

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

STATE OF NORTH CAROLINA v. WAYNE BROOKS FOWLER, DEFENDANT

No. COA08-652

(Filed 19 May 2009)

**1. Appeal and Error— criminal case—appeal by State—
remand from superior to district court**

The Court of Appeals granted *certiorari* for the State to appeal an interlocutory superior court order concluding that certain impaired driving statutes were unconstitutional.

**2. Appeal and Error— criminal case—appeal by State—
impaired driving dismissal**

N.C.G.S. § 20-38.7(a) and N.C.G.S. § 15A-1432(e), read *in pari materia*, did not authorize the State to appeal a superior court order holding certain impaired driving statutes unconstitutional and remanding the matter to district court

**3. Constitutional Law— North Carolina constitution—impaired
driving procedures—authority of courts not violated**

In a case involving the constitutionality of certain impaired driving statutes, the trial court erred by concluding that the matter was controlled by *State v. Tutt*, 171 N.C. App. 518, and that the legislature violated the Supreme Court's authority for the handling of impaired driving cases. The procedures at issue here did not apply to the Appellate Division, unlike the evidentiary rules involved in *Tutt*.

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4. Constitutional Law— North Carolina constitution—court rules—impaired driving—authority of legislature

The General Assembly is constitutionally authorized to create rules of procedure and practice for the superior and district courts, and to prescribe the jurisdiction and powers of the superior courts, and a constitutional amendment was not required for the General Assembly to promulgate a rule of procedure and practice concerning impaired driving cases pertaining exclusively to superior and district courts.

5. Constitutional Law— separation of powers—impaired driving procedures—not properly raised—not violated

The trial court did not conclude that challenged provisions of impaired driving procedures in the courts violated separation of powers. Even if the issue had been properly raised on appeal, no usurpation of judicial power was discerned.

6. Constitutional Law— double jeopardy—pretrial motion and evidence—no attachment of jeopardy

In an action involving required pretrial motions for implied consent offenses and the State's right to appeal, the superior court erred by concluding that portions of N.C.G.S. §§ 20-38.6 and .7 violate the Former Jeopardy Clause of the United States Constitution. In North Carolina nonjury trials, jeopardy attaches when the court begins to hear evidence or testimony, and does not attach when the court is presented with evidence or testimony for a pretrial motion on a question of law.

7. Constitutional Law— fair trial—implied consent offenses—required pretrial motions

The requirement in N.C.G.S. § 20-38.6(a) that defendants charged with implied consent offenses in district court make pretrial motions to dismiss or suppress evidence did not infringe on the right to a fair trial, even though those defendants do not have the benefit of pretrial discovery. The statute allows defendants to make motions to dismiss or suppress during trial when there are newly discovered facts.

8. Constitutional Law— speedy trial—implied consent offenses—district court preliminary determination—State's appeal to district court

Defendants charged with implied consent offenses in district court are not deprived of the right to a speedy trial by the absence

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of a specified time for the State's appeal from the district court's preliminary determination that it would grant a pretrial motion to dismiss or suppress. The General Assembly's decision to refrain from establishing a time for the State to give a notice of appeal will require an examination of the circumstances of each particular case.

9. Constitutional Law— Due Process—implied consent offenses—pretrial motion requirements

The trial court erred by holding that the pretrial motion requirements of N.C.G.S. §§ 20-38.6(a),(f) and 20-38.7(a) violate Due Process. The Legislature determined from the facts before it that the pretrial procedures in the challenged statutes would serve as a means to improve the safety of the motoring public in North Carolina, and the legislation was reasonably related to the valid objective sought to be obtained. Furthermore, there was no procedural due process violation.

10. Constitutional Law— Equal Protection—implied consent offenses—required pretrial motions

The trial court erred by concluding that the pretrial motion requirements of N.C.G.S. §§ 20-38.6(a),(f) and 20-38.7(a) for implied consent offenses in district court violate equal protection. All defendants charged with an implied consent offense appearing in district court are subject to the same procedural requirements and the challenged provisions had a rational relationship to a conceivable legitimate interest of the government.

11. Motor Vehicles— impaired driving—motion to suppress—district court preliminary determination

A preliminary determination that the district court would dismiss an impaired driving charge for lack of probable cause was remanded for a preliminary order indicating the district court's ruling on defendant's motion to suppress evidence of his arrest.

Appeal by the State from order entered 15 January 2008 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 January 2009.

Roy Cooper, Attorney General, by Sebastian Kielmanovich, Assistant Attorney General, and William B. Crumpler, Assistant Attorney General, for the State.

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Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, and Law Offices of Bush & Powers, by Bill Powers, for defendant-appellee.

Center for Death Penalty Litigation, by Thomas K. Maher, and The Ward Law Firm, P.A., by David J. Ward, for North Carolina Advocates for Justice, amicus curiae.

MARTIN, Chief Judge.

On 2 January 2007, defendant Wayne Brooks Fowler was arrested for willfully operating a motor vehicle while subject to an impairing substance in violation of N.C.G.S. § 20-138.1. On 6 August 2007, defendant made a pretrial motion in district court in accordance with N.C.G.S. § 20-38.6(a) alleging that the arresting officer lacked probable cause to arrest him.

On 9 October 2007, the Mecklenburg County District Court entered a Preliminary Finding Granting Pretrial Motion to Dismiss in accordance with N.C.G.S. § 20-38.6(f). In its Preliminary Finding, after concluding that the arresting officer “did not possess probable cause to arrest and charge [d]efendant with Driving While Impaired,” and that “a reasonable person, in same or similar circumstances could not believe the [d]efendant guilty of Driving While Impaired,” the district court made the preliminary finding that it would grant defendant’s motion and dismiss the charges against him for lack of probable cause.

The State gave notice of appeal to superior court from the district court’s Preliminary Finding pursuant to N.C.G.S. § 20-38.7(a). The State’s appeal was heard in Mecklenburg County Superior Court. On 15 January 2008, the superior court entered its Order in which it found that the district court’s “Conclusions of Law granting the motion to dismiss are based upon the Findings of Fact that are cited in [its] order.” The Order further concluded that N.C.G.S. §§ 20-38.6 and 20-38.7—which “allow[ed] the State to appeal the [d]istrict [c]ourt determination on [d]efendant’s motion to dismiss based on a lack of probable cause”—violated the Equal Protection and Due Process Clauses of the United States and North Carolina Constitutions, the Former Jeopardy Clause of the United States Constitution, as well as Article I, Section 3 and Article IV, Section 1 of the North Carolina Constitution. The superior court remanded the matter to district court “for the entry of an order consistent with th[e] superior c[ourt]’s findings.” The State gave notice of appeal to this

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Court and certified that the appeal was not taken for the purpose of delay. The State filed a petition for writ of certiorari on 10 June 2008, and defendant filed a motion to dismiss on 30 October 2008.

[1] In considering whether this appeal is properly before us, we are guided by two well-established principles. First, “[t]he [S]tate’s right of appeal in a criminal proceeding is entirely statutory; it had no such right at the common law. [Accordingly, s]tatutes granting a right of appeal to the [S]tate must be strictly construed.” *State v. Murrell*, 54 N.C. App. 342, 343, 283 S.E.2d 173, 173 (1981), *disc. review denied*, 304 N.C. 731, 288 S.E.2d 804 (1982). Second, “[a]s a general rule, the appellate courts will not review interlocutory orders entered by a superior court in a criminal case.” *State v. Monroe*, 330 N.C. 433, 436, 410 S.E.2d 913, 915 (1991); *see also Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (“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.”), *reh’g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). “An appeal from such [an] order will be dismissed unless the order affects some substantial right and will work injury to the appellant if not corrected before appeal from the final judgment.” *Privette v. Privette*, 230 N.C. 52, 53, 51 S.E.2d 925, 926 (1949).

In the present case, the State concedes that the superior court’s 15 January 2008 Order from which it appeals is interlocutory, and does not argue that it will suffer injury if its appeal is not heard prior to entry of a final judgment in this matter. Nevertheless, the State asserts that it is authorized to appeal the superior court’s 15 January Order pursuant to N.C.G.S. § 15A-1445(a)(1). We disagree.

N.C.G.S. § 15A-1445(a)(1) provides that the State “may appeal from the superior court to the appellate division . . . [w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts,” provided that “the rule against double jeopardy [does not] prohibit[] further prosecution.” N.C. Gen. Stat. § 15A-1445(a)(1) (2007). Here, although the State concedes that the superior court’s Order was not “a decision or judgment *dismissing* criminal charges” against defendant, *see id.* (emphasis added), the State asserts that it has a right of appeal pursuant to N.C.G.S. § 15A-1445(a)(1) because “*the effect* of the superior court’s order [wa]s to dismiss the DWI charge whether or not the court pronounce[d] a dismissal per se.” (Emphasis added.) However, since statutes authorizing an appeal by the State in a criminal case must be strictly construed, *see State*

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v. Harrell, 279 N.C. 464, 466-67, 183 S.E.2d 638, 640 (1971), we decline to extend the application of N.C.G.S. § 15A-1445(a)(1) to grant the State a right of appeal to the Appellate Division from a superior court's interlocutory order which may have the same "effect" of a final order but requires further action for finality. Therefore, we hold the State has no statutory right of appeal to this Court pursuant to N.C.G.S. § 15A-1445(a)(1) from the superior court's 15 January 2008 Order.

[2] The State also asserts that it is authorized to appeal the superior court's 15 January Order pursuant to N.C.G.S. § 20-38.7(a) *in pari materia* with N.C.G.S. § 15A-1432(e). Again, we disagree.

When strictly construing a statute to determine whether it authorizes the State to appeal in a criminal case, we must "resort first to the words of the statute," and be certain to interpret the "words and phrases of a statute . . . contextually, in a manner which harmonizes with the underlying reason and purpose of the statute." *See In re Kirkman*, 302 N.C. 164, 167, 273 S.E.2d 712, 715 (1981). Additionally, while "the caption [of a statute] will not be permitted to control when the meaning of the text is clear," "[w]here the meaning of a statute is doubtful, its title may be called in aid of construction." *Dunn v. Dunn*, 199 N.C. 535, 536, 155 S.E. 165, 166 (1930). Further, "[w]hen multiple statutes address a single subject, this Court construes them *in pari materia* to determine and effectuate the legislative intent." *Brown v. Flowe*, 349 N.C. 520, 523-24, 507 S.E.2d 894, 896 (1998).

The title of the statute upon which the State relies as its authority to appeal the superior court's 15 January 2008 Order to *this Court* is "Appeal to *superior* court." *See* N.C. Gen. Stat. § 20-38.7 (2007) (emphasis added). N.C.G.S. § 20-38.7(a) provides, in part: "The State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. . . . *Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.*" N.C. Gen. Stat. § 20-38.7(a) (emphasis added). In addition, N.C.G.S. § 20-38.6(f), which was enacted pursuant to the same enabling legislation as N.C.G.S. § 20-38.7(a), *see* Motor Vehicle Driver Protection Act of 2006, ch. 253, § 5, 2006 N.C. Sess. Laws 1180-83, provides that, when a district court judge "preliminarily indicates" that a defendant's pretrial motion to suppress evidence or dismiss charges for an implied-consent offense made in accordance with N.C.G.S. § 20-38.6(a) "should be granted, the judge shall not enter a

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final judgment on the motion until *after the State has appealed to superior court* or has indicated it does not intend to appeal.” N.C. Gen. Stat. § 20-38.6(f) (2007) (emphasis added). In other words, according to the plain language of the statutory subsection immediately preceding N.C.G.S. § 20-38.7(a), the prohibition regarding the district court’s entry of a final judgment granting a defendant’s pre-trial motion applies only to the State’s appeal to *superior court*.

Further, N.C.G.S. § 15A-1432 provides, in part:

(a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge to the superior court:

(1) When there has been a decision or judgment *dismissing* criminal charges as to one or more counts.

....

(e) If the superior court finds that the order of the district court was correct, it must enter an order affirming the judgment of the district court. The State may appeal the order of the superior court to the appellate division upon certificate by the district attorney to the judge who affirmed the judgment that the appeal is not taken for the purpose of delay.

N.C. Gen. Stat. § 15A-1432(a)(1), (e) (2007) (emphasis added). In other words, N.C.G.S. § 15A-1432(a)(1) gives the State a statutory right of appeal to superior court from a district court’s order *dismissing* criminal charges against a defendant, and N.C.G.S. § 15A-1432(e) gives the State a statutory right of appeal to this Court from a superior court’s order affirming a district court’s *dismissal*. However, the statutory right of appeal conferred upon the State pursuant to N.C.G.S. § 20-38.7(a) is only a right of appeal to superior court from a district court’s *preliminary* determination indicating that it *would* grant a defendant’s pretrial motion to *dismiss or suppress*.

Thus, we conclude that the General Assembly’s reference to “[a]ny further appeal” in N.C.G.S. § 20-38.7(a) does not give the State a right of appeal to the Appellate Division pursuant to N.C.G.S. § 15A-1432(e) after the State has appealed from district court to superior court pursuant to N.C.G.S. § 20-38.7(a). Therefore, we hold the State has no statutory right of appeal to this Court from the superior court’s 15 January 2008 interlocutory Order. Accordingly, we grant defendant’s motion to dismiss.

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Nevertheless, this Court may issue a writ of certiorari “when no right of appeal from an interlocutory order exists.” N.C.R. App. P. 21(a)(1). Having determined that the State has no right of appeal from the superior court’s 15 January 2008 interlocutory Order, in light of the substantial questions at issue here, we exercise our discretion to grant the State’s petition for writ of certiorari.

On 4 December 2003, Governor Michael F. Easley signed Executive Order No. 54, entitled “Governor’s Task Force on Driving While Impaired,” which provided for the reestablishment of a task force to serve as an ad hoc committee of the Governor’s Highway Safety Commission. Exec. Order No. 54, 2004 N.C. Sess. Laws 893-95. The preamble of the Executive Order provided the following rationale for the reestablishment of the Task Force:

WHEREAS, the operation of motor vehicles on our highways by persons while impaired constitutes a serious threat to the health and safety of our citizens; and

WHEREAS, a large portion of the fatal crashes on our highways are alcohol related; and the “Booze It and Lose It” program has made driving while impaired a major area of emphasis; and

WHEREAS, the State of North Carolina must consider strong measures designed to deter and prevent the operation of motor vehicles by persons while impaired

Id. at 893. The Task Force—ordered to be composed of at most thirty-five members, including representatives of law enforcement, the Judicial Branch, and the General Assembly—was charged with the following responsibilities:

- (a) Review the General Statutes of North Carolina applicable to driving while impaired;
- (b) Review proposals in other states designed to deter driving while impaired;
- (c) Consider legislative proposals to the North Carolina General Assembly; [and]
- (d) Recommend actions to reduce driving while impaired

Id. at 893-94. The Task Force was further directed to present the Governor with a final report, at which time the Task Force would be dissolved. *See id.* at 894. This Executive Order was amended on

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16 April 2004 by Executive Order No. 57, which allowed the Governor to designate three co-chairs of the Task Force; however, the underlying rationale and the responsibilities identified in Executive Order No. 54 remained unchanged. *See* Exec. Order No. 57, 2004 N.C. Sess. Laws 900-02.

In furtherance of its “purpose . . . to make recommendations regarding how North Carolina’s DWI system can be improved,” and in keeping with the State’s “history of being tough on impaired driving” “with the aim of reducing impaired driving,” the Task Force proposed “solutions [to] specifically address the DWI arrest and all activities leading up to adjudication.” *See* Governor’s Task Force on Driving While Impaired, Final Report to Governor Michael F. Easley 7, 20 (Jan. 14, 2005) (hereinafter “DWI Final Report”). Among these solutions was its recommendation that “[a] specific procedure should be developed to prevent dismissals related to delays in processing and by the defendant’s lack of access to witnesses.” *See* DWI Final Report at 21.

House Bill 1048, which later became Session Law 2006-253, was introduced and filed on 31 March 2005 with the short title “Governor’s DWI Task Force Recommendations” during the 2005-2006 Session of the North Carolina General Assembly. As ratified and later signed into law on 21 August 2006, the “Motor Vehicle Driver Protection Act of 2006” enumerated ten objectives said to address its purpose to establish “measures designed to improve the safety of the motoring public of North Carolina.” *See* Motor Vehicle Driver Protection Act of 2006, ch. 253, 2006 N.C. Sess. Laws 1178.

In furtherance of the Act’s objective to provide “procedures for investigating, arresting, charging, and judicial processing of impaired driving offenses,” the General Assembly added Article 2D, entitled “Implied-Consent Offense Procedures,” to the “Motor Vehicles” chapter of the General Statutes. *See id.* at 1178, 1180-83. Within this Article, a draft of which appeared in the Final Report prepared by the Governor’s Task Force on Driving While Impaired, *see* DWI Final Report at 60-63, the General Assembly codified N.C.G.S. §§ 20-38.6 and 20-38.7.

N.C.G.S. § 20-38.6, entitled “Motions and district court procedure,” provides:

- (a) The defendant may move to suppress evidence or dismiss charges only prior to trial, except the defendant may move to

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dismiss the charges for insufficient evidence at the close of the State's evidence and at the close of all of the evidence without prior notice. If, during the course of the trial, the defendant discovers facts not previously known, a motion to suppress or dismiss may be made during the trial.

- (b) Upon a motion to suppress or dismiss the charges, other than at the close of the State's evidence or at the close of all the evidence, the State shall be granted reasonable time to procure witnesses or evidence and to conduct research required to defend against the motion.
- (c) The judge shall summarily grant the motion to suppress evidence if the State stipulates that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.
- (d) The judge may summarily deny the motion to suppress evidence if the defendant failed to make the motion pretrial when all material facts were known to the defendant.
- (e) If the motion is not determined summarily, the judge shall make the determination after a hearing and finding of facts. Testimony at the hearing shall be under oath.
- (f) The judge shall set forth in writing the findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied. If the judge preliminarily indicates the motion should be granted, the judge shall not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal.

N.C. Gen. Stat. § 20-38.6. At the time defendant was alleged to have committed his offense,¹ N.C.G.S. § 20-38.7, entitled "Appeal to superior court," provided as follows:

- (a) The State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. If there is a dispute about the findings of fact, the superior court shall not be bound by the findings of the district

1. N.C.G.S. § 20-38.7 has been amended twice since the date defendant was alleged to have committed the offense in the present case. *See* Act of Aug. 7, 2008, ch. 187, § 10, 2008 N.C. Sess. Laws 780; Act of Aug. 30, 2007, ch. 493, § 9, 2007 N.C. Sess. Laws 1497. However, these amendments relate exclusively to a *defendant's* right of appeal, which is not at issue in the present case.

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court but shall determine the matter de novo. Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.

- (b) The defendant may not appeal a denial of a pretrial motion to suppress or to dismiss but may appeal upon conviction as provided by law.
- (c) Notwithstanding the provisions of G.S. 15A-1431, for any implied-consent offense that is first tried in district court and that is appealed to superior court by the defendant for a trial de novo as a result of a conviction, the sentence imposed by the district court is vacated upon giving notice of appeal. The case shall only be remanded back to district court with the consent of the prosecutor and the superior court. When an appeal is withdrawn or a case is remanded back to district court, the district court shall hold a new sentencing hearing and shall consider any new convictions and, if the defendant has any pending charges of offenses involving impaired driving, shall delay sentencing in the remanded case until all cases are resolved.

N.C. Gen. Stat. § 20-38.7 (Supp. 2006) (amended 2007 and 2008). The Article further provides that all “trial procedures” set forth therein—which include the procedures established by N.C.G.S. §§ 20-38.6 and 20-38.7—“shall apply to any implied-consent offense litigated in the District Court Division.” *See* N.C. Gen. Stat. § 20-38.1 (2007).

Accordingly, based on the plain language of these statutes, when a district court enters a preliminary determination pursuant to N.C.G.S. § 20-38.6(f) indicating that it would grant a defendant’s pretrial motion to suppress evidence or dismiss charges made in accordance with N.C.G.S. § 20-38.6(a), the State may appeal to superior court pursuant to N.C.G.S. § 20-38.7(a). On such an appeal, the district court’s findings of fact are binding on the superior court and should be presumed to be supported by competent evidence *unless* there is a “dispute about the findings of fact,” in which case the matter must be reviewed by the superior court *de novo*. *See* N.C. Gen. Stat. § 20-38.7(a). After considering a matter properly before it according to the appropriate standard of review, the superior court must then enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant’s pretrial motion, since the plain language of N.C.G.S. § 20-38.6(f) indicates that the General Assembly intended the *district* court should enter the

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final judgment on a defendant's pretrial motion made in accordance with N.C.G.S. § 20-38.6(a). *See* N.C. Gen. Stat. § 20-38.6(f) (providing that the district court "judge shall not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal").

In the present case, in its 15 January 2008 Order, the Mecklenburg County Superior Court concluded that "the statutes allowing the State to appeal the [d]istrict [c]ourt determination on [d]efendant's motion to dismiss based on a lack of probable cause" "are in fact unconstitutional" on the following grounds:

- a. First, the statutes violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution in that they create a class of defendants separate from any other type of defendant and violate the defendant's fundamental rights; and,
- b. Second, the statutes violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution in that they give one party, the State of North Carolina, an advantage of immediate appeal over another party, in this instance, the Defendant, before a final judgment is entered; and,
- c. Third, pursuant to *State of North Carolina v. Michael Lee Tutt*, 171 N.C. App. 518, 615 S.E.2d 688 (2005), and Article I, § 3 and Article IV, § 1 of the North Carolina Constitution, the North Carolina Supreme Court maintains exclusive authority to make rules of practice and procedure for the General Court of Justice; and,
- d. Fourth, that Article I, § 3 and Article IV, § 1 of the Constitution of North Carolina prohibits the North Carolina General Assembly from changing the jurisdiction of the District Court; and,
- f.² Fifth, that pursuant to Article I, § 3 and Article IV, § 1 of the North Carolina Constitution, the District Court maintains exclusive original jurisdiction of this matter absent specific amendments to the North Carolina Constitution or provisions adopted by the Supreme Court of North Carolina; and,

2. The superior court did not include a Conclusion of Law "e" in its 15 January 2008 Order.

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- g. Sixth, that the statutes violate the Former Jeopardy Clause of the Constitution.

Based on defendant's arguments at the superior court's hearing on his pretrial motion, we conclude that the only challenged statutory provisions in the present case are the following: N.C.G.S. § 20-38.6(a), which required defendant to submit his motion pretrial; N.C.G.S. § 20-38.6(f), which required the district court to enter written findings of fact and conclusions of law on defendant's pretrial motion and restrained the district court from entering a final judgment granting defendant's motion until after the State had the opportunity to appeal to superior court; and N.C.G.S. § 20-38.7(a), which allowed the State to appeal to superior court from the district court's Preliminary Finding indicating that it would grant defendant's pretrial motion. Accordingly, we limit our review to address the constitutionality of N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a).

Because the Constitution "is a restriction of powers, and those powers not surrendered are reserved to the people to be exercised by their representatives in the General Assembly, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Guilford Cty. Bd. of Educ. v. Guilford Cty. Bd. of Elections*, 110 N.C. App. 506, 510, 430 S.E.2d 681, 684 (1993) (citing *Wayne Cty. Citizens Ass'n v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 399 S.E.2d 311 (1991)); see also *State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960) ("The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts. As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts—it is a political question."). "Therefore, the judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy. This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality." *Guilford Cty. Bd. of Educ.*, 110 N.C. App. at 511, 430 S.E.2d at 684.

"In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Id.* Accordingly, reviewing courts "are mandated to construe any legislative enactment so as to save its constitutionality, if possible, and to avoid a strict interpretation that will result in an absurd

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and unconstitutional result.” *Cooke v. Futrell*, 37 N.C. App. 441, 444, 246 S.E.2d 65, 67 (1978) (citation omitted).

With these as our guiding principles, we now turn to the parties’ arguments.

I.

[3] The State first contends the superior court erred by relying on *State v. Tutt*, 171 N.C. App. 518, 615 S.E.2d 688 (2005), to support its conclusions that the General Assembly violated Article I, § 3 and Article IV, § 1 of the North Carolina Constitution by enacting N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a), and that the Constitution “prohibits the North Carolina General Assembly from changing the jurisdiction of the District Court” absent a constitutional amendment authorizing it to do so.

The General Assembly is empowered to “prescribe the jurisdiction and powers of the District Courts,” *see* N.C. Const. art. IV, § 12, cl. 4, and, “within constitutional limitations,” to “circumscribe” the jurisdiction of the Superior Courts. *See* N.C. Const. art. IV, § 12, cl. 3 (“*Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State.*”) (emphasis added); *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941) (“The Legislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State.”).

Additionally, while the Constitution provides that “[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division,” it also provides that the General Assembly “may make rules of procedure and practice for the Superior Court and District Court Divisions.” *See* N.C. Const. art. IV, § 13, cl. 2. The Constitution further provides that the General Assembly may delegate its authority to make rules of procedure and practice for the Superior and District Court Divisions to the Supreme Court and, if it does so, “the General Assembly may, nevertheless, alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions.” *See id.*

In *Tutt*, the threshold issue before this Court was whether the General Assembly unconstitutionally contravened the Supreme Court’s “exclusive authority to make rules of procedure and practice for the Appellate Division” when it amended Rule 103 of the North Carolina Rules of Evidence. *See id.*; *Tutt*, 171 N.C. App. at 520-21, 615

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S.E.2d at 690-91. As amended by the Legislature, Rule 103 “permit[ted] *appellate review* of an evidentiary ruling even [when] the party fail[ed] to object at trial as required by [Appellate Rule] 10(b)(1).” *See Tutt*, 171 N.C. App. at 518-19, 615 S.E.2d at 689 (emphasis added). In other words, the General Assembly’s statutory amendment to Rule 103 was “in direct conflict with Rule 10(b)(1) of the Rules of Appellate Procedure as interpreted by our case law on point.” *Id.* at 521, 615 S.E.2d at 690. Although this Court ultimately decided to hear the matter by exercising its discretion pursuant to Appellate Rule 2, *see id.* at 524, 615 S.E.2d at 693, we determined that the General Assembly was seeking “to make a rule of procedure and practice for the Appellate Division that lies within the exclusive authority of our Supreme Court.” *Id.* at 521, 615 S.E.2d at 691 (internal quotation marks omitted). Consequently, this Court held that, “to the extent that [N.C.G.S.] § 8C-1, Rule 103(a)(2) is inconsistent with [Appellate Rule] 10(b)(1), it must fail.” *Id.* at 524, 615 S.E.2d at 692-93.

However, *Tutt* is distinguishable from the present case because, as we determined above, the procedures of N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) do not apply to the Appellate Division. Instead, by enacting these provisions, the General Assembly created rules which affect the procedure and practice of the Superior and District Court Divisions *only*, as it is constitutionally permitted to do pursuant to Article IV, § 13, Clause 2 of the North Carolina Constitution. Therefore, we hold the superior court erred by concluding in its 15 January 2008 Order that *Tutt* controlled in this matter.

[4] Because the General Assembly is constitutionally authorized to create rules of procedure and practice for the Superior and District Courts, to prescribe the jurisdiction and powers of the District Courts, and to circumscribe the jurisdiction of the Superior Courts, we further hold a constitutional amendment is not required for the General Assembly to promulgate a rule of procedure and practice pertaining exclusively to the Superior and District Courts. The superior court’s ruling to the contrary was in error.

[5] We note that defendant argues in his brief that N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) violate the separation of powers doctrine of the North Carolina Constitution. The Separation of Powers Clause of the North Carolina Constitution provides that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” N.C. Const. art. I, § 6. However, the trial court did not conclude that the

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challenged statutory provisions violated this constitutional provision, and defendant failed to cross-assign as error the trial court's failure to do so. Nevertheless, even had the issue properly been before us, we discern no usurpation of the judicial power of the State by the Legislature in the enactment of these statutory provisions.

II.

[6] The State next contends, and we agree, the superior court erred by concluding that N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) violate the Former Jeopardy Clause of the United States Constitution.

“Two bases exist in North Carolina for the defense of former jeopardy: the state Constitution and the federal Constitution.” *State v. Brunson*, 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990), *aff'g*, *State v. Brunson*, 96 N.C. App. 347, 351, 385 S.E.2d 542, 544 (1989). While “[t]he North Carolina Constitution does not specifically recognize former jeopardy as a defense, . . . [our Supreme] Court has interpreted the language of the law of the land clause of our state Constitution as guaranteeing the common law doctrine of former jeopardy.” *Id.* Further, “[i]t is well settled that a state cannot establish laws, rules, or procedures that would deprive a defendant of his federally guaranteed freedom from former jeopardy.” *Id.*

“The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.” *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). “It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense.” *State v. Crocker*, 239 N.C. 446, 449, 80 S.E.2d 243, 245 (1954). This principle of double jeopardy, or former jeopardy, “benefits the individual defendants by providing repose; by eliminating unwarranted embarrassment, expense, and anxiety; and by limiting the potential for government harassment.” *Brunson*, 327 N.C. at 249, 393 S.E.2d at 864. “It benefits the government by guaranteeing finality to decisions of a court and of the appellate system, thus promoting public confidence in and stability of the legal system. The objective is to allow the prosecution one complete opportunity to convict a defendant in a fair trial.” *Id.*

“The rule in North Carolina is that in nonjury trials, *jeopardy attaches when the court begins to hear evidence or testimony.*” *Id.*

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(emphasis added). In other words, “until a defendant is ‘put to trial *before the trier of the facts*, whether the trier be a jury or a judge,’ jeopardy does not attach.” *Brunson*, 96 N.C. App. at 351, 385 S.E.2d at 544 (emphasis added) (quoting *United States v. Jorn*, 400 U.S. 470, 479, 27 L. Ed. 2d 543, 553 (1971)). This rule “reflects an attempt to connect the consequences of jeopardy (that is, the risk of conviction) with that element which could result in conviction (the introduction of evidence).” *Brunson*, 327 N.C. at 250, 393 S.E.2d at 865. Accordingly, for nonjury trials in district court where the court presides both as trier of fact and as judge, “the potential for conviction exists [only] when evidence or testimony against a defendant is presented to and accepted . . . by the district court [as the trier of fact] for an adjudication of [the] defendant[s] guilt.” *State v. Ward*, 127 N.C. App. 115, 121, 487 S.E.2d 798, 802 (1997) (citation omitted). Conversely, when the court is “presented” with evidence or testimony for its consideration of a pretrial motion on a question of law, jeopardy has not yet attached to the proceeding.

The General Assembly, by enacting N.C.G.S. § 20-38.6(a), has required that a defendant charged with an implied-consent offense move to suppress evidence or dismiss charges in district court “*only prior to trial*” and, when not determined summarily, such a motion must be decided only after a hearing by the district court judge. See N.C. Gen. Stat. § 20-38.6(a), (e) (emphasis added). Thus, at the time a defendant’s *pretrial* motions to suppress or dismiss are made, heard, and decided by the district court, the defendant has not yet been “put to trial before the trier of fact,” and, so, jeopardy has not yet attached to the proceedings. See *Brunson*, 96 N.C. App. at 351, 385 S.E.2d at 544 (internal quotation marks omitted). Therefore, we hold the State’s right to appeal a district court’s preliminary determination indicating that it would grant a defendant’s pretrial motion to suppress or dismiss made in accordance with N.C.G.S. § 20-38.6(a) does not deprive defendants charged with implied-consent offenses of their guaranteed freedom from former jeopardy.

Moreover, in *State v. Morgan*, 189 N.C. App. 716, 660 S.E.2d 545, *supersedeas and disc. review denied*, 362 N.C. 686, 671 S.E.2d 329 (2008), this Court wrote: “Finally, we observe in passing that, as the law now stands in North Carolina [after the enactment of N.C.G.S. §§ 20-38.6 and 20-38.7], . . . [t]he General Assembly has seen fit to ensure that evidentiary questions in district court are *now decided prior to the point at which jeopardy would attach* to a DWI defendant.” *Morgan*, 189 N.C. App. at 722, 660 S.E.2d at 549 (emphasis

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added). We recognize that these statutes were “not in force at the time” the *Morgan* case went to trial and that *dicta* is not controlling. See *id.* at 723 n.3, 660 S.E.2d at 549-50 n.3. Nonetheless, the *Morgan* Court’s suggestion supports our conclusion that the General Assembly’s requirement that defendants move to suppress evidence or dismiss charges *pretrial* before jeopardy attaches precludes these statutory provisions from encroaching on the “constitutional protections afforded by the prohibitions against double jeopardy.” See *State v. Priddy*, 115 N.C. App. 547, 551, 445 S.E.2d 610, 613, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994).

Further, the United States Supreme Court has held “that ‘a judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause.’ ” *Morgan*, 189 N.C. App. at 720, 660 S.E.2d at 548 (quoting *Smalis v. Pennsylvania*, 476 U.S. 140, 142, 90 L. Ed. 2d 116, 120 (1986)). Accordingly, “[a]fter such a judgment has been entered, ‘the Double Jeopardy Clause bars an appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into further proceedings devoted to the resolution of factual issues going to the elements of the offense charged.’ ” *Id.* (quoting *Smalis*, 476 U.S. at 142, 90 L. Ed. 2d at 120).

In the present case, N.C.G.S. § 20-38.6(a) expressly excepts from its pretrial motion requirement any motion to dismiss for insufficient evidence. See N.C. Gen. Stat. § 20-38.6(a) (“The defendant may move to suppress evidence or dismiss charges only prior to trial, except the defendant may move to dismiss the charges for insufficient evidence at the close of the State’s evidence and at the close of all of the evidence without prior notice.”). Nonetheless, we underscore that any motions to dismiss for insufficient evidence made by a defendant charged with an implied-consent offense and determined in favor of the defendant by the district court are not appealable by the State to the superior court pursuant to these statutes, since “the State may not appeal such a judgment when ‘it is plain that the District Court . . . evaluated the Government’s evidence and determined that it was legally insufficient to sustain a conviction.’ ” *Morgan*, 189 N.C. App. at 720, 660 S.E.2d at 548 (omission in original) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572, 51 L. Ed. 2d 642, 651 (1977)).

Finally, we recognize that N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) do not expressly preclude the State from appealing motions to suppress or dismiss made by defendants *during* trial

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based on newly discovered facts. *See* N.C. Gen. Stat. § 20-38.6(a) (“If, during the course of the trial, the defendant discovers facts not previously known, a motion to suppress or dismiss may be made during the trial.”). Since statutes authorizing an appeal by the State in a criminal case must be strictly construed, *see Harrell*, 279 N.C. at 466-67, 183 S.E.2d at 640, we also hold, by enacting N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a), the General Assembly has granted the State a right of appeal to superior court *only* from a district court’s preliminary determination indicating that it would grant a defendant’s pretrial motion to suppress evidence or dismiss charges on an implied-consent offense which (1) is made and decided in district court at a time *before* jeopardy has attached to the proceedings, i.e., before the district court sits as the trier of fact to adjudicate the defendant’s guilt, and (2) is “entirely unrelated to the sufficiency of evidence as to any element of the offense or to defendant’s guilt or innocence.” *See Priddy*, 115 N.C. App. at 551, 445 S.E.2d at 613. In other words, N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) should not be construed to grant the State a right of appeal to superior court when the district court grants a defendant’s motion to suppress evidence or dismiss charges *during* trial based on “facts not previously known” which are only discovered by defendant “during the course of the trial.” *See* N.C. Gen. Stat. § 20-38.6(a). Rather, based on the recommendations in the Final Report of the Governor’s Task Force on Driving While Impaired, *see* DWI Final Report at 21, as well as the enabling legislation of Article 2D derived therefrom, *see* Motor Vehicle Driver Protection Act of 2006, ch. 253, § 5, 2006 N.C. Sess. Laws 1178, 1180-83, it is our opinion that the General Assembly intended the pretrial motions to suppress evidence or dismiss charges made in accordance with N.C.G.S. § 20-38.6(a) to address only procedural matters including, but not limited to, delays in the processing of a defendant, limitations imposed on a defendant’s access to witnesses, and challenges to the results of a breathalyzer.

Accordingly, since “[w]hether a statute survives a double jeopardy constitutional analysis . . . depend[s] on . . . what the statute accomplishes in reality,” *State v. Wood*, 185 N.C. App. 227, 237, 647 S.E.2d 679, 687 (internal quotation marks omitted), *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007), we hold the superior court erred by concluding that the challenged provisions of N.C.G.S. §§ 20-38.6 and 20-38.7 violate the Former Jeopardy Clause of the United States Constitution.

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III.

The State next contends, and we agree, the superior court erred by concluding that N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) violate the Due Process Clause of the United States Constitution and of the North Carolina Constitution “in that they give one party, the State of North Carolina, an advantage of immediate appeal over another party, in this instance, the [d]efendant, before a final judgment is entered.”

“Our courts have long held that [t]he law of the land clause has the same meaning as due process of law under the Federal Constitution.” *State v. Guice*, 141 N.C. App. 177, 186, 541 S.E.2d 474, 480 (2000) (alteration in original) (internal quotation marks omitted), *disc. review allowed for limited purpose and supersedeas denied*, 353 N.C. 731, 551 S.E.2d 112 (2001), *modified and aff’d on remand*, 151 N.C. App. 293, 564 S.E.2d 925 (2002). Due process “provides two types of protection for individuals against improper governmental action. Substantive due process protection prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty.” *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (citation and internal quotation marks omitted). “Procedural due process protection ensures that when government action depriving a person of life, liberty, or property survives substantive due process review, that action is implemented in a fair manner.” *Id.* (internal quotation marks omitted).

“Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained.” *State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323, *appeal dismissed*, 422 U.S. 1002, 45 L. Ed. 2d 666 (1975). Thus, “[s]ubstantive due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power.” *Guice*, 141 N.C. App. at 188, 541 S.E.2d at 481 (internal quotation marks omitted); *see also State v. Dobbins*, 277 N.C. 484, 497, 178 S.E.2d 449, 457 (1971) (“The police power of the State extends to all the compelling needs of the public health, safety, morals and general welfare. Likewise, the liberty protected by the Due Process and Law of the Land Clauses of the Federal and State Constitutions extends to all fundamental rights of the individual.”).

“The fundamental premise of procedural due process protection is notice and the opportunity to be heard.” *Peace v. Emp. Sec.*

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Comm'n of N.C., 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 503 (1985)). “Moreover, the opportunity to be heard must be ‘at a meaningful time and in a meaningful manner.’ ” *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965)).

“In order to determine whether a law violates substantive due process, we must first determine whether the right infringed upon is a fundamental right.” *Affordable Care, Inc. v. N.C. Bd. of Dental Exam'rs*, 153 N.C. App. 527, 535, 571 S.E.2d 52, 59 (2002) (citing *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 542 S.E.2d 668, *disc. review denied*, 353 N.C. 450, 548 S.E.2d 524 (2001)). “If the right is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the law must demonstrate that it serves a compelling state interest.” *Id.* at 535-36, 571 S.E.2d at 59. “If the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest.” *Id.* at 536, 571 S.E.2d at 59.

[7] Defendant first argues that N.C.G.S. § 20-38.6(a) infringes on the right of a person charged with an implied-consent offense in district court to exercise his or her fundamental right to a fair trial, since it requires that such defendants move to suppress evidence or dismiss charges pretrial without the benefit of any statutory right to pretrial discovery. We disagree.

The United States Supreme Court has recognized that the fundamental right to a fair trial is “the most fundamental of all freedoms.” See *Estes v. Texas*, 381 U.S. 532, 540, 14 L. Ed. 2d 543, 549, *reh'g denied*, 382 U.S. 875, 15 L. Ed. 2d 118 (1965); see also *State v. White*, 331 N.C. 604, 616, 419 S.E.2d 557, 564 (1992) (recognizing that a criminal defendant’s right to a fair trial is “fundamental”), *cert. denied*, 519 U.S. 936, 136 L. Ed. 2d 229 (1996). “[T]he fundamental conception of a fair trial includes many of the specific provisions of the Sixth Amendment, such as the right to have the proceedings open to the public, the right to notice of specific charges, the right to confrontation, . . . the right to counsel,” the right to be tried before impartial jurors, and the right to the presumption of innocence. See *Estes*, 381 U.S. at 560, 14 L. Ed. 2d at 560; see also *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075, 115 L. Ed. 2d 888, 923 (1991) (right to be tried before impartial jurors); *Estelle v. Williams*, 425 U.S. 501, 503, 48 L. Ed. 2d 126, 130 (right to the presumption of innocence), *reh'g denied*, 426 U.S. 954, 49 L. Ed. 2d 1194 (1976).

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“[T]he purpose of discovery under our [General S]tatutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate.” *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). At present, “[i]n North Carolina, no statutory right to discovery exists for criminal cases originating in district court.” *State v. Cornett*, 177 N.C. App. 452, 455, 629 S.E.2d 857, 859, *appeal dismissed and disc. review denied*, 361 N.C. 172, 640 S.E.2d 56 (2006). “Furthermore, it is well-established that there is no Constitutional right to discovery other than to exculpatory evidence.” *Id.* at 456, 629 S.E.2d at 859.

N.C.G.S. § 20-38.6(a) expressly provides that, “[i]f, during the course of the trial, the defendant *discovers facts not previously known*, a motion to suppress or dismiss *may be made during the trial.*” N.C. Gen. Stat. § 20-38.6(a) (emphasis added). In other words, defendants charged with implied-consent offenses in district court are permitted to make motions to suppress or dismiss *during* trial *if* information not known to them *prior* to trial is first discovered only during the course of the trial. Thus, although, unlike other defendants appearing in district court, N.C.G.S. § 20-38.6(a) generally requires defendants charged with implied-consent offenses to make motions to suppress evidence or dismiss charges prior to trial, the express language of N.C.G.S. § 20-38.6(a) also protects defendants against any disadvantage they could suffer as a result of the absence of a statutory right to discovery in district court, since any “unfair surprise” that might arise from the discovery of “facts not previously known” to a defendant is tempered by allowing defendants to make motions to suppress or dismiss *during* the course of the trial on the basis of newly discovered facts. Therefore, we conclude that the pretrial motion requirement of N.C.G.S. § 20-38.6(a) does not infringe on the fundamental right to a fair trial of defendants charged with implied-consent offenses appearing in district court.

[8] Defendant also asserts that, since N.C.G.S. §§ 20-38.6(f) and 20-38.7(a) do not specify a period of time by which the State must appeal from a district court’s preliminary determination indicating that it would grant a defendant’s pretrial motion to dismiss or suppress made in accordance with N.C.G.S. § 20-38.6(a), these provisions necessarily infringe on the fundamental right to a speedy trial of those defendants charged with implied-consent offenses appearing in district court. Again, we disagree.

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“The fundamental law of the State secures to every person *formally accused* of crime the right to a speedy and impartial trial, as does the Sixth Amendment to the Federal Constitution . . .” *State v. Johnson*, 275 N.C. 264, 269, 167 S.E.2d 274, 277-78 (1969). “The guarantee of a speedy trial is designed to protect a defendant from the dangers inherent in a prosecution which has been negligently or arbitrarily delayed by the State: prolonged imprisonment, anxiety and public distrust engendered by untried accusations of crime, lost evidence and witnesses, and impaired memories.” *Id.* at 269, 167 S.E.2d at 278. “Undue delay cannot be categorically defined in terms of days, months, or even years; the circumstances of each particular case determine whether a speedy trial has been afforded.” *Id.* “Four inter-related factors bear upon the question: the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant.” *Id.* “The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution.” *Id.*

When the State appeals from a district court’s preliminary determination indicating that it would grant a defendant’s pretrial motion to suppress evidence or dismiss charges made in accordance with N.C.G.S. § 20-38.6(a), such an appeal is authorized pursuant to N.C.G.S. § 20-38.7(a), which does not specify a time by which the State must appeal. Nevertheless, we are not persuaded that the absence of a specified time for the State to appeal a district court’s preliminary determination pursuant to N.C.G.S. § 20-38.7(a) necessitates a conclusion by this Court that the challenged provisions of these statutes, as written, infringe on a defendant’s fundamental right to a speedy trial. Instead, this Court has recognized that, “[i]n the absence of a statute or rule of court prescribing the time for taking and perfecting an appeal, an appeal must be taken and perfected within a reasonable time.” *Teen Challenge Training Ctr., Inc. v. Bd. of Adjust. of Moore Cty.*, 90 N.C. App. 452, 454, 368 S.E.2d 661, 663 (1988) (citing 4A C.J.S. *Appeal and Error* § 428 (1957)). “ ‘What is a reasonable time must, in all cases, depend upon the circumstances.’ ” *Id.* (quoting *White Oak Props., Inc. v. Town of Carrboro*, 313 N.C. 306, 311, 327 S.E.2d 882, 886 (1985)).

Accordingly, we conclude that the General Assembly’s decision to refrain from establishing a time by which the State must give notice of appeal from a district court’s preliminary determination indicating that it would grant a defendant’s pretrial motion made in accordance with N.C.G.S. § 20-38.6(a) will require an examination of “the circum-

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stances of each particular case” in which a defendant alleges that the State acted in violation of his or her fundamental right to a speedy trial by subjecting that defendant to undue delay. *See Johnson*, 275 N.C. at 269, 167 S.E.2d at 278. Thus, we conclude that the State’s appeal from a district court’s preliminary determination indicating that it would grant a defendant’s pretrial motion made in accordance with N.C.G.S. § 20-38.6(a) on an implied-consent offense charge does not infringe on a defendant’s fundamental right to a speedy trial.

Therefore, since N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) do not infringe on the fundamental rights to a fair and speedy trial of those persons charged with implied-consent offenses in district court, we need only determine whether the challenged statutory provisions are “rationally related to a legitimate state interest.” *Dixon v. Peters*, 63 N.C. App. 592, 598, 306 S.E.2d 477, 481 (1983) (citing *Williamson v. Lee Optical*, 348 U.S. 483, 99 L. Ed. 563, *reh’g denied*, 349 U.S. 925, 99 L. Ed. 1256 (1955)).

[9] “A single standard” has traditionally determined “whether legislation constitutes an improper exercise of the police power so as to violate the ‘law of the land’ clause: the law must have a rational, real and substantial relation to a valid governmental objective (i.e., the protection of the public health, morals, order, safety, or general welfare).” *Treants Enters., Inc. v. Onslow Cty.*, 83 N.C. App. 345, 352, 350 S.E.2d 365, 369-70 (1986), *aff’d*, 320 N.C. 776, 360 S.E.2d 783 (1987). “The inquiry is thus two-fold: (1) Does the [statute] have a legitimate objective? and (2) If so, are the means chosen to implement that objective reasonable?” *Id.* at 352, 350 S.E.2d at 370. Nonetheless, “[e]ven if the legislation is seriously flawed and result[s] in substantial inequality, it will be upheld if it is reasonably related to a permissible state objective.” *Clark*, 142 N.C. App. at 358, 542 S.E.2d at 674 (second alteration in original) (internal quotation marks omitted).

The enabling legislation of the challenged statutory provisions at issue in the present case arose from the Governor’s Task Force on Driving While Impaired—composed of members of the Bar, the Judicial Branch, law enforcement, and the General Assembly—which was responsible for reviewing the General Statutes applicable to driving while impaired, reviewing proposals in other states “designed to deter driving while impaired,” and recommending “actions to reduce driving while impaired.” *See* Exec. Order No. 54, 2004 N.C. Sess. Laws 893-94. In its January 2005 Final Report, the Task Force recognized that, although “[n]o other criminal charge is subject to

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th[e] rule” that “a substantial delay in processing a person charged with DWI justifies a dismissal,” “under the Constitution, DWI cases are different” and, so, delays in the post-arrest processing of persons charged with an implied-consent offense can result in dismissals. *See* DWI Final Report at 22. Thus, the Task Force suggested that “[a] specific procedure should be developed [for implied-consent offense cases] to prevent dismissals related to delays in processing and by the defendant’s lack of access to witnesses.” *See id.* at 21. Consequently, the enabling legislation that added Article 2D to Chapter 20 of the General Statutes, which includes N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a), specified that one of its objectives was to provide “procedures for investigating, arresting, charging, and judicial processing of impaired driving offenses” as “measures designed to improve the safety of the motoring public of North Carolina.” *See* Motor Vehicle Driver Protection Act of 2006, ch. 253, 2006 N.C. Sess. Laws 1178, 1180-83.

Accordingly, we find that the Legislature determined from the facts before it that the pretrial procedures codified in N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) would serve as a means to improve the safety of the motoring public of North Carolina. Since “any act promulgated by the General Assembly is [presumed to be] constitutional and . . . all doubt [must be resolved] in favor of its constitutionality,” *see Guilford Cty. Bd. of Educ.*, 110 N.C. App. at 511, 430 S.E.2d at 684, we conclude that the challenged legislation is not “unreasonable, arbitrary or capricious, and . . . [is] substantially related to the valid object sought to be obtained.” *See Joyner*, 286 N.C. at 371, 211 S.E.2d at 323. Therefore, we hold N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) do not violate substantive due process.

Defendant challenges the statutory provisions as violative of procedural due process based on the General Assembly’s mandate that district courts must first enter preliminary determinations when inclined to rule favorably on a defendant’s pretrial motion made in accordance with N.C.G.S. § 20-38.6(a). However, since we have held the challenged statutory provisions do not violate substantive due process, we find no basis upon which the challenged statutory provisions can violate the right to procedural due process of a defendant subject to these procedures. Therefore, we hold the superior court erred when it concluded that N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) violate the Due Process Clause of the United States Constitution and of the North Carolina Constitution.

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IV.

[10] Finally, the State contends, and we agree, the superior court erred by concluding that N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) violate the Equal Protection Clause of the United States Constitution and of the North Carolina Constitution.

“The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws,” *Dep’t of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001), *cert. denied*, 534 U.S. 1130, 151 L. Ed. 2d 972 (2002), and require that “all persons similarly situated be treated alike.” *See Richardson v. N.C. Dep’t of Corr.*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996).

“Our [state] courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis.” *Id.* When evaluating a challenged classification, “[t]he court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the [statute] meets the relevant standard of review.” *Rowe*, 353 N.C. at 675, 549 S.E.2d at 207.

“Strict scrutiny applies when a [statute] classifies persons on the basis of certain designated suspect characteristics or when it infringes on the ability of some persons to exercise a fundamental right.” *Id.*; *see also Graham v. Richardson*, 403 U.S. 365, 372, 29 L. Ed. 2d 534, 541-42 (1971) (stating that classifications based on race, alienage, and national origin “are inherently suspect and subject to close judicial scrutiny”). “Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the [S]tate to prove that the [statute] is substantially related to an important government interest.” *Rowe*, 353 N.C. at 675, 549 S.E.2d at 207. “If a [statute] draws any other classification, it receives only rational-basis scrutiny, and the party challenging the [statute] must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the [statute] is valid.” *Id.*

However, “[a] statute is not subject to the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment of the United States Constitution or [A]rticle I § 19 of the North Carolina Constitution *unless* it creates a classification between different groups of people.” *State*

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v. Howren, 312 N.C. 454, 457, 323 S.E.2d 335, 337 (1984) (emphasis added). In the present case, no classification between different groups has been created. *See id.* Instead, pursuant to Article 2D of the General Statutes, *all defendants* charged with an implied-consent offense appearing in district court will be subject to the *same* procedural requirements established by N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a), as well as the other statutory provisions in the Article. Defendant makes the unsupported assertion that the classification created by the enactment of Article 2D which violates equal protection is one where defendants charged with an implied-consent offense appearing in district court are subject to different pretrial procedures than all other defendants charged with any other misdemeanor offenses appearing in district court. Nevertheless, since the Article “applie[s] uniformly to all members of the public and does not discriminate against any group,” *see id.* at 458, 323 S.E.2d at 338, we conclude that “[t]his classification is not of the type that can be considered a denial of equal protection.” *See State v. Garvick*, 98 N.C. App. 556, 564, 392 S.E.2d 115, 119-20, *aff’d per curiam*, 327 N.C. 627, 398 S.E.2d 330 (1990).

Still, even assuming, *arguendo*, that Article 2D does create a classification subject to an equal protection analysis, the challenged statutory provisions neither classify persons on the basis of any designated “suspect” characteristics nor, as we concluded in section III above, infringe on any fundamental rights of the persons subject to these procedures. Accordingly, to determine whether N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a), under this “classification,” would violate equal protection, we would need only to determine whether the challenged statutory provisions “bear[] some rational relationship to a conceivable legitimate interest of [the] government.” *See Richardson*, 345 N.C. at 135, 478 S.E.2d at 506 (internal quotation marks omitted).

As we concluded in section III above, it is our opinion that the Legislature’s objective to improve the safety of the motoring public of North Carolina is a legitimate objective and the procedures established by the challenged provisions of these statutes are rationally related to that objective. *See Motor Vehicle Driver Protection Act of 2006*, ch. 253, 2006 N.C. Sess. Laws 1178; *see also Clark*, 142 N.C. App. at 358, 542 S.E.2d at 674 (concluding that, when “[t]he statute at issue . . . neither burdens a suspect class, nor affects a fundamental right[, it] . . . need only satisfy the rational basis level of scrutiny to withstand both the due process and equal protection challenges”)

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(emphasis added). Therefore, we hold N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a) do not violate the Equal Protection Clause of the United States Constitution or of the North Carolina Constitution.

V.

[11] “When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator.” *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). When ruling on a motion to dismiss for insufficient evidence, the trial court “is to *consider all of the evidence actually admitted*, whether competent or incompetent, which is favorable to the State,” *see State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982) (emphasis added), and must consider that evidence “in the light most favorable to the State.” *See id.* at 67, 296 S.E.2d at 652. “[T]he State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence.” *Id.* at 67, 296 S.E.2d at 653. Additionally, a motion to dismiss for insufficient evidence cannot be made pretrial, because only those “defense[s], objection[s], or request[s] which [are] capable of being determined without the trial of the general issue may be raised before trial by motion,” *see* N.C. Gen. Stat. § 15A-952 (2007), and a court can *only* consider a motion to dismiss for insufficient evidence *after* the State has had an opportunity to present all of its evidence to the trier of fact *during* trial.

In the present case, the district court entered a “Preliminary Finding Granting Pretrial Motion to *Dismiss*,” (emphasis added), in which it concluded that the arresting officer “did not possess probable cause to arrest and charge [d]efendant with Driving While Impaired.” Additionally, both parties characterize defendant’s pretrial motion in district court as one to *dismiss*, not *suppress*, for lack of probable cause to arrest. However, the copy of defendant’s 2 January 2007 citation included in the record before this Court contains a handwritten notation in the section designated “Court Use Only” stating, “Pretrial Motion to *Suppress* Granted.” (Emphasis added.)

A trial court’s decision to grant a pretrial motion to *suppress* evidence “does not mandate a pretrial dismissal of the underlying indictments” because “[t]he district attorney may elect to dismiss or proceed to trial without the suppressed evidence and attempt to establish a *prima facie* case.” *See State v. Edwards*, 185 N.C. App. 701, 706, 649 S.E.2d 646, 650, *disc. review denied*, 362 N.C. 89, 656

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S.E.2d 281 (2007). Nevertheless, after concluding that the arresting officer lacked probable cause to arrest defendant, the district court decided that it would *dismiss* the driving while impaired charge against defendant. Consequently, this Court must infer that the district court not only considered whether the officer had probable cause to arrest defendant but, *further*, preliminarily determined that there was insufficient evidence for the State to proceed against defendant on the charge of driving while impaired.

Since there is no indication in the record that the State had the opportunity to present all of its evidence prior to the district court's preliminary determination indicating that it would dismiss the charge against defendant, we believe the superior court erred when it concluded that "it appears the [d]istrict [c]ourt's Conclusions of Law granting the motion to dismiss are based upon the Findings of Fact that are cited in [the court's] Order." Accordingly, we remand this matter to the superior court with instructions to remand the case to the district court to enter a preliminary order indicating its ruling on defendant's motion to *suppress* evidence of his 2 January 2007 arrest for lack of probable cause. If the district court preliminarily allows defendant's motion to suppress, the State may choose to appeal to the superior court from the district court's preliminary determination that it would grant defendant's pretrial motion to suppress pursuant to N.C.G.S. § 20-38.7(a). However, only after the State has had an opportunity to establish a *prima facie* case on the charge in the district court may a motion to dismiss for insufficient evidence be made by defendant and considered by the district court, unless the State elects to dismiss the charge against defendant.

Finally, we realize that under our interpretation of the scheme established by N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a), no statutory right of appeal by the State to the Appellate Division exists from a *district court's* final order granting a defendant's pretrial motion to suppress evidence, even though the General Assembly has conferred upon the State a statutory right of appeal to the Appellate Division from a *superior court's* order granting a defendant's pretrial motion to suppress pursuant to N.C.G.S. § 15A-979(c). *See* N.C. Gen. Stat. § 15A-979(c) (2007) ("An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case."). Since we have already determined that a superior court

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must remand a matter heard pursuant to N.C.G.S. § 20-38.7(a) to district court for a final entry of judgment on a defendant's pretrial motion, we further recognize that the State will not be able to appeal to the Appellate Division pursuant to N.C.G.S. § 15A-979(c) if the superior court determines that a defendant's pretrial motion to suppress should be granted. Moreover, as we indicated at the outset of this opinion, the State has a right of appeal to the superior court from a district court's final *dismissal* of criminal charges against a defendant pursuant to N.C.G.S. § 15A-1432(a)(1), and the State has a right of appeal to the Appellate Division from a superior court's order affirming a district court's dismissal pursuant to N.C.G.S. § 15A-1432(e). While we are unable to determine whether this seeming incongruity was intentional, or the inadvertent result of hasty draftsmanship of N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a), the wisdom of the General Assembly's legislative enactments is not a proper concern of the courts. *See Warren*, 252 N.C. at 696, 114 S.E.2d at 666.

Reversed and Remanded.

Judges BRYANT and BEASLEY concur.

WAL-MART STORES EAST, INC., A/K/A, WAL-MART STORES EAST I, INC., PLAINTIFF v.
REGINALD S. HINTON, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA,
DEFENDANT

No. COA08-450

(Filed 19 May 2009)

1. Taxation— corporate income tax—assessment of additional taxes—statutory authority to combine three related entities

The trial court did not err by granting summary judgment in favor of defendant Secretary of Revenue based on its conclusion that the Secretary acted within his lawful statutory authority when he assessed additional corporate income taxes against plaintiff company as a result of the combination of plaintiff with two related entities because: (1) N.C.G.S. § 105-130.6 on its face does not restrict the Secretary to a finding of a particular type of transaction or dealing; (2) plaintiff's definition of true earnings, what the taxpayer's income would be if it had no affiliates and

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dealt with all parties on an arm's length basis, was rejected by the Court of Appeals since the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise; (3) the tax payable calculated by W-M REBT for 1998-99 was \$786 income tax payable in North Carolina on \$1,208,178,874 in total net income when plaintiff operated at least 82 stores in North Carolina; (4) there was a connection with the three combined subsidiaries with North Carolina when W-M REBT owned and leased stores within North Carolina, passed along income to W-M PC received from leasing and subleasing these stores, which W-M PC further passed along to plaintiff in the form of dividends; (5) plaintiff did not cite any cases, and none were found, where our Supreme Court has ever deemed the unitary method to be constitutionally infirm, and plaintiff has not shown that the dividends received from W-M PC are in any way part of a discrete business; and (6) to the extent that authority from other jurisdictions help construe our statute, it weighs in favor of the Secretary and against plaintiff.

2. Constitutional Law; Taxation— corporate income tax— true earnings definite standard—Commerce Clause—N.C. Constitution article V, section 2(6)—formal rule-making procedures not required

The trial court did not err by granting summary judgment in favor of defendant Secretary of Revenue based on its conclusion that the Secretary acted within his lawful constitutional authority when he assessed additional corporate income taxes against plaintiff as a result of the combination of plaintiff with two related entities because: (1) an elemental principle of taxation law is that the label attached to a transaction or balance is of no importance, and the amount plaintiff sought to classify as dividends was in actual fact rental income; (2) the authority given the Secretary in N.C.G.S. § 105-130.6 was not without sufficient direction, and true earnings is a sufficiently definite standard so that the Secretary may set policies within it without exercising a legislative function; (3) the mere fact that another taxpayer has been treated differently from the plaintiff does not establish plaintiff's entitlement, and the taxpayer cannot premise its right to an exemption by showing that others have been treated more generously, leniently or even erroneously by the IRS; (4) plaintiff cited nothing in the record, and nothing was found, supporting its argument that the assessments violated the Commerce Clause of the

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U.S. Constitution since defendant allegedly only forces combination of foreign multistate corporations; (5) North Carolina Constitution article V, section 2(6) does not require any particular deduction from gross income to be allowed in calculating net income, but implicitly recognizes the authority of the General Assembly to determine what deductions from gross income are properly allowed in the computation of net income; (6) the Secretary was not required to follow the formal rule-making procedures in Chapter 150B since the filing of a consolidated or combined return is exceptional and not allowed unless specifically required; and (7) plaintiff failed to show how the cases it cited compelled a result in its favor.

3. Penalties, Fines, and Forfeiture— understating taxable income by more than 25%—negligence finding not required

The Secretary of Revenue did not err by assessing penalties against plaintiff based on plaintiff's understating its taxable income by more than 25% because: (1) N.C.G.S. § 105-236(a)(5)(c) does not require a finding of negligence as is typically necessary under N.C.G.S. § 105-236(a)(5)(a); and (2) plaintiff did not appear to dispute that if the Secretary's assessment based on the combined returns was lawful, the plaintiff's income was understated by more than 25% which operated to invoke the penalty provision of N.C.G.S. § 105-236(a)(5)(a) without a finding of negligence.

Appeal by plaintiff Wal-Mart Stores East, Inc. from order entered 4 January 2008 by Judge Clarence E. Horton, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 October 2008.

Alston & Bird LLP, by Jasper L. Cummings, Jr. for plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kay Linn Miller Hobart, for defendant-appellee.

Wilson & Coffey, LLP by G. Gray Wilson and Stuart H. Russell for amicus curiae.

STROUD, Judge.

Plaintiff Wal-Mart Stores East, Inc. appeals from an order entered 4 January 2008 granting summary judgment in favor of defendant. We affirm.

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I. Background

Viewed in the light most favorable to plaintiff, the evidence tended to show the following facts:¹

Plaintiff Wal-Mart Stores East, Inc. (“W-M SEI”) operates Wal-Mart retail stores in North Carolina and in 29 other states. At all times relevant to this action, plaintiff was wholly owned by Wal-Mart Stores, Inc. (“W-M SI”), a publicly traded corporation listed on the New York Stock Exchange.

At the beginning of 1996, all of the Wal-Mart stores in North Carolina operated by plaintiff during the tax years relevant to this appeal were owned and operated by W-M SI. In the fall of 1996 W-M SI reorganized its corporate structure. As a result of the corporate reorganization, plaintiff became the sole owner of WSE Management, LLC and WSE Investment, LLC. WSE Investment, LLC was the 99% owner and limited partner of Wal-Mart Stores East, LP. WSE Management, LLC was the 1% owner and general partner of Wal-Mart Stores East, LP. Wal-Mart Stores East, LP owned 100% of Wal-Mart Property Company (“W-M PC”). W-M PC owned all of the voting units of Wal-Mart Real Estate Business Trust (“W-M REBT”), a Delaware business trust with its principal place of business in Bentonville, Arkansas. On 31 October 1996 all real property pertaining to Wal-Mart store premises, including both freeholds and leaseholds, was transferred from W-M SI to W-M REBT.

On or about 31 January 1997, plaintiff entered into a ten-year agreement with W-M REBT to lease land and buildings owned by W-M REBT for plaintiff’s store premises. The lease agreement included at least 12 store premises owned in fee by W-M REBT in North Carolina. Plaintiff also executed a sub-lease agreement with W-M REBT to sub-let store premises, including at least 70 store premises in North Carolina.

1. Plaintiff’s statement of the facts in its brief was sketchy and at times argumentative. We admonish plaintiff’s counsel to follow Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure in future cases before this Court:

A full and complete statement of the facts [is required in an appellant’s brief]. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

N.C.R. App. P. 28(b)(5). We note that compliance with this rule is especially important when the Record on Appeal contains 2,531 pages and an additional stack of exhibits and transcripts standing approximately two feet tall.

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Plaintiff filed a North Carolina Corporation Income Tax Return² for the tax year ended 31 January 1999 (“1998-99 Tax Return”), disclosing \$3,173,869,445 in Total State Net Income. Total State Net Income included a deduction for \$1,657,646,765 for rent paid to W-M REBT pursuant to the lease and sub-lease agreements noted above. From the \$3,173,869,445 in Total State Net Income, plaintiff classified as nonbusiness income³ and subtracted \$1,270,259,076 that it re-

2. We were unable to locate copies of any of plaintiff’s North Carolina Corporation Tax Returns in the 2,531 page Record on Appeal. However, all amounts from the tax returns relevant to this appeal were included in the workpapers prepared during the Secretary’s audit of plaintiff. Plaintiff did not contest any of the amounts in the audit workpapers. The workpapers disclosed the following amounts for plaintiff for the tax year ended 31 January 1999 (“1998-99 Tax Year”), summarized in columnar format, rounded and expressed in millions (except for apportionment factors and tax payable):

Gross Profit	\$ 18,946	
Dividends from W-M PC	1,270	
Other Income	<u>148</u>	
Total Income		\$ 20,364
Rent Expense	\$ 1,658	
Other Deductions	<u>15,532</u>	
Total Deductions		<u>17,190</u>
Total State Net Income		\$ 3,174
Less: Non-business Income		<u>\$ 1,270</u>
Business Income		\$ 1,904
Apportionment Factors		<u>4.1625 %</u>
Business Income Apportioned to N.C.		\$ 79.2
Less Contributions to N.C. Donees		<u>.6</u>
Total Net Taxable Income		\$ 78.6
		=====
Tax Payable at 7.25% (not rounded)		\$5,701,282
		=====

3. At the time plaintiff filed its 31 January 1999 Tax Return, multistate corporations operating in North Carolina divided income for tax purposes into business and nonbusiness income. N.C. Gen. Stat. § 105-130.4. Business income was apportioned and taxed among the several states in which the corporation operated, while nonbusiness income was “allocated in a manner whereby it [was] taxed only by the state with which the asset that generated the income [was] most closely associated[.]” *Polaroid Corp. v. Offerman*, 349 N.C. 290, 294, 507 S.E.2d 284, 288 (1998) (citing N.C. Gen. Stat. § 105-130.4(h) [(1997)], *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999)).

Business income per N.C. Gen. Stat. § 105-130.4(a)(1) was redefined by the General Assembly on 30 September 2002, with effect on taxable years beginning on or after 1 January 2002, to mean “all income that is apportionable under the United States Constitution.” 2002 N.C. Sess. Law 126 § 30G.1. The heading above § 30G.1 is “CLOSE CORPORATE TAX LOOPHOLES,” which we construe as an attempt to keep the meaning of the statute the same but to foreclose a reading of the statute that might allow a corporation to avoid taxes properly due within the legislature’s original intent. Section

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ceived in dividends from W-M PC, to yield a total business income of \$1,903,610,369. Of the total business income, 4.1625% was apportioned to North Carolina per N.C. Gen. Stat. § 105-130.4: \$79,237,782. Plaintiff adjusted the apportioned amount for contributions to North Carolina donees, resulting in a Total Net Taxable Income of \$78,638,377. On this Total Net Taxable Income, plaintiff calculated tax at 7.25% in the amount of \$5,701,282.

W-M REBT filed a North Carolina Corporation Tax Return for the tax year ended 31 December 1998 (“1998 Tax Return”). On its 1998 Tax Return, W-M REBT reported total income of \$1,208,178,874. From its total income, it deducted \$1,207,831,069 for dividends paid to W-M PC, resulting in a net taxable income of \$347,805. W-M REBT apportioned 3.1185% of this income to its business in North Carolina per N.C. Gen. Stat. § 105-130.4, resulting in Total Net Taxable Income of \$10,846.⁴ On this Total Net Taxable Income, W-M REBT calculated tax at 7.25% in the amount of \$786. W-M PC did not file a corporation income tax return in the state of North Carolina for any of the years at issue in this appeal.

Defendant (or “the Secretary”) audited plaintiff’s tax return for the tax year ended 31 January 1999. As a result of the audit, defendant determined that the earnings of plaintiff must be combined with Wal-Mart Property Company and Wal-Mart Real Estate Business Trust in order to present true earnings in the State of North Carolina. Ac-

105-130.4(a)(1) was amended again 14 August 2003, with effect from that date, changing the term “business income” to “apportionable income,” but keeping the same definition. 2003 N.C. Sess. Law 416 § 5.

4. W-M REBT’s 31 December 1998 North Carolina Corporation Tax Return, summarized in columnar format, rounded and expressed in millions (except for apportionment factors and tax payable) disclosed the following amounts:

Taxable Income Per Federal Return Before	
Special Deductions	\$ 1,207.83
Addition per N.C. Tax Code	.35
Total Income	\$ 1,208.18
Dividends Paid Deduction (W-M PC)	\$ 1,207.83
Total State Net Income	\$ 0.35
Apportionment Factors	3.1185 %
Total Net Taxable Income	\$.01
	=====
Tax Payable at 7.25% (not rounded)	\$ 786
	=====

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cordingly, defendant prepared workpapers⁵ showing an additional \$4,183,704.00 tax payable by W-M SEI if the results of W-M SEI were combined with those of W-M PC and W-M REBT.

Based on the tax payable as calculated on the audit workpapers, on 14 April 2005 defendant issued a notice of proposed assessment pursuant to N.C. Gen. Stat. § 105-241.1 in the amount of \$4,184,490.00⁶ for the tax year ending 31 January 1999. Defendant further assessed interest of \$1,675,694.77 and a penalty of \$1,045,926.00.

Defendant also audited plaintiff's tax returns for the years ending 31 January 2000, 2001 and 2002.⁷ As a result of those audits, defendant made similar adjustments, issuing notices of proposed assessments in the amounts of \$4,847,198.00, \$5,680,383.00, and \$5,148,500.00 respectively. The proposed assessments for 2000, 2001, and 2002 also included interest of \$1,552,583.51, \$1,364,010.85, and \$935,635.98 respectively and penalties of \$1,211,608.25, \$1,418,417.50, and \$1,310,933.00 respectively.

On 2 May 2005, the Secretary notified plaintiff, pursuant to N.C. Gen. Stat. § 105-130.6, to file combined returns within 60 days to include W-M SEI, W-M PC and W-M REBT. There is no evidence in the record that plaintiff filed the combined returns, but on 12 May 2005, Wal-Mart Stores, Inc., plaintiff's sole owner, issued a check to the North Carolina Department of Revenue for \$26,564,516.25 in payment of an assessment against W-M SI which is not at issue in this appeal; the assessment against plaintiff for the tax years ending 31 January 1999, 2000, and 2001; and an assessment against Sam's Club, the subject of related appeal No. COA08-453 for which an opinion will be filed simultaneously with this opinion.

On 17 March 2006 plaintiff filed a complaint pursuant to N.C. Gen. Stat. § 105-267 demanding refund of taxes paid. Plaintiff filed an amended complaint on or about 31 March 2006 to more fully set forth

5. On appeal, the only issues raised by defendant were purely legal questions, and the numerical amounts and the arithmetic underlying the notices of proposed assessment were uncontroverted.

6. The difference from the calculation in the workpapers (\$4,184,490-\$4,183,704) is the \$786 shown as tax payable on the 1998 tax return of W-M REBT.

7. The appeal *sub judice* also includes plaintiff's tax years ended 31 January 2000, 31 January 2001, and 31 January 2002. The taxes payable for those tax years involve the same question of law, so we have not included the details of those numbers in the factual background.

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its reasons for demanding refund in the amount \$30,230,338.89.⁸ The gravamen of the complaint was that defendant had no authority to force combination of plaintiff with W-M REBT and W-M PC for the purpose of reporting taxable income.

Plaintiff filed a motion for summary judgment on 1 September 2006. Defendant filed a cross-motion for summary judgment on 12 September 2007. An order granting defendant's motion for summary judgment was entered on 4 January 2008. Plaintiff appeals.

II. Standard of Review and Questions Presented

The standard of review for an order granting summary judgment is well established:

The trial court must grant summary judgment upon a party's motion when there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law. Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party. On appeal, an order granting summary judgment is reviewed *de novo*, with the evidence in the record viewed in the light most favorable to the [non-moving party].

Carter v. West Am. Ins. Co., 190 N.C. App. 532, 536, 661 S.E.2d 264, 268 (2008) (citation, quotation marks, ellipses and brackets in original omitted). In the instant appeal, there is no dispute about the material facts and only questions of law remain, making the case ripe for summary judgment.

Plaintiff presents three questions of law to this Court: (1) whether N.C. Gen. Stat. § 105-130.6 (or "the statute") provides defendant with authority to combine the three entities for the purpose of reporting taxable income, (2) whether, if Section 105-130.6 provides defendant with authority to combine the three entities for the purpose of reporting taxable income, the statute is unconstitutional, and (3) whether defendant's administration of Section 105-130.6 was unlawful.

8. The record does not reveal how plaintiff arrived at this exact number. In the "summary of material facts" attached to its order, the trial court rounded off the refund sought to "around \$30 million."

III. Statutory Authority to Combine

[1] Plaintiff's chief argument is that defendant had no statutory authority to combine the three entities for the purpose of reporting taxable income. The statute reads, in pertinent part:

The net income of a corporation doing business in this State that is a parent, subsidiary, or affiliate of another corporation shall be determined by eliminating all payments to or charges by the parent, subsidiary, or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever. If the Secretary finds as a fact that a report by a corporation does not disclose the true earnings of the corporation on its business carried on in this State [(“true earnings”)], the Secretary may require the corporation to file a consolidated return of the entire operations of the parent corporation and of its subsidiaries and affiliates, including its own operations and income. The Secretary shall determine the true amount of net income earned by such corporation in this State.

N.C. Gen. Stat. § 105-130.6 (1999).⁹

Plaintiff argues that the first sentence of N.C. Gen. Stat. § 105-130.6 must be construed as a limit on the authority granted to the Secretary in the second sentence. Specifically, plaintiff argues that this construction is required because “true net income” or “true earnings” must be defined as “what the taxpayer’s income would be if it had no affiliates and dealt with all parties on an arm’s length basis[.]” Plaintiff reasons from this definition of true earnings “that, absent non-arm’s length dealings, a company’s separate return will accurately reflect its true earnings and neither adjustment nor forced combination are required to achieve the legislature’s intent to tax entities on their true earnings.” Plaintiff concludes therefrom that if its definition of true earnings is placed in the second sentence, and the second sentence of the statute is then read *in pari materia* with the first, the second sentence grants the Secretary authority to force combination *only* when he finds that there were intercompany payments in excess of fair value, but otherwise disallows forced combination. According to plaintiff, its proposed construction of the statute is supported by the “plain language of [the statute], [legislative his-

9. The statute was amended effective 1 January 1999 to its current form and controls three of the four tax years relevant to this appeal. The previous statute controls for plaintiff’s 1998-99 tax return. The 1999 changes were immaterial for purposes of this appeal.

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tory], the North Carolina case law and administrative practice, and persuasive authority from other states with similar statutes[.]”.

Plaintiff further urges us to decide in its favor because “[p]rior to the trial court’s decision in this case, no North Carolina court had ever held that related entities may be required to file a combined return if intercompany transactions are performed at arm’s length.” Assuming *arguendo* that this statement is true, it is not dispositive. Our research revealed no cases where this precise question was presented to a North Carolina appellate court, which would explain why no North Carolina court has answered it one way or the other. Accordingly, we conclude that this case presents a question of first impression.

A. The Language of the Statute

When this Court applies a statute duly passed by the General Assembly to a given set of facts:

The paramount objective of statutory interpretation is to give effect to the intent of the legislature. The primary indicator of legislative intent is statutory language; the judiciary must give clear and unambiguous language its plain and definite meaning. However, strict literalism will not be applied to the point of producing absurd results.

In Re Proposed Assessments v. Jefferson-Pilot Life Ins. Co., 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (citations and quotation marks omitted).

The language of the statute on its face does not limit the Secretary’s authority to require combined reporting by mandating that he first find that the entity engaged in “non-arm’s length dealings,” that is, conducted intercompany transactions at amounts other than fair value. To the contrary, the language of the statute is broad, allowing the Secretary to require combined reporting if he finds as a fact that a report by a corporation does not disclose the true earnings of the corporation on its business carried on in this State. N.C. Gen. Stat. § 105-130.6. On its face, it does not restrict the Secretary to a finding of a particular type of transaction or dealing. *Id.*

B. Definition of True Earnings

Plaintiff’s proposed definition of true earnings as “what the taxpayer’s income would be if it had no affiliates and dealt with all parties on an arm’s length basis” is crucial to its interpretation of

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the statute. However, we reject plaintiff's proposed definition of true earnings.

If the definition of a word or phrase is not found in the statute, and the meaning of the word or phrase is not otherwise clear, we consider the meaning of the word or phrase in cases where the word or phrase has been defined. *See Duke Power Co. v. Clayton, Com'r of Revenue*, 274 N.C. 505, 513-14, 164 S.E.2d 289, 295 (1968) (relying on definitions in cases from the North Carolina Supreme Court, the United States Supreme Court and courts of other states to define a statutory term). Relevant *sub judice*, there is a line of cases from the United States Supreme Court which discusses the concept of "true earnings." *See Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 772-73, 119 L. Ed. 2d 533, 542 (1992) (discussing the concept of true earnings in a State and listing cases); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37, 63 L. Ed. 2d 510, 520 (1980) (listing cases which discuss the concept of true earnings in a State).

The essential meaning of the phrase "true earnings" refers to the limit on state taxation found in the United States Constitution. *Allied-Signal*, 504 U.S. at 772, 119 L. Ed. 2d at 542. However, there are two very different methods for *calculating* true earnings: First, if the intrastate activities of an entity amount to a discrete business enterprise, the net income of that discrete business enterprise represents the true earnings in the State. *See id.* at 772, 119 L. Ed. 2d at 542 ("A State may not tax a nondomiciliary corporation's income if it is derived from unrelated business activity which constitutes a discrete business enterprise." (Citations, brackets and quotation marks omitted.)); accord N.C. Gen. Stat. § 105-130.6 (a discrete business enterprise is implied by the requirement of intercompany eliminations). However, if the entire enterprise is a unitary business, true earnings in the State may be calculated by apportioning the earnings of the entire enterprise on the basis of sales and other indicia of activity in the State. *Allied-Signal*, 504 U.S. at 772, 119 L. Ed. 2d at 542 ("[A] State need not attempt to isolate the intrastate income-producing activities from the rest of the business; it may tax an apportioned sum of the corporation's multistate business if the business is unitary."); accord N.C. Gen. Stat. § 105-130.4 (2007) (defining "apportionable income" as "all income that is apportionable under the United States Constitution" and setting forth the bases and factors for apportioning income).

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It is important to note that in determining true earnings, “the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise.” *Mobil Oil*, 445 U.S. at 440, 63 L. Ed. 2d at 523. Functional integration is the key; whether the earnings are derived as divisional profits from a legally integrated enterprise or as dividends from a legally separate entity is of no consequence in determining if a business is unitary for the purposes of computing true earnings. *See id.* at 440-41, 63 L. Ed. 2d at 523.

If a taxpayer reports income based on the discrete enterprise method, then plaintiff is correct, absent any non-arm’s length transactions the taxpayer’s reported income will reflect its true earnings in the State. However, where a taxpayer’s business is concededly unitary,¹⁰ and where, as here, the taxpayer attempts to reclassify income as nonbusiness or nonapportionable, the reclassification has the potential to distort true earnings in North Carolina even if all inter-company transactions are accounted for at arm’s length, or fair value, prices. *See Polaroid Corp. v. Offerman*, 349 N.C. 290, 293, 507 S.E.2d 284, 287-88 (1998) (overruling the taxpayer’s attempt to classify money received in a patent lawsuit as nonapportionable). We therefore hold that plaintiff’s proposed definition of true earnings is flawed because it is too narrow.

C. Statutory Construction

Where the language of a statute is not entirely clear, the basic principles of construction of tax statutes are well established:

When the plain language of a statute proves unrevealing, a court may look to other indicia of legislative will, including: the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. The intent of the General Assembly may also be gleaned from legislative history. Likewise, later statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute.

Statutory provisions must be read in context: Parts of the same statute dealing with the same subject matter must be con-

10. As in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 437, 63 L. Ed. 2d 510, 521 (1980), plaintiff *sub judice* “included all its operating income in apportionable net income, without regard to the locality in which it was earned.” *Id.*

sidered and interpreted as a whole. Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each.

Tax statutes are to be strictly construed against the State and in favor of the taxpayer. In arriving at the true meaning of a taxation statute, the provision in question must be considered in its appropriate context within the Revenue Act.

Proposed Assessments, 161 N.C. App. at 560, 589 S.E.2d at 181 (citations, quotation marks and brackets omitted).

Plaintiff argues that the legislative history supports its proposed construction of the statute. Plaintiff cites *A Survey of Statutory Changes in North Carolina in 1941*, 19 N.C. L. Rev. 435, 534-35 (1941), as evidence of the legislative history of the enactment of the second sentence in the statute. Even if we accept plaintiff's contention that a contemporaneous commentary in a law review is persuasive as to legislative history and intent, the article cited offers no support to plaintiff.

Specifically, plaintiff argues that *A Survey of Statutory Changes* interpreted the second sentence to continue to relate to the non-arm's length charges situation, but suggested that Defendant could force combination without having to find exactly which intercompany charges were excessive and by how much, if he found other evidence indicating non-arm's length charges (e.g., if a subsidiary consistently loses money).

However the actual language of *A Survey of Statutory Changes*, as opposed to plaintiff's paraphrase, characterizes the second sentence as an

attempt to determine the taxable income of the subsidiary by assigning it a reasonable portion of the consolidated net income of the system. . . . Particularly is this true when . . . over a long period of years the system as a whole has earned money while the subsidiary operating in this state, though doing a substantial business with the system and the public, has nominally earned none. . . . [T]he new provision [the second sentence of N.C. Gen. Stat. § 105-130.6] will . . . authorize consideration of the system's entire income ***without finding any unfairness . . . in connection with specific intercompany transactions.***

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19 N.C. L. Rev. at 534-35 (footnotes omitted and emphasis added). If we accord *A Survey of Statutory Changes* any weight at all in construction of the second sentence, it cuts directly *against* plaintiff's argument that the authority granted to the Secretary in the second sentence was limited to a finding of non-arms' length transactions which by definition are intercompany transactions not accounted for at fair value. In fact, the tax payable calculated by W-M REBT for 1998-99—\$786 income tax payable in North Carolina on \$1,208,178,874 in total net income when plaintiff operated at least 82 stores in North Carolina—is exactly the type of example noted in the article as a reason for enacting the second sentence of the statute.

D. North Carolina Case Law

Plaintiff further contends that its proposed construction of the statute is supported by “the North Carolina case law.” Plaintiff cites two North Carolina cases in support of its position, *In re Clayton-Marcus Co.*, 286 N.C. 215, 210 S.E.2d 199 (1974), and *Polaroid Corp. v. Offerman*, 349 N.C. 290, 507 S.E.2d 284 (1998).

In *Clayton-Marcus*, the Court relied on the plain language of the statute and accordingly overruled the Secretary's attempt to assess additional tax by adding words to a statute defining property to be taxed. 286 N.C. at 222, 210 S.E.2d at 204. *Polaroid Corp. v. Offerman* upheld the Secretary's assessment of tax because the Secretary's proposed construction of the statute followed “general rules of grammar and syntax[,]” 349 N.C. at 301, 507 S.E.2d at 293, while the taxpayer's proposed construction required that the word “includes” be considered a “misplaced modifier,” rather than a “compound predicate,” 349 N.C. at 298, 507 S.E.2d at 290-91.

Neither case avails for plaintiff. Plaintiff would prevail only if we adopt a construction that adds words to the statute, or replaces words in the statute with a definition that we rejected in *supra* Part III.B., while the Secretary prevails if we apply the statute as written.

We further note that *Gulf Oil Corp. v. Clayton*, a case cited by plaintiff in another section of the brief is easily distinguishable from the case *sub judice* and thereby supports the Secretary's application of the statute. 267 N.C. 15, 147 S.E.2d 522 (1966). In *Gulf Oil*, the North Carolina Supreme Court held that the Secretary had incorrectly combined the income of subsidiaries, in the form of dividends, with the income of the parent company. 267 N.C. at 24-25, 147 S.E.2d at 529. In so holding, the Supreme Court recited the following facts:

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None of the [four] subsidiary corporations . . . were domesticated in North Carolina, or owned property here, and none conducted any business activities within the State. Business transactions between them and plaintiff . . . *were [all] conducted at fair market value, i.e.,* no benefit inured [sic] to plaintiff by reason of the corporate kinship. *No products from any of the [four] subsidiaries ever had any connection whatever with North Carolina.* The earnings which produced the dividends which the subsidiaries paid plaintiff were all subject to taxation elsewhere, *i.e.,* in Kuwait, Iran, Italy and Canada, respectively. The net income of each subsidiary is shown on separate books and records of accounts maintained by each entirely outside of North Carolina. There is no interchange or sharing of patents or trademarks between them and plaintiff. Each subsidiary paid its pro rata share of the cost of every service which plaintiff or any other subsidiary performed for it.

Gulf Oil, 267 N.C. at 18, 147 S.E.2d at 524-25 (emphasis added). Combination was improper in *Gulf Oil* because the intercompany transactions were all conducted at fair value (arm's length) **and** none of the combined entities "*had any connection whatever with North Carolina.*" *Id.*

To the contrary, in the case *sub judice*, W-M REBT owned and leased stores within North Carolina, passed along income to W-M PC received from leasing and sub-leasing those stores, which W-M PC further passed along to plaintiff in the form of dividends. This was a connection of the three combined subsidiaries with North Carolina which distinguishes this case from *Gulf Oil*. Plaintiff's argument that its proposed construction of the statute is supported by North Carolina case law is without merit.

E. Authority from Other Jurisdictions

Plaintiff cites a case from Massachusetts, *Polaroid Corp. v. Commissioner of Revenue*, 472 N.E.2d 259 (Mass. 1984), and a case from Georgia, *Blackmon v. Campbell Sales Company*, 189 S.E.2d 474 (Ga. App. 1972), as persuasive authority to support its proposed construction of the statute. While "decisions [from other states] construing [similar] statutes are somewhat indicative of the general legislative purpose in the enactment of a . . . tax[.]" *Clayton-Marcus*, 286 N.C. at 225, 210 S.E.2d at 206, the cases cited by plaintiff from other states have very little persuasive weight *sub judice*. As discussed in more detail below, the statutes in both states were materially differ-

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ent from the North Carolina statute, and the interpretation of the Massachusetts statute was based on legal grounds which do not exist in North Carolina.¹¹

The Georgia statute interpreted in *Blackmon* read:

The net income of a domestic or foreign corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership shall be determined by eliminating all payments to the parent corporation or affiliated corporation in excess of fair value, and by including fair compensation to such domestic business corporation for its commodities sold to or services performed for the parent corporation or affiliated corporation. For the purposes of determining such net income the Commissioner may equitably determine such net income by reasonable rules of apportionment of the combined income of the subsidiary, its parent and affiliates or any thereof.

189 S.E.2d at 476 (quoting Code § 92-3113(6), Ga.L.1950, pp. 299, 300). Despite plaintiff's contention that this statute is "the Georgia analog to N.C. Gen. Stat. § 105-130.6," the Georgia statute *lacks any language at all* authorizing the Georgia tax commissioner to require combination upon a finding that a taxpayer's return "does not disclose the true earnings of the corporation on its business carried on in this State[.]" N.C. Gen. Stat. § 105-130.6. The omission of similar language is fatal to plaintiff's contention that *Blackmon* is persuasive.

The Massachusetts statute interpreted by *Polaroid v. Commissioner* contains language almost identical to the Georgia statute, except that the Massachusetts statute adds language referring to federal consolidated returns not relevant *sub judice*. 472 N.E.2d at 264 n.9 (discussing the similarity of the Georgia statute with the Massachusetts statute). Further, *Polaroid v. Commissioner's* interpretation of the Massachusetts statute¹² rested entirely on the fact

11. We note that the facts and result of both the Georgia case and the Massachusetts case are very similar to *Gulf Oil*, in that the tax commissioner in each of the respective states was prevented from combining discrete entities that had no connection to the taxing state. *Gulf Oil* was distinguished from the case *sub judice supra* Part III.D.

12. It appears that *Polaroid v. Commissioner's* construction of the Massachusetts statute is mere *dicta*, because the case was disposed of on the grounds that the Commissioner of Revenue had not issued relevant regulations beforehand. *Polaroid Corp. v. Commissioner of Revenue*, 472 N.E.2d 259, 261 (Mass. 1984). However, even if *Polaroid v. Commissioner's* interpretation of the statute had been dispositive in Massachusetts, it would only be persuasive, not controlling, in North Carolina.

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that when the Massachusetts statute was passed in 1933, the Massachusetts Supreme Court had determined that the unitary method of assessment violated the United States Constitution. 472 N.E.2d at 265-66 (citing *Commissioner of Corps. & Taxation v. J.G. McCrory Co.*, 182 N.E. 481 (Mass. 1932)). However, by 1920 the United States Supreme Court had already determined that the unitary method of assessment did not violate the United States Constitution. *Allied-Signal*, 504 U.S. at 779-80, 119 L. Ed. 2d at 547 (citing *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120-21, 65 L. Ed. 165 (1920)). Furthermore, plaintiff did not cite any cases, and we found none, where the North Carolina Supreme Court has ever deemed the unitary method to be constitutionally infirm. Therefore, *Polaroid v. Commissioner's* reasoning is wholly inapplicable *sub judice*.

To the extent that cases from other jurisdictions are relevant in determining legislative intent, the Secretary's interpretation of the statute is supported by the opinion of the United States Supreme Court in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 63 L. Ed. 2d 510, 520 (1980). In *Mobil Oil*, as here, the taxpayer classified as "non apportionable" certain dividends received from its corporate subsidiaries and subtracted those dividends from its apportionable taxable income in the state of Vermont. *Id.* at 430, 63 L. Ed. 2d at 517. The Vermont tax commissioner reversed the taxpayer, and added those dividends back to apportionable taxable income. *Id.* at 431, 63 L. Ed. 2d at 517. On appeal, the United States Supreme Court upheld the Commissioner of Taxes. *Id.* at 449, 63 L. Ed. 2d at 528.

Mobil Oil noted that "in its Vermont tax returns for the years in question, Mobil included all its operating income in apportionable net income, without regard to the locality in which it was earned." *Id.* at 437, 63 L. Ed. 2d at 521. *Mobil Oil* opined that "[t]o carve [dividends received from subsidiaries and affiliates] out as an exception [from inclusion in apportionable net income, the taxpayer] must demonstrate something about the nature of this income that distinguishes it from operating income, a proper portion of which the State concededly may tax." *Id.* at 437-38, 63 L. Ed. 2d at 521. *Mobil Oil* further opined that in order to re-classify income as non-apportionable, the taxpayer "must show . . . that the income was earned in the course of activities unrelated to the sale of [its] products in that State." *Id.* at 439, 63 L. Ed. 2d at 522. In other words, the burden is on the taxpayer to demonstrate that its "subsidiaries and affiliates are distinct in any business or economic sense from its . . . sales activities in [the taxing

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State].” *Id.* at 439, 63 L. Ed. 2d at 522. Therefore, “[i]n the absence of any proof of discrete business enterprise, [the Commissioner of Taxes] was entitled to conclude that the dividend income’s foreign source did not destroy the requisite nexus with in-state activities.” *Id.* at 439-40, 63 L. Ed. 2d at 522. Plaintiff has not shown that the dividends received from W-M PC are in any way part of a discrete business. It is undisputed that W-M REBT owns the physical premises which plaintiff rents to operate its stores in North Carolina and that rent from those store premises transferred from W-M REBT to W-M PC in the form of dividends is a significant part of the income of W-M PC. As in *Mobil Oil*, and distinct from *Gulf Oil*, as discussed in *supra* Part III.D, W-M REBT, W-M PC and plaintiff form a unitary business. The Secretary was properly allowed to combine the returns of those businesses if he found that plaintiff’s return did not disclose its true earnings on its North Carolina business activity. In sum, to the extent that authority from other jurisdictions helps us construe the statute, it weighs in favor of the Secretary and against plaintiff. This argument is overruled.

IV. Constitutionality

[2] Plaintiff argues that if the statute authorizes combination in the case *sub judice*, then the assessments based on that combination were unconstitutional. Plaintiff specifically argues that the assessments violated (1) the prohibition on retroactive taxation in article I, section 16 of the North Carolina Constitution; (2) the Due Process Clause of the United States Constitution; (3) the tax uniformity requirements of article V, section 2(2) of the North Carolina Constitution; (4) “the Commerce Clause of the U.S. Constitution because Defendant only forces combination of foreign multistate corporations[;]” and (5) the requirement that the income taxes be assessed on net income found in article 4, section 2(6) of the North Carolina Constitution by denying a deduction for rent paid. We consider each of these issues in turn.

A. Retroactive Taxation

Plaintiff argues that the assessments violated article I, section 16¹³ of the North Carolina Constitution because “[d]efendant’s assessments were not based on any facially applicable statute or interpretation published by [d]efendant that could be reasonably

13. “No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted.” N.C. Const. art. I, § 16.

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applied to these facts” The applicable regulation at the time plaintiff filed its 1998-99 Tax Return stated,

The business income of the taxpayer is that portion of the taxpayer’s entire income which arises from the conduct of the taxpayer’s trade or business operations. For purposes of administration of G.S. 105-130.4, *the income of the taxpayer is business income unless classified as nonbusiness income* under the law and these Rules.

17 N.C.A.C. § 5C.0702 (1998) (emphasis added) (repealed effective 1 July 2000). The regulations further stated:

The *classification* of income by the labels customarily given them, such as interest, rents, royalties, or capital gains, *is of no aid* in determining whether that income is business or nonbusiness income. . . . Rental income from real or tangible personal property constitutes business income when the rental of the property is a principal business activity of the taxpayer or the rental of the property is related to or incidental to the taxpayer’s principal business activity.

17 N.C.A.C. § 5C.0703 (1998) (emphasis added).

Even though 17 N.C.A.C. § 5C.0703 also stated that “[d]ividend income is business income when dealing in securities is a principal business activity of the taxpayer [but o]ther dividends are nonbusiness income[.]” it is an elementary principle of taxation law that the label attached to a transaction or balance is of no importance. *See Mobil Oil*, 445 U.S. at 441, 63 L. Ed. 2d at 523 (“Transforming . . . income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business[.]”). It is clear that the amount plaintiff sought to classify as “dividends” was in actual fact rental income. Since more than one-third of plaintiff’s total income on its 1998-99 Tax Return was derived from rental of its store properties, there can hardly be any dispute that the rental income, as stated in the regulation, was “a principal business activity of the taxpayer[.]” 17 N.C.A.C. § 5C.0703 (1998).

Furthermore, after 17 N.C.A.C. § 5C.0702 was repealed and 17 N.C.A.C. § 5C.0703 was amended, both effective 1 July 2000, the regulations spoke to plaintiff’s situation with even more clarity: “Income is business income unless it is clearly classifiable as nonbusiness income. *A taxpayer must establish that its classification of income as nonbusiness income is proper.* . . . Dividend income is business

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income if . . . [t]he dividend is received from a unitary subsidiary of the taxpayer. 17 N.C.A.C. § 5C.0703 (2000) (emphasis added) (published 15 February 2000 in 14 N.C. Reg. 1431, effective 1 July 2000). The argument that “[d]efendant’s assessments were not based on any facially applicable statute or interpretation” is without merit.

B. Delegation of Legislative Responsibilities

Plaintiff cites *Harvell v. Scheidt*, 249 N.C. 699, 107 S.E.2d 549 (1959), to contend that “[d]efendant did not determine the assessments by any constitutionally sufficient standard in the General Statutes and thereby violated the North Carolina Constitution, Article 1 [sic], sec. 6 and Article V, sec. 2(2).” The question presented in *Harvell* was “whether or not the authority granted to the Commissioner of Motor Vehicles by the General Assembly . . . constitute[d] an unconstitutional delegation of legislative power.” 249 N.C. at 701-02, 107 S.E.2d at 550. In *Harvell*, the legislature had given the Department of Motor Vehicles (“DMV”) the authority, without a preliminary hearing, to suspend the driver’s license of a “habitual violator of the traffic laws” and had also given the DMV sole discretion to define the meaning of “habitual violator” by reference to “the number and character of such violations of the traffic laws and the period of time during which such violations may have occurred[.]” 249 N.C. at 702, 107 S.E.2d at 551.

“Where [certain] power[s] are] left to the unlimited discretion of a board, to be exercised without the guide of legislative standards, the statute . . . must be regarded as an attempted delegation of the legislative function offensive both to the State and the Federal Constitution.” *State v. Harris*, 216 N.C. 746, 754, 6 S.E.2d 854, 860 (1940) (declaring unconstitutional on the grounds of improper delegation of legislative responsibilities a statute granting an administrative agency unlimited discretion to set licensing requirements for dry cleaners). On the other hand,

[w]hen there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

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Adams v. North Carolina Dept. of Natural and Economic Resources, 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978) (holding the statute authorizing the Coastal Resources Commission to be sufficiently specific).

The case *sub judice* is more like *Adams* than *Harvell*. The need for expertise in the implementation of income tax law for assessment and collection of all taxes legally due is obvious.¹⁴ Unlike “*Harvell*, [where] it would have been a simple matter for the General Assembly to define an ‘habitual violator of the traffic laws’ rather than leaving the definition to the Commissioner of Motor Vehicles[,]” *Farlow v. North Carolina State Bd. of Chiropractic Examiners*, 76 N.C. App. 202, 213, 332 S.E.2d 696, 703, *disc. review denied and appeal dismissed*, 314 N.C. 664, 336 S.E.2d 621 (1985), “it would be virtually impossible for the General Assembly to define all possible” accounting and business configurations by which taxpayers endeavor to minimize taxes payable. 76 N.C. App. at 213, 332 S.E.2d at 703. Consequently, “[s]ome discretion ha[d] to be left” to the Secretary, *id.*, which the General Assembly did leave when it granted the Secretary discretionary authority to force combination of entities on a finding that a report does not disclose true earnings in North Carolina. N.C. Gen. Stat. § 105-130.6.

Furthermore, the authority given to the Secretary in Section 105-130.6 was not without sufficient direction. Contrary to plaintiff’s assertion, true earnings attributable to income earned in North Carolina is not an uncertain or ambiguous concept. As the United States Supreme Court has said in explaining the “true earnings” concept:

Because of the complications and uncertainties in allocating the income of multistate businesses to the several States, we permit States to tax a corporation on an *apportionable* share of the multistate business carried on in part in the taxing State. That is

14. As was well put by Judge Learned Hand:

[T]he words of . . . the Income Tax [Act], for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important but successfully concealed, purport I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against all possible evasion[.]

A.O. Smith v. United States, 691 F.2d 1220, 1223 (7th Cir. 1982) (Dumbauld, J., dissenting) (quoting Irving Dilliard (ed.), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (2nd ed. 1953) 213).

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the unitary business principle. *It is not a novel construct*, but one that we approved within a short time after the passage of the Fourteenth Amendment's Due Process Clause.

Allied-Signal, 504 U.S. at 778, 119 L. Ed. 2d at 546 (emphasis added); *see also supra* Part III.B. (discussing the meaning of true earnings). Accordingly, we hold that true earnings "is a sufficiently definite standard so that the [Secretary] may set policies within it without exercising a legislative function." *Farlow*, 76 N.C. App. at 213, 332 S.E.2d at 703. This argument is overruled.

C. Uniform Taxation

Plaintiff next contends that:

The assessments violated the tax uniformity requirement of the North Carolina Constitution, Article V, sec. 2(2) and the U.S. Constitution Equal Protection Clause of the Fourteenth Amendment. Specifically, taxpayers with affiliated Real Estate Investment Trusts have presumably paid tax as separate corporations as required by the statutes except when Defendant audits them and forces combination, which he did not do in all such cases, thus treating Plaintiff differently from similarly situated taxpayers. . . . [I]t can be assumed that other taxpayers simply followed that law (i.e., filed on separate company basis), as did Plaintiff.

Plaintiff contends that *Edward Valves, Inc. v. Wake County*, 117 N.C. App. 484, 451 S.E.2d 641 (1995), *modified and aff'd on other grounds*, 343 N.C. 426, 471 S.E.2d 342 (1996), *cert. denied*, 519 U.S. 1112, 136 L. Ed. 2d 839 (1997), controls this case because two statements appearing in the record as admissions by the Secretary provide evidence of non-uniform taxation: (1) "Defendant has not assessed additional taxes based on requiring a combination of a corporate taxpayer with a[n] affiliated REIT in every case in which he audited corporate taxpayers that had affiliated REIT's for all of the years 1998-2002[;]" and (2) "[A]t the September 5, 2006 meeting of the North Carolina General Assembly's Revenue Laws Study Committee, Greg Radford stated that the North Carolina Department of Revenue cannot audit all inter-company transactions between related companies, one or more of which is doing business in North Carolina."

However, this case is distinguishable from *Edward Valves*. In *Edward Valves*, the record showed, and the County admitted, that no effort was made in the County's enforcement procedures to require

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taxpayers to list certain types of intangible property for tax assessment purposes. 117 N.C. App. at 491-92, 451 S.E.2d at 646-47. This Court held that this “purposeful, though somewhat informal, classification based upon an improper distinction between taxpayers who owned the same class of property” violated the legal requirement of uniformity in taxation. 117 N.C. App. at 492, 451 S.E.2d at 647. However, we do not agree that the first admission by the Secretary quoted above amounts to “improper distinction” between similarly situated taxpayers. For example, it is entirely possible that the affiliated REIT in another audited company would not form part of a unitary business, as was the case *sub judice*, so that the Secretary would be constitutionally disallowed from assessing additional taxes, *see supra* Part III.B. It is also entirely possible that another corporation owning an affiliated REIT would not try to minimize North Carolina income taxes by reclassifying REIT dividends as nonbusiness or non-apportionable. In other words, it may not have been possible or necessary for the Secretary to assess taxes after every audit of a corporation owning a REIT. Accordingly, the Secretary’s statement is not equivalent to the County’s “purposeful, though informal classification based upon an improper distinction” in *Edward Valves. Id.* at 492, 451 S.E.2d at 647.

As to the second admission, that it is not possible for the Secretary to audit all corporations with intercompany transactions, the North Carolina Supreme Court has held that “[t]he rule of equality [in taxation] permits many practical inequalities. And necessarily so. What satisfies this equality has not been, and probably never can be, precisely defined.” *Leonard v. Maxwell*, 216 N.C. 89, 94, 3 S.E.2d 316, 321 (1939) (citation, quotation marks and ellipses omitted). The Fifth Circuit Court of Appeals further opined that:

It is inherent in any voluntary system of taxation that there will be those who, knowingly or not, fail to file the required tax returns. The fact that all taxpayers or all areas of the tax law cannot be dealt with by the Internal Revenue Service with equal vigor and that there thus may be some taxpayers who avoid paying the tax cannot serve to release all other taxpayers from their obligation. As this court said in *Kehaya v. United States*, 355 F.2d 639, 641, 174 Ct.Cl. 74, 78 (1966): “The Commissioner’s failure to assess deficiencies against some taxpayers who owe additional tax does not preclude him from assessing deficiencies against other taxpayers who admittedly owe additional taxes on the same type of income. . . .”

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Austin v. United States, 611 F.2d 117, 119-20 (5th Cir. 1980) (quoting *Wagner v. United States*, 387 F.2d 966, 972 (Ct.Cl. 1967); see also *Galveston by Galveston Wharves v. United States*, 33 Fed. Cl. 685, 707-08 (1995) (“The mere fact that another taxpayer has been treated differently from the plaintiff does not establish the plaintiff’s entitlement. . . . A taxpayer cannot premise its right to an exemption by showing that others have been treated more generously, leniently or even erroneously by the IRS.” (Internal footnotes omitted.)), *aff’d*, 82 F.3d 433 (1996). This argument is without merit.

D. Commerce Clause

Plaintiff argues that “[t]he assessments violated the Commerce Clause of the U. S. Constitution because Defendant only forces combination of foreign multistate corporations.” However, plaintiff cites nothing in the factual record, and we find nothing, in support of this assertion. Accordingly, this argument is dismissed.

E. Tax on Net Income

Next, plaintiff, citing *Atlantic Coast Line v. Daughton*, 262 U.S. 413, 67 L. Ed. 1051 (1923), contends that the assessments violated the North Carolina Constitution, article V, section 2(6) “by denying a deduction for rent paid and thus not taxing Plaintiff’s net income.” Defining “net income” for the purpose of applying N.C. Const. art. V, sec. 2(6), appears to be a question of first impression.

Plaintiff contends that *Atlantic Coast Line* supports its position because according to plaintiff’s characterization of the case, “only because the tax was on property income rather than a taxpayer’s entire income was rent deduction not required on the facts of that case.” We disagree with plaintiff’s characterization of *Atlantic Coast Line* and his general conclusion that denying a particular type of deduction violates article V, section 2(6) of the North Carolina Constitution.

In *Atlantic Coast Line*, 262 U.S. at 424, 67 L. Ed. at 1061, a tax was contended to be in violation of a now superseded constitutional provision¹⁵ similar to the current article V, section 2(6), which requires that “there shall be allowed personal exemptions and deduc-

15. The United States Supreme Court passed on this North Carolina constitutional question because “the cases are properly here on federal questions, [therefore] all questions presented by the record, whether involving federal law or state law, must be considered.” *Atlantic Coast Line v. Daughton*, 262 U.S. 413, 416, 67 L. Ed. 1051, 1058 (1923).

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tions so that only net incomes are taxed.” However, in deciding *Atlantic Coast Line*, the United States Supreme Court made clear that the dispute in that case was not what particular items made up “net income,” but on which particular entity net income should be calculated. 262 U.S. at 420-21, 67 L. Ed. at 1059-60. In the Court’s own words:

The differences between the parties arise, in the main, *not from difference in the method of determining what is net income*, but from difference as to what is the subject of the tax. In other words, they differ as to the thing of which the net income is to be ascertained. . . . The question of law thus presented is not one which involves enquiry into the intricacies of railroad accounting.

Id. (emphasis added). *Atlantic Coast Line* further acknowledged that

[t]he term “net income,” in law or in economics, has not a rigid meaning. Every income tax act necessarily defines what is included in gross income; what deductions are to be made from the gross to ascertain net income; and what part, if any, of the net income, is exempt from taxation. These details are largely a matter of governmental policy.

262 U.S. at 422, 67 L. Ed. at 1060 n.6; *accord Anderson v. Forty-Two Broadway Co.*, 239 U.S. 69, 72, 60 L. Ed. 152, 154 (1915) (“There was error, as it seems to us, in seeking a theoretically accurate definition of ‘net income,’ instead of adopting the meaning which is so clearly defined in the [Corporation Tax] Act itself.”).

Atlantic Coast Line in no way stands for the proposition that a deduction must be allowed for rental expense if an income tax law is to pass muster under the North Carolina Constitution. To the contrary, *Atlantic Coast Line*’s view that the particular deductions allowed from gross income is “largely a matter of governmental policy[,]” 262 U.S. at 422, 67 L. Ed. at 1060 n.6, was tactically supported by the North Carolina Supreme Court in *Aronov v. Secretary of Revenue*, 323 N.C. 132, 371 S.E.2d 468 (1988), *cert. denied*, 489 U.S. 1096, 103 L. Ed. 2d 935 (1989). While *Aronov* admittedly interpreted a statute and not the North Carolina Constitution, *Aronov* declared: “Deductions, such as that authorized in N.C.G.S. § 105-147(9)(d)(2), are in the nature of exemptions: they are privileges, not rights, and are allowed as a matter of legislative grace.” 323 N.C. at 140, 371 S.E.2d at 472 (citation omitted). This Court has similarly held: “A taxpayer claiming a deduction must bring himself within the statutory

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provisions authorizing the deduction.” *Ward v. Clayton*, 5 N.C. App. 53, 58, 167 S.E.2d 808, 811 (1969), *aff’d*, 276 N.C. 411, 172 S.E.2d 531 (1970).

From these cases, we reason that article V, section 2(6) does not require any particular deduction from gross income to be allowed in calculating “net” income. Rather, we conclude that while article V, section 2(6) requires deductions and allows only net income to be taxed, it implicitly recognizes the authority of the General Assembly to determine what deductions from gross income are properly allowed in the computation of net income. This argument is overruled.

V. Administration of the Statute

A. *Ad Hoc* Rule-Making

One of the sub-subsections in plaintiff’s argument that the statute did not give the Secretary authorization to combine the three entities is headed: “Without the Arm’s Length Standard, [the Secretary] would Need to Engage in Improper *Ad Hoc* Rule-Making.” In that sub-subsection, plaintiff contends that defendant engaged in “*ad hoc* rule-making with no ascertainable standard[,]” citing *National Service Industries v. Powers*, 98 N.C. App. 504, 391 S.E.2d 509 (1990), *appeal dismissed and disc. review denied*, 327 N.C. 431, 395 S.E.2d 685 (1990), and that “[a]dministrative rule-making is proper only when the statute provides ‘proper standards’ to ‘check’ the agency and to inform the public of punishable conduct[,]” citing *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). Plaintiff further contends

[w]hile flexibility for *ad hoc* rule[-]making can be necessary to deal with problems not reasonably foreseeable, that is clearly not the situation here because Defendant did not act under a reasonably circumscribed grant of authority that was applicable to cases such as this. . . . Defendant concealed [his criteria for combination], which is not one of the reasons recognized [in *Com’r of Insurance v. N.C. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980)] to justify *ad hoc* rule[-]making.

It appears that plaintiff has conflated two distinct and different legal concepts: (1) whether the General Assembly unconstitutionally delegated its legislative authority without clear guidelines, *see Charlotte-Mecklenburg Hosp. Auth. v. N. C. Industrial Comm.*, 336 N.C. 200, 221, 443 S.E.2d 716, 728-29 (1994) (holding that the Industrial Commission was not given authority by the legislature to

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“set ‘reasonable’ hospital rates at or below the prevailing community charge”); *see Harris*, 216 N.C. at 754, 6 S.E.2d at 860 (statute granting administrative agency unlimited discretion to set licensing requirements for dry cleaners was an unconstitutional delegation of legislative authority), or (2) whether, pursuant to a constitutionally sufficient grant of authority, the Secretary set forth a rule *ad hoc* without following the statutory procedures for rule-making required by the Administrative Procedure Act (“APA”). *See Com’r of Insurance v. N.C. Rate Bureau*, 300 N.C. 381, 413, 269 S.E.2d 547, 569 (1980) (“The Commissioner correctly argues that [even when the APA otherwise applies,] a second mode by which administrative agencies can establish rules is through the case-by-case process of [*ad hoc*] administrative adjudication.”) We discussed the first concept when we addressed plaintiff’s other constitutional arguments *supra* Part IV.B. We will address the second concept here.

The Revenue Act authorizes the Secretary to “adopt rules needed to administer a tax collected by the Secretary” and provides that the APA, specifically, N.C. Gen. Stat. § “150B-1 and Article 2A of Chapter 150B of the General Statutes set[s] out the procedure for the adoption of rules by the Secretary.” N.C. Gen. Stat. § 105-262 (2005). The APA defines “Rule” as “any agency regulation, standard, or statement of *general applicability* that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency.” N.C. Gen. Stat. § 150B-2(8a) (2005) (emphasis added).

The Revenue Act, as plaintiff points out, forbids related corporations from “fil[ing] a consolidated return with the Secretary of Revenue, unless specifically directed to do so in writing by the Secretary[.]” N.C. Gen. Stat. § 105-130.14 (2007). Because the filing of a consolidated (or combined) return is exceptional, and not allowed unless specifically required, we conclude the Secretary’s decision to combine plaintiff’s financial results with its related corporations is not and could not have been a standard of “general applicability” as described in the APA, and is therefore by definition not a “Rule.”

Accordingly, we hold the Secretary was not required to follow the formal rule-making procedures in Chapter 150B in order to make this determination. *See N.C. Comm’r of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 31, 609 S.E.2d 407, 417 (2005) (“[T]he Operations Manual is a non-binding interpretive statement, not a

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rule requiring formal rule-making procedures.” (Citing N.C. Gen. Stat. § 150B-2(8a)(c)). This argument is without merit.

B. Defendant’s History

Plaintiff heads a subsection in its argument that the statute did not give the Secretary authorization to combine the three entities thusly: “This Case Represents Another One of Defendant’s Several Attempts to Exceed Statutory Authority[.]” In this subsection, plaintiff cites several cases lost by defendant over the last eighty years to argue that

[t]his case . . . represents another unlawful attempt to manipulate statutes with long-understood meaning to impose tax liability where none would otherwise exist. . . . So long as the General Assembly sits, there is no need for Defendant to invent new laws to tax corporations employing organizational structures that displease the Defendant.

However, plaintiff has failed to show this Court how the cases cited compel a result in its favor in this case. Plaintiff points us to no material factual similarities from those cases to this one other than the fact that each case is about the amount of income properly reportable as taxable. This argument is also without merit.

VI. Penalties

[3] Finally, plaintiff argues:

Defendant assessed substantial penalties under G.S. 105-236(a)(5) entitled “Negligence.” The penalties were for Plaintiff’s allegedly negligent behavior in filing its returns. . . . The penalties were levied at 25% of the assessed tax, rather than 10%, due to the large size of the assessments. But Plaintiff was not negligent in the original filings because those filings were made on a separate company basis, just as the statute explicitly requires; combined returns, as noted above, can only be filed when specifically requested by Defendant. . . . Therefore, Plaintiff’s conduct in reporting their [sic] income could not have been negligent, and the penalties are not applicable.

This Court should contrast the treatment of Plaintiff with that of the taxpayers in . . . [an]other . . . corporate income tax case

We disagree.

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N.C. Gen. Stat. § 105-236 reads, in pertinent part:

(5) Negligence.—

a. Finding of negligence.—For negligent failure to comply with any of the provisions to which this Article applies, or rules issued pursuant thereto, without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence.

....

c. Other large tax deficiency.—In the case of a tax other than individual income tax, if a taxpayer understates tax liability by twenty-five percent (25%) or more, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency.

N.C. Gen. Stat. § 105-236(a)(5) (2003).

Plaintiff correctly notes that subsection (a)(5) is entitled “Negligence.” However, the title is somewhat misleading, and “[t]he law is clear that captions of a statute cannot control when the text is clear.” *In re Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974).

In the case *sub judice*, penalties were assessed under N.C. Gen. Stat. § 105-236(a)(5)(c), which does not require a finding of negligence as is necessary under N.C. Gen. Stat. § 105-236(a)(5)(a). Plaintiff does not appear to dispute that if the Secretary’s assessment based on the combined returns is lawful, then plaintiff’s income was understated by more than 25%, which operates to invoke the penalty provision of N.C. Gen. Stat. § 105-236(a)(5)(a) without a finding of negligence.

We determined above that the Secretary’s assessment based on the combined returns was indeed lawful. Furthermore, as specifically discussed in *supra* Part IV.C, a taxpayer cannot establish its claim based solely on the treatment of other taxpayers. Accordingly, the penalty assessed against plaintiff is affirmed.

VII. Conclusion

The Secretary acted within his lawful authority when he assessed additional taxes against plaintiff as a result of the combination of plaintiff with two related entities. Judgment is affirmed with respect to the assessment of additional taxes and interest thereon.

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Furthermore, plaintiff understated its taxable income by more than 25%. Accordingly, the penalties assessed are also affirmed.

AFFIRMED.

Judges STEELMAN and JACKSON concur.

RICHARD A. FRANCO, JR., PLAINTIFF v. LIPOSCIENCE, INC., DEFENDANT

No. COA08-785

(Filed 19 May 2009)

1. Employer and Employee— at-will—retaliation letter—absence of consideration

The trial court did not err by granting summary judgment in favor of defendant company on plaintiff's breach of contract claim even though plaintiff contends the promises in a retaliation letter formed a contract precluding defendant's right to terminate his employment in retaliation for the actions of plaintiff's father because: (1) there was no consideration to form a contract when the two promises in the retaliation letter constituted additional obligations on the part of defendant; the letter did not increase or diminish plaintiff's pay, duties, rights, or anything else that could be deemed consideration flowing from plaintiff to defendant; and mere continued employment by the employee is insufficient consideration; (2) there was no evidence showing that plaintiff's father negotiated the retaliation letter for his son's benefit, the promises in the retaliation letter were not incorporated and made binding in the father's severance agreement, and thus plaintiff cannot enforce the promises in the letter as a third-party beneficiary; and (3) the principles from debtor cases such as forbearance were inapplicable to defeat the application of the at-will employment doctrine, and the holding does not affect the rights of plaintiff's father as he is not a party to this action, nor does it appear he has sought to enforce his rights in another action.

2. Judges— motions for new trial and recusal—failure to show trial judge disqualified

The trial court did not err by denying plaintiff's combined motions for a new trial and to recuse the trial judge on the ground

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that the judge's father and defendant's CEO were once commonly affiliated with the University of North Carolina because, given the remote and arm's length affiliation defendant's CEO had with the trial judge's father, plaintiff did not carry his burden to demonstrate objectively that grounds for the trial judge's recusal existed.

Judge ERVIN dissenting.

Appeal by plaintiff from order and judgment entered 9 August 2007 by Judge Allen Baddour in Superior Court, Wake County. Heard in the Court of Appeals 10 February 2009.

James, McElroy & Diehl, P.A., by Richard B. Fennell & Preston O. Odom, III, for plaintiff.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Gregory P. McGuire & Phillip J. Strach, for defendant.

WYNN, Judge.

North Carolina embraces a strong presumption of at-will employment unless the employment relationship fits within one of three recognized exceptions—the pertinent exception here being an alleged contractual relationship.¹ In this appeal, Plaintiff Richard A. Franco, Jr. argues that the evidence established that he had a contract with Defendant Liposcience, Inc. that barred his termination as an at-will employee. Because the record shows there was insufficient consideration to form a binding contract, we affirm the trial court's grant of directed verdict in favor of Liposcience on Franco, Jr.'s breach of contract claim.

In September 2002, Liposcience, a manufacturer and marketer of medical technology products, hired Franco, Jr. to serve as Vice President of Marketing. At that time, Franco, Jr.'s father—Richard A. Franco, Sr.—served as Chairman of Liposcience's Board of Directors. However, Liposcience's Board of Directors voted to remove Franco, Sr. as Chairman of the Board of Directors in October 2002. Thereafter, severance negotiations resulted in the drafting of three documents, each dated 13 December 2002.

First, a document titled "Severance and Release Agreement" was signed by Franco, Sr. and Dr. Charles A. Sanders, Liposcience's

1. *Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 331-32, 493 S.E.2d 420, 422 (1997).

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incoming Chairman of the Board of Directors. Under the Severance and Release Agreement, the parties agreed that Franco, Sr. would resign as Chairman of the Board of Directors, but would remain a voting member of the Board of Directors and a shareholder.

Second, Dr. Sanders signed a letter as “Chairman of the Board of Directors of Liposcience, Inc.” that was addressed to Franco, Jr. and copied to Franco, Sr. (“Retaliation Letter”). The Retaliation Letter stated, in relevant part:

First of all, this letter will signify my commitment to you that there will be no retaliation against you by the Company in connection with your father’s resignation. For the purposes of this letter, the term “retaliation” shall mean to take adverse employment action against you based upon your relationship with Richard Franco, Sr., and not for any legitimate business reason.

In addition, from and after the date of this letter and for a period of two years thereafter, no employment action will be taken by Liposcience that will have any material adverse effect on the terms and conditions of your employment without my prior express written approval, of which you will receive a copy. Such employment actions include any material reduction in your compensation and benefits; any material diminution of your title, role and responsibilities with the Company; and any material disciplinary action, up to and including the termination of your employment. Nothing in this letter agreement shall diminish any other rights that you may have relative to your employment with the Company.

Third, a letter addressed to Franco, Jr. (signed by Executive Vice President Lucy Martindale and Vice President, General Counsel, and Secretary Timothy J. Williams), stated that any Chairman of the Board of Directors succeeding Dr. Sanders would be bound to the conditions in the Retaliation Letter.

During 2003, Liposcience made a series of internal restructuring moves to make the company more efficient and to reduce payroll expenses. By February 2003, Liposcience had hired Richard Brajer as Chief Executive Officer, and shortly thereafter, hired Richard Pinnola as Chief Operating Officer. By December 2003, Mr. Brajer and Mr. Pinnola discussed eliminating the Vice President of Marketing and other lower-level positions to create a Vice President of Sales posi-

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tion, as Liposcience shifted its focus from marketing to product sales. That decision was finalized and executed on 24 February 2004, resulting in Franco, Jr.'s termination.

However, under Franco, Jr.'s version of the events leading to his termination, a "quid-pro-quo" pattern of retaliatory adverse employment actions corresponded to each conflict Franco, Sr. had with Liposcience executives. Specifically, Franco, Jr. alleged that before he was terminated, the following series of events occurred: 1) in March and April 2003, Franco, Sr. made several accountability requests of CEO Brajer; in response, Franco, Jr. received a critical voice message from CEO Brajer, and had his responsibilities and approved personal days reduced; 2) in June 2003, Franco, Sr. requested a full performance review of CEO Brajer; in response, Franco, Jr. received a critical performance review outside the normal review cycle; 3) in August 2003, Franco, Sr. criticized and requested a full performance review of CEO Brajer; in response, Franco, Jr.'s approved vacation time was reduced; 4) in September and October 2003, Franco, Sr. requested and was denied Liposcience sales information, was suspected of authoring an anonymous email criticizing shareholder communications, and ultimately resigned from the Board of Directors; in response, Franco, Jr.'s responsibilities were reduced further despite positive reviews.

After his termination, Franco, Jr. brought this action asserting claims for breach of contract, wrongful discharge in violation of North Carolina public policy, unfair and deceptive trade practices, and punitive damages. In response, Liposcience answered denying liability and moved for summary judgment which Superior Court Judge Howard E. Manning granted on the wrongful discharge claim but denied on the breach of contract claim.

Following Franco, Jr.'s voluntary dismissal of his unfair and deceptive trade practices and punitive damages claims, a jury trial commenced on the breach of contract claim before Superior Court Judge Allen Baddour. However, at the close of all the evidence during the trial, Judge Baddour directed a verdict for Liposcience concluding that "[p]laintiff did not present any evidence at trial of consideration supplied by him to support the alleged contract at issue." Thereafter, Franco, Jr. learned that Judge Baddour's father and Dr. Sanders were once commonly affiliated with the University of North Carolina, and therefore filed motions for new trial and recusal. Judge Baddour denied those motions.

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On appeal, Franco, Jr. argues the trial court erred by (I) granting a directed verdict for Liposcience on his breach of contract claim; and (II) denying his motion to recuse Judge Baddour.

I.

[1] Franco, Jr. acknowledges that Liposcience originally hired him as an at-will employee. In this appeal, however, he contends that the promises in the Retaliation Letter formed a contract precluding Liposcience's right to terminate his employment in retaliation for Franco, Sr.'s actions. Because there was no consideration to form a contract, we disagree.

North Carolina embraces a strong presumption of at-will employment unless the employment relationship fits within an exception, one being a contract specifying a definite period of employment. *See Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 331-32, 493 S.E.2d 420, 422 (1997). Moreover, we have held that an "employment-at-will contract may be supplemented by additional agreements which are enforceable." *Martin v. Vance*, 133 N.C. App. 116, 121, 514 S.E.2d 306, 309 (1999) (citing *Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 261, 335 S.E.2d 79, 84 (1985)). Like any other contract, however, such additional agreements must be supported by consideration. *See id.*; *Watson Electrical Constr. Co. v. Summit Cos., LLC*, 160 N.C. App. 647, 655, 587 S.E.2d 87, 94 (2003) ("Consideration is the glue that binds parties together, and a mere promise, without more, is unenforceable.") (citation and quotation marks omitted).

The Retaliation Letter's two distinct promises—that Liposcience would not retaliate against Franco, Jr. for Franco, Sr.'s actions and that the Chairman of the Board of Directors would provide express written approval of any material adverse employment action—constitute additional obligations on the part of Liposcience. Indeed, when Franco, Jr. received the Retaliation Letter, he was already employed. The Retaliation Letter did not increase or diminish his pay, duties, rights, or anything else that could be deemed consideration flowing from Franco, Jr. to Liposcience. As the trial court noted, mere continued employment by the employee is insufficient. *See Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 121-22, 516 S.E.2d 879, 882-83 ("the prospect of continued employment is insufficient to support a covenant not to compete where the employee receives no change in compensation, commission, duties, nature of employment or other consideration in exchange for signing the agreement"), *disc. review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999).

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Nonetheless, Franco, Jr. contends that consideration to support the Retaliation Letter was supplied by Franco, Sr. He argues that because Franco, Sr. negotiated for the Retaliation Letter in connection with the Severance Agreement, Franco, Jr. is entitled to enforce the Retaliation Letter as a third-party beneficiary.

Neither party disputes the validity of the Severance Agreement, and there is evidence showing that Franco, Sr. negotiated for the Retaliation Letter for Franco, Jr.'s benefit. However, the Retaliation Letter is not referenced in the Severance Agreement, which contains a merger clause. Therefore, the promises in the Retaliation Letter were not incorporated and made binding in the Severance Agreement. Accordingly, Franco, Jr. cannot enforce the promises in the Retaliation Letter as a third-party beneficiary and we reject this assignment of error.

We note that our dissenting colleague implores us to hold that forbearance by Franco, Sr. created sufficient consideration to transform the letter sent by Liposcience to Franco, Jr. into an employment contract. First, our research reveals no case in North Carolina has ever held such regarding employment contracts. Second, all of the cases relied upon by the dissent to support holding that the forbearance of a third party may be sufficient to create consideration for another party, are debtor-type cases. *Inv. Props. of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972) (“In a guaranty contract, a consideration moving directly to the guarantor is not essential. The promise is enforceable if a benefit to the principal debtor is shown or if detriment or inconvenience to the promisee is disclosed.”); *Myers v. Allsbrook*, 229 N.C. 786, 51 S.E.2d 629 (1949) (defendant’s oral promise to pay his brother’s debt to plaintiff not enforceable under Statute of Frauds); *Branch Banking & Trust Co. v. Kenyon Inv. Corp.*, 76 N.C. App. 1, 332 S.E.2d 186, *appeal withdrawn*, 316 N.C. 192, 341 S.E.2d 587 (1986) (the defendant, holder of a second deed of trust on a parcel of land, assumed principal debtor’s obligation relating to first deed of trust). Though in general, employment contracts are guided by the general principles of contract, we decline to extend the principles from the debtor cases cited by the dissent to defeat the application of the at-will employment doctrine here.

The dissent further notes that “a failure to allow Plaintiff to enforce the Retaliation Letter would have the effect of substantially undermining a significant component of the bargain that Franco Sr. made with Defendant in the Severance Agreement.” *Post* at 18. Our

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holding does not affect the rights of Franco Sr. as he is not a party to this action nor does it appear he has sought to enforce his rights in another action.

II.

[2] Franco, Jr. next argues that the trial court erred by denying his combined motions for a new trial and to recuse Judge Baddour. We disagree.

First, we address the denial of Franco, Jr.'s motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(8) (2007), on the ground that the court committed various errors of law. We review denial of a Rule 59(a)(8) motion *de novo*. *Kinsey v. Spann*, 139 N.C. App. 370, 373, 533 S.E.2d 487, 490 (2000). However, the argument in Franco, Jr.'s brief before this Court consists of the following: “[T]he trial court reversibly erred in directing a verdict for Defendant. The trial court therefore also erred in denying Franco, Jr.’s motion for a new trial” Because we have already concluded that the trial court did not err by granting the directed verdict, and Franco, Jr. advances no further argument, we summarily reject this assignment of error.

Second, we consider Franco, Jr.’s argument that his motion for new trial should have been granted because he objectively demonstrated grounds for Judge Baddour’s disqualification. A party requesting a judge’s recusal “must ‘demonstrate objectively that grounds for disqualification actually exist.’” *In re LaRue*, 113 N.C. App. 807, 809, 440 S.E.2d 301, 303 (1994) (quoting *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993)). “The requesting party has the burden of showing through substantial evidence that the judge has such a personal bias, prejudice or interest that he would be unable to rule impartially.” See *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987) (citations omitted).

Franco, Jr. argues that Judge Baddour’s father’s affiliation with Liposcience CEO Dr. Sanders created grounds for Judge Baddour’s disqualification. Specifically, Franco, Jr. produced evidence that Dr. Sanders served on the University of North Carolina’s Board of Trustees when the Board approved the hiring of Judge Baddour’s father as the University’s Athletic Director. Dr. Sanders’ tenure on the Board of Trustees ended in 2001. At the time of trial, Dr. Sanders was a member of UNC’s School of Public Health Advisory Council, which allegedly worked closely with the Athletic Department to promote health and nutrition in local schools.

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However, Dr. Sanders offered an affidavit which established that he had very little personal communication with Judge Baddour's father, and that even his professional connection to the judge's father was limited to Board of Trustees' meetings and related functions. Accordingly, given the remote and arm's length affiliation Dr. Sanders had with Judge Baddour's father, Franco, Jr. did not carry his burden to demonstrate objectively that grounds for Judge Baddour's recusal existed.

Affirmed.

Judge Robert C. HUNTER concurs.

Judge ERVIN dissents by separate opinion.

ERVIN, Judge dissenting.

Although I fully concur in the Court's conclusion that the trial court properly denied Plaintiff's recusal motion, I respectfully dissent from my colleagues' determination that the trial court correctly granted a directed verdict in favor of Defendant at the close of all of the evidence. As a result, I believe that the trial court's judgment should be reversed and that this matter should be remanded for a new trial.

A trial court evaluating a dismissal motion under N.C. Gen. Stat. § 1A-1, Rule 50(a), must view the evidence in the light most favorable to the non-moving party and give that party the benefit of every reasonable inference arising from the evidence. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580 (1983). During this process, all conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. *Davis & Davis Realty Co., Inc. v. Rodgers*, 96 N.C. App. 306, 308-09, 385 S.E.2d 539, 541 (1989), *dis. rev. den.*, 326 N.C. 263, 389 S.E.2d 112 (1990). After a careful review of the briefs and the record, I am convinced that there is evidence in the record tending to show that Plaintiff had an enforceable employment agreement providing him with protection from retaliatory treatment, which Defendant breached, and that this evidence is sufficient to withstand Defendant's directed verdict motion.

When viewed in the light most favorable to the Plaintiff, the evidence tends to show that, at the time that Plaintiff's father, Richard Franco, Sr., was removed from his position as the Executive Chairman of Defendant's Board of Directors, he negotiated a Sev-

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erance Agreement with Charles Sanders, the new Board Chairman, under which Franco Sr. resigned as Executive Chairman while remaining a voting member of the Board until at least May 2004.² The Severance Agreement included a mutual release of claims between the parties to that agreement and contained language providing that “[t]his Agreement, together with the Non-Competition Agreement³, sets forth the entire and fully integrated understanding between the parties, and there are no representations, warranties, covenants or understandings, oral or otherwise, that are not expressly set out herein [(merger clause)].”

During the negotiations leading up to the execution of the Severance Agreement, Franco Sr. insisted that Plaintiff be provided with protection from retaliatory conduct stemming from his relationship with Franco Sr. As a result, Defendant provided Plaintiff with the Retaliation Letter, which is the document upon which he bases his claims in this proceeding. Plaintiff had no involvement in the negotiation of the Retaliation Letter. The Retaliation Letter provided that (1) Plaintiff would not be subject to adverse employment action “based on [his] relationship with [Franco Sr.] and not for any legitimate business purpose” and that (2), “from and after the date of this letter and for a period of two years thereafter, no employment action will be taken by [Defendant] that will have any material adverse effect on the terms and conditions of your employment without my prior express approval, of which you will receive a copy.”⁴ Franco Sr. testified that he would not have executed the Severance Agreement unless the Retaliation Letter had been agreed to by Defendant and provided to Plaintiff.⁵

2. Franco Sr. also continued to hold a substantial number of Defendant’s shares.

3. The Non-Competition Agreement was a separate document executed by both Franco Sr. and Defendant prohibiting Franco Sr. from competing with Defendant for a period of 1 year. None of the provisions of the Non-Competition Agreement are relevant to the matters in dispute between the parties to this proceeding.

4. The record reflects that Sanders personally approved essentially all of the actions taken against Plaintiff from the time that he was provided with the Retaliation Letter until his dismissal, so that Plaintiff has not advanced any contention to the effect that Defendant violated this second aspect of the Retaliation Letter. Thus, the only issue that arises in connection with the consideration of Plaintiff’s complaint against Defendant relates to the first of the two provisions discussed in the text.

5. In addition to the Retaliation Letter, Defendant also provided Plaintiff with another document in which two of its corporate officials stated that, in the event that Sanders left Defendant, they would attempt to obligate any successor Chairman to comply with the same terms and conditions as those that applied to Sanders under the Retaliation Letter.

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Throughout the period from the delivery of the Retaliation Letter to Plaintiff on 13 December 2002 until Plaintiff's termination from Defendant's employment on 24 February 2004, Franco Sr. engaged in a number of actions intended to persuade Defendant to make certain business decisions and to honor certain commitments that he believed had been made to shareholders. Franco Sr. continued to take such actions even after resigning from Defendant's Board on 29 October 2002. Plaintiff contends that, within a relatively short time following a number of Franco Sr.'s actions or perceived actions, Defendant took retaliatory actions against him, culminating in his termination, and that he suffered monetary loss as a result of Defendant's conduct.

At trial, the principal issue was the extent, if any, to which the Retaliation Letter constituted an enforceable agreement that sufficed to take the employment relationship between Plaintiff and Defendant outside the "employment at will" doctrine and, if so, whether Defendant violated the Retaliation Letter by terminating Plaintiff from its employment in retaliation for various actions taken by Franco Sr. in his role as dissident director and shareholder. The Court concludes on appeal that the trial court properly directed a verdict in favor of Defendant because "there was no consideration to form a contract" since (1) Defendant did not receive additional consideration from Plaintiff over and above his continued willingness to remain in Defendant's employ and since (2) the fact that "the Retaliation letter is not mentioned in the Severance Agreement, which contains a complete merger clause," compels the conclusion that "the promises made in the Retaliation Agreement were not incorporated and made binding in the Severance Agreement." Although I agree that Plaintiff's decision to remain in Defendant's employment following receipt of the Retaliation Letter does not result in the creation of a binding contract between Plaintiff and Defendant, *Guarascio v. New Hanover Health Network*, 163 N.C. App. 160, 592 S.E.2d 612 (2004), *disc. rev. den.*, 163 N.C. App. 160, 592 S.E.2d (2004), I do believe that, when the evidence is taken in the light most favorable to Plaintiff, the record allows the trier of fact to find that the Retaliation Letter constitutes an enforceable agreement between the parties.

According to well-established North Carolina law, "a binding contract is created by an agreement involving mutual assent of two parties who are in possession of legal capacity, where the agreement consists of an exchange of legal consideration." *Creech v. Melnik*, 147 N.C. App. 471, 477, 556 S.E.2d 587, 591 (2001). " [A] mere promise,

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without more, [however], is unenforceable.’ ” *Inland Constr. Co. v. Cameron Park II, Ltd., LLC*, 181 N.C. App. 573, 576, 640 S.E.2d 415, 418 (2007) (quoting *Lee v. Paragon Group Contractors*, 78 N.C. App. 334, 338, 337 S.E.2d 132, 134 (1985)). Instead, “[a]n enforceable contract is one supported by consideration.’ ” *Id.* (quoting *Lee*, 78 N.C. App. at 337, 337 S.E.2d at 134). “Consideration consists of ‘any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee.’ ” *Inland Constr.*, 181 N.C. App. at 577, 640 S.E.2d at 418 (citing *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 215, 274 S.E.2d 206, 212 (1981)). “What constitutes valuable consideration depends upon the context of a particular case.” *Estate of Graham v. Morrison*, 168 N.C. App. 63, 68, 607 S.E.2d 295, 299 (2005).

The record clearly establishes that Plaintiff did not request Defendant to enter into the Retaliation Letter and that the Retaliation Letter resulted from negotiations between Franco Sr. and Sanders relating to a range of different issues. However, the Supreme Court has clearly stated that “[f]orbearance to exercise legal rights is sufficient consideration for a promise given to secure such forbearance even though the forbearance is for a third person rather than that of the promisor.” *Investment Properties of Asheville, Inc. v. Norburn* 281 N.C. 191, 196, 188 S.E.2d 342, 345 (1972); *see also Myers v. Allsbrook*, 229 N.C. 786, 791, 51 S.E.2d 629, 631-32 (1949) (“forbearance to exercise legal rights is a sufficient consideration for a promise made on account of it,” “even when the forbearance is in respect to the liability of a third person rather than that of the promisor”); *Branch Banking & Trust Co. v. Kenyon Investment Corp.*, 76 N.C. App. 1, 13, 332 S.E.2d 186, 194 (1986), *app. withdrawn*, 316 N.C. 192, 341 S.E.2d 587 (1986).⁶ As a result, the mere fact that the Retaliation Agreement was negotiated by Franco Sr. rather than

6. In reliance on language found in decisions such as *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987), *overruled in part by Kurtzman v. Applied Analytical Indus.*, 347 N.C. 329, 493 S.E.2d 420 (1997) (“if an employee furnishes ‘additional consideration’ . . . , such consideration may take the case out of the usual employment-at-will rule”) (citing *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 139 S.E.2d 249 (1964)), and *Walker v. Westinghouse Electric Co.*, 77 N.C. App. 253, 260, 335 S.E.2d 79, 84 (1985), *disc. rev. den.* 315 N.C. 597, 341 S.E.2d 39 (1986), (“If an employee gives some additional consideration in addition to the usual obligation of service, a contract for an indefinite term” might become enforceable) (citation omitted), Defendant argues that the affected employee, and only the affected employee, can provide the consideration needed to create an enforceable agreement. However, the holdings in the decisions cited by Defendant do not directly address the issue for which Defendant has cited them, and I can think of no reason why the usual rules governing the validity of contracts should not apply to employment-related agreements.

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Plaintiff does not mean that it is not a binding agreement given that Plaintiff clearly accepted its terms and given that Franco Sr. surrendered his right to take legal action against Defendant in return for the promises made to him in connection with his resignation as Defendant's Executive Chairman. Thus, there is ample consideration for the Retaliation Letter based upon Franco Sr.'s decision to enter into the Severance Agreement rather than pursue whatever legal rights he might have had against Defendant following his removal as Defendant's Executive Chairman.⁷

As noted above, however, the Court has concluded that the Retaliation Letter is not enforceable against Defendant because the Severance Agreement contains a merger clause and because there is no reference to the Retaliation Agreement in the Severance Agreement. To be sure, "where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed that the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing." *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E.2d 239, 242 (1953). "The parol evidence rule is a rule of substantive law, though it is often expressed as if it were a rule of evidence." *Phelps v. Spivey*, 126 N.C. App. 693, 697, 486 S.E.2d 226, 229 (1997); *see also Hinshaw v. Wright*, 105 N.C. App. 158, 164, 412 S.E.2d 138, 142 (1992); *Weiss v. Woody*, 80 N.C. App. 86, 91, 341 S.E.2d 103, 106 (1986), *cert. den.*, 316 N.C. 738, 345 S.E.2d 399 (1986). As a result, "all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement" and "parol testimony [concerning] prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced in the writing, is incompetent." *Neal*, 239 N.C. at 77, 79 S.E.2d at 242. "Merger clauses" "were designed to effectuate the policies of the Parol Evidence Rule; i.e.,

7. The Court notes that "no case in North Carolina has ever held that [third party consideration suffices to support an] employment contract [] and we decline to extend the principles from the debtor cases cited by the dissent to defeat the application of the at-will employment doctrine here." I am not persuaded by this argument. First, I have never understood that the consideration rules applicable to employment contracts substantially differ from those applicable to any other type of contract. At a minimum, the Court has not cited any authority in support of that proposition, and the correctness of this proposition is not intuitively obvious to me. Secondly, recognition of third party consideration as sufficient to render an employment contract enforceable does not "defeat" the at-will employment doctrine. Instead, it enforces that doctrine, which has always allowed an exception for situations in which an employer and an employee enter into a binding contract, at which point the relations between the parties are governed by the contract rather than by the at-will employment doctrine.

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barring the admission of prior and contemporaneous negotiations on terms inconsistent with the terms of the writing” and “create a rebuttable presumption that the writing represents the final agreement between the parties.” *Zinn v. Walker*, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987). Generally speaking, North Carolina recognizes and gives effect to merger clauses of the type present in the Severance Agreement. *Tar River Cable TV, Inc. v. Standard Theatre Supply Co.*, 62 N.C. App. 61, 302 S.E.2d 458 (1983).

There are, however, exceptions to the general prohibition against allowing the use of parol testimony to vary or expand the contents of written agreements. First, allegations of fraud or mistake, *Neal*, 239 N.C. at 77, 79 S.E.2d at 242, may render the parol evidence rule inoperative. Secondly, “where giving effect to the merger clause would frustrate and distort the parties’ true intentions and understanding regarding the contract, the clause will not be enforced” *Zinn*, 87 N.C. App. at 333, 361 S.E.2d at 319; *see also Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 654, 670 S.E.2d 321, 326 (2009) (“The one exception to this general rule applies when giving effect to the merger clause would frustrate the parties’ true intentions.”); *Hinshaw v. Wright*, 105 N.C. App. 158, 162, 412 S.E.2d 138, 141 (1992) (“The one exception to this general rule applies when giving effect to the merger clause would frustrate the parties’ true intentions”).

“The distinction between the application of the two rules lies in the parties’ overall intended purposes for the transaction in each case and whether admission of parol evidence will contradict or support those intentions as expressed in the writings.” *Zinn*, 87 N.C. App. at 333, 361 S.E.2d 319. The first exception may be applicable when a party seeks to “introduce parol agreements which evidence an *entirely different contract* from that written,” *Zinn*, 87 N.C. App. at 333, 361 S.E.2d 319 (citations omitted), “for the allegations of fraud challenge the validity of the contract itself, not the accuracy of its terms—the instrument itself, on the issue of fraud, is the subject of dispute.” *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 270, 141 S.E.2d 522, 525 (1965). On the other hand, “[w]hen . . . the parties’ conduct indicates their intention to include collateral agreements or writings despite the existence of the merger clause and the parol evidence is not markedly different, if at all, from the written contract, the parties’ intentions should prevail.” *Zinn*, 87 N.C. App. at 334, 361 S.E.2d at 319. Given that there is no allegation that Defendant procured the Severance Agreement by fraud or that the parties to the

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agreement operated subject to a mistake at the time that it was entered into, attention should be focused on the second of these two exceptions to the general rule prohibiting consideration of extrinsic evidence concerning the contents of a written contract that contains a merger clause.

A careful examination of the Severance Agreement and the Retaliation Letter reveals that there are no outright inconsistencies between the two documents. Furthermore, the undisputed evidence in the record reveals that all parties to the negotiations leading to the agreement recognized that the Retaliation Letter was an integral part of the process that produced the Severance Agreement and that Franco Sr. insisted on providing Plaintiff with protection against retaliatory conduct by Defendant as a precondition for entering into the Severance Agreement. In fact, in an email dated 10 December 2002, which was admitted into evidence at trial as Plaintiff's Exhibit 104, Sanders set forth the "terms of the deal" to various officials of Defendant as follows:

[For] your approval as soon as is convenient[:]

1. Franco will resign as Chairman of the Board and as a member of all committees. He will remain a board member, serving until the annual meeting of 2004 (presumably May).
2. He will receive 2 years of salary and benefits beginning 11/1/02 with a total value of \$854,179.
3. He will receive his 2002 prorated bonus.
4. He will receive the final 30,000 options granted to him under the August 2001 grant of NQ options given, to make him whole for options he had given back in order to increase the option pool in one of the earlier financings. This represents an acceleration of three months.
5. He will receive an office allowance of \$1,000 per month for 18 months.
6. He will release Liposcience from all claims and we will do the same for him.
7. *For a period of 2 years no employment action may be taken against Rich Franco Jr. that have a material adverse effect on the terms and conditions of RF Jr.'s employment without the express written consent of Charles A. Sanders (in-*

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cluding furnishing a copy of the consent to RF Jr.). The protected employment actions include a reduction in RF Jr's comp and benefits, material diminution in title, role and responsibilities, and material disciplinary action including termination.

8. Lucy and Tim undertake to obligate any successor chairman to adhere to same terms that apply to CAS.
9. Rich Franco will not compete with Liposcience for 1 year following termination of his employment with Liposcience but shall be free to serve on boards of other companies so long as they are not direct competitors (specific companies named).

(emphasis added). The email continues:

This is the basic agreement. Hutchinson and Mason have blessed it. While none of us are happy we had to take this route, I believe it is the best course for the company. Going to court will use resources and very importantly divert the management from getting the business back on track.

With regard to Item No. number 7, Sanders says:

The language relating to RF Jr. is apparently necessary in RF Sr.'s view. It does not protect him from nonperformance. . . . I will provide you the full agreement if you wish but the highlighted points summarize the important parts of the agreement and avoid the 'legalese[.]' ”

Sanders concludes by saying, “[t]here are several ways we could proceed including giving me your approval by phone, email, or through convening a short meeting of the Board by conference call sometime before Friday if possible. . . . Harold Lichtin has already reviewed and approved it.” At an absolute minimum, there is evidence in the record tending to show that both parties to the agreement between Franco Sr. and Defendant viewed the Retaliation Letter as an integral part of the overall agreement; that the Retaliation Letter was intended to directly benefit Plaintiff; *Michael v. Huffman Oil Co.*, 190 N.C. App. 256, —, 661 S.E.2d 1, 10 (2008), *dis. rev. den.*, 363 N.C. 129, 673 S.E.2d 360 (2009); and that a failure to treat the Retaliation Letter as part of the Severance Agreement despite the existence of the merger clause would have the effect of “frustrat[ing] and distort[ing] the parties’ true intentions and understanding regarding the contract” and “ ‘nullify[ing] the clearly understood and expressed intent of the contracting parties,’ ” “ ‘lead[ing] to a patently unjust and absurd re-

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sult” *Zinn*, 87 N.C. App. at 333, 361 S.E.2d at 318 (citing *T.A. Loving Co. v. Latham*, 20 N.C. App. 318, 329-30, 201 S.E.2d 516, 523-24 (1974); see, eg., *Chapel Hill Spa Health Club, Inc. v. Goodman*, 90 N.C. App. 198, 202, 368 S.E.2d 60, 63 (1988) (appropriate to treat a written membership agreement and an oral referral arrangement as part of a single contract despite the presence of language in the membership contract “stating that no oral promises, warranties, or representations were made other than those in the contract”); *T.A. Loving Co.*, 20 N.C. App. at 328-30, 201 S.E.2d 523-24 (appropriate to treat a side letter reflecting oral discussions that a contractor would be held harmless from a provision in a written contract stating a maximum cost of construction as part of the parties’ overall agreement despite the presence of a merger clause in the written contract). Thus, there is evidence in the record that tends to show that consideration provided by Franco Sr. adequately supports the Retaliation Letter despite the presence of a merger clause in the Severance Agreement.

The next issue that needs to be addressed in resolving Plaintiff’s appeal from the trial court’s judgment is the extent, if any, to which the Retaliation Letter is effective to take the employment arrangement between Plaintiff and Defendant outside the “employment at will” doctrine which prevails in North Carolina. *Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 422. Under the “employment at will” doctrine, “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 the performance of either party.” *Id.* Neither the Supreme Court nor this Court have ever held that the only contractual relationship sufficient to take a particular employment relationship out of the “employment at will” category is a contract for a definite term of employment. On the contrary, the Supreme Court specifically denied having held in *Kurtzman* that “the establishment of ‘a definite term of service’ is the sole means of contractually removing the at-will principle.” *Id.*, 347 N.C. at 334, 493 S.E.2d at 424. A number of prior decisions of the Supreme Court and this Court have suggested that a variety of different contractual provisions would suffice to overcome the presumption that a particular employment relationship is terminable at will. See *Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971) (since the employment contract “contains no provision concerning the duration of the employment or the means by which it may be terminated,” it “is terminable at the will of either party irrespective of the quality of the performance by the

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other”); *Doyle v. Asheville Orthopaedic Associates, P.A.*, 148 N.C. App. 173, 174, 557 S.E.2d 577, 577 (2001), *disc. Rev. Den.*, 355 N.C. 348, 567 S.E.2d 278 (2002) (“Breach of contract is the proper claim for a wrongful[ly] discharged employee who is employed for a definite term or an employee subject to discharge only for ‘just cause.’ ”); *Wuchte v. McNeil*, 130 N.C. App. 738, 740, 505 S.E.2d 142, 144 (1998) (describing *Still* as having concluded that “[a]n employee is presumed to be an employee-at-will absent a definite term of employment or a condition that the employee can be fired only ‘for cause’ ”); *Mortenson v. Magneti Marelli U.S.A., Inc.*, 122 N.C. App. 486, 489, 470 S.E.2d 354, 356 (1996), *disc. rev. den.*, 344 N.C. 438, 476 S.E.2d 120 (1996) (employee’s employment terminable at will because the employee’s employment agreement did not “expressly state or imply, that the employment was to be permanent or that the plaintiff could be discharged only for cause”).⁸ Thus, there is considerable support in general statements found in various North Carolina decisions for a conclusion that a contract that provides an employee from protection against a limited range of adverse employment actions is just as efficacious as a contract establishing a definite term of employment for the purpose of taking a particular employer-employee relationship outside the ambit of the “employment at will” doctrine.⁹ Further-

8. Defendant argues vigorously that none of the cases cited in the text actually hold that a contractual provision other than one establishing a definite term of employment suffices to render a particular employment relationship something other than an “at will” arrangement. This fact should not, however, result in a decision to disregard the language in the text given that each of these decisions states a general principle to be used in evaluating the extent to which particular contractual provisions do and do not rebut the presumption that a particular employee holds employment “at will.” On the other hand, it would be equally inappropriate to treat these cases as having definitively resolved the issue that the Supreme Court reserved in *Kurtzman*.

9. Admittedly, there are cases that describe the “contract” exception to the “employment at will” doctrine in terms that omit any reference to any sort of contractual provision other than one establishing a definite term of employment. *See Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 422; *Harris*, 319 N.C. at 629, 356 S.E.2d at 359 (“North Carolina courts have repeatedly held that absent some form of contractual agreement between an employer and employee establishing a *definite* period of employment, the employment is presumed to be an ‘at-will’ employment, terminable at the will of either party, irrespective of the quality of the performance by the other party”) (emphasis in the original); *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 149, 25 S.E.2d 436, 436 (1943) (no employment contract exists where the agreement itself is for no definite time, and there is no business usage or other circumstance which would tend to give it any fixed duration). The existence of these cases does not, however, definitely indicate that the absence of a fixed term of employment precludes the formation of an employment contract sufficient to rebut the presumption that a particular employment arrangement is “at will.” In fact, none of them contain such a holding. As a result, these cases should simply be read as a quick statement of the general rule that

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more, given that “just cause” and “non-retaliation” provisions would be deemed enforceable under general principles of contract law, I can see no reason for holding such provisions insufficient to prevent a particular employment relationship from being terminable at will. As a result, I believe that otherwise enforceable language prohibiting actions such as those specified in the Retaliation Letter should suffice to take a particular employment relationship outside the scope of the “employment at will” doctrine.¹⁰

Although the Supreme Court has placed considerable emphasis on the economic benefits that have accrued, *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 174, 381 S.E.2d 445, 446 (1989), *disc. rev. den.*, 331 N.C. 284, 417 S.E.2d 249 (1992) (“adoption of the [at-will] rule by the courts greatly facilitated the development of the American economy at the end of the nineteenth century”), and continue to accrue, *Kurtzman*, 347 N.C. at 334, 493 S.E.2d 423 (“the rule remains an incentive to economic development, and any significant erosion of it could serve as a disincentive”), from the “employment at will” doctrine, I do not believe that recognition of agreements other than provisions guaranteeing a definite term of employment would amount to the creation of an additional exception to the “employment at will” doctrine of the sort decried by Defendant. Instead, recognition of the enforceability of contractual provisions such as those contained in the Retaliation Letter is fully consistent with North Carolina’s long-standing emphasis on the importance of freedom of contract, *see Tillman v. Commer. Credit Loans, Inc.*, 362 N.C. 93, 115, 655 S.E.2d 362, 377 (2008) (stating that “the right to make contracts is embraced

a contract for a definite term of employment suffices to rebut the presumption that a particular employment relationship is at will without deeming them to have resolved the issue reserved in *Kurtzman*.

10. Defendant points to the indefinite term of certain of the protections provided to Plaintiff in the Retaliation Letter and urges this Court not to recognize such provisions as enforceable because of their unlimited duration. Defendant’s argument overlooks the fact that the duration of the Retaliation Letter was, presumably, negotiated by the parties. Furthermore, Defendant’s argument overlooks the practical reality that, over time, the likelihood that Plaintiff would be subject to retaliation based on the activities of Franco Sr. would probably tend to diminish as Franco Sr.’s level of involvement in Defendant’s activities inevitably declined following his departure from Defendant’s Board. Finally, Defendant’s argument overlooks the general legal principle that, where no temporal limitation is specified in a contract, the rule of reasonableness takes over. *See East Coast Development Corp. v. Alderman-250 Corp.*, 30 N.C. App. 598, 604, 228 S.E.2d 72, 77 (1976) (stating that, “[a]s a general rule, where no time is fixed for the termination of a contract it will continue for a reasonable time, taking into account the purposes that the parties intended to accomplish”). As a result, the fact that the Retaliation Letter lacks a defined term does not support a decision declining to enforce it.

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in the conception of liberty as guaranteed by the Constitution. . . . It is the simple law of contracts that as a man consents to bind himself, so shall he be bound”); *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 243, 539 S.E.2d 274, 276 (2000) (stating that “our state’s legal landscape recognizes that . . . freedom of contract is a fundamental constitutional right”), and that giving effect to a variety of freely negotiated contractual arrangements would have the effect of strengthening the “employment at will” doctrine by giving employers and employees greater flexibility in negotiating employment agreements. Furthermore, assuming that it is otherwise valid under general principles of contract law, a failure to allow Plaintiff to enforce the Retaliation Letter would have the effect of substantially undermining a significant component of the bargain that Franco Sr. made with Defendant in the Severance Agreement. Thus, I do not believe that the basic policies effectuated by the “employment at will” doctrine would be thwarted by allowing Plaintiff to enforce the relatively unusual contractual provisions at issue here.

Finally, the record contains sufficient evidence to support a reasonable inference that Defendant violated the Retaliation Letter by taking a series of adverse employment actions, including terminating Plaintiff’s employment, in retaliation for various actions taken by Franco Sr. Among other things, the record contains evidence tending to show (1) that, after Franco Sr. questioned a new reimbursement strategy and a proposed financing initiative and called for a meeting of disinterested directors to address “duty of care” issues, Defendant removed Plaintiff’s managed care responsibilities and forced Plaintiff to cancel previously-approved vacation time; (2) that, after Franco Sr. criticized Defendant’s new CEO and asked that he be given a “360 Degree” performance review, the new CEO gave Plaintiff a highly critical performance review; (3) that, after Franco Sr. reiterated his criticism of Defendant’s CEO and his request for a “360 Degree” review, Defendant forced Plaintiff to cancel a previously-approved vacation; (4) that, after Franco Sr. asked for certain sales information, was allegedly responsible for an anonymous letter critical of shareholder communications, and resigned from the Board, Defendant removed sales training from Plaintiff’s area of responsibility and again forced Plaintiff to cancel a previously-approved vacation; (5) that, after Franco Sr. demanded that Defendant provide certain financial information to shareholders, Plaintiff’s reporting responsibilities were changed and he was forced to cancel previously-approved vacation time yet again; and (6) that, at various times after Franco Sr. and

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other shareholders received certain financial disclosures from Defendant that Defendant initially resisted providing, Plaintiff was (a) forced to cancel previously-approved vacation once more, (b) informed that neither he nor other members of the “Leadership Team” would receive raises, (c) not afforded a scheduled performance review, (d) removed from the “Leadership Team,” (e) given reduced spending authority, and (f) terminated from Defendant’s employment. Although Defendant has offered a number of explanations that tend to suggest that the treatment that Plaintiff received had a legitimate business justification, was similar to treatment afforded to other employees, and had nothing to do with the actions taken by Franco Sr., those explanations create issues for resolution by the jury rather than by this Court. As a result, the record contains sufficient evidence tending to show, if believed, that Defendant terminated Plaintiff in retaliation for Franco Sr.’s conduct in violation of the Retaliation Letter.

Thus, for all of the reasons stated above, I am convinced that there is evidence in the record tending to show that Plaintiff had an enforceable employment agreement providing him with protection from retaliatory treatment, which Defendant breached, and that this evidence is sufficient to withstand Defendant’s directed verdict motion, leaving the factual issues in dispute between the parties for resolution by the jury. As a result, I would remand this case to the trial court for the holding of a new trial and dissent from that portion of the Court’s decision that declines to reach that result.

STATE OF NORTH CAROLINA v. MAURICE RASHAD MILLER

No. COA08-650

(Filed 19 May 2009)

1. Evidence— relevance—interrogation of defendant—detectives’ questions—third-party statements embedded

Questions from detectives to defendant that included statements attributed to nontestifying third parties were relevant to facts in dispute and gave context to defendant’s responses.

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2. Evidence— hearsay—interrogation of defendant—detectives' questions—third-party statements embedded

Questions from detectives to defendant that included statements attributed to nontestifying third parties were not hearsay where they were offered not for the truth of the matter asserted, but so that the jury could understand the circumstances in which defendant was caught in a lie, changed his story, and made significant admissions of fact.

3. Evidence— ruling on admissibility—recording not seen—no abuse of discretion

The trial court did not fail to exercise its discretion in violation of N.C.G.S. § 8C-1, Rule 403 by not viewing a recording of defendant's interrogation before ruling on whether certain portions should be redacted where the court asked the parties to provide a forecast of what was in the DVD, made its ruling based on the forecasts, and gave a limiting instruction on the disputed evidence. Moreover, the cases cited do not stand for the proposition that a trial court's decision to not physically view evidence before admitting it constitutes an absolute failure to exercise discretion.

4. Evidence— recording of interrogation—request to redact refused—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for murder and other offenses by not redacting portions of a recording of defendant's interrogation where the court heard counsels' arguments, took relevant case law into consideration, listened to counsels' forecast of what was contained in the DVD, and determined that redacting the questions in issue would confuse the jury. The court gave a limiting instruction, and the challenged evidence constituted a small portion of the interview.

5. Robbery— instructions—attempt—intent to commit completed offense

There was no plain error in instructions on attempted robbery with a firearm and acting in concert where the court was clear that the jury had to find the intent by defendant to commit the completed substantive offense.

6. Robbery— instructions—attempted robbery—intent to commit substantive crime—no plain error

The difference between an attempted robbery and a robbery is defendant's success or failure in obtaining the property, and

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instructions on first-degree burglary and its lesser-included offenses, taken as a whole, were sufficiently clear to inform the jury that defendant had to have the intent to commit a robbery and not merely the intent to commit an attempt.

7. Homicide—felony murder—instructions—no plain error

There was no plain error in an instruction on felony murder where the court's initial instruction was technically erroneous, but the court's latter instructions served to eliminate all possibility of error or confusion. Moreover, the jury verdict sheets clearly and correctly stated the underlying felonies that could support a conviction for felony murder.

Appeal by defendant from judgments entered 18 December 2007 by Judge Jerry Cash Martin in New Hanover County Superior Court. Heard in the Court of Appeals 10 February 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joan M. Cunningham, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

HUNTER, ROBERT C., Judge.

Maurice Rashad Miller (“defendant”) appeals from two 18 December 2007 judgments entered in accordance with jury verdicts finding him guilty of: one count of first degree murder based on the felony murder rule; one count of first degree burglary; and one count of attempted robbery with a dangerous weapon, specifically with a firearm. All three convictions were based on the theory of acting in concert. The trial court consolidated the first degree burglary and felony murder convictions and sentenced defendant to life imprisonment without parole. The court arrested judgment for the attempted robbery with a firearm conviction.

I. Background

The State's evidence tended to show that on the evening of 22 January 2006, LaKendra Grady (“Grady”), Rufus Bowser (“Bowser”) and Darian Graham (“Graham”) were together at defendant's residence while he was at work. Of these three, only Bowser testified at trial, and he did so pursuant to a plea agreement.¹ Bowser testified

1. At the time of the robbery, Bowser was fourteen years old. He testified that he received a plea agreement for second degree murder and armed robbery. On cross-

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that he possessed a Tech-9 assault rifle (“Tech-9”), Grady possessed a 9-millimeter handgun (“9mm”), and Graham possessed a .357 revolver (“.357”). He further stated that, prior to defendant’s arrival, he, Grady, and Graham had spent two hours “just planning to rob somebody”; however, they did not have anyone specific in mind.

Bowser testified that defendant arrived home around 10:30 p.m., at which point defendant sat at the kitchen table and talked with the others, and Bowser showed him his Tech-9. Bowser further stated that the three of them “just told [defendant] about the robbery,” and defendant “was like, ‘[a]ll right[,]’ ” and came along with them. During cross-examination, Bowser stated that Grady and a man named “D.J.” planned the robbery and that D.J. suggested Pervis Owens (“Owens”) as a potential target. Bowser also testified that defendant was at work and was not present when Owens was selected as the target for the robbery.

Defendant admitted he knew that Grady had plans to rob someone prior to leaving his residence with her, Bowser, and Graham, but stated that he “didn’t know it was Pervis Owens.” However, during an interview conducted by Detective Lee Odham (“Detective Odham”) and Detective William Young (“Detective Young”) at the Wilmington Police Department on 28 January 2006, defendant stated that Grady had come into his bedroom, along with Graham and Bowser, and told him about wanting to rob Owens because he had a lot of money.² During the interview, Detective Odham asked defendant, “You went there with only the intent of robbing this guy. That was it?” Defendant responded, “Yeah, but I really didn’t even want to do that. But that’s what, yeah, I guess you could say that, yeah. Detective Odham inquired further, “All you wanted to do was rob him. You didn’t want to hurt him?” Defendant responded, “I didn’t even want to rob him, but . . .” at which point Detective Odham interrupted him. Detective Odham then said, “But you were there . . .” and defendant interrupted, stating “yeah, to rob him[,]” while nodding affirmatively.

examination, Bowser admitted that he knew this agreement eliminated the possibility of a life sentence.

2. As discussed *infra*, the State presented to the jury a DVD recording of this interview, which began either “very late” in the evening on 27 January or shortly after midnight on 28 January 2006. No transcription of the interview was prepared or included in the record. Nevertheless, the DVD is included in the record and is properly before us. We have reviewed the DVD in its entirety and include some of its pertinent content herein.

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Defendant, Bowser, Graham, and Grady left defendant's residence in a car driven by Grady. Bowser testified that they drove around for several hours and did not talk about the robbery or have a plan. According to Bowser, during much of the time, Grady was making calls on her cell phone and eventually reached Owens. However, in his interview with Detectives Odham and Young, defendant stated that Grady talked about "how she was going to do [the robbery]" while she drove. Defendant also told police that originally the plan was for them to rob Owens at the door of his residence, but that he (defendant) told Grady that he did not like that plan and that she had to come up with a new one. Bowser testified that, while in the car, Grady had the 9mm, Graham had the .357, and he had the Tech-9.

The group arrived at Owens's house sometime in the early morning of 23 January 2006, while it was still dark. Upon arrival, all four got out of the car. Grady told the others to wait five minutes and then to follow her into the house. She then proceeded to enter Owens's house. Bowser testified that, at this point, he still had the Tech-9 and Graham still had the .357, but that defendant, not Grady, had the 9mm.

According to Bowser, Grady did not come back out of the house or give any kind of signal before he and defendant went into the house. During his interview with police, defendant stated that Grady came out of the house, made a noise, and told the others that the robbery would be easy because Owens was asleep. Bowser testified that he entered Owens's residence first, putting his shirt around his face in the process. He stated that defendant did the "[s]ame thing" and followed him inside. On cross-examination, defendant conceded that he had previously told the detectives that he covered his face with the hood of his sweatshirt as he entered Owens's house. Graham remained outside.

According to Bowser, when he and defendant entered the house, Grady was not present, and Owens was asleep in a recliner. Bowser pointed his gun at Owens, "walked up to him and told him to get up." His intention was to have Owens "show [him] where the money was at." Bowser stated that Owens jumped up from his chair and tackled him, but that he escaped from Owens and ran out the door. Bowser testified that after he left the house, he heard a gunshot. He stated that defendant left the house after him, but that he "couldn't really see" whether there was anything in defendant's hands at that time.

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Defendant told the detectives that he was inside near the front door and trying to make it back outside when he heard a gunshot behind him. He stated that he thought Grady was probably the one who shot Owens.

According to Bowser, he, Graham, and defendant all ran to Graham's house and hid the three guns under a mattress. At this point, he noticed that defendant had the 9mm in his possession. On cross-examination, however, Bowser stated that he had previously told police that he had seen Grady with the 9mm the next day. Bowser also testified that, a few days after the incident, defendant told him, "[I've] got to live with killing somebody."

Owens was found dead on his front lawn. His death was attributed to a single gunshot wound. The State's forensic scientist identified the bullet as a "9-millimeter Luger".

Rose Samuel, Owens's neighbor, had a surveillance camera on her porch pointed towards the alley between the houses. This camera was recording at the time of the robbery and provided an audio account of some of the events that had occurred outside of Owens's residence. Through the assistance of witnesses, Detective Owens was able to identify Grady's voice on the tape. Subsequent to this, Detective Odham obtained a warrant for Grady's arrest for first degree murder.

After questioning Grady, Detective Odham then spoke with Graham. Graham provided the detectives with the 9mm that was purportedly used in the murder. After speaking with Graham, Detective Odham then contacted defendant to question him about the case. Either very late on 27 January or shortly after midnight on 28 January 2006, defendant, accompanied by his mother and step-father, went voluntarily to the Wilmington police station. Detective Odham did not place defendant under arrest at this time, and before he questioned defendant, Detective Odham read him his Miranda rights. Defendant indicated that he understood his rights and signed a written waiver form.

At trial, the jury was shown the DVD recording of defendant's 28 January 2006 interview, in which Detectives Odham and Young asked defendant numerous questions about his involvement in the events that transpired at Owens's house. Some of the detectives' questions contained statements incriminating defendant that were allegedly made by others, including Grady, Graham, Bowser, and defendant's

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sisters.³ With the exception of Bowser, none of the individuals to whom the statements were attributed testified at trial.

At trial, defendant testified on his own behalf. He stated that when he arrived at home on the evening of 22 January 2006, he could not see the three guns because Grady, Bowser and Graham were at the kitchen table and his view was blocked by a dividing wall. Defendant further testified that shortly after arriving at his residence, he went up to his bedroom to play computer games. He claimed he did not see a gun until Grady came into his room with the 9mm approximately thirty minutes later. He also denied any involvement in planning the robbery.

Defendant testified that when he left the house with the others, he did not know that Owens was the intended target. He also claimed that he never held Grady's 9mm and did not touch any of the guns subsequent to getting into the car.

According to defendant, when the group arrived at Owens's residence, they all got out of the car, and Grady said she would be back in five minutes. Defendant claimed that he then walked to a basketball park across the street to smoke a cigarette. He said that he saw Grady knock on the door and enter Owens's house, that he saw Owens, and that he was "pretty sure" that Owens saw him across the street.

After five minutes had passed, Grady came out of the house and proceeded to have a conversation with Bowser and Graham. Defendant stated that he crossed the street to join them after they signaled for him. Defendant testified that he thought they were welcome in the house because the door was "wide open." He also stated that he thought they were going inside so Grady could buy drugs. Defendant admitted that his hood was up when he went inside the house, but stated that it was already up because it was cold outside.

According to defendant, when he entered the house, both Grady and Bowser were in the living room. Bowser had the Tech-9 and Grady had the 9mm. When Bowser woke up Owens, defendant ran to the door to leave the house but was unable to do so because the door was stuck. Defendant testified that he heard a gunshot behind him but did not see or know who shot Owens. Defendant also stated that

3. One sister was referred to as "Nay Nay"; the other was referred to as "Dee-dee". (Phonetic spellings).

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he did not possess a weapon at Owens's house and that he did not place the 9mm under the mattress at Graham's house.

Other facts necessary to the understanding of this case are set out in the opinion below.

II. Analysis

A. DVD Recording and Statements of Non-Testifying Others

First, defendant argues that the trial court committed reversible error by admitting into evidence the DVD recording of his 28 January 2006 police interview without redacting those questions posed to him by Detectives Odham and Young which contained statements attributed to non-testifying third parties. Defendant concedes that his answers to these questions are relevant, but contends that the statements attributed to non-testifying third parties, which were contained in the detectives' questions, should have been redacted before the DVD was presented to the jury. Specifically, he asserts that the detectives' questions that contained statements purportedly made by non-testifying others, including his co-defendants and his sisters, are both irrelevant and inadmissible hearsay, that lack any probative value aside from proving the truth of the matter asserted. Consequently, defendant contends that the admission of these questions violated the North Carolina Rules of Evidence and his state and federal constitutional rights of confrontation. In the alternative, defendant argues that the trial court committed reversible error by not viewing the DVD prior to ruling on the admissibility of the objected to questions and/or that these questions should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 (2007) because whatever probative value the questions arguably had was substantially outweighed by the danger of unfair prejudice. As discussed *infra*, we disagree.

With regard to the DVD and its content, the trial judge ruled that: (1) the detectives' questions, and defendant's responses were relevant under N.C. Gen. Stat. § 8C-1, Rule 401 (2007); (2) defendant's responses to the questions were admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(d)(A) (2007) as "admission[s] by a party opponent"; and (3) the out-of-court statements purportedly made by co-defendants and others that were contained in the detectives' questions were not hearsay, as they were not offered to prove the truth of the matter asserted, but rather to explain the officers' course of investigation and to show their effect on defendant. The court also found that redacting the detectives' questions would make defend-

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ant's answers to those questions unintelligible and confuse the jury and concluded that their prejudicial effect did not substantially outweigh their probative value. Finally, the court gave a limiting instruction telling the jury not to consider the statements attributed to non-testifying third parties for the truth of the matter asserted.

On appeal, as he did below, defendant objects to eight specific portions of the detectives' questions, which he contends were erroneously admitted. These include purported statements made by: (1) defendant's sisters that he was downstairs at the kitchen table when Grady was talking about the robbery; (2) unidentified "other people" that defendant left the house on the night of the murder; (3) defendant's sisters that he was present in the house when others were talking about the robbery; (4) Grady and Graham that defendant was in the house when others were talking about the robbery; (5) unidentified "people" that defendant was at Owens's house on the night in question; (6) Grady that defendant, Bowser, and Graham were with her at Owens's house on the night in question; (7) Grady that she gave a gun to defendant; and (8) Graham that defendant pulled a gun out as he ran into Owens's house and that defendant and Bowser put their "hoodies up" before going inside the house.

i. Relevance

[1] First, defendant contends that these questions should have been redacted because they are not relevant. This argument is without merit.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. "[I]n criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), cert. denied, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966). "In order to be relevant, . . . evidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611 (1991). "The value of the evidence need only be slight." *Id.* at 355, 402 S.E.2d at 610. In addition, the Supreme Court of North Carolina "has held that out-of-court statements offered to explain the conduct of a witness are relevant and admissible." *Id.* at 356, 402 S.E.2d at 611. "[E]ven though a trial

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court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

Here, the detectives' questions were relevant. Their content made facts of consequence to this case more probable or less probable than they would be otherwise. The questions and their answers were relevant to facts under dispute. In addition, here, the questions gave context to defendant's responses. As discussed *infra*, during the course of questioning, defendant eventually conceded to the truth of many of the statements relayed to him via the detectives' questions. The circumstances under which these concessions were made were relevant to understanding the concessions themselves and therefore to the subject matter of the case. At other times, after being confronted with the purported statements of others via the detectives' questions, defendant changed his story substantially. In these instances, the questions were also relevant to explain and provide context to defendant's subsequent conduct of changing his story. In sum, the detectives' questions were clearly relevant.

ii. Hearsay

[2] Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). "However, out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). The Supreme Court of North Carolina "has held that statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as nonhearsay evidence." *Id.* (citing *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990)). "The reason such statements are admissible is not that they fall under an exception to the rule, but that they simply are not hearsay [because] they do not come within the above legal definition of the term." *Long v. Paving Co.*, 47 N.C. App. 564, 569, 268 S.E.2d 1, 5 (1980). The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59-60 n.9, 158 L. Ed. 2d 177, 197-98 n.9 (2004). Our standard of review on this issue

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is *de novo*. See *State v. Hazelwood*, 187 N.C. App. 94, 98, 652 S.E.2d 63, 66 (2007) (“The trial court concluded that this portion of Defendant’s statement was not hearsay under Rule 801(c) because it was not offered for its truth. We review the trial court’s determination *de novo*.”), *cert. denied*, 363 N.C. 133, 673 S.E.2d 867 (2009).

Here, the trial court relied on *State v. Chapman* in ruling that the questions containing statements attributed to non-testifying third parties were admissible because they were not offered for their truth. 359 N.C. 328, 611 S.E.2d 794 (2005).

In *Chapman*, a testifying detective was permitted to read to the jury a statement made by the defendant during his police interview, which stated, *inter alia*, that “ ‘[a]round noon, somebody called [the house where the defendant was at] and said they were going to kill whoever was in the house over [the victim’s] death. [Defendant] then left and went to [Lee] Green’s house.’ ” *Id.* at 355, 611 S.E.2d at 815. The Supreme Court of North Carolina concluded that the “words of the unidentified caller contained within defendant’s statement to [the detective] [were] not hearsay because they were not offered to prove the truth of the matter asserted.” *Id.*, 611 S.E.2d at 816. Specifically, the “[e]vidence of the phone call was admitted to show [the] defendant’s response to receiving the call, not to prove that the caller would actually harm the people in [the] house.” *Id.* Thus, that Court held that “the phone call was admissible to explain [the] defendant’s subsequent conduct in leaving [the] house.” *Id.*

Also, in *Chapman*, the trial court admitted the same detective’s testimony regarding the contents of an interview in which the detective used the statements of others to elicit a response from a witness (“Green”) who was with the defendant both at the time the murder occurred as well as when the aforementioned phone call was received. When Green was confronted with the purported statements of others during his second police interview, including that “ ‘there were statements made’ ” that Green was “ ‘aware of the shooting that occurred’ ”, Green “ ‘broke down’ ” and “ ‘told law enforcement a different story.’ ” *Id.* at 359-60, 611 S.E.2d at 818. The Court held that the testimony regarding what others said was not offered to prove the truth of the matter asserted; rather, “the central purpose . . . was to show Green’s response to being caught in a lie during his second police interview.” *Id.* at 360, 611 S.E.2d at 818.

The *Chapman* case is applicable to the case *sub judice*. Here, the purported statements of co-defendants and others that were con-

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tained in the detectives' questions were not offered to prove the truth of the matters asserted therein but to show the effect they had on defendant and his response. When the detectives confronted defendant with the aforementioned statements they allegedly received from others, defendant changed his story significantly. Indeed, when the detectives began questioning him, he denied all knowledge of the events that occurred at Owens's house and stated that he did not leave his residence on the night in question. However, upon being confronted with statements from others that implicated him, defendant admitted his presence at the scene, knowing about the plan to rob Owens, and that he went to Owens's house with the intent to rob him. In fact, each time defendant was confronted with statements of others, he changed his story a little bit more.

Furthermore, in the recorded interview defendant essentially admitted to the truth of every out-of-court statement with one exception. Specifically, defendant never admitted that he had a gun during the robbery. However, while defendant never admitted to possessing a gun at the scene, he did change his story significantly regarding the weapons when confronted with the questions containing the purported statements of Grady and Graham. Originally, defendant stated that only Grady possessed a firearm; however, upon being confronted with statements allegedly made by Grady and Graham that he did have a firearm, he changed his story to say that all of his co-defendants had firearms, but that he did not. In other words, here, the detectives' questions containing these purported statements had an immediately noticeable effect on defendant as the listener and caused him to change his story in such a way that his later statements became mutually exclusive of substantial parts of his earlier statements. Because defendant changed his story as a result of these out-of-court statements, it can be properly said that these questions were admitted to show their effect on defendant, not to prove the truth of the matter asserted. Moreover, given that defendant was convicted under the theory of acting in concert, defendant did not need to possess a gun in order to be found guilty of the charges for which he was accused, since he admitted that he knew that his co-defendants did have firearms.

Defendant relies extensively on *State v. Canady* to argue that the out-of-court statements constituted hearsay and were not admissible for any valid non-hearsay purpose. 355 N.C. 242, 559 S.E.2d 762 (2002). In that case, along with a series of other errors, the trial court admitted a detective's testimony regarding what a prison inmate told

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him another inmate said about certain murders that the detective was investigating and about the defendant's role in them. *Id.* at 246, 559 S.E.2d at 764. The State argued that the detective's testimony as to what he heard from the inmate served "to show the [detective's] conduct after he received the information" and therefore, was not hearsay. *Id.* The trial court also instructed the jury to not consider the out-of-court statements for the truth of the matter asserted. *Id.*

However, *Canady* is distinguishable from the instant case. There, the Supreme Court of North Carolina essentially found that the State's proffered purpose for using this testimony, i.e., to explain the detective's "subsequent actions", did not reflect the actual use of the statements made by the State at trial:

[T]he State's closing argument confirms that the State did not use [the detective's] statement merely as an explanation of subsequent actions. Instead, the State relied on [the detective's] testimony as substantive evidence of the details of the murders and to imply [the] defendant had given a detailed confession of his alleged crimes. By using [the detective's] testimony in this manner, the State undoubtedly sought to prove the truth of the matter asserted. Accordingly, the testimony at issue was inadmissible hearsay. Moreover, despite the trial court's provision of a limiting instruction, we hold [the detective's] testimony went so far beyond the confines of this instruction that the jury could not reasonably have restricted its attention to any nonhearsay elements in [the detective's] testimony.

Id. at 249, 559 S.E.2d at 766. In fact, the prosecutor in that case based his central theory of the case on the out-of-court statements and cited facts from those statements in closing argument. Here, the prosecution did not use the out-of-court statements to build its case, nor did it reference them in closing argument. Rather, the State offered these statements for a valid nonhearsay purpose and used them for that same purpose.

In sum, the questions containing alleged statements of non-testifying individuals were admissible so that the jury could understand the circumstances in which the defendant was caught in a lie, changed his story, and made significant admissions of fact, not to prove the truth of the matter asserted. Because this "evidence [was] admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial

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statements is not at issue” here, and the admission of these questions did not violate defendant’s state and federal confrontation rights. *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333, *disc. review denied*, 359 N.C. 856, 620 S.E.2d 196 (2005). Accordingly, we overrule these assignments of error.

iii. Failure to Exercise Discretion and Rule 403

[3] Defendant next argues that the trial court violated N.C. Gen. Stat. § 8C-1, Rule 403 by: (1) completely failing to exercise its discretion because it did not view the DVD before ruling on its admissibility; and (2) refusing to redact the aforementioned questions. These arguments are without merit.

Relevant “evidence may [still] be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403. “Whether to exclude relevant evidence under N.C.G.S. § 8C-1, Rule 403 is in the trial court’s discretion; we review the trial court’s decision for an abuse of that discretion.” *State v. Sims*, 161 N.C. App. 183, 190, 588 S.E.2d 55, 60 (2003). “A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985). “In determining whether to exclude evidence on the grounds of undue prejudice, the trial court should consider ‘the probable effectiveness or lack of effectiveness of a limiting instruction.’” *Reis v. Hoots*, 131 N.C. App. 721, 727, 509 S.E.2d 198, 203 (1998) (quoting Fed. R. Evid. 403 advisory committee’s note), *disc. review denied*, 350 N.C. 595, 537 S.E.2d 481 (1999).

[Where] the trial judge [gives] a limiting instruction with regard to the evidence in dispute, it follows that he recognized the potential for prejudice and exercised his discretion in permitting its introduction. This Court will not intervene where the trial court properly appraises the probative and prejudicial values of evidence under Rule 403.

Id.

In support of his argument that the trial court completely failed to exercise its discretion, defendant principally relies on *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985) and *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980). However, these cases are inapposite to the

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instant case. In both *Ashe* and *Lang*, the Supreme Court of North Carolina addressed whether the respective trial judges had failed to exercise their discretion by denying a jury request to review the testimony of an alibi witness when said request was made subsequent to the respective juries retiring for deliberation. *Ashe*, 314 N.C. at 33, 37, 331 S.E.2d at 656; *Lang*, 301 N.C. at 510-11, 272 S.E.2d at 124-25. In both cases, the Court concluded that the respective trial judges' responses indicated that they erroneously believed that they did not have the discretion to grant the juries' requests and thus erroneously failed to exercise their discretion. *Ashe*, 314 N.C. at 35, 331 S.E.2d at 656-57; *Lang*, 301 N.C. at 510-11, 272 S.E.2d at 124-25. Further, the respective errors were prejudicial because they implicated the only defense raised by the respective defendants, i.e., an alibi. *Ashe*, 314 N.C. at 37, 331 S.E.2d at 657-58; *Lang*, 301 N.C. at 511, 272 S.E.2d at 125.

Neither *Ashe* nor *Lang* stand for the proposition that a trial court's decision to not physically view evidence before admitting it constitutes an absolute failure to exercise discretion. Furthermore, we believe that a close review of the record indicates that the trial court did exercise its discretion here by questioning the parties regarding the content of the recorded statements and the objections to that content. Specifically, the court asked both parties to provide a forecast of what was contained in the DVD and made its ruling based on said forecasts. Defendant does not assert that the forecasts were inaccurate, and our review of the transcript and the DVD lead us to conclude that said forecasts were accurate. Furthermore, given that the trial court gave "a limiting instruction with regard to the evidence in dispute, it follows that he recognized the potential for prejudice and exercised his discretion in permitting its introduction." *Reis*, 131 N.C. App. at 727, 509 S.E.2d at 203. Accordingly, we overrule this assignment of error.

[4] Next, defendant argues the trial court should have redacted the questions containing purported statements made by non-testifying witnesses because any probative value "was vastly outweighed by its unfairly prejudicial effect" and violated Rule 403. Based on the record here, we disagree.

In the case *sub judice*, the trial court heard counsels' respective arguments on the possible probative and prejudicial effect of the content of the DVD, took relevant case law into consideration, listened to counsels' respective forecasts as to what was contained in the DVD, and determined that redacting the detectives' questions from the DVD

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would serve to confuse the jury. The court also instructed the jury as follows:

The Court did review the last portion of this exhibit, State's Exhibit 67, which had been identified as a copy of the DVD or interrogation of the defendant . . . I want to give you an instruction about that. That is the statements of the officer in this interrogation that [Graham] or [Grady] or [Bowser] or others said things about what happened on January 23, 2006, or said things about what the defendant did, those statements are not being offered for the truth of the matter asserted within those statements. They are offered for a limited purpose, that is as statements by the officer or officers to invite a response by the defendant and to explain the officer's conduct and the defendant's conduct during the investigation. To the extent they do so, you may consider them but may not consider them for the truth as they are not offered or received in evidence for that purpose[.]

Courts "presume 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.'" *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). We believe this instruction is sufficiently clear as to how the jury was to treat the statements attributed to non-testifying third parties that were contained in the detectives' questions, and defendant did not object to this instruction or its content. Furthermore, the questions to which defendant objected comprised but a small portion, (less than one minute total), of defendant's approximately one-hour interview. The vast majority of them were posed at the beginning of the interview and resulted in defendant changing his original story substantially. Accordingly, it cannot be said that the trial court's decision not to redact the questions was " 'manifestly unsupported by reason.' " *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 832 (1985)).

