(3); (3) failure to reference pages of the transcript or record on appeal in connection with factual assertions as required by N.C.R. App. P. 28(b)(5); (4) failure to submit the assignment of error

in short form, without argument, and failure to state plainly, concisely, and without argumentation, the legal basis upon which error is assigned as required by N.C.R. App. P. 10(c)(1); (5) failure to reference assignment of error and the record page numbers on which the assignment of error appears as required by N.C.R. App. P. 28(b)(6); (6) failure to number the pages of Plaintiff's brief in violation of N.C.R. App. P. 26(g)(1) and Appendix B; (7) failure to include a cover page for Plaintiff's brief as required by N.C.R. App. P. 28(b)(1); and (8) failure to include the email address of the person signing Plaintiff's brief in violation of N.C.R. App. P. 26(g)(1) and Appendix B.

" 'Compliance with the rules [of Appellate Procedure] . . . is mandatory.' " *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 369, 663 S.E.2d 450, 452 (2008) (quoting *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 362 (2008)). Plaintiff's numerous violations are non-jurisdictional in nature. Therefore, pursuant to *Dogwood*, we must

> first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If [we] so [conclude], [we] should then determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if [we] [conclude] that dismissal is the appropriate sanction, [we] may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

Dogwood, 362 N.C. at 201, 657 S.E.2d at 367.

In evaluating whether appellate rules violations are "substantial" or "gross" we may consider "whether and to what extent the noncompliance impairs [our] task of review and whether and to what extent review on the merits would frustrate the adversarial process." *Id.* at 200, 657 S.E.2d at 366-67. Our Supreme Court expressed a "systemic preference" for sanctions other than dismissal even when nonjurisdictional violations are "substantial" or "gross." *Id.* at 200, 657 S.E.2d at 366. "[O]nly in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate." *Id.*

Due to the number and nature of Plaintiff's rules violations, we consider Plaintiff's violations "gross" and "substantial" and order Plaintiff's attorney to pay double costs of this appeal pursuant to N.C.R. App. P. 34(b). *See Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 369, 663 S.E.2d 450, 452 (2008).

II. Merits of Plaintiff's Appeal

[2] Plaintiff argues the trial court erred in granting Defendant's motion for summary judgment because there remained genuine issues of material fact as to whether Thibodeaux's negligence intervened and superceded Defendant's alleged negligence.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). We review an order granting summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)).

"In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party." *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 370, 663 S.E.2d 450, 452 (2008) (citing *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)). A motion for summary judgment should be denied if there is any evidence of a genuine issue of material fact. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). The moving party bears the burden of showing that no triable issue of fact exists. *Gregory v. Floyd*, 112 N.C. App. 470, 473, 435 S.E.2d 808, 810 (1993).

Defendant argues that even if he was negligent, his negligence was not the proximate cause of Plaintiff's injuries because Thibodeaux's negligence intervened and superseded Defendant's alleged negligence as a matter of law. "The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Adams v. Mills*, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984) (citations omitted). "[T]he question of whether the intervening negligence of another tort-feasor will operate to insulate the negligence of the original tort-feasor is ordinarily a question for the jury." *State v. Tioran*, 65 N.C. App. 122, 125, 308 S.E.2d 659, 662 (1983) (citing *Bryant v. Woodlief*, 252 N.C. 488, 491-92, 114 S.E.2d 241, 244 (1960)). Because "[p]roximate cause is an inference of fact . . . [i]t is only when the facts are all admitted and *only one inference may be drawn from them that the court will declare whether an act was the prox-*

imate cause of an injury or not." *Hester v. Miller*, 41 N.C. App. 509, 513, 255 S.E.2d 318, 321, *disc. review denied*, 298 N.C. 296, 259 S.E.2d 913 (1979) (citations omitted) (emphasis in original).

In *Hester*, the defendant abruptly slowed down and turned off the road without using a turn signal. *Id.* at 510, 255 S.E.2d at 320. The plaintiff, who was following behind the defendant, had to come to a complete stop in order to avoid a collision. *Id.* A third vehicle traveling directly behind the plaintiff was unable to stop and crashed into the rear of the plaintiff's vehicle. *Id.* Our Court held that it was error for the trial court to grant the defendant's motion for summary judgment because there was an issue of material fact as to whether the alleged negligence of the defendant was insulated by the negligence of the third vehicle. *Id.* at 514, 255 S.E.2d at 321.

In *Hillman v. United States Liability Ins. Co.*, our Court also addressed the issue of intervening negligence. *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 296 S.E.2d 302 (1982), *disc. review denied*, 307 N.C. 468, 299 S.E.2d 221 (1983). In *Hillman*, the defendant braked suddenly while driving on the highway. *Id.* at 151, 296 S.E.2d at 307. The plaintiff, traveling behind the defendant, was unable to stop and slid into the defendant. *Id.* The operator of a third vehicle traveling behind the plaintiff came to a complete stop. *Id.* However, the operator of a fourth vehicle was not able to stop and collided with the third vehicle, pushing the third vehicle into the rear of the plaintiff's vehicle. *Id.* at 151-2, 296 S.E.2d at 307. Our Court held that

> [i]n terms of proximate causation it is not unforeseeable that one or more, if not all, of the following cars will not be able to stop in time to avoid a "chain reaction" collision. The probable consequences reasonably to be anticipated from suddenly stopping on a highway are exactly those outlined here, a line of cars undergoing a series of impacts in an unbroken sequence.

Id. at 152, 296 S.E.2d at 307 (citing *Lewis v. Fowler*, 22 N.C. App. 199, 206 S.E.2d 329, *cert. denied*, 285 N.C. 660, 207 S.E.2d 754 (1974)).

The facts alleged in the present case are almost identical to *Hester* and *Hillman*. Defendant was traveling on the highway in front of Plaintiff when Defendant came to a sudden stop and turned left without using his turn signal. As a result, Plaintiff and the driver of a vehicle behind her (vehicle two) slammed on their brakes and were able to come to a complete stop on the highway. However, a third

vehicle driven by Thibodeaux was unable to stop and collided with the rear of vehicle two, causing vehicle two to collide with Plaintiff's vehicle. Pursuant to *Hester* and *Hillman*, and viewing the allegations in the light most favorable to Plaintiff, there remains a genuine issue of material fact as to whether the collision caused by Thibodeaux's negligence was a foreseeable result of Defendant's negligent actions. Therefore, the order entering summary judgment in favor of Defendant was erroneously granted.

Reversed and remanded.

Judges GEER and BEASLEY concur.

STATE OF NORTH CAROLINA v. CHARLES EVERETTE HINTON, DEFENDANT

No. COA08-758

(Filed 5 May 2009)

Sentencing— prior record level—out-of-state convictions—stipulation

The trial court did not err in a felony larceny after breaking and entering and possession of stolen goods case by assigning two points to each of defendant's three New York convictions even though defendant contends the State failed to carry its burden of demonstrating that the out-of-state convictions were substantially similar to North Carolina offenses because: (1) defendant did not raise an objection to the existence of any of the convictions raised on the prior record level worksheet, but instead only objected to the assignment of points to his prior convictions in New York; (2) the State satisfied its burden of showing the existence of defendant's prior convictions by stipulation of the parties; and (3) the Court of Appeals would have affirmed defendant's sentence even if it were to reach his underlying contention that the State failed to show that his three out-of-state convictions for attempted burglary and imprisonment/rape were substantially similar to their respective North Carolina offenses since the prosecution only classified the convictions at the default Class I level, and thus, the State was not required to show they were substantially similar.

Appeal by defendant from judgment entered 4 February 2008 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Court of Appeals 23 February 2009.

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

Lisa Skinner Lefler, for defendant-appellant.

WYNN, Judge.

A sentencing worksheet coupled with statements by counsel may constitute a stipulation to the existence of the prior convictions listed therein.[1] In this case, Defendant argues that the trial court's calculation of his prior record level was not supported by sufficient evidence to show that his out-of-state convictions were "substantially similar" to North Carolina offenses. Because Defendant's assertions at trial and failure to object to the sentencing worksheet constituted a stipulation to the existence of his prior convictions, we affirm his sentence.

On 4 February 2008, Defendant Charles E. Hinton pled guilty to felony larceny after breaking and entering and possession of stolen goods. The trial court sentenced him to twelve to fifteen months' imprisonment. His sentence was based in part on the determination that he had a prior record level of V, supported by sixteen prior record points.

On appeal, Defendant argues the trial court erred in assigning two points to each of his three New York convictions because the State failed to carry its burden of demonstrating that the out-of-state convictions were "substantially similar" to North Carolina offenses. Thus, he contends that he should have been sentenced under prior record level IV rather than V. We disagree.

A defendant's prior record level is determined under N.C. Gen. Stat. § 15A-1340.14(a) (2007) by calculating the sum of the points assigned to each prior conviction. Defendants with at least nine but not more than fourteen points receive a level IV classification, while defendants with at least fifteen but not more than eighteen points receive a level V classification. N.C. Gen. Stat. § 15A-1340.14(c)(4)-(5). Here, Defendant's sentencing worksheet shows that, based on his prior convictions, he was assigned sixteen prior record points, resulting in a level V classification.

1. *See State v. Morgan*, 164 N.C. App. 298, 307, 595 S.E.2d 804, 811 (2004); *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000).

Section 15A-1340.14(f) of the North Carolina General Statutes provides that a defendant's prior convictions may be proved by stipulation of the parties, a record of prior convictions, or by any other method the court finds to be reliable. "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). While a sentencing worksheet alone is insufficient to satisfy this burden, a sentencing worksheet coupled with statements by counsel may constitute a stipulation by the parties to the prior convictions listed therein. *Hanton*, 140 N.C. App. at 690, 540 S.E.2d at 383 (concluding that defense counsel's negative response to the court's request for objections to other convictions appearing on the worksheet "might reasonably be construed as an admission by defendant that he had been convicted of the other charges").

The facts of this case are similar to those of *State v. Morgan*, 164 N.C. App. at 307, 595 S.E.2d at 811, in which this Court concluded that statements by defense counsel "constituted a stipulation to the existence of the prior convictions" despite the parties' disagreement over the number of points to be assigned to defendant's prior homicide conviction. In *Morgan*, the following exchange took place:

> THE COURT: What are the prior record points of this defendant?
>
> [THE PROSECUTOR]: We have a number of convictions on here. . . . There was a homicide in the third degree in New Jersey, that was 6/15/1987. . . . I also have, as best I can find out, the definition of homicide in New Jersey. I did not find the definition calling this third degree homicide. What I do have on the definition of homicide, manslaughter. It appears that New Jersey makes a distinction between homicide as an intentional act and manslaughter as an unintentional act. I have, therefore, and would contend that the homicide in the third degree cannot be any less than voluntary manslaughter, pursuant to North Carolina law. I don't think it's any more than that, but it certainly can't be any less than that and, as such, it's a Class F point value, assessed as Class F point value. That would give her a total of nine points.
>
> THE COURT: Mr. Davis?
>
> [THE PROSECUTOR]: Your Honor, if I can approach and hand that up to the court.

> [DEFENSE COUNSEL]: Your Honor, I have gone over this with my client. We would contend that was an unintentional homicide. My client described that to me and, again, we don't have the equivalency here. We would contend it's unintentional. It would make it, perhaps, a lesser charge in terms of points that we assign.
>
> THE COURT: So that you're contending that [Defendant] is a level three?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Rather than a level four?
>
> [DEFENSE COUNSEL]: Yes.
>
> [THE PROSECUTOR]: I have handed to the court—you may want to mark it for identification purposes, but I have handed to the court, as best I can find, the definition from New Jersey law from that period of time and, like I said, I've looked at it. I cannot find anything they call homicide in the third degree, but if you look through those definitions, homicide is a voluntary act and, if you go on through those definitions, they've got manslaughter defined as a reckless—so, again, I would contend anything defined in New Jersey as a homicide would be an intentional act and couldn't be any less than voluntary manslaughter. That's my argument. I would also—
>
> THE COURT: Let counsel approach the bench, please.