While we believe that publishing the recorded interview to the jury did not constitute error here, we nevertheless encourage trial courts to review the content of recorded interviews before publishing them to the jury to ensure that all out-of-court statements contained therein are either admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run

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around the evidentiary and constitutional proscriptions against the admission of hearsay. Further, we would like to remind trial courts that the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court. As such, the wholesale publication of a recording of a police interview to the jury, especially law enforcement's investigatory questions, might very well violate the proscriptions against admitting hearsay or Rule 403. In such instances, trial courts would need to redact or exclude the problematic portions of law enforcement's investigatory questions/statements.

B. Plain Error and Jury Instructions

Next, defendant contends that the trial court's "instructions on acting in concert in conjunction with attempted armed robbery, [first degree] burglary, and felony murder were prejudicially confusing, ambiguous, and incorrect as a matter of law because they permitted the jury to convict [him] of [these respective crimes based] upon a factually and legally impossible state of facts."⁴ We disagree.

Defendant did not object to the jury instructions at trial. Jury instructions to which a defendant did not object are reviewed for plain error. *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315, *cert. denied*, 359 N.C. 854, 619 S.E.2d 854 (2005).

"[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error " '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.' "

4. Defendant also contends that the trial court erred in its instructions on acting in concert with respect to attempted common-law robbery, second degree burglary, and felonious breaking or entering. However, defendant was not convicted of these offenses; thus, it is unclear how these instructions, even if erroneous, could have prejudiced him.

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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.), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). “The adoption of the ‘plain error’ rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant’s failure to object at trial.” *Id.* “Indeed, . . . ‘[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.’ ” *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

Furthermore, even if an instruction does contain technical errors, a charge [to the jury] shall be considered as a whole in the same connected way in which it was given, and on the presumption that the jury did not overlook any portion of it, and, when so taken, 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. Valley, 187 N.C. 571, 572, 122 S.E. 373, 373-74 (1924) (quoting *State v. Dill*, 184 N.C. 645, 650, 113 S.E. 609, 612 (1922)).

i. Attempted Robbery with a Firearm

[5] Defendant argues that the trial court committed plain error because its instructions on attempted robbery with a firearm and acting in concert essentially informed the jury that it could convict him of attempted robbery with a firearm based on his shared purpose or intent to commit an attempt rather than a shared purpose or intent to commit the completed substantive offense. We disagree.

Defendant concedes that the trial court correctly instructed the jury on the intent element of robbery with a firearm. After instructing the jury on the requisite elements for robbery with a firearm, the trial court then proceeded to give the following instruction on acting in concert:⁵

Now for a person to be guilty of a crime it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to com-

5. We note that this instruction is nearly a verbatim statement of N.C.P.I.—Crim. 202.10 (June 2006). The only significant difference is that, here, the instruction refers to the specific crime of robbery with a firearm.

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it robbery with a firearm, each of them if actually or constructively present is guilty of that crime if the other person commits the crime and 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.

With regard to the intent element of attempted robbery with a firearm the trial court stated:

Now, attempted robbery with a firearm is attempting to rob another by endangering or threatening him with a firearm. For you to find the defendant guilty of this offense, the State must prove . . . *that the defendant intended to rob a person*, that is to take and carry away personal property from that person or in his presence without his consent knowing that he, the defendant, was not entitled to take it, intending to deprive that person of its use permanently. . . . The instructions I have given you previously concerning acting in concert with another person or persons are equally applicable here and you should consider them here.

(Emphasis added). The trial court further instructed:

So if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant acting by himself or acting together with another person or persons *intended to rob a person, and that in furtherance of this intent, he possessed a firearm which he used in such a manner as to endanger or threaten the life of that person and if this was an act designed to bring about the robbery and which in the ordinary course of things would have resulted in robbery had it not been stopped or thwarted*, it would be your duty to return a verdict of guilty of attempted robbery with a firearm.

(Emphasis added). The italicized portions of these instructions are clear that in order to find defendant guilty of attempted robbery with a firearm, the jury had to find that he “intended to rob a person”. In other words, the court instructed the jury that it had to find that defendant had the intent to commit the completed substantive offense, not merely the intent to commit an attempt. Furthermore, the italicized portion of the latter instruction is clear that the only real difference between robbery with a firearm and attempted robbery with a firearm is that with the former, a defendant, or someone with whom he is acting in concert, is successful in taking and carrying away the victim’s property, but with the latter he is not.

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Accordingly, we do not believe the court committed error, much less plain error, in instructing the jury on attempted robbery with a firearm and the theory of acting in concert.

ii. First Degree Burglary

[6] Defendant also contends that the trial court “committed a similar error in instructing on first-degree burglary and its lesser included offenses.” As discussed *infra*, while we believe that some of the instructions on first degree burglary were a bit confusing and technically incorrect, we do not believe they rise to the level of plain error. The trial judge instructed the jury on first degree burglary as follows: “The defendant has been charged with first degree burglary, which is breaking and entering the occupied dwelling of another without his consent in the nighttime *with the intent to commit robbery or attempted robbery.*” (Emphasis added). Later, in instructing the jury on the intent element, the court stated that the jury had to find that “at the time of the breaking and entering, the defendant intended to commit robbery with a firearm *or attempted robbery with a firearm* or common law robbery or *attempted common law robbery.*” (Emphasis added). Finally, in instructing the jury on acting in concert and first degree burglary, the court stated:

So if you find from the evidence beyond a reasonable doubt that . . . defendant acting either by himself or acting together with another person or other persons broke into and entered an occupied dwelling house without the tenant’s consent during the nighttime and at that time intended to commit robbery with a firearm, *attempted robbery with a firearm* or common law robbery or *attempted common law robbery*, it would be your duty to return a verdict of guilty of first degree burglary.

(Emphasis added). The italicized portions of these instructions do appear to inform the jury that it could convict defendant based on his intent to commit an attempt. However, the trial court also specifically referred the jury back to its previous instructions on, *inter alia*, the elements of attempted armed robbery and attempted common law robbery: “The instructions I have given you previously about the definition and the elements of the offense of robbery with a firearm, attempted robbery with a firearm, common law robbery, and attempted common law robbery are equally applicable here and you are directed to consider those instructions here.” Both the instructions on attempted robbery with a firearm and attempted common

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law robbery were correct.⁶ The instructions on the intent element of those crimes make it clear that defendant must have “intended to rob a person” by using a firearm or “intended to commit common law robbery” for him to be convicted of first degree burglary.

Here, the instructions, when taken as a whole, are sufficiently clear to inform the jury that in order to find defendant guilty of first degree burglary, defendant actually had to have the intent to commit the completed crime, not merely the intent to commit an attempt, and that the difference between the completed crimes of robbery with a firearm and common law robbery and the crimes of attempted robbery with a firearm and attempted common law robbery, is a defendant’s success or lack thereof in obtaining the property. Hence, although the instruction on first degree burglary does contain technically confusing and erroneous language, we find that on the whole, the instructions fairly and correctly presented the law and do not rise to the level of plain error.

iii. Felony Murder

[7] Defendant also argues that the instructions on acting in concert in connection with felony murder were erroneous. The trial court gave the jury the following instruction on acting in concert in the context of felony murder:

Now for a person to be guilty of a crime it is not necessary that he personally do all of the acts necessary to constitute the crime. *If two or more persons join in a common purpose to commit first degree murder based on the felony murder rule*, each of them if actively or constructively present is guilty of that crime if the other person commits the crime and also guilty of any other crime committed by the other *in pursuance of a common purpose to commit first degree murder based on the felony murder rule* or as a natural or probable consequence thereof.

(Emphasis added). Defendant correctly points out that this instruction is technically erroneous, as “first degree murder based on the felony murder rule” is not one of the underlying felonies that sup-

6. The trial court instructed the jury that to find defendant guilty of attempted common law robbery, the State had to prove “defendant intended to commit common law robbery . . . [and] at the time the defendant had this intent, he performed an act which was calculated and designed to bring about common law robbery, but which fell short of the completed offense and which came so close to bringing it about that in the ordinary and likely course of things, he would have completed that crime had he not been stopped or prevented from completing his apparent course of action.”

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ports first degree felony murder. However, the trial court's later instructions served to eliminate all possibility of error or confusion. The trial court instructed the jury that robbery with a firearm, attempted robbery with a firearm, common law robbery, attempted common law robbery, first degree burglary, or second degree burglary were the possible underlying felonies upon which a felony murder conviction could be predicated. Although the trial court did make an inadvertent misstatement which seemed to indicate "first degree murder based on the felony murder rule" could also serve as an underlying felony upon which a conviction of felony murder could be based, the court's subsequent instructions were sufficiently clear that it was not. Moreover, the verdict sheets provided to the jury clearly and correctly stated the underlying felonies that could support a conviction for felony murder. As such, we do not believe the trial court's initial misstatement rises to the level of plain error.

III. Conclusion

In sum, after careful review of defendant's arguments in this case, we find no error.

No error.

Judges WYNN and ERVIN concur.

LENNIE AND BONNIE HAMBY, PLAINTIFFS v. PROFILE PRODUCTS, LLC, TERRA-MULCH PRODUCTS, LLC, ROY D. HOFFMAN, AND ELECTRIC SERVICE GROUP, INC., DEFENDANTS

No. COA08-942

(Filed 19 May 2009)

1. Workers' Compensation— workplace injury—Woodson claim—evidence—OSHA violations—not sufficient

Plaintiffs' forecast of evidence at summary judgment was insufficient to establish a *Woodson* claim against Terra-Mulch. Plaintiffs' forecast showed that Hamby was injured by Terra-Mulch's inadequately guarded machinery in violation of OSHA standards, but did not demonstrate that Hamby was specifically instructed to descend from a truck-dump operator platform in a manner that exposed him to the hazardous augers or that

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Terra-Mulch was otherwise substantially certain he would be seriously injured.

2. Workers' Compensation— workplace injury—Woodson claim—risk assessment—evidence not sufficient

In a personal injury case arising from a workplace accident, on remand after an appellate determination that defendant Profiles's knowledge and misconduct can be attributed to defendant Terra-Mulch, the trial did not abuse its discretion by denying plaintiffs' motion to reconsider a grant of summary judgment for Terra-Mulch. Defendant's forecast of evidence was not sufficient to establish a *Woodson* claim even with a Risk Assessment Report by a consultant being attributed to Terra-Mulch.

3. Civil Procedure— summary judgment ruling—discovery not complete—no abuse of discretion

The trial court did not err by granting summary judgment for defendant Terra-Mulch before ruling on plaintiffs' outstanding discovery motion. Plaintiffs may not argue on appeal that the trial court erred by granting summary judgment for Terra-Mulch before ruling on their motion to compel when plaintiffs manifestly acquiesced to that course of events at the summary judgment hearing. Moreover, it cannot be concluded that the additional information would have produced a different outcome.

Appeal by Plaintiffs from order entered 8 May 2008 by Judge Timothy L. Patti in Superior Court, Caldwell County. Heard in the Court of Appeals 9 March 2009.

Jones Martin Parris & Tessener Law Offices, P.L.L.C., by John Alan Jones & G. Christopher Olson, for plaintiffs.

Forman Rossabi Black, P.A., by Amiel J. Rossabi & William F. Patterson, Jr., for defendant Terra-Mulch Products, LLC.

WYNN, Judge.

This is the second appeal arising from an action brought by Plaintiffs Lennie and Bonnie Hamby against defendants Roy Hoffman; Terra-Mulch, L.L.C. ("Terra-Mulch"); Profile Products, L.L.C. ("Profile"); and Electric Service Group, Inc. ("ESG"), for personal injuries sustained in a workplace accident. Though this matter has been the subject of opinions from this Court and the Supreme Court, to appre-

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ciate the procedural posture of this case, we first describe the roles of each of the parties involved in this litigation.

Plaintiff Lennie Hamby (“Hamby”) worked as a truck-dump operator for Terra-Mulch at its Conover, North Carolina plant. While descending an elevated platform to clear accumulated wood chips in an auger pit, he slipped and entangled his left leg in the augers, which failed to deactivate because the emergency switch was inoperable. The incident resulted in the amputation of his left leg above the knee. Lennie and Bonnie Hamby (“Plaintiffs”) brought a civil action describing Terra-Mulch as a wholly-owned subsidiary of Profile; Profile as the alter ego of Terra-Mulch; Roy Hoffman as an Assistant Plant Manager for Terra-Mulch; and ESG as a corporation hired to perform electrical work at Terra-Mulch’s Conover plant.

Plaintiffs “allege that Profile and Terra-Mulch collectively failed to provide a safe work site for the inherently dangerous work Hamby performed and that they thus ‘engaged in conduct which was grossly negligent, willful and wanton, and substantially certain to lead to death or serious injury’” *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 632, 652 S.E.2d 231, 233 (2007). Though Plaintiffs asserted joint claims against Profile and Terra-Mulch, Plaintiffs argued (and our Supreme Court so interpreted) that they were asserting a claim against Terra-Mulch pursuant to *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), and an ordinary negligence claim against Profile. *Hamby*, 361 N.C. at 634, 652 S.E.2d at 234. Plaintiffs also asserted a claim against Terra-Mulch’s Assistant Plant Manager, Roy Hoffman, pursuant to *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), alleging that he “engaged in misconduct which was willful and wanton.” Finally, Plaintiffs alleged that ESG negligently performed electrical work causing an emergency stop button to become inoperable, resulting in serious injury to Hamby.

In May 2005, all Defendants moved for summary judgment. On 1 June 2005, Plaintiffs moved to compel discovery, requesting relief pursuant to Rule 56 (f) of the North Carolina Rules of Civil Procedure 56(f). On 6 June 2005, without ruling on Plaintiffs’ motion to compel discovery, the trial court granted summary judgment to Terra-Mulch and Hoffman, but denied summary judgment to Profile and ESG. Profile immediately appealed the denial of summary judgment to this Court, which in a divided opinion dismissed that appeal as interlocutory. *Hamby v. Profile Prods., L.L.C.*, 179 N.C. App. 151, 158, 632 S.E.2d 804, 809 (2006).

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Based on the dissenting opinion, Profile appealed as a matter of right to our Supreme Court, which found the denial of summary judgment to Profile immediately appealable. *Hamby*, 361 N.C. at 639, 652 S.E.2d at 237. To reach that result, the Supreme Court first agreed that Profile's appeal from the denial of summary judgment was interlocutory because the trial court's order "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.* at 633, 652 S.E.2d at 233 (citations and quotation marks omitted). The Court further noted that the trial court did not certify the matter for appeal under Rule 54(b); so, to merit review, the interlocutory order had to affect a substantial right. *Id.* at 634, 652 S.E.2d at 233-34. The Court next focused on Plaintiffs' allegations and evidence that "Profile is [Terra-Mulch's] sole member[-manager]," *id.* at 636-37, 652 S.E.2d at 235, and that under the pertinent statutes, "when a member-manager is managing the LLC's business, its liability is inseparable from that of the LLC."¹ *Id.* at 638, 652 S.E.2d at 236. Because Plaintiffs' allegations and forecast of evidence tended to show that Profile was conducting Terra-Mulch's business when Hamby was injured, the Supreme Court concluded that "Profile's liability for actions taken while managing Terra-Mulch is inseparable from the liability of Terra-Mulch . . ." *Id.* at 639, 652 S.E.2d at 237. It followed that the grant of summary judgment to Terra-Mulch, while denying summary judgment to Profile, created the risk of inconsistent verdicts and made the denial of summary judgment to Profile immediately appealable. *Id.* The Court further concluded that,

the trial court erred in denying Profile's motion for summary judgment because the denial was premised on Plaintiffs' assertion of a third-party ordinary negligence claim against Profile, a claim that, as a matter of law, plaintiffs could not bring against Profile. Therefore, we remand this case to the Court of Appeals for further remand to the trial court for entry of summary judgment in favor of Profile.

Id.

After the Supreme Court's decision, on 9 January and 3 March 2009, Plaintiffs filed a Motion for Reconsideration regarding

1. The Court conspicuously noted that Plaintiffs "did not cross-assign error to the trial court's grant of summary judgment for Terra-Mulch on grounds that the exclusive remedy plaintiffs have against Terra-Mulch is under the Worker's Compensation Act." *Hamby*, 361 N.C. at 634, 652 S.E.2d at 234.

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the granting of summary judgment in favor of Terra-Mulch, contending that,

When the summary judgment arguments were heard . . . , the parties' arguments were premised on Profile's status as a separate legal entity apart from the employer, Terra-Mulch. As such, the misconduct on the part of Defendant Profile was not attributed to Defendant Terra-Mulch. The Supreme Court Opinion in this matter materially changed the substantive law governing issues involved in this case and compels a different result with respect to the summary judgment ruling in favor of Defendant Terra-Mulch. Under the Supreme Court's ruling, the actions, misconduct, and knowledge of Profile is properly attributable to Defendant Terra-Mulch.

The trial court denied Plaintiff's Motion for Reconsideration on 8 May 2008 but certified "the judgment and all rulings in favor of Defendant Terra-Mulch Products, LLC" to this Court for immediate review. Thereafter, Plaintiffs gave "notice of appeal from the following Orders, rulings, and actions of the trial court:"

(1) The Order by the Honorable Nathaniel J. Poovey entered on 21 June 2005, granting Defendant Terra-Mulch Products, LLC's and Defendant Roy D. Hoffman's Motions for Summary Judgment;

(2) The decision by the Honorable Nathaniel J. Poovey to proceed with the hearing of Defendant Terra-Mulch Products, LLC's Motion for Summary Judgment without addressing Plaintiff's pending Motion to Compel and request for relief pursuant to Rule 56(f) of the North Carolina Rules of Civil Procedure;

(3) The Order of the Honorable Robert P. Johnston entered 27 July 2005, staying discovery pending Defendant Profile Products, LLC's appeal;

(4) The decision by the Honorable Robert P. Johnston to proceed with the hearing of Defendant Profile Products, LLC's Motion to Stay without addressing Plaintiffs' pending Motion to Compel;

(5) The 8 May 2008 Order by the Honorable Timothy L. Patti denying Plaintiffs' Motion for Reconsideration in Light of Subsequently-Decided Authority pursuant to N.C.R. Civ.P.60(b)(6); and

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(6) The decision of the Honorable Timothy L. Patti to proceed with the hearing of Plaintiffs' Motion for Reconsideration without addressing Plaintiffs' pending Motion to Compel and request for relief pursuant to Rule 56(f) of the North Carolina Rules of Civil Procedure.

Plaintiffs also filed a petition for writ of certiorari, asking this Court to review the grant of summary judgment to Hoffman contemporaneously with the motion to reconsider the grant of summary judgment to Terra-Mulch. Defendants Terra-Mulch and Hoffman opposed Plaintiffs' petition for writ of certiorari; Terra-Mulch also moved to dismiss this appeal.

From the outset, we observe that our Supreme Court, in mandating the entry of summary judgment in favor of Profile, found it significant to note preliminarily "that plaintiffs did not cross-assign error to the trial court's grant of summary judgment for Terra-Mulch on grounds that the exclusive remedy plaintiffs have against Terra-Mulch is under the Workers' Compensation Act." *Id.* at 634, 652 S.E.2d at 234. The Supreme Court pointed out that,

Plaintiffs' complaint, amended three times, asserts all claims against Terra-Mulch and Profile jointly, and none of these claims allege ordinary negligence as to those defendants. Before the trial court, the Court of Appeals, and this Court, plaintiffs have argued that Profile's liability is based on ordinary negligence, not gross negligence. The pivotal question presented by this case is whether, as a matter of law, plaintiffs are able to assert an ordinary negligence claim in civil court against Profile, the member-manager of the employer Terra-Mulch. To answer that question and, in so doing, determine whether the trial court's order creates the risk of inconsistent verdicts, we must decide whether Profile, like Terra-Mulch, is entitled to the protection of the exclusivity provision of Chapter 97.

Id.

The Court's statement that the Plaintiffs failed to "cross-assign error to the trial court's grant of summary judgment for Terra-Mulch on grounds that the exclusive remedy plaintiffs have against Terra-Mulch is under the Workers' Compensation Act," when read alone, appears to indicate that the trial court's order of summary judgment in favor of Terra-Mulch was a final order. However, in mandating that summary judgment be granted for Profile, the Supreme Court did not

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reach the issue of whether the trial court properly determined that Plaintiffs could not establish a viable *Woodson* claim against Terra-Mulch. Instead, the Court held that “the trial court erred in denying Profile’s motion for summary judgment because the denial was premised on Plaintiffs’ assertion of a third-party ordinary negligence claim against Profile, a claim that, as a matter of law, plaintiffs could not bring against Profile.” *Id.* at 639, 652 S.E.2d at 237. Thus, we now address the issues arising from the granting of summary judgment for Terra-Mulch.

On appeal, Plaintiffs argue the trial court erred by (I) granting summary judgment in favor of Terra-Mulch on the ground that Plaintiffs failed to establish a *Woodson* claim; (II) denying their motion to reconsider because our Supreme Court’s opinion in this case changed the law regarding evidence that could be attributed to Terra-Mulch at summary judgment; and (III) failing to consider discoverable evidence by not ruling on Plaintiffs’ motion to compel discovery.

I.

[1] Plaintiffs first contend that the trial court erred by granting summary judgment for Terra-Mulch on the ground that Plaintiffs failed to establish a *Woodson* claim; and thus, their exclusive remedy was under the Worker’s Compensation Act. We uphold the trial court’s grant of summary judgment in favor of Terra-Mulch.

“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.’ ” *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001)), *aff’d per curiam*, 358 N.C. 381, 591 S.E.2d 521 (2004). “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.’ ” *Id.* (citations omitted). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.” *In re Will of Jones*, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

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The burden of establishing a *Woodson* claim is akin to a showing of culpability required to establish an intentional tort:

[W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the [Worker's Compensation] Act.

Woodson v. Rowland, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991). "The elements of a *Woodson* claim are: (1) misconduct by the employer; (2) intentionally engaged in; (3) with the knowledge that the misconduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured as a consequence of the misconduct." *Pastva v. Naegele Outdoor Adver., Inc.*, 121 N.C. App. 656, 659, 468 S.E.2d 491, 494 (1996) (citing *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228). "Such circumstances exist where there is uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 557, 597 S.E.2d 665, 668 (2003). *Woodson* created "a narrow exception to the exclusivity provisions of the North Carolina Workers' Compensation Act," applicable "only in the most egregious cases of employer misconduct." *Id.*

Woodson's facts are unquestionably the benchmark for a plaintiff seeking to escape the exclusivity provision of this State's Worker's Compensation Act.

In *Woodson*, the defendant-employer's president was on the job site and observed first-hand the obvious hazards of the deep trench in which he directed the decedent-employee to work. Knowing that safety regulations and common trade practice mandated the use of precautionary shoring, the defendant-employer's president nonetheless disregarded all safety measures and intentionally placed his employee into a hazardous situation in which experts concluded that only one outcome was substantially certain to follow: an injurious, if not fatal, cave-in of the trench.

Whitaker, 357 N.C. at 557-58, 597 S.E.2d at 668 (citing *Woodson*, 329 N.C. at 335, 345-46, 407 S.E.2d at 225, 231-32).

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In sharp contrast to *Woodson's* singular circumstances, in this case, Plaintiffs relied on the following forecast of evidence at summary judgment: deposition testimony of employees acknowledging injuries and dangerous conditions at Terra-Mulch's Conover plant; an affidavit from a certified safety professional opining that documented OSHA violations at Terra-Mulch's Conover plant created "an extremely dangerous" work environment and made it "virtually inevitable that an employee would be killed or seriously injured"; Hoffman's agreement during his deposition that conditions documented by the Risk Assessment Report indicated a "virtual inevitability that somebody would be seriously injured unless safety changes were implemented"; and post-incident OSHA citations for safety violations at the Conover plant, including the lack of a stairway from the loading dock to the truck-dump operator platform and inadequate guarding. There was also evidence that it was customary for workers to complete their tasks in a manner that exposed them to the safety violations. The trial court granted summary judgment for Terra-Mulch despite Plaintiffs' pending discovery requests. We agree that Plaintiffs' forecast of evidence was insufficient.

Plaintiffs' forecast of evidence in this case is not unlike the plaintiff-employee's insufficient allegations in *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993). In *Pendergrass*, the plaintiff-employee asserted *Pleasant* claims against his co-employee-defendants and a *Woodson* claim against his employer-defendant. *Id.* at 237, 424 S.E.2d at 394. The plaintiff-employee alleged that the co-employee and employer defendants proximately caused his injuries because they were "grossly and wantonly negligent" in designing and permitting the use of a machine with inadequate guards in violation of OSHA standards, and further directing him to work at the inadequately guarded machine. *Id.* at 238, 424 S.E.2d at 394. The Court held that the plaintiff-employee did not state a *Pleasant* claim because, while the co-employee-defendants "may have known certain dangerous parts of the machine were unguarded when they instructed [the plaintiff-employee] to work at the machine, we do not believe this supports an inference that they intended that [the plaintiff-employee] be injured or that they were manifestly indifferent to the consequences of his doing so." *Id.* at 238, 424 S.E.2d at 394. Nor were the plaintiff-employee's allegations sufficient to meet "the higher level of negligence as defined in *Woodson* of substantial certainty of injury." *Id.* at 239-40, 424 S.E.2d at 395.

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Similar to the plaintiff-employee's allegations in *Pendergrass*, Plaintiffs' forecast of evidence here shows that Hamby was injured by Terra-Mulch's inadequately guarded machinery—the rotating augers—in violation of OSHA standards. Our Supreme Court, however, found this circumstance insufficient to establish a *Woodson* claim, even when coupled with an allegation that supervisors specifically directed the employee to work in the face of the hazard. *Id.* at 235, 424 S.E.2d at 393. Plaintiffs' allegations and forecast of evidence in this case did not demonstrate that Hamby was specifically instructed to descend from the truck-dump operator platform in the manner that exposed him to the hazardous augers, or that Terra-Mulch was otherwise “substantially certain” he would be seriously injured. *But cf. Woodson*, 329 N.C. at 346, 407 S.E.2d at 231-32 (“[The employer’s president’s] knowledge and prior disregard of dangers associated with trenching; his presence at the site and opportunity to observe the hazards; his direction to proceed without the required safety procedures; [and evidence showing the trench’s inherent danger] . . . converge to make plaintiff’s evidentiary forecast sufficient to survive [the employer’s] motion for summary judgment.”). Accordingly, we agree with the trial court that Plaintiffs’ forecast of evidence at summary judgment was insufficient to establish their *Woodson* claim against Terra-Mulch.

II.

[2] Next, Plaintiffs argue the trial court erred by denying their motion to reconsider its grant of summary judgment for Terra-Mulch because the Supreme Court’s opinion changed the applicable law. Plaintiffs seek relief under North Carolina Rule of Civil Procedure 60(b)(6) contending that the Supreme Court’s holding that Profile’s knowledge and misconduct can be imputed to Terra-Mulch changed the governing law that was applied in the summary judgment hearing, at which Profile and Terra-Mulch were treated as separate entities. We hold that the trial court was within its discretion to deny Plaintiffs’ motion to reconsider.

Plaintiffs argue that in light of the Supreme Court’s opinion, the trial court should further consider their evidence against Profile—a Risk Assessment Report prepared prior to Hamby’s injury—as being attributable to Terra-Mulch. The Risk Assessment Report memorializes a risk control consultant’s safety inspection of Terra-Mulch’s Conover plant on 7 February 2002 for purposes of insuring the plant. The consultant generally found safety conditions at the Conover Terra-Mulch plant unsatisfactory, and also made the following spe-

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cific findings, which Plaintiffs deem particularly relevant to their *Woodson* claim:

[The Conover Terra-Mulch plant] has all the red flags of an uncontrolled high hazard account. High risk operation with frequency, severity and catastrophic worker compensation exposures, new management (acting plant manager and most experience on site manager has been there less than a year) (sic), high turn over, low paying jobs, basic OSHA controls not in place, no safety program, no accountabilities, no safety culture. Corporate pressure is work 24/7 and get production out.

. . .

Basically no [risk management programs] in place. There may be a sign here and there; safety glasses are worn and emergency exit maps, but that is it.

. . .

Physical Exposures—Machinery (caught in/amputations); Exposure: High; Control: Needs Improvement; Comments: Choppers, chippers & augers needs improvement. There are some jury-rigged interlock controls but I would want to rely on them if I fell onto a conveyor and was moving toward a chipper. (sic)

. . .

Worker's Compensation Comments: No foreign travel or aircraft. The acct has a turnover rate of between 30 and 70 employees a month. Most of these are temps but they also loose (sic) permanent employees each year (not sure how many, contact would not say). This provides a situation where employees are never really informally trained on jobs and we don't know the losses that have occurred to the temp. The acct keeps their OSHA log on their employees only and tell me the Temp agency takes care of the temps. The account has not addressed their basic OSHA requirements and basically I was told production is the only real concern. . . . The only accountability is budgetary and production.

. . .

This is the poorest worker's comp account I have seen in a long time. Without very strong guidance and leadership from the corporate office, it will never change (and based on used (sic)

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of temps and turnover, I don't think it will change even with corporate guidance). My opinion is that we should not insure this account.

. . .

Likelihood of Compliance: My contact stated the emphasis is production. Also he feels that the turn over is so great, why train, people who are gone tomorrow. . . . Right now this location is overwhelmed and corporate just isn't providing guidance. . . .

Following the inspection, the safety consultant sent a letter, containing specific safety recommendations reflecting the unsatisfactory conditions, to Jim Cebulski, Profile's Vice President and Controller.

Rule 60(b)(6) authorizes a trial court to relieve a party from a final order or judgment for "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2007). Accordingly, "the Rule has been described as a 'grand reservoir of equitable power' by which a court may grant relief from a judgment whenever extraordinary circumstances exist and there is a showing that justice demands it." *Barnes v. Taylor*, 148 N.C. App. 397, 400, 559 S.E.2d 246, 248-49 (2002) (quoting *Dollar v. Tapp*, 103 N.C. App. 162, 163-64, 404 S.E.2d 482, 483 (1991)). Rule 60(b)(6) is properly employed to revisit a judgment affected by a subsequent change in the law. *See id.*; *McNeil v. Hicks*, 119 N.C. App. 579, 580-81, 459 S.E.2d 47, 48 (1995). However, this Court reviews a trial court's decision whether to grant relief from judgment under Rule 60(b)(6) for an abuse of discretion. *Barnes*, 148 N.C. App. at 399, 559 S.E.2d at 248.

Here, we find no abuse of discretion in the trial court's denial of Plaintiffs' motion to reconsider because their forecast of evidence is insufficient to establish a *Woodson* claim even when the Risk Assessment Report is attributed to Terra-Mulch. First, we deem it significant that the trial court heard evidence and arguments on all Defendants' summary judgment motions in the same hearing. We also observe that Plaintiffs in fact attributed the Risk Assessment Report to Terra-Mulch, with the same level of detail with which they cite the Report to this Court in this appeal, in their Memorandum in Opposition to Defendants' Motion for Summary Judgment. Thus, even if we assume, as Plaintiffs contend, that the trial court did not consider the Risk Assessment Report for its probative value against Terra-Mulch, we hold that the consideration of the additional evidence would still not establish a *prima facie Woodson* claim against Terra-Mulch.

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To reiterate, “[t]he elements of a *Woodson* claim are: (1) misconduct by the employer; (2) intentionally engaged in; (3) with the knowledge that the misconduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured as a consequence of the misconduct.” *Pastva*, 121 N.C. App. at 659, 468 S.E.2d at 494. Here, even though evidence in the record raises the suspicion that conditions at the Conover Terra-Mulch plant failed to comply with OSHA mandates, the evidence hardly shows that Terra-Mulch’s noncompliance or other actions or omissions were substantially certain to cause serious injury or death. *See Whitaker*, 357 N.C. at 558, 597 S.E.2d at 669 (reinstating grant of summary judgment to municipal employer because plaintiff’s evidence was insufficient to establish *Woodson* claim); *see also Maraman v. Cooper Steel Fabricators*, 146 N.C. App. 613, 555 S.E.2d 309 (2001) (reversing directed verdict on *Woodson* claim for defendant-employer), *rev’d in part*, 355 N.C. 482, 562 S.E.2d 420 (2002) (per curiam). Rather, the most favorable view of Plaintiffs’ evidence demonstrates that the auger pit was inadequately guarded prior to Hamby’s injury, in violation of OSHA regulations; the Risk Assessment Report tends to show that Terra-Mulch was aware of the inadequately guarded augers before Hamby was injured. As in *Pendergrass*, the Risk Assessment Report, even when cumulated with Plaintiffs’ original forecast of evidence, does not sufficiently show that Terra-Mulch was substantially certain that serious injury or death would result. Accordingly, we reject Plaintiffs’ contention that the trial court erred by denying their motion to reconsider.

III.

[3] In their final argument, Plaintiffs contend that the trial court erred by granting summary judgment to Terra-Mulch before ruling on their outstanding motion to compel discovery.

After Terra-Mulch moved for summary judgment, Plaintiffs filed a motion to compel discovery against Profile and Terra-Mulch. The motion specifically requested an order compelling discovery pursuant to North Carolina Rule of Civil Procedure 37(a)(2), and stated further: “Additionally and out of an abundance of caution, Plaintiffs request relief pursuant to Rule 56(f) . . . insofar as [Profile and Terra-Mulch] are refusing to produce materials which would bolster Plaintiffs’ opposition to [Profile’s and Terra-Mulch’s] motion for summary judgment.” The motion identified “information regarding other workplace injuries, workplace safety and OSHA compliance issues,

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and documents related to investigation of workplace safety incidents,” including Reports of Injury.

The trial court heard all pending motions, including Plaintiffs’ motion to compel and outstanding summary judgment motions, in a single hearing that occurred on 6 and 8 June 2005. At the hearing, the trial court heard argument from all counsel regarding the evidence and claims, and subsequently the court requested argument on Plaintiffs’ motion to compel. Plaintiffs’ counsel identified the Reports of Injury as the most important information sought in their motion to compel. Ultimately, after further argument on the discovery issue from counsel for Plaintiffs and Defendants, the following exchange occurred:

[Terra-Mulch’s counsel]: There’s nothing that they’ve asked for that would have any effect upon our argument as stated in our brief. If you’ll look at them, nothing they’re asking for has anything to do with it.

The Court: I haven’t heard anything either, but, obviously, depending on how I rule on those other motions, it might take care of the motion to compel or a motion for protective order.

[Plaintiffs’ counsel]: Judge, as we stated in our brief, we think, based on the prior safety audit and the testimony of Mr. Hoffman that an injury, serious injury, was virtually inevitable, we think we meet the *Woodson* standard. I filed—I have filed a motion to compel and noticed their motion for protective order out of an abundance of caution to make sure I don’t have to defend a motion without having documents that will bolster my case, but I think we have sufficient evidence in the record now to defeat the pending motions for summary judgment, but if there’s any doubt with the Court, then I think I’m entitled to those documents, because I think they might further bolster our case.

The remaining argument went to the merits of the pending motions for summary judgment with no further mention from either side of the discovery issues.

It is ordinarily error for a trial court to rule on a summary judgment motion without addressing a pending motion to compel discovery that “might lead to the production of evidence relevant to the motion . . . and the party seeking discovery has not been dilatory in doing so.” *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220-21 (1979). However, the court “is not barred in every case from

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granting summary judgment before discovery is completed.” *Patrick v. Wake Cty. Dep’t of Human Servs.*, 188 N.C. App. 592, 597, 655 S.E.2d 920, 924 (2008) (quoting *N.C. Council of Churches v. State*, 120 N.C. App. 84, 92, 461 S.E.2d 354, 360 (1995), *aff’d*, 343 N.C. 117, 468 S.E.2d 58 (1996)). A trial court’s granting summary judgment before discovery is complete may not be reversible error if the party opposing summary judgment is not prejudiced. *See Conover*, 297 N.C. at 512-13, 256 S.E.2d at 220-21 (holding that trial court’s grant of summary judgment before completion of discovery did not prejudice party opposing summary judgment because information sought by pending discovery requests emerged at the hearing). *But see Ussery v. Taylor*, 156 N.C. App. 684, 686, 577 S.E.2d 159, 161 (2003) (stating that “plaintiff did not have adequate time to develop his case” where trial court granted summary judgment while plaintiff had pending discovery requests and had not been dilatory); *Burge v. Integon Gen. Ins. Co.*, 104 N.C. App. 628, 630-31, 410 S.E.2d 396, 398 (1991) (holding the trial court erred by granting summary judgment a short time after initial discovery requests, and the plaintiff detrimentally relied on the defendant’s promise to provide additional discovery). Moreover, this Court has stated that, generally, “motions for summary judgment should not be decided until all parties are prepared to present their contentions on all the issues raised and determinable under Rule 56.” *Am. Travel Corp. v. Cent. Carolina Bank & Tr. Co.*, 57 N.C. App. 437, 441, 291 S.E.2d 892, 895, *disc. rev. denied*, 306 N.C. 555, 294 S.E.2d 369 (1982).

Plaintiffs here argue the trial court erred by granting summary judgment without compelling production of Reports of Injury that allegedly would have “bolstered” their opposition to summary judgment. Plaintiffs characterized, at the summary judgment hearing and in their brief before this Court, the Reports of Injury as “bolstering” their opposition to summary judgment because they acknowledge receiving OSHA logs documenting the same injuries as the unproduced Reports of Injury. They also contend the Reports of Injury “could have proven the total number of workplace injuries at the [Conover Terra-Mulch] plant” and “the occurrence of similar incidents.” Before this Court, Plaintiffs depict the OSHA logs as insufficient because they “contain only the vaguest description of an injury such as ‘left eye’ or ‘mashed left thumb.’ ”

In contrast, Plaintiffs’ position before the trial court was that they produced sufficient evidence to establish their *Woodson* claim against Terra-Mulch without the Reports of Injury, and their motion to

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compel was a mere “abundance of caution”—a figurative “just-in-case” the trial court finds our evidence insufficient. Consistently with that position, Plaintiffs’ counsel spent the remainder of the summary judgment hearing, on 8 June 2005, arguing the merits of the pending claims with no further insistence upon obtaining any additional discovery. Plaintiffs may not now argue the trial court erred by granting summary judgment for Terra-Mulch before ruling on their motion to compel when Plaintiffs manifestly acquiesced in that course of events at the summary judgment hearing. *Cf. Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004) (holding that plaintiffs could not complain that they had insufficient time to produce evidence where the trial court transformed defendants’ Rule 12(b)(6) motion into a motion for summary judgment because plaintiffs “fully participated in the hearing” and did not request a continuance at the hearing).

Moreover, the trial court was required to give Plaintiffs, as the nonmoving party, the most favorable view of the evidence at summary judgment. *Jones*, 362 N.C. at 573-74, 669 S.E.2d at 576. Considering Plaintiffs’ acknowledgment that the OSHA logs document most, if not all, of the same injuries documented by the Reports of Injury, we cannot conclude that any additional information in the Reports of Injury would have produced a different outcome. Nor are we moved by Plaintiffs’ argument that any additional information in the Reports of Injury regarding “the total number of workplace injuries” or “the occurrence of similar incidents” would have assisted them any more than the OSHA logs in establishing their *Woodson* claim. Again, Plaintiffs were entitled to the most favorable view of the evidence in the OSHA logs, which show injuries over the span of at least three years at the Conover Terra-Mulch plant, including, by Plaintiffs’ own admission, “numerous incidents that appear to be the same type injury as Hamby suffered” Thus, the OSHA logs, when viewed most favorably to Plaintiffs, sufficed to show the record of previous injuries at the Conover Terra-Mulch plant, and the similarity of those injuries to Hamby’s.

Accordingly, we find no error in the trial court’s granting summary judgment to Terra-Mulch while discovery requests were pending because: Plaintiffs expressed a preparedness to oppose summary judgment without the Reports of Injury; argued the merits of the summary judgment motions without requesting further discovery; did not object during the trial court’s rulings; and the OSHA logs, when viewed most favorably to Plaintiffs, provided a sufficient forecast of

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any additional evidence Plaintiffs allege to exist in the Reports of Injury. Indeed, our Supreme Court in *Whitaker* emphasized that *Woodson* “represents a narrow holding in a fact-specific case.” *Id.* at 557, 597 S.E.2d at 668. Here, as in the majority of *Woodson* cases, Plaintiffs’ evidence is insufficient even if Terra-Mulch had pre-incident knowledge of the Risk Assessment Report and the unproduced Reports of Injury.

In sum, we affirm the trial court’s denial of Plaintiffs’ motion to reconsider; deny Plaintiffs’ petition for writ of certiorari; and deny Terra-Mulch’s motion to dismiss.

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

CAROL DALENKO D/B/A BRIGHTON STABLES, PLAINTIFF v. PEDEN GENERAL CONTRACTORS, INC. AND JAMES M. PEDEN, JR., JAMES M. PEDEN, III, INDIVIDUALLY, AND AS OFFICERS AND SHAREHOLDERS OF PEDEN, DEFENDANTS

No. COA08-170

(Filed 19 May 2009)

1. Trials— motion for a particular judge—arbitration agreement—purported contract right

The trial court did not abuse its discretion by denying plaintiff’s motion to have a particular judge preside over the case where plaintiff argued that she had a contractual right to have that judge preside over all matters arising from an arbitration agreement. Parties to litigation do not have the right to contract for a specific judge; additionally, the arbitration award was confirmed and all appeals exhausted, so that the case ended and with it any purported right to have the particular judge continue to preside.

2. Appeal and Error— further jurisdiction in trial court— appeal of nonappealable interlocutory order

The appeal of a trial court order denying plaintiff’s motion to have a particular judge assigned to the case did not divest the trial court of jurisdiction to hear further matters. A trial court is not divested of its jurisdiction when the litigant appeals a nonappealable interlocutory order.

3. Judges— motion to recuse—denial—no error

There was no merit to plaintiff's contention that the trial judge's refusal to recuse himself prejudiced her right to a fair hearing before an impartial court. Plaintiff's written motion was not timely filed, her objections were raised only at the end of the hearing, plaintiff did not articulate before the trial judge any objective reason for the judge to recuse himself, or a sufficiently forceful basis for delegating the decision to another judge, and arguments not raised at trial were not properly before the appellate court.

4. Arbitration and Mediation— claim for breach of agreement—case previously resolved

The trial court correctly dismissed an action premised on the misconception that plaintiff has a claim for breach of an arbitration agreement in a case that has been resolved.

5. Arbitration and Mediation— claims from agreement—prior case fully resolved—relitigation—not allowed

Although plaintiff contended that claims arising from an arbitration agreement have never been litigated, the prior lawsuit was fully and finally resolved. Plaintiff cannot seek to reopen a previously litigated matter through a breach of contract action based upon the arbitration agreement.

6. Pleadings— amended complaint—subject to Rule 12(b)(6) dismissal—gatekeeper certification revoked

An amended complaint by a plaintiff was properly dismissed where the trial court ruled that the action would have been dismissed under Rule 12(b)(6) even considering the amended complaint, and the Rule 11 certification by a licensed attorney required in a gatekeeper order was revoked by the attorney.

7. Judges— inherent power—prohibition of future frivolous litigation

The trial courts have the inherent power to prohibit future frivolous and repetitive litigation, and the court here did not abuse its discretion by barring further actions pertaining to this dispute.

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8. Judges— threat of criminal contempt—not abuse of discretion

The threat of criminal contempt to a plaintiff if she filed further claims in the same matter was a warning about the consequences of future conduct and not an abuse of discretion.

9. Liens— uncertainty as to current status—order cancelling

The trial court did not err by entering an order cancelling a lien where the order resolved uncertainty about whether the lien had been cancelled.

Appeal by plaintiff from orders filed 20 July 2007, 23 July 2007, and 4 September 2007 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 24 September 2008.

Carol Dalenko, pro se, plaintiff-appellant.

Nicholls & Crampton, P.A., by W. Sidney Aldridge, for defendant-appellees.

PER CURIAM.

Plaintiff may not attempt to revive previously litigated claims by filing an independent action. An arbitration award is a final adjudication of a matter, subject to the specific matters for which it may be set aside by the trial court. Plaintiff's appeal of a non-appealable interlocutory order does not divest the trial court of jurisdiction to proceed with the case. Parties cannot by contract select a trial judge to hear their lawsuit. The trial courts have discretion to bar parties from abusing the courts with frivolous and repetitive litigation.

I. Procedural Background and Factual History**A. Prior Case in Wake County**

This action is the third case to reach this Court arising out of a 1998 construction contract between Peden General Contractors Inc. (Peden) and Carol Bennett, now Carol Dalenko (Dalenko). In Wake County case 98 CVS 14297, Peden sued Dalenko contending that it was owed \$35,198.00 under the terms of the contract. Peden had previously filed a labor and materialman's lien on Dalenko's real estate, and the lawsuit was filed to perfect this lien. On 10 September 2002, Peden and Dalenko entered into a Consent Agreement for Binding Arbitration (Arbitration Agreement). The agreement provided that "The Arbitration Award shall be binding as an official court ordered

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judgment and shall be final as to all claims between Peden and Bennett.” On 4 September 2003, Robert A. Collier, Jr. entered an arbitration award in favor of Dalenko in the amount of \$13,380.80. This award was confirmed by the trial court on 30 September 2003. Dalenko’s motions to alter, amend, or vacate the order of confirmation were denied on 15 October 2003. Dalenko appealed to this Court, which affirmed the orders of the trial court. *Peden Gen. Contrs., Inc. v. Bennett*, 172 N.C. App. 171, 616 S.E.2d 31 (2005), *disc. rev. denied*, 360 N.C. 176, 626 S.E.2d 648 (2005) (unpublished). Following the final resolution of this case in the appellate courts of this state, on 22 December 2005, Dalenko filed a motion for leave to file a supplemental complaint in Wake County action 98 CVS 14297. On 6 January 2006, Judge Abraham Penn Jones entered an order denying that motion “without prejudice” to the defendant’s right to file a separate and new action for claims arising from the contract dated 10 September 2002 (the Arbitration Agreement). The unnecessary language of “without prejudice” contained in this order by Judge Jones has spawned the subsequent litigation described below.

B. Wake County case 06 CVS 2529

On 20 February 2006, Dalenko filed an action in the Superior Court of Wake County, case 06 CVS 2529, styled as “Carol Bennett d/b/a Brighton Stables, plaintiff, v. Peden General Contractors, Inc., and James M. Peden Jr., James M. Peden III, individually, and officers and shareholders of Peden, defendants.” This complaint alleged that defendants had breached the 10 September 2002 Arbitration Agreement. It asserted the following claims for relief: (1) four counts for specific performance of the Arbitration Agreement; (2) ten counts for breach of contract; (3) a claim for breach of an implied covenant of good faith and fair dealing; (4) a claim for constructive fraud; (5) a claim for fraud on the court; (6) a claim for malicious prosecution; (7) three counts for abuse of process; (8) a claim for obstruction of justice; (9) a claim for unfair and deceptive trade practice; and (10) sought to have the individual Peden defendants held in civil contempt of court. By order dated 6 April 2006, Judge John W. Smith, II entered an order striking Dalenko’s complaint for failure to comply with the provisions of a gatekeeper order previously entered in Wake County Civil Case 00 CVS 5994.¹ By separate order dated 6 April 2006, Judge

1. This order forbade Dalenko from filing any documents with the Clerk of Superior Court of Wake County unless: (1) Dalenko was indigent and filing pursuant to N.C. Gen. Stat. § 1-110; or (2) the document contained a certification by a licensed attorney that it complied with the provisions of Rule 11 of the Rules of Civil Procedure.

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Smith sanctioned Dalenko in the amount of \$4,901.48 for violation of the gatekeeper order. Dalenko appealed these orders but subsequently withdrew her notice of appeal on 11 December 2006.

C. Wake County case 07-5130

On 3 April 2007, Dalenko filed a complaint in the instant case, Wake County Civil Case 07-5130. The complaint alleged that defendants had breached the 10 September 2002 Arbitration Agreement. It asserted the following claims for relief: (1) four counts for specific performance of the Arbitration Agreement; (2) eight counts for breach of contract; (3) for breach of an implied covenant of good faith and fair dealing; and (4) for constructive fraud. Appended to the complaint was a Rule 11 Certification dated 3 April 2007 and signed by attorney Kevin P. Hopper. On 11 May 2007, Mr. Hopper served a revocation of this certification. On 4 May 2007, defendants filed motions to strike or dismiss Dalenko's complaint and for sanctions pursuant to Rule 11 of the Rules of Civil Procedure.

On 10 July 2007, Dalenko filed a motion pursuant to Rule 2.2 of the Tenth Judicial District to have Judge Abraham Penn Jones designated to preside over this matter, in accordance with the provisions of the 10 September 2002 Arbitration Agreement. On 13 July 2007, the Senior Resident Superior Court Judge for the Tenth Judicial District denied Dalenko's motion to designate Judge Jones to hear this case.

On 16 July 2007, Judge Donald W. Stephens heard defendants' motions to strike or dismiss Dalenko's complaint. By order filed 20 July 2007 at 9:13 a.m., the trial court granted defendants' motions to dismiss, citing Rule 12(b)(6) of the Rules of Civil Procedure, the principles of *res judicata*, and the statute of limitations. The trial court further concluded:

[A]ny further claims or actions filed by Plaintiff, Dalenko (formerly Carol Bennett), arising out of, and/or related to, Peden v. Bennett, 98 CVS 14297, Wake County Superior Court, including, but not limited to, any order or decree entered in that case and/or the facts related to the proceedings in that case, are without a lawful basis and are specifically prohibited. If Plaintiff hereafter violates this prohibition, she may be subject to criminal contempt of court.

This order was the basis of the imposition of sanctions against Dalenko in Wake County Case 06 CVS 13133, which was the second case to come before this Court arising out of the 1998 contract dispute with Peden. *Dalenko v. Collier*, 191 N.C. App. 713, 664 S.E.2d 425 (2008), *appeal dismissed*, 362 N.C. 680, 670 S.E.2d 563 (2008).

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On the morning of the 16 July 2007 hearing, Dalenko filed a notice of appeal of the trial court's denial of her motion to have Judge Jones hear the case and an amended complaint seeking to have Robert A. Collier, Jr., the arbitrator in case 98 CVS 14297, added as a defendant to this case. The trial court's order denied Dalenko's attempt to amend the complaint. On 20 July 2007 at 3:11 p.m., Dalenko filed a motion to disqualify Judge Stephens from hearing this matter. On 23 July 2007, the trial court denied the motion as having "no basis in fact or law and is not timely." On 27 July 2007, Dalenko filed a second notice of appeal, appealing the orders of 20 July 2007 and 23 July 2007.

D. Orders Entered Subsequent to Notice of Appeal

On 4 September 2007, the trial court filed an order directing that the Clerk of Superior Court of Wake County cancel the lien filed in 98 M-3116, in accordance with the order that confirmed the arbitration award in 98 CVS 14297. This was the lien that Peden sought to enforce in case 98 CVS 14297. The order stated that it was entered "to eliminate any uncertainty as to whether the Lien has been properly cancelled."

Following the denial of Dalenko's attempt to amend her complaint on 16 July 2007, Dalenko served the "Amended Complaint" on Collier's attorney on 10 December 2007. On 12 December 2007, the trial court filed an order dismissing the "Amended Complaint," with prejudice.

II. Dalenko's 16 July 2007 Appeal of Order Denying Her Motion to Designate Judge Jones to Hear this Matter

In her first two arguments, Dalenko contends that: (1) the trial court erred in denying her motion; and (2) her notice of appeal divested the trial court of jurisdiction to enter any subsequent orders in this matter. We disagree.

A. Motion to Designate Judge Jones

[1] Dalenko argues that the express terms of the Arbitration Agreement to arbitrate the dispute in case 98 CVS 14297 required the Senior Resident Superior Court Judge to assign Judge Abraham Penn Jones to hear the instant case. She cites to the following provision in the Arbitration Agreement: "The Honorable Abraham Penn Jones, presiding retains jurisdiction to enforce the terms and conditions of this Agreement upon application or motion of Peden or Bennett." Dalenko argues that she had a contractual right to have Judge Jones

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hear all matters arising out of the Arbitration Agreement. Judge Jones did not sign the Arbitration Agreement. This argument is without merit for a number of reasons.

First, the Arbitration Agreement was to arbitrate the dispute in case 98 CVS 14297. That case is over. The arbitration award was confirmed by the Superior Court of Wake County, and Dalenko exhausted all of her appeals, without success. Any purported right to have Judge Jones continue to preside over the matter died with case 98 CVS 14297.

Second, parties to litigation do not have the right to contract for a specific judge to hear a case. Judges of the Superior Court are assigned to hold terms of court by the Chief Justice of the Supreme Court. N.C. Const. art. IV, § 11; N.C. Gen. Stat. § 7A-47.3 (2007). Cases are assigned to particular terms of court by the Senior Resident Superior Court Judge of the Judicial District. Gen. R. Pract. Super. & Dist. Cts. 2.

Third, even had Judge Jones purported to retain jurisdiction of matters arising out of the Arbitration Agreement (the record being devoid of any such order), Judge Jones relinquished any such right by order filed in case 98 CVS 14297, dated 9 January 2003.

Fourth, Tenth District Local Rule 2.2 provides that: "The Senior Resident Judge may designate a specific resident judge or a specific judge assigned to hold court in the District to preside over all proceedings in a particular case." This rule vests discretion in the Senior Resident Judge to make such assignments. Where a ruling of the trial court is discretionary, the court "may be reversed for abuse of discretion only upon a showing that its actions are 'manifestly unsupported by reason.'" *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citations omitted). We discern no abuse of discretion in the trial court's denial of Dalenko's motion to have Judge Jones preside over the instant case.

This argument is without merit.

B. Effect of Notice of Appeal

[2] Dalenko next argues that the appeal of the trial court's order denying her motion to assign Judge Jones to hear the instant case divested the trial court of jurisdiction to hear any further matters.

When a party gives notice of appeal from an appealable order, the trial court is divested of jurisdiction and the related proceedings are

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stayed in the lower court. N.C. Gen. Stat. § 1-294 (2007); *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001). In such instances, the trial court has no authority to proceed with the trial of the matter. *RPR & Assocs. v. University of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002), *cert. dismissed and disc. review denied*, 357 N.C. 166, 579 S.E.2d 882 (2003). However, a trial court is not divested of its jurisdiction to determine a case on its merits where the litigant appeals a non-appealable interlocutory order. *Id.* In such instances, the trial court is not required to stay the proceedings but “may disregard the appeal and proceed to try the action[.]” *Velez*, 144 N.C. App. at 591, 551 S.E.2d at 875 (quoting *Veazey v. Durham*, 231 N.C. 357, 364, 57 S.E.2d 377, 383 (1950)).

As noted above, Dalenko had no right, contractual or otherwise, to have Judge Jones preside over the instant case. We hold that the trial court’s ruling on such preliminary matters in litigation are non-appealable interlocutory orders. In *Veazey*, Justice Ervin, writing for our Supreme Court, stated why such appeals cannot be allowed to disrupt trial proceedings:

[A] litigant cannot deprive the Superior Court of jurisdiction to try and determine a case on its merits by taking an appeal to the Supreme Court from a nonappealable interlocutory order of the Superior Court. A contrary decision would necessarily require an acceptance of the paradoxical paralogsism that a party to an action can paralyze the administration of justice in the Superior Court by the simple expedient of doing what the law does not allow him to do, *i.e.*, taking an appeal from an order which is not appealable.

Veazey, 231 N.C. at 364, 57 S.E.2d at 382-83.

We hold that Dalenko’s appeal of the trial court’s order pertaining to Judge Jones did not divest the trial court of jurisdiction in this matter.

This argument is without merit.

III. Dalenko’s Motion to Recuse Judge Stephens

[3] In her third argument, Dalenko contends that Judge Stephens’ refusal to recuse himself upon her motion in open court, and subsequent written motion for recusal, prejudiced her right to a fair hearing before an impartial court. We disagree.

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On 16 July 2007, a hearing was held on defendants' motion to dismiss before Judge Stephens. Near the end of the hearing, Dalenko stated the following to the court:

Your Honor, out of an abundance of caution in this Amended Complaint, I would just like to ask the Court to consider whether or not—I really hate to ask Your Honor—that if it would be appropriate, merely out of an abundance of caution, to recuse yourself from this case because there are issues of fact regarding the prior arbitration proceedings that were before you in September of 2003 that need to be decided independently of whatever interest you may have of preserving your prior rulings, although I don't believe that your Order, to the extent that it affirmed the award subject to Peden cancelling its lien and Peden didn't do as you ordered, I think we still may be OK.

But just out of an abundance of caution, since you may become a fact witness or your orders entered in the underlying construction dispute would be very definitely brought in on evidentiary basis, that it may be appropriate for you to recuse yourself.

This motion to recuse was denied in open court. On 20 July 2007 at 3:11 p.m., following the filing of the trial court's order dismissing this action, Dalenko filed a written motion that Judge Stephens be recused from this case. This motion was denied on 23 July 2007 as being meritless and untimely because this action had already been dismissed.

We first note that Dalenko's written motion was filed after the filing of the order dismissing this action and was thus not timely filed. *Burwell v. Griffin*, 67 N.C. App. 198, 203, 312 S.E.2d 917, 920 (1984) (citing *Atkins v. Beasley*, 53 N.C. App. 33, 36, 279 S.E.2d 866, 869 (1981)) (stating a final judgment disposes of the cause as to all parties, leaving nothing to be judicially determined in the trial court), *appeal dismissed and disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984). We therefore do not consider Dalenko's written motion on appeal.

This Court reviews *de novo* whether a party has met the burden of "showing through substantial evidence that the judge has such a personal bias, prejudice or interest that he would be unable to rule impartially." *In re Faircloth*, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002) (citing *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987); *State v. Honaker*, 111 N.C. App. 216, 219, 431 S.E.2d 869, 871 (1993)). Where there is sufficient force to the allegations to proceed

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to find facts, or an objective basis for doubt as to the trial court's impartiality, the trial judge should recuse himself or refer the motion to another judge. *Faircloth*, 153 N.C. App. at 570, 571 S.E.2d at 69 (citing *State v. Poole*, 305 N.C. 308, 320, 289 S.E.2d 335, 343 (1982); *Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976)). However, "knowledge of evidentiary facts gained by a trial judge from an earlier proceeding does not require disqualification." *Faircloth*, 153 N.C. App. at 570, 571 S.E.2d at 69 (citing *In re LaRue*, 113 N.C. App. 807, 810, 440 S.E.2d 301, 303. (1994)).

Second, we note that Dalenko raised no objections to Judge Stephens' impartiality prior to the 16 July 2007 hearing. It was only at the very end of the hearing that a question was raised. Dalenko first asserted that there were issues of fact from the 2003 arbitration proceedings (in case 98 CVS 14297) that needed "to be decided independently of whatever interest you may have of preserving your prior rulings[.]" The proceedings in 98 CVS 14297 were final and complete. The rulings made by Judge Stephens had been affirmed by this Court and review denied by our Supreme Court. Judge Stephens could not possibly have had an interest in "preserving" his prior rulings; the appellate courts had already affirmed them in their entirety. Further, Dalenko acknowledged that as to Judge Stephens' order requiring cancellation of the lien, "we still may be OK."

Dalenko next asserted that Judge Stephens may become a fact witness as to orders entered in the prior case (98 CVS 14297). Again, that order was *final*. That matter was complete. Any orders entered by Judge Stephens spoke for themselves. Previous involvement by a judge with court proceedings does not require disqualification. *Faircloth*, 153 N.C. App. at 570-71, 571 S.E.2d at 69. Were it otherwise, there would have to be a different judge at each successive hearing in a matter. We hold that Dalenko failed to articulate before Judge Stephens any objective reason for Judge Stephens to recuse himself or a sufficiently forceful basis for delegating the decision to another judge. *Id.*

To the extent that Dalenko attempts to make different arguments for recusal in her brief that were not made at trial, those arguments are not properly before this Court. A party may not present arguments on appeal that were not presented before the trial court. N.C.R. App. P. 10(b)(1); *Morris v. Moore*, 186 N.C. App. 431, 435, 651 S.E.2d 594, 597 (2007).

This argument is without merit.

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IV. Dismissal of Dalenko's Complaint

[4] In her fourth argument, Dalenko contends that the trial court erred in dismissing her complaint, enjoining her from filing further actions in this matter, and threatening her with criminal contempt of court. We disagree.

A. General Considerations

Case 98 CVS 14297 went to binding arbitration, the arbitration award was confirmed by the Superior Court, and that ruling was affirmed by the appellate courts of North Carolina. The instant lawsuit is premised upon the elemental misconception that despite the fact that case 98 CVS 14297 has been resolved, Dalenko has a claim for breach of the Arbitration Agreement that put case 98 CVS 14297 into arbitration. She does not, and the trial court correctly dismissed this action.

The purpose of placing a dispute into binding arbitration is so that it can be resolved expeditiously, inexpensively, and with finality. “ ‘[J]udicial review of an arbitration award is confined to [a] determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute.’ ” *Smith v. Young Moving & Storage, Inc.*, 167 N.C. App. 487, 488, 606 S.E.2d 173, 175 (2004) (quoting *Semon v. Semon*, 161 N.C. App. 137, 141, 587 S.E.2d 460, 463 (2003)); see also *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 411, 255 S.E.2d 414, 418 (1979).² “Ordinarily, an award is not vitiated or rendered subject to impeachment because of a mistake or error of the arbitrators as to the law or facts.” *Gunter*, 41 N.C. App. at 411, 255 S.E.2d at 417. In case 98 CVS 14297, Dalenko challenged the arbitration award and unsuccessfully litigated the matter all the way to the North Carolina Supreme Court. That was the end of the matter. Dalenko has no right to attempt to reopen the matter by a suit based upon alleged breaches of the Arbitration Agreement.

Unfortunately, when Dalenko first attempted to reopen the matter by filing a supplemental complaint in Wake County action 98 CVS 14297, Judge Abraham Penn Jones entered an order denying the request but expressly making that ruling “without prejudice” to Dalenko filing a separate and new action for claims arising out of the Arbitration Agreement. It is abundantly clear from the record in this

2. These cases reference N.C. Gen. Stat. § 1-567.1 *et seq.*, which was repealed in 2003 and superceded by the Revised Uniform Arbitration Act, N.C. Gen. Stat. § 1-569.1 *et seq.* It is the earlier statute that controls in the instant case.

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case that this ill-advised statement created in Dalenko's mind the idea that she in fact had a valid cause of action for breach of the Arbitration Agreement, when in fact she never did.

B. Res Judicata

[5] Dalenko contends that her claims arising out of the 2002 Arbitration Agreement have never been litigated, and the prior proceedings in case 98 CVS 14297 cannot operate as a bar to this action. As noted above, the prior lawsuit was fully and finally resolved. Dalenko cannot seek to reopen the previously litigated matter through a breach of contract action based upon the Arbitration Agreement.

This argument is without merit.

C. Statute of Limitations

Dalenko argues that her action was not barred by the three-year statute of limitations. Because we have already held that this action is without merit, we do not reach this argument.

D. Amendment to Complaint

[6] Dalenko contends that the trial court erred in refusing to recognize her amended complaint, filed on 16 July 2007, the morning of the hearing. She contends that because defendants had not filed an answer, she was entitled to amend her complaint as a matter of right under Rule 15(a) of the Rules of Civil Procedure.

While Dalenko's argument under Rule 15(a) is legally sound, it has no impact on the ultimate resolution of her case on appeal. The trial court ruled that even considering the amended complaint, the action would be dismissed pursuant to Rule 12(b)(6). Dalenko makes no argument on appeal as to how the amended allegations would entitle her to a reversal of the order of dismissal, only that the trial court erred in denying the amendment.

Further, the record reveals that while Dalenko did attach the certification of a licensed attorney to her complaint in the instant case, that certification was revoked by the attorney on 11 May 2007. The amended complaint was filed on 16 July 2007 without the required certification. Thus, the amended complaint was not filed with the required certification and was properly dismissed.³

This argument is without merit.

3. For a more detailed discussion of the gatekeeper order applicable to Dalenko, see footnote 1 and the opinion in *Dalenko v. Collier*, — N.C. App. —, 664 S.E.2d 425 (2008), *appeal dismissed*, 362 N.C. 680, 670 S.E.2d 563 (2008).

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E. Enjoining of Dalenko from Filing Further Actions Relating to Peden Dispute

[7] The trial court's order of 20 July 2007 stated:

The Court further finds that all matters in that case [98 CVS 14297] have been resolved by a final judicial adjudication and repeated attempts by Plaintiff, Dalenko (formerly Carol Bennett), to resurrect such claims related to that matter are without a lawful basis and are frivolous.

Therefore, the Court concludes that any further claims or actions filed by Plaintiff, Dalenko (formerly Carol Bennett), arising out of, and/or related to, Peden v. Bennett, 98 CVS 14297, Wake County Superior Court, including, but not limited to, any order or decree entered in that case and/or the facts related to the proceedings in that case, are without a lawful basis and are specifically prohibited. If Plaintiff hereafter violates this prohibition, she may be subject to criminal contempt of court.

Dalenko contends that this portion of the order was an abuse of discretion by the trial court because the instant lawsuit “does not attempt to relitigate the 1998 dispute[.]” We have already held that the 1998 dispute is over. The complaint in this action is nothing more than a thinly veiled attempt to revive the 1998 claims.

The Constitution of North Carolina provides that “every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law” N.C. Const. art. I, § 18. This means that all citizens of this state have access to the courts to seek redress for injuries done to them. It does not mean that parties have the right to abuse the courts by filing repeated actions involving claims that have already been resolved. It is clear that Dalenko does not personally accept the result of the prior litigation. However, she is required to legally accept the result.

As part of its inherent authority, the trial courts of this state have the power to prohibit future frivolous and repetitive litigation. *See Dunn v. Canoy*, 180 N.C. App. 30, 45, 636 S.E.2d 243, 253 (2006) (citing *In re Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977)), *appeal dismissed and disc. review denied*, 361 N.C. 351, 645 S.E.2d 766 (2007). We emphasize that this power should be used carefully, sparingly, and only in cases of extreme abuse. We hold that this is such a case. This is the third case before this Court arising out of the 1998 contract dispute between Dalenko and Peden. The trial court

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did not abuse its discretion in barring further actions pertaining to this dispute.

This argument is without merit.

F. Trial Court's Mention of Contempt

[8] Dalenko contends that the trial court abused its discretion by threatening her with criminal contempt. N.C. Gen. Stat. § 5A-11(a)(3) provides that the “[w]illful disobedience of, resistance to, or interference with a court’s lawful process, order, directive, or instruction or its execution[.]” is criminal contempt. N.C. Gen. Stat. § 5A-11(a)(3) (2007). The trial court graciously warned Dalenko of this fact so that she would fully understand the consequences of any future conduct.

This argument is without merit.

V. Order Pertaining to Lien on Dalenko's Property

[9] In her final argument, Dalenko contends that the trial court erred in entering an order cancelling the lien on Dalenko’s real property arising out of the 98 CVS 14297 litigation. We disagree.

Dalenko contends that the order is defective on its face, and the trial court should have signed an order that she submitted to the court under a cover letter dated 4 September 2004. She further argues that the order “does not attach the Lien, does not conform to the statutory language to cancel a Lien under G.S. § 44A-16(4), and does not eliminate any uncertainty on this issue.”

We have examined both the order entered by the trial court and the order tendered by Dalenko. Both reference the applicable statute, N.C. Gen. Stat. § 44A-16(4), the applicable file number where the lien was docketed (98 M-3116), and order that the lien be discharged. Dalenko does not argue that the lien has not been cancelled.

The record reveals a long-standing dispute between Dalenko and Peden over the payment of the judgment and cancellation of the lien in 98 CVS 14297. Defendants contend that they tendered the sums ordered to be paid by the arbitration award to Dalenko, and Dalenko refused the payment. Ultimately, the monies were paid to the Clerk of Court of Wake County. They also contend that on two occasions they tendered a cancellation of lien to Dalenko, and it was similarly rejected. The trial court’s order clearly states that “[t]his Order is entered to eliminate any uncertainty as to whether the Lien has been properly cancelled.” We are unable to discern from the record before us whether the lien was properly cancelled prior to the trial court’s

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order. We hold that any question about the cancellation of the lien was resolved by that order.

This argument is without merit.

VI. Conclusion

We hold the trial court did not abuse its discretion in denying Dalenko's motion to have Judge Jones preside over the instant case. We further hold that Dalenko had no right to have Judge Jones preside over the instant case, and the trial court's ruling on such preliminary matters in litigation are non-appealable interlocutory orders. This Court may not hear arguments on appeal that were not presented before the trial court, and to the extent that Dalenko attempts to make different arguments for recusal on appeal that were not made at trial, those arguments are not properly before this Court. Dalenko filed an amended complaint on 16 July 2007 without the required certification; therefore, we hold it was properly dismissed by the trial court. The trial court did not abuse its discretion in barring further actions pertaining to the 1998 construction dispute because trial courts have the inherent authority to prohibit such future frivolous and repetitive litigation. Any question as to whether the lien was properly cancelled prior to the trial court's order was resolved by that order.

AFFIRMED.

Panel Consisting of:

Judges STEELMAN, JACKSON and STROUD.

STATE OF NORTH CAROLINA v. JUAN PABLO GAYTON-BARBOSA

No. COA08-863

(Filed 19 May 2009)

1. Appeal and Error— Rule 2—variance between indictment and proof

Defendant's claim of a variance between the indictment and proof was heard under Appellate Rule 2 even though he failed to challenge the sufficiency of evidence at the end of all of the evi-

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dence or to argue that the State's proof at trial varied from the allegations of the indictment.

2. Larceny— stolen gun—ownership

A larceny conviction was vacated where the indictment alleged that a stolen gun belonged to Minear, who was the victim of an assault in the house which she shared with Leggett, but the evidence showed that Leggett owned the gun and the house.

3. Burglary and Unlawful Breaking or Entering— instructions—entering a building without authorization

There was no plain error in the trial court's instruction in a breaking or entering case that entering a building without authorization would be an entry.

4. Assault— instructions—serious injury—number of wounds

The trial court did not err in its instructions in an assault prosecution by referring to two gunshot wounds when there was conflicting evidence as to the number of wounds. There was evidence to support the court's statement that two gunshot wounds to the chest "as described in this case" would be a serious injury; furthermore, the jury was charged with weighing the evidence, determining the number of wounds, and deciding whether defendant's actions justified a conviction.

5. Assault— serious injury—surgery and pain

An assault victim's injuries were serious, whether she was shot in the chest once or twice, where she underwent exploratory surgery, spent two weeks in the hospital, missed two months of work, and suffered "horrible pain."

6. Appeal and Error— Rule 2—failure to move to dismiss— inadequate representation allegation

Defendant's argument that his kidnapping conviction should be set aside was heard under Appellate Rule 2 despite defendant's failure to move to dismiss at trial where defendant also argued ineffective assistance of counsel.

7. Kidnapping— restraint—separate from assault

The trial court did not err by denying defendant's motion to set aside a kidnapping conviction where there was sufficient evidence that the restraint of the victim during an assault was separate and apart from the assault.

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8. Constitutional Law— effective assistance of counsel—failure to move to dismiss—no prejudice

Defendant was not prejudiced by his counsel's failure to make a motion to dismiss a kidnapping charge at the close of the evidence where the evidence was sufficient to support the conviction, and defendant was therefore not deprived of effective assistance of counsel.

Appeal by defendant from judgments entered 25 January 2008 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 27 January 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jason T. Campbell, for the State.

Sue Genrich Berry for defendant-appellant.

HUNTER, ROBERT C., Judge.

Defendant appeals from multiple felony convictions pursuant to a jury trial in Wake County Superior Court. After careful review, we find no error in part, vacate in part, and remand for resentencing.

Background

Juan Pablo Gayton-Barbosa (“defendant”) was brought to trial on 23 January 2008 on the following charges: 1) assault with a deadly weapon with the intent to kill inflicting serious injury through use of a handgun; 2) assault with a deadly weapon inflicting serious injury through use of a baseball bat; 3) felonious breaking or entering; 4) felonious larceny; 5) first degree kidnapping; and 6) possession of a firearm by a convicted felon. Defendant was convicted of all charges on 25 January 2008. Defendant now appeals.

At trial, the State's evidence tended to show that on 6 December 2004, defendant unlawfully entered the home of his former employer, Brandi Leggett (“Leggett”), where she resided with Natasha Minear (“Minear”) and Minear's daughter, Madeline Minear (“Madeline”). While defendant waited in the house alone, Minear and Madeline returned home in the early evening. As Minear approached her closed bedroom door, defendant emerged with a bat and a gun, screaming for Leggett. Defendant began striking Minear in the head with a baseball bat. Minear yelled for her daughter to get out of the house and run. Madeline ran to the house of the nearest neighbor, Susan Schaler

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("Schaler"), approximately a quarter mile away and told Schaler to call the police.

During the beating, Minear was able to break away from defendant and ran out of the house. Defendant caught her at the bottom of the porch steps, turned her around, and shot her.¹ Minear lost consciousness for an unspecified period of time, and when she regained consciousness, she made her way to Schaler's house. Minear estimated that the attack lasted fifteen minutes.

Emergency services and law enforcement arrived and transported Minear to the hospital, where she had exploratory surgery to ascertain internal damage from the gunshot wound. Minear remained in the hospital for two weeks.

There was no evidence of a forced entry into the house; however, Madeline's baseball bat was missing as well as Leggett's Smith and Wesson .38 caliber revolver.² Arrest warrants were issued for defendant, but he was not apprehended for two years. On 11 June 2007, Raleigh police officers stopped defendant's car due to lack of an operator's license. He was then arrested and served with the outstanding warrants.

At trial, defendant testified that he and Leggett had a personal and sexual relationship. He claimed that Minear was jealous of that relationship. Defendant stated that on 6 December 2004, he went to the women's home to give Leggett money for the purpose of renting equipment to clear land belonging to Leggett. Defendant claimed that he was on the property when he saw Minear and Madeline go inside the house. He then entered the house and asked Minear where he could find Leggett. Minear then told defendant that Leggett would be back in thirty minutes, and then she went into her bedroom. She returned with a gun and told defendant that he could no longer be with Leggett. Defendant then picked up a baseball bat and hit Minear to force her to drop her weapon. The two struggled over the gun and it discharged twice. The struggle continued outside; defendant struck Minear again with the bat, and the gun discharged. Defendant then ran away. Defendant stated that because he was an undocumented alien, he was afraid of deportation. He subsequently changed his name and continued to work construction in Raleigh until he was apprehended by police.

1. Minear testified that she was shot twice, but the emergency room physician testified that she was shot once.

2. Defendant was subsequently charged with larceny of the handgun.

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Analysis

I.

[1] Defendant first argues that the conviction of felonious larceny of the gun used in the attack should be vacated because the indictment erroneously alleged that the gun belonged to Minear, while the evidence at trial tended to show that the gun belonged to Leggett, though it was kept in a bedroom occupied by both women. Defendant did not object to the indictment at trial, nor did he make a motion to dismiss at the close of evidence based on a fatal variance in the indictment.³

“The issue of variance between the indictment and proof is properly raised by a motion to dismiss” and a defendant “waive[s] his right to raise this issue by failing to raise the issue at trial.” *State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195 (1995), *disc. review denied*, 341 N.C. 653, 462 S.E.2d 518 (1995); *see also State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971) (“A motion to dismiss is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged.”); *State v. McGee*, 175 N.C. App. 586, 588, 623 S.E.2d at 784, 786, *disc. review denied*, 360 N.C. 489, 632 S.E.2d 738, *appeal dismissed and disc. review denied*, 360 N.C. 542, 634 S.E.2d 891 (2006).

Although defendant challenged the sufficiency of the evidence to support a felonious larceny conviction at the end of the State’s evidence on the grounds that there was no evidence that the firearm in question was not returned to the owner, he never renewed this argument or advanced any other challenge to the felonious larceny charge at trial. As a result, by failing to challenge the sufficiency of the evidence to support a larceny conviction at the end of all of the evidence or to argue that the State’s proof at trial varied from the allegations of the felonious larceny indictment returned against him in File No. 07 CRS 41987, defendant waived his right to have this Court consider his variance claim on appeal. *See* N.C.R. App. P. 10(b)(1) (“In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.”); N.C.R.

3. We note that if there is a fatal defect on the face of the indictment, as opposed to a fatal variance between the indictment and evidence presented at trial, a defendant may raise that issue for the first time on appeal. *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998). In the present case, a fatal variance is at issue.

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App. P. 10(b)(3) (A “defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial.”). Thus, the next issue that needs to be addressed is the extent, if any, to which the Court is entitled to address this variance-based challenge to defendant’s felonious larceny conviction on the merits despite the absence of a contemporaneous objection at trial.

In *State v. Brown*, 263 N.C. 786, 787-88, 140 S.E.2d 413, 413 (1965), the Supreme Court granted relief on appeal as the result of a fatal variance relating to the ownership of allegedly stolen property despite the fact that no dismissal motion had been made at trial and that the variance issue had not been the subject of an assignment of error on appeal. Even so, the Supreme Court decided this issue on the merits under its general supervisory authority over the trial courts. The general supervisory authority under which the Supreme Court acted in *Brown* is currently embodied in N.C.R. App. P. Rule 2, which authorizes “either court of the appellate division” to “suspend or vary the requirements or provisions of any of these rules” Although N.C.R. App. P. Rule 2 is available to prevent “manifest injustice,” the Supreme Court has stated that this residual power to vary the default provisions of the appellate procedure rules should only be invoked rarely and in “exceptional circumstances.” *State v. Hart*, 361 N.C. 309, 316-17, 644 S.E.2d 201, 205-06 (2007); *see also Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). After careful consideration, we will reach the merits of defendant’s variance-based claim under N.C.R. App. P. 2 for several reasons.

First, the Supreme Court’s decision in *Brown* suggests that fatal variances of the type present here are sufficiently serious to justify the exercise of our authority under N.C.R. App. P. 2. Such a result makes sense given the important notice and double jeopardy protections provided by criminal pleadings such as indictments. Secondly, a variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction. The Supreme Court and this Court have regularly invoked N.C.R. App. P. 2 in order to address challenges to the sufficiency of the evidence to support a conviction. *State v. Booher*, 305 N.C. 554, 564, 290 S.E.2d 561, 566 (1982) (“Nevertheless, when this Court firmly concludes, as it has here, that the evidence is insufficient to sustain a criminal conviction, even on a legal theory different from that argued, it will not hesitate to reverse

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the conviction *sua sponte*, in order to ‘prevent manifest injustice to a party.’” (quoting N.C.R. App. P. 2)); *see also State v. Hudson*, 345 N.C. 729, 732, 483 S.E.2d 436, 438 (1997); *State v. Denny*, 179 N.C. App. 822, 825-26, 635 S.E.2d 438, 441-42 (2006), *aff’d in part and rev’d in part on other grounds*, 361 N.C. 662, 652 S.E.2d 212 (2007); *State v. Richardson*, 96 N.C. App. 270, 271, 385 S.E.2d 194, 195 (1989); *State v. O’Neal*, 77 N.C. App. 600, 604, 335 S.E.2d 920, 923 (1985).

Finally, it is difficult to contemplate a more “manifest injustice” to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support, particularly when leaving the error in question unaddressed has double jeopardy implications. Thus, given the peculiar facts of this case, it is appropriate to address defendant’s variance-based challenge on the merits.⁴

[2] According to well-established North Carolina law, “the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest.” *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976). “It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.” *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). In other words, “[t]he allegation and proof must correspond.” *Id.* “A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the

4. In reaching this conclusion, we recognize that the evidence of defendant’s guilt of felonious larceny of Leggett’s firearm was substantial, that defendant’s felonious larceny conviction was consolidated for judgment with his breaking or entering and first degree kidnapping convictions, and that the sentence that the trial court imposed upon defendant for these three consolidated convictions was at the absolute low end of the presumptive range for an individual convicted of a Class C felony with defendant’s prior record level. However, given that the record suggests that defendant may be able to present evidence (as compared to the argument of counsel) that certain mitigating factors are present and that the trial court would have the option of making the sentence imposed upon defendant in these consolidated cases run concurrently with the sentences imposed as a result of defendant’s other convictions on re-sentencing, we are unwilling to conclude that there is no reasonable possibility that a re-sentencing in the consolidated cases would not result in a different outcome on remand. In addition, the additional consequences that might flow from the mere fact that defendant was convicted of felonious larceny, such as the potential use of this conviction to impeach defendant’s credibility in subsequent judicial proceedings, N.C. Gen. Stat. § 8C-1, Rule 609 (2007), also mitigate in favor of exercising this Court’s authority under N.C.R. App. P. 2 in this instance.

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offense charged.” *Waddell*, 279 N.C. at 445, 183 S.E.2d at 646. “In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal.” *State v. Mason*, 35 N.C. 341, 342 (1852).

However, if it can be shown that the person named in the indictment, though not the actual owner of the stolen item, had a “special property interest” in the item, then the defect in the indictment will not be fatal. *State v. Craycraft*, 152 N.C. App. 211, 213, 567 S.E.2d 206, 208 (2002) (“The State may prove ownership by introducing evidence that the person either possessed title to the property or had a special property interest. If the indictment fails to allege the existence of a person with title or special property interest, then the indictment contains a fatal variance.” (citation omitted)).

Our Courts have evaluated circumstances in which a special property interest has been established. *See e.g. State v. Adams*, 331 N.C. 317, 331, 416 S.E.2d 380, 388 (1992) (spouses have a special property interest in jointly possessed property, though not jointly owned); *State v. Schultz*, 294 N.C. 281, 285, 240 S.E.2d 451, 454-55 (1978) (a “bailee or a custodian” has a special property interest in items in his or her possession); *State v. Salters*, 137 N.C. App. 553, 555-56, 528 S.E.2d 386, 389 (2000) (parents have a special property interest in their children’s belongings kept in their residence, but “that special interest does not extend to a caretaker of the property even where the caretaker had actual possession”); *State v. Carr*, 21 N.C. App. 470, 471-72, 204 S.E.2d 892, 893-94 (1974) (where a car was registered to a corporation, the son of the owner of that corporation had a special property interest in the car because he was the sole user of the car and in exclusive possession of it).

Conversely, our Courts have established situations in which a special property interest does not exist. *See e.g. State v. Eppley*, 282 N.C. 249, 259-60, 192 S.E.2d 441, 448 (1972) (owner of a residence did not have a special property interest in a gun kept in his linen closet, but owned by his father); *State v. Downing*, 313 N.C. 164, 167-68, 326 S.E.2d 256, 258-59 (1985) (the owner of a commercial building did not have a special property interest in items stolen from that building as the items were actually owned by the business that rented the building); *Craycraft*, 152 N.C. App. at 214, 567 S.E.2d at 208-09 (landlord did not have a special property interest in furniture he was maintaining after evicting the tenant-owner).

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In the case *sub judice*, the evidence tended to show that Leggett owned the gun that was stolen by defendant and the home from which it was stolen. Minear and Leggett lived together and shared the bedroom where the gun was kept. Based upon these facts, we conclude that Minear did not have a special property interest in the gun. While it is arguable that Minear was in shared possession of the gun, she did not have exclusive possession or control of the gun as in seen *Carr*, nor was she a custodian or bailee of the gun. Minear had no shared property rights, as seen between parents and children or between spouses. Accordingly, we must vacate the larceny conviction and remand for resentencing.

II.

[3] Next, defendant assigns error to the following jury instruction with regard to the crime of breaking and/or entering: “[f]irst, that there was either a breaking, breaking a window, or an entry. *Entering the building without the authorization of the owner would be an entry.*” (Emphasis added). Specifically, defendant contends that the last sentence of this instruction expressed the trial court’s opinion that the entry element had been satisfied. Defendant did not object to this instruction at trial and requests a plain error review of this assignment of error. “[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a ‘*fundamental*’ error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done’” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alteration in original) (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982)).

We find there was no error, much less plain error, in the trial court’s instruction. The trial court made a correct statement of law that unauthorized entry into the home of another satisfies the entry requirement under N.C. Gen. Stat. § 14-54(a) (2007). See *State v. Perkins*, 181 N.C. App. 209, 217, 638 S.E.2d 591, 597 (2007) (“ ‘a wrongful entry, *i.e.* without consent, will be punishable under this [statute]’ ” (quoting *State v. Locklear*, 320 N.C. 754, 758, 360 S.E.2d 682, 684 (1987)); see also *State v. Fletcher*, 322 N.C. 415, 424, 368 S.E.2d 633, 638 (1988) (“[h]owever weak the evidence may be, it is not an expression of an opinion for the court to make a correct statement of the law”).

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Because we disagree with defendant's contention that the trial court gave an opinion as to the satisfaction of the breaking or entering element of the crime, this assignment of error is without merit.

III.

Defendant further argues that, with regard to the charge of assault with a deadly weapon with intent to kill inflicting serious injury pursuant to N.C. Gen. Stat. § 14-32(a) (2007), the following instruction was erroneous: “[a]nd, third, that the defendant inflicted serious injury upon Natasha Minear. Two gunshot wounds to the [chest] as described in this case would be a serious injury.” Defendant raises two issues with this assignment of error: 1) whether the trial court erred in stating that there were “two gunshot wounds,” when there was conflicting evidence at trial as to whether Minear was shot once or twice; and 2) whether the trial court erroneously stated that the wounds Minear suffered constituted a serious injury.⁵ Defendant did not object to the instruction at trial, and therefore, the standard of review is plain error. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

A. Number of Gunshot Wounds

[4] With regard to the first issue, Minear testified that she was shot twice (one bullet passed through her body and the other lodged in her hip), and the prosecution presented to the jury Minear's undergarment, which contained two bullet holes. The trauma surgeon who treated Minear upon her arrival at the hospital testified that Minear was shot once. He based this belief on the trajectory of the bullet that entered her body, though he qualified this statement by saying that he was a clinician and not a forensic pathologist. Defendant testified that the gun discharged multiple times during the altercation with Minear.

Though there was conflicting evidence as to how many times Minear was shot, the State presented Minear's testimony as well as illustrative evidence that defendant shot Minear twice. We find this evidence to be competent and that it supports the trial court's assertion that “[t]wo gunshot wounds to the [chest] *as described in this case* would be a serious injury.” (Emphasis added). See *State v. Tucker*, 329 N.C. 709, 723, 407 S.E.2d 805, 813 (1991) (“[a] statement of a valid contention based on competent evidence [is not] an expression of judicial opinion”).

5. Although defendant fails to sufficiently argue the latter issue, we will address it since defendant assigned error to that portion of the jury instruction pertaining to the serious injury element.

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Furthermore, prior to its instruction on assault with a deadly weapon with intent to kill inflicting serious injury, the trial court instructed the jury, “[y]ou are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none what have [sic] a witness has said on the stand.” The jury as the finder of fact was therefore charged with weighing the evidence presented, determining how many times Minear was shot, and deciding whether defendant’s actions justified a conviction of the crime charged.

B. Serious Injury

[5] With regard to the second issue, “[w]hether serious injury has been inflicted must be determined according to the particular facts of each case and is a question the jury must answer under proper instruction.” *State v. Marshall*, 5 N.C. App. 476, 478, 168 S.E.2d 487, 489 (1969). However, our Supreme Court has held that, “[i]n the absence of conflicting evidence, a trial judge may instruct the jury that injuries to a victim are serious as a matter of law if reasonable minds could not differ as to their serious nature.” *State v. Hedgepeth*, 330 N.C. 38, 54, 409 S.E.2d 309, 318-19 (1991).

In the present case, although there was conflicting evidence regarding the number of gunshot wounds, we find that reasonable minds could not differ as to the serious nature of Minear’s injuries. Minear was shot, underwent exploratory surgery, spent two weeks in the hospital, missed two months of work, and suffered “horrible pain.” *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983) (“[f]actors our courts consider in determining if an injury is serious include pain, loss of blood, hospitalization and time lost from work”). Assuming, *arguendo*, that Minear was only shot once, her injuries were in fact serious. See *Hedgepeth*, 330 N.C. at 54-55, 409 S.E.2d at 319 (the victim was seriously injured as a matter of law when a bullet was shot through her ear requiring stitches and which resulted in a ringing sound in her ear).

Because we do not find that the trial court gave an improper opinion as to the number of times Minear was shot, nor do we find error in the trial court’s classification of Minear’s injuries as serious, this assignment of error is without merit.

IV.

[6] Defendant next contends that the trial court erred in refusing to grant his motion to set aside the verdict with regard to the first

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degree kidnapping conviction because defendant's restraint of Minear was inherent to the felonious assaults charged. Defendant did not move to dismiss this charge at the close of all of the evidence at trial. Our appellate rules state, "if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit 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). However, pursuant to N.C.R. App. P. 2, we will hear the merits of defendant's claim despite the rule violation because defendant also argues ineffective assistance of counsel based on counsel's failure to make the proper motion to dismiss.

[7] "The standard of review of a trial court's denial of a motion to set aside a verdict for lack of substantial evidence is the same as reviewing its denial of a motion to dismiss, i.e., whether there is substantial evidence of each essential element of the crime." *State v. Duncan*, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000). The evidence must be viewed in the light most favorable to the State. *Id.* at 518, 524 S.E.2d at 810.

In North Carolina, to be convicted of the crime of kidnapping, the perpetrator must "unlawfully confine, *restrain*, or remove from one place to another" the person being kidnapped. N.C. Gen. Stat. § 14-39(a) (2007) (emphasis added). According to our Supreme Court, a restraint for purposes of a kidnapping conviction must be "separate and apart from that which is inherent in the commission of the other felony." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Defendant claims that sufficient evidence was not presented at trial to support a charge of first degree kidnapping because any restraint defendant used against Minear was inherent in the assaults committed, not an element of kidnapping. We disagree.

Here, defendant kept Minear from leaving her house by repeatedly striking her with a bat and questioning her about Leggett. When she was able to escape, he chased her, grabbed her, and shot her. Detaining Minear in her home and then again outside was not necessary to effectuate the assaults charged. These acts were committed "separate and apart from that which is inherent in the commission of the other felony." *Id.*; see also *State v. Romero*, 164 N.C. App. 169, 174-75, 595 S.E.2d 208, 212 (2004) (the trial court did not err in refusing to arrest judgment of the defendant's kidnapping conviction where, during an altercation with the defendant, the victim fled the house and the defendant grabbed her hair, pulled her back in the

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house, and continued beating her). In sum, there was sufficient evidence presented at trial that defendant's restraint of Minear during the attack was separate and apart from the assaults charged. We therefore find no error in the trial court's denial of defendant's motion to set aside the verdict.

V.

[8] Defendant's final argument is that he was provided ineffective assistance of counsel because his attorney failed to make a motion to dismiss the kidnapping charge at the close of all the evidence.

To prevail on an ineffective assistance of counsel claim:

“First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*”

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

As discussed *supra*, the evidence was sufficient to support a kidnapping conviction, therefore defendant was not prejudiced by counsel's failure to make a motion to dismiss at the close of evidence. Because defendant has not shown counsel's assistance to be constitutionally inadequate, this assignment of error is without merit.

Conclusion

Due to the fatal defect in the larceny indictment, we vacate the conviction and remand for resentencing. As to defendant's remaining arguments, we find no error.

No error in part, vacate in part, and remand for resentencing.

Judges WYNN and ERVIN concur.

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[197 N.C. App. 142 (2009)]

GILBERT SILVA, EMPLOYEE, PLAINTIFF v. LOWE'S HOME IMPROVEMENT, EMPLOYER,
SPECIALTY RISK SERVICES, CARRIER, DEFENDANTS

No. COA08-943

(Filed 19 May 2009)

1. Workers' Compensation— additional evidence—continuing disability compensation

The full Industrial Commission did not abuse its discretion in a workers' compensation case by remanding the case to the deputy commissioner for the taking of additional evidence concerning the issue of plaintiff's continuing disability compensation because: (1) although N.C.G.S. § 97-85 has ordinarily been applied to cases before the full Commission on appeal from the opinion and award of a deputy commissioner, the full Commission has plenary power to receive additional evidence and may do so in its sound discretion; (2) defendants waived this issue by failing to object to the Commission's remand to the deputy commissioner for the taking of additional evidence and also stipulating to the witnesses who could be deposed by both parties as well as the evidence which would be admissible; and (3) the full Commission specifically found that plaintiff had shown good ground to receive further evidence and, in its discretion, determined that further evidentiary hearings were necessary in order to make proper findings of fact upon the crucial issue of disability.

2. Workers' Compensation— disability—credibility

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff has shown disability through the production of evidence that he is physically incapable, as a consequence of a work-related injury, of work in any employment, because: (1) the testimony of a physician who treated plaintiff over approximately six years revealed that he was aware of the treatment plaintiff received from other doctors and the progression of plaintiff's chest pain and physical problems over time; and (2) although the record does contain some evidence to the contrary, the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony.

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[197 N.C. App. 142 (2009)]

3. Appeal and Error— preservation of issues—failure to cross-assign error

The Industrial Commission did not err in a workers' compensation case by failing to award attorney fees under N.C.G.S. §§ 97-88 and 97-88.1 because: (1) plaintiff failed to cross-assign error to conclusion of law 7, and thus has not properly preserved this issue for appellate review; and (2) this case does not require the Court of Appeals to invoke N.C. R. App. P. 2 to prevent manifest injustice.

Appeal by defendant-employer and defendant-carrier from judgment entered 14 April 2008 by the Full Industrial Commission. Heard in the Court of Appeals 9 March 2009.

The Kilbride Law Firm, PLLC, by Terry M. Kilbride, for plaintiff-employee.

Moore & Van Allen, PLLC, by Anthony T. Lathrop, Michael T. Champion, and M. Cabell Clay for employer-appellant and carrier-appellant.

MARTIN, Chief Judge.

Defendant-employer Lowe's Home Improvement ("defendant-employer") and defendant-carrier Specialty Risk Services ("defendant-carrier") (collectively "defendants") appeal from the Opinion and Award of the North Carolina Industrial Commission ("Commission") awarding plaintiff-employee Gilbert Silva ("plaintiff") temporary total disability and medical expenses. We affirm.

The facts underlying the present appeal are set out in *Silva v. Lowe's Home Improvement*, 176 N.C. App. 229, 625 S.E.2d 613 (2006). In pertinent part, that case addressed the Commission's findings regarding the circumstances of defendant-employer's termination of plaintiff. Plaintiff worked for defendant-employer in the plumbing department, where, prior to his termination, plaintiff had experienced two accident-related injuries. After seeing a doctor for treatment, plaintiff was released to return to work with restrictions. Plaintiff's physician instructed him not to lift over twenty-five pounds continuously, or over forty pounds on occasion. Subsequently, plaintiff met with his supervisor to discuss various work duties which plaintiff found difficult to perform due to his restrictions. During the meeting a heated exchange took place and

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plaintiff was later terminated by telephone. Thereafter, plaintiff requested a hearing before the Commission alleging entitlement to continuing disability compensation.

After a hearing, the deputy commissioner entered an opinion and award concluding that plaintiff was terminated for insubordination for which a non-disabled employee would have been terminated. Plaintiff appealed to the Full Commission, which entered an Opinion and Award reversing the deputy commissioner and awarding plaintiff ongoing total disability compensation until plaintiff returned to work, as well as all medical expenses incurred as a result of plaintiff's injury. Upon appeal by defendants, this Court held that record evidence supported the Commission's findings that plaintiff's termination was directly related to his light-duty work restrictions and defendants failed to show plaintiff was terminated for misconduct for which a non-disabled employee would have been terminated. However, we also held that the Commission "failed to make specific findings of fact as to the crucial questions necessary to support a conclusion as to whether plaintiff had suffered any disability as defined by G.S. § 97-2(9)." *Id.* at 236, 625 S.E.2d at 620 (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982)). Accordingly, we remanded to the Commission for proper findings on this issue in accordance with *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (holding that where the findings are insufficient to enable the reviewing court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact).

On remand the Full Commission remanded the proceedings to the deputy commissioner "for the taking of additional evidence and additional hearing, if necessary, and the entry of an Opinion and Award regarding the issue of continuing disability compensation as directed herein." On 5 December 2006, the parties entered into a pre-trial agreement, stipulating to the admission of certain evidence and the deposition testimony of certain witnesses. On 21 February 2007, the Full Commission filed an amended order remanding the case to the deputy commissioner "for the taking of additional evidence and ordering the preparation of a transcript for submission to the Full Commission," specifically stating, "[t]his case remains under jurisdiction of this Full Commission panel for decision and entry of an Opinion and Award. Subsequently, an evidentiary hearing was conducted by the deputy commissioner, where plaintiff was allowed to testify and evidence of plaintiff's search for employment was admit-

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ted. Afterwards, additional depositions were taken and admitted into evidence by the deputy commissioner.

On 24 April 2008, the Full Commission filed an Opinion and Award on Remand awarding plaintiff temporary total disability and medical expenses. The Full Commission's Opinion and Award specifically stated, "[t]he appealing party has shown good ground to receive further evidence or to amend the holding of the Deputy Commissioner's Opinion and Award," referring to the 2003 opinion and award of Deputy Commissioner Phillips. *See Silva*, 176 N.C. App. at 231, 625 S.E.2d at 617. The Full Commission's Opinion and Award also contained, inter alia, the following findings of fact:

9. The plaintiff testified at the hearing before the Deputy Commissioner that he has been unemployed since the date of his termination with the defendant-employer. The plaintiff testified that he has made extensive efforts to find other employment within his restrictions by answering newspaper job ads, using Internet job placement websites, and has sending [sic] his resume to prospective employers. Though plaintiff testified that he has applied for over 300 positions, the Full Commission finds that there is insufficient documentary evidence of record, beyond plaintiff's own testimony, to show that plaintiff has made a reasonable job search.

10. Donald Woodburn, M.D., has served as the plaintiff's primary care physician since 2001, and continues to treat the plaintiff for "non-cardiac" chest pain. Dr. Woodburn testified at deposition that the plaintiff's chest pain is typical of or mimics those [sic] of a heart attack, though work-ups by a cardiologist have concluded that plaintiff's pain is not related to a cardiological problem. Dr. Woodburn testified that the plaintiff suffers from significant restrictions in the use of his left arm and "cannot do anything overhead because it stresses the rib cage and increases his pain." Based on the plaintiff's ongoing chest pain, Dr. Woodburn was of the opinion, and the Full Commission finds as fact, that the plaintiff is not capable of gainful employment.

11. Clifford Wheelless, M.D., a board certified orthopedic specialist also provided deposition testimony in this matter. Dr. Wheelless has diagnosed plaintiff with an atypical form of costochondritis caused by the trauma to plaintiff's chest and ribs as a consequence of the work-related accident on May 26, 2001. Dr. Wheelless characterized the plaintiff's costochondritis as an "in-

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sufficiency fracture” that is akin to a stress fracture with accompanying cartilage injury where the ribs meet the sternum. Dr. Wheelless stated that such fractures tend not to heal normally, restricting one’s ability to perform lifting activities and becoming a “major nuisance” with symptoms that mimic a myocardial infarction, or heart attack. Although Dr. Wheelless would not say that plaintiff is incapable of gainful employment, he testified that plaintiff should have lifting restrictions and should not drive more than one hour a day because of various pain medications and analgesics prescribed to the plaintiff to relieve his ongoing pain.

12. The defendants have employed two vocational rehabilitation specialists in this matter, Dwanda Scott and Stephanie Yost, both of whom testified in this matter. Ms. Scott was of the opinion that the plaintiff is capable of some employment; however, the Full Commission gives little weight to her opinion testimony because Ms. Scott never met with plaintiff and merely prepared an assessment based on information provided to her by the defendants. Stephanie Yost, who did meet with plaintiff, was also of the opinion that the plaintiff is capable of some employment. However, a review of her testimony shows that she was not aware of the extent of the plaintiff’s physical restrictions or that the plaintiff is limited to driving only one hour per day.

13. Based on the totality of the evidence of record, and giving greatest weight to the plaintiff’s treating physician, Dr. Woodburn, the Full Commission finds that the plaintiff has shown through medical evidence, in particular the testimony of Dr. Woodburn, that he is physically incapable of work in any employment as a consequence of the May 26, 2001 injury by accident.

14. As a result of his May 26, 2001 injury by accident, the plaintiff has been unable to earn any wages in any employment for the period of April 16, 2002, through the date of hearing before the Deputy Commissioner and continuing.

15. There is insufficient evidence upon which to find that the defendants’ actions in defense of this case were based upon stubborn, unfounded litigiousness.

Based upon the stipulations of the parties as well as its own findings of fact, the Full Commission made the following conclusions of law:

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1. The plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant-employer on May 26, 2001. N.C. Gen. Stat. § 97-2(6).
2. Based upon the credible evidence of record, the defendants have failed to prove that the plaintiff's termination was for misconduct or fault for which a non-disabled employee would also have been terminated. *Seagraves v. Austin Company of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996). Accordingly, the plaintiff did not constructively refuse suitable work. *Id.*; and N.C. Gen. Stat. § 97-32.
3. In order to award compensation to a claimant, the Commission must find that the claimant has shown disability. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). A claimant may meet this burden of proof through the "production of evidence that he is physically incapable, as a consequence of the work related injury, of work in any employment." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). In the present case, the plaintiff has shown through medical evidence, in particular the testimony of Dr. Woodburn, that he is physically incapable of work in any employment as a consequence of the May 26, 2001 injury by accident. *Id.*
4. As the result of his May 26, 2001 injury by accident, the plaintiff is entitled to receive temporary total disability compensation at the weekly rate of \$459.14 for the period of April 16, 2002 through the date of hearing before the Deputy Commissioner and continuing until such time as he returns to work, or further Order of the Industrial Commission. N.C. Gen. Stat. § 97-29.
5. As the result of his May 26, 2001 injury by accident, the plaintiff has sustained a fifteen percent (15%) permanent partial impairment rating to his left arm. N.C. Gen. Stat. § 97-31(24).
6. As the result of his May 26, 2001 injury by accident, the plaintiff is entitled to have the defendants pay for all related medical expenses incurred or to be incurred, as reasonably required to effect a cure, give relief, or lessen the period of disability. N.C. Gen. Stat. § 97-2(19); 97-25; and 97-25.1. In addition, the defendants have the option to provide vocational rehabilitation to the plaintiff. *Id.*
7. Because there is insufficient evidence upon which to find that the defendants' actions in, and defense of, this case were based

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upon stubborn, unfounded litigiousness, the plaintiff is not entitled to sanctions or attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1.

From this Opinion and Award, defendants now appeal, arguing that: (1) the Commission exceeded the scope of its authority under statute and upon the express order of this Court by remanding this case to the deputy commissioner for further findings of fact; and (2) the Commission's findings of fact regarding plaintiff's disability are not supported by competent evidence and in turn do not justify the Commission's conclusions of law.

The Workers' Compensation Act ("the Act") is to be liberally construed to achieve its purpose, namely, to provide compensation to employees injured during the course and within the scope of their employment. *Lynch v. M.B. Kahn Constr. Co.*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). On appeal, we review decisions from the Industrial Commission to determine whether any competent evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). "The findings of fact by the Industrial Commission are conclusive if supported by any competent evidence." *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999) (citing *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). This is true "even though there be evidence that would support findings to the contrary." *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000). However, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). Instead, our duty goes no further than to determine whether the record contains any evidence tending to support the Commission's findings. *See id.* In turn, we review the Commission's legal conclusions to determine whether they are justified by those findings. *See Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997).

[1] Defendants first assign error to the Full Commission's remand of this case to the deputy commissioner for the taking of additional evi-

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dence concerning the issue of plaintiff's continuing disability compensation, arguing that, by doing so, the Full Commission exceeded the proper scope of this Court's remand. As part of this argument, defendants contend that, because our opinion in *Silva*, 176 N.C. App. 229, 625 S.E.2d 613, did not "expressly or implicitly mandate" the taking of new evidence, the Full Commission has failed to "strictly follow this Court's mandate without variation or departure," under *Crump v. Independence Nissan*, 112 N.C. App. 587, 590, 436 S.E.2d 589, 592 (1993). Defendants further argue that, "in order for the Industrial Commission, in its own discretion, to direct the taking of additional evidence, a 'proper showing' must be made," under *Bailey v. N.C. Dep't of Mental Health*, 2 N.C. App. 645, 648, 163 S.E.2d 652, 654 (1968), and that "[a] showing of newly discovered evidence is required," under *Bailey v. N.C. Dep't. of Mental Health*, 272 N.C. 680, 685, 159 S.E.2d 28, 32 (1968). We disagree.

The Full Commission may receive additional evidence on appeal

[i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]

N.C. Gen. Stat. § 97-85 (2007). Although N.C.G.S. § 97-85 has ordinarily been applied to cases before the Full Commission on appeal from the opinion and award of a deputy commissioner, we have held that the Full Commission has plenary power to receive additional evidence, and may do so at its sound discretion. See *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 366 (1992). Furthermore, "[w]hether such good ground [to receive further evidence] has been shown is discretionary and 'will not be reviewed on appeal absent a showing of manifest abuse of discretion.'" *Id.* at 542, 421 S.E.2d at 367 (quoting *Lynch*, 41 N.C. App. at 131, 254 S.E.2d at 238). The Full Commission, when reviewing an award by a deputy commissioner, may receive additional evidence, even if it was not newly discovered evidence. *Id.* Finally, the Commission may waive its own rules in the interest of justice. Workers' Comp. R. of N.C. Indus. Comm'n 801, 2000 Ann. R. (N.C.).

We first note that, upon the Commission's remand to the deputy commissioner for the taking of additional evidence, defendants failed to make any objection. Furthermore, the record on appeal reveals

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that, in the pre-trial agreement entered into prior to the evidentiary hearing, defendants stipulated to the following:

1. All parties are properly before the undersigned Deputy Commissioner and that the Industrial Commission has jurisdiction over the parties and of the subject matter.

. . . .

9. The names and addresses of the witnesses which employee may call to testify at the hearing are as follows:

- (a) Gilbert Silva
- (b) Any witness identified by the defendants
- (c) Clifford Wheeless, M.D.
- (d) Raymond Blackburn, M.D.
- (e) Cardiologist, M.D.

10. The names and addresses of the witnesses which employer/carrier may call to testify at the hearing are as follows:

- (a) Gilbert Silva
- (b) Dwanda Scott
- (c) Steven Thacker
- (d) Treating physicians
- (e) Any witness identified by plaintiff

11. The parties have furnished each other with copies of all exhibits and stipulate to the admission of the following:

- (a) Plaintiff's medical records
- (b) Plaintiff's job search records dated September 28, 2006 thru [sic] November 11, 2006;
- (c) Any document offered into evidence or identified by the opposing party or counsel.

. . . .

13. The parties further stipulate and agree that the record remain open for a period of 60 days following the hearing of this matter to allow for the taking of deposition testimony of the medical and/or expert witnesses.

14. The parties reserve the right to supplement this agreement in the future and to offer additional evidence or witnesses in re-

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sponse to evidence or witnesses presented at the hearing of this matter.

This pre-trial agreement was signed by counsel for both parties. Accordingly, defendants not only failed to object to the taking of additional evidence as ordered by the Full Commission; they also stipulated to the witnesses who could be deposed by both parties as well as the evidence which would be admissible. By so doing, defendants effectively waived their right to object to the taking of new evidence in exchange for, inter alia, the stipulations listed above. Defendants did not except to the Commission's order of remand until after the Commission had, in effect, ruled against defendants, and their exception, therefore, was not timely. *Grigg v. Pharr Yarns, Inc.*, 15 N.C. App. 497, 499, 190 S.E.2d 285, 286 (1972). Even assuming, under N.C.G.S. § 97-85, the action of the Commission in remanding the matter was irregular, defendants waived any irregularity. *Id.*

As to defendants' argument regarding the scope of the Commission's authority on remand, we have, since our ruling in *Crump*, clearly stated that the language cited by defendants is dicta. See *Austin v. Cont'l Gen. Tire*, 185 N.C. App. 488, 492, 648 S.E.2d 570, 573, writ of supersedeas and disc. review denied, 367 N.C. 690, 652 S.E.2d 255 (2007). In *Austin*, our Supreme Court remanded to the Commission for "proceedings not inconsistent with [the Court's] opinion," and for determination of the plaintiff's entitlement to benefits under N.C.G.S. § 97-64, the statute governing compensation for disablement or death caused by asbestosis, rather than § 97-61.5, which governs compensation upon removal from a hazardous occupation. *Id.* The Commission remanded to the deputy commissioner for an evidentiary hearing on the issue of the plaintiff's disability and, on appeal of the Commission's subsequent Opinion and Award, we held that its actions did not violate the Supreme Court's remand order, that the Commission's authority to take additional evidence on remand was not limited by the strictures of Rule 60(b), and that failure to present evidence of disability at the first hearing did not preclude the plaintiff from presenting such evidence on remand. See *id.* Furthermore, prior to our decision in *Austin*, this Court stated that, "[w]here a case is remanded to the Industrial Commission from an appellate court, the appellate court surrenders jurisdiction and the Industrial Commission acquires jurisdiction for all purposes." *Ratchford v. C.C. Mangum Inc.*, 150 N.C. App. 197, 198, 564 S.E.2d 245, 247 (2002) (citing *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799 (1935)).

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Our prior opinion in this case specifically stated, “We remand for further findings on the threshold issue of whether plaintiff has proved the existence of a disability that would entitle him to compensation under the Act.” *Silva*, 176 N.C. App. at 239, 625 S.E.2d at 621. Earlier in the same opinion, we stated,

Because the Commission’s findings of fact are insufficient to enable this Court to determine plaintiff’s right to compensation, this matter must be remanded for *proper* findings on this issue. See *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (holding that where the findings are insufficient to enable the reviewing court to *determine the rights of the parties*, the case must be remanded to the Commission for proper findings of fact).

Id. at 237, 625 S.E.2d at 620 (emphasis added).

Thus, upon our remand the Commission had a duty to make findings of fact which were “more than a mere summarization or recitation of the evidence,” resolving any conflicting testimony, *Lane v. Am. Nat’l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008) (citation omitted), regarding “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, *aff’d*, 360 N.C. 169, 622 S.E.2d 492 (2005) (citation omitted). Here, the Full Commission specifically found that plaintiff had shown good ground to receive further evidence, and, in its discretion, determined that further evidentiary hearings were necessary in order to make *proper* findings of fact upon the crucial issue of disability. Though its methods were irregular, we hold the Commission did not manifestly abuse its discretion in this case. Accordingly, this assignment of error is overruled.

[2] Defendants next assign error to the Commission’s conclusion that plaintiff has shown disability through “the production of evidence that he is physically incapable, as a consequence of the work related injury, of work in any employment,” under *Russell v. Lowes Prod. Distrib’n*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). Defendants argue that the Commission’s findings of fact in support of this conclusion of law are not supported by competent evidence. We disagree.

In order to prove disability under the Act, the employee must show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment.

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Hilliard, 305 N.C. at 595, 290 S.E.2d at 683. An employee may meet this burden in one of four ways:

- (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 preexisting conditions, i.e., age, inexperience, 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.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted) (emphasis added).

Here, the Full Commission found that plaintiff had shown, through medical evidence, and in particular the testimony of Dr. Woodburn, that he is “physically incapable of work in any employment as a consequence of the May 26, 2001 injury by accident.” Our review of the record reveals that Dr. Woodburn did testify to this effect during his deposition, describing his treatment of plaintiff over approximately six years, a constant theme of which was varying levels of chest pain. When asked whether, in light of his knowledge of plaintiff’s condition, he had an opinion to a reasonable degree of medical probability on the issue, Dr. Woodburn responded that he did not think plaintiff was capable of gainful employment. Defendants argue in their brief that this statement was conclusory and speculative, but our review of Dr. Woodburn’s testimony reveals that he was well aware of the treatment plaintiff received from other doctors and the progression of plaintiff’s chest pain and physical problems over time.

Although the record does contain some evidence to the contrary, we reiterate that the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony, and may reject entirely the testimony of a witness if warranted by disbelief of the witness. *Anderson v. N.W. Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951). This Court’s duty goes no further than determining whether the record contains any evidence tending to support the Commission’s findings of fact. *Lincoln Constr. Co.*, 265 N.C. at 434,

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144 S.E.2d at 274. Here, the Commission, in its discretion, assigned more weight to the testimony of Dr. Woodburn in making its findings of fact. Because these findings were supported by competent evidence of record, which in turn justified the Commission's conclusion that plaintiff met his burden of proving disability under *Russell*, this assignment of error is overruled.

[3] Also on appeal, plaintiff argues that the Commission erred in failing to award attorney's fees pursuant to N.C. Gen. Stat. §§ 97-88 and 97-88.1 and that, due to defendants' continued defense of this case without reasonable grounds, this Court should now award plaintiff attorney's fees. We disagree.

We note that plaintiff has failed to cross-assign error to the court's conclusion of law 7 and thus has not properly preserved for appellate review the question of whether plaintiff was entitled to attorney's fees before the Commission. N.C. R. App. P. 10(a) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10."). Although this Court may suspend or vary the requirements or provisions of our Rules of Appellate Procedure pursuant to Rule 2, this case does not present a situation where doing so would "prevent manifest injustice to a party," or benefit "the public interest." N.C. R. App. P. 2. Accordingly, in the exercise of our discretion, we deny plaintiff's request for attorney's fees in relation to this appeal.

Affirmed.

Judges WYNN and ERVIN concur.

STATE OF NORTH CAROLINA v. DAVID REED WILSON

No. COA08-782

(Filed 19 May 2009)

1. Evidence— recorded statement of witness—not an admissible record

The trial court did not err in a murder prosecution by excluding a tape recorded statement given to police from the person with whom a witness stayed after the shooting. While an audio recording can be admissible as a "record" under N.C.G.S. § 8C-1,

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Rule 803(5), that rule applies where a witness is unable to remember the events but recalls making the entry when the fact was fresh in her memory. The witness here did not recall giving a statement to police; moreover, the witness's testimony raised questions about the accuracy of her statement.

2. Evidence— recorded statement of witness—no distinction from deposition transcript

There is no meaningful distinction between a deposition transcript and an audio recording for purposes of admissibility under N.C.G.S. § 8C-1, Rule 803(5). Defendant did not cite authority supporting his contention that the accuracy of a statement was manifest in its being a tape recording and that the witness tacitly adopted it.

3. Appeal and Error— preservation of issues—basis for admission of evidence—not argued to trial court

An argument that a statement should be admitted as a public record was not preserved for appeal where it was not argued as the basis for admission in the trial court.

4. Evidence— impeachment—tape recorded statement of another witness—extrinsic

The trial court did not err in a murder prosecution by refusing to admit a tape recorded statement as impeachment evidence where the statement was from the person with whom a witness to the shooting stayed after the crime.

5. Criminal Law— instructions—self-defense—final mandate

Defendant failed to preserve for appellate review his argument that the trial court erred by failing to include not guilty by reason of self-defense in its final mandate. Even if defendant's argument was properly before the Court, it is meritless as the trial court included an instruction on self-defense in its final mandate as well as instructions on first-degree murder, second-degree murder, voluntary manslaughter, and voluntary intoxication, as requested by defendant at the charge conference.

6. Criminal Law— reinstruction of jury—self-defense not included

There was no plain error in a murder prosecution where the court reinstructed the jury on first-degree and second-degree murder but did not reinstruct on self-defense. The jury only

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requested a reinstruction on first-degree and second-degree murder, and the court confirmed that defendant had no objection to the instructions as given.

7. Homicide— refusal to give voluntary manslaughter instruction—harmless error

Any possible error in a murder prosecution from the trial court's denial of a request for an instruction on voluntary manslaughter based on provocation was harmless where the jury was properly instructed on first-degree and second-degree murder, and returned a verdict of guilty of first-degree murder.

8. Criminal Law— instructions—duty to retreat not included—not plain error

There was no plain error in a murder prosecution from the court's failure to instruct on the lack of a duty to retreat where defendant did not request the instruction and the issue was not a substantial feature of the defense.

Appeal by Defendant from judgment entered 12 October 2007 by Judge Catherine C. Eagles in Superior Court, Guilford County. Heard in the Court of Appeals 10 March 2009.

Attorney General Roy Cooper, by Assistant Attorney General Charlie E. Reece, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for Defendant-Appellant.

McGEE, Judge.

David Reed Wilson (Defendant) was found guilty by a jury of the first-degree murder of Raimond Akira Johnson (Johnson) on 12 October 2007. The trial court sentenced Defendant to life imprisonment without parole. Defendant appeals.

The evidence presented at trial tended to show that Johnson was shot in front of his apartment in High Point at approximately 4:00 a.m. on 25 February 2006. Johnson died at a local hospital as a result of four gunshot wounds.

Officer P.J. Perryman (Officer Perryman) with the High Point Police Department testified to the following. When Officer Perryman arrived on the scene, Defendant was attempting to pull out of Johnson's driveway. Officer Perryman approached Defendant's ve-

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hicle and saw an AR-15 assault rifle on the passenger seat. Officer Perryman placed Defendant in custody. Defendant made several statements to Officer Perryman, including “[t]hat guy took my wallet so I shot him” and that “he hated drug dealers and that he was out to rid the world of drug dealers.” Defendant behaved as though the shooting “wasn’t that big of a deal[,]” and was “pretty calm and relaxed” while in custody.

Officer J.A. Kuchler (Officer Kuchler) with the High Point Police Department testified that Defendant said one of his hobbies was “shooting dope dealers.” Officer Kuchler testified that Defendant was calm. Defendant never told officers that Johnson had brandished a weapon, nor that he shot Johnson in self-defense. No weapon was recovered from Johnson or from his apartment.

Raymond Morgan (Morgan) testified to the following. Johnson sold drugs out of Johnson’s apartment and Morgan was Johnson’s “doorman.” Morgan answered Johnson’s front door when Johnson was in the back of the apartment. Defendant and another man came to Johnson’s apartment to buy crack cocaine between 10:00 p.m. and 11:00 p.m. on 24 February 2006. Defendant and the man bought crack cocaine, smoked it in Johnson’s apartment, and left. Defendant returned to the apartment alone four more times that night looking for his phone and wallet, and trying to buy more cocaine. The last time Defendant came to Johnson’s apartment, Defendant was carrying an AR-15 assault rifle. Defendant wanted to buy a “dime rock,” a ten-dollar piece of cocaine, but Johnson told Defendant he did not sell pieces of cocaine that small. Morgan asked Defendant if he had found his wallet and Defendant responded: “You ——— right I found it. If I didn’t, I’d level this ———.” Defendant then put a round of ammunition in the chamber of the assault rifle.

Morgan, Johnson, and Defendant went outside Johnson’s apartment. Defendant continued to demand a ten-dollar piece of cocaine but Johnson repeated he did not have a ten-dollar piece of cocaine and turned to walk away. Defendant shot Johnson twice and Johnson fell to the ground. Johnson stood up and Defendant shot him a third time, and Johnson again fell. Johnson stood up again and began to stagger toward his car. Defendant shot Johnson a fourth time. Morgan fled the scene. Morgan never saw Johnson with a gun, nor did he ever see Johnson make any threatening motion or gesture towards Defendant. Morgan testified Defendant killed Johnson “like a dog for no reason. He killed him in cold blood.”

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Morgan stayed with Tecolia Daughtridge (Daughtridge) the night of Johnson's shooting. Morgan told Daughtridge about the shooting but denied he had ever told Daughtridge anything inconsistent with his trial testimony. Two days after Johnson's shooting, Morgan gave a statement to police which was consistent with his trial testimony.

Defendant testified in his own defense, admitting that at the time of the shooting he was suffering from a drug and alcohol problem. Defendant admitted he bought drugs from Johnson on 24 February 2006 and that he later returned to Johnson's apartment to look for his wallet. Defendant said that when Johnson opened the door, Defendant could see his wallet on Johnson's kitchen table. Johnson claimed the wallet belonged to him and closed the door on Defendant. Defendant then armed himself with his AR-15 assault rifle, loaded the rifle, and put on his tactical vest with additional ammunition in order to "scare" and "intimidate" Johnson.

Defendant testified that when Johnson saw Defendant was armed, Johnson turned his back on Defendant and walked away. Defendant retrieved his wallet and walked back outside to his vehicle. Defendant got to his vehicle and heard Johnson say, "I'm going to kill your white ass." Defendant said Johnson walked toward him holding a pistol. Defendant saw Johnson raise his gun and Defendant "just started firing" at Johnson. Defendant admitted Johnson never fired any weapon at Defendant. Defendant did not recall ever telling police officers that Johnson had a gun or that Defendant had feared for his life.

Defendant also called Richard Smith (Smith), a neighbor of Johnson's, to testify. Smith testified that he bought drugs from Johnson and had seen a pistol inside Johnson's apartment. Smith testified that Morgan attempted to sell Smith a gun the morning after Johnson was shot and killed. Smith said Morgan never showed him the gun.

I.

[1] Defendant assigns error to the trial court's exclusion of a statement given to police by Daughtridge. Defendant contends Daughtridge's statement was admissible both substantively and to impeach Morgan and that the exclusion of this evidence violated Defendant's constitutional right to present a defense.

The relevant facts pertaining to this issue are as follows. Defendant called Daughtridge to testify. Daughtridge testified she had no

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recollection of seeing Morgan on the night of the shooting, nor of any statements Morgan made to her regarding the shooting. She also testified that she had no recollection of having made a statement to the police. Daughtridg explained she has epileptic seizures and that she had been put in a coma. As a result, she could “hardly remember anything.” Daughtridg testified she was not denying she made a statement to the police, but that she simply did not remember. Daughtridg said she was “liable to say anything” and was “a patient at mental health.”

Outside the presence of the jury, Detective Terry Green (Detective Green) with the High Point Police Department testified to the following. Detective Green interviewed Daughtridg on the evening of 25 February 2006. Daughtridg gave a tape recorded statement to the police in which she stated the following: Morgan told her Defendant had fired a shot at Johnson outside Johnson’s apartment; Johnson pulled out a gun in response but never shot the gun at Defendant or retaliated in any way; Johnson continued to walk toward Defendant while Defendant continued shooting at Johnson; Johnson’s cousin “beat up” Morgan after the shooting; and Morgan was afraid for his life. Defendant cross-examined Morgan on each of these statements and Morgan denied making the statements to Daughtridg. After hearing all the evidence regarding the proposed admission of Daughtridg’s tape recorded statement and arguments from counsel, the trial court excluded Daughtridg’s tape recorded statement.

Defendant argues that Daughtridg’s tape recorded statement was admissible for substantive purposes under N.C.R. Evid. 803(5) as a recorded recollection. We review *de novo* the trial court’s determination of whether an out-of-court statement is admissible pursuant to N.C.R. Evid. Rule 803. See *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000); *State v. Hazelwood*, 187 N.C. App. 94, 98-99, 652 S.E.2d 63, 66 (2007).

North Carolina Rule of Evidence 803(5) states:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

N.C. Gen. Stat. § 8C-1, Rule 803(5) (2007).

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We have found no decisions by our Courts interpreting the language “memorandum or record” in N.C.R. Evid. 803(5) as encompassing a tape recorded statement. However, Kenneth S. Broun, the leading commentator on North Carolina evidence, states in *Brandis & Broun on North Carolina Evidence* § 224 at 201 (6th ed. 2004), regarding 803(5) evidence:

Though most of the cases speak of a “writing,” it seems that a tape or similar recording should equally qualify. Indeed, if the witness dictated the recording and testifies that she then knew her dictation to be accurate and identified her voice, the probability of trustworthiness is higher than in the situations [involving written recordings by a third party].

We agree and hold that an audio recording can be admissible as a “record” under Rule 803(5).

Rule 803(5) “applies in an instance where a witness is unable to remember the events which were recorded, *but the witness recalls having made the entry at a time when the fact was fresh in her memory[.]*” *State v. Spinks*, 136 N.C. App. 153, 158-59, 523 S.E.2d 129, 133 (1999) (emphasis added) (citing *Brandis & Broun on North Carolina Evidence*, § 224, p. 110 (5th ed. 1998)).

In the case before us, Daughtridge testified that she did not recall giving a statement to police. Further, when Daughtridge was asked about whether she fabricated any statement made to the police, she responded:

I didn’t say I made anything up and you’re not going to get me to say I made nothing up. My mental state and my physical health as far as my head, I’m liable to say anything. So, I’m not really—me sitting up here, *anything I say is not going to be credible because really my mental state, I’m liable to say anything.*

....

I’m liable to say anything. Truthfully. I’m a patient at Mental Health. I’m liable to say anything.

(Emphasis added.)

Far from establishing the reliability of her statement to the police, Daughtridge’s testimony raised questions about the accuracy of her statement because, due to her mental state, she was “liable to say anything.” As a result, the audiotape was not admissible under Rule 803(5). *See Id.* (holding that statement was not admissible under

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Rule 803(5) when witness did not testify that statement accurately reflected her actual knowledge at the time, but rather testified that she disagreed with some of the statement); *State v. Hollingsworth*, 78 N.C. App. 578, 581, 337 S.E.2d 674, 676-77 (1985) (holding that when witness testified that information in letter was lies, letter could not be admitted as past recollection recorded because no testimony was presented that letter correctly reflected witness' knowledge of events at time of letter).

[2] Nonetheless, Defendant contends that the fact the statement was a tape recording “manifested its accuracy” and meant Daughtridge “tacitly adopted it.” However, Defendant cites no authority in support of his position. In *Superior Tile v. Rickey Office Equipment*, 70 N.C. App. 258, 263, 319 S.E.2d 311, 315 (1984), *disc. review denied*, 313 N.C. 336, 327 S.E.2d 899 (1985), our Court held that a deposition transcript was not admissible as a recorded past recollection because “the witness did not authenticate the deposition by saying it represented his recollection at the time it was made.” We find no meaningful distinction between a deposition transcript and an audio recording for purposes of admissibility under Rule 803(5). Therefore, the trial court did not err in excluding Daughtridge’s tape recorded statement as substantive evidence.

[3] Defendant also argues Daughtridge’s statement was admissible for substantive purposes as a public record under N.C.R. Evid. 803(8)(B)&(C). However, the transcript shows that Defendant did not argue this basis for admission to the trial court. N.C.R. App. P. 10(b)(1) states that: “In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” A defendant may not assert a different theory on appeal from the one presented to the trial court. *State v. Smarr*, 146 N.C. App. 44, 56, 551 S.E.2d 881, 888 (2001) (citing *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988)), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002). Therefore, Defendant did not preserve this argument for appeal.

[4] Defendant further argues that Daughtridge’s statement was admissible to impeach Morgan’s testimony. N.C.R. Evid. 608(b) states: “Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by extrinsic evidence. They may . . . be inquired into on cross-examination of the witness[.]” N.C. Gen. Stat. § 8C-1, Rule 608(b)

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(2007). In *State v. Hunt*, our Supreme Court held that “extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern matters collateral to the issues.” *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989) (citing *State v. Green*, 296 N.C. 183, 191, 250 S.E.2d 197, 203 (1978)) *reconsideration denied*, 339 N.C. 741, 457 S.E.2d 304 (1995). “[T]estimony contradicting a witness’s denial that he made a prior statement when that testimony purports to reiterate the substance of the statement” is collateral. *Id.* (citing *State v. Williams*, 322 N.C. 452, 456, 368 S.E.2d 624, 626 (1988)). Therefore, “once a witness *denies* having made a prior inconsistent statement, [a party] may not introduce the prior statement in an attempt to discredit the witness; the prior statement concerns only a *collateral matter*, *i.e.*, whether the statement was ever made.” *State v. Najewicz*, 112 N.C. App. 280, 289, 436 S.E.2d 132, 138 (1993), (citing *State v. Minter*, 111 N.C. App. 40, 48-49, 432 S.E.2d 146, 151, *cert. denied*, 335 N.C. 241, 439 S.E.2d 158 (1993)), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

In the present case, Defendant cross-examined Morgan regarding statements Morgan purportedly made to Daughtridge. Morgan admitted telling Daughtridge that a “white guy” had killed Johnson and that Morgan was afraid someone might hurt him. However, Morgan denied telling Daughtridge that Johnson had a gun on the day of the shooting or that Johnson’s cousin had “beat him up.” Defendant argues that he should have been allowed to impeach Morgan by introducing the substance of Daughtridge’s tape recorded statement. Defendant contends that the statement was not extrinsic evidence because he was “offering Daughtridge’s recorded recollection of an inconsistent statement by Morgan himself.” However, pursuant to N.C.R. Evid. 608(b) and our Supreme Court’s holdings in *Hunt* and *Najewicz*, Defendant was limited to Morgan’s answers on cross-examination. Testimony of another witness, whether a recorded recollection or presently remembered by the witness is nonetheless extrinsic evidence. Therefore, the trial court did not err in excluding Daughtridge’s tape recorded statement as impeachment evidence. Defendant’s first assignment of error is overruled.

II.

[5] Defendant argues in his assignment of error number seven that the trial court committed reversible error or, in the alternative, plain error. Defendant argues the trial court erred by failing to explain the law regarding self-defense in its supplemental instruc-

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tions to the jury, and by failing to instruct the jury on voluntary manslaughter based on provocation.

We first note that in addition to arguing the trial court erred in its supplemental instructions to the jury, Defendant argues the trial court failed to include not guilty by reason of self-defense as a possible verdict in its *final mandate* to the jury. Defendant did not assign error to this basis and therefore Defendant's argument is not properly before us. N.C.R. App. P. 28(b)(6). Further, Defendant concedes, and the transcript clearly shows, that the trial court did include in its final mandate a self-defense instruction along with instructions on first-degree murder, second-degree murder, voluntary manslaughter, and voluntary intoxication as requested by Defendant at the charge conference. Therefore, even if Defendant's argument that the trial court erred in its final mandate was properly before us, this argument is without merit.

[6] During deliberations, the jury requested reinstruction on the elements of first-degree and second-degree murder. The trial court confirmed with Defendant that he had no objection to reinstructing the jury on first-degree and second-degree murder. After reinstructing the jury, the trial court confirmed that Defendant had no additions, corrections or objections to the reinstruction as given. Because Defendant failed to object to the reinstruction, Defendant is only entitled to plain error review of the trial court's reinstruction. N.C.R. App. P. 10(c)(4). In order to be plain error, the error must be "*fundamental* error, something 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.) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

In *State v. Southern*, our Court held that the trial court did not abuse its discretion by reinstructing the jury only on malice when the jury only requested additional instructions on malice. *State v. Southern*, 71 N.C. App. 563, 568, 322 S.E.2d 617, 620-21 (1984), *aff'd per curiam*, 314 N.C. 110, 331 S.E.2d 688 (1985). Our Court reasoned that because the jury only requested additional instructions on malice, "giving additional instructions on self-defense might unduly influence" the jury. *Id.*

The present case is directly analogous to *Southern*. The jury in the present case only requested a reinstruction on first-degree and

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second-degree murder. As in *Southern*, the trial court's decision not to reinstruct on self-defense was not an abuse of discretion, and therefore clearly did not amount to plain error. *Id.*

[7] Defendant also argues the trial court erred by failing to instruct the jury on voluntary manslaughter based on provocation. "[W]hen a jury is properly instructed on both first-degree and second-degree murder and returns a verdict of guilty of first-degree murder, the failure to instruct on voluntary manslaughter is harmless error." *State v. East*, 345 N.C. 535, 553, 481 S.E.2d 652, 664, *cert. denied*, 522 U.S. 918, 139 L. Ed. 2d 236 (1997). Our Supreme Court has reasoned that where "the jury . . . did not find that [the] defendant was in the grip of sufficient passion to reduce the murder from first-degree to second-degree, then ipso facto it would not have found sufficient passion to find the defendant guilty only of voluntary manslaughter." *State v. Tidwell*, 323 N.C. 668, 675, 374 S.E.2d 577, 581 (1989).

In this case, Defendant has not alleged that the trial court improperly instructed the jury on first-degree and second-degree murder. Because the jury was properly instructed on first-degree and second-degree murder and returned a verdict of guilty of first-degree murder, any possible error from the trial court's denial of Defendant's request for an instruction on voluntary manslaughter based on provocation was harmless. Therefore, Defendant's assignment of error number seven is overruled.

III.

[8] Defendant argues the trial court committed plain error by failing to instruct the jury that Defendant had no duty to retreat when Johnson confronted Defendant with murderous intent. Because Defendant failed to specifically request this instruction at trial and did not object to the trial court's failure to instruct the jury on duty to retreat, our Court reviews for plain error. N.C.R. App. P. 10(c)(4).

"A comprehensive self-defense instruction requires instructions that a defendant is under no duty to retreat if the facts warrant it, and it is error for the trial court not to give this instruction *if it is requested*." *State v. Davis*, 177 N.C. App. 98, 102, 627 S.E.2d 474, 477 (2006) (emphasis added) (citing *State v. Everett*, 163 N.C. App. 95, 100, 592 S.E.2d 582, 586 (2004)). However, "[w]here a defendant's right to stand his ground and shoot an assailant in self-defense is a 'substantial feature' of a defense, it is error for the trial court to fail to give the instruction, 'even in the absence of a special request there-

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for.’ ” *Id.* at 103, 627 S.E.2d at 478 (emphasis added) (quoting *State v. Ward*, 26 N.C. App. 159, 162, 215 S.E.2d 394, 396 (1975)).

Since Defendant in this case did not request the instruction that he had no duty to retreat, the relevant question is whether Defendant’s right to stand his ground was a “substantial feature” of his defense. *Id.* While Defendant argues the evidence *supported* an instruction that he had no duty to retreat, Defendant fails to argue, nor does the evidence show, that he made the issue of his duty to retreat a *substantial feature* of his defense. Further, the State made no suggestion that Defendant should have retreated nor does Defendant contend the State put his duty to retreat at issue in the case. Because the question of whether or not Defendant had any duty to retreat was not a substantial feature of his defense, the trial court did not err in failing to instruct the jury that Defendant had no duty to retreat.

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.

CHARLES ROGER HOLLOWAY, EXECUTOR OF THE ESTATE OF LOIS RAPER HOLLOWAY,
DECEASED, PLAINTIFF v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC
SAFETY/N.C. HIGHWAY PATROL, DEFENDANT

DENNIS EDGAR BORING AND JUDITH BORING BODNAR, CO-ADMINISTRATORS OF THE
ESTATE OF BLANCHE RAPER BORING, DECEASED, AND JUDITH BORING BODNAR,
INDIVIDUALLY, PLAINTIFFS v. N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC
SAFETY/N.C. HIGHWAY PATROL, DEFENDANT

No. COA08-802

(Filed 19 May 2009)

1. Tort Claims Act— negligence—sufficiency of finding of fact—accident reconstruction

The Industrial Commission did not err in a negligence case under the Tort Claims Act by its finding of fact number 14 even though plaintiffs contend their accident reconstruction expert never stated the highway patrol trooper should have swerved into

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oncoming traffic because: (1) contrary to plaintiff's characterization of the finding, the full Commission did not find the expert suggested the trooper should have swerved into oncoming traffic, but instead found the expert suggested the trooper should have considered swerving left instead; (2) another trooper testified that going right was the pertinent trooper's only option; and (3) the finding was supported by competent evidence.

2. Tort Claims Act— gross negligence—sufficiency of finding of fact—conclusion of law—accident reconstruction

The Industrial Commission did not err in a negligence case under the Tort Claims Act by its findings of fact numbers 7, 16, and 18, and conclusion of law number 2, because: (1) rather than attempting to show that these findings are unsupported by evidence, plaintiffs attempted to relitigate the case on appeal by highlighting evidence contrary to these findings, and the Court of Appeals is bound by these findings if they are supported by any competent evidence even if contrary evidence appears; (2) in an unchallenged finding of fact, the full Commission found that by steering to the right the trooper did the right thing; (3) another trooper who created an accident reconstruction report opined that swerving right was the pertinent trooper's only option, and the full Commission gave greater weight to the testimony of the trooper than plaintiff's accident reconstruction expert; (4) these findings of fact supported conclusion of law 2, and further the conclusion comported with precedent established by our appellate courts; (5) the trooper's actions did not rise to the level of gross negligence or wanton conduct done with conscious or reckless disregard for the rights and safety of others; and (6) the full Commission found that decedent's car was at a complete stop and that it was reasonable for the trooper to assume the car would wait for the vehicles with the right-of-way to pass the median crossover before turning across the highway, and the trooper's immediate evasive action was the only option available to him under the circumstances.

Appeal by plaintiffs from an opinion and award of the Full Commission of the North Carolina Industrial Commission entered 8 May 2008 by Commissioner Buck Lattimore. Heard in the Court of Appeals 10 December 2008.

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Cahoon & Swisher, North, Cooke & Landreth, by A. Wayland Cooke and H. Davis North, III, for plaintiffs-appellants.

Roberts & Stevens, P.A., by Wyatt S. Stevens and Ann-Patton Nelson; and Attorney General Roy A. Cooper, III, by Assistant Attorney General Donna Wojcik, for defendant-appellee.

JACKSON, Judge.

Charles Holloway, Dennis Boring, and Judith Bodnar (collectively, “plaintiffs”) appeal from a decision and order of the Full Commission of the North Carolina Industrial Commission (“Full Commission”) denying plaintiffs’ negligence claim against the North Carolina Department of Crime Control and Public Safety, Division of State Highway Patrol (“defendant”). For the reasons set forth below, we affirm.

On 17 July 2003, at approximately 3:00 p.m., Trooper Kenneth Hyde (“Trooper Hyde”) was driving westbound on U.S. 19/74¹ when he observed a black BMW speeding eastbound at seventy-six miles per hour in a fifty-five mile per hour zone. Trooper Hyde activated his emergency lights and siren and turned across the grass median to initiate a traffic stop in the eastbound lane.

In an effort to evade Trooper Hyde, the black BMW crossed over the grass median to head west. Trooper Hyde followed by crossing the grass median to pursue the westbound BMW. Trooper Hyde alerted Cherokee County Deputy Mashburn (“Deputy Mashburn”), who was stationary just ahead. As the BMW approached Deputy Mashburn, the BMW crossed the median once more—now heading eastbound. Trooper Hyde and Deputy Mashburn gave chase across the median again. Trooper Hyde then notified the State Highway Patrol center in Asheville of the pursuit.

The State Highway Patrol center sent out an alert about the chase. Trooper Jeremy Ledford (“Trooper Ledford”) was located at the Peachtree patrol station and responded to the alert. Trooper Hal Robertson (“Trooper Robertson”) was off-duty, but joined Trooper Ledford in Ledford’s patrol car, a loaned, “spare” patrol vehicle—a retired 1999 Crown Victoria with approximately 89,000 miles on it. Trooper Ledford immediately activated his siren and blue lights, and he proceeded toward the chase in “emergency response” mode.

1. U.S. 19/74 is a four-lane paved highway that runs between the towns of Andrews and Murphy, North Carolina. The highway is divided by a grass median with several crossovers.

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Trooper Ledford testified that the traffic conditions were “very light,” and the weather was clear on U.S. 19/74 on 17 July 2003. He was unsure how fast he traveled along U.S. 19/74 in order to respond to the chase, but testified that it is possible that he drove in excess of 100 miles per hour. However, he estimated that he did not travel “much over a hundred.” The posted speed limit on U.S. 19/74 is fifty-five miles per hour.

During the pursuit, Trooper Ledford passed two vehicles and then crested a hill. From the crest of the hill, the road continues straight ahead, but slopes downhill. Approximately 900 feet from the crest of the hill, a road leading to a landfill intersects with eastbound U.S. 19/74 on the right. As Trooper Ledford started down the hill, he passed a white Honda and then saw two vehicles in front of him occupying both of the eastbound lanes of travel. Trooper Ledford eased off of his accelerator to slow down and to allow the vehicles in front of him to see him and move over.

As Trooper Ledford continued down the hill, he noticed a white Chevrolet Lumina on westbound U.S. 19/74. Blanche Boring (“Boring”) was driving the Lumina and was accompanied by her sister, Lois Holloway (“Holloway”) (collectively, “decedents”). Boring pulled into the median crossover as if she intended to turn into the landfill road across from the eastbound lanes of U.S. 19/74. This section of U.S. 19/74—the median crossover and landfill road intersection—is not regulated by traffic lights or signs. Trooper Ledford observed the Lumina come to a complete stop in the crossover, and he assumed that Boring could see him and the other vehicles approaching the median crossover and landfill road intersection. The two vehicles in front of Trooper Ledford passed the median crossover and landfill road intersection, and then Boring pulled out in front of Trooper Ledford. Trooper Ledford took a hard, evasive turn to the right in an attempt to avoid a collision. Boring continued forward, however, and Trooper Ledford collided with the Lumina, killing decedents.

On 12 February 2004, plaintiffs filed claims against defendant for damages pursuant to the North Carolina Tort Claims Act. On 29 and 30 May 2007, Deputy Commissioner Glenn heard the consolidated claims. On 13 August 2007, Deputy Commissioner Glenn filed amended decisions and orders concluding that Trooper Ledford was grossly negligent and awarding damages to plaintiffs. Defendant appealed Deputy Commissioner Glenn’s decisions and orders to the Full Commission. On 12 February 2008, the Full Commission heard

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the matter, and by opinion and award filed 8 May 2008, the Full Commission reversed Deputy Commissioner Glenn's decisions and orders. Plaintiffs appeal.

Our review of decisions and orders from the Full Commission "is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision." *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998) (citing *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 684, 159 S.E.2d 28, 31 (1968)). Pursuant to the North Carolina Tort Claims Act, "the findings of fact of the Commission shall be conclusive if there is *any* competent evidence to support them." N.C. Gen. Stat. § 143-293 (2007) (emphasis added). "This is so even if there is evidence which would support findings to the contrary." *Simmons*, 128 N.C. App. at 405, 496 S.E.2d at 793 (citing *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 683-84, 159 S.E.2d 28, 30-31 (1968)). We review the Full Commission's conclusions of law *de novo*. *Gratz v. Hill*, 189 N.C. App. 489, 492, 658 S.E.2d 523, 525 (2008) (citing *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003)).

[1] Initially, we address plaintiffs' argument that the Full Commission's finding of fact number 14 is not supported by competent evidence. We disagree.

The Full Commission's finding of fact number 14 provides that

Trooper Souther adamantly disagreed with plaintiff's accident reconstruction expert, John Flanagan, that Trooper Ledford should have considered swerving left instead. Troopers are trained never to steer left into oncoming traffic, never go left of the double yellow lines, and to never go left when you're going to be meeting a vehicle head on. If Trooper Ledford had swerved left, Mrs. Boring could have stopped in her lane of travel and Trooper Ledford would likely have collided with the rear portion of her car. If Mrs. Boring continued on, Trooper Ledford would have swerved into the grassy median and straight into the oncoming lanes of westbound traffic on U.S. 19/74 where it would have been highly possible that Trooper Ledford would have had a head-on collision with oncoming traffic. As a result, Trooper Souther concluded that swerving right was Trooper Ledford's only option. The undersigned give greater weight to the testimony of Trooper Souther than to Mr. Flanagan.

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Plaintiffs contend that their accident reconstruction expert, John F. Flanagan (“Flanagan”), never stated that Trooper Ledford should have swerved into oncoming traffic. Contrary to plaintiff’s characterization of the Full Commission’s finding, the Full Commission did not find that Flanagan suggested Trooper Ledford should have swerved into oncoming traffic. Instead, the Full Commission found that Flanagan suggested “that Trooper Ledford should have considered swerving left instead.” Flanagan testified that if Trooper Ledford had swerved to the left instead of to the right, and if everything else had remained the same, Trooper Ledford would have avoided the collision.

However, Trooper Dan Souther (“Trooper Souther”) testified that he “totally disagree[d] with this thinking.” He explained that, “[b]eing a trooper and being trained by the [Highway] [P]atrol, I’ve heard over and over and over again you never steer left into oncoming traffic, never go left of the double yellow lines, never go left where you’re going to be in—meeting a vehicle head on” Trooper Souther further testified that if Trooper Ledford had gone left, and Boring had stopped her forward motion, Trooper Ledford would have “hit her all the same.” If Trooper Ledford had gone left, and Boring had continued her forward motion, he might have avoided the collision, but he would not have been able to avoid going onto and across the grass median into traffic on the westbound lanes. Therefore, Trooper Souther stated that “going right was [Trooper Ledford’s] only option.” Accordingly, we hold the Full Commission’s finding of fact number 14 is supported by competent evidence. *See Simmons*, 128 N.C. App. at 405-06, 496 S.E.2d at 793.

[2] Next, we address plaintiffs’ argument that the Full Commission erred in making findings of fact numbered 7, 16, and 18 and conclusion of law number 2.

The Full Commission found as follows:

7. As the two vehicles in front of Trooper Ledford cleared the intersection with the landfill entrance where the Lumina was stopped, the Lumina suddenly and without warning pulled out in front of Trooper Ledford. Trooper Ledford immediately made a hard, evasive turn to the right to avoid a collision. As Trooper Ledford’s vehicle swerved into the right lane, the Lumina continued forward and a collision occurred in the right lane of U.S. 19/74. The Lumina was being driven by Mrs. Boring who was accompanied by her sister, Mrs. Holloway. As a result of the col-

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lision, both Mrs. Boring and Mrs. Holloway were killed and Trooper Ledford was seriously injured.

. . . .

16. The undersigned find as fact based upon the greater weight of the evidence that it was reasonable for Trooper Ledford to assume that the White Lumina driven by Mrs. Boring would not pull out in front of him. Mrs. Boring allowed the two vehicles in front of Trooper Ledford to clear the intersection. It is reasonable that Trooper Ledford believed Ms. Boring had seen everyone, including him[,] and would allow Trooper Ledford through the intersection before pulling out in his path of traffic.

. . . .

18. The undersigned find based upon the greater weight of the evidence that Trooper Ledford's actions while driving in emergency response mode in order to assist Trooper Hyde were justified and did not rise to the level [of] gross negligence.

In relevant part, the Full Commission's conclusion of law number 2 provides that "[b]ased upon the greater weight of the competent evidence[,] Trooper Ledford's actions did not rise to [the] level of gross negligence."

Rather than attempting to show that the Full Commission's findings of fact numbered 7, 16, and 18 are unsupported by competent evidence, plaintiffs attempt to re-litigate the case on appeal by highlighting evidence contrary to the Full Commission's findings. However, we are bound by the Full Commission's findings if they are supported by any competent evidence, even if evidence appears to the contrary. *See* N.C. Gen. Stat. § 143-293 (2007); *Simmons*, 128 N.C. App. at 405, 496 S.E.2d at 793.

In the case *sub judice*, Trooper Ledford testified that he was traveling eastbound on U.S. 19/74 in the left lane. He passed a vehicle that was in the right lane, crested the hill, and came upon two vehicles—one in each lane of travel on eastbound U.S. 19/74. He then took his foot off of the accelerator to decelerate. Approximately 900 feet in front of him, he saw a white Chevrolet Lumina on the westbound side of the highway pull into the median crossover turn lane and come to a complete stop. Trooper Ledford testified that he had the right of way, and he anticipated that the Lumina would remain stopped in the westbound median crossover turn lane until the oncoming, east-

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bound traffic had passed. He stated that, “as soon as [the two vehicles] cleared the intersection, Ms. Boring pulled right in front of me, failed to yield, and we collided there in the intersection of U.S. 19[74].” Trooper Ledford testified that he “hit [his] brakes and took a hard, evasive [turn] to the right” in an effort to avoid the collision. Despite his efforts, he testified that he was unable to avoid the collision because Boring continued moving forward instead of stopping.

The parties stipulated that decedents were traveling together in the Lumina driven by Boring and that decedents died as a result of the collision. Trooper Ledford testified that he missed eighteen months of work from injuries he sustained as a result of the collision. Trooper Ledford’s injuries included “some lacerations to the forehead, a broken nose, broken ribs[,] and a hip injury that required surgery.”

Trooper Souther created an accident reconstruction report of the collision, and he testified that

[Trooper Ledford] had the right of way. . . . Even if [Trooper Ledford] had not had his blue light and siren on, which he did, he would still have the right of way. [Boring] has to wait until it’s clear—to attempt to make a left turn or even make a U-turn, she has to wait until it’s clear to do so.

As explained, *supra*, Trooper Souther further testified that Trooper Ledford’s only option was to swerve to the right to avoid the collision because (1) troopers are trained never to swerve left and cross the double yellow line into oncoming traffic; (2) if Trooper Ledford had swerved left, and Boring stopped her forward motion, Trooper Ledford still would have hit the Lumina; and (3) if Boring continued her forward motion, and Trooper Ledford swerved left, he could have crossed the grass median into oncoming, west-bound traffic.

Although Captain Randy Campbell (“Captain Campbell”), Trooper Ledford’s commanding officer at the time, did not supervise this high-speed pursuit, he testified that he reviewed Trooper Souther’s accident reconstruction report, audio and video tapes of the collision, and depositions. Captain Campbell opined that it was appropriate for Trooper Ledford to respond to the call in emergency response mode and that, if he had monitored the chase, he would not have told Trooper Ledford to do anything differently.

Accordingly, we hold that the Full Commission’s findings of fact numbered 7, 16, and 18 are supported by competent evidence.

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Next, we inquire whether the Full Commission's findings of fact support its conclusion of law number 2. *See Simmons*, 128 N.C. App. at 405-06, 496 S.E.2d at 793. We hold that they do.

North Carolina General Statutes, section 20-145 exempts police officers from speed limitations while chasing or apprehending "violators of the law" so long as police officers operate their vehicles with "due regard for safety." N.C. Gen. Stat. § 20-145 (2007). This exemption, however, does not protect police officers from "the consequence of a reckless disregard for the safety of others." *Id.* With respect to section 20-145, our Supreme Court has explained "that the standard of care intended by the General Assembly involves the reckless disregard of the safety of others, which is gross negligence." *Young v. Woodall*, 343 N.C. 459, 461-62, 471 S.E.2d 357, 359 (1996). "[G]ross negligence has been defined as wanton conduct done with conscious or reckless disregard for the rights and safety of others. Further, an act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Parish v. Hill*, 350 N.C. 231, 239, 513 S.E.2d 547, 551-52 (1999) (internal citations and quotation marks omitted). We previously have noted that "North Carolina's standard of gross negligence, with regard to police pursuits, is very high and is rarely met." *Eckard v. Smith*, 166 N.C. App. 312, 323, 603 S.E.2d 134, 142 (2004), *aff'd*, 360 N.C. 51, 619 S.E.2d 503 (2005) (per curiam).

In the case *sub judice*, in support of its conclusion that Trooper Ledford was not grossly negligent, the Full Commission found that Trooper Ledford responded to a radio alert from the Asheville Communications Division of the Highway Patrol, got into his patrol car, "activated his blue light and siren[,] and proceeded toward the chase in 'emergency response' mode." At some point during the pursuit, Trooper Ledford estimated that he traveled at a speed near 100 miles per hour. Trooper Ledford traveled eastbound on U.S. 19/74, crested a hill, passed a Honda, and decelerated when he came upon two cars ahead of him—one car in each eastbound lane. Furthermore, from a distance of approximately 900 feet, Trooper Ledford saw the Lumina driven by Boring come to a complete stop in the turn lane on the westbound side of a median crossover. No traffic lights or signs alter the flow of traffic on this portion of U.S. 19/74, and Trooper Ledford, along with the other cars on eastbound U.S. 19/74, had the right of way. The two vehicles in front of Trooper Ledford passed the median crossover, and Boring "suddenly and without warning pulled out in front of Trooper Ledford." Trooper Ledford immediately took

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evasive action by steering his patrol car hard to the right. Notwithstanding Trooper Ledford's evasive action, his patrol car collided with the Lumina, killed decedents, and injured Trooper Ledford.

However, in an unchallenged finding of fact, the Full Commission found that, "[b]y steering to the right, Trooper Ledford did the right thing" Also, Trooper Souther opined "that swerving right was Trooper Ledford's only option;" the Full Commission gave greater weight to the testimony of Trooper Souther than to Flanagan. The Full Commission found that "it was reasonable for Trooper Ledford to assume that the White Lumina driven by Mrs. Boring would not pull out in front of him." Thus, the Full Commission concluded that "Trooper Ledford's actions did not rise to [the] level of gross negligence."

We hold that these findings of fact support the Full Commission's conclusion of law number 2. Furthermore, conclusion of law number 2 comports with precedent established by our Supreme Court as well as this Court. *See, e.g., Villepigue v. City of Danville, VA*, 190 N.C. App. 359, 661 S.E.2d 12 (affirming summary judgment of no gross negligence by defendant even though officer traveled in excess of 100 miles per hour four seconds before colliding with decedent along an unfamiliar, two-lane road during a high-speed chase), *disc. rev. denied*, 362 N.C. 688, 671 S.E.2d 532 (2008); *Bray v. N.C. Dep't of Crime Control and Pub. Safety*, 151 N.C. App. 281, 284-85, 564 S.E.2d 910, 912-13 (2002) (holding no gross negligence after state trooper collided with oncoming vehicle during pursuit after losing control due to excessive speed); *Fowler v. N.C. Dept. of Crime Control & Public Safety*, 92 N.C. App. 733, 736, 376 S.E.2d 11, 13 (holding no gross negligence when officer caused a collision after the officer traveled at approximately 115 miles per hour, without lights or siren, through a sparsely populated area, and tried to overtake a suspect after an eight-mile chase), *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 773 (1989). *Cf. Jones v. City of Durham*, 168 N.C. App. 433, 608 S.E.2d 387 (2005)² (holding a genuine issue of material fact existed as

2. The appellate history of *Jones* began in this Court. *Jones*, 168 N.C. App. 433, 608 S.E.2d 387. The plaintiff subsequently appealed to the Supreme Court pursuant to Levinson, J.'s dissent. *Jones v. City of Durham*, 360 N.C. 81, 622 S.E.2d 596 (2005). Our Supreme Court originally affirmed the majority opinion of this Court. *See id.* The Supreme Court then granted plaintiff's petition for rehearing, *Jones v. City of Durham*, 360 N.C. 367, 629 S.E.2d 611 (2006), and reversed its prior affirmation for the reasons stated in Levinson, J.'s dissent. *See Jones v. City of Durham*, 361 N.C. 144, 146, 638 S.E.2d 202, 203 (2006) (per curiam). For clarity, we adopt the citation of the original appeal and the reasoning of Levinson, J.'s dissent, upon which our Supreme Court later relied. *Id.*

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to plaintiff's gross negligence claim when the officer responded to another officer's call for assistance—rather than a police pursuit—and drove at an excessive speed through a residential neighborhood without activating his blue lights or siren, all of which the officer knew created a high probability of an accident).

Trooper Ledford's actions did not rise to the level of gross negligence—"wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Parish*, 350 N.C. at 239, 513 S.E.2d at 551 (citation and quotation marks omitted). In response to the alert from the Highway Patrol, Trooper Ledford immediately proceeded toward the chase eastbound on U.S. 19/74 in emergency response mode with the right-of-way along a familiar four-lane highway with his blue lights and siren activated in light traffic on a clear afternoon. The Full Commission found that Boring was at a complete stop and that it was reasonable for Trooper Ledford to assume that the Lumina would wait for the vehicles with the right-of-way to pass the median crossover before turning across eastbound U.S. 19/74. Trooper Ledford's immediate evasive action was the only option available to him under the circumstances. Accordingly, we hold that the Full Commission did not err in concluding that "Trooper Ledford's actions did not rise to [the] level of gross negligence."

For the foregoing reasons, we affirm the Full Commission's decision and order denying plaintiffs' negligence claim against defendant.

Affirmed.

Judges ELMORE and STEPHENS concur.

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STATE OF NORTH CAROLINA, EX REL. ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA, PLAINTIFF v. SENECA-CAYUGA TOBACCO COMPANY AN UNINCORPORATED ARM OF THE SENECA-CAYUGA TRIBE OF OKLAHOMA, AND SENECA-CAYUGA TRIBAL TOBACCO CORPORATION, A SUCCESSOR IN INTEREST TO THE SENECA-CAYUGA TOBACCO COMPANY, DEFENDANTS

No. COA08-812

(Filed 19 May 2009)

1. Immunity— sovereign—tribal—tobacco settlement—waiver

The trial court properly granted defendants' motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) in an action by the State to enforce the escrow provisions of the tobacco settlement against a federally recognized Indian tribe. A limited waiver of sovereign immunity for the tribe's initial participation in the escrow agreement was not a consent to an attempt by the State to impose obligations with respect to funds that were never placed in escrow. A tribal business committee's resolution expressing an intent to comply with the act effectuating the agreement did not constitute an unequivocal express waiver of immunity.

2. Immunity— sovereign—tribal—tobacco settlement—limited waiver—not applicable

Although the trial court had appropriately granted relief on other grounds, it was held on appeal as an alternate justification for affirming the result that the trial court correctly granted summary judgment for defendants in an action in which the State sought to enforce the escrow provisions of the tobacco settlement against an Indian tribe. The State did not provide factual justification for the conclusion that defendants waived tribal sovereign immunity for the claims the State sought to assert.

Appeal by the State of North Carolina from order entered 5 May 2008 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 9 March 2009.

Attorney General Roy Cooper, by Special Deputy Attorneys General Richard L. Harrison and Melissa L. Trippe, for the plaintiff-appellant.

Troutman Sanders LLP, by Gary S. Parsons and Gavin B. Parsons; pro hac vice William H. Hurd and Ashley L. Taylor, Jr., for the defendants-appellees.

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ERVIN, Judge.

The State of North Carolina (the State) appeals from an order entered 5 May 2008 in Wake County Superior Court granting a motion to dismiss filed by Seneca-Cayuga Tobacco Company and Seneca-Cayuga Tribal Tobacco Corporation, the successor in interest to Seneca-Cayuga Tobacco Company (together, Defendants). We affirm the trial court's order.

In November 1998, North Carolina and forty-five other states signed a Master Settlement Agreement (MSA) with four major tobacco manufacturers for the purpose of settling claims that North Carolina could have otherwise asserted against those manufacturers arising from smoking-related health care costs incurred by the State as a result of the consumption of the major manufacturers' products. The General Assembly enacted a series of statutory provisions entitled the Tobacco Reserve Fund and Escrow Compliance Act (Act) in July, 1999 in order to effectuate the MSA. Pursuant to that legislation, all cigarette manufacturers doing business in North Carolina were made subject to N.C. Gen. Stat. § 66-291, which required them to choose between either (1) participating in the MSA or (2) paying certain specified sums, computed on the basis of the quantities of cigarettes sold by April 15 of each year, into a special fund. *See State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 433, 666 S.E.2d 107, 109 (2008). More specifically, N.C. Gen. Stat. § 66-291 provides that:

- (a) Any tobacco product manufacturer selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the effective date of this Article shall do one of the following:
 - (1) Become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or
 - (2) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):

N.C. Gen. Stat. § 66-291(a). The funds placed in escrow pursuant to N.C. Gen. Stat. § 66-291(a)(2) are intended to provide a source from which any judgment for reimbursement of medical costs obtained by

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the State against a nonparticipating manufacturer resulting from the consumption of cigarettes produced by that nonparticipating manufacturer can be satisfied.

According to N.C. Gen. Stat. § 66-291(c), “[e]ach tobacco product manufacturer that elects to place funds into escrow pursuant to this section shall annually certify to the Attorney General that it is in compliance with this section. The Attorney General may bring a civil action on behalf of the State against any tobacco product manufacturer that fails to place into escrow the funds required under this section.” N.C. Gen. Stat. § 66-291(c) further states that:

Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall:

- (1) Be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a violation either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section, may impose a civil penalty (the clear proceeds of which shall be paid to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2) in an amount not to exceed five percent (5%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent (100%) of the original amount improperly withheld from escrow;
- (2) In the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a knowing violation either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section, may impose a civil penalty (the clear proceeds of which shall be paid to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2) in an amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow; and
- (3) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the

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State (whether directly or through a distributor, retailer, or similar intermediary) for a period not to exceed two years.

Id. N.C. Gen. Stat. § 66-294(c) also requires that “nonparticipating manufacturer[s],” such as Defendants, “must submit an application to the Office of the Attorney General by April 30th of each year for inclusion on the compliant nonparticipating manufacturers’ list.” N.C. Gen. Stat. § 66-294(c) also provides that “[t]he application must include a certification that the nonparticipating manufacturer has fulfilled the duties listed in subsection (b) of this section and a list of the brand families of the manufacturer offered for sale in the State during either the current calendar year or the previous calendar year.”

Cigarette brands manufactured by Defendants were sold to consumers in North Carolina in 2001 and subsequent years. Defendants’ tribal business committee at one point expressed the intent to comply with North Carolina’s escrow requirements. As a result, Defendants applied to the State for certification to sell certain brands of cigarettes in North Carolina. More particularly, Defendants submitted a Certification of Compliance (Certification) acknowledging that Defendants manufactured certain specified brands on 30 April 2004, as required by N.C. Gen. Stat. §66-294(c). Defendants also appointed a process service agent in the Certification, and attached a letter from the designated process agent dated 21 April 2004 indicating that Corporation Service Company “hereby accepts the appointment as agent for service of process in the state of North Carolina for the above named nonresident or foreign non-participating tobacco product manufacturer, pursuant to N.C. Gen. Stat. § 66-294(b)(1).” In May 2004, Defendants entered into an Escrow Agreement with Wachovia Bank, N.A. (Wachovia), under which Defendants appointed Wachovia to serve as Escrow Agent of the “Qualified Escrow Fund” that Defendants were required to establish under the Act.

Defendants also complied with the statutory escrow requirements for sales made through the year 2004. For example, in April 2004, Defendants deposited \$1,863,015.30 into its escrow account as a result of the sale of 95,562,280 cigarettes in North Carolina in 2003. Similarly, Defendants complied with the State’s escrow requirements relating to sales made in North Carolina in 2004. After that date, however, Defendants evidently decided to cease compliance with the requirements of the Act. By 17 April 2006, Defendants owed \$725,739.01 to the escrow fund relating to the sale of 34,861,800 cigarettes in North Carolina in 2005. Even so, Defendants sold an

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additional 4,244,000 cigarettes in North Carolina in 2006, an action that obligated Defendants to pay an additional \$91,000.27 into the escrow fund. Defendants did not, however, deposit the required amounts relating to these 2005 and 2006 cigarette sales in their escrow account.

On 12 October 2007, the State filed a complaint seeking a preliminary and permanent injunction requiring Defendants to pay the amount required by the Act into its “Qualified Escrow Fund;” a preliminary and permanent injunction requiring Defendants to file the certificate of compliance required by law; an order prohibiting Defendants, and their successors and assigns, from selling or delivering tobacco products in North Carolina for a period of two years from the date of the court’s order; and the recovery of civil penalties, attorney fees and costs as authorized under the Act. The State also requested in its prayer for relief that the court “find and declare that Defendants are not entitled to sovereign immunity for sales off tribal lands or, in the alternative, that the Court declare that the Defendants have waived any sovereign immunity that might otherwise apply.”

On 13 December 2007, Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6), in which they alleged that the trial court lacked “jurisdiction over the subject matter and on grounds of tribal immunity.” Defendants asserted that “Seneca-Cayuga Tobacco Company and Seneca-Cayuga Tribal Tobacco Corporation, as enterprises of a federally-recognized Indian tribe, are immune from suit as a matter of Federal law.”

The trial court heard Defendants’ motion to dismiss on 6 March 2008, at which time the State made an oral motion to amend its complaint to add an affirmative allegation that Defendants had waived any tribal sovereign immunity defense. The State and Defendants submitted documents for the trial court’s consideration at the hearing.¹ On 4 April 2008, the trial court entered an order denying the State’s motion to amend its complaint and allowing Defendant’s dismissal motion. The trial court’s order had the effect of terminating the State’s claims against Defendants, rendering that order a final judg-

1. According to the trial court’s order, it considered “Exhibits 1 through 5 submitted by the State of North Carolina and Exhibits A, B and C submitted by the Defendants.” Although Exhibits 1 through 5 were attached to the State’s complaint and were, for that reason, part of the pleadings, the same cannot be said for Exhibits A, B, and C. As a result, the record clearly establishes that the trial court considered, apparently without objection, materials outside the pleadings in deciding Defendants’ dismissal motion.

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ment immediately appealable to this Court pursuant to N.C. Gen. Stat. § 7A-27(c). From this order, the State appeals.

Motion to Dismiss

In its argument on appeal, the State contends that the trial court erred in granting Defendants' motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6). After careful consideration of the record and briefs, we conclude that the trial court's decision to dismiss the State's complaint should be affirmed.²

Lack of Subject Matter Jurisdiction

[1] Rule 12(b)(1) of the Rules of Civil Procedure allows for the dismissal of a complaint due to a lack of jurisdiction over the subject matter of the claim or claims asserted in that complaint. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). "[T]he standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*." *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 155, 610 S.E.2d 210, 212 (2005). "[M]atters outside the pleadings . . . may be considered and weighed by the court in determining the existence of jurisdiction over the subject matter." *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978). This Court has held that sovereign immunity is a defense that is appropriately raised by means of a motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1).

Tribal sovereign immunity is a matter of federal law. *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 755-60, 118 S. Ct. 1700, 140 L. Ed. 2d 981, 986-88 (1998). An Indian tribe is subject to suit only to the extent that Congress has authorized the assertion of the claim or claims in question against the tribe or the tribe has expressly and unequivocally waived its tribal sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); see also *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 140 L. Ed. 981 (1998). Tribal sovereign immunity extends to commercial activity conducted by an Indian tribe outside its reservation. *Kiowa Tribe*, 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981. Furthermore, "[i]t is

2. As is discussed in more detail in Footnote No. 1 above, the record reflects that the trial court considered matters outside the pleadings in determining the issues raised by Defendants' dismissal motion. The record does not contain any indication that the State objected to the trial court's consideration of these materials or sought to have the 6 March 2008 hearing delayed in order to permit discovery to be taken concerning any issue, including the extent, if any, to which the trial court had jurisdiction over the subject matter of this case. As a result, we see no obstacle to the evaluation of the trial court's decision with respect to Defendants' dismissal motion on the merits on the basis of the existing record.

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settled that a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’ ” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106, 115 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 954, 47 L. Ed. 2d 114, 12 (1976) (internal quotation omitted)). The State does not dispute Defendants’ claim that, as a general proposition, they are entitled to rely on a defense of tribal sovereign immunity in resisting the State’s claims. As a result, unless the State provided some basis for the trial court to conclude that Defendants had “unequivocally expressed” their decision to waive tribal sovereign immunity with respect to the claims asserted in the State’s complaint, the State’s complaint would have been properly dismissed for lack of subject matter jurisdiction.

At the hearing on Defendants’ motion to dismiss, the State and Defendants submitted documents relating to the continued existence of Defendants’ tribal sovereign immunity and whether Defendants had waived that defense, including, but not limited to, the Constitution of the Tribe, the Business Committee’s 3 December 2003 resolution, and the Escrow Agreement submitted in accordance with N.C. Gen. Stat. § 66-294(a)(5). The Constitution of the Tribe vests in the Business Committee the power “to speak or act on behalf of the Tribe in all matters on which the Tribe is empowered to act.” On 3 December 2003, the Business Committee announced that “no waiver, either express or implied, of the right to assert sovereign immunity as a defense . . . shall be valid without the consent of the Business Committee expressed by resolution.” Furthermore, the Escrow Agreement, which was, as evidenced by the Certification of Compliance, approved by the Attorney General, stated that “the Tribe grants a *limited* waiver of its sovereign immunity, but *solely* with respect to amounts that are held in or previously have been held in the applicable Beneficiary State’s sub-account.” This limited waiver of sovereign immunity does not amount to a consent to the maintenance of the present litigation, which represents an attempt by the State to impose obligations on Defendants with respect to funds that never have been placed in escrow. Although the State has pointed to the Business Committee’s resolution expressing an intent to comply with the Act, to provisions in the Certification application that refer to the defense of claims “that may arise related to the Brand(s)” and Defendants’ assumption “of responsibility for all representations and Brands listed in this Application/Certification,” and to provisions in the Escrow Agreement expressing Defendants’ plans to file appropriate Certifications and to take other steps to comply with the Act,

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none of these statements constitute an unequivocal express waiver of Defendants' right to immunity from an effort by the State to collect unpaid amounts that should have been placed in escrow, penalties, or other relief that might be available under the Act. As a result, the trial court properly granted Defendants' dismissal motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1).

Failure to State a Claim for Which Relief Can be Granted

[2] We now determine whether the trial court erred by granting Defendants' dismissal motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).³ Preliminarily, we observe that, since the trial court considered matters outside the pleadings in granting Defendants' Rule 12(b)(6) motion, Defendants' motion was converted to one for summary judgment. *See Alamance County Hospital v. Neighbors*, 315 N.C. 362, 364-65, 338 S.E.2d 87, 88 (1986). A party seeking summary judgment must establish the absence of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). "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). All inferences are to be drawn against the moving party and in favor of the opposing party. *Deese*, 288 N.C. 375, 218 S.E.2d 379.

As a result of the fact that Defendants' status as tribal entities is unquestioned and the fact that Defendants tendered a document indicating a limited waiver of tribal sovereign immunity that did not extend to the claims asserted by the State, the State bore the burden of showing the existence of a genuine issue of material fact relating to the validity of the State's claim that Defendants waived tribal sovereign immunity. *See Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *appeal dismissed and 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) (stating that,

3. The Court's conclusion that the trial court appropriately granted relief under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) should, in the ordinary course of events, suffice to render the trial court's decision with respect to Defendants' motion under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) moot. As a result, we address the issues raised by the trial court's decision to allow Defendants' dismissal motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) as an alternative justification for affirming the result reached by the trial court.

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“[o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial”); see also *Beck v. City of Durham*, 154 N.C. App. 221, 229, 573 S.E.2d 183, 189-90 (2002) (stating that when the defendants, in moving for dismissal of the case, presented to the court an affidavit stating that the City did not waive its immunity, the burden once again shifted to the plaintiff, as the non-moving party, to introduce evidence in opposition to the motion that set forth specific facts showing that there was a genuine issue for trial, and that the plaintiff failed to come forward with a forecast of his own evidence of specific facts demonstrating that immunity was waived). However, the State failed to provide any factual information tending to show that Defendants waived tribal sovereign immunity with respect to the types of claims asserted in the State’s complaint; rather, the State simply asserted that the court should “find and declare that Defendants are not entitled to sovereign immunity for sales off tribal lands or, in the alternative, that the Court [should] declare that the Defendants have waived any sovereign immunity that might otherwise apply.” After a careful review of the material in the record and for the reasons given in response to the State’s challenge to the trial court’s ruling with respect to the subject matter jurisdiction issue, we conclude that the State failed to provide the trial court with a factual justification necessary to support a conclusion that Defendants waived tribal sovereign immunity with respect to the claims that the State seeks to assert against Defendants. As a result, the record does not suggest the existence of a genuine issue of material fact with respect to whether Defendants waived tribal sovereign immunity, and we conclude that Defendants were entitled to judgment as a matter of law with respect to this issue. Thus, the trial court did not err by granting summary judgment in Defendants’ favor with respect to the tribal sovereign immunity issue.⁴

Conclusion

As a result, we conclude that the trial court did not err by granting Defendants’ dismissal motion pursuant to N.C. Gen. Stat. § 1A-1,

4. As we noted in Footnote No. 1 above, the record does not reflect that the State objected to the trial court’s decision to consider the additional documents tendered by Defendants or sought a continuance in order to conduct discovery concerning the sovereign immunity issue. Thus, we see no procedural obstacle arising from the proceedings in the trial court that would prevent us from appropriately considering this issue on the merits.

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Rule 12(b)(1) or granting summary judgment against the State and in favor of Defendants on the tribal sovereign immunity issue.⁵ As a result, we affirm the order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge WYNN concur.

TERRY DEAN HENSON AND WIFE NANCY RATHBONE HENSON, PLAINTIFFS v. GREEN TREE SERVICING LLC, DEFENDANT

No. COA08-1074

(Filed 19 May 2009)

1. Uniform Commercial Code— alleged breach of contract— warranty of clear title—mobile home

The trial court did not err by concluding that defendant did not breach its contract with plaintiffs by allegedly not providing clear title to plaintiffs for a mobile home, nor did it breach the warranty of clear title, because there was no evidence that defendant failed to transfer clear title when: (1) plaintiff wife admitted she received a title free from any liens from defendant; and (2) plaintiffs presented no evidence that the title was encumbered. N.C.G.S. § 25-2-312.

2. Appeal and Error— preservation of issues—failure to argue

Although plaintiffs contend defendant was negligent for breach of its duty to ensure that defendant had clear title and duties to hire and supervise employees, this assignment of error is abandoned under N.C. R. App. P. 28(b)(6) based on plaintiffs' failure to discuss the negligence claim in their brief.

5. The State also contended before this Court that the trial court erred by denying an oral motion for leave to amend its complaint to allege a waiver of tribal sovereign immunity. As is set forth in more detail above, we have affirmed the trial court's decision to dismiss the State's complaint based upon the absence of any evidence tending to show that Defendants waived tribal sovereign immunity with respect to the claims asserted in the State's complaint in the materials submitted to the trial court. Our decision to affirm the trial court's order does not, in any way, rest upon the absence of allegations asserting that Defendants waived tribal sovereign immunity from the State's complaint. As a result, we do not need to address the trial court's denial of the State's amendment motion in order to adequately resolve the issues raised by the State's appeal.

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3. Fraud; Unfair Trade Practices— allegations of forged agreement—clear title

The trial court did not err by concluding that an alleged forged agreement, coupled with the relationship between defendant and Gordon, the owner of property on which a mobile home had been stored, was insufficient to support a claim for fraud and unfair and deceptive trade practices because: (1) the purported forgery was immaterial and did not support either claim in light of the fact that defendant provided clear title; (2) even if plaintiff wife did not sign the agreement, plaintiffs did not suffer damage since the mobile home was not encumbered with a storage lien from Gordon; (3) there was no evidence that defendant contracted with Gordon to move the mobile home to his property, and instead the evidence revealed that Gordon moved the mobile home without permission or authorization from defendant; and (4) there was not more than a scintilla of evidence as to who in fact signed plaintiff wife's name to the agreement.

4. Damages and Remedies— exclusion of plaintiff's evidence—verdict in defendant's favor

Although plaintiffs contend they should have been permitted to introduce evidence of damages to the jury, the Court of Appeals declined to address this alleged error because the verdict was in defendant's favor.

5. Appeal and Error— preservation of issues—failure to argue—failure to cite authority

Although plaintiffs contend the trial court should have permitted them to offer evidence as to their communications with Johnson and as to defendant's relationship with Gordon, this assignment of error is abandoned under N.C. R. App. P. 28(b)(6) because plaintiffs offered no argument and failed to cite authority in support of the admissibility of such evidence.

Appeal by plaintiffs from judgment entered 25 February 2008 by Judge J. Marlene Hyatt in Henderson County Superior Court. Heard in the Court of Appeals 25 February 2009.

The Lovins Law Firm, P.A., by Shannon Lovins, for plaintiff-appellants.

Smith Moore Leatherwood LLP, by Robert R. Marcus and C. Bailey King, Jr., for defendant-appellee.

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HUNTER, Robert C., Judge.

Terry and Nancy Henson (collectively “plaintiffs,” “Mr. Henson” or “Mrs. Henson”)¹ appeal from a directed verdict dismissing their action for breach of contract, breach of warranties, negligence, unfair and deceptive practices, and fraud against Green Tree Servicing, LLC (“defendant” or “Green Tree”) arising out of their purchase of a mobile home that was previously owned by defendant. Plaintiffs also appeal the trial court’s decision to exclude testimony related to plaintiffs’ communications with various persons involved in the transaction and photographs depicting plaintiffs’ damages. After careful review, we affirm.

I. Facts

Around March 2004, defendant listed the mobile home for sale on a publicly available list. Patrick Johnson (“Mr. Johnson”), an independent mobile home dealer, contacted defendant about the mobile home. Defendant informed Mr. Johnson that the mobile home was located on the property of Ben Gordon (“Mr. Gordon”) and that Mr. Johnson might encounter difficulty removing the home from Mr. Gordon’s property. Defendant was aware that Mr. Gordon demanded compensation for moving the mobile home from a third party’s property and for storing it on his property. Defendant did not authorize or request Mr. Gordon’s services. Defendant did not believe that it owed Mr. Gordon any money or that Mr. Gordon had a valid lien. On or about 13 December 2004, Mr. Johnson made an offer of \$7,650 for the mobile home.

Defendant sent an Agreement to Purchase Repossessed Manufactured Home (the “Agreement”) to Mr. Johnson, who was listed as the buyer. The location of the mobile home was listed as: “Private drive off Massey Dr. in Fletcher/Henderson[.]” The date listed on the Agreement was 13 December 2004. The Agreement stated: “Offer good thru 12/17/04” and that the “[b]uyer assumes all responsibilities for storage and/or mechanic liens[.]”

Around the same time that Mr. Johnson and defendant were in discussions, Mrs. Henson responded to Mr. Johnson’s newspaper advertisement of the mobile home. Mrs. Henson met with Mr. Johnson at his office and later viewed the mobile home at its location on Mr. Gordon’s property. During the course of her negotiations,

1. Mr. Henson is a named plaintiff in this case; however, he was not involved in the transaction at issue.

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Mrs. Henson knew that defendant, and not Mr. Johnson, owned the mobile home.

After viewing the mobile home, Mrs. Henson and Mr. Johnson began price negotiations. Mrs. Henson and Mr. Johnson agreed that Mrs. Henson would purchase the mobile home for the price of \$12,200, and Mrs. Henson would be responsible for moving it off Mr. Gordon's property. There is testimony that Mrs. Henson signed a "Contract to Purchase and Deposit Agreement" for the mobile home that listed "Nancy Rathbone Henson" as the buyer and "Patrick Johnson" as the seller.² Mrs. Henson paid for the mobile home with a check written to Patrick Johnson, individually, for \$12,200.

Mr. Johnson then informed defendant that plaintiffs were going to be the owners of the mobile home. Defendant told Mr. Johnson that Mrs. Henson needed to sign the Agreement that was previously sent to Mr. Johnson. The next day, Mr. Johnson delivered a certified check to defendant in the amount of \$7,650 and a copy of the Agreement that was purportedly signed by Mrs. Henson. Patrick Johnson's name was crossed out and "Nancy Rathbone Henson" was written beside it. Defendant then transferred titled directly to Mrs. Henson.

According to Mrs. Henson, her son, Travis Henson ("Travis"), along with Mr. Johnson, met with an employee of defendant, David Worthington, on 14 December 2004. Mrs. Henson testified that Travis tendered the check for \$12,200 to Mr. Johnson at the meeting, and Mr. Johnson gave title of the mobile home to Travis who then brought it to Mrs. Henson. The title listed defendant as the seller and had already been signed by defendant. There were no liens listed on the title. Prior to receiving title, Mrs. Henson stated that she received a damage disclosure statement signed by defendant.

At trial, Mrs. Henson claimed that she did not sign the Agreement and that her signature was forged by an unknown person on behalf of defendant. She further claimed that no one advised her of any type of storage lien on the mobile home. Plaintiffs' handwriting expert testified that "Nancy Henson probably did not sign . . . [the Agreement]." Plaintiffs' expert did not say who signed the Agreement.

After plaintiffs obtained title, they attempted to move the mobile home from Mr. Gordon's property. Plaintiffs moved only half of the mobile home in January 2005, but were unable to move the second

2. The agreement between Mr. Johnson and Mrs. Henson is not contained in the record.

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half because Mr. Gordon parked his van in front of his driveway so as to block entrance to the property. Mrs. Henson spoke with law enforcement officers who confirmed that she had clear title and had the right to move the mobile home. The movers could have moved the van out of the driveway and taken the mobile home that day, but Mrs. Henson instructed them not to do so.

From January 2005 to October 2006, the other half of the mobile home remained on Mr. Gordon's property, where it was vandalized and fell into disrepair. After receiving a phone call from Mr. Gordon, plaintiffs moved the second half of the mobile home around October 2006.

At trial, plaintiffs offered the testimony of: 1) Mrs. Henson; 2) Mr. Henson; 3) Travis Henson; 4) David Worthington; 5) Jim Karr, David Worthington's supervisor; and 6) Teresa Dean, a forensic document examiner. Plaintiffs did not call Mr. Gordon or Mr. Johnson as witnesses. After the close of plaintiffs' evidence, the trial court granted defendant's motion for directed verdict. Plaintiffs now appeal.

II. Standard of Review

"This Court reviews a trial court's grant of a motion for directed verdict *de novo*." *Weeks v. Select Homes, Inc.*, 193 N.C. App. 725, 730, 668 S.E.2d 638, 641 (2008). Upon a motion for directed verdict, the court must consider all evidence in the light most favorable to the non-moving party, and may grant the motion only if, as a matter of law, there is not more than a scintilla of evidence to support each element of the non-moving party's claim. *Id.*; *Kelly v. Harvester Co.*, 278 N.C. 153, 158, 179 S.E.2d 396, 398 (1971). The plaintiff must "offer evidence, beyond mere speculation or conjecture, sufficient for a jury to find every essential element of their claim." *Abell v. Nash County Bd. of Education*, 89 N.C. App. 262, 264-65, 365 S.E.2d 706, 707 (1988).

III. Breach of Contract and Breach of Warranty Claims

[1] Plaintiffs argue that there was sufficient evidence for a reasonable jury to conclude that defendant breached its contract with plaintiffs by not providing clear title to plaintiffs and consequently, that defendant also breached the warranty of clear title. We disagree.

The Uniform Commercial Code, found in Chapter 25 of the North Carolina General Statutes, controls the rights of parties in the sale of a mobile home not affixed to realty. *See Hensley v. Ray's Motor Co. of Forest City, Inc.*, 158 N.C. App. 261, 264, 580 S.E.2d 721, 723

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(2003). Breach of title claims are generally governed by N.C. Gen. Stat. § 25-2-312 (2007), which provides that the seller shall convey goods free from any liens that the buyer has no knowledge of at the time of contracting.

Furthermore, “ ‘prior decisions of this Court and our Supreme Court have classified a mobile home as a “motor vehicle” for purposes of interpreting the application of our motor vehicle laws to mobile homes.’ ” *Id.* (quoting *Hughes v. Young*, 115 N.C. App. 325, 328, 444 S.E.2d 248, 250 (1994)). Our Courts have held that when a party transfers title to a motor vehicle, they implicitly warrant that the title is clear of any liens or encumbrances. *See Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Automobile, Inc.*, 87 N.C. App. 467, 473, 361 S.E.2d 418, 422 (1987) (holding that it was “impossible” for a seller to transfer title of a motor vehicle to an auto-dealer without warranting title pursuant to the title transfer forms of the North Carolina Department of Motor Vehicles). A towing and storage lien exists when a person tows or stores a mobile home pursuant to an express or implied contract with the owner or legal possessor. N.C. Gen. Stat. § 44A-2(d) (2007); *See Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 342, 515 S.E.2d 223, 225 (1999) (holding that tower and storer of mobile home had a valid lien when the sheriff directed the tower to move the mobile home). If the lienor is asserting a lien against a motor vehicle, the lienor shall give notice to the Division of Motor Vehicles that a lien is asserted, and the Division of Motor Vehicles shall issue the lien to the person having legal title. *See* N.C. Gen. Stat. § 44A-4(b)(1)(2007).

Plaintiffs argue that since defendant, as the original owner, did not disclose the possible encumbrance or exclude the warranty by specific language, then defendant breached its contract with plaintiff and the warranty of title. We disagree and find that there was no evidence that defendant failed to transfer clear title; thus, there is no support for a breach of contract claim.

First, defendant did in fact transfer title to plaintiffs. Mrs. Henson admitted that she received a title, free from any liens from defendant. Plaintiffs presented no evidence that this title was encumbered. Plaintiffs did not introduce evidence of a lien, or call Mr. Gordon to testify. The evidence at trial tended to show that no one contracted with Mr. Gordon to remove the mobile home for a fee. There was no evidence that the Department of Motor Vehicles (DMV) sent notice to defendant that Mr. Gordon asserted a lien on the mobile home or that Mr. Gordon sent the DMV a notice of lien. Moreover, Mrs. Henson tes-

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tified that the local police informed her that she had clear title and could remove the mobile home from Mr. Gordon's property. For the foregoing reasons, there was not more than a scintilla of evidence for the breach of warranty of title claim to survive the motion for directed verdict.