Morgan, 164 N.C. App. at 306-07, 595 S.E.2d at 810-11.

In *Morgan*, this Court concluded that "[d]efense counsel conceded the existence of the convictions [listed on the worksheet submitted by the State] by arguing that Defendant should be sentenced at a level III on the basis of her prior record." *Id.* at 307, 595 S.E.2d at 811. Further, this Court noted that defense counsel's only objection to the worksheet was to the number of points assigned to the homicide conviction, and that, on appeal, the defendant did not contend that any of the convictions listed therein did not, in fact, exist. *Id.* at 307, 595 S.E.2d at 811 (citing *State v. Eubanks*, 151 N.C. App. 499, 506, 565 S.E.2d 738, 743 (2002) (concluding that defense counsel's statements may "reasonably be construed as a stipulation" to the prior convictions listed on his worksheet, and noting that defendant did not argue on appeal that any of the prior convictions did not actually exist)).

Similarly, the following exchange occurred in this case:

> THE COURT: Well I thought I heard that he stipulated he read [sic] sixteen (16) points and he was—
>
> [DEFENDANT]: Yeah—but—
>
> THE COURT: —a prior record level five (5), did I not hear that?
>
> [DEFENDANT]: Well I understand that but—
>
> THE COURT: Isn't that what you had said Mister Blanton [attorney for Defendant] on his behalf?
>
> MR. BLANTON: That is correct, Your Honor.
>
> . . .
>
> THE COURT: You can't have it both ways. Either you're acknowledging that you have sixteen (16) points which gives you a prior record level five (5) or you don't. Now which is it? Do you or don't you?
>
> [DEFENDANT]: Okay. I acknowledge that the State has sixteen (16) points, yes—
>
> THE COURT: That you—
>
> [DEFENDANT]: —on the worksheet.
>
> THE COURT: —have sixteen (16) points.
>
> [DEFENDANT]: Well—yes, on the worksheet, yes.
>
> THE COURT: Okay. And do you acknowledge that's accurate?
>
> [DEFENDANT]: Yes, I acknowledge that's accurate on the worksheet, Your Honor.

Additionally, here, as in Morgan, Defendant did not raise an objection to the existence of any of the convictions listed on the prior record level worksheet. Rather, Defendant only objected to the assignment of points to his prior convictions in New York. Accordingly, we hold that the State satisfied its burden of showing the existence of Defendant's prior convictions by stipulation of the parties.

Our holding that Defendant stipulated to the existence of his prior convictions disposes his sole issue on appeal, challenging the integrity of the trial court's calculation of his prior record level. Nonetheless, we observe that we would affirm Defendant's sentence even if we were to reach his underlying contention that the State

failed to show that his three out-of-state convictions for attempted burglary and imprisonment/rape were "substantially similar" to their respective North Carolina offenses.

Section 15A-1340.14(e) states, "[e]xcept as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony . . . ." However,

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e).

According to the statute, the default classification for out-of-state felony convictions is "Class I." Where the State seeks to assign an out-of-state conviction a *more serious* classification than the default Class I status, it is required to prove "by the preponderance of the evidence" that the conviction at issue is "substantially similar" to a corresponding North Carolina felony. *Id.* However, where the State classifies an out-of-state conviction as a Class I felony, no such demonstration is required. "Unless the State proves by a preponderance of the evidence that the out-of-state felony convictions are substantially similar to North Carolina offenses that are classified as Class I felonies or higher, the trial court must classify the out-of-state convictions as *Class I felonies* for sentencing purposes." *Hanton*, 140 N.C. App. at 690-91, 540 S.E.2d at 383 (emphasis added).

Here, the three out-of-state convictions at issue were classified by the State on the prior record level worksheet as Class I convictions. Thus, the State was not required to show that the New York offenses were "substantially similar" to North Carolina offenses because the prosecution only classified the convictions at the default level, Class I. *Morgan*, 164 N.C. App. at 308-09, 595 S.E.2d at 812 (citation omitted).

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. MARSTON BAPTIST CHURCH, INC., DEFENDANT

No. COA08-856

(Filed 5 May 2009)

1. Eminent Domain— taking of church building—replacement cost

The trial court did not err in an eminent domain case involving a church building by allowing testimony about the cost of a replacement church. N.C.G.S. § 136-112 speaks to the exclusive measure of damages to be used by commissioners, jury, or judge, and does not apply to real estate appraisers. Both parties presented evidence of the replacement cost, and that testimony was proper and directly relevant to the determination of the property's fair market value immediately before and after the taking.

2. Eminent Domain— instructions—isolated reference to peculiar value

Taking the court's instruction in an eminent domain case in its entirety, an isolated statement about the "value peculiar to the church" was not misleading and did not warrant invalidation of the award in light of the repeated use of the proper calculation of damages.

Appeal by plaintiff from judgment entered 6 February 2008 by Judge Michael E. Beale in Superior Court, Richmond County. Heard in the Court of Appeals 23 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for plaintiff-appellant.

Cranfill, Sumner, & Hartzog, LLP, by George B. Autry, Jr., Stephanie Hutchins Autry, and Brady W. Wells, for defendant-appellee.

WYNN, Judge.

In this appeal from a $540,000 just compensation award for the eminent domain taking of a church building, the North Carolina Department of Transportation contends that the trial court erred by considering evidence of the estimated cost of a new church. Because expert real estate appraisers are not restricted to any particular

method of determining the fair market value of property,[1] we affirm the trial court's decision to allow testimony on the cost of a replacement church building.

This matter concerns property owned by Marston Baptist Church Inc. in the Township of Beaver Dam, Richmond County, North Carolina. In September 2005, the Department of Transportation brought an action to obtain a portion of the land owned by Marston Baptist Church as part of a plan to widen and improve U.S. Highway 1. The plan required the removal of the church's sanctuary, located in the area designated for the right of way. To prevent the interruption of church services, Marston Baptist Church began constructing a new church on the same parcel of land (but not in the area to be taken) before the removal of the existing structure.

At trial, the parties agreed that the Department of Transportation must provide just compensation for the taking of the property but disagreed as to the appropriate amount of compensation. After hearing the evidence, a jury awarded Marston Baptist Church $540,000 in total just compensation. From that award, the Department of Transportation appeals, arguing that the trial court erred by (I) admitting evidence of the cost of reproduction for a new church and (II) making statements to the jury inconsistent with the formula for calculating damages set out in N.C. Gen. Stat. § 136-112 (2007).

I.

[1] The Department of Transportation first argues that it is entitled to a new trial because the trial court erred by allowing testimony on the cost of a replacement church, which was irrelevant to the fair market value of the property and did not assist the jury in its calculation of damages. We disagree.

To be granted a new trial based on improperly admitted evidence, an appellant must establish that "the evidence was inadmissible in law because it was incompetent, immaterial, or irrelevant" and prejudicial to the appellant. *Vandervoort v. McKenzie*, 117 N.C. App. 152, 163, 450 S.E.2d 491, 497 (1994) (citation omitted). Here, both parties presented evidence of the cost of reproduction of a new church building.

Marston Baptist Church offered the testimony of Jacob Kanoy, Brian Clodfelter, and Claude Smith. Mr. Kanoy, an architect and real

1. *Board of Transportation v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979).

estate broker retained to design the replacement church building, testified that any replacement building would not be exactly the same as existing structure due to new building requirements. However, he estimated that the cost of a replacement building was between $486,000 and $583,000. The variation in cost would depend largely on grading, paving, utility extensions, and various additional fixtures. Mr. Clodfelter appeared as an expert witness in residential and commercial construction, opining that it would cost approximately $542,212 to build a replacement 4500 square foot church. Mr. Smith, qualified as an expert in real estate development and construction costs, estimated the fair market value of the entire tract before the taking, including depreciation, was $600,000, and the fair market value of the property immediately after the taking was $30,000—a difference of $570,000.

The Department of Transportation offered the testimony of two real estate appraisers, Elizabeth Hamuka and Michael Avent, who testified to the reproduction cost of the church using the cost approach method. Both relied on Marshall & Swift, a national cost service, to determine the fair market value of the land immediately before and after the taking based on the reproduction cost of the church and site improvements less depreciation. They determined the difference between the fair market value of the property before and after the taking to be $172,300 and $221,150 respectively.

N.C. Gen. Stat. § 136-112 states that a jury shall apply the following measure of damages: "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." In *Board of Transportation v. Jones*, our Supreme Court noted that section 136-112 "speaks only to the exclusive measure of damages to be employed by the 'commissioners, jury or judge' " and does not apply to real estate appraisers. *Jones*, 297 N.C. at 438, 255 S.E.2d at 187; *see also Power Co. v. Ham House, Inc.*, 43 N.C. App. 308, 312, 258 S.E.2d 815, 819 (1979) (noting that expert real estate appraisers "should be given latitude in determining the value of property"). Thus, the Court held that expert real estate appraisers are not restricted to any particular method of determining the fair market value of property, either before or after condemnation. *Id.* at 438, 255 S.E.2d at 187.

Additionally, in *Redevelopment Comm. v. Panel Co.*, 273 N.C. 368, 370, 159 S.E.2d 861, 863 (1968), our Supreme Court outlined "the

three standard approaches" for determining the fair market value of real property in takings cases: the cost approach, the income approach, and the market comparison approach. The Court explicitly stated, "[T]he cost approach involves a determination of the fair market value of the (vacant) land, the cost of reproduction of the buildings or replacement thereof by new buildings of modern design and materials less depreciation[.]" *Id.* at 370-71, 159 S.E.2d at 863.

In light of our existing statutory and case law, we hold that the trial court properly allowed testimony on the cost of reproduction for a replacement church building. Indeed, both parties presented such evidence in this case. In our view, such testimony was proper and directly relevant to the determination of the property's fair market value immediately before and after the taking. Accordingly, we reject this assignment of error.

II.

[2] The Department of Transportation next argues that the trial court's statements to the jury were inconsistent with the formula for calculating damages set out in N.C. Gen. Stat. § 136-112. The Department of Transportation further contends that the statements were misleading, causing the jury to rely on factors other than the fair market value of the property immediately before and after the taking in awarding damages. We disagree.

We review a jury charge by considering it contextually and in its entirety. A jury instruction is sufficient "if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (internal quotation marks and citation omitted). Further, " '[t]he appealing party must show not only that error occurred in the jury instructions but also that such error was likely, *in light of the entire charge*, to mislead the jury.' " *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 525, 613 S.E.2d 274, 279 (2005) (quoting *Estate of Hendrickson v. Genesis Health Venture, Inc.*, 151 N.C. App. 139, 151, 565 S.E.2d 254, 262 (2002)) (emphasis added).

Here, the trial court's instructions to the jury included the following statement:

> Consideration may be given not only to the value peculiar to the church, but also to the cost to cure, to wit, the replacement cost

> of the church minus any depreciation, deterioration or other relevant facts you find from the evidence in determining the fair market value of the property and what amount of just compensation to award.

The Department of Transportation argues that this statement misled the jury to base its verdict on the "peculiar" value of the property rather than the difference between the fair market value of the property immediately before and after the taking. Although the language "the value peculiar to the church" would likely be problematic in isolation, we find the jury instructions, when viewed contextually and in their entirety, to be without error.

Here, the trial court instructed the jury on the correct statutory calculation for damages under N.C. Gen. Stat. § 136-112. At three different points during the instruction, the trial court stated to the jury that "[t]he measure of just compensation, where part of a tract is taken, is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remainder of the tract immediately after the taking." Further, the trial court also instructed the jury that it was not required to accept the amount of damages presented by any of the experts or parties involved. Taken in its entirety and in light of the trial court's repeated use of the proper calculation of damages throughout its instructions, we hold that the isolated statement of "value peculiar to the church" was likely not misleading, and does not warrant this Court's invalidation of the jury award to Marston Baptist Church.

No error.

Chief Judge MARTIN and Judge ERVIN concur.

CITY OF DURHAM, PLAINTIFF-APPELLEE v. SAFETY NATIONAL CASUALTY CORPORATION AND UNITED STATES FIRE INSURANCE COMPANY, DEFENDANTS-APPELLANTS

No. COA08-1149

(Filed 5 May 2009)

Workers' Compensation— excess loss coverage—date of disability

The trial court did not err by granting summary judgment for plaintiff in a declaratory judgment action to determine which of two insurance carriers was liable for excess loss coverage on a workers' compensation claim by a police officer suffering from occupational stress. Although the officer had taken an earlier leave of absence, the plain terms of defendant's policy allow the date of the occurrence of the occupational disease to be established by the Workers' Compensation Laws, and the Commission ordered plaintiff to pay disability benefits beginning on a date within the period of this defendant's policy. Moreover, even if the Commission's award established the date of disability as beginning with the leave of absence, when defendant's policy was not in effect, the trial court correctly applied the doctrine of last injurious exposure in finding defendant liable because the officer returned to work and continued to be exposed to the hazards of her occupational disease.

Appeal by Safety National Casualty Corporation (Defendant) from judgments entered 11 February 2008 and 7 July 2008 by Judge A. Leon Stanback, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 8 April 2009.

Kennon, Craver, Belo, Craig & McKee, PLLC, by Joel M. Craig and Henry W. Sappenfield, for Plaintiff-Appellee.

Robinson & Lawing, L.L.P., by Jane C. Jackson and W. Mark Peck, for Defendant-Appellant.

McGEE, Judge.

The City of Durham (Plaintiff) filed an action for declaratory judgment and monetary relief against Defendant and United States Fire Insurance Company (USFIC) on 20 October 2006. The purpose of the action was to determine which of Defendant's insurance carriers was liable to Plaintiff for excess loss coverage on a workers' com-

pensation claim made by Margie Pulley (Pulley), a former police officer with the City of Durham.

Defendant and USFIC filed cross-motions for summary judgment in November 2007. In an order entered 11 February 2008, the trial court granted USFIC's motion for summary judgment. It further denied Defendant's summary judgment motion and granted Plaintiff summary judgment against Defendant on the issue of liability under its policy for excess loss coverage. Plaintiff filed a motion for summary judgment seeking entry of a money judgment against Defendant on 6 May 2008. In an order entered 7 July 2008, the trial court granted Plaintiff's motion for summary judgment. Defendant appeals.

The relevant facts underlying Pulley's workers' compensation claim are as follows: Pulley began working for Plaintiff in November 1975. At that time, Pulley was the only female public safety officer employed by Plaintiff. While working in the Youth Division from 1980 to 1984, Pulley was repeatedly exposed to traumatic situations, particularly crimes involving child sexual abuse. Pulley began mental health treatment in July 1984 for psychological difficulties she was experiencing as a result of her employment. Pulley took a three-month medical leave of absence from work as recommended by her psychologist in August 1984. Pulley was transferred to the Records Division in 1986 and was promoted to acting lieutenant for a brief period in 1987. Pulley transferred to the Warrants Division in 1987 and to the Traffic Division in 1988. Pulley took another medical leave of absence in April 1989. When Pulley's medical leave expired, she was not able to return to work. Pulley's application for disability retirement was approved in October 1989. Plaintiff filed an employer's report of injury with the North Carolina Industrial Commission (the Commission) on 13 April 1989. The Commission entered an opinion and award granting Pulley temporary total disability compensation benefits beginning 30 April 1989.

Defendant argues the trial court erred in failing to grant summary judgment to Defendant. Defendant contends the trial court misapplied the circumstances of Pulley's underlying workers' compensation claim to the express terms of Defendant's insurance policy and incorrectly applied the doctrine of last injurious exposure.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a mat-

ter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). We review an order allowing summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)).

Plaintiff had excess workers' compensation insurance from 1 August 1986 through 1 September 1993 through a policy issued by Defendant. Defendant's policy provided coverage for loss incurred by Plaintiff above a specified retention level, if the loss resulted from an "occurrence." Defendant's policy defined "occurrence" as: "Occupational disease sustained by each Employee shall be deemed to . . . tak[e] place upon the date the Employee ceases work as a result of such disease or upon the date established by the Workers' Compensation or Employers' Liability Laws of the appropriate jurisdiction."

Defendant argues the word "ceases" should be interpreted to include a temporary suspension from employment. Plaintiff argues "ceases" should be interpreted only to a permanent termination of employment. However, we need not choose between the two interpretations of "ceases" because the plain terms of the policy include "the date established by the Workers' Compensation . . . Laws" as an alternative method for determining the date of the occurrence of Pulley's occupational disease.

The Commission's opinion and award ordered Plaintiff to pay weekly temporary total disability benefits to Pulley beginning 30 April 1989. This date, established by the Commission under North Carolina's Workers' Compensation Laws, fell within the period Defendant provided excess insurance coverage to Plaintiff. Therefore, by the plain terms of Defendant's policy, Defendant is liable to Plaintiff.

However, Defendant argues we should consider the reason why the Commission established the date of disability as 30 April 1989. Defendant contends the only reason the Commission did not order benefits to be paid to Pulley for the period between 8 July 1984 and 14 October 1984 was because Plaintiff and Pulley stipulated that Pulley had previously received payment for that time period. Defendant argues that the Commission's decision read as a whole establishes Pulley's date of disability as 8 July 1984, outside the period Defendant provided insurance coverage to Plaintiff.

However, even if the Commission's opinion and award established Pulley's date of disability as 8 July 1984, we hold the trial court correctly applied the doctrine of last injurious exposure (the doctrine) in finding Defendant liable to Plaintiff. The doctrine is defined in N.C. Gen. Stat. § 97-57 as:

> In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

N.C. Gen. Stat. § 97-57 (2007).

Defendant argues the trial court misapplied the doctrine. Defendant contends the doctrine should be applied by determining the date of disability and then looking backward in time to determine liability. However, Defendant cites no North Carolina case law to support its interpretation of the doctrine.

The purpose of the doctrine is "to eliminate the need for complex and expensive litigation of the issue of relative contribution by each of several employments to a plaintiff's occupational disease." *Frady v. Groves Thread*, 56 N.C. App. 61, 64, 286 S.E.2d 844, 846 (1982), *aff'd per curiam*, 312 N.C. 316, 321 S.E.2d 835 (1984). Our Court held in *Caulder v. Waverly Mills* that a "plaintiff need only show (1) that he has a compensable occupational disease and (2) that he was last injuriously exposed to the hazards of such disease while in [the] defendant's employment." *Caulder v. Waverly Mills*, 67 N.C. App. 739, 741, 314 S.E.2d 4, 5 (1984), *aff'd*, 314 N.C. 70, 331 S.E.2d 646 (1985). Our Supreme Court interpreted the phrase "last injuriously exposed" to mean " 'an exposure which proximately augmented the disease to any extent, however slight.' " *Rutledge v. Tultex Corp.*, 308 N.C. 85, 89, 301 S.E.2d 359, 362-63 (1983) (quoting *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 22 S.E.2d 275, 277 (1942)).

In the present case, Pulley's mental health began deteriorating in 1984 due to her employment stress. However, her employment stress did not cause her to be permanently unable to work at that time. Pulley continued working for Plaintiff and continued experiencing work-related stress for five years, until April 1989. Pulley's condition worsened after she transferred out of the Youth Division in 1986. Pulley was "under significant pressure" and had "numerous outbursts" while working in the Records Division in 1986. Pulley was

transferred to the Warrants Division in July 1987. Working in the Warrants Division "caused [Pulley] so much stress that [she] found it increasingly difficult to concentrate." While working in the Traffic Division from May 1988 until April 1989, Pulley became "more frustrated and angry" and "[i]t got to the point where, emotionally, [she] could no longer handle dealing with the public." Pulley stated: "The stress I was under due to my work environment finally got so bad that, in April 1989, I was no longer able to work in any capacity."

Pulley continued to be "exposed to the hazards" of her occupational disease throughout her employment with Plaintiff until April 1989 when she was unable to continue working in any capacity. Therefore, because Defendant provided excess insurance coverage to Plaintiff in April 1989, we find the trial court correctly applied the doctrine in holding Defendant liable to Plaintiff. We affirm the trial court's granting of summary judgment in favor of Plaintiff.

Affirmed.

Judges HUNTER and BEASLEY concur.

NORTH CAROLINA DEPARTMENT OF REVENUE, PETITIONER v. THOMAS W. HUDSON, JR. AND MARY J. HUDSON, RESPONDENTS

No. COA08-945

(Filed 5 May 2009)

Taxation— qualified business income tax credits—amount taxpayer may claim in single taxable year—carryover to subsequent years

Respondent taxpayers were entitled to carry over to 2001 and 2002 amounts of a qualified business income tax credit that had occured in 1999 and had exceeded $50,000 because: (1) when N.C.G.S. § 105-163.012(a) is read in conjunction with the plain language of N.C.G.S. § 105-163.011(b1), the statute provides that the $50,000 limitation imposed by § 105-163.011(b1) applies only to the amount a taxpayer may claim in a single taxable year; and (2) respondents were limited to a credit of $50,000 in the first year, but permitted to carry over the unused amount of the qualified business tax credit allocated to them in 1999 for up to five succeeding years.

Appeal by plaintiff from order entered 25 April 2008 by Judge A. Leon Stanback, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 23 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General Gregory P. Roney, for plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Charles George, and Tobias S. Hampson, for defendant-appellees.

WYNN, Judge.

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning."[1] In this appeal, the North Carolina Department of Revenue argues that N.C. Gen. Stat. § § 105-163.011(b1) and 105-163.012(a) (1999) limit the maximum amount of qualified business income tax credit that an individual may claim based on one years' investment to $50,000. Because the plain language of the statute permits a taxpayer to carry over unused amounts of qualified business income tax credit, accrued in one year and in excess of $50,000, to subsequent years' tax filings, we affirm.

In 1999, Thomas W. Hudson, Jr. was a partner in two pass-through business entities, Raindrop Partners, LLC and Xanthon Partners, LLC. Raindrop Partners, LLC and Xanthon Partners, LLC were granted qualified business income tax credits in the amounts of $528,877.92 and $427,592.40 respectively, for investments made in 1999. Mr. Hudson received a total of $91,061 in tax credits pursuant to N.C. Gen. Stat. § 105-163.011, which allows an individual owner of a pass-through entity to receive a tax credit equal to the owner's allocated share of the business entity's credit. In filing their individual income tax return for the tax year 2000, Mr. and Mrs. Hudson claimed a qualified business income tax credit of $84,207, which was limited to $50,000 on their 2000 individual income tax return. The Hudsons carried over tax credits in the amount of $34,569 in 2001 and $6,478 in 2002.

On 29 September 2005, the Department of Revenue notified the Hudsons that the amounts in excess of $50,000 from their 1999 qualified business income tax credit could not be carried over to 2001 and

1. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted).

2002. The Hudsons contested this decision on 26 October 2005, arguing that N.C. Gen. Stat. § 105-163.012(a) allows unused qualified business income tax credits to be carried forward for up to five succeeding years. On 26 June 2006, the Assistant Secretary for Administrative Tax Hearings of the Department of Revenue issued an opinion upholding the disallowance of the carryover tax credits. On a petition for review, the Tax Review Board reversed the decision of the Assistant Secretary and held that the Hudsons were entitled to the carryover tax credits taken on their 2001 and 2002 tax returns. On 24 April 2008, Department of Revenue appealed to the superior court, which upheld the decision of the Tax Review Board.