Accordingly, plaintiffs claim for breach of contract must also fail. There was no breach because defendant performed its obligation by providing clear title.

IV. Negligence

[2] Plaintiffs' complaint alleges that defendant was negligent for breach of its duty to "ensure that [defendant] had clear title" and duties to hire and supervise employees. Plaintiffs do not discuss the negligence claim in their brief. Pursuant to N.C. R. App. P. 28(b)(6), "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." Accordingly, this argument is deemed abandoned.

V. Fraud and Unfair and Deceptive Practices

[3] Plaintiffs argue that the allegedly forged Agreement, coupled with the relationship between Mr. Gordon and defendant, is sufficient evidence to support their claims for fraud and unfair and deceptive practices. We disagree.

The essential elements of fraud are a "(1) [f]alse representation or concealment of a [past or existing] material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 437, 617 S.E.2d 664, 670 (2005)(quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)).

"[U]nfair or deceptive acts or practices in or affecting commerce, are . . . unlawful." N.C. Gen. Stat. § 75-1.1 (2007). "To prevail on such a claim, a plaintiff must show '(1) 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 his business.'" *Walker v. Fleetwood Homes of N.C., Inc.*, 176 N.C. App. 668, 671, 627 S.E.2d 629, 31 (2006) (quoting *Mitchell v. Linville*, 148 N.C. App. 71, 73-74, 557 S.E.2d 620, 623 (2001)). *Walker* states that "[i]f a practice has the capacity or tendency to deceive, it is deceptive

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for the purposes of the statute.” *Id.*, 627 S.E.2d at 631-32 (quoting Mitchell, 148 N.C. App. at 74, 557 S.E.2d at 623). “ ‘A practice is unfair when it offends established public policy, as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.’ ” *Id.* at 671, 627 S.E.2d at 632 (quoting Mitchell, 148 N.C. App. at 74, 557 S.E.2d at 623).

Plaintiffs argue that defendant, or someone on behalf of defendant, forged Mrs. Henson’s name on the Agreement and that this act constituted fraud and was an unfair and deceptive act.

We find that the purported forgery is immaterial and does not support either claim in light of the fact that defendant provided clear title. The language in the Agreement relieves defendant from any liability from any encumbrance on the mobile home. The allegedly forged document provides that the mobile home is being sold “AS IS/WHERE IS” with “[n]o warranties or guarantees . . . expressed or implied[.]” and that the “[b]uyer assumes all responsibilities for storage and/or mechanic liens, [and] storage and/or transport bills.”

There is no evidence Mrs. Henson received anything other than a mobile home without encumbrances. Mrs. Henson admits that she received clear title to the mobile home from defendant. Mrs. Henson said that she could have moved the mobile home off of Mr. Gordon’s property. Mrs. Henson even knew of the legal process to obtain her property from Mr. Gordon. Thus, even if Mrs. Henson did not sign the Agreement, plaintiffs did not suffer damage because the mobile home was not encumbered with a storage lien from Mr. Gordon.

In addition, there is no evidence that defendant contracted with Mr. Gordon to move the mobile home to his property. Instead, there was evidence that Mr. Gordon moved the mobile home without permission or authorization from defendant. Also, there was not more than a scintilla of evidence as to who in fact signed Mrs. Henson’s name to the Agreement.

VI. Evidence Concerning Damages

[4] Plaintiffs argue that they should have been permitted to introduce evidence of damages to the jury. We decline to address this alleged error. *See Wells v. French Broad Elec. Mem. Corp.*, 68 N.C. App. 410, 413, 315 S.E.2d 316, 318-19 (1984) (stating that when the verdict is in defendant’s favor, this Court need not address errors relating to the determination of damages).

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VII. Evidence of Communications with Mr. Johnson and Defendant's Relationship with Ben Gordon.

[5] Plaintiffs claim that the trial court should have permitted them to offer evidence as to their communications with Patrick Johnson and as to defendant's relationship with Ben Gordon. Plaintiffs offer no argument and cite no authority in support of the admissibility of such evidence. Pursuant to N.C. R. App. P. 28(b)(6) "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." Accordingly, this argument is deemed abandoned.

VIII. Conclusion

Taken in the light most favorable to plaintiffs, there was not more than a scintilla of evidence that plaintiffs' claims could be asserted against defendant. We decline to address plaintiffs' arguments concerning admissibility of evidence. Accordingly, the trial court did not err in granting defendant's motion for directed verdict.

Affirmed.

Judges CALABRIA and HUNTER, Robert N., Jr. concur.

SCOTLAND COUNTY SCHOOLS, PETITIONER v. DONNA F. LOCKLEAR AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. COA08-795

(Filed 19 May 2009)

1. Unemployment Compensation— provisional teacher—failure to comply with licensure requirements

The superior court did not err in an unemployment case by applying N.C.G.S. § 96-14(2b) because claimant provisional teacher's termination was based upon her failure to comply with the employer's licensure requirements and not upon misconduct or substantial fault.

2. Unemployment Compensation— sufficiency of findings of fact—disqualification from benefits

The superior court erred by concluding that claimant was disqualified from unemployment benefits under N.C.G.S.

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§ 96-14(2b), and the case is remanded to the superior court for further remand to the Employment Security Commission to make appropriate findings of fact under N.C.G.S. § 96-14(2b) to determine whether there was a disqualification from unemployment benefits, because: (1) the Commission's findings were predicated upon an erroneous legal theory under N.C.G.S. § 96-14(2) and (2a) rather than the correct legal theory under section (2b); (2) there were no findings that specifically discussed the requirements of N.C.G.S. § 96-14(2b); (3) the status of claimant's provisional license is not discussed and is unclear from the record; and (4) there are no findings as to whether her failure to procure the full license required for her continued employment was within her power to control, guard against, or prevent.

Judge STROUD concurring in part and dissenting in part.

Appeal by respondent Commission from judgment entered 5 March 2008 by Judge Robert F. Floyd, Jr. in Scotland County Superior Court. Heard in the Court of Appeals 4 December 2008.

Williamson, Dean, Williamson & Sojka, L.L.P., by Nickolas J. Sojka, Jr., and Daniel B. Dean, for petitioner-appellant.

Thomas S. Whitaker, Chief Counsel, by Thomas H. Hodges, Jr., for respondent-appellant Employment Security Commission of North Carolina.

Tharrington Smith, L.L.P., by Ann L. Majestic & Robert M. Kennedy and North Carolina School Boards Association, by Allison B. Schafer, Amicus Curiae for North Carolina School Boards Association.

STEELMAN, Judge.

The superior court correctly concluded that the Commission erred in applying N.C. Gen. Stat. §§ 96-14(2) and (2a) rather than § 96-14(2b) to Locklear's claim for unemployment benefits. The Commission did not make sufficient findings of fact for this Court to engage in effective appellate review of the issues presented under N.C. Gen. Stat. § 96-14(2b), and this matter is remanded for further findings of fact.

I. Procedural and Factual Background

The record in this matter reveals the following: The Scotland County Schools (employer) hired Donna Locklear (claimant) as a lat-

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eral-entry kindergarten teacher in 2003. As a lateral-entry teacher, claimant possessed a provisional teaching license. To retain her position, claimant was required to pass a state licensing examination known as "PRAXIS." On 30 October 2006, claimant was notified that her provisional teaching license had expired, and it was "essential that [she] complete all requirements prior to May 1, 2007 or risk the possibility of not being reemployed for the 2007-08 school year." On 14 June 2007, claimant was terminated from her position for failure to pass the PRAXIS exam.

Claimant filed for unemployment benefits effective 22 July 2007. On 1 September 2007, her claim was denied by the Employment Securities Commission (Commission) on the basis of N.C. Gen. Stat. § 96-14(2). The Adjudicator determined that "Claimant was separated from this job because she did not pass the test which was required for continued employment." Claimant appealed.

Following a 2 October 2007 hearing, an Appeals Referee ruled that claimant was not disqualified for benefits under N.C. Gen. Stat. § 96-14(2) because she was not "discharged for substantial fault or misconduct." Employer appealed. On 6 November 2007, the Commission affirmed the decision of the Appeals Referee.

On 6 December 2007, employer filed a Petition for Judicial Review in Scotland County Superior Court. On 24 March 2008, the superior court entered an order reversing the decision of the Commission, applying N.C. Gen. Stat. § 96-14(2b) rather than § 96-14(2), and ruling that, upon the findings of fact made by the Commission, claimant was disqualified under § 96-14(2b) from receiving unemployment benefits. Commission appeals.

II. Standard of Review

"[W]hen judicial review is sought of decisions of the Commission on unemployment benefits, 'the findings of fact by the Commission, if there is evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law.'" *Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 448, 349 S.E.2d 842, 847 (1986) (quoting N.C.G.S. § 96-15(i) (1985)); N.C. Gen. Stat. § 96-15(i) (2007).

In reviewing ESC decisions the superior court must determine whether the facts found by the Commission are supported by any competent evidence and whether those facts support the Com-

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mission's conclusions of law. *Employment Security Comm. v. Young Men's Shop*, 32 N.C. App. 23, 231 S.E.2d 157, *disc. rev. denied*, 292 N.C. 264, 233 S.E.2d 396 (1977). Additionally, "[i]f the findings of fact made by the Commission, even though supported by competent evidence in the record, are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding should be remanded to the end that the Commission make proper findings." *In re Bolden*, 47 N.C. App. 468, 471, 267 S.E.2d 397, 399 (1980).

Dunlap v. Clarke Checks, Inc., 92 N.C. App. 581, 583-84, 375 S.E.2d 171, 173 (1989). The Commission's findings of fact are binding if supported by any competent evidence, but its conclusions of law are reviewed *de novo*. *Housecalls Nursing Servs. v. Lynch*, 118 N.C. App. 275, 278, 454 S.E.2d 836, 839 (1995); N.C. Gen. Stat. § 96-15(i).

III. N.C. Gen. Stat. § 96-14(2b) is the Controlling Statute

[1] In its first argument, the Commission contends that the superior court erred in applying N.C. Gen. Stat. § 96-14(2b). We disagree.

The 1985 General Assembly enacted subsection (2b) of N.C. Gen. Stat. § 96-14, which states that an individual shall be disqualified for benefits:

For the duration of his unemployment beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that the individual is, at the time such claim is filed, unemployed because the individual has been discharged from employment because a license, certificate, permit, bond, or surety that is necessary for the performance of his employment and that the individual is responsible to supply has been revoked, suspended, or otherwise lost to him, or his application therefor has been denied for a cause that was within his power to control, guard against, or prevent.

N.C. Gen. Stat. § 96-14(2b) (2007).

The superior court ruled that:

4. The Employment Security Commission's conclusion of law that "the evidence fails to show that claimant was discharged from the job for substantial fault or misconduct connected with

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the work” improperly applies the law and is irrelevant to the findings of fact.

5. The case at bar is governed by G.S. 96-14(2b)

The Commission made seven findings of fact, four of which addressed the licensure requirements of claimant’s employment. Specifically, the Commission found that: claimant was discharged because she failed to meet the requirements needed to maintain her teaching position; to legally retain her position, claimant was required to pass the PRAXIS test; and, despite taking preparatory classes and sitting on multiple occasions, claimant “was unable to pass.” Based upon these findings, it is clear that claimant’s termination was based upon her failure to comply with employer’s licensure requirements and not upon misconduct or substantial fault. Because the termination did not implicate the misconduct or substantial fault provisions of N.C. Gen. Stat. § 96-14, we hold that the trial court correctly concluded that the controlling statute was subparagraph (2b) of N.C. Gen. Stat. § 96-14.

This argument is without merit.

IV. Findings Under N.C. Gen. Stat. § 96-14(2b)

[2] In its second argument, the Commission contends that the superior court erred in concluding that the claimant was disqualified from unemployment benefits pursuant to N.C. Gen. Stat. § 96-14(2b), *supra*. We agree.

In its entirety, conclusion of law 5 in the order reads:

5. The case at bar is governed by G.S. 96-14(2b) and the claimant’s employment was terminated because of her failure to obtain a teaching license or certificate necessary for the performance of her employment, through her failure to achieve a passing score upon the PRAXIS II examination, and to do so was within her power to control, guard against or prevent.

To affirm the ruling of the superior court, this Court must determine that this conclusion is supported by the Commission’s findings of fact and did not require further findings by the superior court. *Burlington Industries*, 318 N.C. at 448, 349 S.E.2d at 847 (the jurisdiction of the superior court is limited to questions of law).

N.C. Gen. Stat. § 96-14(2b) is not a paragon of clarity. It is not clear from the face of the statute whether the clause “a cause that

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was within his power to control, guard against, or prevent[]” modifies the entire section, or only the last portion, of the statute. When confronted with such an ambiguity, this Court looks to both the legislative history of the relevant section and the section’s context within the entire statute. *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991).

N.C. Gen. Stat. § 96-14(2b) was enacted by the General Assembly as part of the 1985 Session Laws, Chapter 552, in order to “make[] clear that benefits are not payable to an individual where his unemployment is caused by losing a license or certificate required for his work for reasons¹ that he could have prevented.” House Committee on Employment Security Report, *Explanation of House Bill 567*, (May 1, 1985). This is consistent with the declaration of public policy contained in N.C. Gen. Stat. § 96-2, which is that the State of North Carolina shall set aside unemployment reserves “to be used for the benefit of persons unemployed through no fault of their own.” N.C. Gen. Stat. § 96-2 (2007).

We hold that all of N.C. Gen. Stat. § 96-14(2b) is subject to the requirement that the loss or denial of licensure must result from a cause that was within the power of the employee to “control, guard against, or prevent.” We further hold that this determination is a question of fact, not a question of law.

In the instant case, the Commission found that:

3. The claimant was discharged from this job because she failed to meet the requirements needed to maintain the position for which she had been hired.
4. To legally retain her position as a teacher, the claimant was required to pass a test called Praxis.
5. The claimant took all training classes, etc. offered to prepare for the test, and she took the test on several occasions. The claimant was unable to pass the test.
6. The claimant was informed that she would not be allowed to continue in her position as she had not passed the rest [sic] within the allotted time.

The Commission’s findings in the instant case were predicated upon an erroneous legal theory under N.C. Gen. Stat. § 96-14(2) and

1. The example provided by the House Committee is that of “a truck driver who loses his driver’s license because of speeding convictions or DWI, etc.”

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(2a), rather than the correct legal theory under section (2b). There are thus no findings that specifically discuss the requirements of N.C. Gen. Stat. § 96-14(2b). The status of claimant's provisional license, and its relationship to a full license, are not discussed and are unclear from the record. Further, there are no findings as to whether her failure to procure the full license required for her continued employment was within her "power to control, guard against, or prevent." It is not the role of the trial court or appellate courts to make findings of fact in proceedings under Chapter 96.

V. Conclusion

We affirm the superior court's determination that the Commission erred in analyzing claimant's discharge under the provisions of N.C. Gen. Stat. § 96-14(2) and (2a) rather than the provisions of N.C. Gen. Stat. § 96-14(2b). The trial court's conclusion of law 4, and conclusion of law 5 to the extent that it ruled that N.C. Gen. Stat. 96-14(2b) is the governing statute, are affirmed. We vacate the remainder of conclusion of law 5, conclusion of law 6, and the decretal portion of the trial court's order.

We remand this matter to the superior court for further remand to the Commission. Upon remand, the Commission shall make appropriate findings of fact under N.C. Gen. Stat. § 96-14(2b) and determine whether there was a disqualification from unemployment benefits under that statute.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge CALABRIA concurs.

Judge STROUD concurs in part and dissents in part by separate opinion.

STROUD, Judge, concurring in part, dissenting in part.

As to the first issue regarding N.C. Gen. Stat. § 96-14(2b) being the controlling statute, I concur with the majority opinion. As to the second issue regarding the findings under N.C. Gen. Stat. § 96-14(2b), I agree with the majority opinion that this case should be remanded to the Commission for additional findings of fact as to "[t]he status of claimant's provisional license and its relationship to a full license," but I write separately because I disagree that additional findings are needed as to whether claimant's failure to procure the full license

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required for her continued employment was within her “power to control, guard against, or prevent.” Thus, as to the second issue I concur in part and dissent in part.

As noted by the majority, the Commission made a finding of fact number 5 which reads, “The claimant took all training classes, etc. offered to prepare for the test, and she took the test on several occasions. The claimant was unable to pass the test.” I would hold that this finding of fact provides a sufficient basis for the Superior Court’s conclusion of law number 5, which concludes in pertinent part that achieving a “passing score upon the PRAXIS II examination . . . was within her power to control, guard against or prevent.”

The evidence before the Commission and its findings of fact clearly establish that the claimant prepared for and took the PRAXIS test on several occasions, but did not pass it. Thus, the relevant question is whether passing the PRAXIS test is a matter that was within claimant’s “power to control,” or, stated negatively, if failing the test was something claimant could “guard against, or prevent.” N.C. Gen. Stat. § 96-14(2b) (2007). In the context of this case, only the question of claimant’s “power to control” her performance on the test is applicable. The Commission argues that passing the required test was not within claimant’s “power to control” simply because she was unable to pass the test despite proper preparation. I disagree.

Under these facts, passing the test was under claimant’s “power to control[;]” *id.*, the fact that she did not pass does not eliminate claimant’s “power” to control this requirement. Certainly there could be a factual situation where passing a test required to obtain or retain a professional license was somehow rendered beyond a claimant’s “power to control[.]” *See id.* For example, a claimant may have taken a required test, but due to errors within the test itself or in scoring the test, both clearly beyond the claimant’s control, the test results were delayed or voided, and as a result the claimant lost the job for which the test was required. Here, where the claimant took the required test, and there is no indication of any problem other than the claimant’s inability to pass, achieving a passing score on the test is, as a matter of law, within her “power to control.” *Id.* I would hold that the superior court properly made this conclusion of law.

The only findings of fact lacking in the Commission’s order are those relating to the details of claimant’s provisional teaching license and its relation to her full license. As to the second issue, I therefore concur in remanding to the superior court for further remand to the

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Commission for additional findings regarding the licensing process only. I also thus concur in vacating conclusion of law number 6 and the decretal portion of the trial court's order. I dissent in remanding for additional findings as to whether the claimant's failure to procure her full license as required for continued employment was within her "power to control, guard against, or prevent," *see id.*, and I would affirm the ruling of the superior court as to this issue. I also therefore dissent in vacating finding of fact number 5.

STATE OF NORTH CAROLINA v. DENNIS ALLEN PALMER, II, DEFENDANT

No. COA08-633

(Filed 19 May 2009)

1. Appeal and Error— grant of motion to suppress—State's appeal from district to superior court—no statutory appellate appeal—certiorari

Although the State had no statutory right of appeal, its petition for a writ of *certiorari* was granted to allow the State to appeal from a superior court order concluding that the State had not properly appealed a district court preliminary order granting defendant's motion to dismiss.

2. Appeal and Error— grant of motion to suppress—State's appeal from district to superior court—timeliness

The superior court erred by concluding that it was unable to determine whether it had jurisdiction to hear the State's appeal from a district court preliminary order granting defendant's motion to suppress based on the conclusion that the State was required to allege that the appeal was taken within ten days of the district court's preliminary determination.

3. Appeal and Error— grant of motion to suppress—State's appeal from district to superior court—certificate of service—clerical error

The superior court erred by concluding that the State's failure to include the month in the date given on a certificate of service of an appeal from district court to superior court rendered it unable to determine whether the appeal was timely.

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Defendant did not allege that he was misled or prejudiced by the clerical error.

Appeal by the State from order entered 3 March 2008 by Judge Mark Klass in Davidson County Superior Court. Heard in the Court of Appeals 26 January 2009.

Roy Cooper, Attorney General, by Jess D. Mekeel, Assistant Attorney General, and William B. Crumpler, Assistant Attorney General, for the State.

Barnes, Grimes, Bunce & Fraley, PLLC, by Jerry B. Grimes and Shawn L. Fraley, for defendant-appellee.

MARTIN, Chief Judge.

On 10 February 2007, defendant Dennis Allen Palmer, II was arrested for willfully operating a motor vehicle while subject to an impairing substance in violation of N.C.G.S. § 20-138.1. On 30 July 2007, defendant filed a pretrial motion in district court in accordance with N.C.G.S. § 20-38.6(a) to suppress “[a]ny evidence of any kind or form obtained pursuant to the interaction of law enforcement and the defendant” at the time of his detention on 10 February. Defendant alleged that the officer lacked reasonable suspicion to detain defendant at the time of the stop of his automobile and lacked probable cause to arrest him.

The Davidson County District Court heard defendant’s pretrial motion to suppress and, on 26 September 2007, issued a handwritten preliminary order pursuant to N.C.G.S. § 20-38.6(f) in which it made findings of fact and gave “the parties preliminary notice of its intention to grant [d]efendant’s motion to suppress.” The court further noted in its preliminary order that the State gave notice of appeal “in open court.”

On 27 September 2007, the State filed its “State’s Appeal to Superior Court” pursuant to N.C.G.S. § 20-38.7, in which it asserted that “[t]he State gave oral notice of appeal in open court after the hearing,” and “further gives written notice of appeal [to the superior court] through this document.” On 22 February 2008, the State’s appeal was called for hearing in Davidson County Superior Court. At the beginning of the hearing, defendant challenged the State’s appeal as not being properly before the court, contending the State did not sufficiently comply with the statutory requirements authorizing it to

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appeal from the district court's 26 September preliminary order to superior court.

On 3 March 2008, the superior court filed its Order of Dismissal in which it concluded that “[i]t is the State’s burden to demonstrate jurisdiction in this matter, and it has failed to do so” because “[t]he State has failed to properly file a motion appealing the indication of the District Court to suppress the evidence in this case as required by [N.C.G.S. §] 15A-951, [N.C.G.S. §] 20-38.7 and [N.C.G.S. §] 15A-1432.” The superior court then ordered that “[t]he ‘appeal’ of the State from the decision of the District Criminal Court of Davidson County is hereby void, and the matter is remanded to the District Court for the entry of an order by the District Court Judge that heard the motion to suppress.”

The State filed its “Appeal Entries,” in an attempt to appeal to this Court from the superior court’s order “voiding the State’s appeal of the District Court’s preliminary determination granting a motion to suppress.” On 30 May 2008, the State filed a petition for writ of certiorari. On 19 June 2008, defendant filed a response to the State’s petition for writ of certiorari and moved to dismiss the State’s appeal.

[1] We must first determine whether this appeal is properly before us. In *State v. Fowler*, 197 N.C. App. —, — S.E.2d — (2009), this Court determined that, after the superior court considers an appeal by the State pursuant to N.C.G.S. § 20-38.7(a), “the superior court must then enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant’s pretrial motion” made in accordance with N.C.G.S. § 20-38.6(a), because “the plain language of N.C.G.S. § 20-38.6(f) indicates that the General Assembly intended the *district* court should enter the final judgment on [such] a . . . pretrial motion.” *Fowler*, 197 N.C. App. at —, — S.E.2d at —. This Court further concluded that the State does not have a present statutory right of appeal to the Appellate Division from “a superior court’s interlocutory order which may have the same ‘effect’ of a final order but requires further action for finality.” *Id.* — at —, S.E.2d at —.

In the present case, on 3 March 2008, the superior court concluded that the State’s appeal from the district court’s preliminary determination on defendant’s motion to suppress was void, and ordered that the matter be remanded to the district court for “entry of a judgment in this matter on the motion to suppress filed by the

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defendant.” It is this 3 March order from which the State attempts to appeal to this Court. However, as we indicated above, the State has no statutory right of appeal from a superior court’s interlocutory order remanding a matter to a district court for entry of a final order granting a defendant’s pretrial motion to suppress or dismiss in an implied-consent offense case.

Thus, since the State has no statutory right of appeal to this Court from the superior court’s 3 March 2008 order, we must grant defendant’s motion to dismiss. *See id.* at —, — S.E.2d at — (“[T]he [S]tate’s right of appeal in a criminal proceeding is entirely statutory; it had no such right at the common law. [Accordingly, s]tatutes granting a right of appeal to the [S]tate must be strictly construed.”) (second, third, and fourth alterations in original) (internal quotation marks omitted). Nevertheless, this Court may issue a writ of certiorari “when no right of appeal from an interlocutory order exists.” N.C.R. App. P. 21(a)(1). Having determined that the State has no statutory right of appeal from the superior court’s 3 March 2008 order, we exercise our discretion to grant the State’s petition for writ of certiorari.

[2] The State contends, and we agree, the superior court erred by concluding that it was “unable to determine that it ha[d] jurisdiction to hear the State’s ‘appeal[,]’ as the proper basis for this ‘appeal’ and the [superior c]ourt’s jurisdiction to hear an appeal of this matter [wa]s not properly alleged in the State’s sole filing in this matter,” and that the State’s filing was “insufficient as a matter of law to properly appeal the indication made by the District Court Judge concerning his intention to grant the defendant’s motion to suppress.”

N.C.G.S. § 20-38.6(f) provides, in part: “If the judge preliminarily indicates the [defendant’s pretrial] motion [made in accordance with N.C.G.S. § 20-38.6(a)] should be granted, the judge shall not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal.” N.C. Gen. Stat. § 20-38.6(f) (2007). N.C.G.S. § 20-38.7(a) further provides: “The State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. . . . Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.” N.C. Gen. Stat. § 20-38.7(a) (2007). However, neither these provisions, nor the remaining provisions of Article 2D of the General Statutes, set forth the procedures with which the State must comply in order to properly give notice of, or perfect, its appeal

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to superior court pursuant to N.C.G.S. § 20-38.7(a) from a district court's preliminary determination indicating that it intends to grant a defendant's pretrial motion to suppress or dismiss.

Nevertheless, "where a statute regulating appeals to the Superior Court does not prescribe any rules, the courts may look to other general statutes regulating appeals in analogous cases and give them such application as the particular case and the language of the statute may warrant." *Summerell v. Chilean Nitrate Sales Corp.*, 218 N.C. 451, 453, 11 S.E.2d 304, 306 (1940). In doing so, it is essential that the courts "keep[] in view always the intention of the Legislature." *Cook v. Vickers*, 141 N.C. 101, 107, 53 S.E. 740, 742 (1906).

N.C.G.S. § 15A-1432, entitled "Appeals by State from district court judge," provides, in part:

(a) Unless the rule against double jeopardy prohibits further prosecution, *the State may appeal from the district court judge to the superior court:*

(1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

. . . .

(b) When the State appeals pursuant to subsection (a) the appeal is by written motion specifying the basis of the appeal made within 10 days after the entry of the judgment in the district court. The motion must be filed with the clerk and a copy served upon the defendant.

N.C. Gen. Stat. § 15A-1432(a)(1), (b) (2007) (emphasis added). In other words, by enacting subsection (a)(1) of N.C.G.S. § 15A-1432, the General Assembly has conferred upon the State a right of appeal to superior court from a district court's dismissal of criminal charges against a defendant and, in subsection (b), the General Assembly has enumerated the procedures with which the State must comply in order for such an appeal to be heard by the superior court.

It is our opinion that N.C.G.S. § 15A-1432, a statute which was enacted to "create[] a simplified motion practice for the State's appeal in such circumstances," *see* N.C. Gen. Stat. § 15A-1432 official commentary (2007), and which regulates the appeals by the State to superior court from a district court's final order dismissing criminal charges against a defendant, is analogous to N.C.G.S. § 20-38.7(a), which regulates, in part, the appeals by the State to superior court

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from a district court's preliminary order indicating that it would grant a defendant's pretrial motions to dismiss or suppress. Thus, we look to the procedures prescribed by N.C.G.S. § 15A-1432(b) as a guide to determine whether the State properly appealed in the present case pursuant to N.C.G.S. § 20-38.7(a). Nevertheless, we are mindful that this Court has already determined that "the General Assembly's decision to refrain from establishing a time by which the State must give notice of appeal [pursuant to N.C.G.S. § 20-38.7(a)] from a district court's preliminary determination indicating that it would grant a defendant's pretrial motion" "does not infringe on a defendant's fundamental right to a speedy trial." *Fowler*, 197 N.C. App. at —, — S.E.2d at ; *see id.* ("[I]n the absence of a statute or rule of court prescribing the time for taking and perfecting an appeal, an appeal must be taken and perfected within a reasonable time. What is a reasonable time must, in all cases, depend upon the circumstances.") (citation and internal quotation marks omitted). Therefore, we decline to engraft upon N.C.G.S. § 20-38.7(a) the ten-day time limit for making an appeal specified in N.C.G.S. § 15A-1432(b). Hence, assuming without deciding that the State's oral notice of appeal in district court failed to give sufficient notice of its appeal to superior court pursuant to N.C.G.S. § 20-38.7(a), we examine only whether the State's written notice of appeal included in the record before us sufficiently conformed with the remaining requirements of N.C.G.S. § 15A-1432(b).

In the present case, as discussed above, the State filed its "State's Appeal to Superior Court" pursuant to N.C.G.S. § 20-38.7. In the caption of this filing, the State included defendant's name and address, as well as the file number referenced in the district court's 26 September 2007 preliminary order. The document further stated that the State "appeals to superior court the district court preliminary determination granting a motion to suppress or dismiss." The State's filing also enumerated the issues raised in defendant's 30 July 2007 pretrial motion to suppress, and recited almost verbatim all of the district court's findings of fact from its 26 September 2007 preliminary determination. The document was signed by the assistant district attorney and dated, "This the 27th day of September, 2007." However, the State's filing did not specify the date of the preliminary determination from which it was appealing.

The reviewing superior court found and concluded that the State was required to have "allege[d], in its motion that the appeal was taken within 10 days of the preliminary indication of the District Court Judge Presiding," and "[t]he document, entitled, 'State's Appeal

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to Superior Court[,] does not state when this indication or judgment was made by the presiding District Court Judge.” Thus, the superior court stated that there was “no basis upon which [the superior court could] determine that jurisdiction to hear an appeal by the State still exists, in that it is not stated when this hearing was conducted, and whether this ‘appeal’ is timely.”

However, as discussed above, we have declined to infer that the General Assembly intended to engraft upon N.C.G.S. § 20-38.7(a) the ten-day time limit for making an appeal specified in N.C.G.S. § 15A-1432(b). Accordingly, in light of the information that was included in the State’s written motion, we hold the State’s appeal sufficiently comported with the remaining requirements of N.C.G.S. § 15A-1432(b), and that the superior court erred by concluding that it was “unable to determine that it ha[d] jurisdiction to hear the State’s ‘appeal[,]’ as the proper basis for this ‘appeal’ and the [superior c]ourt’s jurisdiction to hear an appeal of this matter [wa]s not properly alleged in the State’s sole filing in this matter.”

[3] Additionally, a “Certificate of Service by Prosecutor” was included in the record before us which referenced the district court’s file number of this matter. This certificate of service indicates that the “State’s Appeal to Superior Court” was served by mail on defendant’s attorney, is signed by the assistant district attorney, and is dated, “This the 27th day of 2007.” The month is not indicated on this certificate of service, and the certificate is not file-stamped by the clerk of court.

The superior court found and concluded that the State’s “fail[ure] to indicate a date that the service was perfected, as required by [N.C.G.S. § 15A-951 was] . . . insufficient to properly state a date of service as required by this statute,” because it could not determine “from the face of the State’s sole filing in this matter, that the certificate of service was done properly, or within the time frame required by the law.” Although we recognize that the superior court correctly concluded that the State’s certificate of service contained a clerical error, defendant does not allege that he was misled or prejudiced in any way by this error. Therefore, we further hold the superior court erred by concluding that the State’s error rendered its appeal insufficient as a matter of law, and that the “State’s Appeal to Superior Court” was “void” and warranted the superior court’s decision to vacate the State’s appeal and to remand the matter to the district court to enter a final judgment on defendant’s motion to suppress.

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Accordingly, we remand this matter to the superior court with instructions to review the district court's 26 September 2007 preliminary determination on defendant's motion to suppress according to the appropriate standard of review. *See Fowler*, 197 N.C. App. at —, — S.E.2d at — (“[T]he district court's findings of fact are binding on the superior court and should be presumed to be supported by competent evidence *unless* there is a dispute about the findings of fact, in which case the matter must be reviewed by the superior court *de novo*.”) (internal quotation marks omitted).

Remanded.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. MARY ALMA ALLEN

No. COA08-773

(Filed 19 May 2009)

1. Search and Seizure— investigatory stop—reasonable articulable suspicion—information from assault victim

The trial court did not err by concluding, under the totality of the circumstances, that a stop which led to a guilty plea of habitual impaired driving was based on a reasonable articulable suspicion where the victim of an assault gave information to an officer about the suspect and the car in which he left the scene, the officer drove around the vicinity until he saw a similar car and driver, and the officer stopped the car and determined that defendant was not involved in the assault, but arrested her for impaired driving.

2. Search and Seizure— investigatory stop—reasonable

A simple investigatory stop that led to an habitual impaired driving conviction was reasonable under all of the circumstances where an assault victim had given an officer a description of a car containing her assailant and a driver, and the officer stopped defendant even though there were some differences from the description the assault victim had given.

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Appeal by defendant from judgment entered 25 March 2008 by Judge W. Osmond Smith, III in Person County Superior Court. Heard in the Court of Appeals 14 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General John W. Conleton, for the State.

Amos Granger Tyndall, P.A., by Amos Granger Tyndall, for defendant-appellant.

CALABRIA, Judge.

Mary Alma Allen (“defendant”) appeals a judgment entered on a guilty plea of habitual impaired driving. We affirm.

At approximately 3:30 a.m., on 17 December 2006, the local emergency dispatcher received a call that there had been an assault at the Budget Inn on North Madison Boulevard in Roxboro. Sergeant Kenneth J. Horton (“Sgt. Horton”) of the Roxboro Police Department responded to the call. The victim of the assault told officers the suspect was a tall white male who left in a small dark car driven by a white female with blonde hair. For approximately ten minutes, Sgt. Horton drove around the vicinity of North Madison Boulevard looking for a small dark vehicle operated by a white female with blonde hair. Sgt. Horton observed a small, light-colored vehicle traveling southbound on Madison, away from the direction of the Budget Inn. Defendant, a white female with blonde hair, was driving the vehicle.

Sgt. Horton observed the defendant enter the center turn-lane and make an abrupt left turn into a parking lot. The pavement in the parking lot was uneven. Sgt. Horton observed the defendant driving hastily over the rough pavement. Sgt. Horton drove over to the area where the defendant had parked her car. The defendant was outside the vehicle. No one was behind the steering wheel. Sgt. Horton observed a person in the passenger seat but could not determine whether the passenger was male or female. Sgt. Horton exited his vehicle and asked the defendant to come to his vehicle to ask her questions regarding the altercation at the Budget Inn. When Sgt. Horton parked and exited his vehicle, he noticed defendant was leaning against the car and appeared to be intoxicated. Sgt. Horton questioned her about the assault incident and determined she was not involved in the assault.

Sgt. Horton arrested defendant for driving while impaired. On 8 October 2007, defendant was indicted for habitual impaired driving

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because she was previously convicted of three or more offenses involving impaired driving.

Defendant moved to suppress all the evidence in support of her charge on the basis that the officer did not have reasonable suspicion to stop her. After hearing evidence, the trial court denied her motion. Defendant entered a guilty plea of habitual driving while impaired and was sentenced to a minimum of twelve months to a maximum of fifteen months in the North Carolina Department of Correction. As a condition of her guilty plea, defendant reserved her right to appeal the order denying her motion to suppress.

I. Standard of Review

“[T]he standard of review in evaluating a trial court’s ruling on a motion to suppress is that the trial court’s findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (internal quotations omitted). The trial court’s conclusions of law are subject to *de novo* review. *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008) (citing *State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206 (2006)).

II. Analysis

[1] Defendant’s sole argument on appeal is that the seizure was unreasonable because it was based on an uncorroborated anonymous tip which lacked a sufficient indicia of reliability. We disagree.

The trial court concluded that “Sgt. Horton’s directive to the defendant to come to his vehicle for his further investigation was a seizure of the defendant[.]” Defendant assigned error to the portion of the trial court’s conclusion of law

that [the seizure] was Constitutionally valid, pursuant to his reasonable and articulable suspicion that the defendant had been involved in recent criminal activity related to the subject fight/assault, including transporting an offender suspect away from the scene of a criminal fight/assault which justified detention for additional investigation. The detention of the defendant for such valid purposes was reasonable in scope and manner and not an unreasonable seizure of the defendant or intrusion upon her liberties to the extent of questioning her regarding the altercation at the Budget Inn. Such lawful and permissible action by Sgt. Horton led to further suspicion of violation by the defendant

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of the motor vehicle statutes, for driving while impaired. Such observations then justified further detention and investigation related to a suspicion of driving while impaired.

“The police can stop and briefly detain a person for investigative purposes if they have a reasonable suspicion supported by articulable facts that criminal activity may be afoot even if they lack probable cause.” *State v. Hudgins*, 195 N.C. App. 430, 433, 672 S.E.2d 717, 719 (2009) (internal quotation marks and brackets omitted) (quoting *United States v. Sokolow*, 490 U.S. 1, 2, 109 S.Ct. 1581, 104 L. Ed. 2d 1, 6 (1989)).

Only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

A court must consider the totality of the circumstances—the whole picture—in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.

State v. Campbell, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (internal citations and quotations omitted). “When police act on the basis of an informant’s tip, the indicia of the tip’s reliability are certainly among the circumstances that must be considered in determining whether reasonable suspicion exists.” *State v. Maready*, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008). “Where the informant is known or where the informant relays information to an officer face-to-face, an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion.” *Hudgins*, 195 N.C. App. at 434, 672 S.E.2d at 719 (citations omitted). “An anonymous tip may provide reasonable suspicion [for an investigatory stop] if it exhibits sufficient indicia of reliability and if it does not, then there must be sufficient police corroboration of the tip before the stop can be made.” *State v. McArn*, 159 N.C. App. 209, 213, 582 S.E.2d 371, 374 (2003) (citation omitted). The “overarching inquiry when assessing reasonable suspicion is always based on the *totality* of the circumstances.” *Maready*, 362 N.C. at 619, 669

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S.E.2d at 567 (citing *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008)).

Defendant cites *State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000) in support of her argument. In *Hughes*, the Supreme Court reversed the denial of defendant's motion to suppress evidence seized from detaining a defendant. In that case, Detective Imhoff of the Jacksonville Police Department received a call from Captain Matthews of the Onslow County Sheriff's Department. *Id.* at 201-02, 539 S.E.2d at 627. Matthews told Imhoff he spoke with a "confidential reliable" informant who after describing the defendant, told him the defendant would be arriving in Jacksonville from New York City, possibly by bus, and would be carrying marijuana and cocaine. *Id.* Detective Imhoff relayed the information to Detective Bryan and told him to go to the bus station. The officers observed defendant leave the bus station and enter a taxi. Before the officers determined which direction defendant was headed in, the officers detained the taxi. *Id.* at 202, 539 S.E.2d at 627-28. The arresting officers also testified they did not directly speak to the informant, nor were they able to testify why this informant was credible or reliable. *Id.* at 204, 539 S.E.2d at 628. The Court determined the anonymous tip lacked the requisite indicia of reliability and was not corroborated by the officers' observations. *Id.* at 210, 539 S.E.2d at 632.

In *State v. Allison*, 148 N.C. App. 702, 559 S.E.2d 828 (2002), this Court affirmed denial of defendant's motion to suppress evidence where an officer detained defendant based on a tip from an eyewitness. A woman in a restaurant observed four African American males sitting near the bar area. She overheard them talking about robbing the restaurant and saw them pass a handgun amongst themselves. The woman reported her observations to Officer Ledford who asked her to report them to Officer Ivey. After writing down the woman's phone number and checking with his supervisor, Officer Ivey entered the restaurant, observed four African American men sitting at the bar area and noticed one of the men had been involved in a prior gun-related incident. When Officer Ivey asked the men to step out into the restaurant foyer, he noticed defendant held his pants up as if he had something dragging his pants down. Officer Ivey conducted a pat-down frisk and discovered a nine-millimeter handgun. The defendant was charged with carrying a concealed weapon. *Id.* at 703, 559 S.E.2d at 829. This Court distinguished certain facts in this case from other unreliable anonymous tip cases. Specifically, this Court noted the tip came from a "face-to-face encounter" rather than an anonymous tele-

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phone call, Officer Ivey could observe the woman's demeanor to assess her reliability, and the likelihood she could have been held accountable if her tip proved false was increased by the fact that she engaged with the officer directly. The informant also provided the officer with a reasonable explanation of how she knew of the possibility of criminal activity. *Id.* at 705, 559 S.E.2d at 830; *see also Maready*, 362 N.C. at 618-20, 699 S.E.2d at 567 (police stop of drunk driver based on a tip from another driver met standard of reliability where driver was in a position to observe defendant's erratic driving, she approached the deputies near the scene of the violations giving little time to fabricate the allegations, and the driver placed her anonymity at risk by speaking face to face with the deputies).

Here, contrary to defendant's contention, the stop was not based on an anonymous tip from an unknown, unaccountable informant. The trial court found that "a victim of the fight/assault provided information to Sgt. Horton that the offender in the fight/assault was a tall white male that had been driven away from the scene in a small, dark car that was operated by a white female with blond hair." This finding is supported by Sgt. Horton's testimony at the suppression hearing, and is therefore binding on appeal. *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826.

Although the record does not reveal the victim's name or give details about the victim's encounter with Sgt. Horton, other than to state he received the information from the victim, we find the facts of this case distinguishable from *Hughes*. A face-to-face encounter with the victim of the crime affords a higher degree of reliability than an anonymous telephone call. The victim of the assault would be in a position to notice the suspect and his departure from the scene of the assault. *See Maready*, 362 N.C. at 619, 669 S.E.2d at 567 (by providing the tip through a face-to-face encounter, an eyewitness was not a completely anonymous informant). In addition, Sgt. Horton's stop was not based solely on the victim's description but also on Sgt. Horton's own observations of the defendant's hurried actions, the fact that it appeared to him that the defendant was trying to avoid him and defendant's proximity to the scene of the assault. Under the totality of the circumstances, the trial court did not err in concluding the stop was based on a reasonable articulable suspicion. *See also State v. Sutton*, 167 N.C. App. 242, 247, 605 S.E.2d 483, 486 (2004) (holding officer's stop of defendant based on pharmacist's description of defendant's activity coupled with officer's observation of defendant handing off an object to another person in

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the pharmacy parking lot “provided reasonable suspicion that criminal activity was afoot”).

[2] Defendant also contends she did not match the tipster’s description because she was driving a small light-colored car with a female passenger instead of a small dark car with a male passenger. Defendant argues the trial court’s finding that defendant was driving a small dark vehicle is not supported by competent evidence because a video surveillance recording from Sgt. Horton’s police vehicle revealed the vehicle to be light-blue in color and Sgt. Horton admitted on cross-examination that the vehicle is light-blue. The fact that the defendant’s car did not exactly match the description of the one Sgt. Horton was seeking does not render the stop unreasonable under all of the circumstances. *State v. Buie*, 297 N.C. 159, 162-63, 254 S.E.2d 26, 28-29 (1979), *cert. denied*, 444 U.S. 971, 100 S.Ct. 404, 62 L. Ed. 2d 386 (1979); *Maready*, 362 N.C. at 619, 669 S.E.2d at 567 (citing *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645) (The “overarching inquiry when assessing reasonable suspicion is always based on the *totality* of the circumstances.”). Defendant matched the description given to Sgt. Horton of the suspect’s driver, a blonde white female in a small car. Sgt. Horton observed defendant driving away from the vicinity of the Budget Inn Motel, the scene of the alleged assault, and driving in a hurried manner as if she was trying to avoid Sgt. Horton. At the time Sgt. Horton detained the defendant, he could not discern whether the passenger was male or female. Sgt. Horton’s basis for calling defendant to his vehicle to answer questions in a simple investigatory stop met a “minimal level of objective justification, something more than an unparticularized suspicion or hunch.” *Campbell*, 359 N.C. at 664, 617 S.E.2d at 14. We affirm the trial court’s order.

Affirmed.

Judges ELMORE and STROUD concur.

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[197 N.C. App. 215 (2009)]

STATE OF NORTH CAROLINA v. ISTIVAN CLEVONDON DOUGLAS

No. COA08-1287

(Filed 19 May 2009)

Jury— verdict form—questions—elements of crime—finding of guilt not included

The jury did not fulfill its constitutional responsibility to make an actual finding of defendant's guilt where the verdict form required only findings on the essential elements of the charges and nothing more.

Appeal by defendant from judgment dated 16 January 2008 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 25 March 2009.

Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant.

BRYANT, Judge.

Istivan Clevondon Douglas (defendant) appeals from a judgment entered upon a jury verdict finding him guilty of one count of possession with intent to sell and/or deliver cocaine, one count of selling cocaine, and defendant's plea of guilty to attaining the status of an habitual felon. For the reasons stated herein, we must grant defendant a new trial.

Facts

Defendant was arrested pursuant to a warrant on 12 February 2007. On 19 February 2007, a Cabarrus County Grand Jury indicted defendant on one count of possession with intent to sell and/or deliver cocaine, one count of sale of crack cocaine, and one count of delivery of crack cocaine. On 12 March 2007 defendant was indicted for attaining the status of an habitual felon. On 31 December 2007, the same Grand Jury returned a superceding indictment in the habitual felon case.

These cases were tried together at the 14 January 2008 Criminal Session of Cabarrus County Superior Court before Superior Judge W. Erwin Spainhour. On 16 January 2008 the jury returned verdicts

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related to the charges. Defendant pled guilty to attaining the status of an habitual felon. The offenses were consolidated for judgment and on 16 January 2008, Judge Spainhour sentenced defendant to a term of imprisonment for a minimum of 120 months and a maximum of 153 months. The State voluntarily dismissed the delivery charge with leave to reinstate. Defendant appealed.

An Order of Appellate Entries was entered on 16 January 2008. The court found defendant indigent and noted that defendant waived appellate counsel. On 25 April 2008, Judge Spainhour entered an amended Order for the Appellate Defender to represent defendant on appeal. Defendant filed a *pro se* motion in Cabarrus County Superior Court which was denied on 11 June 2008 by Judge Spainhour. On 25 June 2008, the North Carolina Court of Appeals denied appellate counsel's motion to withdraw based on defendant's desire to proceed *pro se*. On 26 June 2008, the Court of Appeals granted the State's motion to strike defendant's *pro se* record on appeal and brief, and ordered defendant's appointed appellate counsel to file a proper settled record on appeal. On 28 September 2008, the North Carolina Supreme Court denied defendant's *pro se* petition for *writ of certioari* to review the Court of Appeals' June 25 and 26, 2008 Orders.

The underlying facts of this case are as follows: On 23 January 2007 Officer Eugene Ramos was working as an undercover narcotics officer with the Concord Police Department; Officer Ramos was a new member of the department and was assigned to the narcotics unit because he was not from the area and was unknown to members of the community. At approximately 3:00 pm, Officer Ramos departed to the Sizetown area in an unmarked tan Honda Accord with twenty dollars in special funds to attempt to make an undercover drug buy. Officer Ramos noticed two men standing on a porch at 27 Flow Street. Officer Ramos showed the men the twenty dollar bill and was directed to circle the block by one of the two men. Once he drove around the block the other man, later identified as defendant, approached the car and gave Officer Ramos a small white rock substance in exchange for the twenty dollar bill. Officer Ramos then left the area.

Officer Ramos brought the substance to Officer Brian Kelly. Officer Ramos was not familiar with defendant nor did he recognize him from photo books he reviewed prior to the undercover operation. Officer Ramos did recall that defendant had a disabled hand. Defendant was arrested on 12 February 2007. In the courtroom,

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Officer Ramos identified defendant as the man who sold him the crack cocaine.

During jury instructions, the trial court charged the jury on the elements of possession with intent to sell or distribute cocaine and sale of cocaine pursuant to pattern jury instructions 260.15 and 260.21. The verdict form submitted to the jury read in relevant part:

We, the jury, return as our unanimous verdict that the defendant is:

ISSUE 1:

Did the defendant possess cocaine, a controlled substance, with the intent to sell or deliver it?

ANSWER: _____

. . .

ISSUE 3:

Did he defendant sell cocaine, a controlled substance, to Officer Eugene Ramos?

ANSWER: _____

The jury wrote the word “yes” in the blank beside the word “ANSWER” for both Issues 1 and 3 on the verdict form and signed and dated the form. The form did not contain a designation for entering a verdict of guilty or not guilty. At no time did the jury submit a verdict of guilty or not guilty to the charges of possession with intent to sell or deliver cocaine and sale of cocaine. After the jury returned their answers on the verdict form, the trial court polled the jury as follows:

THE COURT: Members of the jury, your foreperson has returned as your unanimous written verdict . . . as follows:

We the jury return as our unanimous verdict that the defendant is, as to Issue Number 1, did the defendant possess cocaine, a controlled substance with the intent [to] sell or deliver it.

Your answer was yes.

As to Issue 3, did the defendant sell cocaine, a controlled substance, to Officer Eugene Ramos?

Your answer was yes.

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THE COURT: Is this your verdict, so say all of you?

(Unanimous indication given.)

THE COURT: Ladies and gentlemen of the jury, if this was your individual verdict, each you [sic] of your individual verdict while you were voting in the jury room, please indicate by raising your hand.

THE COURT: Let the record show I counted all 12 hands.

THE COURT: If it remains your verdict at this very moment, if each of you would individually raise your hand.

THE COURT: I counted all 12 hands.

Defendant appeals.

On appeal, defendant contends: (I) defendant is entitled to a new trial because the trial court submitted, the jury returned, and the trial court accepted unconstitutional true special verdicts that do not support the judgment; (II) defendant is entitled to a new trial because the trial court erroneously admitted the State's inadmissible evidence about reputation of defendant's neighborhood as being drug-infested in violation of *State v. Williams*; and (III) defendant's convictions must be vacated because there is insufficient evidence he possessed and sold a controlled substance.

I

Defendant argues he is entitled to a new trial because true special verdicts were erroneously submitted, returned, and accepted. We agree.

"A verdict is the unanimous decision made by the jury and reported to the court. It is a substantial right . . ." *State v. Hemphill*, 273 N.C. 388, 389, 160 S.E.2d 53, 55 (1968). "Verdicts and judgments in criminal actions should be clear and free from ambiguity or uncertainty. The enforcement of the criminal law and the liberty of the citizen demand exactitude." *State v. Rhinehart*, 267 N.C. 470, 481, 148 S.E.2d 651, 659 (1966). "A jury verdict must unambiguously state that the defendant has been found guilty of a crime." *State v. Hobson*, 70 N.C. App. 619, 620, 320 S.E.2d 319, 319 (1984).

"A special verdict is a common law procedural device by which the jury may answer specific questions posed by the trial judge that are separate and distinct from the general verdict." *State v. Blackwell*,

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361 N.C. 41, 47, 638 S.E.2d 452, 456 (2006). In North Carolina, special verdicts are a widely accepted method of submitting aggravating factors to a jury. *Id.* A “true” special verdict is where “the jury only makes findings on the factual components of the essential elements alone.” *Id.* “True” special verdicts are not allowed in criminal cases because such verdicts do not allow the jury to fulfill its constitutional responsibilities to determine whether defendant is guilty or not guilty. “[T]his practice violates a criminal defendant’s Sixth Amendment right to a jury trial.” *Id.* at 47, 638 S.E.2d at 457.

The jury’s constitutional responsibility requires the jury to “apply the law to th[e] facts and draw the ultimate conclusion of guilt or innocence.” *United States v. Gaudin*, 515 U.S. 506, 514, 132 L. Ed. 2d 444, 452 (1995). “The Sixth Amendment requires more than appellate speculation about a hypothetical jury’s action . . .; it requires an actual jury finding of guilty.” *Sullivan v. Louisiana*, 508 U.S. 275, 280, 124 L. Ed. 2d 182, 190 (1993). Thus, a criminal conviction must “rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Gaudin*, 515 U.S. at 510, 132 L. Ed. 2d at 449.

In the instant case, the jury did not fulfill its constitutional responsibility to make an actual finding of defendant’s guilt. The verdict form in the instant case only required the jury to make factual findings on the essential elements of the charged crimes and nothing more. Thus, defendant’s Sixth Amendment right to a jury trial was violated because the jury did not make an actual finding of defendant’s guilt. Here, the jury verdict was a true special verdict in violation of *Gaudin* and *Blackwell* and could not be the basis for the judgment entered against defendant.

The State argues the verdict form submitted to the jury merely omits the words “not guilty” and, based on the reasoning in *State v. Hicks*, 86 N.C. App. 36, 356 S.E.2d 595 (1987), omission of the words “not guilty,” is not error when the jury instructions are correct and the jury is polled. However, *Hicks* is inapplicable to the present case because even though it involved the use of a verdict form that was “not preferred,”¹ the form nevertheless required the jury to make an actual finding of guilt.

In *Hicks*, the verdict form required the jury to determine whether the defendant was “Guilty of felonious conspiracy to commit felo-

1. Verdict form used by the trial court that only used the word “guilty” not preferred; use of “not guilty” on verdict form is preferred.

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nious Breaking and Entering” and “Guilty of felonious Conspiracy to commit felonious Larceny.” *Id.* at 43, 356 S.E.2d at 599. The verdict form included the word “guilty” but failed to include the words “not guilty.” *Id.* However, the verdict form used and the trial court’s instruction to the jury required the jury to make an actual and ultimate determination of the defendant’s guilt. *Id.* After considering the trial court’s instructions to the jury with respect to the permissible verdicts the jury could return, as well as each juror’s affirmation when polled that the verdict of *guilty* was his or her verdict, this Court affirmed the conviction in *Hicks* despite the trial court’s failure to include the words “not guilty” on the verdict form. *Id.*

Unlike the jury in *Hicks*, the jury in the instant case was not required to reach an ultimate determination regarding defendant’s guilt or innocence. Here, the verdict form failed to include the words “guilty” or “not guilty.” The trial court’s charge to the jury could not cure the defective verdict form because the verdict form did not require the jury to fulfill its constitutional responsibility to determine defendant’s guilt or innocence. Neither could the polling of the jury cure the defective verdict where the trial court asked the jury members if the verdict was their individual verdict and the verdict to which the trial court referred did not “unambiguously state that defendant ha[d] been found *guilty* of a crime.” *Hobson*, 70 N.C. App. at 620, 320 S.E.2d at 319 (emphasis added); *see also Sullivan*, 508 U.S. at 277, 124 L. Ed. 2d at 188 (“The right [to a jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of ‘guilty.’”). Therefore, defendant is entitled to a new trial on each charge.

Because of our holding, we need not address defendant’s remaining arguments.

NEW TRIAL.

Judges ELMORE and STEELMAN concur.

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[197 N.C. App. 221 (2009)]

STATE OF NORTH CAROLINA v. DERRICK RAHEEM SWANN

No. COA08-1195

(Filed 19 May 2009)

1. Evidence— DNA from prior arrest—expungement refused

The trial court did not err by denying defendant's motion to suppress DNA evidence from a prior charge that was dismissed by the State where there had been no order of expunction of the DNA evidence in the prior case; the provisions for expunction were not met; and defendant was attempting to have a court retroactively expunge his DNA record after he had been identified as the perpetrator of other crimes, rather than expungement for prospective effect.

2. Probation and Parole— restitution—supporting evidence not sufficient

The trial court erred by ordering restitution as a condition of post-release supervision or from work release earnings where there was no stipulation or evidence introduced at the sentencing hearing to support the calculation of the amount of restitution recommended.

Appeal by defendant from judgments entered 7 April 2008 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

Leslie C. Rawls, for defendant-appellant.

STEELMAN, Judge.

The trial court's denial of defendant's motion to suppress DNA evidence is affirmed on three separate bases. First, the record before us does not contain an order for the expunction of DNA evidence collected in a prior criminal proceeding as asserted by defendant. Second, the statutory prerequisites to expunction are not present in the instant case as defendant's previous criminal charges were neither dismissed by the trial court, nor did an appellate court reverse and dismiss a previous conviction. Third, the plain language of the expunction statutes clearly indicate that they are to be applied

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prospectively and would not prohibit law enforcement from utilizing DNA records obtained in other criminal matters prior to the entry of the order of expunction.

Where there was no stipulation and no testimony supporting the amount of restitution, the award must be vacated and the matter remanded for a new hearing.

I. Factual and Procedural History

In 2006, defendant was charged with felonious possession of burglary tools, felonious breaking and entering, and second degree trespass. Incident to his arrest, officers obtained a buccal swab containing a sample of defendant's DNA. Defendant's DNA profile was logged into the State Bureau of Investigation's DNA database. Subsequently, these charges were dismissed by the District Attorney because the officer failed to bring the paperwork for the case to the District Attorney's Office.

Defendant's DNA profile matched DNA evidence in other cases, leading to defendant's being indicted on 16 January 2007 for two counts of first degree rape, two counts of first degree sexual offense, two counts of felonious breaking and entering, two counts of robbery with a dangerous weapon, two counts of first degree kidnapping, assault on a child under the age of 12, and second degree kidnapping. On 2 November 2007, defendant filed a motion to suppress the DNA evidence obtained from the earlier breaking and entering charges based upon the lack of defendant's consent and constitutional violations. On the same date, defendant filed a petition to expunge the earlier charges and to expunge all DNA evidence obtained incident to the earlier charges pursuant to N.C. Gen. Stat. § 15A-146.

The motion to suppress was heard before Judge Cayer on 11 February 2008. At that hearing, defendant offered the petition for expunction into the evidence. Judge Cayer denied the motion to suppress. On 7 April 2008, defendant pled guilty to all charges before Judge Caudill. Defendant's plea agreement specifically reserved the right to appeal the denial of his motion to suppress. The trial court imposed four active sentences of 288-355 months imprisonment and two active sentences of 77-102 months imprisonment, with all sentences to run consecutively. In one judgment, the trial court recommended restitution in the amount of \$510.00 as a condition of post-release supervision, if applicable, or from work release earnings. Defendant appeals.

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II. Motion to Suppress

[1] In his first argument, defendant contends the trial court erred by denying his motion to suppress evidence of his DNA records obtained in the earlier charges. We disagree.

Defendant argues:

Judge Moore ordered the DNA evidence destroyed on November 8, 2007. (R. p. 21.) The statute directs that the DNA evidence must be destroyed upon the judge's order. N.C. Gen. Stat. §§ 15A-146(b2) and 15A-266.10(b). When Judge Cayer denied the Motion to Suppress without regard to the expunction order, he effectively disregarded or overruled the prior court decision in violation of law. [Appellant's brief p.8]

This argument is completely without merit for three separate and independent reasons.

First, defendant misrepresents the actions of Judge Moore on 8 November 2007. Upon the filing of defendant's petition on form AOC-CR-264 (Rev. 2/06), Judge Moore, on 8 November 2007, entered a request to the State Bureau of Investigation for any Criminal History Record Information for the petitioner (defendant). Judge Moore further requested that the Records Officer of the Administrative Office of the Courts provide the court with information as to whether petitioner had previously been granted an expunction or dismissal and discharge in North Carolina. This is the only judicial action reflected in the record of this case with respect to defendant's petition for expunction. The record is totally devoid of any ruling by any judge on defendant's petition for expunction. It is the responsibility of defendant to include in the record on appeal all documents necessary for this Court to consider his assignments of error. *State v. Trull*, 153 N.C. App. 630, 634, 571 S.E.2d 592, 596 (2002), *disc. review denied*, 356 N.C. 691, 578 S.E.2d 597 (2003). Based upon the record before us, there is no order of expunction as to the DNA evidence collected in the earlier case.

Second, there are two provisions in Article 5 of Chapter 15A dealing with the expunction of DNA records; N.C. Gen. Stat. § 15A-146(b1)–(b2) and N.C. Gen. Stat. § 15A-148 (2007). N.C. Gen. Stat. § 15A-146(b1) provides that a person can apply for an order expunging DNA records “when the person's case has been dismissed by the trial court and the person's DNA record or profile has been included in the State DNA Database” Defendant's earlier charges

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were not dismissed by the trial court, but rather were voluntarily dismissed by the District Attorney. Thus, N.C. Gen. Stat. § 15A-146(b1) and (b2) are not applicable to defendant. N.C. Gen. Stat. § 15A-148(a) provides for the expunction of DNA records “following the issuance of a final order by an appellate court reversing and dismissing a conviction of an offense for which a DNA analysis was done . . . or upon receipt of a pardon of innocence with respect to any such offense” Neither of these prerequisites are present in defendant’s case.

Third, defendant is attempting to have the court retroactively expunge his DNA records after they had been used by law enforcement to identify him as the perpetrator of a number of crimes. We do not believe that this is contemplated by the expunction statute. “The purpose of the statute is to clear the public record of entries so that a person who is entitled to expunction may omit reference to the charges to potential employers and others, and so that a records check for prior arrests and convictions will not disclose the expunged entries.” *State v. Jacobs*, 128 N.C. App. 559, 569, 495 S.E.2d 757, 764, *disc. rev. denied*, 348 N.C. 506, 510 S.E.2d 665 (1998). “‘Expungement’ means to erase all evidence of the event as if it never occurred.” 21A Am. Jur. 2d *Criminal Law* § 1219 (2008) (citing *State v. C.P.H.*, 707 N.W.2d 699, 705 (Minn. Ct. App. 2006)).

N.C. Gen. Stat. § 15A-146 has two sections discussing the effect of an expunction, (a) and (a1), which contain the identical provision:

No person *as to whom such an order has been entered shall be held thereafter* under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(Emphasis added). While the expungement of a record wipes it out as if it never existed, it is clear that this only occurs *after* the order of expunction has been entered. The highlighted text in the above quoted statute clearly shows the intent of the legislature that the effect of the expunction is prospective only. Thus, even assuming *arguendo* that an order of expunction was entered on 8 November 2007 (which is not shown by the record in this case), this was after the police had utilized the State Bureau of Investigation’s DNA Database to identify defendant as the perpetrator of the crimes that are the subject of this appeal. The subsequent granting of an expunc-

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tion would not prevent the State from using the DNA evidence in these cases.

Defendant does not argue the other bases for his suppression motion on appeal and they are deemed abandoned. N.C.R. App. P. 28(b)(6) (2008).

For each of the reasons set forth above, Judge Cayer did not err in denying defendant's motion to suppress. This assignment of error is without merit.

III. Restitution

[2] In his second argument, defendant contends and the State concedes, that the trial court erred in recommending that defendant pay restitution in the amount of \$510.00 because the award is not supported by competent evidence. We agree.

In support of the award, the prosecutor presented a restitution worksheet stating one of the rape victims sought restitution in the amount of \$510.00. The victim did not testify and the worksheet was not supported by any documentation. Defendant did not stipulate to the worksheet. The prosecutor stated to the court that the amount represented "additional repairs and medical expenses." A prosecutor's unsworn statement, standing alone, is insufficient to support an award of restitution. *State v. Wilson*, 340 N.C. 720, 727, 459 S.E.2d 192, 196 (1995). In the absence of a stipulation or evidence introduced at the sentencing hearing to support the calculation of the amount of restitution recommended, the award of restitution in the consolidated judgment entered on case numbers 06 CRS 58868, 06 CRS 258871, 06 CRS 258873, and 06 CRS 258879 must be vacated and the matter remanded for a new hearing on the issue of restitution. *See State v. Calvino*, 179 N.C. App. 219, 223, 632 S.E.2d 839, 843 (2006).

AFFIRMED IN PART, ORDER OF RESTITUTION VACATED AND MATTER REMANDED FOR A NEW HEARING ON RESTITUTION.

Judges HUNTER, ROBERT C. and JACKSON concur.

STATE v. POPP

[197 N.C. App. 226 (2009)]

STATE OF NORTH CAROLINA v. VICTOR JAMES POPP

No. COA08-985

(Filed 19 May 2009)

Sentencing— prayer for judgment continued—transformed into final judgment

A prayer for judgment continued (PJC) lost its character as a PJC and transformed into a final judgment when defendant was ordered to complete a number of conditions which were beyond a requirement to obey the law. The judge was without authority to dismiss the charge after the end of the session without a writ of habeas corpus or a motion for appropriate relief, and could not remand for a new sentencing hearing because he had no authority to impose additional punishment.

Appeal by State from judgment entered 27 March 2008 by Judge Jerry Braswell in Craven County Superior Court. Heard in the Court of Appeals 28 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Richard E. Jester, for defendant-appellee.

CALABRIA, Judge.

The State appeals the trial court's dismissal of Victor James Popp ("defendant")'s possession of a handgun on educational property charge. We vacate and remand.

I. Facts

On 29 March 2006, defendant, a seventeen-year-old twelfth grader at Havelock High School, brought weapons in the trunk of his car to his high school. Specifically, defendant's trunk contained a Browning 9mm semi-automatic handgun, three clips of ammunition for the 9mm handgun, two knives, and three pellet rifles with pellets. On 17 April 2006, defendant was indicted on the charge of possession of weapons on educational property in violation of N.C. Gen. Stat. § 14-269.2(b). Defendant entered a guilty plea in exchange for the State's dismissal of charges in another criminal case, case number 06 CRS 52299.

On 26 April 2006, Judge Jerry Braswell ("Judge Braswell") entered a prayer for judgment ("April judgment") continuing the judg-

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ment for twelve months subject to the following conditions: (1) that defendant will fully cooperate with law enforcement regarding case number 06 CRS 52299, (2) defendant will complete his high school education, (3) enroll in an institution of higher education or in the armed forces, (4) not be charged with any felony or misdemeanor offense other than a minor traffic violation, (5) lose driving privileges for ninety days, (6) abide by a curfew of 7 p.m. for 120 days, (7) provide a copy of drug analysis for detection of drugs monthly for a period of six months, (8) perform 100 hours of community service and pay the fee, (9) not possess any weapons for twelve months, (10) write a letter of apology to the school principal and send a copy to every teacher, (11) remain employed either part-time or full-time, (12) pay costs, (13) not be on any school property other than the school defendant is attending, and (14) not leave the State of North Carolina. The order also required defendant's attorney to submit documentation to the district attorney and the court, showing defendant complied with the conditions.

On 19 February 2007, at the request of the State, Judge Paul Jones ("Judge Jones") ordered defendant to comply with random drug testing on a monthly basis, pay \$200.00 for a community service fee within twenty-four hours and pay supervision fees ("February order"). The February order modified the April judgment to include supervised probation for a minimum of ninety days. The order also allowed either the defendant or the State to set the case for disposition in April 2007.

On 27 March 2008, the State moved for a final judgment. At the hearing, defendant presented documents in support of his contention that he complied with the trial court's conditions in both the April judgment and the February order and asked the court to dismiss the charge. Judge Braswell dismissed the charge ("March order"). The State appeals.

II. Grounds for the Appeal

Unless the rule against double jeopardy prohibits further prosecution against a defendant, the State has a statutory right to appeal the dismissal of a criminal charge. N.C. Gen. Stat. § 15A-1445(a)(1) (2007); *State v. Allen*, 144 N.C. App. 386, 388, 548 S.E.2d 554, 555, *appeal dismissed, review denied* 354 N.C. 366, 556 S.E.2d 580 (2001).

III. Analysis

The State argues that because the April judgment was a final judgment, the trial court did not have jurisdiction to dismiss the

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charge in its March order. The State contends this Court should vacate the order dismissing the charge. We note that defendant concedes the April judgment is a final judgment and requests we remand for a new sentencing hearing.

The general rule is that when a prayer for judgment is continued (“PJC”) “there is no judgment—only a motion or prayer by the prosecuting officer for judgment.” *State v. Griffin*, 246 N.C. 680, 683, 100 S.E.2d 49, 51 (1957). “When, however, the trial judge imposes conditions ‘amounting to punishment’ on the continuation of the entry of judgment, the judgment loses its character as a PJC and becomes a final judgment.” *State v. Brown*, 110 N.C. App. 658, 659, 430 S.E.2d 433, 434 (1993) (citing *Griffin*, 246 N.C. at 683, 100 S.E.2d at 51). “Conditions ‘amounting to punishment’ include fines and imprisonment. Conditions not ‘amounting to punishment’ include ‘requirements to obey the law,’ and a requirement to pay the costs of court.” *Id.* at 659, 430 S.E.2d at 434 (internal citations omitted). In *Brown*, the trial court entered a PJC on the condition, *inter alia*, that defendant continue mental health treatment, a condition this Court determined was beyond a requirement to obey the law and thus amounted to punishment. *Id.* at 660, 430 S.E.2d at 434.

Here, defendant was ordered to complete a number of conditions which are beyond a requirement to obey the law. For example, defendant was ordered to abide by a curfew, complete high school, enroll in an institution of higher learning or join the armed forces, cooperate with random drug testing, complete 100 hours of community service, remain employed, and write a letter of apology. Upon the imposition of those conditions, the April judgment lost its character as a PJC and was transformed into a final judgment. *Compare Brown*, 110 N.C. App. at 659, 430 S.E.2d at 434 (holding imposition of the requirement that defendant continue mental health treatment transformed the PJC into a final judgment) *with State v. Cheek*, 31 N.C. App. 379, 382, 229 S.E.2d 227, 228 (1976) (where PJC required defendant to refrain from escaping prison and breaking the law, conditions did not amount to punishment and PJC was not a final judgment).

The next question is whether the trial court had authority to vacate the criminal charge against the defendant in its March order. “It is the general rule that the trial court loses jurisdiction to modify a judgment after the adjournment of the term.” *State v. Duncan*, 222 N.C. 11, 13, 21 S.E.2d 822, 824 (1942); *see also State v. Jones*, 27 N.C. App. 636, 638, 219 S.E.2d 793, 795 (1975). A trial court judge pos-

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sesses discretionary authority to vacate a judgment after the end of the session pursuant to a writ of *habeas corpus* or pursuant to a motion for appropriate relief. *State v. Morgan*, 108 N.C. App. 673, 676, 425 S.E.2d 1, 3 (1993).

Neither scenario is present in this case. The trial judge dismissed the charge almost two years after the April judgment was entered. We hold that the April judgment was a final judgment and Judge Braswell was without authority to dismiss the charge in his March order. Furthermore, upon the entry of the final judgment, the trial court loses authority to impose additional punishment on defendant and remanding for a new sentencing hearing would be improper. *Griffin*, 246 N.C. at 683, 100 S.E.2d at 51; *Brown*, 110 N.C. App. at 660, 430 S.E.2d at 434 (holding trial court was without authority to impose additional punishment after entering a PJC which imposed conditions amounting to punishment and was a final judgment). The March order is vacated. We remand to the trial court to reinstate the April judgment.

Vacated and remanded.

Judges ELMORE and STROUD concur.

SAM'S EAST, INC., PLAINTIFF v. REGINALD S. HINTON, SECRETARY OF REVENUE OF THE
STATE OF NORTH CAROLINA, DEFENDANT

No. COA08-453

(Filed 19 May 2009)

**Taxation— assessment of additional taxes and interest—
penalties**

For the reasons stated in *Wal-Mart Stores E., Inc. v. Hinton*, No. COA08-450, which is filed simultaneously with this opinion, judgment is affirmed with respect to the assessment of additional taxes, interest, and penalties.

Appeal by plaintiff Sam's East, Inc. from order entered 4 January 2008 by Judge Clarence E. Horton, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 October 2008.

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Alston & Bird LLP, by Jasper L. Cummings, Jr. for plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kay Linn Miller Hobart, for defendant-appellee.

Wilson & Coffey, LLP by G. Gray Wilson and Stuart H. Russell for amicus curiae.

STROUD, Judge.

Plaintiff Sam's East, Inc. appeals from an order entered 4 January 2008 granting summary judgment in favor of defendant. This case was consolidated with *Wal-Mart Stores East, Inc. v. Hinton*, No. COA08-450 (Wake County 06-CVS-3928) for the purpose of entry of summary judgment because as the trial court stated in the summary judgment order, "with the exception of the amounts assessed . . . the same facts and reasoning apply" to both cases. Neither party disputes this statement and we found nothing in the record indicating otherwise. Accordingly, for the reasons stated in *Wal-Mart Stores East, Inc. v. Hinton*, No. COA08-450, which is to be filed simultaneously with this opinion, judgment is affirmed with respect to the assessment of additional taxes and interest thereon. Furthermore, judgment as to the penalties assessed is also affirmed.

Affirmed.

Judges STEELMAN and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 MAY 2009

DALENKO v. MONROE No. 08-844	Wake (07CVS1640)	Affirmed
FIRST-CITIZENS BANK & TR. CO. v. DARWIN MED. MGMT., LLC No. 08-1486	Cumberland (07CVS3421)	Reversed and remanded
FLETCHER v. BOWSER No. 08-958	Forsyth (07CVS20)	Affirmed
FRINK v. BATTEN No. 08-696	Robeson (05CVS1806)	Affirmed in part; reversed in part
HARMON v. FRANGIS No. 08-858	Wake (05CVS14228)	Affirmed
IN RE C.A.G. No. 08-1489	Burke (07J154)	The order terminating respondent's parental rights to CAG is af- firmed. Petitioner's motions for sanctions are allowed
IN RE T.T.P. No. 08-1240	New Hanover (05J197)	Affirmed
JOHNSON v. WRIGHT No. 08-1093	Guilford (07CVD9141)	Dismissed
MASOOD v. ERWIN OIL CO. No. 08-1226	Ind. Comm. (IC013942)	Reversed and remanded
MOONEY v. MOONEY No. 08-998	Henderson (03CVD1581)	Affirmed
N.C. STATE BAR v. McGEE No. 08-995	NC State Bar (04DHC21)	Affirmed
ROBERTS v. ROBERTS No. 08-404	Guilford (02CVS10553)	Affirmed
SOUTHEAST LAND CO., LLC. v. LIBERTY MUT. INS. CO. No. 08-972	Guilford (07CVS4277)	Dismissed
STATE v. BROOKS No. 08-886	Cleveland (06CRS5934) (06CRS54383) (07CRS1186)	No error

STATE v. BURGESS No. 08-781	Wake (07CRS60845)	No error
STATE v. CLIFTON No. 08-1097	Guilford (07CRS24236) (07CRS24355-61)	No error
STATE v. DUNSTON No. 08-1130	Granville (07CRS52581-84)	Dismissed
STATE v. ESTRADA No. 08-1293	Mecklenburg (07CRS216124)	No error
STATE v. EWART No. 08-681	Haywood (07CRS50804)	No error
STATE v. FULLER No. 08-1295	Carteret (07CRS5075) (07CRS54334)	No error
STATE v. GIDDINGS No. 08-1032	Buncombe (08CRS263-69) (08CRS274-75) (08CRS53124) (08CRS53126-27) (08CRS53130) (08CRS53426-29) (08CRS53535-41)	Affirmed and re- manded for correc- tion of a clerical error
STATE v. HASKINS No. 08-1202	Rowan (05CRS59770)	No error
STATE v. KEATON No. 08-840	Mecklenburg (05CRS44817-18) (05CRS213280)	No prejudicial error
STATE v. KOONCE No. 08-777	Lenoir (07CRS1465) (05CRS55260)	Dismissed
STATE v. OWENS No. 08-1279	Cherokee (07CRS51060)	No error
STATE v. POLK No. 08-999	Union (06CRS10636) (06CRS53259) (06CRS53271)	No error
STATE v. REYNOLDS No. 08-1375	Buncombe (07CRS64400)	No error
STATE v. SPRUIELL No. 08-1244	Lee (05CRS54493) (05CRS54506) (08CRS261)	No error

STATE v. WALKER No. 08-965	Gaston (04CRS26148-50) (04CRS26153)	Affirmed
STATE v. WALKER No. 08-1319	Mecklenburg (07CRS232736-38) (07CRS232740) (07CRS232741)	No error
STATE v. WATSON No. 08-1241	Forsyth (07CRS5940) (07CRS54170)	No error
STATE v. WILCOX No. 08-1272	Craven (06CRS7285)	Affirmed
STATE v. WILLIAMS No. 08-1228	Hoke (06CRS1852) (06CRS1854)	Affirmed
STATE v. WILLOUGHBY No. 08-1416	Onslow (07CRS50238-39)	No error
VIGUS v. MILTON A. LATTA & SONS No. 08-700	Durham (06CVS59)	Affirmed
WILLIAMS v. KANE No. 08-1369	Wake (07CVS18602)	Affirmed in part, dis- missed in part

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2010-06

July 9, 2010

QUESTION:

May a judge serve on the board of trustees of a not-for-profit hospital?

COMMISSION CONCLUSION:

The Judicial Standards Commission concluded that the North Carolina Code of Judicial Conduct does not allow a judge to serve as an officer, director, trustee or non-legal advisor of a hospital.

DISCUSSION:

The provisions of the Code of Judicial Conduct implicated by this inquiry are:

Canon 2A requires a judge to conduct himself/herself in a such a manner as to promote public confidence in the impartiality of the judiciary (Canon 2A).

Canon 5C(2) prohibits a judge from serving as an officer, director or manager of any business.

Canon 5B of the Code of Judicial Conduct allows a judge to participate in civic and charitable activities provided the activities do not call the judge's impartiality into question nor interfere with the performance of the judge's judicial duties. As part of these activities a "judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization subject to certain restrictions. Such service is not allowed if the organization is likely to be involved in legal proceedings that would usually come before the judge (Canon 5B(1)). A judge cannot actively assist the organization with fund-raising (Canon 5B(2)).

The Commission reasoned that a hospital, regardless of its tax status, is essentially a business. The activities associated with the operation of a hospital customarily involve the corporate entity, its administration, employees, staff and the physicians authorized to practice within its facilities, in legal proceedings. These proceedings, which range from payment collection actions appealed from small claims

court to large medical malpractice suits, ordinarily come before district, superior and appellate court justices and judges. A judge's service as an officer, director, trustee or non-legal advisor of a hospital reasonably calls a judge's impartiality into question when matters involving the hospital come before the judge.

References:

North Carolina Code of Judicial Conduct

Canon 2A

Canon 5B(1) & (2)

Canon 5C(2)

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2010-07

July 9, 2010

QUESTION:

May a judge sponsor or consent to being listed as a sponsor of a fund raising event?

COMMISSION CONCLUSION:

The Judicial Standards Commission reasoned that a judge may not sponsor nor consent to being listed as a “sponsor” or “host” of a fund raising event for any organization or individual, other than the judge’s own judicial election campaign or a joint judicial election campaign in which the judge participates.

DISCUSSION:

Canon 2B of the Code of Judicial Conduct prohibits a judge from lending the prestige of the judge’s office to advance the private interests of others. Canons 4C and 5B(2) both prohibit a judge from active assistance in raising funds for quasi-judicial and non-judicial organizations, but allow a judge to be listed as a contributor on an invitation to a fund raising event. Canon 7C(1) of the Code prohibits a judge from soliciting funds for a political party, organization or individual seeking election to office, except as permitted by Canons 7B(2) and 7B(4) which allow for solicitation of donations for a judge’s own judicial election campaign or a joint judicial election campaign in which the judge participates.

While a judge may make a donation to and attend a fund-raising event, the Commission considers “active assistance . . . in raising funds” to include being listed as a “sponsor” or “host” of an event. Although the terms “sponsor” and “host” may be titles assigned to contributors who donate within an arbitrary monetary range, the Commission is of the opinion that the use of the terms contain connotations of being something more than a mere contributor. Those who “sponsor” or “host” an event publicly associate themselves with and promote the event or cause in an effort to encourage

others to do likewise, thereby rendering such conduct inappropriate for a judicial official.

References:

North Carolina Code of Judicial Conduct

Canon 2B

Canon 4C

Canon 5B(2)

Canon 7B(2)

Canon 7C(1)

BARRINGER v. WAKE FOREST UNIV. BAPTIST MED. CTR.

[197 N.C. App. 238 (2009)]

DERRICK BARRINGER, AS ADMINISTRATOR OF THE ESTATE OF DRAKE BARRINGER,
PLAINTIFF v. WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER,
MICHAEL H. HINES, MD, WAKE FOREST UNIVERSITY PHYSICIANS, NORTH
CAROLINA BAPTIST HOSPITAL, AND WAKE FOREST UNIVERSITY, DEFENDANTS

No. COA08-269

(Filed 2 June 2009)

1. Medical Malpractice— doctor’s affidavit—stricken—no prejudice

The trial court did not abuse its discretion by striking a doctor’s affidavit in a medical malpractice action where plaintiff did not show prejudice; on the contrary, plaintiff stated that the affidavit simply re-affirmed the expert opinions previously set forth in a deposition.

2. Medical Malpractice— proposed expert—basis of opinion—undeveloped

A medical malpractice case was remanded for a *voir dire* to determine the admissibility of a proposed medical expert’s testimony where the basis of the doctor’s opinion that defendants breached the standard of care was undeveloped.

3. Medical Malpractice— motion to compel discovery denied—no basis stated—presumptions—no abuse of discretion

The trial court did not abuse its discretion in a medical malpractice action by denying plaintiff’s motions to compel discovery. The record was completely silent as to the basis for the denial and the court is presumed to have made findings supported by competent evidence and orders supported by the findings.

4. Medical Malpractice— Rule 9(j)—procedural mechanism

It was noted in a medical malpractice action that Rule 9(j) does not provide a procedural mechanism for a defendant to file a motion to dismiss; the Rules of Civil Procedure provide other methods by which a defendant may allege a violation of Rule 9(j).

5. Medical Malpractice— Rule 9(j)—summary judgment

One superior court judge did not overrule another by granting summary judgment for defendants on a medical malpractice claim pursuant to Rule 9(j) where a first judge had previously denied a motion to dismiss under Rule 9(j). Compliance with Rule 9(j) presents a question of law, and the first judge did not convert the motion into one for summary judgment by considering mat-

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ters outside the pleadings. Moreover, even if the first motion became one for summary judgment, the issue there was whether the witnesses were reasonably expected to qualify as experts while the issue in the second motion was whether the witnesses in fact qualified as experts.

6. Medical Malpractice— not transferring patient—summary judgment

The trial court did not err in a medical malpractice action by granting summary judgment for defendants on a claim of negligence in not transferring a patient to another facility. This allegation was added in an affidavit after the witness's deposition, is inconsistent with the prior sworn testimony, and does not create a genuine issue of fact. Moreover, plaintiff's other expert testified that there was no standard of care on the issue of transferring the patient to another hospital.

7. Medical Malpractice— plaintiff's expert—no personal experience of procedures—not qualified to testify

The trial court did not err in a medical malpractice action by granting summary judgment for defendants on claims which depended upon expert testimony that Dr. Hines was negligent in failing to order a particular test. Plaintiff's expert had never performed the relevant surgical procedures and was not qualified to testify that those procedures were performed incorrectly.

8. Appeal and Error— assignments of error—not supported by authority—abandoned

Assignments of error not supported by authority were deemed abandoned.

9. Medical Malpractice— doctor's testimony limited—not effectively a directed verdict

Plaintiff mischaracterized the court's action in a medical malpractice claim as effectively granting a directed verdict when the court limited the testimony of a doctor regarding certain claims. It was undisputed that the witness had never performed the procedures in question and was not qualified to testify that the standard of care had been breached.

10. Medical Malpractice— punitive damages—corporate defendant—directed verdict

There was no prejudice in a medical malpractice action where the trial court entered a directed verdict for defendants on

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plaintiff's claim for punitive damages against the corporate defendants; even if the physician was the head of the treatment team, and even if the head of the treatment team was a manager, the jury did not find that the physician was negligent.

11. Appeal and Error— record—entire instruction not included

An assignment of error concerning the denial of a request for a special instruction was not properly presented for appellate review where the record did not include a transcript of the entire charge. This is important because the record is received by all three members of the Court of Appeals panel, while the only single copy of the transcript is filed. Even though the record in this case contained the instruction given in response to a jury question, this portion of the charge was not sufficient to allow review of the charge in its entirety.

Appeal by Plaintiff from orders entered 8 September 2006 and 22 March 2007 by Judge A. Moses Massey; from order entered 18 May 2007 by Judge R. Stuart Albright; and from judgment entered 13 June 2007 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 6 October 2008.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for Plaintiff-Appellant.

Wilson & Coffey, L.L.P., by Tamara D. Coffey, J. Chad Bomar, and Lorin J. Lapidus, for Defendants-Appellees.

STEPHENS, Judge.

In this medical malpractice action, Plaintiff appeals following a jury verdict which found that Defendants were not negligent in their treatment of Plaintiff's infant son, Drake Barringer, who died seven months after his birth. We reverse and remand with instructions.

Background

Through counsel, Plaintiff initiated an action on 23 December 2003 by filing a complaint against Defendants Wake Forest University Baptist Medical Center, Wake Forest University Physicians, North Carolina Baptist Hospital, and Wake Forest University (collectively, "corporate Defendants"), and Michael H. Hines, M.D., Karen H. Raines, M.D., and R. Mark Payne, M.D. Defendants answered the complaint on 18 March 2004, but the action subsequently was dismissed.

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Plaintiff re-filed the complaint *pro se* on 21 October 2005. Defendants filed an answer on 19 December 2005. On 16 February 2006, the law firm of Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., which did not prepare the initial complaint, filed a notice of appearance as Plaintiff's counsel. The trial court subsequently allowed Plaintiff to amend the complaint. The complaint, as amended, contained the following allegations:

Drake was born to Plaintiff and Plaintiff's wife on 13 May 2001. On 18 May 2001, Dr. Hines, a pediatric cardiothoracic surgeon at Baptist Hospital, diagnosed Drake with tetralogy of Fallot, one symptom of which is a ventricular septal defect ("VSD"). Dr. Hines recommended that Drake undergo heart surgery to repair the VSD. Plaintiff asked Dr. Hines about the propriety of conducting a preoperative cardiac catheterization on Drake in order to determine if the operation was necessary. Dr. Hines advised the Barringers that Drake was too "young" for a catheterization and that Drake would not survive such a procedure. The Barringers consented to the surgery. Without ordering a preoperative transesophageal echocardiogram ("TEE"), Dr. Hines operated on Drake on 27 June 2001. Dr. Hines did not order an intraoperative or postoperative TEE to determine whether the VSD had been repaired. Drake did not recover as expected from the surgery.

The complaint further alleged that Drake underwent an echocardiogram on 5 July 2001 and that Dr. Raines, a pediatric cardiologist, "failed to accurately interpret the echocardiogram." On 9 July 2001, Drake underwent a cardiac catheterization. On 10 July 2001, Dr. Hines performed a second operation on Drake. As before, Drake did not undergo an intraoperative or postoperative TEE. As before, Drake did not recover as expected from the surgery.

Finally, the complaint alleged that Drake underwent another echocardiogram on 14 July 2001, and that Dr. Payne, a pediatric cardiologist, "failed to accurately interpret the echocardiogram." Dr. Hines performed a third operation on Drake on 16 August 2001. The complaint alleged that, under the circumstances, the procedure performed by Dr. Hines "was not the correct procedure to perform." Drake died at Baptist Hospital on 26 December 2001.

On these allegations, Plaintiff asserted that Defendants were negligent in providing medical care and treatment to Drake. Specifically, Plaintiff alleged as follows:

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1. Dr. Hines was negligent in failing to order a TEE before the first surgery;
2. Dr. Hines was negligent in failing to order TEEs during or after the first and second surgeries;
3. Dr. Hines was negligent in failing to order an echocardiogram or catheterization in a timely manner following the first surgery;
4. Dr. Hines was negligent in failing to transfer Drake to another facility after the second surgery;
5. Dr. Hines was negligent in failing to perform the correct procedure during the third surgery;
6. In advising the Barringers that Drake would not survive a catheterization before the first surgery, Dr. Hines obtained the Barringers' consent by "fraud, deception[,] and a misrepresentation of a material fact," and, therefore, Dr. Hines was negligent in performing the first operation on Drake without the Barringers' informed consent.
7. Dr. Raines and Dr. Payne were negligent in failing to properly interpret the echocardiograms.

Plaintiff advanced each of these claims against the corporate Defendants under the theory of vicarious liability, and Plaintiff sought compensatory and punitive damages on the claims.

In a discovery scheduling order, the trial court set the matter for trial on 21 May 2007 and ordered all discovery to be completed by 13 April 2007. The trial court did not designate a date by which the parties were required to file all dispositive motions. Pursuant to the order, Plaintiff designated pediatric cardiothoracic surgeon Ralph S. Mosca and pediatric cardiologist Arthur S. Raptoulis as the experts who would testify at trial. On 31 July 2006, Plaintiff filed the doctors' affidavits, both of which stated that the medical care provided to Drake "was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care was rendered."

On 4 August 2006, Plaintiff filed a motion to compel discovery. On 8 September 2006, the trial court allowed the motion in part and denied the motion in part.

Defendants deposed Plaintiff's experts in November and December 2006. In his deposition, Dr. Mosca testified that Dr. Hines

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breached the standard of care by (1) performing the first surgery, because surgery was not indicated for a patient of Drake's age, (2) failing to properly diagnose Drake's condition prior to performing the first surgery, and (3) failing to transfer Drake to another hospital after the second surgery. In his deposition, Dr. Raptoulis testified that Dr. Hines breached the standard of care by (1) failing to properly interpret an echocardiogram before the first surgery, (2) failing to order a TEE before, during, or after the first surgery, and (3) improperly obtaining the Barringers' consent to perform the first surgery. On 12 December 2006, Plaintiff voluntarily dismissed Dr. Raines and Dr. Payne from the action without prejudice.

On or about 6 March 2007, Plaintiff filed a motion to reconsider the 8 September 2006 order which denied in part Plaintiff's motion to compel discovery. In the motion to reconsider, Plaintiff sought to discover, *inter alia*, the names and addresses of all patients who died while under Dr. Hines' care between 1 January 1995 and 26 December 2001. By order entered 22 March 2007, the trial court denied Plaintiff's motion to reconsider.

On 9 March 2007, Defendants filed a motion to dismiss Plaintiff's complaint "pursuant to Rule 9(j) and Rule 41(b) of the North Carolina Rules of Civil Procedure." In the motion, Defendants asserted that Plaintiff could not have had a reasonable expectation that either Dr. Mosca or Dr. Raptoulis would qualify as expert witnesses. Defendants also asserted that "[b]ecause neither of [P]laintiff's experts is qualified to testify against [D]efendants at the trial of this matter, [P]laintiff can offer no expert opinion as to the standard of care which is required by N.C. Gen. Stat. [§] 90-21.12." The trial court, Judge A. Moses Massey presiding, conducted a hearing on Defendants' motion on 16 March 2007 and denied the motion by order entered 22 March 2007.

On or about 29 March 2007, Defendants filed a motion for summary judgment "pursuant to Rule 56 of the North Carolina Rules of Civil Procedure[.]" In the motion, Defendants asserted that "[b]ecause neither of [P]laintiff's experts is qualified to testify at the trial of this matter, [P]laintiff can offer no expert opinion as to the standard of care which is required by N.C. Gen. Stat. [§] 90-21.12." On 23 April 2007, Plaintiff filed a motion to strike and dismiss Defendants' motion for summary judgment on the ground that the motion was "identical" to the motion to dismiss filed 9 March 2007.

On or about 25 April 2007, Plaintiff filed a second affidavit of Dr. Raptoulis in which he averred, *inter alia*, that Defendants were neg-

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ligent “through their employee, Dr. Wesley Covitz,” in that Dr. Covitz mis-diagnosed Drake’s condition.¹ On 15 May 2007, Plaintiff filed a third affidavit of Dr. Raptoulis in which he averred that Dr. Hines breached the standard of care by advising the Barringers before Drake’s first surgery that Drake would not survive a catheterization. On 7 May 2007, Plaintiff filed a second affidavit of Dr. Mosca in which he averred, *inter alia*, that he was familiar with the standard of care in communities similar to Winston-Salem. On 3, 7, and 16 May 2007, Defendants filed motions to strike these affidavits on the ground that the affidavits contradicted the doctors’ deposition testimony.

The trial court, Judge R. Stuart Albright presiding, subsequently conducted a hearing on (1) Plaintiff’s motion to dismiss Defendants’ motion for summary judgment, (2) Defendants’ motions to strike Plaintiff’s affidavits, and (3) Defendants’ motion for summary judgment. In three orders entered 18 May 2007, the trial court (1) denied Plaintiff’s motion to dismiss Defendants’ motion for summary judgment, (2) granted Defendants’ motion to strike Dr. Mosca’s 7 May 2007 affidavit, and (3) granted Defendants’ motion to strike Dr. Raptoulis’ 25 April 2007 affidavit only to the extent that the affidavit referred to the alleged negligence of Dr. Covitz. In a fourth order entered that day, the trial court granted Defendants’ motion for summary judgment on (1) all claims which depended on the testimony of Dr. Mosca, (2) the claim that Defendants negligently failed to transfer Drake to another facility, (3) all claims which depended on the testimony of Dr. Raptoulis concerning the performance of any action taken during surgery, and (4) all claims based on the negligence of Dr. Covitz. The court denied Defendants’ motion as to:

1. Dr. Hines’ alleged failure to interpret the 18 May 2001 echocardiogram correctly;
2. Dr. Hines’ alleged failure to perform additional diagnostic studies prior to the first surgery;
3. Dr. Hines’ alleged failure to obtain the Barringers’ informed consent prior to the first surgery; and
4. Dr. Hines’ alleged failure to obtain further diagnostic studies following the first surgery.

The case proceeded to trial on these remaining issues.

At trial, Dr. Raptoulis testified that Dr. Hines breached the standard of care by telling the Barringers that Drake would not survive a

1. Dr. Covitz was never a named Defendant in this action.

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catheterization before the first surgery. Plaintiff's counsel then asked Dr. Raptoulis whether that breach was a "direct or proximate cause of the multiple surgeries and subsequent death of Drake[.]" Defendants' counsel objected, and the trial court heard extensive *voir dire* testimony. At the conclusion of the hearing, the trial court ruled that while Dr. Raptoulis could testify that Dr. Hines breached the standard of care in advising the Barringers that Drake would not survive a pre-surgery cardiac catheterization and that the failure to perform the cardiac catheterization was a proximate cause of Drake's death, Dr. Raptoulis could not testify that Dr. Hines breached the standard of care in failing to perform additional diagnostic studies prior to or after the first surgery.

At the conclusion of Plaintiff's evidence, the trial court granted Defendants' motion for a directed verdict on Plaintiff's claim for punitive damages "as to the corporate [D]efendants[.]" but denied the motion "with regard to Dr. Hines." Following the presentation of Defendants' evidence, the court submitted the following issue to the jury: "Was the death of Drake Barringer caused by the negligence of [Defendants], by and through the actions of Dr. Hines?" The jury answered this question in the negative, and the court entered judgment in Defendants' favor on 13 June 2007. Plaintiff timely appealed.

I. SUMMARY JUDGMENT—DR. MOSCA

We first address Plaintiff's argument that the trial court erred in granting summary judgment on all claims that were dependent on Dr. Mosca's testimony. Plaintiff argues that summary judgment was improper on these claims because (1) Dr. Mosca stated in his 31 July 2006 affidavit that Defendants breached "the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care was rendered[.]" (2) Dr. Mosca testified in his deposition that he was familiar with the national standard of care and that there was no difference between a national standard and the same or similar community standard, (3) Dr. Mosca testified in his deposition that he was familiar with the standard of care in communities similar to Winston-Salem, and (4) Dr. Mosca sufficiently stated in his 7 May 2007 affidavit that he was familiar with the applicable standard of care.

[1] Initially, we note that the trial court struck and did not consider Dr. Mosca's 7 May 2007 affidavit when ruling on Defendants' motion for summary judgment. Plaintiff asserts that the court "committed

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prejudicial error” in striking the affidavit because the affidavit “did not contradict any prior opinions set forth in [Dr. Mosca’s] deposition[.]” We review an order striking an affidavit for abuse of discretion. *Blair Concrete Servs., Inc. v. Van-Allen Steel Co.*, 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002). The appellant must show not only that the trial court abused its discretion in striking an affidavit, but also “that prejudice resulted from that error.” *Miller v. Forsyth Mem’l Hosp., Inc.*, 174 N.C. App. 619, 620, 625 S.E.2d 115, 116 (2005) (citing *Bowers v. Olf*, 122 N.C. App. 421, 427, 470 S.E.2d 346, 350 (1996)). “This Court will not presume prejudice.” *Id.*

Even if the trial court abused its discretion in striking the affidavit,² Plaintiff in no way explains how he was prejudiced by the trial court’s action. On the contrary, Plaintiff states that the 7 May 2007 affidavit “simply re-affirmed the expert opinions previously set forth in [Dr. Mosca’s] deposition.” We thus conclude that Plaintiff has not met the heavy burden of showing that the trial court erred in striking the affidavit, and we will not consider the affidavit’s contents in reviewing the grant of summary judgment on all claims which depended on Dr. Mosca’s testimony. Our review is limited to Dr. Mosca’s 31 July 2006 affidavit and deposition testimony.

[2] In a medical malpractice action, “a plaintiff has the burden of showing ‘(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.’” *Purvis v. Moses H. Cone Mem’l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (quoting *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998)). “To meet [the] burden of proving the applicable standard of care, [a plaintiff] must satisfy the requirements of N.C.G.S. § 90-21.12” *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009). Section 90-21.12 states as follows:

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

2. *But see* Part II.A, below.

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

N.C. Gen. Stat. § 90-21.12 (2005).

When plaintiffs have introduced evidence from an expert stating that the defendant doctor did not meet the accepted medical standard, “[t]he evidence forecast by the plaintiffs establishes a genuine issue of material fact as to whether the defendant doctor breached the applicable standard of care and thereby proximately caused the plaintiffs’ injuries.”

Crocker, 363 N.C. at 142-43, 675 S.E.2d at 628 (quoting *Mozingo v. Pitt Cty. Mem’l Hosp., Inc.*, 331 N.C. 182, 191, 415 S.E.2d 341, 346 (1992)). “This issue is ordinarily a question for the jury, and in such case, it is error for the trial court to enter summary judgment for the defendant.” *Id.* We review a trial court’s ruling on summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

The sole issue raised by this argument is whether Dr. Mosca was sufficiently familiar with the applicable standard of care. It is undisputed that Dr. Mosca was otherwise qualified to offer expert testimony against Defendants. We agree that Dr. Mosca’s 31 July 2006 affidavit speaks in the language of N.C. Gen. Stat. § 90-21.12. However, Dr. Mosca’s subsequent deposition testimony presents a close question as to whether Dr. Mosca was indeed sufficiently familiar with the applicable standard of care. In response to Defendants’ counsel’s questions, Dr. Mosca seemed to state that Defendants breached a national standard of care:

Q. First of all, you understand, Dr. Mosca, that in order to be held responsible for medical negligence there must have been a breach of the applicable standard of care for a surgeon like Dr. Hines in his community, correct?

A. Yes, although I’ll also admit I’m not sure exactly what those things mean from place to place and time to time. I think it’s a little nebulous in the medical community. I have a general idea of what I think should be done.

Q. Let’s follow up on that for just a minute.

Tell me how you are defining the standard of care for purposes of reviewing Dr. Hines['] care.

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A. I think I did already but I'll repeat it and that is having now worked in two or three major medical centers and dealing on a daily, monthly, whatever basis with other people who perform many of these operations, the way we do it is pretty much similar across different institutions.

And what I'm telling you is having said that and talked to them and been to the national meetings and reading the literature and reviewing the literature, that it seems to me that that[,] as far as medicine goes[,] would have to be considered the standard of care.

Q. To more simply put that, are you applying a standard of care for national major medical centers to Dr. Hines?

A. Well, anybody, I think, who does these type of surgeries, in my opinion should apply the care that they can get at major medical centers, yes.

Q. And is that a national standard of care in your opinion?

A. In my opinion, yes.

But again, we don't have defined standard of cares in medicine. That I know of.

Q. But in your opinion, you are applying a national standard of care, correct?

A. I guess the answer is yes.

I'm trying to generalize for what I think surgeons who do this on a regular basis would say is reasonable.

Q. Do you recognize that there is a difference between a true breach of the standard of care and what physicians may differ about and what may therefore be called a matter of physician judgment?

A. I believe so, yes.

Q. And you understand the difference between those two concepts?

A. I do. I think the difference is really generated by the overwhelming opinion of people who do it a lot. That's what I'm trying to use as my yardstick.

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In response to Plaintiff's counsel's questions, Dr. Mosca seemed to state that Defendants breached the standard of care in communities similar to Winston-Salem:

Q. I just want to touch briefly on the standards of practice.

I want to ask you first of all: Are you familiar with the Durham medical community, Durham North Carolina medical community, they call it Duke University Medical Center?

A. I'm familiar with Duke University, North Carolina Chapel Hill, with Wake Forest, insofar as I know that they are—exist and who works there. And again, I visited the area. I went to school in the area, but as far as actually visiting the medical centers, it's rare.

Q. But have you been to the medical center at Wake Forest University?

A. Yes.

Q. And do you consider the Durham Medical Community, Duke University Medical Community similar to the medical community in Winston-Salem?

A. I would say yes, they're about the same size and offer the same care.

Q. Do you consider the medical community in Ann Arbor, Michigan to be similar to the medical community in Winston-Salem?

A. I think Ann Arbor Michigan—are you speaking of the pediatric surgery program or just the community in general.

Q. Just the community in general.

A. I think they're similar towns with similar medical communities, yes.

Q. What about the medical community in Syracuse, New York?

A. I would say yes.

Q. I believe you said your brother lives in Charlotte, North Carolina, you visit him now and then?

A. Yes.

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Q. Do you consider the medical community in Charlotte, North Carolina to be similar to the medical community in Winston-Salem?

A. I would have to say I'm not all that familiar with the hospital, so it would be hard for me to make a determination on that.

Q. You also indicated that you do some work in New Jersey, is that right?

A. Yes.

Q. What city in New Jersey?

A. New Brunswick, New Jersey.

Q. Do you consider that medical community to be similar to the medical community in Winston-Salem?

A. That medical community is, it's a smaller environment, but surrounded by a large population. So I would say that there are ways that they are very similar, yes.

Q. I want to go back then and ask you, in terms of your opinions on the violation of the standard of care, whether back in 2001, whether you would have been familiar with the standards of care, standards of practice in Winston-Salem, North Carolina or similar communities for pediatric cardiac thoracic surgery?

A. Again, if we draw the analogy of medical centers that you've mentioned to Winston-Salem, then I believe I would be familiar.

But I did not live or work in Winston-Salem so I'm not sure exactly what the standard of care was. But if it's similar to those others then I would say it should be, yes.

Considering this testimony in the light most favorable to Plaintiff, as we must, we conclude that the basis of Dr. Mosca's opinion that Defendants breached the standard of care is "undeveloped." *Crocker*, 363 N.C. at 147, 675 S.E.2d at 631.

While Dr. Mosca *seemed* to testify that he was applying a national standard of care in response to Defendants' counsel's questions, Defendants' counsel never asked, and Dr. Mosca never testified, that such national standard of care applied in Winston-Salem in 2001. Additionally, while Dr. Mosca *seemed* to testify that he was applying the standard of care in communities similar to Winston-Salem in

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response to Plaintiff's counsel's questions, he also expressed doubt as to whether Winston-Salem was indeed similar to the communities with which he was familiar. This is, thus, a "close case[]." ³ *Id.* at 153, 675 S.E.2d at 634 (Martin, J., concurring).

Our Supreme Court has instructed that "[w]hen the proffered expert's familiarity with the relevant standard of care is unclear from the paper record, our trial courts should consider requiring the production of the expert for purposes of voir dire examination." *Id.* (Martin, J., concurring). "[P]articularly when the admissibility decision may be outcome-determinative, the expense of voir dire examination and its possible inconvenience to the parties and the expert are justified in order to ensure a fair and just adjudication." *Id.* (Martin, J., concurring). Accordingly, we reverse the trial court's order which granted summary judgment on all claims which depended on the testimony of Dr. Mosca. We remand this case to the trial court with instructions to conduct a voir dire examination of Dr. Mosca in order to "determine the admissibility of the proposed expert testimony."⁴ *Id.* (Martin, J., concurring). Should the trial court, after conducting the voir dire examination, determine that Dr. Mosca is qualified to offer his standard of care opinion to the jury, the trial court is instructed to conduct a new trial in this matter.

II. ADDITIONAL PRE-TRIAL ISSUES

A. Discovery

[3] Plaintiff argues that the trial court erred in denying (1) the 4 August 2006 motion to compel discovery, and (2) the 6 March 2007 motion to reconsider the order denying the earlier motion. Plaintiff contends that Defendants should have been compelled to answer the following interrogatories:

9. Please list the names and last known home address[es] of all pediatric cardiology patients of [Dr. Hines] who have died while under his care from January 1, 1995 until December 26, 2001.

3. Judge Albright stated that he was "having a hard time" with Dr. Mosca's deposition testimony, which he described as "troubling" and "problematic[.]"

4. As stated in the footnote to Justice Newby's dissent in *Crocker*, Justice Martin's concurring opinion, "having the narrower directive, is the controlling opinion . . . and requires the trial court to conduct a voir dire examination of the proffered expert witness." *Crocker*, 363 N.C. at 154, n.1, 675 S.E.2d at 635 n.1 (Newby, J., dissenting) (citation omitted).

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10. Please list the names of all patients in the pediatric intensive care unit who died between June 27, 2001 and December 26, 2001, who were under the care of [Dr. Hines].

Plaintiff's motions were denied by orders entered 8 September 2006 and 22 March 2007, respectively.

In general,

[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2005). “ [O]rders regarding matters of discovery are within the trial court’s discretion and are reviewable only for abuse of that discretion.’ ” *In re Estate of Tucci*, 104 N.C. App. 142, 152, 408 S.E.2d 859, 865-66 (1991) (quoting *Weaver v. Weaver*, 88 N.C. App. 634, 638, 364 S.E.2d 706, 709, *disc. review denied*, 322 N.C. 330, 368 S.E.2d 875 (1988)), *disc. review improvidently allowed*, 331 N.C. 749, 417 S.E.2d 236 (1992). “ In addition, the appellant must show not only that the trial court erred, but that prejudice resulted from that error.” *Miller*, 174 N.C. App. at 620, 625 S.E.2d at 116 (citing *Bowers*, 122 N.C. App. at 427, 470 S.E.2d at 350). “ This Court will not presume prejudice.” *Id.*

The North Carolina Supreme Court has cautioned this Court to apply the “ abuse of discretion ” standard of review “ strictly, ” and has explained that

[f]or well over one hundred years, it has been a sufficiently workable standard of review to say merely that a manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof.

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Worthington v. Bynum, 305 N.C. 478, 484-85, 290 S.E.2d 599, 604 (1982). The Supreme Court has also stated that when a trial court makes a discretionary decision, “the court should make appropriate findings of fact and conclusions of law, sufficient to allow appellate review for abuse of discretion.” *Roberts v. Madison Cty. Realtors Ass’n, Inc.*, 344 N.C. 394, 401, 474 S.E.2d 783, 788 (1996). “Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b).” N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2005). Failure to make findings upon request constitutes error. *Texas W. Fin. Corp. v. Mann*, 36 N.C. App. 346, 349, 243 S.E.2d 904, 906 (1978). But where no request is made, “it is presumed that the judge, upon proper evidence, found facts sufficient to support [the] judgment.” *Holcomb v. Holcomb*, 192 N.C. 504, 504, 135 S.E. 287, 288 (1926) (citing *McLeod v. Gooch*, 162 N.C. 122, 78 S.E. 4 (1913)). “Thus, when no findings are made there is nothing for the appellate court to review.” *Kolendo v. Kolendo*, 36 N.C. App. 385, 386, 243 S.E.2d 907, 908 (1978) (citing *Holcomb*, 192 N.C. 504, 135 S.E. 287).

In this case, we conclude that Plaintiff has not met the heavy burden of proving an abuse of discretion. Plaintiff contends that the trial court denied the motions to compel “based on a mere assertion of privilege of Defendants’ counsel.” In fact, the record before this Court is completely silent as to the basis or bases upon which the trial court relied in denying Plaintiff’s motions. Plaintiff does not contend that the trial court announced its reasons for denying the motion to compel at the conclusion of the hearing on that motion, and the transcript of that hearing is not part of the record on appeal. The transcript of the hearing on Plaintiff’s motion for reconsideration is part of the record, but the trial court merely took the motions under advisement at the conclusion of the hearing. Neither party asked the trial court to enter findings of fact or conclusions of law in its orders denying the motions to compel, and neither order denying the motions contains findings or conclusions. The orders state only that the motions were “denied.” Thus, though we are able to discern the various arguments the parties made in support of their positions on the motion to reconsider, we are wholly unable to discern the trial court’s underlying reasoning in denying Plaintiff’s motions. Accordingly, we presume that the trial court found facts sufficient to support its orders and that its factual findings were supported by competent evidence. Plaintiff has not met the heavy burden of proving that the trial court abused its discretion in denying Plaintiff’s motions to compel discovery. This assignment of error is overruled.

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B. Summary Judgment

Plaintiff contends the trial court erred in granting summary judgment in favor of Defendants on (1) the claim that Defendants negligently failed to transfer Drake to another facility, (2) all claims which depended on Dr. Raptoulis' testimony that Defendants breached the standard of care by failing to perform TEEs during or after the first surgery and during the second surgery, and (3) all claims based on the negligence of Dr. Covitz. Plaintiff argues that Defendants were not entitled to judgment as a matter of law on any of these claims. Plaintiff also argues that, in entering the summary judgment order, Judge Albright improperly overruled Judge Massey's order denying Defendants' motion to dismiss for failure to comply with Rule 9(j).

[4] First, Plaintiff argues that by considering matters outside the pleadings in ruling on Defendants' 9 March 2007 motion to dismiss for failure to comply with Rule 9(j), Judge Massey converted that motion into a motion for summary judgment; therefore, by granting the 29 March 2007 motion for summary judgment, Judge Albright "in effect overruled Judge Massey" in violation of the principle that "[n]o appeal lies from one superior court judge to another." *Greene v. Charlotte Chem. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961).

Civil Procedure Rule 9(j) provides in full as follows:

Medical malpractice.—Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

- (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
- (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

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- (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

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 or, if no resident judge for that judicial district is physically present in that judicial district, otherwise available, or able or willing to consider the motion, then any presiding judge of the superior court for that judicial district 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. The plaintiff shall provide, at the request of the defendant, proof of compliance with this subsection through up to ten written interrogatories, the answers to which shall be verified by the expert required under this subsection. These interrogatories do not count against the interrogatory limit under Rule 33.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2005). As Judge Albright observed during the hearing on the summary judgment motion, we note that this rule does not provide a procedural mechanism by which a defendant may file a motion to dismiss a plaintiff's complaint. *But see Thippen v. Ngo*, 355 N.C. 198, 200, 558 S.E.2d 162, 164 (2002) (stating that the trial court granted defendants' "motions to dismiss pursuant to Rules 9(j) and 12(b)(6)"); *Trapp v. Maccioli*, 129 N.C. App. 237, 239, 497 S.E.2d 708, 709 (stating that defendant filed a motion to dismiss "pursuant to Rule 9(j)"), *disc. review denied*, 348 N.C. 509, 510 S.E.2d 672 (1998). The Rules of Civil Procedure provide other methods by which a defendant may file a motion alleging a violation of Rule 9(j). *E.g.*, N.C. Gen. Stat. § 1A-1, Rules 12, 41, and 56 (2005). Rule 9(j) itself, however, does not provide such a method.

[5] Rule 9(j) unambiguously requires a trial court to dismiss a complaint if the complaint's allegations do not facially comply with the rule's heightened pleading requirements. Additionally, this Court has determined "that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008); *McGuire v. Riedle*, 190 N.C. App. 785, 787, 661 S.E.2d 754, 757-58 (2008). In considering whether a

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plaintiff's Rule 9(j) statement is supported by the facts, "a court must consider the facts relevant to Rule 9(j) and apply the law to them." *McGuire*, 190 N.C. App. at 787, 661 S.E.2d at 757 (quoting *Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002)). In such a case, this Court does not "inquire as to whether there was any question of material fact," nor do we "view the evidence in the light most favorable" to the plaintiff. *Id.* at 787-88, 661 S.E.2d at 757. Rather, "our review of Rule 9(j) compliance is *de novo*, because such compliance clearly presents a question of law" *Id.* (quoting *Smith v. Serro*, 185 N.C. App. 524, 527, 648 S.E.2d 566, 568 (2007)).

This Court's holding in *McGuire* eviscerates Plaintiff's contention that, by considering matters outside the pleadings in ruling on Defendants' 9 March 2007 motion, the trial court converted that motion into one for summary judgment. In *McGuire*, the defendants filed "motions to dismiss based on Rule 9(j)," and the trial court "entered an order dismissing the suit for failure to comply with Rule 9(j)." 190 N.C. App. at 786, 661 S.E.2d at 756-57. On appeal, the plaintiff argued "that because the trial court considered matters outside the pleadings in reaching its decision, defendants' motions to dismiss based on Rule 9(j) violations were converted to . . . Rule 56 summary judgment motion[s]." *Id.* at 787, 661 S.E.2d at 757. Therefore, the plaintiff argued, this Court should review the evidence in the light most favorable to the plaintiff to determine whether there was any genuine issue of material fact. *See Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 294, 628 S.E.2d 851, 855 (2006) (stating that, in reviewing an order granting summary judgment, this Court "view[s] the evidence in the light most favorable to the nonmoving party") (citing *Falk Integrated Techs., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999)), *disc. review denied*, 361 N.C. 426, 648 S.E.2d 209 (2007). We rejected the plaintiff's argument, stating that "our review of Rule 9(j) compliance is *de novo*, because such compliance clearly presents a question of law" *McGuire*, 190 N.C. App. at 787, 661 S.E.2d at 757 (quoting *Serro*, 185 N.C. App. at 527, 648 S.E.2d at 568). Accordingly, we hold that Judge Massey did not convert Defendants' 9 March 2007 motion into a motion for summary judgment by considering matters outside the pleadings. *McGuire*, 190 N.C. App. 787, 661 S.E.2d 754.

In reaching this result, we note that Plaintiff only cites *King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Authority*, 113 N.C. App. 341, 439 S.E.2d 771, *disc.*

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review denied, 336 N.C. 316, 445 S.E.2d 396 (1994), in support of his argument that Judge Massey converted Defendants' 9 March 2007 motion into a motion for summary judgment. This authority is unavailing as *King* merely stands for the well-established principle that a trial court converts a Rule 12(b)(6) motion into a Rule 56 motion by considering matters outside the pleadings. Moreover, even assuming *arguendo* that Judge Massey converted Defendants' motion into one for summary judgment, *but see McGuire*, 190 N.C. App. 787, 661 S.E.2d 754, we conclude that Judge Albright did not overrule Judge Massey's order. The issue raised by Defendants' 9 March 2007 motion and presented to Judge Massey was

whether it was 'reasonably expected' that the witness[es] would qualify under Rule 702. In other words, were the facts and circumstances known or those which should have been known to the pleader such as to cause a reasonable person to believe that the witness[es] would qualify as . . . expert[s] under Rule 702.

Trapp, 129 N.C. App. at 241, 497 S.E.2d at 711 (footnote omitted). The issue raised by Defendants' 29 March 2007 motion and presented to Judge Albright was whether Plaintiff's witnesses *in fact qualified* as experts under Rule 702. *See id.* (concluding that "although the trial court ultimately resolved the Rule 702 issue against the plaintiff, there [was] ample evidence in [the] record that a reasonable person armed with the knowledge of the plaintiff at the time the pleading was filed would have believed that [its expert] would have qualified as an expert under Rule 702"). Accordingly, Plaintiff's assignment of error is overruled.

[6] Second, Plaintiff argues that the trial court erred in granting summary judgment on Plaintiff's claim that Defendants were negligent in failing to transfer Drake to another facility following the second surgery. This argument lacks merit.

In his deposition testimony, Dr. Raptoulis repeatedly asserted that Defendants breached the standard of care by (1) failing to accurately interpret Drake's echocardiograms, (2) failing to order an echocardiogram before the first surgery, and (3) failing to order TEEs. In his affidavit filed after his deposition, however, Dr. Raptoulis added the additional allegation that Defendants breached the standard of care by failing to transfer Drake to another hospital following the second surgery and that this failure caused Drake's death. Even if the trial court erred in striking this portion of Dr. Raptoulis' affidavit, the affidavit is plainly inconsistent with his prior

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sworn testimony and does not create a genuine issue of fact concerning Plaintiff's failure to transfer claim. *Pinczkowski v. Norfolk S. Ry. Co.*, 153 N.C. App. 435, 440, 571 S.E.2d 4, 7 (2002) (“[A] party opposing a motion for summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting his prior sworn testimony.”). For his part, Dr. Mosca never stated in his affidavit or his deposition testimony that Defendants breached the standard of care by failing to transfer Drake to another facility. In fact, Dr. Mosca testified in his deposition that “there is [no] standard of care” on the issue. Accordingly, there was no evidence before the trial court that Defendants breached the standard of care by failing to transfer Drake to another hospital, and the trial court, therefore, did not err in granting summary judgment on this issue. This assignment of error is overruled.

[7] Third, Plaintiff argues that the trial court erred in granting summary judgment on all claims which depended on Dr. Raptoulis' testimony that Dr. Hines was negligent in failing to order a TEE during or after the first surgery or during the second surgery. Although Plaintiff concedes that Dr. Raptoulis, a cardiologist, did not specialize in the same specialty as Dr. Hines, a cardiothoracic surgeon, Plaintiff maintains that Dr. Raptoulis should have been allowed to testify because he specialized in a similar specialty and was therefore qualified to testify under Rule 702. Under Rule 702, however, a plaintiff's expert is not qualified to offer testimony merely because the expert specializes in a similar specialty as the defendant. The expert's specialty must also “include[] within its specialty the performance of the procedure that is the subject of the complaint[.]” N.C. Gen. Stat. § 8C-1, Rule 702(b) (2005). The procedures that are the subject of the complaint in this case are the surgeries performed by Dr. Hines, including diagnostic procedures incident to the surgeries. Dr. Raptoulis acknowledged in his deposition that he has “never performed the procedures that are at issue in this case[.]” Because Dr. Raptoulis has never performed the relevant surgical procedures, he was not qualified to testify that those procedures were performed incorrectly. This assignment of error is overruled.

[8] Fourth, Plaintiff argues that the trial court erred in striking that portion of Dr. Raptoulis' affidavit related to Dr. Covitz and in granting summary judgment on his claims based on the alleged negligence of Dr. Covitz. Plaintiff does not cite any authority in support of this argument, and, thus, this assignment of error is deemed abandoned. N.C. R. App. P. 28(b)(6); *see also James River Equip., Inc. v. Mecklenburg*

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Utils., Inc., 179 N.C. App. 414, 420, 634 S.E.2d 557, 561 (2006) (“[P]laintiff has cited no authority in support of its argument, and thus has abandoned this assignment of error.”), *appeal dismissed and disc. review denied*, 361 N.C. 355, 644 S.E.2d 226 (2007).

III. TRIAL ISSUES

Plaintiff contends that the trial court committed four errors at trial. First, Plaintiff argues that the trial court erred in limiting Dr. Raptoulis’ trial testimony. Plaintiff does not cite any authority in support of this argument and, thus, as discussed *supra*, this assignment of error is deemed abandoned.

[9] Second, Plaintiff argues that the trial court erred by “in effect granting a directed verdict during the presentation of . . . Plaintiff’s case and dismissing all of Plaintiff’s negligence claims except for the lack of informed consent claim.” We agree with Defendants that this argument mischaracterizes the trial court’s action. In limiting Dr. Raptoulis’ trial testimony, the court found under Rule 702 that Dr. Raptoulis was not qualified to offer standard of care testimony concerning claims based on Dr. Hines’ alleged negligence in the performance of the surgeries. As discussed in Part II.B above, it is undisputed that Dr. Raptoulis has never performed the surgical procedures that are the subject of the complaint. Accordingly, Dr. Raptoulis was not qualified to testify that Dr. Hines breached the standard of care in performing those surgeries. This assignment of error is overruled.

[10] Third, Plaintiff argues that the trial court erred in entering a directed verdict in favor of Defendants on Plaintiff’s claim for punitive damages against the corporate Defendants. We disagree.

When ruling on a motion for a directed verdict, a trial court “must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor.” *West v. Slick*, 313 N.C. 33, 40, 326 S.E.2d 601, 605 (1985). The trial court may only grant the motion if “the evidence, when so considered, is insufficient to support a verdict in the nonmovant’s favor[.]” *Id.* at 40, 326 S.E.2d at 606. We review a trial court’s ruling on a motion for a directed verdict *de novo*. *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 351, 666 S.E.2d at 135.

Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present

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and was related to the injury for which compensatory damages were awarded:

- (1) Fraud.
- (2) Malice.
- (3) Willful or wanton conduct.

N.C. Gen. Stat. § 1D-15(a) (2005). Punitive damages may be awarded against a corporation only if “the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.” N.C. Gen. Stat. § 1D-15(c) (2005).

Plaintiff asserts in his brief that “a physician who is head of a treatment team is tantamount to a manager” within the meaning of G.S. 1D-15(c). Plaintiff acknowledges that there is no authority in this jurisdiction which supports this assertion. Assuming *arguendo* that Dr. Hines was the head of Drake’s treatment team, and further assuming that the head of a treatment team is a manager within the meaning of G.S. 1D-15(c), we conclude that Plaintiff cannot show that the entry of directed verdict on the claim for punitive damages against the corporate Defendants was prejudicial. The jury did not find that Dr. Hines was negligent. In the absence of such a finding, Plaintiff’s claim for punitive damages against the corporate Defendants necessarily fails. N.C. Gen. Stat. § 1D-15(c). This assignment of error is overruled.

[11] Finally, Plaintiff argues that the trial court erred in denying Plaintiff’s request for a special jury instruction on the issue of informed consent and in instructing the jury as it did on that issue. We conclude that Plaintiff has not properly presented this issue for appellate review.

To present an alleged instructional error for appellate review, the party asserting error must include in the record on appeal “a transcript of the entire charge given[.]” N.C. R. App. P. 9(a)(1)(f); N.C. R. App. P. 9(c). “While this rule may seem quite technical, it serves an important practical purpose: it facilitates review of an instruction issue by all three members of our panel in that the parties file but a single copy of the trial transcript, but all three members receive the printed record.” *Campbell v. McIlwain*, 163 N.C. App. 553, 555, 593 S.E.2d 799, 801 (2004). In this case, the record on appeal does not include a *transcript* of the entire charge, and the charge is inex-

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plicably absent from the verbatim, certified transcript of the trial proceedings. The trial transcript only includes those instructions the trial court gave in response to jury questions. Admittedly, the trial court repeated its instruction on the issue of informed consent in response to a jury question. However, in light of our duty to review a jury charge “contextually and in its entirety[.]” *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002), and an appellant’s duty to demonstrate that an instructional error “‘was likely, *in light of the entire charge*, to mislead the jury[.]’ ” *id.* (emphasis added) (quoting *Robinson v. Seaboard Sys. R.R., Inc.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988)), this portion of the transcribed charge is insufficient to allow us to properly review Plaintiff’s assigned error. Accordingly, this assignment of error is overruled.

IV. CONCLUSION

For the foregoing reasons, this case is reversed and remanded to the trial court with instructions to conduct a voir dire examination of Dr. Mosca and, based on this evidentiary foundation, to determine the admissibility of his testimony. *Crocker*, 363 N.C. at 153, 675 S.E.2d at 635 (Martin, J., concurring). If the trial court determines that Dr. Mosca should be allowed to offer his opinion to the jury, the trial court is instructed to conduct a new trial in this matter.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge McGEE concur.

NORTH CAROLINA STATE BAR, PLAINTIFF v. CREIGHTON W. SOSSOMON,
DEFENDANT

No. COA08-1248

(Filed 2 June 2009)

1. Appeal and Error— appealability—Rule 60(b) motion made after notice of appeal given—writ of certiorari—attorney malpractice

Although the Disciplinary Hearing Commission (DHC) did not err in a legal malpractice case by concluding that it lacked jurisdiction to rule upon defendant’s N.C.G.S. § 1A-1, Rule 60(b)

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motion when such motion was made after the notice of appeal had been given, the Court of Appeals in its discretion treated defendant's first appeal as a petition for writ of *certiorari* given the nonjurisdictional nature of the complaint and found substantial evidence that a reasonable person might accept as adequate to support the conclusions that defendant's conduct was violative of each of the Rules of Professional Conduct found in the DHC's Conclusions of Law, except for Rule 1.6(a) in Conclusion No. 2(e). Although there was adequate factual support for the DHC's legal conclusions that defendant disclosed confidential information and that he did so without obtaining informed consent, the order contained no finding of fact with regard to the issue of whether the disclosure was implicitly required in order to address the reasonable person standard.

2. Attorneys— malpractice—clear, cogent, and convincing evidence—sufficiency of findings of fact and conclusions of law

An order in a legal malpractice hearing fell short of containing clear, cogent, and convincing evidence needed to support the discipline imposed upon defendant attorney, and the case was remanded to allow the Disciplinary Hearing Commission to make proper findings of fact and conclusions of law and to reconsider defendant's sanction under N.C.G.S. § 84-28(c).

Appeal by defendant from a disciplinary order entered on 15 April 2008 by the Disciplinary Hearing Commission of the North Carolina State Bar imposing a one-year suspension of defendant's law license and from order entered 16 September 2008 by the Disciplinary Hearing Commission. Heard in the Court of Appeals 19 March 2009.

Sharpless and Stavola, P.A., by Eugene E. Lester III, for defendant-appellant.

N.C. State Bar, by Carmen K. Hoyme and David R. Johnson, for plaintiff-appellee.

HUNTER, JR., Robert N., Judge.

Creighton W. Sossomon (“defendant”) appeals from orders entered 15 April 2008 and 16 September 2008 by the Disciplinary Hearing Commission (the “DHC”) of the North Carolina State Bar (“plaintiff”). We affirm in part, reverse in part, and remand to the DHC.

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I. Background

Defendant was admitted to the North Carolina State Bar in 1969 and has since maintained a practice in the Town of Highlands. Linda David (“Mrs. David” or the “Seller”) retained defendant to represent her in the sale of approximately 19 acres of mountain land adjacent to her home as early as 10 October 2003. Mrs. David told defendant that she wished to sell the property only if restrictive covenants limited its use to single-family homes. On 11 October 2003, Mrs. David contracted to sell the property to Sanders Dupree (“Dupree”) for \$700,000.00. The offer, prepared by a realtor, was on Standard Form 2-T copyrighted July 2002 and approved by the North Carolina Bar Association and the North Carolina Association of Realtors (“Standard Form 2T”). Dupree intended to subdivide the property and establish a subdivision entitled “Old Hemlock Cove.”

Among the provisions contained in Standard Form 2-T are numbered paragraphs, some containing blank spaces which require completion by the parties. Section “5. CONDITIONS (b),” reads: “There must be no restriction, easement, zoning, or other governmental regulation that would prevent the reasonable use of the Property for SINGLE FAMILY RESIDENTIAL purposes” (“Condition 5(b)"). Section “12. PROPERTY DISCLOSURE AND INSPECTIONS:” reads “(e) CLOSING SHALL CONSTITUTE ACCEPTANCE OF EACH OF THE SYSTEMS, ITEMS AND CONDITIONS LISTED ABOVE IN ITS THEN EXISTING CONDITION UNLESS PROVISION IS OTHERWISE MADE IN WRITING.” Section 14. “CLOSING:” states “Closing shall be defined as the date and time of recording of the deed. All parties agree to execute any and all documents and papers necessary in connection with Closing and transfer of title on or before December 23, 2003, at a place designated by Buyer.” In Section 16, “Other Provisions and Conditions,” the contract provides for two attachments: Standard Form 2A5-T “Seller Financing Addendum” and an “Addendum B.” Addendum B to the contract provides “Buyer and Seller shall mutually agree on restrictive covenants similar to Highlands Point.” (“Addendum B”). Highlands Point is an existing single family residential community developed by Dupree. Addendum B also required Dupree to complete a survey showing individual lots as a pre-condition to closing.

Following contractual negotiations, Mrs. David reviewed a draft entitled “Declaration of Restrictive Covenants for Old Hemlock Cove,” prepared by her real estate agent, Molly Leonard (“the draft”). The draft was similar to the Highlands Point restrictive covenants in

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that it limited homes to “single family” residences. Additionally, the covenants contained terms not present in the 11 October agreement including design criteria, limitations on building materials and/or fixtures, architectural standards, the required approval of an Architectural Review Committee, and the preservation of surrounding woodlands.

On 8 and 10 December 2003, Mrs. David and Dupree subsequently modified Addendum B. The typed and handwritten modifications were labeled “WAIVER.” The waiver reads “Buyer hereby acknowledges completion and/or waives contingency items in above referenced attachment of Offer to Purchase and Contract[.]” Condition 5(b) was not referenced in the waiver. Dupree waived the completion of certain preconditions concerning survey work. In exchange, Mrs. David acknowledged receiving a copy of the Highlands Point Declarations, agreed to accept these declarations, and agreed to be appointed to the Architectural Review Committee. Defendant had reviewed the draft with Mrs. David no later than 23 December 2003, after which he faxed a letter to Dupree’s counsel regarding possible changes.

A general warranty deed dated 12 January 2004 prepared by defendant from Mrs. David and spouse Keaton David (“Mr. David” collectively, the “Davids”) conveyed 19.24 acres of property to Old Hemlock Cove Development, LLC (“2004 Closing”). The deed was recorded simultaneously with a \$400,000 purchase money deed of trust. A survey of the property, without interior lot lines, showing only the outer perimeter was also recorded. No restrictive covenants were recorded with these instruments, and the instruments do not mention restrictive covenants.

After the closing, defendant was contacted by the Davids concerning the omitted restrictive covenants. Defendant told the Davids that he believed Old Hemlock’s obligation to restrict the use of the property survived the closing and that, if necessary, “they could sue to enforce the obligation.” On at least two occasions, one as late as February 2006, defendant contacted counsel for Old Hemlock to request that the covenants be recorded. No restrictive covenants were ever recorded. No subdivision survey was platted.

In July 2006, Dupree sought to sell the unrestricted 19-acre tract to William Shephard (“Shephard”). On 19 July 2006, defendant agreed to represent Shephard in the purchase of the same 19 acres from Old Hemlock (“2006 closing”) without first obtaining the Davids’ in-

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formed consent. Shephard planned to develop multi-story condominiums on the property. During their initial meeting, defendant disclosed to Shephard the existence of a potential cloud on title posed by Dupree's obligations to record restrictive covenants, which could have survived the 2004 closing.

The 2006 closing was not limited to the 19-acre tract. The sale also included the purchase of an adjacent parcel of land from Lloyd Wagner ("Wagner"). Defendant agreed to represent not only Shephard in this 2006 closing, but also Dupree and Wagner (collectively, "2006 clients"). Defendant did not obtain informed consent from Old Hemlock, Dupree, or Shephard, despite the conflicts of interest derived from the prior representation of the Davids.

Defendant contacted the Davids in connection with modifying or waiving the restrictive covenants but did not inform them that he was representing Shephard. The parties dispute whether defendant's representation of Dupree began before or after these conversations. The Davids indicated they would waive the restrictive covenants in return for payment of one million dollars. Defendant's 2006 clients refused this demand and declined to make a counteroffer. Defendant then advised the Davids they could sue Dupree to enforce recording the restrictive covenants, but he explained that he could not represent them.

The 2006 closing was scheduled to take place on 12 September 2006, at 11:00 a.m. at defendant's law office. During the closing, Mr. David arrived at defendant's office unannounced and requested copies of the draft restrictions contained within defendant's records of the 2004 closing. After Mr. David obtained these records, Dupree and Shephard asked defendant if the Davids could potentially interfere with their transfer of title. Defendant advised them that the Davids could file a *lis pendens* and explained its legal significance. After this explanation, the parties to the 2006 closing offered to drive defendant to the Macon County Courthouse immediately, so their transfer could be recorded before a potential *lis pendens* could be filed. Defendant declined, wanting to wait until after 2:00 p.m. when his next scheduled closing would be completed.

Meanwhile the Davids raced to the Macon County Courthouse and filed a summons without complaint and a *lis pendens* against Old Hemlock Cove and Dupree at 3:00 p.m., identifying the 19-acre tract as the subject of the litigation. Defendant arrived at the Macon County Register of Deeds at 3:30 p.m. After conducting his final title

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examination and learning of the *lis pendens*, defendant did not record any instruments. The Davids subsequently filed a complaint against Dupree and Old Hemlock in Macon County Superior Court on 2 October 2006, alleging breach of contract.

Following the failed 2006 closing, the following events occurred. Pursuant to a Letter of Notice dated 4 January 2007, the North Carolina State Bar informed defendant it had received a grievance from Dupree. Defendant responded to the grievance on 22 January 2007. The Davids filed a professional negligence claim against defendant in Macon County Superior Court on 24 January 2007. In his amended answer, filed 16 April 2007, defendant filed a third-party complaint against Dupree and Old Hemlock seeking indemnity and contribution.

The complaint in the case *sub judice* was filed 29 June 2007 and heard before the DHC on 29 February 2008 and 1 March 2008. The Chair of the DHC filed its “Findings Of Fact, Conclusions Of Law, And Order Of Discipline” on 15 April 2008. Pursuant to N.C. Gen. Stat. § 84-28(b)(2), the DHC found defendant’s conduct violated the following Revised Rules of Professional Conduct (the “Rules”): Rule 1.3 “Diligence”; Rule 1.4(a)&(b) “Communication”; Rule 1.6(a) “Confidentiality of information”; Rule 1.8(b), “Conflict of interest”; and Rule 1.9(a) “Duties to former clients.”

The DHC’s conclusions of law read as follows:

- (a) By failing to ensure that the single family lot restriction requested by Linda David was in effect and enforceable upon transfer of the property to Old Hemlock/Dupree, Sossomon failed to act with reasonable diligence in representing a client in violation of Rule 1.3;
- (b) By failing to inform Linda David prior to the January 2004 closing of the legal effect of failing to execute and record the restrictive covenants, Sossomon failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation in violation of Rule 1.4(b);
- (c) By undertaking representation of Shephard and Old Hemlock/Dupree to transfer the land free from the restrictions that the Davids sought to place on the property without obtaining Linda David’s informed consent, confirmed in writing, Sossomon represented persons whose interests were

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materially adverse to the interests of a former client, without the former client's informed consent confirmed in writing, in violation of Rule 1.9(a);

- (d) By negotiating with his former client, Linda David, about waiving the property restrictions without disclosing that he was representing Shephard and Ol [sic] Hemlock/Dupree, Sossomon failed to inform his former client of a circumstance for which her informed consent was required in violation of Rule 1.4(a);
- (e) By discussing with Shephard some of the terms of the prior contract between Old Hemlock/Dupree and Linda David without first obtaining David's informed consent to this disclosure, Sossomon revealed information acquired during the professional relationship with a client in violation of Rule 1.6(a); and
- (f) By disclosing to the Davids that the closing in the Shephard/Dupree transaction was imminent without obtaining Shephard and Old Hemlock/Dupree's informed consent to this disclosure, Sossomon revealed information acquired during the professional relationship with a client in violation of Rule 1.6(a), and used information relating to the representation of a client to the disadvantage of the client in violation of Rule 1.8(b).

Based on authority pursuant to N.C. Gen. Stat. § 84-28(c)(2), the DHC ordered defendant be "hereby suspended from the practice of law in North Carolina for one year[.]" Defendant agreed with the DHC that he violated Rule 1.9 conflict of interest (Conclusion (c), above) but appealed the remaining findings.

After filing notice of appeal on 8 May 2008 ("first appeal"), defendant failed to timely file a notice that arrangements to obtain a transcript had been made or to obtain the transcript under Rule 18(b)(2) & (3) and Rule 7 of the Rules of Appellate Procedure. After the expiration of the time period as provided by the Rules, plaintiff moved for dismissal on 31 July 2008, which was subsequently granted by the DHC on 5 August 2008. Following this dismissal, defendant moved for relief from the order dismissing the appeal on 11 August 2008 on grounds of excusable neglect. Defendant filed a motion for stay of the order of discipline pending his appeal. Subsequently, he filed a second notice of appeal on 2 September 2008 ("second appeal"). The motion for relief was denied by the DHC; however, in its

order, the DHC granted the stay and stated that but for its lack of jurisdiction, it would have granted defendant's motion for relief.

II. Appellate Jurisdiction

1. Procedural History of the Motion to Dismiss Appeal

[1] As filed, this Court has no jurisdiction to consider the merits of defendant's first appeal, which was dismissed by the DHC. As filed, this Court would have jurisdiction only to consider defendant's second appeal, the denial of defendant's motion for relief from the order dismissing the first appeal. Were the Court in the second appeal to reverse the DHC's denial of the order granting relief, then defendant would have to begin again with his initial appeal.

In examining the merits of the second appeal, the record shows the following facts. Defendant's counsel contacted the court reporter to prepare the transcript in a timely manner. After time had elapsed, the court reporter informed counsel that the transcript had not been sent because payment had not yet been received. Payment for the transcripts was previously arranged with a third-party insurer. The insurer admitted it failed to make prompt payment, despite instructions from counsel to the contrary.

The chair of the DHC concluded that dismissal of defendant's appeal was appropriate according to Rule 25(a):

Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, *or unless the court for good cause shall permit the action to be taken out of time.*

N.C. R. App. P. 25(a) (2007) (emphasis added). In his motion filed 11 August 2008, defendant argued that good cause exists to afford relief from the order dismissing the complaint and to extend the time to file the transcript. Plaintiff's brief does not address defendant's good cause argument. We agree that good cause existed to allow the transcript to be filed out of time. Unfortunately, at the time the request was made, the DHC had already dismissed the appeal.

Defendant also requested DHC relief from dismissal pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. The basis for the 60(b) motion included excusable neglect in that defendant's

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counsel did not receive notice of plaintiff's motion to dismiss appeal or the affidavits supporting dismissal until after the 5 August 2008 Order Dismissing Appeal was granted. Counsel had returned from vacation to find the relevant documents awaiting him. Defendant's counsel has acknowledged full responsibility in the matter. Nonetheless, defendant contends these events deprived him of a notice and hearing.

The DHC filed its order on 11 September 2008, whereby it "neither allowed nor denied" defendant's motion, for lack of jurisdiction. Conclusions of law set forth in the order stated that defendant's notice of appeal on 8 May 2008 deprived the DHC of jurisdiction to allow or deny his Rule 60(b) motion. Pursuant to *Talbert v. Mauney*, 80 N.C. App. 477, 478-79, 343 S.E.2d 5, 7-8 (1986), however, the DHC also stipulated in its order that it would have otherwise allowed defendant's motion.

2. Appellate Review

We affirm the DHC's conclusion that it lacked jurisdiction to rule upon defendant's Rule 60(b) motion. "The trial court does not have jurisdiction . . . to rule on motions pursuant to Rule 60(b) where such motion is made after the notice of appeal has been given." *York v. Taylor*, 79 N.C. App. 653, 655, 339 S.E.2d 830, 831 (1986). We note that no motion for relief was filed with this Court; however, we are guided by the following principle. "The imperative to correct fundamental error, however, may necessitate appellate review of the merits despite the occurrence of default." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008).

We examine the rule violation in light of *Dogwood Dev. v. White Oak Transp. Co.* ("Dogwood Analysis"). "[D]efault under the appellate rules arises primarily from the existence of one or more of the following circumstances: (1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." *Id.* at 194, 657 S.E.2d at 363. We must first determine whether the appellate rule violation is jurisdictional or nonjurisdictional, because a jurisdictional default renders the Dogwood Analysis moot under N.C. R. App. P. 2. "[I]n the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of Rule 2. . . . Accordingly, Rule 2 may not be used to reach the merits of an appeal in the event of a jurisdictional default." *Id.* at 198, 657 S.E.2d at 365

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(citations omitted). If the violations are nonjurisdictional, on the other hand, the Dogwood Analysis imposes three requirements: (1) “[T]he court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34.” *Id.* at 201, 657 S.E.2d at 367; (2) “If it so concludes, it should then determine which, if any, sanction under Rule 34(b) should be imposed.” *Id.*; and (3) “[I]f the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.” *Id.*

Although the DHC’s legal conclusions concerning Rule 60(b) were indeed correct, Rule 60(b) was not the exclusive basis for defendant’s motion for relief. His “good cause” argument constituted two additional components of the motion under Rules 25 and 27(c). The Rule 27(c) component can be dismissed at the outset as a jurisdictional default. *See id.* at 198, 657 S.E.2d at 365 (“As the Commentary to Rule 2 provides, our appellate courts have authority to suspend the rules in exceptional situations ‘except as otherwise expressly provided by these rules’ . . . *this ‘refers to the provision in Rule 27(c) that the time limits for taking appeal . . . may not be extended by any court.’*”) (citation omitted) (emphasis added).

The third component of defendant’s motion, stemming from his failure to comply with Rule 7, was brought pursuant to Rule 25. Since Rule 25 will inevitably be considered in the first step of the Dogwood Analysis, the true genesis of this default lies in the Rule 7 violation it sought to cure.

Rule 7 is a nonjurisdictional defect.¹ *See Lawrence v. Sullivan*, 192 N.C. App. 608, 617, 666 S.E.2d 175, 181 (2008) (“[W]e do not deem

1. (1) *Civil cases.* Within 14 days after filing the notice of appeal the appellant shall arrange for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to prepare the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record, and upon the person designated to prepare the transcript. If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within 14 days after the service of the written documentation of the appellant, shall arrange for the transcription of any additional parts of the pro-

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these *nonjurisdictional* failures [under N.C. R. App. P. 7(a)(1)] on the part of plaintiff to be so egregious that they warrant dismissal of plaintiff's appeal[.].” *Id.* (emphasis added). We accordingly limit our Dogwood Analysis to that part of defendant's motion brought pursuant to Rule 25, based upon the nonjurisdictional defect arising under Rule 7.

In *Dogwood*, our Supreme Court gave three factors to consider “among others,” when “determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation[.]” 362 N.C. at 200, 657 S.E.2d at 366: (1) “whether and to what extent the noncompliance impairs the court's task of review[;]” *id.*; (2) “whether and to what extent review on the merits would frustrate the adversarial process[;]” *id.* at 200, 657 S.E.2d at 366-67; and (3) “[t]he court may also consider the number of rules violated, although in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review.” *Id.* at 200, 657 S.E.2d at 367.

Regarding the first factor, any impairment of this Court's ability to review the merits is minimal. To guide our determination, we have a complete and accurate record on appeal and copies of the evidence made available to the DHC. As such, the merits are identifiable. *C.f. Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, —, 673 S.E.2d 667, 674 (2009). (“We note that Defendants include no authority in their brief in support of several of the following arguments . . . Applying the *Dogwood Dev.* guidelines, we choose to address most of Defendants' arguments on the merits despite this violation of our appellate rules[.]”).

Most notable, however, is that this case presents the unique circumstance whereby this Court's task of review has been eased. Although defendant's Rule 60(b) motion is not reviewable on its merits, it is not irrelevant.

After appeal, the trial court is without jurisdiction to grant relief under Rule 60. But the trial court does have limited jurisdiction

ceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed; and the name and address of the court reporter or other neutral person designated to prepare the transcript.

In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2). N.C. R. App. P. 7(a)(1).

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to consider a Rule 60(b) motion after an appeal for the purpose of indicating what action it could take if it did have jurisdiction. *Such an indication can be an aid to the appellate court, since it can review the trial court's indication on the Rule 60(b) motion at the same time it considers other assignments of error.*

1 Woodlief, *Shuford N.C. Civil Prac. and Proc.* § 60:11, 1131 (6th ed. 2003) (emphasis added) (footnotes omitted). Accordingly, the DHC acknowledged that it would have otherwise granted defendant's Motion for Relief from Order Dismissing Appeal. This type of legal conclusion is also relevant to the second factor because it protects an appellee from being "left without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). There has been no showing of any procedural burden on the part of plaintiff should review of the merits be allowed. Plaintiff's brief did not address defendant's argument that good cause exists under the Rule 25 exception, leaving support to the notion that any frustration of the adversarial process remains minimal under the second factor as well.

As to the third factor, the violations of the deadlines prescribed by Rule 18(b)(3) & (d)(2) were the direct consequence of the Rule 7 violation. Despite the existence of multiple violations, none occurred independent of each other.

The three articulated factors are not exclusive, and other factors can be gleaned from our case law. In *Harvey v. Stokes*, 137 N.C. App. 119, 527 S.E.2d 336 (2000), we considered whether "a court which is deciding a motion to dismiss an appeal, [can] determine whether appellant has contributed to the delay in preparation of a proposed record on appeal." *Id.* at 124, 527 S.E.2d at 340. In *Lawrence v. Sullivan*, the record did not contain an explanation of the court reporter's delay in producing the transcript or a reason for the appellant's failure to seek an extension of time. 192 N.C. App. at 618, 666 S.E.2d at 181. Thus, the appellants' attorney was found to have violated Rule 7(a)(1). *Id.* Like the attorney in *Lawrence*, defendant's counsel was responsible for the Rule 7 violations. Unlike *Lawrence*, however, the record provides both an explanation from the court reporter and an excuse for counsel's delay. Regardless of its acceptability, providing an excuse bolsters reasons given in *Lawrence* for allowing review.

Another factor for determining whether noncompliance rises to the level of substantial failure or gross violation is whether, prior to

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the *Dogwood* ruling, there was a “long tradition of dismissing such assignments of error.” *Odom v. Clark*, 192 N.C. App. 190, 194, 668 S.E.2d 33, 35 (2008). Prior to *Dogwood*, there is authority that supports not dismissing upon a Rule 7 error. *See, e.g., Thompson v. Town of Warsaw*, 120 N.C. App. 471, 475 n.1, 462 S.E.2d 691, 693 n.1 (1995) (“At most, failing to comply with Rule 7 should result in excluding the transcript from the record.”) (Wynn, J., concurring in part (emphasis added)) (dissenting in “that part which assesses costs against appellant’s attorney for violating Rule 7”), *id.* at 474, 462 S.E.2d at 693.

Most notable, however, is one of the principles established by this Court in *Lawrence*: “[F]ail[ing] to seek an extension of time in which to produce [the] transcript is not a valid reason to dismiss [appellant’s] appeal.” *Lawrence* at 617, 666 S.E.2d at 181 (citation omitted). Moreover, “*Dogwood* instructs that in most cases the appellate courts should impose less drastic sanctions than dismissal and reach the merits of the case.” *Odom*, 192 N.C. App. at 194, 668 S.E.2d at 35. We apply these rules together to hold no egregious error exists to constitute substantial failure or gross violation of Rule 7’s non-jurisdictional requirements.

[T]he appellate court may not consider sanctions of any sort when a party’s noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a “substantial failure” or “gross violation.” In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible.

Dogwood, 362 N.C. at 199, 657 S.E.2d at 366.

Although not required to consider the appellant’s appeal as a petition for writ of certiorari, this *Dogwood* Analysis informs our treatment of defendant’s appeal. If we were to reverse the Rule 60(b) motion decision and grant an extension of time to prepare the record, a second appeal would be necessitated. Given the non-jurisdictional nature of the complaint, this Court in its discretion will treat defendant’s first appeal as a petition for writ of certiorari.

In treating the first appeal as a petition for writ of certiorari, this Court may, in its discretion, consider all or part of the assignments of error raised by the appellant. Based upon our review of the record under the standard of review discussed *infra*, we find substantial evidence that a reasonable person might accept as adequate to support the conclusions that defendant’s conduct was violative of each of the

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Rules of Professional Conduct found in the DHC's Conclusions of Law, except for Rule 1.6(a) in Conclusion No. 2(e). We find adequate factual support for the DHC's legal conclusions that defendant disclosed confidential information, and that he did so without obtaining informed consent. This finding does not alone support the decision that defendant violated Rule 1.6(a). Rule 1.6(a) contains an important exception that was not addressed by the DHC in either its findings or conclusions: "disclosure . . . impliedly authorized in order to carry out the representation[.]" Revised Rules of Professional Conduct, Rule 1.6(a) (2009). In order to conclude defendant violated Rule 1.6(a), the DHC must address all three of the exceptions to the disclosure of confidential information. Because the order contains no finding of fact with regard to the issue of whether the disclosure was implicitly required, we cannot say that the order has properly addressed the rule to the required "reasonable person" standard. A reasonable person would require some factual finding on the issue of "implicit disclosure" before reaching a conclusion of law.

Put differently, with this sole exception, the DHC properly concluded defendant committed the offense or misconduct. *N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576 S.E.2d 305, 309-10 (2003). We find that the DHC's conclusions derive from complications which inherently flow from a violation of Rule 1.9, which both parties agree was violated in this case. The representation of a second client would have necessarily impeded defendant's ability to satisfactorily complete the representation of the previous client. Negotiating a compromise or settlement between two clients is always problematic. Failing to completely disclose all facts to both clients creates ethical dilemmas such as those faced by defendant. Zealous representation of one client shortchanges the other, and disclosure of confidential information to one violates a basic duty to the other. Defendant's defense that his representation of the Davids had ended with the closing is undermined by his efforts to see that restrictive covenants were subsequently recorded. It is clear that the prior representation had not ended, when the second representation began. Defendant drank the hemlock of multiple representations too often.

[2] The remainder of our grant of the writ is limited to only one of the four assignments of error presented by defendant: Did the DHC err in failing to find that a lesser sanction, other than a one-year suspension of defendant's law license, would be sufficient discipline and protect the public? In the language of *Talford*, 356 N.C. at 634, 576 S.E.2d at 311, "(2) Do the order's expressed finding(s) of fact adequately sup-

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port the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?"

III. Standard of Review

"By statute, judicial review of a disciplinary order is limited to 'matters of law or legal inference.'" *N.C. State Bar v. Key*, 189 N.C. App. 80, 83, 658 S.E.2d 493, 496 (2008) (quoting N.C. Gen. Stat. § 84-28(h) (2005)). The Court of Appeals must apply the "whole record test." *N.C. State Bar v. DuMont*, 304 N.C. 627, 642-43, 286 S.E.2d 89, 98 (1982). "Under the whole record test there must be substantial evidence to support the findings, conclusions and result. The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion." *Id.* at 643, 286 S.E.2d at 98-99 (citation omitted).

The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of "clear, cogent, and convincing."

Talford, 356 N.C. at 632, 576 S.E.2d at 310 (citations omitted).

"[T]he Supreme Court set forth a three-step process to determine 'if the lower body's decision has a "rational basis in the evidence." ' " *Key*, 189 N.C. App. at 84, 658 S.E.2d at 497 (quoting *Talford*, 356 N.C. at 634, 576 S.E.2d at 311): "(1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?" *Talford*, 356 N.C. at 634, 576 S.E.2d at 311.

This three-step process "must be applied separately" to each disciplinary phase: (1) the "'adjudicatory phase' (Did the defendant commit the offense or misconduct?)," and (2) the "'dispositional phase' (What is the appropriate sanction for committing the offense or misconduct?)." *Id.*; but cf. *N.C. State Bar v. Culbertson*, 177 N.C. App. 89, 97, 627 S.E.2d 644, 650 (2006) ("[T]he DHC's choice of discipline is reviewed under an abuse of discretion standard.").

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IV. The Disciplinary Order

Because the dispositional analysis is not made until after the adjudicatory phase, both the findings of fact and conclusions of law from the first phase are incorporated into the disciplinary phase. This two-step process is reflected in the DHC's order. For its dispositional analysis, the DHC made additional findings of fact and conclusions of law regarding discipline, basing them upon the "foregoing" findings of fact made in its adjudicatory phase. " 'The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult.' " (*Key*, 189 N.C. App. at 88, 658 S.E.2d at 499) (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)). "Moreover, classification of an item within the order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review." *Id.* (citing *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675).

While we agree that the DHC's order is sufficient to show defendant's conduct violates the Rules (except as noted *supra*), we disagree that its order complies with the requirements that the findings of fact support the discipline imposed. The failure of the order in this case stems from a lack of findings in the adjudicatory phase of the order and from findings in the adjudicatory phase which do not support the conclusions made in the dispositional section of the order. As a result, we cannot conclude that the second and third requirements of *Talford* are met in this order.

In the order's dispositional section its deficiencies include the following:

1. The order found defendant's misconduct to be aggravated by the "[v]ulnerability of the victim, Linda David." Mrs. David may in fact be vulnerable, however, there is no finding of fact in the adjudicatory section which supports this characterization of Mrs. David. Therefore in reviewing the order, one simply does not know the factual predicate which forms this conclusion.

2. No factual findings support the mitigating factors that defendant had an absence of a prior disciplinary record.

3. While one may assume defendant contested the imposition of discipline, there are no findings of fact which support the conclusion that defendant refused to acknowledge the wrongful nature of his conduct other than the finding in paragraph 40 of the order that "Sossomon admitted that his conduct violated Rule 1.9[.]" Findings of

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Fact and Conclusions Regarding Discipline 1(c) notes defendant's acknowledgment of his Rule 1.9 violation as part of an aggravating factor: "Except as to a single instance of misconduct, a refusal to acknowledge the wrongful nature of his conduct[.]" Conversely, the DHC made no parallel finding of this acknowledgment within the mitigating factors.

4. In its disciplinary order, the DHC found that Dupree and Wagner sustained economic loss due to the six-month delay in selling their respective properties to Shephard. No factual finding supports this conclusion.

5. In paragraph 5(b), the DHC found that Mrs. David "experienced, and continues to experience, emotional distress" tied to a number of factors with regard to lack of restrictions on the property, including "the cutting of the old growth forest on her former property." It is unclear how, even if defendant had placed single-family restrictions on the 19-acre tract, Mrs. David's distress arising from the loss of forest land could have been prevented by defendant. No prior findings of fact support this conclusion.

As a result, this Court cannot find that the order's expressed findings of fact adequately support the order's subsequent conclusions of law and that the expressed findings and/or conclusions adequately support the DHC's ultimate decision. Mindful that we may not substitute our judgment for that of the committee, we nonetheless deem the disciplinary findings inadequate in this regard. Thus, we hold that the order falls short of containing clear, cogent, and convincing evidence, which is needed to support the discipline imposed upon defendant.

"The statutory scheme for disciplining attorneys is set out in N.C.G.S. § 84-28." *Talford*, 356 N.C. at 635, 576 S.E.2d at 312. "Subsection (b) defines such a violation as 'misconduct,' and subsection (c) provides that any such misconduct 'shall be grounds for' one of the five sanctions listed in the statute." *Id.* at 636 n.3, 576 S.E.2d at 312 n.3. These five sanctions include: disbarment, suspension, censure, reprimand, and admonition. "[S]o long as the punishment imposed is within the limits allowed by the statute this Court does not have the authority to modify or change it." *N.C. State Bar v. Nelson*, 107 N.C. App. 543, 552, 421 S.E.2d 163, 167 (1992), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993). When suspension is imposed,

there must be a clear showing of how the attorney's actions resulted in significant harm or potential significant harm to the

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entities listed in the statute, *and* there must be a clear showing of why “suspension” [is] the only sanction option[] that can adequately serve to protect the public from future transgressions by the attorney in question.

Talford, 356 N.C. at 638, 576 S.E.2d at 313. We note as to finding 6 of the disciplinary findings that admonition was not considered by the DHC in making its determination with regard to lesser sanctions. This finding is mitigated by finding 7 which recites the committee has considered lesser sanctions. This Court holds this mixed finding does not meet the requirements of *Talford* or *Nelson*, that lesser sanctions be considered. The DHC must show a reviewing court that all potential lesser sanctions have been considered before discipline of a greater nature is imposed.

Since the DHC has shown significant harm to defendant’s clients, we must now review the DHC’s determination that suspension was the only sanction that could adequately serve to protect the public from defendant’s future transgressions. *See Talford*, 356 N.C. at 638, 576 S.E.2d at 313. In Findings of Fact and Conclusions Regarding Discipline No. 7, the DHC gave four reasons for concluding in the affirmative: defendant’s “pattern of continuing conduct”; defendant’s “continuing course of multiple undisclosed offenses”; defendant’s “refusal to appreciate or acknowledge the significance of the wrongful nature of the entirety of his misconduct”; and “entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses . . . and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar of this State.”

Only that portion of the third reason which refers to “refusal to appreciate or *acknowledge . . . the entirety* of his misconduct” is unsupported by the record, because it contradicts one of the previously listed aggravating factors: “*Except as to a single instance of misconduct*, a refusal to acknowledge the wrongful nature of his conduct.” (Emphasis added.) Defendant acknowledged he violated Rule 1.9. The remainder of the third reason still shows a future harm to the public, as do the other reasons in their entirety.

Subsection (h) states there “shall be an appeal of right by either party from *any* final order” of the DHC. N.C. Gen. Stat. § 84-28(h) (2007) (emphasis added). Mindful that “[r]eview by the appellate division shall be upon matters of law or legal inference[,]” our review is limited only to whether suspension in this case was proper. *Id.*; *see*

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Talford, 356 N.C. at 631, 576 S.E.2d at 309 (“‘G.S. 84-28(h) does not give a reviewing court the authority to modify or change the discipline *properly* imposed by the Commission.’”) (citation omitted). Therefore, we remand for the limited purpose of allowing the DHC to make proper findings of fact and conclusions of law and reconsideration of defendant’s sanction pursuant to N.C. Gen. Stat. § 84-28(c). Whether to lessen the suspension or impose another appropriate measure of discipline is left to the discretion of the DHC.

VII. Conclusion

We affirm the DHC’s conclusion that it lacked jurisdiction to rule upon defendant’s Rule 60(b) motion. We further affirm the DHC’s orders showing defendant’s conduct violated the Rules, with the exception of Conclusion of Law 2(e), which lacks a complete factual predicate. As discussed *supra*, the DHC’s findings of fact in the adjudicatory phase fail to support the conclusions made in the dispositive section of the order, and thus the order falls short of containing clear, cogent, and convincing evidence supporting the discipline imposed upon defendant. We reverse and remand to allow the DHC to make proper findings of fact and conclusions of law and to reconsider defendant’s sanction as it considers warranted.

Affirmed in part, reversed in part, and remanded.

Judges HUNTER, Robert C., and CALABRIA concur.

SUSAN JONES, AND THE NORTH CAROLINA ASSOCIATION OF EDUCATORS,
PLAINTIFFS V. THE GRAHAM COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA08-477

(Filed 2 June 2009)

**Constitutional Law— random drug testing—school employees—
unreasonable search**

A school board policy mandating random, suspicionless drug and alcohol testing for all employees violated plaintiffs’ right be free from unreasonable searches under Article I, Section 20 of the North Carolina Constitution, and the trial court order granting the board’s motion for summary judgment was reversed. The employees’

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acknowledged privacy interests outweigh the board's interest in conducting random, suspicionless testing.

Appeal by Plaintiffs from amended order entered 6 February 2008 by Judge James U. Downs in Graham County Superior Court. Heard in the Court of Appeals 1 December 2008.

Tin, Fulton, Walker & Owen, by S. Luke Largess, for Plaintiffs-Appellants.

Roberts & Stevens, P.A., by K. Dean Shatley, II, and Christopher Z. Campbell, for Defendant-Appellee.

STEPHENS, Judge.

*“The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”*¹

The Graham County Board of Education enacted a policy mandating the random, suspicionless drug and alcohol testing of all Board employees. Plaintiffs brought suit contending that the policy violates the North Carolina Constitution's guarantees against unreasonable searches and seizures. The trial court granted summary judgment in favor of the Board of Education. We reverse.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2006, the Graham County Board of Education employed approximately 250 teachers, staff, and administrators to serve approximately 1,300 students in three public schools—a high school, a middle school, and an elementary school. All Board employees were subject to the Board's “Alcohol/Drug-Free Workplace Policy” which required all job applicants to pass “an alcohol or drug test” as a condition of employment; required all employees to submit to “an alcohol or other drug test” upon a supervisor's “reasonable cause” to believe that the employee was using alcohol or illegal drugs, or abusing prescription drugs, in the workplace; and required “[a]ny employee placed on the approved list to drive school system vehicles” to submit to “random drug tests.” Additionally, the policy mandated the suspension of any employee who, in a supervisor's opinion, was impaired by alcohol or drugs in the workplace.

1. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 687, 103 L. Ed. 2d 685, 716 (1989) (Scalia, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 479, 72 L. Ed. 944, 957 (1928) (Brandeis, J., dissenting)).

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The Board of Education enacted a new testing policy on 5 December 2006. Significantly, the new policy required all employees to submit to “drug or alcohol testing” upon the policy’s implementation and required all employees to submit to random, suspicionless testing thereafter. On 20 April 2007, Plaintiffs Susan Jones—a teacher at the County’s high school—and The North Carolina Association of Educators—a statewide association of public school teachers, support personnel, and administrators to which approximately fifty Board of Education employees belonged—filed a complaint seeking to have the new policy declared violative of the North Carolina Constitution.

The Board of Education subsequently revised the new testing policy, answered the complaint, and filed a motion for judgment on the pleadings. The Board attached a copy of the new policy, as revised (“the policy”), to the answer. The policy states that

[a]ll positions of employment within the Graham County School system, including but not limited to administrative, classified, non-classified, part time, full time, temporary, and permanent, shall be designated as safety sensitive positions due to the fact that these positions require work where an inattention to duty or error in judgment will have the potential for significant risk or harm to those entrusted to their care, and the possibility or probability of contact with students and the influence employees have could cause irreparable damage to the health and well being of the students.

The policy specifically defines the classes of employees subject to the policy as follows:

- 1) athletic coaches[;]
- 2) bookkeepers[;]
- 3) cafeteria personnel[;]
- 4) centralized administrative support personnel[;]
- 5) centralized support personnel[;]
- 6) custodians[;]
- 7) directors and supervisors[;]
- 8) extracurricular advisors[;]
- 9) maintenance personnel[;]
- 10) other instructional personnel[;]
- 11) principals and assistant principals[;]
- 12) school-based administrative support personnel[;]

- 13) student support personnel[;]
- 14) superintendents[;]
- 15) teachers[;]
- 16) teacher assistants[;]
- 17) transportation personnel excluding bus drivers who are covered separately[; and]
- 18) substitute teachers[.]

Under the policy, the Board of Education may perform “drug or alcohol testing” in the following instances:

- a. Of any employee who manifests “reasonable suspicion” behavior. . . .
- b. Of any employee who is involved in an accident that results or could result in the filing of a Workers’ Compensation claim.
- c. On a random basis of any employee.
- d. Of any employee who is subject to drug or alcohol testing pursuant to federal or state rules, regulations or laws.

The policy defines “[d]rug testing” as “the scientific analysis of urine, blood, breath, saliva, hair, tissue, and other specimens of the human body for the purpose of detecting a drug or alcohol.”

The policy states that “[t]he collection site is Graham County Schools” and that “[t]he procedures for random selection of employees and the procedures for collection shall be the procedures adopted by the Board of Education as set forth in the random procedure and the collection procedure utilized by Keystone Laboratories[,]” a testing facility located in Asheville. While the policy does not particularly prescribe the specific “specimens” an employee is required to submit, Keystone Laboratories’ collection procedure only details the collection of employees’ urine. Under the collection procedure, employees are required to “go into the toilet area and void into [a] container.” The collection method “does not involve the direct visual observation of employees while providing a urine sample, unless extraordinary circumstances exist as stated in paragraph twelve . . . of the procedure.” Paragraph twelve provides, in part, as follows:

For walk-in specimens (those collected in the laboratory), consider an out of range temperature [of the specimen] as reasonable evidence of adulteration or substitution, and collect another specimen under direct observation by a same-gender laboratory employee.

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An “out of range temperature” of a specimen collected “in the laboratory” is the only circumstance under which an employee may be directly observed passing urine. Neither the policy nor the collection procedure identify either the entity responsible for collecting employees’ specimens or the entity responsible for transporting specimens to Keystone Laboratories.

The policy does not detail the “scientific analysis” that Keystone Laboratories will perform on submitted specimens. The policy does not indicate to whom Keystone Laboratories will submit test results. The Graham County Schools superintendent, however, is required to file all test results in a “locked file cabinet[.]” The policy provides that

[a]ny employee who is found through drug or alcohol testing to have in his or her body a detectable amount of an illegal drug or of alcohol will result in a letter of reprimand being placed in the personnel file and the employee will be offered a one-time opportunity to enter and successfully complete a rehabilitation program that has been approved by the Graham County Board of Education.

In the event of a positive test, an employee can submit “the written test result” to an “independent medical review officer” and can obtain and independently test “the remaining portion of the urine specimen that yielded the positive result.” The policy also provides that

[a]n applicant or employee whose drug or alcohol test reported positive will be offered the opportunity of a meeting to offer an explanation. The purpose of the meeting will be to determine if there is any reason that a positive finding could have resulted from some cause other than drug or alcohol use. Graham County Board of Education, through its health and/or human resource officials, will judge whether an offered explanation merits further inquiry.

The policy states that test results will not be reported to law enforcement “unless otherwise required by law[.]”

At the 7 August 2007 Civil Session of Graham County Superior Court, the trial court conducted a hearing on (1) Plaintiffs’ motion for summary and declaratory judgment, (2) the Board’s motion for judgment on the pleadings, and (3) the Board’s motion for summary judgment. The evidence before the trial court included the deposition testimony and affidavit of the school system’s superintendent, the deposition testimony of two of the school system’s principals, and the deposition testimony and affidavits of the individual Board members:

William Jackie Adams, Mitchell E. Colvard, Ricky Kyle Davis, Pamela Carringer Moody, and Lois Ann Pressley.

Mr. Colvard, the Board's chairman, testified that he does not believe that drug testing constitutes either a search of a person or an invasion of privacy. Mr. Colvard further testified—as did every other Board member—that there was no evidence that any student had ever been injured or put at risk of being injured by an employee whose body contained “a detectable amount of an illegal drug or of alcohol[.]” It is undisputed that there was no evidence of a drug “problem” among Board employees. As to why the Board enacted the policy, Ms. Moody testified as follows:

Q. . . . Okay. Explain to me, if you can, if there's been no student in the 30-plus years that you've been associated with the school system who's been impacted by—harmed in anyway [sic] by an employee using drugs or alcohol, and you've had one employee other than a bus driver failing a mandatory test, one employee identified in the last 20 years, prior to two weeks ago, as having drugs on campus, what is the problem among the school system staff that you're trying to address?

A. As I stated earlier, that this county is becoming aware more than ever of the issue of drugs in our county. I could bring you papers [sic] after paper after paper, and it is all people I know that I went to school with, a lot of them, graduated with, some of them high honors, they're—that are behind bars as we speak.

. . . .

[Q.] Yes, ma'am. For the record, your counsel will know what I mean by this. But I'm going to move to strike your last answer, because I don't think it was responsive to the question I asked you. Let me ask you the question again, okay?

Q. . . . What problem—identified problem with your staff is this policy going to address that the prior policy did not address?

A. Our—

Q. Or are you—

A. —problem?

Q. —or are you trying to preempt a potential problem?

A. The first part is a question. If I understand, let me see. All we did to change our policy was to classify the employees. The policy

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didn't change; it just classified the employees that are subject to random drug testing.

. . . .

Q. And my question again is, what problem did the board identify with the staff under the existing policy that required the change to the new policy?

A. I feel like that it—it was just better clarification with the employees, themselves [sic], who does this include. Because previously, it was just bus drivers and people who are custodians.

Mr. Adams testified as follows:

Q. What issue were you, as a board member, trying to address by broadening the definition of safety sensitive to include everybody?

A. Just to make the Graham County Schools a safer place for the student [sic] and the employees.

Q. Okay, and my question is, how was it unsafe prior to your changing the policy? What evidence was there—I mean, what—that's what I meant by what problem you were addressing. If there was no evidence of any student ever being harmed up to that point and other than . . . two people's rumors no other information about drug use by staff, what issue were you addressing by broadening the definition?

A. Well, it's the safety-sensitive positions—it would be hard to determine, you know, to me, and if—in my opinion, they're all safety-sensitive positions at school: teacher, bus driver, whatever position you hold.

So I don't—I don't know that they [sic] were a problem—is a reason that we changed the policy to all safety sensitive, you know, I just—I don't . . .

Q. So you were not trying to—you were not trying to address an actual problem at that point?

A. No.

Ms. Pressley testified as follows:

Q. Okay. Can you tell me in your view why the prior policy needed to be changed?

A. To keep the kids—to keep the kids safe and make sure they [sic] ain't nobody on drugs.

Mr. Crisp, the only Board member to vote against the policy, testified that the Board never discussed whether there were any safety concerns or safety issues related to employee drug use.

The school system's superintendent testified in his deposition that the old policy was effective in dealing with drug and alcohol issues among Board employees. The superintendent stated in his affidavit, however, as follows:

7. As to each employment category, the safety issues relevant to children are as follows:

- a. High-Level of Direct Student Contact. Several categories have extensive, repeated, and daily contact with students. These employees supervise students and/or have the opportunity for direct physical contact with students. These categories include:
 - i. Athletic coaches, bookkeepers, cafeteria personnel, custodians, extracurricular advisors, maintenance personnel, other instructional personnel, principals, assistant principals, school-based administrative support personnel, student support personnel, teachers, teacher assistants, and substitute teachers.
- b. Intermittent Contact with Students: The remaining categories of employees oversee the instruction program of the school system and have the opportunity for significant contact with students. In addition to activities within the schools such as teacher observations, these employees may also serve in direct supervisory roles for extracurricular activities and school-approved field trips. These categories include:
 - i. Centralized administrative support personnel, centralized support personnel, directors, supervisors, and superintendents.
- c. Access to Hazardous Substances and Dangerous Equipment: Due to the nature of the school environment all employees have some access to hazardous substances and/or dangerous equipment. The categories of employees with direct access to such substances or materials as part of their direct job duties include:

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- i. Athletic coaches, cafeteria personnel, custodians, maintenance personnel, science/chemistry teachers and teacher assistants, transportation personnel (e.g. mechanics, bus attendants, etc.) and vocational teachers and teacher assistants (e.g. auto mechanics, construction technology, child care, and home economics).

8. Finally, it is also important to note a pre-school is housed in the central office and the central office shares a parking lot with the elementary school. Thus, every employee of the Graham County schools is in the position to have significant contact with students in some manner during the normal workday.

On 18 January 2008, the trial court granted the Board's motion for summary judgment and denied "Plaintiffs' [sic] Motions for Judgment on the Pleadings and for Summary Judgment[.]" In an amended order entered 6 February 2008, the trial court granted the Board's motion for summary judgment, denied the Board's motion for judgment on the pleadings, and denied Plaintiffs' motions for summary and declaratory judgment. From the amended order, Plaintiffs appeal.

II. STANDARD OF REVIEW

A party against whom a declaratory judgment is sought may move, at any time, for a summary judgment in his favor. N.C. Gen. Stat. § 1A-1, Rule 56(b) (2007). A trial court must grant 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). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated.") (citing *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 674-75 (2000); *Ornelas v. United States*, 517 U.S. 690, 696-97, 134 L. Ed. 2d 911, 918-19 (1996)).

III. ANALYSIS

We first address Plaintiffs' contention that the policy violates Article I, Section 20 of the North Carolina Constitution, which provides as follows:

General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act

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committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

N.C. Const. art. I, sec. 20. Plaintiffs assert that “[o]n its face, the . . . policy violates the prohibition against general warrants[,]” and that the policy violates Article I, Section 20’s guarantee against unreasonable searches conducted by the government.²

A. General Warrants

We are inclined to agree that the policy violates the prohibition against general warrants. *See In re Stumbo*, 357 N.C. 279, 297, 582 S.E.2d 255, 266 (2003) (Martin, J., concurring) (“[P]ermitting government actors ‘to search suspected places without evidence of the act committed’ . . . is tantamount to issuing a general warrant expressly prohibited by the North Carolina Constitution.”) (quoting N.C. Const. art. I, sec. 20). However, because we hold, for the reasons set forth below, that the Board’s policy violates Article I, Section 20’s guarantee against unreasonable searches, we do not reach the question of whether the policy violates the prohibition against general warrants.

B. Reasonableness

The language of Article I, Section 20 “‘differs markedly from the language of the Fourth Amendment to the Constitution of the United States.’” *State v. McClendon*, 350 N.C. 630, 635, 517 S.E.2d 128, 132 (1999) (quoting *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984)); *see also Corum v. Univ. of N. Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (“Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens.”) (citing *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983); Chief Justice James G. Exum, Jr., *Dusting Off Our State Constitution*, 33 State Bar Quarterly, No. 2 6-8 (1986)), *reh’g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). Nevertheless, Article I, Section 20 provides protection “similar” to the protection provided by the Fourth Amendment, *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008); *Stumbo*, 357 N.C. at 293, 582 S.E.2d

2. The parties rightly agree that the policy implicates Article I, Section 20’s guarantee against unreasonable searches conducted by the government. *See Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 617, 103 L. Ed. 2d 639, 660 (1989) (“[T]he collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable”); *State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988) (“The withdrawal of a blood sample from a person is a search subject to protection by article I, section 20 of our constitution.”) (citing *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966); *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986)).

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at 264 (Martin, J., concurring), and it is well-settled that both Article I, Section 20 and the Fourth Amendment prohibit the government from conducting “unreasonable” searches. *Von Raab*, 489 U.S. at 665, 103 L. Ed. 2d at 701; *Stumbo*, 357 N.C. at 292, 582 S.E.2d at 264 (Martin, J., concurring); *McClendon*, 350 N.C. at 636, 517 S.E.2d at 132. Whether a search is unreasonable, and therefore prohibited by Article I, Section 20, and the proper tests to be used in resolving that issue “are questions which can only be answered with finality by [the North Carolina Supreme Court].” *McClendon*, 350 N.C. at 635, 517 S.E.2d at 132 (quoting *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260).

The North Carolina Supreme Court has stated that we may not construe provisions of the North Carolina Constitution as according lesser rights than are guaranteed by the federal Constitution. *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 475, 515 S.E.2d 675, 692 (1999); *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998); *Carter*, 322 N.C. at 713, 370 S.E.2d at 555. As explained by the Supreme Court in *Virmani*,

“because the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be ‘accorded lesser rights’ no matter how we construe the state constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision. In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.”

Virmani, 350 N.C. at 475, 515 S.E.2d at 692 (quoting *Jackson*, 348 N.C. at 648, 503 S.E.2d at 103). Accordingly, we first determine whether the policy violates the Fourth Amendment; if so, the policy also violates Article I, Section 20. *See id.*; *Carter*, 322 N.C. at 714, 370 S.E.2d at 556 (“[A]n individual’s constitutional rights under the Constitution of North Carolina must receive at least the same protection as such rights are accorded under the Federal Constitution.”) (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 64 L. Ed. 2d 741 (1980)). If we determine that the policy does not violate the Fourth Amendment, we may then pro-

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ceed to determine whether Article I, Section 20 provides “basic rights in addition to those guaranteed by the [Fourth Amendment].” *Virmani*, 350 N.C. at 475, 515 S.E.2d at 692 (quoting *Jackson*, 348 N.C. at 648, 503 S.E.2d at 103).

The reasonableness of a governmental search is generally determined “by balancing the nature of the intrusion on the individual’s privacy against the promotion of legitimate governmental interests.” *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829, 153 L. Ed. 2d 735, 743 (2002) (citing *Delaware v. Prouse*, 440 U.S. 648, 654, 59 L. Ed. 2d 660 (1979)). But “some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure.” *Samson v. California*, 547 U.S. 843, 855 n.4, 165 L. Ed. 2d 250, 261 n.4 (2006) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560, 49 L. Ed. 2d 1116, 1130 (1976)); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 148 L. Ed. 2d 333, 340 (2000) (“A search . . . is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”) (citing *Chandler v. Miller*, 520 U.S. 305, 308, 137 L. Ed. 2d 513 (1997)). The Fourth Amendment, however, “imposes no irreducible requirement of [individualized] suspicion.” *Earls*, 536 U.S. at 829, 153 L. Ed. 2d at 744 (quoting *Martinez-Fuerte*, 428 U.S. at 561, 49 L. Ed. 2d at 1130). “[I]n certain limited circumstances, the Government’s need to discover . . . latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting . . . searches without any measure of individualized suspicion.” *Id.* (quoting *Von Raab*, 489 U.S. at 668, 103 L. Ed. 2d at 704); *see also Skinner*, 489 U.S. at 624, 103 L. Ed. 2d at 664 (“In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.”). Thus, a suspicionless search may be reasonable under the Fourth Amendment where “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Griffin v. Wisconsin*, 483 U.S. 868, 873, 97 L. Ed. 2d 709, 717 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 83 L. Ed. 2d 720, 741 (1985) (Blackmun, J., concurring)).

Where the government alleges “special needs” in justification of a suspicionless search, “courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.” *Chandler*, 520 U.S. at 314, 137 L. Ed. 2d at 523 (citing *Von Raab*, 489 U.S. at 665-66, 668, 103 L. Ed. 2d 685). An important consid-

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eration in conducting the inquiry is whether there is “any indication of a concrete danger demanding departure from the Fourth Amendment’s” usual requirement of individualized suspicion. *Id.* at 319, 137 L. Ed. 2d at 526. The purpose of the inquiry is “to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” *Von Raab*, 489 U.S. at 665-66, 103 L. Ed. 2d at 702 (citing *Skinner*, 489 U.S. at 619-20, 103 L. Ed. 2d 639). Conducting the inquiry, the United States Supreme Court has upheld suspicionless searches in the following instances: (1) drug testing of students seeking to participate in competitive extracurricular activities, *Earls*, 536 U.S. 822, 153 L. Ed. 2d 735, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995); (2) searches of probationers, *Griffin*, 483 U.S. 868, 97 L. Ed. 2d 709; (3) drug testing of railroad employees involved in train accidents, *Skinner*, 489 U.S. 602, 103 L. Ed. 2d 639; (4) drug testing of United States customs officials seeking promotion to certain sensitive positions, *Von Raab*, 489 U.S. 656, 103 L. Ed. 2d 685; and (5) searches of government employees’ offices by the employer, *O’Connor v. Ortega*, 480 U.S. 709, 94 L. Ed. 2d 714 (1987).

We begin our inquiry by attempting to examine the intrusiveness of the proposed testing procedure.³ It *appears* from the evidence in the record that the Board will only perform a scientific analysis of employees’ urine. However, the policy itself does not specify the “bodily specimen” employees will be required to produce. On the contrary, a plain reading of the policy reveals that the Board “may perform” a “scientific analysis of [employees’] urine, blood, breath, saliva, hair, tissue, and other specimens of the human body for the purpose of detecting a drug or alcohol.” We acknowledge that Keystone Laboratories’ collection procedure only details the collection of employees’ urine and that the policy in one instance *suggests* that employees will only be required to produce urine. Nevertheless, assuming the Board only tests employees’ urine, we emphasize that the policy provides that “[a]ny employee who is found through drug or alcohol testing to have in his or her body *a detectable amount* of an illegal drug or of alcohol” will be suspended. (Emphasis added.) Although a litany of other provisions in the policy bear directly on the intrusiveness of the testing procedure, we find it

3. Although Plaintiffs do not assert that the policy violates any statutory provision, we note that our General Assembly has mandated “that employers who test employees for controlled substances shall use reliable and minimally invasive examinations and screenings and be afforded the opportunity to select from a range of cost-effective and advanced drug testing technologies.” N.C. Gen. Stat. § 95-230 (2007). Accordingly, the General Assembly has established “procedural and other requirements for the administration of controlled substance examinations.” *Id.*

unnecessary to venture beyond this provision to state that the policy is remarkably intrusive.

We next consider whether Board employees have a reduced expectation of privacy by virtue of their employment in a public school system. Public employees may have reduced expectations of privacy if their employment carries with it safety concerns for which the employees are heavily regulated. *Skinner*, 489 U.S. at 627, 103 L. Ed. 2d at 666. By way of illustration, chemical weapons plant employees are heavily regulated for safety. *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989) (per curiam). There is no evidence in the record before us, however, that any of the Board's employees are regulated *for safety*. We question whether the Board could produce such evidence. The Board errantly relies on the premise that "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia*, 515 U.S. at 656, 132 L. Ed. 2d at 576. The Board, however, fails to account for the explicit teaching of the Supreme Court that because "the nature of [the schools' power over schoolchildren] is custodial and tutelary, [the schools' power] permit[s] a degree of supervision and control [over schoolchildren] that could not be exercised over free adults." *Id.* at 655, 132 L. Ed. 2d at 576. We are unable to conclude from this record that any of the Board's employees have a reduced expectation of privacy by virtue of their employment in a public school system.

Finally, the record in the case at bar is wholly devoid of any evidence that the Board's prior policy was in any way insufficient to satisfy the Board's stated needs. The Board acknowledges that there is no evidence in the record of any drug problem among its employees. There is also a complete want of evidence that any student or employee has ever been harmed because of the presence of "a detectable amount of an illegal drug or of alcohol" in an employee's body. We agree that the Board need not wait for a student or employee to be harmed before implementing a preventative policy. However, the evidence completely fails to establish the existence of a "concrete" problem which the policy is designed to prevent. The need to promote an anti-drug message is "symbolic, not 'special,' as that term draws meaning from [the decisions of the United States Supreme Court]." *Chandler*, 520 U.S. at 322, 137 L. Ed. 2d at 528.

Considering and balancing all the circumstances, we conclude that the employees' acknowledged privacy interests outweigh the Board's interest in conducting random, suspicionless testing. *See T.L.O.*, 469 U.S. at 337, 83 L. Ed. 2d at 732 ("[E]ven a limited search of the person is

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a substantial invasion of privacy.”) (citing *Terry v. Ohio*, 392 U.S. 1, 24-25, 20 L. Ed. 2d 889 (1968)). Accordingly, we hold that the policy violates Article I, Section 20’s guarantee against unreasonable searches.

C. Boesche v. Raleigh-Durham Airport Authority

We reject the Board’s assertion that “ample guidance to uphold the Board’s drug testing policy” can be found in *Boesche v. Raleigh-Durham Airport Authority*, 111 N.C. App. 149, 432 S.E.2d 137 (1993), *disc. review improvidently allowed and appeal dismissed*, 336 N.C. 304, 442 S.E.2d 320 (1994) (per curiam). The plaintiff in *Boesche* was an airport maintenance mechanic whose job duties generally consisted of “performing preventative maintenance and repairs on airport terminal [HVAC] systems, but plaintiff also had security clearance to drive a motor vehicle 10 M.P.H. in a designated area on the apron of the flight area in order to get access to the systems located on the outside of the building.” *Id.* at 154, 432 S.E.2d at 141. Without expressing that the plaintiff was suspected of any individualized wrongdoing, the defendants asked the plaintiff to submit to a urine drug test. *Id.* at 150, 432 S.E.2d at 138. The defendants told the plaintiff that the test was required “pursuant to a Federal Aviation Administration directive requiring that all employees who drive a motor vehicle in the airside of the airport must be tested.” *Id.* The plaintiff refused to submit to the test, was fired, and subsequently filed a complaint alleging

that the actions of the defendants violated his rights to be free from illegal searches and invasion of privacy under the Fourth Amendment to the United States Constitution and Article I, Sections 20, 35 and 36 of the North Carolina Constitution; his rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 19, 35 and 36 of the North Carolina Constitution; his right not to be discharged from employment in bad faith or for reasons contravening public policy under the common law of North Carolina; and for the common law tort of intentional/negligent infliction of emotional distress.

Id. at 151, 432 S.E.2d at 139. The defendants moved to dismiss the complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and the trial court granted the defendants’ motion. *Id.*

On appeal, the plaintiff argued, *inter alia*,

that the trial court committed reversible error in dismissing plaintiff’s constitutional claims against defendant’s [sic] random drug

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testing procedure policy that afforded plaintiff no prior notice of testing or test procedure, that included no guarantee of confidentiality of test results or immunity from criminal prosecution in the case of a positive result, and that led to plaintiff's termination with no opportunity for a hearing before an impartial tribunal.