On appeal to this Court from the superior court's order, the Department of Revenue argues that the superior court erred in its interpretation of sections 105-163.011(b1) and 105-163.012(a) because section 105-163.011(b1) sets $50,000 as the maximum total amount of qualified business tax credit that an individual taxpayer may claim based on one years' investment. We disagree.

Our review of issues of statutory construction is *de novo*. *See, e.g.*, *American Nat'l Ins. Co. v. Ingram*, 63 N.C. App. 38, 41, 303 S.E.2d 649, 651, *cert. denied*, 309 N.C. 819, 310 S.E.2d 348 (1983).[2] In our review, we must give a statute its plain meaning where the language of the statute is clear; however, where a statute is ambiguous or unclear as to its meaning, we must interpret the statute to give effect to the legislative intent. *See Martin v. N.C. HHS*, —— N.C. App. ——, ——, 670 S.E.2d 629, 632 (2009). Thus, the rules of construction are "relevant . . . only in those instances in which the interpretation of the statute is ambiguous or in doubt." *Realty Corp. v. Coble*, 291 N.C. 608, 612, 231 S.E.2d 656, 659 (1977). Because we find that the statutes at issue are unambiguous, we give effect to the plain meaning of their language.

Section 105-163.011(b1) provides "[t]he aggregate amount of credit *allowed* an individual for one or more investments *in a single taxable year* under this Part, whether directly or indirectly as owner of a pass-through entity, may not exceed fifty thousand dollars

2. While the Hudsons argue that Department of Revenue must show prejudice of a substantial right in order for this Court to affirm the decision of the Assistant Secretary, we disagree. The question before this Court is whether the superior court erred as a matter of law in interpreting sections 105-163.011(b1) and 105-163.012(a). *See Ingram*, 63 N.C. App. at 41, 303 S.E.2d at 651 ("When an appellate court is reviewing the decision of another court . . . the scope of review to be applied by the appellate court . . . is the same as it is for other civil cases. That is, we must determine whether the trial court committed any errors of law.").

($50,000)" (emphasis added). The Department of Revenue argues that section 105-163.011(b1) sets the maximum qualified business income tax credit allowed for all investments made in a single year at $50,000. However, this section does not use language indicating the $50,000 maximum is imposed on investments *made* in a single year. Rather, the statute provides that "[t]he aggregate amount of credit *allowed* an individual for one or more investments *in a single taxable year* . . . may not exceed fifty thousand dollars ($50,000)." § 105-163.011(b1) (emphasis added). When a legislative body " 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.' " *Rodriguez v. United States*, 480 U.S. 522, 525, 94 L. Ed. 2d 533, 537 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 24 (1983)).

Moreover, the absence of words indicating a maximum limit for investments *made* in a single taxable year is significant because the General Assembly does refer to investments "made" in a calendar year elsewhere in the statute. For example, section 105-163.012(b) provides that "[t]he total amount of all tax credits allowed to taxpayers under G.S. 105-163.011 for investments *made* in a calendar year may not exceed six million dollars ($6,000,000)." N.C. Gen. Stat. § 105-163.012(b) (1999) (emphasis added). The plain meaning of § 105-163.011(b1) provides a $50,000 limit on the amount of qualified business income tax credit a taxpayer *may claim* in a single taxable year, rather than a $50,000 maximum on the total qualified business income tax credit allowed a taxpayer.

Further, section 105-163.012(a) provides:

> The credit allowed a taxpayer under G.S. 105-163.011 may not exceed the amount of income tax imposed by Part 2 of this Article for the taxable year reduced by the sum of all other credits allowable except tax payments made by or on behalf of the tax payer. The amount of unused credit allowed under G.S. 105-163.011 may be carried forward for the next five succeeding years. The fifty thousand dollar ($50,000) limitation on the amount of credit allowed a taxpayer under G.S. 105-163.011 does not apply to unused amounts carried forward under this subsection.

Both parties concede that section 105-163.012(a) permits an individual to "roll over" tax credits in surplus of his or her tax liability,

where the surplus has accumulated over a period of years to create a combined amount of total credits in excess of $50,000. However, the parties dispute the meaning of "unused credit." The Department of Revenue argues that section 105-163.012(a) only permits an individual to carry over unused amounts of the $50,000 maximum qualified business income tax credit allowable per year. According to the Department of Revenue, an individual would only be allowed to carry forward any unused portion of the maximum allowable $50,000; credits would be "unused" where the taxpayer's liability was less than the amount of the tax credit (up to $50,000) allowed in a particular tax year. This interpretation of section 105-163.012(a) is premised on the Department of Revenue's incorrect reading of section 105-163.011(b1), discussed *infra*, which interprets the statute as setting a $50,000 maximum on the total qualified business income tax credit allowed a taxpayer per one years' investment.

When section 105-163.012(a) is read in conjunction with the plain language of section 105-163.011(b1), the statute provides that the $50,000 limitation imposed by section 105-163.011(b1) applies only to the amount a taxpayer may claim in a single taxable year. Accordingly, the Hudsons were limited to a credit of $50,000 in the first year, but permitted to carry over the unused amount of the qualified business income tax credit allocated to them in 1999 for up to five succeeding years.

In sum, we uphold the superior court's affirmance of the Tax Review Board's decision that the Hudsons' claims of qualified business income tax credits of $34,569 in 2001 and $6,478 in 2002 were consistent with the plain language of sections 105-163.011(b1) and 105-163.012(a).

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

MARY B. WEBB, PLAINTIFF v. GEORGE TRAVERS WEBB, III, DEFENDANT

No. COA08-1150

(Filed 5 May 2009)

Appeal and Error— appealability—permanent alimony—interlocutory order—claim for attorney fees pending

Defendant's appeal from an order awarding plaintiff permanent alimony is dismissed as an appeal from an interlocutory order because: (1) plaintiff's claim for attorney fees was pending at the time the trial court entered its order for alimony; (2) the order for alimony did not dispose of the case, but left it for further action by the trial court in order to settle and determine the entire controversy; and (3) defendant failed to identify a substantial right that might be lost without immediate appeal, and defendant's rights will be adequately protected by an appeal timely taken from the final judgment.

Appeal by Defendant from judgment entered 22 January 2008 by Judge James K. Roberson in Alamance County District Court. Heard in the Court of Appeals 10 March 2009.

Walker & Bullard, P.A., by James F. Walker and Daniel S. Bullard, for Plaintiff-Appellee.

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

BEASLEY, Judge.

Defendant (George Travers Webb, III) appeals from an order awarding Plaintiff (Mary B. Webb) permanent alimony. We dismiss this appeal as interlocutory.

The parties are residents of Alamance County, North Carolina. They were married in 1982 and separated on 19 October 2002. Three children were born of the marriage; two daughters born in 1985 and 1991, and a son born in 1987. On 24 October 2002 Plaintiff filed a complaint against Defendant seeking child custody and support, post-separation support, permanent alimony, equitable distribution, interim distribution, a temporary injunction, and attorney's fees. Defendant answered in December 2002, seeking equitable distribution and dismissal of Plaintiff's claims for post-separation support

and alimony. In March 2003 the trial court awarded Plaintiff $4000 a month in post-separation support and $2174 a month in child support, and in May 2003 the trial court entered an order approving the parties' parenting agreement. In October 2006 a consent order was entered on equitable distribution.

In May 2006 Defendant filed a motion for reduction of child support. In July 2006 Plaintiff filed a motion seeking to have Defendant held in contempt of court for failing to pay child support or maintain health insurance, and asking for attorney's fees. Defendant filed a motion alleging overpayment of post-separation support and child support. A trial was conducted over sixteen days between 6 November 2006 and 7 February 2007 on alimony, Plaintiff's motion for contempt, and Defendant's motion for modification of child support.

On 22 January 2008 the trial court entered an order concluding that Plaintiff was a dependent spouse and Defendant a supporting spouse, and that Plaintiff was entitled to alimony and to an award of counsel fees. The trial court awarded Plaintiff permanent alimony of $5000 a month and ordered that, if Defendant received bonuses or other compensation from his employer, his alimony payments would be increased. The trial court also found that Plaintiff was "an interested party without sufficient resources to fully defray the cost of this action, including attorney's fees, and is entitled to an award of counsel fees." Regarding the amount of counsel fees, the trial court ordered that:

> [c]ounsel for each party shall submit affidavits regarding the time spent in connection with the prosecution or defense of this matter on or before February 15, 2008. The Court will determine a partial allowance of attorney's fees to be paid by the Defendant to the Plaintiff.

From this order Defendant has appealed.

Interlocutory Appeal

An order "is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2007). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citations omitted). "Although the parties have not raised this issue, 'whether an appeal is interlocutory presents a jurisdictional issue,

[and] this Court has an obligation to address the issue *sua sponte*.' " *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (quoting *Akers v. City of Mt. Airy*, 175 N.C. App. 777, 778, 625 S.E.2d 145, 146 (2006)).

In the instant case, Plaintiff's claim for attorney's fees was pending at the time the trial court entered its order for alimony. The trial court concluded that Plaintiff was entitled to an award of partial attorney's fees and directed the parties to submit affidavits to assist the court in determining the amount of attorney's fees. Thus, the order for alimony did "not dispose of the case, but le[ft] it for further action by the trial court in order to settle and determine the entire controversy." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381 (citations omitted). As such it was interlocutory. *See, e.g.*, *Watts v. Slough*, 163 N.C. App. 69, 592 S.E.2d 274 (2004) (where Plaintiff sought summary judgment and attorney's fees, trial court's order granting partial summary judgment and reserving ruling on Plaintiff's pending claim for attorney's fees was interlocutory); *Evans v. Evans*, 158 N.C. App. 533, 534, 581 S.E.2d 464, 465 (2003) (where "court's order did not resolve the parties' respective claims for equitable distribution and for attorney's fees" or rule on claim for alimony, this Court concludes "the order from which defendant appeals was interlocutory."); *Beau Rivage Plantation v. Melex USA*, 112 N.C. App. 446, 436 S.E.2d 152 (1993). In *Beau Rivage*, the defendant filed a counterclaim and claim for attorney's fees. The trial court entered summary judgment for the defendant and awarded defendant attorney's fees. The order stated that the trial court "reserves ruling on the amount of such fees until supporting affidavits are filed and a further hearing is conducted[.]" *Id.* at 452, 436 S.E.2d at 155. On appeal, this Court held that:

> the threshold and dispositive question is whether the trial court's order of 27 July had the requisite finality to make it subject to immediate appeal. We are of the opinion that it did not. . . . It follows, therefore, that plaintiff could not oust the trial court's jurisdiction to settle and determine the entire controversy by filing its notice of appeal[.]

Id. at 452-53, 436 S.E.2d at 155 (internal quotations omitted). We conclude that, inasmuch as it did not resolve Plaintiff's pending claim for attorney's fees, the trial court's order in this case was interlocutory.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (citations omitted).

> [A]n interlocutory order is immediately appealable only under two circumstances. First, 'if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie.' . . . The other situation in which an immediate appeal may be taken from an interlocutory order is when the challenged order affects a substantial right of the appellant that would be lost without immediate review.

Embler v. Embler, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001) (quoting *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)) (citations omitted). In the instant case, "[s]ince the trial court did not certify its decision, we must decide whether [Defendant] has a substantial right that would be lost absent immediate review." *McCutchen v. McCutchen*, 360 N.C. 280, 282, 624 S.E.2d 620, 623 (2006).

"The appealability of interlocutory orders pursuant to the substantial right exception is determined by a two-step test. '[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.' " *Miller v. Swann Plantation Development Co.*, 101 N.C. App. 394, 395, 399 S.E.2d 137, 138-39 (1991) (quoting *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)). Moreover, "the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citation omitted). This requirement is codified in N.C. R. App. P. 28(b)(4), which states in pertinent part that an appellant's brief must include:

> [a] statement of grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

Defendant does not identify any substantial right that might be lost without immediate appeal, but simply asserts that:

> [t]his appeal lies from a final decision . . . pursuant to N.C. Gen. Stat. § 7A-27(c). *See also*, *In re Harts*, —— N.C. App. ——,

——, 664 S.E.2d 411, 414 (2008) (requiring an appellant as the "only course of action" to preserve appeal from an underlying order immediately divesting trial court of jurisdiction, even if the trial court reserves the issue of the amount of attorney's fees for a later hearing).

Defendant apparently contends that he appeals from a "final decision" notwithstanding the pending claim for attorney's fees. His reliance on *In re Will of Harts*, 191 N.C. App. 807, 664 S.E.2d 411 (2008), in support of this position, is misplaced. In *Harts*, the trial court entered judgment for the propounders in a caveat case, in an order that "did not address the issues of costs and attorney's fees at that time." *Id.* at 808, 664 S.E.2d at 413. The opinion does not suggest that an attorney's fees motion was then pending. The caveator delayed giving notice of appeal until after the trial court ruled on a motion for attorney's fees, which presumably was made post-trial. By then the time had expired for caveator to appeal from the judgment in favor of the propounders. *Harts* held that, following entry of a final judgment, an appellant must file notice of appeal within the time limits of N.C.R. App. P. 3. However, *Harts* did not hold that an interlocutory order, entered before the trial court rules on a pending motion for attorney's fees, is immediately appealable. Nor does *Harts* suggest that a pending motion for attorney's fees does not count in determining whether an order is interlocutory.

" 'Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment.' In keeping with the policy discouraging fragmentary appeals, we conclude that the present interim order does not affect a substantial right and that [Defendant's] rights will be adequately protected by an appeal timely taken from the final . . . judgment." *Hunter v. Hunter*, 126 N.C. App. 705, 708, 486 S.E.2d 244, 245-46 (1997) (quoting *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951)).

Appeal dismissed.

Judges McGEE and GEER concur.

IN RE D.M.B.

[196 N.C. App. 775 2009)]

IN THE MATTER OF: D.M.B.

No. COA08-618

(Filed 5 May 2009)

1. Juveniles— partiality—judge commenting on desire to impose harsher punishment

The trial court did not violate a juvenile's right to a fair and impartial trial on the charge of assault causing serious bodily injury by allegedly making improper comments during disposition that he was confined to imposing a Level I or Level II disposition despite his desire to impose a harsher punishment because: (1) there was no jury and no indication the trial judge was not impartial in his role as factfinder; (2) the judge did not act on his desire to impose a harsher punishment than the law allowed; and (3) there was no prejudice to the juvenile by the court's comments.

2. Appeal and Error— preservation of issues—failure to bring motion to dismiss at close of State's evidence and close of all evidence—failure to allege plain error

Although a juvenile contends the trial court erred by failing to dismiss the charge of assault causing serious bodily injury based on alleged insufficient evidence that the victim suffered a serious bodily injury, this assignment of error is dismissed because this issue was not preserved for review based on: (1) the juvenile's failure to bring a motion to dismiss at the close of the State's evidence and again at the close of all evidence; and (2) the juvenile's assignments of error failed to specifically and distinctly contend that failure to dismiss the charge amounted to plain error, and plain error only applies to jury instructions and evidentiary matters in criminal cases.

3. Juveniles; Probation and Parole— restitution—failure to make appropriate findings of fact

The trial court erred in a juvenile case by failing to make appropriate findings of fact in support of its order that the juvenile pay restitution as a condition of probation, and the case is remanded to the trial court for appropriate further action.

Appeal by juvenile from orders entered 27 November 2007 by Judge Robert A. Evans in Nash County District Court. Heard in the Court of Appeals 10 December 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Larissa S. Williamson, for the State.

Lisa Skinner Lefler, for juvenile-appellant.

JACKSON, Judge.

D.M.B. ("the juvenile") appeals his 27 November 2007 adjudication and disposition for assault causing serious bodily injury. For the reasons stated below, we affirm, but remand with instructions as to the order of restitution.

On 19 October 2007, T.G. ("the victim") was a fifteen-year-old student at Nash Central High School. When he got off the school bus that afternoon, the juvenile—whom he had not seen before as he did not ride his bus and did not go to his school—approached him and asked him about something that was "going on" at school. After telling the juvenile, "I don't know what you're talking about," the victim began walking toward his home. The juvenile then began hitting the victim in the back of the head, causing him to "hit the ground" with blood coming from his mouth. He felt dizzy.

After the juvenile stopped hitting the victim, the victim walked home, rinsed his mouth, and laid down. When his mother returned home from work, she took him to the hospital where he was x-rayed, CT scanned, and prescribed pain medication. Although the victim had broken both jaws and had a facial fracture, he was sent home. The next day, the victim's mother took him to another hospital, where arrangements were made for surgery. Doctors inserted plates on the left and right side of his jaw, under his chin, and in the front, as well as wired his teeth together so that he could eat only through a straw.

A police investigation led to the juvenile's home. Although he was not home when police arrived, his mother agreed to bring him in for questioning in the morning. In his mother's presence, the juvenile was read his rights and admitted that he had hit the victim. A juvenile delinquency petition was filed on 25 October 2007.

On 27 November 2007, the trial court adjudicated the juvenile delinquent and by disposition order filed 7 December 2007, ordered him to pay $1000.00 in restitution for the victim's benefit, serve seventy-two hours of community service, serve twelve months of supervised probation, and not associate with the victim and two witnesses. The juvenile appeals.

[1] The juvenile first argues that the trial court did not fulfill its duty to be fair and impartial because it made improper comments during disposition. We disagree.

"It is fundamental to our system of justice that each and every person charged with a crime be afforded the opportunity to be tried 'before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.' " *State v. Harris*, 308 N.C. 159, 167, 301 S.E.2d 91, 97 (1983) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)). To that end, North Carolina General Statutes, section 15A-1222 prohibits a trial judge from expressing "any opinion in the presence of the jury on any question of fact to be decided by the jury[,]" during any stage of the trial. N.C. Gen. Stat. § 15A-1222 (2007). This Court uses a totality of the circumstances test to evaluate whether a judge's comments "cross into the realm of impermissible opinion." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (citations omitted).

> The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made.

State v. Carter, 233 N.C. 581, 583, 65 S.E.2d 9, 10-11 (1951) (citations omitted).

We note that section 15A-1222 is inapplicable when the judge's comments are not made in the presence of the jury. *State v. Joyce*, 97 N.C. App. 464, 471, 389 S.E.2d 136, 140, *disc. rev. denied*, 326 N.C. 803, 393 S.E.2d 902 (1990) (citing *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986)). Here, there was no jury. There also is no indication that the trial judge was not impartial in his role as finder of fact. He did not act on his desire to impose a harsher punishment than the law allowed. After having adjudicated the juvenile delinquent, the trial judge explained that he was confined to imposing a Level I or Level II disposition, despite his desire to impose a harsher punishment. He then imposed disposition at both Level I and Level II, as permitted by law. We can discern no prejudice to the juvenile by the court's comments. Therefore, this argument is without merit.

[2] The juvenile also argues that the trial court should have dismissed the charge against him because the State failed to present sufficient evidence that the victim suffered a serious bodily injury. This issue has not been preserved for our review.

The juvenile admits that trial counsel failed to bring a motion to dismiss at the close of the State's evidence and again at the close of all the evidence, thereby failing to preserve the issue. However, he contends that this Court should review the matter pursuant to the plain error doctrine. We disagree.

The juvenile is correct that the North Carolina Rules of Appellate Procedure permit a criminal defendant to assign error to an issue not otherwise preserved "where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4) (2007). However, his assignments of error do not "specifically and distinctly" contend that failure to dismiss the charge amounted to plain error.

In addition, plain error "only applies to jury instructions and evidentiary matters in criminal cases. While this is a criminal case, defendant's failure to [move] to dismiss does not trigger a plain error analysis." *State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004) (citations omitted); *see also State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995) (plain error analysis unavailable where the defendant failed to properly preserve the issue of sufficiency of the evidence); *State v. Bartley*, 156 N.C. App. 490, 494, 577 S.E.2d 319, 322 (2003) ("Defendant's attempt to invoke plain error review is inappropriate as this assignment of error concerns the sufficiency of the evidence, not an instructional error or an error concerning the admissibility of evidence.").

[3] Finally, the juvenile argues that the trial court committed reversible error by failing to make appropriate findings of fact in support of its restitution order. We agree that the court erred and remand to the trial court for appropriate further action.

"[A] requirement that a juvenile make restitution as a condition of probation must be supported by the record and appropriate findings of fact which demonstrate that the best interest of the juvenile will be promoted by the enforcement of the condition." *In re Berry*, 33 N.C. App. 356, 360, 235 S.E.2d 278, 280-81 (1977). Here, the State concedes that the trial court failed to make appropriate findings of fact to support its restitution order. Accordingly, we remand for purposes of

making appropriate findings of fact to support an order of restitution. *See In re Z.A.K.*, 189 N.C. App. 354, 362, 657 S.E.2d 894, 899, *disc. rev. denied*, 362 N.C. 682, 671 S.E.2d 532 (2008); *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007); *In re Schrimpsher*, 143 N.C. App. 461, 466, 546 S.E.2d 407, 411 (2001).

No error in part and remanded with instructions in part.

Judges Robert C. HUNTER and ELMORE concur.

STATE OF NORTH CAROLINA v. VANDEL NORMAN

No. COA08-1165

(Filed 5 May 2009)

1. Evidence— hearsay—medical diagnosis or treatment exception

The trial court did not err in a multiple first-degree rape, multiple first-degree sexual offense, and multiple taking indecent liberties with a child case by excluding testimony of a physician's assistant about what the minor child victim's mother said to her during the minor child's first medical examination because: (1) defendant was not attempting to admit statements by the victim through the testimony of her mother under the N.C.G.S. § 8C-1, Rule 803(4) hearsay exception since her mother was not present at trial, but instead was attempting to admit the out-of-court statements of the victim's mother; and (2) assuming *arguendo* that a third party's statements to medical personnel could be admissible under the Rule 803(4) medical diagnosis or treatment hearsay exception, the statements by the victim's mother that the victim never made any disclosures to her about the abuse revealed nothing about the victim's condition but instead tended to show the mother's intent to exculpate herself, defendant failed to establish that the mother made her statements for the purpose of diagnosis or treatment of the victim, and the fact of whether the victim told her mother about the abuse was not relevant to her diagnosis or treatment.

2. Sexual Offenses— first-degree sexual offense—motion to dismiss—sufficiency of evidence—anal penetration

The trial court did not err by denying defendant's motion to dismiss the charges of first-degree sexual offense even though defendant contends the State failed to provide sufficient evidence of anal penetration because the evidence, viewed in the light most favorable to the State, including the victim's testimony and the corroboration testimony of three others, was sufficient.

3. Sexual Offenses— instructions—conditional directed verdicts—possibility of multiple verdicts for single offense

The jury instructions in a prosecution on four counts of first-degree sexual offense did not result in conditional directed verdicts since the instructions could not have led the jury to believe that it could return a verdict of guilty in all four first-degree sexual offense charges if the jury was satisfied of defendant's guilt beyond a reasonable doubt for only one of those offenses.

4. Appeal and Error— preservation of issues—issue already decided in prior cases

Although defendant contends the trial court erred by failing to instruct the jury that it had to be unanimous as to each specific incident of first-degree rape, first-degree sexual offense, and taking indecent liberties with a minor, this assignment of error is dismissed because defendant concedes our Supreme Court has already ruled against this contention.

Appeal by Defendant from judgments entered 4 October 2007 by Judge Clifton W. Everett, Jr. in Superior Court, Chowan County. Heard in the Court of Appeals 24 March 2009.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

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

McGEE, Judge.