Id. at 155, 432 S.E.2d at 141. The plaintiff additionally argued that he was not subject to random drug testing because he was neither "(1) a sensitive public employee because of either safety or security reasons or (2) an individual suspected of drug use." *Id.* Citing *Skinner*, 489 U.S. 602, 103 L. Ed. 2d 639, this Court stated that random drug testing of public employees is permissible "where the individual tested was engaged in activity which involved either public safety or safety concerns for others because it was a legitimate governmental interest." 111 N.C. App. at 153-54, 432 S.E.2d at 140. We emphasized that "there must be a showing by the employer that the employees required to undergo such testing have responsibilities or duties which are connected to the safety concerns of others." *Id.* at 154, 432 S.E.2d at 140 (quoting *Twigg v. Hercules Corp.*, 406 S.E.2d 52, 56 (W.Va. 1990)). Applying those standards to the facts of that case, this Court stated that "the record showed that plaintiff was in a position in which public safety or the safety of others was an overriding concern[,] and this Court found "that plaintiff, if drug impaired while operating a motor vehicle on the apron of the flight area, could increase the risk of harm to others." *Id.* at 154, 432 S.E.2d at 140-41. In affirming the trial court, we held that the "plaintiff was indeed a sensitive public employee because of safety concerns[]" and that the plaintiff was "subject to random drug testing as a legitimate governmental interest." *Id.* at 155, 432 S.E.2d at 141.

We are wholly unconvinced by the Board of Education's argument that *Boesche* is "dispositive" in the case at bar. In stating that the *Boesche* plaintiff was in a position "in which public safety or the safety of others was an overriding concern," this Court merely held that the defendants had made the showing required by *Skinner* that the plaintiff had "duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628, 103 L. Ed. 2d at 667. This Court did not hold that *any* public employee who, "if drug impaired . . ., could increase the risk of harm to others" was subject to urine drug testing. Rather, the Court held that the plaintiff, "if drug impaired *while operating a motor vehicle on the apron of the flight area*, could increase the risk of harm to others." 111 N.C. App. at 154, 432 S.E.2d at 141 (emphasis added).

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The holding in *Boesche* was limited to the specific facts of that case. In the case before us, there is absolutely no evidence in the record which in any way equates the safety concerns inherent in the driving of a motor vehicle on the apron of an airport's flight area with the safety concerns inherent in the job duties of any Board employee. In fact, there is absolutely no evidence in the record that any Board employee whose body contains "a detectable amount of an illegal drug or of alcohol" increases the risk of harm to anyone. For these reasons, *Boesche* is not dispositive in the case at bar.

IV. CONCLUSION

Lest the American people, and the people of North Carolina in particular, forget the foundational importance of the Fourth Amendment right to be secure against unreasonable searches and seizures, we should recall that the cherished liberties enjoyed in our brief historical moment have been inherited by this generation only because they have been nurtured and protected by earlier generations of Americans so driven in their pursuit of liberty that life itself was not too great a cost to purchase liberty for themselves and their posterity.

State v. Barnard, 362 N.C. 244, 259, 658 S.E.2d 643, 652-53 (Brady, J., dissenting), *cert. denied*, — U.S. —, 172 L. Ed. 2d 198 (2008). We are cognizant of the fact that the policy was enacted by the duly elected representatives of the people of Graham County. Moreover, the evidence in the record establishes that the policy had ample support by Board employees. Nevertheless, in our view, the policy violates Plaintiffs' rights under Article I, Section 20 to be free from unreasonable searches.⁴ Constitutional rights are not lightly cast aside. The trial court's order is reversed.

REVERSED.

Chief Judge MARTIN and Judge WYNN concur.

4. Because of this holding, we do not determine whether the policy violates Article I, Section 19.

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JONATHAN BLITZ, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-
APPELLANT v. AGEAN, INC., DEFENDANT-APPELLEE

No. COA08-686

(Filed 2 June 2009)

1. Appeal and Error— denial of class certification—issue of law—de novo review—equity may be considered

While appeal from the denial of class certification generally involves an abuse of discretion standard of review, the Court of Appeals reviews issues of law, such as statutory interpretation, *de novo*. Class actions should be permitted where they serve useful purposes, balanced against inefficiency or other drawbacks; among the matters the trial court may consider in its discretion are matters of equity.

2. Class Actions— certification—fax advertising—individualized issues—fact-based approach

The primary issue concerning class certification in a case under the Telephone Consumer Protection Act (TCPA) involving fax advertisements was whether, under the “commonality and typicality” prong of the test, individualized issues concerning unsolicited advertisements predominated over issues of law and fact common to the proposed class members. A fact-based approach was adopted over a bright line rule.

3. Telecommunications— fax advertising—established business relationship

An existing established business relationship did not constitute prior express permission or invitation to receive unsolicited fax advertisements before the amendment to the federal statute to include that exception.

4. Class Actions— fax advertising—established business relationships—excluded from proposed class—relevance

Even though plaintiff in an action involving fax advertising by a restaurant expressly excluded from the proposed class all persons or entities having an established business relationship (EBR) with defendant, the issue remained relevant because those people had to be identified to ensure removal from the proposed class. Defendant had the obligation to keep records documenting any prior express invitation or permission.

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5. Class Actions— fax advertising—small claims court—not a superior venue

Small claims court cannot, *per se*, be a superior venue (for class certification purposes) for violations of the Telephone Consumer Protection Act (TCPA) in North Carolina because it does not have the authority to grant injunctions. Furthermore, the amount in controversy could easily exceed the small claims court jurisdictional limit, and the actions of a single individual could theoretically lead to many actions being heard at all trial levels, leading to inconsistent decisions on the same acts and evidence, with serious over burdening of trial court resources.

6. Telecommunications— fax advertising—class action—unsolicited communications

A plaintiff seeking class certification for a Telephone Consumer Protection Act case involving fax advertising by a restaurant had the burden of showing that some of the advertisements were unsolicited, but the possibility that some proposed class members might later be removed should not automatically defeat class certification. Plaintiff should present the court with a reasonable means of ensuring that there will not be an inordinate number of proposed class members who do not belong in the class, and should present the court as tailored a proposed class as is practicable.

7. Class Actions— certification—Telephone Consumer Protection Act claims—not per se inappropriate

A trial court ruling denying class certification in a Telephone Consumer Protection Act (TCPA) fax advertising case was based upon a misapprehension of the law and thus constituted an abuse of discretion. Claims brought pursuant to the TCPA are not per se inappropriate for class actions; decisions on whether to certify TCPA claims for class actions should be made on the basis of the particular facts presented and theories advanced, and the trial court has broad discretion in determining whether class certification is appropriate.

8. Telecommunications— unsolicited fax advertising—summary judgment

The trial court erred by granting defendant's motion for summary judgment regarding three unsolicited faxes in an action under the Telephone Consumer Protection Act involving fax advertising by defendant restaurant. It cannot be held that there

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were no issues of material fact concerning the number of faxes sent by defendant to plaintiff.

9. Appeal and Error— remand on other grounds—spoliation—right to argue

As summary judgment was improperly granted, the issue of spoliation was not addressed and plaintiff retained the right to argue the issue at trial.

Appeal by Plaintiff from order entered 25 June 2007 and from order and judgment entered 3 March 2008 by Special Superior Court Judge Albert Diaz in Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 3 December 2008.

Margulis Law Group, by Max G. Margulis and Dewitt Law, PLLC, by N. Gregory DeWitt, for Plaintiff-Appellant.

Hoof & Hughes, PLLC, by J. Bruce Hoof, for Defendant-Appellee.

McGEE, Judge.

Defendant operates two restaurants in Durham, North Carolina: Papa's Grill and Front Street Cafe. Defendant obtained a list of approximately 900 business fax numbers (the list) from InfoUSA, a list broker, in the spring of 2004. Defendant then contracted with Concord Technologies, Inc. (Concord) for Concord to send Defendant's fax advertisements to all the numbers on the list at Defendant's direction. It is uncertain from the record whether the list obtained from InfoUSA was augmented by additional fax numbers obtained directly by Defendant from its customers.

Defendant, through Concord, sent 7,000 fax advertisements to the fax numbers on the list during 2004. Plaintiff obtained a fax number in September of 2004 and Plaintiff's number was included on the list. Plaintiff alleged in his complaint that he received five unsolicited fax advertisements from Defendant. Plaintiff retained two of the fax advertisements sent by Defendant, but claimed to have discarded the other three.

Plaintiff filed an amended class action complaint on 11 February 2005, alleging that Defendant had violated 47 U.S.C. § 227 of the Telephone Consumer Protection Act (TCPA) by sending unsolicited fax advertisements to Plaintiff and the other proposed class members. Plaintiff sought the statutory damages of \$500.00 for each un-

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solicited fax advertisement sent by Defendant to any member of the proposed class. Alleging Defendant's actions were willful and knowing, Plaintiff further sought to treble those damages as permitted by 47 U.S.C. § 227(b)(3). Plaintiff later abandoned his claim for treble damages.

Plaintiff moved for class certification on 17 October 2006, which motion was denied by order filed 25 June 2007. Plaintiff moved for partial summary judgment on 15 November 2007, arguing he should obtain a favorable judgment as a matter of law for two of the five fax advertisements, and that the issue of the additional three fax advertisements should go to trial. Defendant responded to Plaintiff's motion for partial summary judgment, and moved for summary judgment in its favor for all five fax advertisements. By order entered 3 March 2008, the trial court granted summary judgment in favor of Plaintiff for two of the fax advertisements, and granted summary judgment in favor of Defendant for the additional three fax advertisements. Plaintiff appeals from the trial court's orders denying class certification and granting Defendant partial summary judgment. Additional relevant facts will be discussed in the body of the opinion.

Standards of Review

[1] Plaintiff and Defendant appear to disagree on the appropriate standard of review for class certification in this case. Plaintiff argues that on these facts, *de novo* review is appropriate for all his arguments. Defendant contends that the proper standard of review is abuse of discretion.

Generally, appeal from the denial of class certification involves an abuse of discretion standard of review. *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 548, 613 S.E.2d 322, 326 (2005) (quoting *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 284, 354 S.E.2d 459, 466 (1987)) ("Where all the prerequisites are met, it is within the trial court's discretion to determine whether 'a class action is superior to other available methods for the adjudication of th[e] controversy.' "). However, our analysis does not end here. Defendant, arguing for an abuse of discretion standard, directs us in its memorandum of additional authority to *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13 (2d Cir. N.Y. 2003), which states:

The standards governing review of class certification decisions under Rule 23 are well known. Generally, a district court's de-

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cision regarding class certification is reviewed for abuse of discretion. An appellate court, however, is “noticeably less deferential . . . when [the district] court has denied class status than when it has certified a class[.]”

A district court vested with discretion to decide a certain matter is “empowered to make a decision—of *its* choosing—that falls within a range of permissible decisions. A district court ‘abuses’ or ‘exceeds’ the discretion accorded to it when (1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.” In contrast, *de novo* review is “review without deference,” and is “‘traditionally’ associated with appellate assessments of a district court’s legal conclusions.”

With these principles in mind, the standard of review applicable to class certification decisions can be succinctly summarized as follows: “We review class certification rulings for abuse of discretion. We review *de novo* the district court’s conclusions of law that informed its decision to deny class certification.”

Id. at 18 (citations omitted); see also *Augustin v. Jablonsky*, 461 F.3d 219, 224-25 (2d Cir. N.Y. 2006); *Turner v. Benefit Corp.*, 242 F.3d 1023, 1025 (11th Cir. Ala. 2001). We agree with the Second Circuit’s analysis and find it in accord with North Carolina precedent involving matters of law decided in cases where the general standard of review is abuse of discretion. See *Edwards v. Wall*, 142 N.C. App. 111, 114-15, 542 S.E.2d 258, 262 (2001) (Whether witness qualifies as an expert is within the discretion of the trial court, but “‘where an appeal presents questions of statutory interpretation, full review is appropriate, and [a trial court’s] ‘conclusions of law are reviewable *de novo*.’”’) (citations omitted); *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (“Generally, a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion. However, where the motion involves a question of law or legal inference, our standard of review is *de novo*.”) (citations omitted). We hold that in appeals from the grant or denial of class certification this Court reviews issues of law, such as statutory interpretation, *de novo*.

“[A]n appellate court is bound by the [trial] court’s findings of fact if they are supported by competent evidence.” *Nobles v. First*

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Carolina Communications, Inc., 108 N.C. App. 127, 132, 423 S.E.2d 312, 315 (1992).

Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. [T]he trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in this opinion.

Crow, 319 N.C. at 284, 354 S.E.2d at 466; *see also Maffei v. Alert Cable TV, Inc.*, 316 N.C. 615, 617, 342 S.E.2d 867, 870 (1986) (citation omitted); *Pitts v. Am. Sec. Ins. Co.*, 144 N.C. App. 1, 11, 550 S.E.2d 179, 188 (2001) (citations omitted), *questioned on other grounds by Reep v. Beck*, 360 N.C. 34, 619 S.E.2d 497 (2005). Among the matters and drawbacks the trial court may consider in its discretion involving class certification are matters of equity. *Maffei*, 316 N.C. at 621, 342 S.E.2d at 872 (benefits of class action must be weighed against the costs of such an action, “in terms of convenience and fairness to all involved”) (citing *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972); *see also Long v. Abbott Labs.*, 1999 NCBC 10, P42 (N.C. Super. Ct. 1999) (concerning the “equitable nature of the class action proceeding” and how equity “should not condone use of the class action procedure simply for leverage in settlement”); *Lupton v. Blue Cross & Blue Shield*, 1999 NCBC 3, P18 (N.C. Super. Ct. 1999) (citing *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1305 (4th Cir. N.C. 1978) (citation omitted)).

The standard of review for the trial court’s partial grant of Defendant’s motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

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.” The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, “all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.”

Id. at 523-24, 649 S.E.2d at 385 (citations omitted).

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Class Certification

[2] The majority of Plaintiff's arguments on appeal involve the trial court's denial of Plaintiff's proposed class certification. "The party seeking to bring a class action . . . has the burden of showing that the prerequisites to utilizing the class action procedure are present." *Harrison*, 170 N.C. App. at 548, 613 S.E.2d at 325 (citations omitted). "Where all the prerequisites are met, it is within the trial court's discretion to determine whether 'a class action is superior to other available methods for the adjudication of the controversy.'" *Id.* at 548, 613 S.E.2d at 326. As stated above, however, "[t]he usefulness of the class action device must be balanced . . . against inefficiency or other drawbacks. [T]he trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23[.]" *Crow*, 319 N.C. at 284, 354 S.E.2d at 466.

The appellate courts of this State have not considered the issue of class certification in the context of the TCPA. Decisions from other jurisdictions have been split on this issue, and we must now make a determination of how the requirements for class certification should be applied in the TCPA context in North Carolina. N.C. Gen. Stat. § 1A-1, Rule 23 is the statute providing for class action suits in certain circumstances.

The North Carolina Supreme Court set forth the salient principles applicable to Rule 23(a) and the prerequisites for certification of a class action in *Crow* Under *Crow*, plaintiff must first establish that a class exists.

"[A] 'class' exists under Rule 23 when the [A] named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." [This is the "commonality and typicality" prong of the test.] Plaintiff must also show that the named representative will fairly and adequately represent the interests of all members of the class[;] that there is no conflict of interest between the named representatives and the unnamed class members; and that the class members are so numerous that it is impractical to bring them all before the court. The trial court has broad discretion in determining whether class certification is appropriate, however, and is not limited to those prerequisites which have been expressly enunciated in either Rule 23 or in *Crow*.

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Nobles, 108 N.C. App. at 131-32, 423 S.E.2d at 315 (citations omitted). The fax advertisements at issue in the case before us were allegedly sent in 2004. Therefore, the relevant version of the TCPA is the version in effect at that time. The 2004 version of the TCPA states in relevant part:

It shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine[.]

47 USCS § 227(b)(1)(C) (2004). “The term ‘unsolicited advertisement’ means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 USCS § 227(a)(4) (2004).

The primary issue concerning class certification in this case, and the primary issue courts from other jurisdictions have based their decisions upon when dealing with class certifications involving the TCPA, is whether, under the “commonality and typicality” prong of the test, individualized issues concerning whether sent fax advertisements were “unsolicited” predominate over issues of law and fact common to the proposed class members.

I.

Upon review of authority outside this jurisdiction, we find the following reasoning persuasive as it relates to the issues in this case:

For consent to send fax advertisements to be valid according to Section 227(b)(1)(c), Title 47, U.S. Code, the recipient must be *expressly* told that the materials to be sent are *advertising* materials and will be sent *by fax*. In the absence of each clear prior notice, express invitation or permission to send fax advertisements is not obtained.

Proof of “prior express invitation or permission” is the only complete defense to a claim that a defendant sent unsolicited fax advertisements in violation of the TCPA.

. . . .

The House Report on the TCPA discusses the phrase “prior express invitation or permission” and makes clear that advertisers have a duty to “establish specific procedures for obtaining prior

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permission and maintaining appropriate documentation with respect to such permission.” U.S. House Rep. 102-317, at 13. This responsibility “is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner’s uses of his or her fax machine.” U.S. Senate Rep. No. 102-178, at 8. Hence, a fax advertiser has an obligation to obtain prior express consent from the recipients of its advertisements and to keep and maintain records of such consent.

Consent may not be inferred from the meredistribution or publication of a fax number, or the existence of [an established] business relationship [(EBR)] between an advertiser and the recipient, in the absence of specific evidence of “prior express invitation or permission” to send advertisements by fax. The touchstone is *consent*. This is self-evident from the fact that “prior express invitation or permission” is the sole statutory defense to a cause of action based upon unsolicited fax advertisements. *See* Section 227(a)(4), Title 47, U.S. Code.

Jemiola v. XYZ Corp., 802 N.E.2d 745, 748-49 (Ohio C.P. 2003).¹

The legislative history indicates that one of Congress’ primary concerns was to protect the public from bearing the costs of unwanted advertising. Certain practices were treated differently because they impose costs on consumers. Because of the cost shifting involved with fax advertising, Congress . . . prohibited unsolicited faxes without the prior express permission of the recipient.

In re Rules and Regulations Implementing the TCPA of 1991, 18 FCC Rcd 14014, 14128 (2003).

The Commission has determined that the TCPA requires a person or entity to obtain the prior express invitation or permission of the recipient before transmitting an unsolicited fax advertisement. This *express* invitation or permission must be in writing and include the recipient’s signature. The recipient must clearly indicate that he or she consents to receiving such faxed advertisements from the company to which permission is given, and provide the individual or business’s fax number to which faxes may be sent.

In re Rules, 18 FCC Rcd at 14126.

1. Congress amended 47 U.S.C. 227(b)(1)(C) in 2005 to exempt persons with an EBR with the sender of the fax advertisement from this section.

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Congress determined that companies that wish to fax unsolicited advertisements to customers must obtain their express permission to do so before transmitting any faxes to them. Advertisers may obtain consent for their faxes through such means as direct mail, websites, and interaction with customers in their stores. Under the new rules, the permission to send fax advertisements must be provided in writing, [and] include the recipient's signature and facsimile number[.] The Commission believes that given the cost shifting and interference caused by unsolicited faxes, the interest in protecting those who would otherwise be forced to bear the burdens of unwanted faxes outweighs the interests of companies that wish to advertise via fax.

In re Rules, 18 FCC Rcd at 14128-29.

In *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318 (5th Cir. La. 2008), a case where the district court's class certification of a TCPA claim was reversed, the Fifth Circuit stated:

violations of § 227(b)(1)(C) of the TCPA are not *per se* unsuitable for class resolution. But, as . . . cases also illustrate, there are no invariable rules regarding the suitability of a particular case filed under this subsection of the TCPA for class treatment; the unique facts of each case generally will determine whether certification is proper. This of course means that plaintiffs must advance a viable theory employing generalized proof to establish liability with respect to the class involved, and it means too that district courts must only certify class actions filed under the TCPA when such a theory has been advanced.

Gene, 541 F.3d at 328; *see also Carnett's, Inc. v. Hammond*, 610 S.E.2d 529, 532 (Ga. 2005). We agree with the Fifth Circuit's rejection of a bright line rule regarding class certification in the TCPA context, and adopt its fact-based approach. In reversing class certification, *Gene* contrasted the facts of its case with those of *Kavu v. Omnipak Corp.*, 246 F.R.D. 642 (W.D. Wash. 2007).

Kavu moved for the certification of a class composed of "[a]ll persons who received an unsolicited advertisement . . . via facsimile from [the defendant]" within a given period. The *Kavu* court, in granting class certification, determined that the question of consent was susceptible to common proof. Importantly, the *Kavu* court did not disagree with earlier federal district court determinations that individual consent issues could preclude class certification. Rather, the *Kavu* court determined that in its

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case the question of consent presented would not require “individual evidence.” This was true because [the defendant] had obtained *all* of the fax recipients’ fax numbers from a single purveyor of such information and because, given this fact, *Kavu* was able to propose a novel, class-wide means of establishing the lack of consent based on arguably applicable federal regulations. [47 C.F.R. § 64.1200(a)(3)(ii)(B), which indicates that if a “sender obtains the facsimile number from a [commercial database], the sender must take reasonable steps to verify that the recipient agreed to make the number available for distribution”]. The common question in *Kavu* was thus whether the inclusion of the recipients’ fax numbers in the purchased database indicated their consent to receive fax advertisements, and there were therefore no questions of individual consent. [*See also Hinman v. M and M Rental Ctr.*, 545 F. Supp. 2d 802, 2008 WL 927910, at 4 (N.D. Ill. 2008) (granting class certification on similar grounds).

Gene, 541 F.3d at 327-28 (emphasis added). We note that 47 C.F.R. § 64.1200(a)(3) was amended, with an effective date after the fax transmissions relevant to this case. That portion of 47 C.F.R. § 64.1200 cited in *Gene*, *supra*, and relied upon by the *Kavu* Court, was not in effect for the relevant time period in this case.

In *Hinman*, the United States District Court for the Northern District of Illinois, Eastern Division reasoned:

The commonality and typicality requirements of Rule 23 are inter-related and tend to overlap. Commonality is satisfied by showing “a common nucleus of operative fact.” Typicality is met if the class representative’s claim “arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.”

The essence of [the defendant’s] argument is that because the TCPA applies only to “unsolicited” faxes, an individualized analysis is required to determine whether each class member consented to transmission of the faxes in question. Indeed, several of the cases defendant cites have found that the consent issue precludes class certification. *See, e.g., Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Penn. 1995) (denying certification of TCPA claim based on “inherently individualized” question of consent) and *Kenro, Inc. v. Fax Daily Inc.*, 962 F.Supp. 1162 (S.D. Ind. 1997) (same). I am not bound, however, by these

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authorities, nor do I find their reasoning persuasive. Indeed, I agree with Judge McCann's analysis in *Travel 100 Group v. Empire Cooler Service*, No. 03 CH 14510, 2004 WL 3105679 (Ill. Cir.) and find it applies equally here:

"[*Forman* and *Kenro*] belie a misunderstanding of telephone facsimile advertising as alleged in the complaint and materials supporting the instant Motion. Those courts seem to resolve the matter based upon a belief that this form of messaging is occasional or sporadic and not an organized program. To the contrary, the facts before this Court yield that this Defendant engaged a third party to send more than 3,000 facsimiles to targeted businesses. The manner in which the Defendant identified these recipients will not require individualized inquiry."

Under the circumstances, the question of consent may rightly be understood as a common question.

Hinman, 545 F. Supp. 2d at 806-07 (citations omitted).

The fact that, following certification, some putative members of the class will eventually be found to have consented to the receipt of [the defendant's] fax transmissions does not preclude certification of the class as recipients of unsolicited faxes from [the defendant].

Display South, Inc. v. Graphics House Sports Promotions, Inc., 992 So. 2d 510, 523 (La. App. 1 Cir. 2008); see also *Am. Home Servs. v. A Fast Sign Co.*, 651 S.E.2d 119, 121 (Ga. Ct. App. 2007) (The proposed class did not fail "the commonality requirement based on the hypothetical existence of persons in the class against whom it could assert the existing business relationship exemption, despite not having any knowledge or record of such relationship. See *Hooters of Augusta v. Nicholson*, 245 Ga. App. 363, 368 (4) (537 SE2d 468) (2000).") (Note that *Am. Home Servs.* was decided after the amendment of the TCPA to include an express EBR exemption. This express exemption was not in the TCPA at the time the faxes in this case were sent.)

II.

In Plaintiff's third, fourth, fifth, sixth and tenth arguments, he contends the trial court erred in denying class certification on the basis that issues concerning whether potential class members had an EBR with Defendant, or whether they had given prior express permission or invitation to receive faxes from Defendant were "predominating individualized issues militating against class certification."

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Plaintiff further argues that the trial court erred in ruling small claims court is a superior forum for TCPA claims. We agree in part, and remand to the trial court.

We first note that Plaintiff's first two arguments on appeal pertain to statutory interpretation of the TCPA involving the meaning of EBR under that statute, and whether the trial court erred in ruling an EBR constituted "express invitation or permission" to receive faxes under the TCPA as it then existed.

[3] In this case, Plaintiff defines the proposed class as follows:

All persons and other entities to whom Defendant sent or caused to be sent, one or more facsimile advertisement transmissions promoting the restaurants of Defendant from February 12, 2001 until February 11, 2005 inclusive, and *excluding those persons and other entities who had an established business relationship with Defendant at the time said facsimile advertisement transmissions were sent.* (Emphasis added).

These arguments are irrelevant to *this* appeal given the definition of the proposed class in the matter before us, which expressly *excluded* persons or entities having any EBR with Defendant. However, because of the possibility that the class definition may be amended upon remand, we hold that an EBR did not constitute prior express permission or invitation to receive unsolicited fax advertisements before the amendment of 47 USCS § 227 to include that exception. *See Gottlieb v. Carnival Corp.*, 595 F. Supp. 2d 212, 221 (E.D.N.Y. 2009) (citing cases reaching the same conclusion) ("Given the plain language of the TCPA and its legislative history, it is clear that Congress limited the EBR exemption to 'telephone solicitations,' and the only exemption from the prohibition on fax advertisements required the sender to obtain the express invitation or permission of the recipient.").

[4] In the case currently before us, because Plaintiff expressly excluded from the proposed class all persons or entities having an EBR with Defendant, the EBR issue was still relevant in determining whether individualized issues predominated and militated against class certification. This is because those persons having an EBR with Defendant had to be identified in order to ensure their removal from Plaintiff's proposed class.

The trial court found as fact that Defendant purchased the list in April of 2004, limited to numbers in three postal codes in the vicinity

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of Defendant's restaurants. Defendant then contracted with Concord to send fax advertisements to all the numbers on the list. Defendant, testifying that he was unaware of the TCPA, did not know, and made no attempt to determine, whether any of the fax numbers on the list included any businesses that had given prior express invitation or permission to receive fax advertisements from Defendant.

Defendant had served more than 500,000 meals in its twelve years of operation. During that period, Defendant received numerous requests that it fax its menus and other materials relating to the restaurants and their services. Defendant provided customers with "customer information cards" to obtain customer information, which Defendant kept in a computer database. Defendant was uncertain whether it added any of the additional fax numbers voluntarily provided by its customers to the list it purchased and sent to Concord. During 2004, Concord successfully transmitted 7,000 of Defendant's fax advertisements to the fax numbers on the list. [R.p. 87]

Concerning the "prior express invitation or permission" requirement, it was Defendant's obligation to maintain some form of record keeping to document any prior express invitation or permission. Had Defendant conducted the required verification before sending its fax advertisements, it could have established the express prior invitation or permission of at least some of the purported class members.

[5] The trial court further based its denial of class certification on its ruling that a class action on these facts did not represent a superior method of adjudicating violations of the TCPA. We disagree with some of the trial court's analysis. In reaching its conclusion, the trial court determined that small claims court was a superior forum in which to deal with violations of the TCPA. This conclusion ignores an important remedy available to plaintiffs who prevail in a TCPA action. "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—(A) an action based on a violation of this subsection [of the TCPA] or the regulations prescribed under this subsection to enjoin such violation[.]" 47 U.S.C. 227(b)(3) (2004). Small claims court cannot, *per se*, be a superior venue in this State for violations of the TCPA, because it does not possess the authority to grant injunctions.

[A]n action may be brought in the district court as a small claim if: "(1) The amount in controversy, computed in accordance with G.S. 7A-243, does not exceed [five] thousand dollars [(\$ 5,000)]; and (2) The only principal relief prayed is monetary, or the recov-

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ery of specific personal property, or summary ejection, or any combination of the foregoing in properly joined claims[.]”

Wilson v. Jefferson-Green, Inc., 136 N.C. App. 824, 826, 526 S.E.2d 506, 507 (2000) (quoting N.C. Gen. Stat. § 7A-210). Further, depending on the number of allegedly unsolicited fax advertisements sent to any one person, the amount in controversy could easily exceed the \$5,000.00 small claims court jurisdictional limit. In the case before us, Plaintiff’s complaint sought an injunction against Defendant. Further, because the TCPA allows for trebling the \$500.00 statutory damages in certain circumstances, and Plaintiff requested treble damages in his complaint, the requested monetary damages for the five unsolicited fax advertisements received from Defendant exceeds the \$5000.00 jurisdictional limit for small claims in North Carolina.

In fact, depending on the amounts in controversy, and whether an action is designated as a mandatory complex business case, the actions of a single defendant could theoretically lead to hundreds, or thousands, of individual actions being heard in small claims court, general district court, general superior court, and business court. This scenario could lead to inconsistent decisions based upon identical acts and evidence, and serious over-burdening of our trial court resources.

An individual seeking only monetary recompense for a small number of unsolicited fax advertisements received may find small claims court a convenient forum. However, we must hold as a matter of law that small claims court cannot represent a superior forum to a class action in *all* instances involving TCPA claims. See *Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Communs., L.P.*, 2007 U.S. Dist. LEXIS 97153, 2-5 (M.D. La. Aug. 2, 2007).

III.

[6] Having reviewed *de novo* the law underpinning the trial court’s denial of class certification, we now turn to the specific facts of the instant case to determine if denial of class certification was proper. We have determined that “plaintiffs must advance a viable theory employing generalized proof to establish liability with respect to the class involved, and it means too that district courts must only certify class actions filed under the TCPA when such a theory has been advanced.” *Gene*, 541 F.3d at 328.

Further, Plaintiff’s amended proposed class was not limited to persons receiving “unsolicited” fax advertisements (nor did it exclude

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persons who had given express prior invitation or permission, which is another means of limiting the class to persons receiving unsolicited fax advertisements). Therefore, by its very definition, the proposed class was open to persons who had given express prior invitation or permission to Defendant to receive fax advertisements. *See Carnett's, Inc. v. Hammond*, 610 S.E.2d 529, 532 (Ga. 2005).

It was Plaintiff's burden to show the fax advertisements sent to the class were unsolicited. The possibility that some proposed class members will later be removed should not *automatically* defeat class certification. Plaintiff should present the trial court with some reasonable means of ensuring there will not be an inordinate number of proposed class members who do not belong in the class, and further show that he has, through thorough discovery and investigation, presented the trial court with as tailored a proposed class as practicable. *See Harrison*, 170 N.C. App. at 548, *Gene*, 541 F.3d at 329; 613 S.E.2d at 325-26; *Carnett's*, 610 S.E.2d at 532.

[7] In the present case, Plaintiff has alleged that Defendant obtained a list of business fax numbers without any attempt to determine whether the owners of these fax numbers gave express prior invitation or permission to receive fax advertisements from Defendant. Defendant testified that it did not know if it had supplemented the list with fax numbers it had acquired through its normal course of business dealings, and the trial court had no basis to determine how many of the fax numbers included in the list represented persons or entities that had given express prior invitation or permission to Defendant to receive fax advertisements. *Gene*, 541 F.3d at 329.

Plaintiff's arguments on appeal concern the difficulty or ease of determining whether any individual recipient of Defendant's fax advertisements gave express prior invitation or permission. The record before us does not establish that Plaintiff proceeded at the class certification hearing on a theory consistent with that stated in *Gene* and *Kavu*, namely a theory of generalized proof of invitation or permission. As stated in *Gene*: "The common question in *Kavu* was . . . whether the inclusion of the recipients' fax numbers in the purchased database indicated their consent to receive fax advertisements, and there were therefore no questions of individual consent." *Gene*, 541 F.3d at 327-28.

We disagree with some of the legal reasoning of the trial court in this case, as we find different authority more persuasive. We hold that claims brought pursuant to the TCPA are not *per se* inappropriate for class actions. Decisions whether to certify TCPA claims for

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class actions should be made on the basis of the particular facts presented and theories advanced, and the “trial court has broad discretion in determining whether class certification is appropriate, . . . and is not limited to those prerequisites which have been expressly enunciated in either Rule 23 or in *Crow*.” *Nobles*, 108 N.C. App. at 132, 423 S.E.2d at 315.

Because we hold North Carolina should follow a different line of opinions concerning class certification of TCPA cases, we hold that the trial court’s ruling denying class certification was based upon a misapprehension of law, and thus constituted an abuse of discretion. “[W]here a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light.” *Dunleavy v. Yates Constr. Co.*, 106 N.C. App. 146, 154, 416 S.E.2d 193, 198 (1992) (quoting *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979)). See also *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 523, 398 S.E.2d 586, 603 (1990) (holding that when the judge’s order “was signed under a misapprehension of the law,” then “the better approach is to vacate the order and remand for reconsideration” of the order in accordance with the appellate court’s opinion); *Stanback v. Stanback*, 270 N.C. 497, 507, 155 S.E.2d 221, 229 (1967) (quoting *State v. Grundler*, 249 N.C. 399, 402, 106 S.E.2d 488, 490 (1959)) (“And it is uniformly held by decisions of this Court that where it appears that the judge below has ruled upon [a] matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light.”). We therefore reverse and remand to the trial court for reconsideration of Plaintiff’s motion for class certification consistent with the legal holdings of this opinion.

Summary Judgment

[8] In Plaintiff’s seventh and ninth arguments, he contends the trial court erred in granting Defendant’s motion for summary judgment with respect to three unsolicited faxes Plaintiff alleged Defendant sent him in the relevant time period. We agree.

Plaintiff’s relevant allegations include: (1) Plaintiff received more than two faxes from Defendant, but only kept two of the faxes; (2) Plaintiff’s fax number was on the list Defendant used to send its fax solicitations, and Defendant testified that it instructed Concord to send fax solicitations to the entire list on at least five occasions after Plaintiff began using the relevant fax number; and (3) Defendant

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destroyed relevant evidence, such as fax logs, that had recorded the actual transmission data for the fax transmissions to Plaintiff and others on the list.

When considering this evidence, construing all inferences of fact in favor of Plaintiff and against Defendant, as we must do, *Forbis*, 361 N.C. at 523-24, 649 S.E.2d at 385, we cannot hold that there were no issues of material fact concerning the number of faxes sent by Defendant to Plaintiff, so as to determine Defendant should have been granted judgment as a matter of law on the three additional faxes allegedly sent to Plaintiff by Defendant. Issues concerning these additional three faxes constitute genuine issues of material fact that should have been decided by the trier of fact, and not by the trial court as a matter of law. We reverse and remand to the trial court for further action consistent with this holding.

Spoliation

[9] In Plaintiff's eighth argument, he contends the trial court erred in finding that there was no citation in the record to evidence of spoliation by Defendant.

Plaintiff's argument is based upon a footnote in the trial court's summary judgment order which states: "Plaintiff alleges that this evidentiary vacuum [the absence of evidence supporting Plaintiff's contention that he received five unsolicited fax advertisements] was caused by Defendant's 'spoliation of evidence' but noticeably absent from Plaintiff's papers is any citation to the record supporting that claim." We note that the trial court's order does not state that there was no evidence in the record supporting Plaintiff's claim of spoliation, only that Plaintiff failed to cite to any such evidence in his "papers."

As we have held summary judgment was improperly granted to Defendant with respect to the three additional faxes of the alleged five fax advertisements received by Plaintiff, we need not address this argument. Plaintiff retains the right to argue spoliation at trial in support of his claim that he received three additional unsolicited fax advertisements from Defendant.

Affirmed in part, reversed and remanded in part.

Judges BRYANT and GEER concur.

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LULA SANDERS, CYNTHIA EURE, ANGELINE McINERNEY, JOSEPH C. MOBLEY, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS v. STATE PERSONNEL COMMISSION, A BODY POLITIC, OFFICE OF STATE PERSONNEL, A BODY POLITIC; THOMAS H. WRIGHT, STATE PERSONNEL DIRECTOR (IN HIS OFFICIAL CAPACITY); TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; MICHAEL WILLIAMSON, DIRECTOR OF THE RETIREMENT SYSTEM DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); RICHARD H. MOORE, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); TEMPORARY SOLUTIONS, A SUBDIVISION OF THE OFFICE OF STATE PERSONNEL, AND STATE OF NORTH CAROLINA, DEFENDANTS

No. COA08-1179

(Filed 2 June 2009)

1. Public Officers and Employees— temporary state employees—employment exceeding twelve consecutive months—status and benefits—breach of contract

Plaintiff workers who were employed by state agencies as temporary employees stated claims against the State Personnel Commission for breach of contract based on its failure to give them permanent state employee compensation, status, and benefits after they had been employed for twelve consecutive months where plaintiffs' complaint sufficiently alleged the existence of contracts and a breach of personnel rules under which they were hired. The case is remanded for a declaratory judgment to declare plaintiffs' status and rights in their employment by the state agencies.

2. Declaratory Judgments— granting of motion to dismiss— not equivalent of declaration—legally recognized injury— right to declaration—unavailability of monetary relief

The granting of a motion to dismiss a complaint which seeks declaratory judgment as a remedy is not a functional equivalent of a declaratory judgment. Where there is a legally recognized injury, like a breach of contract, or where an important public policy is at issue which has been recognized by our Supreme Court as the functional equivalent of a legally recognized form of injury, N.C.G.S. § 1-253 provides that the complainant is entitled to a declaration, even if no monetary relief is available.

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3. Public Officers and Employees— equal protection—temporary state employees—appointments exceeding twelve months

The trial court did not err by dismissing plaintiffs' equal protection claims under Article I, Section 19 of the North Carolina Constitution even though the State granted benefits only to those employees who held permanent appointments and not to those who held temporary appointments exceeding twelve months because: (1) the Administrative Code of North Carolina's Office of State Personnel expressly authorized differential employee appointments including, for example, permanent, time-limited permanent, and temporary; (2) plaintiffs failed to meet their burden under the rational basis test to show that there was no governmental justification for defendants' actions in granting benefits only to persons with permanent appointments; and (3) many possible and valid reasons existed for defendants' actions in granting benefits only to those employees who hold permanent appointments, including that the State Personnel Commission during the relevant time could neither create a new position without authorization nor pay benefits without funds from which such payments could be authorized, and the need to select permanent candidates on a competitive basis by not allowing temporary employees who were in positions longer than twelve months to automatically become permanent employees.

4. Public Officers and Employees— enjoyment of fruits of labor—temporary state employees—appointments exceeding twelve months

The trial court did not err by dismissing plaintiffs' claim under Article I, Sections 1 and 35 of the North Carolina Constitution even though plaintiffs contend they showed defendants' alleged arbitrary and capricious treatment classifying plaintiffs as temporary employees when they held their positions longer than twelve months, denied them benefits, and deprived them of the enjoyment of the fruits of their own labor because: (1) the pertinent regulation did not exhibit a situation in which the legislature was interfering with an ordinary and simple occupation, nor was the employment scheme intended to be free from governmental regulation; (2) such regulation was rationally related to a substantial governmental interest; (3) nothing in the governmental action arbitrarily or irrationally limited plaintiffs' right to earn a livelihood; and (4) this claim was substantively indistinguishable

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from plaintiffs' equal protection claim that the Court of Appeals already concluded was without merit.

Appeal by plaintiffs from judgment entered 5 March 2008 by Judge Clarence E. Horton, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 March 2009.

Kilpatrick Stockton LLP, by Jim Kelly and Gregg E. McDougal; and Jack Holtzman, for plaintiff appellants.

Attorney General Roy Cooper, by Special Deputy Attorneys General Norma S. Harrell and Lars F. Nance, for defendant appellees.

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

HUNTER, JR., Robert N., Judge.

Plaintiffs, who worked for the State as "temporary" employees for periods exceeding twelve months, assert that they have been wrongfully denied employment benefits and seek relief for breach of contract and violations of the North Carolina Constitution Article I, sections 1, 19, and 35. In a 5 March 2008 order, the trial court (Horton, Jr., J.) dismissed plaintiffs' claims for failure to state a claim upon which relief may be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007). Because plaintiffs stated a valid claim for breach of contract, we reverse as to that claim and remand. Plaintiffs failed to state valid claims under the equal protection or fruits of their labor clauses of the North Carolina Constitution; we therefore affirm as to those claims.

I. Background

Plaintiffs Lula Sanders and Cynthia Eure filed suit in the Superior Court of Wake County on 1 April 2005 against the State of North Carolina, the State Personnel Commission ("SPC"), the Office of State Personnel, Temporary Solutions, and the Teachers' and State Employees' Retirement System, as well as against the State Personnel Director (Thomas H. Wright), the State Treasurer (Richard H. Moore), and the Director of the Retirement Systems Division of the Department of State Treasurer (Michael Williamson), in their official capacities (collectively, "defendants"). In a second amended complaint filed 23 June 2005, Sanders and Eure were joined by Angeline McInerny and Joseph C. Mobley (collectively, "plaintiffs") and complained that they and "other class members have been wrongfully

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denied the employee rights, compensation, benefits, and status to which they are entitled by law.” Plaintiffs seek class certification which has not yet been heard. Specifically, plaintiffs contended that because they and “proposed class members worked or upon information and belief are working for the state for periods exceeding 12 consecutive months without benefits,” the State “misclassified” them and “illegally denied them the benefits provided to similarly-situated permanent or time-limited permanent State employees.” Based on the facts alleged in the complaint, plaintiffs sought redress for violations of the North Carolina Administrative Code, breach of contract, and violations of the North Carolina Constitution.

Plaintiff Sanders was hired by Temporary Solutions, employed in a temporary assignment in the Division of Emergency Management between September of 1999 and October of 2002 without receiving any benefits, and paid by Temporary Solutions with funds received from the agency with which she was placed. She became employed as a permanent State employee in June of 2004. Plaintiff Eure was hired by Temporary Solutions, employed in a temporary assignment in the Division of Emergency Management between December of 1999 and April of 2002 without receiving any benefits, and paid by Temporary Solutions with funds received from the agency with which she was placed. She has not been employed by the State since April 2002. Plaintiff McInerny was hired by Temporary Solutions, employed in a temporary assignment in the Division of Emergency Management between September of 2000 and April of 2003 without receiving any benefits, and paid by Temporary Solutions with funds received from the agency with which she was placed. She then held a time-limited appointment with the same employer from April of 2003 until September of 2004, later resigned, and has not since been employed by the State. Plaintiff Mobley was hired by Temporary Solutions, employed in a temporary assignment with the North Carolina Highway Patrol from January of 1998 until May of 2005 without receiving any benefits, and paid by Temporary Solutions with funds received from the agency with which he was placed.

In their prayer for relief, plaintiffs sought, among other things, monetary damages including benefits, compensation, attorneys’ fees and expenses, and “all funds to which they and other class members are entitled”; Class certification pursuant to Rule 23 of the North Carolina Rules of Civil Procedure; injunctive relief “against retaliatory termination of Plaintiff Mobley”; a “permanent injunction ordering Defendants to comply with their legal and fiduciary duties to

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inform all class members of their rights to receive benefits in accordance with State regulations and applicable law”; and a “declaratory judgment pursuant to N.C. Gen. Stat. § 1-253 holding that the Defendants’ practices in denying compensation, rights, benefits and permanent employee status to Plaintiffs and class members violate the law.”

On 22 July 2005, defendants answered and moved to dismiss the action as barred by principles of sovereign and/or qualified immunity and for a failure to state a claim for relief. Following a hearing on defendants’ motion to dismiss argued solely as to sovereign immunity, the trial court (Allen, Jr., J.) dismissed the remaining four claims in an Order & Judgment entered on 22 September 2005. On appeal, this Court on 1 May 2007, affirmed the dismissal on the basis of sovereign immunity as to the claim for relief based on a violation of 25 NCAC 1C.0405 (2006) but reversed as to the dismissal of the claims for breach of contract and constitutional violations. *Sanders v. State Personnel Comm’n*, 183 N.C. App. 15, 644 S.E.2d 10 (“*Sanders I*”), *disc. review denied*, 361 N.C. 696, 652 S.E.2d 653 (2007). In *Sanders I*, we stated that the trial court “declined to address defendants’ motion to dismiss pursuant to Rule 12(b)(6).” *Id.* at 18, 644 S.E.2d at 13.

On remand, the Honorable Sarah Parker, Chief Justice of the Supreme Court of North Carolina, designated the matter as an “exceptional” case to be heard pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts and assigned it to Special Superior Court Judge Clarence E. Horton, Jr. On 1 February 2008, defendants’ motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) was heard as to all pending claims as was plaintiffs’ motion for class certification. On 5 March 2008, the trial court stated that plaintiffs’ “three surviving claims” did not “state a claim for relief,” and granted defendants’ motion to dismiss as to “plaintiffs’ remaining claims for relief.” The court then specified, “that is, for breach of contract and for violations of the ‘equal protection’ and the ‘fruits of their own labor’ clauses of the North Carolina Constitution[.]” On 1 April 2008, plaintiffs appealed. The record on appeal was settled by stipulation on 17 September 2008, filed in this Court on 22 September 2008, and docketed on 6 October 2008.

II. Issues

The issues presented in this appeal are whether, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), the trial court properly dismissed

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plaintiffs' claims for relief for: (1) breach of contract; (2) violation of the North Carolina Constitution Article I, Section 19; and (3) violation of the North Carolina Constitution Article I, Sections 1 and 35.

III. Standard of Review

Motion to Dismiss

This Court reviews the grant of a motion to dismiss de novo. *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414 (2003). A motion to dismiss made pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises and must state sufficient allegations to satisfy the substantive elements of at least some recognized claim. *Hewes v. Johnston*, 61 N.C. App. 603, 604, 301 S.E.2d 120, 121 (1983). The question for the Court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *See Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). In general, “‘a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*’” *Id.* (quoting 2A Moore’s Federal Practice, § 12.08, pp. 2271-74 (2d ed. 1975)). Such a lack of merit may consist of the disclosure of facts which will necessarily defeat the claim as well as the absence of law or fact necessary to support a claim. *Sutton v. Duke*, 277 N.C. 94, 102-03, 176 S.E.2d 161, 166 (1970).

IV. Discussion

The SPC is a regulatory commission that is “responsible for ‘establish[ing] policies and rules’ relating to, *inter alia*, position classification, compensation, qualification requirements, and holiday, vacation, and sick leave.” *Sanders I*, 183 N.C. App. at 23, 644 S.E.2d at 15 (citing N.C. Gen. Stat. § 126-4 (2005)). Plaintiffs’ claims stem from a rule adopted by the SPC which bars the State from employing “temporary” workers for more than twelve consecutive months. The rule provides:

- (a) A temporary appointment is an appointment for a limited term, normally not to exceed three to six months, to a permanent or temporary position. Upon request, the Office of State Personnel shall approve a longer period of time; but in no case shall the

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temporary employment period exceed 12 consecutive months. (Exceptions for students and retired employees: Students are exempt from the 12-months maximum limit. If retired employees sign a statement that they are not available for nor seeking permanent employment, they may have temporary appointments for more than 12 months. "Retired" is defined as drawing a retirement income and social security benefits.)

(b) Employees with a temporary appointment do not earn leave, or receive total state service credit, health benefits, retirement credit, severance pay, or priority reemployment consideration.

25 NCAC 1C.0405. Plaintiffs further rely on 25 NCAC 1C.0402, which explains that "[i]f an employee is retained in a time-limited permanent position beyond three years, the employee shall be designated as having a permanent appointment."

A. Breach of Contract

[1] Plaintiffs first contend that it was error for the trial court to dismiss their breach of contract claim because their "[c]omplaint alleges both of the elements of a breach of contract claim." In a breach of contract action, a complainant must show that there is "(1) existence of a valid contract, and (2) breach of the terms of that contract." *Toomer v. Garrett*, 155 N.C. App. 462, 481, 574 S.E.2d 76, 91 (2002) (citation omitted), *disc. review denied, appeal dismissed*, 357 N.C. 66, 579 S.E.2d 576 (2003).

We first consider whether there was a valid contract between the parties. This Court has previously explained that "[t]he Legislature has delegated, to the extent of the [SPC]'s statutory powers, its own legislative powers over the State's personnel system [and] [t]herefore, rules and policies made pursuant to the [SPC]'s statutory authority have the effect of law." *N.C. Dept. of Justice v. Eaker*, 90 N.C. App. 30, 37-38, 367 S.E.2d 392, 398 (citations omitted), *disc. review denied*, 322 N.C. 836, 371 S.E.2d 279 (1988), *overruled on other grounds by Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 342, 389 S.E.2d 35, 39 (1990), *overruled in part on other grounds by Empire Power Co. v. N.C. Dep't of E.H.N.R.*, 337 N.C. 569, 584, 447 S.E.2d 768, 777 (1994). Further, any relevant regulations of the SPC as well as statutory and constitutional provisions must be read into any contract that might exist between plaintiffs and their employers. *See, e.g., McNally v. Allstate Ins. Co.*, 142 N.C. App. 680, 683, 544 S.E.2d 807, 809, *disc.*

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review denied, 353 N.C. 728, 552 S.E.2d 163 (2001) (explaining “statute in effect at the time the contract is signed becomes part of the contract”). Thus, we agree with plaintiffs’ assertion that the regulatory code has the effect of law and is incorporated into the employment contract when employees are placed into a temporary assignment. We also agree that defendants, pursuant to the SPC’s regulatory authority, entered into a valid employment contract with plaintiffs. *See Sanders I*, 183 N.C. App. at 22, 644 S.E.2d at 14 (stating “the State entered into a contract of employment with plaintiffs,” and “there is no dispute that plaintiffs were validly employed by the State”). There is an agreement between the parties whose term is known and agreed. What is unknown is what are the legal relationships and status of the parties when the contract continues in effect after the expiration of the agreed upon terms.

We now turn to plaintiffs’ claim for breach of contract. The record reflects that in their answer to plaintiffs’ complaint, defendants acknowledged that the SPC promulgated 25 NCAC 1C.0405 and that plaintiffs were hired for temporary appointments, which then exceeded twelve months. Thus, by defendants’ own admission, the rules governing plaintiffs’ employment status (i.e. legal relationship) are breached. Because there is a breach of the rules under which the contract was formed, we hold that plaintiffs’ complaint sufficiently alleged a breach of contract claim and should have survived defendants’ motion to dismiss. *See Sanders I*, 183 N.C. App. at 22, 644 S.E.2d at 14 (stating plaintiffs “alleged the breach of an actual employment contract”); *see also Stanback*, 297 N.C. at 185, 254 S.E.2d at 615.

Less clear, however, are the contract terms. *Sanders I*, 183 N.C. App. at 22, 644 S.E.2d at 14 (stating “the dispute between the parties concerns only the actual terms of their contracts”). The plaintiffs assert an entitlement to permanent status and benefits because their employment exceeded twelve months. Plaintiffs supply no reference to regulations that would entitle them to permanent contractual employment or benefits. Though plaintiffs contend that reading 25 NCAC 1C.0405 in conjunction with 25 NCAC 1C.0402 establishes the legislature’s “obvious intent [] to prevent the State from employing ‘temporary’ workers for more than 12 consecutive months without providing them with benefits,” such a reading ignores 25 NCAC 1C.0405(b), which declares that employees with a temporary appointment do not receive benefits. Plaintiffs’ assertions further ignore other legislative requisites for establishing and filling appointments. *See, e.g.*, 25 NCAC 1H.0609 (“An appointment may be made only if a

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classified and budgeted vacancy exists in the position complement authorized for the agency.”) Moreover, our state constitution requires that “appropriations” must be “made by law” in order for money to be “drawn from the State treasury.” N.C. Const. art. V, § 7. Thus, if the court below finds defendants automatically converted plaintiffs’ positions from temporary to permanent on their own accord without appropriate classification and budgetary approval, they would have enacted an employment scheme in direct contravention of the state constitution and other sections of the regulatory scheme.

Inasmuch as defendants contend that no contract exists when reading the allegations in context with the regulations and statutes, and it cannot therefore be a breach of contract, we are likewise unpersuaded. In asserting that “[t]he only basis for plaintiffs’ complaint is that some agencies or supervisors *allegedly* violated a rule against employing persons with temporary appointments for more than twelve months,” (emphasis added), defendants ignore the SPC’s mandate that “in no case shall the temporary employment period exceed 12 consecutive months.” 25 NCAC 1C.0405.

Plaintiffs’ complaint sufficiently alleges existence of a contract and a breach of the personnel rules under which they were hired; their complaint should have survived the motion to dismiss. Although plaintiffs sought monetary damages, class certification, and injunctive relief with rights to receive benefits, they also sought a declaratory judgment with requested compensation, status, and benefits. North Carolina’s Declaratory Judgment Act provides that: “Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.” N.C. Gen. Stat. § 1-253 (2007).

“The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment.”

Insurance Co. v. Roberts, 261 N.C. 285, 288, 134 S.E.2d 654, 657 (1964) (citation omitted).

Although the regulations clearly state that temporary employees shall not be employed greater than twelve months, they fail to provide

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a remedy or to establish a classification for a “temporary” employee whose term then exceeds the twelve months. *Compare* 25 NCAC 1C.0402(b)(2) (“If an employee is retained in a time-limited permanent position beyond three years, the employee shall be designated as having a permanent appointment.”). Plaintiffs, who were left in “temporary” positions find themselves in legal limbo in which rules governing appointment terms have been broken but in which the legal result is uncertain. Thus, while we state no opinion here as to what relief, if any, is available on plaintiffs’ claims, we hold that plaintiffs are entitled to have their rights declared. *See* N.C. Gen. Stat. § 1-253.

On remand, the trial court’s task is to assess the terms of plaintiffs’ contracts with defendants at the twelve month and one day mark and beyond. Although plaintiffs allege that “defendants failed to adhere to the existing terms of the contract,” it is unclear as to whether or how those terms changed. Even assuming defendant’s breach of their own rules, it is clear that plaintiffs accepted some sort of arrangement with defendants by accepting continued work and compensation, without a permanent appointment and without benefits. Whether that arrangement was discussed with plaintiffs individually or collectively and what plaintiffs understood about their status are relevant inquiries requiring further factual development. Helpful to this inquiry would be what, if any, remedies would be allowable under the regulatory scheme, and whether the remedial nature of a directive to defendants is an appropriate judicial resolution.

For the above-stated reasons, we reverse the trial court’s grant of defendants’ motion to dismiss under Rule 12(b)(6) on the breach of contract claim and remand for a declaratory judgment, to declare plaintiffs’ status and rights pursuant to the Uniform Declaratory Judgment Act.

[2] Appellees argue that in granting their motion to dismiss the court has de facto given the appellants the declaration they seek. We disagree. We hold that granting a motion to dismiss a complaint which seeks declaratory judgment as a remedy is not the functional equivalent of a declaratory judgment. Where there is a legally recognized injury, like breach of contract, or where an important public policy is at issue which has been recognized by our Supreme Court as the functional equivalent of a legally recognized form of injury, *Goldston v. State*, 361 N.C. 26, 33-35, 637 S.E.2d 876, 881-82 (2006), N.C. Gen. Stat. § 1-253 provides that the complainant is entitled to a declaration, even if no monetary relief is available. This declaration may be resolved as a question of law under Rule 55.

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B. Equal Protection

[3] Plaintiffs next contend that they have “adequately alleged facts to support their claim for violations of Article I, Section 19 of the North Carolina Constitution.” Plaintiffs assert that because the SPC’s regulatory framework “clearly is intended” to prevent employees from working for periods exceeding twelve months without receiving benefits, defendants’ failure to adopt a uniform policy applicable to all employees violates the equal protection guarantees of the North Carolina Constitution. Specifically, plaintiffs argue that they are “similarly situated” to employees in permanent or permanent time-limited appointments, because they worked for more than twelve months, and that by not being given the status and benefits of permanent employees, they were subjected “arbitrarily and capriciously” to “differential treatment.”

Our assessment of plaintiffs’ contentions that they were denied certain constitutional rights is predicated by two well-settled principles. First, a state constitution is not a grant of power, all power not limited by a constitution belongs to the people, and an act of a state legislature is legal when the constitution does not prohibit it. *Marks v. Thompson*, 282 N.C. 174, 182, 192 S.E.2d 311, 316 (1972). Second, we presume that an act passed by the legislature is constitutional unless it conflicts with some constitutional provision. *Marks*, 282 N.C. at 182, 192 S.E.2d at 317.

“Article I, Section 19 of the North Carolina Constitution guarantees both due process rights and equal protection under the law by providing that no person shall be ‘deprived of his life, liberty, or property, but by the law of the land’ and that ‘[n]o person shall be denied the equal protection of the laws.’” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quoting N.C. Const. art. I, § 19). Upon the challenge of a statute as violating the Equal Protection Clause, we apply a rational basis test if the statute impacts neither a fundamental right nor a suspect class. *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). When there is no suspect class or fundamental right, the equal protection clause is satisfied if the classification provided by the legislature “could provide a reasonable means to a legitimate state objective.” *Powe v. Odell*, 312 N.C. 410, 412, 322 S.E.2d 762, 763 (1984). In *Rhyne v. K-Mart Corp.*, our Supreme Court explained that a rational basis review requires “‘a plausible policy reason for the classification,’” pertinent legislative facts that “‘rationally may have been considered to be true by the governmental decisionmaker,’” and a “‘relationship

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of the classification to its goal' ” that is “not so attenuated as to render the distinction arbitrary or irrational.’ ” 358 N.C. 160, 180-81, 594 S.E.2d 1, 15 (2004) (quoting *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980)).

The Administrative Code of North Carolina’s Office of State Personnel expressly authorizes differential employee appointments including, for example, permanent, time-limited permanent, and temporary. 25 NCAC 1C.0402, 1C.0405. Because plaintiffs here are not mounting a facial challenge to the classifications within the regulatory scheme, we presume “that this differential treatment, permitted by statutes duly enacted by the General Assembly, [has] a rational, rather than arbitrary, basis.” *Lea v. Grier*, 156 N.C. App. 503, 510, 577 S.E.2d 411, 417 (2003). Under the rational basis test, plaintiffs have the difficult burden of showing that there is no governmental justification for defendants’ actions in granting benefits only to persons with permanent appointments. This, they have failed to do.

Many possible and valid reasons exist for defendants’ actions in granting benefits only to those employees who hold permanent appointments. First, the SPC’s responsibility for the rules and regulations governing the appointments is constrained by the legislature. *See* N.C. Gen. Stat. §§ 126-4(1) through 126-4(3). As defendants point out, the SPC during the time relevant to this case “could neither create a new position without authorization nor pay benefits without funds from which such payments would be authorized.” *See* N.C. Gen. Stat. § 143-34.1(a), (b) (2005) (repealed eff. July 1, 2007); *see also* N.C. Gen. Stat. § 143C-6-6 (2007) for subsequent similar provisions. Another reason that temporary employees who were in positions longer than twelve months might not automatically become permanent employees is the need to select permanent candidates on a competitive basis. Thus, by not creating new, permanent positions without authorization, defendants pursued a “reasonable means to a legitimate state objective.” *See Powe*, 312 N.C. at 412, 322 S.E.2d at 763. Likewise, placing employees in permanent positions through a competitive selection process, rather than by automatically turning temporary positions into permanent positions, provides “a plausible policy reason for the classification” that is “not so attenuated as to render the distinction arbitrary or irrational.” *See Rhyne*, 358 N.C. at 181, 594 S.E.2d at 15.

Based on the foregoing rational basis analysis, we hold that plaintiffs failed to state a claim under the equal protection clause of the North Carolina Constitution. Accordingly, we affirm the trial court’s

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dismissal of plaintiffs' equal protection claims under Article I, Section 19 of the North Carolina Constitution.

C. Fruits of their Labor

[4] Finally, plaintiffs contend that, pursuant to Article I, Sections 1 and 35 of the North Carolina Constitution, their complaint adequately “allege[d] facts showing that defendants [sic] arbitrary and capricious treatment [] deprived plaintiffs of the fruits of their own labors.” Plaintiffs assert that by “continuing to treat Plaintiffs and class members as temporary employees,” defendants “den[ie]d them benefits” and “deprived them of the enjoyment of ‘the fruits of their own labor.’ ”

Article I, Section 1 of the North Carolina Constitution establishes that the inalienable rights of the people include “life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.” The test used to interpret the validity of state regulation of business under Article I, Section 1 is the same as that used under the analysis articulated above for an equal protection claim. *See Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 778-79, 360 S.E.2d 783, 785 (1987) (“A single standard determines whether the [regulation] passes constitutional muster imposed by both section 1 and the ‘law of the land’ clause of section 19: the [regulation] must be rationally related to a substantial government purpose.”).

Prior cases have considered this constitutional provision. In *Real Estate Licensing Board v. Aikens*, for example, we explained that “fundamental provisions” of our state constitution, including Article I, Section 1, “guarantee the right to pursue ordinary and simple occupations free from governmental regulation.” 31 N.C. App. 8, 13, 228 S.E.2d 493, 496 (1976) (citing *State v. Warren*, 252 N.C. 690, 114 S.E.2d 660 (1960)). Our Supreme Court in *Roller v. Allen* found a violation of the provision when the North Carolina Licensing Board for Tile Contractors imposed a licensing requirement for installing tile, which the Court said “create[d] a monopoly in a trade designed by the framers of the Constitution to be free from legislative control.” 245 N.C. 516, 526, 96 S.E.2d 851, 859 (1957). These cases make it clear that Article I, Section 1 is intended to be a check against the government’s excessive regulation of business affairs.

The regulations at issue here do not exhibit a situation in which the legislature is interfering with an “ordinary and simple occupation,” nor is the employment scheme intended to be “free from gov-

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ernmental regulation.” See *Real Estate Licensing Board*, 31 N.C. App. at 13, 228 S.E.2d at 496. In fact, it is a legislatively mandated, SPC regulated employment scheme that is meant to delineate State employees and their appointments. We hold that such regulation is rationally related to a substantial governmental interest. Thus, while we agree with plaintiffs’ assertions that the “fruits of their labor” provision protects their “right to earn a livelihood,” and that we should invalidate “governmental actions that irrationally and arbitrarily place limits on that right,” we hold that nothing in the governmental action at issue has arbitrarily or irrationally limited plaintiffs’ rights to earn a livelihood. Plaintiffs have not been barred from earning a living, denied pay for their employment, or deprived of bargained-for benefits. In an attempt to distinguish this claim, plaintiffs explain: “Again, Plaintiffs are not claiming they were treated differently from other ‘temporary’ employees; Plaintiffs claim they were similarly situated with and treated differently from other ‘permanent’ employees.” Notwithstanding plaintiffs’ attempt, we consider this “fruits of their own labor” claim to be substantively indistinguishable from their equal protection claim and hold that it, too, fails to state a claim for relief. We affirm the trial court, which stated that “there were no allegations that would support a finding that their classification as ‘temporary’ employees was arbitrary, capricious, or without a rational basis.”

As to plaintiffs’ claim pursuant to Article I, Section 35, they merely quote that it is necessary “to preserve the blessings of liberty.” Because they allege no specific violation of rights, they state no claim upon which relief may be granted. Based on the foregoing analysis, we affirm the trial court’s dismissal of plaintiffs’ claims under Article I, Sections 1 and 35.

V. Conclusion

For the foregoing reasons, we reverse as to the trial court’s dismissal of plaintiffs’ breach of contract claim and remand. We affirm as to the trial court’s dismissal of plaintiffs’ claims pursuant to Article I, Sections 1, 19, and 35.

Affirmed in part, reversed and remanded in part.

Judges HUNTER, Robert C., and CALABRIA concur.

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[197 N.C. App. 328 (2009)]

TIMOTHY DANIEL HEAD, PLAINTIFF v. SHELLY H. MOSIER, DEFENDANT

No. COA08-1132

(Filed 2 June 2009)

1. Child Support, Custody, and Visitation— modification—fifteen percent presumption

The trial court did not abuse its discretion in a child support modification case by failing to make any findings regarding any changes in the needs of the minor children because: (1) the 2006 Child Support Guidelines provided that when the moving party has presented evidence that satisfied the requirements of the fifteen percent presumption, they do not need to show a change of circumstances by other means; (2) the trial court concluded that there had been a substantial change in circumstances based on it being more than three years since the calculation of obligor's child support obligation and the current obligation calculation being greater than fifteen percent of the prior obligation calculation; and (3) nothing in the record indicated obligor requested a deviation, and thus the court's order for child support determined by the Guidelines did not require any specific findings regarding the children's reasonable needs and the obligor's ability to provide support.

2. Child Support, Custody, and Visitation— modification—earning capacity—legitimate business expenses—depression of income in bad faith

The trial court did not abuse its discretion in a child support modification case by considering obligor's earning capacity allegedly without considering legitimate business expenses, or in the alternative, without finding obligor had deliberately depressed his income in bad faith or had otherwise disregarded his child support obligations because the trial court in findings of fact 5-7 properly considered obligor's gross income and expenses.

3. Child Support, Custody, and Visitation— modification—deviation—4-step process

The trial court did not abuse its discretion in a child support modification case by refusing to consider a requested deviation from the 2006 Child Support Guidelines and not following the required 4-step process to determine the need to deviate because: (1) once the substantial change in circumstances is shown, the

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appropriate amount of support is calculated by the guidelines, and this amount is conclusively presumed to meet the reasonable needs of the child and to be commensurate with each parent's relative ability to pay support; (2) the Child Support Enforcement Agency filed the motion to modify child support on the mother's behalf based on the original order being three years old or older and on a deviation of fifteen percent or more between the amount of the existing order and the amount of child support resulting from application of the Guidelines, thus meeting the presumption of a substantial change of circumstances warranting modification; (3) nothing in the record indicated that obligor filed a counter-motion or timely requested the court's deviation from the guidelines, nor did obligor offer evidence in court to support such a deviation; and (4) the four-step process referenced by obligor is for determining a child support amount and is applied only after a trial court decides to deviate.

4. Child Support, Custody, and Visitation— modification— separation of findings of fact and conclusions of law

The findings of fact and conclusions of law in a child support modification case were sufficiently separate for meaningful appellate review.

5. Child Support, Custody, and Visitation— modification— sufficiency of findings of fact and conclusions of law

Although obligor contends the trial court erred in a child support modification case by failing to make any findings on the issues and allegedly issued an improper order based on erroneous findings of fact and conclusions of law, this argument was dismissed because it was substantively indistinguishable from an issue already overruled by the Court of Appeals.

Appeal by plaintiff from orders entered 15 April 2008 and 28 May 2008 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 25 March 2009.

Timothy Daniel Head, pro se, plaintiff appellant.

King Law Offices, PLLC, by Brian W. King, for Rutherford County Department of Social Services, petitioner appellees.

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HUNTER, JR., Robert N., Judge.

Background

Timothy Daniel Head (“obligor”)¹ and Shelly H. Mosier (“Mosier”) are the parents of two children, Charity Amanda Head, born 9 October 1998, and Joshua Aaron Head, born 14 August 1993. Both children are in the custody of Mosier and continue to be in need of child support. The trial court entered a child support order against obligor on 16 April 2004 *nunc pro tunc* to 6 February 2004, requiring him to pay child support in the monthly amount of \$298.57 of which \$20.00 per month was to be applied toward the arrearage. The Rutherford County Department of Social Services Child Support Enforcement Agency (“CSEA”) was allowed to intervene in an action to enforce this child support obligation.

Following entry of the prior orders, Mosier had another child, who lives in her home and for whom she is responsible. Obligor is not the father of that child. Mosier stays home with the child, and the court imputed to her a minimum wage salary of \$1,065.92 per month.

On 26 February 2008, the CSEA on Mosier’s behalf (collectively, the “movants”), brought a motion to modify obligor’s child support based on a substantial change of circumstances and an increase in the calculation of child support over fifteen percent after three years.

Obligor appeared pro se at the 9 April 2008 hearing to contest the motion. At the hearing, the trial court allowed obligor to submit certain business deductions.

In its 15 April 2008 order, the court entered the following relevant findings of fact which are the subject of this appeal:

5. The [obligor] since November 09, 2007 has been employed as a truck driver with Heartland Trucking Company on a full time

1. The parties in the instant case have been identified differently in various case headings and orders. The case heading on appeal lists Timothy Daniel Head as plaintiff and Shelly Conner Head as defendant; the Motion to Modify Support Order underlying the appeal identifies Rutherford County on behalf of Shelly H. Mosier as plaintiff and Timothy D. Head as defendant; the heading of the order in response to that motion lists Timothy D. Head as plaintiff and Shelly H. Mosier as defendant, but the text of the order refers to Timothy D. Head as both plaintiff and defendant; the Motion for New Trial, Findings, and Conclusions of Law, and Move to Strike Order of April 15, 2008 lists Timothy Daniel Head as plaintiff and Shelly Mosier as defendant; and the responsive order lists Rutherford County on behalf of Shelly H. Mosier as plaintiff and Timothy D. Head as defendant. For clarity, we refer herein to Timothy D. Head as obligor.

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basis five days a week. For the first 13 weeks of the year 2008 the obligor] was paid \$13,072.52 in gross income. Based thereon the [obligor] is grossing \$4,357 per month from this employment. The [obligor] contends that the IRS allows \$40 per day as an income tax deduction without substantiation for job related expenses to be deducted from this income for income tax purposes, for which he claims a reduction for the calculation of his gross income for the calculation of child support. Assuming the [obligor] was entitled to a deduction for his employment related expenses for child support purposes, there would be required a showing of the actual expenses incurred. The IRS allowance at best is only an income tax deduction for which substantiation is not required, which is inapplicable to child support determinations. The only expense actually shown was \$10 per day five days a week for showers and \$25 per week for cell phone expenses. Hygiene expenses however are personal expenses for which all individuals incur and is not a proper deduction for the calculation of income. The cell phone expense would appear to be business related for both the trucking and locksmith business as hereinafter set out.

6. The [obligor] is self employed as a locksmith for which he now works primarily on weekends, and was previously operating this business on a full time basis prior to his trucking employment. The only income over the last thirteen weeks from the business has been \$246.50 or \$82 per month. From this business the [obligor] continues to incur expenses such as phone service in the monthly amount of \$120 per month, phone-book advertising in the monthly amount of \$180 per month, and cell phone costs of \$108 per month. No other valid business expenses have been shown. From this locksmith business the [obligor] is currently incurring a loss of \$326 per month. (\$82-\$120-\$180-108). The truck debt and other debt expenses would not be appropriate to reduce income for calculation of child support under the guidelines.

7. The [obligor] currently has monthly gross income of \$4,031 (\$4,357-\$326) for purposes of determining child support under the guidelines.

8. Based on the guidelines the [obligor] should pay child support in the amount of \$935.92 per month as calculated on the attached exhibit A.

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The relevant conclusions thereupon included:

2. There has been a substantial change in circumstances in that it has been more than three years since the calculation of the [obligor's] child support obligation and the current obligation is greater than fifteen percent (15%) of the prior obligation;

3. The [obligor] should pay child support to the defendant based on the guidelines in the monthly amount of \$935.92 beginning April 1, 2008; and

4. Except as modified herein the court's prior order of November 29, 2005 should remain in full force and effect including the payment of an additional amount of \$20 toward the arrearage.

On 25 April 2008, obligor filed a "Motion for New Trial, Findings, and Conclusions of Law, and Move to Strike Order of April 15, 2008." On 28 May 2008, the trial court denied obligor's motion. Obligor appeals.

Issues

The issues presented are whether, under the applicable North Carolina Child Support Guidelines (the "Guidelines"), the trial court improperly computed the obligor's child support obligation by: (I) failing to make any findings of changes in the needs of the minor children; (II) considering obligor's earning capacity without considering legitimate business expenses, or in the alternative, without finding obligor had deliberately depressed his income in bad faith, or had otherwise disregarded his child support obligations; (III) refusing to consider a requested deviation from the Guidelines and not following the required four-step process to determine the need to deviate; (IV) failing to separate its findings of fact and conclusions of law when requested by obligor to facilitate meaningful appellate review; and (V) failing to follow case law, failing to make any findings on the issues raised, and thus issuing an improper order via errors in findings of fact numbered 5-8 and conclusions of law numbered 1-4.

Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003) (citation omitted). To support a reversal, "an appellant must show that the trial court's actions were manifestly unsupported by reason."

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State ex rel Godwin v. Williams, 163 N.C. App. 353, 356, 593 S.E.2d 123, 126 (2004) (citing *Bowers v. Bowers*, 141 N.C. App. 729, 731, 541 S.E.2d 508, 509 (2001)).

Discussion

Preliminarily, we note that resolution of this appeal is determined under the 2006 version of the Guidelines, which were in effect at the time of the trial court's order. N.C. Child Support Guidelines 2009 Ann. R. N.C. 41 ("2006 Guidelines").

I.

[1] Obligor first contends the trial court erred by failing to make any findings regarding any changes in the needs of the minor children. He submits that such findings would have allowed this court, on review, to weigh the children's needs against his ability to pay the amount of support ordered.

N.C. Gen. Stat. § 50-13.7(a) (2007) authorizes a North Carolina court to modify or vacate an order of a North Carolina court providing for the support of a minor child at any time upon motion in the cause by an interested party and showing of changed circumstances. Modification of an order requires a two-step process. *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 536, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995); *Trevillian v. Trevillian*, 164 N.C. App. 223, 224, 595 S.E.2d 206, 207 (2004). First, a court must determine whether there has been a substantial change in circumstances since the date the existing child support order was entered. *McGee*, 118 N.C. App. at 26-27, 453 S.E.2d at 535-36; *Newman v. Newman*, 64 N.C. App. 125, 128, 306 S.E.2d 540, 541-42, *disc. review denied*, 309 N.C. 822, 310 S.E.2d 351 (1983). The 2006 Guidelines provide:

In a proceeding to modify the amount of child support payable under a child support order that was entered at least three years before the pending motion to modify was filed, a difference of 15% or more between the amount of child support payable under the existing order and the amount of child support resulting from application of the guidelines based on the parents' current incomes and circumstances shall be presumed to constitute substantial change of circumstances warranting modification of the existing child support order.

2006 Guidelines at 46. When the moving party has presented evidence that satisfies the requirements of the fifteen percent presumption,

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they do not need to show a change of circumstances by other means. *Garrison v. Connor*, 122 N.C. App. 702, 706, 471 S.E.2d 644, 647, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 116 (1996) (finding a change of circumstances warranting an increase in defendant's child support when plaintiff presented evidence satisfying the requirements of the fifteen percent presumption and defendant presented no evidence). The Court's "determination of whether changed circumstances exist is a conclusion of law." *Brooker v. Brooker*, 133 N.C. App. 285, 289, 515 S.E.2d 234, 237 (1999).

Upon finding a substantial change in circumstances, the second step is for the court to enter a new child support order that modifies and supersedes the existing child support order. *McGee*, 118 N.C. App. at 26-27, 453 S.E.2d at 535-36. "Once a substantial change in circumstances has been shown by the party seeking modification, the trial court then 'proceeds to follow the Guidelines and to compute the appropriate amount of child support.'" *Beamer v. Beamer*, 169 N.C. App. 594, 596, 610 S.E.2d 220, 222 (2005) (quoting *Davis v. Risley*, 104 N.C. App. 798, 800, 411 S.E.2d 171, 173 (1991)). "Child support set in accordance with the Guidelines 'is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support.'" *Beamer*, 169 N.C. App. at 596, 610 S.E.2d at 222-23 (quoting *Buncombe County ex rel. Blair v. Jackson*, 138 N.C. App. 284, 287, 531 S.E.2d 240, 243 (2000)); N.C. Gen. Stat. § 50-13.4(c) (2007). Absent a request by a party for deviation, when the court enters an order for child support determined pursuant to the Guidelines, specific findings regarding the child's reasonable needs and the parents' ability to provide support generally are not required. *Brooker*, 133 N.C. App. at 289, 515 S.E.2d at 237. Although the court need not "make specific, or evidentiary findings of fact reciting the child's past and present expenses," the court must make "ultimate" findings of fact that will support the court's conclusion that there has been a substantial change of circumstances and that are necessary to resolve material disputes in the evidence. *Id.*

In the instant case, the court concluded that there had been a substantial change in circumstances based on it being more than three years since the calculation of obligor's child support obligation and the current obligation calculation being greater than fifteen percent of the prior obligation calculation. *See McGee*, 118 N.C. App. at 26-27, 453 S.E.2d at 535-36. Based on the Guidelines, the court found and concluded obligor should pay \$935.92 in monthly child support. We

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presume this finding to be an amount that will meet the reasonable needs of the children and commensurate with the relative abilities of each parent to pay support. *See Beamer*, 169 N.C. App. at 596, 610 S.E.2d at 222-23. Because we see nothing in the record indicating obligor requested a deviation, the court's order for child support determined pursuant to the Guidelines did not require any specific findings regarding the child's reasonable needs and the parents' ability to provide support. *See Brooker*, 133 N.C. App. at 289, 515 S.E.2d at 237. We hold therefore that the trial court did not abuse its discretion by not making findings regarding changes in the needs of the minor children or by failing to weigh the children's needs against obligor's ability to pay the amount of support. Obligor's assignment of error number 1 is overruled.

II.

[2] Obligor next contends the trial court erred by considering obligor's earning capacity without considering legitimate business expenses, or in the alternative, without finding obligor had deliberately depressed his income in bad faith, or had otherwise disregarded his child support obligations. Obligor specifically contends it was error for the trial court to label certain business expenses "invalid" instead of setting forth "understandable" reasons as to why such expenses were not accepted and that his "ordinary and necessary expenses required for self-employment or business operation" should have been subtracted from his gross receipts.

When determining a parent's child support obligation under the Guidelines, a court must determine each parent's gross income. 2006 Guidelines. A parent's child support obligation should be based on the parent's "actual income at the time the order is made." *Hodges v. Hodges*, 147 N.C. App. 478, 483, 556 S.E.2d 7, 10 (2001) (quoting *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997)). Next, the court must determine allowable deductions from a parent's gross income to get his or her adjusted gross income. 2006 Guidelines. A parent's presumptive child support obligation is based primarily on his or her adjusted gross income. To calculate gross income derived from self-employment, ordinary and necessary expenses required for self-employment or business operation are subtracted from gross receipts. 2006 Guidelines. A court in its discretion may disallow business expense deductions for a home office or personal vehicle, bad debts, depreciation, and repayment of principal on a business loan if it determines that the expenses are inappropriate for the purpose of determining gross income under the Guidelines.

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Cauble v. Cauble, 133 N.C. App. 390, 395, 515 S.E.2d 708, 712 (1999) (finding no error when court disallowed bad debt and depreciation expenses claimed by Subchapter C corporation); *Kennedy v. Kennedy*, 107 N.C. App. 695, 700, 421 S.E.2d 795, 798 (1992) (finding no error when court did not allow expense deductions for utilities, phone, truck lease, insurance, home and truck maintenance, and personal property taxes claimed by self-employed musician/father).

In the instant case, the trial court in findings of fact 5-7 considered obligor's gross income and expenses. In finding 5 the court made findings regarding obligor's employment and gross income, stated that allowable deductions would require "a showing of the actual expenses incurred," noted the inapplicability of an Internal Revenue Service allowance, and explained that hygiene expenses "are personal expenses for which all individuals incur and [are] not a proper deduction for the calculation of income." The court allowed cell phone expenses as business related expenses. The court in finding 6 calculated obligor's income from his locksmith business; noted phone, cell phone, and phonebook advertising expenses; and noted "[n]o other valid business expenses have been shown." The court further noted that "truck debt and other debt expenses would not be appropriate to reduce income for calculation of child support under the guidelines." In finding 7, from obligor's \$4,357 monthly gross income the court deducted a total of \$326 in monthly business expenses to determine obligor's monthly income of \$4,031 for calculating the child support obligations under the Guidelines. Based on the court's findings, we discern no abuse of discretion and overrule obligor's assignment of error number 2.

III.

[3] Obligor next contends the trial court erred by "refusing to consider a requested deviation from the guidelines" and "not following the required 4 step process to determine the need to deviate." Obligor specifically contends the trial court erred by "not making any determinations as to [his] ability to pay four times [his] previous amount of child support."

As stated in section I, *supra*, once the substantial change in circumstances is shown, the appropriate amount of support is calculated pursuant to the Guidelines. *See Beamer*, 169 N.C. App. at 596, 610 S.E.2d at 222. This amount is conclusively presumed to meet the reasonable needs of the child and to be commensurate with each parent's relative ability to pay support. *Id.* at 596, 610 S.E.2d at 222-23.

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A court in its discretion may deviate from the Guidelines. To deviate from the Guidelines, a court may make its own motion if it makes required findings, 2006 Guidelines; see *Pataky v. Pataky*, 160 N.C. App. 289, 296, 585 S.E.2d 404, 409 (2003), *aff'd, disc. review improvidently allowed*, 359 N.C. 65, 602 S.E.2d 360 (2004); a party may request deviation in an original pleading; or a party may request deviation by motion, with at least ten days' written notice. N.C. Gen. Stat. § 50-13.5(d)(1) (2007); *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991).

Whether the court enters a child support order determined under the Guidelines or deviates from the Guidelines, a copy of the worksheet used to determine a parent's presumptive child support obligation should be attached to the child support order, incorporated by reference in the child support order, or included in the case record. An appellant should include the Guidelines worksheet in the record on appeal. *Hodges*, 147 N.C. App. at 483, 556 S.E.2d at 10 (finding that when worksheet was not included, the appellate court was unable to determine with certainty the amount placed in defendant's gross income column).

In the instant case, the CSEA filed the motion to modify child support on Mosier's behalf based on the original order being three years old or older and on a deviation of fifteen percent or more between the amount of the existing order and the amount of child support resulting from application of the Guidelines. Thus, the movants met the presumption of a "substantial change of circumstances" that warranted modification. See *McGee*, 118 N.C. App. at 26, 453 S.E.2d at 536. The court's duty was then to go to the second step of applying the Guidelines. See *id.* Other than obligor's assignment of error and brief arguing that the court "refus[ed] to consider a requested deviation from the guidelines," we see nothing in the record indicating obligor filed a countermotion or timely requested the court's deviation from the Guidelines. We also see nothing in the record indicating obligor offered evidence in court to support such a deviation.

Although obligor also references a "required 4 step process to determine the need to deviate," the four-step process is for determining a child support amount and is applied only after a trial court decides to deviate. See *Beamer*, 169 N.C. App. at 597, 610 S.E.2d at 223 (explaining if a trial court decides to deviate from the Guidelines, it then follows a four-step process to determine the child support amount and to enter written findings of fact). Thus, the trial court

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was not required to deviate from the Guidelines, nor was it obligated to apply a four-step process, take any evidence, make any findings of fact, or enter any conclusions of law relating to the reasonable needs of the child for support and the relative ability of each parent to pay or provide support in setting the amount of support. *See Hodges*, 147 N.C. App. at 482, 556 S.E.2d at 10; *Beamer*, 169 N.C. App. at 597, 610 S.E.2d at 223. Thus, the trial court did not abuse its discretion in applying the Guidelines, and we overrule obligor's third assignment of error.

IV.

[4] Obligor next contends the trial court erred by "not separating its findings of fact and conclusions of law when requested by [obligor] to facilitate a meaningful [appellate] review." Specifically, obligor contends the court should have made findings about the "expenses deductibility," his "ability to pay and the needs of the children," and which expenses were "valid." On these issues, he argues the trial court's order was "vague" and "brief."

As noted *supra* in issue II, the court in findings 5-7 assessed obligor's income and expenses. The court's conclusions of law were based on the findings of fact. In conclusion of law number 2, the court stated that there had been a "substantial change in circumstances in that it has been more than three years since the calculation of [obligor's] child support obligation and the current obligation is greater than fifteen percent (15%) of the prior obligation." This satisfied the "ultimate" finding requisite of *Brooker*. *See Brooker*, 133 N.C. App. at 289, 515 S.E.2d at 237. The court further stated that the payment calculation was based on the Guidelines, and that the prior order remained in effect, excepting the modifications. We hold that the findings of fact and conclusions of law are sufficiently separate for meaningful appellate review and therefore overrule obligor's assignment of error 4.

V.

[5] Finally, obligor contends the trial court "fail[ed] to follow established case law," "failed to make any findings on the issues raised," and issued an "improper" order based on errors in findings of fact numbered 5-8 and conclusions of law numbered 1-4. This argument is substantively indistinguishable from that found in issue IV; accordingly, we overrule obligor's assignment of error 5.

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Conclusion

Movants here presented evidence satisfying the requirements of the fifteen percent presumption, and obligor presented no counter-motion or request to deviate. The trial court properly entered findings of fact that support the conclusions of law, which in turn support the judgment in favor of movants. We therefore hold that under the Guidelines as revised in 2006, movants have shown a change in circumstances sufficient to warrant an increase in obligor's child support obligation. The order of the trial court is

Affirmed.

Judges HUNTER, Robert C., and CALABRIA concur.

STATE OF NORTH CAROLINA v. PENNY L. WALLACE AND BRENDA BENTON

No. COA08-1429

(Filed 2 June 2009)

1. Assault— deadly weapon with intent to kill inflicting serious injury—motion to dismiss—deadly weapon

The trial court did not err by denying defendant Benton's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury even though defendant contends there was no evidence presented that tended to show she employed a deadly weapon during the assault, because in the light most favorable to the State and taking into consideration the relative size and conditions of the parties in conjunction with the manner these instruments were used, the evidence was sufficient to submit to the jury the question of whether defendant's fists or the tree limbs she allegedly used were of such character as to constitute a deadly weapon.

2. Assault— deadly weapon with intent to kill inflicting serious injury—motion to dismiss—serious injury

The trial court did not err by submitting the charge of assault with a deadly weapon with intent to kill inflicting serious injury and its lesser-included offenses to the jury against defendant Wallace even though she asserted that there was no evidence presented tending to show her alleged assault with a deadly

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weapon resulted in serious injury, because: (1) the evidence presented at trial tended to show that in addition to placing the plastic bag over the victim's head, defendant also participated in beating him; (2) a doctor's testimony provided a sufficient causal link between the use of defendant's fists and the tree limbs and the injuries inflicted upon the victim; and (3) the State presented substantial evidence tending to show that the victim sustained serious injuries including the testimonies of a doctor, the victim, the victim's wife, and a detective.

3. Assault—deadly weapon with intent to kill inflicting serious injury—jury instruction—plastic bag

The trial court did not err by instructing the jury that it could find defendant Benton guilty of assault with a deadly weapon with intent to kill inflicting serious injury if it found a plastic bag, limb, or fist was a deadly weapon even though defendant contends there was no evidence that she either used or possessed the plastic bag during the assault because the victim's testimony was sufficient evidence to support submission of the charge.

Appeal by defendants from judgments entered 5 February 2008 by Judge Susan C. Taylor in Richmond County Superior Court. Heard in the Court of Appeals 6 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece and Assistant Attorney General LaToya B. Powell, for the State.

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

Jarvis John Edgerton, IV, for defendant-appellant Benton.

STEELMAN, Judge.

Where the State presented substantial evidence to support every element of assault with a deadly weapon inflicting serious injury, the trial court properly denied defendants' motions to dismiss. Where substantial evidence was presented at trial to submit each alternative theory of guilt to the jury, the trial court did not err by instructing the jury in the disjunctive.

I. Factual and Procedural Background

The State's evidence tended to show that James Allred (Allred) had a long-standing boundary dispute with Penny Wallace (Wallace)

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over real property located on County Line Road in Richmond County, North Carolina. The dispute originated approximately one year after Allred sold Wallace a six acre tract of land, which was adjacent to his twenty acre tract of land. Allred had previously used Wallace's driveway to travel to and from his property. Wallace blocked Allred's access and his property became landlocked. As a result, Allred acquired an easement from his nephew and built another road for ingress and egress. The new road was constructed only feet away from Wallace's property line and led to another controversy between Allred and Wallace. Prior to the events that are the subject of this appeal, Wallace's husband died of a heart attack. Wallace believed that her husband had died of a broken heart and held Allred responsible. Wallace told Allred "she'd see him in hell for that."

At approximately 11:30 a.m. on 11 April 2005, Allred was between 100 and 200 yards away from Wallace's house and was taking photographs of debris that had been placed on his easement. Allred was approached by Brenda Benton (Benton), Wallace's adult daughter, who grabbed his camera and caused both of them to fall to the ground. Allred stood up and walked in the opposite direction while Benton walked toward the house. Benton reappeared with Wallace and the two women began to assault Allred. This assault would last for over an hour.

At that time, Allred was 79 years old, 6 feet tall, and weighed 165 pounds. Allred had a pacemaker in his chest, which regulated the beating of his heart and had also been diagnosed with polyneuropathy, a progressive disease that affects a person's muscles and nerves. Allred had passed out or fallen down at least once before due to this condition. Benton was 40 years old, 5 feet 2 inches tall, and weighed 125 pounds. Benton was allegedly paralyzed on the right side of her body, but had some use of her right hand. Wallace was 66 years old, 4 feet 11 inches tall, and weighed 112 pounds.

The assault began when Benton jumped on Allred's back and Wallace assisted her in pulling him to the ground and tying his hands and feet with plow rope. Allred initially decided not to fight back because he believed that if he did, he would be "in real trouble." While Allred was lying on his back, Wallace produced a "translucent"¹ plastic bag, placed it over his head, and stated "This won't last long." Allred was able to create a hole in the plastic bag with his teeth and

1. Translucent is defined as "[t]ransmitting light but causing significant diffusion to eliminate perception of distinct images." *The American Heritage Dictionary* 1288 (2d college ed. 1982).

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then used his finger to make the hole bigger. Then either “[b]oth of them or one of them started trying to cram the bag in [Allred’s] mouth[,]” but this attempt was unsuccessful. After Allred grabbed Wallace’s hair, Benton sat on his chest, bent his arms back, and started “beating [him] in the face.” Both Wallace and Benton repeatedly struck Allred with their fists and tree limbs from the surrounding wooded area. At some point during the assault, the parties became exhausted and took a break to rest. Allred began begging for his life because he was convinced Wallace and Benton were going to kill him. Allred stated, “[Wallace], if you kill me . . . you know they’ll come right to you.”

Allred was not sure what happened next because he passed out. Because Allred could barely stand when he awoke, Wallace and Benton put him in a child’s wagon and pulled him to their carport. Wallace instructed Allred to write a note saying that Wallace and Benton were nice to him and that “the land in question was theirs all the time and [he] shouldn’t have been trying to take it.” With his hands still bound in front of him, Allred wrote the note as Wallace dictated. Once the note was written and signed, Wallace and Benton became “extremely gentle.” Benton brought a washcloth to Wallace, and she cleaned the blood off of Allred’s face and neck. Wallace also took off Allred’s bloody shirt, but he did not know what she did with it. Wallace and Benton then assisted Allred in walking to his pickup truck. Allred drove home and his son called 911. Allred gave a statement to law enforcement about the events that had transpired earlier that day, and his wife took him to the emergency room to obtain treatment for his injuries.

Detective Michael Williams (Detective Williams) of the Richmond County Sheriff’s Office executed a search warrant on Wallace and Benton’s residence that same day. Detective Williams observed that both Wallace and Benton had bandages on their hands. Wallace had a small cut mark on her thumb and Benton had two small “cuts or holes punched” into the back of her hand. Detective Williams described Wallace and Benton as very “energetic” and “talkative.” A search of the outside of the residence revealed a small area where debris had been burned. Detective Williams described the items in the burn pile as “small twigs[,]” but later stated some were “a couple inches in diameter” and the longest measured eight feet.

On 16 May 2005, Wallace and Benton were indicted for attempted first degree murder, first degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury. Wallace and

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Benton's criminal actions were joined and tried before the Richmond County Superior Court. At the close of the State's evidence and then again at the close of all the evidence, both Wallace and Benton made a motion to dismiss the assault with a deadly weapon with intent to kill inflicting serious injury charge. These motions were denied. In addition to attempted first degree murder and first degree kidnapping, the trial court instructed the jury on assault with a deadly weapon with intent to kill inflicting serious injury and five lesser-included offenses: (1) assault with a deadly weapon with intent to kill; (2) assault with a deadly weapon inflicting serious injury; (3) assault with a deadly weapon; (4) assault inflicting serious injury; and (5) simple assault.

The jury found both Wallace and Benton not guilty of attempted first degree murder and first degree kidnapping. Wallace and Benton were found guilty of the lesser-included offense of assault with a deadly weapon inflicting serious injury. The trial court determined Wallace to be a prior record level II for felony sentencing purposes and imposed an active prison term of twenty-nine to forty-four months. The trial court determined Benton to be a prior record level I for felony sentencing purposes and imposed an active prison term of twenty-five to thirty-nine months. Wallace and Benton appeal.

II. Motions to Dismiss

Wallace and Benton contend the trial court erred by denying their motions to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury for two separate and distinct reasons. Each challenge the sufficiency of the evidence to support different elements of the offense. We disagree.

A. Standard of Review

"Upon defendant's motion for dismissal, 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. 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 has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). We view the evidence "in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to

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resolve.” *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (internal citation and quotation omitted).

B. Benton’s Motion to Dismiss

[1] In her first argument, Benton contends the trial court erred by denying her motion to dismiss the charge of assault with a deadly weapon with the intent to kill inflicting serious injury and instructing the jury on the lesser-included offenses where there was no evidence presented that tended to show she employed a deadly weapon during the assault.²

At the outset, we note that an acting in concert instruction was not requested by the State nor given to the jury by the trial court. Therefore, we must determine whether Benton, individually, employed a deadly weapon during the assault against Allred.

A deadly weapon is characterized as one which under the circumstances of its use is likely to cause death or great bodily harm, but must not necessarily kill. *State v. Strickland*, 290 N.C. 169, 178, 225 S.E.2d 531, 538 (1976). “The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself.” *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924) (citations omitted). Our Supreme Court has explained:

Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury.

Id. (internal citation omitted). “No item, no matter how small or commonplace, can be safely disregarded for its capacity to cause serious bodily injury or death when it is wielded with the requisite evil intent and force.” *State v. Sturdivant*, 304 N.C. 293, 301 n.2, 283 S.E.2d 719, 725 n.2 (1981) (citations omitted).

2. Because Benton only challenges the sufficiency of the evidence to support the element that a deadly weapon was used during the assault, we need not address the remaining elements of assault with a deadly weapon with intent to kill inflicting serious injury as set forth in N.C. Gen. Stat. § 14-32 (2005).

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In the instant case, the indictment against Benton for the assault with a deadly weapon with intent to kill inflicting serious injury charge alleged: “defendant named above unlawfully, willfully and feloniously did assault James Allred with Large Limb, Fist and Plastic Bag over his head, a deadly weapon, with the intent to kill and inflicting serious injury.” We must therefore determine whether the State presented sufficient evidence to support the assertion that Benton used at least one of the instruments set forth in the indictment as a deadly weapon.

We have previously held “that a defendant’s fists can be considered a deadly weapon depending on the manner in which they were used and the relative size and condition of the parties.” *State v. Lawson*, 173 N.C. App. 270, 279, 619 S.E.2d 410, 416 (2005) (citations omitted), *disc. review denied*, 360 N.C. 293, 629 S.E.2d 276 (2006). Although traditionally these cases have involved a male assailant attacking a smaller female victim, there is no authority that stands for the proposition that these roles could not be reversed depending upon the size and conditions of the parties involved. *See, e.g., State v. Rogers*, 153 N.C. App. 203, 569 S.E.2d 657 (2002), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 442 (2003); *State v. Hunt*, 153 N.C. App. 316, 569 S.E.2d 709 (2002); *State v. Grumbles*, 104 N.C. App. 766, 411 S.E.2d 407 (1991); *State v. Shubert*, 102 N.C. App. 419, 402 S.E.2d 642 (1991); *State v. Jacobs*, 61 N.C. App. 610, 301 S.E.2d 429, *disc. review denied*, 309 N.C. 463, 307 S.E.2d 368 (1983). Further, our appellate courts have held that a piece of wood may or may not constitute a deadly weapon depending on the manner of its use. *State v. Palmer*, 293 N.C. 633, 640, 239 S.E.2d 406, 411 (1977) (“wooden stick”); *State v. Tillery*, 186 N.C. App. 447, 450-51, 651 S.E.2d 291, 294 (2007) (“2x4 board”).

Benton was 40 years old, 5 feet 2 inches tall, and weighed 125 pounds at the time of the assault. Benton was allegedly paralyzed on the right side of her body, but had some use of her right hand and evidence in the record shows that Benton had been performing yard work earlier in the day. Allred was a 79-year-old man with a heart condition and had been diagnosed with polyneuropathy. Although Allred was 6 feet tall and weighed 165 pounds, Wallace and Benton together outweighed him by approximately 72 pounds. We note that while we are here deciding whether sufficient evidence was presented tending to show Benton, individually, employed a deadly weapon during the assault, that does not preclude us from considering the fact that Wallace, a 66-year-old woman who allegedly weighed 112 pounds,

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assisted Benton in knocking Allred to the ground and rendering him completely incapacitated during the assault.

Benton jumped on Allred's back and pulled him to the ground. Benton assisted in tying Allred's hands and feet with plow rope. Once Wallace had placed the plastic bag over his head, Benton sat on his chest, restrained his arms, and repeatedly hit him with her fists. Further evidence shows Benton also used "[l]imbs off of some trees" to "beat" Allred. Benton's assault on Allred continued for over an hour until she was so exhausted she had to take a break to rest.

In the light most favorable to the State and taking into consideration the relative size and conditions of the parties in conjunction with the manner these instruments were used, this evidence was sufficient to submit to the jury the question of whether Benton's fists or the tree limbs were of such character to constitute a deadly weapon.³ The trial court properly denied Benton's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury.

Benton's argument is without merit.

C. Wallace's Motion to Dismiss

[2] In her sole argument on appeal, Wallace contends the trial court erred by submitting the charge of assault with a deadly weapon with intent to kill inflicting serious injury and its lesser-included offenses to the jury, asserting that there was no evidence presented tending to show Wallace's alleged assault with a deadly weapon resulted in "serious injury."

Wallace's argument is two-fold. Wallace first argues that there is no "chain of causation" linking Allred's injuries to Wallace's use of a deadly weapon. This contention is based upon a flawed premise. Wallace asserts that placing the plastic bag over Allred's head was the only conduct she engaged in that would constitute assault with a deadly weapon. However, the evidence presented at trial tended to show that in addition to placing the plastic bag over Allred's head, she also participated in beating him. Allred testified that "they beat [him]" and that "[t]hey were on top of [him] beating on [him]" with their fists and tree limbs. Detective Williams read the notes he had taken regard-

3. We note the trial court did not give a peremptory instruction to the jury regarding what constituted a deadly weapon. Having deemed that Benton's fists or the tree limbs were not *per se* deadly weapons, the trial court properly instructed the jury on the lesser-included offenses.

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ing Allred's account of the events: "He stated that they started beating him in the face" once he was on the ground. Detective Williams also testified that Allred had stated "that they had used their hands, fists, and some brush or sticks" to hit him.

Allred's emergency room physician, Dr. Steven Strobel (Dr. Strobel) recounted the assault as Allred had explained it to him: "He had said that he was grabbed from behind, pushed to the ground, [a] bag was placed over his head, his wrists were tied, and then he was kicked and punched multiple times in the ribs, as well as over his facial area." After receiving this explanation, Dr. Strobel ordered a chest x-ray, which revealed a non-displaced left lateral rib fracture. Dr. Strobel opined that this injury had been caused by blunt force trauma to the chest wall. Other injuries Dr. Strobel observed included bruises and contusions with significant swelling over Allred's facial area, dried blood around his lips, nose, and teeth margins, and a subconjunctival hemorrhage⁴ of his left eye. Dr. Strobel also observed that Allred had bruising around his wrists and forearms, which appeared to be ligature marks. We hold that based upon the above-described testimony, there was a sufficient causal link between the use of Wallace's fists and the tree limbs and the injuries inflicted upon Allred.

Wallace next challenges whether Allred's injuries could be deemed serious. "The term 'serious injury' as employed in [N.C. Gen. Stat. § 14-32] means physical or bodily injury resulting from an assault with a deadly weapon." *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988). It is well-established that "[w]hether serious injury has been inflicted must be determined according to the particular facts of each case and is a question the jury must answer under proper instruction." *State v. Marshall*, 5 N.C. App. 476, 478, 168 S.E.2d 487, 489 (1969) (citation omitted); *see also State v. Alexander*, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994) ("Cases that have addressed the issue of the sufficiency of evidence of serious injury appear to stand for the proposition that as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious." (citation omitted)). Factors to be considered in determining if an injury is serious include pain, loss of blood, hospitalization, and time lost from work. *State v. Owen*, 65

4. A subconjunctival hemorrhage occurs when a blood vessel ruptures just underneath the clear surface of a person's eye, which can be produced by blunt force trauma. This injury causes the white part of the eye to turn blood red.

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N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983). “Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury.” *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991) (citation omitted).

In addition to Dr. Strobel’s description of Allred’s injuries, he also testified that he had prescribed pain medication and instructed Allred to limit his physical activities. Allred was also instructed to cough and breathe deeply frequently to avoid the risk of “atelectasis reflect” in the lung tissue and subsequent pneumonia. Further, the State introduced the photographs Detective Williams had taken of Allred on 11 and 14 April 2005. The jury also heard testimony from Allred and his wife that his injuries “hurt” and that he was “having a lot of pain” in his chest. Detective Williams testified that Allred was “obviously distraught[,]” “very weak in appearance[,]” and “was literally physically shaking.” We hold that the State presented substantial evidence tending to show that Allred sustained serious injuries as a result of the assault by Wallace and properly submitted this issue to the jury for resolution. *See State v. Brunson*, 180 N.C. App. 188, 194, 636 S.E.2d 202, 206 (2006) (holding that where the victim had swollen, black eyes; bruises on her neck, arms, back and inner thighs; redness on her vagina; and the victim testified that she suffered “pain all . . . over” as a result of the beating, this evidence was sufficient for the jury to find that the defendant had inflicted serious injury), *per curiam aff’d*, 362 N.C. 81, 653 S.E.2d 144 (2007).

Wallace’s arguments are without merit.

III. Jury Instructions

[3] In her second argument on appeal, Benton contends the trial court committed reversible error by instructing the jury that it could find her guilty of assault with a deadly weapon with intent to kill inflicting serious injury if it found “a plastic bag, limb, or fist . . . was a deadly weapon” where there was no evidence that she either used or possessed the plastic bag during the assault. We disagree.

In support of her contention, Benton cites *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997). In *Belton*, our Supreme Court stated “a conviction cannot stand merely because it could have been supported by one theory submitted to the jury if another, invalid theory also was submitted and the jury’s general verdict of guilty does not specify the theory upon which the jury based its verdict.” 318 N.C. at 164, 347 S.E.2d at 769 (citations omitted). We must therefore deter-

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mine whether the use of the plastic bag as a deadly weapon was a valid alternative theory of guilt to submit to the jury.

On direct examination, Allred testified that although Wallace initially placed the plastic bag over his head, when he managed to bite a hole in it, “*they* attempted to cram [the plastic bag] in my mouth. . . . And then I’m not sure which one put that plastic bag over my mouth and my nose and tried to keep me from breathing. That didn’t work either.” Later on cross-examination, Allred repeated that “[b]oth of them or one of them started trying to cram the bag in my mouth.” This evidence was sufficient to support the submission of the assault charge to the jury based upon the plastic bag, as to Benton. We hold the trial court’s disjunctive jury instruction did not submit an invalid alternative theory of guilt to the jury.

Benton’s argument is without merit.

NO ERROR.

Chief Judge MARTIN and Judge CALABRIA concur.

KIMLEN DYESS GRAY, ADMINISTRATRIX OF THE ESTATE OF RICKEY L. GRAY,
PLAINTIFF v. BENJAMIN G. ALLEN, CHARLES A. CRUMLEY AND ALBEMARLE
SURGICAL CLINIC, P.A., DEFENDANTS

No. COA08-1092

(Filed 2 June 2009)

**1. Evidence— relevancy—board certification of doctor—not
testifying as expert—other evidence**

The trial court did not abuse its discretion in a medical malpractice action by excluding evidence that defendant Crumley had failed the exam for board certification as a surgeon five times and was not board eligible at the time of the incident. It was reasonable for the trial court to conclude that defendant’s board eligibility was not relevant to this action because Dr. Crumley testified only as a fact witness and not as an expert, while the board eligibility of the witnesses who testified as experts was relevant. Furthermore, there was no prejudice, given the similar testimony that was introduced through other witnesses.

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2. Evidence— cross-examination—medical code of conduct—unauthenticated article

The trial court did not abuse its discretion in a medical malpractice action by limiting cross-examination of a defendant about a code of conduct and by not allowing cross-examination based on an unauthenticated article. The trial court conducted a *voir dire* and admitted the relevant portions of the code and was within its discretion in excluding documents that were not authenticated. Importantly, plaintiff made no showing of prejudice.

3. Evidence— medical malpractice—prior lawsuit—knowledge of risk—unduly prejudicial

The trial court was within its discretion in a medical malpractice case in excluding evidence of a prior lawsuit as unduly prejudicial to defendants, even taking as true plaintiff's argument that the evidence should have been admitted as to knowledge of the risk involved in postoperative care for this surgery.

4. Discovery— opinions of experts—allegedly undisclosed—no abuse of discretion in admitting

The trial court did not abuse its discretion in a medical malpractice action by admitting certain opinions from defendants' experts where plaintiff contended that the opinions were previously undisclosed. Considering all of the circumstances of discovery and the testimony at trial, the evidence was not unrelated, unduly prejudicial, or unfairly surprising to plaintiff.

5. Evidence— medical malpractice—portions of deposition admitted—entire statement admitted on redirect

The trial court did not err in a medical malpractice action by allowing defendants to introduce portions of a deposition transcript during cross-examination of plaintiff's witness. Although plaintiff contended that portions of the transcript were taken out of context, the court allowed the complete statement to be introduced by plaintiff on redirect. There is never a guarantee of timing when a witness is cross-examined.

Appeal by plaintiff from judgment entered 28 August 2007 by Judge Mark Klass in Stanly County Superior Court. Heard in the Court of Appeals 8 April 2009.

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Katten Muchin Rosenman LLP, by William L. Sitton, Jr., for plaintiff appellant.

Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson, Stacy H. Stevenson, and Tasha L. Winebarger, for defendants appellees.

ELMORE, Judge.

In 2003, Rickey Gray (decedent), husband of Kimlen Dyess Gray (plaintiff), died following complications from a laparoscopic abdominal procedure performed by Dr. Benjamin G. Allen (defendant Allen) and Dr. Charles A. Crumley (defendant Crumley). Plaintiff brought a medical malpractice claim against defendants Allen and Crumley and their medical facility, Albemarle Surgical Clinic (defendant Clinic), based on the treatment provided to decedent. At the close of trial, the jury returned a unanimous verdict in favor of defendants, and plaintiff appealed based on several questions of the admissibility of evidence. After careful review, we find no error.

I. Facts

On 2 December 2003, at defendant Clinic, defendants Crumley and Allen performed a laparoscopic hernia repair (also called a herniorrhaphy) on decedent to repair a chronic ventral hernia. Decedent had undergone two previous non-laparoscopic surgeries for the same hernia. Defendant Allen had performed numerous laparoscopic procedures, including eight or nine herniorrhaphies performed alongside defendant Crumley; defendant Crumley had performed eighteen such procedures himself at the time of decedent's procedure.

Decedent was discharged on 4 December 2003. Later the same day, plaintiff called defendant Clinic and reported to the receptionist who answered the phone that decedent was in a great deal of pain. Plaintiff received no return call from either defendant Crumley or defendant Allen and thus called again when defendant Clinic opened on 5 December, reporting decedent's condition. Plaintiff later received a phone call telling her to bring decedent in to defendant Clinic later that morning.

When plaintiff brought decedent back to defendant Clinic, defendant Crumley ordered a CT scan of decedent's abdomen. The scan revealed a bowel perforation and sepsis; this was confirmed by

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the ensuing emergency surgery performed by defendant Crumley.¹ After the operation, decedent was placed in intensive care to be treated for septic shock. His condition continued to deteriorate, however, and decedent passed away in the evening of 6 December. Plaintiff then instigated this suit against defendants for negligence.

At trial, two motions *in limine* were made by defendants to exclude certain evidence. The first motion concerned defendant Crumley's taking and failing five times the board examination to become board certified by the American College of Surgeons (ACS), as well as the fact that, as a result, he is no longer eligible to take the examination again.

The second motion concerned details of what both sides refer to as "the Moore case." The Moore case refers to defendant Allen's overseeing the postoperative care of a patient following a laparoscopic liver biopsy who displayed the same symptoms as decedent after the procedure and who was eventually diagnosed with a bowel perforation and sepsis.

At trial, defendants moved *in limine* to exclude evidence of both defendant Crumley's status as to board certification and the Moore case. Both motions were granted by the trial court.

On 20 August 2007, judgment was entered pursuant to jury verdicts in favor of defendants. Plaintiff now appeals based on the admission of certain evidence by the trial court.

II. Standard of Review

"The conduct of a trial is left to the sound discretion of the trial judge, and absent abuse of discretion, will not be disturbed on appeal." *Marley v. Graper*, 135 N.C. App. 423, 425, 521 S.E.2d 129, 132 (1999) (quotation and citation omitted). On appeal, plaintiff has raised multiple evidentiary rulings as assignments of error. In reviewing these determinations by the trial court, we defer to the trial court and will reverse only if the record shows a clear abuse of discretion. *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007). In particular, we will review the trial court's rulings on motions *in limine* and on the admissibility of expert testimony at trial for an abuse of discretion. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004); *State v. Wilson*, 183 N.C. App. 100, 103, 643 S.E.2d 620, 622 (2007).

1. Defendant Allen was apparently out of town for personal reasons at this point.

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Under this standard, a trial court may have abused its discretion when the record shows that its ruling was so arbitrary that it “ ‘could not have been a result of competent inquiry.’ ” *Morris v. Gray*, 181 N.C. App. 552, 556, 640 S.E.2d 737, 740 (2007) (quoting *Wienczek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992)). A court has abused its discretion where its “ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Peterson*, 361 N.C. at 419, 652 S.E.2d at 227 (quotation and citation omitted).

Moreover, “an error in the admission of evidence is not grounds for granting a new trial or setting aside a verdict unless the admission amounts to the denial of a substantial right.” *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002). “The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred.” *Id.*

III. Evidence of Dr. Crumley’s Board Certification

[1] The first issue raised by plaintiff is whether the trial court erred in ruling to exclude evidence of board certification and board eligibility as to defendant Crumley. The parties concede that defendant Crumley had failed the exam for board certification as a surgeon five times, and he was therefore ineligible for board certification at the time of the incident. Ruling *in limine* on defendants’ motion to exclude the evidence, the trial court precluded plaintiff from introducing this evidence. Plaintiff argues that it was an abuse of the trial court’s discretion to allow evidence of board certification as to certain expert witnesses but to exclude evidence that defendant Crumley was no longer eligible to obtain such certification. We disagree.

Under North Carolina law, evidence is not relevant and not properly admissible if it has no “logical tendency . . . to prove a fact at issue in the case.” *State v. Sloan*, 316 N.C. 714, 724, 343 S.E.2d 527, 533 (1986). We find that it is a reasonable conclusion by the trial court that defendant Crumley’s credentials have no logical tendency to prove a fact at issue in the case. In other words, it was reasonable for the trial court to conclude that whether or not defendant Crumley was board eligible was not relevant to the negligence action. Given that he is a defendant in this action, defendant Crumley testified as a fact witness and not to assist the jury with opinions as an expert. His credentials are thus only relevant as a matter of general competence and membership in a voluntary organization; they are

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not relevant to whether he breached the standard of care in his treatment of plaintiff.

By contrast, the record suggests that this evidence *was* relevant and admissible with respect to the witnesses who testified as experts and were therefore subject to proper qualification to be tendered by the court. We note that several other jurisdictions have concluded on review that evidence of board certification and eligibility is properly admissible to qualify experts, but is not relevant to prove a breach of the applicable standard of care in a negligence action. *See, e.g., Jackson v. Buchman*, 996 S.W.2d 30, 34 (Ark. 1999) (“[T]he ability or inability to pass examinations has no bearing on the issue of one’s ability to meet the appropriate standard of care on a specific occasion.”); *Gipson v. Younes*, 724 So.2d 530, 532 (Ala. 1998) (“[T]he physician’s failing the test is irrelevant to the issue of his negligence in a malpractice case.”); *Williams v. Mem’l Medical Ctr.*, 460 S.E.2d 558, 560 (Ga. 1995) (“A physician’s inability to pass certification and licensure examinations does not make probable his negligent performance of a specific procedure.”) (quotation and citation omitted). We agree with the trial court’s ruling to this effect.

Furthermore, we are not persuaded that plaintiff was prejudiced by the exclusion of this evidence, given that similar testimony was introduced through other witnesses during trial. During the direct examination of defendant Crumley, defendant Crumley was asked whether he was board certified, to which defendant Crumley replied “No, I’m not.” Plaintiff has not explained to this Court’s satisfaction why defendant Crumley’s lack of eligibility, rather than his lack of certification, is a crucial piece of evidence in this case.

As such, we hold that the trial court properly exercised its discretion to exclude further evidence of defendant Crumley’s board eligibility, as it was potentially prejudicial information that was not relevant and therefore not helpful to the jury.

IV. Cross-examination on ACS Code of Conduct

[2] Plaintiff next argues that the trial court erred in limiting cross-examination of defendant Allen with respect to the ACS Code of Conduct. The record reveals that the trial court allowed some testimony on this code of conduct, but with limitations. It appears that, in her argument, plaintiff has conflated the admissibility of two separate pieces of evidence: the first, an article which was not authenticated and therefore on which the witness did not give testimony, and the

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second, a code of conduct which was partially admitted for cross-examination by plaintiff. To determine the admissibility of the code, the trial court conducted a *voir dire* examination and admitted the relevant portions of the ACS Code of Conduct. Under Rule 901, the trial court was within its discretion to limit the scope of cross-examination to just the code of conduct and to exclude any other documents if they were not relevant or authenticated under Rule 901. N.C. Gen. Stat. § 8C-1, Rule 901 (2007); *State v. Pharr*, 110 N.C. App. 430, 437, 430 S.E.2d 267, 271 (1993) (“[T]he scope of cross-examination is subject to appropriate control in the sound discretion of the court.”) (citations omitted).

Importantly, plaintiff makes no showing of prejudice based on the exclusion of any portion of the evidence on the article or the code of conduct. There is no evidence in the record, and no plausible argument made by plaintiff, that the trial court unreasonably excluded the evidence, or that a ruling on this matter was unfairly prejudicial to plaintiff. Accordingly we find no abuse of discretion by the court in allowing some testimony on the code of conduct, but with limitations based on the lack of authentication of the evidence by the witness.

V. Evidence of Prior Lawsuit

[3] Plaintiff next argues that the trial court erred in excluding evidence of a prior lawsuit against defendant Allen, which the parties refer to as “the Moore case.” Defendants filed a motion *in limine* to exclude this evidence, and the trial court ruled to exclude the evidence. We conclude that it was properly within the discretion of the court to exclude this evidence on grounds of relevancy, prejudice to defendants, and the purpose for which it was introduced.

Under Rule 404(b) of the North Carolina Rules of Evidence, evidence of a prior instance of similar conduct may not be introduced in order to show a pattern of conduct by a defendant. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007) (“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.”). Evidence of this type risks significant prejudice to a defendant, and, in the case at hand, the specific evidence at issue carries questionable relevancy. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2007) (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]”).

In North Carolina, evidence of prior lawsuits against a defendant in a medical malpractice action is not relevant to whether a physician

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was negligent in the current case. *Willoughby v. Wilkins*, 65 N.C. App. 626, 637-38, 310 S.E.2d 90, 97-98 (1983). Furthermore, evidence of a prior negligence action against defendants threatens substantial prejudice to the defendants.

Although plaintiff contends that she would have offered this evidence to show knowledge of the risk and symptoms of bowel perforations during postoperative care, we are not persuaded by this argument. Plaintiff has failed to show that this evidence was relevant or necessary to meet her burden to prove knowledge; in fact, there was specific testimony at trial by defendant Allen with regard to the risk of bowel perforations. Even taking plaintiff's argument as true—and thus that the evidence was admissible under Rule 404(b)—it is still within the trial court's discretion to make a ruling on admissibility based on the prejudicial effect of the evidence relative to its probative value. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2007); *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990) (“Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court.”) (citations omitted). We find that the trial court in this case acted properly within its discretion to exclude evidence of a prior lawsuit that would be unduly prejudicial to defendants and otherwise inadmissible for a proper purpose under Rule 404(b). Accordingly, we hold that trial court did not err in ruling to exclude this evidence.

VI. Testimony by Defendants' Experts

[4] Plaintiff next argues that the trial court erred in its ruling to admit certain opinions by three of defendants' witnesses at trial. Specifically, plaintiff contends that defendants' experts testified as to opinions that were previously undisclosed and therefore inadmissible under Rule 26(e)(1) of the North Carolina Rules of Civil Procedure. We disagree.

Per Rule 26(e)(1),

[a] party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

N.C. Gen. Stat. § 1A-1, Rule 26(e)(1) (2007). The record in this case reflects that the names of the experts and the content of their testimony were properly disclosed by defendants in advance of trial.

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Furthermore, each of the experts was available for depositions and each was in fact deposed by plaintiff. During these depositions, the experts also revealed the specific content of their opinions to plaintiff. Plaintiff's specific arguments as to each witness's testimony are: Dr. Robiscek in deposition stated that decedent had a "significantly reduced life expectancy," with explanations focusing on coronary artery disease, but at trial, he referenced different cardiovascular problems decedent had. Dr. Heniford testified about a relevant case study that helped illustrate his point; he had not mentioned the case study in his deposition. Dr. Nichols testified to the timing of the fatal injury, and plaintiff was not allowed to ask certain questions on cross-examination.

The discrepancies between the deposition and in-court testimonies of Drs. Robiscek and Heniford appear to be not so much discrepancies as differences in detail and elaboration such as are bound to occur in the two distinct settings. Plaintiff makes no argument that the testimony of Dr. Nichols differed from his deposition, and as such, we disregard plaintiff's mention of it.

Considering all of the circumstances of discovery and the testimony at trial, we conclude that the evidence was not unrelated, unduly prejudicial, or unfairly surprising to plaintiff, as she contends. We defer to the trial court's discretion and affirm its rulings to allow the testimony of Drs. Robiscek, Heniford, and Nichols at trial.

VII. Cross-examination of Dr. Martin

[5] Finally, plaintiff argues that the trial court erred in ruling to allow the introduction by defendants of portions of a deposition transcript. During cross-examination of plaintiff's witness Dr. Martin at trial, defendants introduced portions of his prior testimony about possible causes of a bowel perforation. Although plaintiff's counsel had also introduced portions of the same transcript, counsel objected to these statements on the grounds that they were taken out of context. In the next few lines of the transcript of the previous testimony, which were not read into evidence by defendants, Dr. Martin went on to reject the other possible causes as the likely cause of the perforation in this case. Plaintiff requested that the rest of the statement be read into evidence at the time, but the trial court did not sustain the objection; rather, the trial court allowed the evidence of the complete statement to be introduced by plaintiff on redirect. Indeed, on redirect examination by plaintiff's counsel, the witness returned to his testimony on the possible causes of the perforation to eliminate the other causes

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and referred to the deposition. The testimony at this stage proceeded without objection and was allowed by the trial court.

Given that plaintiff had an adequate opportunity to introduce this evidence and question her own witness about his prior statements, we conclude there was no prejudice to plaintiff by the court's ruling. North Carolina law provides that a trial court may require a party to read a complete statement or other relevant portions of evidence in order to provide context for the jury; however, this decision is within the trial court's discretion at trial. *See* N.C. Gen. Stat. § 1A-1, Rule 32(a)(5) (2007) ("If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which is relevant to the part introduced, and any party may introduce any other parts."). There is never a guarantee of timing when a witness is cross-examined, and we decline to reverse the trial court's reasonable determination on this issue when plaintiff has suffered no prejudice as a result of the ruling. Accordingly, we find the trial court did not err in its ruling.

No error.

Judges WYNN and STROUD concur.

STATE OF NORTH CAROLINA v. TERRY NEAL CROCKER, JR.

No. COA08-1363

(Filed 2 June 2009)

1. Sexual Offenses— first-degree sexual offense of a child under the age of 13—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the three counts of first-degree sexual offense with a child under the age of 13 based on alleged insufficiency of the evidence because, taken in the light most favorable to the State and allowing every reasonable inference to be drawn therefrom, the evidence from the victim and a doctor's testimony that defendant on three separate occasions used his hand to touch the inside of the victim's labia majora was sufficient to constitute substantial evidence of each element of the crime.

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2. Evidence— expert testimony—sexual abuse—credibility of minor victim—opening the door to response

The trial court did not err in a multiple first-degree sexual offense with a child under the age of 13 and multiple taking indecent liberties with a child case by allowing an expert witness to testify to the credibility of the minor victim because: (1) when a defendant asks a question which is designed to elicit the exact type of response given, defendant has opened the door to the response, and the witness has a right to respond; and (2) defendant's cross-examination of the doctor was designed to elicit the type of response the doctor provided, and thus defendant cannot now contend that the doctor's response, which might have rightfully been excluded had it been offered by the State, unfairly prejudiced defendant and warranted a new trial.

Appeal by defendant from judgments entered 9 June 2008 by Judge Kimberly S. Taylor in Davidson County Superior Court. Heard in the Court of Appeals 9 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Susannah B. Cox, for the State.

Paul F. Herzog for defendant-appellant.

BRYANT, Judge.

Defendant appeals from judgments and commitments entered 9 June 2008 after a jury returned verdicts of guilty on three counts of first degree sexual offense with a child under the age of 13 and three counts of taking indecent liberties with a child. For the reasons stated herein, we find no error with the judgment of the trial court.

The evidence presented at trial tended to show that defendant befriended Robert¹ while working at the Grandover Resort in Greensboro, North Carolina. Robert lived with his parents and had two children—a daughter, Helen, and a son, Peter. At the time of trial, Helen was eleven and Peter fourteen.

Sometime during the summer of 2006, Robert and defendant began spending time together, and occasionally, Robert, along with Helen and Peter, would spend the night in defendant's apartment. The guests would sleep on an air mattress and a sofa in the living room.

1. Pseudonyms have been used for minors and some adults to protect the identity of the minors.

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Helen testified that one night in September 2006 she was laying on the sofa watching T.V. when defendant sat down and began rubbing her feet. Defendant moved his hand up her leg and under her shorts.

State: Tell the ladies and gentlemen of the jury where would his hands be underneath your pants and underneath your panties?

Helen: Where I use the bathroom.

. . .

State: The area that you pee out of?

Helen: Yes

State: Would his hand touch that area?

Helen: Yes

State: What would his hand do to that area? Can you describe that for the ladies and gentlemen of the jury?

Helen: It would go between the skin type area.

State: Okay. The area that you use the bathroom out of?

Helen: Yes.

State: How did it feel when he would touch you in those areas?

Helen: It felt like there was a pressure point that he would rub against and I felt like I was about to pass out.

. . .

State: All right. Now, when you say that he would push or rub on that pressure point, . . . did that cause you any discomfort or pain?

Helen: Yes, it hurt.

Helen also testified that defendant reached inside her t-shirt and touched her chest. This same conduct occurred on three occasions: (1) one night in September 2006, (2) once before her 19 October 2006 birthday, and (3) sometime between November and 19 December 2006.

Sometime during December 2006, Helen's mother discovered blood in Helen's underwear. Not knowing whether Helen had begun her menstrual cycle or if she had been hurt—and "[Helen] was not very forthcoming with what had happened"—Helen was taken to see

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Dr. Melissa Lowe, a pediatrician with Wendover Pediatricians in Greensboro, North Carolina. At trial, Dr. Lowe was admitted as an expert witness. She testified that during her initial conversation she asked what Helen thought may have caused her bleeding. When Helen failed to respond, Dr. Lowe asked “if anyone had touched her in her private.” Helen became “very upset. She, when she nodded because she had tears coming down her face, she was not able—I think she was choked up at the moment, not really saying anything verbally. And then she managed to say . . . that Terry touched her down there.” Dr. Lowe informed Helen’s mother and filed a report with law enforcement authorities.

On 19 December 2006, Helen met with Kimberly Madden, a forensic interviewer with Family Services of the Piedmont in Greensboro, North Carolina. Helen explained how defendant had put his hand down her shirt and in her pants touching the part of her body where she urinates. Helen described how defendant touched a pressure point that made her feel “kind of faint” that was near the part of her body where she urinates. She told Ms. Madden these events occurred at defendant’s apartment, on defendant’s couch.

On 17 January 2007, Helen saw Dr. Angela Stanley, a pediatrician with the Moses Cone Health System. At trial, Dr. Stanley, testifying as an expert and using diagrams for illustration, described the anatomy of the female genital area. Dr. Stanley related that the labia majora or outer layer is tougher “so it is not susceptible to painfulness, not highly innervated”; that “its normal role is to pad the genital area.” She noted that the labia majora would have to be separated in order to expose the inside structures. When asked to describe the inside structures, Dr. Stanley stated, “Those are different types of structures. This area is . . . more susceptible to injury, hence the covering.”

State: In hearing the description that [Helen] had given in reading material that you had been given as far as sensory detail that she gave also describing the pain and discomfort that she was feeling, would you find it more consistent with touching the structures on the inside of the labia majora or outside the labia majora?

Stanley: It would be more consistent with touching on the inside rather than . . . [the] padded structures on the outside.

State: The detail she gave about a pressure point and shaking and these kinds of details, would that be consistent with

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touching on the outside of the labia majora or inside the labia majora?

Stanley: The description the child was giving would be stimulation of these structures [sic] would be possible with extreme pressure and friction on the outside over these structures or also on the inside coupled with the complaint of pain, it would be more suggestive of touching these structures on the inside.

...

State: The descriptions that you gave would be more consistent with touching the inside the labia majora or these internal structures here; is that correct?

Stanley: That's correct.

At the close of the State's evidence and again after the close of all evidence, defendant made a motion to dismiss based on insufficiency of the evidence. Both motions were denied.

The jury returned verdicts of guilty on three counts of first degree sexual offense with a child under the age of thirteen and three counts of taking indecent liberties with a child. The trial court entered judgments consistent with the jury verdicts and committed defendant to a term of 192 months to 240 months for two counts of first degree sex offense and two counts of indecent liberties to be followed by a term of 192 months to 240 months for one count of first degree sex offense and one count of indecent liberties in the custody of the North Carolina Department of Correction. Defendant appeals.

Defendant raises two issues on appeal: whether the trial court erred by (I) failing to dismiss the three counts of first degree sexual offense and (II) allowing opinion testimony on the credibility of the victim.

I

[1] Defendant first argues that the trial court erred in failing to dismiss the three counts of first degree sexual offense upon defendant's motion to dismiss for insufficiency of the evidence. We disagree.

"When reviewing a sufficiency of the evidence claim, this Court considers whether the evidence, taken in the light most favorable to the state and allowing every reasonable inference to be drawn there-

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from, constitutes substantial evidence of each element of the crime charged.” *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008) (citation and internal quotations omitted).

Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence.

State v. Williams, 186 N.C. App. 233, 234, 650 S.E.2d 607, 608 (2007) (citation omitted). “Moreover, circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citation and internal quotations omitted).

Under our North Carolina General Statutes, section 14-27.4(a),

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) (2007). A “sexual act” includes the penetration, however slight, by any object into the genital or anal opening of another’s body. *State v. Fuller*, 166 N.C. App. 548, 556, 603 S.E.2d 569, 575 (2004).

Here, Helen testified that on three separate occasions defendant reached beneath her shorts and touched between “the skin type area” in “[t]he area that you pee out of[.]” Helen testified defendant would rub against a pressure point causing her pain and made her feel as if she was about to pass out.

Dr. Stanley testified that “with extreme pressure and friction on the outside [of the labia majora] or also on the inside coupled with the complaint of pain, it would be more suggestive of touching these structures on the inside.”

This evidence, that defendant on three separate occasions used his hand to touch the inside of the victim’s labia majora, taken in the light most favorable to the State and allowing every reasonable inference to be drawn therefrom, was sufficient to constitute substantial evidence of each element of the crime of first degree sexual offense.

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Therefore, the trial court did not err in denying defendant's motion to dismiss. Accordingly, this assignment of error is overruled.

II

[2] Next, defendant argues the trial court erred in allowing an expert witness to testify to the credibility of the minor victim. Defendant argues the testimony of Dr. Lowe was a violation of N.C. Gen. Stat. § 8C-1, Rules 405 and 608. We disagree.

"This Court has repeatedly held that N.C.G.S. § 8C-1, Rule 608 and N.C.G.S. § 8C-1, Rule 405(a), when read together, forbid an expert's opinion testimony as to the credibility of a witness." *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 843 (1994) (citations omitted).^{2,3} See also *State v. Aguillo*, 318 N.C. 590, 350 S.E.2d 76 (1986) (holding a new trial was warranted where the State's witness, testifying as an expert, stated that she found the victim believable); *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986) (holding it was error to permit the State to question an expert as to whether the victim could "make up a story about the sexual assault" and the witness responded with "[t]here is nothing . . . that indicates that she has a record of lying."). However, "[d]efendant cannot invalidate a trial by . . . eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State." *State v. Burgess*, 134 N.C. App. 632, 636, 518 S.E.2d 209, 212 (1999) (citations omitted). When a defendant asks a question which is designed to elicit the exact type of response given, the defendant has opened the door to the response, and the witness has a right to respond. See *State v. Neely*, 4 N.C. App. 475, 477, 166 S.E.2d 878, 879 (1969) (holding no prejudicial error when defendant's question "[y]ou say you [sic] scared of these two defendants here?" opened the door to the elicited response "[i]f anybody had a record like them, you'd be scared of them too.").

2. N.C.G.S. § 8C-1, Rule 405 (2007). (a) Reputation and opinion—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.

3. N.C.G.S. § 8C-1, Rule 608 (2007).(a) Opinion and reputation evidence of character—The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

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Here, during the cross-examination of Dr. Lowe, defense counsel asked the following questions:

Defense: You testified that when you spoke with [Helen] you got all the information necessary to make a report to the police?

Lowe: I got all the information that I needed to, that was needed to make a report for an investigation.

Defense: Did you ever, Dr. Lowe, ask [Helen] if anybody else might have done this to her?

Lowe: I asked her if anyone had touched her.

Defense: Did you ever ask her—I guess, did you ever ask her if she was telling you the truth?

Lowe: I did not specifically ask her. I felt like what she was telling me was the truth.

Defense: I object.

State: Her own question, your Honor.

The Court: Overruled.

Defendant's cross-examination was designed to elicit the type of response Dr. Lowe provided; therefore, defendant cannot now contend that Dr. Lowe's response, which might have rightfully been excluded had it been offered by the State, unfairly prejudices defendant and warrants a new trial. Accordingly, this assignment of error is overruled.

No error.

Judges GEER and STEPHENS concur.

STATE v. McGEE

[197 N.C. App. 366 (2009)]

STATE OF NORTH CAROLINA v. EVERETTE DUSTIN McGEE

No. COA08-1285

(Filed 2 June 2009)

1. Conspiracy— malicious assault in secret manner—instruction—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to maliciously assault in a secret manner and by instructing the jury on that charge because in the light most favorable to the State, the circumstances show a reasonable inference that defendant and others conspired to assault the victims on the road when: (1) the two groups of men were feuding with each other, and a confrontation had occurred earlier that night; (2) defendant's statement about planning to meet other people was uncorroborated; (3) defendant had two others accompany him with weapons and then told them to hide in the woods; and (4) when the victims approached defendant, the others ran out of the woods and vehicle to assault the two victims.

2. Accomplices and Accessories— accessory after fact—assault with deadly weapon with intent to kill inflicting serious injury—instruction—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact of assault with a deadly weapon with intent to kill inflicting serious injury and by instructing the jury on that charge even though the principal person pled guilty to a lesser-included offense because: (1) the principal pled guilty, albeit to a lesser-included offense, and there was no acquittal; (2) N.C.G.S. § 14-7 provides that an accessory after the fact may be indicted and convicted regardless of whether the principal has been previously convicted; and (3) the State presented substantial evidence of the charge, including that the principal admitted to stabbing the victim with his knife; defendant told police the principal stabbed the victim; the principal testified that he gave his knife to defendant to get rid of it; the testimony was corroborated by another witness who saw the principal give his knife to defendant; and the witness testified that she and the principal went back to defendant's residence the day after the incident to retrieve the knife, and defendant told them he had thrown the knife away.

STATE v. MCGEE

[197 N.C. App. 366 (2009)]

Appeal by defendant from judgment entered 23 May 2008 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 25 March 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Reita P. Pendry, for defendant-appellant.

STEELMAN, Judge.

The State presented substantial evidence to support each of the charges of a conspiracy to commit malicious assault in a secret manner and accessory after the fact of assault with a deadly weapon with intent to kill inflicting serious injury. The fact that the perpetrator of an offense pleads guilty to a lesser-included offense does not exculpate a defendant on a charge of accessory after the fact.

I. Factual and Procedural Background

In the light most favorable to the State, the evidence presented tended to show that on 9 November 2006, a melee occurred in Winston-Salem, which resulted in one person seriously injured by assault and another person killed by a gunshot.

On the afternoon of 9 November 2006, Richard Happel (Happel) went to Colt Barber's (Barber) residence to visit with Barber and Brian Brooks (Brooks). At about 7 p.m., Happel, Barber, and Brooks went to Dennis Tullock's (Tullock) residence. Barber and Brooks wanted to speak to Tullock about "rumors that were going around[.]" and Happel was to be the mediator. Tullock was not home so they went to another residence to locate him. Tullock refused to talk to Barber and Brooks, and then Happel, Barber, and Brooks went back to Barber's residence.

After refusing to talk to Barber and Brooks, Tullock went back to his residence. Anthony "Bear" Davis (Davis), Dustin Everette McGee (defendant), Austin McGee (Austin), and Billy Ray "Willie" Hilterbrand (Hilterbrand) showed up at Tullock's residence asking him if anything was wrong. Tullock testified he told them that Happel, Barber, and Brooks had come looking for him, and he was scared they would come back to his house. Davis and Tullock are first cousins, and the others are friends of Tullock. Davis, defendant, Austin, and Hilterbrand then left Tullock's residence.

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After returning to Barber's residence, Happel, Barber, and Brooks drank alcohol, smoked marijuana, and took klonopin pills. They played a drinking game, which involved a stun gun. Brooks passed out, and Happel and Barber duct-taped him to a chair and shaved his head. Barber "did a lot of coke[,] and he and Happel walked to a gas station on Old Hollow Road. The stun gun was in Happel's pocket. Happel was also carrying a small pocketknife. The store was closed so they walked back to Barber's residence.

A vehicle containing Davis, Hilterbrand, Ashley Williams (Williams), and Jessica Martiere (Martiere) passed Happel and Barber on Old Hollow Road as they were driving to defendant's residence. The four people inside the vehicle started screaming at Happel and Barber. The two decided to take an alternate route via Ozark Road back to Barber's residence.

At about the same time, defendant, Geoffrey Lamoreaux (Lamoreaux), and Austin left defendant's residence for a meeting on Ozark Road. Defendant later stated to Trooper Brent Daniels (Trooper Daniels) that he was going to meet Josh and Taylor White. Defendant told Trooper Daniels that Austin had a butcher knife, and Lamoreaux had a baseball bat. No one corroborated defendant's statement about meeting the Whites.

When the three men reached Ozark Road, defendant told Austin and Lamoreaux to stay in the woods. Defendant told Trooper Daniels, "They were there to make sure nothing was going to happen to me." Witnesses also identified defendant's father, Dueran McGee (Dueran), as being present in the woods.

As Happel and Barber were walking on Ozark Road, they saw defendant standing to the side of the road. Barber approached defendant to speak with him. The same vehicle, which had previously passed them, drove up, and Hilterbrand and Davis jumped out. Happel thought one of the men had a gun so he threw his hands up. Hilterbrand had a knife. Happel heard footsteps running toward him from behind, and he "pretty much was assaulted." The men who were in the woods ran out and attacked Happel. Witnesses differed on the precise sequence of events.

Hilterbrand stated that after driving past Happel and Barber on Old Hollow Road, the people in the vehicle went to defendant's residence and found defendant's girlfriend to be "hysterical." She told them that defendant, Austin, and Lamoreaux had already left for a

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meeting on Ozark Road. The people in the vehicle immediately drove to meet defendant. Hilterbrand stated that when he saw the stun gun, he pulled his knife out and stabbed Happel two or three times. Happel was severely beaten and stabbed in his abdomen, chest, back, and head. He ran through the woods to a nearby residence for help. As Happel ran, he heard gunshots. Happel's injuries required surgery and extended hospitalization. Lamoreaux was shot and killed.

Hilterbrand testified that after the incident, he and other people went back to defendant's residence, where he "washed the knife off and wiped the prints off of it and gave it to [defendant]." Defendant did not say anything to Hilterbrand, "He just took it." Williams also testified that she saw defendant take the knife from Hilterbrand. The next day, Hilterbrand and Williams went back to defendant's residence to retrieve the knife, and Williams said defendant stated "he had thrown it, but he didn't remember where it was."

Defendant was indicted for the crimes of felony conspiracy to maliciously assault in a secret manner, accessory after the fact of maliciously assaulting in a secret manner, and accessory after the fact of assault with a deadly weapon with intent to kill inflicting serious injury. At the close of the State's evidence, the trial court dismissed the charge of accessory after the fact of maliciously assaulting in a secret manner. On 23 May 2008, the jury returned verdicts of guilty of accessory after the fact of assault with a deadly weapon with intent to kill inflicting serious injury and guilty of conspiracy to commit malicious assault in a secret manner. The offenses were consolidated for sentencing, and the trial court imposed an active sentence of 29-44 months imprisonment.

Defendant appeals.

II. Conspiracy to Commit Malicious Assault in a Secret Manner

[1] In his first and second arguments, defendant contends the trial court erred in denying defendant's motion to dismiss the charge of conspiracy to maliciously assault in a secret manner and erred in instructing the jury on that charge. We disagree.

"[I]n ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the crime and whether the defendant is the perpetrator of that crime." *State v. Ford*, 194 N.C. App. 468, 472-73, 669 S.E.2d 832, 836 (2008) (quoting *State v. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244 (2007)).

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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) (citations and quotations omitted). The trial court is to consider the evidence in the light most favorable to the State. *Id.* at 67, 296 S.E.2d at 652.

The State’s theory on this charge was that defendant conspired with Austin and Lamoreaux, and perhaps Dueran, to commit the felony of malicious assault upon Happel in a secret manner by having the men wait in the woods to assault Happel.

To establish a conspiracy, the State must prove an agreement between two or more people to commit an unlawful act or to commit a lawful act in an unlawful manner. *State v. Wiggins*, 185 N.C. App. 376, 389, 648 S.E.2d 865, 874 (citations omitted), *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160-61 (2007). The State need not prove an express agreement. *Id.* Evidence that establishes a mutual, implied understanding is sufficient to withstand a motion to dismiss. *Id.* (citation omitted); *see also State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933) (Conspiracy generally established by indefinite acts and circumstantial evidence).

In the instant case, the evidence presented at trial, taken in the light most favorable to the State, showed the sequence of the events on 9 November 2006 to be: (1) Happel, Barber, and Brooks went looking for Tullock so they could speak with him; (2) Tullock tells defendant, Hilterbrand, Davis, and Austin that Happel and Barber are looking for him, and Tullock is afraid they will come back; (3) Hilterbrand and Davis drive past Happel and Barber as they are walking along Old Hollow Road; (4) defendant goes to a meeting on Ozark Road and has Austin and Lamoreaux accompany him and wait in the woods; Austin has a butcher knife; and Lamoreaux has a baseball bat; and (5) Hilterbrand and others find defendant’s girlfriend upset about the meeting and drive to meet defendant and participate in the melee.

In determining the sufficiency of this evidence to withstand defendant’s motion to dismiss, the test is the same whether the evidence is circumstantial, direct, or both. *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991). “Therefore, if a motion to dismiss calls

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into question the sufficiency of circumstantial evidence, the issue for the court is whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *Id.* (citing *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

In the light most favorable to the State, the circumstances show a reasonable inference that defendant and others conspired to assault Happel and Barber on Ozark Road. The two groups of men were feuding with each other, and a confrontation had occurred earlier that night between Tullock and Happel, Barber, and Brooks. Defendant's statement about planning to meet the Whites is uncorroborated. Defendant had Austin and Lamoreaux accompany him with weapons and then told them to hide in the woods. When Happel and Barber approached defendant, the others ran out of the woods and the vehicle to assault the two men. "A conspiracy 'may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.'" *Wiggins*, 185 N.C. App. at 389, 648 S.E.2d at 874 (quoting *Whiteside*, 204 N.C. at 712, 169 S.E. at 712 (1933)). We hold that the State presented substantial evidence of each of the elements on the offense of a conspiracy to commit malicious assault in a secret manner.

This argument is without merit.

III. Accessory After the Fact of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury

[2] In his third and fourth arguments, defendant contends that the trial court erred in denying defendant's motion to dismiss the charge of accessory after the fact of assault with a deadly weapon with intent to kill inflicting serious injury and erred in instructing the jury on that charge. We disagree.

The underlying felony was assault with a deadly weapon with intent to kill inflicting serious injury, and the principal was Hilterbrand based upon the stabbing of Happel. Defendant argues that because Hilterbrand pled guilty to a Class E felony, which was a lesser-included offense of the Class C felony of assault with a deadly weapon with intent to kill inflicting serious injury, that this exculpates defendant from the accessory after the fact charge. Defendant reasons that because a person cannot be convicted of being an accessory after the fact if the principal is acquitted, that Hilterbrand's plea to a lesser offense is the functional equivalent of an acquittal. This is not correct. A lesser-included offense is "[a] crime that is composed

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of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime[.]” *Black’s Law Dictionary* 1111 (8th ed. 2004). If the named principal is acquitted, then the accessory after the fact must be acquitted. *State v. Robey*, 91 N.C. App. 198, 208, 371 S.E.2d 711, 717, *disc. review denied*, 323 N.C. 479, 373 S.E.2d 874 (1988). However, in the instant case, the principal pled guilty, albeit to a lesser-included offense, and there was no acquittal.

If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a crime, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such crime whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice.

N.C. Gen. Stat. § 14-7 (2007). This statute expressly provides that an accessory after the fact may be indicted and convicted regardless of whether the principal has been previously convicted. In the instant case, the named principal was Hilterbrand who admitted to stabbing Happel, and he testified that a lesser plea had been offered. Hilterbrand was not acquitted, his actions have been adequately established, and defendant’s conviction on the accessory charge was proper.

Defendant next argues that the evidence was insufficient to prove the elements of accessory after the fact. In order to convict defendant of being an accessory after the fact, the State must prove: (1) the principal committed the underlying felony, (2) defendant gave personal assistance to the principal to aid in his escaping detection, arrest, or punishment, and (3) defendant knew the principal committed the felony. *State v. Jordan*, 162 N.C. App. 308, 312, 590 S.E.2d 424, 427 (2004) (citations omitted).

In the instant case, Hilterbrand admitted to stabbing Happel with his knife. Defendant also told police that Hilterbrand stabbed Happel. Hilterbrand testified that he gave his knife to defendant to get rid of it. This testimony was corroborated by Williams who saw Hilterbrand give his knife to defendant. Williams testified that she and Hilterbrand went back to defendant’s residence the day after the incident to retrieve the knife, and defendant told them he had thrown the knife away. Looking at this evidence in the light most favorable to the

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State, we hold that the State presented substantial evidence that supports the charge of accessory after the fact of assault with a deadly weapon with intent to kill inflicting serious injury.

This argument is without merit.

NO ERROR.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. BYRON BLACK

No. COA08-1009

(Filed 2 June 2009)

1. Appeal and Error— appealability—mootness—sentence already completed—collateral legal consequences of adverse nature

The Court of Appeals took judicial notice of the fact that defendant has completed his sentence and although under prior case law this appeal would be dismissed as moot, the amendment to N.C.G.S. § 15A-1340.16(d) in 2008 created collateral legal consequences of an adverse nature, and thus the appeal has continuing legal significance for defendant that is not moot because courts could interpret N.C.G.S. § 15A-1340.16(d)(12a) as a sentencing enhancement statute and defendant's probation violation may be used as an aggravating factor in a subsequent sentencing hearing.

2. Probation and Parole— jurisdiction—hearing held after probation expired—State's failure to follow requirements in N.C.G.S. § 15A-1344(f)

The trial court lacked jurisdiction to hold a probation revocation hearing when the hearing was held after defendant's probation had expired and the State had not followed the necessary requirements found in N.C.G.S. § 15A-1344(f) for conducting a probation revocation hearing after the expiration of defendant's term of probation. The State failed to make reasonable efforts to notify defendant of his probation violations, and those efforts are not balanced against the failure of defendant to comply with the conditions of his probation.

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Appeal by defendant from judgment entered 14 April 2008 by Judge Thomas D. Haigwood in Durham County Superior Court. Heard in the Court of Appeals 25 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General Karissa J. Davan, for the State.

Lucas & Ellis, PLLC, by Anna S. Lucas, for defendant-appellant.

CALABRIA, Judge.

Byron Black (“defendant”) appeals a judgment revoking his probation. The trial court lacked jurisdiction to hold the probation hearing because the hearing was held after his probation had expired and the State did not follow the requirements found in N.C. Gen. Stat. § 15A-1344(f) necessary to hold a probation revocation hearing after the expiration of defendant’s term of probation. We vacate the judgment of the trial court.

I. Background

On 11 January 2006, defendant pled guilty in Durham County District Court to the misdemeanor charges of obtaining property by false pretenses, resisting a public officer, careless and reckless driving, driving with a revoked license, attempted larceny, and two counts of larceny. The charges were consolidated for judgment and defendant was sentenced to a term of 120 days in the custody of the Sheriff of Durham County. This sentence was suspended and defendant was placed on supervised probation for twelve months.

Defendant violated the conditions of his probation by failing to comply with the monetary conditions of his probation, and failing to keep in regular contact with his probation officer. A probation violation report was filed with the court on 26 October 2006, however no date, time, or place of the hearing appears on the report. An order for defendant’s arrest was issued on 31 October 2006 for violating the conditions of his probation. He was arrested for other offenses on 16 October 2007.

Defendant filed a motion to dismiss the probation violation charge and argued the court was without jurisdiction to conduct the revocation hearing because defendant’s probationary period had expired and the State failed to follow the procedures set forth in N.C. Gen. Stat. § 15A-1344(f). Specifically, defendant argued that the State

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failed to properly file a motion indicating its intent to conduct the revocation hearing and failed to make reasonable efforts to notify defendant of the hearing. This motion was denied. The trial court found that the 31 October 2006 order for arrest, which transferred the case to a surveillance officer, constituted reasonable effort under N.C. Gen. Stat. § 15A-1344(f)(2). On 14 April 2008, defendant was found in violation of his probation and his 120 day suspended sentence was activated. Defendant appealed.

II. Appellate Jurisdiction

[1] Although not included in the record on appeal, we take judicial notice that defendant has completed this sentence, and under prior case law this appeal would be dismissed as moot.

As a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist. By reason of the discharge of the Defendant from custody, the subject matter of this appeal has ceased to exist and the issue is moot.

State v. Cross, 188 N.C. App. 334, 335, 655 S.E.2d 725, 725 (2008) (internal quotations omitted). In *Cross*, as here, the defendant received suspended sentences and was placed on supervised probation. After the defendant's probation was revoked, his sentences were activated. *Id.* Since the defendant's sentences expired prior to review by this Court, the appeal was dismissed as moot. *Id.* at 336, 655 S.E.2d at 726. At the time *Cross* was decided, when the defendant completed his sentence, there were no additional legal consequences for a defendant willfully violating the conditions of probation.

However, in July 2008, the General Assembly amended N.C. Gen. Stat. § 15A-1340.16(d), which sets forth the aggravating factors that can be used to deviate from the presumptive range of minimum sentences. *See* Act of July 28, 2008, 2008 N.C. Sess. Laws 129. The General Assembly's amendment added a new aggravating factor. Specifically, a trial court could consider a defendant's willful violation of the conditions of a probationary sentence imposed within the previous ten years as an aggravating factor during sentencing. N.C. Gen. Stat. § 15A-1340.16(d)(12a) (Supp. 2008).

Before determining whether an appeal is moot when the defendant has completed his sentence, it is necessary to determine whether collateral legal consequences of an adverse nature may result. "[W]hen the terms of the judgment below have been fully carried out,

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if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance.” *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977). The amendment to N.C. Gen. Stat. § 15A-1340.16(d) created collateral legal consequences of an adverse nature even though defendant’s judgment, as a result of his probation violation, had been fully carried out, therefore *Cross* no longer controls.

The State argues the amended statute has prospective effect and probation violations that occurred prior to the effective date of the legislation would not be considered as aggravating factors. The State further argues this appeal is still moot because defendant’s probation violation could not be used as an aggravating factor in a later sentencing hearing. While the session laws do indicate that the section in question is only to have prospective effect, the statute and our case law indicate the prospective mandate applies to sentencing in which the aggravating factors may be used, not the offenses on which the aggravating factors are based.

In *State v. Taylor*, 128 N.C. App. 394, 496 S.E.2d 811 (1998), *affirmed* 349 N.C. 219; 504 S.E.2d 785 (1998), this Court considered whether changes made to the very statute at issue here could be applied to offenses committed prior to the effective date of the change. Taylor was adjudicated delinquent in 1993 for an offense that would have been a Class C felony if committed by an adult. *Id.* at 397, 496 S.E.2d at 814. At the time of the commission of the offense, and the adjudication of delinquency, the applicable sentencing statute would not allow this adjudication of delinquency to be considered as an aggravating factor for a later offense. *Id.* In 1995, the sentencing statute was modified permitting a trial court to consider as an aggravating factor in sentencing that “the defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.” N.C. Gen. Stat. § 15A-1340.16(d)(18a) (1996).

Taylor challenged the use of his 1993 delinquency adjudication as an aggravating factor during sentencing for an offense he committed in 1995, after the effective date of the legislation. This Court upheld the use of the delinquency adjudication as an aggravating factor, holding that it did not violate the *ex post facto* protections in the North Carolina Constitution and the United States Constitution, nor did it violate the due process rights of the defendant. *Taylor*, 128 N.C. App. at 397-98, 496 S.E.2d at 814.

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Further examples can be found in the habitual felon statute, *see Gryger v. Burke*, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948); *State v. Todd*, 313 N.C. 110, 117-18, 326 S.E.2d 249, 253 (1985), and the sex offender registry, *see Smith v. Doe*, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); *State v. White*, 162 N.C. App. 183, 590 S.E.2d 448 (2004). Since courts would interpret N.C. Gen. Stat. § 15A-1340.16(d)(12a) as a sentencing enhancement statute, defendant's probation violation may be used as an aggravating factor in a subsequent sentencing hearing. Therefore, "collateral legal consequences of an adverse nature can reasonably be expected to result therefrom . . . and the appeal has continued legal significance" for defendant. *Hatley*, 291 N.C. at 694, 231 S.E.2d at 634. This appeal is not moot, and we must address whether the trial court had jurisdiction to conduct the probation revocation hearing.

III. Trial Court Jurisdiction

[2] Defendant argues that the trial court lacked jurisdiction to hold the probation revocation hearing because the hearing was held after his probation had expired and the State did not follow the necessary requirements found in N.C. Gen. Stat. § 15A-1344(f) for conducting a probation revocation hearing after the expiration of defendant's term of probation. "[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal de novo." *Childress v. Fluor Daniel, Inc.*, 172 N.C. App. 166, 167, 615 S.E.2d 868, 869 (2005).

The State may not inquire into alleged violations of the conditions of probation if the term of probation has expired, unless the State complies with N.C. Gen. Stat. § 15A-1344(f). Pursuant to N.C. Gen. Stat. § 15A-1344(f), the court has the jurisdiction to revoke probation after the expiration of the period of probation if two conditions are satisfied. First, the State must "file[] a written motion with the clerk indicating its intent to conduct a revocation hearing" prior to the expiration of the period of probation. N.C. Gen. Stat. § 15A-1344(f)(1) (2007). Second, "[t]he court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier." N.C. Gen. Stat. § 15A-1344(f)(2) (2007).¹ If these two conditions are met, then the lower court has jurisdiction to revoke defendant's probation and impose an active sentence.

1. N.C. Gen. Stat. § 15A-1344(f) was amended effective 1December 2008 removing the statutory requirement of reasonable efforts. *See* Act of July 28, 2008, 2008 N.C. Sess. Laws 129. Defendant's probation hearing was held prior to the effective date of the amendment and we must apply the statute effective at the time his probation violation hearing was held.

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This case is similar to *State v. Burns*, 171 N.C. App. 759, 615 S.E.2d 347 (2005). In *Burns*, the defendant's probation was to expire in July 2001. On 1 March 2001, the defendant's probation officer filed a violation report, and on 6 March 2001, an order for his arrest was issued. *Id.* at 760, 615 S.E.2d at 348. The defendant's probation officer made only one attempt to contact him regarding his probation violation before turning the case over to a surveillance officer. *Id.* at 762, 615 S.E.2d at 349. The defendant was eventually arrested for other offenses after his probation term expired. The defendant was never served with his violation report prior to his arrest. The trial court in *Burns* failed to make any findings regarding the efforts of the State to notify the probationer and conduct the hearing.

The *Burns* Court held that the trial court erred by failing to make specific findings under N.C. Gen. Stat. § 15A-1344(f). The Court then determined if evidence in the record could support such findings. The *Burns* Court defined reasonable effort as "the diligent and timely implementation of a plan of action" or "those actions a reasonable person would pursue in seeking to notify defendant of his probation violation and conduct a hearing on the matter." *Id.* at 762, 615 S.E.2d at 349. The *Burns* Court held the State failed to show that it made reasonable efforts to notify the defendant and conduct a hearing as required by N.C. Gen. Stat. § 15A-1344(f)(2). *Id.* at 763, 615 S.E.2d at 350.

In the present case, the probation officer issued an order for arrest on 31 October 2006 and the case was transferred to a surveillance officer. Defendant's probation expired 11 January 2007. The probation violation hearing was held on 14 April 2008. The trial court based its finding of reasonable efforts solely on the transfer of the case to a surveillance officer. This Court has held that transferring a case to a surveillance officer satisfies the reasonable efforts requirement of N.C. Gen. Stat. § 15A-1344(f)(2) if the trial court finds the probationer has absconded supervision. *State v. High*, 183 N.C. App. 443, 449, 645 S.E.2d 394, 398 (2007). However, in the present case, the State alleged defendant was an absconder and the court stated "I'm not going to find him in violation as [an] abscond[er]." Since the trial court did not find that defendant absconded supervision, the trial court erred in finding the State satisfied the reasonable efforts requirement based solely on the transfer of the case to a surveillance officer.

The only other evidence in the record to support a finding that the State made reasonable efforts to contact the defendant is the pro-

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bation officer's phone call and visit to the home of the defendant. In the present case, the probation officer made two attempts to contact the probationer, unlike *Burns*, where the probation officer made only one attempt to contact the probationer. Here, the probation officer's attempts show additional effort by the State to notify the defendant of the revocation hearing prior to the expiration of his term of probation. The additional phone call, however, does not establish that the State's efforts were "the diligent and timely implementation of a plan of action" in seeking to notify defendant of his probation violation and conduct a hearing on the matter. *Burns* at 762, 615 S.E.2d at 349.

The State argues, in part, that its efforts were reasonable because defendant failed to maintain regular contact with his probation officer. We disagree. There is an objective standard used to measure when a party to a litigation has made a reasonable effort to notify another party in the case of a hearing. In considering whether the evidence in the record supports a finding that the State's efforts were reasonable, we do not balance those efforts against the failure of defendant to comply with the conditions of his probation.

IV. Conclusion

The State failed to make reasonable efforts to notify defendant of his probation violations and the intent to hold a probation revocation hearing prior to the expiration of his term of probation. The trial court lacked jurisdiction and authority to revoke defendant's probation. The judgment is vacated.

Judgment vacated.

Judges HUNTER, Robert C. and HUNTER, Robert N., Jr. concur.

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MEHERRIN INDIAN TRIBE, DOROTHY LEE, JONATHAN CAUDILL, MARGO HOWARD, ABBY REID, THERESA LANGSTON, WAYNE MELTON, WAYNE BROWN, AND KELLY BROWN, PLAINTIFFS v. THOMAS LEWIS, ERNEST POOLE, DIANE BYRD, AARON WINSTON, TERRY HALL, PATRICK RIDDICK, JANET L. CHAVIS, DOUG PATTERSON, DENYCE HALL, DOROTHY MELTON, AND BEVERLY MELTON, DEFENDANTS

No. COA08-928

(Filed 2 June 2009)

1. Appeal and Error— appealability—Rule 54 certification—no effect

A Rule 54(b) certification for immediate appeal had no effect where the trial court did not enter a final judgment as to fewer than all of the claims or parties in the action.

2. Appeal and Error— appealability—interlocutory order—motion to dismiss—sovereign immunity—personal jurisdiction

The Court of Appeals denied plaintiffs' motion to dismiss as interlocutory defendants' appeal from the denial of their Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, which was based on sovereign immunity.

3. Appeal and Error— appealability—interlocutory order—sovereign immunity

The denial of defendants' Rule 12(b)(1) motion to dismiss based on sovereign immunity was not immediately appealable pursuant to N.C.G.S. § 1-277(b), nor did it affect a substantial right. Although defendants alleged lack of standing as a second basis for their motion to dismiss at trial, they did not argue on appeal that this affected a substantial right.

4. Appeal and Error— appealability—interlocutory order—sovereign immunity—Rule 12(b)(6) motion to dismiss—substantial right

Plaintiff's motion to dismiss defendant's appeal from the denial of their Rule 12(b)(6) motion to dismiss based on sovereign immunity was denied; such a motion affects a substantial right.

5. Indians— Meherrin Indian Tribe—sovereign immunity—predicate facts not present

The trial court correctly denied defendants' Rule 12(b)(2) and (6) motions to dismiss where those motions were based solely on

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a claim of sovereign immunity as an Indian tribe. The predicate facts which would present a sovereign immunity defense were not present where the tribe has no reservation and has not been recognized by the federal government; and the constitution of the tribe has no functioning judiciary for resolution of intra-tribal disputes to which this dispute could be referred prior to litigation.

Appeal by defendants from order entered 8 May 2008 by Judge Cy A. Grant, Sr., in Hertford County Superior Court. Heard in the Court of Appeals 14 January 2009.

Barry Nakell for plaintiff-appellees.

Patterson Dilthey, LLP, by Edward K. Brooks, for defendant-appellants.

HUNTER, JR., Robert N., Judge.

Thomas Lewis, *et al.* (collectively, “defendants”) appeal an order entered 8 May 2008, which denied their motion to dismiss based on N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6). We affirm the trial court’s dismissal of the Rule 12(b)(2) and (6) motions and dismiss the appeal of the Rule 12(b)(1) motion as interlocutory.

I. Background

The Meherrin Indian Tribe (“the Tribe”) is composed of the descendents of indigenous peoples who formerly resided at the mouth of the Meherrin River Valley and “who are of the same linguistic stock as the Cherokee, Tuscarora, and other tribes of the Iroquois Confederacy of New York and Canada” N.C. Gen. Stat. § 71A-7.1 (2007). These descendents “now resid[e] in small communities in Hertford, Bertie, Gates, and Northampton Counties” *Id.* The Tribe has not been recognized by the federal government and although N.C. Gen. Stat. § 71A-7.1 states that “in 1726 [the Tribe] w[as] granted reservational lands[,]” any such right to these lands now appears extinguished.

The Tribe is governed by the 1996 Meherrin Tribe Constitution and By-Laws, as amended. On 10 November 2007, the Tribe held a duly noticed and regularly scheduled meeting of its General Body. The Tribe, Dorothy Lee, *et al.* (collectively, “plaintiffs”) allege that at that meeting, the General Body removed defendant Thomas Lewis as Chief of the Tribe and scheduled the next meeting of the General Body for 12 January 2008.

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At this second meeting, plaintiffs allege that the General Body removed the remaining members of the Tribal Council, removed the Tribe's representative to the North Carolina Commission on Indian Affairs, and elected a new Tribal Council. As a result of these actions, plaintiffs allege that plaintiff Dorothy Lee became Acting Chief of the Tribe. Plaintiffs further allege that the Secretary of the General Body was removed by the General Body at the Tribe's regularly scheduled 8 March 2008 meeting. It is the dispute between these factions of the Tribe which underlie this litigation.

On 13 March 2008, plaintiffs individually and on behalf of the Tribe filed a complaint against the individuals plaintiffs contend formerly held tribal office. The complaint contained a claim for declaratory judgment, a claim for injunctive relief, and an action to quiet title. Plaintiffs' complaint alleged: (1) the Tribe's General Body removed defendants at tribal meetings on 10 November 2007, 12 January 2008, and 8 March 2008; (2) defendants did not timely appeal their removal to the Tribe's Grievance Committee; (3) plaintiffs were properly elected by the Tribe's General Body at meetings on 12 January 2008 and 8 March 2008; (4) plaintiffs directed defendants to deliver "all books, records, materials, funds, keys, material relating to control of the Meherrin Indian Tribe web site, and property in their possession or control belonging to the Meherrin Indian Tribe[;]" (5) defendants failed to deliver all requested material; and (6) the Tribal Council and the Tribe's General Body never approved the property transfer purportedly accomplished by a deed recorded on 21 October 2005 in Hertford County's Register of Deeds Office.

In addition to the Tribe there is alleged to exist another entity entitled Meherrin Indian Tribe ("MIT, Inc."), a non-profit North Carolina corporation. The legal relationship between the Tribe and the non-profit corporation is not articulated in the pleadings, but the 21 October 2005 deed challenged by plaintiffs transferred a 46.965-acre parcel from MIT, Inc., to "the MEHERRIN INDIAN TRIBE, known as petitioners 119A by the Bureau of Indian Affairs"

On 8 May 2008, defendants filed a pre-answer motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6). Defendants' motion to dismiss claimed "the underlying facts raised in the Complaint arise from acts of self-governance over the people and property of the Meherrin Tribe of North Carolina[;] this action should be dismissed for lack of subject matter jurisdiction, lack of personal jurisdiction and for Plaintiffs' failure to state a claim upon which relief may be granted." Defendants further alleged that "Plaintiffs'

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action should be dismissed for lack of subject matter jurisdiction based on Plaintiffs' lack of standing to bring suit."

The trial court denied defendants' motion to dismiss, found "that [its] Order affect[ed] a substantial right of Defendants[,]" and certified its order for immediate appeal pursuant to N.C. Gen. Stat. §§ 1-277(a) and 1A-1, Rule 54(b). Defendants appeal.

II. Interlocutory Appeal

[1] On 8 August 2008, plaintiffs filed a motion to dismiss defendants' appeal as interlocutory and premature. Plaintiffs alleged the trial court's certification for immediate appeal had no effect and the denial of defendants' motion to dismiss did not affect a substantial right of defendants.

"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, *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). A party may also immediately appeal a denial of a motion to dismiss based on lack of personal jurisdiction. N.C. Gen. Stat. § 1-277(b) (2007).

A. Rule 54(b) Certification

Here, the trial court certified its order "for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure and Section 1-277(a) of the North Carolina General Statutes." The trial court did not, however, "enter[] a final judgment as to fewer than all of the claims or parties in [the] action." *Rowe*, 351 N.C. at 175, 521 S.E.2d at 709. The trial court's certification of its denial of defendants' motion to dismiss has no effect in this instance. We now turn to

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whether this appeal although interlocutory, is properly before us pursuant to N.C. Gen. Stat. § 1-277(b).

B. N.C. Gen. Stat. § 1-277

[2] N.C. Gen. Stat. § 1-277 allows a party to immediately appeal the denial of a motion to dismiss if the denial either (1) affects a substantial right or (2) is based on lack of personal jurisdiction. N.C. Gen. Stat. § 1-277 (2007). In the present case, the sole basis for defendants' Rule 12(b)(2) and (6) motions to dismiss is defendant's claim of sovereign immunity. Defendant's 12(b)(1) motion to dismiss is based on sovereign immunity and plaintiffs' lack of standing.

Defendants' appeal from denial of Rule 12(b)(2) motion

In *Teachy v. Coble Dairies, Inc.*, our Supreme Court stated:

Although the federal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a Rule 12(b)(1) motion regarding subject matter jurisdiction or a Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction becomes crucial in North Carolina because G.S. 1-277(b) allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion.

Teachy v. Coble Dairies, Inc., 306 N.C. 324, 327-28, 293 S.E.2d 182, 184 (1982). While our Supreme Court in *Teachy* declined to determine whether sovereign immunity is a question of subject matter jurisdiction or personal jurisdiction, our Court has held "that an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable." *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) (citing N.C. Gen. Stat. § 1-277 (1996) and *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 133-34, 360 S.E.2d 115, 116 (1987)). Therefore, pursuant to *Data Gen. Corp.* and *Zimmer*, plaintiffs' motion to dismiss defendants' appeal as interlocutory is denied with respect to defendants' appeal from denial of their Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.

Defendants' appeal from denial of Rule 12(b)(1) motion

[3] N.C. Gen. Stat. § 1-277(b) allows only for an immediate appeal of the denial of a motion to dismiss based on personal jurisdiction, not subject matter jurisdiction. Further, pursuant to *Data Gen. Corp.*, the

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claim of sovereign immunity cannot be the basis for a motion to dismiss for lack of subject matter jurisdiction. Therefore, we hold defendants' appeal from the denial of their Rule 12(b)(1) motion based on sovereign immunity is neither immediately appealable pursuant to N.C. Gen. Stat. § 1-277(b), nor affects a substantial right.

Defendants alleged plaintiffs' lack of standing as a second basis for their motion to dismiss based on lack of subject matter jurisdiction. However, on appeal, defendants failed to argue why the denial of a motion to dismiss based on lack of standing affects a substantial right of defendants. "An appellant bears the burden of demonstrating that an order will adversely affect a substantial right." *Crouse v. Mineo*, 189 N.C. App. 232, 235, 658 S.E.2d 33, 35 (2008) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)). Therefore, plaintiffs' motion to dismiss defendants' appeal as interlocutory is granted with respect to defendants' appeal from the denial of their Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

Defendants' appeal from denial of Rule 12(b)(6) motion

[4] Our Court in *Anderson v. Town of Andrews* held that an appeal from the denial of a Rule 12(b)(6) motion to dismiss based on sovereign immunity affects a substantial right and is therefore immediately appealable. *Anderson v. Town of Andrews*, 127 N.C. App. 599, 601, 492 S.E.2d 385, 386 (1997) (citing *EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources*, 108 N.C. App. 24, 27, 422 S.E.2d 338, 340 (1992), *overruled on other grounds by Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997)) (holding if immunity is raised as a basis in the motion for summary adjudication, a substantial right is affected and the denial is immediately appealable). Therefore, plaintiffs' motion to dismiss defendants' appeal from the denial of their Rule 12(b)(6) motion to dismiss based on sovereign immunity is denied.

III. Merits of defendants' appeal

[5] We now turn to review of the trial court's denial of defendants' motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) and (6). Defendants' sole basis for their Rule 12(b)(2) and (6) motions to dismiss is defendants' claim of sovereign immunity.

The Meherrin Tribe has no reservation. The Tribe has not been recognized by the federal government. The constitution of the Tribe has no functioning judiciary for resolution of intra-tribal disputes to which this dispute could be referred prior to litigation. The sole

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source of legal authority of the Tribe flows from N.C. Gen. Stat. § 71A-7.1 which reads as follows:

The Indians now residing in small communities in Hertford, Bertie, Gates, and Northampton Counties, who in 1726 were granted reservational lands at the mouth of the Meherrin River in the vicinity of present-day Parker's Ferry near Winton in Hertford County, and who are of the same linguistic stock as the Cherokee, Tuscarora, and other tribes of the Iroquois Confederacy of New York and Canada, shall, from and after July 20, 1971, be designated and officially recognized as the Meherrin Tribe of North Carolina, and shall continue to enjoy all their rights, privileges, and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law.

While indigenous tribes may enjoy sovereign immunity over some disputes, the predicate facts which would present a sovereign immunity defense are not present here. *See Jackson Co. v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (1987) (dismissing child custody case on jurisdictional grounds of sovereign immunity arising from Eastern Band of Cherokee reservation). Based upon the above-cited statute, the trial court correctly denied defendants' Rule 12(b)(2) and (6) motions to dismiss.

Affirmed in part, dismissed in part.

Judges McGEE and JACKSON concur.

INSULATION SYSTEMS, INC., PLAINTIFF v. JAMES FISHER, DEFENDANT

No. COA08-915

(Filed: 2 June 2009)

Enforcement of Judgments— execution—request for information by sheriff—delay in responding

The trial court erred by imposing a willfulness requirement on the “neglects or refuses” language in N.C.G.S. § 1-324.4 in a case involving defendant's delay in responding to a sheriff's request for information from which to satisfy an outstanding

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judgment. The court's order that plaintiff recover nothing was remanded because it was not clear whether defendant's neglect to provide the information was due to mere failure to act or neglect by carelessness.

Appeal by plaintiff from an order entered 2 May 2008 by Judge Richard W. Stone in Guilford County Superior Court. Heard in the Court of Appeals 28 January 2009.

Nexsen Pruet, PLLC, by Brooks F. Bossong, for plaintiff-appellant.

Manger Law Firm, by Richard A. Manger, for defendant-appellee.

JACKSON, Judge.

Insulation Systems, Inc. ("plaintiff") appeals the trial court's order that it recover nothing in its action against James Fisher ("defendant"), an officer and director of Fisher Roofs and Decks, Inc. ("Fisher Roofs"). For the reasons stated below, we reverse and remand.

On or about 31 March 2006, plaintiff obtained a judgment in Rutherford County against Fisher Roofs. The judgment subsequently was transcribed to Catawba County, where Fisher Roofs was located. On or about 18 July 2006, the Deputy Clerk of Rutherford County Superior Court issued a Writ of Execution to Catawba County in the amount of \$52,264.26, with interest continuing to accrue thereon at the rate of \$9.15 per day until fully paid.

On 2 August 2006, Corporal Kerry Hayer ("Corporal Hayer") of the Catawba County Sheriff's Office presented defendant with documents designed to ascertain the property of Fisher Roofs from which he could satisfy the outstanding judgment. At that time, defendant informed Corporal Hayer that he would have the documents ready on 9 August 2006. When Corporal Hayer returned to retrieve the documents on 9 August 2006, they were not completed.

Corporal Hayer again returned to defendant's office on 13 September 2006 and defendant informed him that the documents may be ready by 15 September 2006. When Corporal Hayer completed the Return of Execution on 25 September 2006, he noted that he had requested the completed documents from defendant on at least three occasions and that defendant refused to return the completed documents, stating that he needed more time to complete them. The only

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property Corporal Hayer ultimately was able to collect pursuant to the Writ of Execution was \$1,408.38.

Plaintiff filed its complaint on 22 December 2006, alleging that defendant was personally liable for the full amount of the judgment against Fisher Roofs because defendant had failed to comply with sections 1-324.2 and 1-324.4 of the North Carolina General Statutes. On 12 March 2007, defendant filed his answer admitting many allegations but denying that he had failed to comply with sections 1-324.2 and 1-324.4. He also asserted the affirmative defense of excusable neglect, claiming that his delay in returning the documents was due to significant health problems. Defendant attached the completed documents to his answer. They were signed and dated 25 January 2007.

The trial court heard the matter in a bench trial on 7 January 2008. The trial court found as fact that the documents provided to defendant contained no deadline for completion and that defendant did not intend to fail to comply, and that he ultimately did comply, with sections 1-324.2 and 1-324.4. Further, the court concluded as a matter of law that in order to hold defendant liable for his noncompliance, plaintiff was required to show that defendant acted intentionally or willfully in failing to respond to the sheriff's request for information. Having failed to show that defendant acted intentionally or willfully, the trial court ordered that plaintiff recover nothing from defendant. Plaintiff appeals.

We note that pursuant to the North Carolina Rules of Appellate Procedure, an appellant's brief is required to contain "a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented." N.C. R. App. P. 28(b)(6) (2007). Plaintiff has failed to state the applicable standard of review in its brief. However, we recognize that when the trial court sits without a jury, the standard of review for this Court

"is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial . . . are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*."

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Luna v. Division of Soc. Servs., 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004) (omission in original) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)).

Here, the dispositive issue is whether the trial court was operating under a misapprehension of the law when it concluded that “[t]he plaintiff was required to show that the defendant acted intentionally or willfully in failing to respond to the sheriff’s request under [section] 1-324.2[.]” We believe that it was.

Pursuant to section 1-324.2, when a public officer seeking to serve a writ of execution against a corporation requests, “[e]very agent or person having charge or control of any property of the corporation . . . shall furnish to [the public officer] the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same.” N.C. Gen. Stat. § 1-324.2 (2005). Section 1-324.4, *inter alia*, provides that “[e]very agent or person who *neglects or refuses* to comply with the provisions of this section and [section] 1-324.2 is liable to pay to the execution creditor the amount due on the execution, with costs.” N.C. Gen. Stat. § 1-324.4 (2005) (emphasis added). Section 1-324.5 further provides that

If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, *willfully refuse* to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, . . . or shall *willfully refuse* to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 1-324.5 (2005) (emphasis added).

“The cardinal principle of statutory interpretation is to ensure that legislative intent is accomplished.” *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490 (citing *Harris v. Nationwide Mutual Ins. Co.*, 332 N.C. 184, 191, 420 S.E.2d 124, 128 (1992)), *disc. rev. denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). “To determine legislative intent, we first look to the language

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of the statute.” *Estate of Wells v. Toms*, 129 N.C. App. 413, 415-16, 500 S.E.2d 105, 107 (1998) (citing *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995)). We are guided in our review by several principles of statutory construction.

[T]he judiciary must give clear and unambiguous language its plain and definite meaning. However, strict literalism will not be applied to the point of producing absurd results. When the plain language of a statute proves unrevealing, a court may look to other indicia of legislative will, including: the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. The intent of the General Assembly may also be gleaned from legislative history. Likewise, later statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute. Statutory provisions must be read in context: Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole. Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each.

In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co., 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (internal quotation marks and citations omitted).

Section 1-324.4 civilly penalizes one who *neglects or refuses* to provide information of corporate assets. “Neglect” is defined as “[t]he omission of proper attention to a person or thing, *whether inadvertent, negligent, or willful*; the act or condition of disregarding.” Black’s Law Dictionary 1061 (8th ed. 2004) (emphasis added). Of the eight definitions provided by Noah Webster, only the seventh connotes a degree of willfulness—“leave undone or unattended to *through carelessness or by intention*.” Webster’s Third New International Dictionary 1513 (1968). Both the legal and the common definitions of neglect permit, but do not require, a party to act willfully. The legislature did not limit the definition of neglect to include only willful conduct. Further, by using the conjunction “or,” the legislature indicated two methods by which the statute would be involved: (1) by refusing to comply, or (2) by merely neglecting to comply.

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Moreover, section 1-324.5 criminally penalizes one who *willfully refuses* to provide corporate asset information. It is clear that the legislature knew the difference between mere refusal—as used in section 1-324.4—and willful refusal as used in this section. By enacting two separate statutes, the legislature clearly intended that two distinct standards be applied. If the refusal to comply is willful and not merely careless, criminal punishment will be imposed. However, mere neglect subjects one to civil punishment.

Here, citing *Williams v. Williams*, 113 N.C. App. 226, 437 S.E.2d 884 (1994), *aff'd*, 339 N.C. 608, 453 S.E.2d 165 (1995) (per curiam), the trial court engrafted a willfulness requirement upon section 1-324.4's "neglects or refuses" language, noting that neglect may mean "(1) failure to do a thing that can be done, (2) to leave undone through carelessness, or (3) to leave undone by intention." In *Williams*, this Court interpreted "neglect" as used in Rule 4(h) of the North Carolina Rules of Civil Procedure, and adopted the second definition, "to leave undone through carelessness." *Williams*, 113 N.C. App. at 229, 437 S.E.2d at 887. It did not go so far as to adopt the third definition requiring an intentional act, as the trial court did here.

Defendant failed to comply with sections 1-324.2 and 1-324.4. The sheriff attempted to obtain the completed documents on at least three occasions, each time being told that defendant needed more time. Defendant did not complete the documents until more than five months after they were requested, and one month after a lawsuit was filed against him, and failed to proffer any reasonable excuse to the trial court for this neglect.

Having determined that the trial court erred in imposing a willfulness requirement on section 1-324.4, we must reverse its order that plaintiff recover nothing from defendant. Because it is not clear whether, pursuant to *Williams*, defendant's neglect to provide the requested information was due to mere failure to act or neglect by carelessness, we remand to the trial court for a determination consistent with *Williams* and this opinion.

Reversed and remanded.

Judges McGEE and Robert N. HUNTER, Jr. concur.

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STATE OF NORTH CAROLINA v. DANNY LEE DALTON, DEFENDANT

No. COA08-873

(Filed 2 June 2009)

Motor Vehicles— impaired driving—sentencing—notice of aggravating factors—effective date of statute

The trial court did not err in an impaired driving prosecution by allowing the State to present evidence of grossly aggravating factors without having complied with the ten-day notice provisions of the amended N.C.G.S. § 20-179(a1)(1). Although defendant acknowledged that the Motor Vehicle Driver Protection Act was passed after the date of his offense, he contended that the statute relates to a mode of procedure and should be applied retroactively. However, defendant focused only on the statute and overlooked the dispositive language in the Act, which had an effective date that was after the date of defendant's offense.

Appeal by defendant from judgment entered 25 January 2008 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 15 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

David Q. Burgess for defendant-appellant.

GEER, Judge.

Defendant Danny Lee Dalton was convicted of driving while impaired (“DWI”) and sentenced to 24 months imprisonment based on the trial court's finding of two grossly aggravating circumstances. On appeal, defendant contends that his sentence is improper because the State failed to give him 10 days notice of its intent to submit grossly aggravating factors, as required by N.C. Gen. Stat. § 20-179(a1)(1) (2007). We hold that the trial court properly concluded that this notice provision did not apply in this case because defendant committed his offense prior to the effective date of the statute providing for 10 days notice. We, therefore, uphold defendant's judgment and commitment.

Facts

On 16 March 2007, defendant was convicted of DWI in Forsyth County District Court. After defendant appealed to superior court, a

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jury also found defendant guilty of DWI. Prior to sentencing, the State announced that it intended to submit evidence of grossly aggravating factors pursuant to N.C. Gen. Stat. § 20-179(c). Defense counsel objected on the grounds that the State had not given defendant 10 days notice of its intent to submit those factors in accordance with the newly-amended N.C. Gen. Stat. § 20-179(a1)(1). The trial court found that the amended version of N.C. Gen. Stat. § 20-179(a1)(1) did not apply to the case, overruled defendant's objection, and permitted the State to submit evidence of grossly aggravating factors.

The trial court subsequently found as grossly aggravating factors defendant's two prior DWI convictions that had occurred within seven years of the charged offense. After finding no aggravating or mitigating factors, the trial court sentenced defendant to 24 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant's sole contention on appeal is that the trial court erred in ruling that N.C. Gen. Stat. § 20-179(a1)(1), as amended, did not apply and that the State was not, therefore, required to give defendant at least 10 days notice of its intent to submit his prior convictions as grossly aggravating factors in sentencing.¹ N.C. Gen. Stat. § 20-179(c) provides that "[a]t the sentencing hearing [of a defendant convicted of an impaired driving offense], based upon the evidence presented at trial and in the hearing, the judge, or the jury in superior court, must first determine whether there are any grossly aggravating factors in the case." As was the situation in this case, it is the responsibility of the judge to determine the existence of any prior convictions that the statute sets out as constituting grossly aggravating factors. N.C. Gen. Stat. § 20-179(c). The statute specifies that grossly aggravating factors include a defendant's prior DWI conviction if that conviction "occurred within seven years before the date of the offense for which the defendant is being sentenced." N.C. Gen. Stat. § 20-179(c)(1)(a).

In 2006, the General Assembly passed the Motor Vehicle Driver Protection Act ("the Act"). 2006 N.C. Sess. Laws ch. 253. Section 23 of the Act created the provision relied upon by defendant by rewriting N.C. Gen. Stat. § 20-179(a1)(1) to state:

1. Defendant included in the record on appeal an assignment of error asserting that the State's failure to comply with N.C. Gen. Stat. § 20-179(a1)(1) violated his due process rights. Although defendant cites this assignment of error in his brief, he does not present any argument on the issue. Therefore, we deem that assignment of error abandoned under N.C.R. App. P. 28.

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If the defendant appeals to superior court, and the State intends to use one or more aggravating factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent. The notice shall be provided no later than 10 days prior to trial and shall contain a plain and concise factual statement indicating the factor or factors it intends to use under the authority of subsections (c) and (d) of this section. The notice must list all the aggravating factors that the State seeks to establish.

Id. sec. 23.

Although defendant acknowledges that this Act was passed after the date of his offense, he argues that the statute relates to a mode of procedure and should, therefore, be applied retroactively. As defendant asserts, the Supreme Court held in *State v. Green*, 350 N.C. 400, 404-05, 514 S.E.2d 724, 727, *cert. denied*, 527 U.S. 1066, 144 L. Ed. 2d 840, 120 S. Ct. 38 (1999), that “statutes relating to modes of procedure are generally held to operate retroactively, where the statute or amendment does not contain language clearly evincing a contrary legislative intent.”

Defendant, however, in contending that the General Assembly did not express an intent contrary to retroactive application, has focused only on the statute as codified and has overlooked the dispositive language contained in the Act itself. Section 33 of the Act specifically addresses the effective dates of the various sections of the Act and states:

Sections 20.1, 20.2, and the requirement that the Administrative Office of the Courts electronically record certain data contained in subsection (c) of G.S. 20-138.4, as amended by Section 19 of this act, become effective after the next rewrite of the superior court clerks system by the Administrative Office of the Courts. *The remainder of this act becomes effective December 1, 2006, and applies to offenses committed on or after that date.*

(Emphasis added.)²

By the terms of the Act, therefore, section 23 of the Act—creating the notice provisions in N.C. Gen. Stat. § 20-179(a1)(1)—applies only to offenses committed on or after 1 December 2006. The date of defendant’s offense was 27 May 2006. Accordingly, the trial court did

2. These effective dates were amended in 2007 N.C. Sess. Laws ch. 493 sec. 5 as to sections 6 and 23 only of the Motor Vehicle Driver Protection Act of 2006.

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not err in allowing the State to present evidence of grossly aggravating factors without having complied with the 10-day notice provisions of the amended N.C. Gen. Stat. § 20-179(a1)(1).

No error.

Judges STEELMAN and STEPHENS concur.

IN THE MATTER OF: N.E.L., A MINOR CHILD

No. COA08-1573

(Filed 2 June 2009)

Jurisdiction— subject matter—expiration of summons

An order terminating respondent's parental rights was vacated where respondent "accepted" service 285 days after the summons was issued. There was no endorsement, extension, or alias and pluries summons, and any subject matter jurisdiction the court had pursuant to the issuance of a summons was discontinued and expired before respondent's parental rights were terminated.

Appeal by respondent from an order entered 30 October 2007 by Judge J. Stanley Carmical in Robeson County District Court. Heard in the Court of Appeals 5 May 2009.

No brief, for Robeson County Department of Social Services, petitioner-appellee.

North Carolina Administrative Office of the Courts, by Associate Legal Counsel Pamela Newell Williams, for Guardian ad Litem.

Robin E. Strickland, for respondent-appellant mother.

JACKSON, Judge.

Respondent-mother ("respondent") appeals the termination of her parental rights to her son, N.E.L. For the reasons stated below, we vacate.

Robeson County DSS ("DSS") took custody of N.E.L. on 6 January 2005, when he was just three days old. His mother had had no

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prenatal care and had used drugs during her pregnancy. N.E.L. tested positive at birth for cocaine. On 10 May 2005, N.E.L. was adjudicated a neglected juvenile within the meaning of North Carolina General Statutes, section 7B-101(15).

DSS filed a petition to terminate respondent's parental rights on 1 December 2006. A summons was issued to respondent, but it was returned unserved on 6 December 2006. That original summons has no endorsement. Neither a new summons nor an alias and pluries summons was issued. On 12 September 2007, respondent signed a document purporting to accept service of a summons and petition. No summons was issued to or served upon N.E.L., nor was any summons served upon a guardian *ad litem* on his behalf.

On 24 October 2007, the trial court held a hearing on the termination of respondent's parental rights. In its order filed 30 October 2007, the trial court made findings of fact and concluded as a matter of law that grounds existed to terminate respondent's parental rights and that it was in N.E.L.'s best interests to do so. Therefore, the trial court terminated respondent's parental rights. Respondent appeals.

Respondent first argues that the trial court lacked subject matter jurisdiction to terminate her parental rights because she was not served with a valid summons. We agree.

We often have stated that “[t]he question of subject matter jurisdiction may be raised at any time, even in the Supreme Court.” *In re A.F.H-G*, 189 N.C. App. 160, 160-61, 657 S.E.2d 738, 739 (2008) (quoting *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986)). We review matters of subject matter jurisdiction *de novo*. *In re J.A.P.*, 189 N.C. App. 683, 685, 659 S.E.2d 14, 16 (2008).

Pursuant to North Carolina General Statutes, section 7B-1106(a), “upon the filing of the petition [to terminate parental rights], the court shall cause a summons to be issued.” N.C. Gen. Stat. § 7B-1106(a) (2007). “The summons shall be directed to the [juvenile's parent] . . . who shall be named as [a] respondent[.]” N.C. Gen. Stat. § 7B-1106(a)(1) (2007).

Our Supreme Court recently rejected the notion, that “service of the summons on any particular party is necessary to invoke the trial court's subject matter jurisdiction.” *In re N.C.H.*, 363 N.C. 116, 116, — S.E.2d —, — (2009) (citing *In re J.T. (I)*, 363 N.C. 1, 4-5, 672 S.E.2d 17, 19 (2009) (“[T]he trial court's subject matter jurisdiction was properly invoked upon the *issuance* of a summons.”))

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(emphasis added)). However, pursuant to Rule 4 of the North Carolina Rules of Civil Procedure, service of a summons “must be made within 60 days after the date of the issuance of summons.” N.C. Gen. Stat. § 1A-1, Rule 4(c) (2007). “[A] summons that is not served within [this] period becomes dormant and cannot effect service over the defendant, but may be revived by either of [] two methods.” *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 158, 323 S.E.2d 458, 461 (1984).

Within ninety days of issuance, a plaintiff either may secure an endorsement upon the original summons for an extension of time within which to complete service of process or sue out an alias or pluries summons. N.C. Gen. Stat. § 1A-1, Rule 4(d)(1), (2) (2007). Additionally, a plaintiff make seek an extension of time pursuant to Rule 6 upon motion and a showing of excusable neglect. N.C. Gen. Stat. § 1A-1, Rule 6(b) (2004); *Hollowell v. Carlisle*, 115 N.C. App. 364, 444 S.E.2d 681 (1994); *Dozier v. Crandall*, 105 N.C. App. 74, 76-77, 411 S.E.2d 635, 637 (1992). “The consequence of not obtaining an endorsement, extension, or alias/pluries summons within ninety days after the issuance of the summons is the discontinuation of the action.” *In re A.B.D.*, 173 N.C. App. 77, 85, 617 S.E.2d 707, 713 (2005). The action is treated as if it had never been filed. *Johnson v. City of Raleigh*, 98 N.C. App. 147, 148-49, 389 S.E.2d 849, 851, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 176 (1990). “[W]here an action has not been filed, a trial court necessarily lacks subject matter jurisdiction.” *In re A.B.D.*, 173 N.C. App. at 86, 617 S.E.2d at 713.

Here, respondent “accepted service” on 12 September 2007, 285 days after the summons was issued. At that time, it was as though no action had been filed because there was no endorsement, extension, or alias and pluries summons. Accordingly, any subject matter jurisdiction the court had pursuant to the issuance of a summons was discontinued and expired before respondent’s parental rights were terminated. Therefore, we must vacate the trial court’s order terminating respondent’s parental rights.

Because our review of this issue is dispositive, we need not address respondent’s other argument with respect to the issuance and service of a summons upon N.E.L.

Vacated.

Judges WYNN and Robert N. HUNTER, Jr. concur.

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STATE OF NORTH CAROLINA v. BARRY SCOTT VIA

No. COA08-1147

(Filed 2 June 2009)

1. Appeal and Error— motion to dismiss in superior court— review of district court preliminary determination

Defendant did not have a statutory right to appeal from superior court, but *certiorari* was granted, where the superior court denied defendant's motion to dismiss the State's appeal from a district court preliminary determination that it would dismiss impaired driving charges. While N.C.G.S. § 15A-1432(d) provides a method by which a defendant may appeal the ruling of a superior court finding that a judgment, ruling or order dismissing criminal charges in district court was in error, the district court here did not dismiss the charges.

2. Criminal Law— appeal by State to Superior Court—motion to dismiss—review of preliminary determination

The Court of Appeals affirmed a superior court order denying defendant's motion to dismiss a prosecution after the State's appeal from a preliminary district court determination that it would grant a dismissal for defendant. The matter was remanded to superior court for review of the district court's preliminary determination.

Appeal by defendant from order entered 21 May 2008 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 9 March 2009.

Roy Cooper, Attorney General, by Sebastian Kielmanovich, Assistant Attorney General, for the State.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Tobias S. Hampson, and Fanney & Jackson, P.C., by John K. Fanney, for defendant-appellant.

Center for Death Penalty Litigation, by Thomas K. Maher, and The Ward Law Firm, P.A., by David J. Ward, for North Carolina Advocates for Justice, amicus curiae.

MARTIN, Chief Judge.

Barry Scott Via ("defendant") appeals from the order of the superior court denying his motion to dismiss the State's appeal,

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made pursuant to N.C.G.S. § 20-38.7(a), and to declare N.C.G.S. §§ 20-38.6(f) and 20-38.7 unconstitutional. We affirm.

Defendant was charged with operating a motor vehicle without decreasing speed as necessary to avoid a collision, possessing an open container of alcohol in the passenger area of a vehicle while operating the vehicle, and driving while impaired. When the matter came on for hearing in Nash County District Court, defendant filed a pretrial motion to dismiss. Pursuant to N.C.G.S. § 20-38.6, the district court preliminarily ruled the motion to dismiss should be allowed. The State appealed the district court's preliminary determination to superior court, where defendant then filed a motion to dismiss the State's appeal and to declare N.C.G.S. §§ 20-38.6(f) and 20-38.7 unconstitutional. The superior court entered an order denying defendant's motion. Defendant gave notice of appeal, after which the superior court certified this matter as appropriately justiciable in the appellate division pursuant to N.C.G.S. § 15A-1432. Additionally, defendant filed a petition for writ of certiorari in this Court.

[1] N.C.G.S. § 15A-1432(d) provides a method by which a defendant may appeal the ruling of a superior court which “finds that a *judgment, ruling, or order* dismissing criminal charges in the district court was in error.” N.C. Gen. Stat. § 15A-1432(d) (2007) (emphasis added). In the case at bar, the district court did not dismiss criminal charges, but rather made a preliminary determination, pursuant to N.C.G.S. § 20-38.6(f), that it would grant defendant's pretrial motion to dismiss. The superior court did not rule on the merits of the district court's preliminary determination, but instead merely denied defendant's motion to dismiss the State's appeal and declare N.C.G.S. §§ 20-38.6(f) and 20-38.7 unconstitutional. As such, N.C.G.S. § 15A-1432 does not provide defendant a statutory right of appeal from the superior court's ruling in this case and we must dismiss defendant's appeal.

However, this Court may issue a writ of certiorari “when no right of appeal from an interlocutory order exists.” N.C.R. App. P. 21(a)(1). Having determined that defendant has no statutory right of appeal from the superior court's order, we exercise our discretion to grant the State's petition for writ of certiorari.

[2] Defendant's assignments of error and arguments in this appeal are essentially identical to those raised by the defendant in *State v. Fowler*, 197 N.C. App. —, — S.E.2d — (2009). For the reasons stated in that opinion, we reject defendant's arguments in this case.

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The order denying defendant's motion is affirmed and this case is remanded to the superior court for review of the district court's preliminary determination that it would grant defendant's pretrial motion to dismiss made in accordance with N.C.G.S. § 20-38.6(a).

Affirmed.

Judges WYNN and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 JUNE 2009

CAROLINA POLE, INC. v. FIRSTENERGY CORP. No. 08-829	Brunswick (07CVS2027)	Affirmed
DOWNNEY v. MARTIN No. 08-1380	Yancey (08CVM47)	Reverse and remand
EAST CAMP, L.L.C. v. SPRUILL No. 08-1081	Tyrrell (07CVS90)	Affirmed in part, reversed in part
IN RE A.O.S. No. 09-126	Columbus (05JT44)	Vacated & remanded
IN RE B.C., B.C.2., J.B., J.D. No. 08-1513	Scotland (03JA122-23) (05J96) (07J42)	The orders in cases 03J123, 05J96, and 07J42 are Affirmed. The appeal in case 03J122 is Dismissed.
IN RE B.J.M. & B.N.M. No. 09-77	Wilkes (08JA27-28)	Affirmed
IN RE C.F.S. & J.D.S. No. 09-47	Forsyth (07JT134) (02JT332)	Affirmed
IN RE E.M.C. & P.A.C. No. 08-1583	Cabarrus (05JA222-23)	Affirmed
IN RE J.B. No. 08-1590	Durham (06JB78)	Dismissed in part; affirmed in part
IN RE J.B.G., III, T.F.A. No. 09-177	Iredell (05JT198) (99JT143)	Affirmed
IN RE L.S.C-W. No. 09-54	Mecklenburg (06JT1353)	Affirmed
IN RE M.L.V. & Z.A.V. No. 09-198	Burke (06J8-9)	Affirmed
LOVICK v. FARRIS No. 08-1335	Lee (07CVS930)	Dismissed
MIDGETT v. FOOD LION, LLC No. 08-1268	Ind. Comm. (IC472954)	Affirmed
PAUL v. MECHWORKS MECH. CONTR'S No. 08-1245	Ind. Comm. (IC327356)	Affirmed

STATE v. AUSTIN No. 08-1382	Beaufort (07CRS50939-40) (07CRS50444)	No error
STATE v. BAILEY No. 08-1328	Wilson (03CRS51920) (03CRS51930) (04CRS8587)	No prejudicial error in part; vacated in part and remanded for resentencing
STATE v. BIONGO No. 09-226	Wake (07CRS76757) (08CRS8492)	No error
STATE v. BLINDERMAN No. 08-824	Henderson (07CRS2270)	No error
STATE v. BONDS No. 08-1397	Catawba (08CRS1457) (08CRS1701)	No error
STATE v. BREWTON No. 08-1338	Bertie (07CRS51191)	No error
STATE v. BROWN No. 08-1142	Forsyth (06CRS61315)	No error
STATE v. BURNS No. 08-1181	Wake (06CRS30648)	Affirmed
STATE v. CHANCE No. 08-1362	Moore (07CRS2201) (07CRS853)	No error
STATE v. COON No. 08-1501	Wilkes (07CR54211)	Remanded for resentencing
STATE v. DISROE No. 08-1121	Wake (06CRS84545) (06CRS84547)	No error
STATE v. ELDRIDGE No. 08-1219	Forsyth (06CRS37789) (06CRS63855)	No error
STATE v. FOWLER No. 08-1577	Wayne (07CRS50264)	No error
STATE v. FULTON No. 08-1210	Forsyth (06CRS13215) (06CRS54935-36)	No error
STATE v. GARY No. 08-1535	Durham (07CRS47792)	No error
STATE v. HOLMES No. 08-1421	Cumberland (04CRS69935)	No error

STATE v. HUDSON No. 08-1481	Wake (06CRS114677-78)	No error
STATE v. KITTRELL No. 08-988	Wake (05CRS108603) (05CRS125496)	Vacated
STATE v. KNOTTS No. 08-1559	Mecklenburg (06CRS249296) (07CRS43748)	No error
STATE v. NEWSOME No. 08-1430	Northampton (08CRS50180-81)	No error
STATE v. PARKER No. 08-1470	Cleveland (07CRS611-12)	No error
STATE v. REESE No. 08-1336	Wake (06CRS63578)	No error
STATE v. SMITH No. 08-1350	Haywood (07CRS53936)	No error
STATE v. SMITH No. 08-1463	Haywood (04CRS3785-86)	No error
STATE v. SMITH No. 07-172-2	Cleveland (03CRS50708-09)	No error
STATE v. STALLINGS No. 08-1379	Union (05CRS50861) (07CRS53247)	Dismissed in part; vacated and re- manded for resentencing
STATE v. STANBACK No. 08-1000	Forsyth (06CRS29688) (06CRS62679)	No prejudicial error
STATE v. STEPHENS No. 08-1420	Robeson (06CRS54452)	No error
STATE v. STUDIVENT No. 08-1507	Guilford (08CRS24431) (08CRS87647)	No error

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MAXINE SHELTON AND JERRY SHELTON, PLAINTIFFS v. STEELCASE, INC. AND
M.B. HAYNES CORPORATION, DEFENDANTS

No. COA08-560

(Filed 16 June 2009)

**1. Workers' Compensation— special employee—exclusivity—
motion for directed verdict denied**

There was sufficient evidence to go to the jury on the question of whether plaintiff, who worked for a contract janitorial service and who was injured while working at Steelcase, was a special employee of Steelcase, so that the exclusivity provisions of Workers' Compensation would apply. The trial court properly denied Steelcase's motion for a directed verdict and motion for JNOV.

2. Workers' Compensation— special employee—instructions

Instructions on special employment contained correct statements of law, or were not addressed due to the failure to object at trial.

**3. Premises Liability— door leaning against wall—evidence of
hazard sufficient**

The trial court properly concluded that Steelcase was not entitled to a directed verdict or a JNOV on a premises liability claim that arose when a heavy fire door stored against a wall fell on plaintiff Maxine Shelton while she was working in Steelcase's facility. The evidence supported a jury finding that the door was a hazardous condition, that Steelcase knew or should have known of its hazardous nature, that Steelcase did not warn Ms. Shelton of the hazard, and that Ms. Shelton was then injured by that hazard.

**4. Negligence— contributory—heavy door leaning unsecured
against wall—hiring non-English speaking worker—not
required to anticipate another's negligence**

The trial court properly refused to submit the issue of contributory negligence to the jury in a case that arose when a heavy fire door stored against a wall fell on Ms. Shelton as she cleaned Steelcase's facility. Steelcase's argument that Ms. Shelton was contributorily negligent in hiring a worker who did not speak English and who must have tried to move the door after he was told not to was conjecture. Moreover, Ms. Shelton was not re-

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quired to anticipate that Steelcase would leave a 300 pound door leaning unsecured against a wall.

5. Negligence—workplace injury—contractor’s injury—workers’ compensation recovered—allegations of employer’s negligence by third party

The trial court did not err by not submitting to the jury the issue of negligence by Ms. Shelton’s employer in an action that arose when a heavy fire door fell on Ms. Shelton, a Drew employee, as she cleaned Steelcase’s facility. Although Steelcase argues that it was entitled to have the issue of Drew’s negligence submitted to the jury on its answer alone under N.C.G.S. § 97-10.2(e), that statute did alter the basic civil procedure principle that a defense alleged in an answer may be submitted to the jury only if the defendant forecasts sufficient evidence to allow the jury to find for the defendant on that issue.

6. Negligence—insulating—joint and several liability

The trial court erred by granting summary judgment for defendant Haynes in an action that rose from when a heavy door leaning against a wall that had been moved by Haynes employees fell on Ms. Shelton, an employee of Drew, while she cleaned Steelcase’s facility. There was an issue of fact as to the distance from the wall to the door; although Haynes argued that the door would not have fallen if it had been secured to the wall by Steelcase, negligence by Steelcase does not necessarily insulate Haynes.

Appeal by plaintiffs from order entered 13 July 2007 by Judge Mark E. Powell and appeal by defendant Steelcase, Inc. from order and judgment entered 29 November 2007 by Judge James U. Downs in Henderson County Superior Court. Heard in the Court of Appeals 19 November 2008.

Grimes & Teich LLP, by Scott M. Anderson; and Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham and Roy G. Pettigrew, for plaintiffs.

Dean & Gibson PLLC, by Rodney Dean and Barbara J. Dean, for defendant Steelcase, Inc.

Ball, Barden & Bell, P.A., by Thomas R. Bell, for defendant-appellee M.B. Haynes Corporation.

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GEER, Judge.

Defendant Steelcase, Inc. appeals from the trial court's order and judgment denying its motions for directed verdict and judgment notwithstanding the verdict ("JNOV") and upholding the jury's verdict finding Steelcase liable to plaintiffs Maxine Shelton and her husband Jerry Shelton for negligence and loss of consortium. Plaintiffs have also appealed from the trial court's order granting summary judgment to defendant M.B. Haynes Corporation.

Steelcase primarily argues that plaintiffs were precluded from proceeding with their negligence action because Ms. Shelton, although formally employed by another company, should have been considered a special employee of Steelcase as a matter of law and, therefore, subject to the exclusive remedy of workers' compensation. One of the critical elements for finding a special employee is that the special employer had the right to control the details of the alleged special employee's work. Since Steelcase had by contract expressly provided that Ms. Shelton's employer would be responsible for the supervision and control of Ms. Shelton's work, Steelcase has not demonstrated its entitlement to a directed verdict or JNOV on that issue.

Alternatively, Steelcase argues that its motions for a directed verdict or JNOV should have been granted for lack of evidence of negligence. Steelcase's arguments fail to recognize that this case was tried on a premises liability theory. Since plaintiffs presented evidence that Steelcase maintained a hazardous condition on its premises (an unsecured fire door leaning against a wall), that it knew or should have known that the unsecured door was a hazard, that it nonetheless failed to warn Ms. Shelton of that hazard, and that the hazardous nature of the door was not open and obvious, we hold that the trial court properly denied defendants' motions. Steelcase's remaining arguments are unpersuasive and, therefore, we find no error.

With respect to plaintiffs' appeal, we hold that plaintiffs presented sufficient evidence to raise an issue of fact regarding whether M.B. Haynes workers moved the fire door into a position making it likely that it would tip over and fall—precisely what occurred here—with the result that Ms. Shelton was seriously injured. Because genuine issues of material fact existed, the trial court erred in granting summary judgment to M.B. Haynes. We, therefore, reverse the summary judgment order and remand for further proceedings.

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Facts

At the time of trial, Ms. Shelton was 53 years old and had a GED. Sometime in 2000, she began working for Drew, LLC, a company that contracted with other businesses to provide cleaning and janitorial services. Drew provided services to Steelcase, with Ms. Shelton being the on-site supervisor at Steelcase's Fletcher, North Carolina facility.

In October 2003, Steelcase decided to consolidate some of its space in the 990,000 square-foot Fletcher facility and lease the unused space to generate revenue. Steelcase opted to lease out the maintenance area of the facility and hired M.B. Haynes Corporation to remove some duct work in that area and install a new dock door. In addition, Steelcase requested that Drew, as a special project, clean out the maintenance area so that Steelcase could lease that space to a tenant it had found. Prior to beginning the cleanup project, none of the Drew employees, including Ms. Shelton, had been allowed to enter the maintenance area. Robert Flicker, Steelcase's maintenance manager, told Ms. Shelton that he had marked the items in the maintenance area to be discarded with spray paint and that Drew employees should remove those items that could be picked up by hand.

The scope of the project required Drew to hire another worker. Ms. Shelton hired Alfredo Morales, who primarily spoke Spanish. Another Drew employee, Tomas Vergera, translated for Ms. Shelton. On 29 October 2003, Ms. Shelton, Mr. Vergera, and Mr. Morales did a walk-through of the maintenance area. On that same day, other Steelcase employees were in the area moving materials. M.B. Haynes also had employees working in the maintenance area, cleaning the walls, cutting a hole in the wall with heavy machinery, removing ducting near the pipes and conduits on the wall, and excavating just outside the area for a new dock.

Ms. Shelton gave Mr. Morales instructions, through Mr. Vergera, about what to do. When Mr. Morales pointed to a fire door leaning against the wall with an "X" spray painted on it, Ms. Shelton told Mr. Morales "no," pointed to Mr. Vergera, and indicated that Mr. Vergera would have to remove it with a forklift. The fire door was roughly eight feet long and six feet high and weighed about 300 pounds.

Kenneth Matthews, the Fletcher facility maintenance supervisor, testified that the fire door had been removed from a wall in another section of the facility and moved to the maintenance area for storage.

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The door had been in storage for two or three years prior to the accident. James Ogle, an electrician at the Fletcher plant, stated that about three to four months before the accident, the door was secured to conduits on the wall with rope, but at the time of the accident, the rope was gone. The maintenance area had also been cordoned off with curtains and some sort of fence or cage, but the curtain, cage, and rope had all been removed from the area for the cleaning project.

The fire door was propped up against an uneven wall. Coming down from the ceiling, the wall recessed five to six inches and continued to the floor; piping or conduit also ran down the wall to the floor. The fire door was leaning against the conduits along this span, so that the conduits held the door off the wall several inches. One of the conduits had flex or “spring” in it and could be pushed in. Mr. Flicker admitted this “probably wasn’t the best place to store the door”

Ms. Shelton testified that when she first saw the fire door, it looked like it was standing straight up against the wall, as if it were part of the wall. At first glance, she thought that it might be a door to another room because there were other doors like it throughout the plant and she had never been in this part of the facility before.

Near the end of the day, Ms. Shelton returned to the maintenance area to check on Mr. Morales’ progress. As most of the trash had been cleared, Ms. Shelton pointed at a broom, indicating that Mr. Morales should sweep the floor. Mr. Morales nodded and turned in the direction of the broom. Ms. Shelton spotted a metal C-clamp on the floor and bent down to pick it up. At that moment, the fire door fell on Ms. Shelton, pinning her to the floor. Mr. Morales heard her cry out and ran to lift the door off of her, but it was too heavy. Mr. Morales shouted for help and two M.B. Haynes employees, Thomas Allen and Jeffrey Burrell, who were working in the area came running. They were able to lift the door off of Ms. Shelton.

Eighteen months after the accident, Mr. Allen and Mr. Burrell told M.B. Haynes’ safety director, Charles Lively, that they had moved the fire door the day before it fell on Ms. Shelton. Mr. Allen explained that he and Mr. Burrell were cleaning the wall on which the door was positioned. Mr. Allen was in a lift using an air hose to blow off the wall, and Mr. Burrell was below guiding the hose. Seeing skid marks from the door on the floor, the two men were concerned that they might have moved the door while working with the hose. The men moved the bottom of the door closer to the base of the wall, so that it was

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close to a “straight angle.” Mr. Allen stated that they “repositioned it against the wall where it was steadfast, where we felt comfortable with it, and left it there. Left it alone. It was in the same place it was, but we had just rectified it.” Mr. Allen believed that it would be safer to place the door flat on the ground but decided not to do so because he and Mr. Burrell were not authorized under M.B. Haynes’ safety policy to move the door.

As a result of the door falling on her, Ms. Shelton sustained a crushed pelvis with multiple fractures, a broken sacrum, and nerve damage. She spent two weeks in the hospital and was bedridden for a month afterward. Ms. Shelton continues to have headaches, blurred vision, and intestinal dysfunction. She is no longer physically able to have sex with her husband. She walks with a cane and takes several medications.

On 3 October 2005, Ms. Shelton and her husband filed suit against Steelcase. Subsequently, on 18 August 2006, plaintiffs amended their complaint to add M.B. Haynes as a defendant. Steelcase, M.B. Haynes, and plaintiffs all moved for summary judgment. The trial court denied summary judgment to Steelcase and plaintiffs, but granted summary judgment to M.B. Haynes. Plaintiffs’ negligence and loss of consortium claims against Steelcase proceeded to trial, where a jury found Steelcase liable to Ms. Shelton in the amount of \$1,250,000.00, although it awarded no damages to Mr. Shelton. Steelcase moved for JNOV, a new trial, and reduction of the verdict based on indemnification. In an order and judgment entered 29 November 2007, the trial court denied Steelcase’s motions, entered judgment on the verdict, allowed costs to plaintiffs in the amount of \$7,879.11, and awarded prejudgment and postjudgment interest. Steelcase timely appealed to this Court from that order and judgment. Plaintiffs timely appealed from the trial court’s order granting M.B. Haynes’ motion for summary judgment.

Steelcase’s Appeal

A. Special Employment Doctrine

[1] Steelcase argues, as an initial matter, that the trial court should have granted its motions for a directed verdict and JNOV because Ms. Shelton was a special employee of Steelcase. According to Steelcase, because Ms. Shelton was an employee of both Drew and Steelcase, any claim alleging negligence by Steelcase would be barred by the exclusivity provisions of the Workers’ Compensation Act. *See* N.C.

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Gen. Stat. § 97-10.1 (2007) (providing that if the employee and employer are subject to the Act, the rights and remedies of employee exclude all remedies against employer at common law).

The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002). We must determine “whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.” *Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003) (quoting *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003)). A motion for either a directed verdict or JNOV “should be denied if there is more than a scintilla of evidence supporting each element of the non-movant’s claim.” *Branch*, 151 N.C. App. at 250, 565 S.E.2d at 252 (quoting *Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998)).

Our courts have recognized that under the “special employment” or “borrowed servant” doctrine, “a person can be an employee of two different employers at the same time.” *Brown v. Friday Servs., Inc.*, 119 N.C. App. 753, 759, 460 S.E.2d 356, 360, *disc. review denied*, 342 N.C. 191, 463 S.E.2d 234 (1995). When an employee is employed by one company (the “general” employer), but a party contends the employee was also a special employee of a second company, the courts apply a three-prong test to determine whether the employee is a “special employee” for purposes of the Workers’ Compensation Act’s exclusivity provisions:

“When a general employer lends an employee to a special employer, the special employer becomes liable for workmen’s compensation only if:

- (a) the employee has made a contract of hire, express or implied, with the special employer;
- (b) the work being done is essentially that of the special employer; and
- (c) the special employer has the right to control the details of the work.

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When all three of the above conditions are satisfied in relation to both employers, both employers are liable for worker's compensation."

Anderson v. Demolition Dynamics, Inc., 136 N.C. App. 603, 606, 525 S.E.2d 471, 473 (quoting 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 67 (1999) [hereinafter Larson's]), *disc. review denied*, 352 N.C. 356, 544 S.E.2d 546 (2000). In making this determination, however, "[c]ontinuation of the 'general' employment is presumed, and the party asserting otherwise must make a 'clear demonstration that a new . . . employer [was] substituted for the old.'" *Id.* at 607, 525 S.E.2d at 473 (quoting *Larson's* § 67.02).

We need not address the second prong because Steelcase has failed to establish that no issue of fact exists as to the first and third prongs—in other words, whether (1) Ms. Shelton made a contract for hire with Steelcase, and (2) whether Steelcase had the right to control the details of Ms. Shelton's work. Viewing the evidence in the light most favorable to Ms. Shelton, the record contains sufficient evidence to submit the special employee issue to the jury.

With respect to the first prong, this Court stated in *Anderson*, the contract requirement is "crucial" because:

the employee loses certain rights along with those gained when striking up a new employment relation. Most important of all, he or she loses the right to sue the special employer at common law for negligence; and . . . the courts have usually been vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common-law suit.

Id. at 607-08, 525 S.E.2d at 473-74 (quoting *Larson's* § 67.01[2]). Steelcase does not contend that it had an express contract with Ms. Shelton, but rather that she had an implied employment agreement with Steelcase since she was hired by Drew "for the express purpose of working and supervising at Steelcase," she had her own office at Steelcase, and she worked at the Steelcase plant full time.

Evidence of a more compelling nature than that presented by Steelcase was, however, deemed insufficient to justify summary judgment in *Anderson*. The defendant in *Anderson* pointed to evidence that the alleged special employer contacted the decedent directly about working on a project, and the decedent sought permission from the general employer to work on the project, came to the site, and

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accepted the assignment. *Id.* at 608, 525 S.E.2d at 474 (“These actions standing alone do not conclusively satisfy the contract for employment prong of the special employer test.”).

Here, there is no evidence that Steelcase contacted Ms. Shelton, but rather the evidence is that Steelcase entered into a contract with Drew to provide cleaning services and that Drew elected to provide those services through assignment of Ms. Shelton to the Steelcase facility. Further, evidence was offered that, pursuant to the Drew/Steelcase contract, Drew was required to provide Drew employees to provide the cleaning services and that contract stated that those personnel “will be employees of the Contractor.” The record contains extensive evidence from various witnesses, including Steelcase’s Human Resources Manager, identifying Ms. Shelton as an employee of Drew and not an employee of Steelcase. In addition, Drew paid Ms. Shelton, withheld her taxes, was responsible for her workers’ compensation insurance, and paid her benefits.

While Steelcase points to the fact that Ms. Shelton was working on a special project for Steelcase at the time of the injury, the contract gave Drew employees the power to do projects for Steelcase, as needed, that were outside the standard services provided. Ms. Shelton did not receive any additional compensation for such special projects, although Steelcase was required to pay Drew additional sums.

This evidence is more than the scintilla necessary to send the issue of special employment to the jury. *See id.* at 608-09, 525 S.E.2d at 474 (holding that issue of fact as to existence of implied contract existed based on evidence that decedent was paid and insured through general employer, defendant did not pay payroll taxes for decedent or claim him as employee for insurance purposes, decedent (when alive) identified himself as employee of general employer, and general employer gave decedent his assignments and permission to work on specific jobs).

This Court has stressed that “[t]he third prong, control of the *detail* of the work, may be the most significant.” *Id.* at 609, 525 S.E.2d at 474 (emphasis added). *See also Moody v. Kersey*, 270 N.C. 614, 621, 155 S.E.2d 215, 220-21 (1967) (“The crucial test in determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passes under the latter’s right of control with regard not only to the work to be done *but also to the manner of performing it.*” (quoting *Weaver v. Bennett*, 259 N.C. 16, 28, 129 S.E.2d 610, 618 (1963))); *Wolfe v.*

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Wilmington Shipyard, Inc., 135 N.C. App. 661, 669, 522 S.E.2d 306, 312 (1999) (upholding directed verdict for plaintiff “[b]ecause the record contains no evidence [the alleged special employer] exercised actual control *over the manner of [the employee’s] performance*” (emphasis added)).

On this prong, Steelcase points to evidence that Steelcase’s maintenance manager spoke with Ms. Shelton daily about what projects needed to be done and that Ms. Shelton was required to ensure that Steelcase was satisfied with her services. As for the special project of cleaning out the vacated area of the Steelcase plant, Steelcase again points only to evidence that its managers, including Mr. Flicker, explained to Ms. Shelton what they wanted done on the project. Steelcase has pointed to no evidence that it had the right to tell Ms. Shelton specifically how to go about completing the projects, but only that it designated what projects she needed to do. Indeed, Mr. Flicker testified with respect to the fire door that it would have been up to Drew to decide “as to how specifically they” went about disposing of the door.

Even more significantly, the contract between Steelcase and Drew specified in a provision entitled “Supervision”: “[Drew] will be solely responsible for the direction and supervision of personnel assigned to the facility, except that maintenance supervisor shall direct the duties of two (2) employees assigned to his/her department.” Steelcase’s maintenance manager testified that Ms. Shelton was not one of the two employees assigned to his department as specified in the contract and that Ms. Shelton was supervised by Drew.

As our Supreme Court has observed, “[e]mployment, of course, is a matter of contract. Thus, where the parties have made an explicit agreement regarding the right of control, this agreement will be dispositive.” *Harris v. Miller*, 335 N.C. 379, 387, 438 S.E.2d 731, 735 (1994). Our Supreme Court reconfirmed this principle in *Rouse v. Pitt County Mem’l Hosp., Inc.*, 343 N.C. 186, 470 S.E.2d 44 (1996), quoting, in addition to *Harris*, 335 N.C. at 387, 438 S.E.2d at 735, *Producers Chem. Co. v. McKay*, 366 S.W.2d 220, 226 (Tex. 1963), in which the Texas Supreme Court held: “When a contract, written or oral, between two employers expressly provides that one or the other shall have right of control, solution of the [borrowed servant] question is relatively simple.”

Thus, Steelcase specifically chose to require, by contract, that Drew be “solely responsible for the direction and supervision” of Ms.

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Shelton. That contract provides sufficient evidence to warrant submission of the special employee issue to the jury. Steelcase cannot blindly disregard its own contract in order to argue that no issue of fact existed for the jury to decide.¹

Nonetheless, Steelcase, in support of its argument, urges that *Poe v. Atlas-Soundelier/Am. Trading & Prod. Corp.*, 132 N.C. App. 472, 512 S.E.2d 760, cert. denied, 350 N.C. 835, 538 S.E.2d 199 (1999), and *Brown* should control. In *Poe*, the issue presented by this appeal was not before the Court because the plaintiff had agreed that the defendant was a co-employer with the temporary agency that had supplied him to the defendant. 132 N.C. App. at 476, 512 S.E.2d at 763. The plaintiff was arguing that the defendant should have provided workers' compensation insurance for him in addition to that supplied by the temporary agency and that the defendant's failure to do so allowed him to sue the company for negligence. *Id.* Thus, *Poe* does not address the issue in this case.

While *Brown* did address the question whether the plaintiff was a special or borrowed employee, the plaintiff, in that case, worked for a temporary agency—a factual scenario entailing special consideration. See *Brown*, 119 N.C. App. at 760, 460 S.E.2d at 361 (noting that “numerous other jurisdictions have considered whether a temporary employee is an employee of both the temporary agency and the temporary employer”). Nonetheless, *Brown* did not include a contract provision specifying which company had the right to control the details of the employee's work, and the evidence established conclusively that “an implied contract existed between the decedent and [the alleged special employer] since the decedent accepted the assignment from [the temporary agency] and performed the work at the direction and under the supervision of [the alleged special employer].” *Id.* at 759-60, 460 S.E.2d at 360. Further, the evidence specifically indicated that the alleged special employer “controlled the details of decedent's work.” *Id.* at 760, 460 S.E.2d at 361.

1. Steelcase also argues that it had the right to fire Drew employees for cause, pointing to a provision in the contract stating that “[i]f requested by [Steelcase], [Drew] will remove/replace any person who [Steelcase] believes to be engaged in improper conduct, appears unqualified to perform duties or has violated established procedure regarding security or code of conduct.” This provision does not permit Steelcase to deprive any Drew employee of his or her job; it simply allows Steelcase to require Drew to remove the employee from Steelcase's premises. Only Drew could decide whether the employee should be completely let go. In any event, this provision, at best, creates an issue of fact to be decided by the jury.

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Here, in contrast to *Brown*, the evidence is not so unequivocal. Steelcase, instead of demonstrating that it was entitled to a directed verdict, has, at best, pointed to evidence giving rise to an issue of fact. See *Anderson*, 136 N.C. App. at 611, 525 S.E.2d at 475 (“In short, defendant at best has shown a genuine issue of material fact as to the third prong of the special employer test, defendant’s control over the details of decedent’s work.”). The trial court, therefore, properly denied Steelcase’s motion for a directed verdict and motion for JNOV.

B. *Jury Instructions on Special Employment*

[2] Steelcase argues alternatively, as to the special employment issue, that the trial court’s instructions to the jury regarding the “special employment” doctrine were “misleading, confusing, and contradictory.” Steelcase acknowledges that the trial court gave its requested instruction, but challenges the trial court’s additional instruction on the issue defining the nature of a contract and stating: “Continuation of the original employment with Drew by Ms. Shelton, that’s presumed, and the party asserting otherwise—that is Steelcase—must make a clear demonstration that the new employment or the special employment was satisfied by fulfilling all of these three things I just went over with you.”

We first note that Steelcase failed to properly preserve for appellate review any challenge to the instruction regarding the definition of a contract. Rule 10(b)(2) of the Rules of Appellate Procedure states: “A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection[.]” To preserve a challenge to the trial court’s jury instructions, “there must be an exception in the record Otherwise, no question is presented to the appellate court.” *Durham v. Quincy Mut. Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E.2d 372, 377 (1984).

Here, both Steelcase and plaintiffs submitted to the trial court their proposed jury instructions on the special employment doctrine. During the charge conference, trial counsel for both parties discussed with the trial court the list of issues to be submitted the jury:

[THE COURT:] The first issue says, “Was the plaintiff, Maxine Shelton, also an employee of the defendant, Steelcase, Incorporated?” The answer blank.

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[DEFENSE COUNSEL]: Your Honor, I think our proposed instructions are—are very similar except I noticed at the end of [plaintiffs’] proposed—

THE COURT: You mean proposed issues?

[DEFENSE COUNSEL]: On the statutory employee proposed instruction that [plaintiffs’ counsel] has just handed to you. The very last sentence of that says, “Continuance of the original employment is presumed, and the party asserting otherwise must make a clear demonstration that the new employer was substituted for the old.[”] This is not an issue of substitution. . . .

THE COURT: I don’t think I was asking for instructions. I was on the issues.

[DEFENSE COUNSEL]: All right. I’m sorry. I apologize, Your Honor. I just—I just noticed that.

When the trial court subsequently asked counsel about any requests for special instructions, Steelcase’s counsel did not repeat his argument regarding the special employee instruction.

The instructions ultimately given to the jury included the language contained in plaintiffs’ requested instruction regarding the presumption of continuation of the original employment. After the trial court charged the jury, but before the jury was excused to deliberate, the trial court asked if counsel had anything further regarding the instructions, and Steelcase’s counsel responded “no.” The trial court repeated the question after the jury left, and although plaintiffs’ counsel requested an additional instruction regarding expert witnesses, Steelcase’s counsel did not make any objection. Finally, the jury requested reinstruction on the special employee issue. After the trial court repeated its instruction, it stated: “I’ll note your objection to the Court’s supplemental instruction.” The court did not identify who had objected or the basis for the objection, and the transcript contains no objection. The court then asked if counsel had anything further, and Steelcase’s counsel stated, “[N]o sir.”

Since Steelcase never lodged any objection to the instruction regarding the definition of a contract, that issue is not properly before this Court and, therefore, we do not address it. *See Penley v. Penley*, 314 N.C. 1, 27, 332 S.E.2d 51, 66 (1985) (“Defendant, however, failed to object to the instruction on implied contract and therefore Rule 10(b)(2) bars her from assigning error to this portion of the judge’s

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instruction.”). Assuming, without deciding, that the remaining issue—regarding a presumption of continued employment by Drew—was properly preserved for review, the trial court’s instruction was a correct statement of the law. *See Anderson*, 136 N.C. App. at 607, 525 S.E.2d at 473 (“Continuance of the ‘general’ employment is presumed, and the party asserting otherwise must make a ‘clear demonstration that a new . . . employer [was] substituted for the old.’” (quoting *Larson’s* § 67.02)). Accordingly, we overrule this assignment of error.

C. Negligence

[3] Steelcase next contends that the trial court should have granted its motions for a directed verdict and JNOV on the grounds that plaintiffs presented insufficient evidence that Ms. Shelton’s injuries were caused by any negligence on the part of Steelcase. Plaintiffs’ negligence claim against Steelcase is based on a premises liability theory.

As our Supreme Court noted in *Martishius*, 355 N.C. at 473, 562 S.E.2d at 892 (internal citations omitted), a premises liability case, “[a]ctionable negligence occurs when a defendant owing a duty fails to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions, or where such a defendant of ordinary prudence would have foreseen that the plaintiff’s injury was probable under the circumstances.” The Court explained further:

This Court in *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), eliminated the distinction between invitees and licensees and established that the standard of care a landowner owes to persons entering upon his or her land is to “exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.” *Id.* at 632, 507 S.E.2d at 892. Adoption of a “true negligence” standard allows the jury to concentrate “upon the pertinent issue of whether the landowner acted as a reasonable person would *under the circumstances.*” *Id.* (emphasis added).

Id., 562 S.E.2d at 892-93.

The Supreme Court, in *Cherney v. N.C. Zoological Park*, 362 N.C. 223, 657 S.E.2d 352 (2008) (per curiam), subsequently adopted Judge Wynn’s dissent, *Cherney v. N.C. Zoological Park*, 185 N.C. App. 203, 212, 648 S.E.2d 242, 248 (2007), which elaborated on the principles set out in *Nelson*. Judge Wynn’s dissent stated:

In a premises liability case, the duty to exercise reasonable care “requires that the landowner not necessarily expose a lawful

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visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge.” *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 604, *disc. review denied*, 356 N.C. 297, 570 S.E.2d 498 (2002). Thus, where in a negligence action a plaintiff must show that the defendant had a duty to the plaintiff and that the defendant breached that duty, thereby causing the plaintiff’s injuries, . . . a plaintiff in a premises liability action must show that the defendant owed her a duty, and that the defendant breached that duty by unnecessarily exposing her to danger and failing to warn her of “hidden hazards of which the landowner has express or implied knowledge[,]” thereby causing her injuries.” [*Id.*] at 430, 562 S.E.2d at 604

Id. at 213, 648 S.E.2d at 248.

In *Cherney*, Judge Wynn’s dissent, as adopted by the Supreme Court, found sufficient evidence of negligence when a woman was struck and injured by the falling of a 34-foot ficus tree at the Zoo. The tree had previously been cabled to the planter’s wall because of a prior fall, but the cables had snapped. Judge Wynn noted that the cables “illustrate[d] that the Zoo and its employees had ‘express or implied knowledge’ that the tree might fall” *Id.* at 215, 648 S.E.2d at 249. Judge Wynn then explained that the issue was not whether the tree was likely to fall, but rather whether the plaintiff, when visiting that building, “was unnecessarily exposed to danger and was not warned of a hidden hazard.” *Id.* Judge Wynn concluded that because the Zoo’s staff was aware of the danger of the tree falling—as a result of the prior fall and monitoring and cabling of the tree—“the Zoo had a duty to warn [the plaintiff] and other Zoo visitors of the possibility that the tree might fall.” *Id.* He observed further that “[t]he Zoo staff could also have moved the tree to a different location, where it would not have injured visitors even if it fell, or could have pruned it back even further to ensure that it was not outgrowing its planter.” *Id.*, 648 S.E.2d at 249-50.

Similarly, in *Mazzacco v. Purcell*, 303 N.C. 493, 279 S.E.2d 583 (1981), *overruled in part on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), the plaintiff was helping the defendant and other men cut down a tree. While the plaintiff had left the location, the defendant had improperly rigged a rope over another tree that the men intended to pull in order to direct the fall of the tree. The Supreme Court reversed a directed verdict granted for defendant on a premises liability negligence claim because the evidence was

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sufficient to allow the jury to find that the defendant “negligently failed to warn plaintiff of the hidden danger in the rigging of the rope.” *Id.* at 498, 279 S.E.2d at 587. Although the defendant argued that the condition was obvious and, therefore, there was no duty on the part of the landowner to warn of the condition, the Court determined that there was evidence—based on the plaintiff’s testimony—that the hazardous nature of the condition was not equally obvious to the plaintiff. *Id.* at 499, 279 S.E.2d at 587.

This Court addressed a similar situation in *Ryder v. Benfield*, 43 N.C. App. 278, 258 S.E.2d 849 (1979). The *Ryder* plaintiff had agreed with the defendant landowner to pour a concrete cap on top of a cinder block retaining wall. The plaintiff was injured when the wall caved in, pinning the plaintiff underneath it, because the wall had not been braced by the defendant. In upholding the trial court’s denial of the defendant’s motions for a directed verdict and JNOV, this Court reasoned:

Viewing the evidence in the instant case in the light most favorable to the plaintiff, it appears that defendant was informed on at least two occasions by at least two different individuals that a retaining wall behind which fill dirt was to be poured should be braced. Reasonable men could draw a logical inference therefrom that the defendant was aware that failure to brace such a wall would create a dangerous or unsafe condition. Moreover, that defendant knew the wall had not been braced could also reasonably be inferred since he owned the premises, conducted his business there, planned the renovations to the basement, and hired all the work done. There is no indication in plaintiff’s evidence, and defendant has not come forward with any proof, from which one could conclude that plaintiff was warned of the absence of bracing in the wall. Thus, one justifiable conclusion to make is that plaintiff reasonably “assumed” the wall had been braced, especially in light of the evidence that defendant told plaintiff he would have the wall braced. We believe this evidence presented a question for the jury to decide whether defendant’s failure to brace and to warn constituted actionable negligence and, further, whether such negligence, if any, was a proximate cause of the plaintiff’s injuries.

Id. at 285, 258 S.E.2d at 854.

In this case, Steelcase argues that there was no negligence because plaintiffs presented “no evidence that Steelcase acted unrea-

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sonably in the way it had positioned the door.” Steelcase has, however, disregarded the premises liability principles set out in the above cases.

Plaintiffs at trial presented evidence that would allow a jury to determine that Steelcase knew that this 300-pound fire door, leaning against a wall lined with conduits, constituted a hazardous condition. Plaintiffs’ evidence established that the door was stored in a maintenance area, where non-maintenance workers were not generally allowed to go, and had originally been cordoned off by curtains and a fence or cage. Only three or four months before the accident, the door was also secured to the conduits on the wall with a rope so that it would not fall over if someone hit the door or ran into it. The Steelcase maintenance manager acknowledged in his testimony that there was “no” doubt that it would be safer to tie off the door when leaning it against the wall because it removed the “fall hazard.” He even agreed that the testimony of the Steelcase employee that the door had, at one point, been tied off showed that Steelcase knew that the door should have been tied off. The evidence presented at trial further established that the curtains, fence, and rope tying the door to the wall had all been removed as of the date of the accident.

This evidence is more than sufficient to allow a jury to find that Steelcase knew or should have known that the door presented a hazardous condition as it leaned against the wall—and a conduit that could move—without any guarding and without being secured. Although Steelcase argues that the fire door had never fallen before, it was for the jury to weigh that evidence against the evidence that Steelcase had previously secured the door and screened other workers from the door by a fence and curtains. *See Martishius*, 355 N.C. at 475, 562 S.E.2d at 894 (stating, in upholding denial of motions for directed verdict and JNOV on negligence claims, “[e]vidence was presented that defendant was aware that the uninsulated power lines presented a hazard to film crews on the back lot and that workers would have to confront such a hazard to accomplish their assigned duties”).

Moreover, plaintiffs also presented evidence that Ms. Shelton was not warned about the hazard presented by the door. Steelcase contends that “[t]he position of the door was open and obvious” and that there “was no hidden danger known only to Steelcase” As was the case in *Mazzacco*, we cannot say that the hazard presented by the door was equally obvious to Steelcase and Ms. Shelton. The day of the

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accident was the first time Ms. Shelton had ever seen the door, and she had previously not been allowed in that portion of Steelcase's facility. Steelcase has cited no evidence establishing as a matter of law that Ms. Shelton should have known that the door was not secured to the wall and was at risk of falling. Steelcase's argument was one for the jury to address.

The evidence of Steelcase's actual or constructive knowledge of the hazardous nature of the door when combined by the failure to warn Ms. Shelton regarding the door is comparable to the evidence found sufficient in *Cherney, Mazzacco*, and *Ryder* to prevail on a premises liability claim. In addition, however, plaintiffs presented further evidence that Steelcase could have eliminated the hazardous condition by, at the time of the accident, laying the door down on the floor or re-securing the door to the wall with a rope and bolts. See *Martishius*, 355 N.C. at 477, 562 S.E.2d at 895 ("Given the evidence presented to the jury concerning the nature and use of the property, the knowledge of defendant through its facility manager of the set conditions, and the available alternatives, there was sufficient evidence to submit to the jury the question of whether defendant was negligent in causing plaintiff's injuries." (emphasis added)); *Cherney*, 185 N.C. App. at 215, 648 S.E.2d at 249-50 (relying upon evidence of actions that defendant could have taken to eliminate hazardous condition).

Steelcase argues, however, that this case is indistinguishable from and thus controlled by *Ashe v. Acme Builders, Inc.*, 267 N.C. 384, 148 S.E.2d 244 (1966), in which the Supreme Court was "confronted with th[e] question: Is the plaintiff's evidence, viewed in the light most favorable to her, sufficient to permit a legitimate inference that the defendant was negligent in stacking the sheetrock slabs against the wall at a slight angle and should have reasonably foreseen that some injury to the plaintiff would proximately result from that negligence?" *Id.* at 386, 148 S.E.2d at 246. In holding that the evidence was insufficient to support a finding of negligence, the Court reasoned:

The proper storage place for the materials would appear to be in the room where they were to be used rather than in some other part of the house occupied and in use by the plaintiff. The slabs, if placed lengthwise on the floor, leaning at an angle against the wall, would appear to be less likely to topple over than if they were placed endwise on the floor. To place these slabs flat on

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the floor would occupy a space of 12 square feet and would handicap those engaged in remodeling the room. Any danger from the falling slabs would have been as apparent to the plaintiff as to the workmen. For three weeks they had been in the same position.

Id.

We note first that *Ashe* is not a premises liability case, but rather an action *by the homeowner* against a contractor. In any event, the Supreme Court directed in *Martishius* that, in a premises liability case, “the reasonableness of a defendant’s actions depends upon the circumstances of the case, including the nature of the property involved and the intended uses of that property.” 355 N.C. at 475, 562 S.E.2d at 893. While the sheetrock in *Ashe* was being stored in the same area where it was being used, it is undisputed that the fire door was not being used or serving any function in the maintenance area at the time of the accident and that Steelcase had kept it in storage only because of its scrap value. Although the plaintiff in *Ashe* had presented no evidence of safer alternatives, plaintiffs, in this case, presented evidence that the door could have been laid flat on the floor or secured against the wall, both alternatives eliminating any danger. Finally, unlike the plaintiff in *Ashe* who had been living with the slabs of sheetrock leaning against her kitchen wall for three weeks, Ms. Shelton had never seen the fire door or its placement prior to the day it fell on her. As discussed above, the evidence was sufficient to go to the jury on the question whether the hazard presented by the door should have been obvious to Ms. Shelton.

Steelcase next argues that there is no evidence establishing a causal connection between its negligence, if there was any, and Ms. Shelton’s injuries because plaintiffs did not present evidence explaining how the door fell on Ms. Shelton. This argument, however, again, overlooks the fact that this case was tried on a theory of premises liability. The evidence supported a finding that the door was a hazardous condition, that Steelcase knew or should have known of its hazardous nature, and that Steelcase nonetheless did not warn Ms. Shelton of the hazard. She was then injured by that hazard. Steelcase cites no authority that would require plaintiffs to prove the precise mechanism by which the door came to fall.

In any event, plaintiffs did present evidence at trial relating to the question of how the door happened to fall. Thomas Allen, an iron worker for defendant M.B. Haynes, testified that a day or two before the accident, he and his partner were working near the door and

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noticed, because of fresh marks in the dust on the floor, that the door appeared to have slid out from the wall. The two men pushed the door back. On the day of the accident, the door, according to Ms. Shelton, was nearly flush with the wall. Based on this evidence, the jury could have found that the door fell because the M.B. Haynes workers pushed it too close to the wall.

With respect to causation, our Supreme Court has explained: “Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff’s injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.” *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). To establish that an action is foreseeable, a plaintiff is required to show that “‘in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.’” *Id.* at 234, 311 S.E.2d at 565 (quoting *Hart v. Curry*, 238 N.C. 448, 449, 78 S.E.2d 170, 170 (1953)). “It is well settled that the test of foreseeability as an element of proximate cause does not require that defendant should have been able to foresee the injury in the precise form in which it actually occurred.” *Id.* at 233-34, 311 S.E.2d at 565.

Here, with respect to causation, Steelcase has argued only that plaintiffs presented no evidence regarding what caused the door to fall. Steelcase does not specifically address whether the failure to warn Ms. Shelton of the hazardous condition maintained on its premises was the proximate cause of her injuries. The evidence is sufficient, however, to permit a jury to find that Steelcase should have been able to foresee that its maintenance of a hazardous condition—the unsecured 300-pound door leaning against a wall—and failing to warn Ms. Shelton and others whom it had requested work in the area of the hazard could result in some injury. Indeed, the risk that the door might fall and injure someone was the very reason that the door had been secured earlier with a rope.

We note that Steelcase does not argue that any insulating negligence would shield Steelcase from liability. *See id.* at 236, 311 S.E.2d at 566 (“‘An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be

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an independent force, entirely superseding the original action and rendering its effect in the causation remote.’” (quoting *Harton v. Forest City Tel. Co.*, 141 N.C. 455, 462, 54 S.E. 299, 301 (1906))). Accordingly, we hold that the trial court properly concluded that Steelcase was not entitled to a directed verdict or JNOV on plaintiffs’ negligence claim.

D. *Contributory Negligence*

[4] Steelcase next argues that the trial court erred in not submitting to the jury the issue of contributory negligence. Contributory negligence is “negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant . . . to produce the injury of which the plaintiff complains.” *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). To establish contributory negligence, the defendant must demonstrate: “(1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff’s negligence and the injury.” *Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004). If, however, “the evidence raises only a ‘mere conjecture’ of contributory negligence, the issue should not be submitted to the jury.” *Brown v. Wilkins*, 102 N.C. App. 555, 557, 402 S.E.2d 883, 884 (1991).

In answering the “pivotal question” whether the evidence supports a finding of contributory negligence, a plaintiff’s conduct “‘must be judged in the light of the general principle that the law does not require a person to shape his behavior by circumstances of which he is justifiably ignorant, and the resultant particular rule that a plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves.’” *Screaming Eagle Air, Ltd. v. Airport Comm’n of Forsyth County*, 97 N.C. App. 30, 37, 387 S.E.2d 197, 201 (quoting *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965)), *disc. review denied*, 326 N.C. 598, 393 S.E.2d 882 (1990).

Steelcase argues that a jury could reasonably find Ms. Shelton contributorily negligent based on evidence that she hired someone who did not understand English to assist with the special cleaning project; that just before the accident Mr. Morales pointed to the door; that Ms. Shelton *told* Mr. Morales that the door would be taken away by forklift; that Mr. Morales said that before the door fell, everyone was speaking in English that he did not understand; and that Ms. Shelton immediately after speaking to Mr. Morales bent over in front

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of the door.² Steelcase's argument hinges on its claim that "[t]he only plausible explanation is that Morales tried to move the door, causing it to fall."

Steelcase has, however, pointed to no evidence exceeding conjecture that Mr. Morales tried to move the door. Mr. Morales denied touching or attempting to move the door. No witness testified that he or she saw Mr. Morales moving near the door or in a position suggesting an attempt to move the door. Steelcase's sole evidence on this point is a statement taken from Ms. Shelton for workers' compensation purposes shortly after the accident suggesting that just before the accident, Mr. Morales pointed to the door and Ms. Shelton responded in English, which Mr. Morales did not understand, that he was not to move the door. Without any more evidence, we are left with only conjecture that Mr. Morales, after pointing to a 300-pound, six-foot-by-eight-foot steel door, and receiving a response that he could not understand, proceeded on his own initiative to try to move the door—even though the undisputed evidence was that the door would not fit into the dumpsters that Mr. Morales had been using to dispose of the trash. This speculation is not sufficient to send the issue of contributory negligence to the jury. *See Radford v. Norris*, 74 N.C. App. 87, 88, 327 S.E.2d 620, 621 ("Evidence which merely raises a conjecture as to plaintiff's negligence will not support an instruction [on contributory negligence]."), *disc. review denied*, 314 N.C. 117, 332 S.E.2d 483 (1985).

Moreover, Steelcase has pointed to no evidence that Ms. Shelton knew or should have known that the door—which she had seen for the first time on the day it fell on her—was unsecured and presented such a risk that her leaning over in front of it constituted contributory negligence. Our Supreme Court has emphasized that "[a]s a general rule one is not required to anticipate the negligence of others; in the absence of anything which gives or should give notice to the contrary, one is entitled to assume and to act on the assumption that others will exercise ordinary care for their own or others' safety." *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 469, 279 S.E.2d 559, 563 (1981), *overruled in part on other grounds by Nelson v. Freeland*, 349 N.C.

2. Plaintiffs presented contrary evidence, but we consider the evidence in the light most favorable to Steelcase in deciding whether the issue of contributory negligence should have been submitted to the jury. *See Enns v. Zayre Corp.*, 116 N.C. App. 687, 692, 449 S.E.2d 478, 481 (1994) ("Applying the rule of contributory negligence to the instant case, it is necessary to interpret all evidence and reasonable inferences therefrom in the light most favorable to defendant."), *aff'd per curiam*, 342 N.C. 406, 464 S.E.2d 298 (1995).

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615, 507 S.E.2d 882 (1998). Ms. Shelton was not, therefore, required to anticipate that Steelcase would leave a 300-pound door leaning unsecured against a wall.

Here, the evidence, even when viewed in the light most favorable to Steelcase, indicates that Ms. Shelton was doing precisely what Steelcase had asked her to do: cleaning up the former maintenance area by removing all the trash. Without a showing that Ms. Shelton knew or should have known that the door was unsecured and could fall, the record contains no evidence that she failed to exercise due care for herself when picking up a piece of trash from the floor in front of the door. Yet, “[d]efendant must show that plaintiff disregarded her legal duty to exercise due care for herself.” *Enns*, 116 N.C. App. at 692, 449 S.E.2d at 481. We, therefore, hold that the trial court properly refused to submit to the jury the issue of contributory negligence. *See id.* (holding that evidence plaintiff touched one can opener or shelving holding can openers prior to boxed can opener falling on plaintiff’s head and injuring her was insufficient evidence of contributory negligence as it did not show “plaintiff disregarded her legal duty to exercise due care for herself . . . [or] unreasonably placed herself in danger”); *Screaming Eagle Air*, 97 N.C. App. at 38, 387 S.E.2d at 202 (holding that defendant failed to present evidence of contributory negligence when, even though plaintiff knew of dogs at airport, record contained no evidence plaintiff was “on notice of the danger presented by the animals present on airport property”).

E. *Employer Negligence*

[5] In its final argument on appeal, Steelcase contends that the trial court erred in failing to submit to the jury the issue of negligence on the part of Drew, Ms. Shelton’s employer. Steelcase argues that the trial court was required to submit the issue to the jury pursuant to N.C. Gen. Stat. § 97-10.2(e) (2007), which states:

If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then *an issue shall be submitted to the jury* in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. . . .

(Emphasis added.) According to Steelcase, it was entitled to have the issue submitted to the jury based on its answer and without consid-

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eration whether it had forecast sufficient evidence of negligence by Ms. Shelton's employer Drew. We disagree with this construction of the statute.

Our Supreme Court pointed out in *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 101, 305 S.E.2d 528, 535 (1983), that N.C. Gen. Stat. § 97-10.2(e) codified the Court's prior decision in *Brown v. Southern Ry. Co.*, 204 N.C. 668, 169 S.E. 419 (1933). As the *Leonard* Court explained, the Court in *Brown* had held that when a plaintiff—as in this case—has received workers' compensation from his or her employer and then sues a third party as a result of the accident giving rise to the compensation, the plaintiff's employer cannot be made a party defendant, but “if the defendants proved that [the employer's] negligence contributed to decedent's death, [the employer] could not recover its subrogated interest, and the damages awarded plaintiff employee would be reduced by the amount of the employer's subrogated interest.” *Leonard*, 309 N.C. at 101, 305 S.E.2d at 535. The *Leonard* Court stated: “It was this holding [in *Brown*] that was codified in 1959 as N.C.G.S. 97-10.2(e).” *Id.* In short, N.C. Gen. Stat. § 97-10.2(e) exists to permit a defendant to raise as a defense the employer's negligence even though the employer cannot be made a party defendant. *Leonard*, 309 N.C. at 102, 305 S.E.2d at 535.

Subsequently, our Supreme Court explained further that another purpose of N.C. Gen. Stat. § 97-10.2(e) was to ensure that “in a tort action brought by an injured employee against third parties who allege that the employer is jointly and concurrently liable for the employee's injuries, the employer is entitled to a jury trial on the issue of employer negligence under N.C.G.S. § 97-10.2(e).” *Williams v. Int'l Paper Co.*, 324 N.C. 567, 570, 380 S.E.2d 510, 511-12 (1989). Thus, once the defendant—the non-employer—has, in its answer, requested a jury trial on the question of the employer's negligence, the parties (the plaintiff and the defendant) could not extinguish the employer's right to a jury trial by consenting to a hearing by the trial court.

More recently, this Court has explained that N.C. Gen. Stat. § 97-10.2(e) “does not provide for a direct action against the negligent employer nor does it allow for the recovery of direct damages from the employer.” *Jackson v. Howell's Motor Freight, Inc.*, 126 N.C. App. 476, 479, 485 S.E.2d 895, 898, *disc. review denied*, 347 N.C. 267, 493 S.E.2d 456, 457 (1997). Instead, the statute “provides a negligent defendant with recourse against an also negligent employer by allowing it to: (1) allege that the employer's negligence concurred in producing plaintiff's injury and, (2) seek a reduction in damages as pro-

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vided in the statute.” *Id.* When the necessary allegation is contained in the statute, then the employer is entitled to proceed as if it were a party even though it is not named or joined as a party to the proceeding. *Id.* at 479-80, 485 S.E.2d at 898.

As these opinions demonstrate, N.C. Gen. Stat. § 97-10.2(e) sets out a procedural mechanism by which an employer’s potential concurrent liability may be determined—including a jury trial right—without the employer being added as a party. We do not, however, read the statute as altering the basic civil procedure principle that a defense alleged in an answer may be submitted to the jury only if the defendant forecasts sufficient evidence to allow the jury to find for the defendant on that issue. We cannot conceive of the General Assembly’s intending that a jury could be required to decide an issue simply based on an allegation without presentation of evidence. Indeed, courts applying N.C. Gen. Stat. § 97-10.2(e) have applied the Rules of Civil Procedure regarding sufficiency of allegations and evidence in deciding whether the § 97-10.2(e) issue should be presented to the jury. *See Tise v. Yates Constr. Co.*, 345 N.C. 456, 480 S.E.2d 677 (1997) (upholding pretrial dismissal of defense under N.C. Gen. Stat. § 97-10.2(e) where intervening acts “broke the chain of causation” between employer’s negligence and plaintiff’s injuries); *see also Geiger v. Guilford Coll. Cmty. Volunteer Firemen’s Ass’n*, 668 F. Supp. 492, 497 (M.D.N.C. 1987) (applying summary judgment principles to N.C. Gen. Stat. § 97-10.2(e) issue).

The trial court, in deciding whether to submit the issue of Drew’s negligence, thus was correct in focusing on whether Steelcase presented sufficient evidence at trial to allow a reasonable jury to find that Drew had been negligent. In support of its contention, Steelcase recites the allegations in its answer and repeats the argument that it made on contributory negligence: that Mr. Morales must have tried to move the door, causing it to fall on Ms. Shelton. We have, however, already concluded that this contention does not rise above conjecture. The trial court, therefore, properly refused to submit the issue of Drew’s negligence to the jury.

Plaintiff’s Appeal

[6] Turning to plaintiffs’ appeal, they argue that the trial court erred in granting summary judgment to M.B. Haynes. “[T]he standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, ‘(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

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show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.’ ” *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664, *appeal dismissed and 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, 122 S. Ct. 345 (2001)), *aff’d per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001). The evidence presented by the parties is viewed in the light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). Moreover, “[s]ummary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.” *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), *aff’d per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

In order to establish a *prima facie* claim for negligence, a plaintiff must show that: “(1) the defendant owed the plaintiff a duty of care; (2) the defendant’s conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff’s injury; and (4) damages resulted from the injury.” *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002). Plaintiffs argue that “M.B. Haynes had a positive duty to exercise ordinary care to protect Mrs. Shelton from harm” when its employees “entered into an active course of conduct[] by moving the metal door the day before it fell on Mrs. Shelton, knowing that Mrs. Shelton and her assistants were working in the area of the door.”

“The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence.” *Council v. Dickerson’s, Inc.*, 233 N.C. 472, 474, 64 S.E.2d 551, 553 (1951). Thus, “under certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person, for injuries resulting from his failure to exercise reasonable care in such undertaking.” *Quail Hollow East Condo. Ass’n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 522, 268 S.E.2d 12, 15, *disc. review denied*, 301 N.C. 527, 273 S.E.2d 454 (1980). “This duty to protect third parties from harm arises under circumstances where the party is in a position so that ‘anyone of ordinary sense who thinks will at once recognize that if he does not use

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ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other.’” *Olympic Prods. Co. v. Roof Sys., Inc.*, 88 N.C. App. 315, 323, 363 S.E.2d 367, 372 (quoting *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 666, 255 S.E.2d 580, 584, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979)), *disc. review denied*, 321 N.C. 744, 366 S.E.2d 862-63 (1988).

It is undisputed that during the time frame in which Ms. Shelton’s accident occurred, M.B. Haynes employees Mr. Allen and Mr. Burrell were in the maintenance area of Steelcase’s Fletcher facility cleaning and performing other work pursuant to a contract between M.B. Haynes and Steelcase. Both Mr. Allen and Mr. Burrell stated in their depositions that when they moved the fire door they were aware that other people were working in that area. Although they did not see the door move, they believed they had inadvertently moved it while dragging an air hose along the ground during their cleaning. When they saw skid marks on the floor, they moved the bottom of the door back toward the wall because they were worried that it might “scoot out” from the bottom and hit someone’s feet. Despite believing that it would have been safer to lay the door flat on the floor, they did not do so.

When viewed in the light most favorable to plaintiffs, Mr. Allen’s and Mr. Burrell’s testimony indicates that the two workers were concerned that they had accidentally moved the door while performing their work, that the door might slide out from the bottom, and that there was a risk of injury to other people working in the area. This evidence is sufficient to allow a finding that the M.B. Haynes workers, by repositioning the fire door, assumed a duty to exercise reasonable care to protect third parties that might be injured by their handling of the door. *See Council*, 233 N.C. at 475, 64 S.E.2d at 553 (“When the defendant undertook to perform the promised work under his contract with the State Highway and Public Works Commission, the positive legal duty devolved upon him to exercise ordinary care for the safety of the general public traveling over the road on which he was working.”).

M.B. Haynes contends that plaintiffs failed to present evidence of any breach of that duty since, according to M.B. Haynes, the door was moved to a safer distance from the wall. Plaintiffs, however, argue that an issue of fact exists regarding the location of the door once it was moved back.

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Plaintiffs presented evidence that Steelcase's maintenance manager learned from the two M.B. Haynes workers, at least two years after the accident, that they moved the door the day before it fell on Ms. Shelton so that they could clean the wall behind it with air hoses.³ The next day, when Ms. Shelton saw the fire door, it appeared to her to be "straight up, flat" against the wall and looked as if it were "part of the wall." Since the record contains evidence suggesting that no one other than M.B. Haynes employees was working in the area prior to Ms. Shelton's seeing the door, a jury could reasonably find that the location of the door when Ms. Shelton saw it was the location where the M.B. Haynes workers left the door. Mr. Allen and Mr. Burrell, on the other hand, testified that they moved the door from roughly 24 inches away from the wall to a distance more like 11½ to 14-16 inches away from the wall. An issue of fact, therefore, exists as to how far from the wall the M.B. Haynes employees left the fire door.

The actual distance of the door from the wall is a material issue in this case because plaintiffs' mechanical engineering expert, Dr. Bryan Durig, testified that if the door was roughly 14 to 16 inches away from the wall, significant force would be required to cause it to topple over. If, however, the door was moved closer to the wall—as Ms. Shelton observed it—the door would have been "too vertical" and could have tipped over easily with little force applied. The conflicting testimony regarding the distance of the door from the wall and how close Mr. Allen and Mr. Burrell moved the door to the wall creates a genuine issue of material fact as to whether M.B. Haynes breached its duty of care owed to Ms. Shelton.

M.B. Haynes maintains that plaintiffs cannot establish a causal connection between its negligence, if any, and Ms. Shelton's injuries, and thus summary judgment was properly granted in this case. M.B. Haynes is correct that liability does not exist "if all that can be shown is that an actor was negligent" because there must be a showing of proximate cause. *King v. Allred*, 309 N.C. 113, 117, 305 S.E.2d 554, 557 (1983). "[T]he test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs,

3. This explanation of how the men came to move the fire door is, of course, inconsistent with the explanation given by the men in their depositions. In addition, when the men were first interviewed by their employer's Corporate Safety Director shortly after the accident, they did not mention having moved the fire door. They did not report moving it until the Corporate Safety Director interviewed them again more than a year later.

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is within the reasonable foresight of the defendant.’ ” *Martishius*, 355 N.C. at 479, 562 S.E.2d at 896 (quoting *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979)).

Here, the injury that occurred was precisely the type of injury expected to result from the risk created by M.B. Haynes’ negligence of moving the door too close to the wall. The risk of placing the fire door in a position “too vertical” is that it may tip over and fall, potentially injuring someone or damaging property. Thus, the conflicting testimony regarding the distance of the door from the wall also raises a triable issue of fact regarding proximate causation improper for determination on summary judgment. *See Floyd v. McGill*, 156 N.C. App. 29, 41, 575 S.E.2d 789, 797 (“ ‘Proximate cause is an inference of fact to be drawn from other facts and circumstances. . . . [W]hat is the proximate cause of an injury is ordinarily a question for the jury.’ ” (quoting *Hairston*, 310 N.C. at 235, 311 S.E.2d at 566)), *disc. review denied*, 357 N.C. 163, 580 S.E.2d 364 (2003).

M.B. Haynes repeatedly references the fact that plaintiffs have contended that if Steelcase had secured the door to the wall, it would not have fallen. They then assert that even if their workers were negligent, that negligence could not, consequently, be the proximate cause of Ms. Shelton’s injury. It is, however, well established that “[t]here may be more than one proximate cause of an injury.” *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565. Thus, “[w]hen two or more proximate causes join and concur in producing the result complained of, the author of each cause may be held for the injuries inflicted. The defendants are jointly and severally liable.” *Id.*, 311 S.E.2d at 565-66. In sum, Steelcase’s negligence does not necessarily insulate M.B. Haynes from liability for its own negligence. Since M.B. Haynes has made no argument and cited no authority suggesting that, under the facts of this case, Steelcase’s negligence would somehow preclude M.B. Haynes’ liability, M.B. Haynes has failed to show an absence of evidence of proximate cause. The trial court, therefore, erred in granting M.B. Haynes’ motion for summary judgment.

Conclusion

With respect to Steelcase’s appeal, we hold that Steelcase has failed to demonstrate any basis for overturning the verdict and final judgment and, therefore, conclude that Steelcase received a trial free of error. As for plaintiffs’ appeal, however, we hold that genuine issues of material fact exist and thus the trial court erred

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in granting summary judgment in favor of M.B. Haynes. Accordingly, we reverse the order granting summary judgment and remand for further proceedings.

No error in part; reversed and remanded in part.

Judges McGEE and BRYANT concur.

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INC. D/B/A MULLEN/LHC AND CARNEY MEDIA, INC., DEFENDANTS

No. COA08-801

(Filed 16 June 2009)

**1. Pleadings— denial of motion to amend—counterclaims—
untimely motion**

The Business Court did not abuse its discretion by denying defendant's motion to amend to add counterclaims of fraud and unfair and deceptive trade practices because: (1) defendant filed its motion to amend after the thirty-day deadline for amending without leave; and (2) defendant did not offer any credible explanation for the delay to the trial court and did not offer any explanation on appeal.

2. Damages and Remedies— instruction—lost profits

The trial court did not err in a breach of contract and unfair and deceptive trade practices case by its instruction to the jury on the allowable measure of damages including the use of lost profits because: (1) the past relationship between the parties suggests that plaintiff reasonably relied upon the promise by defendant's agent that the contracts were non-cancelable; and (2) the value of what was promised was plaintiff's expected profit had it been allowed to perform all of the insertion orders in 2005, and the value of what was received was the amount plaintiff was actually paid for its services as a one-sheet vendor in 2005.

**3. Unfair Trade Practices— commercial bribery—improper
emphasis on conduct rather than effect on commerce**

The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict even though defendant

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contends that plaintiff's commercial bribery foreclosed any recovery of damages by plaintiff for an unfair and deceptive trade practices claim (UDTP) because: (1) commercial bribery has not been recognized as a defense, complete or otherwise, to unfair and deceptive trade practices in North Carolina; and (2) our existing case law suggests that North Carolina would not recognize commercial bribery as a defense since it places the emphasis on plaintiff's conduct rather than on the effect of defendant's actions upon commerce.

4. Unfair Trade Practices— reliance—causation—fraud in the inducement

The trial court did not err in an unfair and deceptive trade practices (UDTP) case by denying defendant's motion for judgment notwithstanding the verdict even though defendant contends that plaintiff could not establish reliance or causation because plaintiff presented sufficient evidence of each element of fraud in the inducement which was sufficient to send its UDTP claim to the jury.

5. Unfair Trade Practices— commercial contract claim— prima facie case

The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict even though defendant contends that this dispute is truly a commercial contract claim and does not constitute an unfair and deceptive trade practices (UDTP) violation, because plaintiff set forth a *prima facie* case of UDTP and the trial court properly allowed the claim to proceed to trial by denying defendant's motions for summary judgment and directed verdict.

6. Unfair Trade Practices— erroneous instruction—commercial bribery—no prejudicial error

Although the trial court erred by instructing the jury on the defense of commercial bribery in a breach of contract and unfair and deceptive trade practices case, no reversal is required because: (1) N.C.G.S. § 1A-1, Rule 61 provides that erroneous jury instructions are not grounds for granting a new trial unless the error affected a substantial right wherein a different result would have likely ensued had the error not occurred; and (2) the erroneous instructions did not affect the outcome.

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7. Unfair Trade Practices— instruction—reasonableness of delay

The trial court did not err in a breach of contract and unfair and deceptive trade practices case by failing to instruct the jury to decide whether defendant had unreasonably delayed removing its agent from his job because: (1) removing the agent from the pertinent one-sheet program before completing the commercial bribery investigation might have allowed the agent to destroy evidence or to inform plaintiff of the investigation; and (2) the question of reasonable delay, if relevant at all, related to whether defendant ratified its agent's authorized representation instead of defendant's knowledge of the agent's improper conduct.

8. Contracts— breach— indefinite offer

The trial court did not err by granting defendant's motion for summary judgment on plaintiff's claims for breach of contract even though plaintiff contends that it had a non-cancelable contract with defendant which defendant allegedly breached by canceling and requiring proof of performance because: (1) there was no contract between the parties following plaintiff's receipt of the Haynes memorandum and its 7 October 2004 email response since the offer was too indefinite to bind the parties; and (2) Mullen/LHC was free to retract its earlier offer of a guaranteed one-year term, which it did by tendering its form insertion order containing the 60-day cancellation provision, since the parties had not yet committed to a contract.

9. Damages and Remedies— diminution in business value— breach of contract

The trial court did not err in a breach of contract and unfair trade practices case by granting defendant's motion for summary judgment as to plaintiff's demand for diminution in business value damages because: (1) the basis for these damages was too speculative; and (2) the trial court properly denied plaintiff's motion to supplement its evidence based on its grant of summary judgment in favor of defendant on the issue.

10. Evidence— exclusion—proof of performance damages— lost pick up orders— corroborating witness

The trial court did not abuse its discretion in a breach of contract and unfair trade practices case by excluding certain evidence at trial because: (1) in regard to exclusion of proof of performance damages, the trial court considered the proof of

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performance expenses to be part of the cost of doing business rather than an economic loss stemming from the unfair and deceptive trade acts; (2) in regard to defendant's motion *in limine* to exclude plaintiff's expert testimony on damages arising from lost pick up orders, plaintiff's evidence was not sufficient as a matter of law to prove the damages with reasonable certainty since the expert relied upon only one year of history to make his projections; and (3) in regard to plaintiff seeking to call one of defendant's experts as a corroborating witness for one of plaintiff's own experts, the evidence was properly excluded based on hearsay and the fact that the testimony confused issues and wasted time.

11. Contracts— breach—erroneous instruction—commercial bribery

Although the trial court erred in a breach of contract and unfair trade practices case by admitting evidence of plaintiff's commercial bribery and then submitting that question to the jury, the erroneous instruction did not affect a substantial right because the jury essentially bypassed the question in reaching its verdict.

12. Unfair Trade Practices— multiple violations—amount of damages

The trial court did not err by directing a verdict at the close of defendant's evidence on certain predicate unfair and deceptive acts and by overruling plaintiff's objection to have additional predicate act issues submitted to the jury because: (1) plaintiff recovered the maximum amount of damages that it could have recovered; and (2) multiple violations of Chapter 75 would not have increased the amount of damages.

13. Costs— attorney fees—unique questions of law

The trial court did not abuse its discretion in an unfair and deceptive trade practices case by denying plaintiff's motion for attorney fees and by excluding evidence of the reasonableness of those fees because: (1) the case involved unique questions of law, especially as applied to the facts of record; and (2) defendant had valid reasons to refuse to settle this matter and to litigate it to conclusion.

Appeal by defendant Long Haymes Carr, Inc., d/b/a Mullen/LHC, from order entered 24 May 2006, order entered 19 January 2007, order and judgment entered 14 January 2008, and order entered 25 March

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2008 by Judge Albert Diaz in the Business Court. Appeal by plaintiff Media Network, Inc., d/b/a Gateway Media, from order entered 19 January 2007 and order and judgment entered 14 January 2008 by Judge Albert Diaz in the Business Court. Heard in the Court of Appeals 10 December 2008.

Hamilton Moon Stephens Steele & Martin, PLLC, by Jackson N. Steele and Mark R. Kutny, for plaintiff.

Kilpatrick Stockton LLP, by James H. Kelly, Jr., W. Mark Conger, and Elliot A. Fus, for defendant.

ELMORE, Judge.

Long Haymes Carr, Inc., d/b/a Mullen/LHC (defendant or Mullen), appeals various orders, judgments, and rulings issued as part of its litigation against Media Network, Inc., d/b/a Gateway Media (plaintiff or Gateway). Plaintiff also appeals from orders and rulings arising during this litigation. For the reasons stated below, we affirm the trial court as to all issues.

Facts

During the relevant time period, plaintiff was an outdoor advertising company that placed “one-sheet” advertisements at convenience stores. It leased space on the outside of the convenience store and placed signs on that space. In 1993, plaintiff already had a business relationship with defendant and its agent, Carl Haynes. Until 1997, Haynes was the director of out-of-home advertising for defendant. Brad Heard, who owned Gateway along with his brother, testified that, until 1997, Haynes was the only person who handled out-of-home advertising for defendant.

In 1997, as a result of the tobacco litigation settlement that limited tobacco companies’ billboard advertising, RJ Reynolds Tobacco (Reynolds) turned to one-sheet advertising, which Philip Morris had been using. Haynes claimed to have developed the one-sheet product in the 1980s while working in the media department at Reynolds. In 1998, plaintiff made a presentation to defendant and Haynes demonstrating how it could support the maintenance and development of a Reynolds one-sheet program. Heard described such programs as “very high maintenance” and requiring a substantial outlay of capital and labor at the outset. At the time, there were two other companies working with defendant on Reynolds’s one-sheet program, Boss Media and Carteles. Boss Media handled the one-sheets in Florida

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and Carteles handled the one-sheets in the rest of the country. Following the 1998 presentation, Haynes and Gerald Troutman, another Mullen executive, indicated that plaintiff would receive some of Reynolds's one-sheet business.

Although plaintiff received no Reynolds work in 1998, Heard again met with Haynes and Troutman in August or September of 1999. Heard testified that Haynes told him:

[O]ne-sheets are a little bit different than the rest of the products that I do, or what I do here on Long Haymes Carr is that I have a consulting business called High Plains, and High Plains controls the one-sheets, and it's going to cost you more than just a hamburger if you want to get into the one-sheet business.

Heard shook hands with Haynes and Troutman after the meeting. A few days later, Haynes told Heard that he had been recruited to work for defendant "in hopes that he could bring—revive a one-sheet program that he invented while at RJ Reynolds. And in return Carl—they knew he had a consulting business." The consulting business "had been established for quite a while, and that part of his compensation package that he negotiated was he could come back." Haynes "would get a percentage of the one-sheet business, a commission on it, and that in return he would take the lesser salary or whatever he negotiated in his employment agreement, but that he was entitled to a percentage." Haynes advised Heard that both Boss Media and Carteles paid him a ten percent commission.

Brad Heard testified that he and his brother accepted Haynes's proposal, which included a five percent commission on all Reynolds one-sheet business, because of Haynes's reputation:

[M]y perception of Carl was that he was trustworthy. He was vice president of the company. He was a very proud former Marine. Double Purple Hearts.

[His r]eputation, from what I knew from people in the industry, he was impeccable. He served on all kinds of outdoor committees. He was on the board of directors of American Home Association.

The Heards told Haynes that they would require a signed, written contract as well as the company's name and federal tax identification number. They told Haynes that they would only make payments to High Plains via wire transfer. Haynes did not hesitate to agree to the Heards' requests. Heard explained that they wanted to transfer funds

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via wire transfer “to make sure it was above board and there was a record to track, keep track of any payments that were made.”

On 18 October 1999, Haynes sent Heard a signed letter providing High Plains’s business identification number and checking account number to facilitate payment via wire transfer. Haynes wrote, “We have talked about possible fee structure. We are currently receiving between 5%-10% of net billings. In deference to the relationship we have had over the years, we are asking for 5%.” Haynes stated that he had provided contracts “valued at \$102,000 (gross dollars) or \$86,700 (net dollars) for the months of November and December 1999.” The letter estimated plaintiff’s costs on a per unit basis, using \$72.25 net income per unit, based on \$85.00 gross income per unit. This estimate included a fifteen percent cut to defendant and a five percent cut to High Plains, which was described as a “\$3.61 High Plains fee,” from which Haynes stated “High Plains will pay all state and federal taxes.” Brad Heard signed and dated the letter on 19 October 1999 with the note, “We agree to terms as outlined[.]”

Reynolds ran its one-sheet program during 2000 and 2001, but canceled the program on sixty days’ notice halfway through 2002. A provision on the back of Reynolds’s insertion order said that Reynolds could cancel the contract upon sixty days’ notice. In 2003, Reynolds again issued insertion orders for \$85.00, but canceled some of the contracts halfway through the year.

Heard testified that these two cancellations were “very, very difficult and devastating” to his company. He explained that plaintiff’s “costs on one-sheets [are] front-end loaded. You have all your start-up costs, all your frame costs, overhead, labor. . . . weeks of people staying in hotels in various markets to get all this up and running.” It took a minimum of sixty days to have frames made and place them, as well as to negotiate leases with the convenience stores. Thus, “the latter half of the year is when you start receiving the benefit or the profit from your investment.”

In 2002 or 2003, High Plains’s commission increased from five percent to eight percent. Haynes also wanted a car, so plaintiff leased a vehicle for Haynes to use. Haynes and defendant also requested “continuous, over the five-year, six-year period, tickets to just about everything and anything that was available.”¹ These were not tickets

1. Plaintiff provided tickets to a variety of events, including: “Hairspray,” a Broadway musical playing in New York City; a Cleveland baseball game; 2004 World Series tickets to see the Boston Red Sox play the St. Louis Cardinals in Boston, which plaintiff purchased for \$4,500.00; and the circus.

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that plaintiff or its employees already had, but were tickets that plaintiff “had to go out and purchase on the open market through Ticketmaster or whatever to various events.” Mullen employees, Reynolds employees, and other clients that Mullen had relationships with or was trying to develop relationships with also used these tickets. Heard estimated that plaintiff spent “in excess of \$30,000 a year” on these tickets.

In late 2003, Reynolds decided that it could save money on the one-sheet programs by entering long-term contracts with vendors in exchange for price reductions; by guaranteeing vendors continuous business for a certain period of time, vendors would be willing to reduce rates because they would be assured of recouping their considerable up-front costs. On 24 October 2003, Haynes sent a memorandum to Heard and Don Foley, the owner of Carteles. The memorandum explained that Reynolds had been having a difficult year following its restructuring and had communicated the following arrangement with Haynes:

I asked in light of the RJRT’s desire to save money[,] would you accept a reduced rate of \$75 gross per month. You responded in the affirmative. This was predicated upon arrival of materials two weeks prior to the display date and issuance of non-cancelable contracts. . . . RJRT has agreed to these terms and this will be reflected in 2004 contracts.

After several meetings with RJRT and their consultants I have approval to contract for 2004. However, RJRT will pay \$74 gross for the regular one-sheets instead of \$75 gross per unit per month. . . .

We will be adding a couple of new one-sheet vendors in 2004. RJRT and their consultants pressed for this point and while I can minimize they would not change their minds on this point. They were quick to point out in past years we had utilized multiple vendors.

I honestly believe this is the best that can be negotiated for the coming year. . . .

Contracts will be sent to you early next week and I am hopeful of continuing the great working relationship that now exists. . . .

Heard explained that Gateway was willing to take a \$10.00 or \$11.00 rate cut because non-cancelable contracts would allow Gateway to

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go into stores and commit to the stores long term. Defendant also agreed to reduce the number of postings from ten or twelve to no more than eight, which reduced the number of times that plaintiff had to visit the convenience stores and change out the posters. In addition, defendant agreed to supply the copy two weeks in advance; previously, defendant supplied the copy one day before it had to be posted, which cost plaintiff \$30,000.00 to \$40,000.00 in overnight shipping charges.

The insertion orders specify the number of sheets and their cost, as well as additional guidelines. The back side of the insertion orders is printed with terms and conditions that governed the contract among plaintiff, defendant, and Reynolds. The front of the 2004 insertion orders included the following language:

Contracts are non-cancelable per agreement with RJRT to receive reduced space rate of \$74 gross per unit per month for traditional one-sheets and \$74 gross per unit per month for backlites. Contracts will run the term indicated. It is agreed that the materials are to be provided to one-sheet suppliers two weeks (14 days) prior to display dates. Any lateness on the part of RJRT necessitating air shipment by one-sheet vendors to post on schedule will result in RJRT compensating vendors for air shipment charges. Display cycles are to be 45 days commencing Feb[.] 15 per RJRT.

However, the following terms and conditions on the back side of the insertion order contradict the terms on the front:

11. Mullen/LHC shall have the right to cancel this contract with no obligation of payment or penalty of short rate, upon written notice to [Gateway] at least sixty (60) days, including Sundays and holidays, in advance of any scheduled posting date.

* * *

16. This contract contains the entire understanding between the parties and cannot be changed or terminated orally. When there is any inconsistency between these standard conditions and a provision on the face hereof, the latter shall govern. Failure of either party to enforce any of the provisions hereof shall not be construed as a general relinquishment or waiver of that or any other provision. All notices hereunder shall be in writing, given only by facsimile transmission or overnight

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messenger addressed to the other party at the address on the face hereof, and shall be deemed given on the date of receipt.

The parties re-negotiated the terms of the 2005 one-sheet program following Reynolds's merger with Brown & Williamson. Plaintiff and Haynes discussed reducing the rate from \$74.00 to \$71.00 for non-cancelable contracts, or, in the alternative, \$85.00 for cancelable contracts. On 5 October 2004, Haynes sent a memorandum to plaintiff, Carteles, and Carney regarding the 2005 one-sheet pricing (the Haynes Memorandum). The memorandum included the following language:

As we move toward issuance of RJRT one-sheet contracts for 2005 we will be reducing the unit rate to \$71 gross.

* * *

The \$71 is predicated upon continuous contracts (non-cancelable) and significant volume to make the acceptance of our contracts worth your while. We will also guarantee that materials will be in your hands two weeks prior to posting.

* * *

As always acceptance of the new pricing is your decision. If you choose not to do so please let me know so we can plan accordingly.

Heard testified that he understood Haynes's use of the term "continuous contracts as non-cancelable" to mean that each contract would "be non-cancelable continuous throughout whatever period the insertion order said, that it would run that entire year, would not be cancelable." Heard also testified that he expected the volume of business to increase because the merger meant that the new Reynolds had more products to advertise and a higher media budget.

Heard replied to the Haynes Memorandum by email, writing, "We certainly are on board at the new rate. We appreciate the business you have given us and look forward to 2005." Heard and Haynes then exchanged a series of emails detailing the Camel brand one-sheets for 2005. Haynes informed Heard that Reynolds would "be giving 12-15 month non-cancelable contracts for" Camel backlights during 2005, but that the program would require an initial outlay of approximately \$1 million for hard wiring and other installation costs. Heard did not communicate with anyone from Mullen except Haynes regarding these contracts. On 27 October 2004, Haynes informed plaintiff and

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the other one-sheet providers that Reynolds had approved the Camel one-sheet backlight program. He explained, “These units will be kept throughout 2005.” The next day, Haynes sent another email to Brad Heard with the greeting, “Here you go my friend.” This email stated that the Camel one-sheet backlight program “will be continued for all of 2005 which should assist in your lease efforts.” Heard explained that by going into a convenience store and telling the management that Mullen would be running the backlight program for the next thirteen or fourteen months, rather than one or two months, “you develop an immediate credibility with them” and “they’re more interested in leasing[.]”

The insertion orders detailing the Camel backlights in the Pittsburgh, Pennsylvania, market showed a term beginning in January 2005 and ending in December 2005. The back of page one of the insertion orders included the same language printed on the back of page one of the 2004 insertion orders. The front of page two stated that “in the event of conflict between the provisions contained on the front of this insertion order and those contained on the back, the provisions on the front will govern.” Although that language was also identical to the language printed on the 2004 insertion orders, the 2005 orders lacked any language stating that the contracts were non-cancelable; the 2004 orders contained that language. All of the 2005 orders for all of the one-sheets, not just the Camel backlights, contained this omission. Heard noticed the omission and contacted Haynes about the error. Heard testified that Haynes advised him that in “their rush to get the insertion orders out, that it was a clerical error, and that his assistant had left off the non-cancelable language, and it was too hard to go back in and redo every insertion order, but that \$71, that was the non-cancelable rate.” Heard explained that he did not insist that defendant fix the error based upon his “prior experience” with Haynes:

[W]e had moved our office, and the shipping address had changed from our previous address to a new address, and the old address was put on the insertion orders in the prior year.

And when I called to make them aware of this situation and say we needed corrected insertion orders, Carl [Haynes] became very angry at me, very upset, told me he wasn’t going to do it, he would cancel the contracts before he would go in and change the insertion orders because each—each piece of the language on this insertion order would have to be gone into each insertion order.

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It's not just one boilerplate where the change is made on everything. They have to go into each one and each page and change it manually, and he wasn't going to do that.

When I spoke to Carl, he was the senior vice president, and he told me it was non-cancelable, the rate were, and—non-cancelable. And I took his word.

Following this conversation, Heard contacted his lenders to secure the funding for capital expenses associated with the 2005 one-sheet program. Plaintiff also purchased equipment and other necessary supplies, leased space from convenience store operators, and convened operational meetings with its management, employees, and subcontractors. Heard picked up the insertion orders at defendant's office in Winston-Salem and met with Haynes and Troutman while he was there. The three men discussed that the insertion orders were non-cancelable. Defendant disputes that Haynes had the authority to issue non-cancelable contracts because Reynolds had not yet approved them. However, on 8 December 2004, Reynolds notified defendant that it had approved the one-year guaranteed contracts for the 2005 one-sheet program.

On 16 December 2004, Heard sent an email to Haynes, which bounced back to him with a message that the email address was no longer valid. Haynes then called Heard and informed him he had been suspended by defendant. On 22 December, Heard participated in a meeting with an investigator from Deloitte. In March 2004, defendant's parent company, The Interpublic Group, had retained Deloitte to investigate the "consulting fees" paid to Haynes. The investigation confirmed that the payments had been made and that they violated The Interpublic Group's internal ethics policies, which resulted in Haynes's suspension and subsequent firing in January 2005.

On 2 February 2005, defendant terminated plaintiff as a one-sheet vendor pursuant to the sixty-day termination provision in the 2005 insertion orders, referring specifically to the payments made to Haynes as the termination's basis. Following the termination, plaintiff was unable to mitigate its damages by obtaining other business. Heard reasoned that this was because plaintiff had missed 2005's two major buying cycles, fall 2004 and first quarter 2005.

However, months before terminating plaintiff's contracts, Mullen and Reynolds discussed the termination and decided to postpone it. A 27 January 2005 memo from JoAn M. Williard at Reynolds to

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defendant memorialized this thought process: “Mullen has recommended that we not disrupt the Kool creative change on the backlights currently scheduled for 2/14; they will notify Gateway and Interstate after the backlights have been posted with the new creative that we are not going to continue their contracts.” The memo also stated that Reynolds would

not pay for January posting from either Gateway or Interstate without proof of performance, i.e. a completion photo with the name of the store in the photo along [*sic*] identifying information tying that photo back to the list of stores approved. We will only pay for the stores that have the photo; we will not pay a blanket invoice based on a list of stores provided without proof of each posting showing the name of the store or street address—some positive confirmation of the validity of the billing.

Before paying plaintiff’s January invoices, plaintiff did require proof of performance as outlined in Williard’s memo. Plaintiff alleged that it cost over \$200,000 to complete that proof of performance, which was not required by their contracts.

Procedural History

Plaintiff filed suit against defendant on 23 August 2005.² Plaintiff alleged breach of contract, misappropriation of trade secrets, fraud, negligent misrepresentation, tortious interference with contract, trespass to chattels, and unfair and deceptive trade practices. On 3 February 2006, the case was transferred to the Business Court and assigned to Special Superior Court Judge Albert Diaz. On 16 February 2006, defendant moved to amend to add counterclaims and a third-party complaint, which the Business Court denied. On 11 May 2006, plaintiff voluntarily dismissed its claims of tortious interference with contract and trespass to chattels. On 27 June 2006, the Business Court dismissed with prejudice plaintiff’s claims for fraud, negligent misrepresentation, misappropriation of trade secrets, injunctive relief, and negligent supervision. On 16 February 2006, defendant moved for partial summary judgment regarding damages for diminution in business value. On 31 May 2006, plaintiff moved for summary judgment on its claims for breach of contract and unfair and deceptive trade practices. On the same day, defendant filed a cross-motion seeking summary judgment on all claims. On 18 August 2006, plaintiff

2. Plaintiff also filed suit against Carney Media, Inc., which is not a party to this appeal. Accordingly, we limit our discussion of the procedural history to claims against defendant Mullen.

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filed a motion for leave to submit additional materials in opposition to defendant's motion for partial summary judgment regarding diminution in business value damages. The Business Court heard arguments on all of the pending motions and issued an opinion on 19 January 2007. The court granted summary judgment to defendant on plaintiff's claim for breach of contract, denied the parties' cross-motions for summary judgment as to plaintiff's claim of unfair and deceptive trade practices, and granted partial summary judgment to defendant regarding diminution in business value damages; it also excluded plaintiff's proposed expert testimony as to that issue.

The remaining issues were heard by a jury, which returned the following verdict sheet:

1. Did Carl Haynes tell Brad Heard after he received the insertion orders for the 2005 one-sheet program that the orders were non-cancelable? Yes.
2. Was Carl Haynes authorized to make that representation on behalf of Defendant Mullen? Yes.

* * *

4. Did [Gateway] commit commercial bribery with respect to its alleged payments of cash and goods to Carl Haynes or his consulting company High Plains? Yes.
5. Did Mullen know of the alleged payments of cash and goods from Gateway to Carl Haynes or his consulting company, High Plains, at the time it allowed Haynes to continue negotiating with vendors for the 2005 one-sheet program and later accepted Gateway's performance of the one-sheet insertion orders for 2005? Yes.
6. Was Mullen's conduct a proximate cause of Gateway's injury? Yes.
7. In what amount, if any, has the Plaintiff Gateway been injured? \$1,258,695.

On 31 October 2007, Judge Diaz entered a judgment based upon the jury's findings. The court found "as a matter of law that the acts committed by the Defendant are unfair and deceptive acts . . . that proximately caused damage to Gateway." The court awarded plaintiffs treble damages pursuant to N.C. Gen. Stat. § 75-16 in the amount

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of \$3,776,085.00. The court declined to award attorneys' fees to plaintiff. The court also assessed \$23,917.93 in costs against defendant, as well as interest at the legal rate of eight percent from the date the action was commenced. Defendant moved for judgment notwithstanding the verdict or, in the alternative, a new trial. After hearing oral arguments on the motions, the court denied both.

Both parties filed notices of appeal. We first address defendant's arguments and then plaintiff's. For the reasons stated below, we affirm on all issues.

Defendant's Appeal**A. Denial of motion to amend.**

[1] On 16 February 2006, defendant moved to amend to add counterclaims of fraud and unfair and deceptive trade practices (UDTP). The Business Court denied defendant's motion, concluding that there had been

undue delay in pursuing the counterclaims, in that Defendants knew the relevant facts surrounding the Haynes Payments on or before February 2, 2005, yet they failed to assert the claim in their original pleadings, and waited almost a year from the filing of the first action to seek leave to amend.

The court found "further that the Defendants have offered no credible explanation for the delay."

Defendant now argues that the Business Court abused its discretion by denying defendant's motion. Defendant filed its motion to amend after the thirty-day deadline for amending without leave. Accordingly, amendment required leave of the court, which "leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2007). "A motion to amend . . . is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent proof that the judge manifestly abused that discretion." *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 247 (2000) (citation omitted). In *Walker*, we found no abuse of discretion when the trial court denied a plaintiff's motion for leave to amend based upon a three-month delay between the defendant's answer and the plaintiff's motion. *Id.* Here, defendant filed its answer on 31 October 2005 and filed its motion for leave to amend on 16 February 2006. The delay is nearly identical to the delay that we found reasonable to deny in *Walker*. Defendant did not offer any credible explanation for the delay to the

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trial court and does not offer any explanation now. Accordingly, we affirm the order of the Business Court.

B. Jury instructions regarding damages.

[2] Defendant argues that the trial court improperly instructed the jury on the allowable measure of damages. Specifically, defendant argues that the trial court erred by giving the following instructions to the jury about how to calculate actual damages:

As applied here, the measure of damages would be the difference between the amount, if any, that you find would have been Gateway's expected profit had it been allowed to perform all of the insertion orders in 2005 and the amount Gateway was actually paid for its services as a one-sheet vendor in 2005.

Defendant contends that the court's instruction "improperly restricted the jury from choosing other measures that would 'restore the victim to his original condition.'" Defendant proposes that the measure of damages could have been the difference between the non-cancelable rate of \$85.00 and the cancelable rate of \$71.00 on each poster for the first three months of 2005. Defendant postulates that this measure of damages would have restored plaintiff to "the position it would . . . have held if Haynes had correctly represented the cancelable nature of the contracts[.]"

Unfair and deceptive trade practices and unfair competition claims are neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions. The measure of damages used should further the purpose of awarding damages, which is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.

Richardson v. Bank of Am., N.A., 182 N.C. App. 531, 562, 643 S.E.2d 410, 429 (2007) (quotations and citations omitted). In a UDTP case, it is proper to use lost profits that were proximately caused by the tortfeasor as the measure of damages. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 62, 620 S.E.2d 222, 231 (2005). This Court "evaluate[s] the quality of evidence of lost profits on an individual case-by-case basis in light of certain criteria to determine whether damages have been proven with 'reasonable certainty.'" *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 378, 542 S.E.2d 689, 693 (2001) (citation omitted). In

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Byrd's Lawn & Landscaping, we relied upon evidence of the parties' prior business relationship to affirm the trial court's method of calculation. *Id.*

Here, the court instructed the jury to use lost profits as the measure of damages, which was appropriate. The instructions directed the jury to calculate "the difference between the value of what was received and the value of what was promised." The past relationship between the parties suggests that Heard reasonably relied upon Haynes's promise that the contracts were non-cancelable. The value of what was promised was, as the trial judge explained, "Gateway's expected profit had it been allowed to perform all of the insertion orders in 2005"; the value of what was received was, as the trial judge explained, "the amount Gateway was actually paid for its services as a one-sheet vendor in 2005." We find no error in the trial court's instructions on damages.

C. Denial of judgment notwithstanding the verdict.

Defendant argues that the Business Court erred by denying its motion for judgment notwithstanding the verdict. Defendant presents three separate arguments for reversal of the Business Court's order, all of which we reject.

On appeal our standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury. When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence, and resolving [a]ny conflicts and inconsistencies in the evidence . . . in favor of the non-moving party. Furthermore, the motion must be denied [i]f there is more than a scintilla of evidence supporting each element of the non-moving party's claim.

Papadopoulos v. State Capital Ins. Co., 183 N.C. App. 258, 262-63, 644 S.E.2d 256, 259 (2007) (quotations and citations omitted; alterations in original).

[3] 1. Commercial bribery. Defendant argues that plaintiff's commercial bribery foreclosed any recovery of damages by plaintiff. In defendant's words, "Since every transaction that Gateway ever performed for Mullen was spawned from commercial bribery, Gateway cannot recover[.]" We disagree.

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Commercial bribery has not been recognized as a defense, complete or otherwise, to unfair and deceptive trade practices in North Carolina. The trial court based its instructions and verdict sheet on a 1979 New Jersey Superior Court case, which recognized commercial bribery as a defense to breach of contract. *Jaclyn, Inc. v. Edison Bros. Stores, Inc.*, 406 A.2d 474 (N.J. Super. 1979). In *Jaclyn*, the plaintiff company, Jaclyn, sought payment for goods sold and delivered to the defendant company, Edison. *Id.* at 477. Edison argued that Jaclyn had engaged in commercial bribery, a misdemeanor in New Jersey, by bribing Edison's head purchaser, Joseph Fingerhut. Edison reasoned that "one who resorts to the acts employed by Jaclyn should be denied the right of recovering the agreed price of the goods sold and delivered, notwithstanding that the merchandise was retained by Edison and retailed at a profit." *Id.* at 483. Edison averred that it would not have made the purchase orders from Jaclyn had Jaclyn not bribed Edison's purchaser. The court acknowledged that the defense of commercial bribery was a novel legal issue and discussed its applicability at length in the opinion. The modern civil and criminal actions of commercial bribery stem from the common law, which

recognized that the misconduct of an agent by concealment or neglect of duty entitled the principal to the equitable remedy of rescission. Thus, an agreement between a seller and an agent for a buyer whereby an increase in the purchase price was to go to the agent unbeknownst to the buyer, amounted to fraud. The buyer had a right of action against both his agent as well as against the seller.

Id. at 482 (citations omitted). The court repeated the following "oft-cited definition" of the economic ramifications of commercial bribery: "The vice of conduct labeled 'commercial bribery' . . . is the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealing with employees or agents of prospective purchasers." *Id.* at 483 (quoting *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939)). It further explained:

The evil of commercial bribery is the invasion of the principal's right to undivided loyalty from his agent which results from secret payments to the agent. The party which interposes the defense must establish that the payments to the agent were made secretly, *i.e.*, without the knowledge and consent of the principal,

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and must be attended with the intent to influence the agent's action with respect to his employer's business.

* * *

There is no fraud perpetrated upon a principal when he is made aware of the commissions or gifts paid to his agent by another, but nonetheless consummates an agreement negotiated on his behalf. The consent thereto may be implied by the court from the principal's acquiescence[.]

Id. at 485, 486 (citations omitted).

The *Jaclyn* court concluded that Edison had knowledge of Fingerhut's bribery months before terminating him. *Id.* at 486. During those months, Edison allowed Fingerhut to continue to place purchases from Jaclyn, even though some of those orders formed the basis of Edison's claims. *Id.* The court rejected Edison's defense, explaining:

It would be unconscionable to permit a principal, possessed of knowledge that its agent has received covert compensation, to allow that agent to continue to contract in its name, and thereafter to avoid liability for the bargained-for exchange. A principal may rely upon his agent's faithfulness only until the principal acquires knowledge of a breach of trust of relational duties. Upon acquiring knowledge that his agent has solicited or received bribes, the principal has the option, prior to consummating a contract negotiated through such agent, of either adopting or disaffirming his agent's conduct.

Id. at 487 (citations omitted).

The principles discussed in *Jaclyn* would seem to apply to the case at hand—here we have a principal buyer (Mullen) who sought to avoid payment to a seller (Gateway) because the seller engaged in commercial bribery with one of Mullen's agents (Haynes). However, the parties in *Jaclyn* were disputing a contract claim and the parties here are disputing an unfair and deceptive trade practices claim, which is a different legal creature and not subject to the same defenses as traditional contract and tort claims. *Marshall v. Miller*, 302 N.C. 539, 544-45, 546-47, 276 S.E.2d 397, 401, 402 (1981). UDTP developed in response to the ineffective common law remedies available to the victims of unfair or deceptive commercial acts. *Id.* at 543, 276 S.E.2d at 400. Tort actions for deceit or fraud require showing intent to deceive or scienter, which are heavy burdens of proof. *Id.*

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Contract actions for breach of warranty, rescission, or representation “also entailed burdensome elements of proof.” *Id.* at 544, 276 S.E.2d at 400 (citation omitted). A UDTP claimant need not establish the defendant’s bad faith, intent, willfulness, or knowledge. *Id.* at 546, 547-48, 276 S.E.2d at 402-03. Our Supreme Court explained that “state courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the states’ unfair and deceptive practices act.” *Id.* at 548, 276 S.E.2d at 403 (citations omitted). Thus, “[i]f unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor’s conduct on the consuming public.” *Id.* In explaining this result, the Court emphasized its consideration of “the overall purpose for which this statute was enacted.” *Id.* at 549, 276 S.E.2d at 403.

Moreover, not only is the defendant’s intent irrelevant when evaluating a UDTP claim, the plaintiff’s intent and conduct is also irrelevant. “If the effect of the actor’s conduct is of sole relevance, then it follows that plaintiff’s alleged conduct here . . . is not relevant.” *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 95, 331 S.E.2d 677, 680 (1985). In *Winston Realty*, our Supreme Court held that contributory negligence was not a viable defense to a UDTP claim. The *Winston Realty* court discussed *Marshall* at length, noting:

In concluding that the legislature intended the automatic trebling of any assessed damages, this Court, in *Marshall*, stated that “[t]o rule otherwise would produce the anomalous result of recognizing that although N.C.G.S. 75-1.1 creates a cause of action broader than traditional common law actions, N.C.G.S. 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie.”

Id. at 96, 331 S.E.2d at 680 (quoting *Marshall*, 302 N.C. at 547, 276 S.E.2d at 402). The Court concluded “that such an anomalous result would likewise be reached here if we allowed defendant to avail itself of plaintiff’s alleged contributory negligence.” *Id.* at 96, 331 S.E.2d at 680-81.

Similarly, a plaintiff’s alleged commission of commercial bribery cannot be a complete defense to an unfair and deceptive trade practice. Although a New Jersey court has held that it is a valid defense to a contract claim, we are aware of no jurisdiction that has held that it

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is a valid defense to a UDTP claim. Moreover, our existing case law strongly suggests that North Carolina would not recognize it as a defense because it places the emphasis on the plaintiff's conduct, rather than on the effect of the defendant's actions upon commerce. We also note that if a UDTP claimant can establish that the defendant committed commercial bribery, that is sufficient to make the UDTP claim. *Kewaunee Scientific Corp. v. Pegram*, 130 N.C. App. 576, 581, 503 S.E.2d 417, 420 (1998). However, it does not follow from that holding that if the plaintiff commits commercial bribery, the defendant is not liable under the UDTP claim.

Just as the *Winston Realty* court concluded that contributory negligence was not a viable defense to a UDTP claim, we conclude that commercial bribery is also not a viable defense in this case. Accordingly, the trial court properly denied defendant's motion for judgment notwithstanding the verdict as to this issue.

[4] 2. Reliance and causation. Defendant also argues that the trial court erred by denying its motion for judgment notwithstanding the verdict because plaintiff could not establish reliance or causation. The thrust of defendant's argument is that the merger clause contained on the insertion orders belies defendant's reliance on Haynes's repeated representations that the contracts were not cancelable. Again, we disagree.

The Business Court concluded that plaintiff's claim "smacks of fraud in the inducement," and we agree. Proof of fraud in the inducement necessarily constitutes a violation of Chapter 75 and shifts the burden of proof from the plaintiff to the defendant, which must then prove that it is exempt from Chapter 75's provisions. *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991). "The essential elements of fraud [in the inducement] are: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Rowan County Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658 (1992) (quotations and citations omitted). As the Business Court succinctly explained,

Construing the disputed facts in the light most favorable to Gateway, Haynes's alleged conduct (and Mullen/LHC's ensuing silence) may well have been fraudulent and was certainly unethical. At a minimum, it had the capacity or tendency to deceive, and Gateway's evidence is that—in reliance on Haynes's promises—

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Gateway was deceived into undertaking a host of commitments that it would not otherwise have made and also failed to pursue other business.

We find that plaintiff presented sufficient evidence of each element of fraud in the inducement, which was sufficient to send its UDTP claim to the jury. The Business Court properly denied defendant's motion for judgment notwithstanding the verdict.

[5] 3. Unfair or deceptive trade practice. Defendant next argues that “[a]t a more basic level, the trial court also erred by allowing this case to proceed to trial (and judgment) on a UDTP theory.” Defendant argues that this dispute is truly a commercial contract claim and does not constitute a UDTP violation. Again, we disagree.

As explained in the section above, plaintiff set forth a *prima facie* case of UDTP and the trial court properly allowed the claim to proceed to trial by denying defendant's motions for summary judgment and directed verdict. Accordingly, the trial court also properly denied defendant's motion for judgment notwithstanding the verdict with respect to the UDTP claim.

D. Denial of motion for new trial.

Defendant argues that the trial court erred by denying its motion for new trial. Defendant presents three separate arguments for reversal of the Business Court's order, all of which we reject.

Generally, a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion. . . . However, where the motion involves a question of law or legal inference, our standard of review is *de novo*.

N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 371, 649 S.E.2d 14, 25 (2007) (quotations and citations omitted).

[6] 1. Commercial bribery. Defendant argues that the trial court improperly instructed the jury on the issue of Mullen's knowledge of the commercial bribery and that this error entitles defendant to a new trial. Specifically, defendant avers that the trial court “created an erroneously low threshold for establishing ‘knowledge.’” We disagree.

The greater problem here is not the jury charge's content, but its validity. As discussed above, commercial bribery is not a complete

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defense to a claim of unfair and deceptive trade practices. However, although the trial court erred by instructing the jury on the defense of commercial bribery, no reversal is required.

Rule 61 of the North Carolina Rules of Civil Procedure provides that erroneous jury instructions are not grounds for granting a new trial unless the error affected a substantial right. In other words it must be shown that a different result would have likely ensued had the error not occurred.

Word v. Jones ex rel. Moore, 350 N.C. 557, 565, 516 S.E.2d 144, 148 (1999) (quotations and citations omitted). Here, the erroneous jury instructions did not affect the outcome. The verdict sheet was designed so that if the jury concluded that plaintiff committed commercial bribery *and* that defendant did not know about the payments, then defendant would win. However, if the jury concluded that plaintiff committed commercial bribery, but defendant *did* know about the payments, then the jury would have to answer question 6. Had the jury concluded that plaintiff had *not* committed commercial bribery, then the jury would have simply skipped question 5 about defendant's knowledge and moved on to question 6. Because the jury answered both questions 4 and 5 in the affirmative, the outcome was the same as if the jury had answered question 4 in the negative.

Accordingly, the trial court did not commit reversible error by instructing the jury on the defense of commercial bribery and the trial court properly denied defendant's motion for a new trial on this issue.

[7] 2. Unreasonable delay. Defendant argues that the trial court erred by not asking the jury to decide whether defendant had unreasonably delayed removing Haynes from his job and that this error warrants a new trial. Defendant argues that it had "sound reasons" for not immediately removing Haynes after confirming that he was engaged in commercial bribery. Removing Haynes from the one-sheet program before completing the investigation might have allowed Haynes to destroy evidence or to inform Gateway of the investigation. The trial court denied defendant's request for this instruction because it was offered as a defense to issue five, discussed above, which concerned defendant's knowledge of Haynes's improper conduct, and the trial court found the requested instruction irrelevant to issue five. The trial court opined that the question of reasonable delay, if it was relevant at all, related only to issue three—whether Mullen ratified Haynes's unauthorized representation.

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We agree with the trial court that the requested instruction was not appropriate.

3. Jury instructions on damages. Defendant argues that, even assuming that the jury instructions on damages were correct, the jury disregarded them when it calculated the damages. Defendant alleges that the jury should have subtracted plaintiff's 2005 net sales (\$623,241.00) from plaintiff's 2005 expected profit from the non-cancelable insertion orders (\$1,258,695.00). We disagree with this approach. The reasonable and proper interpretation of the jury instructions is to calculate damages by finding the difference between plaintiff's expected profit and its actual profit. Defendant is proposing that the instructions specify that the damages should be the difference between plaintiff's expected profit and its actual sales. The \$1,258,695.00 figure accounts for both sales and expenses, while the \$623,241.00 figure does not account for expenses; they are not comparable. The jury properly calculated the damages to be the difference between plaintiff's expected profit (\$1,258,695.00) and actual profit (\$0.00).³ Accordingly, the trial court properly denied defendant's motion for a new trial based upon the jury's application of the damage instructions.

Plaintiff's Appeal

We now move on to the issues raised in Gateway's appeal.

A. Summary judgment.

[8] Plaintiff first argues that the trial court erred by granting defendant's motion for summary judgment on plaintiff's claims for breach of contract. Plaintiff argues that it had a non-cancelable contract with defendant, which defendant breached by canceling and requiring proof of performance.

The trial court concluded that "there simply was no contract between the parties following plaintiff's receipt of the Haynes Memorandum and its 7 October 2004 e-mail response because the offer was too indefinite to bind the parties." "For an agreement to constitute a valid contract, the parties' minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001) (quotations and citations omitted).

3. We note that Gateway points out that its expert calculated a \$41,000.00 loss for 2005.

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Here, the Haynes Memorandum and Heard's email response represented a negotiation for a \$71.00 rate in conjunction with an offer of a non-cancelable contract. However, the parties did not negotiate any other terms. For example, the Haynes Memorandum stated that the Reynolds 2005 one-sheet contracts would "specify the market in which we are placing one-sheets," but those markets were not specified by the memorandum or in Heard's email response. As the trial court pointed out, plaintiff did not have enough information to perform because the parties had not yet agreed to "the number of one-sheets to be posted, the 'issue months' for the postings, and their geographic locations." Defendant included these missing terms in its subsequent insertion orders, which Heard received in November 2004. The trial court explained, "Because the parties had not yet committed to a contract, however, Mullen/LHC was free to retract its earlier offer of a guaranteed one-year term, which it did by tendering its form insertion order containing the 60-day cancellation provision."

We agree with the trial court that no contract was formed on 7 October 2005 and, thus, no contract was breached. The trial court properly granted Mullen's motion for summary judgment.

B. Diminution in business value damages.

[9] Plaintiff next argues that the trial court erred by granting defendant's motion for summary judgment as to plaintiff's demand for "diminution in business value" damages. Plaintiff moved to supplement the record to demonstrate these damages, which motion the trial court denied.

1. Summary judgment. The trial court concluded that "a diminution in business value theory of damages has no place" in this case because plaintiff's alleged damages were too speculative.

In order to recover damages for lost profits, the complainant must prove that except for the breach of contract, profits would have been realized, and he must ascertain such losses with reasonable certainty. North Carolina courts have long held that damages for lost profits will not be awarded based upon hypothetical or speculative forecasts of losses.

Iron Steamer, Ltd. v. Trinity Restaurant, 110 N.C. App. 843, 847, 431 S.E.2d 767, 770 (1993) (quotations and citations omitted).

Plaintiff based its damages calculation on two primary assumptions: (1) defendant would renew its one-sheet contract with plaintiff

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for the years ending 2006 through 2010, which the trial court concluded was unfounded, given the facts, and (2) plaintiff would have been able to solicit a level of business comparable to its business with defendant, which the trial court dismissed as speculative because “Gateway had no established history of profits from clients other than Mullen[.]”

We agree with the trial court that the basis for these damages is too speculative. Accordingly, we affirm the trial court’s order granting defendant’s motion for summary judgment as to diminution in business value damages.

2. Exclusion of evidence on damages. Plaintiff also argues that the trial court should not have denied its motion to supplement its evidence on diminution in business value damages with deposition testimony by defendant’s expert. The trial court deemed the motion moot based on its grant of summary judgment to defendant on the issue. We agree and hold that this argument is meritless.

C. Exclusion of evidence.

[10] Plaintiff next argues that the trial court erred by excluding certain evidence at trial. We review the trial court’s decision to exclude evidence for an abuse of discretion. *Barham v. Hawk*, 165 N.C. App. 708, 721, 600 S.E.2d 1, 9 (2004).

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.

Little v. Penn Ventilator Co., 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (quotations and citations omitted).

1. Proof of performance damages. Plaintiff argues that the trial court erred by excluding evidence of proof of performance damages and by not instructing the jury that payments made to prove performance were a proper component of damages. Plaintiff seeks to recover the amount that it spent on proving that it had performed its

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obligations under the insertion order contracts, \$218,922.00. Plaintiff argues that the contracts contained no proof of performance requirement and that the additional expense was “directly attributable to Mullen’s unreasonable conduct in terminating Gateway.” At trial, plaintiff theorized that defendant and Reynolds imposed the proof of performance conditions because they thought that defendant would not be able to comply due to the expense. The trial court sustained defendant’s objection to presenting the proof of performance damage claim to the jury.

The trial court’s decision was not “manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *Id.* It appears that the trial court considered the proof of performance expenses part of the cost of doing business, rather than an economic loss stemming from the unfair and deceptive trade acts. Accordingly, this argument is without merit.

2. “Pick up” insertion orders. Plaintiff argues that the jury should have been instructed to include “pick up” insertion orders in its damage calculation. “Pick up” insertion orders are orders that defendant would issue to plaintiff throughout the year, but which were not included in the original set of contracts. Plaintiff argued that historical data supported plaintiff’s claim that it could have expected to receive such orders during 2005 had defendant not canceled the contracts following Haynes’s termination. Defendant made a motion *in limine* to exclude plaintiff’s expert testimony on damages arising from lost pick up orders. The court allowed this motion, finding that plaintiff’s evidence was not sufficient as a matter of law to prove the damages with reasonable certainty because the expert relied upon only one year of history to make his projections. Again, we find this decision to be based in reason and hold that the trial court did not abuse its discretion.

3. Expert witness. At trial, plaintiff sought to call David Wedding, one of defendant’s experts, as a witness to corroborate plaintiff’s own expert, Randolph Whitt. Plaintiff alleged that defendant had opened the door to such testimony by challenging the inclusion of certain expenses in the damages calculations. Plaintiff’s trial counsel explained, “My understanding is David Wedding accepted all those expenses exactly as Mr. Whitt did and had no problem. Given that’s been made an issue, I think we’re entitled to say your expert had no problems with those.” The trial court denied plaintiff’s request, citing the hearsay rule. Plaintiff’s trial counsel explained,

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“we’re offering it . . . just to talk about what Mr. Whitt was asked to do, and the fact that the expenses and the financial statements are what they are and that nobody has had any problems with them.” The trial court countered, “In other words, you’re offering them for the truth of the matter asserted.” In addition, even if the testimony were relevant, “its probative value is substantially outweighed by the danger of not asserting unfair prejudice, but just confusing issues and undelayed [*sic*] waste of time.”

We find no abuse of discretion in the trial court’s ruling.

D. Motion to exclude evidence.

[11] Plaintiff argues that the trial court erred by admitting evidence of its commercial bribery and then submitting that question to the jury. As explained at length above, we agree. However, the erroneous instruction did not affect a substantial right because the jury essentially bypassed the question in reaching its verdict.

E. Directed verdict on unfair and deceptive trade acts.

[12] Plaintiff argues that the trial court erred by directing a verdict at the close of plaintiff’s evidence on certain predicate unfair and deceptive acts on which there was sufficient evidence to submit such issues to the jury and in overruling plaintiff’s objection to have additional predicate act issues submitted to the jury that would have supported the court’s finding of an unfair and deceptive trade practice. Plaintiff points to a number of acts allegedly committed by defendant that could support a violation of Chapter 75. In our opinion, plaintiff recovered the maximum amount of damages that it could have recovered. Multiple violations of Chapter 75 would not have increased the amount of damages. We need not address this issue further.

F. Denial of motion for attorneys’ fees.

[13] Finally, plaintiff argues that the trial court erred by denying its motion for attorneys’ fees and by excluding evidence of the reasonableness of those fees. An award of attorneys’ fees pursuant to N.C. Gen. Stat. § 75-16.1 is “within the sound discretion of the trial judge [and] . . . may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.” *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 421-22 (2005) (citations omitted). The trial court declined to award attorneys’ fees in its order and judgment, explaining, “the Court does not find that there was an unwarranted refusal to fully resolve this

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matter. This case involved some unique questions of law, especially as applied to the facts of record. The Defendant had valid reasons to refuse to settle this matter and to litigate it to conclusion.” We agree with the trial court’s assessment and find no abuse of discretion.

Accordingly, we affirm the judgments and orders of the trial court.

Affirmed.

Judges JACKSON and STEPHENS concur.

STATE OF NORTH CAROLINA v. FREDDIE JUNIOR BARE

No. COA08-818

(Filed 16 June 2009)

1. Constitutional Law— ex post facto law—satellite-based monitoring of sex offenders

The trial court did not err by directing defendant to enroll in satellite-based monitoring (SBM) under N.C.G.S. § 14-208.40B even though defendant contends it violates the *ex post facto* clause of the North Carolina and United States Constitutions when the SBM provisions did not exist at the time defendant was convicted of the charges and imposition of SBM increases defendant’s punishment for his crime because: (1) the legislature intended SBM to be a civil and regulatory scheme; (2) the statutes regarding SBM do not refer to, incorporate, or rely upon the definition of “intermediate punishment” under N.C.G.S. § 15A-1340.11(6) and does not compel an interpretation that the legislature intended SBM as a punishment; (3) the fact that SBM can be one of the conditions imposed upon an offender who has not completed his probation, parole, or post-release supervision does not mean that SBM alone is intended as punitive; (4) while SBM results in electronic monitoring of an offender’s whereabouts, the record does not indicate that it restricts an offender’s liberty in matters such as where to live and work; (5) the fact that SBM provisions are codified in Chapter 14 entitled “Criminal Law” does not in and of itself transform a nonpunitive civil regulatory scheme into a criminal one; and (6) involvement of the dis-

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strict attorney in SBM determination hearings does not by itself supersede the declared intent of the legislature, nor does the fact that the Department of Correction is involved in the risk assessment override the legislature's stated intent.

2. Sex Offenses— satellite-based monitoring—civil regulatory scheme instead of punitive intent

The trial court did not err by directing defendant to enroll in satellite-based monitoring (SBM) under N.C.G.S. § 14-208.40B even though defendant contends the statutory scheme is so punitive in purpose or effect as to negate the State's intention to deem it civil because: (1) our Supreme Court has noted the publicity and resulting stigma of the sex offender registry is not an integral part of the objective of the regulatory scheme, and wearing an electronic monitoring device is no more stigmatizing than the public registration of sex offenders required by the sex offender registry; (2) defendant has not shown that cooperation with the Department of Correction for the purposes of maintaining the SBM device is any more of an affirmative restraint than the registration requirements; (3) although defendant characterizes the tracking device as bulky and cumbersome, the record did not contain any information as to the size of the device or any information as to the manner of its attachment to defendant; (4) although defendant contends the device hindered his ability to obtain employment, defendant failed to present any testimony or evidence on this issue, and defense counsel's statements are not considered evidence; (5) the fact alone that the SBM provisions could have a deterrent effect is not enough to override a non-punitive purpose; (6) defendant does not contest that the SBM provisions have a rational connection to a nonpunitive purpose, and the ability to track the location of individuals who have committed sex offenses against minors or other aggravated sex offenses has a rational connection to the purpose of protecting the public; (7) SBM restrictions are not imposed on all sex offenders, but only those whom the legislature has designated as posing a particular risk; and (8) although the trial court initially imposed SBM for the remainder of defendant's natural life, defendant may request termination of SBM under N.C.G.S. § 14-208.43.

3. Sentencing— no contest plea—satellite-based monitoring not a direct consequence of plea

The trial court did not violate N.C.G.S. § 15A-1022 when it failed to inform defendant that imposition of satellite-based mon-

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itoring (SBM) would be a direct consequence of his 2002 no contest plea because: (1) defendant's argument is predicated on the assumption that SBM is a punishment, the Court of Appeals has determined that SBM provisions are not punitive, and thus N.C.G.S. § 15A-1022 is not implicated; (2) the imposition of a sentence may have a number of collateral consequences, and a plea of guilty is not rendered involuntary if defendant is not informed of all the possible indirect and collateral consequences; and (3) lifetime SBM was not an automatic result of defendant's no contest plea since the trial court is required to separately determine whether an offender meets the criteria subjecting him to SBM when an offender is convicted of a reportable conviction under N.C.G.S. § 14-208.6(4), or the Department of Corrections makes the initial determination if there has been no determination by the court.

Appeal by defendant from order entered 19 February 2008 by Judge Henry E. Frye, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 20 November 2008.

Attorney General Roy Cooper, by Assistant Attorney General Catherine M. (Katie) Kayser, for the State.

Mary McCullers Reece, for defendant-appellant.

CALABRIA, Judge.

Freddie Junior Bare ("defendant") appeals the trial court's order directing him to enroll in satellite-based monitoring ("SBM") pursuant to N.C. Gen. Stat. § 14-208.40B. We affirm the trial court's order.

Defendant pled guilty to indecent liberties with a minor in 1998. The court sentenced defendant to a minimum term of 19 months to a maximum term of 23 months in the North Carolina Department of Correction. In 2002, he pled no contest to failure to register as a sex offender in violation of N.C. Gen. Stat. § 14-208.11 and sexual activity by a custodian of a minor under § 14-27.7. The court consolidated the offenses for judgment and sentenced defendant to a minimum term of 46 months to a maximum term of 65 months in the North Carolina Department of Correction. The court recommended defendant attend and complete a sex offenders program while incarcerated. Defendant was ordered to register as a sex offender within ten days of his release date. In 2006, the General Assembly enacted the SBM provisions which became effective 16 August 2006. N.C. Sess. Laws

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2006-247, section 15(a); N.C. Gen. Stat. § 14-208.40 (2007). Defendant was released on 20 April 2007. Defendant was enrolled in SBM on 11 May 2007.

On 19 February 2008, the trial court held a determination hearing pursuant to N.C. Gen. Stat. § 14-208.40B. The trial court found that defendant was convicted of a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4) and is a recidivist. Defendant was ordered to enroll in SBM for the remainder of his natural life. Defendant appeals.

I. *Ex Post Facto*

[1] Defendant contends imposition of SBM violates the *ex post facto* clause of the North Carolina and United States Constitutions because the SBM provisions did not exist at the time defendant was convicted of the charges and imposition of SBM increases defendant's punishment for his crime. We disagree.

The standard of review is *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999) (citation omitted) ("Alleged errors of law are subject to *de novo* review on appeal."). "Because both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition, we analyze defendant's state and federal constitutional contentions jointly." *State v. White*, 162 N.C. App. 183, 191, 590 S.E.2d 448, 454 (2004) (quoting *State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (quotation marks omitted)).

The prohibition against *ex post facto* laws applies to:

1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

State v. Pardon, 272 N.C. 72, 76, 157 S.E.2d 698, 701 (1967) (quotation omitted). Defendant argues that imposition of SBM falls under the third category of *ex post facto* law: "a law which changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Id.*

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In determining whether a law inflicts a greater punishment than was established for a crime at the time of its commission, we first examine whether the legislature intended SBM to impose a punishment or to enact a regulatory scheme that is civil and nonpunitive. *See Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 1147, 155 L. Ed. 2d 164, 176 (2003); *State v. Johnson*, 169 N.C. App. 301, 307, 610 S.E.2d 739, 743-44 (2005); *White*, 162 N.C. App. at 192, 590 S.E.2d at 454.

If the intent of the legislature was to impose punishment, that ends the inquiry. If however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the [legislature's] intention to deem it civil.

Doe v. Bredesen, 507 F.3d 998, 1003 (6th Cir. 2007) (internal quotations omitted) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, —, 138 L. Ed. 2d 501, — (1997)).

“Because we ordinarily defer to the legislature’s stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Smith v. Doe*, 538 U.S. at 92, 123 S.Ct. at 1147, 155 L. Ed. 2d at 176 (internal citations and quotation marks omitted) (citations omitted).

A. Legislative Intent

Whether a statutory scheme is civil or criminal is first of all a question of statutory construction. We consider the statute’s text and its structure to determine the legislative objective. A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it.

Smith, 538 U.S. at 92, 93, 123 S.Ct. at 1147, 155 L. Ed. 2d at 177 (internal citations and quotation marks omitted). “‘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. Cheek*, 339 N.C. 725, 728, 453 S.E.2d 862, 864 (1995) (quoting *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). However, if

the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings, the intended sense of

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it may be sought by the aid of all pertinent and admissible considerations. Proper considerations include the law as it existed at the time of its enactment, the public policy of the State as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act.

State v. Sherrod, 191 N.C. App. 776, 779, 663 S.E.2d 470, 472-73 (2008) (internal citations and quotations omitted). “In discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible.” *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) (citation omitted). “The courts must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” *Smith* at 93, 123 S.Ct. at 1147, 155 L. Ed. 2d at 177 (citation and internal quotation marks omitted). “It is well settled that statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law.” *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (citation and quotation marks omitted).

The SBM provisions were enacted by N.C. Sess. Laws 2006-247, § 1(a) which states: “This act shall be known as ‘An Act To Protect North Carolina’s Children/Sex Offender Law Changes.’” N.C. Sess. Laws 2006-247, § 1(a). The SBM provisions are located in part 5 of Article 27A of Chapter 14 of the General Statutes. Art. 27A of Chapter 14 of the General Statutes is entitled “Sex Offender and Public Protection Registration Programs.” The SBM system is required to provide “[t]ime-correlated and continuous tracking of the geographic location of the subject using a global-positioning system based on satellite and other location tracking technology” and “[r]eporting of subject’s violations of prescriptive and proscriptive schedule or location requirements. Frequency of reporting may range from once a day (passive) to near real-time (active).” N.C. Gen. Stat. § 14-208.40(c)(1)-(2) (2007).

The sex offender monitoring program monitors two categories of offenders. N.C. Gen. Stat. § 14-208.40(a) (2007). The first category is any offender who is convicted of a reportable conviction defined by N.C. Gen. Stat. § 14-208.6(4) and required to register as a sex offender under Part 3 of Article 27A because he or she is “classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as defined in G.S. § 14-208.6.” N.C. Gen. Stat. § 14-208.40(a)(1)

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(2007) (effective until Dec. 1, 2008). The second category is any offender who satisfies four criteria: (1) is convicted of a reportable conviction defined by § 14-208.6(4), (2) is required to register under Part 2¹ of Article 27A, (3) has committed an offense involving the “physical, mental, or sexual abuse of a minor,” and (4) based on a risk assessment program, “requires the highest possible level of supervision and monitoring.” N.C. Gen. Stat. § 14-208.40(a)(2) (2007) (effective until Dec. 1, 2008).

In construing the statute as a whole, we conclude the legislature intended SBM to be a civil and regulatory scheme. This Court has interpreted the legislative intent of Article 27A as establishing “a civil regulatory scheme to protect the public.” *See White*, 162 N.C. App. at 193, 590 S.E.2d at 455 (holding that retroactive application of sex offender registration statute does not offend the *ex post facto* clause); *see also State v. Sakobie*, 165 N.C. App. 447, 452, 598 S.E.2d 615, 618 (2004) (“Having previously determined that Article 27A is a civil and not a criminal remedy, this panel is not at liberty to revisit the issue.”) (citing *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). By placing the SBM provisions under the umbrella of Article 27A, the legislature intended SBM to be considered part of the same regulatory scheme as the registration provisions under the same article. *See also Smith* at 93, 123 S.Ct. at 1147, 155 L. Ed. 2d at 177 (citation and quotation marks omitted) (“an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective and has been historically so regarded”).

Defendant argues SBM was intended to be punitive because (1) “the original enacting legislation” included language that the system was to be used as “an intermediate sanction,” (2) the statute requires SBM as a condition of probation, parole and post-release supervision; (3) SBM provisions are located in Chapters 14 and 15, both criminal statutes; (4) the district attorney initiates the determination regarding whether an offender is eligible for SBM and (5) the Department of Correction (“DOC”) maintains and monitors the SBM system.

1. Part 2 is entitled “Sex Offender and Public Protection Registration Program” and applies to offenders convicted of a reportable conviction. N.C. Gen. Stat. § 14-208.7 (2007). Part 3 is entitled “Sexually Violent Predator Registration Program” and applies to an offender classified as a sexually violent predator. N.C. Gen. Stat. § 14-208.20 (2007). Part 3 requires sexually violent predators to register additional information in conjunction with the Part 2 registration requirements. N.C. Gen. Stat. § 14-208.21, -208.22.

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(1) “Intermediate Sanction”

Defendant directs our attention to an Editor’s Note to the 2007 version of N.C. Gen. Stat. § 14-208.40 describing the “Global Positioning System” for use “as an intermediate sanction.”² Defendant contends including the words “intermediate sanction” expresses the legislature’s intent that the purpose of the SBM provisions is punitive. Defendant equates the term “intermediate sanction” with “intermediate punishments” as defined in N.C. Gen. Stat. § 15A-1340.11(6) (2007).

The term “intermediate punishment” is defined as “[a] sentence in a criminal case that places an offender on supervised probation and includes at least one of . . . [six] conditions” enumerated in N.C. Gen. Stat. § 15A-1340.11(6). N.C. Gen. Stat. § 15A-1340.11(6) (2007). At least two other criminal sentencing statutes, N.C. Gen. Stat. §§ 15A-837(a)(5) and 15A-1340.13(h) use the terms “intermediate punishment” and “intermediate sanction” interchangeably. *See* N.C. Gen. Stat. § 15A-837(a)(5), -1340.13(h) (2007). N.C. Gen. Stat. § 15A-837(a)(5) specifically cites to the definition of “intermediate punishment” in N.C. Gen. Stat. § 15A-1340.11(6) and N.C. Gen. Stat. § 15A-1340.13(h) is located within Chapter 15A, Article 81B entitled, “Structured Sentencing of Persons Convicted of Crimes[,]” of the North Carolina General Statutes, the article for which N.C. Gen. Stat. § 15A-1340.11(6) provides definitions. *See* N.C. Gen. Stat. § 15A-837(a)(5), -1340.11(6), 1340.13(h). However, the statutes regarding SBM do not refer to, incorporate, or rely upon the definition of “intermediate punishment” as set forth in N.C. Gen. Stat. § 15A-1340.11(6) in any way related to their use of the term “interme-

2. The relevant portion of the Editor’s Note reads as follows:

The Department of Correction shall either issue an RFP prior to signing a contract, or with prior approval by the State Chief Information Officer or his designee, enter into a contract through an approved contracting alliance or consortium for a passive and active Global Positioning System. *The system shall be for use as an intermediate sanction* and to help supervise certain sex offenders who are placed on probation, parole, or post-release supervision. If an RFP is issued, the contract shall be awarded by October 1, 2006 for contract terms to begin January 1, 2007. The Department of Correction shall report by November 1, 2006 to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the details of the awarded contract.

N.C. Sess. Laws 2006-247, § 16; Editor’s Note, N.C. Gen. Stat. § 14-208.40 Ann. (2007) (emphasis added). The quoted language does not appear in the Editor’s Note to the 2008 version of N.C. Gen. Stat. § 14-208.40. (Interim Supp. Vol. I, 2008)

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mediate sanction.” The use of the term “intermediate sanction” in the Editor’s Note of N.C. Gen. Stat. § 14-208.40 is therefore distinct from and unrelated to the term “intermediate punishment” as defined in N.C. Gen. Stat. § 15A-1340.11(6).

The word “sanction” as used in this context is defined by Black’s Law Dictionary as “[a] penalty or coercive measure that results from failure to comply with a law, rule, or order.” Black’s Law Dictionary 1368 (8th ed. 2004). The word “sanction” often appears in cases and statutes in both the civil and criminal context. *See, e.g.*, N.C. Gen. Stat. § 1A-1, Rule 11(a), 26(g), 37(b)(1-2); *State v. Beckham*, 148 N.C. App. 282, 285-86, 558 S.E.2d 255, 257-58 (2002); *see Smith*, 538 U.S. at 100, 123 S.Ct. at 1151, 155 L. Ed. 2d at 181 (comparing the restraints imposed by Alaska’s sex offender registration act as being less harsh than “the sanctions of occupational debarment which we have held to be nonpunitive”). For example, this Court refers to the *civil* remedy in N.C. Gen. Stat. § 1-538.2 as a “sanction.” *See Beckham*, 148 N.C. App. at 285-87, 558 S.E.2d at 257-58. Furthermore, various “sanctions” are often imposed against parties who violate the North Carolina Rules of Civil Procedure, clearly these “sanctions” are not criminal punishments. *See, e.g.*, N.C. Gen. Stat. § 1A-1, Rule 11(a), 26(g), 37(b)(1). Thus, the words “intermediate sanction” or the word “sanction” does not compel an interpretation that the legislature intended SBM as a punishment.

(2) Condition of probation

Defendant next contends the SBM provisions were intended to be punitive because “the Legislature required courts to place offenders subject to lifetime satellite-based monitoring on lifetime probation.” Defendant also contends the “requirement that the trial court impose monitoring as a condition of probation, parole, and post-release supervision, was consistent with the Legislature’s intent that monitoring serve as punishment, since mandatory probation, parole, and post-release supervision have long been deemed ‘punishment.’ ”

Defendant supports this argument by relying on N.C. Gen. Stat. § 14-208.42. Prior to a 2007 amendment the words “unsupervised probation” were included in the statute, “Lifetime registration offenders required to submit to satellite-based monitoring for life *and to continue on unsupervised probation upon completion of sentence.*” (Emphasis added). N.C. Sess. Laws 2006-247, § 15(a) (codified as N.C. Gen. Stat. § 14-208.35 (2006)). In 2007, the General Assembly amended the provision to read: “Offenders required to submit to

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satellite-based monitoring required to cooperate with Department upon completion of sentence.” N.C. Gen. Stat. § 14-208.42 (2007); N.C. Sess. Laws 2007-213, § 5; N.C. Sess. Laws 2007-484, § 42(b). The text of N.C. Gen. Stat. § 14-208.42 originally stated:

Notwithstanding any other provision of law, when the court sentences an offender who is in the category described by G.S. 14-208.40(a)(1) for a reportable conviction as defined by G.S. 14-208.6(4), and orders the offender to enroll in a satellite-based monitoring program, *the court shall also order that the offender, upon completion of the offender’s sentence and any term of parole, post-release supervision, intermediate punishment, or supervised probation that follows the sentence, continue to be enrolled in the satellite-based monitoring program for the offender’s life and be placed on unsupervised probation unless the requirement that the person enroll in a satellite-based monitoring program is terminated pursuant to G.S. 14-208.43.*

N.C. Sess. Laws 2006-247, § 15(a) (emphasis added).

Subsequently, the General Assembly removed the language referring to “unsupervised probation” in the title of N.C. Gen. Stat. § 14-208.42. N.C. Sess. Laws 2007-213, § 5. The statute specifies enrollment in SBM is to continue after “completion of the offender’s sentence and any term of parole, post-release supervision, intermediate punishment, or supervised probation that follows the sentence.” N.C. Gen. Stat. § 14-208.42 (2007). The statute does not require an offender who is subject to SBM to be on “parole, post-release supervision, intermediate punishment, or supervised probation,” (although SBM may be imposed during these time periods) but that SBM may be imposed after completion of these forms of punishment. N.C. Gen. Stat. § 14-208.42 (2007). Therefore, the fact that SBM can be one of the conditions imposed upon an offender who has not completed his probation, parole, or post-release supervision does not mean that SBM alone is intended as punitive.

The sex offender registration requirements may also be imposed as a condition to probation or post-release supervision. *See* N.C. Gen. Stat. § 15A-1343(b2)(1) (2007) (registration “as required by N.C. Gen. Stat. § 14-208.7” is included as a “special condition of probation”); N.C. Gen. Stat. § 15A-1368.4(b1)(1) (2007). In *Smith*, the United States Supreme Court examined whether registration requirements for sex offenders were parallel to supervised release or probation, which are punishments for crime. 538 U.S. at 101-02, 123 S.Ct. at 1152,

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155 L. Ed. 2d at 182. The Supreme Court distinguished the registration requirements from conditions imposed by probation because offenders were still “free to move where they wish and to live and work as other citizens with no supervision.” *Id.* While SBM results in electronic monitoring of an offender’s whereabouts, the record does not indicate that it restricts an offender’s liberty in matters such as where to live and work. SBM is therefore similar to registration requirements in this regard and is distinguishable from probation, parole, and post-release supervision. *See id.*

(3) Location of SBM provisions

As to defendant’s next argument, the fact that the SBM provisions are codified in Chapter 14 entitled “Criminal Law,” does not “in and of itself transform [a] nonpunitive, civil regulatory scheme into a criminal one.” *White*, 162 N.C. App. at 193-94, 590 S.E.2d at 455 (quoting *State v. Mount*, 317 Mont. 481, 491, 78 P.3d 829, 837 (2003)).

(4) Involvement of District Attorney

Defendant contends the legislature chose to “place[] the responsibility for initiating eligibility determinations on the District Attorney for offenders awaiting sentencing” which evidences an intent the SBM provision serve as punishment. We disagree. Involvement of the district attorney in SBM determination hearings does not by itself supercede the declared intent of the legislature. District attorneys are required to perform a number of nonpunitive statutory duties. *See* N.C. Gen. Stat. § 52C-3-308 (2007) (duty of district attorney to represent obligee in proceedings under the Uniform Interstate Family Support Act); N.C. Gen. Stat. § 122C-268.1 (2007) (district attorney may represent the State in civil commitment hearings following a respondent’s involuntary commitment upon a verdict of not guilty by reason of insanity).

(5) Involvement of the DOC

Defendant also argues involvement of the DOC in eligibility determinations for offenders who are released indicates a punitive intent by the legislature. We disagree.

Defendant cites to N.C. Gen. Stat. § 14-208.40A, -208.40B in support of this argument. These SBM provisions support our conclusion that imposition of SBM was intended to protect the public and not intended to punish the offender. Where an offender commits an offense that involved physical, mental or sexual abuse of a minor but

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the offense is not aggravated and the offender is not a recidivist, the DOC performs a risk assessment. N.C. Gen. Stat. § 14-208.40B(c) (effective until Dec. 1, 2008). The trial court is then required to determine whether “based on the Department’s risk assessment, the offender requires the highest possible level of supervision and monitoring.” N.C. Gen. Stat. § 14-208.40B(c) (effective until Dec. 1, 2008). Offenders who have been convicted of a reportable conviction and are recidivists, as well as those classified as sexually violent predators or those convicted of aggravated offenses, are the type of offenders who would receive a high risk assessment. N.C. Gen. Stat. § 14-208.40B(c) (effective until Dec. 1, 2008). Use of the words “risk assessment” reveals the legislature’s concern that these offenders pose a greater risk to the public. The fact that the DOC is involved in the risk assessment does not override the legislature’s stated intent. *Smith*, 538 U.S. at 93, 123 S.Ct. at 1147, 155 L. Ed. 2d at 176.

Defendant has failed to direct us to any considerations which would support his contention that the General Assembly intended that SBM to be a criminal punishment. Therefore, in accord with our prior cases regarding sex offender registration, we again conclude that Article 27A of Chapter 14 of the North Carolina General Statutes, entitled “Sex Offender and Public Protection Registration Programs[,]” which now includes “Part 5. Sex Offender Monitoring[,]” was intended as “a civil and not a criminal remedy[.]” *Sakobie*, 165 N.C. App. at 452, 598 S.E.2d at 618 (citation omitted).

B. Punitive in Purpose or Effect

[2] Although SBM was created as a civil regulatory scheme, we

recognize that a civil label is not always dispositive, [and] we will reject the legislature’s manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention to deem it civil[.]

Kansas v. Hendricks, 521 U.S. 346, 361, 117 S.Ct. 2072, 2082, 138 L. Ed. 2d 501, 515 (1997) (internal citations, quotation marks, and brackets omitted). We must therefore further examine whether the statutory scheme is “so punitive either in purpose or effect as to negate the State’s intention to deem it civil.” *Smith* at 92, 123 S.Ct. at 1147, 155 L. Ed. 2d at 176 (citation, quotation marks, and brackets omitted). In our consideration of SBM’s purpose and effects, we look to

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whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose.

Id. at 97, 123 S.Ct. at 1149, 155 L. Ed. 2d at 180. These “factors are designed to apply in various constitutional contexts . . . [and] are neither exhaustive nor dispositive, but are useful guideposts[.]” *Smith* at 97, 123 S.Ct. at 1149, 155 L. Ed. 2d at 179-80 (internal citations and quotation marks omitted). We now consider each of defendant’s arguments as to why SBM is punitive in purpose and effect.

(1) Historically Regarded as Punishment

Defendant contends wearing the SBM device is akin to a modern-day shame sanction. Shame sanctions are historically regarded as punishment. *Smith*, 538 U.S. at 98, 123 S.Ct. at 1150, 155 L. Ed. 2d at 180. However, “dissemination of truthful information in furtherance of a legitimate governmental objective” is not traditionally regarded as punishment. *Id.* at 98-99, 123 S.Ct. at 1150, 155 L. Ed. 2d at 181 (*see also White*, 162 N.C. App. at 194, 590 S.E.2d at 456). In *Smith*, the Supreme Court noted the publicity and resulting stigma of the sex offender registry is not “an integral part of the objective of the regulatory scheme.” *Id.*

In 2007, the Sixth Circuit examined whether the “Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act” (“Monitoring Act”) which “authorized the Tennessee Board of Probation and Parole . . . to subject a convicted sexual offender to a satellite-based monitoring program for the duration of his probation” violated the *ex post facto* clause. *Bredesen*, 507 F.3d at 1000. Doe pled guilty to a number of offenses between 1995 and 2004 under the Sex Offender Act. *Id.* In 2004, the Tennessee legislature repealed the Sex Offender Act and replaced it with the Registration Act. *Id.* at 1001. Under the new code, Doe was re-classified as a violent sexual offender and required to wear a global positioning device for the rest of his life. *Id.* The *Bredesen* court applied the *Mendoza-Martinez* factors set forth in *Smith v. Doe* and concluded Tennessee’s satellite-based monitoring program was not so punitive in effect to override its nonpunitive purpose. *Id.* at 1005-07.

We find the analysis in *Bredesen* helpful in the case at bar. In *Bredesen*, Doe alleged the physical nature of the device rendered it

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visible to any onlooker because the global positioning satellite device was relatively large and worn outside “his person.” *Id.*, 507 F.3d at 1002. The *Bredesen* court concluded the Monitoring Act’s registration, reporting and surveillance requirements are “not of a type that we have traditionally considered as a punishment.” The lifetime registration and monitoring of sex offenders is less harsh than other civil penalties historically considered nonpunitive, such as revocation of a professional license and preclusion from certain employment. *Id.* at 1005 (citing *Smith*, 538 U.S. at 100, 123 S.Ct. at 1140. The court also noted that the device was only six inches by 3.25 inches by 1.75 inches and weighed less than a pound. *Id.* The court noted the appearance of the device was not dissimilar to other electronic devices such as a walkie-talkie or a personal organizer. *Id.* More importantly, there was no evidence presented to suggest an observer would recognize the device as one that monitored sex offenders. *Id.*

Here, defendant contends the SBM device is a modern day shame sanction because the “bulky” device is a physical, visible sign notifying the public that the wearer committed a sex offense, unlike the sex offender registry. However, defendant has presented no affidavits or other evidence demonstrating that the device is recognizable as a monitor assigned to sex offenders as opposed to an ordinary electronic device such as a cell phone, personal data assistant, or walkie-talkie.

We conclude that based on the record before us, wearing an electronic monitoring device is no more stigmatizing than the public registration of sex offenders required by the sex offender registry. *See White*, 162 N.C. App. at 194, 590 S.E.2d at 456 (concluding public disclosure of sex offender registry is not designed to humiliate and punish).

(2) Affirmative Disability or Restraint

Defendant contends wearing an electronic tracking device “at all times” and being required to cooperate with the DOC in order to ensure the device is working properly pursuant to N.C. Gen. Stat. § 14-208.42 imposes a punitive restraint on defendant’s daily activities. We disagree.

In support of his argument, defendant cites N.C. Gen. Stat. § 14-208.42, which specifically authorized the DOC to contact offenders for the limited purpose of enrollment and maintenance of the SBM device. The statute states, in relevant part:

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The Department shall have the authority to have contact with the offender at the offender's residence or to require the offender to appear at a specific location as needed for the purpose of enrollment, to receive monitoring equipment, to have equipment examined or maintained, and for any other purpose necessary to complete the requirements of the satellite-based monitoring program. The offender shall cooperate with the Department and the requirements of the satellite-based monitoring program until the offender's requirement to enroll is terminated and the offender has returned all monitoring equipment to the Department.

N.C. Gen. Stat. § 14-208.42 (2007). It is clear that defendant must meet with an officer for maintenance of the monitoring device. However, all we can glean from the record and the statute is that an offender who is enrolled in SBM must meet at some unknown frequency and location with an officer who is charged with the maintenance of the transmitting unit. Under these facts, defendant has not shown that cooperation with the department for the purposes of maintaining the SBM device is any more of an affirmative restraint than the registration requirements.

Defendant also argues the device is "bulky and cumbersome" and "hindered his ability to obtain employment." We first note that although the defendant characterizes the tracking device as "bulky and cumbersome," the record does not contain any information as to the size of the device or any information as to the manner of its attachment to defendant. Pursuant to the North Carolina Rules of Appellate Procedure, Rule 9, this Court's "review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9, and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d)." N.C. R. App. P. 9(a) (2008). "The appellate courts can judicially know only what appears of record." *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988).

In addition, defendant argues that the device has "hindered his ability to obtain employment." However, defendant did not present any testimony or evidence at his determination hearing as to his inability to obtain employment. Defendant's counsel argued to the trial court that the device had prevented defendant from obtaining two jobs. Specifically, defendant's counsel argued that because the monitor cannot be cleaned and would be exposed to unsanitary conditions it restricted defendant from obtaining a job at Tyson Foods. Defense counsel also argued the device posed a safety hazard for an

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assembly job at Hosiery Mills because it would be exposed to belts and machinery. However, the statements of counsel are not evidence. “[I]t is axiomatic that the arguments of counsel are not evidence.” *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (citation omitted). Furthermore, even if defense counsel’s statements could be considered as evidence, it is not the function of this Court to make findings of fact. The trial court made no findings of fact as to defendant’s ability to obtain employment while on SBM, nor could the court make any such findings in the absence of any testimony or evidence. Based upon the record before us, we cannot determine the restraints which would be imposed upon defendant by SBM are anything more than “minor” or “indirect” restraints and thus they do not rise to the level of punishment. *White*, 162 N.C. App. at 195, 590 S.E.2d at 456 (citing *Smith v. Doe*, 538 U.S. at 102, 123 S.Ct. at 1152, 155 L. Ed. 2d at 183 (recognizing sex offender registration requirement imposes an indirect restraint but holding it is not a punitive restraint)); *Kansas v. Hendricks*, 521 U.S. at 363, 117 S.Ct. at 2083, 138 L. Ed. 2d at 516 (concluding that despite the fact a regulatory scheme resulting in the indefinite civil confinement of a person diagnosed as a pedophile imposes an affirmative restraint, an affirmative restraint on a defendant’s freedom does not automatically lead to the presumption that such a restraint is punishment); see also *Bredesen*, 507 F.3d at 1005 (holding despite restrictions on his daily activities as a result of wearing the GPS device, because the Monitoring Act did not increase the length of his incarceration, or prevent him from changing jobs, residences or traveling, it was not a punitive restraint).

(3) Promotes Traditional Aims of Punishment

Defendant also argues SBM serves a deterrent purpose, which is one of the traditional aims of punishment.

We agree that the SBM provisions could have a deterrent effect. Presumably, sex offenders would be less likely to repeat offenses since they would be aware their location could be tracked and it would be easier to catch them. However, this factor alone is not enough to override a nonpunitive purpose. See *Smith*, 538 U.S. at 102, 123 S.Ct. at 1152, 155 L. Ed. 2d at 183 (reasoning that “[a]ny number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions criminal . . . would severely undermine the Government’s ability to engage in effective regulation” (internal citations and quotation marks omitted)).

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(4) Rational Connection to Nonpunitive Purpose

A statute's "rational connection to a nonpunitive purpose is a most significant factor in our determination that the statute's effects are not punitive." *Smith*, 538 U.S. at 102, 123 S.Ct. at 1152, 155 L. Ed. 2d at 183 (internal quotation marks omitted). "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* at 103, 123 S.Ct. at 1152, 155 L. Ed. 2d at 183.

Here, as in *State v. White*, the defendant does not contest that the SBM provisions have a rational connection to a non-punitive purpose. 162 N.C. App. at 196, 590 S.E.2d at 457. The ability to track the location of individuals who have committed sex offenses against minors or other aggravated sex offenses has a rational connection to the purpose of protecting the public. *See also Bredesen*, 507 F.3d at 1006 (holding the Tennessee legislature could rationally conclude sex offenders pose a high risk of recidivism and that electronic monitoring could reduce the risk of recidivism and protect the public without punishing offenders).

(5) Excessive in Relation to Nonpunitive Purpose

Defendant also argues the SBM provisions are excessive because wearing a monitor cannot prevent an offender from re-offending.

"The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105, 123 S.Ct. at 1154, 155 L. Ed. 2d at 185. "The proper analysis considers whether the regulations required are excessive—in other words, whether the extent and duration of those requirements are greater than necessary to meet the legislature's purpose." *White*, 162 N.C. App. at 197, 590 S.E.2d at 457.

The nonpunitive purpose is to supervise certain offenders whom the legislature has identified as posing a particular risk to society. The question is whether continuous SBM for the remainder of an offender's life is reasonable in light of the objective to protect the public. The SBM restrictions are not imposed on all sex offenders, but only those whom the legislature has designated as posing a particular risk. In addition, although the trial court initially imposed SBM for the

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remainder of defendant's natural life, defendant may request termination of SBM under N.C. Gen. Stat. § 14-208.43. The Post-Release Supervision and Parole Commission ("the Commission") has authority to terminate satellite-based monitoring upon request of the first category of offender who has served his sentence and completed any period of probation, parole, or post-release supervision as part of the sentence, if the offender has not received any additional reportable convictions during the period of satellite-based monitoring. N.C. Gen. Stat. § 14-208.43 (2007). SBM will also be terminated if the offender has been released from the requirement to register under Part 2 of Article 27A. N.C. Gen. Stat. § 14-208.43(d1). The Commission does not have authority to consider or terminate a monitoring requirement for an offender in the second category. N.C. Gen. Stat. § 14-208.43(e). The trial court determined defendant falls under the first category of offender under N.C. Gen. Stat. § 14-208.40(a)(1).

The United States Supreme Court has held that a much more restrictive Kansas statute, which established "a civil commitment procedure for the long-term care and treatment of the sexually violent predator" was not excessive, given its purpose of protection of the public by holding a person until his mental abnormality no longer causes him to be a threat to others. *Kansas v. Hendricks*, 521 U.S. at 351-52, 117 S.Ct. at 2077, 138 L. Ed. 2d at 509. Accordingly, based on the record before us, we conclude that imposition of continuous SBM of recidivists or violent sex offenders is not unreasonable in light of the statute's purpose.

C. Conclusion

We hold that the restrictions imposed by the SBM provisions do not negate the legislature's expressed civil intent. Defendant has failed to show that the effects of SBM are sufficiently punitive to transform the civil remedy into criminal punishment. Based on the record before us, retroactive application of the SBM provisions do not violate the *ex post facto* clause.

II. No Contest Plea Arrangement

[3] Defendant makes two arguments regarding his 2002 no contest plea arrangement. First, defendant argues the trial court violated N.C. Gen. Stat. § 15A-1022 when it failed to inform him that imposition of SBM would be a direct consequence of his plea. We disagree.

N.C. Gen. Stat. § 15A-1022 provides in relevant part:

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(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

. . . .

(6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge;

N.C. Gen. Stat. § 15A-1022(a) (2007).

Defendant's argument is predicated on the assumption that SBM is a punishment. Because we determined the SBM provisions are not punitive, N.C. Gen. Stat. § 15A-1022(a) is not implicated.

Defendant next argues his plea is rendered involuntary because imposition of SBM was a direct consequence of his no contest plea. Our case law requires that "[a]lthough a defendant need not be informed of all possible indirect and collateral consequences, the plea nonetheless must be 'entered by one fully aware of the *direct consequences*, including the actual value of any commitments made to him by the court. . . .'" *State v. Bozeman*, 115 N.C. App. 658, 661, 446 S.E.2d 140, 142 (1994) (quoting *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L. Ed. 2d 747, 760 (1970) (emphasis added)). "Direct consequences" of a plea "are those that have a definite, immediate, and largely automatic effect on the range of the defendant's punishment[,]" and a statute and the due process clause entitle the defendant to be apprised of them. *State v. Smith*, 352 N.C. 531, 550-51, 532 S.E.2d 773, 786 (2000). Direct consequences include mandatory minimum sentences or additional terms of imprisonment as a result of the guilty plea. *Bozeman*, 115 N.C. App. at 661, 446 S.E.2d at 142-43 (holding mandatory minimum sentences are a direct consequence of a guilty plea); *State v. McNeill*, 158 N.C. App. 96, 104, 580 S.E.2d 27, 31 (2003) (additional terms of imprisonment resulting from defendant's guilty plea to habitual offender status were a direct consequence). However, "[t]he imposition of a sentence or sentences may have a number of collateral consequences, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of all of the possible indirect and collateral consequences." *Strader v. Garrison*, 611 F.2d

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61, 63 (4th Cir. 1979) (holding parole eligibility status is a collateral consequence of a guilty plea).

We disagree that lifetime satellite-based monitoring was an automatic result of defendant's no contest plea. "When an offender is convicted of a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4), during the sentencing phase," the trial court is required to separately determine whether an offender meets the criteria subjecting him to SBM. N.C. Gen. Stat. § 14-208.40A. If there has been no determination by the court whether an offender is required to enroll in SBM, the DOC makes the initial determination, schedules a hearing, notifies the offender, and the trial court determines in a separate hearing whether the offender falls under one of the categories subjecting him to SBM. N.C. Gen. Stat. § 14-208.40B (2007). Therefore, imposition of SBM was not an automatic result of his no contest plea, unlike a mandatory minimum sentence or an additional term of imprisonment. *See Cuthrell v. Patuxent Institution*, 475 F.2d 1364, 1365, 1367 (1973) (although defendant's guilty plea subjected him to the possibility of civil commitment, because the purpose of the commitment was not punishment and it occurred after a separate civil commitment hearing, civil commitment was not a direct and automatic consequence of defendant's guilty plea). This assignment of error is overruled.

Affirmed.

Judges STEELMAN and STROUD concur.

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No. COA09-53

(Filed 16 June 2009)

1. Child Abuse and Neglect— findings of neglect—no objection—sufficiency

Findings of fact to which respondent did not object supported the conclusion of neglect in a child neglect adjudication. Other findings were not dispositive.

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2. Child Abuse and Neglect— neglect by mother—custody to father—evidence sufficient

There was sufficient competent evidence in a child neglect adjudication for the trial court to conclude that the father was a fit and proper person to have custody of a child. Although respondent-mother argued that more evidence was needed, she did not challenge the findings the court made or the competency of the evidence.

3. Child Abuse and Neglect— custody to father—judicial notice of juvenile files

There was substantial evidence in a child neglect adjudication from which the court could conclude without abusing its discretion that a child should be placed with her father, with legal custody to remain with DSS. Respondent did not object to the trial court taking judicial notice of the underlying juvenile case files.

4. Appeal and Error— mootness—foster care in child's best interest—child returned to mother

An appeal from a finding in a child neglect adjudication that it was in the best interest of a child to remain in foster care was moot where custody was subsequently granted to respondent-mother.

5. Child Abuse and Neglect— reasonable efforts to prevent placement—functional equivalent

Assuming that N.C.G.S. § 7B-507(a)(3) applies, ordering DSS to supervise respondent-mother's visitation and to aid in her substance abuse assessment and psychological evaluation is the functional equivalent of ordering DSS to make reasonable efforts to prevent the need for placement as required by the statute.

6. Child Abuse and Neglect— child's father—counsel waived—no further notice of motions or hearing

Child neglect adjudication and disposition orders were reversed and remanded where the child's father waived counsel; was not served with at least twenty documents; there was no indication that he had notice of the disposition hearing; and one of the reasons for not finding placement with the father appropriate was that he had not appeared before the court for several months.

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Appeal by respondent-mother and father Gary F. from adjudication order entered on or about 2 July 2008 and disposition order entered on or about 17 September 2008 by Judge Joseph Moody Buckner in District Court, Orange County. Heard in the Court of Appeals 6 May 2009.

Sofie W. Hosford, for appellant respondent-mother.

Peter Wood, for appellant respondent-father Gary F.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, for appellee respondent-father Thomas F.

Northern Blue, LLP, by Carol J. Holcomb, for petitioner-appellee.

Pamela Newell Williams, for appellee guardian ad litem.

STROUD, Judge.

Respondent-mother has three children with three different fathers. The trial court adjudicated the children as neglected and ordered custody of one child to his father and custody of the other two children to remain with the Department of Social Services. From the adjudication and disposition orders, respondent-mother and respondent-father of one of the children in the custody of the Department of Social Services appeal. For the following reasons, we affirm in part, dismiss in part, and reverse and remand in part.

I. Background

The trial court made the following pertinent findings in its 2 July 2008 adjudication order:

3. A Petition alleging Neglect of all three children¹ was filed on December 11, 2007. A Child Planning Conference (CPC) was held on December 18, 2007, where an agreement was reached that custody of the children would remain with Respondent

1. Pseudonyms will be used to protect the identity of the minor children. Discerning which child is being discussed and which child belongs to which father has been difficult as the children's names, beyond the first letter, have been marked out within the record to protect their identity and the briefs also differed in how they referred to the children. Adding to the confusion, two of the children's names start with the letter H. After a thorough review of the record we have determined that Harry is the son of Bradley C., Hannah is the daughter of Thomas F., and Amy is the daughter of Gary F. We will refer to the children by their pseudonyms when we are able to ascertain which child is at issue.

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mother, subject to the provisions included in the Consent Order. Non-secure custody was ordered on January 15, 2008 and a non-secure custody hearing was set for January 17, 2008. At the non-secure custody hearing, by agreement of the parties non-secure custody was continued and, another CPC was held on January 22, 2008. No agreement was reached at the CPC

4. [Respondent-mother] and her [three] children . . . have been known to the Orange County Department of Social Services (OCDSS) since March 17, 2007, when the department received a referral alleging that [respondent-mother] abused benzodiazepines and opiates which impaired her ability to parent her children. OCDSS completed a family assessment and closed the case on April 17, 2007.
5. On May 1, 2007, OCDSS received a second referral alleging that [Harry] had been locked out of the house and could not get back in, even though his mother was at home. Upon being unable to gain entry into the home, [Harry] went to a neighbor's house and called his father, Bradley C., who immediately responded by going to the neighbors' home where [Harry] waited. Mr. C. knocked on the door in an attempt to get [respondent-mother] to respond. [Respondent-mother] did not respond. The Orange County Sheriff's Department was called for assistance. The evidence regarding the amount of time that [Harry] was locked out of the house and the amount of time it took to ultimately get [respondent-mother] to open the door is unclear. However, the court can conclude and does find that [Harry] was left unsupervised and locked out of his home for a substantial amount of time. This event occurred on a school day and [Harry] was not in school on this day. While [respondent-mother] claimed [Harry] was sick, Mr. C. observed that he was fine. A month before this event, [respondent-mother] had a car accident with [Amy] in the car, where she ran off the road and struck a tree. Again, OCDSS completed a family assessment and closed the case on June 19, 2007.
6. On July 31, 2007, OCDSS received another referral regarding a child of [respondent-mother]. This referral included information that [Amy] had not received proper medical care. Again, OCDSS completed a family assessment and closed the case on September 6, 2007.

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7. On September 19, 2007, OCDSS received another referral indicating that [Harry] was left alone in the neighborhood without parental supervision; that he rode his bike without shoes or a helmet; that he would roam the neighborhood, sometimes taking things from the neighbors' garages and; and [sic] that he had entered the community clubhouse unattended. On October 19, 2007, the family was found to be in need of services and the case was referred to Child Protective Services for case management. Courtney McIntyre was the Social Worker assigned to the case.
8. After an initial meeting with [respondent-mother] in October, 2007, the Social Worker made numerous attempts to contact [respondent-mother] in order to establish a case plan, but [respondent-mother] failed and refused to respond to the Social Worker's attempts to contact her. Finally in late November, 2007, [respondent-mother] contacted the Social Worker's supervisor and was angry and hostile at OCDSS's continuing involvement and at the Social Worker's attempt to contact her. [Respondent-mother] agreed, however, to meet with the Social Worker on the following day. The next day, the Social Worker went to [respondent-mother's] home, but [respondent-mother] refused to let the Social Worker in the home. Rather, [respondent-mother] stood in the doorway, holding [Amy], while [Harry] watched. [Respondent-mother] screamed, yelled and cursed at the Social Worker for as long as the Worker was willing to stand there, which was about forty-five (45) minutes. During [respondent-mother's] tirade, [Harry] took [Amy] from his mother's arms, and took her to another room. When [respondent-mother] noticed that [Harry] had taken [Amy] to another room, she demanded that he bring her back and when he did, she placed [Amy] at the base of the stairs and proceeded to scream and yell obscenities at the Social Worker. Neither [Harry] nor [Amy] seemed phased [sic] by [respondent-mother's] rage. No case plan was established during this encounter.
9. In December, 2007, OCDSS filed a Juvenile Petition alleging neglect. A Consent Order was signed at a Child Planning Conference on December 18, 2007, but custody of the children remained with [respondent-mother], subject to conditions listed in the order.

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10. After the December 18, 2007 Child Planning Conference, OCDSS continued to receive reports from the community that [respondent-mother] was abusing drugs to the extent that she was impaired and unable to adequately parent the children; and that the children were not attending school regularly. [Respondent-mother] continued to be uncooperative with the Social Worker assigned to her case.
11. While providing case management services to the [respondent-mother] and her children, the Social Worker learned and the court finds:
 - a) Between August, 2007 and November 14, 2007, [Hannah] had ten (10) unexcused absences and five (5) excused absences from C.W. Stanford Middle School.
 - b) [Respondent-mother] failed and refused to respond to the many notices sent to her from the school regarding [Hannah's] absences.
 - c) Because of [Hannah's] chronic absences, a notice was sent to the District Attorney.
 - d) At the time [Hannah] was removed from [respondent-mother's] custody, she had an academic grade average of a "D".
 - e) During [Harry's] year . . . he missed twenty-nine (29) days . . . and had been tardy to school twenty-seven (27) times. . . .
12. Upon requesting and receiving non-secure custody and placement authority of the children, [Amy] was placed in foster care, [Harry] was placed with his father and [Hannah] was placed with a family friend.
13. After non-secure custody was obtained, the Social Worker learned and the court so finds that [Amy] had not obtained routine immunizations, . . . had a yeast infection, mild eczema and cradle cap. [Amy's] vaginal area was caked in baby powder when the foster mother went to change her diaper.
14. [Respondent-mother] has an opiate dependency. In August, 2007, she began to be treated for opiate dependence by Dr.

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Nathan Strahl, a psychiatrist who maintains opiate dependency with a drug called Suboxone. . . .

. . . .

24. [Respondent-mother's] dependency upon opiates and her current use of Suboxone, an opiod replacement, impairs her ability to parent. [Respondent-mother] does not provide appropriate care and supervision to the children which has created an environment injurious to the health and welfare of her children.

Based upon these and other findings the trial court concluded that the three children were neglected "in that they are juveniles who do not receive proper care or supervision from their parents; and they are juveniles who live in an environment injurious to their welfare."

On or about 17 September 2008, the trial court filed a disposition order which adopted all the findings of fact from the adjudication order. The disposition order further found:

- 12) Based upon the court reports and other documents submitted by the Orange County Department of Social Services, the Guardian ad Litem and Respondents, the court also finds specifically:
- a) Brad C., [Harry's] father has no clinical diagnosis and is mentally sound.
 - b) Thomas F., [Hannah's] father has addressed his drug and/or alcohol addiction and is in early full remission.
 - c) Based on his psychological evaluation, [Harry] has not had his physical and emotional needs met by his mother on a consistent basis and will benefit from short-term therapy.
 - d) [Respondent-mother's] promises to [Harry] regarding trips to Disney World upon his return to her are damaging and confusing to [Harry].
 - e) Since being placed with his father, [Harry] has appeared well cared for, relaxed and happy. He has received tutoring in math and reading over the summer in order to prepare him for the . . . school year.
 - f) [Hannah] is in therapy with Dr. April Harris-Britt. Thomas F. and his current wife have attended two therapy sessions

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with [Hannah] and are willing to attend more. [Hannah] has begun to establish a relationship with her father and her step-mother which is positive and which [Hannah] is happy about.

. . . .

- h) [Respondent-mother] often has minimal interaction with [Harry] and [Hannah] during visitations and focuses on [Amy].
- i) [Respondent-mother] has been observed acting inappropriately during visitations in that she will often turn her back to the supervisor and mouth things to [one child] so that the supervisor cannot hear or see. [Respondent-mother] has also been observed talking to [Harry] and [Hannah] about how [Amy] is not properly cared for in her foster home, and [respondent-mother] does not come to the visits with anything for the children to do. [Respondent-mother] does not engage the children in activities during her visits.

. . . .

- m) To date, [respondent-mother] has failed to adequately address the underlying issues that led to the findings of neglect in the Adjudication Order.
- 13) The conditions which led to the removal of the children from the home of the Respondent Mother still exist and that the return of the children to the home of the Respondent Mother would be contrary to the welfare of the said minor children.
 - 14) Gary F., has waived counsel and did not appear before this Court. His child, [Amy], has been adjudicated neglected, and he has failed to appear and advocate that he is or should be the appropriate placement for the child, and has made no appearance before this Court in several months. Mr. F.[s] failure to appear and participate in the decisions about where his child shall be placed is evidence to this Court that he is not a proper placement for [Amy] at this time. Neither OCDSS nor the Guardian are recommending that he be a placement for [Amy].
 - 15) Brad C. is a fit and proper person to have custody of [Harry] and it is in [Harry's] best interest that custody be awarded to Brad C.

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- 16) Thomas F. and his wife Jennie provide a fit and proper home for the placement of [Hannah] and it is in [Hannah's] best interest that she remain in OCDSS custody but be placed in their home for a trial placement. This Court is not awarding Thomas F. custody of [Hannah] at this time because it is early in his recovery and remission from alcohol and/or drug addiction. If Thomas F. continues to address his addiction and provide proper care and supervision to [Hannah], the Court may consider awarding him custody in the future.
- 17) It is in [Amy's] best interest that she remain in foster care, pending further orders of the court. Returning to the custody of Respondent mother or Respondent father Gary F. is not in [Amy's] best interest and is contrary to the child's interest, health and welfare.

Based upon these and other findings the trial court awarded custody of Harry to Brad C. and custody and placement authority of Hannah and Amy to OCDSS. From the adjudication and disposition orders, respondent-mother and Gary F, respondent-father of Amy, appeal.

II. Respondent-mother's Arguments

Respondent-mother brings forth several issues on appeal. We address each below.

A. Findings of Fact Addressing Neglect and Best Interests

[1] We address respondent-mother's first and last arguments in conjunction. Respondent-mother contends numerous findings of fact within the adjudication and disposition orders were unsupported by the evidence, including findings of fact 5, 8, 10, 11(f), 13, 14, 18-20, and 24 of the adjudication order and findings of fact 11, 12(c-d), 12(g-i), 12(k), 13, 16, and 17 of the disposition order. Furthermore, respondent-mother contends that "the trial court erred in concluding that these children were neglected in the absence of clear and convincing evidence of such neglect."

Findings of fact 5, 8, 10, 13, 14, 19, and 24 of the adjudication order and 11, 12(c-d), 12 (g-i), 12(k) and 13 in the disposition order were all supported by documents and reports submitted to the court to which respondent-mother failed to object. As respondent-mother did not object to the evidence, she has waived any challenges to the admission of the evidence on appeal. *See* N.C.R. App. P. 10(b)(1); *see*

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also *In re W.L.M.*, 181 N.C. App. 518, 522, 640 S.E.2d 439, 442 (2007) (citation omitted) (“At trial, respondent did not object to the trial court’s taking judicial notice of the underlying juvenile case files . . . and, therefore, has waived appellate review of this issue.”). As respondent-mother failed to preserve any challenges to these findings for the purposes of appeal, they are now binding. See *Pascoe v. Pascoe*, 183 N.C. App. 648, 650, 645 S.E.2d 156, 157 (2007) (citation and quotation marks omitted) (“Findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal.”)

A proper review of a trial court’s finding of . . . neglect entails a determination of (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact. In a non-jury . . . neglect adjudication, the trial court’s findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings. Our review of a trial court’s conclusions of law is limited to whether they are supported by the findings of fact.

In re Pittman, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (citations and quotation marks omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003).

A neglected juvenile is one

who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; or who has been abandoned; *or* who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile’s welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2007).

Here, the facts establish, *inter alia*, that: (1) Harry was locked outside of his home and unsupervised for a substantial amount of time, even though his mother was inside the home. Harry required the assistance of a neighbor, his father, and the Orange County Sheriff’s Department in order to regain access to his home; (2) Respondent-mother screamed obscenities at a social worker in front of her children for approximately 45 minutes; (3) Hannah frequently missed school; (4) Respondent-mother “refused to respond” to several

notices regarding her child's absences from school; (5) Harry also frequently missed school; (6) Amy "had not obtained routine immunizations . . . had a yeast infection, mild eczema and cradle cap. [Amy's] vaginal area was caked in baby powder when the foster mother went to change her diaper[;]" and (7) respondent-mother has an opiate dependency that "impairs her ability to parent." These findings of fact support the conclusion that the children were neglected pursuant to N.C. Gen. Stat. § 7B-101(15). *See* N.C. Gen. Stat. § 7B-101(15).

As to the remaining challenged findings of fact in the adjudication order, 11(f), 18 and 20 regarding respondent-mother's demeanor, veracity, and drug use, we need not address them as even assuming they are unsupported by the evidence, they are not dispositive of any determination by the trial court. *See Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987) (citations omitted) ("Where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions."), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988).

[2] The remaining findings challenged by respondent-mother in the disposition order relate to the best interests of the children and we address these challenges below.

Respondent-mother contends the trial court erred in its findings regarding the best interests of each of the children. At the disposition stage, "facts found by the trial court are binding absent a showing of an abuse of discretion." *Pittman* at 766, 561 S.E.2d at 567 (citation and quotation marks omitted).

The court, after making findings of fact . . . may make any disposition authorized by G.S. 7B-903, including the authority to place the juvenile in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile. The court may enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-906(d) (2007).

Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by

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the trial court . . . Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child.

In Re Shue, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984).

Respondent contends that “the trial court erred in finding and concluding at disposition that Brad C. was a fit and proper person to have custody of [Harry] and that it was in [Harry’s] best interest that custody be awarded to his father. This conclusion was unsupported by the competent findings of fact.” (Original in all caps.) We first note that respondent-mother does not direct our attention to any evidence that Brad C. is not “a fit and proper person to have custody of [Harry] and that it was in [Harry’s] best interest that custody be awarded to his father.” Instead, respondent-mother essentially contends that more evidence was needed; in other words, the evidence presented was not enough to conclude that Brad C. is “a fit and proper person to have custody of [Harry] and that it was in [Harry’s] best interest that custody be awarded to his father.”

Respondent-mother did not challenge the trial court’s finding that “Brad C., [Harry’s] father has no clinical diagnosis and is mentally sound.” She also did not challenge the finding that “[s]ince being placed with his father, [Harry] has appeared well cared for, relaxed and happy. He has received tutoring in math and reading over the summer in order to prepare him for the . . . school year.” *Pascoe* at 650, 645 S.E.2d at 157 (citation and quotation marks omitted) (“Findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal.”). As respondent-mother has not challenged the competency of the evidence presented, we conclude that there was *enough* competent evidence, including the report of the *guardian ad litem*, the report of DSS, Brad C.’s psychological evaluation, and Brad C.’s testimony, upon which the trial court could conclude without abusing its discretion that “Brad C. is a fit and proper person to have custody of [Harry] and it is in [Harry’s] best interest that custody be awarded to Brad C.”

[3] Respondent-mother also challenges finding of fact 16 that “Thomas F. and his wife Jennie provide a fit and proper home for the placement of [Hannah] and it is in [Hannah’s] best interest that she remain in OCDSS custody but be placed in their home for a trial placement.” Respondent-mother contends “[t]his finding is based upon no evidence beyond the ‘reports’ considered by the court.” As we have already established, “[a]t trial, respondent did not object to

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the trial court's taking judicial notice of the underlying juvenile case files . . . and, therefore, has waived appellate review of this issue." *In re W.L.M.* at 522, 640 S.E.2d at 442. We conclude there was substantial evidence in the reports from which the trial court could conclude without abusing its discretion that Hannah should be placed with her father, with legal custody to remain with DSS.

[4] As to Amy, respondent-mother challenges finding of fact 17: "It is in [Amy's] best interest that she remain in foster care, pending further orders of the court. Returning to the custody of Respondent mother or Respondent father Gary F. is not in [Amy's] best interest and is contrary to the child's interest, health and welfare." We take judicial notice that on 8 May 2009 the trial court entered a custody order which granted custody of Amy to respondent mother and Gary F. Respondent-mother's brief noted that as Amy is in her physical custody, this argument is moot. *See Pearson v. Martin*, 319 N.C. 449, 451, 355 S.E.2d 496, 497 (1987) (citation and ellipses omitted) ("Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law."). Respondent mother's appeal on this issue is therefore dismissed.

Therefore, we conclude that there was clear and convincing evidence to support the findings of fact and that the findings of fact support the conclusions of law, including that the children were neglected; it was in the best interests of Harry to be in the legal custody of his father; and it was in the best interests of Hannah to be in the legal of custody of DSS, with placement to be with her father. Any contentions as to Amy's placement are moot. These arguments are overruled.

B. Reasonable Efforts

[5] Respondent-mother also contends that

[t]he decretal portion of the Disposition Order . . . failed to address reunification of [respondent-mother] with either [Harry] or [Hannah]. This constituted reversible error because the court was required to either find that reasonable efforts should or should not be made to prevent or eliminate the need for further placement with regard to those children.

N.C. Gen. Stat. § 7B-507 provides,

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- (a) An order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued non-secure custody, a dispositional order, or a review order:

. . . .

- (3) Shall contain findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines under subsection (b) of this section that such efforts are not required or shall cease[.]

N.C. Gen. Stat. § 7B-507 (a)(3) (2007).

N.C. Gen. Stat. § 7B-101 defines reasonable efforts as

[t]he diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time. If a court of competent jurisdiction determines that the juvenile is not to be returned home, then reasonable efforts means the diligent and timely use of permanency planning services by a department of social services to develop and implement a permanent plan for the juvenile.

N.C. Gen. Stat. § 7B-101(18) (2007).

Here, the trial court ordered

- 6) Respondent mother is granted supervised visitation with [Harry] and [Hannah] every other Sunday from 1 p.m. until 5 p.m. beginning August 24, 2008 and with [Amy] every Wednesday from 4:30 p.m. until 5:30 p.m.
- 7) Visitation with Respondent mother and [Harry] and [Hannah] shall be in the home of the Respondent mother.

. . . .

- 9) Respondent fathers, Brad C. and Thomas F. shall provide transportation for [Harry] and [Hannah] to visit with Respondent mother.
- 10) The visits shall be supervised by Anna Lankford Kennedy or another visitation supervisor approved by the Orange County

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Department of Social Services. The burden to arrange supervision for the visits is the responsibility of Respondent mother. Likewise, Respondent mother shall pay the supervisor her fees for providing supervision for the visitation.

. . . .

- 13) Should Respondent mother take advantage of the visitation as set forth above, this Court authorizes additional visitation to occur at the discretion and recommendation of the treatment team.
- 14) Respondent mother shall complete a full substance abuse assessment. Respondent mother shall follow the treatment recommendations resulting from the evaluation, if any. Respondent mother shall complete a full psychological evaluation and follow the resulting treatment recommendations. The evaluators shall be selected in consultation with and upon the agreement of DSS and the GAL.

Assuming *arguendo* that N.C. Gen. Stat. § 7B-507 (a)(3) even applies to Harry and Hannah, as Harry is in the custody of a parent, his father, and Hannah has been placed with her father, we note that though the trial court does not explicitly state that DSS must “make reasonable efforts to prevent or eliminate the need for placement of the juvenile[s,]” N.C. Gen. Stat. § 7B-507(a)(3), the trial court does order “[t]he diligent use of preventive or reunification services by a department of social services” pursuant to N.C. Gen. Stat. § 7B-101(18) as the trial court set out a visitation schedule for respondent-mother and ordered DSS to supervise the visits. N.C. Gen. Stat. § 7B-101(18). We conclude that the trial court complied with N.C. Gen. Stat. § 7B-507(a)(3) because ordering DSS to supervise respondent-mother’s visitation and to aid in her substance abuse assessment and psychological evaluation is the functional equivalent of ordering DSS to “make reasonable efforts” with respondent-mother with regard to Harry and Hannah. N.C. Gen. Stat. § 7B-507(a)(3). This argument is overruled.

IV. Respondent-father Gary F.

[6] Gary F. first contends “[t]he trial court committed prejudicial error by conducting the adjudication and disposition hearings when Gary F. was not represented by counsel.” Gary F. argues that although he signed a consent order waiving counsel, the trial court was re-

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quired to inquire into whether the waiver was knowing and voluntary. We disagree.

“In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right.” N.C. Gen. Stat. § 7B-602(a) (2007). The 23 January 2008 consent order in which Gary F. waived counsel reads,

Prior to accepting the stipulated agreement of the parties, the undersigned judge reviewed with the parties the above stipulations and agreements via the undersigned Facilitator. The Facilitator made careful inquiry of them with regards to the voluntary nature of the agreement and their understanding thereof. The Facilitator explained to the parties the legal effect of their stipulations and agreements and determined that the parties understood the legal effect and terms of the agreement and stipulations. The parties acknowledged their voluntary execution of the agreements and stipulation stated that the terms accurately reflected their agreement, and agreed of their own free will to abide by them.

The consent order itself therefore establishes that the trial court reviewed the order with the parties via the Facilitator and that each party, including Gary F., understood the terms of the order and voluntarily entered into the order. One of the terms of the order was Gary F.’s waiver of counsel. Gary F.’s waiver of counsel was therefore knowing, voluntary, and valid.

However, from the record it appears that after Gary F.’s counsel withdrew, the other parties forgot that he was still a party to the case. After Gary F. waived his counsel, numerous documents were filed by the various parties, and based upon the record, at least twenty of these documents were not served upon Gary F., including several motions, an affidavit, and notice of a deposition.