Vandel Norman (Defendant) was convicted of three counts of first-degree rape, four counts of first-degree sexual offense, and four counts of taking indecent liberties with a child on 4 October 2007. The trial court entered five judgments on Defendant's convictions. In judgment number one, the trial court consolidated two of Defendant's

first-degree rape convictions and sentenced Defendant to 240 months to 297 months in prison. In judgment number two, the trial court sentenced Defendant to 240 months to 297 months in prison on the third count of first-degree rape, to run consecutively to the first judgment. In judgment number three, the trial court consolidated two first-degree sexual offense convictions and sentenced Defendant to 240 months to 297 months in prison to run consecutively to the second judgment. In judgment number four, the trial court consolidated two first-degree sexual offense convictions and sentenced Defendant to 240 months to 297 months in prison to run consecutively to the third judgment. In judgment number five, the trial court consolidated four taking indecent liberties with a child convictions and sentenced Defendant to 19 months to 23 months in prison, to run consecutively to the fourth judgment. Defendant appeals.

At trial, the State presented evidence that at the time the incidents occurred between September 2002 and December 2003, the victim, J.G., was between four and five years old. During that time, J.G. lived in Edenton with Defendant, her stepfather; her mother; her brother, J.A.G.; and two other siblings.

At the time of trial, J.G. was nine years old. J.G. testified that when she was living with Defendant, he would sometimes call her upstairs to his room. Defendant would be watching a "sex movie." J.G. said Defendant "[stuck] his ding-a-ling in my back or my bottom. Sometimes he does it in the front." The State clarified that "in the front" was the place where J.G. "pees" and that by "ding-a-ling" J.G. meant the "private part . . . that boys have." The State asked J.G. if Defendant "put [his ding-a-ling] in [J.G.'s] butt . . . inside of it?" J.G. answered, "yes." J.G. testified these incidents happened more than ten times. J.G.'s brother, J.A.G., heard J.G. crying and asked why she was crying. J.G. told J.A.G. she was crying because Defendant stuck "his ding-a-ling in front and my butt and peed in my mouth."

J.A.G. testified to the following. J.A.G. heard J.G. crying when she was upstairs with Defendant. J.A.G. said that when J.G. came downstairs "her eyes [were] red and puffy" and her "nose was running." J.A.G. asked J.G. why she was crying, and she told him Defendant "stuck his ding-a-ling in her front . . . in her front private part and in her butt." J.A.G. said this happened "more than five" times and "maybe" more than ten. J.A.G. told their mother about the incidents and she told him that "she would either call the cops if she ever caught [Defendant] or kick [Defendant] out of the house."

Ida Rogers (Rogers), a children's therapist, met with J.G. after the incidents of sexual abuse were reported to the Department of Social Services and testified to the following. Rogers met with J.G. on 19 August 2004. J.G. drew a picture of a girl and identified body parts and their uses. J.G. identified the "butt" and genitals and told Rogers that "you pee up at front and you do the other in the back." J.G. told Rogers that she told her brother J.A.G. what happened because J.A.G. heard her crying. Rogers asked J.G. why she was crying and J.G. shouted at Rogers "because it hurt." J.G. told Rogers again on 31 August 2004 that "it hurts when [Defendant] sticks his ding-a-ling in my front and in my back." J.G. told Rogers that Defendant had "stuff that kind of looked like grease and [Defendant] put [it] on his ding-a-ling before he put it in my front and my back." J.G. told Rogers that she had told her mother about the incidents and that her mother said "if [J.G.] told anyone, [she] was going to get a whipping." J.G. told Rogers: "[Mother] said that it never happened, but it really did."

Maria Angelica Taylor (Taylor), a physician's assistant who conducted J.G.'s physical examination, testified that she conducted J.G.'s vaginal exam and found J.G. had "no lacerations, no scars, [and] no bruising" and her hymen was present. Taylor confirmed that it was "normal for a hymen to be totally normal even after sexual penetration." Taylor said she conducted a rectal examination and that J.G.'s anus had "no lesions, no laxity, no fissures and a skin tag." Taylor said that sexual abuse was still possible because the anal area was meant to stretch without tearing. Taylor said that her examination neither confirmed nor ruled out sexual abuse.

Defendant testified at trial that "nine times out of ten, [he] would not be left alone with the children," and that if he was left alone with the children, it was "probably no more than ten or fifteen minutes." Defendant denied he ever touched J.G., fondled her, or made her watch dirty movies.

At the close of Defendant's evidence, Defendant moved to dismiss all of the charges against him. The trial court denied Defendant's motion. Defendant appeals.

I.

[1] In his assignment of error number seven, Defendant argues the trial court erred in excluding testimony by physician's assistant Taylor about what J.G.'s mother said to her during J.G.'s first medical examination. Defendant contends this testimony was admissible as

statements made for the purpose of medical diagnosis or treatment of J.G. under N.C. Gen. Stat. § 8C-1, Rule 803(4).

The State argues that because Defendant failed to make an offer of proof at trial, he has waived this argument for appellate review. "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). After the trial court sustained the State's objection to Taylor's testimony about what J.G.'s mother told Taylor, Defendant failed to make an offer of proof. However, the record on appeal contains an offer of proof statement to which the State stipulated. The offer of proof statement reads:

> In Part B of a Medical Report prepared on [4 January 2008] about alleged sexual abuse and neglect of J.G., Physician Assistant [Taylor] wrote the following with respect to statements made to her by Beth Norman, J.G.'s mother, during a physical examination of J.G.: "[J.G.'s mother] does not believe anything happened to [J.G.]. [She] reports that [J.G.] has not made any disclosures to her, and she had never heard [J.G.'s] sibling say anything about anybody touching [J.G.] inappropriately until [the Department of Social Services] showed up at [her] doorstep."

Because the excluded evidence appears in the record, Defendant preserved this issue for appeal.

Defendant argues the statements by J.G.'s mother to Taylor were admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(4) as statements made for the purpose of medical diagnosis or treatment of J.G. N.C. Gen. Stat. § 8C-1, Rule 803(4) defines statements for the purpose of medical diagnosis or treatment as "[s]tatements . . . describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." N.C. Gen. Stat. § 8C-1, Rule 803(4) (2007). We review *de novo* the trial court's determination of whether an out-of-court statement is admissible pursuant to Rule 803(4). *See State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000). In order to be admissible under Rule 803(4), the testimony must meet a two-part inquiry: "(1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were rea-

sonably pertinent to diagnosis or treatment." *Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667.

Our Supreme Court has recognized that young children cannot independently seek medical attention. Therefore, a child's statements to a non-medical person, such as a therapist, social worker, or "even members of the family" may be admissible under Rule 803(4) when the statements meet the two-pronged test outlined in *Hinnant*. *Id.* at 288, 523 S.E.2d at 670. In our Courts' previous decisions in which statements were admitted under Rule 803(4), the non-medical person to whom the child made the statements was physically present and testified to the child's statements at trial. However, in the present case, Defendant was not attempting to admit statements by J.G. through the testimony of her mother under the Rule 803(4) hearsay exception, because her mother was not present at trial. Rather, Defendant was attempting to admit the out-of-court statements of J.G.'s mother to Taylor under Rule 803(4).

Defendant cites and we have found only one prior decision in which our Courts have addressed the question of whether a third-party's statements to medical personnel can be admissible under Rule 803(4). In *State v. Jones*, our Supreme Court said that statements made by the defendant's wife and mother to a doctor were inadmissible under Rule 803(4) because the "text of the rule makes it quite clear that only the statements of the person being diagnosed or treated are excepted from the prohibition against hearsay." *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 842 (1994). However, we have found no published opinion that cites *Jones* for this proposition. Further, Kenneth S. Broun, in *Brandis and Broun on North Carolina Evidence* § 217, p. 181 (6th ed. 2004), cautions that this language in *Jones* is dictum, "of uncertain validity in light of the actual language of the rule," and "is questionable . . . in other contexts, such as where a parent or other caretaker has made statements to a physician concerning the health of an infant or an impaired person."

Assuming *arguendo* that a third-party's statements to medical personnel could be admissible under the Rule 803(4) hearsay exception, the statements would still need to meet the two-prong test outlined in *Hinnant*. Concerning the first prong, "the proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Hinnant*, 351 N.C. at 287, 523 S.E.2d at 669.

Regarding the first prong of the *Hinnant* test, Defendant argues that because J.G.'s mother made her statements to Taylor during J.G.'s first medical examination, her statements were for the purpose of medical diagnosis of J.G. However, the statements by J.G.'s mother that J.G. never made any disclosures to her about the abuse reveals nothing about J.G.'s condition. To the contrary, the evidence tends to show that J.G.'s mother's intent was more likely to exculpate herself. J.G.'s mother was under investigation for child neglect by the Department of Social Services at the time she made her statements to Taylor. Both J.G. and J.A.G. testified they had told their mother about Defendant's abuse of J.G., and that their mother did nothing in response. Rodgers testified that J.G. said her mother threatened that J.G. would "get a whipping" if J.G. told anyone about the abuse. Because Defendant failed to affirmatively establish that J.G.'s mother made her statements to Taylor for the purpose of diagnosis or treatment of J.G., her statements fail the first prong of the *Hinnant* test.

The statements by J.G.'s mother to Taylor also fail the second prong of the *Hinnant* test which requires the statements be reasonably pertinent to medical diagnosis or treatment. The fact of whether J.G. did or did not tell her mother about the abuse was not relevant to J.G.'s diagnosis or treatment. J.G.'s alleged silence does not describe her "medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof." N.C.G.S. Rule 803(4).

Therefore, assuming a third-party's statements to medical personnel could be admissible under Rule 803(4), the trial court nonetheless properly excluded the statements of J.G.'s mother to Taylor because her statements failed both prongs of the *Hinnant* test. Defendant's assignment of error number seven is overruled.

II.

[2] In his assignments of error numbers eight and thirty-three, Defendant argues the trial court erred in denying Defendant's motion to dismiss the charges of first-degree sexual offense because the State failed to provide sufficient evidence of anal penetration.

The standard of review for a motion to dismiss in a criminal trial 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." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citing *State v.*

Roseman, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971)). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Kraus*, 147 N.C. App. 766, 769, 557 S.E.2d 144, 147 (2001) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). "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." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)).

First-degree sexual offense is defined as "a sexual act . . . with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.4 (2007). N.C. Gen. Stat. § 14-27.1 defines a "sexual act" as "cunnilingus, fellatio, analingus, . . . anal intercourse . . . [or the] penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.1 (2007). To prove sexual offense on the basis of anal intercourse in the present case, the State must prove that Defendant's penis penetrated J.G.'s anus. *See State v. Hicks*, 319 N.C. 84, 90, 352 S.E.2d 424, 427 (1987).

Defendant argues the present case is similar to *Hicks*. In *Hicks*, the State's only evidence of anal penetration was the victim's testimony that the defendant "put his penis in the back of [the victim]." *Id.* Our Supreme Court reversed the defendant's conviction of first-degree sexual offense, holding that "[g]iven the ambiguity of [the victim's] testimony as to anal intercourse, and absent corroborative evidence," the evidence of sexual offense was insufficient to support the verdict. *Id.*

We find the present case distinguishable from *Hicks* and more analogous to *State v. Griffin*. In *Griffin*, the victim testified that the defendant "stuck his private parts up her butt," which caused her to cry in pain. *State v. Griffin*, 319 N.C. 429, 431, 355 S.E.2d 474, 475 (1987). The State presented corroborative testimony by the victim's mother and a physician. *Id.* at 431, 355 S.E.2d at 476. The physician testified that the victim's rectal examination showed no signs of trauma but that the absence of injury would not have been inconsistent with the abuse the victim described. *Id.* Our Supreme Court held that "[t]he child's testimony describing [the] defendant's commission of anal intercourse, corroborated by that of her mother and the exam-

ining physician, [was] sufficient competent evidence supporting proof of the essential elements of first degree sexual offense." *Id.* at 433, 355 S.E.2d at 477.