Rule 5 of the North Carolina Rules of Civil Procedure requires,

[E]very 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

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N.C. Gen. Stat. § 1A-1, Rule 5(a) (emphasis added). “This Court has held the General Assembly’s use of the word ‘shall’ establishes a mandate, and failure to comply with the statutory mandate is reversible error.” *In re D.A.*, 169 N.C. App. 245, 247-48, 609 S.E.2d 471, 472 (2005) (citation omitted).

The certificates of service in the record contain detailed listings of all parties and counsel served, and Gary F. is conspicuously absent from many of them. Gary F. was essentially left out of the case for months and did not have a chance to participate after his counsel withdrew. We are particularly concerned about the failure to serve Gary F. because one of the reasons that the trial court found Gary F. not to be an appropriate placement for Amy was that

he has failed to appear and advocate that he is or should be the appropriate placement for the child, and has made no appearance before this Court in several months. Mr. F.[’s] failure to appear and participate in the decisions about where his child shall be placed is evidence to this Court that he is not a proper placement for [Amy] at this time.

The “several months” during which Gary F. was not appearing coincides with the time period during which Gary F. was not being served with most of the filed documents. In fact, the record does not contain any indication that Gary F. even had notice of the disposition hearing. We admonish counsel for the parties to pay special attention to making sure that *all* parties are served with *all* documents required to be served, especially in a case such as this, with multiple children and parents. We also urge the trial courts to take special care to check the certificates of service to make sure that all required parties have been served, particularly before making a finding that the party will not be considered as a placement for a child due to his failure to appear. Therefore, we reverse the adjudication order and the disposition order as it applies to Gary F. as he was not served with multiple documents regarding his daughter’s case on numerous occasions and did not have a meaningful opportunity to participate in the case after his appointed counsel’s withdrawal. As we are reversing the adjudication and disposition orders as applied to Gary F., we need not address his other contentions.

IV. Conclusion

We reverse the adjudication and disposition order as it applies to Gary F. and remand for a new hearing regarding whether Amy was neglected as to Gary F. We dismiss as moot the appeal of respondent-

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mother as to Amy in the disposition order and as to all other issues, we affirm.

AFFIRMED IN PART, DISMISSED IN PART, REVERSED AND REMANDED IN PART.

Judges ELMORE and ERVIN concur.

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No. COA09-21

(Filed 16 June 2009)

1. Child Abuse and Neglect— jurisdiction—improperly terminated

The trial court improperly terminated its jurisdiction over a juvenile case by mandating that future matters of custody and visitation were to be addressed under Chapter 50 of the General Statutes without complying with the mandates in N.C.G.S. § 7B-911.

2. Child Abuse and Neglect— placement with grandmother— findings—not sufficient

The trial court erred in finding and concluding that a juvenile should be placed with his grandmother by not making the findings mandated by N.C.G.S. §§ 7B-906 and 907.

3. Child Abuse and Neglect— best interest of child—findings—not sufficient

The trial court's findings in a juvenile case were not sufficient to support its best interest determination, especially in light of findings and evidence regarding respondent's compliance with the DSS case plan and assessments made by DSS and the guardian ad litem.

Appeal by respondent from order entered 9 October 2008 by Judge Scott C. Etheridge in Moore County District Court. Heard in the Court of Appeals 6 May 2009.

Richard Croutharmel for Respondent-Mother.

Lisa M. Schreiner for Appellee-Guardian Ad Litem.

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HUNTER, ROBERT C., Judge.

Respondent-mother (“respondent”) appeals from a “Review Order[.]” which, *inter alia*: (1) granted legal and physical custody of her son, J.B., to his paternal grandmother, E.F.; (2) released her and the respondent-father’s¹ respective attorneys, the Guardian ad litem (“GAL”) advocate, and the attorney advocate; and (3) transferred the case to Chapter 50 and terminated the trial court’s jurisdiction over the juvenile proceeding. After careful review, we reverse the trial court’s order and remand for further proceedings.

I. Background

On 17 May 2007, J.B. was placed in the custody of petitioner Moore County Department of Social Services (“DSS”) pursuant to a non-secure custody order. On 18 May 2007, DSS filed a juvenile petition alleging that J.B. was a neglected juvenile. At the time DSS filed the petition, J.B. lived with his father, T.P., and his live-in girlfriend, A.B.² DSS obtained legal custody of J.B. and placed him with his paternal grandmother, E.F.

Following a 5 September 2007 adjudication hearing, the court determined that J.B. had been subject to an environment injurious to his welfare and adjudicated him neglected. This determination stemmed from an altercation between respondent and A.B. that occurred in J.B.’s presence during a visitation exchange. Pursuant to the adjudication order, J.B.’s legal custody remained with DSS.

Following an 11 September 2007 disposition hearing, the trial court entered a disposition order, which, *inter alia*: (1) concluded that J.B.’s legal custody should remain with DSS; and (2) mandated that respondent, T.P., and A.B. submit to, and pass, three random drug screens as a prerequisite to obtaining unsupervised visitation.

Following a 10 December 2007 review hearing, a “Review Order” was entered, which, *inter alia*: (1) continued J.B.’s placement in E.F.’s home, “with alternating weekend overnight visits” with respondent and her live-in boyfriend, D.B.; (2) noted that the “prior civil order prohibit[ing] D.B.] from being in the home with [J.B.]” had been superseded by a subsequent order of the trial court which “allowed [J.B] to be in the home of [respondent] and [D.B.] unsupervised”; (3) continued legal custody of J.B. with DSS; and (4)

1. Respondent father did not appeal the order.

2. The record indicates that T.P. had exclusive custody of J.B. at the time the petition was filed.

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mandated that respondent, D.B., T.P., and A.B. all submit to random drug screens.

Following an 11 February 2008 review hearing, the trial court entered another “Review Order[,]” which found, *inter alia*, that: (1) J.B. had been engaging in therapy in an effort to reunify with respondent and the therapy was going well; (2) DSS had recommended a trial placement of J.B. in respondent’s home, but that the court did not concur in this recommendation; and (3) “[t]he present permanent plan remains reunification with a parent.” Based on these and other findings of fact, the court concluded, *inter alia*, that: (1) it was contrary to J.B.’s best interest to return home; (2) it was in his best interest for legal custody to remain with DSS; and (3) it was in his best interest to continue his placement with E.F.

For the most part, over the next few months, the case maintained its status quo. However, for a short period of time, respondent lost the right to unsupervised visits with J.B. at her residence because D.B. missed some of his court-mandated drug screens. On 25 April 2008, the unsupervised visits resumed based upon negative drug screens by both respondent and D.B. and the absence of any reports of domestic violence in respondent’s home. As indicated by the trial court’s orders, during this period, J.B.’s permanent plan remained reunification with a parent.

On 31 July 2008, Richmond County Department of Social Services issued home study reports on respondent’s and E.F.’s respective homes, which concluded that J.B. would be safe in either home. Specifically, with regard to respondent’s home, the report stated: “There were no findings of maltreatment. No current safety issues exist. At this time, it does not appear [J.B.] would be unsafe. Based on the findings of Richmond County CPS Assessment, [J.B.] is not at risk of future harm. [J.B.] is not in need of protection.” In late August 2008, DSS Social Worker, Adrian Black, submitted a “Family Reunification Assessment”, which concluded: (1) there was a moderate risk level in respondent’s home; (2) respondent had demonstrated “High Compliance” with her case plan; and (3) it was safe for J.B. to live in her home. In addition, DSS recommended that J.B. be returned to respondent’s custody. The guardian ad litem (“GAL”) report also recommended that legal and physical custody of J.B. be given to respondent and D.B.

A hearing was held on 28 August and 11 September 2008. At the close of testimony, respondent, DSS and the GAL all agreed that J.B.

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should be placed in respondent's custody. T.P.'s attorney asserted that J.B. should be placed in E.F.'s custody. In its 9 October 2008 "Review Order", the trial court determined, *inter alia*, that it was in J.B.'s best interest to: (1) grant physical and legal custody to E.F.; and (2) terminate the court's jurisdiction over the juvenile case and transfer the matter to Chapter 50. This appeal followed.

II. Analysis

At the outset, we note that in the instant case: (1) during the proceeding below, both DSS and the GAL asserted that it was in J.B.'s best interest for custody to be granted to respondent; (2) the GAL has filed an appellee's brief on behalf of J.B. asserting that the trial court's 9 October 2008 order should be reversed; and (3) no brief has been filed with this Court urging us to affirm the order.

A. Transfer to Chapter 50 and Termination of Jurisdiction

[1] On appeal, both respondent and the GAL assert that the trial court erred by transferring J.B.'s juvenile case to Chapter 50 and terminating its jurisdiction over the juvenile proceeding. In addition, respondent contends that the trial court erred because its order lacks numerous findings of fact mandated by N.C. Gen. Stat. § 7B-911 (2007). We agree.

Here, the trial court made no findings of fact regarding its decision to transfer J.B.'s case to Chapter 50 and to terminate its jurisdiction. Rather, the court simply concluded: "It is in the child's best interest that any future issues related to custody including matters of visitation that may arise between the respondent parents and paternal grandmother shall be conducted pursuant to the provisions of NCGS chapter 50[.]" Based on this conclusion, the court mandated that the respondent parents' respective attorneys, the GAL, and the attorney advocate were to be released and that "[t]he respondent parents are to address future matters in connection with custody, including issues related to visitation pursuant to the provisions of NCGS Chapter 50 and not under the provisions of NCGS Chapter 7B."

At the outset, we note that section 7B-911 governs "[c]ivil child-custody order[s]" and the transfer of Chapter 7B juvenile cases to Chapter 50. *Id.* In the instant case, the trial court labeled its 9 October 2008 order as a "Review Order[.]" not as a civil child custody order. As such, it appears that the trial court impermissibly intended to transfer J.B.'s juvenile case to Chapter 50 without entering the requisite civil custody order mandated by section 7B-911. *See In re: H.S.F.*,

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182 N.C. App. 739, 744, 645 S.E.2d 383, 386 (2007) (stating that section 7B-911(c)) only applies to civil custody orders and not review orders). However, even if we were to assume, *arguendo*, that the trial court mislabeled its 9 October 2008 order and actually intended to enter a civil custody order, the findings of fact contained therein do not comply with section 7B-911.

Pursuant to section 7B-911:

- (a) After making proper findings at a dispositional hearing or any subsequent hearing, the court . . . may award custody of the juvenile to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7, as provided in [section 7B-911], and terminate the court's jurisdiction in the juvenile proceeding.
- (b) When the court enters a custody order under [section 7B-911], the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody. . . .

N.C. Gen. Stat. § 7B-911(a), (b). Subsection (b) further provides that where the order is filed in an existing civil action and the person awarded custody is not a party thereto, the court must order the person to be joined as a party and the caption of the case to be changed accordingly. N.C. Gen. Stat. § 7A-911(b). In existing actions, “[t]he order shall resolve any pending claim for custody and shall constitute a modification of any custody order previously entered in the action.” *Id.* Where the court's order initiates a civil action, the court must designate the parties to the action and determine the appropriate case caption. *Id.* In initiated actions, “[t]he order shall constitute a custody determination, and any motion to enforce or modify the custody order shall be filed in the newly created civil action in accordance with the provisions of Chapter 50[.]” *Id.* Finally, pursuant to N.C. Gen. Stat. § 7B-911(c):

- (c) The court may enter a civil custody order under [section 7B-911] and terminate the court's jurisdiction in the juvenile proceeding only if:
 - (1) In the civil custody order the court makes findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order

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entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7; and

- (2) In a separate order terminating the juvenile court's jurisdiction in the juvenile proceeding, the court finds:
 - a. That there is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding; and
 - b. That at least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

While the evidence in the record does intimate that a prior civil order had been entered, which gave T.P. custody of J.B., this order does not appear in the record, nor is there any indication that E.F. was a party to that proceeding. Furthermore, nothing in the record suggests that the 9 October 2008 order was filed in an existing civil action, that E.F. was joined as a party in that action, that the court's order initiated a civil action, or that the court was modifying a prior custody order via its 9 October 2008 order. Consequently, the court did not comply with N.C. Gen. Stat. § 7B-911(b) in entering its order.

In addition, the order clearly lacks the findings mandated by N.C. Gen. Stat. § 7B-911(c)(2). Here, the court did not find that there was no longer a need for continued State intervention on behalf of J.B. in accordance with subsection 7B-911(c)(2)(a). Furthermore, the court did not find that six months had passed since the court made a determination that J.B.'s placement with E.F. was the permanent plan for J.B. in accordance with subsection (c)(2)(b). In fact, the trial court's order makes no reference to the permanent plan for J.B., and all of the prior orders in the record that contain findings regarding the permanent plan, state that the permanent plan for J.B. was reunification with a parent. Also, when the juvenile petition was filed, J.B. was living with his father; consequently, the court was not excused from making this finding when it awarded custody to E.F.

In sum, regardless of whether the trial court's order was accurately labeled as a "Review Order" or was mislabeled and intended to

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be a civil custody order, the court improperly terminated its jurisdiction over J.B.'s juvenile case and transferred the matter to Chapter 50 without complying with the mandates contained in section 7B-911.

B. Findings as to Custody

[2] In its 9 October 2008 order, the trial court found and concluded that it was in J.B.'s best interest for his physical and legal custody to be placed with E.F. Both respondent and the GAL contend that the trial court's order lacks the requisite findings mandated by section 7B-906 and section 7B-907 respectively, and that as a result, we should reverse the order and remand the case for further proceedings. We agree.

At the outset, we note that it is difficult to discern from the record if the 11 September 2008 hearing³ was a section 7B-906 review hearing, a section 7B-907 permanency planning hearing, or a combined hearing.⁴ However, given that the order contains both a finding of fact and a conclusion of law, which state that "the Court has considered the criteria set out in [sections 7B-906 and 7B-907] and has made specific findings as to those that are relevant[.]" it appears that the court intended to conduct a combined hearing.

N.C. Gen. Stat. § 7B-906(c) provides:

- (c) At every [custody] review hearing, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid in its review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

In each case the court shall consider the following criteria and make written findings regarding those that are relevant:

3. The 11 September 2008 hearing actually began on 28 August 2008; however, the court continued the hearing until 11 September 2008.

4. "In any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody, and the hearing may be combined, if appropriate, with a review hearing required by G.S. 7B-906." N.C. Gen. Stat. § 7B-907(a).

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- (1) Services which have been offered to reunite the family, or whether efforts to reunite the family clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time.
- (2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care.
- (3) Goals of the foster care placement and the appropriateness of the foster care plan.
- (4) A new foster care plan, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile.
- (5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent, guardian, custodian, or caretaker.
- (6) An appropriate visitation plan.
-
- (8) When and if termination of parental rights should be considered.
- (9) Any other criteria the court deems necessary.

After making the necessary findings of fact, the court

may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or may make any disposition authorized by G.S. 7B-903, including the authority to place the juvenile in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile. The court may enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interests of the juvenile. . . .

N.C. Gen. Stat. § 7B-906(d).

At a section 7B-907 permanency planning hearing, the court considers the same evidence as in a section 7B-906 custody review hearing also in an effort "to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-907(b). Following a hearing in which the juvenile is not returned home, the court must

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consider the following criteria and make written findings regarding those that are relevant:

- (1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
- (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
- (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
- (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
- (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;
- (6) Any other criteria the court deems necessary.

Id. At the end of the hearing, the court must also

make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time. The judge may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or make any disposition authorized by G.S. 7B-903 including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interest of the juvenile. If the juvenile is not returned home, the court shall enter an order consistent with its findings that directs the department of social services to make reasonable efforts to place the juvenile in a timely manner in accordance with the permanent plan, to complete whatever steps are necessary to finalize the permanent placement of the juvenile, and to document such steps in the juvenile's case plan. . . .

N.C. Gen. Stat. § 7B-907(c).

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In sum, both section 7B-906 and section 7B-907 provide trial courts with the authority to place a juvenile in the custody of a relative in accordance with section 7B-903, so long as it is in the best interest of the juvenile. However, prior to doing this, the court must make the necessary relevant findings mandated by sections 7B-906 and 7B-907 and continue to review the matter until either reunification, termination of parental rights, or other change in custody occurs.

Here, the trial court made the following pertinent findings of fact:

9. That [J.B.] is presently in the physical custody home [sic] of his paternal grandmother[.] [J.B.] completed kindergarten and was promoted to the first grade, attending Carthage Elementary School and is doing well.
 10. That [J.B.] has been referred to BHC/Mentor for therapy in connection with anger management and presently receives therapy[.]
 11. That [J.B.] continues to visit his mother on weekends and additionally stayed with his mother and her family from August 18, 2008 through August 21, 2008 and no problems were reported.
 12. That [respondent] and her paramour, [D.B.], continue under court order to submit to random drug screens and submit to screens when requested and the results continue to be negative.
 13. That there have been no reports of acts of domestic violence in the home of [respondent] or any safety concerns by [DSS] of [J.B.] while in the care of [respondent].
 14. That the Court heard testimony of Social Workers with the Richmond County Department of Social Services as to the results of the RCDSS Family Assessment of the homes of [E.F.] and [respondent] and the absence of safety concerns in either home.
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18. That the Court heard testimony of Social Worker Adrian Black as to his recommendations and observations of the interaction of the child with both parents and the grandmother, as well as, the absence of any safety concerns

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for the child in either the home of the mother or paternal grandmother, but with reservations as to the home of the respondent father.

19. That the Court heard testimony of the respondent mother as to her desire to have the child reunified with the mother and permanent placement in her home.
20. That the Court heard testimony as to the [respondent] allowing the six year old [J.B.] to play in and around a creek in proximity of the [respondent's] home in the company of his thirteen year old brother without further adult supervision which the Court finds competent.
21. That the Court heard testimony as to the [respondent] allowing the thirteen year old son to operate a motor vehicle on [their] property with the six year old [J.B.] in the automobile without further adult supervision which the Court finds competent.
22. That [respondent's] paramour [D.B.] was absent on each day of the proceeding and did not testify.
23. That the Court heard testimony of the present daycare worker Collins as to the conduct and behavior of [J.B.] and his demeanor immediately preceding and following court proceedings and following visits with his Mother, including his attendant anxiety and appearance of sadness and depression.
24. That both the Daycare worker Collins and [E.F.] testified as to the child's anxiety about having to choose between living with his grandmother, his father or his mother.
25. That the child has been placed continuously in the home of his grandmother . . . for a period of time in excess of twelve months, except for brief periods of trial placement and weekends in the home of his mother[.]
26. That the paternal grandmother . . . testified as to her willingness to act as custodian of the minor child, that she understood the legal significance of the placement and that she had adequate resources to care appropriately for the child.
27. That at present, the father, [T.P.], continues to fail to follow the recommendations of [DSS] and is not a viable placement resource for the minor child.

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28. That it is in the child's best interest that his custody be placed with his paternal grandmother . . . and that he continues to have every weekend visitation with his mother[.]
29. [DSS] has made reasonable efforts since the last hearing to prevent or eliminate need for placement in foster care. Efforts made by [DSS] are set out in the [DSS] Court Summary and adopted and incorporated herein as if set out fully herein and specifically include but are not limited to consults with the parents, consults with mental health, home visits and the offer of drug screenings, consults with care-takers, and appropriate referrals on behalf of the juvenile and the offer of transportation.
30. That it is desirable and in the best interest of the child that the child have continued visitation with the respondent parents, every weekend with respondent mother . . . and at such times as respondent the father [T.P.] and the paternal grandmother may agree.
31. The continuation in or return to the home by the minor child is contrary to his best interests.
32. That the Court has considered the criteria set out in NCGS §7B-906 [sic] and NCGS 7B-907 and has made specific findings as to those that are relevant.
33. That there is a reasonable alternative to continued custody with [DSS] for the minor child.

Here, the trial court's order lacks numerous requisite findings to establish what precisely the custody plan for J.B. is and essentially undermines "[t]he permanency planning process in Article 9 [which] is meant to bring about a definitive placement plan for the abused, neglected, or dependent child." *In re: R.T.W.*, 359 N.C. 539, 546, 614 S.E.2d 489, 494 (2005), *superseded on other grounds as recognized in*, *In re: T.R.P.*, 360 N.C. 588, 592, 636 S.E.2d 787, 791 (2006) and *In re K.J.L.*, 196 N.C. App. —, —, 674 S.E.2d 789, 791-95 (2009). For example, the order does not specify whether the grant of physical and legal custody to E.F. was a continuation or modification of the original placement or the new permanent plan. In fact, the order is completely silent with regard to: (1) the permanent plan for J.B.; (2) whether the permanent plan had changed from reunification with a parent; and (3) whether and why reunification efforts should be maintained or ceased. The findings do not address "[w]hether it is possible

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for the juvenile to be returned home . . . within the next six months, and if not, why it is not in the juvenile's best interests to return home." N.C. Gen. Stat. § 7B-907(b)(1). Also, other than the findings as to visitation and the conclusions of law as to E.F.'s rights and responsibilities, the order is devoid of findings that clearly delineate "the rights and responsibilities which should remain with the parents[.]" N.C. Gen. Stat. § 7B-907(b)(2). Even with regard to visitation, the trial court's order improperly delegates decisions regarding respondent father's visitation rights to E.F. *See, e.g., In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005) ("The awarding of visitation of a child is an exercise of a judicial function, and a trial court may not delegate this function to the custodian of a child."). Nor are there any findings indicating that the "juvenile's return [to respondent's] home is unlikely[.]" N.C. Gen. Stat. §§ 7B-906(c)(2), 7B-907(b)(2), (3) and (4). "[D]ecisions of this Court support reversing the order of the trial court and remanding the case where the findings of fact do not comport with N.C. Gen. Stat. § 7B-907." *In re: Ledbetter*, 158 N.C. App. 281, 286, 580 S.E.2d 392, 395 (2003).

C. Best Interest Determination as to Custody

[3] Next, both respondent and the GAL assert that the trial court employed the wrong standard in reaching its best interest determination with regard to the issue of J.B.'s custody. In addition, even assuming, *arguendo*, that the court applied the correct standard, they both argue that the trial court's findings do not support its conclusion that granting legal and physical custody of J.B. to E.F. is in the juvenile's best interest. As discussed *infra*, we agree.

At the outset, we note that our review is hindered by the fact that the order is unclear as to the precise custody ruling and best interest determination the trial court made here, including, *inter alia*, whether the grant of custody to E.F. constituted a change to J.B.'s permanent plan and whether reunification with respondent is still possible and desirable. Furthermore, we note that the grant of custody to E.F. subrogates respondent's paramount rights as a parent.

That being said, the findings show that respondent maintained diligent efforts to comply with the DSS case plan in an effort to be reunified with J.B., and both DSS and the GAL noted the absence of safety concerns in respondent's home and recommended that custody of J.B. be granted to respondent. While the trial court made some findings, particularly 20 through 24, which indicate that the court had some reservations about placing J.B. in the custody of respondent

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and D.B., these findings are inadequate to support its best interest determination, especially in light of the findings and evidence regarding respondent's compliance with the DSS case plan and the assessments made by DSS and the GAL.

In sum, for the above reasons, we reverse the 9 October 2008 order and remand this case to the trial court for further proceedings not inconsistent with this opinion. Based on our disposition, we do not reach respondent's remaining assignments of error.

Reversed and remanded.

Judges MCGEE and BEASLEY concur.

ROSS A. PANOS, PLAINTIFF v. TIMCO ENGINE CENTER, INC., DEFENDANT

No. COA08-1018

(Filed 16 June 2009)

1. Appeal and Error— appealability—partial summary judgment—interlocutory order—avoidance of two trials—common facts

Although plaintiff's appeal from the trial court's order granting partial summary judgment on plaintiff's claim under the N.C. Wage and Hour Act was from an interlocutory order, it affected the substantial right of avoiding two trials on the same issue and was immediately appealable. In the interest of judicial economy, the Court of Appeals also elected to review defendant's appeal of its trade secrets claim since it arose out of the same facts common to the remaining claims.

2. Employer and Employee— North Carolina Wage and Hour Act—nonresident employee—phone calls to coworkers in this state

The North Carolina Wage and Hour Act did not apply to a nonresident employee who worked primarily outside this state but communicated by phone daily with coworkers within this state. Nor was the nonresident employee entitled to the protection of the Wage and Hour Act because the employment agreement stipulated that it shall be governed by North Carolina Law.

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3. Trade Secrets— failure to show trade secret—spoliation of evidence

The trial court did not err by granting partial summary judgment in favor of plaintiff employee even though defendant contends plaintiff's actions constitute spoliation of the evidence which severely impeded defendant's ability to prove its claim under the North Carolina Trade Secrets Protection Act because: (1) a *prima facie* case does not exist without a showing of the trade secret the person against whom relief sought knows or should have known, N.C.G.S. § 66-155; (2) defendant cannot identify the specific information it argues constituted trade secrets and that it claims plaintiff misappropriated; and (3) it is improper to base the grant or denial of a motion for summary judgment on evidence of spoliation when an adverse inference is permissive and not mandatory.

Appeal by Plaintiff and Defendant from order entered 6 June 2008 by Judge Catherine C. Eagles in Superior Court, Guilford County. Heard in the Court of Appeals 12 February 2009.

Hill Evans Jordan & Beatty, PLLC, by R. Thompson Wright and Benjamin D. Ridings, for Plaintiff.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mack Sperling and Elizabeth V. LaFollette, for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

Timco Engine Center, Inc. ("Defendant") is in the business of servicing and repairing jet engines on commercial aircraft. Timco Aviation Services, Inc. ("Timco") is the parent company of Defendant, and has an office in Greensboro, North Carolina. Defendant is a Delaware corporation with its principal place of business in Oscoda, Michigan.

Ross A. Panos ("Plaintiff") entered into an employment agreement with Defendant on 20 January 2005, under which Plaintiff was employed as a general manager for Defendant for a term of two years and a salary of \$150,000 per year. Under the terms of the employment agreement, Defendant's early termination of Plaintiff's employment "without cause" required Defendant to pay Plaintiff his base salary of \$150,000 for a period of twelve months following such termination. The employment agreement defines "cause" as

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a determination by [Defendant's] Board of Directors that (i) Employee has breached of [sic] this Agreement, (ii) Employee has failed or refused to perform the duties and responsibilities required to be performed by Employee under the terms of this Agreement, (iii) Employee has acted with gross negligence or willful misconduct in the performance of his duties hereunder, (iv) Employee has committed an act of dishonesty affecting [Defendant] or committed an act constituting common law fraud or a felony, or (v) Employee has committed an act (other than the good faith exercise of his business judgment in the performance of his duties) that is reasonably likely to result in material harm or loss to [Defendant] or Parent or the reputation of [Defendant] or Parent.

The employment agreement also provides that it “shall be construed in accordance with and governed for all purposes by the laws of the State of North Carolina[.]”

During his employment with Defendant, Plaintiff maintained a residence in San Diego, California, and the facility that he managed was located in Oscoda, Michigan. Plaintiff's normal work routine consisted of two weeks working in Oscoda and then working from his residence in San Diego the third week. Gil West (“West”), Plaintiff's direct supervisor and president of Defendant, was based in Greensboro. Plaintiff participated in a conference call with West and other management in Greensboro on most weekdays. Plaintiff also attended quarterly management meetings in Greensboro. Plaintiff estimated that he came to North Carolina about eight or nine times a year, generally for one or two days on each visit.

Plaintiff testified at deposition that despite efficiencies and increased revenue enjoyed by Defendant during Plaintiff's tenure, West led Plaintiff to believe that Timco's Chief Operating Officer, Roy Rimmer (“Rimmer”), was looking for a way to terminate Plaintiff's employment prior to the expiration of Plaintiff's employment agreement. Thereafter, in December 2005, Plaintiff began searching for new employment by sending email correspondence through his corporate email account, some of which was sent to competitors of Defendant. Defendant claims that Plaintiff's actions constituted a breach of Plaintiff's contractual duty to “devote his full time and efforts to the service of [Defendant].”

Plaintiff claims that Rimmer requested that Plaintiff fly to Dallas-Fort Worth International Airport for a meeting on 29 December 2005.

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According to Plaintiff, when he arrived at the airport, Rimmer handed him a letter stating that his employment with Defendant had been terminated “for cause.” Defendant claims that it terminated Plaintiff because of Plaintiff’s disloyalty in actively seeking other employment with Defendant’s competitors. Defendant notes that it was inappropriate for Plaintiff to publicize to the marketplace that he would be departing from Defendant, and especially to do so by using his corporate email account. Plaintiff did not receive any further explanation, and the record does not contain any meeting minutes or other indication that Defendant’s Board of Directors discussed Plaintiff’s termination. After Plaintiff was terminated, no further investigation into whether Plaintiff was terminated “for cause” was undertaken by Defendant’s Board of Directors.

Plaintiff’s termination letter also informed Plaintiff that he should immediately return his company-issued computer. Before doing so, Plaintiff deleted all data from the computer’s hard drive. This data included management information, wage information for employees, and other company information, most of which Plaintiff claimed existed on Defendant’s central server. Plaintiff claims he deleted these files out of concern that someone not privy to information on the computer, such as company payroll information, might discover the privileged information. Defendant, however, argues that Plaintiff’s conduct violated Defendant’s code of ethical conduct, and that Plaintiff’s actions constitute evidence spoliation which severely impaired Defendant’s trade secrets claim against Plaintiff.

Based, *inter alia*, on Defendant’s alleged breach of Plaintiff’s employment agreement and alleged violation of the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1, Plaintiff filed a complaint against Defendant on 18 April 2006, seeking recovery of severance pay under the employment agreement. Defendant filed its answer and counterclaim on 26 June 2006, which included a claim under the North Carolina Trade Secrets Protection Act, N.C. Gen. Stat. § 66-152. On 6 June 2008, following arguments of counsel and upon consideration of each party’s evidence in support of their respective positions, the trial court entered an order granting partial summary judgment for each party. Specifically, the court determined that:

[D]efendant is entitled to judgment as a matter of law with respect to . . . [P]laintiff’s Second Claim for Relief (N.C. Wage and Hour Act), and the Third Claim for Relief (N.C. Gen. Stat. § 75-1, et seq.); . . . [and Plaintiff] is entitled to judgment as a matter of

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law with respect to . . . [D]efendant's Second Cause of Action (North Carolina Trade Secrets Protection Act, N.C. Gen. Stat. § 66-152, et seq.) and . . . [D]efendant's Third Cause of Action (Temporary, Preliminary, and Permanent Injunctive Relief)[.]¹

The court denied Defendant's motion for summary judgment on Plaintiff's breach of contract claim and, likewise, denied Plaintiff's motion for summary judgment on Defendant's breach of contract counterclaim. Both parties appeal.

Standard of Review

Our Court reviews *de novo* a trial court's ruling on a motion for summary judgment. *Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 581, 668 S.E.2d 114, 116 (2008). Where a trial court has granted a motion for summary judgment, "the two critical questions on appeal are whether, on the basis of the materials presented to the trial court, (1) there is no genuine issue of material fact, and (2) the moving party is entitled to judgment as a matter of law." *Nationwide Mut. Fire Ins. Co. v. Mnatsakanov*, 191 N.C. App. 802, 805, 664 S.E.2d 13, 15 (2008). The evidence must be viewed in the light most favorable to the non-moving party. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

[1] The trial court's order granting partial summary judgment for each party is an interlocutory order. "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." *North Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68, 72, 674 S.E.2d 436, 439 (2009) (quoting *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]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.

1. The parties do not assign as error the trial court's grant of summary judgment on Plaintiff's Section 75 claim and Defendant's Third Cause of Action on this appeal.

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Embler v. Embler, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001) (internal quotation marks and citations omitted). “A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.” *Id.* at 165, 545 S.E.2d at 262 (internal quotation marks and citations omitted). “The right to avoid the possibility of two trials on the same issues can be a substantial right that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims.” *Allen v. Sea Gate Ass’n, Inc.*, 119 N.C. App. 761, 763, 460 S.E.2d 197, 199 (1995) (citation omitted).

Plaintiff’s N.C. Wage and Hour Act claim arises out of Plaintiff’s employment agreement with Defendant, as does Plaintiff’s breach of contract claim, which remains before the trial court. If we dismiss Plaintiff’s appeal with respect to the N.C. Wage and Hour Act claim and a later appeal is successful, Plaintiff will be required to present the same evidence of Defendant’s breach of the employment agreement that he will present on his remaining breach of contract claim. Should this occur, the same evidence will be presented to different juries on the same factual issue, which could result in inconsistent verdicts. Thus, Plaintiff’s appeal of the trial court’s dismissal of his Second Claim for Relief under the N.C. Wage and Hour Act affects the substantial right of avoiding two trials on the same issues, and is properly before us. *See id.*

Also before us on appeal is Defendant’s trade secrets claim. This claim does not involve the issue of Defendant’s breach of the employment agreement, but it does arise out of the same facts common to the remaining claims. In the interests of judicial economy, we elect to also review Defendant’s appeal. *See Robinson, Bradshaw & Hinson, P.A. v. Smith*, 139 N.C. App. 1, 9, 532 S.E.2d 815, 820 (2000) (where interlocutory order was not immediately appealable, our Court elected to review the defendants’ appeal “in the interests of judicial economy and pursuant to our discretionary powers”).

Plaintiff’s Appeal

[2] Plaintiff argues on appeal that the trial court erred in granting Defendant’s motion for partial summary judgment because the North Carolina Wage and Hour Act applies to a nonresident employee who performs work in this State. *See* N.C. Gen. Stat. § 95-25.1 (2007). Specifically, Plaintiff argues this Act applies to the employment of (1) a resident of California (2) who managed a Michigan facility (3) for a corporation with an office in Greensboro, North Carolina, (4) where

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the business required the employee to perform duties in North Carolina up to eighteen times per year, and (5) where the parties agreed that North Carolina law governed the employment agreement. We are not persuaded.

The Wage and Hour Act provides in pertinent part that:

(a) This Article shall be known and may be cited as the “Wage and Hour Act.”

(b) The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry. The General Assembly declares that the general welfare of the State requires the enactment of this law under the police power of the State.

N.C. Gen. Stat. § 95-25.1.

Our Court recently considered the applicability of the Wage and Hour Act to a nonresident employee working outside of North Carolina in the factually similar case, *Sawyer v. Market Am., Inc.*, 190 N.C. App. 791, 661 S.E.2d 750, *disc. review denied*, 362 N.C. 682, 670 S.E.2d 235 (2008). In *Sawyer*, the plaintiff, Sawyer, was an Oregon resident and was employed as an independent contractor by Market America, Inc. (“Market America”), a North Carolina corporation based in Greensboro, North Carolina. *Id.* at 793, 661 S.E.2d at 751. The parties met in Greensboro on 1 December 2004 and executed an independent contractor agreement which provided that North Carolina law should apply to disputes under the agreement. *Id.* at 792-93, 661 S.E.2d at 751-52. Sawyer performed services for Market America outside of North Carolina from December 2004 until his contract was terminated on 30 January 2006. *Id.* at 792, 661 S.E.2d at 752. Sawyer subsequently filed suit against Market America alleging violation of the Wage and Hour Act. *Id.* In granting summary judgment for Market America, the trial court ruled that “the North Carolina Wage [and] Hour Act does not apply to [Sawyer] as an individual who resides and *primarily* works outside of the State of North Carolina[.]” *Id.* (emphasis added). Our Court affirmed the ruling of the trial court, holding that the “Wage and Hour Act does not apply to the wage payment claims of a nonresident who neither lives nor works in North Carolina.” *Id.* at 793, 661 S.E.2d at 753. We placed

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emphasis on the trial court's ruling in *Sawyer* to note that it does not appear that Sawyer *never* worked in North Carolina, but rather that Sawyer *rarely* worked in North Carolina. *See id.*

The present case is nearly indistinguishable from the facts in *Sawyer*. Plaintiff is a nonresident, who worked primarily outside of the State of North Carolina, and whose employment agreement stipulated that North Carolina law was to apply. *See id.* at 792, 661 S.E.2d at 752. Plaintiff worked primarily in Michigan and spent at most eighteen days working within North Carolina. Indeed, the only distinguishing fact between *Sawyer* and the present case is the fact that Plaintiff participated in almost daily conference calls with Defendant's Greensboro, North Carolina office. Despite this factual difference, our analysis in the present case is properly informed by the analysis in *Sawyer*.

In *Sawyer*, we noted that “[t]he U.S. Supreme Court has long held that ‘[l]egislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.’” *Id.* at 796, 661 S.E.2d at 754 (quoting *Sandberg v. McDonald*, 248 U.S. 185, 195, 63 L. Ed. 200, 204 (1918) (citations omitted)). Our own Supreme Court has echoed this sentiment:

The law is unmistakably clear that the Legislature has no power to enact statutes, even though in general words, that can extend in their operation and effect beyond the territory of the sovereignty from which the statute emanates *Prima facie*, every statute is confined in its operation to the persons, property, rights, or contracts, which are within the territorial jurisdiction of the legislature which enacted it. The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect No presumption arises, from a failure of the state through its legislative authority to speak on the subject, that the state intends to grant any right, privilege, or authority under its laws to be exercised beyond its jurisdiction.

McCullough v. Scott, 182 N.C. 865, 877-78, 109 S.E. 789, 796 (1921) (citations omitted). Therefore, we must decide if an individual who does not live within the State and who worked primarily outside the State, but communicated daily with co-workers within the State, is within the jurisdiction of the Wage and Hour Act. *See id.* In other words, is the fact that Plaintiff participated in daily conference calls with Defendant's Greensboro, North Carolina office enough to allow Plaintiff the protection of the Wage and Hour Act where he otherwise

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would not have had this protection under *Sawyer*? We hold that it is not. A daily phone call to North Carolina is insufficient to bring Plaintiff within the protection of the Wage and Hour Act where he otherwise would not have had such protection.

Plaintiff also argues that he is entitled to the protection of the Wage and Hour Act because the employment agreement stipulates that it shall be governed by North Carolina law. We considered this argument in *Sawyer* where the parties had also contractually agreed that North Carolina law was to apply. In *Sawyer*, we applied “the substantive law of North Carolina to our determination of the territorial ambit of the North Carolina Wage and Hour Act[,]” and held “that the choice of law provision in the parties’ contract, although it requires us to apply North Carolina law, does not change the limits or requirements of the North Carolina statutes thus applied.” *Sawyer*, 190 N.C. App. at 795, 661 S.E.2d at 753. We are bound by our decision in *Sawyer* and hold that the choice of law provision in the employment agreement *sub judice* does not give extraterritorial application to the Wage and Hour Act. *See id.* Plaintiff’s assignment of error is overruled.

Defendant’s Appeal

[3] Defendant argues the trial court erred in granting partial summary judgment for Plaintiff because Plaintiff’s actions constituted spoliation of the evidence, which severely impeded Defendant’s ability to prove its claim under the North Carolina Trade Secrets Protection Act (“TSPA”).

Under the TSPA, a trade secret is

business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

- a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
- b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3) (2007). Under the TSPA, the owner of a trade secret may bring a civil action for the misappropriation of the trade secret. N.C. Gen. Stat. § 66-153 (2007). In order to survive a

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motion for summary judgment, the nonmovant must allege sufficient facts to allow a reasonable finder of fact to conclude that the information at issue meets the two above stated requirements of a trade secret under N.C. Gen. Stat. § 66-152(3). *Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr., Inc.*, 125 N.C. App. 174, 180, 480 S.E.2d 53, 56 (1997) (In order to survive the defendant's motion for summary judgment, the plaintiff, a health maintenance organization operator, was required to show negotiated price lists were, in fact, trade secrets.).

A *prima facie* case of misappropriation of trade secrets is

established by the introduction of substantial evidence that the person against whom relief is sought both:

- (1) Knows or should have known of the trade secret; and
- (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

N.C. Gen. Stat. § 66-155 (2007). Thus, a *prima facie* case does not exist without a showing of the trade secret the person against whom relief is sought knows or should have known. *See* N.C. Gen. Stat. § 66-155. Summary judgment should be granted upon the nonmovant's failure to identify that information which it claims to be a trade secret that was misappropriated.

Defendant argues Plaintiff violated the TSPA by “wrongfully misappropriating and using [Defendant's] trade secrets[.]” Because Plaintiff deleted all of the information stored on his company-issued computer, Defendant was unable to identify the trade secret information that Plaintiff allegedly improperly used.

Elizabeth MeHaffey (“MeHaffey”), the Executive Vice President and general counsel to Timco, testified as follows when asked at a deposition which trade secrets Plaintiff allegedly misappropriated:

He—I don't know what he shared with anyone else. All I know is that he offered to share at least [Defendant's] business with—information with third parties, including our customers' vendors and what we consider to be competitors. I also—he's told us that he retained or didn't return to us proprietary information that was on a company computer. I don't know what he did with that information. I don't even know—he wouldn't tell us what the scope of that information was, so—

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McHaffey also testified that Plaintiff referred to improvements he had made to Defendant's business practice and shop processes in his resume and correspondence with potential employers. According to McHaffey, Defendant interpreted these references as an offer by Plaintiff "to bring that to whoever his next employer is." Finally, McHaffey provided the following response when asked to identify the harm Defendant suffered as a result of Plaintiff's actions:

A. We believe that our reputation was harmed. We believe that there was—because of the results, what would have had to happen when he was doing this, the termination of his employment, that the shop was harmed from that.

Q. The shop was harmed because of what?

A. Because of the turnover there that had to occur.

Q. Because [Plaintiff] was no longer working there?

A. Because he breached his employment agreement and we couldn't have somebody continuing to do that.

Q. Okay. So whatever he had done businesswise when you decided to fire him, that was harm because you had to fire him; is that what you're saying?

A. I think it was a—it was a disruption to the shop, certainly. I think—we lost credibility in the market.

Q. And that was because you fired [Plaintiff]?

A. No. Because [Plaintiff] is out shopping, telling how his mission is complete, while we're holding him out on our web site as our GM.

Q. And credibility in the market, specifically to whom do you feel like—can you identify anybody specifically that you feel like you lost credibility with?

A. I don't know. You know, I'm not the person most knowledgeable about what customers have said.

Defendant cannot identify the specific information which it argues constituted trade secrets and that it claims Plaintiff misappropriated. Accordingly, Defendant has not established a *prima facie* case that Plaintiff misappropriated trade secrets.

Defendant argues that its inability to establish a *prima facie* case on its trade secrets cause of action was caused by Plaintiff's miscon-

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duct. Specifically, Defendant contends that Plaintiff's conduct in erasing his company-issued computer's hard drive constitutes evidence spoliation. The remedy for Plaintiff's misconduct, according to Defendant, should be the creation of a "presumption that the destroyed evidence goes to the merits of the case and *that the evidence was adverse to the party that destroyed it.*" Accordingly, Defendant asserts it should be presumed that (1) the destroyed records were relevant to Defendant's case, (2) the destroyed information was confidential and proprietary, and (3) Plaintiff misappropriated the data involved.

"The spoliation doctrine recognizes that where a party fails to produce certain evidence relevant to the litigation, the finder of fact may infer that the party destroyed the evidence because the evidence was harmful to its case." *Outlaw v. Johnson*, 190 N.C. App. 233, 244, 660 S.E.2d 550, 559 (2008). Defendant argues that the evidentiary inference allowed by the spoliation doctrine should apply in this case so as to permit the specific inference that the information erased from Plaintiff's hard drive constituted trade secrets and that Plaintiff misappropriated that information. We cannot agree.

Although spoliation of evidence permits an inference that the destroyed evidence was unfavorable to the party that destroyed it, the inference does not

[“]supply the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced.[”]

McLain v. Taco Bell Corp., 137 N.C. App. 179, 183-84, 527 S.E.2d 712, 716 (quoting *Doty v. Wheeler*, 120 Conn. 672, 182 A. 468, 471 (1936)), *disc. review denied*, 352 N.C. 357, 544 S.E.2d 563 (2000). Furthermore, the adverse inference “is permissive, not mandatory.” *Id.* at 185, 527 S.E.2d at 717 (quoting *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996)). “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.” *Sunset Beach Dev., LLC v. AMEC, Inc.*, 196 N.C. App. 202, 220, 675 S.E.2d 46, 58 (2009).

In *Hawley v. Cash*, 155 N.C. App. 580, 574 S.E.2d 684 (2002), this Court considered the applicability of the spoliation doctrine to a

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plaintiff's claim for punitive damages. In *Hawley*, the “plaintiff appealed the trial court’s granting of defendants’ motion for partial summary judgment on plaintiff’s punitive damages claim[,]” and argued that the defendants’ alleged spoliation of evidence prevented him from proving his claim. *Id.* at 586, 574 S.E.2d at 688. We affirmed the order of the trial court, noting that the “[p]laintiff did not forecast any evidence that would have supported a punitive damages claim. Further, [the] plaintiff points to nothing that might be contained in the discovery material he claims was inappropriately destroyed which would support such a claim.” *Id.* at 586, 574 S.E.2d at 688.

Likewise, in the present case, Defendant has not identified any information destroyed by Plaintiff that could support a claim of misappropriation of trade secrets. Defendant has produced no evidence that Plaintiff misappropriated any trade secrets, nor has Defendant produced evidence of any damages incurred as a result of the alleged misappropriation. Because Defendant has presented no independent evidence to establish or support its TSPA claim, the trial court did not err in granting Plaintiff’s motion for summary judgment on this claim. Defendant’s assignment of error is overruled.

As to each party’s appeal, the order of the trial court is

AFFIRMED.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. EDGAR BEDOLLA GARCIA

No. COA08-1312

(Filed 16 June 2009)

Search and Seizure— investigatory detention—anonymous tip—surveillance—sufficient reasonable suspicion

The trial court’s findings supported its conclusion that officers had sufficient reasonable suspicion to stop defendant and place him in investigatory detention where anonymous tips were received about marijuana being stored and sold from a particular house by defendant, the tips were corroborated through searching a police information system and days of surveillance of the

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house, and the arresting officers followed defendant from the house to a location known for drug activity.

Judge JACKSON concurring.

Appeal by Defendant from judgments entered 25 June 2008 by Judge A. Moses Massey in Superior Court, Forsyth County. Heard in the Court of Appeals 21 April 2009.

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

David L. Neal, for defendant.

WYNN, Judge.

“[A] tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration.”¹ Defendant Edgar Bedolla Garcia argues that police officers, relying in part on an anonymous informant’s tip, lacked reasonable suspicion to put him into investigatory detention. Because the police officers sufficiently corroborated the anonymous informant’s tip, we affirm the trial court’s denial of Defendant’s motions to suppress.

In May 2007, Detective Kimberly Jones of the Winston-Salem Police Department received a tip from an anonymous informant alleging that marijuana was being stored and sold from a house located at 338 Barnes Road. The informant identified Defendant as the person selling the marijuana. Thereafter, Detective Jones attempted a narcotics investigation at the location; but, no one answered when she knocked. Upon searching Defendant’s name on the Police Information System (“PISTOL”), Detective Jones found his picture and information that he lived at 338 Barnes Road, and had a lengthy history of police contact, including suspicion of narcotics and firearms offenses.

Detective Jones received a second tip from the same confidential informant on 7 July 2007. Detective Jones stated that the informant generally gave the same information in the 7 July tip that was contained in the earlier tip, including Defendant’s general description. She further testified that, as a result of the information gleaned from

1. *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000) (citing *Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000)).

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the background check and the second tip, she did undercover surveillance on Defendant's residence three times during July.

On 26 July 2007, Detective Jones was doing undercover surveillance at Defendant's residence while three other officers—Detective Williams, Detective McReady, and Sergeant Southern—stood nearby in their unmarked patrol vehicles ready to assist. Detective Jones observed a white Ford Mustang and a black BMW parked in the driveway. She saw two persons she described as Hispanic males—one wore a white T-shirt and yellow plaid shorts, and the other wore a gray T-shirt and blue jeans—leave and return to the residence in the black BMW several times throughout the day. Detective Jones testified that she was not able to “positively identify” either of the Hispanic males as Defendant at that time; however, she “felt pretty sure” one of the men was Defendant.

At some point during her surveillance on 26 July, Detective Jones observed the Hispanic males going toward a storage shed located on the property in front of the residence at 338 Barnes Road. Her line of sight did not permit her to actually see either individual enter the shed. However, she observed both men coming from the area of the storage shed and returning to the black BMW. The man wearing the white T-shirt and yellow plaid shorts carried “a black bag with large handles,” which he placed behind the driver's seat. The man in the white T-shirt and yellow plaid shorts got into the driver's seat; the other man got into the passenger seat, and the men began to leave the residence.

Meanwhile, Detective Jones radioed to the officers standing by to continue surveillance on the BMW. She testified that she communicated her observations at 338 Barnes Road by radio as Detectives McReady and Williams and Sergeant Southern continued their surveillance. They followed the BMW to a Winston-Salem community named “Ferrell Court.” In his testimony, Detective Williams stated that he knew Ferrell Court as “a drug location” and “predominantly African-American.” Moreover, Detective Williams testified that “since [the officers] were watching [the Hispanic males] for selling marijuana, [the officers] assumed [the Hispanic males] were going down there and probably sell marijuana.” Therefore, the officers decided to approach the men in the black BMW to avoid losing evidence, and seeing that “people were out everywhere,” they called for marked patrol cars and uniformed officers to come to the scene.

Sergeant Southern arrived first. He initially approached the Hispanic males, whom had exited the black BMW and now stood

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about ten feet right of the vehicle where they spoke to two African-American men. The two African-American men fled when Sergeant Southern identified himself as a police officer. When he arrived moments later, Detective Williams approached Sergeant Southern and the two Hispanic males. Detective Williams put the two Hispanic males in handcuffs and advised them that they were in “investigative detention” “for officer safety because [the officers] were outnumbered by the crowd” Thereafter, Detective Williams approached the BMW. He testified that he smelled “green marijuana,” which he also described as “fresh marijuana or unburnt marijuana.” Detective Williams opened the BMW, found the black bag in the back seat, and in that bag he discovered two freezer bags of marijuana later measured at 890 grams.

After discovering the marijuana, Detective Williams searched one of the Hispanic males and found a card identifying him as Defendant. Detective Williams then “asked [Defendant] where he was coming from prior to his arrival on Ferrell Court.” Defendant responded that “he just left his residence at 1029 Thomasville Road.” Because he was involved with the surveillance at 338 Barnes Road, Detective Williams suspected that Defendant did not truthfully reveal his residence. Then Detective Williams asked Defendant what he “was doing on Ferrell Court.” Defendant admitted that he was there to deliver drugs. Thereafter, Detective Williams read Defendant his *Miranda* rights.

The officers at Ferrell Court communicated Defendant’s arrest with Detective Jones, who remained at Defendant’s residence at 338 Barnes Road with other officers that came to the scene. Some of the other officers obtained a resident’s consent to search the house. Officers discovered more marijuana, large plastic bags, scales, a large amount of currency, and a .22 caliber rifle in the house. Detective Jones led a drug-sniffing dog to the storage shed, where the dog alerted. Detective Jones testified that she also smelled “a very strong odor of marijuana.” She later obtained a search warrant for the shed, where police found 11.5 pounds of marijuana.

Before his trial, Defendant moved to suppress: 1) evidence recovered from the shed, contending that the search warrant was not supported by probable cause; 2) evidence recovered from the black BMW, contending that the search was not lawfully based on reasonable suspicion or probable cause; and 3) Defendant’s statements, contending that officers elicited his statements in violation of his 5th Amendment rights. In its order following the suppression hearing, the trial court made the following relevant findings of fact:

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1. In May of 2007, K.L. Jones, a Detective with the Winston-Salem Police Department (hereinafter “WSPD”) received information from a confidential source of information that Edgar Garcia was selling marijuana at 338 Barnes Road, Lot # 40, in Winston-Salem, North Carolina.

2. The confidential source further informed Detective Jones that Edgar Garcia kept the marijuana in a storage shed adjacent to his residence at that address.

...

4. In July of 2007, the same confidential source of information contacted Detective Jones and told her the same information that had been communicated in May.

5. Detective Jones then utilized . . . “PISTOL”, and retrieved information on the suspect Edgar Garcia. She found an address for Edgar Garcia of 338 Barnes Road, Lot #40, and that Garcia had had 18 previous contacts with law enforcement officers. Detective Jones found that Garcia had been arrested for possession of a stolen firearm, felony possession of cocaine, and discharging a firearm within city limits. . . .

6. Detective Jones performed surveillance on three separate occasions at 338 Barnes Road, Lot # 40. She observed several vehicles coming and going from that location.

7. On July 26, 2007, Detective Jones and other officers with the WSPD performed surveillance at the 338 Barnes Road location. During her surveillance of the residence, she was able to identify two vehicles as being the main vehicles that were parked at the location. One was a white Ford Mustang and the other was a black BMW. She was able to see the license plate for the BMW.

8. Detective Jones saw two Hispanic males occupying the black BMW at various times during the day. One of the males was wearing a white T-shirt with yellow plaid shorts and the other was wearing a grey shirt with blue jeans. Based on the photo she retrieved from PISTOL, Detective Jones believed Edgar Garcia was one of those Hispanic males.

...

10. Detective Jones later observed the same two Hispanic males coming from the area of the storage shed that was located on the

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property at 338 Barnes Road, Lot #40. She saw the Hispanic male with the white t-shirt and yellow plaid shorts carrying a black bag from that location. She saw this same male place the bag behind the driver's seat in the black BMW, and she saw both Hispanic males enter the vehicle and drive off.

11. Based on her training, her 11 years as a detective with the WSPD narcotics division, the information she had previously received from a confidential source, and on her own surveillance of the residence during the month of July, Detective Jones believed the black bag contained marijuana.

. . .

14. Detectives Southern, McCready, and Williams followed the two Hispanic males in the black BMW to Ferrell Court, which is an apartment complex in the Rolling Hills neighborhood in Winston-Salem, North Carolina.

15. Detective Jones testified that Ferrell Court is a well known location for narcotics activity, including the sale of narcotics such as cocaine and marijuana. She testified that she has been involved in at least a dozen operations investigating drug activity at that location.

16. Detective Williams testified that Ferrell Court is a well known location for narcotics activity. Based on the collective knowledge of the officers involved, Detective Williams believed that the two Hispanic males were going to Ferrell Court to sell marijuana. During his law enforcement career, Detective Williams has found that narcotics traffickers and sellers often carry firearms.

From those findings of fact, the trial court deduced the following conclusions of law: 1) police had "reasonable suspicion to stop and place [Defendant] into investigatory detention"; 2) Detective Williams had probable cause to search the BMW based on his smelling marijuana emanating from the vehicle; 3) Defendant's statements "from the moment he was handcuffed to when he was read his Miranda rights are not admissible"; 4) Defendant's statements after he received his *Miranda* rights are admissible; 5) the warrant to search the shed was supported by probable cause; and 6) all evidence seized as a result of the search warrant is admissible.

After the trial court's ruling, Defendant preserved his right to appeal the rulings on his suppression motions. Thereafter, he pled

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guilty to trafficking in marijuana, possession with intent to sell or deliver marijuana, maintaining a dwelling for purposes of keeping and selling a controlled substance, possession of drug paraphernalia, and maintaining a vehicle for purposes of keeping and selling a controlled substance. The trial court consolidated the convictions and sentenced Defendant to a term of 25 to 30 months imprisonment.

On appeal, Defendant argues that police lacked reasonable suspicion to stop and detain him at Ferrell Court, and as result, all statements and evidence seized after that point are subject to the exclusionary rule.² We disagree.

It is well established that “[l]aw enforcement officers do not violate the Fourth Amendment’s prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen.” *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (quoting *United States v. Drayton*, 536 U.S. 194, 200, 153 L. Ed. 2d 242, 251 (2002)). Rather, “[t]he encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.” *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991)). At that point, the encounter may become an investigatory stop, which must be supported by reasonable suspicion to pass constitutional muster. *Id.* at 664, 617 S.E.2d at 14 (citing *Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357 (1979)); see also *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968) (“Before a police officer may stop a vehicle and detain its occupants without a warrant, the officer must have a reasonable suspicion that criminal activity may be occurring.”)).

“[R]easonable suspicion” requires that “[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.”

2. Some of Defendant’s assignments of error seek to challenge the trial court’s findings of fact on various grounds, but Defendant has abandoned these assignments of error by failing to specifically argue them in his brief. See N.C. R. App. P. 28(b)(6). Furthermore, we find competent evidence in the transcript to support every finding of fact. See *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000) (this Court’s function in reviewing denial of a motion to suppress is to determine “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”) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

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State v. Watkins, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). All that is required is a “minimal level of objective justification, something more than an ‘unparticularized suspicion or hunch.’” *Id.* at 442, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). A court must consider the totality of the circumstances in determining whether reasonable suspicion to make an investigatory stop existed. *Id.* at 441, 446 S.E.2d at 70.

State v. Jacobs, 162 N.C. App. 251, 255, 590 S.E.2d 437, 440 (2004).

Factors to determine whether reasonable suspicion existed include activity at an unusual hour, a suspect’s nervousness, presence in a high-crime area, and unprovoked flight. *State v. Blackstock*, 165 N.C. App. 50, 58, 598 S.E.2d 412, 417-18 (2004), *disc. review denied*, 359 N.C. 283, 610 S.E.2d 208 (2005) (citations omitted). However, none of those factors are sufficient independently. *Id.*

An anonymous informant’s tip may form the basis for reasonable suspicion, but it must exhibit “sufficient indicia of reliability.” *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000) (citing *Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d. 254, 260 (2000)). But even “[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.* The reliability of an anonymous tip is determined by assessing the totality of the circumstances as to what the officer knew before making the stop. *See Hughes*, 353 N.C. at 210, 539 S.E.2d at 632 (concluding that anonymous tip and subsequent police corroboration were still insufficient to create reasonable suspicion).

Here, Defendant argues that the police officers lacked reasonable suspicion before they put him into investigatory detention because the anonymous tips were insufficient and the police officers otherwise observed only innocent behavior. The anonymous tips provided specific information of illegal activity—possessing and selling marijuana. The tipster also provided a specific location—Defendant’s residence. Furthermore, the tipster specifically referenced the shed, the area from which Detective Jones later observed Defendant and his partner emerge carrying a black bag they placed in the rear seat of the black BMW.

Even assuming information in the anonymous tips was insufficient to create reasonable suspicion, we hold that the trial court’s findings of fact support the conclusion that the police sufficiently corroborated the anonymous tips. The tips were buttressed by Detec-

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tive Jones' substantial subsequent surveillance at 338 Barnes Road. During that surveillance, Detective Jones was aware of Defendant's history of police contacts for narcotics and firearms offenses while she observed the suspects come and go at 338 Barnes Road. Furthermore, Detective Jones communicated her observations to Sergeant Southern and Detectives Williams and McReady, who followed Defendant to Ferrell Court, a location known for its drug activity. We hold that these observations sufficiently corroborated information in the anonymous tips such that the officers could reasonably suspect Defendant went to Ferrell Court to sell marijuana.

Indeed, subsequent corroboration by officers in this case contrasts with the insufficient corroborative efforts of the officers in *Hughes*. The anonymous tipster in *Hughes* alleged:

an individual nicknamed "Markie" would be arriving that day in Jacksonville by way of a bus coming from New York City, possibly the 5:30 p.m. bus. "Markie" was described as "a dark-skinned Jamaican from New York who weighs over three hundred pounds and is approximately six foot, one inch tall or taller, between twenty or thirty years of age [,] . . . who would be clean cut with a short haircut and wearing baggy pants," and who would have marijuana and powdered cocaine in his possession. The informant also indicated that Markie "sometimes" came to Jacksonville on weekends before it got dark, that he "sometimes" took a taxi from the bus station, that he "sometimes" carried an overnight bag, and that he would be headed to North Topsail Beach.

Hughes, 353 N.C. at 201-02, 539 S.E.2d at 627. At the bus station, the investigating officers identified the defendant, who had already gotten off a bus when the officers arrived, as matching the tipster's description. *Id.* The defendant got into a taxi immediately after getting off the bus and the officers stopped the defendant's taxi before determining whether it was traveling toward North Topsail Beach. *Id.* The Court held that officers lacked reasonable suspicion on these facts because the officers failed to "establish the reliability of the [tipster's] assertion of illegality" by neglecting to "confirm the suspect's name, the fact that he was Jamaican, or whether the bus from Rocky Mount had originated in New York City." *Id.* at 209, 539 S.E.2d at 632.

The same is not true in this case. Detective Jones corroborated the pointed information in the anonymous tips through her discoveries in the "PISTOL" system and her days of surveillance at 338 Barnes

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Road. She passed this information to the arresting officers, who followed Defendant to a location known for drug activity. Accordingly, we hold that the trial court's findings of fact support its conclusion that the Winston-Salem police had "sufficient reasonable suspicion to stop and place [Defendant] into investigatory detention"

Defendant also argues that the exclusionary rule should apply to suppress his statements to police, evidence seized from the bag in the BMW, and evidence seized from the shed by search warrant obtained after his arrest. Because Defendant challenges the admission of this evidence on the sole ground that there was no reasonable suspicion to put him into investigatory detention at Ferrell Court, and we have already decided that issue to the contrary, we conclude that this assignment of error is without merit.

Affirmed.

Judge JACKSON concurs in a separate opinion.

Judge Robert N. HUNTER, Jr. concurs.

JACKSON, Judge concurring.

I concur in both the opinion and the result reached by the majority, but I write separately to express my concern regarding placing handcuffs upon defendant pursuant to an "investigatory detention" based upon reasonable suspicion. Because the phrase "investigatory detention" is ambiguous in the context of Fourth Amendment jurisprudence, I believe there is a danger of confusion posed by conflating the proper legal standards (*i.e.*, probable cause and reasonable suspicion) already inherent within a trial court's fact-specific inquiry as to whether a stop, search, or seizure passes constitutional muster.

The Supreme Court of the United States has explained that

to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, *whether*

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these intrusions be termed “arrests” or “investigatory detentions.” We made this explicit only last Term in *Terry v. Ohio*, . . . when we rejected “the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a ‘technical arrest’ or a ‘full-blown search.’”

Davis v. Mississippi, 394 U.S. 721, 726-27, 22 L. Ed. 2d 676, 680-81 (1969) (emphasis added) (footnote call number omitted). Therefore, it is clear that the Supreme Court does not draw a bright line between “arrests” and “investigatory detentions,” but instead focuses on the intrusive nature of the activity involved.

The Supreme Court of North Carolina, as well as prior opinions of this Court have stated that so-called investigatory detentions are permitted upon reasonable suspicion. *See, e.g., State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citations omitted); *State v. Sanchez*, 147 N.C. App. 619, 623, 556 S.E.2d 602, 606 (2001). In these opinions, North Carolina’s appellate Courts have used “investigatory detention” as a synonym for “investigatory stop.”³

In view of our precedent, and upon the facts presented, I would construe the limited “investigatory detention” in case *sub judice* as an “investigatory stop” which was supported by reasonable suspicion pursuant to an informant’s tip and independent police corroboration. Having construed the “investigative detention” as an “investigative stop,” Detective Williams permissibly used handcuffs to put the two Hispanic males into a limited “investigative detention” “for officer safety” prior to obtaining probable cause to arrest defendant. *See State v. Campbell*, 188 N.C. App. 701, 708-12, 656 S.E.2d 721, 727-29 (affirming the use of handcuffs during an investigative stop after explaining that “when conducting investigative stops, police officers are ‘authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.’”) (quoting *United States v. Hensley*, 469 U.S. 221, 235, 83 L. Ed. 2d 604, 616 (1985)), *appeal dismissed*, 362 N.C. 364, 664 S.E.2d 311 (2008).

With the foregoing caveat, I join the majority.

3. Although both *Styles* and *Sanchez* are factually distinct from the case *sub judice* insofar as they involve “traffic stops” as opposed to traditional “*Terry* stops,” reasonable suspicion provides the legal justification required to initiate the stop in both instances. *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000).

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CATAWBA COUNTY, A NORTH CAROLINA BODY POLITIC, PLAINTIFF v. CHARLIE C. WYANT AND WIFE, MARY JANE RHONEY WYANT, DEFENDANTS AND CATAWBA COUNTY, A NORTH CAROLINA BODY POLITIC, PLAINTIFF v. JOHNNY LEE WYANT AND WIFE, ELAINE W. WYANT, DEFENDANTS AND CATAWBA COUNTY, A NORTH CAROLINA BODY POLITIC, PLAINTIFF v. FARRELL C. JOHNSON AND WIFE, LOTTIE L. JOHNSON; STEVE F. JOHNSON AND WIFE, APRIL G. JOHNSON; AND RONALD D. JOHNSON AND WIFE, PATRICIA E. JOHNSON, DEFENDANTS

No. COA08-1159

(Filed 16 June 2009)

Eminent Domain—condemnation—sewer line easement—public purpose

The trial court did not err by finding and concluding that the condemnation of defendants' land for a sewer line easement was for a public purpose because: (1) the record evidence established that the sewer line connected both plaintiff county's landfill and a lumber company with the City of Newton's Clark Creek Wastewater Treatment Plant, and at least seven other users are or will be connecting to the sewer line; (2) the evidence showed that the purpose of connecting the landfill to the public sewer system was primary and paramount, and that purpose was not defeated by the fact that the lumber company will also use or benefit from the sewer line; (3) plaintiff was required by N.C.G.S. § 40A-40(a) to give notice only that the purpose of the condemnation was for a sewer line, and did not have to give notice as to all the planned or potential users of the sewer line; (4) Chapter 40 does not require plaintiff to negotiate voluntary easements with defendants prior to instituting condemnation proceedings and is devoid of any provision imposing a duty on plaintiff to hold public hearings at any point regarding the condemnation proceedings; and (5) the construction of the sewer line was necessary for plaintiff to adequately treat leachate and to remain compliant with state regulations, which in turn, benefits the public generally.

Appeal by Defendants from judgment entered 2 June 2008 by Judge Anderson D. Cromer in Catawba County Superior Court. Heard in the Court of Appeals 26 February 2009.

Anne Marie Pease and Patrick, Harper & Dixon, by Stephen M. Thomas, for Plaintiff.

Daniel G. Christian and Forrest A. Ferrell for Defendants.

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STEPHENS, Judge.

I. Procedure

Catawba County (“Plaintiff”) filed actions on 12 May 2006 to condemn property owned by Charlie C. Wyant and his wife, Mary Jane Rhoney Wyant (06 CVS 1573), Johnny Lee Wyant and his wife, Elaine W. Wyant (06 CVS 1575), Farrell C. Johnson and his wife, Lottie L. Johnson, Steve F. Johnson and his wife, April G. Johnson, and Ronald D. Johnson and his wife, Patricia E. Johnson (06 CVS 1576) (collectively “Defendants”). Defendants timely filed answers challenging the authority of Plaintiff to condemn the properties at issue. By stipulation of the parties, the actions were joined together for the trial court to determine all issues except compensation pursuant to N.C. Gen. Stat. § 40A-47. On 3 September 2007, the Honorable Anderson D. Cromer conducted a bench trial of the consolidated actions in Catawba County Superior Court. On 2 June 2008, Judge Cromer entered judgment, finding that Plaintiff’s taking of the various parcels of Defendants’ property was for a public purpose under Chapter 40A of the North Carolina General Statutes, which governs local public condemnation proceedings. From this judgment, Defendants appeal.

II. Facts

Plaintiff owns and operates the Blackburn Landfill located at 4017 Rocky Fork Road, Newton, North Carolina. The Blackburn Landfill is a Municipal Solid Waste Landfill (“MSWLF”) as defined in 40 C.F.R. § 258.2. Plaintiff seeks to construct or has already constructed a sewer line to connect Plaintiff’s property that is or was located at and around the Blackburn Landfill with the existing sewer lines of the City of Newton (“the sewer line”). Defendants own land through which the sewer line would and does pass.

Pursuant to 40 C.F.R. § 258.40, which was adopted in 1991, all new MSWLF units and lateral expansions require a leachate¹ collection system. Plaintiff’s first waste area requiring leachate collection, Unit 1, began operating in January 1998. The phased construction of the Unit 2 waste area began in 1997, and the phased construction of the Unit 3 waste area began in 2008. In 1997, the North Carolina Department of Environmental and Natural Resources (“NCDENR”) enacted new solid waste rules, requiring solid waste landfills to connect their leachate systems to a public sewer if available, or to pump and haul the leachate to a state permitted and certified wastewater

1. Leachate is rainwater that comes into contact with solid waste.

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treatment facility. As no public sewer service was available in the immediate area of the Blackburn Landfill in 1997, and future construction of a public sewer system would have taken considerable time to plan, budget, and construct, Plaintiff obtained permits from the state to construct leachate storage tanks in order to comply with the solid waste rules.

Plaintiff pumped leachate from lined landfill waste areas to the storage tanks and then transferred the leachate by tanker truck to the City of Hickory's Henry Fork Wastewater Treatment Plant. This pump and haul system is considered temporary under NCDENR rules and permits are issued in six-month increments until a permanent solution is instituted.

In 1999, Plaintiff hired McGill Associates ("McGill") to prepare a solid waste master plan. In developing the plan, Plaintiff and McGill considered alternatives to the pump and haul system. In 2001, the amount of leachate collected far exceeded the storage capacity of the storage tanks so Plaintiff decided to move forward with connecting the leachate collection system to a public sewer system. Plaintiff hired Hayes, Seay, Mattern and Mattern ("HSM") to study and evaluate connection options with the City of Hickory, the City of Newton, and the Town of Maiden.

In July 2003, the Catawba County Economic Development Corporation approached Plaintiff with a proposition to locate a lumber company called Gregory Wood Products, Inc. ("GWP") on the Blackburn Landfill property, potentially creating 125 jobs as well as providing the opportunity to seek economic grants that would fund a portion of the sewer project. In December 2003, Plaintiff entered into an Economic Development Agreement with "G&G Lumber" through GWP. In exchange for GWP's agreement to construct and operate a sawmill or lumber processing company, Plaintiff agreed to transfer title of Plaintiff's property located below the Blackburn Landfill to GWP. Additional incentives for GWP included extension of water and sewer service to the property and roadway improvements.

On 7 June 2004, based on HSM's recommendation, Plaintiff contracted with the City of Newton to dispose of the Blackburn Landfill leachate at the Clark Creek Wastewater Treatment Plant. Plaintiff was responsible for the design and construction of all piping and pump stations and for securing the easements necessary to connect the Blackburn Landfill area to Newton's sewer system.

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To help finance the water lines, sewer lines, and roadway improvements, Plaintiff sought funding through state and federal grants. Plaintiff applied for a Project Grant from the Economic Development Administration of the United States Department of Commerce (“EDA”). The grant was targeted at promoting long-term economic development in areas experiencing substantial distress by investing in the construction and rehabilitation of essential public infrastructure and development facilities. Plaintiff also applied for a Community Development Block Grant (“CDBG”) from the North Carolina Department of Commerce. This grant provided funds for public infrastructure to help facilitate job creation. Both grant applications state only that the sewer line would serve GWP.

Pursuant to the requirements of the North Carolina Department of Commerce, two public hearings were held regarding the CDBG application. Plaintiff’s published notice for the second hearing stated that funds from the grant would be used to install water lines and sewer lines, and to construct a road to serve GWP. Plaintiff did not notify citizens that the sewer line would serve anyone other than GWP. The EDA grant was awarded to Plaintiff on 14 December 2004 and the CDBG was awarded to Plaintiff on 2 July 2004.

Plaintiff estimated that the Blackburn Landfill would utilize approximately 90% of the capacity in the new sewer line, with GWP and other entities utilizing the remaining 10%. In addition to the Blackburn Landfill and GWP, seven other users were committed to connecting to the sewer line, and 28 additional property owners were eligible to connect. The seven users who had committed to connection included P1 Catawba Development Company; county residents Johnny and Eunice Punch; Oakwood Farm, LLC; a Target Distribution Center; the City of Newton Jacobs Ford Park; the Catawba County Bio-Solids Facility; and the Catawba County Bio-Energy Facility.

In May 2005, Plaintiff hired Camp, Dresser and McKee (“CDM”) to design the sewer line between the Blackburn Landfill area and the City of Newton’s waste treatment plant. The project was named the “G&G Sewer Project.” In order to proceed with the construction of the sewer line, Plaintiff had to either obtain voluntary easements from the property owners along the sewer line or condemn the property needed. In July 2005, Plaintiff hired Martin-McGill, a consulting firm, to obtain the necessary voluntary easements. In late 2005, Plaintiff discovered that it would have to secure approximately 17 additional easements from property owners along the sewer project route; the property owners affected included Defendants. Ms.

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Kathryne Alonso of Martin-McGill contacted Defendants to try to obtain voluntary easements for the sewer line. Ms. Alonso informed Defendants that the sewer line was for GWP and that Defendants could not connect to it.

Plaintiff was unable to obtain a voluntary easement from Defendants and initiated condemnation proceedings on 12 May 2006.

III. Discussion

Defendants argue that the trial court erred in finding and concluding that the condemnation of Defendants' land for the sewer line easement was for a public purpose.

In the exercise of the sovereign power of eminent domain, a county may only take private property for the public use or benefit and upon the payment of just compensation. *State Highway Comm'n v. Batts*, 265 N.C. 346, 355, 144 S.E.2d 126, 133 (1965). On appeal, "[a] trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive . . . if there is evidence to support them." *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000). Whether a condemnor's intended use of the land is for the public use or benefit is a question of law for the courts, *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001), *cert denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002), reviewable *de novo* on appeal.

"[T]he statutory phrase 'the public use or benefit' is incapable of a precise definition applicable to all situations." *Carolina Telephone and Telegraph Co. v. McLeod*, 321 N.C. 426, 429, 364 S.E.2d 399, 401 (1988). However, in determining whether a particular undertaking by a municipality is for a public use or benefit, courts have looked at whether the undertaking "involves a reasonable connection with the convenience and necessity of the particular municipality[,] and whether "the activity benefits the public generally, as opposed to special interests or persons." *Piedmont Triad Airport Auth.*, 354 N.C. at 339, 554 S.E.2d at 333 (quotation marks and citations omitted).

The trial court made the following findings of fact relevant to the sewer line's public use or purpose:

7. Plaintiff seeks to construct or has already constructed a sewer line that connected its property that is or was located at and around the Blackburn Landfill with the existing sewer lines of the City of Newton

. . . .

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10. “Leachate” is rainwater that comes into contact with solid waste.

11. Pursuant to 40 C.F.R. [§] 258.40, which was adopted in 1991, all new MSWLF units and lateral expansions require a leachate collection system.

12. Plaintiff’s first waste area requiring leachate collection, Unit 1, began operating on January 1, 1998.

13. The phased construction of the Unit 2 waste area began in 1997 and the phased construction of the Unit 3 waste area began in 2008.

14. In 1997, the North Carolina Department of Environment and Natural Resources (“NCDENR”) enacted new Solid Waste Rules, requiring solid waste landfills to connect their leachate collection systems to a public sewer system (if available) or to pump and haul the leachate to a State permitted and certified wastewater treatment facility.

15. In 1997, no public sewer service was available in the immediate area of the landfill Therefore, Plaintiff sought permits from the State of North Carolina for the construction of leachate storage tanks on the Blackburn Landfill property in order to comply with North Carolina’s newly adopted Solid Waste Rules.

. . . .

21. In 2001, Plaintiff decided to move forward with connection of the leachate collection system to a public sewer system.

22. . . . Plaintiff began to consider the available options of extending sewer service to the landfill. The three public sewer systems to be considered for connection to the landfill were systems owned by the City of Hickory, the City of Newton and the Town of Maiden.

23. . . . To identify the most economical route for connecting the sewer, Plaintiff hired Hayes, Seay, Mattern and Mattern (HSMM), a consulting firm, to study and evaluate the three connection options.

. . . .

25. In July of 2003, Scott Millar, President of the Catawba County Economic Development Corporation, approached Barry

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Edwards, Utilities and Engineering Director for Catawba County, about a potential Economic Development project involving a lumber company considering locating in Catawba County. Specifically, Mr. Millar consulted with Barry Edwards because of the availability of “industrial property” within the Blackburn Landfill area. . . .

. . . .

27. In August of 2003, . . . the lumber company was inquiring about the availability of sewer service to the potential industrial sites in the Blackburn Landfill area.

28. Because Plaintiff was already in the process of planning a sewer system to remove leachate from the Blackburn [L]andfill, sewer service to potential industrial sites in the Blackburn Landfill area became one of the many incentives Plaintiff could utilize to attract industry to the county and specifically to the Blackburn Landfill area.

. . . .

35. In April of 2004, HSMM . . . recommended that the County connect the Blackburn Landfill area to the City of Newton treatment plant.

36. On June 7, 2004, Plaintiff executed a contract with the City of Newton for 25,000 gallons per day of capacity in the City of Newton’s Clark Creek Wastewater Treatment Plant for delivery of the landfill leachate for treatment in the City’s plant.

37. Pursuant to the contract . . . , Plaintiff was solely responsible for the design and construction of all of the piping and pump stations as well as securing all of the rights of way necessary to connect the Blackburn Landfill area to Newton’s sewer system.

38. In May of 2005, Plaintiff hired Camp, Dresser and McKee (“CDM”), an engineering firm, to design the sewer line between the Blackburn Landfill area and the City of Newton waste treatment plant.

39. The sewer project was named the “G&G Sewer Project”, [sic] because, according to Plaintiff, it was its custom to name the project based on the identity of the end user, which in this case would be G&G Lumber Company. . . .

. . . .

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42. Plaintiff has caused to be constructed and established across the Defendant/Landowners' respective properties a "forced main" sewer line . . . through which sewage flows under pressure and is pumped from the County's present or formerly owned property to the existing City of Newton wastewater collection system. It provides service to Gregory Wood Products, the Sawmill Industrial Site, as well as at least eight other users that are connected or will be connecting. These users include the Catawba County Blackburn Landfill, including its leachate collection system; the Catawba County Bio-Solids Facility; the Catawba County Bio-Energy Facility; P1 Catawba Development Company; Johnny and Eunice Punch; Oakwood Farm, LLC; Target Distribution Center[;] and City of Newton Jacobs Fork Park.

[49]. Taken and viewed in its entire context, Plaintiff seeks permanent sewer easements and temporary construction easements for the connecting sewer line for a public purpose, public use or benefit. Furthermore, the public notices, legal descriptions and statements made by individuals negotiating with the individual landowners do not estop Plaintiff from taking property for a legitimate purpose, use or benefit.

Defendants assign error only to finding of fact number [49], arguing that the trial court erred in analyzing whether condemning property to build a sewer line to connect the Blackburn Landfill with the county sewer system was for a public purpose because the sewer line at issue was not intended to serve Blackburn Landfill at all.

Specifically, Defendants contend that "the evidence in the record indicated the [sewer] line was to serve [only] GWP, a private entity[;]" in that "all of the evidence establishes that the stated, published, noticed[,] and communicated purpose [of the sewer line] was to serve GWP." In essence, Defendants contend that public notices promulgated by Plaintiff which referenced only GWP as the entity to be served by the sewer line proves Defendants' position that, in fact, the purpose of the sewer line is entirely private. We disagree.

The evidence of record establishes that the sewer line connects both Blackburn Landfill and GWP with the City of Newton's Clark Creek Wastewater Treatment Plant. Furthermore, at least seven other users are or will be connecting to the sewer line.

"[A] taking can be for public use or benefit even when there is also a substantial private use so long as the private use in question is

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incidental to the paramount public use.” *Carolina Telephone & Telegraph Co.*, 321 N.C. at 433, 364 S.E.2d at 403 (citing 26 Am. Jur. 2d Eminent Domain § 32 (1966)). While the sewer line may not serve Blackburn Landfill exclusively, Barry Brian Edwards, the Director of Utilities and Engineering for Catawba County, testified that approximately 90% of the capacity of the sewer line will be utilized by Blackburn Landfill, and Jack Chandler, Public Services Administrator for Catawba County, testified that GWP would use approximately three to five percent of the sewer line capacity. Thus, the evidence in the record shows that the purpose of connecting Blackburn Landfill to the public sewer system was primary and paramount, and that purpose is not defeated by the fact that GWP will also use or benefit from the sewer line.

Second, Defendants argue that if Plaintiff “intended for the sewer line to serve Blackburn Landfill,” then Plaintiff should have specifically stated that intention in the statutory notice required by N.C. Gen. Stat. § 40A-40(a).

At least 30 days prior to filing a complaint, a public condemnor must provide notice to each property owner of the condemnor’s intent to institute a civil action to condemn property. N.C. Gen. Stat. § 40A-40(a) (2007). The pre-suit notice must contain a statement of “the purpose for which the property is being condemned[.]” *Id.* Although “[t]here are no North Carolina cases or statutes detailing the specificity with which the notice must state the ‘purpose’ of the condemnation[.]” *Scotland Cty. v. Johnson*, 131 N.C. App. 765, 769, 509 S.E.2d 213, 215 (1998), this Court has explained that the notice need not specifically state each and every intended “use” of the property. *Id.*

In this case, the notice provided to Defendants pursuant to N.C. Gen. Stat. § 40A-40(a) stated that the condemnation was “for a sewer line, to be part of the county sewer system.” The evidence indicates that Plaintiff planned to build, or had already built, a sewer line which extended from the property on and around the Blackburn Landfill to the City of Newton’s Clark Creek Wastewater Treatment Plant. While the sewer line connected the Blackburn Landfill, GWP, seven other users, and potentially 28 additional property owners to the Clark Creek Wastewater Treatment Plant, Plaintiff was required by N.C. Gen. Stat. § 40A-40(a) to give notice only that the purpose of the condemnation was for a sewer line, and did not have to give notice as to all the planned or potential users of the sewer line.

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Defendants further complain that when Plaintiff attempted to secure voluntary easements from Defendants and held public hearings regarding the CDBG, neither Plaintiff nor its agents informed Defendants that the sewer line was to serve any person or entity other than GWP. This argument is without merit.

Chapter 40A plainly does not require Plaintiff to negotiate voluntary easements with Defendants prior to instituting condemnation proceedings. *See* N.C. Gen. Stat. § 40A-4 (2007) (“The power to acquire property by condemnation shall not depend on any prior effort to acquire the same property by gift or purchase”). Plaintiff’s attempts to secure voluntary easement agreements were not mandated by law; they were entirely gratuitous. Furthermore, Chapter 40A is devoid of any provision which imposes a duty on Plaintiff to hold public hearings at any point regarding the condemnation proceedings. The public hearings Plaintiffs complain of concerned the CDBG application and were held pursuant to the requirements of the North Carolina Department of Commerce as part of its review of the grant application. Accordingly, Plaintiff was not required to provide notice to Defendants during those hearings as to the purpose of the condemnation.

A thorough review of the record thus reveals that the trial court’s findings of fact are amply supported by competent evidence, much of which is uncontradicted. Based on the above-stated findings of fact, the trial court concluded, *inter alia*, that Plaintiff’s connection of the Blackburn Landfill leachate collection system and the Blackburn Landfill to a public sewer system is for a public purpose.

The evidence before this court, and the trial court’s findings of fact, support this conclusion. The evidence establishes that removal of leachate from the Blackburn Landfill has been a matter of public concern and legal obligation for Plaintiff since at least 1997. Plaintiff has been disposing of leachate with a temporary pump and haul system, in compliance with regulation, since 1997. However, increased leachate production at the Blackburn Landfill necessitated that Plaintiff connect the leachate collection system to a public sewer system in order to remain in compliance with state regulation.

As the construction of the sewer line was necessary for Plaintiff to adequately treat leachate and to remain compliant with state regulation, which, in turn, benefits the public generally, *see Piedmont Triad Airport Auth.*, 354 N.C. at 339, 554 S.E.2d at 333, the trial court did not err in concluding that the connection of the Blackburn

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Landfill leachate collection system and the Blackburn Landfill to a public sewer system is a public purpose as defined by Chapter 40A and that Defendants failed to meet their burden of proof that the taking of Defendants' property is not for a public use or benefit as required by Chapter 40A.

AFFIRMED.

Judges JACKSON and STROUD concur.

STATE OF NORTH CAROLINA v. VICTORIA GRAHAM GOODE

No. COA08-1145

(Filed 16 June 2009)

1. Constitutional Law— effective assistance of counsel—conceding guilt of lesser offense

A first-degree murder defendant was not denied effective assistance of counsel when her attorney conceded guilt of second-degree murder to the jury. Defendant gave a knowing and voluntary consent in response to an inquiry by the trial court, and did not demonstrate any deficiency in her counsel's performance.

2. Criminal Law— competency to stand trial—no objection to trial resuming—hearing waived

A first-degree murder defendant effectively waived her statutory right to a competency hearing when she did not object to the trial court resuming the trial without the hearing after an adjournment taken because the jail staff had not given defendant her anti-anxiety medication.

3. Criminal Law— transferred intent—attack on murder victim with car—bystander injured

The trial court did not err in a first-degree murder prosecution by applying the doctrine of transferred intent to an instruction on attempted first-degree murder.

4. Homicide— felony murder—instructions—no plain error

There was no plain error in giving a felony murder instruction where defendant was also convicted on the basis of malice, premeditation and deliberation.

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Appeal by Defendant from judgment entered 27 March 2008 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 24 March 2009.

Attorney General Roy A. Cooper, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Amos Granger Tyndall, for Defendant.

BEASLEY, Judge.

Victoria Graham Goode (Defendant) appeals from judgment entered on her convictions of first-degree murder and attempted first-degree murder. We find no error.

The evidence shows the following: Defendant was involved in a romantic relationship with Tanya Mattison (Mattison) for seven years. They lived together approximately four to five years. Defendant discovered in early 2007 that Mattison had cheated on her with Veronica Malone (Malone), but the couple agreed to stay together. However, on the morning of 1 July 2007, Mattison informed Defendant that she was terminating the relationship. Defendant, in an attempt to prevent Mattison from leaving the residence, took Mattison's keys, some of her jewelry, and her cell phone. Defendant left their residence and drove to a nearby park.

While Defendant was at the park, Malone and her nephew, D.M.¹, went to Defendant's residence to assist Mattison with her plans to move out of the home. D.M. testified that as he and Malone were loading up Malone's car, a Dodge Durango, he overheard Mattison yell, "there she goes." D.M. then saw Defendant driving her blue Camry towards the Durango. As Malone stood between the inside of the Durango and its door, Defendant's car hit the Durango's opened door and D.M. saw Malone laying on the road, badly injured. D.M. went inside the home to call the police and when he returned outside, he witnessed Defendant running towards the house with a hammer in her hand. D.M. testified that Defendant was running up the street yelling, "I am going to kill that b——, I am going to get you." Mattison succeeded in grabbing the hammer out of Defendant's hands and wrestling her to the ground.

Demarcus Mouzzon (Mouzzon)², who lived in the neighborhood, testified that Defendant got back into her Camry, drove down the

1. D.M. is a pseudonym used to refer to a juvenile to protect the privacy.

2. D.M. and Demarcus Mouzzon (Mouzzon) are not the same person.

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street, “[m]ade a U-turn and just gunned it.” D.M. attempted to help Malone, who was laying down on the street, when Defendant struck both of them with her Camry, running over Malone and hitting D.M. Mouzzon testified that Defendant did not appear to use the brakes after making a U-turn until she struck Malone.

Tomocus Alston (Alston), who also lived in the neighborhood, corroborated Mouzzon’s testimony. As Alston attempted to assist Malone, he saw Defendant drive her car in their direction, running over Malone, and dragging her 20 yards.

D.M. testified that he could not stand up because his legs were broken. Both victims were taken to the hospital. D.M. was treated for two broken legs, but Malone died later that day. The cause of Malone’s death was multiple blunt force injuries consistent with being struck by a vehicle.

At trial, the jury found Defendant guilty of first-degree murder of Malone and attempted first-degree murder of D.M. Defendant was sentenced to life imprisonment without parole. From these judgments and convictions, Defendant appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

[1] Defendant first argues her attorney conceded her guilt to second-degree murder without her consent. As a result, Defendant further argues that she was denied effective assistance of counsel. We disagree.

Defendant relies on *State v. Harbison*, where our Supreme Court held that, “a counsel’s admission of his client’s guilt, without the client’s knowing consent and despite the client’s plea of not guilty, constitutes ineffective assistance of counsel.” *State v. Harbison*, 315 N.C. 175, 179, 337 S.E.2d 504, 506-07 (1985). When this occurs, “the harm is so likely and so apparent that the issue of prejudice need not be addressed.” *Id.* at 180, 337 S.E.2d at 507. We reiterate that “[a] plea decision must be made exclusively by the defendant. . . . Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences.” *Id.* “For us to conclude that [defendant] permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that defendant *knew* his counsel [was] going to make such a concession.” *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004).

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In the present case, Defendant's counsel explained to the trial court judge in Defendant's presence that Defendant had consented to permitting her counsel to argue to the jury that she was guilty of homicide, but not first-degree murder. The trial court judge spoke directly with Defendant to ensure that she understood and consented to an admission of guilt to homicide, less than first-degree murder. The following colloquy, in relevant part, between the trial court and Defendant occurred:

Court: Your lawyer has indicated to the Court, as you have heard him a moment ago, that he is going to argue to the jury that you may have caused the death of at least right now Miss Malone, but that it was not first degree murder and that he may argue to the jury that they can consider some lesser offense I presume less than first degree murder. You have a right to plead not guilty and have a jury trial on all of the issues. You can concede you are guilty on some lesser offense if you so desire for whatever reason.

....

The only issue before the Court is whether or not you will allow your lawyer to proceed with this trial strategy. That is, argue that you may be guilty of some offense other than first degree murder. It's not something that you have to do. It is something that you can do—that he can do with your consent. I want to know if Mr. Collins your lawyer has, first of all, talked over this strategy were [sic] you at some point.

Defendant: Yes, sir.

Court: All right. Do you understand that you do not have to concede that you are guilty of any offense, and that as a matter of trial strategy you can concede that. That is your right? Do you understand that?

Defendant: Yes, sir.

Court: What is it you wish to tell the Court, if anything, about this situation? Do you consent to your lawyer making the argument that he intends to make to the jury or do you not consent?

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Defendant: I consent.

Court: All right. Is there anything you want to ask the Court about that or is there anything you want to say about that situation?

Defendant: Not at this time.

....

Court: Then Mr. Court Reporter, Mr. Collins, the lawyer for the defendant, has addressed the Court in open court in the presence of the defendant that as a trial strategy he may argue to the jury, with the consent of the defendant, that she might be guilty of some lesser offense other than first degree murder. The Court has explained this situation to the defendant and given her an opportunity to respond. The Court finds as a fact, and concludes as a matter of law, that the defendant consents to this trial strategy used by her lawyer though [sic] argument that if she is guilty of anything at all, that it is some lesser included offense other than first degree murder. Court finds this to be the informed consent of the defendant, that it is made freely, voluntarily and understandingly, and the Court finds that the lawyer can make such argument without detriment to the defendant.

The trial court's inquiry of Defendant is sufficient evidence that Defendant knowingly consented to an admission of guilt. In *State v. McDowell*, our Supreme Court found a knowing consent to a concession of guilt where the record revealed that the trial court informed defendant of the need for authorization for the concession, that defendant stated he and counsel had discussed the arguments, that defendant had consented to the concession, and that counsel's jury argument was as Defendant had authorized. *State v. McDowell*, 329 N.C. 363, 387, 407 S.E.2d 200, 213 (1991). In the present case, Defendant knowingly and voluntarily consented to allow her attorney to admit her guilt to second-degree murder. As our Supreme Court held in *McDowell*, we conclude that the trial court's inquiry was consistent with the requirements of *Harbison*.

When there is a knowing consent, as demonstrated by this case, "the issue concerning ineffective assistance of counsel should be examined pursuant to the normal ineffectiveness standard set forth in

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Strickland v. Washington[.]” *McDowell*, 329 N.C. at 387, 407 S.E.2d at 213. Defendant must show two things. First, Defendant must show that her counsel’s performance was deficient. “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984) Second, Defendant must also show that the deficient performance prejudiced the defense. “This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* There must be a demonstration that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 80 L. Ed. 2d at 698.

As we discussed above, Defendant gave a knowing and voluntary consent to her counsel to concede guilt to a lesser offense. Defendant’s counsel conceded that Defendant was guilty of second-degree murder but not first-degree murder in his opening and closing arguments. Defendant has not demonstrated any deficiency in her counsel’s performance nor that she was therefore deprived of a fair trial. This assignment of error is overruled.

COMPETENCY

[2] In Defendant’s second argument, she contends that the trial court erred by failing to ensure Defendant was competent for trial throughout all the proceedings. Defendant argues that her due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution were violated when the trial court failed to ensure that she had the mental capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in preparing her defense during all phases of the trial. We disagree.

“The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court.” N.C. Gen. Stat. § 15A-1002(a) (2007). N.C. Gen. Stat. § 15A-1001(a) (2007) provides that:

[n]o person shall be tried, convicted, sentenced or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

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The burden rests upon Defendant to establish his mental incapacity. *State v. Gates*, 65 N.C. App. 277, 283, 309 S.E.2d 498, 502 (1983).

On 25 March 2008, Defendant's counsel informed the trial court of his concern for Defendant's mental state because the staff in the jail had not given Defendant her anti-anxiety medication for that day. The following, in pertinent part, was exchanged:

DEFENSE: I have noticed a steadily deteriorating emotional state of [Defendant] over the course of the day. . . . We had a talk . . . [w]hat she said to me then was I can't do this anymore, but I felt like that she was still competent. I learned . . . that she was not given the medication that she has been taking . . . since July for anxiety. . . . For reasons unknown to use [sic] that was not given to her this morning. I just asked her if she knows where she is and she told me no. . . .

COURT: She told you what?

DEFENSE: She said no. . . . I anticipate and I plan to call her as a witness. I am completely confident that she is not able to do that right now. . . . And I will say that this is the first indication that I have had since I began representing her that there was any question about her competence. I had her evaluated by a psychologist for competence early on, and that's never been an issue.

At the request of Defendant's counsel, the trial court adjourned until the next day.

During the recess, in open court and outside the presence of the jury, the trial court determined that Defendant had not received her medication that morning "through no fault of her own," but because the nurse dispensing the medications had not reached Defendant before her trial. The following day, the trial court reconvened without any discussion or reference to Defendant's mental status. Once the court makes a determination that the defendant is competent to stand trial, the court's findings of fact are conclusive on appeal if there is evidence to support them. *State v. McCoy*, 303 N.C. 1, 18, 277 S.E.2d 515, 528 (1981).

Under normal circumstances, "the trial court '[m]ust hold a hearing to determine the defendant's capacity to proceed' *if* the question

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is raised.” *State v. King*, 353 N.C. 457, 466, 546 S.E.2d 575, 584 (2001) (quoting N.C. Gen. Stat. 15A-1002(b)(3)). However, as illustrated by the present case, “a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.” *State v. Young*, 291 N.C. 562, 567, 231 S.E.2d 577, 580 (1977) (internal quotations omitted). Because Defendant “did not thereafter request a competency hearing or make a motion detailing the specific conduct that leads the moving party to question [Defendant’s] capacity to proceed,” Defendant “waived [her] statutory right to a competency hearing under N.C.G.S. § 15A-1002(b) by [her] failure to assert that right.” *King*, 353 N.C. at 466, 546 S.E.2d at 585. Therefore, when Defendant failed to object to the trial court resuming the trial without a competency hearing, she effectively waived her statutory rights. This assignment of error is overruled.

TRANSFERRED INTENT

[3] Defendant argues that the trial court erred by applying the common law doctrine of transferred intent to the instruction of attempted first-degree murder in regards to D.M. We disagree.

The common law doctrine of transferred intent provides that:

[i]t is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as [if] the fatal act had caused the death of his adversary. It has been aptly stated that “[t]he malice or intent follows the bullet.”

State v. Wynn, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) (quoting 40 Am. Jur., 2d Homicide, § 11). Under this doctrine “it is immaterial whether [Defendant] intended injury to the person actually harmed; if [Defendant] in fact acted with the required or elemental intent toward someone, that intent suffices as the intent element of the crime charged as a matter of substantive law.” *State v. Locklear*, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992).

In *State v. Andrews*, 154 N.C. App. 553, 572 S.E.2d 798 (2002), the defendant was convicted of two counts of attempted first-degree murder. The evidence showed that the defendant was separating from his wife, Kelly Andrews (Kelly). One day while Kelly and her friend, Brian

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Evsich (Evsich), were walking in a store parking lot, the defendant “revved” his engine and struck both Kelly and Evsich with his car. *Id.* at 555, 572 S.E.2d at 800. Once the car stopped, the defendant approached Kelly, stabbing her three times. *Id.* In the *Andrews* case, our Court held that the instruction of transferred intent was proper. “Because defendant acted with the specific intent to kill [Kelly], evidence of that intent could properly serve as the basis of the intent element of the offense against [Evsich].” *Id.* at 559, 572 S.E.2d at 802.

We apply the reasoning of *Andrews* to the case before us in our analysis of whether the evidence is sufficient to support the doctrine of transferred intent. Defendant injured D.M. while intending to attack Malone. Whether Defendant possessed the specific intent to injure D.M. is not the query. Defendant’s specific intent to murder Malone serves as a sufficient basis for the charge of attempted first-degree murder of D.M. Therefore, the trial court did not err in instructing the jury on the doctrine of transferred intent. This assignment of error is overruled.

JURY INSTRUCTIONS

[4] In Defendant’s final assignment of error, she argues that the trial court erred by instructing the jury, over Defendant’s objection, that it could find Defendant guilty of first-degree murder based on the felony murder rule. We disagree.

The jury was charged with the following instructions, in pertinent part:

You may find the defendant guilty of first degree murder either on the basis of malice, premeditation and deliberation, or under the first degree felony murder rule, or both.

First degree murder on the basis of malice, premeditation and deliberation is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation.

First degree murder under the first degree felony murder rule is the killing of a human being in the perpetration of or attempt to perpetrate assault with a deadly weapon inflicting serious injury.

. . . .

Members of the jury, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally assaulted the victim with a deadly weapon and in-

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flicted serious injury, and that while committing or attempting to commit assault with a deadly weapon inflicting serious injury the defendant killed the victim, and that the defendant's act was a proximate cause of the victim's death, and that the defendant committed or attempted to commit assault with a deadly weapon inflicting serious injury with the use of a deadly weapon, then it would be your duty to return a verdict of guilty of first degree murder under the felony murder rule.

Defendant requested that the trial court judge not instruct the jury on the felony murder rule because the evidence did not support such an instruction. However, Defendant now argues that because the instruction refers to "the victim" in the singular form, that this instruction was error. Defendant contends that our Supreme Court noted in *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000), that "'cases involving a single assault victim who dies of his injuries have never been' construed to allow the underlying assault of a victim to satisfy the predicate felony for the felony murder of the same victim."

"In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1). "When the error asserted on appeal is not grounded in the objection before the trial court the alleged error is not preserved for appellate review." *State v. Riley*, 159 N.C. App. 546, 553, 583 S.E.2d 379, 384 (2003). "As the objections at trial in no way supported defendant's assignment of error on appeal, we conclude that defendant did not preserve this error for appellate review pursuant to Rule 10(b)(2)." *State v. Francis, Jr.*, 341 N.C. 156, 160, 459 S.E.2d 269, 271 (1995). Therefore, we must review this assignment error under the plain error standard. *State v. Odom*, 307 N.C. 655, 656, 300 S.E.2d 375, 376 (1983).

In *State v. Odom*, the Supreme Court defines the plain error rule as follows:

[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 it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

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Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). Before relief under the “plain error” rule, “‘the appellate court must be convinced that absent the error the jury probably would have reached a different verdict.’” *State v. Hartman*, 90 N.C. App. 379, 383, 368 S.E.2d 396, 399 (1988) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

In the present case, Defendant was convicted of the first-degree murder of Malone on the basis of both malice, premeditation, and deliberation and under the first-degree felony murder rule. Therefore, the fact that Defendant was convicted under the felony murder rule is immaterial as it does not have a probable effect on the jury finding Defendant guilty of first-degree murder. Assuming *arguendo* that instructing the jury on the felony murder rule was error, the absence of that error would not have led the jury to reach a different verdict. Because the jury found Defendant guilty of first degree murder under both theories, the verdict would have remained the same. Consequently, Defendant has failed to show plain error and this assignment of error must be overruled.

For the foregoing reasons, we conclude that the Defendant had a fair trial, free from prejudicial error.

No error.

Judges McGEE and GEER concur.

IN THE MATTER OF: C.N.C.B.

No. COA08-1510

(Filed 16 June 2009)

Termination of Parental Rights— jurisdiction—improper use of Rule 60 for addition of omitted finding of fact in corrected order

The trial court lacked jurisdiction in a termination of parental rights case when it added an omitted finding of fact in a corrected order under N.C.G.S. § 1A-1, Rule 60(a), the corrected order is vacated, and the matter is remanded to the trial court for further

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proceedings if necessary to make appropriate findings of fact reflecting the trial court's intended decision, because: (1) while Rule 60 allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment; and (2) the trial court relied upon a single ground to terminate parental rights, and the presence or absence of the finding of fact that respondent lacked an appropriate alternative child care arrangement altered the effect of the order.

Judge STEPHENS dissenting in separate opinion.

Appeal by respondent from an order entered 15 October 2008, *nunc pro tunc* 9 October 2008, by Judge L. Suzanne Owsley in Burke County District Court. Heard in the Court of Appeals 13 April 2009.

Stephen M. Schoeberle, for petitioner-appellee Burke County Department of Social Services.

Ellis & Winters, LLP, by Alexander M. Pearce, for guardian ad litem.

Patricia Kay Gibbons, for respondent-appellant.

JACKSON, Judge.

Respondent-mother ("respondent") appeals from an order terminating her parental rights to C.N.C.B. For the reasons stated below, we reverse and remand.

On 5 September 2007, the Burke County Department of Social Services ("DSS") filed a petition alleging that C.N.C.B. was a neglected juvenile. DSS stated that respondent and the juvenile were residing with respondent's boyfriend, who was a registered sex offender and had a "long criminal history." DSS claimed that respondent and her boyfriend had "engaged in domestic violence in the juvenile's presence" and both of them "abuse[d] substances." DSS further alleged that respondent was "often impaired by prescription medications and unable to provide appropriate care and supervision for the juvenile" As an example of its last allegation, DSS claimed that: (1) on 17 July 2007, respondent passed out and the juvenile had access to vicodin tablets; and (2) on 5 August 2007, respondent passed out and the juvenile failed to receive diaper changes. DSS assumed custody by non-secure custody order. On 4 October 2007, C.N.C.B. was adjudicated a dependent juvenile.

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On 22 May 2008, DSS filed a “Motion/Petition to Terminate Parental Rights.” The sole ground alleged by DSS for termination of respondent’s parental rights was that respondent was incapable of providing for the proper care and supervision of the juvenile, such that C.N.C.B. was a dependent juvenile within the meaning of North Carolina General Statutes, section 7B-101(9), and there was a reasonable probability that such incapability would continue for the foreseeable future, pursuant to North Carolina General Statutes, section 7B-1111(a)(6).

A hearing was held on the petition to terminate respondent’s parental rights on 9 October 2008. The trial court concluded that grounds existed pursuant to North Carolina General Statutes, section 7B-1111(a)(6) to terminate respondent’s parental rights. The trial court further concluded that it was in the juvenile’s best interest that respondent’s parental rights be terminated. Therefore, her parental rights were terminated by order filed 15 October 2008, *nunc pro tunc* 9 October 2008. Respondent appeals.

After respondent filed her notice of appeal on 24 October 2008, but prior to the docketing of the appeal with this Court, the trial court filed a “Corrected Order” on 27 October 2008, purportedly correcting “clerical mistakes and errors arising from oversight or omission.” Although respondent’s assignments of error reference the original order respondent, DSS, and the guardian *ad litem* all cite to this corrected order as though it were the order from which the appeal was taken and make their arguments referencing the order accordingly.

We note that “[s]ubject matter jurisdiction may not be waived, and this Court has the power *and the duty* to determine issues of jurisdiction *ex mero motu*.” *In re Will of Harts*, 191 N.C. App. 807, 809, 664 S.E.2d 411, 413 (2008) (emphasis added) (citing *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882, *disc. rev. denied*, 352 N.C. 676, 545 S.E.2d 428 (2000)). “[Q]uestions of subject matter jurisdiction may properly be raised at any point, even in the Supreme Court.” *Forsyth Co. Bd. of Social Services v. Div. of Social Services*, 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986) (citations omitted).

“[T]he general rule has been that a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court[.]” *Parrish v. Cole*, 38 N.C. App. 691, 693, 248 S.E.2d 878, 879 (1978) (citing *Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E.2d 659 (1963)). In the instant case, we hold that we must vacate the corrected order for the following reasons. We stress that no party has

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argued that the trial court lacked subject matter jurisdiction to enter the 27 October 2008 corrected order. Unlike in *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008), cited in the dissenting opinion, here, all parties have proceeded as though the corrected order was valid. We do not address the merits of respondent's appeal pursuant to the corrected order; we address it for the sole purpose of determining subject matter jurisdiction. We cannot turn a blind eye to a trial court's exercise of its powers when it does not have subject matter jurisdiction to do so.

Rule 60 of the North Carolina Rules of Civil Procedure provides a limited exception to a trial court's lack of jurisdiction once notice of appeal has been filed:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C. Gen. Stat. § 1A-1, Rule 60(a) (2007). "While Rule 60 allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment." *Food Service Specialists v. Atlas Restaurant Management*, 111 N.C. App. 257, 259, 431 S.E.2d 878, 879 (1993) (citing *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), *disc. rev. denied*, 316 N.C. 377, 342 S.E.2d 895 (1986)). "A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order." *Buncombe County ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (citing *Schultz and Assoc. v. Ingram*, 38 N.C. App. 422, 427, 248 S.E.2d 345, 349 (1978)), *disc. rev. denied*, 335 N.C. 236, 439 S.E.2d 143 (1993).

We have carefully compared the corrected order to the original order and the transcript of the rendering of judgment in open court. The comparison has revealed, *inter alia*, that the corrected order contains a finding of fact that was neither in the original order nor in the trial court's oral rendering of judgment. *Cf. Mason*, 190 N.C. App. at 215, 660 S.E.2d at 62 ("The court amended one finding of fact and one conclusion of law to add that it was making its findings 'by clear,

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cogent and convincing evidence' . . . [noting] that the court had articulated the proper standard 'on the record on several occasions, but inadvertently omitted it from its Order.' "). That finding includes the phrase that respondent "continues to lack an appropriate alternative child care arrangement for the minor child," a finding that was essential to the trial court's final determination.

A trial court may terminate parental rights upon a finding

[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile *and the parent lacks an appropriate alternative child care arrangement.*

N.C. Gen. Stat. § 7B-1111(a)(6) (2007) (emphasis added). When, as here, the trial court relies upon a single ground to terminate parental rights, the presence or absence of a required finding of fact must be substantive within the scope of that order. The presence or absence of the finding of fact that respondent lacked an appropriate alternative child care arrangement altered the effect of the order. The presence of the finding supports termination of parental rights, and in contrast, its absence would have precluded termination of parental rights. Therefore, the change was substantive and precluded by Rule 60(a).

This Court routinely has vacated orders that were improperly "corrected" pursuant to Rule 60(a). *See Pratt v. Staton*, 147 N.C. App. 771, 556 S.E.2d 621 (2001); *S.C. Dep't of Soc. Servs. v. Hamlett*, 142 N.C. App. 501, 543 S.E.2d 189 (2001); *Buncombe County ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993); *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), *disc. rev. denied*, 316 N.C. 377, 342 S.E.2d 895 (1986). Because the trial court was without jurisdiction pursuant to Rule 60(a) to add the omitted finding of fact, the corrected order must be vacated. Accordingly, we must look to the original order to reach our decision, as that was the order from which respondent, in fact, appealed.

The dissenting opinion states that respondent did not assign error to any of the trial court's findings of fact or conclusions of law; there-

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fore, the trial court's conclusions of law are binding. However, in *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 623 S.E.2d 45 (2005)—cited by the dissent—the respondent had challenged only one of three grounds for termination. By failing to challenge the other two, she indicated her assent to them. *Id.* at 74, 623 S.E.2d at 50. Here, there is only one ground for termination, stated in one conclusion of law. “An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made[.]” N.C. R. App. P. 10(c)(1) (2007). Respondent's assignment of error sufficiently directs our attention to the conclusion of law that she was incapable of providing proper care and supervision to her child, that the incapability was likely to continue for the foreseeable future, and that she lacked appropriate alternative child care arrangements.

The 15 October 2008 order contains no finding of fact that respondent lacks an appropriate alternative child care arrangement. Section 7B-1111(a)(6) requires that in addition to a parent having a condition which renders her unable or unavailable to parent the juvenile, the parent also must have no appropriate alternative child care arrangement in order to terminate parental rights. Absent such a finding of fact, the order does not support the conclusion of law that sufficient grounds exist pursuant to section 7B-1111(a)(6) to terminate respondent's parental rights. Accordingly, the order must be reversed.

Therefore, we remand the matter to the trial court for further proceedings, if necessary, to make appropriate findings of fact reflecting the trial court's intended decision.

Because we resolve the matter on preliminary grounds, we do not address respondent's arguments on the merits.

Reversed and remanded.

Judge STROUD concurs.

Judge STEPHENS dissents in a separate opinion.

STEPHENS, Judge, dissenting.

For the following reasons, I must respectfully dissent from the opinion of the majority in this case.

By Order entered 15 October 2008, the trial court terminated Respondent's parental rights. On 24 October 2008, Respondent filed

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a notice of appeal “to the Decision to Terminate her Parental Rights . . . Order entered October 15, 2008[.]” On 27 October 2008, the trial court entered a corrected order, noting that “[p]ursuant to Rule 60(a) of the Rules of Civil Procedure, this order corrects several clerical mistakes and errors arising from oversight or omission contained in an order entered on October 9, 2008; signed on October 15, 2008; and filed on October 15, 2008.” The record on appeal contains no notice of appeal from the 27 October corrected order. The sole notice of appeal included in the record on appeal references only the 15 October order.

“Any party entitled by law to appeal from a judgment or order . . . rendered in a civil action or special proceeding may take appeal by filing notice of appeal . . .” N.C. R. App. P. 3(a). Such notice of appeal “shall designate the judgment or order from which appeal is taken[.]” N.C. R. App. P. 3(d). The record on appeal in civil actions and special proceedings shall contain “a copy of the notice of appeal[.]” N.C. R. App. P. 9(a)(1)(i). Appellate review “is solely upon the record on appeal, the verbatim transcript of proceedings, . . . and any items filed . . . pursuant to Rule 9(c) and 9(d).” N.C. R. App. P. 9(a). “Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2.” *Mason v. Dwinnell*, 190 N.C. App. 209, 216, 660 S.E.2d 58, 63 (2008) (quoting *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), *disc. review denied in part*, 339 N.C. 609, 454 S.E.2d 246, *aff’d in part*, 341 N.C. 702, 462 S.E.2d 219 (1995)). “[T]his Court has the power and the duty to determine issues of jurisdiction *ex mero motu* . . .” *In re Will of Harts*, 191 N.C. App. 807, 809, 664 S.E.2d 411, 413 (2008).

In *Mason v. Dwinnell*, the trial court entered a permanent custody order on 1 June 2006. On 21 June 2006, Dwinnell filed a notice of appeal from the 1 June 2006 order. On 24 July 2006, the trial court entered an order amending its 1 June 2006 permanent custody order “to correct ‘a clerical error in the facts and conclusions.’” *Id.* at 215, 660 S.E.2d at 62. The trial court amended one finding of fact and one conclusion of law to add that it was making its findings “by clear, cogent and convincing evidence.” *Id.* The amended order noted that the trial court had articulated the proper standard “‘on the record on several occasions, but inadvertently omitted it from its Order.’” *Id.*

On appeal to this Court, Dwinnell argued, *inter alia*, that the trial court improperly entered its 24 July 2006 order amending its 1 June

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2006 permanent custody order. This Court noted that since Dwinnell's notice of appeal, filed 21 June 2006, was filed prior to the entry of the 24 July 2006 amended order, the notice of appeal could not have referenced that subsequent order. "Dwinnell was, therefore, required to file another notice of appeal regarding that [amended] order." *Id.* Since the record on appeal contained no notice of appeal from the 24 July 2006 order, this Court had "no jurisdiction to review the 24 July 2006 order." *Id.* at 215, 660 S.E.2d at 63.

The same result must be reached in this case.¹ Since Respondent's notice of appeal, filed 24 October 2008, was filed prior to the entry of the 27 October 2008 corrected order, the notice of appeal could not have referenced that subsequent order. Respondent was, therefore, required to file another notice of appeal regarding the corrected order. *See id.* at 215, 660 S.E.2d at 62. Since the record on appeal contains no notice of appeal from the 27 October 2008 corrected order, in accordance with *Mason*, this Court has no jurisdiction to review the 27 October 2008 corrected order. *See id.* at 215, 660 S.E.2d at 63.

While the majority correctly notes that "[s]ubject matter jurisdiction may not be waived, and this Court has the power and the duty to determine issues of jurisdiction *ex mero motu*," *Will of Harts*, 191 N.C. App. at 807, 664 S.E.2d at 413, the majority then analyzes the substance of the 27 October 2008 corrected order from which Respondent did not appeal, and holds that the corrected order must be vacated "[b]ecause the trial court was without jurisdiction pursuant to Rule 60(a) to add the omitted finding of fact[.]" However, in accordance with *Mason*, this Court has no jurisdiction to review the corrected order to determine if the trial court exceeded its authority by adding the omitted finding of fact.

I thus turn to Respondent's appeal from the original order. Respondent first argues that the trial court erred in terminating Respondent's parental rights because there was insufficient competent evidence to support the findings of fact and conclusions of law.

The record on appeal must contain "assignments of error set out in the manner provided in Rule 10[.]" N.C. R. App. P. 9(a)(1)(k). "[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]" N.C. R. App. P. 10(a), and argued in an appellant's brief. *See* N.C. R. App. P.

1. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (explaining that one panel of this Court cannot overrule another panel).

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28(b)(6) (“Assignments of error not set out in appellant’s brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.”).

“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Furthermore, “[t]he appellant must assign error to each conclusion it believes is not supported by the evidence. N.C. R. App. P. 10. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts.” *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005) (quoting *Fran’s Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999)).

In this case, Respondent did not assign as error any of the trial court’s findings of fact or conclusions of law.² Accordingly, the trial court’s findings of fact and conclusions of law are binding on this Court. *In re S.N.H.*, 177 N.C. App. 82, 89, 627 S.E.2d 510, 515 (2006). Furthermore, while Respondent contends in her brief that Findings of Fact numbers 11, 12, and 13 in the *corrected* order are not supported by competent evidence, as explained *supra*, the corrected order is not properly before us. Accordingly, I would overrule Respondent’s first argument.

By Respondent’s second argument, Respondent contends that the trial court abused its discretion in denying Respondent’s motion to continue when Respondent was not present at the commencement of the termination hearing.

“A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require.” N.C. Gen. Stat. § 1A-1, Rule 40(b) (2007). “A motion to continue is addressed to the court’s sound discretion and will not be disturbed on appeal in the absence of abuse of discretion.” *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984).

Here, the motion to terminate Respondent’s parental rights was filed on 22 May 2008. The hearing on the motion was originally scheduled for 17 July 2008. However, as the child’s father had not yet been served personally or via certified mail, the trial court, with Re-

2. Notably, Respondent does not argue that the trial court’s findings of fact, as contained in the order from which Respondent appealed, are inadequate to support the trial court’s conclusion of law that grounds exist to terminate Respondent’s parental rights for dependency under N.C. Gen. Stat. § 7B-1111(a)(6).

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spondent present, continued the matter to 11 September 2008 and allowed petitioner to serve the child's father via publication. On 11 September 2008, the trial court noted that service by publication had commenced on 21 August 2008 and, therefore, the requisite 40 days for the father's response had not yet elapsed. The trial court, with Respondent present, thus continued the matter to 9 October 2008. On 9 October 2008, Respondent was not present in court. Counsel for Respondent moved for a continuance due to Respondent's absence, stating, "I have had contact with my client. She contacted the office, I guess this morning, and it was my understanding she was going to be here. I don't know if something happened or—[.]" The trial court denied counsel's motion.

As "[c]ontinuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it[.]" *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976), the trial court did not abuse its discretion in denying Respondent's motion where Respondent failed to show good cause for granting the continuance. I likewise would overrule this argument.

For the foregoing reasons, I would affirm the order of the trial court terminating Respondent's parental rights.

KARL E. TURNER AND WIFE, BARBARA W. TURNER, ADMINISTRATORS OF THE ESTATE OF KERRY EDWARD TURNER, PLAINTIFFS v. THE CITY OF GREENVILLE, DEFENDANT

No. COA08-630

(Filed 16 June 2009)

**Police Officers— shooting after car chase—claim against city—
public officer's immunity—summary judgment**

The trial court did not err by granting summary judgment for the City of Greenville on claims arising from the shooting death of plaintiffs' son by police officers after a car chase. The officers who were involved knew that the decedent was behaving unlawfully and in a manner that posed a danger to himself, officers, and other people, and the officers acted reasonably by pursuing and attempting to apprehend decedent. The officers would be entitled to public officer's immunity, and a claim against the city cannot be supported. N.C.G.S. § 15A-401(d)(2).

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Appeal by plaintiffs from judgment entered 19 March 2008 by Judge W. Russell Duke, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 10 February 2009.

Robert D. Rouse, III, for plaintiffs.

Troutman Sanders LLP, by Gary S. Parsons and D. Kyle Deak, and Assistant City Attorney William J. Little, III, for defendant.

WYNN, Judge.

Under N.C. Gen. Stat. § 15A-401(d), a law enforcement officer is justified in using deadly physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.¹ In this appeal, Plaintiffs Karl and Barbara Turner argue that the trial court erred by granting summary judgment to Defendant City of Greenville on their claims arising from the shooting death of their son by police officers. Because the officers' actions were justified under N.C. Gen. Stat. § 15A-401(d) (2007), we affirm summary judgment in favor of the City of Greenville.

Early on the morning of 26 January 2006, Plaintiffs called the Greenville Police Department to request assistance with their belligerent son, Kerry Edward Turner, who suffered from a bipolar disorder. Plaintiffs indicated to the responding officers, Chad Bowen and Selestine Smith, that they wanted to have their son taken for a psychiatric evaluation. Kerry voluntarily left the house with the officers, who drove him to the hospital where they left him for evaluation.

At the hospital, Kerry was diagnosed with alcohol intoxication and upon his release a short time later, he called his parents who refused to bring him back to their home. Kerry responded by making threats to them and indicating that he was on his way to their house. Plaintiffs again called the Greenville Police Department and were advised to contact the Magistrate's Office to obtain an involuntary commitment order. After trying unsuccessfully to get an involuntary commitment order for their son, Plaintiffs went to the Greenville Police Department and, on returning to the Magistrate's Office with Officer Bowen, obtained an involuntary commitment order from the Magistrate.

1. N.C. Gen. Stat. § 15A-401(d)(2)a (2007).

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Plaintiffs returned home and found Kerry waiting, appearing to be angry, and throwing objects at their car as they approached. Plaintiffs again called the Greenville Police Department. Officer Bowen responded and found Kerry visibly upset, screaming obscenities and throwing objects. Officer Bowen attempted to calm Kerry; however, he darted into the house and locked the door. Officer Bowen radioed the approaching officers that Kerry had barricaded himself inside the house.

Shortly after the second officer, Cachelle L. Warmell, arrived on the scene, Kerry emerged from the front of the house holding what appeared to be a shotgun, but was later identified as a broken and inoperable .22 rifle. Officers Warmell and Bowen took cover and, after a short time, Kerry went back into the house without shots being fired. Believing, however, that Kerry was armed and dangerous, the officers called for the Emergency Response Team, which responds to high risk situations.

Thereafter, Barbara Turner and Lieutenant Susan Bass attempted unsuccessfully in multiple phone conversations to coax Kerry out of the house. Lieutenant Bass testified in her deposition that Kerry made statements such as, "The pigs are gonna have to kill me."

While the Emergency Response Team positioned its personnel around the Turner home, Kerry suddenly exited from the side of the house and got into a red SUV parked in the driveway. Some officers testified that it appeared as though Kerry threw a long black object into the vehicle. Emergency Response Team personnel approached and ordered Kerry to stop, but he started the vehicle and backed it out of the driveway in the direction of the officers at a high rate of acceleration. The Emergency Response Team personnel jumped out of the way and took cover, with one of them firing a shot that punctured the rear left tire of the vehicle.

A pursuit followed that reached speeds of seventy to eighty miles per hour on city streets. Officers testified in their depositions that Kerry rammed or attempted to ram at least four police patrol cars, nearly collided with a school bus, veered over the center line multiple times, and nearly struck Officer Robert Jones as he attempted to lay spike strips.

Listening to reports of the chase on the radio, Sergeant David Johnson positioned his patrol car on Greenville Boulevard and prepared to lay his spike strips just as the red SUV turned onto

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Greenville Boulevard and proceeded in his direction. Sergeant Johnson was out of his patrol car and in the roadway when he observed Kerry approaching and making an alleged attempt at “deliberately striking [his] vehicle” According to Sergeant Johnson, the red SUV “skidded past,” swerved into lanes of oncoming traffic, and entered a 180 degree spin, going up onto two wheels.

Upon seeing this, Sergeant Johnson ran towards the red SUV, believing it would turn over and allow him to apprehend Kerry. But instead of turning over, the red SUV returned to all four wheels and wound up facing Sergeant Johnson as he stood in the open road. Thereafter, Kerry accelerated forward, making contact with a civilian’s vehicle and pushing it backward some twenty-eight feet. Meanwhile, Officer Warmell’s patrol car was just arriving on the scene as Kerry pushed and tried to swerve around the civilian vehicle. With its tires spinning and smoking, the red SUV became wedged between the civilian vehicle and Officer Warmell’s patrol car, which “rocked back and forth.”

At some point after the red SUV made contact with the civilian vehicle, Sergeant Johnson and Officer Keith Knox opened fire. Sergeant Johnson was positioned in the open roadway, somewhere near the front passenger-side of the red SUV. Officer Knox was in the rear seat on the driver’s side of Officer Warmell’s patrol car when he leaned out the window and opened fire. Multiple shots struck Kerry, causing his death.

Plaintiffs sued the City of Greenville alleging negligence, assault and battery, and willful and wanton conduct. Following a hearing, the trial court granted the City of Greenville’s motion for summary judgment on the defenses of federal qualified immunity and public officer’s immunity. Plaintiffs appeal arguing that the trial court improperly granted summary judgment in favor of the City of Greenville. We disagree.

Summary judgment is proper when there is no genuine issue as to any material fact and any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The nonmoving party is entitled to the most favorable view of the affidavits, pleadings and other materials and all reasonable inferences to be drawn therefrom. *See Prior v. Pruett*, 143 N.C. App. 612, 617, 550 S.E.2d 166, 170 (2001), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 572 (2002).

The general rule in North Carolina is that a municipality is “immune from torts committed by an employee carrying out a govern-

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mental function.” *Schmidt v. Breeden*, 134 N.C. App. 248, 252, 517 S.E.2d 171, 174 (1999) (quoting *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990)). “Law enforcement operations” are “clearly governmental” activities for which a municipality is generally immune. *Id.* at 253, 517 S.E.2d at 175. A municipality may, however, waive its governmental immunity to the extent it has purchased liability insurance. N.C. Gen. Stat. § 160A-485(a) (2007) (“Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. . . . Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability.”).

Similarly, “[t]he public immunity doctrine protects public officials from individual liability for negligence in the performance of their governmental or discretionary duties.” *Campbell v. Anderson*, 156 N.C. App. 371, 376, 576 S.E.2d 726, 730, *disc. review denied*, 357 N.C. 457, 585 S.E.2d 385 (2003).

In this jurisdiction an official may be held liable when he acts maliciously or corruptly, when he acts beyond the scope of his duties, or when he fails to act at all. As long as a public official lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability.

Bailey v. State, 330 N.C. 227, 245, 412 S.E.2d 295, 306 (1991), *disavowed on other grounds*, 348 N.C. 130, 500 S.E.2d 54 (1998) (citations and quotation marks omitted). Accordingly, “[a]ctions that are malicious, corrupt, or outside of the scope of official duties will pierce the cloak of official immunity” *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citations omitted).

Moreover, the General Assembly has prescribed circumstances under which an officer’s use of deadly physical force is justified. N.C. Gen. Stat. § 15A-401 states in relevant part:

A law enforcement officer is justified in using deadly physical force upon another person . . . only when it is or appears to be reasonably necessary thereby . . . [t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force Nothing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any per-

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son or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

N.C. Gen. Stat. § 15A-401(d)(2) (2007). This portion of the statute “was designed solely to codify and clarify those situations in which a police officer may use deadly force without fear of incurring criminal or civil liability.” *State v. Irick*, 291 N.C. 480, 501, 231 S.E.2d 833, 846 (1977).

Preliminarily, we note that Plaintiffs sued only the City of Greenville. However, the allegations in Plaintiffs’ complaint essentially seek to impute the individual officers’ conduct to the City of Greenville under the respondeat superior doctrine.² We find several bases to affirm the trial court’s grant of summary judgment for the City of Greenville.

First, the record on appeal shows that the officers’ conduct was objectively reasonable, or justified, under section 15A-401(d)(2). Kerry’s disregard for officers’ commands, his driving recklessly through city streets, and his collisions with civilian and officers’ vehicles could have caused the officers to reasonably believe they faced an imminent risk of deadly physical force. *See State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (“It is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner.”).

The comment to section 15A-401 notes that a law enforcement officer “is permitted [to use deadly force] only in the defense situation or when necessary to prevent the risk of death or serious physical injury to others, made manifest by the use of a deadly weapon or other conduct or means” N.C. Gen. Stat. § 15A-401(d)(2) cmt.(d) (2007). Sergeant Johnson and Officer Knox were faced with that situation here because the red SUV—used as a deadly weapon under North Carolina law because Kerry drove it recklessly—was lodged between Officer Warmell’s patrol car and a civilian vehicle. More-

2. The Complaint includes one bare allegation that could arguably support the City of Greenville’s liability by direct negligence. The Complaint states: “The City of Greenville by and through its officers and supervisors have failed to adequately train the members of the Greenville Police Department” However, the Complaint alleges no specific acts or omissions that might constitute such a failure to adequately train, Plaintiffs’ forecast of evidence before the trial court did not substantiate this allegation, the trial court’s judgment does not address this theory of liability, and Plaintiffs have not argued this theory on appeal. Therefore, this theory of the City of Greenville’s liability is not properly before us. *See* N.C. R. App. P. 10(b)(1) (2007); *Prior*, 143 N.C. App. at 621-22, 550 S.E.2d at 172-73 (forecast of evidence sufficient to sustain negligent training and supervision claim).

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over, Sergeant Johnson and Officer Knox were aware that Kerry had led officers on a pursuit and exhibited threatening behavior before the pursuit began. Sergeant Johnson stood in the open road in a position of vulnerability while or immediately before the fatal shots were fired. Under these circumstances, we hold that Officer Knox and Sergeant Johnson could have reasonably believed that Kerry posed an imminent threat to themselves and nearby civilians, and that they were justified in using deadly physical force under section 15A-401(d)(2). This basis alone is sufficient to affirm the court's grant of summary judgment.

Nonetheless, we further note that the City of Greenville is immune from liability for the torts of any of its police officers' legitimate law enforcement activities unless it waived its governmental immunity by purchasing liability insurance. N.C. Gen. Stat. § 160A-485(a) (2007); *Schmidt*, 134 N.C. App. at 252, 517 S.E.2d at 174. Here, Plaintiffs alleged in their complaint that the City of Greenville had a liability insurance policy in effect on the date of the shooting, but the City of Greenville denied that allegation in its Answer and no affirmative proof of insurance coverage appears in the record.

Moreover, “[w]ithout a[n] underlying negligence charge against [the officers], a claim of negligence against the [municipality] can not be supported.” *Prior*, 143 N.C. App. at 622, 550 S.E.2d at 172-73 (citing *Johnson v. Lamb*, 273 N.C. 701, 707, 161 S.E.2d 131, 137 (1968)). To remove the officers’ “cloak of official immunity” in this case, Plaintiffs were required to show “[a]ctions that [were] malicious, corrupt, or outside of the scope of official duties” *Moore*, 124 N.C. App. at 42, 476 S.E.2d at 421.

The most favorable view of Plaintiffs’ evidence showed: Officers Bowen and Smith were aware that Kerry suffered from a bipolar disorder when they escorted and left him at the hospital on the morning of 26 January 2006; Officer Bowen assisted Plaintiffs in obtaining an involuntary commitment order for Kerry from a magistrate; Officers Bowen and Warmell observed Kerry emerge from Plaintiffs’ house holding what appeared to be a shotgun, forcing them to take cover; the Emergency Response Team was unable to prevent Kerry from leaving Plaintiffs’ residence in the red SUV despite shooting out its left rear tire; a pursuit ensued during which the red SUV made contact with several police vehicles, one civilian vehicle, and nearly missed striking at least two officers; Sergeant Johnson stood in the open road somewhere to the front-passenger side of the red SUV on Greenville Boulevard; and Sergeant Johnson and Officer Knox

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fatally shot Kerry at some point immediately before or while the red SUV was lodged between the civilian vehicle and Officer Warmell's patrol car.

Our review of Plaintiffs' forecast of evidence and the entire record does not reveal any action by any involved officer that was "malicious, corrupt, or outside of the scope of official duties." *Id.* Indeed, many of the involved officers either personally observed, or learned by communication, certain of Kerry's actions that were unlawful and personally threatening. Because the involved officers knew that Kerry was behaving unlawfully, and in a manner that posed danger to himself, the officers, and other persons, the officers acted reasonably by pursuing and attempting to apprehend him. *See Prior*, 143 N.C. App. at 620, 550 S.E.2d at 172 ("In a negligence action, a law enforcement officer is held to the standard of care that a reasonably prudent person would exercise in the discharge of official duties of like nature under like circumstances.") (citations omitted).

Nor do we find evidence that Sergeant Johnson or Officer Knox acted maliciously, corruptly, or outside the scope of their official duties when they fired the fatal shots. Plaintiffs produced no evidence that Sergeant Johnson and Officer Knox acted with any malice, ill will, or any motivation other than preserving the safety of the surrounding officers and civilians. Considering that Kerry had evaded law enforcement in a pursuit on city streets, and the red SUV was in a position that threatened the safety of officers (one of whom stood in the open road) and at least one civilian in an adjacent vehicle, we conclude that Sergeant Johnson and Officer Knox acted without malice or corruption within the scope of their official duties.

Accordingly, we hold that the officers involved in this case would be entitled to public officer's immunity based on Plaintiffs' forecast of evidence, which includes no proof of malicious, corrupt or ultra vires conduct by the officers. Because a negligence claim against the officers would not survive on Plaintiffs' forecast of evidence, "a claim of negligence against the [municipality] can not be supported." *Prior*, 143 N.C. App. at 622, 550 S.E.2d at 172-73.

In sum, we uphold the trial court's grant of summary judgment in favor of the City of Greenville.

Affirmed.

Judges STEPHENS and ERVIN concur.

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[197 N.C. App. 570 (2009)]

IN THE MATTER OF: B.G.

No. COA08-1448

(Filed 16 June 2009)

1. Child Support, Custody, and Visitation— custody granted to nonparent relative over parent—sufficiency of findings of fact—best interests of child

The trial court erred by granting custody to nonparent relatives over respondent parent without making adequate findings of fact and conclusions of law, and the case is remanded for reconsideration because: (1) although the trial court concluded it was in the best interest of the minor child to remain with the nonparent relatives, it failed to issue findings of fact to support the application of the best interest analysis that respondent father acted inconsistently with his custodial rights; and (2) although there may be evidence in the record to support a finding that respondent acted inconsistently with his custodial rights, it is not the duty of the Court of Appeals to issue findings of fact.

2. Child Support, Custody, and Visitation— custody granted to nonparent relative over parent—sufficiency of findings of fact under N.C.G.S. § 7B-907(b), (c), and (f)

The trial court's child custody order did not fail to make sufficient findings of fact with regard to N.C.G.S. § 7B-907(b), (c), and (f) because: (1) although respondent father contends the order failed to address why joint legal custody was the best permanent plan, he made no substantive argument and cited no authority to support this argument; (2) the trial court's uncontested findings indicated that it considered the stability of the child's home life, her ability to interact with her siblings and mother, and her desire to remain in her current living situation; (3) the findings sufficiently supported and explained the basis for the trial court's determination that placement with respondent within the next six months would not be in the child's best interest, and the child should be placed in another permanent living arrangement with the relatives; (4) according to the plain language of these statutes, there is no prohibition on an award of joint legal custody to both a relative and a parent, and respondent cited no authority to suggest that joint legal custody was impermissible; and (5) the trial court's finding that the relatives have adequate resources to support the child was treated as conclu-

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sive, and thus was sufficient to satisfy the statutory requirements of N.C.G.S. § 7B-907(f).

Appeal by Respondent-father from order entered 8 October 2008 by Judge James T. Hill in District Court, Durham County. Heard in the Court of Appeals 5 May 2009.

Deputy County Attorney Thomas W. Jordan, Jr., for petitioner-appellee Durham County Department of Social Services.

Poyner Spruill LLP, by John W. O'Hale, for guardian ad litem-appellee.

Appellate Defender, Staples S. Hughes, by Assistant Appellant Defender Annick Lenoir-Peek, for respondent-appellant.

WYNN, Judge.

This appeal follows our decision in *In re B.G., B.D.G., C.D., C.D.2*, 191 N.C. App. 399, 663 S.E.2d 12 (2008) (unpublished), wherein we set forth the facts as follows:

In 2005, Beth's mother gave birth prematurely to twins who tested positive for cocaine at birth. The mother also tested positive for cocaine and was reported to have used cocaine on the day of the delivery. She delivered the first baby at Genesis House, while the second baby was delivered at Duke University Medical Center. On 5 October 2005, the Durham County Department of Social Services ("DSS") filed a petition alleging that Beth, a second daughter, and the twins were neglected based primarily on the mother's drug use and her unstable housing.[]

DSS did not, in this petition, seek nonsecure custody because the mother was allowing the two older children to live with their maternal aunt, Monica Edwards, and the twins to live with Rose Jones. Previously, Beth and her sister were living with their mother at Genesis House.

On 18 October 2005, as a result of changed circumstances, DSS filed a motion for nonsecure custody, seeking an order granting DSS custody with placement to be with the mother so long as she remained drug and alcohol free, maintained stable housing, continued individual therapy, and accepted mental health services for herself and her two older daughters. On the same date, the trial court entered an order granting the relief sought by DSS. On

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27 October 2005, the trial court granted respondent visitation with Beth to be arranged by DSS. On 27 January 2006, all four children were adjudicated neglected “in that the children do not receive proper care from their mother” and “live in an environment injurious to the children’s welfare in the care of the mother.” With respect to respondent, the trial court found that respondent was interested in obtaining custody or extensive visitation with Beth. The court noted that it had previously ordered that respondent have visitation with Beth, but “the mother choose [sic] not to comply with the court’s order” and “[s]he did not have an acceptable reason for her willful noncompliance with” the order. The trial court further found that the fact respondent had “little recent contact” with Beth led to or contributed to the court’s decision to remove custody from respondent, but added that “[t]he mother has had custody and has willfully refused to allow visits.”

The trial court ordered that it was in the best interests of the children that they be placed in the custody of DSS with authorization for a trial placement with the mother so long as she complied with specified conditions. The trial court ordered unsupervised visitation between respondent and Beth and directed respondent to develop a plan of care for Beth.

On 24 March 2006, however, the trial court approved temporary placement of Beth with her maternal aunt and uncle, Daniel and Monica Edwards, because the mother had been incarcerated. Following additional review and permanency planning hearings, the trial court continued Beth’s placement with Daniel and Monica Edwards, but provided for additional visitation with respondent. Following a review hearing on 23 May 2006, the trial court entered an order on 25 July 2006, finding that although Beth desired to continue to live with Mr. and Mrs. Edwards, DSS’ permanent plan for Beth was reunification with respondent. The trial court noted that there had been a positive home study on respondent’s home and “[n]ow is the best time to attempt a transition into the home of the [respondent.]” Accordingly, the trial court ordered that respondent have weekend visitation every other weekend and periods of two-week visitation during Beth’s summer vacation.

Following a permanency planning hearing on 17 July 2007, the trial court entered an order on 11 October 2007, concluding that it was in the best interests of Beth that she continue in the physical custody of Mr. and Mrs. Edwards, that she be placed in the

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joint legal custody of respondent and the Edwardses, that Beth have a structured plan of visitation with respondent, and that DSS be relieved of reunification efforts with the mother. The trial court ordered that DSS and Beth's guardian ad litem be relieved of their duties as to Beth and that the case be closed and removed from the active juvenile docket. Respondent timely appealed from this order.

On review, this Court reversed the 11 October 2007 order for insufficient findings of fact pursuant to N.C. Gen. Stat. § 7B-907 (2007) and remanded for further proceedings. *Id.* Thereafter, on 8 October 2008, the trial court entered a new permanency planning order, making additional findings of fact but reaching the same conclusions as in its 11 October 2007 order.

Respondent-father now appeals from the 8 October order arguing that the trial court erred by (I) granting custody of the minor child to the Edwardes (non-parent relatives) over Respondent (parent) without making adequate findings of fact and conclusions of law; and (II) failing to make findings of fact in accordance with sections 7B-907(b), (c), and (f).

I.

[1] As in the earlier appeal to this Court, Respondent argues that the trial court erred by granting custody to the Edwardses (non-parent relatives) over Respondent (parent) without making adequate findings of fact and conclusions of law. However, we did not address this issue in our earlier opinion noting that:

We cannot, however, determine whether this issue was raised below. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). The recording device at the trial of this case malfunctioned and did not record the hearing. The parties prepared a narration of the proceedings that recited the testimony of each witness, but did not reflect the arguments of counsel. While neither of the appellees has argued that respondent failed to make his constitutional argument at trial, the trial court did not address the issue in its order. We, therefore, leave the issue to be addressed in the first instance by the trial court on remand.

In re B.G., B.D.G., C.D., C.D.2, 191 N.C. App. 399, 663 S.E.2d 12 (2008) (unpublished).

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Upon considering this issue on remand, the trial court made the following conclusions of law, regarding custody:

6. [Respondent] has a constitutional right to the care and custody of his daughter [Beth], and the issue of his right to the care and custody of his daughter was specifically argued before the court. However, the Court believes the child's wishes are to be considered and it is in her best interest to be placed with a third party, the Edwardses.

7. When balancing the constitutional rights of a non offending parent *who has not acted inconsistently* with that constitutionally protected right to the care and custody and control of the child against those of a third person with the best interest of the child, the court should resolve the issue in favor of what is in the best interest of the child.

(emphasis added). According to its order, the trial court ultimately balanced the rights of the Respondent “against those of a third person with the best interest of the child[,]” and determined that it was in the best interest of Beth to grant custody to the Edwardses, the child's nonparent relatives.

Contrary to the trial court's conclusions otherwise, to apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status. *See, e.g., Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (holding the “best interest of the child” test may be applied without offending due process rights if the court also finds conduct inconsistent with a parent's constitutionally protected status); *see also Adams v. Tessener*, 354 N.C. 57, 61-62, 550 S.E.2d 499, 502 (2001).

Here, the trial court concluded that it was in the best interest of Beth to remain with the Edwardses but failed to issue findings to support the application of the best interest analysis—namely that Respondent acted inconsistently with his custodial rights. Although there may be evidence in the record to support a finding that Respondent acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact. Rather, our review “is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law.” *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004). Ac-

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cordingly, we must reverse the order awarding custody to the minor child's non-parent relative and remand for reconsideration in light of this opinion.

II.

[2] Respondent also argues that the trial court's order failed to make sufficient findings of fact with regard to sections 7B-907(b), (c), and (f). We review the court's order in light of these arguments, addressing each subsection of the statute in turn.

A.

Section 7B-907(b) of the North Carolina General Statutes provides, in part:

At the conclusion of the hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;

(2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;

...

(4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why[.]

First, Respondent argues that the trial court failed to explain in its findings of fact why it was not in the child's best interest to return home to her father and why joint permanent custody is the "best permanent plan." In its permanency planning order, the trial court issued the following findings relevant to this issue:

6. The child has been in the legal custody of Durham DSS. She has been in placement with [the Edwardses] since January, 2006 which is a period of over one year. Prior to January, 2006, there were other periods of time when Beth lived with [the Edwardses]

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due to the mother's inability to care for her. . . . The child has maintained a consistent relationship and has maintained consistent contact with the Edwards[es].

. . .

16. A bond exists between Beth and [the Edwardses]. They are her maternal aunt and uncle. Beth engages in extracurricular activities within the Durham community. . . .

. . .

23. It is possible for the child to be returned home to her father, however it is against the wishes of the child and not in her best interest because of the stability she has attained with the Edwardses and her ability to see her mother and siblings.

24. It is not likely for the child to be returned home to her father in the next six months in that it is against the child's wishes and not in her best interests.

. . .

30. The child was not removed from the home of the father. The child is not being placed in the home of the father due to the child [sic] wishes and she has achieved stability in the home of her aunt and uncle and this will allow her to visit with her mother, her siblings and her father. . . .

Respondent argues that finding of fact number 23 "should not be construed to comply with the requirements of N.C. Gen. Stat. § 7B-907(b)(1)[,]" yet makes no substantive argument and fails to cite to any case law supporting this contention. Further, while Respondent states "the order fails to address why joint legal custody is the best permanent plan[,]" he again makes no substantive argument and cites no authority to support this argument.

The trial court's findings—uncontested by Respondent on appeal—indicate that the court considered the stability of the child's home life, her ability to interact with her siblings and mother, and her desire to remain in her current living situation. Moreover, they sufficiently support and explain the basis for the trial court's determination that placement with Respondent within the next six months would not be in the child's best interest, and the child should be placed in another permanent living arrangement—with the Edwardses. Accordingly, we find no error with regard to the statutory requirements of section 7B-907(b).

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B.

Next, Respondent argues that the trial court erred by awarding joint legal custody to Respondent and the Edwardses because N.C. Gen. Stat. § 7B-907(c) does not authorize such a dispositional alternative, stating: “Nowhere does the statute provide for ‘joint legal custody’ which is a legal relationship used regularly in domestic custody disputes.”

Section 7B-907(c) states in relevant part:

The judge may appoint a guardian of the person for the juvenile pursuant to G.S. 7B 600 or make any disposition authorized by G.S. 7B-903 including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interest of the juvenile.

Further, N.C. Gen. Stat. § 7B-903(a) (2007), provides “the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile[.]” Accordingly to the plain language of these statutes, there is no such prohibition on an award of joint legal custody to both a relative and a parent. Moreover, Respondent cites no authority to suggest that joint legal custody is impermissible. Accordingly, we find this argument to be without merit.

C.

Finally, Respondent argues the trial court “failed to determine that the Edwards[es] had adequate resources to care for Beth as required by N.C. Gen. Stat. § 7B-907(f).” Specifically, he argues that because the court found that the Edwardses are receiving “\$240.00 monthly from Durham DSS” for Beth’s care and “[o]nce the court closed the case, the Edwards[es] would no longer receive this additional supplement[.]” the trial court did not adequately determine that the Edwardses had the adequate resources to provide for the child. This argument is without merit.

Section 7B-907(f) provides that where the court determines a child should be—placed in the custody of an individual other than the parents . . . , the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.” Here, the trial court made the following findings of fact, uncontested on appeal:

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25. The child's current placement is meeting her needs.

...

28. . . . The Edward[es] have the financial resources to provide for the child. The Edward[es] understand the responsibility of having custody of the child.

Neither of these findings of fact are assigned as error by Respondent, and are thus deemed to be supported by competent evidence, and conclusive on review by this Court. *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003). Accordingly, the trial court's finding that the Edwardses have adequate resources to support the child is treated as conclusive, and is thus sufficient to satisfy the statutory requirements of section 7B-907(f).

In sum, we recognize that this is a particularly difficult and complicated custody situation. Beth is approaching the age of majority and has consistently expressed a preference for remaining in the home of the Edwardses. However, we also note the gravity of the constitutional right involved in this case, and urge the trial court on remand to carefully revisit the custody issue in light of the principles of law articulated in this opinion.

Affirmed in part; reversed and remanded in part.

Judges JACKSON and HUNTER, JR. concur.

SUZANNE MONAGHAN, M.D., PLAINTIFF v. ANNA SCHILLING, MD, PLLC AND
ANNA SCHILLING, M.D., DEFENDANTS

No. COA08-1308

(Filed 16 June 2009)

Judgments— default—motion to set aside denied—insufficient showing of excusable neglect

A Rule 60(b) motion to set aside a default judgment was properly denied where there was sufficient evidence in the record to support the trial court's conclusion that defendants failed to establish excusable neglect, notwithstanding defendants' failure to request findings. The issue of whether there was a showing of a meritorious defense was immaterial.

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[197 N.C. App. 578 (2009)]

Appeal by defendants from order entered 26 March 2008, judgment entered 26 March 2008, findings of fact and conclusions of law entered 31 March 2008, and order entered 5 May 2008 by Judge Laura J. Bridges in Rutherford County Superior Court. Heard in the Court of Appeals 9 April 2009.

Wimer & Jobe, by Michael G. Wimer, for plaintiff-appellee.

Hayes Hofler, P.A., by R. Hayes Hofler, for defendant-appellants.

BRYANT, Judge.

Defendants Anna Schilling, MD, PLLC and Anna Schilling, M.D. appeal from a Rutherford County Superior Court order entered 26 March 2008, which denied defendants' motion to set aside entry of default and motion for sanctions; a final judgment entered 26 March 2008, which ordered that plaintiff Monaghan, M.D. recover a principal sum of \$69,529 plus prejudgment interest, post-judgment interest, and court costs; findings of fact and conclusions of law entered 31 March 2008; and an order entered 5 May 2008 which denied defendants' motion to renew and reconsider a previously filed motion to set aside entry of default and motion for sanctions, motion to set aside entry of default judgment, motion for a new trial, motion to amend findings of fact and motion for stay. For the reasons stated herein, we affirm the orders and judgments of the trial court.

On 21 August 2006, Monaghan entered into a written employment agreement with Schilling PLLC in which she was to receive salary, bonuses, and expenses and a three-month notice in the event of termination without cause. On 25 September 2007, she filed a complaint alleging that on 16 July 2007 defendants abruptly terminated her without cause and without appropriate notice. Monaghan claimed breach of contract and intentional infliction of emotional distress and sought damages in excess of \$10,000.

On 30 October 2007, defendants filed a motion for extension of time. The motion was granted and the time for filing an answer to Monaghan's complaint extended until 5 December 2007; however, no answer was ever filed. On 4 February 2008, Monaghan filed a motion for entry of default. Defendants failed to respond to the motion, and on 6 February 2008, the Rutherford County Clerk of Superior Court entered default in favor of Monaghan.

On 28 February 2008, Monaghan filed a motion for default judgment. A notice of hearing, also filed 28 February 2008, provided that

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Monaghan's motion for default judgment would be heard by the trial court on 18 March 2008 during the morning session beginning at 9:30 a.m. On 29 February 2008, defendants filed a motion to set aside entry of default and a motion for sanctions. The hearing on defendants' motions was scheduled for the same morning session on 18 March 2008. At the hearing, defendant Schilling did not appear, and defense counsel was forty-five minutes late. Meanwhile, the trial court heard testimony as to damages on Monaghan's motion for default judgment.

On 26 March 2008, the trial court entered a written order consistent with its oral ruling at the 18 March hearing denying defendants' motion to set aside entry of default and motion for sanctions stating that "[a]fter reviewing the documents in the file, the Court concludes that the Defendants failed to establish good cause for setting aside the Entry of Default."

Also, on 26 March 2008, consistent with its oral ruling, the trial court entered a final judgment on Monaghan's motion for default judgment which stated that "[Monaghan] shall have and recover a Final Judgment against the Defendants in the principal sum of \$69,529 . . . plus prejudgment interest, postjudgment interest, and court costs." Monaghan immediately filed a request pursuant to Civil Procedure Rule 52 for findings of fact and conclusions of law. On 31 March 2008, the trial court entered the following findings of fact and conclusions of law in support of the default judgment:

4. After [an] extended deadline expired, Defendants failed to file an answer or otherwise respond to [Monaghan's] Complaint.
5. On February 4, 2008, [Monaghan] filed a Motion for Entry of Default as to all liability issues. [Monaghan] duly and properly served this Motion for Entry of Default upon Defendants' counsel, but Defendants did not respond to the motion.
6. On February 6, 2008, the Clerk of Court signed an Entry of Default against Defendants, jointly and severally, as to all liability issues.
7. On or about February 28, 2008, [Monaghan] filed a Motion for Default Judgment pursuant to Rule 55. . . . The Motion and Notice of Hearing were duly and timely served upon Defendants' counsel.

. . .

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9. Defendants did not respond to [Monaghan's] Motion for Default Judgment.

...

11. On March 18, 2008, [Monaghan's] Motion for Default Judgment and Defendants' Motion to Set Aside Entry of Default and Motion for Sanctions came on for hearing, as noticed.
12. [Monaghan] and her counsel appeared for the hearings. Defendants' counsel also appeared for the hearings. Defendants did not appear for the hearing in person.

On 8 April 2008, defendants filed a motion pursuant to Rule 62 to stay the proceedings to enforce the judgment, as well as a "Motion to Renew And Reconsider Previously-Filed Motion To Set Aside Entry of Default And Motion For Sanctions And Motion To Set Aside Entry of Default Judgment And Motion for New Trial" pursuant to Rules 55(d), 59, and 60(b). Defendants' motions were heard on 29 April 2008. At the conclusion of the hearing, the trial court stated, "I cannot find that [defendants] have shown a meritorious defense. I cannot find that there is excusable neglect." On 5 May 2008, the trial court entered an order which stated that "[a]fter reviewing the documents in the file and hearing the arguments of counsel, the Court concludes that the Defendants' motions should be denied." Defendants appeal.

On appeal, defendants present one question: Did the trial court err in failing to make findings of fact and conclusions of law as to whether there was a showing of excusable neglect and meritorious defense?

Under North Carolina Rules of Civil Procedure, Rule 55(d), "[f]or good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." N.C. R. Civ. P. 55(d) (2007). Under Rule 60(b), "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or *excusable neglect* . . ." N.C. R. Civ. P. 60(b) (2007) (emphasis added). "The decision whether to set aside a default judgment under Rule 60(b) is left to the sound discretion of the trial judge, and will not be overturned on appeal absent a clear showing of abuse of discretion." *JMM Plumbing & Utils., Inc. v. Basnight Constr. Co.*, 169 N.C. App. 199, 202, 609 S.E.2d 487, 490 (2005) (citation omitted).

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Under the North Carolina General Statutes, section 1A-1, Rule 52(a)(2), “[f]indings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b).” N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2007).

A trial court is not required to make written findings of fact when ruling on a Rule 60(b) motion, unless requested to do so by a party. Where the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion[.]

Creasman v. Creasman, 152 N.C. App. 119, 124, 566 S.E.2d 725, 729 (2002) (internal citations and quotations omitted); *see also Grant v. Cox*, 106 N.C. App. 122, 415 S.E.2d 378 (1992) (holding that when ruling on a motion under Rule 60(b)(1), the trial court is not required to make written findings of fact unless a request is made); *Texas Western Financial Corp. v. Mann*, 36 N.C. App. 346, 243 S.E.2d 904 (1978) (holding that though a trial court is not required to make findings of fact, absent a request, whether there exists sufficient evidence to support the order ruling on a motion to set aside a judgment is fully reviewable).

Our review of the record reveals that no request was made for written findings of fact regarding the trial court’s 5 May 2008 order. That order denied defendants’ post-trial motions—“Motion to Renew And Reconsider Previously-Filed Motion To Set Aside Entry of Default And Motion For Sanctions And Motion To Set Aside Entry of Default Judgment And Motion for New Trial”—filed on 8 April 2008 pursuant to Rules 55(d), 59, and 60(b). We note with particularity defendants’ motion to amend, pursuant to Rule 52(b), the trial court’s findings of fact in its 31 March order.¹ Therein, defendants requested that the trial court amend its findings of fact set forth in the 31 March order (which referenced its previous separate orders both dated 25 March 2008 denying defendants’ motion to set aside entry of default and for sanctions and granting default judgment). Defendants requested the following four amendments:

1. N.C. Gen. Stat. § 1A-1, Rule 52(b) (2007)—Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

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1. Defendants request that the findings of fact be amended to state that Plaintiff's counsel agreed to an informal extension of time for Defendants' response.
2. Defendants request that the findings of fact be amended to state that Defendants' counsel was in trial in Henderson County during the week of February 4, 2008.
3. Defendants request that Finding of Fact number 9 be omitted in its entirety on the basis that Defendants' counsel did in fact file a response, a Motion to Set Aside Entry of Default, attaching numerous exhibits which Defendants' contend go to show good cause for setting aside the Entry of Default.
4. Defendants request that Finding of Fact number 12 be revised to state that Defendants' counsel did not appear for the hearing but arrived just prior to the conclusion of Plaintiff's presentation of evidence on Plaintiff's Motion for Default Judgment. Defendants further request that Findings of Fact number 12 be revised to state that Defendant's counsel did contact the Clerk of Court at some time prior to the beginning of the hearing to advise the Court that she was going to be late.

At the 29 April hearing, in addition to the argument on the post-trial motions, defense counsel argued that the trial court should allow her suggested amendments to the findings of fact set forth in the 31 March order. Plaintiff's counsel was allowed to respond. Thereafter, the trial court succinctly ruled "[t]he changing of the findings of facts is denied."

Before this Court, defendants argue that the trial court was required to make findings of fact as to their Rule 60(b) motion; however, "[f]indings of fact . . . are necessary on decisions of any motion . . . only when requested by a party[,]" N.C.G.S. § 1A-1, Rule 52(a)(2). Here, defendants requested that the trial court amend its findings pursuant to Rule 52(b) rather than make findings of fact on the denial of the "Motion to Renew And Reconsider Previously-Filed Motion To Set Aside Entry of Default And Motion For Sanctions And Motion To Set Aside Entry of Default Judgment And Motion for New Trial."

We are aware that defendants are dissatisfied with the trial court's findings of fact and conclusions of law as to the orders entered; however, defendants cannot make a Rule 52(b) request for amended findings of fact regarding a previous 31 March 2008 order applicable to a Rule 60(b) motion and subsequent 5 May 2008 order

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where there was no additional request for findings of fact. Nevertheless, we look to determine whether, on the evidence before it, the trial court could have made findings of fact sufficient to support its legal conclusion that there was no excusable neglect or a meritorious defense.

To set aside a judgment on the grounds of excusable neglect under Rule 60(b), the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense. However, in the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial.

Scoggins v. Jacobs, 169 N.C. App. 411, 413, 610 S.E.2d 428, 431 (2005) (internal citations and quotations omitted).

“The issue of what constitutes ‘excusable neglect’ is a question of law which is fully reviewable on appeal.” *McIntosh v. McIntosh*, 184 N.C. App. 697, 704-05, 646 S.E.2d 820, 825 (2007) (citation omitted).

While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case.

Thus, we have previously noted that deliberate or willful conduct cannot constitute excusable neglect, nor does inadvertent conduct that does not demonstrate diligence.

Id. at 705, 646 S.E.2d at 825 (internal citations and quotations omitted). And, “[c]learly, an attorney’s negligence in handling a case . . . should not be grounds for relief under the ‘excusable neglect’ provision of Rule 60(b)(1).” *Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998).

In *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 586 S.E.2d 791 (2003), this Court held that a trial court properly denied the defendant’s motion to set aside the entry of default and the default judgment. There, the plaintiff filed a complaint alleging breach of contract on 19 July 2001, and the summons was served 23 July 2001. *Id.* at 485-86, 586 S.E.2d at 793. The defendant first responded to the lawsuit on 15 March 2002 when he filed a motion to strike the plaintiff’s motion for entry of default. *Id.* at 486, 586 S.E.2d at 793. In the defendant’s motion, he argued that good cause as follows existed to strike

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the entry of default: “That defendant is not a lawyer, and is unfamiliar with the procedural and substantive rules of law of the State of North Carolina. That he did not know nor understand the consequences of a failure to timely respond to the complaint and summons.” *Id.* at 487, 586 S.E.2d at 794 (brackets omitted). This Court noted that “[it] generally has upheld the denial of a motion to set aside entry of default where the evidence shows defendant simply neglected the matter at issue.” *Id.* at 488, 586 S.E.2d at 795 (citation omitted). For such reason, this Court held the trial court did not err by denying the defendant’s motion to set aside the entry of default or the order for default judgment. *Id.* at 494, 586 S.E.2d at 798.

In the instant case, defendants’ conduct does not demonstrate diligence or conduct that may reasonably be expected of a party paying proper attention to its case. *See McIntosh*, 184 N.C. App. at 705, 646 S.E.2d at 825. Monaghan filed suit on 25 September 2007, and defendants were duly served. Defendants obtained an extension of time until 5 December 2007 but as of 4 February 2008 defendants had not filed an answer or otherwise responded to the complaint. On 4 February 2008, Monaghan filed a motion for entry of default, and after defendant failed to respond, default judgment was entered on 6 February 2008. Upon defendants’ motions to set aside entry of default and other post-trial motions, the trial court heard defense counsel’s acknowledgment that errors and mistakes were made; however, the explanations were not sufficient to excuse the mistakes.

Notwithstanding defendants’ failure to request findings of fact as to the denial of the Rule 60(b) motion, on the record before us, there is sufficient evidence to support the trial court’s conclusion that defendants failed to establish excusable neglect; therefore, the issue of whether there was a showing of a meritorious defense is immaterial. *See Scoggins*, 169 N.C. App. at 413, 610 S.E.2d at 431. The Rule 60(b) motion to set aside default judgment was properly denied. Accordingly, this assignment of error is overruled, and the judgment of the trial court affirmed.

Affirmed.

Judges GEER and STEPHENS concur.

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PAUL CHRISTOPHER BLOW, PLAINTIFF v. DSM PHARMACEUTICALS, INC., FORMERLY CATALYTICA PHARMACEUTICALS, INC., EASTERN OMNI CONSTRUCTORS, INC., THE GREENWOOD GROUP, INC. D/B/A MANPOWER TEMPORARY SERVICES, DEFENDANTS

No. COA08-1500

(Filed 16 June 2009)

Workers' Compensation— workplace accident—Woodson claim—not adequately pled

The trial court did not err by granting defendant's Rule 12(b)(6) motion to dismiss in a workplace negligence action. Plaintiff did not adequately plead a *Woodson* claim falling outside the Workers' Compensation Act, and the trial court did not have subject matter jurisdiction.

Appeal by plaintiff from an order entered 16 March 2006 by Judge Jack W. Jenkins in Pitt County Superior Court. Heard in the Court of Appeals 20 May 2009.

McDonald Law Offices, P.C., by Demyra R. McDonald, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Mark A. Ash and J. Mitchell Armbruster, for defendant-appellee.

JACKSON, Judge.

Paul Christopher Blow ("plaintiff") appeals the 16 March 2006 dismissal of his suit against DSM Pharmaceuticals, Inc. ("defendant"). For the reasons stated below, we affirm.

In August 1999, plaintiff was a temporary employee of The Greenwood Group d/b/a Manpower Temporary Services ("Manpower") working as a chemical processor at defendant's plant. Defendant was a pharmaceuticals manufacturer or processor of chemicals for the production of pharmaceuticals. As part of its operations, defendant maintained and operated a Bulk Bromine Storage/Handling System ("bromine system"). Bromine is a highly toxic and lethal chemical element that defendant used to manufacture one of the pharmaceuticals it produced. Its transportation, storage, handling, and processing are highly regulated to protect workers and the general public from its hazardous properties.

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Due to minor leaks caused by vibrations, defendant and Eastern Omni Constructors, Inc. (“Eastern Omni”)—its design consultants—decided to replace a section of transfer line with Multiflex hose rated at 625 pounds of pressure per square inch (“*psi*”). However, what actually was installed was Ultraflex hose rated at 300 *psi*. An inspection of the bromine system by an independent chemical engineering consultant revealed that “certain features of the system must be considered hazardous at worst and probably poor practice at best.” On 15 August 1999, the Ultraflex hose ruptured, releasing approximately 360 gallons of liquid bromine.

Plaintiff arrived at work that evening approximately fifteen minutes after the bromine spill. There were no warnings of the danger posed by the bromine spill. As plaintiff approached the building where he would have changed into work-appropriate attire, he experienced difficulty breathing; burning sensations in his nose, throat and chest; and eye irritation. Upon entering the building, he experienced more difficulty breathing, burning sensations, and eye irritation. Plaintiff managed to exit the building and escaped the area with the assistance of a fellow employee. He was transported to Pitt County Memorial Hospital where he was hospitalized for two days due to exposure to bromine gas and vapors. Plaintiff alleges he suffered permanent injuries as a result of the exposure to bromine gas at defendant’s plant.

On 5 September 2005, plaintiff filed a complaint against defendant, Eastern Omni, and Manpower alleging gross negligence, negligence, and infliction of emotional distress. Subsequently, plaintiff filed a voluntary dismissal with prejudice as to Manpower.

On 4 November 2005, defendant filed a motion to dismiss plaintiff’s complaint pursuant to North Carolina Rules of Civil Procedure Rule 12(b)(1) and Rule 12(b)(6) alleging (1) lack of subject matter jurisdiction because plaintiff’s claims were barred by the exclusivity of the Workers’ Compensation Act (“the Act”), and (2) plaintiff’s allegations failed to state a claim falling outside the Act pursuant to *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), an exception to the Act’s exclusivity. On 16 March 2006, the trial court granted defendant’s motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Plaintiff appealed.

This Court dismissed plaintiff’s appeal as interlocutory on 17 April 2007. *See Blow v. DSM Pharmaceuticals, Inc.*, 182 N.C. App.

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765, 643 S.E.2d 83 (2007) (unpublished). On 5 September 2008, plaintiff filed a voluntary dismissal with prejudice as to Eastern Omni. Plaintiff now appeals the trial court's final judgment.

Plaintiff asserts two interrelated assignments of error: (1) that the trial court erred in dismissing his complaint based upon a lack of subject matter jurisdiction, and (2) that the trial court erred in dismissing his complaint based upon a failure to state a claim upon which relief can be granted. We disagree.

We review a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure *de novo*. *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 155, 610 S.E.2d 210, 212 (2005) (citation omitted). Pursuant to the *de novo* standard of review, "the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory."

Block v. County of Person, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)). A complaint is properly dismissed pursuant to Rule 12(b)(6) when (1) the complaint, on its face, reveals that no law supports the plaintiff's claim; (2) the complaint, on its face, reveals an absence of facts sufficient to make a good claim; or (3) some fact disclosed in the complaint necessarily defeats the plaintiff's claim. *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 380 (1987).

The rights and remedies granted to an employee by the Act "shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of [an] injury or death." N.C. Gen. Stat. § 97-10.1 (2007). In exchange for the "limited but assured benefits" of the Act, "the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the Act." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552,

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556, 597 S.E.2d 665, 667 (2003) (citing *Pleasant v. Johnson*, 312 N.C. 710, 712, 325 S.E.2d 244, 246-47 (1985); *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227).

However,

[w]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228. “This exception applies only in the most egregious cases of employer misconduct. Such circumstances exist where there is uncontroverted evidence of the employer’s *intentional* misconduct and where such misconduct is substantially certain to lead to the employee’s serious injury or death.” *Whitaker*, 357 N.C. at 557, 597 S.E.2d at 668 (emphasis added). “We made it clear in [*Woodson*] that there had to be a higher degree of negligence than willful, wanton and reckless negligence as defined in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985)]” to maintain a claim in tort against an employer, when the parties are subject to the Act. *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993). “The elements of a *Woodson* claim are: (1) misconduct by the employer; (2) intentionally engaged in; (3) with the knowledge that the misconduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured as a consequence of the misconduct.” *Pastva v. Naegele Outdoor Advertising*, 121 N.C. App. 656, 659, 468 S.E.2d 491, 494 (1996) (citing *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228).

Due to the exclusivity of the Act, in order for plaintiff to succeed on defendant’s motion to dismiss pursuant to Rule 12(b)(1), plaintiff must have adequately pled a *Woodson* claim pursuant to Rule 12(b)(6). Accordingly, we address this aspect of plaintiff’s appeal first.

Although it may be possible to cobble together the necessary allegations for a *Woodson* claim from the complaint, essentially, plaintiff’s claim is one for negligence which fails to rise to the level of a valid *Woodson* claim. In attempting to meet the required *Woodson* elements, the complaint alleges generally that (1) defendant failed to

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comply with governmental safety standards; (2) defendant acted willfully, wantonly, with reckless disregard, and constructive intent; (3) defendant “knew or should have known that it was foreseeable that if [it] failed to comply . . . there was a substantial certainty that a catastrophic [bromine spill] would result in the serious bodily injury or death of its employees (including [plaintiff]);” and (4) plaintiff was seriously injured as a result.

Plaintiff has failed to allege “a higher degree of negligence than willful, wanton and reckless negligence as defined in *Pleasant*.” See *Pendergrass*, 333 N.C. at 239, 424 S.E.2d at 395. “[S]imply having knowledge of some possibility, or even probability, of injury or death is not the same as knowledge of a substantial certainty of injury or death.” *Whitaker*, 357 N.C. at 558, 597 S.E.2d at 669. As was true in *Whitaker*, “[t]he facts of this case involve defective equipment and human error that amount to an accident rather than intentional misconduct.” *Id.*

The bromine system began operating in July 1998. The Ultraflex hose that ruptured was installed in November 1998. The consultant prepared his report in April 1999. The objectives of the report were to bring problems in the bromine system to defendant’s attention “and to recommend modifications to reduce the hazards” posed by those problems. The report failed to inform defendant that a catastrophic bromine spill was substantially certain to occur as a result of the Ultraflex hose, or any other of the problem components of the bromine system.

With respect to the transfer lines for which the Ultraflex hose was used, the report noted that failure “can create catastrophic [bromine] emission.” There was a “potential” of fatigue failure and “water hammer” impact. Although the excessive size and weakness of the transfer lines posed a “serious hazard,” the consultant did not recommend immediate replacement to a safer material; he recommended that all new transfer line installations be to the safer material, while only replacing older lines “as opportunities permit” or “as maintenance costs or failures justify.” These statements are not sufficient to put defendant on notice of an impending catastrophic bromine spill.

Soon after the incident, The North Carolina Department of Labor, Division of Occupational Safety and Health conducted an investigation, finding thirty-one state and federal safety and health violations, including, but not limited to, failure to have adequate emergency action plans, failure to have complete process safety information, and

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failure to have an adequate process hazard analysis. It found twenty-four “serious” violations and seven “unclassified” violations; not one of the violations was deemed to be “willful” or a “repeat” violation. The North Carolina Division of Air Quality also conducted an investigation after the incident. It found, *inter alia*, that process safety information was incomplete, process hazard analysis was incomplete, mechanical integrity was inadequate, and emergency response was inadequate.

In *Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 668 S.E.2d 114 (2008), the evidence tended to show that the defendant company did not adequately maintain its equipment; however, this Court noted that “even a ‘knowing failure to provide adequate safety equipment in violation of OSHA regulations [does] not give rise to liability under . . . *Woodson* . . .’ ” *Id.* at 584, 668 S.E.2d at 118 (quoting *Mickles v. Duke Power Co.*, 342 N.C. 103, 112, 463 S.E.2d 206, 212 (1995)) (alterations in original) (additional citations omitted). This Court also recognized that “[u]nlike the employer in *Woodson*, who had received four citations for violating safety procedures in the six and a half years preceding the incident, [the defendant company] had never been cited by OSHA prior to the accident” for the problems giving rise to the employee’s death. *Id.* See also *Vaughan v. J. P. Taylor Co.*, 114 N.C. App. 651, 654, 442 S.E.2d 538, 540 (1994) (noting that the plaintiff’s employer had no prior OSHA citations for safety violations). Finally, this Court noted that although the plaintiff contended that the defendant company “could have done more to ensure its workers’ safety, ‘the evidence does not show that [the employer] engaged in misconduct *knowing* it was substantially certain to cause death or serious injury.’ ” *Id.* (quoting *Jones v. Willamette Industries, Inc.*, 120 N.C. App. 591, 595, 463 S.E.2d 294, 297 (1995)) (alterations in original).

Similarly, defendant in the case *sub judice* had not been cited for violations of the bromine system prior to the spill. Although it failed to adequately construct and maintain the bromine system, and failed to implement appropriate safety procedures, defendant did not “engage[] in misconduct *knowing* it was substantially certain to cause death or serious injury,” as required to support a *Woodson* claim. See *Jones v. Willamette Industries, Inc.*, 120 N.C. App. 591, 595, 463 S.E.2d 294, 297 (1995).

Because plaintiff failed to adequately plead a *Woodson* claim, the trial court did not err in granting defendant’s motion to dismiss pursuant to Rule 12(b)(6). Absent a proper *Woodson* claim, the trial court

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had no subject matter jurisdiction to hear plaintiff's claim, because the Act provides an exclusive remedy for injured workers. Accordingly, we affirm the trial court.

Affirmed.

Judges McGEE and ERVIN concur.

RACHEL DARLENE TUCKER, PLAINTIFF v. JEWETT EUGENE TUCKER, JR.,
DEFENDANT

No. COA08-789

(Filed 16 June 2009)

Contempt—civil—failure to make alimony payments—current ability to pay

The trial court did not err in a civil contempt case arising out of the failure to make alimony payments by concluding defendant had the current ability to pay \$10,000 as a purge payment because: (1) the trial court properly considered the assets that defendant had available at the time of the hearing to satisfy the \$10,000 payment towards the alimony arrears and specifically based its conclusion regarding defendant's ability to pay upon the fact that defendant had \$6,200 from his 401K account and a \$2,000 cashier's check, which together would comprise \$8,200 of the \$10,000; (2) the court also noted two of defendant's assets could be readily converted to cash including a boat and a 2001 Ford Explorer; and (3) defendant failed to assign error to any of the findings of fact regarding his 401K money, the cashier's check, his boat, and motor vehicle, and thus these findings are deemed binding on appeal.

Appeal by defendant from order entered on or about 7 November 2007 by Judge Scott C. Etheridge in District Court, Moore County. Heard in the Court of Appeals 28 January 2009.

Staton, Doster, Post Silverman & Foushee, P.A., by Jonathan Silverman, for defendant-appellant.

Arthur M. Blue Law Office, P.A., by Arthur M. Blue, for plaintiff-appellee.

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STROUD, Judge.

The trial court found defendant to be in civil contempt of court due to a failure to make court ordered alimony payments and ordered defendant's incarceration until payment of a \$10,000.00 purge payment. Defendant appeals, arguing the trial court erred in concluding that he had the present ability to pay a \$10,000.00 purge payment towards his alimony arrearages. For the following reasons, we affirm.

I. Background

On or about 24 March 1998, plaintiff and defendant entered into a settlement agreement for divorce in Georgia. On or about 15 June 1998, plaintiff and defendant were divorced and defendant was ordered by the State of Georgia to pay \$1,500 a month in alimony. On or about 22 August 2006, the Georgia alimony order was registered in North Carolina against defendant, with \$14,750.00 of alimony in arrears. On or about 15 September 2006, defendant objected to the registration of the Georgia order in North Carolina. On or about 13 March 2007, defendant withdrew his objection based upon an agreement by plaintiff to wait 60 days before taking enforcement action.

On or about 5 June 2007, plaintiff filed a verified motion asking that the trial court find defendant to be in civil contempt and requesting that defendant be ordered to pay her costs and attorney fees for prosecution of the motion. On or about 8 June 2007, the trial court found probable cause that defendant was in contempt, ordered defendant to show cause why he should not be held in civil contempt, and set a hearing regarding the show cause order for 25 June 2007. The contempt hearing was held on 26 June 2007.

At the hearing, the parties stipulated that the alimony arrears owed by defendant as of 30 June 2007 were \$42,650.00. After the hearing, the trial court orally found defendant to be in civil contempt and ordered that he be held in the Moore County jail until he paid \$10,000.00 towards his alimony arrears. On 27 June 2007, defendant paid the \$10,000.00 purge payment, and the trial court entered an order directing defendant's release from custody as he had purged himself of contempt by his payment. On or about 7 November 2007, the trial court entered its written civil contempt order from the 26 June 2007 hearing. From the contempt order, defendant appeals. Defendant contends that the trial court committed reversible error by concluding that he had the current ability to pay \$10,000.00. Defendant "requests that the trial Court's civil contempt order be

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vacated and this matter be remanded for a new hearing.” For the following reasons, we affirm.

II. Ability to Pay \$10,000.00

Defendant contends that “there was insufficient evidence to support the trial court’s findings of fact, conclusions of law and order that . . . [defendant] had the present means and ability to pay an alimony arrearage and therefore was in civil contempt of court.” (Original in all caps.) We disagree.

Review in [civil] contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.

Hartsell v. Hartsell, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990) (citations and quotation marks omitted), *aff’d per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991). However, “[f]indings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal.” *Pascoe v. Pascoe*, 183 N.C. App. 648, 650, 645 S.E.2d 156, 157 (2007) (citations and quotation marks omitted). “The trial court’s conclusions of law drawn from the findings of fact are reviewable *de novo*.” *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (citation and quotation marks omitted), *disc. review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007). “A show cause order in a civil contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show why he should not be held in contempt.” *State v. Coleman*, 188 N.C. App. 144, 149-50, 655 S.E.2d 450, 453 (2008) (citations omitted); *see also Hartsell* at 387, 393 S.E.2d at 575 (“In civil contempt the defendant has the burden of presenting evidence to show that he was not in contempt and the defendant refuses to present such evidence at his own peril.”).

Defendant does not challenge the trial court’s conclusion that he is in civil contempt for failure to pay his alimony, but only claims that the trial court did not properly determine that he had the ability to pay the \$10,000.00 purge payment. There is no question as to defendant’s liability to pay alimony generally or the amount of arrears owed because defendant stipulated to these facts. Defendant also does not argue in his brief that the Court erred in finding that he had the abil-

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ity to pay alimony. Defendant's argument is limited to the trial court's finding that he had the ability to pay a \$10,000.00 payment toward his arrearages to purge himself of contempt.

If a trial court orders imprisonment for civil contempt, the court must also state how the defendant may purge himself of contempt and find that the defendant has the ability to do so.

General Statute 5A-21 provides that a person may not be imprisoned for civil contempt unless the person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order. General Statute 5A-22 provides that the order of a court holding a person in contempt must specify how the person may purge himself of the contempt. Because these statutes relate to the same subject matter, they must be construed *in pari materia*. When so construed, these statutes require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt.

....

To justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages. The majority of cases have held that to satisfy the present ability test defendant must possess some amount of cash, or asset readily converted to cash.

McMiller v. McMiller, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985) (citations, quotation marks, and brackets omitted).

Here, the trial court found the following facts which were not challenged by defendant:

5. . . . Defendant has a long history of employment dating back to 1980 when he received certification to perform ultrasounds. In 1980 the Defendant began employment with Tift General Hospital in Georgia. Thereafter he worked for approximately one and [a] half years with Shared Medical doing rotational work for various doctor's office[s]. Thereafter, the Defendant set up his own diagnostic practice where he worked for approximately 23 years. For approximately 3 years the Defendant worked interpreting ultrasounds in Perry, Georgia. In 2002 the Defendant moved to

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Moore County, North Carolina and accepted a position with FirstHealth Moore Regional Hospital where he remained from April 1, 2002 until approximately June 1, 2007.

6. That the Defendant lives in a residence in Seven Lakes, North Carolina. That the house is subject to homeowner's dues which were paid on his behalf. The Defendant enjoys the facilities including the lake and plays golf at least two times a week and enjoys various functions available to members of the association.
7. In 2005, the Defendant took a Carribean cruise on Celebrity Cruise Line.

. . . .

9. That the defendant earned approximately \$78,000.00 last year and his income has been approximately \$72,000.00 from FirstHealth for several years.
10. That the Defendant owns an 18 foot boat, 2001 Ford Explorer, furniture located in the home consisting of at least a leather couch, a leather chair, a rocking chair, a queen size bed in the master bedroom, a chest of drawers, a bedroom suit in the daughter's bedroom, a full size bed night stand and chest in the guest room, a set of MacGregor golf clubs. In addition, the Defendant has a credit card/debit card furnished for his use, it is in the name of his spouse/fiancé. The Defendant testified that he has access to use the card as desired. The Court does note that we are presently unaware of the limits of the credit extended by the card and the limit of use by the Defendant. Within weeks of this hearing the Defendant cashed in his 401K plan and did not pay any alimony. The Defendant received approximately \$6,200.00 net from the liquidation of the account. The Defendant paid bills and the loan secured by his truck. However he failed to produce any documentation or receipts indicating that he paid any of these bills.

. . . .

12. The court finds that he was fired from his job at Moore Regional Hospital due to his failure to follow Moore Regional Hospital policies and is unemployed at the time of this hearing. He stated he had a job interview set for June 28, 2007.

. . . .

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16. The Court finds that [sic] all testimony of the Defendant to be less than credible.

. . . .

19. That the Defendant has in Court a \$2,000.00 cashier's check he testified was a loan from his mother. However, as of the trial, the Defendant had failed to give the \$2,000.00 to the Plaintiff.

The trial court also made a conclusion of law that “[d]efendant has the ability to comply with the alimony order when considering the above facts and in particular that he has a \$2,000.00 cashiers check, a boat, a 2001 Ford Explorer, and at least \$6,200.00 from his 401K plan.” Thus, the trial court properly considered the assets that defendant had available at the time of the hearing to satisfy the \$10,000.00 payment towards the alimony arrears and specifically based its conclusion regarding defendant’s ability to pay upon the fact that defendant had available, *inter alia*, \$6,200.00 from his 401K account and a \$2,000.00 cashier’s check, which together would comprise \$8,200.00 of the \$10,000.00. The court also noted two of defendant’s assets which could be “readily converted to cash[,]” *id.*, the boat and the 2001 Ford Explorer.

Defendant has assigned error to the conclusion of law quoted above regarding his present ability to pay, but defendant did not assign error to any of the findings of fact upon which it is based; i.e., defendant does not challenge the findings that he had a \$2,000.00 cashiers check, a boat, a Ford Explorer, or \$6,200.00 from his 401K plan. Defendant did testify at trial that he had already spent the \$6,200.00, but he failed to assign error to the trial court’s finding that he did not produce documentation as to his payment of bills with the \$6,200.00 or the finding that his testimony was “less than credible.” As defendant failed to assign error to *any* of the findings of fact regarding his 401K money, the cashier’s check, his boat, and motor vehicle, these findings are deemed binding on appeal; *Pascoe* at 650, 645 S.E.2d at 157, and thus the trial court’s conclusion regarding defendant’s ability to pay was supported by the findings of fact. We therefore conclude the uncontested facts support the conclusion that “[d]efendant has the present means and ability to comply with the order or is able to take reasonable measures that would enable him to comply with the order by paying \$10,000.00[.]”

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III. Conclusion

We affirm the trial court order requiring defendant to pay \$10,000.00 towards alimony arrears as a purge payment for civil contempt of court.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

IN THE MATTER OF: D.S.

No. COA08-1078

(Filed 16 June 2009)

1. Juveniles— delinquency—sexual battery—untimely filing of petition

The trial court lacked subject matter jurisdiction in a juvenile delinquency case for a sexual battery adjudication based on the untimely filing of the petition in violation of N.C.G.S. § 7B-1703, and thus erred by denying the juvenile’s motion to dismiss the sexual battery charge.

2. Juveniles— delinquency—simple assault—variance between acts alleged in petition and evidence presented at hearing

The trial court did not err in a juvenile delinquency case arising from a simple assault even though the juvenile contends there was a fatal variance between the acts alleged in the petition and the evidence presented at the hearing because: (1) it cannot be concluded that the juvenile was unable to prepare for his defense since the petition alleged the juvenile touched the victim with his hands and the evidence showed that he touched her with a Pixy Stix; and (2) the petition as a matter of law put the juvenile on notice of the offense for which he was alleged to have committed.

3. Juveniles— delinquency—simple assault—touching

The trial court did not err in a juvenile delinquency case arising out of a simple assault by its finding of fact in the adjudication order that the juvenile touched the victim on her buttocks because: (1) N.C.G.S. § 14-27.1 provides that “touching” is defined

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as physical contact with another person, whether accomplished directly through the clothing of the person committing the offense or through the clothing of the victim; and (2) the juvenile touched the victim with a Pixy Stix he was holding in his hand.

Appeal by Juvenile from judgment entered 16 April 2008 by Judge James G. Bell in Robeson County District Court. Heard in the Court of Appeals 10 March 2009.

Attorney General Roy A. Cooper, by Assistant Attorney General Judith Tillman, for the State.

Peter Wood, for Juvenile.

BEASLEY, Judge.

D.S.¹ (Juvenile) appeals the adjudication and disposition of Robeson County District Court which adjudicated him delinquent for committing sexual battery and simple assault. For the reasons stated below, we affirm the adjudication for simple assault and vacate the adjudication for sexual battery.

On 21 September 2007, Juvenile and A.A., both fifth grade students, were in the same classroom. During class, Juvenile approached A.A. while holding a straw-like candy, known as Pixy Stix, in his hands. Juvenile repeatedly touched A.A.'s bottom with the Pixy Stix and also stuck it between her legs. A.A. testified that in three instances, A.A. ordered that Juvenile cease touching her with the Pixy Stix. Juvenile ignored her. Two of Juvenile's classmates, D.A. and S.E., corroborated A.A.'s testimony.

Angela Hunt (Hunt), the teacher of the class where the incident occurred, testified that A.A. had not told her about the incident until the end of the school day. Hunt noticed that A.A. was crying, and after speaking with A.A., Hunt told her to talk with the principal of the school. Hunt testified that A.A. told her that Juvenile "was touching her butt."

S.E., a classmate of Juvenile and A.A., saw Juvenile walk to A.A.'s desk; "he had like some candy, Pixie Stick, and he was sticking it in her." D.A. was sitting next to A.A. when Juvenile approached A.A. with a Pixy Stix and saw Juvenile "playing with her . . . in her butt." D.A. heard A.A. tell Juvenile to stop, but Juvenile ignored A.A.'s demands.

1. To protect their privacy, all minors are referred to by initials in this opinion.

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At the adjudication hearing, the trial court found Juvenile to be delinquent as to both allegations of simple assault and sexual battery. At the dispositional hearing, the trial court accepted the court counselor's recommendation of probation for a period of up to twelve months. From these adjudication and disposition orders, Juvenile appeals.

Subject Matter Jurisdiction

[1] Juvenile first argues that the trial court lacked subject matter jurisdiction because the sexual battery petition was not timely filed in violation of N.C. Gen. Stat. § 7B-1703. We agree and vacate the sexual battery adjudication.

“In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*.” *In re K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007). “Although not raised in the trial court, this issue may be addressed for the first time on appeal.” *In re J.B.*, 186 N.C. App. 301, 302, 650 S.E.2d 457, 457-58 (2007).

N.C. Gen. Stat. § 7B-1703 (2007) governs the time by which a juvenile petition must be filed after a juvenile court counselor's receipt of a complaint. This statute provides that:

(a) The juvenile court counselor shall complete evaluation of a complaint *within 15 days of receipt of the complaint*, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall decide within this time period whether a complaint shall be filed as a juvenile petition.

Therefore, “the petition must be filed within, at a maximum, thirty days after the receipt of the complaint.” *J.B.*, 186 N.C. App. at 303, 650 S.E.2d at 458.

It is undisputed that the court counselor received the first complaint on 25 September 2007 and filed the petition charging simple assault under N.C. Gen. Stat. § 14-33(a) on 10 October 2007. Accordingly, the first petition was timely since it was filed within 15 days of the court counselor's receipt. The court counselor received the second complaint on 15 November 2007 and filed the petition alleging sexual battery under N.C. Gen. Stat. § 14-27.5A on 16 November 2007. Because the actions complained of in each petition arose from the single incident that occurred on 21 September 2007, the second petition was filed beyond the 30 days allotted by the statute and therefore untimely.

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One of the purposes of the juvenile code is to “[t]o deter delinquency and crime . . . by providing *swift*, effective dispositions that emphasize the juvenile offender’s accountability for the juvenile’s actions.” N.C. Gen. Stat. § 7B-1500(2) (2007) (emphasis added). The juvenile code also exists, “[t]o provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders *to proceed with all possible speed in making and implementing determinations* required by this Subchapter.” N.C. Gen. Stat. 7B-1500(4) (2007) (emphasis added).

In the case before us, the court counselor received all of the information regarding the allegations against Juvenile on 25 September 2007, but failed to act swiftly when he filed the second petition over 50 days later. Because it was untimely filed, the trial court did not have subject matter jurisdiction over the second petition alleging sexual battery. Therefore, the order adjudicating D.S. as a delinquent juvenile on the allegations of sexual battery must be vacated.

Petitions and Evidence

[2] Juvenile argues that there was a fatal variance between the acts alleged in both the juvenile petitions and the evidence presented at the hearing. We do not reach Juvenile’s argument regarding the petition alleging sexual battery as explained above, but instead, only address the petition alleging simple assault. Juvenile argues that the trial court erred because the simple assault petition alleged that Juvenile touched A.A. “on her butt, 2 times with his hands[,]” while the evidence only showed that Juvenile touched A.A. with a Pixy Stix. We disagree.

For a juvenile petition alleging delinquency to be valid, it:

shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile’s commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation.

N.C. Gen. Stat. § 7B-1802 (2007). A juvenile petition “ ‘serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity’ ” *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006) (quoting *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004)). The purpose of a

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juvenile petition is to “clearly identify the crime being charged” and “should not be subjected to hyper technical scrutiny with respect to form.” *Id.* at 153-54, 636 S.E.2d at 280.

“A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial.” *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). This is based on an effort “to insure that [juvenile] is able to prepare his defense against the [allegation] with which he is charged, and to protect the [juvenile] from another prosecution for the same incident. In order for a variance to warrant reversal, the variance must be material.” *Id.* “Not every variance between the allegations of the [petition] and the proof presented at trial is a material variance requiring dismissal.” *State v. McCree*, 160 N.C. App. 19, 30, 584 S.E.2d 348, 356 (2003).

We cannot conclude that because the petition alleged Juvenile touched A.A. “with his hands” instead of touching her with a Pixy Stix, that Juvenile was unable to prepare for his defense. The simple assault petition as a matter of law put Juvenile on notice of the offense for which he was alleged to have committed. This assignment of error is overruled.

Findings of Fact

[3] Juvenile’s last argument is that the trial court erred when it made finding of fact 3(c) in the adjudication order without any supporting evidence presented at the hearing. We find that because there was competent evidence to support the adjudication of simple assault, the trial court’s findings of fact related to the simple assault allegation are conclusive on appeal.

In the trial court’s adjudication order, finding of fact 3(c) states the following:

That on or about September 21, 2007 the Juvenile, D.S., did unlawfully and willfully assault A.A. touching her on her butt, two times with his hands; and that he did unlawfully and willfully for the purpose of sexual arousal or sexual gratification engage in sexual contact, by placing his hand on the buttocks of another person, A.A., by force and against the will of the other person, being offenses in violation of G.S. 14-33(a) and 14-27.5(a) respectively, and the court finds this beyond a reasonable doubt.

Juvenile argues that the trial court erred because there was no evidence that Juvenile touched A.A. with his hands.

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This Court has held that:

[w]hen an appellant asserts that an adjudication order of the trial court is unsupported by the evidence, this Court examines the evidence to determine whether there exists clear, cogent and convincing evidence to support the findings. If there is competent evidence, the findings of the trial court are binding on appeal. Such findings are moreover *conclusive on appeal* even though the evidence might support a finding to the contrary.

In re McCabe, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003) (emphasis added). “Touching” is defined as “physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim.” N.C. Gen. Stat. § 14-27.1 (2007).

Touching can be accomplished indirectly as illustrated in the case before us. It is undisputed that Juvenile touched A.A. with a Pixy Stix he was holding in his hands, making Juvenile’s argument unwarranted. Therefore, there was clear, cogent, and convincing evidence to support the findings of fact and conclusions of law by the trial court that Juvenile assaulted A.A.

For the foregoing reasons, we affirm the simple assault adjudication. However, we conclude that the trial court lacked subject matter jurisdiction for the sexual battery petition, that the trial court erred in denying the motion to dismiss the sexual battery allegation, and we vacate the adjudication and disposition orders for D.S. on the allegations of sexual battery.

Affirmed in part; Vacated in part.

Judges McGEE and GEER concur.

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[197 N.C. App. 604 (2009)]

BRIAN SCOTT BAKER AND JANNA C. JORDAN-BAKER, PLAINTIFFS v. PRUDENCE
ROSNER, ED ROSNER, JO FAULK, AND NOVA REALTY, INC., DEFENDANTS

No. COA08-1298

(Filed 16 June 2009)

1. Discovery— violations—erroneous striking of answers and default judgment—nonparty

The trial court abused its discretion in a fraud and unfair and deceptive trade practices case arising out of the sale of a home by striking defendant realty company's answer and entering a default against it when it was not in violation of the order, and the entry of default regarding the realty company is reversed and remanded because: (1) the company was not a party to the pertinent order and thus not a disobedient party; and (2) plaintiffs did not seek discovery from the company.

2. Discovery— violation of consent order—striking of answers—entry of default

The trial court did not abuse its discretion in a fraud and unfair and deceptive trade practices case arising out of the sale of a home by striking all defendants' answers and entering default against defendants Rosners and Faulk because: (1) there was ample evidence that Prudence Rosner acted improperly and violated the consent order including refusal to answer numerous questions regarding her finances during her deposition, failure to produce pertinent documents within fourteen days after mediation on 10 March 2008 as ordered by the trial court, and failure to produce real property tax information and information regarding a possible trust in her possession; (2) Ed Rosner failed to produce any financial statements; and (3) Faulk failed to produce financial documents within the fourteen days after the mediation and did not produce any documents until after plaintiffs filed the motion for sanctions.

Appeal by Defendants from judgment entered 22 April 2008 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 24 March 2009.

William H. Helms, for Plaintiffs-Appellees.

Horack, Talley, Pharr & Lowndes, P.A., by John W. Bowers, for Defendants-Appellants.

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BEASLEY, Judge.

Defendants appeal from the trial court's order striking Defendants' answers and entering default as to the Plaintiffs' claims for fraud against each Defendant. We affirm in part, reverse in part, and remand for further proceedings.

The record shows the following: in September 2006, Brian Scott Baker and Janna C. Jordan-Baker (Plaintiffs) filed a complaint against Prudence Rosner, Ed Rosner, Jo Faulk, and Nova Realty, Inc. (Defendants) in connection with Plaintiff's purchase of a home located at 4520 Ferguson Circle in Waxhaw, North Carolina. Prudence Rosner was the previous owner of the home and Ed Rosner was her husband. Jo Faulk (Faulk) was a real estate agent who represented Prudence and Ed Rosner (Rosners) in the sale of the home. Faulk was acting as an agent of Nova Realty, Inc. (Nova). The complaint alleged that Defendants committed fraud and unfair and deceptive trade practices when they sold a home to Plaintiffs in 2003. Plaintiffs sought compensatory and punitive damages from Defendants, jointly and severally.

In their Answers, Defendants denied the allegations and asserted numerous affirmative defenses. In January 2008, Plaintiffs served Defendants with a notice of deposition and requested production of documents at the deposition. During the deposition, Prudence Rosner was not cooperative and refused to answer questions concerning her finances. In response, Plaintiffs filed a Motion to Compel, requesting that Prudence Rosner answer questions concerning her financial affairs and accounts. In March 2008, the trial court signed a consent order (order) directing the Rosners and Faulk to produce certain financial documents, including federal income tax returns, account information from financial institutions, and property tax invoices. The parties were to attempt mediation and if they were unable to reach a settlement, Defendants were to give Plaintiffs their financial documents within fourteen days following mediation.

On 10 March 2008 mediation was held and the parties were unable to reach a settlement. The Rosners and Faulk failed to produce the necessary documents within fourteen days. It was not until 7 April 2008 that they produced only a portion of the required documents, most of which were redacted. Because they failed to fully comply with the trial court's order, Plaintiffs filed a Motion for Sanctions pursuant to Rule 37 of the Rules of Civil Procedure on 2

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April 2008. On 22 April 2008, the trial court issued an Order that stated, in pertinent part:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, in the Court's discretion, that the plaintiffs' motion for sanctions is allowed, and the Court, having considered lesser sanctions, in its discretion, orders that the answer of each defendant is hereby stricken, and an entry of default is hereby made as to the plaintiffs' claims for fraud against each defendant.

From this order, Defendants appeal.

Order

Defendants' central argument is that the trial court erred and abused its discretion in striking all Defendants' answers and entering default against all Defendants. Defendants assert that the trial court erred when not every Defendant was required to produce documents under the consent order, when there was no evidence before the trial court or in the record that all Defendants acted improperly, and when the order was not the result of a reasoned decision. We agree in part and disagree in part.

Rule 37 of the North Carolina Rules of Civil Procedure states that if a party fails to obey an order, a judge may make an order "striking out pleadings or part thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the *disobedient party*[" N.C. Gen. Stat. § 1A-1, Rule 37 (b)c (2007) (emphasis added). Determining which sanctions are appropriate under Rule 37 is within the sound discretion of the trial court. *Fayetteville Publ'g Co., v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419, 665 S.E.2d 518, 522 (2008). The court's ruling on sanctions "will not be reversed on appeal absent a showing of abuse of discretion." *Williams v. N.C. Dept't of Env't and Natural Res.*, 166 N.C. App. 86, 92, 601 S.E.2d 231, 235 (2004). When considering sanctions,:

[b]efore dismissing the action, . . . the trial court must first consider less severe sanctions. This court reviews the trial court's action in granting sanctions pursuant to Rule 37, including dismissal of claims, for abuse of discretion. A trial court may be reversed for abuse of discretion *only* upon a showing that its ruling was so arbitrary that it *could not have been the result of a reasoned decision or was manifestly unsupported by reason.*

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Fayetteville Publ'g, 192, N.C. App. at 424, —, 665 S.E.2d at 522 (quoting *Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 299, 636 S.E.2d 829, 831 (2006)) (internal citations omitted and emphasis added).

[1] First, Defendants argue that the trial court erred by striking Nova's answer and entering default against it because Nova was not in violation of the Order. We agree. Nova was not a party to the order and Plaintiffs did not seek discovery from Nova. "An abuse of discretion may arise if there is no record evidence which indicates that defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred." *Baker v. Speedway MotorSports, Inc.*, 173 N.C. App. 254, 264, 618 S.E.2d 796, 803 (2005), *disc. review denied*, 361 N.C. 425, 648 S.E.2d 204 (2007). In the present case, Nova was not a party to the March 2008 order, calling for the production of financial documents.

There is no record evidence that Nova acted improperly or that Nova violated any discovery orders. We agree with Defendants that the trial court abused its discretion by striking Nova's answer and entering default against it when it was not a disobedient party. We reverse the trial court's entry of default regarding Nova and remand for further proceedings with respect to Plaintiffs' claims against Nova.

[2] Defendants also argue that the trial court erred by striking all Defendants' answers and entering default against Rosners and Faulk. Defendants contend that there was no evidence that all Defendants acted improperly and that the order was not the result of a reasoned decision. Specifically, Defendants argue that Faulk fully complied with the consent order, that Ed Rosner did not file tax returns because he did not produce any income, and that the Rosners provided all the financial statements specified in the order.

In regards to the Rosners and Faulk, we hold that the trial court did not abuse its discretion in striking their answers and entering default against them. The trial court found, in pertinent part, that:

it appearing that following a scheduled hearing on plaintiff's motion to compel production of documents, the defendants, through counsel, consented to the production of certain documents, including Federal income tax returns for the last two filed returns;

. . . .

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it appearing that at the time of the filing of the motion for sanctions the time for production of the documents had passed and that no documents had been produced;

. . . .

it appearing that the responding parties have either chosen in certain instances not to respond, or, even with the benefit of the court hearing on sanctions, have unilaterally interpreted the relevant scope of the response; that the failure to produce full and complete documents as to which the defendants consented, without objection, without application for further protective provisions, and without good cause, subverts the plaintiffs' rights to seek recovery of punitive damages in this case;

"The trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Haislip*, 362 N.C. 499, 500, 666 S.E.2d 757, 758 (2008) (quoting *State v. Buchanan* 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)). There was ample evidence that Prudence Rosner acted improperly and violated the consent order. First, during her deposition, Prudence Rosner refused to answer numerous questions regarding her finances. For example, she refused to disclose the balances in her banking accounts, whether she possessed any bonds or CDs, and whether or not she had shared accounts with her husband. Secondly, Prudence Rosner was required to produce documents such as federal income tax returns for the last two years, all financial statements prepared within the past four years, and all 2007 property tax invoices pursuant to the March 2008 consent order. Prudence Rosner failed to produce these documents within fourteen days after mediation on 10 March 2008, as ordered by the trial court. It was not until 7 April 2008 that Plaintiffs received any response from Prudence Rosner. In her response, Prudence Rosner produced a redacted version of her 2005 tax return, only the first page of her 2006 tax return, and information for one checking account when she indicated she had more than one checking account during her deposition. Prudence Rosner failed to produce real property tax information and information regarding a possible trust in her possession.

Ed Rosner violated the consent order when he did not produce any financial statements, asserting that he had been retired for ten years in his deposition. During his deposition, Ed Rosner stated that he did not have any income. However, Prudence Rosner, while being

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deposed, stated that she and her husband had separate bank accounts and that Ed Rosner was CEO of the Ringing Rocks foundation.

There is also sufficient evidence to support Faulk's violation of the consent order. While Defendants argue that Faulk produced "all relevant information required by the Consent Order" and the parties stipulated that there were no issues related to their production, Faulk failed to produce financial documents within the fourteen days after the mediation after failing to reach a settlement. Faulk did not produce any documents until after Plaintiffs filed the motion for sanctions, thereby clearly violating the terms of the consent order.

In its order, the trial court considered lesser sanctions and, "in its discretion . . . determined that the most appropriate sanction [was] the striking of defendants' answers and entry of default as to the plaintiffs' claims for fraud against each defendant." We hold that the trial court did not abuse its discretion in finding that the answers of the Rosners and Faulk be stricken and that an entry of default be made as to each of their claims against Defendant. We affirm the trial court's ruling as to the Rosners and Faulk.

For the foregoing reasons, we reverse in part, affirm in part, and remand for further proceedings.

Judges McGEE and GEER concur.

SCHWARZ & SCHWARZ, LLC, PLAINTIFF v. CALDWELL COUNTY RAILROAD CO. AND
CALDWELL COUNTY ECONOMIC DEVELOPMENT COMMISSION, INC.,
DEFENDANTS

No. COA08-1458

(Filed 16 June 2009)

**Railroads— crossing blocked by railroad—railroad purpose
easement**

The trial court did not err by granting summary judgment for defendant railroad in an action that began when the railroad blocked a crossing after damage from a truck leaving a facility owned by plaintiff. There was no indication that an easement by necessity arose when the railroad was constructed, the continued

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use of the crossing since the 1940's cannot estop defendant from closing the crossing, and a railroad has the authority and ability to expand its use of a right-of-way to manage safety risks. N.C.G.S. § 1-44.

Appeal by plaintiff from judgment entered 15 August 2008 by Judge Timothy L. Patti in Caldwell County Superior Court. Heard in the Court of Appeals 23 April 2009.

Parker Poe Adams & Bernstein LLP, by Charles E. Raynal, IV, John J. Butler, and Jamie S. Schwedler, for plaintiff-appellant.

Williams Mullen, by Gilbert C. Laite III and Kelly C. Hanley, for defendant-appellees.

BRYANT, Judge.

Schwarz & Schwarz, LLC (plaintiff) appeals from an order granting summary judgment in favor of Caldwell County Railroad Company (defendant) and Caldwell County Economic Development Commission, Inc. (Caldwell County EDC). We affirm.

Facts

In 2001, plaintiff purchased a fee simple interest in a 43.5 acre parcel of land from Singer Furniture Company, a furniture manufacturing company that operated its business on the site from the 1940's until the 1990's. Plaintiff leases the facility to commercial tenants who use the facility for manufacturing or storage purposes.

Defendant Caldwell County EDC owns a 100-foot railroad right-of-way easement located along the eastern boundary of the property which physically separates the property from Norwood Road, a public road. A deed to a 100-foot easement was first obtained in 1902 by the Carolina and Northwestern Railroad (C&NR) which remained in possession of the easement through several mergers until 1995, when the successor of C&NR, Southern Railway, conveyed the right-of-way to the Caldwell County EDC. The right-of-way is currently leased by defendant and defendant has operated trains over the right-of-way since 1995.

Prior to the 1940's, no crossing existed over the right-of-way. Around 1945 or 1946 a crossing was constructed during development of the property. No easements, agreements, crossing rights, or other

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record documents convey a right to establish or maintain a crossing over the right-of-way.

The current litigation arose when the crossing was damaged by a truck's docking gear that caught on the track after leaving the loading docks of the facility on 8 December 2005. On 10 December 2005, defendants repaired, then barricaded the tracks, preventing any trucks from crossing the railroad. Plaintiff requested that defendant restore the tracks to their condition prior to the damage and remove the barrier in order for trucks to cross the railroad and have access to the facility. In response, defendant requested that plaintiff execute a licensing agreement before it would reopen the crossing. The agreement required an \$1,800 per year maintenance fee and required plaintiff to provide insurance. Plaintiff refused to sign the agreement and filed an action against defendant on 27 February 2006 for trespass to land and declaratory judgment.

Defendant filed a motion for summary judgment on 10 April 2008. On 16 April 2008, plaintiff also filed a motion for summary judgment. Summary judgment was granted in favor of defendant on 15 August 2008. Plaintiff appeals.

Plaintiff argues on appeal that the trial court erred in granting defendant's motion for summary judgment. We disagree.

The standard of review on appeal from a summary judgment order is *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The question is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. *Gattis v. Scotland Cty. Bd. of Educ.*, 173 N.C. App. 638, 639, 622 S.E.2d 630, 631 (2005). The evidence is viewed in the light most favorable to the non-moving party. *Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

Plaintiff's arguments present three essential issues: (I) whether the crossing arose out of an easement by necessity; (II) whether defendant is estopped from preventing use of the property because plaintiff and its predecessors have used the crossing since the 1940's; and (III) whether closing the crossing exceeds reasonable use of the easement.

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I

Undisputed in the present case is the fact that a railroad easement exists and that defendant controls the easement through lease of the easement from the Caldwell County EDC. Defendant also presented uncontroverted evidence establishing that the railroad right-of-way existed prior to the crossing that was constructed during the 1940's and that no deed reserved an express easement regarding the crossing. Plaintiff has produced no record evidence that controverts defendant's evidence or shows the crossing existed at the time the railroad was constructed. Plaintiff has also failed to produce any evidence of an express easement reserving a right to use the crossing. Thus, the question becomes whether the crossing was created by necessity.

To prove an easement by necessity, plaintiff must show:

- (i) the claimed dominant tract and the claimed subservient tract were once held in common ownership that was severed by a conveyance and
- (ii) the necessity for the easement arose out of the conveyance.

Cieszko v. Clark, 92 N.C. App. 290, 296, 374 S.E.2d 456, 460 (1988) (“[U]nder the appropriate circumstances, the law of this State will imply an easement by necessity in favor of a grantor.”). Plaintiff has not established by record evidence that the necessity for the easement arose out of the conveyance of the property to the railroad company in 1902. However, defendant presented evidence that until the 1940's the property which plaintiff now owns was a meadow possibly used as a berry patch. Even viewing the evidence in the light most favorable to the plaintiff, there is no indication that an easement by necessity arose at the time the railroad was constructed.

II

Plaintiff argues defendant should be estopped from closing the crossing because plaintiff and its predecessors in interest have used the crossing since the 1940's. The continued use of the crossing by plaintiff and its predecessor in interest since the 1940's cannot estop defendant from closing the crossing. This principle is soundly established in N.C. Gen. Stat. § 1-44 which provides:

No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right-of-way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right-of-

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way, depot, station house or place of landing, by any statute of limitation or by occupation of the same by any person whatever.

N.C.G.S. § 1-44 (2007). Although the crossing has been in use for over sixty years, plaintiff cannot rely on the doctrine of estoppel to prevent defendant from closing the crossing.

III

Finally, plaintiff's argument that defendant cannot increase the burden of its easement on plaintiff's fee simple estate is erroneous. Plaintiff contends defendant's decision to close the crossing exceeded the reasonable use of the easement and was an increased burden on plaintiff's property. Plaintiff's assertion may be a correct statement of law applicable to most easements. However, because the easement at issue in the instant case is a railroad purpose easement, plaintiff's assertion is erroneous.

In the case of a railroad purpose easement, a property owner may use areas of the right-of-way that are not required for railroad purposes. *Norfolk S. Ry. Co. v. Smith*, 169 N.C. App. 784, 788, 611 S.E.2d 427, 430 (2005). "However, the owner's use is subject to the railroad's easement." *Id.*

It is well settled by statute and precedent in this jurisdiction that when a railroad has acquired and entered upon the enjoyment of its easement, the further appropriation and use by it of the right of way for necessary railroad business may not be destroyed or impaired by reason of the occupation of it by the owner or any other person.

Keziah v. Seaboard Air Line R. Co., 272 N.C. 299, 308, 158 S.E.2d 539, 546 (1968). "The railroad may expand its use of the right-of-way, to the extent of its statutory right, for any legitimate purpose as determined by the railroad's sound business judgment." *Norfolk*, 169 N.C. App. at 789, 611 S.E.2d at 430. " 'Use' by the railroad includes managing safety risks on its right-of-way." *Id.* Because a railroad is required to maintain the safety of the right-of-way, a property owner cannot create risks that interfere with the railroad's maintenance of the right-of-way. *Id.*

The law surrounding railroad purpose easements is clear. A railroad has the authority and ability to expand its use of a right-of-way to manage safety risks. As such, it was within defendant's authority to determine that the crossing interfered with the use of the railroad and subsequently close the crossing.

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For the foregoing reasons, the trial court did not err by granting summary judgment in favor of defendant.

AFFIRMED.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. MARKEUS WESLEY LARGENT, DEFENDANT; SURETY: CREAG A. HANSON, AGENT FOR AMERICAN SAFETY CASUALTY INSURANCE; JUDGMENT CREDITOR: WATAUGA COUNTY BOARD OF EDUCATION

No. COA08-1108

(Filed 16 June 2009)

Bail and Pretrial Release— bond forfeiture—failure to give timely notice of incarceration in another state

The trial court did not err by denying a surety's motion to set aside a bond forfeiture because: (1) the surety failed to give timely notice to the district attorney's office that defendant was incarcerated in another state as required by N.C.G.S. § 15A-544.5(b) (7); (2) although the statute in no way indicates that the incarceration must be regarding the same charges, defendant's period of incarceration must be continuous; and (3) although the surety provided notice to the district attorney regarding defendant's incarceration on 7 May 2008 while defendant was incarcerated in Tennessee for a second time, defendant's incarceration was not continuous with the period of incarceration during which defendant failed to appear in court.

Appeal by surety from order entered 16 June 2008 by Judge Alexander Lyerly in District Court, Watauga County. Heard in the Court of Appeals 26 February 2009.

Stott, Hollowell, Palmer, & Windham, L.L.P., by Aaron C. Low, for surety-appellant.

Miller & Johnson, PLLC, by Nathan A. Miller, for judgment creditor-appellee.

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STROUD, Judge.

The trial court denied the surety's motion to set aside the bond forfeiture. The surety appeals, arguing its motion should have been granted pursuant to N.C. Gen. Stat. § 15A-144.5(b) (7). For the following reasons, we affirm.

I. Background

The trial court found:

1. Defendant failed to Appear in District Court of Watauga County on December 10, 2007 for charges contained in 07 CRS 051934 and 07 CR 051994.
2. Bond Forfeiture Notices were duly issued by the Honorable Kyle David Austin on December 17, 2007 for both of the cases and the Bond Forfeiture Notices were delivered to the surety on December 17, 2007 by the Deputy Clerk of Superior Court, Debbie S. Blake.
3. The Surety, via the bail agent, Creag Hanson, noticed the Watauga County, North Carolina District Attorney's Office on May 7, 2008 that the Defendant was imprisoned in the custody of the Carter County, Tennessee, Sheriff in writing via two separate letters pertaining to each of the individual cases.
4. The Surety, via the bail agent, Craig [sic] Hanson, made a Motion to Set Aside Forfeiture for each of the cases on May 7, 2008 on the basis of the Defendant being incarcerated in a local, state, or federal detention center.
5. The Defendant was incarcerated in Tennessee from November 16, 2007 through December 14, 2007 and again on March 26, 2008 in the Carter County, Tennessee, Sheriff's Office Detention Center and remains currently imprisoned in the Carter County, Tennessee, Sheriff's Office Detention Center as of the time of this Order.
6. The Watauga County Board of Education, via their attorney, Nathan A. Miller, duly objected to the Motions to Set Aside Forfeitures on May 12, 2008.

Based upon its findings the trial court concluded, "The Surety failed to give timely notice to the Watauga County District Attorney's Office that Defendant was incarcerated in another state, as required by North Carolina General Statute § 15A-544.5[(b)](7)." The trial

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court ordered “that the Surety’s Motion to Set Aside the Bond Forfeiture [be] denied.” The surety appeals arguing its motion should have been granted pursuant to N.C. Gen. Stat. § 15A-144.5(b) (7). For the following reasons, we affirm.

II. N.C. Gen. Stat. § 15A-544.5(b) (7)

N.C. Gen. Stat. § 15A-544.5(b) provides in pertinent part:

A forfeiture shall be set aside for any one of the following reasons, and none other:

. . . .

- (7) The defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant’s incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney’s receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C. Gen. Stat. § 15A-544.5(b) (7) (2007).

The facts are not in dispute. The issue is whether the district attorney “was notified of the defendant’s incarceration while the defendant was *still incarcerated*[.]” *Id.* (emphasis added). The surety contends,

If the legislature intended the defendant to be incarcerated and serving one continual sentence from the time of the failure to appear until 10 days after the notice to the District Attorney, then they would have required that the defendant to [sic] be serving a sentence as they did in section (b) (6) and not that the defendant simply be ‘incarcerated.’ In the case at bar, Defendant was still incarcerated 10 days following the notice to the District Attorney . . . , and it makes no difference whether or not the defendant was serving one continual sentence from the failure to appear or not

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The Watauga County Board of Education argues,

[a]t the time of the Surety's notice to the district attorney the Defendant was not incarcerated for the reasons he was incarcerated at the time of his failure to appear. The Defendant instead was incarcerated on entirely unrelated charges. . . .

The Surety is attempting to piggy back off an unrelated incarceration to satisfy the statute. It was mere luck that the Defendant happened to be re-incarcerated in the same county jail as he was in when he failed to appear in Watauga County.

We are presented here with a question of interpretation regarding N.C. Gen. Stat. § 15A-544.5(b) (7). Both parties concede that this is a question of first impression.

Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court. In conducting this review, we are guided by the following principles of statutory construction.

The paramount objective of statutory interpretation is to give effect to the intent of the legislature. The primary indicator of legislative intent is statutory language; the judiciary must give clear and unambiguous language its plain and definite meaning.

In Re Proposed Assessments v. Jefferson-Pilot Life Ins. Co., 161 N.C. App. 558, 559-60, 589 S.E.2d 179, 180-81 (2003) (citations and quotation marks omitted). "Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning, and the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Begley v. Employment Sec. Comm.*, 50 N.C. App. 432, 436, 274 S.E.2d 370, 373 (1981) (citations omitted).

The surety argues the practical effects of the statute, and both the surety and the Watauga County Board of Education arguments regarding the possible intent of the legislature are reasonable. However, the language of the statute is clear. "Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning[.]" *Id.* The language in contention here is the phrase "still incarcerated[.]" N.C. Gen. Stat. § 15A-544.5(b) (7). "Still" is "used as a function word to indicate the continuance of an action or condition[.]" Merriam-Webster's Collegiate Dictionary 1226 (11th ed. 2003). In N.C.

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Gen. Stat. § 15A-544.5(b) (7) “still” “indicate[s] the continuance of” incarceration. *Id.*; see N.C. Gen. Stat. § 15A-544.5(b) (7). Thus, the plain language of the statute refers to one continuous period of incarceration which begins “at the time of the failure to appear” and ends no earlier than 10 days after the date that “the district attorney for the county in which the charges are pending was notified of the defendant’s incarceration[.]” N.C. Gen. Stat. § 15A-544.5(b) (7). However, the statute in no way indicates that the incarceration must be regarding the same charges, but only that the defendant’s period of incarceration be continuous. A defendant could be incarcerated consecutively on numerous different charges, but if there is no interruption in his incarceration during the time period specified by the statute, it falls within the purview of N.C. Gen. Stat. § 15A-544.5(b) (7). However, if defendant is incarcerated at the time he fails to appear and then is later released, only to be incarcerated again at the time notice is provided to the district attorney and for 10 days thereafter, he was not “still incarcerated[.]” *id.*, and this does not fall within N.C. Gen. Stat. § 15A-544.5(b) (7).

Here, the relevant dates are uncontested. Defendant failed to appear on 10 December 2007. On 10 December 2007, defendant was incarcerated in Tennessee, but on 14 December 2007 he was released. On 26 March 2008, defendant was once again incarcerated in Tennessee and remained there as of the time the trial court entered its order. The surety provided notice to the district attorney regarding defendant’s incarceration on 7 May 2008, while defendant was incarcerated in Tennessee for the second time; however, this period of incarceration was not continuous with the period of incarceration during which defendant failed to appear in court. Accordingly, N.C. Gen. Stat. § 15A-544.5(b)(7) was not applicable, and the trial court properly denied the Surety’s motion to set aside the bond forfeiture. This argument is overruled.

III. Conclusion

We conclude that as defendant’s incarceration was not continuous, N.C. Gen. Stat. § 15A-544.5(b)(7) was not applicable. Therefore, the trial court did not err in denying the surety’s motion to set aside the bond forfeiture, and we affirm.

AFFIRMED.

Judges JACKSON and STEPHEN concur.

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[197 N.C. App. 619 (2009)]

STATE OF NORTH CAROLINA v. JOHN THOMAS WEBB, DEFENDANT

No. COA08-806

(Filed 16 June 2009)

1. Evidence— expert testimony—truthfulness of child victim

The trial court erred in a taking indecent liberties with a minor case by overruling defendant's objection to expert testimony regarding the truthfulness of the child victim, and the case is remanded for a new trial.

2. Discovery— sealed documents—in camera review

A de novo review revealed the trial court erred in a taking indecent liberties with a minor case by denying defendant the opportunity to examine certain sealed documents from the Department of Social Services investigation that may have contained exculpatory evidence because the Court of Appeals reviewed the sealed documents, determined they contained potentially exculpatory evidence, and at the very least, they contained information that might cast doubt on the veracity of one or more State witnesses including the victim and the victim's mother.

3. Evidence— expert testimony—veracity of victim's testimony

The trial court erred in a taking indecent liberties with a minor case by allowing the testimony of a Department of Social Services worker concerning whether the claim against defendant was substantiated because expert testimony as to the veracity of the victim's testimony should be excluded.

4. Evidence— prior crimes or bad acts—sexual abuse two and three decades ago

The trial court erred in a taking indecent liberties with a minor case by allowing the testimony of two witnesses who alleged that defendant had abused them twenty-one and thirty-one years prior respectively because: (1) although North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges, when two or three decades have passed between the incidents, courts must require more similarity between the acts than that the victims were young girls in defendant's care, the incidents happened in his home, and he told the girls not to report his behavior; and (2) while the similarities between the incidents need not be unique and bizarre, the similarity must tend to support a reasonable

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inference that the same person committed both the earlier and later acts.

Appeal by defendant from judgment entered 15 November 2007 by Judge Laura J. Bridges in Macon County Superior Court. Heard in the Court of Appeals 14 January 2009.

Melrose, Seago & Lay, P.A., by Nathan J. Earwood, for the defendant.

Attorney General Roy Cooper, by Assistant Attorney General Angette R. Stephenson, for the State.

ELMORE, Judge.

John Thomas Webb (defendant) was convicted of one count of taking indecent liberties with a minor—specifically, his daughter—pursuant to N.C. Gen. Stat. § 14-202.1 and was sentenced to twenty to twenty-four months' imprisonment. As is so often true with cases of sexual abuse, the only person able to testify directly to the events of the abuse was the victim herself.

I.

[1] One of the arguments defendant makes to this Court is that the trial court erred in overruling his objection to certain expert witness testimony, an error which he argues warrants a new trial. We agree.

Defendant's daughter was referred by her pediatrician to a child psychologist, Dr. Fred List, after exhibiting anger problems. At trial, on direct examination, Dr. List was asked: "In your expert opinion, does [the victim] fit the profile of a child who has been exposed to trauma and sexual abuse?" Defense counsel objected; the trial court overruled the objection and instructed Dr. List to answer. In answer, Dr. List testified:

In my opinion, and in the time that I spent with her, and the manner in which she reported and described things, and her emotional responses, all suggested to me that yes, she had been exposed to trauma. And the manner of her description gave me no reason to doubt that there—make sure I phrase it—I believe that yes, she had been exposed to sexual abuse.

This Court has expressly held that such testimony constitutes error. As we explained in *State v. Hannon*, "It is fundamental to a fair trial that the credibility of the witnesses be determined by

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the jury. . . . [T]he admission of such an opinion is plain error when the State's case depends largely on the prosecuting witness's credibility." 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citations omitted).

A very similar situation occurred in the trial of Donald Gene Holloway, as described by this Court in *State v. Holloway*; there, "two witnesses for the State, a pediatrician and a child psychologist, testified that in their opinion the child had testified *truthfully*." 82 N.C. App. 586, 587, 347 S.E.2d 72, 73 (1986). This Court noted:

For a jury trial to be fair it is fundamental that the credibility of witnesses must be determined by them, unaided by anyone, including the judge. Yet, though the State's case depended almost entirely upon the child's credibility as a witness, her credibility in the eyes of the jury was inevitably increased, we believe, by these two learned and prestigious professionals declaring that her testimony was true.

Id. at 587-88, 347 S.E.2d at 73-74. The Court noted that "[t]he evidence did not meet the requirements for expert testimony as it concerned the credibility of a witness, . . . rather than some fact involving 'scientific, technical or other specialized knowledge.'" *Id.* at 587, 347 S.E.2d at 73 (quoting N.C. Gen. Stat. § 8C-1, Rule 702). The Court concluded that this testimony violated Rules 405(a) and 608 of the North Carolina Rules of Evidence and, as such, a new trial was required. *Id.*; N.C. Gen. Stat. § 8C-1, Rules 405(a), 608 (2007).

The case at hand presents a virtually identical situation: the victim testified as to the alleged acts, and an expert witness commented on her truthfulness. Thus, Dr. List's commentary on the truthfulness of the victim was error, and its admission over objection requires a new trial.

As was true in *Holloway*, "[o]ur decision does not require an extended statement of facts or even a recital of the melancholy and sordid details of the charge involved." 87 N.C. App. at 587, 347 S.E.2d at 73.

II.

Although, as already stated, this Court orders a new trial based on the above error by the trial court, three of defendant's other assignments of error bear mention by this Court as they will affect the conduct of that new trial.

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A.

[2] First, defendant argues that the trial court erred in denying him the opportunity to examine certain sealed documents from the Department of Social Services investigation that may have contained exculpatory evidence. We agree.

Our standard of review on this point is *de novo*. *State v. Scott*, 180 N.C. App. 462, 463, 637 S.E.2d 292, 293 (2006).

On appeal, the appellate court is required to examine the sealed records to determine whether they contain information that is favorable and material to an accused's guilt or punishment. "Favorable" evidence includes evidence which tends to exculpate the accused, as well as any evidence adversely affecting the credibility of the government's witnesses. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Thaggard, 168 N.C. App. 263, 280, 608 S.E.2d 774, 785 (2005) (quotations and citations omitted).

Having reviewed the sealed materials, we find that the trial court's failure to disclose these materials to defendant was error. The sealed records contain potentially exculpatory evidence; at the very least, they contain information that might cast doubt on the veracity of one or more State witnesses, including the victim and the victim's mother. The State is obligated by statute to turn over such evidence, and it was error for the trial court to seal the evidence without allowing defendant to inspect it *in camera*. See *State v. Kelly*, 118 N.C. App. 589, 593, 456 S.E.2d 861, 866 (1995) (applying standard set out by Supreme Court for such material that new trial is required where disclosure of sealed materials "probably would have changed the outcome of [defendant's] trial").

B.

[3] Next, defendant argues that the trial court erred in allowing the testimony of a Department of Social Services worker, William Bullock, to testify as to whether the claim against defendant was substantiated. As explained in section I of this opinion, this type of testimony—that is, testimony by an expert as to the veracity of the victim's testimony—should be excluded. See, e.g., *State v. Grover*, 142

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N.C. App. 411, 413, 543 S.E.2d 179, 181 (2001) (“W]here ‘experts found no clinical evidence that would support a diagnosis of sexual abuse, their opinions that sexual abuse had occurred merely attested to the truthfulness of the child witness,’ and were inadmissible.” (quoting *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90 (1997)). As such, it was error for the trial court to admit the testimony.

C.

[4] Finally, defendant argues that the trial court erred in allowing the testimony of two witnesses who alleged that defendant had abused them twenty-one and thirty-one years prior, respectively. We agree.

“The use of evidence as permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity.” *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). “[T]he passage of time between the commission of the two acts slowly erodes the commonality between them.” *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988). While it is true that “North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges[,]” *State v. Jacob*, 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994), when two or three decades have passed between the incidents, certainly the Court must require more similarity between the acts than what was provided herein—namely, that the victims were young girls in defendant’s care, the incidents happened in his home, and he told the girls not to report his behavior. While “the similarities between the two incidents need not be unique and bizarre[,] . . . the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts.” *State v. Sneed*, 108 N.C. App. 506, 509-10, 424 S.E.2d 449, 451 (1993) (quotations and citations omitted). Such is not the case here. Admission of this testimony was, therefore, error.

III.

For the foregoing reasons, we order a new trial.

New trial.

Judges CALABRIA and STROUD concur.

CITY OF GREENSBORO v. MORSE

[197 N.C. App. 624 (2009)]

CITY OF GREENSBORO, PLAINTIFF v. KEVIN B. MORSE, DEFENDANT

No. COA08-547

(Filed 16 June 2009)

1. Statutes of Limitation and Repose— collection of parking tickets—pursuant to ordinance—N.C.G.S. § 1-54(2) not applicable

The trial court erred by concluding that the one year statute of limitations in N.C.G.S. § 1-54(2) barred plaintiff city's recovery in an action to recover unpaid parking tickets and penalties. That statute applies only to actions based on statutes which expressly provide for a penalty or forfeiture for punitive purposes; the penalty at issue here is civil in nature. N.C.G.S. § 160A-175 grants municipalities the power to impose fines and penalties for violation of its ordinances.

2. Statutes of Limitation and Repose— collection of parking tickets—no statute of limitations against city

The common doctrine of *nullum tempus occurrit regi* (time does not run against the king) applied such that no statute of limitations barred an action to recover unpaid parking tickets and penalties, which is a governmental function.

Appeal by plaintiff from an order entered 24 January 2008 by Judge Margaret L. Sharpe in Guilford County District Court. Heard in the Court of Appeals 14 January 2009.

City of Greensboro City Attorney's Office, by Anargiros N. Kontos, for plaintiff-appellant.

North Carolina League of Municipalities, by North Carolina League of Municipalities General Counsel Andrew L. Romanet, Jr. and Senior Assistant General Counsel Gregory F. Schwitzgebel, III, Amicus Curiae.

No brief, for defendant-appellee.

JACKSON, Judge.

The City of Greensboro ("plaintiff") appeals the trial court's order granting a motion by Kevin B. Morse ("defendant") to dismiss plaintiff's complaint. We reverse the trial court's order and remand the matter for the reasons set forth below.

CITY OF GREENSBORO v. MORSE

[197 N.C. App. 624 (2009)]

Between March 2004 and February 2007, plaintiff issued to defendant eighty citations for parking violations of plaintiff's municipal ordinances. Defendant did not pay the associated penalties assessed, and on 16 February 2007, plaintiff commenced this action in small claims court to recover from defendant a sum of \$2,345.00 in unpaid parking ticket and penalty assessments.¹ On 14 March 2007, a magistrate entered an order in plaintiff's favor for \$2,335.00. Defendant timely appealed, and the case was scheduled for mandatory arbitration. On 16 May 2007, the arbitrator awarded \$390.00 to plaintiff. On 1 June 2007, plaintiff sought a trial *de novo*. On 18 July 2007, defendant filed a motion to dismiss plaintiff's complaint pursuant to North Carolina Rules of Civil Procedure, Rule 12(b)(6). On 24 January 2008, the trial court entered an order granting defendant's motion to dismiss after concluding that plaintiff's complaint was barred by the one-year statute of limitations set forth in North Carolina General Statutes, section 1-54(2). Plaintiff appeals.

We review the trial court's decision to dismiss plaintiff's claim *de novo*. *Jones v. Coward*, 193 N.C. App. 231, 233, 666 S.E.2d 877, 879 (2008) (citing *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008)). We inquire

whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. In ruling upon such a motion, the complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.

Id. (quoting *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997)).

[1] Plaintiff argues that the trial court erred by concluding that the one year statute of limitation period set forth in North Carolina General Statutes, section 1-54(2) barred plaintiff's recovery. We agree.

Section 1-54(2) sets forth one of several statutes of limitation contained within our General Statutes. It requires the commencement within one year of an action "[u]pon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation." N.C. Gen.

1. Plaintiff concedes that defendant paid \$10.00 after this action commenced, and that the balance of defendant's unpaid parking tickets is now \$2,335.00.

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Stat. § 1-54(2) (2007). We previously have held that “[North Carolina General Statutes, section] 1-54(2) applies only to actions based on statutes which expressly provide for a penalty or forfeiture, the purpose of which is punitive.” *Miller v. C. W. Myers Trading Post*, 85 N.C. App. 362, 368, 355 S.E.2d 189, 193 (1987) (original emphasis omitted) (citing *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979)). Here, the penalty at issue is civil in nature.

North Carolina General Statutes, section 160A-175 grants municipalities the “power to impose fines and penalties for violation of its ordinances.” N.C. Gen. Stat. § 160A-175(a) (2007). Furthermore,

[a]n ordinance may provide that violation shall subject the offender to a civil penalty to be recovered by the city in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time after he has been cited for violation of the ordinance.

N.C. Gen. Stat. § 160A-175(c) (2007).

Plaintiff has enacted Greensboro, North Carolina Code of Ordinances, section 16-71 which provides civil penalties for violations of various municipal parking regulations. *See* Greensboro, N.C., Code of Ordinances § 16-71. Subsection (a) details the penalty amounts and types of violations. *Id.* Subsection (b) provides that “[t]he city tax collector may accept payments in full and final settlement of the claim or claims, rights or rights of action which the city may have to enforce such penalties, by civil action in the nature of debt.” *Id.*

In the case *sub judice*, the record demonstrates that the penalties assessed against defendant were pursuant to a municipal ordinance rather than a statute. Therefore, we hold that the trial court erred by dismissing plaintiff’s complaint pursuant to the statute of limitations set forth in North Carolina General Statutes, section 1-54(2) because section 1-54(2) applies only to an action for a penalty or forfeiture. *See* N.C. Gen. Stat. § 1-54(2) (2007); *Miller*, 85 N.C. App. at 368, 355 S.E.2d at 193.

[2] Plaintiff further contends that the common law doctrine of *nulum tempus occurrit regi* applies such that no statute of limitations bars actions pursuant to governmental functions. We agree.

Our Supreme Court has explained that *nullum tempus occurrit regi*—“time does not run against the king”—“developed at common

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law under the reasoning that the king, who was preoccupied with weighty affairs, ‘should [not] suffer by negligence of his officers’ in failing to pursue legal claims.” *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 6, 418 S.E.2d 648, 652 (1992) (quoting *Armstrong v. Dalton*, 15 N.C. (4 Dev.) 568, 569 (1834)). Although the doctrine “‘appears to be a vestigial survival of the prerogative of the Crown,’ the source of its continuing vitality ‘is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.’” *Id.* (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132, 82 L. Ed. 1224, 1227-28 (1938)). The Court instructed that “*nullum tempus* survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State.” *Rowan County Bd. of Education*, 332 N.C. at 8, 418 S.E.2d at 653. However,

[n]ullum tempus does not . . . apply in every case in which the State is a party. If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly includes the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly excludes the State.

Rowan County Bd. of Education, 332 N.C. at 9, 418 S.E.2d at 654.

We previously have held that, like taxes, “the collection of parking fines and late fees, imposed for parking violations, is a governmental function. This is so because the collection of these fines and fees is necessary to enforce the parking regulations.” *Wall v. City of Raleigh*, 121 N.C. App. 351, 354, 465 S.E.2d 551, 553 (1996). Therefore, we hold that the collection of fines and fees to enforce plaintiff’s parking regulations also is a governmental function within the meaning of the doctrine of *nullum tempus*. See *Rowan County Bd. of Education*, 332 N.C. at 8-9, 418 S.E.2d at 653-54; *Wall*, 121 N.C. App. at 354, 465 S.E.2d at 553.

Accordingly, we reverse the trial court’s order granting defendant’s motion to dismiss plaintiff’s complaint as being time-barred pursuant to North Carolina General Statutes, section 1-54(2), and we remand the matter to the trial court.

Reversed and remanded.

Chief Judge MARTIN and Judge MCGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JUNE 2009}

APAC-ATLANTIC, INC. v. 7 STAR CONSTR. CO. No. 08-913	Mecklenburg (07CVS5312)	Reversed and remanded
BADSTEIN v. BADSTEIN No. 08-1176	Orange (03CVD702)	Reversed and remanded
BENNETT v. MERCHANDISE MART PROPS., INC. No. 08-784	Guilford (07CVS1009)	Affirmed
BRYANT v. JONES No. 08-1404	Jackson (05CVD626)	Affirmed
CARTER v. FRESENIUS MED. CTR. No. 08-1063	Indus. Comm. (IC395242)	Remanded
CRAIG v. SANDY CREEK CONDO. ASS'N No. 08-1048	Wake (06CVS10020)	Affirmed
DECKER v. HOMES, INC./CONSTR. MGMT. & FIN. GRP. No. 08-1553	Buncombe (04CVS70)	Dismissed
HICKS v. DUNN-BENSON FORD, INC. No. 08-1088	Sampson (07CVS754)	Reversed and remanded
IN RE A.B.E. No. 09-137	Chatham (06JA16)	Affirmed
IN RE A.D.T. & D.R.T., III No. 09-209	Gaston (05JT157) (05JT158)	Reversed and remanded
IN RE D.J.C. No. 09-242	Lincoln (05JT155)	Affirmed
IN RE J.M.M. & P.L.M. No. 09-80	Harnett (07J187) (07J188)	Affirmed
IN RE N.M.W. No. 09-39	Wayne (07JT03)	Affirmed
IN RE P.R. & H.R. No. 08-1504	Orange (06JT179) (06JT180)	Affirmed in part; remanded
MANITIUS v. GUTHRIE No. 08-1083	Carteret (05CVS1379)	Dismissed

NAZZARO v. SAGUN No. 08-691	Dare (06CVS801)	Affirmed
NORTHLAND CABLE TELEVISION, INC. v. HIGHLANDS CABLE GRP, LP No. 08-997	Macon (03CVS424)	Affirmed
STATE v. ALLEN No. 08-1213	Randolph (05CRS6336)	No error
STATE v. BARTLETT No. 08-1123	Durham (07CRS45658) (07CRS45659) (07CRS45662) (07CRS45663)	Reversed
STATE v. CATOE No. 08-1541	Mecklenburg (06CRS252337)	No error
STATE v. CAUTHEN No. 08-1527	Forsyth (07CRS46215) (07CRS51061)	No error
STATE v. COLEMAN No. 09-105	Orange (07CRS55215) (08CRS1187) (08CRS51382) (08CRS52826) (08CRS52827)	No error
STATE v. CROCKER No. 08-1062	Rowan (07CRS1580) (07CRS1581) (07CRS1582) (07CRS1583) (07CRS1584) (07CRS1585) (07CRS1586) (07CRS1587)	No error
STATE v. DAVIS No. 08-1252	Halifax (07CRS2782) (07CRS54159) (07CRS54160)	No error
STATE v. HELMS No. 08-1323	Rowan (04CRS58832)	No error
STATE v. JACKSON No. 08-1434	Mecklenburg (07CRS248414) (07CRS248415) (08CRS7608)	No error

STATE v. LAFOUNTAIN No. 08-924	Clay (98CRS61) (97CRS449)	Remanded for resentencing
STATE v. LAWRENCE No. 08-1231	Durham (04CRS41102)	Vacated
STATE v. MOBLEY No. 08-1415	Mecklenburg (02CRS222885) (02CRS222886) (02CRS222887) (02CRS222888)	No error
STATE v. MORGAN No. 08-1342	Guilford (07CRS95428)	No error
STATE v. NICHOLSON No. 08-1007	Durham (05CRS56102)	No error
STATE v. PARKER No. 08-1260	Columbus (07CRS444) (07CRS456)	No error
STATE v. PARKER No. 08-1471	Alamance (05CRS61811) (06CRS58053)	No error
STATE v. PEELER No. 08-1450	Guilford (07CRS105160)	No error
STATE v. PHILLIPS No. 08-1512	Wake (00CRS99443) (07CRS15716)	No error
STATE v. POOLE No. 08-876	Caswell (07CRS50165) (07CRS50166)	No error
STATE v. STURDIVANT No. 08-1422	Davidson (06CRS8364) (06CRS55582)	No prejudicial error. Remand to Trial Court for correction of clerical error on judgment and commitment.
STATE v. WALKER No. 08-1224	Rockingham (07CRS1984) (07CRS50962)	No error
STATE v. WARD No. 08-1465	Watauga (07CRS818)	No error
SUNSHINE HEAVY HAULING, INC. v. BEATTY No. 08-1101	(07CVS19677)	Affirmed

TOWN OF LELAND, N.C. v.
HWW, LLC
No. 08-987

Brunswick
(07CVS2440)

Affirmed in part,
remanded in part

TURNER v. BEATTY
No. 08-1100

Guilford
(07CVS2285)

Affirmed

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STATE OF NORTH CAROLINA v. CARNELL TYRONE STREATER

No. COA08-961

(Filed 7 July 2009)

1. Sexual Offenses— expert testimony—sexual abuse by defendant—opinion on victim’s credibility—plain error

A pediatrician’s testimony in a prosecution for first-degree sexual offense that his findings were consistent with “the history that [he] received from [the victim]” of repeated anal penetration by defendant constituted an improper opinion on the victim’s credibility and amounted to plain error where the pediatrician testified that there was no physical evidence of anal penetration; the victim’s medical history as testified to by the pediatrician presented an unclear evidentiary foundation for the pediatrician’s conclusion that defendant, rather than one of the other men the victim referred to as “dad,” was the perpetrator of the sexual offense; and the victim’s testimony was the only direct evidence implicating defendant as the perpetrator of the sexual offense.

2. Evidence— expert testimony—sexual abuse victim’s physical condition consistent with history

The trial court did not err in a first-degree statutory rape case when it admitted an expert’s testimony that the victim’s physical condition was consistent with her history because: (1) the doctor was qualified as an expert in the field of pediatrics, the expert testified that the victim’s history of repeated vaginal penetration was consistent with his findings made during his examination of the victim, and his testimony was not impermissible opinion testimony regarding the victim’s credibility since the expert’s previous testimony established the existence of physical evidence supporting a diagnosis of sexual intercourse; and (2) once the trial court accepted the doctor as an expert, controversy over his opinion goes to the weight of his testimony and not its admissibility.

3. Evidence— child abuse investigator—victim’s interview at DSS

The trial court did not commit plain error in a first-degree sexual offense and first-degree rape case by allowing a child abuse investigator’s testimony about the victim’s interview at DSS

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because: (1) the investigator did not testify as an expert; (2) the investigator did not render an opinion that sexual abuse had occurred; and (3) the investigator merely explained her usual protocol in forensic interviews and stated she thought the first portion of the interview was sufficient to support the allegations contained in the protective services report.

4. Evidence— victim’s testimony—truthfulness—swore to Jesus

Although the trial court erred in a first-degree sexual offense and first-degree rape case by admitting the victim’s testimony that she told the truth and swore to Jesus regarding her previous testimony, it did not amount to plain error because it cannot be said that the victim’s testimony tilted the scales and caused the jury to reach its verdict convicting defendant of first-degree rape in light of the remainder of the victim’s testimony, the physical evidence of vaginal penetration presented by a doctor, and the victim’s prior consistent statements made to a child sex abuse investigator.

5. Evidence— prior crimes or bad acts—incarceration—drug use—non-sexual physical assault of a victim

The trial court did not commit plain error in a first-degree sexual offense and first-degree rape case by admitting into evidence a witness’s testimony concerning defendant’s prior bad acts including incarceration, drug use, and non-sexual physical assault of a victim because: (1) although the trial court erred when it admitted a witness’s testimony that defendant was previously incarcerated and used marijuana while living with the witness and the victim since this evidence came before defendant placed his credibility at issue by testifying, it cannot be said that absent the error the jury probably would have reached a different verdict in light of other similar evidence properly admitted at trial; and (2) the testimony concerning a “whooping” incident tended to show the victim began wetting the bed around the time of the alleged sexual abuse and was properly admitted to establish defendant’s intent to conceal the alleged sexual abuse.

6. Constitutional Law— effective assistance of counsel—dismissal without prejudice to file motion for appropriate relief

Although defendant contends he received ineffective assistance of counsel in a first-degree sexual offense and first-degree

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rape case based on his counsel's failure to object at trial, this assignment of error is dismissed without prejudice to allow defendant to file a motion for appropriate relief with the trial court because the trial court is in a better position to determine whether counsel's performance was deficient and prejudiced defendant.

7. Sentencing— consolidated—remand for resentencing— new trial awarded on one of charges

A first-degree sexual offense and first-degree rape case was remanded for resentencing on defendant's first-degree rape conviction because: (1) the trial court consolidated defendant's convictions; and (2) defendant was awarded a new trial on the charge of first-degree sexual offense.

Appeal by defendant from judgment entered on 21 February 2008 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 28 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Carnell Tyrone Streater ("defendant") appeals from judgment entered after a jury found him guilty of: (1) first-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a) and (2) first-degree rape pursuant to N.C. Gen. Stat. § 14-27.2(a). We award defendant a new trial on his first-degree sexual offense charge, hold there to be no error in his first-degree rape conviction, and remand for resentencing on the first-degree rape conviction.

I. Background

Defendant was indicted for first-degree statutory sexual offense and first-degree statutory rape on 13 March 2006. The indictments alleged that "between the 1st day of October, 2004 and the 31st day of March, 2005" defendant engaged in a sex offense and vaginal intercourse with B.H.S. (hereinafter "B.H.S." or "the victim").

The State's evidence showed that B.H.S. was born on 7 October 2000. When B.H.S. was age four she was living with her parents,

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defendant and Rosanna Nicole Bacon (“Bacon”). At this time, defendant was unemployed and “watched” B.H.S. while Bacon worked at a dance club about five nights a week from approximately 5:30 p.m. to 4:00 a.m. She testified while Bacon was at work, defendant “would do things [she] didn’t like,” on her “bed.” Defendant would put “[h]is private” inside of the victim’s “[f]ront and back” privates, and doing these acts “hurt” her front and back parts. She testified that she would tell him to stop, but he did not. B.H.S. further testified that defendant told her he “would ground [her]” if she told anyone. B.H.S. did not tell Bacon about these events because she “felt scared to” tell. She testified the acts stopped around October of 2005, when Bacon “wanted [B.H.S.] to go stay with [B.H.S.’s] aunt and uncle so [Bacon] could get [her]self together”

On cross-examination, B.H.S. testified she first told her aunt and uncle about these events. She further testified that the acts caused a “mess” on sheets which were changed by Bacon. At trial she testified that she called Bobby and Boyd, two friends of her mother who lived with them, “daddy” and would also call her uncle “daddy,” but none of the other men she called “daddy” touched her, and that the person who touched her was defendant.

Bacon testified that she, B.H.S., and defendant lived together from “the time period around her fourth birthday” until March 2005 when defendant had a stroke. During the period of time in which the events B.H.S. complained of, and afterward, two other men, Boyd and Bobby, lived in the house with Bacon and B.H.S. Both Boyd and Bobby “watched” B.H.S. Bacon testified that during this period of time she used cocaine supplied by Bobby, and defendant used marijuana. She also testified during the period of time she lived with defendant, B.H.S. did not report to her that defendant touched her, and that she did not notice anything or suspect anything. Bacon testified that defendant had a stroke in March and lived in a hospital and nursing home. After leaving the nursing home, he returned to her home.

On 12 October 2005, Bacon signed an agreement relinquishing custody of B.H.S. to Bacon’s brother George and his wife. Their agreement provided for return of the victim to Bacon conditioned upon her giving up cocaine and dancing.

The Alamance County Department of Social Services (“DSS”) received a Protective Services Report regarding B.H.S. on 27 January 2006. The custodial aunt brought B.H.S. to DSS’s interview facility on

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30 January 2006. At the interview, B.H.S. described defendant's actions to DSS's child abuse investigator Leslie Jones ("Jones"). B.H.S. drew anatomical pictures of herself and described defendant's genitals. Her pictures also showed urine and blood on the bed.

Lieutenant Weidner of the Thomasville Police Department testified that he conducted an investigation of B.H.S.'s report which included seizing a mattress from the residence of Bacon. After being tested by the SBI, there were no findings of bodily fluids present.

At DSS's request, Dr. Joseph Pringle, Jr. ("Dr. Pringle") examined B.H.S. on 3 February 2006. At trial Dr. Pringle was qualified without objection as an expert in the field of pediatrics. The prosecutor notified the court at the time of Dr. Pringle's testimony that Dr. Pringle was "obviously extremely busy" and was specially scheduled to testify at 2:00 p.m. on 20 February 2008. His direct examination with regard to the history given him by the victim is as follows:

Q During the time period in which you spoke with [B.H.S.], do you recall any specific comments she made to you in reference to the allegations?

A Yes. She was calm during the interview process and stated to me that her dad—and she did not name a name—but she called and said her dad and she used the word weeny for penis, stuck his weeny in both her front and back areas and on her bottom and it hurt. And at times there was some bleeding after the event occurred and she said it happened many times. She didn't give me a number of times

* * * *

Q Explain to the ladies and gentlemen what a physical examination or that part of the evaluation entails.

A It is a physical examination in child sexual or physical abuse cases. We are looking for signs of trauma such as bruises, burns, scars and lacerations. In sexual abuse cases as alleged here, we are looking for signs of any changes in the anatomy of the genital area that might have been caused by trauma or signs of infection such as vaginal discharge or bleeding for an accute (sic) event.

Q In your experience and in the literature that's published in this field, when you go in for these examinations, regardless of the history that you receive from the child making the allegations, do you expect to make findings, generally?

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A Many times in sexual abuse cases there are no residual findings in the genital area that will say yes or no to this, that the abuse did or did not occur. It is not uncommon to have the abuse alleged and have a normal genital examination.

Q Is there any reason why you expect that other than the literal take says that, is there any particular experience you have in that area of the human body causes you to believe that?

A It could be the degree of trauma involved. If it was minor trauma, it wouldn't show anything. If the tissues are stretchy, they give or take. They may just stretch and spring back to normal if there's no laceration or abrasion or tearing of the tissues at all. There was no evidence of discharge here either so—

Q Thank you. I appreciate you answering that question. That's in general?

A In general.

Dr. Pringle explained the procedures he used to examine the victim and that he conducted a full examination of the victim's vaginal and anal openings. He testified the victim's "vaginal opening was abnormal in several ways[:]" (1) "it was slightly larger than . . . a child of her age[;]" (2) "there w[ere] deep notches at the upper part of the vaginal opening . . . at 10:00 o'clock and 2:00 o'clock[;]" and (3) "[t]here was also a small scar just inside the rim of the vaginal opening that looked like a healed laceration" Dr. Pringle stated this was a "significant finding." The examination of Dr. Pringle continued as follows:

Q Would you find that based on the history that we already covered, [the victim's] statements that the defendant did penetrate her with his penis on many occasions, would you find that that is consistent with a finding of two deep notches in the vaginal tissue?

A Yes, I would think so. The penetration split the opening at the margins of the vaginal opening and created the tears that resulted in these notches as they healed.

After explaining the formation of scar tissue, the examination continued as follows:

Q Again, based on the history that you received from [B.H.S.], repeated penile intercourse by the defendant, did you find that's consistent with that history?

A Yes, I believe so. It was not a normal finding.

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Q Taking that and moving to the next part of that examination, you also had a history from [B.H.S.], as you indicated in your testimony, of anal penetration by the defendant's penis; is that correct?

A That is correct.

Q After you finished your vaginal examination did you examine her anal area?

A Yes, I did.

* * * *

Q And in reviewing of the examination of [B.H.S.] at that time, did you make any significant findings there?

A No. I thought her anal opening looked normal in her size, shape and caliber. There was no hemorrhoids or fissures or splits in the anal wall. It looked normal.

Q Based on the history that you received from [B.H.S.], potentially repeated penetration of the defendant's penis into the anal area, would you find that inconsistent with your medical findings of no trauma or would you find that consistent with it?

A I think it was consistent with the findings. She may not, despite having been anally penetrated, she may not have had any physical findings. In many cases it is common to have a normal exam even after an allegation of physical sexual abuse in that area.

Dr. Pringle indicated that there were no other allegations made by the victim other than those indicated. Defendant testified in his own defense and denied the charges. On 21 February 2008, a jury found defendant guilty of first-degree sexual offense and first-degree rape. The trial court determined defendant to be a prior record level III offender, consolidated the convictions, and sentenced him to a minimum of 269 and a maximum of 332 months' incarceration. Defendant appeals.

II. Issues

Defendant argues the trial court committed plain error when it admitted: (1) Dr. Pringle's expert testimony that "sexual abuse" had in fact occurred; (2) Dr. Pringle's expert testimony that defendant's repeated penetration of the victim with his penis was consistent with

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her history and bolstered the victim's credibility; (3) Dr. Pringle's expert testimony that the presence and absence of physical findings were both consistent with the victim's history; (4) Jones's testimony about the credibility and sufficiency of the victim's initial DSS interview; (5) the victim's testimony about the truthfulness of her testimony; and (6) evidence of defendant's prior bad acts. Defendant also argues he received ineffective assistance of counsel.

III. Standard of Review

Because defendant failed to object or move to strike this testimony, we must determine whether these evidentiary errors amounted to plain error.

When an issue is not preserved in a criminal case, we apply plain error review. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). We find plain error

only in exceptional cases 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.*" Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error.

State v. Davis, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998) (citations omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). Accordingly, we must determine whether the jury would probably have reached a different verdict if this testimony had not been admitted. *See State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (explaining that "plain error" is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached"), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988); *State v. Hammett*, 361 N.C. 92, 637 S.E.2d 518 (2006).

IV. Dr. Pringle's Testimony

[1] Defendant argues he is entitled to a new trial in the sex offense conviction because Dr. Pringle's expert opinion evidence that sexual abuse had in fact occurred was plain error. In addition, defendant argues that he is entitled to a new trial on both cases because Dr. Pringle's evidence that the victim's physical condition was consistent with her testimony that it was defendant who had repeatedly penetrated her with his penis and that the presence and absence of physi-

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cal findings were both consistent with the victim's history. We agree with defendant with regard to the sexual abuse conviction but disagree with defendant with regard to the rape conviction.

Our consideration of these issues is governed by *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002); *Hammitt*, 361 N.C. 92, 637 S.E.2d 518; *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988); and *In re Butts*, 157 N.C. App. 609, 582 S.E.2d 279 (2003), *disc. review improvidently allowed, appeal dismissed*, 358 N.C. 370, 595 S.E.2d 146 (2004), and their progeny. We are also mindful that application of the evidentiary principles established by these cases are *sui generis* involving a fact intensive analysis of the testimony involved. There is a fine line between permissible and impermissible expert testimony and its effects on the jury's result.

We find plain error in the sex abuse conviction based upon our analysis of the following factors and their cumulative effects on the jury result in that specific conviction. These factors include (1) the presence of ordinary evidentiary error which, if an objection had been lodged, should have been sustained; (2) the ambiguous testimony of Dr. Pringle as to which of the two charges his testimony was directed toward with regard to the allegations of "sexual abuse"; (3) the victim's medical history as testified to by Dr. Pringle, presenting an unclear evidentiary foundation for the conclusion by Dr. Pringle that defendant, rather than one of the other men the victim called "Dad," was the perpetrator of the sexual abuse; (4) the likelihood that Dr. Pringle's opinion bolstered the victim's credibility with regard to the sexual abuse case and its probable impact on the jury; (5) the lack of a curing instruction with regard to the evidence which could be considered by the jury in the sexual abuse conviction; and (6) lack of any corroborative testimony or physical evidence, which was not derived from the child's testimony, that sexual abuse (as opposed to rape) had in fact occurred.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) holds:

In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility.

See also, *State v. Trent*, 320 N.C. 610, 614-15, 359 S.E.2d 463, 465-66 (1987); *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *aff'd per*

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curiam, 354 N.C. 354, 553 S.E.2d 679 (2001). However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith. *State v. Hall*, 330 N.C. 808, 818, 412 S.E.2d 883, 888 (1992); *Aguallo*, 322 N.C. at 822-23, 370 S.E.2d at 678; *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987).

N.C. Gen. Stat. § 8C-1, Rule 702 (2007), provides:

Testimony by experts.

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

The proper foundation is a predicate to the admission of expert opinion. In a sex abuse case, a physical examination and an interview with the victim can lay the proper foundation for expert testimony.

Prior to Dr. Pringle's testimony, testimony from the victim and Bacon showed that the victim referred to as many as four men by the name of "daddy." In his direct testimony, Dr. Pringle, in reporting history given by the victim, "dad," and "she did not give a name," was the perpetrator of both the vaginal and anal penetration. Subsequently, Dr. Pringle testified "in general" that physical findings are not always present in sex abuse cases. This conclusion was proper testimony and provided the needed evidence for the State.

Nonetheless, the State examined Dr. Pringle with leading questions which did not have the predicate foundation. The questions assumed a fact not in evidence from Dr. Pringle's history—that the man the victim named as "dad" and defendant were the same person. The impact of this questioning could not be for the purpose of clarifying for the jury the fact that sexual abuse can occur in the absence of physical findings. Prior to that question being lodged, Dr. Pringle had testified that physical findings of abuse were not always present in sex abuse cases. The impact of this line of questions was not only to bolster the credibility of defendant but to resolve the issue for the jury that the victim had specifically identified defendant as the perpetrator during her case history, which was directly contrary to Dr. Pringle's earlier testimony. The leading questioning repeatedly made this connection without proper foundation.

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While Dr. Pringle could give such testimony with regard to vaginal rape, where he found “significant” findings of physical evidence to support the charge history, he cannot testify that it was defendant who repeatedly abused the victim where no such physical evidence exists. He could testify that the physical findings could be present even where there was repeated penetration, but it is the specific identification of defendant as perpetrator which crosses over the line into impermissible testimony.

Here, following Dr. Pringle’s testimony, the prosecutor questioned Dr. Pringle:

Q Can you explain to the ladies and gentlemen when you have a history as described by [the victim] and you moved to examine the anus what would you be looking for as far as that part of the body is indicated?

A We are looking for a natural laxity, gaping anal opening caused by a breakdown of the anal sphincter muscle that would result in an anal laxity with a breakdown of the anal sphincter. We would look for fresh lacerations or tears if they were recently created.

Q And in reviewing of [sic] the examination of [the victim] at that time, did you make any significant findings there?

A No. I thought her anal opening looked normal in her [sic] size, shape and caliber. There [were] no hemorrhoids or fissures or splits in the anal wall. It looked normal.

Q Based on the history that you received from [the victim], potentially repeated penetration of the defendant’s penis into the anal area, would you find that inconsistent with your medical findings of no trauma or would you find that consistent with it?

A I think it was consistent with the findings. She may not, despite having been anally penetrated, she may not have had any physical findings. In many cases it is common to have a normal exam even after an allegation of physical sexual abuse in that area.

Dr. Pringle testified that there was no physical evidence of anal penetration. The trial court therefore erred when it admitted Dr. Pringle’s testimony that his findings were consistent with “the history that [he] received from [the victim]” of repeated anal penetration by defendant. “[S]uch testimony [was] an impermissible opinion regarding the victim’s credibility.” *Stancil*, 355 N.C. at 266-67, 559 S.E.2d at 788.

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Here, the jury had only the testimony of the victim and testimony by investigators that the victim had repeated the same evidence to them at an earlier time. The victim's testimony was the only direct evidence implicating defendant on the charge of first-degree sexual offense. Dr. Pringle's testimony amounted to an improper opinion on the victim's credibility, and it had a probable impact on the jury's result. *See State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (“[B]ecause there was no physical evidence of abuse and the State's case was almost entirely dependent on J.M.'s credibility with the jury, the admission of Dr. Brown's statement was plain error.”), *disc. review denied*, 356 N.C. 173, 567 S.E.2d 144 (2002); *State v. Couser*, 163 N.C. App. 727, 731, 594 S.E.2d 420, 423 (2004) (“We conclude that the impermissible expert medical opinion evidence had a probable impact on the jury's result because it amounted to an improper opinion on the victim's credibility, whose testimony was the only direct evidence implicating defendant.”). Defendant is entitled to a new trial on the charge of first-degree sexual offense. In light of this holding, we review defendant's remaining assignments of error only as they relate to his first-degree rape conviction.

[2] Defendant's remaining arguments with regard to Dr. Pringle's testimony are that the trial court erred when it admitted Dr. Pringle's testimony that the victim's physical condition was consistent with her history and found that this testimony was not helpful to the jury. We disagree.

“If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.” N.C. Gen. Stat. § 8C-1, Rule 702(a). “[O]nce the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility.” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 461, 597 S.E.2d 674, 688 (2004) (citation omitted).

Here, Dr. Pringle was qualified as “an expert in the field of pediatrics.” Dr. Pringle testified that the victim's history of repeated vaginal penetration was consistent with his findings made during his examination of the victim's vaginal opening. This testimony was not impermissible opinion testimony regarding the victim's credibility

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because Dr. Pringle's previous testimony established the existence of physical evidence supporting a diagnosis of sexual intercourse. *Stancil*, 355 N.C. at 266-67, 559 S.E.2d at 789. Once the trial court accepted Dr. Pringle as an expert, controversy over his opinion goes to the weight of his testimony, not its admissibility. *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688. The trial court did not err when it allowed Dr. Pringle to testify that his physical findings were consistent with the victim's history. These assignments of error are overruled.

V. Jones's Testimony

[3] Defendant argues the trial court committed plain error when it allowed Jones's testimony about the victim's interview at DSS "because it was 1) opinion evidence a legal standard had been met, and 2) evidence on [the victim's] credibility." We disagree.

Jones testified that as a child abuse investigator she conducts forensic interviews of children to determine "whether the allegations [contained in the Protective Services Report] are true or false." After playing a portion of the videotaped interview of the victim for the jury, the following exchange occurred between the prosecutor and Jones:

Q During this part of the video you and [the victim] are out of the room; is that correct?

A Yes.

Q Where did you go?

A I walked up with [the victim] where there was another play area and walked back down the hall.

Q Did you meet with anybody at that time?

A I spoke with Detective Kelly.

* * * *

Q What was the topic of your discussion? Don't say what anybody else said, but what did you talk about?

A Detective Kelly and I talked about was there any additional information or any other questions that need to be asked.

Q Is that normal protocol [sic] that you take a break and ask if there's any other questions that anybody needs to ask?

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A Right.

* * * *

Q What did you tell [Detective Kelly] about what was [sic] the answers of the child?

A I felt from that interview there was enough.

Q For the allegations?

A For the allegations on the report.

Defendant correctly notes that in *State v. Parker*, our Supreme Court stated:

An expert may not testify regarding whether a legal standard or conclusion has been met “at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness.” Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable.

354 N.C. 268, 289, 553 S.E.2d 885, 900 (2001) (citations omitted) (emphasis added), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). *Parker* is not applicable here, however, because Jones did not testify as an expert. More importantly, Jones did not render an opinion that sexual abuse had occurred. Jones merely explained her usual protocol in forensic interviews and stated she thought the first portion of the interview was sufficient to support the allegations contained in the Protective Services Report. The trial court properly allowed Jones’s testimony. This assignment of error is overruled.

VI. The Victim’s Testimony

[4] Defendant argues the trial court committed plain error when it admitted the victim’s testimony “that she ‘told the truth’ and ‘swore to Jesus[.]’ ” We disagree.

“The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone.” *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784, *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 438 (1995). “Therefore . . . it is improper for . . . counsel to ask a witness (who has already sworn an oath to tell the truth) whether he has in fact spoken the truth during his testimony.” *State v. Chapman*, 359 N.C. 328, 364, 611 S.E.2d 794, 821 (2005).

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In *Chapman*, our Supreme Court stated:

[T]he error cited by [the] defendant involve[d] the prosecutor's questions to the State's witness after that witness's credibility had been attacked. Moreover, [the] defendant did not object to the prosecutor's questions concerning [the witness's] truthfulness at trial; thus, [the] defendant must show plain error to prevail on appeal. As stated earlier, plain error is error " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " After thorough review of the record, we cannot say that [the witness's] responses probably altered the outcome of the trial.

359 N.C. at 364, 611 S.E.2d at 821 (citations omitted).

Here, the following exchange occurred between the prosecutor and the victim at the end of the victim's direct examination:

Q Now, earlier when you came up to the witness stand and Judge Klass had you put your hand on the Bible and swear that you would tell the truth, do you understand what that meant?

A Yes.

Q When you put your hand on the Bible, who were you swearing you were going to tell the truth to?

A Jesus.

Q Have you told the truth to these folks here today?

A Yes.

Like *Chapman*, the error cited by defendant involves the prosecutor's questions to the State's witness. Unlike *Chapman* however, the victim's credibility had not been attacked on cross-examination. The victim's ability to tell the truth was questioned only during *voir dire*. The trial court erred when it allowed the victim's testimony about the truthfulness of her previous testimony. *Id.*

In light of the remainder of the victim's testimony, the physical evidence of vaginal penetration presented by Dr. Pringle, and the victim's prior consistent statements made to Jones, we cannot say that the victim's testimony " 'tilted the scales' and caused the jury to reach its verdict convicting . . . defendant" of first-degree rape. *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. Likewise, we cannot say the victim's tes-

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timony that she swore she was going to tell the truth to “Jesus” probably altered the jury’s verdict on the charge of first-degree rape. *Id.* The admission of the victim’s testimony did not constitute plain error. This assignment of error is overruled.

VII. Defendant’s Prior Bad Acts

[5] Defendant argues the trial court committed plain error when it “admitted . . . Bacon’s ‘other crimes’ character evidence about defendant’s prior incarceration, drug use, and non-sexual physical assault of [the victim] into evidence” We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

During the State’s direct examination of Bacon, she disclosed the following facts: (1) defendant was previously incarcerated; (2) defendant used marijuana while he lived with Bacon and the victim; and (3) she walked in on defendant “whooping” the victim with a belt and thought it might have been because the victim “us[ed] the bathroom on the bed or on herself or something.”

After the State presented its case, defendant took the stand to testify on his own behalf. Defendant stated during his direct examination that he sold drugs to help out around the house, “got busted[,]” and was incarcerated first for “six to nine months” and then for “111 days.” The following exchange occurred during the State’s cross-examination of defendant:

Q [Defendant], what have you been tried and convicted of in the last ten years that carries a jail sentence of 60 days or more?

A Drugs.

Q Possession with intent to sell and deliver marijuana October of '01?

A Yeah.

Q Anything else?

A Crack.

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Q Possession with intent to sell and deliver cocaine August of '04?

A Yeah.

Q Anything else?

A Some more crack.

Q Some more crack?

A Yeah.

Q Anything else?

A No.

Q Assault on a female maybe in May of 2002?

A Yeah, yeah.

Q Larceny in 2000?

A Yeah.

The trial court erred when it admitted Bacon's testimony that defendant was previously incarcerated and used marijuana while living with Bacon and the victim. This evidence was admitted before defendant placed his credibility at issue by testifying. *See State v. Norkett*, 269 N.C. 679, 681, 153 S.E.2d 362, 363 (1967) ("[The][d]efendant testified, but did not otherwise put his character in issue. For purposes of impeachment, he was subject to cross-examination as to convictions for unrelated prior criminal offenses."). Nonetheless, in light of the other similar evidence properly admitted at trial, we are not "convinced that absent the error the jury probably would have reached a different verdict." *Walker*, 316 N.C. at 39, 340 S.E.2d at 83.

The trial court properly admitted Bacon's testimony regarding the "whooping" incident. The State's evidence tended to show that the victim began "wetting the bed" around the time of the alleged sexual abuse. Bacon's testimony about the "whooping" incident therefore tended to establish defendant's intent to conceal the alleged sexual abuse. The trial court properly admitted this testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b). This assignment of error is overruled.

VIII. Ineffective Assistance of Counsel

[6] Defendant argues he received ineffective assistance of counsel and is entitled to a new trial.

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A defendant's ineffective assistance of counsel claim may be brought on direct review "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." If an ineffective assistance of counsel claim is prematurely brought, this Court may dismiss the claim without prejudice, allowing the defendant to reassert the claim during a subsequent motion for appropriate relief proceeding.

State v. Pulley, 180 N.C. App. 54, 69, 636 S.E.2d 231, 242 (2006) (citations omitted), *disc. review denied*, 361 N.C. 574, 651 S.E.2d 375 (2007). "Simply stated, the trial court is in a better position to determine whether a counsel's performance: (1) was deficient so as to deprive defendant of "counsel" guaranteed under the Sixth Amendment; and (2) prejudiced defendant's defense to such an extent that the trial was unfair and the result unreliable." *State v. Duncan*, 188 N.C. App. 508, 517, 656 S.E.2d 597, 603 (Hunter, J., dissenting), *disc. review improvidently allowed, reversed*, 362 N.C. 665, 669 S.E.2d 738 (2008) ("For the reasons stated in the dissenting opinion of the Court of Appeals, the decision of the Court of Appeals is reversed[.]").

Here, defendant's alleged errors relate to his counsel's failure to object at trial. Under *Pulley*, the proper action is to dismiss this assignment of error without prejudice, allowing defendant to file a motion for appropriate relief with the trial court. The trial court is in the best position to review defendant's counsel's performance.

IX. Resentencing

[7] In *State v. Stonestreet*, our Supreme Court stated:

Where two or more indictments or counts are consolidated for the purpose of judgment, and a single judgment is pronounced thereon, even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment(s) or count(s) requires that the cause be remanded for proper judgment on the valid count. 243 N.C. 28, 31, 89 S.E.2d 734, 737 (1955).

Here, the trial court consolidated defendant's convictions for first-degree sexual offense and first-degree rape. We have awarded defendant a new trial on the charge of first-degree sexual offense

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and found there to be no error in defendant's first-degree rape conviction. Based on our Supreme Court's holding in *Stonestreet*, this cause is remanded for resentencing on defendant's first-degree rape conviction.

X. Conclusion

For the foregoing reasons, we award defendant a new trial on the charge of first-degree sexual offense, hold there to be no error in his first-degree rape conviction, and remand for resentencing on the first-degree rape conviction.

No error in part; new trial in part; and remanded for resentencing.

Judges McGEE and JACKSON concur.

FAIRWAY OUTDOOR ADVERTISING, A DIVISION OF MORRIS COMMUNICATIONS CORPORATION, PLAINTIFF v. JERRY T. EDWARDS AND WIFE, MARTHA E. EDWARDS, DEFENDANTS

No. COA08-1172

(Filed 7 July 2009)

1. Landlord and Tenant— holdover tenant—billboard on leased property—reasonable compensation—unjust enrichment—fair rental value—gross profits

Defendant lessor's counterclaim for unjust enrichment in a case arising from a dispute over a billboard on leased property was without merit and overruled because: (1) although defendants labeled their counterclaim as unjust enrichment, the substance of the counterclaim was an action to recover reasonable compensation from a holdover tenant; (2) plaintiff presented no evidence of the reasonable rental value of the property, defendants presented only evidence of plaintiff's gross income from the use of the property, and evidence of a lessee's gross income from the use of a leased property, standing alone, is not evidence of reasonable rental value since it does not take into account the lessee's other expenses in generating that income; (3) nothing else appearing, the negotiated rental rate was presumed to be fair compensation for use of the pertinent property; and (4) defend-

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ants accepted \$1,500 in rental payment on 15 March 2007 which was exactly the same as the negotiated rental rate, and this transaction further strengthened the presumption that the negotiated rental rate was equal to the reasonable rental value of the property. N.C.G.S. § 42-4.

2. Landlord and Tenant— billboard on leased property— abandonment—reasonable time—pursuit of nonfrivolous litigation

Plaintiff lessee did not abandon its billboard to the lessor by failing to remove it while the lessee prosecuted nonfrivolous litigation regarding the parties' rights under the lease after expiration of the lease because: (1) plaintiff attempted to remove the sign two weeks after the declaratory judgment action was ultimately decided in defendants' favor, but defendants blocked plaintiff's access to do so; (2) plaintiff filed the current action two weeks after defendants blocked plaintiff from removing the sign; and (3) plaintiff has not yet exhausted the reasonable time allowed for removal of the sign and thus has not abandoned it to defendants, especially in a situation where the lessor specifically forbade the lessee from entering its property after expiration of the lease.

3. Landlord and Tenant— billboard on leased property—removal of billboard

Defendant landowner may not demand that the lessee choose between removing the entire billboard, including the foundation, or leaving the entire billboard, including the sign, when the lease did not address the lessee's duty to remove the foundation or any other part of the billboard but granted the lessee the right to remove all structures, equipment, and materials placed upon the leased premises.

Appeal by defendants from order entered on or about 21 May 2008 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 26 February 2009.

Isaacson Isaacson Sheridan & Fountain, LLP by Jennifer N. Fountain, for plaintiff-appellee.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A. by James R. DeMay, for defendants-appellants.

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STROUD, Judge.

This case arises from a dispute over a billboard on leased property. Plaintiff erected the billboard as lessee of the land. Defendants are the landowner/lessor. The billboard has an aboveground sign with an underground foundation. The lease was not renewed when it expired.

Defendants present three issues to this Court: (1) whether the lessor is entitled to an amount greater than the rent as set by the original lease from a holdover lessee when the only evidence presented as to fair rental value is the gross profits of the lessee; (2) whether the lessee abandoned its billboard to the lessor by failing to remove it while the lessee prosecuted non-frivolous litigation regarding the parties' rights under the lease after expiration of the lease; and (3) whether the landowner may demand that the lessee choose between removing the entire billboard, including the foundation, or leaving the entire billboard, including the sign, when the lease does not address the lessee's *duty* to remove the foundation or any other part of the billboard but grants the lessee the *right* to remove "all structures, equipment and materials placed upon the [leased] premises." We affirm.

I. Background

On 21 November 2001, plaintiff executed a five-year lease in the amount of one thousand five hundred dollars (\$1,500.00) per year with Robert and Elliot Lawing to maintain a billboard on land at Highway 29 and Calloway in Concord, Cabarrus County. The lease stated that "[a]s between the Lessor and Lessee all structures, equipment and materials placed upon the premises shall remain the property of Lessee and *Lessee is granted the right to remove same from Lessor's premises within a reasonable period of time after the expiration of this Lease or any renewal thereof.*" (Emphasis added.) The lease further stated "[y]ears 6-10 [are] to be renegotiated by Nov. 31 [sic] 2006[.]" The lease was filed with the Cabarrus County Register of Deeds on 21 December 2001.

On 14 May 2003, defendants acquired the property occupied by the billboard. After negotiation, the parties were unable to agree on a price to continue the lease for years six through ten. On 20 October 2006, defendants notified plaintiff:

The lessor will not extend the term [of the lease] on a temporary basis. . . .

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After November 31 [sic] you will no longer have permission to enter the premises. If you remove [the billboard] you must notify us in advance and must remove not only the above ground fixtures but also the below ground concrete. You must also restore the parking lot pavement to its original condition after removal of the concrete.

On 1 December 2006, plaintiff filed a complaint for declaratory judgment in Superior Court, Cabarrus County (“06-CVS-3564”). The complaint requested a declaration that the lease gave plaintiff the right to maintain the billboard on defendants’ property until 30 November 2011 and requested the trial court to determine the amount of rent to be paid for that time. Plaintiffs also requested an order enjoining defendants from removing or restricting plaintiff’s access to the sign.

On 28 December 2006, the trial court entered a preliminary injunction in favor of plaintiff. The injunction concluded “[p]laintiff [was] likely to succeed on the merits of [the] action in enforcing the Lease for an additional five years running through November 30, 2011” and accordingly enjoined defendants “from restricting Plaintiff’s access or interfering in any way with Plaintiff’s leasehold interest in Defendants’ property.” Additionally, the parties were ordered “to operate under the same terms and conditions of the Lease as existed prior to November 30, 2006[,]” with the added requirement that plaintiff give defendants “one day advance notice prior to . . . changing the advertising” on the sign.

However, after a full hearing on the merits in 06-CVS-3564, the trial court granted summary judgment in favor of defendants on 27 September 2007. The summary judgment order declared “that the lease is unenforceable as to years six through ten[.]” The order of 27 September 2007 is not at issue in this appeal.

On 12 October 2007, plaintiff’s employees attempted to enter defendants’ property in order to remove the billboard. Defendants denied them access. On or about 26 October 2007 plaintiff filed a verified complaint in Superior Court, Cabarrus County. The complaint alleged conversion and breach of lease. Plaintiff sought to enjoin defendants from denying access to the billboard. The trial court entered a temporary restraining order on or about 28 November 2007.

Defendants answered on or about 7 January 2008. The answer asserted that the lease did not allow plaintiff to remove only part of

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the sign without also removing the foundation and sought declaratory judgment on that issue. The answer further asserted that plaintiff had abandoned the sign to defendants by failing to remove it within a reasonable time. Defendants also counterclaimed for unjust enrichment.

The trial court entered a preliminary injunction in favor of plaintiff on or about 27 January 2008. On or about 12 February 2008, plaintiff moved for summary judgment. On 25 April 2008, defendants moved for partial summary judgment “that plaintiff be required to remove all of the sign, above ground and below ground, or none of the sign.”

On or about 20 May 2008, the trial court granted plaintiff’s motion for summary judgment and denied defendants’ motion for partial summary judgment, ruling that

Plaintiff has the right to come upon the Defendants’ real property and remove the above ground components of its sign from Defendants’ property, by cutting the pole at grade level, removing approximately six inches of the pole below grade level and filling the hole with concrete and leave the below ground components on Defendants’ property.

Defendants appeal.

II. Standard of Review

Summary judgment is proper 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. 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 Mem’l Hosp., Inc., 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007) (citations and quotation marks omitted), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

III. Payment after Expiration of the Lease

[1] We first address defendants’ counterclaim for unjust enrichment. Defendants contend that

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from November 2006 through February 2008, during which time no lease agreement was in place, Fairway earned \$14,489.45 in gross revenue from the billboard. The sole consideration paid to Edwards during this period was \$1,500.00.

If Edwards had desired to continue leasing his property to Fairway for \$1,500.00 per year, he would have renewed the original lease. Instead, he was forced to enter into a *de facto* lease agreement pursuant to the preliminary injunction entered in the 06-CVS-3564 action on December 28, 2006. . . .

Fairway was essentially able to . . . use litigation as a tool to extend the duration of a favorable lease agreement. This should not be rewarded.

(Citations to the record omitted.)

Even though defendants do not point to, and the record does not show, any factual disputes relevant to this issue, defendants contend that summary judgment on this issue should be reversed and “the matter remanded for trial.” However, when the record shows no disputes as to any material facts and the only question is the legal effect of those undisputed facts, an issue is ripe for summary judgment. *Knight Publ'g. Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 488, 616 S.E.2d 602, 604, *disc. review denied*, 360 N.C. 176, 626 S.E.2d 299 (2005).

Although defendants labeled their counterclaim as unjust enrichment, the substance of the counterclaim is an action to recover reasonable compensation from a holdover tenant and we will treat it as such. *In re Quevedo*, 106 N.C. App. 574, 578, 419 S.E.2d 158, 159, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992) (“[A] motion is treated according to its substance and not its label.”); *see also Simon v. Mock*, 75 N.C. App. 564, 567, 331 S.E.2d 300, 302 (1985) (“Although not denominated as such in the complaint, this cause of action appears to be based on, and we will treat it as based on, [N.C. Gen. Stat. §] 42-4, which enables a property owner to recover ‘reasonable compensation’ for occupation of her property.”).

North Carolina law specifically addresses holdover tenants:

Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to *recover reasonable compensation*

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or the use of the property, or he may recognize him as still a tenant, having the same rights and duties as under the original lease, except that the tenancy is one from year to year and is terminable by either party upon giving to the other 30 days' notice directed to the end of any year of such new tenancy.

Coulter v. Capitol Finance Co., 266 N.C. 214, 217, 146 S.E.2d 97, 100 (1966) (emphasis added). The amount of a reasonable rental is generally a question of fact. *Simon*, 75 N.C. App. at 568-69, 331 S.E.2d at 303. However,

[i]n the absence of evidence that the rental value of the leased property has increased or diminished since negotiation of the rent at the time of agreement to lease, that negotiated rental rate will determine the rate at which the holdover must pay for his continued use and occupation. Either party may, however, introduce evidence that independently establishes that the reasonable value is greater or lower than the previous rental rate, and recovery will be extended or limited to that measure.

Restatement (Second) of Property: Landlord & Tenant § 14.5, cmt. a (1977).

In the case *sub judice*, plaintiff presented no evidence of the reasonable rental value of the property. Defendants presented only evidence of plaintiff's gross income from the use of the property. We hold that evidence of a lessee's gross income from the use of a leased property, standing alone, is not evidence of reasonable rental value because it does not take into account the lessee's other expenses in generating that income. See *Lumsden v. Lawing*, 107 N.C. App. 493, 504, 421 S.E.2d 594, 601 (1992). ("A mortgage payment is not necessarily a reliable indicator of rental value since such payments are dependent upon the amount of the down payment, the interest rate, and the length of the mortgage."). Nothing else appearing, therefore, the negotiated rental rate is presumed to be fair compensation for use of the property *sub judice*.

Defendants accepted one-thousand five hundred dollars (\$1,500.00) in rental payment on 15 March 2007, exactly the same as the negotiated rental rate. This transaction further strengthens the presumption that the negotiated rental rate was equal to the reasonable rental value of the property. Accordingly, defendants's counterclaim is without merit and we overrule this assignment of error.

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IV. Abandonment

[2] Defendants further argue that the sign belongs to them because plaintiff abandoned the sign by not removing it “within a reasonable time” after expiration of the lease. Therefore, they argue, plaintiff no longer have a right to remove the sign under the lease agreement. Specifically, defendants argue

Fairway waited ten months after the expiration of the lease agreement to attempt to remove the billboard. Even if the *06-CVS-3564* action is to be taken into account, Fairway still waited almost an entire month after the final disposition of that action in favor of Edwards. Moreover, it is now nearly two years from the expiration of the lease on November 30, 2006 and Fairway has yet to attempt to remove the entire sign, which, as discussed [elsewhere] in this brief, Fairway is obligated to do if it wants to remove anything at all.

(Emphasis in original.) Defendants rely on *Harris v. Lamar Co.*, an unpublished case¹ where this Court held that an eleven-month delay in removing a billboard created a jury question as to whether or not a reasonable time had elapsed when the record contained evidence that there was confusion regarding the identity of the true owner of the property, negotiations for a new lease, agreement were still on-going two months after expiration of the lease and Hurricane Floyd hampered the lessee’s ability to remove the billboard. 150 N.C. App. 437, 563 S.E.2d 642 (2002) (unpublished).

The lease agreement in the case *sub judice* granted plaintiff the right “to remove [all structures, equipment and materials] from Lessor’s premises within a reasonable period of time after the expiration of this Lease” Under North Carolina law, when a billboard is not removed within a reasonable time after expiration of a lease, the billboard is deemed abandoned and the lessee no longer has a right to it. *National Advertising Co. v. N.C. Dept. of Transportation*, 124 N.C. App. 620, 625, 478 S.E.2d 248, 250 (1996).

1. We note that

[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case.

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The North Carolina Supreme Court has held

what is [a] “reasonable time” is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not disputed; and the matter should be decided by the jury upon proper instructions on the particular circumstances of each case. . . .

The time, however, may be so short or so long that the court will declare it to be reasonable or unreasonable as [a] matter of law. . . .

If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or the circumstances are numerous and complicated and such that a definite legal rule can not be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences can not be reasonably drawn from them that the question ever becomes one of law.

Claus v. Lee, 140 N.C. 552, 554-55, 53 S.E. 433, 434-35 (1906) (citations omitted).

The holding of *Claus* was implicitly applied to the removal of a billboard in *National Advertising*, 124 N.C. App. at 624, 478 S.E.2d at 250. In *National Advertising*, the undisputed facts showed the billboard owner was allowed four full months to remove his billboard but did not remove it. *Id.* at 625, 478 S.E.2d at 250. This Court found that amount of time to be reasonable and held that the billboard owner had abandoned the sign as a matter of law. *Id.* at 625, 478 S.E.2d at 250.

In the case *sub judice* the facts are undisputed, and unlike *Harris* there is no confusion about ownership which could permit various inferences to be drawn from the facts. The question of reasonable time in this case may be answered by applying the legal principle that diligent prosecution of related non-frivolous litigation should be taken into account in determining whether a party’s time for action has passed. See *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 644 (4th Cir. 1983) (“[T]ime frames may be tolled where equitable considerations justify their suspension. We think it equitable that when [plaintiff] has made a not frivolous challenge to the constitutionality of [a statute], . . . the pendency of the litigation

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should toll the running of the [statutory] period” (Citation omitted.); accord *Duke University v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 692-93 (1987) (tolling the statute of limitations for equitable reasons); *Quinn v. Olsen*, 298 F. 704, 707-08 (8th Cir. 1924) (time during which party prosecuted and appealed a collateral lawsuit which he ultimately won was not held against him in determining reasonable time to act).

In the case *sub judice*, plaintiff brought a declaratory judgment action the day after the lease expired. The action was not frivolous; the trial court issued a preliminary injunction in plaintiff’s favor because it concluded “plaintiff [was] likely to succeed on the merits of [the] action in enforcing the Lease for an additional five years running through November 30, 2011.”

Plaintiff attempted to remove the sign two weeks after the declaratory judgment action was ultimately decided in defendants’ favor, but defendants blocked plaintiff’s access to do so. Two weeks after defendants blocked plaintiff from removing the sign, plaintiff filed the current action. This action was not frivolous; plaintiff prevailed on summary judgment at the trial court.

We hold as a matter of law that on these undisputed facts plaintiff has not yet exhausted the reasonable time allowed for removal of the sign and therefore has not abandoned it to defendants. This is especially true where, as here, the lessor specifically forbade the lessee from entering its property after expiration of the lease. Defendants’ argument is without merit.

V. Removal of the Entire Billboard

[3] Defendants also argue that

[i]t is fundamentally unfair for Fairway to stick Edwards with the cost for removal of the “bad” [underground concrete foundation of the billboard] while Fairway gets to walk away with the “good” [aboveground sign].

While issues of fairness do not necessarily decide legal disputes, nothing in the lease agreement allows Fairway to remove only some, but not all, of the billboard sign. Further, such action is directly contrary to well-settled common law concerning the removal of trade fixtures. . . . [Defendants are] agreeable to Fairway leaving the entire sign; however, [they] do not wish to be left with only Fairway’s “scraps”.

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The parties cite no cases directly addressing this issue; it appears to be a case of first impression in North Carolina.

The greater weight of authority in other jurisdictions does not favor defendants. According to *Corpus Juris Secundum*:

The lessee is not required to remove improvements made by him or her with the consent of the landlord or under authority of the lease, unless the lease so provides Where the tenant is given the right to make improvements and remove them during the term, the right to remove includes the right to cause such damage to the freehold as such removal will naturally cause, and the tenant is liable only for such damages as are unnecessarily or wantonly caused by him.

52A C.J.S. *Landlord and Tenant* § 884 (2003) (internal footnotes omitted). “Generally, a tenant who has made alterations in the premises does not have to restore the property to its original condition where the lease does not specifically require such action.” *Id.* at § 887. Furthermore, “[a]s a general rule, in the absence of an express provision in the lease where the lessee elects to remove one particular alteration this does not obligate him or her to remove all alterations and return the premises to their pre-lease condition.” *Id.* Thus, the general rule is that in absence of a specific lease provision directing otherwise, a tenant has the right, but not the obligation, to restore the leased property to its original condition. The lease in the instant case does not contain any provision which creates an obligation for plaintiff to remove its sign or foundation, but only granted the right for plaintiff to remove its “structures, equipment and materials” within a reasonable time.

The only case discovered by this Court’s research which directly addressed this particular fact pattern held in favor of the billboard owner against the landowner. *U.P.C., Inc. v. R.O.A. General, Inc.*, 990 P.2d 945 (Utah App. 1999). In *U.P.C.* the landowner had purchased land which was subject to a billboard lease. *Id.* at 949. The lease document itself did “not require removal of the sign foundation [n]or [did] the . . . lease document require that the [lessee] restore the property to its former condition upon vacating the property.” *Id.* at 954. When the lease expired, the landowner and the billboard owner were not able to reach agreement as to renewal of the lease and the landowner demanded that the billboard owner remove the sign. *Id.* at 949. The billboard owner removed the aboveground portion of the sign, but refused to remove the foundation. *Id.* The landowner sued. *Id.*

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U.P.C. held in favor of the billboard owner:

[T]he lease did not contain a duty on [the billboard owner's] part to remove the foundation or restore the property to its original condition[.]

The language of the lease neither explicitly nor implicitly addresses the parties' obligation or expectations regarding [the billboard owner's] duty to remove the sign's foundation. Nor does the lease require that [the billboard owner] restore the premises to its pre-leased condition. While [the landowner] urges the court to imply such a requirement, "a court may not make a better contract for the parties than they have made for themselves; furthermore, a court may not enforce asserted rights not supported by the contract itself." *Ted R. Brown & Assocs., Inc. v. Carnes Corp.*, 753 P.2d 964, 970 (Utah Ct. App. 1988). Additionally,— '[t]he lessee is not required to remove improvements made by him with the consent of the landlord, or under authority of the lease in the absence of express requirement thereof.' " *Arkansas Fuel Oil Co. v. Connellee*, 39 S.W.2d 99, 101 (Tex. Ct. App. 1931) (citation omitted).

....

"By the terms of this lease [the lessee] had the right to erect the improvements in question. It was under no duty to remove them, although it was granted the right and option to do so if it saw fit. [The landowner] could not require removal." [*Duvanel v. Sinclair Refining Co.*, 170 Kan. 483, 489, 227 P.2d 88, 92 (1951)]. We decline to impose such a duty upon [the billboard owner] when the lease does not.

....

[W]e hold that [the billboard owner] did not have a duty to remove the sign's foundation[.]

990 P.2d at 954-55 (internal footnote omitted). We are persuaded by the majority rule and the holding in *U.P.C.* which is consistent with our common law that "[n]o meaning, terms, or conditions can be implied [in a contract] which are inconsistent with the expressed provisions." *Gilmore v. Garner*, 157 N.C. App. 664, 667, 580 S.E.2d 15, 18 (2003) (citation and quotation marks omitted).

Accordingly, we hold that when, as here, a lease agreement grants the lessee the right to remove "all structures, equipment and ma-

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terials,” but does not require the lessee to remove all of them or to restore the property to the same condition as at the beginning of the lease, the lessor may not require the lessee to choose between removing all or removing none. This assignment of error is overruled.

VI. Conclusion

Defendants are not entitled to more than the negotiated rent from plaintiff’s use of the billboard on defendants’ land beyond the expiration date of the lease. Plaintiff did not abandon its billboard. Defendants may not require plaintiff to remove all or none of the billboard when the lease did not require it. Accordingly, the order of the trial court granting summary judgment in favor of plaintiff is affirmed.

Affirmed.

Judges JACKSON and STEPHENS concur.

STATE OF NORTH CAROLINA v. MICHAEL RAY

No. COA08-1329

(Filed 7 July 2009)

1. Evidence— prior crimes or bad acts—lack of similarities—remoteness in time

The trial court abused its discretion in a first-degree sex offense and indecent liberties case by allowing the State to cross-examine defendant about instances of domestic violence occurring between defendant and his former girlfriend, and defendant is entitled to a new trial because: (1) although defendant’s first trial ended in a mistrial, the trial judge’s ruling that the State could not introduce evidence of defendant’s 1990 and 1991 criminal convictions or any other criminal convictions of defendant from more than ten years earlier remained in effect at defendant’s retrial; (2) although the State asserted that evidence of defendant’s 1990 behavior was admissible since it tended to show that defendant had a problem with assaultive behavior when he drank alcohol, the State failed to make a threshold showing that defendant had committed assaults in 1990 while under the influence of alcohol, and the 1990 convictions arose in circumstances signifi-

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cantly different from the instant offenses where defendant was charged with sexual offenses against a seven-year-old girl whom he barely knew versus personal conflicts fifteen years earlier between defendant and an adult woman with whom he was involved in a romantic relationship; (3) the fact that both alleged victims were female did not establish the kind of similarity under which evidence may be admitted concerning assaults committed fifteen years prior to the charged offense; (4) the cross-examination would be impermissible under N.C.G.S. § 8C-1, Rule 609 since more than 10 years had elapsed on the convictions; and (5) the probative value of the cross-examination was very slight and was significantly outweighed by its probable prejudicial effect on the jury.

2. Sentencing— indecent liberties—erroneous maximum sentence

The trial court erred by imposing a sentence of 20 to 25 months imprisonment for the charge of indecent liberties because the maximum sentence corresponding to a minimum sentence of 20 months is 24 months instead of 25 months.

3. Evidence— expert testimony—examination consistent with sexual abuse

Testimony by the State's expert medical witness that his examination of an alleged victim of a sexual offense and indecent liberties was consistent with a child who had been sexually abused did not improperly vouch for the victim's credibility and was properly admitted.

Appeal by Defendant from judgment entered 11 June 2008 by Judge Alma L. Hinton in Hoke County Superior Court. Heard in the Court of Appeals 8 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Angette R. Stephenson, for the State.

Geoffrey W. Hosford, for Defendant.

BEASLEY, Judge.

Defendant (Michael Ray) appeals from judgments and convictions of first-degree sex offense and indecent liberties. We reverse.

Defendant was indicted in November 2005 on charges of first-degree sex offense and indecent liberties. The alleged victim was

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a seven-year-old girl, L.G.¹ Defendant's first trial was in May 2008. After the jury was impaneled, the trial court excused two jurors. This left a jury of only ten people, which required the trial court to declare a mistrial.

Defendant was retried in June 2008. The State's evidence tended to show, in pertinent part, the following: L.G. testified that in June 2005 she was seven-years-old, and that on 12 June 2005, she accompanied her mother and five-year-old brother to an outdoor party at Defendant's house. Towards the end of the party, L.G. used the bathroom in Defendant's house. L.G. wore a skirt, underpants, and a shirt. L.G. had used the toilet, and was starting to pull up her underpants and skirt when the Defendant entered the bathroom. L.G. testified that Defendant lifted her off the toilet, held her against the bathroom wall, and "stuck his finger in [her] privacy part." Defendant did not talk to her and left immediately after this incident. L.G. testified that "it hurt[]" when Defendant "put his finger inside [her] privacy part."

L.G. returned outside and told her mother what happened. L.G.'s mother took her home and called the police. Later that evening, a law enforcement officer came to their house and took a brief statement from L.G. and her mother. After these events, L.G. saw a doctor for treatment for painful urination, which she described as a "bladder problem."

On 10 August 2005, L.G. was examined by Dr. Howard Loughlin, medical director of child abuse evaluations at the Southern Regional Office of the Area Health Education Center (AHEC), in Fayetteville, North Carolina. Dr. Loughlin was qualified as an expert in pediatrics and child abuse pediatrics. He testified that his examination of L.G. had included an interview and a physical examination. L.G. told Dr. Loughlin that Defendant had "touched [her] down there" while she was using the bathroom at Defendant's house. She said that Defendant came into the bathroom and "put his finger in [my] private" and described the penetration as painful. Dr. Loughlin testified that L.G. experienced "intrusive thoughts" about the incident. Dr. Loughlin also interviewed L.G.'s mother and Detective Rugg.

Although Dr. Loughlin's examination revealed no physical indicia of sexual abuse or trauma, he offered an expert opinion that L.G.'s history was "consistent" with having been sexually abused. His opinion was based in part upon the consistency between L.G.'s statements

1. To protect the privacy of the minor child, we refer to her in this opinion as "L.G."

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to him and to others. He also noted L.G.'s description of digital penetration as painful, her bad dreams and intrusive thoughts about the incident, and unspecified behavioral changes reported by her mother.

Detective Timothy Rugg of the Hoke County Sheriff's Department testified that on 12 June 2005 he received a call from another law enforcement officer about a reported incidence of child sexual abuse involving digital penetration. On 14 June 2005 Detective Rugg took formal statements from L.G. and her mother. L.G.'s statement, which Detective Rugg read to the jury, largely corroborated her trial testimony. In September 2005 Detective Rugg received Dr. Laughlin's report from AHEC. Thereafter, he drew up warrants charging Defendant with sex offenses against L.G.

The Defendant's evidence is summarized as follows: Defendant testified that he hosted a backyard party on 12 June 2005. L.G.'s mother had attended, accompanied by L.G. and her younger brother. Defendant recalled that L.G. had used the bathroom inside his house and remembered scolding L.G. for looking in his refrigerator. However, Defendant denied molesting L.G. and testified that he did not enter the bathroom while the child was there or touch her inappropriately.

Following the presentation of evidence, the jury found Defendant guilty of first-degree sex offense and indecent liberties. The trial court sentenced Defendant to concurrent sentences of 384 to 470 months for first-degree sex offense, and 20 to 25 months for indecent liberties. From these judgments and convictions, Defendant appeals.

[1] Defendant first argues that the trial court committed reversible error by allowing the State to cross-examine him about instances of domestic violence occurring in 1990 between Defendant and his former girlfriend. The Defendant asserts that the evidence was inadmissible and that its prejudicial nature outweighed its probative value. We agree.

Prior to Defendant's first trial, the State moved to admit evidence that Defendant had been convicted of assault by pointing a gun, assault with a deadly weapon, and two charges of assault on a female, all arising from incidents in 1990 between Defendant and Brenda McPhaul, the Defendant's former girlfriend. Superior Court Judge Robert F. Floyd, Jr., ruled that the State could not introduce evidence of these or any other criminal convictions of Defendant from more than ten years earlier. Defendant's first trial ended in a

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mistrial, but Judge Floyd's ruling remained in effect at Defendant's retrial before Superior Court Judge Alma L. Hinton. Consequently, the State could not introduce evidence of Defendant's 1990 or 1991 criminal convictions.

However, over Defendant's objection, the State was allowed to cross-examine Defendant about the conflicts with McPhaul that allegedly were the basis of these convictions, and about whether Defendant was drinking at the time of these events:

PROSECUTOR: Whenever you drink alcohol, specifically when you drink a lot of alcohol, isn't it true that it changes your demeanor?

DEFENDANT: No, sir.

PROSECUTOR: It does not change your demeanor?

DEFENDANT: No, sir.

THE COURT: [To the prosecutor] Mr. Hardin, the jurors are having trouble hearing your questions.

PROSECUTOR: I'm sorry. Let me ask it again. Mr. Ray, I asked, isn't it true when you drink a lot of alcohol, isn't it true that that changes your demeanor?

DEFENDANT: No, sir.

PROSECUTOR: Isn't it true that you have had problems with alcohol and assaultive behavior before?

DEFENDANT: No, sir.

PROSECUTOR: You have not had any problems where alcohol was involved and you assaulted other individuals?

DEFENDANT: Yes, I have had that.

PROSECUTOR: So, again, my question is, isn't it true that you have had prior occurrences where alcohol has affected your assaulting other individuals?

DEFENDANT: No, sir.

PROSECUTOR: So the alcohol played no part in your assaulting other individuals?

DEFENDANT: No, sir.

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PROSECUTOR: Did the alcohol play a part in your assaulting Ms. Brenda McPhaul back in December of 1990?

DEFENDANT: No, sir.

PROSECUTOR: Did alcohol play a part in your assaulting Ms. McPhaul with a deadly weapon in December of 1990?

DEFENDANT: No, sir.

PROSECUTOR: Did alcohol play a part in your assaulting Ms. McPhaul by pointing a gun in December of 1990?

DEFENDANT: No, sir.

PROSECUTOR: And did alcohol play a part in your assaulting Ms. McPhaul in February of 1990?

DEFENDANT: No, sir.

PROSECUTOR: The alcohol had no effect on your assaulting her during those times?

DEFENDANT: No, sir.

PROSECUTOR: But you had been drinking?

DEFENDANT: I can't really say "yes" that far back.

This cross-examination was admitted under North Carolina Rules of Evidence 404(b), as evidence of Defendant's motive and intent to commit a sexual assault against L.G. Defendant asserts that this cross-examination testimony was inadmissible. We agree.

North Carolina Rules of Evidence 404(b) states in part that:

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.

As summarized by the Supreme Court of North Carolina:

In [*State v.*] *McClain*, [240 N.C. 171, 81 S.E.2d 364 (1954)], this Court stated that as a general rule "in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." We then enumerated certain well recognized

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exceptions—the “other purposes” to which Rule 404(b) makes reference. Our courts have since relied on *McClain* both for its succinctly stated general rule and its clear articulation of the exceptions. . . . We also pointed out that “[s]ince evidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial, the general rule of exclusion should be strictly enforced in all cases where it is applicable.”

State v. McKoy, 317 N.C. 519, 525-26, 347 S.E.2d 374, 378 (1986) (quoting *McClain*, 240 N.C. at 173 and 176, 81 S.E.2d at 365 and 368). *McKoy* further noted that:

“The acid test [of admissibility of evidence under Rule 404(b)] is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. . . . [T]he dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. . . . Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.”

McKoy, 317 N.C. at 527, 347 S.E.2d at 379 (quoting *McClain*, 240 N.C. at 177, 81 S.E.2d at 368) (other citations omitted).

Rule 404(b) evidence “must be offered for a proper purpose, must be relevant, [and] must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant[.]” *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991). If “the probative value of the evidence is so slight and the evidence is so prejudicial that there is a substantial likelihood that the jury will consider the evidence only for the purpose of determining the defendant’s propensity to commit the crimes with which he has been charged, the evidence must be excluded[.]” *State v. White*, 331 N.C. 604, 615-16, 419 S.E.2d 557, 564 (1992).

“To effectuate these important evidentiary safeguards, the [admission of evidence under Rule 404(b)] . . . is constrained by the requirements of similarity and temporal proximity.” *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122-23 (2002) (citations omitted). Regarding temporal proximity, “remoteness in time is less significant when the prior conduct is used to show intent, motive,

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knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility.” *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (citation omitted). As to the requirement of similarity:

Under Rule 404(b) a prior act or crime is ‘similar’ if there are “some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.” However, it is not necessary that the similarities between the two situations “rise to the level of the unique and bizarre.” Rather, the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts.

Id. at 304, 406 S.E.2d at 890-91 (quoting *State v. Green*, 321 N.C. 594, 603, 604, 365 S.E.2d 587, 593 (1988)).

In the instant case, the State contends that the cross-examination evidence is relevant to the issues of Defendant’s motive and intent, on the grounds that (1) the Defendant is charged with an offense committed against a female, and the incidents from 1990 also involved a female; (2) the Defendant was drinking beer on the date of the alleged offense, and it is possible that the Defendant was also drinking during the 1990 incidents. On this basis, the State asserts that evidence of Defendant’s 1990 behavior towards McPhaul is admissible because it tends to show that Defendant has a “problem” with “assaultive behavior” when he drinks alcohol. We disagree for several reasons.

At trial, Defendant’s 1990 and 1991 convictions were excluded, the State offered no witness testimony about the incidents, and the Defendant did not testify that he had assaulted McPhaul. Additionally, there was no evidence that the Defendant was drinking or under the influence of alcohol during the 1990 incidents. Accordingly, the State failed to make a threshold showing that Defendant had committed assaults in 1990 while under the influence of alcohol.

Furthermore, Defendant’s 1990 convictions arose in circumstances significantly different from those of the instant offenses. In the present case, Defendant was charged with sexual offenses against a seven-year-old girl whom he barely knew. The offenses were allegedly committed during a picnic at Defendant’s house, after Defendant had consumed a quantity of beer. The 1990 incidents, which occurred fifteen years earlier, were based on personal conflicts between Defendant and an adult woman with whom he was then involved in a romantic relationship. No evidence was introduced that

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the 1990 incidents took place at Defendant's house or after he drank beer. We conclude that these events do not demonstrate the kind of similarity that would "support a reasonable inference that the same person committed both the earlier and later acts." *Stager*, 329 N.C. at 304, 406 S.E.2d at 891.

As discussed above, the State failed to offer evidence that Defendant was drinking or was under the influence of alcohol during his disputes with McPhaul. Thus, the only common feature of the charged offenses and the 1990 events is that L.G. and McPhaul are both female. "When the State's efforts to show similarities between crimes establish no more than 'characteristics inherent to most' crimes of that type, the State has 'failed to show . . . that sufficient similarities existed' for the purposes of Rule 404(b)." *State v. Carpenter*, 361 N.C. 382, 390, 646 S.E.2d 105, 111 (2007) (quoting *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123). In *Al-Bayyinah*, the Supreme Court of North Carolina held that use of a weapon and a demand for money, followed by immediate flight from the scene, were characteristics "inherent to most armed robberies" and did not support admission of the earlier robbery under Rule 404(b). In *Carpenter*, the Court held that absence of individual wrapping of cocaine rocks in two drug sales was not an unusual fact or distinctively similar act, and that evidence of the earlier drug sale was inadmissible. Similarly, we conclude that the fact that both L.G. and McPhaul were female does not establish the kind of "similarity" under which evidence may be admitted concerning assaults committed fifteen years prior to the charged offense.

It is important to note that the cross-examination of Defendant would also be impermissible under N.C. Gen. Stat. § 8C-1, Rule 609 (2007) which states:

(a) General rule.—For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts

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and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

More than 10 years had elapsed on the convictions about which Defendant was asked, assault by pointing a gun, assault with a deadly weapon, and two charges of assault on a female, all arising from incidents in 1990 between Defendant and a former girlfriend, since the date of conviction or confinement and would therefore be inadmissible.

We conclude that it was error to admit the challenged cross-examination. However, “before the defendant is entitled to any relief on appeal, he must show that he was prejudiced by the error.” *State v. Mason*, 317 N.C. 283, 291, 345 S.E.2d 195, 200 (1986) (citations omitted). In this regard:

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2007). Thus, to show prejudice, a defendant must show that the error affected the outcome of the trial. *State v. Lynn*, 157 N.C. App. 217, 221, 578 S.E.2d 628, 632 (2003) (holding discovery violation was “not reversible error where there is no likelihood that the outcome of the trial was affected”) (citations omitted).

In the instant case, it was undisputed that in June 2005 Defendant hosted an outdoor party attended by L.G. and her mother, and that during the party L.G. used the bathroom in Defendant’s house. L.G. testified that Defendant entered the bathroom while she was using it and put his finger in her private parts. The Defendant denied touching L.G. or being in the bathroom with the child. L.G.’s trial testimony was corroborated by her statements to law enforcement officers and Dr. Loughlin, but neither L.G.’s mother nor other adult guests at the party testified in corroboration of the incident. There was no physical or medical evidence of abuse. Dr. Loughlin testified that he had been

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told that L.G. suffered from “behavioral changes” and “intrusive thoughts” after the alleged incident; however, the State offered no testimony verifying the existence of such problems, describing any behavioral changes, or articulating a temporal relationship between L.G.’s emotional state and the party at Defendant’s house. Indeed, Defendant’s uncontradicted testimony was that he discouraged parents from bringing children to his parties.

Against this backdrop of evidence, the jury’s assessment of the relative credibility of L.G. and the Defendant assumed crucial significance. This was the context in which the State cross-examined Defendant about his “assaultive behavior” committed against a former girlfriend, and about whether these assaults were fueled by Defendant’s consumption of alcohol. We conclude that the probative value of the cross-examination was very slight, and was significantly outweighed by its probable prejudicial effect on the jury.

“We review a trial court’s determination to admit evidence under N.C. R. Evid. 404(b) . . . for an abuse of discretion. An abuse of discretion occurs when a trial judge’s ruling is ‘manifestly unsupported by reason.’” *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907, (2006) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (internal citations omitted)). In the instant case, we conclude that the admission of the challenged cross-examination constituted an abuse of discretion and may have affected the outcome of the trial, and that the Defendant is entitled to a new trial.

[2] Defendant argues next that the trial court erred by imposing a sentence of 20 to 25 months imprisonment for Defendant’s conviction of indecent liberties. Defendant asserts that the maximum sentence corresponding to a minimum sentence of 20 months is 24 months, not 25 months. The State agrees with Defendant on this issue. On retrial, if Defendant is convicted of indecent liberties and is given a minimum sentence of 20 months, the maximum sentence may not exceed 24 months.

[3] Finally, Defendant argues that the trial court committed reversible error in admitting certain testimony by the State’s expert witness, Dr. Loughlin. Defendant contends that Dr. Loughlin improperly vouched for the victim’s credibility. We disagree.

During his testimony, Dr. Loughlin referred to the results of his examination of L.G. as “consistent with” a child who had been sexu-

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ally abused. Dr. Loughlin did not testify that abuse had in fact occurred or commented on L.G.'s believability. This Court previously has held that, upon a proper foundation, the trial court does not err by allowing a physician to testify that certain findings were "consistent" with sexual abuse. "[O]ur appellate courts have generally upheld the admission of testimony from a medical expert in a sexual abuse case that her observations are 'consistent with sexual abuse.'" *In re T.R.B.*, 157 N.C. App. 609, 618, 582 S.E.2d 279, 285 (2003) (quoting *State v. Brothers*, 151 N.C. App. 71, 77-78, 564 S.E.2d 603, 607-08 (2002)). This assignment of error is overruled.

For the reasons discussed above, we conclude that Defendant's conviction must be reversed and the case remanded.

Reversed and remanded for new trial.

Judges MCGEE and HUNTER, Robert C. concur.

TOWN OF ORIENTAL, PLAINTIFF v. LACY HENRY AND WIFE, JUDY B. HENRY,
DEFENDANTS

No. COA08-896

(Filed 7 July 2009)

Cities and Towns; Highways and Streets— action to clear title to property—public use—withdrawal from dedication—abandonment

An unpaved portion of a town street that was never paved or used for vehicular traffic remained dedicated to public use, although plaintiff town leased portions of the pertinent property, because (1) the fact that a municipality improves or directs improvement of only part of the property dedicated does not constitute an abandonment of the balance; (2) the pertinent property was not subject to withdrawal from dedication since that property was but an unopened portion of a street which was otherwise actually opened and used by the public; (3) even assuming *arguendo* that the property was subject to withdrawal, land may not be withdrawn from dedication until the fee owners record in the register's office a declaration withdrawing such land from the use to which it has been dedicated, and a former owner's with-

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drawal of dedication was not legally effective since she was not the fee owner of the property on the date she filed the dedication of withdrawal after she already quitclaimed the property to defendant; (4) a mere nonuse of a portion of a street fenced in with abutting property is not an abandonment of the street by the public; (5) the fencing in of a street or the planting of trees, shrubs, flowers, and grass are not such permanent improvements as work an estoppel even though the city does not complain; and (6) although defendants have paid taxes on the property since 1989, the mere collection of taxes on dedicated property ordinarily will not estop a municipality from asserting the public character of the land dedicated.

Appeal by Plaintiff from order entered 2 May 2008 by Judge Kenneth F. Crow in Pamlico County Superior Court. Heard in the Court of Appeals 29 January 2009.

Wheatly, Wheatly, Weeks & Lupton, P.A., by Stevenson L. Weeks, and Davis, Hartman, Wright, PLLC, by Michael Scott Davis, for Plaintiff.

Lee, Hancock & Lasitter, PA, by Moses D. Lasitter, and McAfee Law, P.A., by Robert J. McAfee, for Defendants.

STEPHENS, Judge.

I. Procedure

The Town of Oriental (“the Town”) filed an action on 6 March 2003 in the Superior Court of Pamlico County against Lacy and Judy B. Henry (“the Henrys”), and E. Sherrill and Phyllis H. Styron (“the Styrons”), seeking to clear title to real property known as the terminus of South Avenue (“the property” or “the South Avenue terminus”). The Town also filed a Notice of Lis Pendens with respect to the property on that date.

On or about 23 May 2003, the Henrys filed an answer and counterclaim, seeking, *inter alia*, to be declared the owners of the real property, raising certain affirmative defenses, and moving to dismiss the Town’s claim pursuant to Rule 12(b)(6). On 25 June 2003, the Town amended its complaint, adding an alternative claim based on adverse possession, and filed its reply and affirmative defenses to the Henrys’ counterclaims. On or about 27 June 2003, the Henrys filed an answer to the Town’s amended complaint. On 10 July 2003, the

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Pamlico County Clerk of Superior Court entered default against the Styrons for failure to plead or otherwise appear in the case.¹

On 5 April 2007, the Town filed a motion for summary judgment. The Town's motion for summary judgment and the Henrys' 12(b)(6) motion were heard on 31 December 2007. Order was entered 2 May 2008 denying summary judgment for the Town, treating the Henrys' 12(b)(6) motion as a motion for summary judgment, and granting summary judgment for the Henrys. From this order, the Town appeals.

II. Facts

On 30 March 1899, the Town of Oriental, through its Board of Town Commissioners ("Commissioners"), "[o]rdered that the Commissioners meet the first Monday in May [of 1899] and lay off the Streets for the town." On 4 December 1899, the Commissioners ordered the town clerk to write and post the following notice in the Town:

To the citizens of the town of Oriental. Please take [n]otice, that whereas the board of town commissioners have had the Streets run out and the corners located so that any and all persons can know where the Streets are, the citizens of this town are hereby notified that any person or persons building houses or fences on lands condemned by the board of commissioners for Streets, will do so at their own risk and expense.

On 3 July 1900, the Commissioners "[o]rdered that Henry Brown, Jr. of Newberne be employed to make a survey and plot of the Town at a wage[] of \$4.00 per day and expenses." Henry Brown, Jr. completed the survey and plot of the Town and presented the Town with a bill for his services at the 3 October 1900 Commissioners' meeting.

In June 1907, an official map of the Town was "[t]raced from [the] blueprint of a survey made by H.A. Brown, Jr.[.] Surveyor[.] Survey dated July 1900." The map was recorded in Deed Book 51, Page 600 in the Pamlico County Registry and subsequently transferred to Map Book 11, Page 20 in the Pamlico County Registry. The map depicts the Town divided into 32 blocks with South Avenue running in an east-west direction, bordering lot 31 on the south side and lot 32 on the north side, intersecting Wall Street, and terminating at Raccoon Creek.

1. The Styrons are not parties to this appeal and the record does not indicate that the Styrons challenged the entry of default.

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The Oriental Bulkhead and Improvement Company (“OBIC”) had a survey entitled “Survey Oriental Bulkhead Property” recorded in Plat Cabinet 1, Slide 3, Page 19 of the Pamlico County Registry.² This survey depicts the property fronting Raccoon Creek subdivided into approximately 34 lots and shows South Avenue running in an east-west direction, intersecting Wall Street and the newly designated Avenue A, and terminating at Raccoon Creek.

A map of the Town prepared by R.C. Holton, County Surveyor, in October 1939 compiles the survey completed by H.A. Brown, Jr., a survey of property surrounding Raccoon Creek referred to as Neuse River Heights completed by P.J. Delemar in 1906, and the survey done by OBIC. This map again depicts South Avenue running in an east-west direction, intersecting Wall Street and Avenue A, and terminating at Raccoon Creek.

The property at issue is a portion of South Avenue between Avenue A and Raccoon Creek. Unlike the rest of South Avenue, this property was never paved or used for vehicular traffic. However, some evidence in the record suggests the property was used by pedestrians to access Raccoon Creek.

By deed dated 16 October 1911, and recorded in Book 54, Page 590 of the Pamlico County Registry, L.B. Midgette and wife, Rebecca M. Midgette, conveyed a tract of land to OBIC, which included the South Avenue terminus. On 17 October 1911, OBIC executed a mortgage in favor of the Bank of Oriental which was recorded in Book 57, Page 296 of the Pamlico County Registry.

On or about 30 April 1917, the Bank of Oriental foreclosed on the mortgage deed to OBIC. A court-appointed receiver for the Bank, W.J. Swann, sold the tract of land to Benjamin Wallace O’Neal (“O’Neal”).

Beginning in or around 1937, the Town leased the South Avenue terminus to various individuals and entities, including Defendant Lacy Henry, his father Lacy Carl Henry, and the Henry family business, Neuse Ways Company. The Town’s Official Minutes (“Minutes”) from 7 December 1937 reflect that the Town “lease[d] the water front at the foot of [South Avenue] at the North west [sic] end, to Hampton Spruill for ten years[.]” The Minutes from 7 May 1951 reflect that the Town considered a transfer of the lease of the South Avenue terminus to Neuse Ways Company and its owners Lacy Henry and Curtis Benton. On 10 July 1958, the Minutes reflect that Lacy Henry re-

2. The record does not indicate when this survey was made or recorded.

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requested a renewal of the lease of the property to Neuse Ways Company, as the lease was set to expire 30 June 1959. The Commissioners agreed to a ten-year lease, from 30 June 1959 to 30 June 1969. By lease executed on 16 July 1969, the Town again renewed the lease. The lease provides:

We, the governing board of commissioners of the Town of Oriental, do hereby lease to Mr. L.C. Henry of Oriental, N.C. the rights and privileges for private use the extension of South Avenue beyond the area of traffic usage and extending to Raccoon Creek, said property to be utilized as the site of a marine railways business; said lease to endure for a period of five (5) years from date of July 1, 1969 and thus to terminate on June 30, 1974.

On 2 July 1974, the Minutes reflect that the lease was renewed for another five years. By lease dated 19 May 1977, and recorded in Book 190, Page 298 of the Pamlico County Registry, the Town leased the property to Lacy C. Henry and Defendant Lacy M. Henry for a period of 15 years. The lease states:

WHEREAS, the Town of Oriental is the owner of a public dedicated street known as South Avenue;

WHEREAS, the Town of Oriental desires to lease that portion of South Avenue which is not used by vehicular traffic to Lacy M. Henry and Lacy C. Henry.

The lease more particularly describes the property to be leased as follows:

Bounded on the North by the land of Garland Fulcher[;] bounded on the [East] by the paved portion of South Avenue; bounded on the South by Neuse Ways and Marine, Inc.; and bounded on the [West] by Raccoon Creek (Oriental Harbor). Said land being the extension of South Avenue beyond the area of vehicular traffic and extending to Raccoon Creek and shown on a map entitled "Survey, Oriental Bulkhead Property", [sic] which is recorded in Map Book 1, page 19, Pamlico County Registry.

In 1979, O'Neal died testate, leaving his property to Ann Wadley Wing ("Wing"). On 7 September 1982, the Minutes reflect that the Town received an offer from Defendant Lacy Henry to purchase the South Avenue terminus property which he was currently leasing from the Town. The record does not reflect any response to this offer.

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On 28 March 1995, Wing executed a quitclaim deed in favor of Defendant Lacy Henry, releasing all of her right, title, claim, and interest in the South Avenue terminus property. Upon receiving the quitclaim deed, the Henrys erected a fence along the boundaries of the property, except for that portion of the property fronting Raccoon Creek.

On 21 July 1995, Wing filed a Declaration of Withdrawal pursuant to N.C. Gen. Stat. § 136-96, attempting to withdraw dedication of the subject property for public or private use. On 6 March 2003, the Town initiated this action to clear title to the property.

III. Discussion

The Town contends the trial court erred in granting summary judgment in favor of the Henrys and in not granting summary judgment in favor of the Town. We agree.

Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). Furthermore, “all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.” *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (internal quotation marks omitted). The standard of review for summary judgment is *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

Generally, where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to public use, and the purchaser of the lot or lots acquires the right to have each of the streets kept open. *Wofford v. Highway Commission*, 263 N.C. 677, 683, 140 S.E.2d 376, 381, *cert. denied*, 382 U.S. 822, 15 L. Ed. 2d 67 (1965). However, insofar as the general public is concerned, such dedication is but a revocable offer and is not complete until the offer is accepted in some proper way by the responsible public authority. *Owens v. Elliott*, 258 N.C. 314, 317, 128 S.E.2d 583, 586 (1962).

A municipality may or may not accept the dedication at its election. *Osborne v. North Wilkesboro*, 280 N.C. 696, 699, 187 S.E.2d 102,

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104 (1972). Acceptance is conclusively presumed if the responsible public authority improves the streets and opens them to public use. *Id.* “In the event of acceptance of [a] portion of [a] street, . . . the unaccepted portion would remain exactly as it was before it became a part of the town, dedicated to public use, though not kept in repair by the town, and is not to be obstructed because it must at all times be free to be opened as occasion may require.” *Home Real Estate Loan & Ins. Co. v. Carolina Beach*, 216 N.C. 778, 788, 7 S.E.2d 13, 20 (1940). The municipality “has no right to relinquish or give away the unaccepted portion of the dedicated street.” *Id.*

If, however, for a period of fifteen years or more, the municipality fails to improve and open to public use a dedicated street, the owner may file and record a declaration withdrawing the street from dedication. N.C. Gen. Stat. § 136-96 (2007); *Osborne*, 280 N.C. at 699, 187 S.E.2d at 104. Nonetheless, “[t]he dedication of a street . . . may not be withdrawn if the dedication has been accepted and the street, or any part of it, is actually opened and used by the public.” *Tower Dev. Partners v. Zell*, 120 N.C. App. 136, 142, 461 S.E.2d 17, 21 (1995) (citing *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 29, 265 S.E.2d 123, 129 (1980)).

In this case, OBIC caused a plat of its properties to be placed on the public records of Pamlico County. Said land was divided into lots and streets, and the plat was recorded in Plat Cabinet 1, Slide 2 at Page 19 of the Pamlico County Registry. The plat depicts South Avenue running in an east-west direction, intersecting Wall Street and Avenue A, and terminating at Raccoon Creek. Additionally, the map of the Town prepared in October 1939 depicts South Avenue running in an east-west direction, intersecting Wall Street and Avenue A, and terminating at Raccoon Creek.³ It is uncontroverted that a portion of the property dedicated as South Avenue has been paved and is open to vehicular traffic.

The Henrys assert, and the trial court found and concluded, that from the time of the recording of the map from OBIC until the date of the hearing on Defendants’ motion to dismiss, the Town of Oriental did nothing to indicate that it accepted *that portion* of South Avenue that is in contention in this matter. However, where a portion of a dedicated street is accepted, the unaccepted portion remains dedi-

3. Sherrill Styron, former Mayor of the Town, submitted an affidavit in which he states, “While serving as the Mayor of the Town of Oriental, I have also observed that all of the official maps of the Town . . . reflect that the west terminus of South Avenue runs to the water’s edge . . . of Raccoon Creek.”

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cated to public use, though not kept in repair by the town, and “must at all times be free to be opened as occasion may require.” *Home Real Estate Loan & Ins. Co.*, 216 N.C. at 788, 7 S.E.2d at 20. Furthermore, although the trial court found that the town leased portions of the South Avenue terminus, “[t]he fact that a municipality improves or directs improvement of [only part] of the property dedicated does not constitute an abandonment of the balance[.]” *Salisbury v. Barnhardt*, 249 N.C. 549, 555, 107 S.E.2d 297, 301 (1959) (quotation marks and citation omitted). Similarly, “the public use of only a part of land dedicated for a public highway does not constitute an abandonment of the unused portion.” *Id.* (quotation marks and citation omitted).

At the hearing before the trial court, Defendants submitted six affidavits, five of which contain the following statement: “That I have never known or suspected that South Avenue extended to Raccoon Creek; I believed that South Avenue turned southward and became Avenue A because of its physical appearance.” The trial court found that “[a]ll of the Affidavits submitted by the Defendants . . . indicate that the terminus point of South Avenue did not extend to Raccoon Creek, that it turns southward and becomes Avenue A, thereby bypassing the area in dispute in the lawsuit.” However, these affidavits do not establish that the property dedicated as South Avenue did not extend to Raccoon Creek; these affidavits support only the uncontroverted fact that the portion of South Avenue that was *paved and opened for public use* intersects “Avenue A, thereby bypassing the area in dispute in the lawsuit.” The *unpaved* portion of South Avenue continued to Raccoon Creek, as shown in the various surveys and maps of the Town beginning in July 1900, and as attested to in affidavits submitted by the Town at the summary judgment hearing.⁴

Accordingly, as part of South Avenue was paved and opened to public use, the remaining portion of South Avenue, including the South Avenue terminus, remained dedicated to public use.

The Henrys contend, however, and the trial court found, that the dedication of the South Avenue terminus was effectively withdrawn. We disagree. The South Avenue terminus was not subject to withdrawal from dedication since that property was but an unopened portion of South Avenue which was otherwise actually opened and

4. The Town submitted affidavits from John W. Bond and Fannie E. Higgins wherein the affiants stated, “Everyone knew that the terminus of South Avenue was a public street and extended to Raccoon Creek.”

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used by the public. *Food Town Stores, Inc.*, 300 N.C. at 29, 265 S.E.2d at 129.

Even assuming, *arguendo*, that the South Avenue terminus *was* subject to withdrawal, “[w]e note, moreover, that land may not be withdrawn from dedication until the fee owners record in the register’s office a declaration withdrawing such land from the use to which it has been dedicated.” *Id.* (citing N.C. Gen. Stat. § 136-96). In this case, the evidence established that Wing conveyed the land at issue to Defendant Lacy Henry by quitclaim deed dated 28 March 1995.⁵ Subsequently, on 21 July 1995, Wing filed a Declaration of Withdrawal regarding the subject property pursuant to N.C. Gen. Stat. § 136-96. However, as Wing was not the fee owner of the property on the date she filed the Dedication of Withdrawal, having already quitclaimed the property to Defendant Lacy Henry, Wing’s withdrawal of dedication was not legally effective.

The trial court further found that Defendant Lacy Henry, upon receiving the quitclaim deed from Wing, “immediately erected a fence along the boundaries of the properties conveyed[,]” and concluded that Defendant Lacy Henry “has been in open, hostile[,] and notorious possession, under known and visible boundaries, of said property under color of title for at least eight (8) years.” However, “a mere nonuse[] of a portion of a street fenced in with abutting property [is not] an abandonment of the street by the public. Some private use of the public way is not infrequently accorded abutting owners until the public use requires its surrender.” *Salisbury*, 249 N.C. at 555, 107 S.E.2d at 301 (quotation marks and citation omitted). Furthermore, “the fencing in of a street or the planting of trees, shrubs, flowers and grass are not such permanent improvements as work an estoppel even though the city does not complain.” *Id.* (quotation marks and citations omitted). Moreover,

[n]o person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occu-

5. “A quitclaim deed conveys only the interest of the grantor, whatever it is, no more and no less.” *Heath v. Turner*, 309 N.C. 483, 491, 308 S.E.2d 244, 248 (1983). If the grantor has complete ownership at the time of executing the deed, “the deed is sufficient to pass such ownership” *Black’s Law Dictionary* 446 (8th Ed. 2004) (citation omitted).

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pancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations.

N.C. Gen. Stat. § 1-45 (2007). Because we conclude for the foregoing reasons that the South Avenue terminus remained dedicated to public use, the Henrys were not permitted to acquire possession of the property by adverse possession.

Finally, the trial court found that the Henrys have paid taxes on the South Avenue terminus since 1989. However, “[t]he mere collection of taxes on dedicated property ordinarily will not estop a municipality from asserting the public character of the land dedicated[.]” *Lee v. Walker*, 234 N.C. 687, 696, 68 S.E.2d 664, 670 (1952).

Accordingly, as there were no genuine issues of material fact as to whether the Town was the owner of the South Avenue terminus, the Town was entitled to judgment as a matter of law. We hold that the trial court erred in granting summary judgment in favor of the Henrys and in failing to grant summary judgment in favor of the Town. We thus reverse and remand this matter to the Pamlico County Superior Court with instructions to enter an order consistent with this opinion.

REVERSED and REMANDED.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. JOHN PAUL MADURES

No. COA08-602

(Filed 7 July 2009)

1. Confessions and Incriminating Statements— intent—absence of mistake or accident—redacted statements

The trial court did not abuse its discretion in an assault with a firearm upon a law enforcement officer and resisting a public officer case by admitting under N.C.G.S. § 8C-1, Rule 404(b) evidence of statements relating to defendant’s prior arrest and statements made by defendant while he was being transported from his home to jail on the present charges because: (1) the evidence was properly admitted to provide a complete picture for the

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jury; (2) there was no violation of Rule 8C-1, Rule 403; (3) the evidence has a tendency to make defendant's prior assaults upon and resistance to the officers more probable, and defendant's statements tend to show both his intent and absence of mistake or accident in the commission of the offenses charged against him; and (4) the trial court allowed a recording of the latter statements to be played for the jury, but required the jury to exit the courtroom to prevent the jury from hearing portions of the recording which the court previously had determined to be unfairly prejudicial or irrelevant.

2. Appeal and Error— preservation of issues—failure to make motion to recuse

Although defendant contends the trial judge erred by failing to recuse himself *ex mero motu* after realizing that he previously had met defendant's family during negotiations between the family and a gas company for an easement on the family's real property, this argument is dismissed because defendant made no motion to recuse.

Appeal by defendant from judgment entered 2 October 2007 by Judge John L. Holshouser, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 14 January 2009.

Attorney General Roy A. Cooper, III, by Special Attorney General Karen E. Long, for the State.

Gilda C. Rodriguez, for defendant-appellant.

JACKSON, Judge.

John Paul Madures ("defendant") appeals from judgment and commitment orders entered 2 October 2007 convicting him of two counts of assault with a firearm on a law enforcement officer and two counts of resisting a public officer in the performance of his duties. Defendant was sentenced to two consecutive sentences of twenty-nine months minimum and forty-four months maximum imprisonment. For the reasons stated below, we hold no error in part and dismiss in part.

In October 2003, defendant lived with his elderly parents, Louise Madures ("Ms. Madures") and John Madures, Sr. ("Mr. Madures"). On 19 October 2003, Ms. Madures called the Rowan County Sheriff's Department ("Sheriff's Department"). She asked whether Deputy Scott Flowers ("Deputy Flowers") was on duty because she wanted

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to talk with him about her son's probation. Deputy Flowers was patrolling another area at that time and was unable to respond to Ms. Madures when she called. After Ms. Madures called the Sheriff's Department, her brother, Tim Hamilton ("Hamilton"), came to Ms. Madures' home and took her to her sister's house. Mr. Madures remained at the Madures' house.

The Sheriff's Department communications dispatcher contacted Deputy Flowers and notified him that Ms. Madures had called and wanted him to come to the Madures' residence. Deputy Flowers attempted to call Ms. Madures on his cell phone several times, but the Madures' telephone line was busy. Deputy Flowers contacted the dispatchers to conduct an "emergency break-in" to the Madures' phone line, but the dispatchers told Deputy Flowers "that there was nothing on the line, no talking, nothing could be heard in the background." Deputy Flowers became concerned for Ms. Madures' safety, contacted his superior officer, and drove to the Madures' residence. Deputy Flowers testified that he was familiar with the Madures' residence and had concern for Ms. Madures because he previously had responded to a domestic disturbance at the Madures' residence on 21 July 2003.

When Deputy Flowers arrived at the Madures' residence on 19 October 2003, he parked in the driveway and saw defendant outside wearing underwear and a t-shirt. Defendant ran into the house, and Deputy Flowers took cover behind a tree near the door to the house. Deputy Flowers did not have his weapon drawn, but took cover because he did "[n]ot know[] what was going on[] with [defendant's] running in the house[.]" Deputy Flowers announced his presence to defendant and asked to speak to Ms. Madures. Defendant cursed at Deputy Flowers, told him that Ms. Madures had gone to her sister's house, and demanded that Deputy Flowers get off of the property. By this time, Sergeant Neil Goodman ("Sergeant Goodman") also had arrived at the Madures' residence, and Deputy Flowers asked Sergeant Goodman to go to Ms. Madures' sister's home to see whether Ms. Madures was there.

Sergeant Goodman found Ms. Madures at her sister's house; Hamilton drove Ms. Madures back to the Madures' residence. She asked the officers to go inside to retrieve (1) her pocketbook, (2) Mr. Madures, and (3) Mr. Madures' medication. Deputy Flowers asked Ms. Madures whether, if necessary, the officers could make a forced entry into the residence; she responded affirmatively. Deputy Flowers testified that he and Sergeant Goodman positioned themselves on each

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side of the door and asked defendant to open the door. Defendant refused, continued to curse the officers, claimed that they were going to arrest him, and demanded that they leave the property. Deputy Flowers asserted that they only wanted to retrieve Ms. Madures' pocketbook, Mr. Madures, and his medication, and that the officers then would leave.

Upon defendant's subsequent refusal, Deputy Flowers and Sergeant Goodman drew their weapons, re-announced their intentions, kicked in the door, and forced entry into the residence. Deputy Flowers immediately saw Mr. Madures sitting in the living room and informed him that the officers were there to escort him to Ms. Madures who was waiting outside. Mr. Madures "slowly got up from his chair and began to shuffle across the floor." Deputy Flowers explained that Mr. Madures "did not take regular steps. He slid his feet across the floor." As Deputy Flowers began to escort Mr. Madures outside, he saw defendant step into the doorway across the room—approximately fifteen feet away—and raise a rifle in the officers' direction. Deputy Flowers took cover behind the television near the doorway, but did not shoot defendant because he was concerned that Mr. Madures would be caught in the crossfire.

Once Mr. Madures was outside safely, the officers exited the residence. Sergeant Goodman escorted Mr. Madures to where Ms. Madures was located while Deputy Flowers took cover behind a tree and guarded Mr. Madures and Sergeant Goodman. Defendant then went out onto the porch and said to Deputy Flowers, "Step on out. We'll finish it right here. You're not that good of a shot. It'll all end right here."

The Special Response Team was called to assist in defendant's apprehension and arrest. Defendant subsequently ran out of the back of the residence and into his "shop," a shed behind the house, where he later was arrested.

Defendant testified that he had fallen asleep watching television when Ms. Madures went to her sister's house. He had awoken and was getting something to eat when Deputy Flowers first inquired as to whether Ms. Madures was home. After defendant told the deputy that she was at her sister's, defendant returned to watching television. Approximately one-half hour later, defendant heard a crash at the front of the house, jumped out of bed, picked up his rifle, and entered the hallway pointing the rifle at the suspected intruders—Deputy Flowers and Sergeant Goodman. Once defendant saw Mr. Madures

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escorted to Ms. Madures' location, defendant returned inside and expected that the officers would leave the premises. Defendant then went out to his shop for several hours and was arrested when he exited the shop.

On 2 October 2007, a jury returned verdicts finding defendant guilty of two counts of assault with a firearm upon a law enforcement officer and two counts of resisting a public officer. On the same day, the trial court entered judgment and commitment orders upon the jury's verdicts. Defendant appeals.

On appeal, defendant first contends that the trial court erred by admitting evidence pursuant to North Carolina Rules of Evidence, Rule 404(b) because the evidence was both irrelevant and highly prejudicial. Defendant asserts that the trial court's purported error entitles him to a new trial. We disagree.

[1] We review a trial court's evidentiary rulings for abuse of discretion. *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006) (citing *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004)). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quoting *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985)).

Generally, all relevant evidence is admissible pursuant to North Carolina Rules of Evidence, Rule 402. N.C. Gen. Stat. § 8C-1, Rule 402 (2007). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2007). However, even relevant evidence is subject to exclusion "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2007). Furthermore, Rule of Evidence 404(b) provides in relevant part

that [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

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N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). Our Supreme Court has explained that the rule is

a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, 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). “The list of permissible purposes for admission of ‘other crimes’ evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant’s propensity to commit the crime.” *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995) (citing *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). Our Supreme Court also has explained that

[e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174-75 (1990) (*quoting United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

Defendant argues that the trial court erred by admitting statements (1) related to defendant’s 21 July 2003 arrest, and (2) made by defendant while he was being transported from his home to jail on 19 October 2003.

At trial, evidence was admitted of Ms. Madures’ 911 call to report a domestic disturbance on 21 July 2003, defendant’s subsequent guilty plea for communicating threats, and his subsequent probation. The trial court did not abuse its discretion by admitting this evidence because it completed the picture for the jury. Deputy Flowers explained that he was familiar with the Madures’ residence because he had responded to the 21 July 2003 domestic disturbance. The domestic disturbance resulted in defendant’s guilty plea for communicating threats, and defendant’s guilty plea resulted in his being placed on probation. Ms. Madures called Deputy Flowers on 19 October 2003 to discuss the terms of defendant’s probation. Deputy

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Flowers stated that on 21 July 2003, he asked Ms. Madures to call the Sheriff's Department if she needed help. When Ms. Madures called 911 asking for Deputy Flowers on 19 October 2003, he was unable to respond to take her call, but he attempted to return her call soon after. When he attempted to contact Ms. Madures several times via cell phone without success, he requested that the dispatchers conduct an emergency break-in on the Madures' telephone line. After the emergency break-in failed, Deputy Flowers became concerned for Ms. Madures in light of his prior experiences and communications with her, and therefore, he drove to the Madures' residence leading to the events at issue in the case *sub judice*.

Therefore, we hold that the trial court properly admitted this evidence in order to provide a complete picture for the jury. *See Agee*, 326 N.C. at 548, 391 S.E.2d at 174-75. Furthermore, on the facts of the case *sub judice*, we discern no violation of Rule 403 of the North Carolina Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2007).

The trial court also admitted evidence of defendant's statements made after his arrest, during transportation from his home to jail on 19 October 2003. As with the evidence related to the 21 July 2003 domestic disturbance and its subsequent causal history, we hold that the trial court did not abuse its discretion by admitting defendant's statements made after his arrest. The transcript of the recording of defendant's statements made subsequent to his arrest contains the following relevant colloquy:

DEPUTY FLOWERS: Get in the seat, John.

[DEFENDANT]: Yeah, thanks a lot[,] Scott.

. . . .

DEPUTY FLOWERS: John, I've got four warrants for your arrest.

[DEFENDANT]: Kiss my ass!

DEPUTY FLOWERS: Four for resisting (INAUDIBLE) public officer—

[DEFENDANT]: Four? Hell, why not forty!

DEPUTY FLOWERS: Two—two for assault on a law enforcement officer while pointing a firearm. (INAUDIBLE) probable cause (INAUDIBLE) assault

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[DEFENDANT]: (talking over officer) Yeah, yeah, yeah, yeah, yeah, yeah. . . .

. . . .

DEPUTY FLOWERS: (INAUDIBLE) an officer was performing a duty of his office to assist John Madures, Sr. in leaving his residence. He resist—you resisted C.F. Flowers, G.—G.M. Goodman, ah,—

[DEFENDANT]: (talking over officer) Do you like to play cop? Are you feeling good? You got a big hard on now because you're a nice guy. Suck my ass you fat son of a bitch!

Deputy Flowers then informed defendant of his *Miranda* rights, and defendant responded, “You fucking with me—you—you[.]”

As the officers were conducting business outside of the car, the following exchange occurred:

[DEFENDANT]: I've been nice to y[']a]ll, (INAUDIBLE) but I'm about finished with it.

. . . .

[DEFENDANT]: Yeah, we playing ain't we? We playing now? Alright.

. . . .

(banging noise inside of car)

DEPUTY FLOWERS: (talking outside of car) Oh, damn it he (INAUDIBLE). Don't do it! That would be stupid. (back inside of car) John, there will be an additional charge for damage to county property.

[DEFENDANT]: Well, good for you then.

Deputy Flowers explained that the banging noise inside the car was defendant's kicking out the rear-passenger's window of the deputy's vehicle. Subsequently, while en route to the jail, defendant asserted to Deputy Flowers, “[Y]ou had it in for me, you fat bastard.”

Notwithstanding defendant's contentions, the recording reveals evidence that has a tendency to make defendant's prior assaults upon and resistance to the officers more probable, and defendant's statements tend to show both his intent and his absence of mistake or accident in the commission of the offenses charged against him. *See*

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N.C. Gen. Stat. § 8C-1, Rules 401 and 404(b) (2007). In addition, the trial court allowed the recording to be played for the jury, but the court required the jury to exit the courtroom to prevent the jury from hearing portions of the recording which the court, in its discretion, previously had determined to be unfairly prejudicial or irrelevant. *See* N.C. Gen. Stat. § 8C-1, Rules 402 and 403 (2007); *Hagans*, 177 N.C. App. at 23, 628 S.E.2d at 781.

Accordingly, the record demonstrates that the trial court's decisions to admit the foregoing evidence were reasoned determinations, and we hold the trial court did not abuse its discretion in admitting statements related to defendant's 21 July 2003 arrest or redacted statements made by defendant while he was being transported from his home to jail on 19 October 2003. *See id.*; *White*, 340 N.C. at 284, 457 S.E.2d at 852-53.

[2] Next, defendant contends that Judge Holshouser erred by failing to recuse himself *ex mero motu* after realizing that he previously had met defendant's family during negotiations between the Madures family and a gas company for an easement on the Madures' real property. Notwithstanding defendant's contention, defendant made no motion to recuse. Accordingly, we dismiss defendant's argument because it has not been preserved for appellate review. *State v. Key*, 182 N.C. App. 624, 632-33, 643 S.E.2d 444, 450-51 (2007) (citing *State v. Love*, 177 N.C. App. 614, 627-28, 630 S.E.2d 234, 243 (2006) ("There was no request, objection or motion made by defendant at trial and therefore the question was not properly preserved for appeal.") and N.C. R. App. P. 10(b)(1)), *disc. rev. denied*, 361 N.C. 433, 649 S.E.2d 398 (2007).

For the reasons set forth above, we hold that the trial court did not err either by admitting relevant evidence pursuant to North Carolina Rules of Evidence, Rule 404(b) after properly balancing its probative value pursuant to Rule 403. In addition, pursuant to our controlling precedent, we dismiss defendant's argument relating to the trial court's decision not to disqualify itself *ex mero motu*.

No error in part; Dismissed in part.

Judges McGEE and HUNTER, Jr., Robert N. concur.

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SECHIA ROWELL, PLAINTIFF v. JACK BOWLING, JR., M.D. AND NEW HANOVER
REGIONAL MEDICAL CENTER, INC., DEFENDANTS

No. COA08-1352

(Filed 7 July 2009)

1. Appeal and Error— preservation of issues—failure to cite authority—Rule 2

The Court of Appeals exercised its authority under N.C. R. App. P. 2 to address plaintiff's argument in a medical malpractice case even though plaintiff failed to include authority in her brief in support of her argument as required by N.C. R. App. P. 28(b), thus subjecting the argument to dismissal.

2. Medical Malpractice— Rule 9(j) certification—res ipsa loquitor

The trial court did not err in a medical malpractice case by granting summary judgment in favor of defendant doctor because: (1) plaintiff's pleading was void of any specific assertion that the medical care was reviewed by an expert who would testify that the medical care failed to comply with the applicable standard of care, and thus the pleading did not meet the heightened pleading requirements of N.C.G.S. § 1A-1, Rule 9(j)(1) or (2); and (2) contrary to plaintiff's assertion, the doctrine of *res ipsa loquitor* was inapplicable since plaintiff offered direct proof of the cause of the skin incisions made to her left knee and complained that such incisions caused her pain and damages.

Judge JACKSON dissenting.

Appeal by plaintiff from judgment granted 31 July 2008 and entered 5 August 2008 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 7 April 2009.

Bruce Robinson for plaintiff appellant.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by Jerry A. Allen, Jr. and O. Drew Grice, Jr., for defendant appellee.

HUNTER, JR., Robert N., Judge.

In this action for medical malpractice, plaintiff alleged that she sustained injuries as a result of medical care provided by Dr. Jack Bowling, Jr. Because plaintiff did not allege that her complaint had

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been reviewed by a qualified expert witness prior to filing suit, and because we hold her complaint did not allege facts sufficient to invoke the doctrine of *res ipsa loquitur*, we affirm the trial court's grant of summary judgment to Dr. Bowling.

On 24 July 2003, Sechia Rowell ("plaintiff") saw Dr. Bowling regarding an injury to her right knee, which occurred when she misstepped at her work on 22 July 2003. An MRI from 8 August 2003 showed symptoms, which Dr. Bowling explained as being "consistent with acute chondromalacia." Dr. Bowling prescribed conservative management treatment, but after those measures failed, he recommended a right knee arthroscopy.

On 25 November 2003, hospital staff positioned, prepped, and draped plaintiff's *left* knee for surgery, which was the wrong knee, though Dr. Bowling was not present during these preparations. Dr. Bowling then made two "puncture wounds or incisions" in the left knee. Dr. Bowling testified that two minutes after the start of the procedure, a nurse anesthetist called to his attention the fact that he had the wrong knee; he "aborted" the process; and the two, four-to-five millimeter puncture holes, which did not enter the actual knee joint or compartment, were sutured with one suture each and sterilely dressed. Dr. Bowling then performed an arthroscopy on the *right* knee.

Dr. Bowling first saw plaintiff for postoperative care on 1 December 2003. Plaintiff testified that Dr. Bowling did not explain why surgery was started on the left knee, that he did not tell her specifically that he did or did not do surgery on the left knee, and that he just told her "he went into the wrong knee." She further testified that post-operatively she had fluid on both knees. On 4 December 2003, Dr. Bowling's office notes indicated plaintiff's left knee still had some swelling over the left portal site and that her left knee was "improved."

During continued post-operative care, Dr. Bowling prescribed physical therapy for plaintiff's right knee. On 7 January 2004, plaintiff complained of pain in her right hip. By 21 January 2004, the pain had progressed to her lower back. On 5 February 2004, Dr. Bowling noted that the incisions had healed well, neither knee had "effusion" (seeping) or "ecchymosis" (bruising), and her strength was graded as "normal." Her primary complaint at that visit was her right hip.

To obtain a second opinion regarding continued complaints of right knee pain and right hip pain, as well as left knee pain, plaintiff

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saw Wilmington orthopedic surgeon Dr. David Esposito on 18 March 2004. Dr. Esposito performed a second arthroscopic surgery on plaintiff's right knee on 17 June 2004. Plaintiff continued to experience bilateral knee pain and right hip pain. She was then referred to Dr. John Liguori, a Wilmington physical medicine and rehabilitation specialist, for care and pain management.

On 13 July 2006, plaintiff filed a medical malpractice action against Dr. Bowling and New Hanover Regional Medical Center (collectively, "defendants"). Plaintiff's complaint, in pertinent part, alleged defendants were negligent as follows:

10. The operative report states that, "the left lower extremity was mistakenly prepped and draped in standard fashion. Two skin puncture sites were made and at this point it was noted by the operating room staff that the incorrect limb had been prepped and draped and an incision had been made on the left lower extremity."

. . . .

12. The conduct of the defendants in operating on the left knee was negligence in and of itself pursuant to Rule 9(j) not requiring certification of negligence of an expert witness. Defendants admit that they operated on the incorrect leg before they began to operate on the correct leg.

13. Before the operation, plaintiff never had any difficulty at all with her left knee or leg. Following the operation negligently performed by the defendants, the plaintiff has had constant pain, permanent injury, disfigurement, and future possible medical expenses associated with the incorrect, negligent, incision to her left knee.

. . . .

16. As a proximate cause of the negligence of the defendants as stated in this complaint, defendants are justly indebted to the plaintiff in excess of ten thousand (\$10,000.00) dollars for pain and suffering, permanent injuries, scaring [sic] and disfigurement, medical expenses, future medical expenses, lost future wages, and other damages as will be shown at trial.

Dr. Bowling answered and denied the alleged negligence and damages. On 2 June 2008, after conducting the depositions of the parties and several treating physicians, Dr. Bowling filed a motion for

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summary judgment, which was heard on 7 July 2008. On 21 July 2008, plaintiff voluntarily dismissed her complaint against the hospital. Dr. Bowling's motion for summary judgment was granted on 5 August 2008. Plaintiff appeals.

I. Issue

On appeal, plaintiff argues it was error for the trial court to grant Dr. Bowling's motion for summary judgment. Plaintiff specifically argues in her brief that there are genuine issues of material fact as to the "damage that was done by an incision, admitted liability, and whether [] the conduct of [Dr. Bowling] constituted the performance of an operation[.]"

II. Standard of Review

A grant of summary judgment is proper 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). An appellate court's standard of review of a trial court's grant of a motion for summary judgment is whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Smith v. Harris*, 181 N.C. App. 585, 587, 640 S.E.2d 436, 438 (2007). "An appeal from an order granting summary judgment raises only the issues of whether, on the face of the record, there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law." *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 353, 595 S.E.2d 835, 778, 782 (2004). We review a trial court's ruling on summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Our review of a complaint for medical malpractice is further discussed *infra*.

III. Analysis

[1] We note as a preliminary matter that plaintiff includes no authority in her brief in support of her argument, which constitutes a violation of Rule 28(b) of the North Carolina Rules of Appellate Procedure and subjects the argument to dismissal. *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 358, 673 S.E.2d 667, 674 (2009); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008). Despite this violation of our appellate rules, we choose to further address plaintiff's argument pursuant to the authority granted us by

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Rule 2 of the North Carolina Rules of Appellate Procedure. *See Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365-66.

[2] N.C. R. Civ. P. 9(j) provides, in pertinent 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;
- (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
- (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2007). “[T]his rule does not provide a procedural mechanism by which a defendant may file a motion to dismiss a plaintiff’s complaint.” *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. —, —, —, S.E.2d —, — (2009). In *Barringer*, this Court established the following principles regarding the review of medical malpractice action compliance:

Rule 9(j) unambiguously requires a trial court to dismiss a complaint if the complaint’s allegations do not facially comply with the rule’s heightened pleading requirements. Additionally, this Court has determined “that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate.” In considering whether a plaintiff’s Rule 9(j) statement is supported by the facts, “a court must consider the facts relevant to Rule 9(j) and apply the law to them. In such a case, this Court does not “inquire as to whether there was any question of ma-

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terial fact,” nor do we “view the evidence in the light most favorable” to the plaintiff. Rather, “our review of Rule 9(j) compliance is de novo, because such compliance clearly presents a question of law”

Id. at —, — S.E.2d — (citations omitted); see N.C. Gen. Stat. § 1A-1, Rule 9(j) (2007).

In the instant case, plaintiff’s pleading is void of any specific assertion that the medical care was reviewed by an expert who would testify that the medical care failed to comply with the applicable standard of care; thus, the pleading does not meet the heightened pleading requirements of Rule 9(j)(1) or (2). Plaintiff asserts in her complaint that “[t]he conduct of the defendants in operating on the left knee was negligence in and of itself pursuant to Rule 9(j) not requiring certification of negligence by an expert witness.” Accordingly, we consider de novo whether her complaint alleges facts establishing negligence under the doctrine of *res ipsa loquitor* pursuant to Rule 9(j)(3). See *Barringer*, 197 N.C. App. at —, — S.E.2d at —.

This Court has determined that in medical malpractice cases, the doctrine of *res ipsa loquitor* should be “restrictive[ly]” applied, because the “‘average juror [is] unfit to determine whether [a] plaintiff’s injury would rarely occur in the absence of negligence[.]’” *Howie v. Walsh*, 168 N.C. App. 694, 698, 609 S.E.2d 249, 251 (2005) (citation omitted). Medical malpractice cases typically require expert testimony because “(1) most medical treatment involves inherent risks despite adherence to the appropriate standard of care and (2) [of] ‘the scientific and technical nature of medical treatment.’” *Id.* (citation omitted). Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 56, at 185-86 (6th ed. 2004) further explains this concept: “Although various explanations have been given for the inapplicability of *res ipsa* in medical malpractice cases, this one is the most plausible. Normally, in such actions, both the standard of care and its breach must be established by expert testimony.”

Previously, this Court has held that the doctrine of *res ipsa loquitor* applies in “‘situations where the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of [a] defendant.’” *Howie*, 168 N.C. App. at 698, 609 S.E.2d at 251 (citation omitted). It is appropriate to use the doctrine “‘when no proof of the cause of an injury is available, the instrument involved in the injury is in the exclusive control of [a]

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defendant, and the injury is of a type that would not normally occur in the absence of negligence.’ ” *Id.*

We first consider whether the first element of the doctrine was met in this case; that is, whether there was any direct proof of the cause of injury available to plaintiff. *See Yorke v. Novant Health, Inc.*, 192 N.C. 340, 351-52, 666 S.E.2d 127, 136 (2008). In *Yorke*, for example, the plaintiff offered direct proof of the cause of his injury during his trial testimony; specifically, he consistently identified through testimony a blood pressure cuff as the cause of his injury to his arm. *Id.* This Court stated that “[w]hen a plaintiff offers direct evidence of the negligence that led to his injury, the doctrine of *res ipsa loquitur* is inapplicable.” *Id.* Conversely, in *Parks v. Perry*, a doctor performed a hysterectomy on the plaintiff while she was under general anesthesia. *Parks v. Perry*, 68 N.C. App. 202, 204, 314 S.E.2d 287, 290, *disc. review denied*, 311 N.C. 761, 321 S.E.2d 142, 143 (1984). Upon awakening, she experienced numbness and weakness in her fingers, which was later identified as damage to the ulnar nerve in her right arm. *Id.* On these facts, this Court held that the plaintiff had satisfied the first element for invoking the doctrine of *res ipsa loquitur*. *Id.* at 207, 314 S.E.2d at 290.

In the instant case, plaintiff neither pled that there is no direct proof of her injury nor did she make such an argument in her brief. In fact, her complaint points to the “[t]wo skin puncture sites” made by Dr. Bowling “on the left lower extremity” as the causation of her “constant pain, permanent injury, [and] disfigurement.” Similarly, her argument in her brief focuses on the “damage that was done by an incision.” Moreover, plaintiff’s own testimony focuses on the skin incisions made to the left knee as the source of her pain. Her own testimony is sufficient to identify the cause of her injury. *See Yorke*, — N.C. at —, 666 S.E.2d at 136. Plaintiff offered direct proof of the cause of the skin incisions made to her left knee and complained that such incisions caused her pain and damages. Under these facts, we hold that the doctrine of *res ipsa loquitur* was not applicable. Accordingly, plaintiff failed to sufficiently plead her action for medical malpractice, and her assignments of error are overruled.

IV. Conclusion

Plaintiff’s complaint for a medical malpractice action failed to meet the heightened pleading requirements of N.C. Gen. Stat. § 1A-1, Rule 9(j), in that it did not include the assertion that the medical care provided by Dr. Bowling was reviewed by an expert who would testify that the medical care failed to comply with the applicable stand-

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ard of care, and it did not satisfactorily invoke the doctrine of *res ipsa loquitur*. The trial court's grant of summary judgment to Dr. Bowling is, therefore,

Affirmed.

Judge WYNN concurs.

Judge JACKSON dissents with separate opinion.

JACKSON, Judge, dissenting.

I must respectfully dissent from the majority's decision to invoke Rule 2 to reach the merits of plaintiff's appeal. For the reasons stated below, I would dismiss.

Rule 28 of the North Carolina Rules of Appellate Procedure requires an appellant to include in the body of his argument "citations of the authorities upon which the appellant relies." N.C. R. App. P. 28(b)(6) (2007). "The function of all briefs . . . is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs." N.C. R. App. P. 28(a) (2007). "Assignments of error . . . in support of which no . . . authority [is] cited, will be taken as abandoned." N.C. R. App. P. 28(b)(6) (2007).

Plaintiff devotes a single page to her sole argument on appeal. That argument is devoid of any supporting legal authority whatsoever. Therefore, as noted in the majority opinion, plaintiff's argument is subject to dismissal. However, rather than dismissing the argument, the majority addresses it under the auspices of Rule 2.

Pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, the appellate courts may excuse a party's appellate rules violations when necessary to "prevent manifest injustice to a party" or to "expedite decision in the public interest." N.C. R. App. P. 2 (2007). However, Rule 2 is to be invoked "cautiously." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). In *Dogwood*, our Supreme Court reaffirmed "prior cases as to the 'exceptional circumstances' which allow the appellate courts to take this 'extraordinary step.' *Id.* (citing *State v. Hart*, 361 N.C. 309, 315-17, 644 S.E.2d 201, 205-06 (2007); *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999)).

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I do not believe this case presents an “exceptional circumstance” warranting the “extraordinary step” of invoking Rule 2. No “manifest injustice to a party” will be prevented by invoking Rule 2; no “decision in the public interest” will be expedited. Accordingly, I would dismiss the appeal.

PAMELA C. GRANGER, PETITIONER-APPELLANT v. UNIVERSITY OF NORTH CAROLINA
AT CHAPEL HILL, RESPONDENT-APPELLEE

No. COA08-992

(Filed 7 July 2009)

1. Administrative Law— standard of review—de novo

The appropriate standard of review is *de novo* where a final agency decision rejects the decision of the administrative law judge.

2. Public Officers and Employees— termination of career state employee—unacceptable personal conduct

The trial court did not err by affirming the final decision of the State Personnel Commission to dismiss petitioner career state employee on the basis of unacceptable personal conduct because: (1) petitioner admitted to using the “n” word in the workplace in reference to an African-American employee under the direct supervision of petitioner; (2) by uttering this epithet in the workplace, where petitioner was overheard by one of her subordinates, petitioner undermined her authority and exposed respondent university to embarrassment and potential legal liability; (3) petitioner attempted to obstruct the investigation, which amounted to insubordination, petitioner stated she would not hire another black person, petitioner disposed of the African-American employee’s Black History notebook, and petitioner created a general sense of intimidation in the workplace; and (4) petitioner’s actions, when considered together, supported her dismissal under all four of the definitions of unacceptable personal conduct under 25 N.C.A.C. 1J.0614(i) including conduct for which no reasonable person should expect to receive prior warning, the willful violation of known or written work rules, conduct unbecoming a state employee that is detrimental to state service, or the abuse of a person over whom the employee has charge or to whom the employee has a responsibility.

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Appeal by Petitioner from order entered 21 April 2008 by Judge R. Allen Baddour, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 10 March 2009.

Law Offices of Michael C. Byrne, PC, by Michael C. Byrne, for Petitioner-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly D. Potter, for Respondent-Appellee.

McGEE, Judge.

Respondent dismissed Petitioner, a career employee, on 19 August 2005, on the basis of Petitioner's unacceptable personal conduct. Isabelle Jones-Parker (Jones-Parker), an African-American and also an employee of Respondent, who was under the direct supervision of Petitioner, sent Respondent a letter in June 2005 arguing, *inter alia*, that Petitioner had subjected Jones-Parker to "racism, harassment and workplace hostility." In response to Jones-Parker's letter, Respondent appointed three investigators to investigate Petitioner's allegations: Karen Silverberg, Assistant Dean for Human Resources for the UNC School of Medicine; Gena Carter, UNC Chapel Hill Human Resources Team Leader; and Joanna Carey Smith, a member of the UNC Chapel Hill Office of General Counsel (the investigators). In the course of their investigation, the investigators obtained statements from other employees under Petitioner's direct supervision. One of those employees, Susan Huey (Huey) stated that she had overheard Petitioner refer to Jones-Parker as "that n——" as Petitioner was leaving Petitioner's office. Petitioner, upon being informed of Huey's statement, admitted she had used the epithet in reference to Parker-Jones, explaining that she knew it was inappropriate. Petitioner stated it had been an expression of her anger due to the investigation, and that she had only used the epithet once, while speaking to her sister on the phone, and had not meant for anyone in the office to overhear it. Another employee, Betty Satterfield (Satterfield), stated that Petitioner had told her Petitioner would never hire another black person. Satterfield also reported she witnessed Petitioner taking a workbook belonging to Jones-Parker that contained work on Black History month that Jones-Parker was compiling for her church. Satterfield further stated that Petitioner informed her that Petitioner had instructed Petitioner's boyfriend to dispose of the notebook. In addition, Satterfield stated that Petitioner continually spoke with her concerning the ongoing investigation, attempting to elicit information, and instructing Satterfield how to

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respond to questioning. Both Huey and Satterfield stated Petitioner created a hostile work environment by continually referring to Petitioner's contacts with Respondent, and Petitioner's ability to use those contacts to punish employees who crossed Petitioner. Petitioner admitted to using the racial slur against Jones-Parker, but denied the other allegations.

The end result of the investigation was the dismissal of Petitioner. Petitioner completed Respondent's internal grievance process without success, and filed a petition for a contested case with the Office of Administrative Hearings on 5 January 2006. Administrative Law Judge (ALJ) Beecher Gray heard the case on 20-21 September 2006, and on 22 December 2006, the ALJ filed his decision in which he concluded Petitioner was improperly dismissed. Respondent appealed to the State Personnel Commission. The State Personnel Commission overturned the ALJ's decision by final decision entered 2 April 2007. Petitioner filed for judicial review, and the matter was heard by the trial court in Wake County Superior Court on 6 December 2007. By order entered 21 April 2008, the trial court affirmed the final decision of the State Personnel Commission. Petitioner appeals.

In Petitioner's arguments, she contends the trial court erred in concluding (1) that one use of a racial slur under these circumstances constituted unacceptable personal conduct, and thus provided just cause for dismissal; (2) that Petitioner's discussions with other employees about the investigation amounted to interference with that investigation, and thus insubordination; and (3) that Petitioner's statement that she would not hire another black person, Petitioner's discarding of Jones-Parker's Black History notebook, and Petitioner's creation of a "general sense of intimidation in the workplace" constituted unacceptable personal conduct, and thus just cause for dismissal. We disagree.

We observe that . . . subsection 150B-51(c) requires a reviewing court to engage in independent "*de novo*" fact-finding in all contested cases . . . where the agency fails to adopt the ALJ's initial decision. Subsection 150B-51(c) provides, in pertinent part: "In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision, the [trial] court *shall review the official record, de novo, and shall make findings of fact* and conclusions of law. In reviewing the case, the [trial] court shall not give deference to any prior decision made in the case and shall not be

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bound by the findings of fact or the conclusions of law contained in the agency's final decision." N.C.G.S. § 150B-51(c) (2003) (emphasis added).

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 662-63, 599 S.E.2d 888, 897 (2004) (internal citations omitted).

The [trial] court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The [trial] court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

N.C. Gen. Stat. § 150B-51(c) (2008).

"When this Court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold . . . : (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard."

Corbett v. N.C. Div. of Motor Vehicles, 190 N.C. App. 113, 118, 660 S.E.2d 233, 237 (2008). "In cases reviewed under G.S. 150B-51(c), the [trial] court's findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52 (2008). "Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion," ' even if contradictory evidence may exist." *Cape Med. Transp., Inc. v. N.C. Dep't of Health & Human Servs.*, 162 N.C. App. 14, 22, 590 S.E.2d 8, 14 (2004) (internal citations omitted); see also *Rainey v. N.C. Dep't of Pub. Instruction*, 181 N.C. App. 666, 671, 640 S.E.2d 790, 794 (2007), rev. on other grounds by *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 652 S.E.2d 251 (2007); *Enoch v. Alamance County Dep't of Soc. Servs.*, 164 N.C. App. 233, 250, 595 S.E.2d 744, 757 (2004).

[1] Because the case before us involves a situation where the final agency decision rejected the decision of the ALJ, the appropriate standard of review for the trial court was *de novo*. *Carroll*, 358 N.C. at 662-63, 599 S.E.2d at 897. The trial court stated the correct standard of review in its order. [R.p. 181] We must now decide whether the trial court properly applied that standard of review. *Corbett*, 190 N.C. App. at 118, 660 S.E.2d at 237.

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[2] At the time of her dismissal, Petitioner was a career state employee as defined by Chapter 126 of the North Carolina General Statutes: the “State Personnel Act.”

(a) Any employee, regardless of occupation, position or profession may be warned, demoted, suspended or dismissed by the appointing authority. Such actions may be taken against career employees as defined by the State Personnel Act, only for just cause. The provisions of this section apply only to employees who have attained career status. The degree and type of action taken shall be based upon the sound and considered judgment of the appointing authority in accordance with the provisions of this Rule. When just cause exists the only disciplinary actions provided for under this Section are:

- (1) Written warning;
- (2) Disciplinary suspension without pay;
- (3) Demotion; and
- (4) Dismissal.

(b) There are two bases for the discipline or dismissal of employees under the statutory standard for “just cause” as set out in G.S. 126-35. These two bases are:

(1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance.

(2) *Discipline or dismissal imposed on the basis of unacceptable personal conduct.*

(c) Either unsatisfactory or grossly inefficient job performance or *unacceptable personal conduct as defined in 25 NCAC 1J.0614 of this Section constitute just cause for discipline or dismissal.* The categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case. No disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly.

(d) *The imposition of any disciplinary action shall comply with the procedural requirements of this Section.*

25 N.C.A.C. 1J.0604 (2008) (emphasis added). Petitioner was dismissed based upon a finding of unacceptable personal conduct,

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which is defined in relevant part as: “conduct for which no reasonable person should expect to receive prior warning”; “the willful violation of known or written work rules”; “conduct unbecoming a state employee that is detrimental to state service”; or “the abuse of . . . person(s) over whom the employee has charge or to whom the employee has a responsibility[.]” 25 N.C.A.C. 1J.0614(i) (2008).

The trial court made the following relevant findings of fact: (1) Based on the investigation of Jones-Parker’s complaints, “other employees in the department expressed concerns and difficulties in dealing personally and professionally with Petitioner[.]” (2) Satterfield’s testimony was “credible and is consistent with other believable evidence in this case,” as was the testimony of Huey. (3) “Petitioner used a racial slur, ——— (hereinafter, the “n” word), in the workplace.” Petitioner admitted using this slur on one occasion. (4) Huey, a State employee under Petitioner’s direct supervision, overheard Petitioner use the “n” word. (5) Petitioner told Satterfield that Petitioner would “not hire another black person[.]” Satterfield’s testimony is bolstered by Petitioner’s continued attempts to question and direct Satterfield during the investigation, indicating concern on Petitioner’s part with respect to what the content of Satterfield’s testimony would be. (6) “Petitioner discarded a Black History project notebook, which was a personal item belonging to Jones-Parker.” (7) Petitioner violated the investigators’ instructions to avoid speaking to anyone concerning the ongoing investigation, and this violation constituted an act of insubordination. (8) “Petitioner created a general sense of intimidation in the workplace.” (9) “Respondent has adopted and administers policies related to racial harassment, discrimination, unlawful workplace harassment, and violence in the workplace.” (10) “Respondent has a duty and responsibility to act in compliance with all state and federal laws, including workplace discrimination or harassment laws.” And, (11) Respondent acted appropriately in considering the acts of Petitioner

in light of its interest in fostering a fair workplace free of intimidation based on race, ethnicity, or any other relevant factor, as well as in light of the perception of the public (the “public” being other employees in the department or university, or the people of the State of North Carolina), and its interpretation of possible legal actions based on any action of inaction on its own part.

The trial court then made the following relevant conclusions of law: (1) Petitioner’s admitted use of the “n” word in reference to

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Jones-Parker “constitutes unacceptable personal conduct, for which no prior warning is required.” (2) “Petitioner’s discussions with other employees about their interviews with the investigation group amounted to interference with that investigation and such conduct amounts to insubordination.” (3) “Petitioner’s statement that she would not hire another black person, discarding of Jones-Parker’s personal Black History notebook, and creation of a general sense of intimidation in the workplace, when taken together, constitute unacceptable personal conduct, for which no prior warning is required.” (4) “The conclusions of law . . . above are individually, and therefore collectively, sufficient to constitute unacceptable personal conduct, and as such, permit Petitioner’s dismissal without any prior disciplinary action.” And, (5) “Respondent has satisfied its burden of establishing just cause for Petitioner’s dismissal.”

Though contradictory evidence exists for some of the trial court’s findings of fact, we hold that substantial evidence—evidence a reasonable mind might accept as adequate to support a conclusion—exists to support the relevant findings of fact listed above. *Cape Med. Transp., Inc.*, 162 N.C. App. at 22, 590 S.E.2d at 14.

Petitioner admitted using the “n” word in the workplace in reference to Jones-Parker, which remark was overheard by Huey, one of the employees Petitioner supervised. Petitioner initially omitted her use of this racial slur in her interview with the investigators, then changed her statement twice after she was informed another employee had heard her use the racial slur.

Huey made the following written statements: (1) That after a disagreement with Jones-Parker, Petitioner “came out of her office and said under her breath ‘that ——’”; and that one “could tell [Petitioner] didn’t care for black people, just by the way she treated them or others that came into the office.” (2) Petitioner

told us on many occasions that she knew people on this campus and she could make our lives a living hell if we ever challenged her. She has always thrown around her power at the University[.] I was afraid to apply for another job . . . I didn’t want it to get back to her.

(3) Petitioner “was very rude and snippy to everyone, she didn’t like to be bothered with questions and that was known.” And, (4) “[f]or the past year or so the ethics in the office have [g]one downhill.”

Petitioner denied knowing anything about the disappearance of Jones-Parker’s Black History notebook, but Satterfield stated that she

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saw Petitioner remove the notebook from the cubicle where Jones-Parker had left it, and take it into Petitioner's office. Petitioner later told Satterfield that Petitioner had instructed Petitioner's boyfriend to throw it away. Satterfield also made the following statements: (1) Petitioner instructed Satterfield to deny knowing anything about the notebook when Satterfield spoke with investigators; (2) Petitioner repeatedly questioned Satterfield about the ongoing investigation and instructed Satterfield to withhold information potentially damaging to Petitioner; (3) Petitioner told Satterfield Petitioner would "never hire another black person in her office"; (4) Petitioner told Satterfield that if Jones-Parker "thought it was hostile before [Jones-Parker took a leave of absence], that [Jones-Parker] had no idea how hostile it could be"; (5) Petitioner indicated that she had many contacts in the university, and that she could use those contacts to "make it very difficult for someone to pursue other employment." Petitioner also "bragged that she could get [Jones-Parker] fired. [Petitioner] then told [Satterfield] that [Petitioner] could get in trouble for having told [Satterfield] that information, and that [Satterfield] should not repeat it." And, (6) Petitioner was "furious" that another employee would not divulge the content of her interview with investigators, and Petitioner told Satterfield if Satterfield "found out what was going on that [Satterfield] had better tell [Petitioner]."

Respondent has policies prohibiting racial harassment or harassment in the workplace. Respondent has a duty to enforce these policies, and to further its stated goal of promoting an "environment of tolerance and mutual respect that must prevail if the University is to fulfill its purposes." As stated by the Fourth Circuit in *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. Md. 2001):

Far more than a "mere offensive utterance," the word "[——]" is pure anathema to African-Americans. "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as '[——]' by a supervisor in the presence of his subordinates."

Id. We agree with the Fourth Circuit's analysis.

By uttering this epithet in the workplace, where Petitioner was overheard by one of her subordinates, Petitioner undermined her authority and exposed Respondent to embarrassment and potential legal liability. Further, Petitioner had attempted to obstruct the investigation, which amounted to insubordination; Petitioner stated

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she would not hire another black person, Petitioner took and disposed of Jones-Parker's Black History notebook, and she created a "general sense of intimidation in the workplace." When considered together, we hold the trial court did not err in finding that Petitioner's actions constituted unacceptable personal conduct for which dismissal was proper.

Arguably, Petitioner's actions, when considered together, support her dismissal under all four of the following definitions of unacceptable personal conduct: (1) "conduct for which no reasonable person should expect to receive prior warning"; (2) "the willful violation of known or written work rules"; (3) "conduct unbecoming a state employee that is detrimental to state service"; or (4) "the abuse of . . . a person(s) over whom the employee has charge or to whom the employee has a responsibility[.]" 25 N.C.A.C. 1J.0614(i). We hold Petitioner's unacceptable personal conduct provided Respondent just cause to terminate Petitioner's employment without any prior warning or lesser punishment. 25 N.C.A.C. 1J.0604; *see also Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005) ("One act of [unacceptable personal conduct] presents 'just cause' for any discipline, up to and including dismissal."). There is substantial evidence supporting the trial court's findings of fact, and we hold that the trial court's findings of fact support its conclusions of law and its 21 April 2008 order. These arguments are without merit.

Affirmed.

Judges GEER and BEASLEY concur.

STATE OF NORTH CAROLINA v. ERIC JEROME McLEOD

No. COA09-136

(Filed 7 July 2009)

1. Search and Seizure— warrantless search—motion to suppress evidence—implied consent

The trial court did not err in a possession of a firearm by a convicted felon case by failing to suppress evidence seized during a warrantless search into the residence defendant shared with his

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mother because the search and seizure was authorized based on implied consent because: (1) once defendant's mother told police that defendant had a gun in the residence, and defendant confirmed the presence of a gun in the residence and where it could be located, the deputies were justified in entering the residence and seizing the weapon; (2) valid consent may be given by any one of the cohabitants of a premises even though no other cohabitant has consented; (3) based on the specific facts of this case, defendant and his mother, both cohabitants of the residence, gave consent through their words and actions for the officers to enter the residence and seize the weapon; and (4) the issue of whether the officers were entitled to conduct a protective sweep need not be addressed in light of the fact that implied consent existed to justify the search and seizure.

2. Constitutional Law—right to counsel—waiver of counsel—pro se representation—failure to make inquiry required by N.C.G.S. § 15A-1242

The trial court erred in a possession of a firearm by a convicted felon case by allowing defendant to discharge his attorney and proceed *pro se* in the middle of trial when the trial court failed to make proper inquiries under N.C.G.S. § 15A-1242 before releasing defendant's counsel because: (1) the trial court made no inquiry as to defendant's understanding of his right to counsel, his understanding of the charge and possible punishment, or the consequences of proceeding without counsel; (2) while defendant made it clear he wanted to proceed on his own and keep counsel on standby to help him, the trial court had an obligation to conduct the inquiry prior to allowing defendant to proceed; and (3) the State acknowledged that it was unable to distinguish the facts of this case from the facts set forth in authority cited by defendant, and also acknowledged that defendant was entitled to a new trial based on the error committed.

Appeal by defendant from judgment entered 14 May 2008 by Judge A. Leon Stanback, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

J. Clark Fischer for defendant-appellant.

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BRYANT, Judge.

Defendant appeals from judgments and commitments entered 14 May 2008 after a jury returned a verdict of guilty on the charge of possession of a firearm by a convicted felon. For the reasons stated herein, we affirm the trial court's ruling on the motion to suppress, but remand for a new trial.

The evidence presented at trial tended to show that Deputy Janie M. Rowe, a twelve year employee of the Wake County Sheriff's Office, testified that she was working on the south side of Wake County on 26 October 2007. On that date, Deputy Rowe and fellow Deputy Darrell Morris responded to a disturbance between defendant and his mother at a Raleigh residence. Both parties lived at the residence and were present when the officers arrived. The disturbance was a verbal disagreement which led defendant's mother (Miss Lillie Wilson) to pursue an eviction of defendant. According to Miss Wilson, defendant made rental payments and cut her grass. Miss Wilson was informed by the deputies that she would have to pursue an eviction through a civil process. After speaking with and calming both parties, the deputies left the residence.