In the present case, J.G. testified that Defendant "[stuck] his ding-a-ling in my back or my bottom." The State asked J.G. if Defendant "put [his ding-a-ling] in [J.G.'s] butt . . . inside of it?" J.G. answered, "yes." J.G. testified that her brother J.A.G. heard her crying and she told him she was crying because Defendant stuck "his ding-a-ling in front and my butt and peed in my mouth."

The State also presented corroborative testimony of J.A.G., Taylor, and Rogers. J.A.G. testified that when he asked J.G. why she was crying, she told him Defendant "stuck his ding-a-ling in her front . . . in her front private part and in her butt." Taylor testified that J.G.'s rectal examination neither confirmed nor ruled out sexual abuse. Rogers testified that during a therapy session, J.G. identified the "butt" and genitals and told Rogers that "you pee up at front and you do the other in the back." J.G. told Rogers that "it hurts when [Defendant] sticks his ding-a-ling in my front and in my back" and that Defendant had "stuff that kind of looked like grease and [Defendant] put [it] on his ding-a-ling before he put it in my front and my back."

Viewing the evidence in the light most favorable to the State, we hold the State presented sufficient evidence of anal penetration to allow a jury to find that Defendant committed first-degree sexual offense. Therefore, we conclude the trial court did not err in denying Defendant's motion to dismiss. Defendant's assignments of error numbers eight and thirty-three are overruled.

III.

[3] In his assignment of error number seventeen, Defendant argues the trial court erred by instructing the jury that they could convict Defendant of four counts of first-degree sexual offense if the jury found that Defendant had committed first-degree sexual offense once. Defendant contends the trial court's instructions violated his right to a jury verdict on all counts of first-degree sexual offense because the jury instructions resulted in conditional directed verdicts.

In support of his argument, Defendant points to a portion of the jury instructions in which the trial court instructed the jury: "If you find . . . Defendant engaged in *a* sexual act with [J.G.] . . . it

would be your duty to return a verdict of guilty as to . . . *each one* of those charges in count one of those cases." (emphasis added). However, in reviewing jury instructions for error, the jury instructions must be considered in their entirety. *State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987) (citing *State v. Poole*, 305 N.C. 308, 324, 289 S.E.2d 335, 345 (1982)). In the present case, the trial court instructed the jury:

> [W]ith respect to case number[s] 05 CRS 739, 740, 741, and 742 . . . Defendant is charged in each one of those cases in count one of first degree sex offense. . . . [F]or you to find [] Defendant guilty of . . . these offenses, any one or more of them, the State must prove three things beyond a reasonable doubt.

We hold the jury instructions did not result in conditional directed verdicts because reviewing the jury instructions in their entirety, the instructions could not have led the jury to believe that it could return a verdict of guilty in all four first-degree sexual offense charges if the jury was satisfied of Defendant's guilt beyond a reasonable doubt for only one of those offenses. *See State v. Schultz*, 294 N.C. 281, 240 S.E.2d 451 (1978). Therefore, we find Defendant's argument without merit and overrule his assignment of error number seventeen.

IV.

[4] In his assignments of error numbers twelve, fourteen, and nineteen, Defendant argues the trial court erred by failing to instruct the jury that it had to be unanimous as to each specific incident of first-degree rape, first-degree sexual offense, and taking indecent liberties with a minor. However, Defendant concedes that our Supreme Court ruled against his contention in *State v. Lawrence*. *See State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). Therefore, Defendant's assignments of error numbers twelve, fourteen, and nineteen are overruled.

Defendant did not argue his remaining assignments of error and therefore they are abandoned pursuant to N.C.R. App. P. 28(b)(6).

No error.

Judges GEER and BEASLEY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MAY 2009)

ADAMS v. WINSTON-SALEM/ FORSYTH CTY. SCHOOLS No. 08-815	Indus. Comm. (IC156560)	Affirmed
BRANHAM v. JACKSON No. 08-1254	Harnett (06CVS1708)	Affirmed
BROWN v. HEALTHSOFT, INC. No. 08-1173	Catawba (06CVS3993)	Affirmed
DEAN v. BRUNO No. 08-1498	Cabarrus (06CVS1891)	Affirmed
FIELDS v. PITT CTY. MEM'L HOSP. No. 08-761	Indus. Comm. (IC599446)	Affirmed
IN RE A.L.V.M. No. 08-1351	Guilford (07JT241)	Affirmed
IN RE D.M. & K.M. No. 09-27	Forsyth (04JT08-09)	Affirmed
IN RE J.D. No. 08-1491	Mecklenburg (06JT750)	Affirmed
IN RE J.D., D.D., J.D., T.D. No. 08-1401	Harnett (06J86-88) (06J188)	Affirmed
IN RE J.R.C. No. 08-1154	Mecklenburg (08JB107)	Vacated
IN RE K.K. No. 08-1473	Buncombe (06J372)	Reversed and remanded
IN RE M.D. & J.D. No. 08-1384	Durham (05J279-80)	Affirmed
IN RE R.C., J.C., N.R. No. 08-1480	Mecklenburg (08J141-43)	Affirmed
IN RE T.K.D.O. No. 08-1599	Johnston (05JT247)	Affirmed
MURRAY v. LORILLARD TOBACCO CO. No. 08-778	Indus. Comm. (IC393942)	Affirmed
PRUITT v. PRUITT No. 08-879	Mecklenburg (06SP4437) (07CVD20202)	Dismissed

SHORE ACRES CO. v. TOWN OF WRIGHTSVILLE BEACH No. 08-919	New Hanover (07CVS1099)	Affirmed
STATE v. BEAVERS No. 08-550	Buncombe (06CRS53064)	No error
STATE v. BELL No. 08-959	Gaston (05CRS70362) (05CRS70364) (05CRS70440) (06CRS3684)	No error
STATE v. BURTON No. 08-973	Caswell (07CRS50596) (07CRS50598)	No error
STATE v. CHANCE No. 08-994	Forsyth (07CRS53011) (07CRS58774) (07CRS59787)	No error
STATE v. DOUGHERTY No. 08-1200	Brunswick (04CRS56630-31)	Affirmed
STATE v. ELLIOTT No. 08-1203	Cumberland (06CRS54342) (06CRS55012) (06CRS59286) (07CRS53565)	No error
STATE v. ELLIOTT No. 08-1273	Craven (05CRS4976)	No error
STATE v. FAULISE No. 08-1124	Mecklenburg (07CRS204838)	No prejudicial error
STATE v. GATTISON No. 08-1361	Wake (07CRS17583) (07CRS18993)	No error
STATE v. GAYLES No. 08-1151	Onslow (06CRS60008)	No error
STATE v. HARTNESS No. 08-1227	Catawba (05CRS10843) (05CRS55268-69)	Affirmed
STATE v. HOCKADAY No. 08-1047	Moore (06CRS50577) (06CRS50579-80)	No error
STATE v. JACKSON No. 08-1058	Wayne (06CRS57282) (07CRS5344)	No error

STATE v. KENNEDY No. 08-877	Lincoln (01CRS5795-97)	No error at trial. Remanded for correction of clerical error in the judgments
STATE v. KOTECKI No. 08-1070	Forsyth (06CRS62793)	No error
STATE v. MAJETT No. 08-1076	Forsyth (06CRS31287) (06CRS61005)	Reversed
STATE v. MARSHBURN No. 08-1157	Sampson (07CRS3826) (07CRS50455) (07CRS50968)	Affirmed
STATE v. McDONALD No. 08-948	Mecklenburg (06CRS255804-05) (07CRS26731)	No error
STATE v. MINTZ No. 08-1075	Haywood (05CRS51770) (05CRS51772) (07CRS3485) (07CRS3487)	No error
STATE v. PARKER No. 08-989	Rowan (05CRS50563) (05CRS50568) (05CRS50580) (07CRS04107-09)	No error
STATE v. SHORT No. 08-1022	Richmond (07CRS53137) (07CRS53683)	Affirmed
STATE v. SMITH No. 08-680	Martin (04CRS50483) (04CRS50480)	No error
STATE v. SMITH No. 08-1164	Caswell (07CRS745)	No error
STATE v. SMITH No. 08-1222	Forsyth (07CRS60857) (08CRS1585)	No error
STATE v. STALLINGS No. 08-500	Nash (05CRS56025)	No error
STATE v. SWINEHART No. 09-166	Wake (08CR68396) (08CR70241-45)	Remanded for resentencing

STATE v. TAYLOR No. 08-1045	Mecklenburg (07CRS232295-96)	No error in part, remanded with instructions in part
STATE v. VALDEZ No. 08-820	McDowell (05CRS50747)	No error
STATE v. VALENTINE No. 08-1153	Forsyth (06CRS27384) (06CRS57831)	No error

JUDICIAL STANDARDS COMMISSION

STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2010-05

May 14, 2010

QUESTION:

Is a judge required to disqualify from matters involving the District Attorney or members of the District Attorney's staff when the judge's son/daughter is employed by the District Attorney as an assistant district attorney?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined that where a judge's relative, within the third degree of relationship, is employed as an assistant district attorney, the judge is not required to disqualify himself/herself from matters involving the District Attorney or other attorneys from the District Attorney's staff, so long as the judge's relative had no involvement in the matter and does not appear before the judge. The judge is required to disqualify from all matters in which the judge's relative was previously or is currently involved.

DISCUSSION:

Canon 3C(1)(d)(ii) of the Code of Judicial Conduct requires a judge to disqualify from matters wherein an individual within the third degree of relationship, or the spouse of such a person, is acting as a lawyer in a proceeding before the judge. A judge is required to conduct himself/herself in a such a manner as to ensure the preservation of the integrity and independence of the judiciary and to promote public confidence in its impartiality (Canons 1 and 2A). Canon 2B of the Code provides, inter alia, that a judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. In addition Canon 2B requires that a judge not convey nor allow others to convey the impression that they are in a special position to influence the judge.

The judge's son/daughter is employed in a multi-county judicial district and is not customarily involved in any cases outside of the one county to which he/she is assigned. The Commission advises as a best practice that the judge disclose the employment relationship on the record and inquire as to any involvement the judge's son/daughter may have had in the matter. Upon confirmation that the judge's

son/daughter has not been involved in the matter, the judge's impartiality could not reasonably be questioned.