Approximately thirty minutes after leaving the residence, Deputy Rowe and Deputy Morris were called to the Wilson/McLeod residence for a second time. The deputies arrived to find defendant locked out of the residence and sitting in the garage area. Deputy Rowe went into the residence and spoke with Miss Wilson. Deputy Morris remained outside with defendant. Miss Wilson told Deputy Rowe that defendant had a gun, given to him by her late husband, which was kept in defendant's room.¹ After receiving this information Deputy Rowe and Deputy Morris accompanied defendant inside the residence and went into a bedroom in which defendant had been seen sitting on a bed earlier that evening. In the bedroom, Morris asked where defendant kept the gun. Defendant replied, "I keep it under the bed." Defendant testified that he had free range of the residence and that he slept anywhere in the home, with the exception of his mother's room.

Deputy Morris located the weapon—a sawed off shotgun with pistol grip—under the bed. The gun was not loaded and appeared to be in operable condition. Deputy Morris secured the weapon in the trunk of his patrol vehicle. Defendant was asked if he was a convicted

1. On cross examination Miss Wilson testified that she did not know "for certain" if there was a firearm in the residence, but she "just said it."

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felon, and admitted that he was a convicted felon. Deputy Morris received confirmation from communications that defendant had a felony conviction.² Defendant was then arrested for possession of a firearm by a convicted felon.

Defendant was indicted on the charge of possession of a firearm by a convicted felon on 11 December 2007. Defendant filed a pretrial motion to suppress. This motion was heard and denied by Judge Paul W. Gessner in Wake County Superior Court on 21 April 2008. At the close of the State's evidence at trial, defendant discharged his court-appointed attorney and was allowed to represent himself. The pro se defendant called Deputy Rowe and Deputy Morris as defense witnesses to testify that the situation between defendant and his mother was not hostile or volatile. Testifying on his own behalf, defendant denied having ownership of the weapon and denied having knowledge of his prior felony conviction.

On 14 May 2008, the jury returned a guilty verdict on the charge of possession of a firearm by a convicted felon. The trial court entered judgment consistent with the jury verdict and sentenced defendant to a minimum of thirteen months and a maximum of sixteen months in the custody of the North Carolina Department of Correction. This judgment was suspended and defendant was placed on eighteen months supervised probation. Defendant appeals.

Defendant raises two issues on appeal: whether the trial court erred by (I) denying defendant's motion to suppress evidence and (II) allowing defendant to proceed pro se. Because of our resolution of the second issue, wherein we remand for a new trial, and because this will likely arise again at a new trial, we address defendant's first issue regarding suppression of the evidence on the merits.

I

[1] Defendant argues that the trial court erred in failing to suppress evidence seized during a warrantless entry into the residence defendant shared with his mother when the trial court concluded the search and seizure was authorized as a protective sweep based on implied consent. We disagree.

“[A] law-enforcement officer may conduct a search and make seizures without a search warrant or other authorization, if consent

2. Judgment in file number 90 CRS 54252 for the offense of burning a dwelling house on 18 July 1990. Defendant pled guilty to the felony on 5 May 1992 in Wake County Superior Court and was sentenced to eight years imprisonment.

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to the search is given.” N.C. Gen. Stat. § 15A-221(a) (2007). “[T]he State need only show ‘that defendant’s consent to the search was freely given, and was not the product of coercion.’” *State v. Jacobs*, 162 N.C. App. 251, 258, 590 S.E.2d 437, 442 (2004). Consent to search must be given “[b]y a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of [the] premises.” N.C. Gen. Stat. § 15A-222(3) (2007).

“The standard of review to determine whether a trial court properly denied a motion to suppress is whether the trial court’s findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.” *State v. Young*, 186 N.C. App. 343, 347, 651 S.E.2d 576, 579 (2007). A trial court’s findings of fact are “conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). Where “a defendant does not assign error to . . . the trial court’s conclusions of law . . . the conclusions of law are binding [on appeal]”. *Dodson v. Dodson*, 185 N.C. App. 265, 267, 647 S.E.2d 638, 641 (2007). Unchallenged findings of fact, “[w]here no exceptions have been taken[,] . . . are presumed to be supported by competent evidence and binding on appeal.” *State v. Phillips*, 151 N.C. App. 185, 190, 565 S.E.2d 697, 701 (2002).

In the instant case the trial court made the following unchallenged findings of fact:

1. That Deputy Morris and Deputy Rowe of the Wake County Sheriff’s Department answered a disturbance call in the evening hours of October 26, 2007 at 8805 Carolina Marlin Court, Raleigh, North Carolina.
2. That the deputies talked with the complainant Lillie Mae Wilson and the Defendant in the house. The Defendant was in a bedroom, with the door open, sitting on the bed.
3. That approximately 20 minutes later, Deputies responded back to this same address pursuant to dispatch to speak with Defendant who informed deputies he had been locked out of the house by Wilson.
4. That Deputy Rowe went inside [the] residence to speak with Wilson, and Deputy Morris spoke with the Defendant in the garage area.
5. That Lillie Mae Wilson testified she told Deputy Rowe the Defendant had indicated to Wilson that he had a gun.

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6. That Deputy Rowe returned to speak with Deputy Morris.
7. From this interchange, Deputy Morris asked the Defendant if he had a weapon.
8. That the Defendant responded yes, there was a gun, in the house, under his bed.
9. That Deputy Morris went into the house and to the Defendant's bedroom where he had been when deputies arrived on prior call, and found a weapon under the bed as the Defendant had indicated.
10. That because of the volatile situation, Deputy Morris secured weapon [sic] and placed it into his patrol vehicle.
11. That Deputy Morris asked the Defendant if he had been convicted of a felony.
12. That the Defendant responded yes, he was convicted of a felony.

Thereafter the trial court concluded that, based on *United States v. Hylton*, implied consent was given to search for the weapon.

In *United States v. Hylton*, 349 F.3d 781, 2003 U.S. App. LEXIS 23575 (4th Cir. 2003), *cert. denied*, 541 U.S. 1065, 158 L. Ed. 2d 966 (2004), the Court upheld the denial of the defendant's motion to suppress evidence of a gun seized from a residence finding that consent to enter and retrieve a gun was implied by words and actions. In that case the defendant and his girlfriend shared an apartment with their children. The defendant's girlfriend called police, saying the defendant was in her apartment, that he would not let her in, and that he had a gun. She said the gun was under the mattress of the bed in the bedroom they shared. The defendant was arrested and officers thereafter entered the apartment and retrieved a loaded .38 caliber gun under the mattress in the bedroom.

In his appeal of the suppression of his gun defendant Hylton argued that when officers entered the apartment, after he had been placed under arrest, there was no danger to anyone and therefore officers exceeded the scope of their warrantless search when they retrieved his gun. The government countered, arguing that "[the girlfriend] gave implied consent to enter and recover the firearm by summoning police to her apartment and providing them with the precise location of the firearm." *Id.* at 785.

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The *Hylton* Court found that the girlfriend had authority to give consent to search her apartment and that her words and actions—specifically telling them where the gun was located—were such that it could be inferred that she gave police authority to enter her apartment and retrieve the gun. The Court held that the undisputed facts supported the inference that the girlfriend gave consent, and there was no need to address the protective sweep theory. *Id.* at 787, 2003 U.S. App. LEXIS 23575 at 11-12.

Just as in *Hylton*, the facts in the instant case support the trial court's conclusion that implied consent to search was given. Once defendant's mother told police that defendant had a gun in the residence, and defendant confirmed the presence of a gun in the residence and where it could be located, the deputies were justified in entering the residence and seizing the weapon. *See State v. Harper*, 158 N.C. App. 595, 603, 582 S.E.2d 62, 67-68 (2003) (holding that a defendant's nonverbal conduct after engaging in conversation with police and allowing them to enter a residence constituted consent to search and seize property therein), *disc. review denied*, 357 N.C. 509, 588 S.E.2d 372 (2003). Further, "valid consent may be given by any one of the co-habitants of a premises, even though no other co-habitant has consented." *Hylton*, 349 F.3d at 785. Moreover, based on the specific facts of this case, defendant and his mother, both co-habitants of the residence, gave consent through their words and actions for the officers to enter the residence and seize the weapon. Finally, just as in *Hylton*, in the present case because we have held that implied consent existed to justify the search and seizure, we need not address whether the officers were entitled to conduct a protective sweep.

Therefore, the trial court did not err in denying defendant's motion to suppress evidence. Accordingly, this assignment of error is overruled.

II

[2] Next, defendant argues the trial court erred in allowing defendant to discharge his attorney and proceed pro se in the middle of trial when the trial court failed to make proper inquiries pursuant to N.C. Gen. Stat. § 15A-1242 before releasing defendant's counsel. We agree.

The Sixth Amendment to the United States Constitution provides in part that the accused has the right to have "Assistance of

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Counsel” for his defense. U.S. Const. amend. VI. Criminal defendants also have the right to represent themselves. Our North Carolina Supreme Court stated the following in *State v. Moore*, 362 N.C. 319, 661 S.E.2d 722 (2008):

[The law] has long recognized the state constitutional right of a criminal defendant to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes. However, [b]efore allowing a defendant to waive in-court representation by counsel . . . the trial court must insure that constitutional and statutory standards are satisfied. Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel.

Id. at 321-22, 661 S.E.2d at 724 (internal citations and quotations omitted).

North Carolina General Statutes section 15A-1242 provides:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant: (1) [h]as been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled; (2) [u]nderstands and appreciates the consequences of this decision; and (3) [c]omprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2007).

Here, the trial court had the following exchange with defendant:

THE COURT: All right, yes sir.

MR. McLEOD: Yes, your Honor. I talked this matter over with my attorney and I did ask—told her I want to proceed.

THE COURT: So you want to discharge her and proceed on your own?

MR. McLEOD: Proceed on my own and keep her on stand by to help me in any way—any way that she can.

THE COURT: All right.

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MS. BAKER-HARRELL: And your Honor, if you can just give me about three minutes. I'm trying to give him all of the paperwork, all the discovery and everything that I have.

THE COURT: All right, I'll permit it. Highly unusual, but I'll permit it.

The record shows that the trial court made no inquiry as to defendant's understanding of his right to counsel, his understanding of the charge and possible punishment, or the consequences of proceeding without counsel. N.C. Gen. Stat. § 15A-1242 makes it clear that the defendant must be advised of the aforementioned inquiries before being allowed to proceed *pro se*. While defendant made it clear he wanted to proceed on his own and "keep [counsel] on stand by to help [him]," the trial court had an obligation to conduct the inquiry pursuant to N.C. Gen. Stat. § 15A-1242 prior to allowing defendant to proceed. *See State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 230-31 (2000) (holding a new trial was warranted based on the trial court's failure to comply with § 15A-1242 because "neither the statutory responsibilities of standby counsel . . . nor the actual participation of standby counsel . . . is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver."). Further, the State, acknowledging that it is unable to distinguish the facts of the instant case from the facts set forth in authority cited by defendant, also acknowledges that error was committed and defendant is entitled to a new trial. *See State v. Moore*, 362 N.C. 319, 661 S.E.2d 722 (2008) (holding a new trial was warranted where the trial court did not make an adequate determination pursuant to N.C. Gen. Stat. § 15A-1242 whether defendant's decision to proceed *pro se* was knowingly, intelligently, and voluntarily made).

AFFIRMED in part and remanded for NEW TRIAL.

Judges CALABRIA and ELMORE concur.

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[197 N.C. App. 716 (2009)]

STATE OF NORTH CAROLINA v. DENISE HERMAN CLOER, DEFENDANT

No. COA09-44

(Filed 7 July 2009)

**Appeal and Error— appealability—pretrial confinement—
credit for time served**

Although defendant contends the superior court erred in a forgery and uttering forged instruments case by failing to give defendant credit for the 56 days that she spent in pretrial confinement from 27 July 2008 through 17 September 2008 against the amount of time that she would have to serve as a result of the entry of judgment revoking her probation and activating her suspended sentences in File No. 07 CrS 50636, defendant's appeal is dismissed without prejudice to file a motion for an award of additional credit in the superior court under N.C.G.S. § 15-196.4 because: (1) the proper procedure to be followed by a defendant seeking to obtain credit for time served in pretrial confinement in addition to that awarded at the time of sentencing or the revocation of defendant's probation is for defendant to initially present his or her claim for additional credit to the trial court, with alleged errors in the trial court's determination subject to review in the appellate division following the trial court's decision by either direct appeal or *certiorari*; and (2) it did not appear from the record that defendant ever presented her claim for additional credit for time served in pretrial confinement to the trial court.

Appeal by defendant from judgments entered 17 September 2008 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 10 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General Mary S. Mercer, for the State.

Kevin P. Bradley, for Defendant-Appellant.

ERVIN, Judge.

On 15 January 2007, the Caldwell County grand jury returned bills of indictment charging the defendant, Denise Herman Cloer (Defendant), with two counts of forgery and uttering forged instruments in File Nos. 07 CrS 50636 and 50637. On 16 January 2008, Defendant entered guilty pleas to two counts of uttering forged instruments in

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File Nos. 07 CrS 50636 and 50637 and was sentenced to two consecutive six to eight month terms of imprisonment in the custody of the North Carolina Department of Correction. The active sentences imposed upon Defendant in these cases were suspended, and Defendant was placed on supervised probation for 40 months. At the time that sentence was imposed in these cases, Defendant was given credit for 11 days of time served in pretrial confinement in File No. 07 CrS 50636 and zero days credit for time served in pretrial confinement in File No. 07 CrS 50637.

On 12 May 2008, notices charging Defendant with violating the terms and conditions of her probation in File Nos. 07 CrS 50636-50637 by testing positive for the presence of cocaine and marijuana, failing to perform the required amount of community service, being absent from her residence without lawful excuse, and failing to make certain monetary payments were executed by Intensive Supervision Officer J.J. Amelia. On the same date, orders for Defendant's arrest for violating the terms and conditions of her probation were issued as well. Defendant was arrested pursuant to these orders for arrest on 22 May 2008 and was released from custody after posting bond on 24 May 2008.

On 2 June 2008, the Caldwell County grand jury returned a bill of indictment in File No. 08 CrS 1863 charging Defendant with breaking or entering a motor vehicle, misdemeanor larceny, and misdemeanor possession of stolen goods. A warrant for Defendant's arrest in File No. 08 CrS 1863 was issued on the same date. A magistrate set bail in File No. 08 CrS 1863 on 19 June 2008, and Defendant posted bond and was released from custody on the same date.

On 26 June 2008, an order for Defendant's arrest for failure to appear were issued in File No. 07 CrS 50636. On 14 July 2008, an order for Defendant's arrest for failure to appear was issued in File No. 08 CrS 1863. On 24 July 2008, Defendant was surrendered to the custody of the Caldwell County Jail by her surety as evidenced by notices of surrender filed in File Nos. 07 CrS 50636 and 08 Crs 1863.

On 17 September 2008, Defendant admitted to having willfully violated the terms and conditions of the probationary judgments entered against her in File Nos. 07 CrS 50636 and 50637. Based on Defendant's admission, the trial court revoked Defendant's probation and activated the two consecutive six to eight month sentences that had originally been imposed.

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On the same date, Defendant entered pleas of guilty to breaking or entering a motor vehicle, misdemeanor larceny, and misdemeanor possession of stolen goods in File No. 08 CrS 1863. In light of Defendant's guilty pleas, the trial court consolidated all three counts for sentencing and sentenced Defendant to a minimum of six months and a maximum of eight months imprisonment in the custody of the North Carolina Department of Correction. The trial court suspended the active sentence imposed upon Defendant in File No. 08 CrS 1863 and placed her on intensive probation for a period of 36 months. After consulting with her trial counsel, Defendant rejected her probationary sentence and requested that her suspended sentence be activated. As a result, the trial court ordered that Defendant be imprisoned for a minimum term of six months and a maximum term of eight months in File No. 08 CrS 1863. Since the trial court did not order that the sentences imposed in File Nos. 07 CrS 50636 and 50637 on the one hand and File No. 08 CrS 1863 on the other be served consecutively, the six to eight month sentence imposed in File No. 08 CrS 1863 would be served concurrently with the two consecutive six to eight month sentences imposed upon Defendant in File Nos. 07 CrS 50636 and 50637. N.C. Gen. Stat. § 15A-1340.15(a) ("Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment").

At the time of sentencing, the trial court gave Defendant credit for 14 days spent in pretrial confinement in File No. 07 CrS 50636 and for 57 days spent in pretrial confinement in File No. 08 CrS 1863. The record does not reflect that Defendant lodged any objection to the amount of credit for time served in pretrial confinement awarded by the trial court on 17 September 2008. On 22 September 2008, Defendant noted an appeal from the trial court's judgments to this Court.

On appeal, Defendant argues the superior court erred by failing to give her credit for the 56 days that she spent in pretrial confinement from 27 July 2008 (when Defendant's surety surrendered her to the custody of the Caldwell County Jail in both File Nos. 07 CrS 50636 and 50637 and in File No. 08 CrS 1863) through 17 September 2008 (the date upon which sentence was imposed in all three cases) against the amount of time that she would have to serve as a result of the entry of the judgment revoking her probation and activating her suspended sentences in File No. 07 CrS 50636. According to Defendant, N.C. Gen. Stat. § 15-196.2 requires that each concurrent sentence be credited with the amount of time spent in pretrial con-

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finement during that period because the Defendant's confinement during that interval resulted from actions taken in both File Nos. 07 CrS 50636 and 50637 and File No. 08 CrS 1863.

The first issue that must be addressed is whether this Court has the authority to hear Defendant's appeal at this time at all. "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002), *disc. rev. denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). Generally speaking, all defendants have an appeal as of right from final judgments imposed in criminal cases pursuant to N.C. Gen. Stat. § 7A-27(b). In addition, N.C. Gen. Stat. § 15A-1347 provides that "[w]hen a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a *de novo* hearing after appeal from a district court, the defendant may appeal under [N.C. Gen. Stat. §] 7A-27." Thus, there is no question but that, at least in the abstract, Defendant has a right to note an appeal from the judgments that the trial court entered on 17 September 2008 as a matter of right.

The State notes, however, that when a defendant has entered a plea of guilty, as Defendant did in File Nos. 07 CrS 56036 and 07 CrS 56037 on 16 January 2008 and in File No. 08 CrS 1863 on 17 September 2008, he or she may only raise certain issues on appeal as a matter of right. N.C. Gen. Stat. § 15A-1444; *see also State v. Carter*, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004). Given Defendant's guilty pleas, the State contends that she may only raise the issues specified in N.C. Gen. Stat. § 15A-1444(a1) and (a2) on appeal to this Court from the trial court's judgments. Since the issue of whether proper credit for time served in pretrial confinement is not one of the enumerated issues set out in N.C. Gen. Stat. § 15A-1444(a1) and (a2), the State contends that Defendant is not entitled to challenge the trial court's determination of credit for time served on appeal to this Court. As a result, the State contends that Defendant's appeal should be dismissed.

In response, Defendant argues that an admission of a probation violation is not equivalent to a guilty plea and that she is not, therefore, limited to raising the issues that can be considered in connection with appeals as of right from judgments entered following guilty pleas specified in N.C. Gen. Stat. § 15A-1444(a1) and (a2). Instead, Defendant argues that, since N.C. Gen. Stat. § 15A-1347 governs appeals from probation revocation orders and since that statutory provision does not limit the issues that she is entitled to raise on

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appeal, she is entitled to raise the issue of the propriety of the trial court's calculation of the amount of credit for time served in pretrial confinement to which she is entitled on direct appeal. Finally, Defendant contends that N.C. Gen. Stat. § 15A-1446(d)(18), which allows claims that "the sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law" to be advanced on appeal in the absence of a contemporaneous objection before the trial court, authorizes her to challenge the trial court's calculation of the amount of credit for time spent in pretrial confinement on direct appeal to which she is entitled on appeal. After careful consideration, we conclude that, on the facts present here, Defendant is not entitled to raise this credit for time served issue before this Court at this time and that her claim, which the record before us suggests may well be valid, should be addressed to the trial court in the first instance.

Although there are a number of reported decisions addressing the proper manner in which to calculate credit for time served in pretrial confinement, those decisions arise from varied procedural contexts. For example, in *State v. Farris*, 336 N.C. 552, 444 S.E.2d 182 (1994), and *State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361 (1987), the Supreme Court addressed issues involving the amount of credit for time served in pretrial confinement to which the defendant was entitled on direct appeal from the imposition of judgment. On the other hand, in *State v. Lutz*, 177 N.C. App. 140, 628 S.E.2d 34 (2006), and *State v. Jarman*, 140 N.C. App. 198, 535 S.E.2d 875 (2000), this Court addressed credit for time served issues on appeal or by way of *certiorari* from rulings on post-trial motions.¹ As a result, it appears that claims for an award of credit for time spent in pretrial confinement can, in appropriate circumstances, be advanced on both direct appeal and in proceedings stemming from the filing of post-judgment motions.

According to N.C. Gen. Stat. § 15-196.4:

Upon sentencing or activating a sentence, the judge presiding shall determine the credits to which the defendant is entitled and

1. Although our *Lutz* opinion implies at one point that the motion at issue there was a motion for appropriate relief, 177 N.C. App. at 142, 628 S.E.2d at 35, it is clear from the remainder of the opinion that the Court believed that defendant's motion was really lodged pursuant to N.C. Gen. Stat. § 15-196.1, *et seq.* Similarly, the proceedings at issue in *Jarman* appear to have been triggered by a "form" submitted by the defendant, 140 N.C. App. at 199, 535 S.E.2d at 877. However, in this Court's opinion, N.C. Gen. Stat. § 196.1 is treated as the relevant statutory provision.

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shall cause the clerk to transmit to the custodian of the defendant a statement of allowable credits. Upon committing a defendant upon the conclusion of an appeal, or a parole, probation, or post-release supervision revocation, the committing authority shall determine any credits allowable on account of these proceedings and shall cause to be transmitted, as in all other cases, a statement of the allowable credit to the custodian of the defendant. *Upon reviewing a petition seeking credit not previously allowed, the court shall determine the credits due and forward an order setting forth the allowable credit to the custodian of the petitioner.*

(emphasis added). In construing N.C. Gen. Stat. § 15-196.4, the Supreme Court stated that, when a defendant contends he is “entitled to this credit under the provisions of [N.C. Gen. Stat. §] 15-196.1 through [15]-196.4 . . . [it is] a matter for administrative action, as provided by [N.C. Gen. Stat. §] 15-196.4, rather than a subject to be considered on . . . appeal.” *State v. Mason*, 295 N.C. 584, 594, 248 S.E.2d 241, 248 (1978), *cert. denied*, 440 U.S. 984 (1979). A careful reading of *Dudley*, *Farris*, *Lutz*, and *Jarman* suggests that the issue of credit for time served was addressed on appeal in those cases only after it had been presented to the trial court, a result which is consistent with the refusal of the *Mason* court to address the issue of credit for time served present there on direct appeal. As a result, the relevant decisions of the Supreme Court and this Court tend to suggest that the proper procedure to be followed by a defendant seeking to obtain credit for time served in pretrial confinement in addition to that awarded at the time of sentencing or the revocation of the defendant’s probation is for the defendant to initially present his or her claim for additional credit to the trial court, with alleged errors in the trial court’s determination subject to review in the Appellate Division following the trial court’s decision by either direct appeal or *certiorari*, as the case may be.² Such an approach makes sense given the reality that, in at least some instances, factual issues will need to be resolved before a proper determination of the amount of credit to which a particular defendant is entitled can be made, and such issues

2. In view of the possible inconsistency between *Lutz* and *Jarman* on the issue of the proper manner in which a defendant can obtain appellate review of a trial court’s decision addressing issues raised in connection with a post-trial request for additional credit for time spent in pretrial confinement and the fact that the parties to this proceeding have, understandably enough, not addressed this issue in their briefs, we believe that it would be premature for us to attempt to definitively address the manner in which appellate review of such orders can be procured at this time.

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are best addressed, as an initial matter, in the trial courts rather than in the Appellate Division.

In this instance, it does not appear from the record that Defendant ever presented her claim for additional credit for time served in pretrial confinement to the trial court. The information in the record tends to show that Defendant was confined from 27 July 2008 through 17 September 2008 in both the probation revocation proceedings and in the pending criminal case in which Defendant was charged with breaking or entering a motor vehicle, larceny, and possession of stolen goods, and that N.C. Gen. Stat. § 1-196.2 provides, in pertinent part, that “[i]n the event that time creditable under this section shall have been spent in custody as the result of more than one pending charge,” “[e]ach concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence,” which suggests that Defendant is, in fact, entitled to the additional credit for time spent in pretrial confinement that she seeks. *See also Dudley*, 319 N.C. at 660, 356 S.E.2d at 364 (defendant given two concurrent life sentences “should have been credited on both life sentences with time spent in jail awaiting trial”). However, we cannot be confident that we have all the facts needed to make this determination because Defendant’s claim for additional credit for time spent in pretrial confinement was never presented to or resolved by the trial court. As a result, we conclude that Defendant’s request for additional credit for time served in pretrial confinement is not properly before us at this time and that Defendant’s appeal should be dismissed without prejudice to her ability to file a motion for an award of additional credit in the superior court of Caldwell County pursuant to N.C. Gen. Stat. § 15-196.4. In the event that Defendant seeks relief from the superior court of Caldwell County pursuant to N.C. Gen. Stat. § 15-196.4, we urge the court to act upon Defendant’s request expeditiously.

DISMISSED.

Judges McGEE and JACKSON concur.

IN RE T.P., M.P., & K.P.

[197 N.C. App. 723 (2009)]

IN THE MATTER OF: T.P., M.P., AND K.P.

No. COA09-143

(Filed 7 July 2009)

1. Termination of Parental Rights— subject matter jurisdiction—juvenile petitions filed

The trial court had subject matter jurisdiction to terminate respondent mother's parental rights because: (1) petitioner filed juvenile petitions alleging the minor children were neglected and dependent juveniles on 1 September 2006; (2) although respondent contends the court's initial temporary order for nonsecure custody entered in September 2006 was improper, entry of an order for nonsecure custody is governed by N.C.G.S. §§ 7B-500-506 and the criteria for issuance of a nonsecure custody order are set out in N.C.G.S. § 7B-503, and these statutes do not require the trial court to make any specific written findings; (3) it is the petition, and not the temporary nonsecure custody order that determined the existence of the jurisdiction; and (4) the trial court's failure to complete AOC-J-150 did not deprive the court of subject matter jurisdiction to enter a termination order.

2. Termination of Parental Rights— sufficiency of findings of fact—conclusions of law

The trial court erred in a termination of parental rights case by failing to include adequate findings of fact and conclusions of law because: (1) the trial court failed to set out the specific facts that require termination of respondent's parental rights; (2) the orders do not state whether reunification efforts were undertaken, the manner by which respondent failed to comply with petitioner's and the trial court's efforts, the conditions that led to the removal of the children from respondent's home, or in what respect respondent failed to make progress addressing these conditions; (3) although the termination orders referred several times to respondent's substance abuse problems, it provided no details about her drug use or any rehabilitation that was offered or attempted; and (4) the orders did not include facts about petitioner's case plan, respondent's family or work history, her visitation with the children, or her housing situation.

IN RE T.P., M.P., & K.P.

[197 N.C. App. 723 (2009)]

Appeal by Respondent from orders entered 28 October 2008 by Judge John W. Davis in Warren County District Court. Heard in the Court of Appeals 25 May 2009.

Stainback, Satterwhite, Burnette & Zollicoffer, PLLC, by Caroline S. Burnette, for Petitioner-Appellee Warren County Department of Social Services.

Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for Respondent. Deana K. Fleming, for Guardian ad Litem.

BEASLEY, Judge.

Respondent appeals from an order terminating her parental rights of her minor children, K.P., M.P., and T.P. We reverse and remand.

In July 2006 the Warren County Department of Social Services (Petitioner) investigated a report that Respondent's children, T.P. and M.P., were neglected. Petitioner discovered that T.P. and M.P. were undernourished and improperly supervised, had poor hygiene, and lived in inadequate and unsanitary conditions. Respondent was a habitual substance abuser who was "addicted to illegal drugs such as cocaine[.]" Petitioner's efforts to assist Respondent with substance abuse treatment were unsuccessful, and on 1 September 2006 Petitioner filed petitions alleging that T.P. and M.P. were neglected and dependent juveniles, as defined in N.C. Gen. Stat. § 7B-101(9) and (15) (2007). On the same day, the trial court issued nonsecure custody orders and placed T.P. and M.P. in Petitioner's custody.

Following a hearing conducted 28 November 2006, the trial court adjudicated T.P. and M.P. neglected and dependent. The formal adjudication and disposition orders were entered in June 2007. The children remained in the legal and physical custody of Petitioner, and Respondent was ordered to cooperate with substance abuse treatment.

In March 2007, Respondent gave birth to K.P. On 13 March 2007 Petitioner filed a petition alleging that K.P. was neglected and dependent. The trial court entered a nonsecure custody order placing K.P. in Petitioner's custody. Following a hearing conducted 29 January 2008, the trial court entered an adjudication and disposition order adjudicating K.P. neglected and continuing custody of K.P. with Petitioner.

On 20 June 2008, Petitioner filed petitions for termination of Respondent's parental rights to K.P., M.P., and T.P. The petitions alleged that Respondent was a chronic substance abuser who had not com-

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plied with previous court orders. The petitions asserted that the juveniles were neglected and dependent, that it was reasonably probable that the neglect and dependency would continue if they were returned to Respondent's custody, and that Respondent had willfully left them in foster care for more than a year without making reasonable progress towards correcting the conditions which had led to the children's placement outside the home.

In October 2008, the trial court conducted a hearing on the termination petitions. At the hearing, Petitioner offered the testimony of Nyesha Cook, the social worker assigned to this case. Cook testified that Respondent was a substance abuser who tested positive for drugs on every occasion that she had submitted to a drug test. Respondent had not complied with her case plan. Respondent did not cooperate with drug treatment, did not complete a parenting class or attend vocational training, and did not obtain suitable housing. Cook testified that Respondent had made no progress in correcting the problems that had led to the children being removed from her care. Following the hearing, the trial court on 23 October 2008 entered orders terminating Respondent's parental rights of K.P., M.P. and T.P. Respondent appeals these termination orders.

[1] Respondent first argues that the trial court lacked subject matter jurisdiction to terminate her parental rights in M.P. and T.P. Although the absence of subject matter jurisdiction over a proceeding in which the juveniles have been adjudicated neglected would deprive the court of jurisdiction over a termination proceeding. *In re K.J.L.*, 194 N.C. App. 386, 389, 670 S.E.2d 269, 271 (2008), we conclude that no such defect exists here.

“Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it[,] . . . [and] is conferred upon the courts by either the North Carolina Constitution or by statute.” *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (quoting *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001) and *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987)). “Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment.” *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953) (citations omitted). “Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial.”

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Stark v. Ratashara, 177 N.C. App. 449, 451-52, 628 S.E.2d 471, 473 (2006) (citations omitted). “The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal.” *In re T.B., J.B., C.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895, 896-97 (2006). “In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*.” *In re K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007).

Under N.C. Gen. Stat. § 7B-200(a)(4) (2007), the “court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent” and “also has exclusive original jurisdiction” over “[p]roceedings to terminate parental rights.” Once “the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.” N.C. Gen. Stat. § 7B-201(a) (2007). We conclude that the trial court was generally authorized to exercise jurisdiction over the type of case presented in this instance. However, “ ‘a trial court’s general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action.’ ‘Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.’ ” *In re A.B.D.*, 173 N.C. App. 77, 86-87, 617 S.E.2d 707, 714 (2005) (quoting *In re McKinney*, 158 N.C. App. at 444, 447, 581 S.E.2d at 795, 797) (other internal quotations omitted).

“The pleading in an abuse, neglect, or dependency action is the petition.” N.C. Gen. Stat. § 7B-401 (2007). “A juvenile abuse, neglect, or dependency action is a creature of statute and ‘is commenced by the filing of a petition,’ which constitutes the initial pleading in such actions.” *In re A.R.G.*, 361 N.C. 392, 397, 646 S.E.2d 349, 352 (2007) (citing N.C. Gen. Stat. § 7B-401, and quoting N.C. Gen. Stat. § 7B-405 [(2007)]). “A trial court’s subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition.” *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006).

In the instant case, the trial court obtained subject matter jurisdiction over this matter on 1 September 2006, when Petitioner filed juvenile petitions alleging M.P. and T.P. were neglected and dependent juveniles. Respondent does not dispute that a properly verified petition was filed and a summons issued. Respondent’s sole basis for challenging subject matter jurisdiction is her assertion that the court’s initial temporary order for nonsecure custody, entered in

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September 2006, was improper. We disagree.

The criteria for the issuance of a nonsecure custody order are set out in N.C. Gen. Stat. § 7B-503 (2007), which provides in relevant part that:

- (a) . . . An order for nonsecure custody shall be made only when there is a reasonable factual basis to believe the matters alleged in the petition are true, and . . . (3) The juvenile is exposed to a substantial risk of physical injury or sexual abuse because the parent, . . . has created the conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate supervision or protection[.] . . . A juvenile alleged to be abused, neglected, or dependent shall be placed in nonsecure custody only when there is a reasonable factual basis to believe that there are no other reasonable means available to protect the juvenile. . . .

The issuance of a nonsecure custody order is governed by N.C. Gen. Stat. § 7B-504 (2007), which provides, in pertinent part, that a nonsecure custody order “shall be in writing and shall direct a law enforcement officer or other authorized person to assume custody of the juvenile and to make due return on the order. A copy of the order shall be given to the juvenile’s parent, guardian, custodian, or caretaker by the official executing the order.” N.C. Gen. Stat. § 7B-506(a) (2007), states, in part, that a juvenile may not be “held under a nonsecure custody order for more than seven calendar days without a hearing on the merits or a hearing to determine the need for continued custody.” In the instant case, Respondent does not allege that the criteria for nonsecure custody were not present, or that the trial court failed to follow the requirements of G.S. § 7B-504 and G.S. § 7B-506. However, Respondent asserts that the trial court’s failure to state the specific basis for nonsecure custody in its temporary nonsecure custody order deprived the court of jurisdiction over the entire case. We disagree.

In its entry of an order for nonsecure custody, the trial court made use of a form provided by the Administrative Office of the Courts (AOC), AOC-J-150, “Order for Nonsecure Custody.” This form order states in pertinent part that:

As grounds for the issuance of this Order, the Court finds that there is a reasonable factual basis to believe that the matters alleged in the petition are true, that there are no other reasonable means available to protect the juvenile, and: (check one or more)

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Immediately following are six boxes corresponding to the statutory grounds for nonsecure custody set out in N.C. Gen. Stat. § 7B-503. In the instant case, none of these boxes is checked. The remainder of AOC-J-150 has been completed, including information about efforts made by Petitioner to avoid the need for nonsecure custody, instructions to the law enforcement officer serving the order, and information about the statutorily mandated hearing to determine the need for continued nonsecure custody.

As discussed above, entry of an order for nonsecure custody is governed by N.C. Gen. Stat. §§ 7B-500-506, and the criteria for issuance of a nonsecure custody order are set out in G.S. § 7B-503. However, these statutes do not require the trial court to make any specific written findings. In *In re E.X.J. & A.J.J.*, 191 N.C. App. 34, 39, 662 S.E.2d 24, 27 (2008), *aff'd*, 363 N.C. 9, 672 S.E.2d 19 (2009), the trial court entered a nonsecure custody order that “did not assert a basis for jurisdiction[.]” However, in its adjudication order and order for termination of parental rights, the trial court made findings of fact that supported the court’s exercise of subject matter jurisdiction. This Court held:

These findings establish a basis for emergency jurisdiction. It is immaterial to the question of the trial court’s subject matter jurisdiction in granting nonsecure custody to DSS that the trial court did not make the necessary findings.

In *In re L.B.*, 181 N.C. App. 174, 639 S.E.2d 23 (2007), the Respondent argued that the trial court lacked subject matter jurisdiction to issue a permanency planning order on the grounds that the original nonsecure custody order was entered before the juvenile petition was signed and verified. This Court again held that it is the petition, and not the temporary nonsecure custody order, that determines the existence of jurisdiction:

In this case, the order for nonsecure custody was filed 17 August 2004 and summons was issued 18 August 2004. However, the juvenile petition was not signed and verified until 19 August 2004. Therefore . . . the trial court did not have jurisdiction when the order for nonsecure custody was filed and summons was issued. . . . [T]he juvenile petition was eventually signed and verified by a DSS representative. Once this occurred on 19 August 2004, the trial court gained subject matter jurisdiction and could properly act on this matter from that day forward. Therefore, the trial court had authority to enter its permanency planning order.

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Id. at 187, 639 S.E.2d at 29. We conclude that the trial court's failure to complete AOC-J-150 did not deprive the court of subject matter jurisdiction to enter a termination order. This assignment of error is overruled.

[2] Respondent also argues that the court committed reversible error by failing to include adequate findings of fact and conclusions of law in its orders for termination of parental rights. We agree.

“The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law.” *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (2004) (quoting *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). “[A] proper finding of fact requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.” *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982). “The trial court’s ‘conclusions of law are reviewable *de novo* on appeal.’” *In re D.H., C.H., B.M., C.H. III*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (quoting *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996)).

N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2007) states that:

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

Rule 52 applies to termination of parental rights orders. *See e.g., In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (“trial court must, through ‘processes of logical reasoning,’ based on the evidentiary facts before it, ‘find the ultimate facts essential to support the conclusions of law’”) (quoting *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003)). “‘[W]hile Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific* findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.’” *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (quoting *Quick*, 305 N.C. at 451, 290 S.E.2d at 657).

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In the instant case, the trial court entered three essentially identical orders for termination of Respondent's parental rights of K.P., M.P., and T.P. The orders consist mainly of quotations from the statutory grounds for termination of parental rights and conclusory recitation of the statutory standard for termination. However, the trial court failed to set out the specific facts that require termination of this Respondent's parental rights. For example, the orders state that Petitioner made reasonable efforts to reunite Respondent and the children, that Respondent failed to comply with the Court's reunification efforts, and that the Respondent willfully left her children in foster care for more than twelve months without making adequate progress in addressing the conditions that had led to their removal from her home. However, the orders do not state whether reunification efforts were undertaken, the manner by which Respondent failed to comply with Petitioner's and the trial court's efforts, the conditions that led to the removal of the children from Respondent's home, or in what respect Respondent failed to make progress addressing these conditions. The termination orders refer several times to Respondent's substance abuse problems, but provide no details about her drug use or any rehabilitation that was offered or attempted. The orders do not include facts about Petitioner's case plan, Respondent's family or work history, her visitation with the children, or her housing situation.

We have little doubt after studying the record that there existed evidence from which the trial court could have made findings and conclusions to support its orders for termination of parental rights. Unfortunately, the skeletal orders in the record are inadequate to allow for meaningful appellate review. We conclude that the termination of parental rights orders must be

Reversed and Remanded.

Judges HUNTER, JR. and ERVIN concur.

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[197 N.C. App. 731 (2009)]

STATE OF NORTH CAROLINA v. MARTINEZ ORLANDO BLACK, DEFENDANT

No. COA08-1180

(Filed 7 July 2009)

1. Evidence— hearsay—transcript—past recollection recorded—refreshed recollection

The trial court did not abuse its discretion in a voluntary manslaughter and possession of a firearm by a felon case by allowing a witness to testify while referring to a transcript of a police interview conducted the day the crime occurred because: (1) defendant's argument that the transcript did not qualify as a past recollection recorded under N.C.G.S. § 8C-1, Rule 803(5) was irrelevant since the transcript itself was not admitted into evidence; and (2) the testimony was admissible as present recollection refreshed because the evidence was sufficient to support the trial court's determination that the witness used the transcript to refresh his memory rather than as a testimonial crutch.

2. Appeal and Error— preservation of issues—failure to cite authority

Although defendant contends the trial court violated the Double Jeopardy Clause of the United States Constitution by sentencing him as an habitual felon since the same prior felony served as the basis for his conviction for possession of a firearm by a felon and for the habitual felon conviction, this assignment of error is abandoned because defendant failed to cite authority in support of his argument as required by N.C. R. App. P. 28(b)(6) and further acknowledged that the Court of Appeals has already rejected a similar argument.

3. Sentencing— aggravated range—consideration of juvenile offenses

The trial court did not abuse its discretion in a voluntary manslaughter and possession of a firearm by a felon case by sentencing defendant in the aggravated range because: (1) although defendant contends that a juvenile adjudication may not be used to aggravate a sentence since it is not determined by a jury and violates *Blakely v. Washington*, 542 U.S. 296 (2004), defendant failed to raise this constitutional issue at trial and thus cannot raise it on appeal; and (2) although defendant contends the trial court gave undue weight to his juvenile offenses of first-degree

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rape and first-degree burglary, as opposed to the mitigating factor that the victim was over 16 years of age and a voluntary participant in defendant's conduct, the judge could give greater weight to the aggravating factor because the juvenile offenses were very serious crimes and the length of defendant's criminal record showed that his juvenile adjudication had little if any effect of turning him away from serious criminal activity later in life.

Appeal by defendant from judgments entered on or about 4 February 2008 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 March 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Leonard G. Green, for the State.

Michael E. Casterline, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of voluntary manslaughter and possession of a firearm by a felon. He was sentenced as an habitual felon on both convictions and given a sentence in the aggravated range. Defendant contends the trial court erred by (1) allowing a witness to testify while referring to a transcript of a police interview conducted the day the crime occurred; (2) sentencing defendant as an habitual felon; and (3) sentencing defendant in the aggravated range. For the following reasons, we find no error.

I. Background

On 24 July 2004 defendant shot Reginald Reid in the abdomen and the shoulder at close range. Reid died from the gunshot wounds.

On 11 October 2004, the Mecklenburg County Grand Jury indicted defendant for (1) possession of a firearm by a felon, case number 04CRS61836; (2) for having attained the status of habitual felon, case number 04CRS061837; and (3) murder, case number 04CRS239042. A superseding indictment was issued on 25 June 2007 to add possession of cocaine with intent to distribute ("PWISD") to the murder charge in case 04CRS239042.

Defendant was tried before a jury from 14 January to 4 February 2008. The PWISD charge was dismissed for insufficient evidence before the case was submitted to the jury. The jury found defendant guilty of possession of a firearm by a felon, voluntary manslaughter

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and of being an habitual felon. In case 04CRS239042 the trial court sentenced defendant on the verdict of voluntary manslaughter as an habitual felon in the aggravated range of 130 to 165 months imprisonment. In case 04CRS61836 the trial court sentenced defendant on the verdict of possession of a firearm by a felon as an habitual felon in the aggravated range of 130 to 165 months imprisonment, to run consecutively from his sentence in case 04CRS239042. Defendant appeals.

II. Present Recollection Refreshed

[1] Defendant contends the trial court erred in admitting the testimony of Eduardo McConico, a witness for the State. Defendant relies on *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977), to contend that the trial court erred because McConico was allowed to testify after he saw a written transcript and heard an audio recording of a police interview conducted the day the crime occurred.

More specifically, defendant argues that McConico's testimony was inadmissible because the transcript qualified neither as past recollection recorded pursuant to Rule 803(5)¹ nor as present recollection refreshed. Defendant argues McConico merely parroted the information in the interview transcript because the trial court's discussion of the rules of evidence "along with the court's direct questions to the witness to establish a foundation, conceivably put the witness under extreme pressure to testify consistently with the prior recorded recollection for fear of committing perjury." Defendant further argues that the admission of McConico's testimony was prejudicial, thereby entitling him to a new trial.

A. Standard of Review

Defendant contends that this issue should be reviewed *de novo*. However, the case defendant relies on, *Smith*, plainly states that a ruling on a witness' use of a memory aid to refresh his recollection is in the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion. 291 N.C. at 518, 231 S.E.2d at 672. "An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Clark v. Sanger Clinic*, 175 N.C. App.

1. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly [is not excluded by the hearsay rule, even though the declarant is available as a witness].

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76, 84, 623 S.E.2d 293, 299 (2005) (citation, quotation marks, and ellipses omitted).

B. Analysis

Because the transcript itself was not admitted into evidence, defendant's argument that the transcript did not qualify as a past recollection recorded pursuant to Rule 803(5) is irrelevant to the appeal *sub judice*. See *State v. Gibson*, 333 N.C. 29, 50, 424 S.E.2d 95, 107 (1992) (no analysis of Rule 803(5) claim when the document used to refresh the memory of the witness was not itself proffered as evidence), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 410, 432 S.E.2d 349, 353 (1993); see also *Xiong v. Marks*, 193 N.C. App. 644, —, 668 S.E.2d 594, 597-98 (2008) (issue not considered on appeal when there was no ruling by the trial court). Therefore, the only issue for our consideration is "whether the witness ha[d] an independent recollection of the event and [was] merely using the memorandum to refresh details or whether the witness [was] using the memorandum as a testimonial crutch for something beyond his recall." *State v. York*, 347 N.C. 79, 89, 489 S.E.2d 380, 386 (1997).

Defendant correctly identifies *Smith* as outlining the circumstances in which a trial court may allow a witness to use a previously recorded writing or other memory aid when testifying. 291 N.C. at 517-18, 231 S.E.2d at 671-72. However, we do not agree that applying *Smith sub judice* entitles defendant to a new trial. In *Smith*, the defendants argued "that the testimony should have been stricken because the transcript did not 'refresh' [the witness'] memory but merely provided a script for her to recite at trial." *Id.* at 517, 231 S.E.2d at 671. *Smith* generally agreed with the defendants' statement of the law, but not with the defendants' application of the law to the facts of that case. *Id.* at 517-18, 231 S.E.2d at 671-72.

Smith first distinguished an aid to refresh recollection from a writing or recording which a party seeks to admit into evidence as past recollection recorded, noting that "looser standards [are] involved with present recollection refreshed" than with past recollection recorded. *Id.* at 517, 231 S.E.2d at 671. *Smith* further stated that "the stimulation of an actual present recollection is not strictly bounded by fixed rules [as is the admission of a past recollection recorded] but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present." *Id.* at 516, 231 S.E.2d at 671.

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According to *Smith*, when a witness uses a memory aid that is not itself admitted into evidence,

the memorandum [or other memory aid] must actually “refresh” the memory of the witness and his subsequent testimony must indeed be from his own recollection. Where the testimony of the witness purports to be from his refreshed memory but is *clearly* a mere recitation of the refreshing memorandum, such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge. [However, w]here there is doubt as to whether the witness purporting to have a refreshed recollection is indeed testifying from his own recollection, the use of such testimony is dependent upon the credibility of the witness and is a question for the jury.

291 N.C. at 518, 231 S.E.2d at 671-72 (citations omitted; emphasis in original retained). *York*, a later case which applied *Smith*, added that when a witness first

testifie[s] from memory, and in particular detail, about the events surrounding the interview with the defendant[,] . . . [occasionally] refer[s] to . . . his notes . . . [,] answer[s some questions] independently of his notes [and] ha[s] extensive independent recall about the events surrounding the interview and the interview itself[, i]t is . . . evident from the full circumstances that th[e] witness [has] used his notes . . . in order to specifically recall for the jury what occurred during his interview with [the] defendant.

347 N.C. at 89, 489 S.E.2d at 386; *see also Gibson*, 333 N.C. at 50-51, 424 S.E.2d at 107 (no error when witness answers some questions independently of his notes and other questions after referring to his notes).

In applying the law to the facts of the case, *Smith* observed:

The evidence on this point is contradictory. At one point the witness, when questioned as to the origin of her testimony, stated that it was “[o]f my own memory.” At another point she said, “some is to my memory, and some isn’t.” Such statements raise questions as to the validity of her testimony.

291 N.C. at 517, 231 S.E.2d at 671. Accordingly, *Smith* determined that the witness’ reference to a previous transcript was not a *clear* recitation from the refreshing memorandum but *merely raised doubt* that the witness was testifying from her own recollection. *Id.* at 518, 231

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S.E.2d at 671-72. *Smith* concluded that the testimony was admissible within the discretion of the trial judge and overruled the defendants' assignment of error. *Id.* at 518, 231 S.E.2d at 672.

In the case *sub judice*, McConico testified to some of the events of the night in question before being shown the transcript of his police interview. When McConico was shown the transcript, he was equivocal about whether or not he remembered making the statements found therein. The trial court then allowed him to listen to the entire audio recording of his statements outside the presence of the jury. After hearing the tape, McConico admitted that the tape "refreshed [his] memory as to certain aspects of the case[.]" McConico then testified in detail to the events of the night in question, apparently without further reference to the interview transcript.

We conclude that this is not a case where the witness' testimony was "*clearly* a mere recitation of the refreshing memorandum." *Smith*, 291 N.C. at 518, 231 S.E.2d at 671 (emphasis in original). Rather, there was "doubt as to whether the witness purporting to have a refreshed recollection [was] indeed testifying from his own recollection." *Id.* The trial court carefully considered the evidence and did not make an arbitrary or unreasonable decision. Accordingly, this assignment of error is overruled.

III. Habitual Felon Conviction

[2] Defendant contends that the trial court violated the Double Jeopardy Clause of the United States Constitution by sentencing him as an habitual felon because the same prior felony served as the basis for his conviction for possession of a firearm by a felon and as the basis for the habitual felon conviction. Defendant cites no authority in support of this argument, acknowledging that this Court has already rejected a similar argument and that he raises the issue here only "for preservation purposes for possible future review in the Supreme Court of North Carolina or in federal court." Accordingly, this assignment of error is considered abandoned. N.C.R. App. P. 28(b)(6).

IV. Aggravated Sentence

[3] Defendant contends that the trial court erred by sentencing him in the aggravated range. Defendant first contends that a juvenile adjudication may not be used to aggravate a sentence because a juvenile adjudication is not determined by a jury, thereby violating *Blakely v. Washington*, a case holding that aggravating factors

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must be found by a jury. 542 U.S. 296, 159 L. Ed. 2d 403 (2004). However, defendant did not raise this constitutional issue before the trial court; therefore, he may not raise it on appeal. *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

Defendant next contends that the trial court abused its discretion by giving undue weight to the aggravating factor of his juvenile adjudication of first degree rape and first degree burglary as opposed to the mitigating factor that Reid was over 16 years of age and a voluntary participant in defendant's conduct. We disagree.

The weight to be given to aggravating and mitigating factors is within the sound discretion of the trial judge and will not be disturbed on appeal absent abuse of that discretion. *State v. Love*, 177 N.C. App. 614, 626, 630 S.E.2d 234, 242-43, *disc. review denied*, 360 N.C. 580, 636 S.E.2d 192-93 (2006). "An abuse of discretion results only where a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Clark*, 175 N.C. App. at 84, 623 S.E.2d at 299 (citation, quotation marks, and ellipses omitted).

Defendant's juvenile offenses were very serious crimes and the length of defendant's criminal record shows that his juvenile adjudication had little if any effect of turning him away from serious criminal activity later in life. We perceive no abuse of discretion in the trial judge giving greater weight to the aggravating factor and sentencing defendant in the aggravated range. Accordingly, this assignment of error is overruled.

V. Conclusion

The trial court did not err when it allowed Eduardo McConico to refresh his memory from the written transcript of his interview with police. The trial court did not err when it sentenced defendant as an habitual felon in the aggravated range.

No Error.

Judges JACKSON and STEPHENS concur.

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STATE OF NORTH CAROLINA v. JAMES MICHAEL DAVIS

No. COA08-1318

(Filed 7 July 2009)

1. Homicide— second-degree murder—driving while impaired—sufficiency of evidence—malice

The trial court did not err by denying defendant's motion to dismiss the charges of second-degree murder based on alleged insufficient evidence of malice because: (1) the State presented evidence from which the jury could conclude that defendant had consumed nine to twelve beers in a two-hour time frame but denied it when asked by law enforcement officers, his 0.13 blood alcohol content (BAC) was well-above the 0.08 BAC threshold for driving while impaired, and defendant got into his truck and drove on a well-traveled highway running over a sign and continuing to drive; (2) defendant should have known that he was a danger to the safety of others, but instead continued weaving side to side where he eventually ran off the road and, without braking or otherwise attempting to avoid a collision, crashed into the victim's pickup truck knocking it into the air; and (3) the evidence was sufficient to support a finding of malice.

2. Homicide— second-degree murder instruction—burden of proof on malice

The trial court did not abuse its discretion in a second-degree murder case by allegedly lessening the burden of proof on the malice element in the jury instructions because the pertinent additional language did not eliminate the need for the State to prove defendant committed an intentional act, but merely informed the jury that the intentional act did not need to include a specific intent to kill or injure.

3. Assault— deadly weapon inflicting serious injury—sufficiency of evidence—intent—driving while impaired—culpable negligence

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 intent because: (1) violation of the driving while impaired statute under N.C.G.S. § 20-138.1 constitutes culpable negligence as a matter of law; (2) there was substantial evidence presented of defendant's

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driving while impaired in violation of N.C.G.S. § 20-138.1; and (3) defendant's actions constituted culpable negligence sufficient to meet the intent requirement.

4. Assault— deadly weapon inflicting serious injury—instruction—burden of proof for intent

The trial court did not abuse its discretion in an assault with a deadly weapon inflicting serious injury case by allegedly lessening the burden of proof on the intent element in the jury instruction because the pertinent language was in accord with *McGill*, 314 N.C. 633 (1985).

5. Appeal and Error— preservation of issues—failure to argue constitutional issue at trial

Although defendant contends the trial court erred by failing to arrest the felony serious injury by vehicle and two felony death by vehicle convictions on the ground that they are lesser included offenses for which he has been convicted and sentenced, this assignment of error is dismissed because defendant made no objection or argument at trial concerning the double jeopardy issue and thus failed to preserve it for appellate review under N.C. R. App. P. 10(b)(1).

Appeal by defendant from judgments entered 11 June 2008 by Judge Richard D. Boner in Gaston County Superior Court. Heard in the Court of Appeals 26 March 2009.

Attorney General Roy A. Cooper, III, by Special Counsel Isaac T. Avery, III, for the State.

James N. Freeman, Jr., for defendant-appellant.

JACKSON, Judge.

James Michael Davis (“defendant”) appeals his convictions of felony serious injury by vehicle, assault with a deadly weapon inflicting serious injury, two counts of felony death by vehicle, and two counts of second-degree murder. For the reasons stated below, we hold no error in part and dismiss in part.

On 16 June 2007, at approximately 8:30 p.m., defendant was driving his 1987 F-350 flat-bed “dually” pickup truck in South Carolina on Highway 321 near the border between North Carolina and South Carolina. He was traveling northbound toward North Carolina when

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Deputy Tim Davidson of the York County, South Carolina Sheriff's Department ("Deputy Davidson")—who was engaged in a traffic stop of another vehicle—saw the truck run off the road, strike a sign, and continue driving.

Mary Thomasson was a passenger in a truck driving southbound on Highway 321. She heard a loud boom and saw a traffic sign flying through the air toward her truck. Defendant's truck was weaving side to side.

Just across the border in North Carolina, Warren G. Ray, Jr. ("Mr. Ray") was driving his daughter's 1999 S-10 extended cab pickup truck toward South Carolina. Anna Melissa Ray ("Ray")—Mr. Ray's daughter—was riding in the passenger seat, while Victoria Ray ("Mrs. Ray") was riding in the "jumper seat" in the extended cab. All three were wearing seat belts.

As Mr. Ray was stopped at a stop sign, preparing to turn onto southbound Highway 321, defendant's truck "came out of nowhere and headed right toward [the S-10]." Defendant's truck passed under the nearby train trestle, veered off the road onto the grass, and proceeded toward their truck. Defendant's truck hit Ray's truck with such force that it was "knocked [] straight up and it hit the caution sign and then it just landed back down and flipped over."

Mrs. Ray was thrown from the S-10 through the back window. Emergency medical personnel found Mrs. Ray laying face down on the road without a pulse; she was not breathing. The medical examiner pronounced her dead at the scene.

When Ray woke up, her father was on top of her. Her seatbelt was still buckled. Her father was covered in blood and unresponsive. She was trapped in her truck for what "felt like hours" until emergency crews could cut open the roof of her truck, at which time she was able to climb past her father to get herself out. The medical examiner pronounced Mr. Ray dead at the scene.

Ray was airlifted to the hospital. She suffered severe bruises, scrapes, and scratches. Although she had no internal injuries, a hematoma in her left breast failed to heal and was surgically removed one year later. She had two black eyes, was very stiff for a month, and experienced pain for approximately one year following the collision.

Defendant remained in his truck until emergency crews arrived. An emergency medical technician called for a backboard; however,

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defendant got out of his truck on his own and complained of shoulder pain. He denied having had any alcohol to drink. Defendant was taken to the hospital.

At the hospital, Trooper Darius Litaker (“Trooper Litaker”) of the Highway Patrol detected a strong odor of alcohol on defendant, notwithstanding the fact that defendant denied that he had been drinking. Trooper Litaker administered an Alkasensor test, which indicated that defendant had alcohol in his system. A subsequent blood test indicated a blood alcohol concentration (“BAC”) of 0.09. The hospital also tested defendant for alcohol. That test resulted in a BAC equivalent of 0.11. An expert extrapolated these results to the time of the collision and determined that at that time defendant’s BAC was 0.13. He also stated that it would take approximately nine to twelve beers over a two-hour period for a 150 to 200 pound male to register a BAC of 0.13.

Measurements taken at the scene of the collision revealed that the back tires of defendant’s truck went off the roadway into the grass and traveled 132 feet before the collision. It was traveling approximately forty-six to forty-eight miles per hour upon impact. After the impact, it continued approximately fourteen feet on pavement and sixty-six feet on grass. Ray’s truck moved fifty-five feet after impact. There were no skid marks or other indications that defendant attempted to brake or turn.

On 17 June 2007, the State brought charges against defendant for the deaths of Mr. Ray and Mrs. Ray, the injury to Ray, and associated motor vehicle violations. On 2 July 2007, a grand jury indicted defendant. After trial, a jury found defendant guilty of reckless driving, driving while impaired, felony serious injury by vehicle and assault with a deadly weapon inflicting serious injury for the injuries to Ray, and two counts of felony death by vehicle and two counts of second-degree murder for the deaths of Mr. Ray and Mrs. Ray.

On 11 June 2008, the trial court sentenced defendant to serve forty-five days in the custody of the Gaston County Sheriff for the reckless driving charge, as well as 189 to 236 months in the custody of the Department of Correction for the second-degree murder of Mrs. Ray, followed by an equal term for the second-degree murder of Mr. Ray, followed by a term of nineteen to twenty-three months for felony serious injury by vehicle, followed by a term of twenty-nine to forty-four months for assault with a deadly weapon inflicting serious injury. Defendant also was sentenced to serve twenty-nine to forty-

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four months in prison for the felony death by vehicle of Mrs. Ray, followed by an equal term for the same charge as to Mr. Ray. The trial court arrested judgment on the driving while impaired charge. Defendant appeals.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charges of second-degree murder because the State failed to present sufficient evidence of malice. We disagree.

This Court reviews a trial court's denial of a motion to dismiss criminal charges *de novo*, to determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

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 (citing *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978)).

The essential elements of second-degree murder are "the (1) unlawful killing (2) of a human being (3) with malice, but without premeditation and deliberation." *State v. Vassey*, 154 N.C. App. 384, 390, 572 S.E.2d 248, 252 (2002) (citing *State v. McDonald*, 151 N.C. App. 236, 243, 565 S.E.2d 273, 277, *disc. rev. denied*, 356 N.C. 310, 570 S.E.2d 892 (2002)). "Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice." *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991).

In *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000), the North Carolina Supreme Court stated that

it was necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind. *The State was not required to show that defendant had a conscious, direct*

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purpose to do specific harm or damage, or had a specific intent to kill.

Rich, 351 N.C. at 395, 527 S.E.2d at 304 (emphasis added). The Court recognized that the State had shown “a pattern of such behavior by eliciting testimony that defendant [had driven] his vehicle at a high rate of speed while impaired, on the wrong side of the road, in a no-passing zone and in violation of right-of-way rules.” *Id.* Such evidence was sufficient to support a finding of malice by the jury necessary for second-degree murder. *Id.* Defendant contends the facts of his case “are far from *Rich*.”

Here, the State presented evidence from which the jury could conclude that defendant had consumed nine to twelve beers in a two-hour timeframe but denied it when asked by law enforcement officers. His 0.13 BAC was well-above the 0.08 BAC threshold for driving while impaired. He then got into his truck and drove on a well-traveled highway. He ran over a sign and continued driving. At this point, he should have known that he was a danger to the safety of others. He continued weaving side to side. He eventually ran off the road and, without braking or otherwise attempting to avoid a collision, crashed into Ray’s S-10 pickup truck, knocking it into the air. This evidence, though different from the evidence presented in *Rich*, is sufficiently similar to support a finding of malice. Accordingly, the trial court did not err in denying defendant’s motion to dismiss the second-degree murder charges.

[2] Defendant also argues that the trial court erred by lessening the burden of proof on the malice element in the jury instructions. We disagree.

“This Court reviews jury instructions only for abuse of discretion. Abuse of discretion means manifestly unsupported by reason or so arbitrary that [the instructions] could not have been the result of a reasoned decision.” *State v. Bagley*, 183 N.C. App. 514, 524, 644 S.E.2d 615, 622 (2007) (internal citations, ellipses, and quotation marks omitted).

Here, the State requested, and the trial court gave, the following instruction:

The fifth thing that the State must prove is that the defendant acted unlawfully and with malice. Malice is a necessary element that distinguishes second[-]degree murder from manslaughter.

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ter. Malice arises when an act inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. *For malice to exist it is not necessary that there be an intent to kill or to injure any person.*

(Emphasis added). Defendant contends that the additional highlighted language lessens the burden of proof leaving the jury with the impression that the State need not prove any intentional act. However, the additional language derives from the *Rich* decision as quoted *supra*. It does not eliminate the need for the State to prove defendant committed an intentional act; it merely informs the jury that the intentional act does not need to include a specific intent to kill or injure. We can discern no abuse of discretion in the trial court's instruction.

[3] With respect to the charge of assault with a deadly weapon inflicting serious injury, defendant argues that the trial court erred in denying his motion to dismiss because the State failed to prove the element of intent. We disagree.

[I]ntent is an essential element of the crime of assault, including an assault with an automobile, but intent may be implied from culpable or criminal negligence, if the injury or apprehension thereof is the direct result of intentional acts done under circumstances showing a reckless disregard for the safety of others and a willingness to inflict injury.

State v. Coffey, 43 N.C. App. 541, 543, 259 S.E.2d 356, 357 (1979) (internal citation omitted). "Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933). Violation of North Carolina General Statutes, section 20-138.1—the driving while impaired statute—constitutes culpable negligence as a matter of law. *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 93 (1985). Here, there was substantial evidence presented of defendant's driving while impaired in violation of section 20-138.1. Accordingly, his actions constituted culpable negligence sufficient to meet the intent requirement. Therefore, the trial court did not err in denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury.

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[4] Defendant also argues with respect to this charge that the trial court erred by lessening the burden of proof on the intent element in the jury instructions. We disagree.

In addition to the pattern jury instruction for assault with a deadly weapon inflicting serious injury, the trial court gave the following instruction:

Now, ladies and gentlemen, it is not necessary that the defendant had intended to—to have intended to inflict injury upon Melissa Ray. When a person operates a motor vehicle in a culpable or criminally negligent manner such that it constitutes a deadly weapon, thereby proximately causing injury to another, he commits an assault. Culpable or criminal negligence is defined as such recklessness or carelessness proximately resulting in injury or death as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *Operating a motor vehicle upon a highway within this state while impaired is culpable negligence.*

Defendant contends the highlighted language lessens the burden of proof upon the State to prove the intent necessary to convict him. However, the highlighted language is in accord with *McGill* as quoted *supra*. We can discern no abuse of discretion.

[5] Finally, defendant argues that the trial court erred in failing to arrest the felony serious injury by vehicle and two felony death by vehicle convictions because they are lesser included offenses for which he has been convicted and sentenced. Therefore, defendant contends that the trial court exposed him to double jeopardy in violation of both the federal and State constitutions. However, defendant made no objection or argument at trial expressing concern as to a purported double jeopardy violation. Accordingly, defendant has failed to preserve this issue for appellate review pursuant to binding precedent and North Carolina Rules of Appellate Procedure, Rule 10(b)(1), and it is dismissed. *See State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (citations omitted); *see also* N.C. R. App. P. 10(b)(1) (2007). *Cf. State v. Ezell*, 159 N.C. App. 103, 105-06, 582 S.E.2d 679, 682 (2003) (addressing the merits of the defendant's argument after explaining that, "[a]lthough defendant did not raise his double jeopardy argument using those exact words, the substance of the argument was sufficiently presented and, more importantly, addressed by the trial court in finalizing its instructions to the jury.").

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For the reasons set forth above, we hold no error in part and we dismiss in part.

No error in part; Dismissed in part.

Judges STEPHENS and STROUD concur.

WANNETTA L. LANG, PLAINTIFF v. ANTONIO LANG, DEFENDANT

No. COA08-1251

(Filed 7 July 2009)

1. Child Support, Custody, and Visitation— child custody— change in circumstances

The trial court did not err in a child custody case by concluding a change in circumstances had occurred since entry of the prior custody order even though plaintiff mother alleges the trial court failed to make any findings as to the circumstances existing when the prior order was entered because: (1) the trial court's undisputed findings noted four very significant events that occurred subsequent to entry of the prior custody order including that plaintiff had given birth to a child who was one year old in May 2008, plaintiff had separated from her second husband in December 2007, the child was in first grade in May 2008, and the child had been diagnosed with and had treatment recommended for ADHD on 20 July 2007; and (2) the four findings were sufficient to show that the trial court properly considered only events which occurred after entry of the prior custody order when it concluded that there was a change of circumstances.

2. Child Support, Custody, and Visitation— child custody— effect of change in circumstances on child

The trial court in a child custody case sufficiently considered the effect of the change in circumstances on the minor child because: (1) when the effects of the substantial changes in circumstances on the minor child are self-evident, there is no need for evidence directly linking the change to the effect on the child; and (2) the trial court's consideration of the effect of the changes in circumstances on the child is implicit in its three findings that

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the child needed ADHD medication and defendant father was willing to provide it, defendant was very attentive to the child's progress and behavior in school while the mother was less attentive, and defendant had been more consistent in treating the child's various recurring medical conditions.

Appeal by plaintiff from order entered 22 May 2008 by Judge Lillian Jordan in Guilford County District Court. Heard in the Court of Appeals 26 March 2009.

Kathryn S. Lindley, for plaintiff-appellant.

Cynthia A. Hatfield, for defendant-appellee.

STROUD, Judge.

The issue in this case is whether the trial court's findings of fact were sufficient to support its legal conclusion that a child custody order should be modified because of a substantial change in circumstances affecting the minor child. We affirm.

I. Background

The parties married on 14 February 1999. Jack,¹ the only child of the marriage, was born 28 October 2000. The parties separated in April 2001 and subsequently divorced. The parties "share[d] joint legal custody of [Jack] with [p]laintiff having primary physical custody and the [d]efendant having secondary physical custody" by order entered on 21 April 2004 in District Court, Guilford County. The parties agreed to minor changes in the custody arrangement in an order entered on 22 September 2006 ("the prior custody order").²

On 1 April 2008 defendant moved to judicially modify the custody order. Defendant's motion alleged substantial changes in circumstances affecting the minor child including Jack's difficulty in school and plaintiff's inattention to Jack's medical needs. The motion requested that defendant be given primary custody of Jack.

The trial court held a hearing on defendant's motion on 13 May 2008. The trial court made findings, concluded that "primary physical custody of the child should be with [d]efendant" and modified the custody order accordingly. Plaintiff appeals.

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

2. The parties do not dispute that the order of September 2006 is the relevant order from which a change in circumstances must be measured.

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II. Standard of Review

“[A]n order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.” N.C. Gen. Stat. § 50-13.7(a) (2007). The steps in determining whether to modify a custody order are well established:

If . . . the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child’s best interests. If the trial court concludes that modification is in the child’s best interests, only then may the court order a modification of the original custody order.

Shipman v. Shipman, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003).

On appellate review, an order modifying child support is to be construed broadly. *Karger v. Wood*, 174 N.C. App. 703, 709-10, 622 S.E.2d 197, 202 (2005); *see also Shipman*, 357 N.C. at 479, 586 S.E.2d at 256 (“While, admittedly, the trial court’s findings of fact do not present a level of desired specificity, the court’s factual findings were sufficient for our review, given the circumstances in the instant case.”). The reviewing court “evaluat[es] whether a trial court’s findings of fact are supported by substantial evidence, [and] must [also] determine if the trial court’s factual findings support its conclusions of law.” *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. “When determining whether the findings [in an order modifying child custody] are adequate [to support its conclusions], this Court examines the entire order. The trial court is not constrained to using certain and specific buzz words or phrases in its order.” *Karger*, 174 N.C. App. at 709, 622 S.E.2d at 202 (citations and quotation marks omitted).

III. Findings of Fact

The trial court’s material findings of fact are undisputed:³

8. Both parties have remarried. The Defendant married Rhonda Lang in October 2004. The plaintiff has 2 children ages 1 and 3 with her [current] husband. Plaintiff and her [current] husband separated in December, 2007 but are in counseling and are try-

3. Plaintiff assigned error to one finding of fact which was immaterial to the questions presented, then abandoned that assignment of error by failing to bring it forward in her brief. N.C.R. App. P. 28(b)(6). Accordingly, the trial court’s findings of fact are “conclusively established.” *Hartsell v. Hartsell*, 189 N.C. App. 65, 68, 657 S.E.2d 724, 726 (2008).

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ing to work things out. The Defendant has no children other than [Jack].

9. . . . [Two clinical] evaluations concluded that the child has ADHD and that a trial run of medication would be appropriate to address the child's issues. Both evaluations have been provided to the child's counselor Ann Harrell who agrees with the diagnosis and treatment recommendations. The child's teacher, Suzanne Daly is aware of the diagnosis and also agrees with it.

10. The Defendant has been more involved with the child's school and extracurricular activities. He goes to the child's class weekly and has attended most field trips. The child's 1st grade teacher Suzanne Daly, testified that the Defendant was very attentive to the child's progress and behavior in school.

11. The Plaintiff has two other young children; works two jobs and is a single parent and appears to not have as much time to go to the child's school and attend extracurricular activities. The child's teacher confirmed that Plaintiff does call and write notes to her regularly, and Plaintiff is attempting to keep in close contact with the teacher.

12. The Defendant has been more consistent in treating the child's various recurring medical conditions, such as eczema.

13. The parties both acknowledge they have been advised that the child needs medication for ADHD at least on a trial basis. The Plaintiff opposes use of medication and Defendant supports its use under the advice and recommendations of the doctors who have evaluated the child. There has been a delay in use of medication due to Plaintiff's opposition.

IV. Conclusions of Law

Plaintiff contends that the trial court's findings were not sufficient to support its legal conclusions. Specifically, plaintiff argues the trial court erred (1) by failing to make any findings as to the circumstances existing when the prior custody order was entered, and (2) by "fail[ing] to indicate the effect, if any, that the[] facts [it found] had on the welfare of the child."

A. Circumstances at Entry of the Prior Custody Order

[1] The trial court concluded:

Circumstances have changed since the entry of the prior custody order in that the Defendant has become more involved and atten-

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tive to the child's education and other needs and the Plaintiff has become less able to give the child such attention.

Plaintiff contends that this conclusion is not supported by the trial court's findings because the order contained no findings as to the circumstances existing when the trial court entered the prior custody order in September 2006. We disagree.

The trial court's undisputed findings are that (1) plaintiff had given birth to a child who was one year old in May 2008, (2) plaintiff had separated from her husband in December 2007, (3) the child was in first grade in May 2008, and (4) the child had been diagnosed with and had treatment recommended for ADHD on 20 July 2007. It is clear that these four very significant events occurred subsequent to entry of the prior custody order.

These four findings are sufficient to show that the trial court properly considered only events which occurred after entry of the prior custody order when it concluded that there was a change of circumstances. The trial court did not need to use the specific words, for example, "I find that in September 2006 the child had not yet been diagnosed with ADHD, but now he has." *See Karger*, 174 N.C. App. at 709, 622 S.E.2d at 202. This assignment of error is overruled.

B. Welfare of the Minor Child

[2] The trial court further concluded:

It is still in the best interest of the child that the parties share his joint legal custody but primary physical custody of the child should be with Defendant during the school years set forth below.

Plaintiff argues that this conclusion is error because the trial court "failed to indicate the effect, if any, that the[] facts [it found] had on the welfare of the child." Plaintiff relies on *Frey v. Best*, where this Court vacated and remanded an order modifying child custody on the basis of insufficient factual findings regarding the effect of the change in circumstances on the children. 189 N.C. App. 622, 659 S.E.2d 60 (2008). Again, we disagree.

Where the "effects of the substantial changes in circumstances on the minor child . . . are self-evident," there is no need for evidence directly linking the change to the effect on the child. *Shipman*, 357 N.C. at 478-79, 586 S.E.2d at 256. Furthermore, in *Karger*, the Court refused to "construe the order as narrowly as [the] appellant sug-

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gest[ed,]” 174 N.C. App. at 710, 622 S.E.2d at 202, and affirmed the order modifying child custody even though “the trial court did not use the exact phrase ‘affecting the welfare of the child[.]’ ” *id.* at 709, 622 S.E.2d at 202.

In *Frey*, the case relied on by plaintiff, the trial court modified a custody order to grant increased visitation based on bare evidence of changes in defendant’s lifestyle and increase in the children’s ages. Specifically, the trial court found that “there has been a substantial change in circumstances in that the husband no longer works on Friday nights and rents a three-bedroom townhouse instead of a one-bedroom apartment. The children are older now as they were only 6 months, 2 years and 4 years [old] when the parties separated.” 189 N.C. App. at 638, 659 S.E.2d at 72 (brackets in original omitted). On appeal, this Court determined that the trial “court’s conclusion that there had been a substantial change in circumstances regarding husband’s ‘custodial time’ is not supported by findings of fact which indicate that those changes affected the welfare of the parties’ minor children.” *Id.* Accordingly, this Court vacated and remanded the order for further findings and conclusions. 189 N.C. App. at 638-39, 659 S.E.2d at 72.

In contrast, in *Karger* the trial court found facts related to the defendant’s current lifestyle, “then found that the child’s grades had suffered, thus providing the nexus between the substantial change in circumstances and the affect on the child’s welfare. The findings go on to describe the stable environment plaintiff can now provide.” 174 N.C. App. at 709, 622 S.E.2d at 202. This Court concluded “that the findings of fact and conclusions of law support the trial court’s order” and affirmed. *Id.* at 709, 622 S.E.2d at 202.

We conclude the case *sub judice* is more apposite to *Shipman and Karger* than to *Frey*. In the case *sub judice*, the trial court found that (1) the child needed ADHD medication and defendant was willing to provide it; (2) defendant was “very attentive to the child’s progress and behavior in school[.]” while the mother was less attentive; and (3) “[d]efendant ha[d] been more consistent in treating the child’s various recurring medical conditions[.]” These findings are very different from the findings in *Frey* which addressed only lifestyle changes for the husband and the obvious fact that the children’s ages had increased. Instead, the effect of these factual circumstances on the child is self-evident, like *Shipman*. 357 N.C. at 478-79, 586 S.E.2d at 256. Further, the trial court’s consideration of the effect of the changes in circumstances on the child is implicit in these

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three findings in the context of the whole order as in *Karger*. 174 N.C. App. at 709, 622 S.E.2d at 202. Accordingly, we overrule this assignment of error.

V. Conclusion

The trial court properly concluded that a change in circumstances had occurred since entry of the prior custody order. Further, the trial court properly considered the effect of the change in circumstances on the minor child. Accordingly, the order modifying child custody is affirmed.

Affirmed.

Judges JACKSON and STEPHENS concur.

IN THE MATTER OF: D.B.J.

No. COA09-320

(Filed 7 July 2009)

Child Abuse and Neglect— neglect—sufficiency of findings of fact

The trial court did not err by adjudicating a minor child to be a neglected juvenile because the evidence and the trial court's findings revealed that: (1) another juvenile had been subjected to abuse and neglect by an adult who regularly lived in the home; (2) the minor child's parents engaged in acts of domestic violence in the minor child's presence resulting in physical injury to the mother, personal property damage, and a domestic violence protective order even though the mother never ceased contact with respondent father; and (3) the mother abused alcohol and/or controlled substances.

Appeal by Respondent from order entered 20 November 2008 by Judge Jeanie R. Houston in Yadkin County District Court. Heard in the Court of Appeals 8 June 2009.

IN RE D.B.J.

[197 N.C. App. 752 (2009)]

James N. Freeman, Jr. for Yadkin County Department of Social Services, Petitioner-Appellee.

Robert W. Ewing, for Respondent-Appellant. Pamela Newell Williams, for Guardian Ad Litem.

BEASLEY, Judge.

Respondent is the father of D.B.J., a child born of a relationship between Respondent and the child's mother (Mother). D.B.J. is the youngest of Mother's three children. D.B.J.'s maternal half siblings are a brother (Brother) and a sister (Sister). All three of Mother's children were adjudicated neglected. Sister was additionally adjudicated abused. Respondent appeals from the adjudication of neglect for D.B.J. We affirm.

On 2 April 2008 Sister's father brought her to the emergency room at Baptist Hospital in Winston-Salem for examination and treatment of marks and bruises he observed on her body. The attending physician noted multiple adult-sized bite marks, which were covered in blue dye, on the child's arms. A nurse took photographs of the marks. The nurse also observed bruising on the child's forehead and an abrasion on her chin. Hospital personnel reported suspected child abuse to the Yadkin County Department of Social Services (Petitioner). On 4 April 2008 Petitioner filed a juvenile petition alleging that the three children were abused and neglected juveniles. Petitioner also obtained nonsecure custody of the three children.

At the adjudication hearing, the trial court made several findings of fact regarding the prior history of Mother and her two oldest children with Petitioner. In October 2006 the trial court adjudicated Brother and Sister abused and neglected due to numerous unexplained fractures of Sister's arms and collarbone. Sister was four months old at the time. On 14 January 2008, after sixteen months of placement out of Mother's home, the two older children were returned to her custody.

Shortly thereafter, on 19 January 2008, two Jonesville Police Department officers traveled to Mother's home in response to a 911 call made by the children. The officers encountered Mother, who was belligerent. On 19 March 2008 Jonesville Police Department Officer Chuck Puckett responded to a subsequent 911 call made from Mother's residence. Officer Puckett observed that Mother had facial and neck injuries purportedly inflicted by Respondent in the presence of D.B.J. and Sister.

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On the evening of 19 March 2008, an officer of the Elkin Police Department stopped a vehicle that had pulled out of the parking lot of the Elkin Creek Bar and Grill into the path of his vehicle. The officer spoke to the operator of the vehicle, whom he identified as Mother, and observed that she had red glassy eyes and slurred speech. Mother also performed poorly on field sobriety tests. The officer arrested Mother for driving while impaired.

The following day Mother obtained a domestic violence protective order against Respondent. Notwithstanding the order, Mother continued to communicate, associate and visit with Respondent. Mother's physician refused to prescribe any pain medications for Mother based on her observations of Mother's behavior, which in the physician's opinion, was indicative of "drug seeking behavior."

After Sister was seen in the emergency room of Baptist Hospital on 2 April 2008, she was examined by Dr. Sara Sinal, who concluded that the red marks on Sister's chin were "grab" marks and curved marks on her right arm were bite marks. Dr. Sinal suspected physical abuse.

The trial court concluded that D.B.J. and Brother are neglected juveniles pursuant to N.C. Gen. Stat. § 7B-101 in that D.B.J. has been in the midst of domestic violence, Mother has not distanced herself from the perpetrator of the domestic violence, and D.B.J. and Brother reside in a home where Sister has been physically abused. The trial court adjudicated D.B.J. and Brother neglected and Sister as both neglected and abused.

Review of a trial court's adjudication of neglect requires an examination of (1) the findings of fact which must be supported by clear and convincing evidence, and (2) the conclusions of law which must be supported by the findings of fact. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Respondent does not challenge the findings of fact; consequently they are presumed supported by evidence and are binding. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Respondent argues that the findings of fact do not support the conclusion of law that D.B.J. is a neglected juvenile. Respondent further argues that the findings of fact do not demonstrate any impairment or substantial risk of impairment as a result of D.B.J.'s parents' actions, that D.B.J.'s sibling was subjected to physical abuse by an adult who regularly lives in her home, or that D.B.J. was abused or that there was a substantial risk of abuse to D.B.J. based on the prior abuse of the sibling.

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A neglected juvenile is defined by N.C. Gen. Stat. § 7B-101(15) (2007) as one

who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

"[T]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (internal quotations omitted). In determining whether a child is neglected based upon the abuse or neglect of a sibling, "the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). "It is well-established that the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re T.S., III & S.M.*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006), *aff'd per curiam on other ground*, 361 N.C. 231, 641 S.E.2d 302 (2007). "[S]evere or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile" may include alcohol or substance abuse by the parent, driving while impaired with a child as a passenger, or physical abuse or injury to a child inflicted by the parent. *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). Other conduct that supports a conclusion that a child is neglected includes exposing the child to acts of domestic violence, abuse of illegal substances, and threatening or abusive behavior toward social workers and police officers in the presence of the children. *In re T.S.*, 178 N.C. App. at 114, 631 S.E.2d at 22-23.

Here, the trial court's findings of fact show that "another juvenile had been subjected to abuse [and] neglect by an adult who regularly lives in the home" in that D.B.J.'s sister had been physically abused and had sustained injuries including "marks on her left eye, right fore-

IN RE D.B.J.

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head, chin, both legs, both arms, both shoulders, groin and lower back . . . and extensive diaper rash, dark blue dye covering her bottom and legs and curved marks on her right arm . . . , grab marks [and] bite marks” by non-accidental means. The trial court also found that D.B.J.’s parents engaged in acts of domestic violence in D.B.J.’s presence, resulting in physical injury to Mother and personal property damage; that Mother was subsequently attacked by Respondent, after which she received a domestic violence protective order but never ceased contact with Respondent; and Mother has abused alcohol and/or controlled substances. The findings of fact support the trial court’s conclusion that D.B.J. is a neglected juvenile.

The order is

Affirmed.

Judges HUNTER, JR. and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JULY 2009)

BENNETT v. NEWS & OBSERVER PUBL'G CO. No. 08-1212	Wake (06CVS14229)	Affirmed in part, re- versed and remanded in part
FORD v. RODRIGUEZ No. 08-1266	Wake (05CVD16847)	Affirmed
GESEL v. MILLER ORTHOPAEDIC CLINIC, INC. No. 08-1077	Indus. Comm. (IC263168)	No error
GOODSON v. AFFILIATED COMPUTER SERVS. No. 08-1281	Indus. Comm. (IC668784)	Affirmed
GRAFTON v. WASHINGTON MUT. BANK No. 08-1035	Durham (06CVS5277)	Affirmed
IN RE C.M.R., L.C.R., B.G.R. No. 09-117	Union (07JT0206) (07JT0207) (07JT0208)	Vacated and remanded
IN RE C.M.W. No. 09-295	Guilford (06JT427)	Affirmed
IN RE F.A.C. No. 09-258	Randolph (06JA237)	Affirmed
IN RE I.H. & E.H. No. 09-244	Harnett (06J224) (06J225)	Affirmed
IN RE K.H. No. 09-405	Johnston (08J190)	Affirmed
IN RE K.P.M., F.B.B., JR., N.A.B. No. 09-340	Buncombe (08JT0101) (08JT0102) (08JT0103)	Affirmed
IN RE N.M. No. 09-218	Buncombe (08JT217)	Affirmed
IN RE Q.T.H. & W.L.R. No. 09-134	Iredell (05JT209) (05JT210)	Affirmed
IN RE S.C. No. 09-243	Harnett (07J157)	Affirmed

IN RE S.D.B. No. 09-233	Stokes (06J100A)	Reversed
IN RE S.J.F.P. No. 09-186	Harnett (06J141)	Affirmed
KEAL v. KEAL No. 08-1067	Mecklenburg (05CVD12700)	Vacated and remanded
LA COSTA DEV. CORP. v. TOWN OF NORTH TOPSAIL BEACH No. 08-855	Onslow (07CVS4412)	Reversed
LASSITER v. TOWN OF SELMA No. 08-1148	Indus. Comm. (IC589062)	Affirmed
LAWSON v. WHITE No. 07-296-2	Sampson (05CVS964)	Dismissed
MACDONALD v. BANK OF AMERICA CORP. No. 09-26	Guilford (07CVS9274)	Affirmed
RICKS v. DAVIS No. 08-1600	Nash (08CVD179)	Dismissed
SEAGLE v. CROSS No. 08-911	Buncombe (07CVS2009)	Affirmed
SIQUAR USA, INC. v. WANG No. 08-1049	Catawba (07CVS4383)	Affirmed
SOUTHER v. SOUTHER No. 08-1341	New Hanover (07CVD1263)	Affirmed
STATE v. BASNIGHT No. 08-1457	Washington (08CRS50070)	No error
STATE v. BIGGS No. 08-1170	Chowan (05CRS50466) (05CRS50467)	No error
STATE v. BOSWELL No. 09-14	Columbus (07CRS50109) (08CRS2522) (08CRS2523) (08CRS2524)	No error in part, va- cated in part as to 08CRS2524 and remanded for resentencing
STATE v. BREWINGTON No. 08-1521	Forsyth (07CRS51901)	Affirmed
STATE v. BROWN No. 08-1095	Edgecombe (07CRS52812)	No error
STATE v. BROWN No. 08-1370	Surry (04CRS52862) (07CRS2826)	No prejudicial error

STATE v. CHRISTIAN No. 08-827	Montgomery (03CRS50646) (03CRS50647) (03CRS50648)	No error
STATE v. COOPER No. 08-1098	Wake (05CRS73427) (05CRS73428)	No prejudicial error
STATE v. DIXON No. 08-1550	Mecklenburg (07CRS221179)	No error
STATE v. DUNN No. 08-1331	Onslow (07CRS51780)	No error
STATE v. DURHAM No. 09-78	Forsyth (07CRS58234)	No error
STATE v. FERGUSON No. 08-1568	Haywood (06CRS054323) (06CRS054326)	Dismissed
STATE v. FREELAND No. 08-1388	Cumberland (06CRS56389)	No error
STATE v. GAMBLE No. 09-113	Forsyth (05CRS64753)	No error
STATE v. GRAHAM No. 08-1046	Guilford (06CRS96123)	No error
STATE v. GRAVES No. 09-200	Alamance (06CRS55350)	No error in part; resti- tution order vacated and remanded for resentencing on the issue of restitution; remanded for correc- tion of judgment
STATE v. HANSLEY No. 09-91	Pender (08CRS2080) (08CRS2081) (08CRS2082)	Reversed and remanded
STATE v. HERNANDEZ No. 08-1112	Forsyth (05CRS37287) (05CRS63189) (05CRS63190) (05CRS63191) (05CRS63193) (05CRS63304) (05CRS63306) (08CRS3580)	No error
STATE v. JOHNSON No. 08-1479	Wake (05CRS19786) (05CRS29472)	No error

STATE v. JOHNSON No. 09-146	Forsyth (07CRS13176) (07CRS52511)	No error
STATE v. JONES No. 09-45	Mecklenburg (06CRS246080) (06CRS246083) (06CRS246084)	No error
STATE v. JONES No. 09-20	Gaston (05CRS57404)	No error
STATE v. JUSTICE No. 09-151	Moore (08CRS3765) (08CRS50911)	No error
STATE v. LAUREL No. 08-1114	Forsyth (07CRS53297)	No error
STATE v. McNAIR No. 09-103	Gaston (07CRS8234)	Dismissed
STATE v. McNEIL No. 08-1284	Union (06CRS50297) (06CRS13455)	No error
STATE v. McQUEEN No. 08-1484	Guilford (07CRS98092)	No error
STATE v. MILLER No. 09-66	Guilford (08CRS78489)	Appeal dismissed; petition for Writ of Certiorari denied
STATE v. MOORE No. 08-1276	Mecklenburg (05CRS206901)	No error
STATE v. OGBURN No. 08-1516	Union (05CRS57656) (07CRS7145) (07CRS7146) (07CRS7147) (07CRS7148) (07CRS7149) (07CRS7150) (07CRS7151)	No error
STATE v. PATTERSON No. 08-1571	Anson (05CRS51676) (05CRS51679)	No error
STATE v. RHINEHARDT No. 08-1330	Cabarrus (07CRS52876)	No error
STATE v. RICHARDSON No. 09-266	Alleghany (07CRS50123) (07CRS50124)	Affirmed

STATE v. ROSE No. 08-1050	New Hanover (06CRS10370) (06CRS10371)	No error
STATE v. SMALLS No. 08-1574	Guilford (07CRS23163) (07CRS23164)	No error
STATE v. TOMLINSON No. 08-1290	Burke (03CRS2068) (03CRS2069) (03CRS5088)	No error
STATE v. TRAUB No. 08-1464	Watauga (06CRS52202)	Affirmed
STATE v. TURNER No. 09-76	Mecklenburg (08CRS2610) (08CRS26099) (08CRS26100) (08CRS46153) (08CRS46155)	No error
STATE v. VINES No. 08-1292	Edgecombe (07CRS51898) (07CRS51903)	Dismissed
STATE v. WILLIAMS No. 08-1570	Henderson (07CRS1985) (07CRS1986)	No error
STATE v. YOUNG No. 08-1264	Forsyth (06CRS30099) (06CRS58869)	No error
SUTTON v. SUTTON No. 08-1178	Wayne (07CVS1886)	Affirmed
TWIN TOWER ERECTION & MAINT., INC. v. BEATTY No. 08-1437	Forsyth (07CVS2448)	Affirmed

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ACCOMPLICES AND ACCESSORIES

Accessory after fact—assault with deadly weapon with intent to kill inflicting serious injury—instruction—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact of assault with a deadly weapon with intent to kill inflicting serious injury and by instructing the jury on that charge even though the principal person pled guilty to a lesser-included offense. **State v. McGee, 366.**

ADMINISTRATIVE LAW

Standard of review—de novo—The appropriate standard of review is *de novo* where a final agency decision rejects the decision of the administrative law judge. **Granger v. Univ. of N.C., 699.**

APPEAL AND ERROR

Appealability—interlocutory order—motion to dismiss—sovereign immunity—personal jurisdiction—The Court of Appeals denied plaintiffs' motion to dismiss as interlocutory defendants' appeal from the denial of their Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, which was based on sovereign immunity. **Meherrin Indian Tribe v. Lewis, 380.**

Appealability—interlocutory order—sovereign immunity—The denial of defendants' Rule 12(b)(1) motion to dismiss based on sovereign immunity was not immediately appealable pursuant to N.C.G.S. § 1-277(b), nor did it affect a substantial right. **Meherrin Indian Tribe v. Lewis, 380.**

Appealability—interlocutory order—sovereign immunity—Rule 12(b)(6) motion to dismiss—substantial right—Plaintiffs' motion to dismiss defendants' appeal from the denial of their Rule 12(b)(6) motion to dismiss based on sovereign immunity was denied; such a motion affects a substantial right. **Meherrin Indian Tribe v. Lewis, 380.**

Appealability—mootness—sentence already completed—collateral legal consequences of adverse nature—The Court of Appeals took judicial notice of the fact that defendant has completed his sentence and although under prior case law this appeal would be dismissed as moot, the amendment to N.C.G.S. § 15A-1340.16(d) in 2008 created collateral legal consequences of an adverse nature, and thus the appeal has continuing legal significance for defendant that is not moot because courts could interpret N.C.G.S. § 15A-1340.16(d)(12a) as a sentencing enhancement statute and defendant's probation violation may be used as an aggravating factor in a subsequent sentencing hearing. **State v. Black, 373.**

Appealability—partial summary judgment—interlocutory order—avoidance of two trials—common facts—Although plaintiff's appeal from the trial court's order granting partial summary judgment on plaintiff's claim under the N.C. Wage and Hour Act was from an interlocutory order, it affected the substantial right of avoiding two trials on the same issue and was immediately appealable. In the interest of judicial economy, the Court of Appeals also elected to review defendant's appeal of its trade secrets claim since it arose out of the same facts common to the remaining claims. **Panos v. Timco Engine Ctr., Inc., 510.**

Appealability—pretrial confinement—credit for time served—Although defendant contends the superior court erred in a forgery and uttering forged

APPEAL AND ERROR—Continued

instruments case by failing to give defendant credit for the 56 days that she spent in pretrial confinement from 27 July 2008 through 17 September 2008 against the amount of time that she would have to serve as a result of the entry of judgment revoking her probation and activating her suspended sentences in File No. 07 CRS 50636, defendant's appeal is dismissed without prejudice to file a motion for an award of additional credit in the superior court under N.C.G.S. § 15-196.4. **State v. Cloer, 716.**

Appealability—Rule 54 certification—no effect—A Rule 54(b) certification for immediate appeal had no effect where the trial court did not enter a final judgment as to fewer than all of the claims or parties in the action. **Meherrin Indian Tribe v. Lewis, 380.**

Appealability—Rule 60(b) motion made after notice of appeal given—writ of certiorari—attorney malpractice—Although the Disciplinary Hearing Commission (DHC) did not err in a legal malpractice case by concluding that it lacked jurisdiction to rule upon defendant's N.C.G.S. § 1A-1, Rule 60(b) motion when such motion was made after the notice of appeal had been given, the Court of Appeals in its discretion treated defendant's first appeal as a petition for writ of certiorari given the nonjurisdictional nature of the complaint and found substantial evidence that a reasonable person might accept as adequate to support the conclusions that defendant's conduct was violative of each of the Rules of Professional Conduct found in the DHC's Conclusions of Law, except for Rule 1.6(a) in Conclusion No. 2(e). **N.C. State. Bar v. Sossomon, 261.**

Assignments of error—not supported by authority—abandoned—Assignments of error not supported by authority were deemed abandoned. **Barringer v. Wake Forest Univ. Baptist Med. Ctr., 238.**

Criminal case—appeal by State—impaired driving dismissal—N.C.G.S. § 20-38.7(a) and N.C.G.S. § 15A-1432(e), read *in pari materia*, did not authorize the State to appeal a superior court order holding certain impaired driving statutes unconstitutional and remanding the matter to district court. **State v. Fowler, 1.**

Criminal case—appeal by State—remand from superior to district court—The Court of Appeals granted *certiorari* for the State to appeal an interlocutory superior court order concluding that certain impaired driving statutes were unconstitutional. **State v. Fowler, 1.**

Denial of class certification—issue of law—de novo review—equity may be considered—While appeal from the denial of class certification generally involves an abuse of discretion standard of review, the Court of Appeals reviews issues of law, such as statutory interpretation, *de novo*. Class actions should be permitted where they serve useful purposes, balanced against inefficiency or other drawbacks; among the matters the trial court may consider in its discretion are matters of equity. **Blitz v. Agean, Inc., 296.**

Further jurisdiction in trial court—appeal of nonappealable interlocutory order—The appeal of a trial court order denying plaintiff's motion to have a particular judge assigned to the case did not divest the trial court of jurisdiction to hear further matters. A trial court is not divested of its jurisdiction when the litigant appeals a nonappealable interlocutory order. **Dalenko v. Peden Gen. Contr's, Inc., 115.**

APPEAL AND ERROR—Continued

Grant of motion to suppress—State’s appeal from district to superior court—certificate of service—clerical error—The superior court erred by concluding that the State’s failure to include the month in the date given on a certificate of service of an appeal from district court to superior court rendered it unable to determine whether the appeal was timely. Defendant did not allege that he was misled or prejudiced by the clerical error. **State v. Palmer, 201.**

Grant of motion to suppress—State’s appeal from district to superior court—no statutory appellate appeal—certiorari—Although the State had no statutory right of appeal, its petition for a writ of *certiorari* was granted to allow the State to appeal from a superior court order concluding that the State had not properly appealed a district court preliminary order granting defendant’s motion to dismiss. **State v. Palmer, 201.**

Grant of motion to suppress—State’s appeal from district to superior court—timeliness—The superior court erred by concluding that it was unable to determine whether it had jurisdiction to hear the State’s appeal from a district court preliminary order granting defendant’s motion to suppress based on the conclusion that the State was required to allege that the appeal was taken within ten days of the district court’s preliminary determination. **State v. Palmer, 201.**

Mootness—foster care in child’s best interest—child returned to mother—An appeal from a finding in a child neglect adjudication that it was in the best interest of a child to remain in foster care was moot where custody was subsequently granted to respondent-mother. **In re H.D.F., H.C., A.F., 480.**

Motion to dismiss in superior court—review of district court preliminary determination—Defendant did not have a statutory right to appeal from superior court, but *certiorari* was granted, where the superior court denied defendant’s motion to dismiss the State’s appeal from a district court preliminary determination that it would dismiss impaired driving charges. **State v. Via, 398.**

Preservation of issues—basis for admission of evidence—not argued to trial court—An argument that a statement should be admitted as a public record was not preserved for appeal where it was not argued as the basis for admission in the trial court. **State v. Wilson, 154.**

Preservation of issues—failure to argue—Although plaintiffs contend defendant was negligent for breach of its duty to ensure that defendant had clear title and duties to hire and supervise employees, this assignment of error is abandoned under N.C. R. App. P. 28(b)(6) based on plaintiffs’ failure to discuss the negligence claim in their brief. **Henson v. Green Tree Servicing LLC, 185.**

Preservation of issues—failure to argue constitutional issue at trial—Although defendant contends the trial court erred by failing to arrest the felony serious injury by vehicle and two felony death by vehicle convictions on the ground that they are lesser included offenses for which he has been convicted and sentenced, this assignment of error is dismissed because defendant made no objection or argument at trial concerning the double jeopardy issue and thus failed to preserve it for appellate review under N.C. R. App. P. 10(b)(1). **State v. Davis, 738.**

Preservation of issues—failure to argue—failure to cite authority—Although plaintiffs contend the trial court should have permitted them to offer

APPEAL AND ERROR—Continued

evidence as to their communications with Johnson and as to defendant's relationship with Gordon, this assignment of error is abandoned under N.C. R. App. P. 28(b)(6) because plaintiffs offered no argument and failed to cite authority in support of the admissibility of such evidence. **Henson v. Green Tree Servicing LLC, 185.**

Preservation of issues—failure to cite authority—Although defendant contends the trial court violated the Double Jeopardy Clause of the United States Constitution by sentencing him as an habitual felon since the same prior felony served as the basis for his conviction for possession of a firearm by a felon and for the habitual felon conviction, this assignment of error is abandoned because defendant failed to cite authority in support of his argument as required by N.C. R. App. P. 28(b)(6) and further acknowledged that the Court of Appeals has already rejected a similar argument. **State v. Black, 731.**

Preservation of issues—failure to cite authority—Rule 2—The Court of Appeals exercised its authority under N.C. R. App. P. 2 to address plaintiff's argument in a medical malpractice case even though plaintiff failed to include authority in her brief in support of her argument as required by N.C. R. App. P. 28(b), thus subjecting the argument to dismissal. **Rowell v. Bowling, 691.**

Preservation of issues—failure to cross-assign error—The Industrial Commission did not err in a workers' compensation case by failing to award attorney fees under N.C.G.S. §§ 97-88 and 97-88.1 because: (1) plaintiff failed to cross-assign error to conclusion of law 7, and thus has not properly preserved this issue for appellate review; and (2) this case does not require the Court of Appeals to invoke N.C. R. App. P. 2 to prevent manifest injustice. **Silva v. Lowe's Home Improvement, 142.**

Preservation of issues—failure to make motion to recuse—Although defendant contends the trial judge erred by failing to recuse himself *ex mero motu* after realizing that he previously had met defendant's family during negotiations between the family and a gas company for an easement on the family's real property, this argument is dismissed because defendant made no motion to recuse. **State v. Madures, 682.**

Record—entire instruction not included—An assignment of error concerning the denial of a request for a special instruction was not properly presented for appellate review where the record did not include a transcript of the entire charge. **Barringer v. Wake Forest Univ. Baptist Med. Ctr., 238.**

Remand on other grounds—spoliation—right to argue—As summary judgment was improperly granted, the issue of spoliation was not addressed and plaintiff retained the right to argue the issue at trial. **Blitz v. Agean, Inc., 296.**

Rule 2—failure to move to dismiss—inadequate representation allegation—Defendant's argument that his kidnapping conviction should be set aside was heard under Appellate Rule 2 despite defendant's failure to move to dismiss at trial where defendant also argued ineffective assistance of counsel. **State v. Gayton-Barbosa, 129.**

Rule 2—variance between indictment and proof—Defendant's claim of a variance between the indictment and proof was heard under Appellate Rule 2 even though he failed to challenge the sufficiency of evidence at the end of all of

APPEAL AND ERROR—Continued

the evidence, or to argue that the State's proof at trial varied from the allegations of the indictment. **State v. Gayton-Barbosa, 129.**

ARBITRATION AND MEDIATION

Claim for breach of agreement—case previously resolved—The trial court correctly dismissed an action premised on the misconception that plaintiff has a claim for breach of an arbitration agreement in a case that has been resolved. **Dalenko v. Peden Gen. Contr'rs, Inc., 115.**

Claims from agreement—prior case fully resolved—relitigation—not allowed—Although plaintiff contended that claims arising from an arbitration agreement have never been litigated, the prior lawsuit was fully and finally resolved. Plaintiff cannot seek to reopen a previously litigated matter through a breach of contract action based upon the arbitration agreement. **Dalenko v. Peden Gen. Contr'rs, Inc., 115.**

ASSAULT

Deadly weapon inflicting serious injury—instruction—burden of proof for intent—The trial court did not abuse its discretion in an assault with a deadly weapon inflicting serious injury case by allegedly lessening the burden of proof on the intent element in the jury instruction because the pertinent language was in accord with *McGill*, 314 N.C. 633 (1985). **State v. Davis, 738.**

Deadly weapon inflicting serious injury—sufficiency of evidence—intent—driving while impaired—culpable negligence—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 intent because: (1) violation of the driving while impaired statute under N.C.G.S. § 20-138.1 constitutes culpable negligence as a matter of law; and (2) there was substantial evidence presented of defendant's driving while impaired in violation of N.C.G.S. § 20-138.1. **State v. Davis, 738.**

Deadly weapon with intent to kill inflicting serious injury—jury instruction—plastic bag—The trial court did not err by instructing the jury that it could find defendant Benton guilty of assault with a deadly weapon with intent to kill inflicting serious injury if it found a plastic bag, limb, or fist was a deadly weapon even though defendant contends there was no evidence that she either used or possessed the plastic bag during the assault because the victim's testimony was sufficient evidence to support submission of the charge. **State v. Wallace, 339.**

Deadly weapon with intent to kill inflicting serious injury—motion to dismiss—failure to instruct on lesser-included offenses—deadly weapon—The trial court did not err by denying defendant Benton's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury where the evidence was sufficient to submit to the jury the question of whether defendant's fists or the tree limbs were of such character as to constitute a deadly weapon. **State v. Wallace, 339.**

Deadly weapon with intent to kill inflicting serious injury—motion to dismiss—serious injury—The trial court did not err by submitting the charge

ASSAULT—Continued

of assault with a deadly weapon with intent to kill inflicting serious injury and its lesser-included offenses to the jury against defendant Wallace because the State presented substantial evidence tending to show that the victim sustained serious injuries including the testimonies of a doctor, the victim, the victim's wife, and a detective. **State v. Wallace, 339.**

Instructions—serious injury—number of wounds—The trial court did not err in its instructions in an assault prosecution by referring to two gunshot wounds when there was conflicting evidence as to the number of wounds. There was evidence to support the court's statement that two gunshot wounds to the chest "as described in this case" would be a serious injury; furthermore, the jury was charged with weighing the evidence, determining the number of wounds, and deciding whether defendant's actions justified a conviction. **State v. Gayton-Barbosa, 129.**

Serious injury—surgery and pain—An assault victim's injuries were serious, whether she was shot in the chest once or twice, where she underwent exploratory surgery, spent two weeks in the hospital, missed two months of work, and suffered "horrible pain." **State v. Gayton-Barbosa, 129.**

ATTORNEYS

Malpractice—clear, cogent, and convincing evidence—sufficiency of findings of fact and conclusions of law—An order in a legal malpractice hearing fell short of containing clear, cogent, and convincing evidence needed to support the discipline imposed upon defendant attorney, and the case was remanded to allow the Disciplinary Hearing Commission to make proper findings of fact and conclusions of law and to reconsider defendant's sanction under N.C.G.S. § 84-28(c). **N.C. State Bar v. Sossomon, 261.**

BAIL AND PRETRIAL RELEASE

Bond forfeiture—failure to give timely notice of incarceration in another state—The trial court did not err by denying a surety's motion to set aside a bond forfeiture because: (1) the surety failed to give timely notice to the district attorney's office that defendant was incarcerated in another state as required by N.C.G.S. § 15A-544.5(b)(7); (2) although the statute in no way indicates that the incarceration must be regarding the same charges, defendant's period of incarceration must be continuous; and (3) although the surety provided notice to the district attorney regarding defendant's incarceration on 7 May 2008 while defendant was incarcerated in Tennessee for a second time, defendant's incarceration was not continuous with the period of incarceration during which defendant failed to appear in court. **State v. Largent, 614.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Instructions—entering a building without authorization—There was no plain error in the trial court's instruction in a breaking or entering case that entering a building without authorization would be an entry. **State v. Gayton-Barbosa, 129.**

CHILD ABUSE AND NEGLECT

Best interest of child—findings—not sufficient—The trial court's findings in a juvenile case were not sufficient to support its best interest determination, especially in light of findings and evidence regarding respondent's compliance with the DSS case plan and assessments made by DSS and the guardian ad litem. **In re J.B., 497.**

Child's father—counsel waived—no further notice of motions or hearing—Child neglect adjudication and disposition orders were reversed and remanded where the child's father waived counsel; he was not served with at least twenty documents; there was no indication that he had notice of the disposition hearing; and one of the reasons for not finding placement with the father appropriate was that he had not appeared before the court for several months. **In re H.D.F., H.C., A.F., 480.**

Custody to father—judicial notice of juvenile files—There was substantial evidence in a child neglect adjudication from which the court could conclude without abusing its discretion that a child should be placed with her father, with legal custody to remain with DSS. Respondent did not object to the trial court taking judicial notice of the underlying juvenile case files. **In re H.D.F., H.C., A.F., 480.**

Findings of neglect—no objection—sufficiency—Findings of fact to which respondent did not object supported the conclusion of neglect in a child neglect adjudication. Other findings were not dispositive. **In re H.D.F., H.C., A.F., 480.**

Jurisdiction—improperly terminated—The trial court improperly terminated its jurisdiction over a juvenile case by mandating that future matters of custody and visitation were to be addressed under Chapter 50 of the General Statutes without complying with the mandates in N.C.G.S. § 7B-911. **In re J.B., 497.**

Neglect by mother—custody to father—evidence sufficient—There was sufficient competent evidence in a child neglect adjudication for the trial court to conclude that the father was a fit and proper person to have custody of a child. Although respondent mother argued that more evidence was needed, she did not challenge the findings the court made or the competency of the evidence. **In re H.D.F., H.C., A.F., 480.**

Neglect—sufficiency of findings of fact—The trial court did not err by adjudicating a minor child to be a neglected juvenile because the evidence and the trial court's findings revealed that: (1) another juvenile had been subjected to abuse and neglect by an adult who regularly lived in the home; (2) the minor child's parents engaged in acts of domestic violence in the minor child's presence resulting in physical injury to the mother, personal property damage, and a domestic violence protective order even though the mother never ceased contact with respondent father; and (3) the mother abused alcohol and/or controlled substances. **In re D.B.J., 752.**

Placement with grandmother—findings—not sufficient—The trial court erred in finding and concluding that a juvenile should be placed with his grandmother by not making the findings mandated by N.C.G.S. § § 7B-906 and 907. **In re J.B., 497.**

Reasonable efforts to prevent placement—functional equivalent—Assuming that N.C.G.S. § 7B-507(a)(3) applies, ordering DSS to supervise respondent

CHILD ABUSE AND NEGLECT—Continued

mother's visitation and to aid in her substance abuse assessment and psychological evaluation is the functional equivalent of ordering DSS to make reasonable efforts to prevent the need for placement as required by the statute. **In re H.D.F., H.C., A.F., 480.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Child custody—change in circumstances—The trial court did not err in a child custody case by concluding a change in circumstances had occurred since entry of the prior custody order even though plaintiff mother alleges the trial court failed to make any findings as to the circumstances existing when the prior order was entered because: (1) the trial court's undisputed findings noted four very significant events that occurred subsequent to entry of the prior custody order; and (2) the four findings were sufficient to show that the trial court properly considered only events which occurred after entry of the prior custody order when it concluded that there was a change of circumstances. **Lang v. Lang, 746.**

Child custody—effect of change in circumstances on child—The trial court in a child custody case sufficiently considered the effect of the change in circumstances on the minor child because the trial court's consideration of the effect of the changes in circumstances on the child is implicit in its three findings that the child needed ADHD medication and defendant father was willing to provide it, defendant was very attentive to the child's progress and behavior in school while the mother was less attentive, and defendant had been more consistent in treating the child's various recurring medical conditions. **Lang v. Lang, 746.**

Custody granted to nonparent relative over parent—sufficiency of findings of fact—best interests of child—The trial court erred by granting custody to nonparent relatives over respondent parent without making adequate findings of fact and conclusions of law, and the case is remanded for reconsideration because, although the trial court concluded it was in the best interest of the minor child to remain with the nonparent relatives, it failed to issue findings of fact to support the application of the best interest analysis that respondent father acted inconsistently with his custodial rights. **In re B.G., 570.**

Custody granted to nonparent relative over parent—sufficiency of findings of fact under N.C.G.S. § 7B-907(b), (c), and (f)—The trial court's child custody order did not fail to make sufficient findings of fact with regard to N.C.G.S. § 7B-907(b), (c), and (f) in awarding joint legal custody to respondent father and to the child's maternal aunt and uncle. **In re B.G., 570.**

Deviation—4-step process—The trial court did not abuse its discretion in a child support modification case by refusing to consider a requested deviation from the 2006 Child Support Guidelines and not following the required 4-step process to determine the need to deviate because the Child Support Enforcement Agency filed the motion to modify child support on the mother's behalf based on the original order being three years old or older and on a deviation of fifteen percent or more between the amount of the existing order and the amount of child support resulting from application of the Guidelines, thus meeting the presumption of a substantial change of circumstances warranting modification; and the four-step process referenced by obligor is for determining a child support amount and is applied only after a trial court decides to deviate. **Head v. Mosier, 328.**

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

Modification—earning capacity—legitimate business expenses—depression of income in bad faith—The trial court did not abuse its discretion in a child support modification case by considering obligor's earning capacity allegedly without considering legitimate business expenses, or in the alternative, without finding obligor had deliberately depressed his income in bad faith or had otherwise disregarded his child support obligations because the trial court in its findings of fact properly considered obligor's gross income and expenses. **Head v. Mosier, 328.**

Modification—fifteen percent presumption—The trial court did not abuse its discretion in a child support modification case by failing to make any findings regarding any changes in the needs of the minor children because the trial court concluded that there had been a substantial change in circumstances based on it being more than three years since the calculation of obligor's child support obligation and the current obligation calculation being greater than fifteen percent of the prior obligation calculation. **Head v. Mosier, 328.**

Modification—separation of findings of fact and conclusions of law—The findings of fact and conclusions of law in a child support modification case were sufficiently separate for meaningful appellate review. **Head v. Mosier, 328.**

CITIES AND TOWNS

Action to clear title to property—public use—withdrawal from dedication—abandonment—An unpaved portion of a town street that was never paved or used for vehicular traffic remained dedicated to public use, although plaintiff town leased portions of the pertinent property, because the fact that a municipality improves or directs improvement of only part of the property dedicated does not constitute an abandonment of the balance; and the pertinent property was not subject to withdrawal from dedication since that property was but an unopened portion of a street which was otherwise actually opened and used by the public. **Town of Oriental v. Henry, 673.**

CIVIL PROCEDURE

Summary judgment ruling—discovery not complete—no abuse of discretion—The trial court did not err by granting summary judgment for defendant Terra-Mulch before ruling on plaintiffs' outstanding discovery motion. Plaintiffs may not argue on appeal that the trial court erred by granting summary judgment for Terra-Mulch before ruling on their motion to compel when plaintiffs manifestly acquiesced to that course of events at the summary judgment hearing. Moreover, it cannot be concluded that the additional information would have produced a different outcome. **Hamby v. Profile Prods., LLC, 99.**

CLASS ACTIONS

Certification—fax advertising—individualized issues—fact-based approach—The primary issue concerning class certification in a case under the Telephone Consumer Protection Act (TCPA) involving fax advertisements was whether, under the "commonality and typicality" prong of the test, individualized issues concerning unsolicited advertisements predominated over issues of law and fact common to the proposed class members. A fact-based approach was adopted over a bright line rule. **Blitz v. Agean, Inc., 296.**

CLASS ACTIONS—Continued

Certification—Telephone Consumer Protection Act claims—not per se inappropriate—A trial court ruling denying class certification in a Telephone Consumer Protection Act (TCPA) fax advertising case was based upon a misapprehension of the law and thus constituted an abuse of discretion. **Blitz v. Agean, Inc., 296.**

Fax advertising—established business relationships—excluded from proposed class—relevance—Even though plaintiff in an action involving fax advertising by a restaurant expressly excluded from the proposed class all persons or entities having an established business relationship with defendant, the issue remained relevant because those people had to be identified to ensure removal from the proposed class. Defendant had the obligation to keep records documenting any prior express invitation or permission. **Blitz v. Agean, Inc., 296.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Intent—absence of mistake or accident—redacted statements—The trial court did not abuse its discretion in an assault with a firearm upon a law enforcement officer and resisting a public officer case by admitting under N.C.G.S. § 8C-1, Rule 404(b) evidence of redacted statements relating to defendant's prior arrest and statements made by defendant while he was being transported from his home to jail on the present charges because the evidence was properly admitted to provide a complete picture for the jury, and defendant's statements tend to show both his intent and absence of mistake or accident in the commission of the offenses charged against him. **State v. Madures, 682.**

CONSPIRACY

Malicious assault in secret manner—instruction—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to maliciously assault in a secret manner and by instructing the jury on that charge because the circumstances show a reasonable inference that defendant and others conspired to assault the victims on the road when: (1) the two groups of men were feuding with each other, and a confrontation had occurred earlier that night; (2) defendant had two others accompany him with weapons and then told them to hide in the woods; and (3) when the victims approached defendant, the others ran out of the woods and vehicle to assault the two men. **State v. McGee, 366.**

CONSTITUTIONAL LAW

Corporate income tax—true earnings definite standard—Commerce Clause—N.C. Constitution article V, section 2(6)—formal rule-making procedures not required—The trial court did not err by granting summary judgment in favor of defendant Secretary of Revenue based on its conclusion that the Secretary acted within his lawful constitutional authority when he assessed additional corporate income taxes against plaintiff as a result of the combination of plaintiff with two related entities. **Wal-Mart Stores E., Inc. v. Hinton, 30.**

Double jeopardy—pretrial motion and evidence—no attachment of jeopardy—In an action involving required pretrial motions for implied consent

CONSTITUTIONAL LAW—Continued

offenses and the State's right to appeal, the superior court erred by concluding that portions of N.C.G.S. §§ 20-38.6 and .7 violate the Former Jeopardy Clause of the United States Constitution. In North Carolina nonjury trials, jeopardy attaches when the court begins to hear evidence or testimony, and does not attach when the court is presented with evidence or testimony for a pretrial motion on a question of law. **State v. Fowler, 1.**

Due Process—implied consent offenses—pretrial motion requirements—The trial court erred by holding that the pretrial motion requirements of N.C.G.S. §§ 20-38.6(a), (f) and 20-38.7(a) violate Due Process. The Legislature determined from the facts before it that the pretrial procedures in the challenged statutes would serve as a means to improve the safety of the motoring public in North Carolina, and the legislation was reasonably related to the valid objective sought to be obtained. Furthermore, there was no procedural due process violation. **State v. Fowler, 1.**

Effective assistance of counsel—conceding guilt of lesser offense—A first-degree murder defendant was not denied effective assistance of counsel when her attorney conceded guilt of second-degree murder to the jury. Defendant gave a knowing and voluntary consent in response to an inquiry by the trial court. **State v. Goode, 543.**

Effective assistance of counsel—dismissal without prejudice to file motion for appropriate relief—Although defendant contends he received ineffective assistance of counsel in a first-degree sexual offense and first-degree rape case based on his counsel's failure to object at trial, this assignment of error is dismissed without prejudice to allow defendant to file a motion for appropriate relief with the trial court. **State v. Streater, 632.**

Effective assistance of counsel—failure to move to dismiss—no prejudice—Defendant was not prejudiced by his counsel's failure to make a motion to dismiss a kidnapping charge at the close of the evidence where the evidence was sufficient to support the conviction, and defendant was therefore not deprived of effective assistance of counsel. **State v. Gayton-Barbosa, 129.**

Equal Protection—implied consent offenses—required pretrial motions—The trial court erred by concluding that the pretrial motion requirements of N.C.G.S. §§ 20-38.6(a), (f) and 20-38.7(a) for implied consent offenses in district court violate equal protection. All defendants charged with an implied consent offense appearing in district court are subject to the same procedural requirements and the challenged provisions had a rational relationship to a conceivable legitimate interest of the government. **State v. Fowler, 1.**

Ex post facto law—satellite-based monitoring of sex offenders—The trial court did not err by directing defendant to enroll in satellite-based monitoring (SBM) under N.C.G.S. § 14-208.40B even though defendant contends it violates the *ex post facto* clause of the North Carolina and United States Constitutions when the SBM provisions did not exist at the time defendant was convicted of the charges and imposition of SBM increases defendant's punishment for his crime because the legislature intended SBM to be a civil and regulatory scheme. **State v. Bare, 461.**

Fair trial—implied consent offenses—required pretrial motions—The requirement in N.C.G.S. § 20-38.6(a) that defendants charged with implied con-

CONSTITUTIONAL LAW—Continued

sent offenses in district court make pretrial motions to dismiss or suppress evidence did not infringe on the right to a fair trial, even though those defendants do not have the benefit of pretrial discovery. The statute allows defendants to make motions to dismiss or suppress during trial when there are newly discovered facts. **State v. Fowler, 1.**

North Carolina constitution—court rules—impaired driving—authority of legislature—The General Assembly is constitutionally authorized to create rules of procedure and practice for the superior and district courts, and to prescribe the jurisdiction and powers of the superior courts, and a constitutional amendment was not required for the General Assembly to promulgate a rule of procedure and practice concerning impaired driving cases pertaining exclusively to superior and district courts. **State v. Fowler, 1.**

North Carolina constitution—impaired driving procedures—authority of courts not violated—In a case involving the constitutionality of certain impaired driving statutes, the trial court erred by concluding that the matter was controlled by *State v. Tutt*, 171 N.C. App. 518, and that the legislature violated the Supreme Court's authority for the handling of impaired driving cases. The procedures at issue here did not apply to the appellate division, unlike the evidentiary rules involved in *Tutt*. **State v. Fowler, 1.**

North Carolina—enjoyment of fruits of labor—temporary state employees—temporary appointments with State exceeding twelve months—The trial court did not err by dismissing plaintiffs' claim under Article I, Section 35 of the North Carolina Constitution even though plaintiffs contend they showed defendants' alleged arbitrary and capricious treatment classifying plaintiffs as temporary employees when they held their positions longer than twelve months, denied them benefits, and deprived them of the enjoyment of the fruits of their own labor. **Sanders v. State Personnel Comm'n, 314.**

Random drug testing—school employees—unreasonable search—A school board policy mandating random, suspicionless drug and alcohol testing for all employees violated plaintiffs' right to be free from unreasonable searches under Article I, Section 20 of the North Carolina Constitution. **Jones v. Graham Cty. Bd. of Educ., 279.**

Right to counsel—waiver of counsel—pro se representation—failure to make inquiry required by N.C.G.S. § 15A-1242—The trial court erred in a possession of a firearm by a convicted felon case by allowing defendant to discharge his attorney and proceed *pro se* in the middle of trial when the trial court failed to make proper inquiries under N.C.G.S. § 15A-1242 before releasing defendant's counsel. **State v. McLeod, 707.**

Separation of powers—impaired driving procedures—not properly raised—not violated—The trial court did not conclude that challenged provisions of impaired driving procedures in the courts violated separation of powers. Even if the issue had been properly raised on appeal, no usurpation of judicial power was discerned. **State v. Fowler, 1.**

Speedy trial—implied consent offenses—district court preliminary determination—State's appeal to district court—Defendants charged with implied consent offenses in district court are not deprived of the right to a speedy trial by the absence of a specified time for the State's appeal from the district

CONSTITUTIONAL LAW—Continued

court's preliminary determination that it would grant a pretrial motion to dismiss or suppress. The General Assembly's decision to refrain from establishing a time for the State to give a notice of appeal will require an examination of the circumstances of each particular case. **State v. Fowler, 1.**

CONTEMPT

Civil—failure to make alimony payments—current ability to pay—The trial court did not err in a civil contempt case arising out of the failure to make alimony payments by concluding defendant had the current ability to pay \$10,000 as a purge payment where the court based its conclusion upon the fact that defendant had \$6,200 from his 401K account and a \$2,000 cashier's check, and that two of defendant's assets could be readily converted to cash including a boat and a 2001 Ford Explorer. **Tucker v. Tucker, 592.**

CONTRACTS

Breach—erroneous instruction—commercial bribery—Although the trial court erred in a breach of contract and unfair trade practices case by admitting evidence of plaintiff's commercial bribery and then submitting that question to the jury, the erroneous instruction did not affect a substantial right because the jury essentially bypassed the question in reaching its verdict. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

Breach—indefinite offer—The trial court did not err by granting defendant's motion for summary judgment on plaintiff's claims for breach of contract even though plaintiff contends that it had a non-cancelable contract with defendant which defendant allegedly breached by canceling and requiring proof of performance because: (1) there was no contract between the parties following plaintiff's receipt of the Haynes memorandum and its 7 October 2004 email response since the offer was too indefinite to bind the parties; and (2) Mullen/LHC was free to retract its earlier offer of a guaranteed one-year term, which it did by tendering its form insertion order containing the 60-day cancellation provision, since the parties had not yet committed to a contract. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

COSTS

Attorney fees—unique questions of law—The trial court did not abuse its discretion in an unfair and deceptive trade practices case by denying plaintiff's motion for attorney fees and by excluding evidence of the reasonableness of those fees because: (1) the case involved unique questions of law; and (2) defendant had valid reasons to refuse to settle this matter and to litigate it to conclusion. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

CRIMINAL LAW

Appeal by State to superior court—motion to dismiss—review of preliminary determination—The Court of Appeals affirmed a superior court order denying defendant's motion to dismiss a prosecution after the State's appeal from a preliminary district court determination that it would grant a dismissal for defendant. The matter was remanded to superior court for review of the district court's preliminary determination. **State v. Via, 398.**

CRIMINAL LAW—Continued

Competency to stand trial—no objection to trial resuming—hearing waived—A first-degree murder defendant effectively waived her statutory right to a competency hearing when she did not object to the trial court resuming the trial without the hearing after an adjournment taken because the jail staff had not given defendant her anti-anxiety medication. **State v. Goode, 543.**

Instructions—duty to retreat not included—not plain error—There was no plain error in a murder prosecution from the court's failure to instruct on the lack of a duty to retreat where defendant did not request the instruction and the issue was not a substantial feature of the defense. **State v. Wilson, 154.**

Instructions—self-defense—final mandate—Defendant failed to preserve for appellate review his argument that the trial court erred by failing to include not guilty by reason of self-defense in its final mandate. Even if Defendant's argument was properly before the Court, it is meritless as the trial court included an instruction on self-defense in its final mandate as well as instructions on first-degree murder, second-degree murder, voluntary manslaughter, and voluntary intoxication, as requested by defendant at the charge conference. **State v. Wilson, 154.**

Reinstruction of jury—self-defense not included—There was no plain error in a murder prosecution where the court reinstructed the jury on first-degree and second-degree murder but did not reinstruct on self-defense. The jury only requested a reinstruction on first and second-degree murder, and the court confirmed that defendant had no objection to the instructions as given. **State v. Wilson, 154.**

Transferred intent—attack on murder victim with car—bystander injured—The trial court did not err in a first-degree murder prosecution by applying the doctrine of transferred intent to an instruction on attempted first-degree murder. **State v. Goode, 543.**

DAMAGES AND REMEDIES

Diminution in business value—breach of contract—The trial court did not err in a breach of contract and unfair trade practices case by granting defendant's motion for summary judgment as to plaintiff's demand for diminution in business value damages because: (1) the basis for these damages was too speculative; and (2) the trial court properly denied plaintiff's motion to supplement its evidence based on its grant of summary judgment in favor of defendant on the issue. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

Exclusion of plaintiff's evidence—verdict in defendant's favor—Although plaintiffs contend they should have been permitted to introduce evidence of damages to the jury, the Court of Appeals declined to address this alleged error because the verdict was in defendant's favor. **Henson v. Green Tree Servicing LLC, 185.**

Instruction—lost profits—The trial court did not err in a breach of contract and unfair and deceptive trade practices case by its instruction to the jury on the allowable measure of damages including the use of lost profits because: (1) the past relationship between the parties suggests that plaintiff reasonably relied upon the promise by defendant's agent that the contracts were non-cancelable;

DAMAGES AND REMEDIES—Continued

and (2) the value of what was promised was plaintiff's expected profit had it been allowed to perform all of the insertion orders in 2005, and the value of what was received was the amount plaintiff was actually paid for its services as a one-sheet vendor in 2005. **Media Network, Inc. v. Long Haymes Carr, Inc.**, 433.

DECLARATORY JUDGMENTS

Granting of motion to dismiss—not equivalent of declaration—legally recognized injury—right to declaration—unavailability of monetary relief—The granting of a motion to dismiss a complaint which seeks declaratory judgment as a remedy is not a functional equivalent of a declaratory judgment. Where there is a legally recognized injury, like a breach of contract, or where an important public policy is at issue which has been recognized by our Supreme Court as the functional equivalent of a legally recognized form of injury, N.C.G.S. § 1-253 provides that the complainant is entitled to a declaration, even if no monetary relief is available. **Sanders v. State Personnel Comm'n**, 314.

DISCOVERY

Opinions of experts—allegedly undisclosed—no abuse of discretion in admitting—The trial court did not abuse its discretion in a medical malpractice action by admitting certain opinions from defendants' experts where plaintiff contended that the opinions were previously undisclosed. Considering all of the circumstances of discovery and the testimony at trial, the evidence was not unrelated, unduly prejudicial, or unfairly surprising to plaintiff. **Gray v. Allen**, 349.

Sealed documents—in camera review—The trial court erred in a taking innocent liberties with a minor case by denying defendant the opportunity to examine certain sealed documents from the Department of Social Services investigation that may have contained exculpatory evidence. **State v. Webb**, 619.

Violation of consent order—striking of answers—entry of default—The trial court did not abuse its discretion in a fraud and unfair and deceptive trade practices case arising out of the sale of a home by striking all defendants' answers and entering default against defendants Rosners and Faulk because: (1) there was ample evidence that Prudence Rosner violated the consent order including refusal to answer numerous questions regarding her finances during her deposition, failure to produce pertinent documents within fourteen days after mediation as ordered by the trial court, and failure to produce real property tax information and information regarding a possible trust in her possession; (2) Ed Rosner failed to produce any financial statements; and (3) Faulk failed to produce financial documents within the fourteen days after the mediation and did not produce any documents until after plaintiffs filed the motion for sanctions. **Baker v. Rosner**, 604.

Violations—erroneous striking of answers and default judgment—non-party—The trial court abused its discretion in a fraud and unfair and deceptive trade practices case arising out of the sale of a home by striking defendant realty company's answer and entering a default against it when it was not in violation of the order, and the entry of default regarding the realty company is reversed and remanded because: (1) the company was not a party to the pertinent order and thus not a disobedient party; and (2) plaintiffs did not seek discovery from the company. **Baker v. Rosner**, 604.

EMINENT DOMAIN

Condemnation—sewer line easement—public purpose—The trial court did not err by finding and concluding that the condemnation of defendants' land for a sewer line easement was for a public purpose because: (1) the record evidence established that the sewer line connected both plaintiff county's landfill and a lumber company with the City of Newton's Clark Creek Wastewater Treatment Plant, and at least seven other users are or will be connecting to the sewer line; (2) the evidence showed that the purpose of connecting the landfill to the public sewer system was primary and paramount; and (3) the construction of the sewer line was necessary for plaintiff to adequately treat leachate and to remain compliant with state regulations, which in turn, benefits the public generally. **Catawba Cty. v. Wyant, 533.**

EMPLOYER AND EMPLOYEE

At-will—retaliation letter—absence of consideration—The trial court did not err by granting summary judgment in favor of defendant company on plaintiff's breach of contract claim even though plaintiff contends the promises in a retaliation letter formed a contract precluding defendant's right to terminate his employment in retaliation for the actions of plaintiff's father because: (1) there was no consideration to form a contract when the two promises in the retaliation letter constituted additional obligations on the part of defendant; the letter did not increase or diminish plaintiff's pay, duties, rights, or anything else that could be deemed consideration flowing from plaintiff to defendant; and mere continued employment by the employee is insufficient consideration; and (2) there was no evidence showing that plaintiff's father negotiated the retaliation letter for his son's benefit, the promises in the retaliation letter were not incorporated and made binding in the father's severance agreement, and thus plaintiff cannot enforce the promises in the letter as a third-party beneficiary. **Franco v. Liposcience, Inc., 59.**

North Carolina Wage and Hour Act—nonresident employee—phone calls to coworkers in this state—The North Carolina Wage and Hour Act did not apply to a nonresident employee who worked primarily outside this state but communicated by phone daily with coworkers within this state. Nor was the nonresident employee entitled to the protection of the Wage and Hour Act because the employment agreement stipulated that it shall be governed by North Carolina Law. **Panos v. Timco Engine Ctr., Inc., 510.**

ENFORCEMENT OF JUDGMENTS

Execution—request for information by sheriff—delay in responding—The trial court erred by imposing a willfulness requirement on the "neglects or refuses" language in N.C.G.S. § 1-324.4 in a case involving defendant's delay in responding to a sheriff's request for information from which to satisfy an outstanding judgment. The court's order that plaintiff recover nothing was remanded because it was not clear whether defendant's neglect to provide the information was due to mere failure to act or neglect by carelessness. **Insulation Sys., Inc. v. Fisher, 386.**

EVIDENCE

Child abuse investigator—victim's interview at DSS—The trial court did not commit plain error in a first-degree sexual offense and first-degree rape case by

EVIDENCE—Continued

allowing a child abuse investigator's testimony about the victim's interview at DSS where the investigator did not render an opinion that sexual abuse had occurred but merely explained her usual protocol in forensic interviews and stated she thought the first portion of the interview was sufficient to support the allegations contained in the protective services report. **State v. Streater, 632.**

Cross-examination—medical code of conduct—unauthenticated article—The trial court did not abuse its discretion in a medical malpractice action by limiting cross-examination of a defendant about a code of conduct and by not allowing cross-examination based on an unauthenticated article. The trial court conducted a *voir dire* and admitted the relevant portions of the code and was within its discretion in excluding documents that were not authenticated. **Gray v. Allen, 349.**

DNA from prior arrest—expungement refused—The trial court did not err by denying defendant's motion to suppress DNA evidence from a prior charge that was dismissed by the State where there had been no order of expunction of the DNA evidence in the prior case; the provisions for expunction were not met; and defendant was attempting to have a court retroactively expunge his DNA record after he had been identified as the perpetrator of other crimes, rather than expunction for prospective effect. **State v. Swann, 221.**

Exclusion—proof of performance damages—lost pick up orders—corroborating witness—The trial court did not abuse its discretion in a breach of contract and unfair trade practices case by excluding certain evidence at trial because: (1) in regard to exclusion of proof of performance damages, the trial court considered the proof of performance expenses to be part of the cost of doing business rather than an economic loss stemming from the unfair and deceptive trade acts; (2) in regard to defendant's motion in limine to exclude plaintiff's expert testimony on damages arising from lost pick up orders, plaintiff's evidence was not sufficient as a matter of law to prove the damages with reasonable certainty since the expert relied upon only one year of history to make his projections; and (3) in regard to plaintiff seeking to call one of defendant's experts as a corroborating witness for one of plaintiff's own experts, the evidence was properly excluded based on hearsay and the fact that the testimony confused issues and wasted time. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

Expert testimony—examination consistent with sexual abuse—Testimony by the State's expert medical witness that his examination of an alleged victim of a sexual offense and indecent liberties was consistent with a child who had been sexually abused did not improperly vouch for the victim's credibility and was properly admitted. **State v. Ray, 662.**

Expert testimony—sexual abuse—credibility of minor victim—opened the door to response—The trial court did not err in a multiple first-degree sexual offense of a child under the age of 13 and multiple taking indecent liberties with a child case by allowing an expert witness to testify to the credibility of the minor victim because defendant's cross-examination of the doctor was designed to elicit the type of response the doctor provided, and thus defendant cannot now contend that the doctor's response, which might have rightfully been excluded had it been offered by the State, unfairly prejudiced defendant and warranted a new trial. **State v. Crocker, 358.**

EVIDENCE—Continued

Expert testimony—truthfulness of child victim—The trial court erred in a taking indecent liberties with a minor case by overruling defendant's objection to expert testimony regarding the truthfulness of the child victim, and the case is remanded for a new trial. **State v. Webb, 619.**

Expert testimony—veracity of victim's testimony—The trial court erred in a taking indecent liberties with a minor case by allowing the testimony of a Department of Social Services worker concerning whether the claim against defendant was substantiated because expert testimony as to the veracity of the victim's testimony should be excluded. **State v. Webb, 619.**

Hearsay—interrogation of defendant—detectives' questions—third-party statements embedded—Questions from detectives to defendant that included statements attributed to nontestifying third parties were not hearsay where they were offered not for the truth of the matter asserted, but so that the jury could understand the circumstances in which defendant was caught in a lie, changed his story, and made significant admissions of fact. **State v. Miller, 78.**

Hearsay—transcript—past recollection recorded—refreshed recollection—The trial court did not abuse its discretion in a voluntary manslaughter and possession of a firearm by a felon case by allowing a witness to testify while referring to a transcript of a police interview conducted the day the crime occurred because: (1) defendant's argument that the transcript did not qualify as a past recollection recorded under N.C.G.S. § 8C-1, Rule 803(5) was irrelevant since the transcript itself was not admitted into evidence; and (2) the testimony was admissible as present recollection refreshed because the evidence was sufficient to support the trial court's determination that the witness used the transcript to refresh his memory rather than as a testimonial crutch. **State v. Black, 731.**

Impeachment—tape recorded statement of another witness—extrinsic—The trial court did not err in a murder prosecution by refusing to admit a tape recorded statement as impeachment evidence where the statement was from the person with whom a witness to the shooting stayed after the crime. **State v. Wilson, 154.**

Medical malpractice—portions of deposition admitted—entire statement admitted on redirect—The trial court did not err in a medical malpractice action by allowing defendants to introduce portions of a deposition transcript during cross-examination of plaintiff's witness. Although plaintiff contended that portions of the transcript were taken out of context, the court allowed the complete statement to be introduced by plaintiff on redirect. There is never a guarantee of timing when a witness is cross-examined. **Gray v. Allen, 349.**

Medical malpractice—prior lawsuit—knowledge of risk—unduly prejudicial—The trial court was within its discretion in a medical malpractice case in excluding evidence of a prior lawsuit as unduly prejudicial to defendants, even taking as true plaintiff's argument that the evidence should have been admitted as to knowledge of the risk involved in postoperative care for this surgery. **Gray v. Allen, 349.**

Prior crimes or bad acts—incarceration—drug use—non-sexual physical assault of a victim—The trial court did not commit plain error in a first-degree sexual offense and first-degree rape case by admitting into evidence a witness's

EVIDENCE—Continued

testimony concerning defendant's prior bad acts including incarceration, drug use, and non-sexual physical assault of a victim. **State v. Streater, 632.**

Prior crimes or bad acts—lack of similarities—remoteness in time—The trial court abused its discretion in a first-degree sex offense and indecent liberties case by allowing the State to cross-examine defendant about instances of domestic violence occurring between defendant and his former girlfriend, and defendant is entitled to a new trial because: (1) although defendant's first trial ended in a mistrial, the trial judge's ruling that the State could not introduce evidence of defendant's 1990 and 1991 criminal convictions or any other criminal convictions of defendant from more than ten years earlier remained in effect at defendant's retrial; and (2) although the State asserted that evidence of defendant's 1990 behavior was admissible since it tended to show that defendant had a problem with assaultive behavior when he drank alcohol, the State failed to make a threshold showing that defendant had committed assaults in 1990 while under the influence of alcohol, and the 1990 convictions arose in circumstances significantly different from the instant offenses where defendant was charged with sexual offenses against a seven-year-old girl whom he barely knew versus personal conflicts fifteen years earlier between defendant and an adult woman with whom he was involved in a romantic relationship. **State v. Ray, 662.**

Prior crimes or bad acts—sexual abuse two and three decades ago—The trial court erred in a taking indecent liberties with a minor case by allowing the testimony of two witnesses who alleged that defendant had abused them twenty-one and thirty-one years prior respectively. **State v. Webb, 619.**

Recorded statement of witness—no distinction from deposition transcript—There is no meaningful distinction between a deposition transcript and an audio recording for purposes of admissibility under N.C.G.S. § 8C-1, Rule 803(5). Defendant did not cite authority supporting his contention that the accuracy of a statement was manifest in its being a tape recording and that the witness tacitly adopted it. **State v. Wilson, 154.**

Recorded statement of witness—not an admissible record—The trial court did not err in a murder prosecution by excluding a tape recorded statement given to police from the person with whom a witness stayed after the shooting. While an audio recording can be admissible as a "record" under N.C.G.S. § 8C-1, Rule 803(5), that rule applies where a witness is unable to remember the events but recalls making the entry when the fact was fresh in her memory. The witness here did not recall giving a statement to police; moreover, the witness's testimony raised questions about the accuracy of her statement. **State v. Wilson, 154.**

Recording of interrogation—request to redact refused—no abuse of discretion—The trial court did not abuse its discretion in a prosecution for murder and other offenses by not redacting portions of a recording of defendant's interrogation where the court heard counsels' arguments, took relevant case law into consideration, listened to counsels' forecast of what was contained in the DVD, and determined that redacting the questions in issue would confuse the jury. The court gave a limiting instruction, and the challenged evidence constituted a small portion of the interview. **State v. Miller, 78.**

Relevance—interrogation of defendant—detectives' questions—third-party statements embedded—Questions from detectives to defendant that

EVIDENCE—Continued

included statements attributed to nontestifying third parties were relevant to facts in dispute and gave context to defendant's responses. **State v. Miller, 78.**

Relevancy—board certification of doctor—not testifying as expert—other evidence—The trial court did not abuse its discretion in a medical malpractice action by excluding evidence that defendant Crumley had failed the exam for board certification as a surgeon five times and was not board eligible at the time of the incident. It was reasonable for the trial court to conclude that defendant's board eligibility was not relevant to this action because Dr. Crumley testified only as a fact witness and not as an expert, while the board eligibility of the witnesses who testified as experts was relevant. **Gray v. Allen, 349.**

Ruling on admissibility—recording not seen—no abuse of discretion—The trial court did not fail to exercise its discretion in violation of N.C.G.S. § 8C-1, Rule 403 by not viewing a recording of defendant's interrogation before ruling on whether certain portions should be redacted where the court asked the parties to provide a forecast of what was in the DVD, made its ruling based on the forecasts, and gave a limiting instruction on the disputed evidence. **State v. Miller, 78.**

Victim's testimony—truthfulness—swore to Jesus—Although the trial court erred in a first-degree sexual offense and first-degree rape case by admitting the victim's testimony that she told the truth and swore to Jesus regarding her previous testimony, it did not amount to plain error. **State v. Streater, 632.**

FRAUD

Allegations of forged agreement—clear title—The trial court did not err by concluding that an alleged forged agreement, coupled with the relationship between defendant and Gordon, the owner of property on which a mobile home had been stored, was insufficient to support a claim for fraud and unfair and deceptive trade practices because the purported forgery was immaterial and did not support either claim in light of the fact that defendant provided clear title. **Henson v. Green Tree Servicing LLC, 185.**

HIGHWAYS AND STREETS

Action to clear title to property—public use—withdrawal from dedication—abandonment—An unpaved portion of a town street that was never paved or used for vehicular traffic remained dedicated to public use, although plaintiff town leased portions of the pertinent property, because the fact that a municipality improves or directs improvement of only part of the property dedicated does not constitute an abandonment of the balance; and the pertinent property was not subject to withdrawal from dedication since that property was but an unopened portion of a street which was otherwise actually opened and used by the public. **Town of Oriental v. Henry, 673.**

HOMICIDE

Felony murder—instructions—no plain error—There was no plain error in an instruction on felony murder where the court's initial instruction was technically erroneous, but the court's latter instructions served to eliminate all possi-

HOMICIDE—Continued

bility of error or confusion. Moreover, the jury verdict sheets clearly and correctly stated the underlying felonies that could support a conviction for felony murder. **State v. Miller, 78.**

Felony murder—instructions—no plain error—There was no plain error in giving a felony murder instruction where defendant was also convicted on the basis of malice, premeditation and deliberation. **State v. Goode, 543.**

Refusal to give voluntary manslaughter instruction—harmless error—Any possible error in a murder prosecution from the trial court's denial of a request for an instruction on voluntary manslaughter based on provocation was harmless where the jury was properly instructed on first-degree and second-degree murder, and returned a verdict of guilty of first-degree murder. **State v. Wilson, 154.**

Second-degree murder—driving while impaired—sufficiency of evidence—malice—The trial court did not err by denying defendant's motion to dismiss the charges of second-degree murder based on alleged insufficient evidence of malice where the State presented evidence from which the jury could conclude that defendant had consumed nine to twelve beers in a two-hour time frame but denied it when asked by law enforcement officers, his 0.13 blood alcohol content (BAC) was well-above the 0.08 BAC threshold for driving while impaired, and defendant got into his truck and drove on a well-traveled highway running over a sign and continuing to drive. **State v. Davis, 738.**

Second-degree murder—instruction—burden of proof on malice—The trial court did not lessen the burden of proof on the malice element of second-degree murder in the jury instructions because the pertinent additional language did not eliminate the need for the State to prove defendant committed an intentional act, but merely informed the jury that the intentional act did not need to include a specific intent to kill or injure. **State v. Davis, 738.**

IMMUNITY

Sovereign—tribal—tobacco settlement—limited waiver—not applicable—Although the trial court had appropriately granted relief on other grounds, it was held on appeal as an alternate justification for affirming the result that the trial court correctly granted summary judgment for defendants in an action in which the State sought to enforce the escrow provisions of the tobacco settlement against an Indian tribe. The State did not provide factual justification for the conclusion that defendants waived tribal sovereign immunity for the claims the State sought to assert. **State ex rel. Cooper v. Seneca-Cayuga Tobacco Co., 176.**

Sovereign—tribal—tobacco settlement—waiver—The trial court properly granted defendants' motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) in an action by the State to enforce the escrow provisions of the tobacco settlement against a federally recognized Indian tribe. A limited waiver of sovereign immunity for the tribe's initial participation in the escrow agreement was not a consent to an attempt by the State to impose obligations with respect to funds that were never placed in escrow. A tribal business committee's resolution expressing an intent to comply with the act effectuating the agreement did not constitute an unequivocal express waiver of immunity. **State ex rel. Cooper v. Seneca-Cayuga Tobacco Co., 176.**

INDIANS

Meherrin Indian Tribe—sovereign immunity—predicate facts not present—The trial court correctly denied defendants' Rule 12(b)(2) and (6) motions to dismiss where those motions were based solely on a claim of sovereign immunity as an Indian tribe. The predicate facts which would present a sovereign immunity defense were not present where the tribe has no reservation and has not been recognized by the federal government; and the constitution of the tribe has no functioning judiciary for resolution of intra-tribal disputes to which this dispute could be referred prior to litigation. **Meherrin Indian Tribe v. Lewis, 380.**

JUDGES

Inherent power—prohibition of future frivolous litigation—The trial courts have the inherent power to prohibit future frivolous and repetitive litigation, and the court here did not abuse its discretion by barring further actions pertaining to this dispute. **Dalenko v. Peden Gen. Contr'rs, Inc., 115.**

Motion to recuse—denied—no error—There was no merit to plaintiff's contention that the trial judge's refusal to recuse himself prejudiced her right to a fair hearing before an impartial court. Plaintiff's written motion was not timely filed, her objections were raised only at the end of the hearing, plaintiff did not articulate before the trial judge any objective reason for the judge to recuse himself, or a sufficiently forceful basis for delegating the decision to another judge, and arguments not raised at trial were not properly before the appellate court. **Dalenko v. Peden Gen. Contr'rs, Inc., 115.**

Motions for new trial and recusal—failure to show trial judge disqualified—The trial court did not err by denying plaintiff's combined motions for a new trial and to recuse the trial judge on the ground that the judge's father and defendant's CEO were once commonly affiliated with the University of North Carolina because, given the remote and arm's length affiliation defendant's CEO had with the trial judge's father, plaintiff did not carry his burden to demonstrate objectively that grounds for the trial judge's recusal existed. **Franco v. Liposcience, Inc., 59.**

Threat of criminal contempt—not abuse of discretion—The threat of criminal contempt to a plaintiff if she filed further claims in the same matter was a warning about the consequences of future conduct and not an abuse of discretion. **Dalenko v. Peden Gen. Contr'rs, Inc., 115.**

JUDGMENTS

Default—motion to set aside denied—insufficient showing of excusable neglect—A Rule 60(b) motion to set aside a default judgment was properly denied where there was sufficient evidence in the record to support the trial court's conclusion that defendants failed to establish excusable neglect, notwithstanding defendants' failure to request findings. The issue of whether there was a showing of a meritorious defense was immaterial. **Monaghan v. Schilling, 578.**

JURISDICTION

Subject matter—expiration of summons—An order terminating respondent's parental rights was vacated where respondent "accepted" service 285 days after the summons was issued. There was no endorsement, extension, or alias and pluries summons, and any subject matter jurisdiction the court had pursuant to the issuance of a summons was discontinued and expired before respondent's parental rights were terminated. **In re N.E.L., 395.**

JUVENILES

Default—motion to set aside denied—insufficient showing of excusable neglect—A Rule 60(b) motion to set aside a default was properly denied where there was sufficient evidence in the record to support the trial court's conclusion that defendants failed to establish excusable neglect, notwithstanding defendants' failure to request findings. The issue of whether there was a showing of a meritorious defense was immaterial. **Monaghan v. Schilling, 578.**

Delinquency—sexual battery—untimely filing of petition—The trial court lacked subject matter jurisdiction in a juvenile delinquency case for a sexual battery adjudication based on the untimely filing of the petition in violation of N.C.G.S. § 7B-1703, and thus erred by denying the juvenile's motion to dismiss the sexual battery charge. **In re D.S., 598.**

Delinquency—simple assault—touching—The trial court did not err in a juvenile delinquency case arising out of a simple assault by its finding of fact in the adjudication order that the juvenile touched the victim on her buttocks where the juvenile touched the victim with a Pixy Stix he was holding in his hand. **In re D.S., 598.**

Delinquency—simple assault—variance between acts alleged in petition and evidence presented at hearing—The trial court did not err in a juvenile delinquency case arising from a simple assault even though the juvenile contends there was a fatal variance between the acts alleged in the petition and the evidence presented at the hearing because: (1) it cannot be concluded that the juvenile was unable to prepare for his defense since the petition alleged the juvenile touched the victim with his hands and the evidence showed that he touched her with a Pixy Stix; and (2) the petition as a matter of law put the juvenile on notice of the offense for which he was alleged to have committed. **In re D.S., 598.**

KIDNAPPING

Restraint—separate from assault—The trial court did not err by denying defendant's motion to set aside a kidnapping conviction where there was sufficient evidence that the restraint of the victim during an assault was separate and apart from the assault. **State v. Gayton-Barbosa, 129.**

LANDLORD AND TENANT

Billboard on leased property—abandonment—reasonable time—pursuit of nonfrivolous litigation—Plaintiff lessee did not abandon its billboard to the lessor by failing to remove it while the lessee prosecuted nonfrivolous litigation regarding the parties' rights under the lease after expiration of the lease. **Fairway Outdoor Adver. v. Edwards, 650.**

LANDLORD AND TENANT—Continued

Billboard on leased property—removal of billboard—Defendant landowner may not demand that the lessee choose between removing the entire billboard, including the foundation, or leaving the entire billboard, including the sign, when the lease did not address the lessee's duty to remove the foundation or any other part of the billboard but granted the lessee the right to remove all structures, equipment, and materials placed upon the leased premises. **Fairway Outdoor Adver. v. Edwards, 650.**

Holdover tenant—billboard on leased property—reasonable compensation—unjust enrichment—fair rental value—gross profits—Defendant lessor's counterclaim for unjust enrichment in a case arising from a dispute over a billboard on leased property was without merit and overruled because: (1) although defendants labeled their counterclaim as unjust enrichment, the substance of the counterclaim was an action to recover reasonable compensation from a holdover tenant; (2) plaintiff presented no evidence of the reasonable rental value of the property, defendants presented only evidence of plaintiff's gross income from the use of the property, and evidence of a lessee's gross income from the use of a leased property, standing alone, is not evidence of reasonable rental value since it does not take into account the lessee's other expenses in generating that income; (3) nothing else appearing, the negotiated rental rate was presumed to be fair compensation for use of the pertinent property; and (4) defendants accepted \$1,500 in rental payment on 15 March 2007 which was exactly the same as the negotiated rental rate, and this transaction further strengthened the presumption that the negotiated rental rate was equal to the reasonable rental value of the property. **Fairway Outdoor Adver. v. Edwards, 650.**

LARCENY

Stolen gun—ownership—A larceny conviction was vacated where the indictment alleged that a stolen gun belonged to Minear, who was the victim of an assault in the house which she shared with Leggett, but the evidence showed that Leggett owned the gun and the house. **State v. Gayton-Barbosa, 129.**

LIENS

Uncertainty as to current status—order cancelling—The trial court did not err by entering an order cancelling a lien where the order resolved uncertainty about whether the lien had been cancelled. **Dalenko v. Peden Gen. Contr'rs, Inc., 115.**

MEDICAL MALPRACTICE

Doctor's affidavit—stricken—no prejudice—The trial court did not abuse its discretion by striking a doctor's affidavit in a medical malpractice action where plaintiff did not show prejudice; on the contrary, plaintiff stated that the affidavit simply re-affirmed the expert opinions previously set forth in a deposition. **Barringer v. Wake Forest Univ. Baptist Med. Ctr., 238.**

Doctor's testimony limited—not effectively a directed verdict—Plaintiff mischaracterized the court's action in a medical malpractice claim as effectively granting a directed verdict when the court limited the testimony of a doctor

MEDICAL MALPRACTICE—Continued

regarding certain claims. It was undisputed that the witness had never performed the procedures in question and was not qualified to testify that the standard of care had been breached. **Barringer v. Wake Forest Univ. Baptist Med. Ctr., 238.**

Motion to compel discovery denied—no basis stated—presumptions—no abuse of discretion—The trial court did not abuse its discretion in a medical malpractice action by denying plaintiff's motions to compel discovery. The record was completely silent as to the basis for the denial and the court is presumed to have made findings supported by competent evidence and orders supported by the findings. **Barringer v. Wake Forest Univ. Baptist Med. Ctr., 238.**

Not transferring patient—summary judgment—The trial court did not err in a medical malpractice action by granting summary judgment for defendants on a claim of negligence in not transferring a patient to another facility. This allegation was added in an affidavit after the witness's deposition, is inconsistent with the prior sworn testimony, and does not create a genuine issue of fact. Moreover, plaintiff's other expert testified that there was no standard of care on the issue of transferring the patient to another hospital. **Barringer v. Wake Forest Univ. Baptist Med. Ctr., 238.**

Plaintiff's expert—no personal experience of procedures—not qualified to testify—The trial court did not err in a medical malpractice action by granting summary judgment for defendants on claims which depended upon expert testimony that Dr. Hines was negligent in failing to order a particular test. Plaintiff's expert had never performed the relevant surgical procedures and was not qualified to testify that those procedures were performed incorrectly. **Barringer v. Wake Forest Univ. Baptist Med. Ctr., 238.**

Proposed expert—basis of opinion—undeveloped—A medical malpractice case was remanded for a *voir dire* to determine the admissibility of a proposed medical expert's testimony where the basis of the doctor's opinion that defendants breached the standard of care was undeveloped. **Barringer v. Wake Forest Univ. Baptist Med. Ctr., 238.**

Punitive damages—corporate defendants—directed verdict—There was no prejudice in a medical malpractice action where the trial court entered a directed verdict for defendants on plaintiff's claim for punitive damages against the corporate defendants; even if the physician was the head of the treatment team, and even if the head of the treatment team was a manager, the jury did not find that the physician was negligent. **Barringer v. Wake Forest Univ. Baptist Med. Ctr., 238.**

Rule 9(j) certification—res ipsa loquitur—The trial court did not err in a medical malpractice case by granting summary judgment in favor of defendant doctor because: (1) plaintiff's pleading was void of any specific assertion that the medical care was reviewed by an expert who would testify that the medical care failed to comply with the applicable standard of care; and (2) contrary to plaintiff's assertion, the doctrine of *res ipsa loquitur* was inapplicable since plaintiff offered direct proof of the cause of the skin incisions made to her left knee and complained that such incisions caused her pain and damages. **Rowell v. Bowling, 691.**

MEDICAL MALPRACTICE—Continued

Rule 9(j)—procedural mechanism—It was noted in a medical malpractice action that Rule 9(j) does not provide a procedural mechanism for a defendant to file a motion to dismiss; the Rules of Civil Procedure provide other methods by which a defendant may allege a violation of Rule 9(j). **Barringer v. Wake Forest Univ. Baptist Med. Ctr.**, 238.

Rule 9(j)—summary judgment—One superior court judge did not overrule another by granting summary judgment for defendants on a medical malpractice claim pursuant to Rule 9(j) where a first judge had previously denied a motion to dismiss under Rule 9(j). Compliance with Rule 9(j) presents a question of law, and the first judge did not convert the motion into one for summary judgment by considering matters outside the pleadings. Moreover, even if the first motion became one for summary judgment, the issue there was whether the witnesses were reasonably expected to qualify as experts while the issue in the second motion was whether the witnesses in fact qualified as experts. **Barringer v. Wake Forest Univ. Baptist Med. Ctr.**, 238.

MOTOR VEHICLES

Impaired driving—motion to suppress—district court preliminary determination—A preliminary determination that the district court would dismiss an impaired driving charge for lack of probable cause was remanded for a preliminary order indicating the district court's ruling on defendant's motion to suppress evidence of his arrest. **State v. Fowler**, 1.

Impaired driving—sentencing—notice of aggravating factors—effective date of statute—The trial court did not err in an impaired driving prosecution by allowing the State to present evidence of grossly aggravating factors without having complied with the ten-day notice provisions of the amended N.C.G.S. § 20-179(a1)(1). Although defendant acknowledged that the Motor Vehicle Driver Protection Act was passed after the date of his offense, he contended that the statute relates to a mode of procedure and should be applied retroactively. However, defendant focused only on the statute and overlooked the dispositive language in the Act, which had an effective date that was after the date of defendant's offense. **State v. Dalton**, 392.

NEGLIGENCE

Contributory—heavy door leaning unsecured against wall—hiring non-English speaking worker—not required to anticipate another's negligence—The trial court properly refused to submit the issue of contributory negligence to the jury in a case that arose when a heavy fire door stored against a wall fell on Ms. Shelton as she cleaned Steelcase's facility. Steelcase's argument that Ms. Shelton was contributorily negligent in hiring a worker who did not speak English and who must have tried to move the door after he was told not to was conjecture. Moreover, Ms. Shelton was not required to anticipate that Steelcase would leave a 300 pound door leaning unsecured against a wall. **Shelton v. Steelcase, Inc.**, 404.

Insulating—joint and several liability—The trial court erred by granting summary judgment for defendant Haynes in an action that arose from when a heavy door leaning against a wall that had been moved by Haynes employees fell on Ms.

NEGLIGENCE—Continued

Shelton, an employee of Drew, while she cleaned Steelcase's facility. There was an issue of fact as to the distance from the wall to the door; although Haynes argued that the door would not have fallen if it had been secured to the wall by Steelcase, negligence by Steelcase does not necessarily insulate Haynes. **Shelton v. Steelcase, Inc., 404.**

Workplace injury—contractor's injury—workers' compensation recovered—allegations of employer's negligence by third party—The trial court did not err by not submitting to the jury the issue of negligence by Ms. Shelton's employer in an action that arose when a heavy fire door fell on Ms. Shelton, a Drew employee, as she cleaned Steelcase's facility. Although Steelcase argues that it was entitled to have the issue of Drew's negligence submitted to the jury on its answer alone under N.C.G.S. § 97-10.2(e), that statute did alter the basic civil procedure principle that a defense alleged in an answer may be submitted to the jury only if the defendant forecasts sufficient evidence to allow the jury to find for the defendant on that issue. **Shelton v. Steelcase, Inc., 404.**

PENALTIES, FINES, AND FORFEITURE

Understating taxable income by more than 25%—negligence finding not required—The Secretary of Revenue did not err by assessing penalties against plaintiff based on plaintiff's understating its taxable income by more than 25% because: (1) N.C.G.S. § 105-236(a)(5)(c) does not require a finding of negligence as is typically necessary under N.C.G.S. § 105-236(a)(5)(a); and (2) plaintiff did not appear to dispute that if the Secretary's assessment based on the combined returns was lawful, the plaintiff's income was understated by more than 25%, which operated to invoke the penalty provision of N.C.G.S. § 105-236(a)(5)(a) without a finding of negligence. **Wal-Mart Stores E., Inc. v. Hinton, 30.**

PLEADINGS

Amended complaint—subject to Rule 12(b)(6) dismissal—gatekeeper certification revoked—An amended complaint by a plaintiff was properly dismissed where the trial court ruled that the action would have been dismissed under Rule 12(b)(6) even considering the amended complaint, and the Rule 11 certification by a licensed attorney required in a gatekeeper order was revoked by the attorney. **Dalenko v. Peden Gen. Contr'rs, Inc., 115.**

Denial of motion to amend—counterclaims—untimely motion—The Business Court did not abuse its discretion by denying defendant's motion to amend to add counterclaims of fraud and unfair and deceptive trade practices because: (1) defendant filed its motion to amend after the thirty-day deadline for amending without leave; and (2) defendant did not offer any credible explanation for the delay to the trial court and did not offer any explanation on appeal. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

POLICE OFFICERS

Shooting after car chase—claim against city—public officer's immunity—summary judgment—The trial court did not err by granting summary judgment for the City of Greenville on claims arising from the shooting death of plaintiffs' son by police officers after a car chase. The officers who were involved knew that

POLICE OFFICERS—Continued

the decedent was behaving unlawfully and in a manner that posed a danger to himself, officers, and other people, and the officers acted reasonably by pursuing and attempting to apprehend decedent. The officers would be entitled to public officer's immunity, and a claim against the city cannot be supported. **Turner v. City of Greenville, 562.**

PREMISES LIABILITY

Door leaning against wall—evidence of hazard sufficient—The trial court properly concluded that Steelcase was not entitled to a directed verdict or a JNOV on a premises liability claim that arose when a heavy fire door stored against a wall fell on plaintiff Maxine Shelton while she was working in Steelcase's facility. The evidence supported a jury finding that the door was a hazardous condition, that Steelcase knew or should have known of its hazardous nature, that Steelcase did not warn Ms. Shelton of the hazard, and that Ms. Shelton was then injured by that hazard. **Shelton v. Steelcase, Inc., 404.**

PROBATION AND PAROLE

Jurisdiction—hearing held after probation expired—State's failure to follow requirements in N.C.G.S. § 15A-1344(f)—The trial court lacked jurisdiction to hold a probation revocation hearing when the hearing was held after defendant's probation had expired and the State had not followed the necessary requirements found in N.C.G.S. § 15A-1344(f) for conducting a probation revocation hearing after the expiration of defendant's term of probation. **State v. Black, 373.**

Restitution—supporting evidence not sufficient—The trial court erred by ordering restitution as a condition of post-release supervision or from work release earnings where there was no stipulation or evidence introduced at the sentencing hearing to support the calculation of the amount of restitution recommended. **State v. Swann, 221.**

PUBLIC OFFICERS AND EMPLOYEES

Enjoyment of fruits of labor—temporary state employees—appointments exceeding twelve months—The trial court did not err by dismissing plaintiffs' claim under Article I, Sections 1 and 35 of the North Carolina Constitution even though plaintiffs contend they showed defendants' alleged arbitrary and capricious treatment classifying plaintiffs as temporary employees when they held their positions longer than twelve months, denied them benefits, and deprived them of the enjoyment of the fruits of their own labor. **Sanders v. State Personnel Comm'n, 314.**

Equal protection—temporary state employees—appointments exceeding twelve months—The trial court did not err by dismissing plaintiffs' equal protection claims under Article I, Section 19 of the North Carolina Constitution even though the State granted benefits only to those employees who held permanent appointments and not to those who held temporary appointments exceeding twelve months because: (1) the Administrative Code of North Carolina's Office of State Personnel expressly authorized differential employee appointments including, for example, permanent, time-limited permanent, and temporary; (2) plaintiffs failed to meet their burden under the rational basis test to show that there

PUBLIC OFFICERS AND EMPLOYEES—Continued

was no governmental justification for defendants' actions in granting benefits only to persons with permanent appointments; and (3) many possible and valid reasons existed for defendants' actions in granting benefits only to those employees who hold permanent appointments, including that the State Personnel Commission during the relevant time could neither create a new position without authorization nor pay benefits without funds from which such payments could be authorized, and the need to select permanent candidates on a competitive basis by not allowing temporary employees who were in positions longer than twelve months to automatically become permanent employees. **Sanders v. State Personnel Comm'n, 314.**

Temporary state employees—employment exceeding twelve consecutive months—status and benefits—breach of contract—Plaintiff workers who were employed by state agencies as temporary employees stated claims against the State Personnel Commission for breach of contract based on its failure to give them permanent state employee compensation, status, and benefits after they had been employed for twelve consecutive months where plaintiffs' complaint sufficiently alleged the existence of contracts and a breach of personnel rules under which they were hired. The case is remanded for declaratory judgment to declare plaintiffs' status and rights in their employment by the state agencies. **Sanders v. State Personnel Comm'n, 314.**

Termination of career state employee—unacceptable personal conduct—The trial court did not err by affirming the final decision of the State Personnel Commission to dismiss petitioner career state employee on the basis of unacceptable personal conduct where petitioner admitted to using the "n" word in the workplace in reference to an African-American employee under the direct supervision of petitioner; petitioner attempted to obstruct the investigation, which amounted to insubordination; petitioner stated she would not hire another black person; and disposed of the African-American employee's Black History notebook; and petitioner created a general sense of intimidation in the workplace. **Granger v. Univ. of N.C., 699.**

RAILROADS

Crossing blocked by railroad—railroad purpose easement—The trial court did not err by granting summary judgment for defendant railroad in an action that began when the railroad blocked a crossing after damage from a truck leaving a facility owned by plaintiff. There was no indication that an easement by necessity arose when the railroad was constructed, the continued use of the crossing since the 1940's cannot estop defendant from closing the crossing, and a railroad has the authority and ability to expand its use of a right-of-way to manage safety risks. **Schwarz & Schwarz, LLC v. Caldwell Cty. R.R. Co., 609.**

ROBBERY

Instructions—attempt—intent to commit completed offense—There was no plain error in instructions on attempted robbery with a firearm and acting in concert where the court was clear that the jury had to find the intent by defendant to commit the completed substantive offense. **State v. Miller, 78.**

Instructions—attempt—intent to commit substantive crime—no plain error—The difference between an attempted robbery and a robbery is defend-

ROBBERY—Continued

ant's success or failure in obtaining the property, and instructions on first-degree burglary and its lesser-included offenses, taken as a whole, were sufficiently clear to inform the jury that defendant had to have the intent to commit a robbery and not merely the intent to commit an attempt. **State v. Miller, 78.**

SEARCH AND SEIZURE

Investigatory detention—anonymous tip—surveillance—sufficient reasonable suspicion—The trial court's findings supported its conclusion that officers had sufficient reasonable suspicion to stop defendant and place him in investigatory detention where anonymous tips were received about marijuana being stored and sold from a particular house by defendant, the tips were corroborated through searching a police information system and days of surveillance of the house, and the arresting officers followed defendant from the house to a location known for drug activity. **State v. Garcia, 522.**

Investigatory stop—reasonableness—A simple investigatory stop that led to an habitual impaired driving conviction was reasonable under all of the circumstances where an assault victim had given an officer a description of a car containing her assailant and a driver, and the officer stopped defendant even though there were some differences from the description the assault victim had given. **State v. Allen, 208.**

Reasonable articulable suspicion—information from assault victim—The trial court did not err by concluding, under the totality of the circumstances, that a stop which led to a guilty plea of habitual impaired driving was based on a reasonable articulable suspicion where the victim of an assault gave information to an officer about the suspect and the car in which he left the scene, the officer drove around the vicinity until he saw a similar car and driver, and the officer stopped the car and determined that defendant was not involved in the assault, but arrested her for impaired driving. **State v. Allen, 208.**

Warrantless search—motion to suppress evidence—implied consent—The trial court did not err in a possession of a firearm by a convicted felon case by failing to suppress evidence seized during a warrantless search into the residence defendant shared with his mother because the search and seizure was authorized based on implied consent where defendant and his mother, both cohabitants of the residence, gave consent through their words and actions for the officers to enter the residence and seize the weapon. **State v. McLeod, 707.**

SENTENCING

Aggravated range—consideration of juvenile offenses—The trial court did not abuse its discretion in a voluntary manslaughter and possession of a firearm by a felon case by sentencing defendant in the aggravated range because: (1) although defendant contends that a juvenile adjudication may not be used to aggravate a sentence since it is not determined by a jury and violates *Blakely v. Washington*, 542 U.S. 296 (2004), defendant failed to raise this constitutional issue at trial and thus cannot raise it on appeal; and (2) although defendant contends the trial court gave undue weight to his juvenile offenses including first-degree rape and first-degree burglary, as opposed to the mitigating factor that the victim was over 16 years of age and a voluntary participant in defendant's con-

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duct, the judge could give greater weight to the aggravating factor because the juvenile offenses were very serious crimes and the length of defendant's criminal record showed that his juvenile adjudication had little if any effect of turning him away from serious criminal activity later in life. **State v. Black, 731.**

Consolidated—remand for resentencing—new trial awarded on one of charges—A first-degree sexual offense and first-degree rape case was remanded for resentencing on defendant's first-degree rape conviction because: (1) the trial court consolidated defendant's convictions; and (2) defendant was awarded a new trial on the charge of first-degree sexual offense. **State v. Streater, 632.**

Indecent liberties—erroneous maximum sentence—The trial court erred by imposing a sentence of 20 to 25 months imprisonment for the charge of indecent liberties because the maximum sentence corresponding to a minimum sentence of 20 months is 24 months instead of 25 months. **State v. Ray, 662.**

No contest plea—satellite-based monitoring not a direct consequence of plea—The trial court did not violate N.C.G.S. § 15A-1022 when it failed to inform defendant that imposition of satellite-based monitoring (SBM) would be a direct consequence of his 2002 no contest plea. **State v. Bare, 461.**

Prayer for judgment continued—transformed into final judgment—A prayer for judgment continued (PJC) lost its character as a PJC and transformed into a final judgment when defendant was ordered to complete a number of conditions which were beyond a requirement to obey the law. The judge was without authority to dismiss the charge after the end of the session without a writ of habeas corpus or a motion for appropriate relief, and could not remand for a new sentencing hearing because he had no authority to impose additional punishment. **State v. Popp, 226.**

SEXUAL OFFENSES

Expert testimony—sexual abuse by defendant—opinion on victim's credibility—plain error—A pediatrician's testimony in a prosecution for first-degree sexual offense that his findings were consistent with "the history that [he] received from [the victim]" of repeated anal penetration by defendant constituted an improper opinion on the victim's credibility and amounted to plain error where the pediatrician testified that there was no physical evidence of anal penetration; the victim's medical history as testified to by the pediatrician presented an unclear evidentiary foundation for the pediatrician's conclusion that defendant, rather than one of the other men the victim referred to as "dad," was the perpetrator of the sexual offense; and the victim's testimony was the only direct evidence implicating defendant as the perpetrator of the sexual offense. **State v. Streater, 632.**

Expert testimony—sexual abuse victim's physical condition consistent with history—The trial court did not err in a first-degree statutory rape case when it admitted an expert's testimony that the victim's history of repeated vaginal penetration was consistent with his findings made during his examination of the victim. **State v. Streater, 632.**

First-degree sexual offense of a child under the age of 13—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defend-

SEXUAL OFFENSES—Continued

ant's motion to dismiss the three counts of first-degree sexual offense with a child under the age of 13 based on alleged insufficiency of the evidence because testimony by the victim and a doctor that defendant on three separate occasions used his hand to touch the inside of the victim's labia majora was sufficient to constitute substantial evidence of each element of the crime. **State v. Crocker, 358.**

Satellite-based monitoring—civil regulatory scheme instead of punitive intent—The trial court did not err by directing defendant to enroll in satellite-based monitoring (SBM) under N.C.G.S. § 14-208.40B even though defendant contends the statutory scheme is so punitive in purpose or effect as to negate the State's intention to deem it civil. **State v. Bare, 461.**

STATUTES OF LIMITATION AND REPOSE

Collection of parking tickets—no statute of limitations against city—The common doctrine of *nullum tempus occurrit regi* (time does not run against the king) applied such that no statute of limitations barred an action to recover unpaid parking tickets and penalties, which is a governmental function. **City of Greensboro v. Morse, 624.**

Collection of parking tickets—pursuant to ordinance—N.C.G.S. § 1-54(2) not applicable—The trial court erred by concluding that the one year statute of limitations in N.C.G.S. § 1-54(2) barred plaintiff city's recovery in an action to recover unpaid parking tickets and penalties. That statute applies only to actions based on statutes which expressly provide for a penalty or forfeiture for punitive purposes; the penalty at issue here is civil in nature. N.C.G.S. § 160A-175 grants municipalities the power to impose fines and penalties for violation of its ordinances. **City of Greensboro v. Morse, 624.**

TAXATION

Assessment of additional taxes and interest—penalties—For the reasons stated in *Wal-Mart Stores East, Inc. v. Hinton*, No. COA08-450, which is filed simultaneously with this opinion, judgment is affirmed with respect to the assessment of additional taxes, interest, and penalties. **Sam's E., Inc. v. Hinton, 229.**

Corporate income tax—assessment of additional taxes—statutory authority to combine three related entities—The trial court did not err by granting summary judgment in favor of defendant Secretary of Revenue based on its conclusion that the Secretary acted within his lawful statutory authority when he assessed additional corporate income taxes against plaintiff company as a result of the combination of plaintiff with two related entities. **Wal-Mart Stores E., Inc. v. Hinton, 30.**

TELECOMMUNICATIONS

Fax advertising—class action—unsolicited communications—A plaintiff seeking class certification for a Telephone Consumer Protection Act case involving fax advertising by a restaurant had the burden of showing that some of the advertisements were unsolicited, but the possibility that some proposed class

TELECOMMUNICATIONS—Continued

members might later be removed should not automatically defeat class certification. Plaintiff should present the court with a reasonable means of ensuring that there will not be an inordinate number of proposed class members who do not belong in the class, and should present the court with as tailored a proposed class as is practicable. **Blitz v. Agean, Inc., 296.**

Fax advertising—established business relationship—An existing established business relationship did not constitute prior express permission or invitation to receive unsolicited fax advertisements before the amendment to the federal statute to include that exception. **Blitz v. Agean, Inc., 296.**

Fax advertising—small claims court—not a superior venue—Small claims court cannot, per se, be a superior venue (for class certification purposes) for violations of the Telephone Consumer Protection Act in North Carolina because it does not have the authority to grant injunctions. Furthermore, the amount in controversy could easily exceed the small claims court jurisdictional limit, and the actions of a single individual could theoretically lead to many actions being heard at all trial levels, leading to inconsistent decisions on the same acts and evidence, with serious over-burdening of trial court resources. **Blitz v. Agean, Inc., 296.**

Unsolicited fax advertising—summary judgment—The trial court erred by granting defendant's motion for summary judgment regarding three unsolicited faxes in an action under the Telephone Consumer Protection Act involving fax advertising by defendant restaurant. It cannot be held that there were no issues of material fact concerning the number of faxes sent by defendant to plaintiff. **Blitz v. Agean, Inc., 296.**

TERMINATION OF PARENTAL RIGHTS

Jurisdiction—improper use of Rule 60 for addition of omitted finding of fact in corrected order—The trial court lacked jurisdiction in a termination of parental rights case when it added an omitted finding of fact in a corrected order under N.C.G.S. § 1A-1, Rule 60(a), the corrected order is vacated, and the matter is remanded to the trial court for further proceedings if necessary to make appropriate findings of fact reflecting the trial court's intended decision. **In re C.N.C.B., 553.**

Subject matter jurisdiction—juvenile petitions filed—The trial court had subject matter jurisdiction to terminate respondent mother's parental rights where petitioner DSS had filed juvenile petitions alleging the minor children were neglected and dependent juveniles. **In re T.P., M.P., & K.P., 723.**

Sufficiency of findings of fact—conclusions of law—The trial court erred in a termination of parental rights case by failing to include adequate findings of fact and conclusions of law because: (1) the trial court failed to set out the specific facts that require termination of respondent's parental rights; (2) the orders do not state whether reunification efforts were undertaken, the manner by which respondent failed to comply with petitioner's and the trial court's efforts, the conditions that led to the removal of the children from respondent's home, or in what respect respondent failed to make progress addressing these conditions; (3) although the termination orders referred several times to respondent's substance abuse problems, it provided no details about her drug use or any rehabilitation

TERMINATION OF PARENTAL RIGHTS—Continued

that was offered or attempted; and (4) the orders did not include facts about petitioner's case plan, respondent's family or work history, her visitation with the children, or her housing situation. **In re T.P., M.P., & K.P., 723.**

TORT CLAIMS ACT

Highway patrolman—high speed chase—collision with vehicle not in chase—absence of gross negligence—The evidence and findings of the Industrial Commission supported its conclusion that the actions of a state trooper involved in a high speed chase that resulted in a fatal collision in which the trooper struck a vehicle not involved in the chase did not rise to the level of gross negligence because the trooper could assume that the driver of the other vehicle would wait for vehicles with the right-of-way to pass a median crossover before turning across the highway. **Holloway v. N.C. Dep't of Crime Control & Pub. Safety, 165.**

TRADE SECRETS

Failure to show trade secret—spoliation of evidence—The trial court did not err by granting partial summary judgment in favor of plaintiff employee even though defendant contends plaintiff's actions constitute spoliation of the evidence which severely impeded defendant's ability to prove its claim under the North Carolina Trade Secrets Protection Act because: (1) a prima facie case does not exist without a showing of the trade secret the person against whom relief sought knows or should have known, N.C.G.S. § 66-155; (2) defendant cannot identify the specific information it argues constituted trade secrets and that it claims plaintiff misappropriated; and (3) it is improper to base the grant or denial of a motion for summary judgment on evidence of spoliation when an adverse inference is permissive and not mandatory. **Panos v. Timco Engine Ctr., Inc., 510.**

TRIALS

Motion for a particular judge—arbitration agreement—purported contract right—The trial court did not abuse its discretion by denying plaintiff's motion to have a particular judge preside over the case where plaintiff argued that she had a contractual right to have that judge preside over all matters arising from an arbitration agreement. Parties to litigation do not have the right to contract for a specific judge; additionally, the arbitration award was confirmed and all appeals exhausted, so that the case ended and with it any purported right to have the particular judge continue to preside. **Dalenko v. Peden Gen. Contr'rs, Inc., 115.**

UNEMPLOYMENT COMPENSATION

Provisional teacher—failure to comply with licensure requirements—The superior court did not err in an unemployment case by applying N.C.G.S. § 96-14(2b) because claimant provisional teacher's termination was based upon her failure to comply with the employer's licensure requirements and not upon misconduct or substantial fault. **Scotland Cty. Schools v. Locklear, 193.**

Sufficiency of findings of fact—disqualification from benefits—The superior court erred by concluding that claimant was disqualified from unemploy-

UNEMPLOYMENT COMPENSATION—Continued

ment benefits under N.C.G.S. § 96-14(2b), and the case is remanded to the superior court for further remand to the Employment Security Commission to make appropriate findings of fact under N.C.G.S. § 96-14(2b) to determine whether there was a disqualification from unemployment benefits, because: (1) the Commission's findings were predicated upon an erroneous legal theory under N.C.G.S. § 96-14(2) and (2a) rather than the correct legal theory under section (2b); (2) there were no findings that specifically discussed the requirements of N.C.G.S. § 96-14(2b); (3) the status of claimant's provisional license is not discussed and is unclear from the record; and (4) there are no findings as to whether her failure to procure the full license required for her continued employment was within her power to control, guard against, or prevent. **Scotland Cty. Schools v. Locklear, 193.**

UNFAIR TRADE PRACTICES

Allegations of forged agreement—clear title—The trial court did not err by concluding that an alleged forged agreement, coupled with the relationship between defendant and Gordon, the owner of property on which a mobile home had been stored, was insufficient to support a claim for fraud and unfair and deceptive trade practices. **Henson v. Green Tree Servicing LLC, 185.**

Commercial bribery—improper emphasis on conduct rather than effect on commerce—The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict even though defendant contends that plaintiff's commercial bribery foreclosed any recovery of damages by plaintiff for an unfair and deceptive trade practices claim (UDTP) because: (1) commercial bribery has not been recognized as a defense, complete or otherwise, to unfair and deceptive trade practices in North Carolina; and (2) our existing case law suggests that North Carolina would not recognize commercial bribery as a defense since it places the emphasis on plaintiff's conduct rather than on the effect of defendant's actions upon commerce. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

Commercial contract claim—prima facie case—The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict even though defendant contends that this dispute is truly a commercial contract claim and does not constitute an unfair and deceptive trade practices (UDTP) violation, because plaintiff set forth a *prima facie* case of UDTP and the trial court properly allowed the claim to proceed to trial by denying defendant's motions for summary judgment and directed verdict. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

Erroneous instruction—commercial bribery—no prejudicial error—Although the trial court erred by instructing the jury on the defense of commercial bribery in a breach of contract and unfair and deceptive trade practices case, no reversal is required because: (1) N.C.G.S. § 1A-1, Rule 61 provides that erroneous jury instructions are not grounds for granting a new trial unless the error affected a substantial right wherein a different result would have likely ensued had the error not occurred; and (2) the erroneous instructions did not affect the outcome. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

Instruction—reasonableness of delay—The trial court did not err in a breach of contract and unfair and deceptive trade practices case by failing to instruct the

UNFAIR TRADE PRACTICES—Continued

jury to decide whether defendant had unreasonably delayed removing its agent from his job because: (1) removing the agent from the pertinent one-sheet program before completing the commercial bribery investigation might have allowed the agent to destroy evidence or to inform plaintiff of the investigation; and (2) the question of reasonable delay, if relevant at all, related to whether defendant ratified its agent's authorized representation instead of defendant's knowledge of the agent's improper conduct. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

Multiple violations—amount of damages—The trial court did not err by directing a verdict at the close of defendant's evidence on certain predicate unfair and deceptive acts and by overruling plaintiff's objection to have additional predicate act issues submitted to the jury because: (1) plaintiff recovered the maximum amount of damages that it could have recovered; and (2) multiple violations of Chapter 75 would not have increased the amount of damages. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

Reliance—causation—fraud in the inducement—The trial court did not err in an unfair and deceptive trade practices (UDTP) case by denying defendant's motion for judgment notwithstanding the verdict even though defendant contends that plaintiff could not establish reliance or causation because plaintiff presented sufficient evidence of each element of fraud in the inducement which was sufficient to send its UDTP claim to the jury. **Media Network, Inc. v. Long Haymes Carr, Inc., 433.**

UNIFORM COMMERCIAL CODE

Alleged breach of contract—warranty of clear title—mobile home—The trial court did not err by concluding that defendant did not breach its contract with plaintiffs by allegedly not providing clear title to plaintiffs for a mobile home, nor did it breach the warranty of clear title, because there was no evidence that defendant failed to transfer clear title when: (1) plaintiff wife admitted she received a title free from any liens from defendant; and (2) plaintiffs presented no evidence that the title was encumbered. **Henson v. Green Tree Servicing LLC, 185.**

WORKERS' COMPENSATION

Additional evidence—continuing disability compensation—The full Industrial Commission did not abuse its discretion in a workers' compensation case by remanding the case to the deputy commissioner for the taking of additional evidence concerning the issue of plaintiff's continuing disability compensation. **Silva v. Lowe's Home Improvement, 142.**

Disability—credibility—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff has shown disability through the production of evidence that he is physically incapable, as a consequence of a work-related injury, of work in any employment, because: (1) the testimony of a physician who treated plaintiff over approximately six years revealed that he was aware of the treatment plaintiff received from other doctors and the progression of plaintiff's chest pain and physical problems over time; and (2) although the record does contain some evidence to the contrary, the Commission is the sole

WORKERS' COMPENSATION—Continued

judge of the credibility of witnesses and the weight to be given their testimony. **Silva v. Lowe's Home Improvement, 142.**

Special employee—exclusivity—motion for directed verdict denied—There was sufficient evidence to go to the jury on the question of whether plaintiff, who worked for a contract janitorial service and who was injured while working at Steelcase, was a special employee of Steelcase, so that the exclusivity provisions of Workers' Compensation would apply. **Shelton v. Steelcase, Inc., 404.**

Special employee—instructions—Instructions on special employment contained correct statements of law, or were not addressed due to the failure to object at trial. **Shelton v. Steelcase, Inc., 404.**

Workplace accident—Woodson claim—not adequately pled—The trial court did not err by granting defendant's Rule 12(b)(6) motion to dismiss in a workplace negligence action. Plaintiff did not adequately plead a *Woodson* claim falling outside the Workers' Compensation Act, and the trial court did not have subject matter jurisdiction. **Blow v. DSM Pharms., Inc., 586.**

Workplace injury—Woodson claim—risk assessment evidence—not sufficient—In a personal injury case arising from a workplace accident, on remand after an appellate determination that defendant Profiles's knowledge and misconduct can be attributed to defendant Terra-Mulch, the trial did not abuse its discretion by denying plaintiffs' motion to reconsider a grant of summary judgment for Terra-Mulch. Defendant's forecast of evidence was not sufficient to establish a *Woodson* claim even with a Risk Assessment Report by a consultant being attributed to Terra-Mulch. **Hamby v. Profile Prods., LLC, 99.**

Workplace injury—Woodson claim—evidence—OSHA violations—not sufficient—Plaintiffs' forecast of evidence at summary judgment was insufficient to establish a *Woodson* claim against Terra-Mulch. Plaintiffs' forecast showed that Hamby was injured by Terra-Mulch's inadequately guarded machinery in violation of OSHA standards, but did not demonstrate that Hamby was specifically instructed to descend from a truck-dump operator platform in a manner that exposed him to the hazardous augers or that Terra-Mulch was otherwise substantially certain he would be seriously injured. **Hamby v. Profile Prods., LLC, 99.**

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