References:
North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 2B
Canon 3C(1)(d)(ii)

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TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

Appeal from a summary judgment and permanent injunction involving distribution of defendant's newsletters was interlocutory where the amount of damages was left to be determined, the trial judgment did not certify the summary judgment or the permanent injunction for immediate appeal, and there was no jeopardy to a substantial right. Although defendant argued loss of First Amendment rights, the presence of protected First Amendment material does not mean that defendant is exempt from the general laws, such as those governing the settlement agreement involved here. Assuming that First Amendment rights are affected, defendant's own statements demonstrate a myriad of other ways to distribute its newsletters. **Hammer Publ'ns v. Knights Party, 342.**

Appealability—summary judgment—interlocutory order—possibility of inconsistent verdicts—Appeal from a summary judgment was interlocutory but involved a substantial right where this lawsuit against the personal representative of an estate arose from the sale of a rest home, bankruptcy by the rest home, the failure of the closing, and actions against all of the buyers. A substantial right is affected because of the possibility of two trials on the same issues and inconsistent verdicts. **Azalea Garden Bd. & Care, Inc. v. Vanhoy, 376.**

Appealability—summary judgment—interlocutory order—qualified immunity—Although defendant's appeal from the grant of summary judgment in a false imprisonment case was an appeal from an interlocutory order, the substantial right of qualified immunity was at issue and thus the case was subject to immediate appeal. **Parker v. Hyatt, 489.**

Appellate rules violations—standard of review—incorrect references to record in assignments of error—The trial court did not err by concluding plaintiff did not violate the Rules of Appellate Procedure in its brief because: (1) contrary to defendants' assertion, plaintiff set forth the standard of review in its brief as required by N.C. R. App. P. 28(b)(6); and (2) although defendants assert that plaintiff violated N.C. R. App. P. 10(c) based on incorrect references to the record in its assignments of error, all such errors were remedied by plaintiff when the Court of Appeals granted its motion to amend the page references contained in its assignments of error. **Harbin Yinhai Tech. Dev. Co. v. Greentree Fin. Grp., Inc., 615.**

Declaratory judgment order—reviewed as summary judgment—A trial court order concluding that a non-solicitation agreement was void as a matter of law was reviewed as a summary judgment where it appeared that the complaint for declaratory relief had been treated as a summary judgment, there were no disputed issues of fact, and summary judgment was an appropriate procedure in a declaratory judgment action. **Hejl v. Hood, Hargett & Assocs., 299.**

Notice of appeal—timeliness—Plaintiff's notice of appeal from an order of dismissal without prejudice was timely filed, even though it was filed prior to entry of the dismissal order, where the trial court announced its decision to deny the motion to set aside dismissal and the motion for Rule 11 sanctions on 30 April 2008, plaintiff filed notice of appeal on 6 May 2008 explaining that the order being appealed was rendered orally by the court on 30 April 2008 and was to be entered shortly, and the order was subsequently entered on 27 May 2008. **Harbin Yinhai Tech. Dev. Co. v. Greentree Fin. Grp., Inc., 615.**

Plain error review—discretion of court—The Court of Appeals did not exercise its discretion to review as plain error the issue of whether the trial court

APPEAL AND ERROR—Continued

SCHOOLS—Continued

a county government center plus funds for developing replacement space complied with statutes authorizing the board, "upon such terms and conditions as it determines," to exchange property it determined was no longer suitable or necessary for public school purposes, N.C.G.S. §§ 160A-274 and 115C-518, because the board's determination that the replacement office space in the government center was "more suitable" for its needs was adequate to meet the unnecessary or unsuitable requirement in N.C.G.S. §115C-518. Furthermore, plaintiff failed to overcome the presumption of legality of the acts of public officials. **Reese v. Charlotte-Mecklenburg Bd. of Educ., 539.**

Board of education—transfer of property to county—unilateral expectation of property interest—due process claim—Plaintiff's allegation that he and others similarly situated were not afforded a process whereby they could submit a proposal to purchase county board of education property which the board transferred to the county as part of an exchange agreement stated only a unilateral expectation of a property interest in the board's site that was insufficient to support a due process claim. **Reese v. Charlotte-Mecklenburg Bd. of Educ., 539.**

SEARCH AND SEIZURE

Consensual search—exclusion of evidence improper—The trial court erred in a case arising out of the sexual abuse of a child by excluding evidence seized as a result of a consensual search because Miranda warnings are inapplicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent. **State v. Rooks, 147.**

Driving while impaired—grounds for stop not reasonable—tip from dispatcher—weaving within lane—The trial court erred by denying defendant's motion to suppress evidence of impaired driving obtained as a result of an anonymous tip to the dispatcher and the officer's observation of one instance of weaving within the lane. The tip had no indicia of reliability, and no corroboration, and defendant's conduct fell within the broad range of normal driving behavior. **State v. Peele, 668.**

Warrant—motion to suppress—notebook with rap lyrics—The trial court did not err in a first-degree murder case by denying defendant's motion to suppress rap lyrics about the murders found in a notebook seized from his vehicle even though defendant contends the notebook and its contents were not listed as items to be seized in the warrant and were not immediately apparent to the officer as evidence of the crime because: (1) the seizure of the notebook was authorized by the terms of the search warrant when the warrant expressly stated the police were looking for documents showing ownership, control, and access that constituted evidence of a crime and the identity of the person(s) participating in a crime; and (2) it was not unreasonable for a detective to examine the contents of the notebook and conclude the rap lyrics were evidence of the crime after the detective made out the identifying information on the front of the notebook. **State v. Bryant, 154.**

Warrantless entry into mobile home to pursue defendant—motion to suppress evidence—exigent circumstances—The trial court did not err in a drug case by denying defendant's motion to suppress evidence seized after officers'

SEARCH AND SEIZURE—Continued

warrantless entry into a mobile home in pursuit of defendant because exigent circumstances existed justifying the warrantless entry where: (1) the officers had probable cause to arrest defendant based on an outstanding warrant; (2) two detectives were aware that defendant had absconded from his probation violation hearing a month earlier and thus was a flight risk, that defendant was previously conviction for armed robbery as well as his other narcotics convictions and assaultive behavior, and that defendant was normally armed; and (3) the detectives saw defendant run inside the mobile home after law enforcement announced their presence, and from the totality of circumstances the officers reasonably believed that a dangerous situation existed for them and the remaining occupants of the mobile home. **State v. Fuller, 412.**

SENTENCING

Felony murder merger doctrine—arrest of underlying judgment—Judgment on an armed robbery conviction should have been arrested pursuant to the felony murder merger doctrine. **State v. Rush, 307.**

Habitual felon—same underlying felony used for underlying conviction—The trial court did not err by using defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious injury as an underlying prior felony for both the possession of a firearm by a felon charge and the habitual felon charge because the Court of Appeals has previously held that elements used to establish an underlying conviction may also be used to establish a defendant's status as an habitual felon. **State v. Neal, 100.**

Mitigating factors—failure to find—no abuse of discretion—The trial court did not abuse its discretion by not finding certain statutory mitigating factors when sentencing defendant for second-degree murder. It was within the court's discretion to determine that defendant's home life and mental health issues did not significantly reduce his culpability, or that defendant did not have a good treatment prognosis. **State v. Johnson, 330.**

Prior record level—convictions serving as basis for habitual felon status—excluded—A sentence for armed robbery as a prior record level IV was remanded where defendant was also sentenced as being an habitual felon. With the three convictions that provided the basis for the habitual felon status being excluded, the prior record level should have been III. **State v. Wells, 498.**

Prior record level—out-of-state convictions—stipulation—The trial court did not err in a felony larceny after breaking and entering and possession of stolen goods case by assigning two points to each of defendant's three New York convictions even though defendant contends the State failed to carry its burden of demonstrating that the out-of-state convictions were substantially similar to North Carolina offenses because: (1) the State satisfied its burden of showing the existence of defendant's prior convictions by stipulation of the parties; and (2) the Court of Appeals would have affirmed defendant's sentence even if it were to reach his underlying contention that the State failed to show that his three out-of-state convictions for attempted burglary and imprisonment/rape were substantially similar to their respective North Carolina offenses since the prosecution only classified the convictions at the default Class I level, and thus, the State was not required to show they were substantially similar. **State v. Hinton, 750.**

STATUTES OF LIMITATION AND REPOSE—Continued

tiff on the date plaintiff received the policy, or immediately upon the injury at the latest. **Scott & Jones, Inc. v. Carlton Ins. Agency, Inc., 290.**

SURETIES

Prenuptial agreement—not a waiver of right to reimbursement or subrogation—guaranty agreement—The trial court did not err by concluding that plaintiff wife did not waive her right to reimbursement or subrogation arising from plaintiff's payment of a note under a guaranty agreement based on the parties entering into a prenuptial agreement because none of the language in the prenuptial agreement evidenced an intention on the part of plaintiff to relinquish her statutory right to sue for reimbursement of payments made as surety for a debt of the deceased, and particularly one which was incurred after entry into the agreement. **Liptrap v. Coyne, 739.**

Right to reimbursement of monthly payments from estate of deceased principal—guaranty agreement—The trial court did not err by requiring the estate of a deceased husband to reimburse monthly payments made by plaintiff wife under a guaranty agreement on a note executed by the husband, and compelling the estate to pay the balance of a note, because: (1) *Montsinger*, 240 N.C. 441 (1954), was inapplicable since plaintiff was obligated to pay the note by a guaranty agreement she executed which was a primary, and not a secondary, obligation; and the holding was superseded by statute in 1959 giving a surety who makes payment on the principal debtor's note the right to sue for reimbursement in addition to the common law equitable remedy of subrogation; and (2) N.C.G.S. § 26-3.1 provides plaintiff with ample authority to require defendant administrator to reimburse the amounts which she paid under a guaranty agreement as surety of the deceased. **Liptrap v. Coyne, 739.**

TAXATION

Ad valorem—nature of property transfer—A pro se appellant's argument that he was not a taxpayer because his property had been transferred with a bill of sale rather than a warranty deed was determined against him in a prior case, *Sullivan I.* **Sullivan v. Pender Cty., 726.**

Appeal to superior court—standard of review—mixed law and fact—The trial court erred by applying a pure de novo standard of review to a review of the Tax Review Board that involved issues of law and fact. Moreover, the trial court's review erroneously rests on a factual basis which is either inconsistent with or not contained in the agency findings. The matter was remanded, given the complexity of the record and that the parties were heard on issues that remain unresolved. **In re Denial of N.C. IDEA's Refund, 426.**

Bulletin and administrative decision—publication—The argument that a Department of Revenue Sales and Use Tax Technical Bulletin and an administrative decision were not applicable because they were not published was rejected where the bulletin was available on a website, the administrative decision in a Lexis database, and plaintiff had the option of contacting the Department of Revenue to inquire about its liability. **Carolina Photography, Inc. v. Hinton, 337.**

Qualified business income tax credits—amount taxpayer may claim in single taxable year—carryover to subsequent years—Respondent tax-

WORKERS' COMPENSATION—Continued

the wages the employee would have earned in the job that was offered to him and that he declined. Without such a finding, the Commission could not have compared the wages the employee would have earned in the new position with those he was earning at the time of the injury and thus could not determine the suitability of employment offered to the employee. **Munns v. Precision Franchising, Inc., 315.**

Successive injuries—disability benefits—apportioned where possible—joint liability otherwise—The Industrial Commission did not abuse its discretion in a workers' compensation case by apportioning disability benefits between a current and a prior back injury, and by assigning joint and several liability for those disability benefits that the doctor could not determine stemmed from one injury or the other. If the General Assembly had intended to adopt a "last injurious exposure" rule for accidental injuries as well as occupational disease, it would have done so explicitly. **Newcomb v. Greensboro Pipe Co., 675.**

Temporary total disability—wage earning period—remanded for further findings—A workers' compensation award of temporary total disability was remanded for further findings where it could not be determined from the record whether plaintiff earned wages during a relevant period. **Biggerstaff v. Petsmart, Inc., 261.**

ZONING

Biodiesel production—not bona fide farm use—The trial court erred in a declaratory judgment action when it found the production of biodiesel by a farmer on farm premises for agricultural purposes was a bona fide farm use and exempt from county zoning ordinances. **North Iredell Neighbors for Rural Life v. Iredell Cty., 68.**

Board of adjustment—delegation of authority—compliance with conditions—The trial court erred by concluding that a board of adjustment improperly delegated its authority to determine the effect on adjoining landowners of secondary impacts from a special use permit for an adult business. There is a necessary interplay between a board of adjustment and other governmental bodies for both the issuance of special use permits and the assurance of compliance. **Mangum v. Raleigh Bd. of Adjust., 249.**

Special use permit—board of adjustment findings—competent supporting evidence—The trial court erred by ruling that a board of adjustment did not make the necessary findings to support its issuance of a special use permit for an adult business. There was competent evidence in the record to support the board's findings concerning the secondary impacts on adjoining landowners, and the trial court was without authority to conduct a de novo review. **Mangum v. Raleigh Bd. of Adjust., 249.**

Special use permit—distance from adult business—variance not needed—A variance was not needed to obtain a special use permit for an adult business where the ordinance prohibited an adult establishment within a 2,000 foot radius of a speciality school and there was a karate school within that distance if the measurement was to the closest point of each lot. While the city code expressly states that the entire property of the adult establishment is to be

ZONING—Continued

WORD AND PHRASE INDEX